INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

WASHINGTON, D.C.

IN THE PROCEEDINGS BETWEEN

M.C.I. POWER GROUP L.C. AND NEW TURBINE, INC.
(CLAIMANTS)

AND

REPUBLIC OF ECUADOR
(RESPONDENT)

ICSID Case No. ARB/03/6

AWARD

Members of the Tribunal:

Professor Raúl E. Vinuesa, President

Judge Benjamin J. Greenberg, Q.C., Arbitrator

Professor Jaime Irarrázabal C., Arbitrator

Secretary of the Tribunal:

Ms. Claudia Frutos-Peterson

Date of dispatch to the parties: July 31, 2007

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I. PROCEDURAL HISTORY

1. On December 16, 2002, the International Centre for Settlement of Investment Disputes (hereinafter "ICSID" or "the Centre") received from M.C.I. Power Group, L.C. and New Turbine, Inc. (hereinafter "the Claimants") a request for arbitration against the Republic of Ecuador (hereinafter "the Respondent" or "Ecuador"). On December 19, 2002, the Centre acknowledged receipt of the request, and accompanying documentation, together with the prescribed lodging fee, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (hereinafter the "Institution Rules"). On December 20, 2002, the Centre transmitted a copy of the request to Ecuador and Ecuador's Embassy in Washington, D.C. in accordance with Institution Rule 5(2).

2. According to Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of other States ("the ICSID Convention"), the Acting Secretary-General of the Centre registered the request for arbitration on April 8, 2003. In accordance with Institution Rule 7, the Acting Secretary-General notified the parties on the same date of the registration of the request and invited them to proceed to constitute an Arbitral Tribunal as soon as possible.

3. In accordance with Rule 2(3) of the ICSID Rules of Procedure for Arbitration Proceedings ("Arbitration Rules"), on June 9, 2003, Claimants requested that the Arbitral Tribunal in this case be constituted in accordance with the provisions of Article 37(2)(b) of the ICSID Convention. According to this provision, the Arbitral Tribunal would consist of three arbitrators, one arbitrator to be appointed by each party and the third, who shall serve as the President of the Tribunal, to be appointed by agreement of the parties. The Claimants appointed the Honorable Benjamin J. Greenberg, Q.C., a Canadian national, and the Respondent appointed Professor Jaime Irarrázabal, a Chilean national. However, the parties failed to agree on the appointment of the third, presiding arbitrator. On July 8, 2003, the Claimants requested that the third, presiding

arbitrator be appointed in accordance with Article 38 of the ICSID Convention and Rule 4 of the Arbitration Rules.

4. After consulting the parties, Professor Raúl E. Vinuesa, an Argentinean national, was appointed by the Centre as the third, presiding arbitrator. In accordance with Rule 6(1) of the Arbitration Rules, on September 11, 2003, the Acting Secretary-General notified the parties that all three arbitrators accepted their appointment and that the Arbitral Tribunal was deemed to be constituted and the proceedings deemed to begin on that date. On the same date, pursuant to ICSID Administrative and Financial Regulation 25, the parties were informed that Mr. Mariano García-Rubio, Counsel, ICSID, would serve as Secretary of the Arbitral Tribunal. Mr. Rubio was later on replaced by Ms. Claudia Frutos-Peterson, Counsel, ICSID. The Tribunal held its first session in Washington, D.C. on November 7, 2003.

5. Messrs. Barry Appleton, Robert Wisner and Hernando Otero from Appleton and Associates, and Messrs. José I. Astigárraga and Edward M. Mullins from Astigárraga Davis represented the Claimants at the first session. Messrs. Ivor Massey and Richard Gorman also attended on behalf of the Claimants. Ms. Martha Escobar Koziel of the *Procuraduría General del Estado* and Mr. Gustavo Anda of the Embassy of Ecuador in Washington, D.C., represented the Respondent at the first session.

6. During the first session, the parties agreed that the Tribunal had been properly constituted in accordance with the ICSID Convention and the ICSID Arbitration Rules and that they did not have any objections to any members of the Tribunal. It was also noted that the proceedings would be conducted under the ICSID Arbitration Rules in force since September 26, 1984.

7. During the first session, the parties also agreed on several other procedural matters, which were later reproduced in the written minutes signed by the President and the Secretary of the Tribunal. In respect of the pleadings to be filed by the parties, their number, sequence and timing, it was agreed that the Claimants would file a Memorial by February 6, 2004; the Respondent would

file a Counter-Memorial within 90 (ninety) days of their receipt of the Claimants' Memorial; the Claimants would file a Reply within 30 (thirty) days of their receipt of the Respondent's Counter-Memorial, and the Respondent would file a Rejoinder within 30 (thirty) days of its receipt of the Claimants' Reply.

8. The Tribunal further noted that, if there were no objections to Jurisdiction, the time-limit for the Claimants' Memorial shall be followed, in accordance with the ICSID Arbitration Rules.

9. On February 20, 2004, the Claimants filed their Memorial on the Merits and accompanying documentation.

10. On June 16, 2004, the Respondent informed the Centre and this Tribunal that the law firm Cabezas & Wray had been appointed as counsel for Ecuador in the present case, being authorized to represent the Respondent either independently or jointly with the *Procuraduría General del Estado*.

11. On June 16, 2004, the Respondent raised some objections to the Jurisdiction of the Centre and the competence of the Tribunal. In the same communication, counsel for the Respondent indicated that Messrs Robert Volterra and Alejandro Escobar of the law firm Herbert Smith, in London, were also appointed as co-counsel for Ecuador.[1]

12. On June 18, 2004, the Claimants made preliminary observations on Ecuador's objections on Jurisdiction, to which counsel for the Respondent replied by letter of June 21, 2004.

13. On June 23, 2004, the Tribunal issued Procedural Order No. 1, suspending the proceeding with respect to the Merits in accordance with Rule 41(3) of the ICSID Arbitration Rules, and fixing a timetable for the Jurisdictional phase, according to which Respondent would have 30 (thirty) days (by July 26, 2004)

[1] Mr. Volterra and Mr. Escobar later on joined the law firm Latham & Watkins, in London.

to submit its Memorial on Jurisdiction; Claimants would have 30 (thirty) days from their receipt of the Respondent's Memorial on Jurisdiction to file their Counter-Memorial on Jurisdiction; the Respondent would file its Reply on Jurisdiction within 15 (fifteen) days from its receipt of the Claimants' Counter-Memorial on Jurisdiction; and the Claimants would file a Rejoinder on Jurisdiction within 15 (fifteen) days from their receipt of the Respondent's Reply on Jurisdiction.

14. In accordance with Procedural Order No. 1, on July 26, 2004, the Respondent filed its Memorial on Jurisdiction. Thereafter, on August 23, 2004, Claimants filed their Counter-Memorial on Jurisdiction; on September 14, 2004, the Respondent filed it Reply on Jurisdiction; and on October 1, 2004, the Claimants filed their Rejoinder on Jurisdiction.

15. As it had been scheduled, after consultation with the parties, the Hearing on Jurisdiction was held in Washington, D.C. on December 13 and 14, 2004. At the Hearing, the Claimants were represented by Messrs. Ivor Massey, Richard Gorman, Jack Haeflich, Barry Appleton, José I. Astigarraga, Robert Wisner and Hernando Otero, and as Observers from Appleton & Associates, Nick Gallus, Ali Ghiassi and Asha Kaushal. The Respondent was represented by Messrs. Alberto Wray Espinosa, Ernesto Albán Ricaurte, Álvaro Galindo, Alejandro Escobar, Robert Volterra, Danilo Sylva and Martha Escobar Koziel. During the Hearing, the Tribunal also put questions to the parties in accordance with ICSID Arbitration Rule 32(3).

16. On April 4 2005, the Tribunal issued Procedural Order No. 2, joining the objections to Jurisdiction to the Merits of the dispute, in accordance with ICSID Arbitration Rule 41(4) and number 8 in Procedural Order No. 1 of June 23, 2004. A timetable was set for the continuation of the proceeding, according to which the Respondent was to file its Counter-Memorial by May 19, 2005; the Claimants would have 30 (thirty) days from their receipt of the Respondent's Counter-Memorial to file their Reply; and the Respondent would file its Rejoinder within 30 (thirty) days after its receipt of the Claimants' Reply.

17. On May 5, 2005, after due consideration of the Respondent's letter of April 25, 2005, as well as of the Claimants' response of April 26, 2005, the Tribunal decided to grant an extension of 15 days to counsel for the Respondent to file its Counter-Memorial (i.e. by June 3, 2005).

18. On June 3, 2005, the Respondent filed its Counter-Memorial on the Merits.

19. On July 8, 2005, the Claimants, invoking the principle of equality, requested an extension to file its Reply, which was due by July 15, 2005. On July 13, 2005, The Tribunal granted an extension for the Claimants to file their Reply until August 1, 2005.

20. On July 13, 2005, the Tribunal, after considering the Respondent's request for production of documents (letters of June 23 and July 7, 2005), as well as Claimants' response of July 1, 2005, denied such request. However, the Tribunal noted that it reserved its powers to call upon the parties to produce any documents, witnesses and experts, if it so deemed necessary at any stage of the proceeding.

21. On July 22, 2005, the Claimants filed their Reply on the Merits; and thereafter, on August 31, 2005, the Respondent filed its Rejoinder on the Merits.

22. On February 2, 2006, the Tribunal issued Procedural Order No. 3, concerning the organization of the Merits Hearing.

23. As it had been confirmed by the Tribunal to the parties on October 11, 2005, the Merits Hearing took place on March 20-24, 2006, in Washington, D.C. Present at the Hearing were:

Members of the Tribunal

Professor Raúl E. Vinuesa, President
The Honorable Benjamin J. Greenberg, Q.C., Arbitrator
Professor Jaime Irarrázabal C., Arbitrator

ICSID Secretariat

Claudia Frutos-Peterson, Secretary of the Tribunal
Tomás Solis, ICSID Secretariat

On behalf of the Claimants

Jack Haeflich,
Ivor Massey,
Richard Gorman,
Jose Astigárraga,
Barry Appleton,
Robert Wisner,
Ed Mullins,
Hernando Otero,
Nick Gallus,
Asha Kaushal.

As Support Team for the Claimants

Jill Mayer,
Sue Ki,
Damien Charles "Tai" Smith,
Mona Davies,
Elizabeth Lorelei Simpson,
Regis Figur,
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Garrett Hooe,
Richard Taylor.

On behalf of the Respondent

Alberto Wray,
Ernesto Albán,
Alvaro Galindo,
Martha Escobar,
Verónica Arroyo,
Robert Volterra,
Alejandro Escobar.

24. As instructed by the Tribunal, and in accordance with the notification of April 4, 2006, on April 19, 2006 the parties filed their post-Hearing briefs.

25. On May 31, 2007, the Tribunal declared the proceedings closed in accordance with Arbitration Rule 38(1).

II. JURISDICTION

1. INTRODUCTION: OBJECTIONS TO JURISDICTION

26. As indicated above, on July 26, 2004 Ecuador submitted a Memorial objecting to the Jurisdiction (hereafter Memorial on Jurisdiction) with respect to the claims raised by the Claimants, requesting that the Tribunal declare the dispute not within the Jurisdiction of ICSID, nor the competence of the Tribunal, that it decline to consider the case on the Merits, and that it order the Claimants to pay Ecuador the costs of the proceedings and the cost of legal representation.

27. In its Memorial on Jurisdiction, Ecuador alleges that it had not given its written consent for this case to be submitted to ICSID arbitration, as required under Article 25 of the ICSID Convention. Ecuador argues that this lack of consent cannot be overcome by the provisions of the Bilateral Investment Treaty concluded between Ecuador and the United States of August 27, 1993 (hereinafter the "BIT" or the "Treaty"), because the facts used to support the Claimants' allegations arose before the entry into force of that Treaty, that is, before May 11, 1997.

28. Ecuador contends that the claims refer to two separate situations, which involve entirely different legal principles; these situations were consummated and legally defined before the BIT entered into force.

29. The first of these situations has to do with a contract signed in Quito on November 7, 1995 (hereinafter referred to as "the Seacoast Contract"), and the Memorandum of Clarification for the Execution of the Contract (hereinafter referred to as "Clarification Contract") signed on the same date, by which Seacoast agreed to provide power to the Instituto Ecuatoriano de Electrificación (hereinafter referred to as "INECEL") for six months starting on November 18, 1995, using equipment that it agreed to bring into Ecuador at its own expense and risk under the temporary admission of imports regime. Ecuador contends that INECEL communicated to Seacoast that the contract would terminate by May 1996.

30. According to Ecuador, Seacoast claimed that the termination of the contract was untimely, that it had only been paid for the energy consumed and not for the energy made available, and that the fines imposed on it for breach of contract were inapplicable. Ecuador believes that these allegations raised by the Claimants in the present case are unjustified with respect to the BIT, as Seacoast had persisted in its claims by suing INECEL before the Ecuadorian courts in 1996.

31. In the opinion of Ecuador, the second situation referred to in the request has no connection whatsoever to the first. It relates to the contract that INECEL entered into on January 24, 1997 with Power Services Ecuador Ecuapower (hereinafter referred to as "the Ecuapower Contract") by which the latter agreed to provide it with power.

32. According to the Respondent, the original shareholders of Ecuapower, in whose ownership structure the Claimants say they participated, transferred their shares in full on March 6, 1997 to four other companies, which were also foreign-owned. According to Ecuador, the Claimants believed that Ecuadorian officials caused an unwarranted delay in the signing of the Ecuapower Contract and because of this delay they were forced to sell their investment under disadvantageous terms, for which they are seeking compensation in the present claim.

33. Ecuador alleges that the disputes caused by the two abovementioned situations arose before the BIT entered into force, and therefore they did not give rise to rights in favor of the Claimants, nor have they generated any obligation whatsoever on the part of Ecuador under the provisions of the BIT.

34. Moreover, Ecuador alleges that when the BIT entered into force, the Claimants did not have an investment under that Treaty. It also alleges that the events that occurred after the entry into force of the BIT simply consisted of successive and failed attempts to resolve these disputes and therefore they have not given rise to any rights in favor of the Claimants nor any obligation for Ecuador.

35. Ecuador argues that the BIT is not retroactive, nor are there any circumstances that would justify its retroactive application. Even under the assumption that the BIT was applicable to this case, Ecuador contends that the dispute would still not fall under the Competence of the Tribunal because it did not arise directly out of an investment under the terms of Article 25 of the ICSID Convention and Article I(1)(a) of the BIT at the time when the latter entered into force; or because the arbitration option was precluded under Article VI(3)(a) of the BIT.

36. In summary, Ecuador argues that the dispute submitted does not fall within the Jurisdiction of the Centre *ratione temporis* and subsidiarily, that the dispute does not arise out of an investment and that there was a preclusion of the arbitral option, owing to the Claimants' submission of the dispute to the domestic courts of Ecuador ("for-in-the-road").

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37. On August 23, 2004 the Claimants filed their Counter-Memorial on Objections to Jurisdiction (hereinafter referred to as "the Counter-Memorial").

38. In the Counter-Memorial, the Claimants contend that the Tribunal has Competence based on the following reasons: the Claimants had an investment within the terms of the ICSID Convention and the BIT at all relevant times; the Tribunal must consider events before the BIT's entry into force; events subsequent to that date attributable to Ecuador violated the BIT; and the Claimants have not triggered the "fork-in-the-road" provision of the Treaty. The Claimants therefore ask the Tribunal to reject Ecuador's objections to Jurisdiction and award costs to the Claimants.

39. The Claimants allege that as legal entities of the United States of America they own and control Seacoast. In their view, Seacoast, in turn, is a United States corporation that invested in Ecuador through a branch operation. This branch carried on the business of acquiring, assembling and installing two electricity generating plants and selling their power to INECEL, an Ecuadorian state-

owned entity. After these operations were completed and the power generating assets sold, Seacoast continued to hold and manage its accounts receivable and other contractual rights against INECEL. Thus, the Seacoast branch and its intangible assets in Ecuador were an *investment* before and after the entry into force of the BIT.

40. After the entry into force of the BIT, the Claimants allege that they continued to own the Seacoast branch in Ecuador. This branch had a legal representative, an office in Ecuador, and an operating permit. Seacoast held and managed substantial accounts receivable and other contractual rights against INECEL. Consequently, the Claimants allege that Ecuador violated the BIT through acts subsequent to its entry into force.

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41. The Tribunal, having examined the submissions put forward by the parties in these arbitration proceedings with respect to the question of its Competence to hear the Merits of the present dispute, and having evaluated the relevant arguments on the Merits put forward by both parties, has decided to deal first with the main objection of the non-retroactivity of the BIT, and then deal with each of the subsidiary objections relating to the non-existence of an investment and the preclusion of the BIT's "fork-in-the-road" provision.

42. The Tribunal will decide on the objections to Jurisdiction raised by the Respondent and rejected by the Claimants in accordance with the provisions of the ICSID Convention, the BIT, and the applicable norms of general international law, including the customary rules recognized in the Final Draft of the International Law Commission of the UN (hereinafter referred to as "the ILC") Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries (hereinafter referred to as "the ILC Draft").[2]

[2] Available at http://www.ejil.org/journal/Vol12/No5/art2.html.

43. For purposes of interpreting the treaties applicable to the objections submitted, the Tribunal will be guided by the rules contained in the 1969 Vienna Convention on the Law of Treaties (hereafter "the Vienna Convention") that reflect the customary law on the subject.

44. The Tribunal will refer to precedents that state the legal implications of binding norms of conventional and customary international law that are applicable only to the extent that and insofar as they specifically relate to the present case.

2. MAIN OBJECTION TO THE COMPETENCE OF THE TRIBUNAL. THE NON-RETROACTIVITY OF THE BIT: EFFECT ON EVENTS ALLEGED TO BE PRIOR AND SUBSEQUENT TO THE ENTRY INTO FORCE OF THE BIT.

45. Ecuador alleges that the BIT is not retroactive. By the terms of the Treaty, it entered into force thirty days after exchange of the respective instruments of ratification, that is, on May 11, 1997.

46. Ecuador cites as precedents the preliminary decisions adopted in the *Marvin Roy Feldman Kapra v. United Mexican States* and the *Mondev v. United States of America* cases in order to put forward the argument that before the BIT entered into force there was no consent to be bound and therefore no obligation arising from the Treaty can be attributed to a State Party.

47. In support of its argument, it cites Article 28 of the Vienna Convention, which states:

> *Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.*

48. Ecuador also invokes Article XII of the BIT which sets out the treaty's temporal application to investments in existence at the time it entered into force as well as

investments made or acquired thereafter. Thus, according to Ecuador, the scope of the treaty excludes any investment that had ceased to exist at that date.

49. Ecuador concludes that the only factual grounds of the claims put forward in the request refer to acts consummated and legally defined before the entry into force of the BIT. It maintains that neither in the framework of the Seacoast Contract nor in that of the Ecuapower Contract did the Claimants own shares in the investment within the meaning of Article 25 of the ICSID Convention. But even assuming that they did, such alleged investments had ceased to exist before the BIT entered into force.

50. According to Ecuador, the Seacoast Contract terminated in May 1996 upon expiry of the term. Even if we accept Seacoast's argument with regard to the term of the Contract, the latter would in any event have terminated before the BIT entered into force.

51. Ecuador contends that when the BIT entered into force there was a dispute in existence that had been submitted to the Ecuadorian courts, for the untimely termination of the Seacoast Contract, payment for the installed capacity of power, return of the fines imposed, and reimbursement of the cost of fuel.

52. In support of this argument about the existence of a dispute Ecuador cites the *Maffezini v. Kingdom of Spain* precedent regarding the importance of the critical date for purposes of deciding whether a dispute falls within the consent necessary to warrant ICSID Jurisdiction under a BIT. Ecuador maintains that in the present case the critical date, that is the date when the dispute arose, is prior to the entry into force of the BIT.

53. According to Ecuador, when the BIT entered into force, Seacoast had sold all its equipment, its operations had ceased, and it had submitted the dispute with INECEL to the Ecuadorian tribunals. It had no investment whatsoever, nor rights substantiated in titles or registers to which the status of investment could possibly be attributed *prima facie*.

54. As for the Claimants' demand for compensation for the supposedly wrongful conduct on the part of Ecuadorian authorities in the signing of the contract between Ecuapower and INECEL on January 24, 1997 and the allegation that those events caused the forced sale of their investment on March 6, 1997, Ecuador maintains that, on the assumption that the facts invoked as grounds for the claim were true, they would not fall within the temporal provisions of the BIT as they would have occurred before the Treaty entered into force. With regard to subsequent events alleged by the Claimants to be in violation of the BIT, Ecuador considers them to be merely pleadings concerning disputes that had already been raised prior to the entry into force of the BIT.

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55. For their part, the Claimants do not deny the date of entry into force of the BIT, nor do they deny the non-retroactive nature of the BIT.

56. The Claimants put forward the arguments that the Tribunal must consider events occurring before the BIT entered into force because Ecuador's actions before the BIT entered into force were continuing or composite breaches; Ecuador had a duty to act in good faith following its signature of the BIT; and moreover, the BIT's most-favored-nation clause and Article VII of the Argentina-Ecuador BIT demonstrate Ecuador's intention that the US–Ecuador BIT would have limited retrospective effect. The Claimants are also claiming as violations of the BIT acts attributable to Ecuador subsequent to the entry into force of the BIT. Finally, the Claimants submit that events occurring before the BIT came into force are important in determining the damage caused by Ecuador's actions after that date.

57. The Claimants maintain that this Tribunal's consideration of events occurring before the BIT's entry into force in the aforementioned circumstances is not a breach of the principle of non-retroactivity recognized in the Vienna Convention and the ILC Draft. The Claimants allege that Article XII of the BIT does not

limit its temporal application to disputes arising subsequent to its entry into force.

58. The Claimants contend that the Tribunal can examine conduct occurring before the BIT came into force when that conduct continues beyond that date. They maintain that Article 28 of the Vienna Convention only curtails a tribunal's ability to examine conduct occurring before a treaty comes into force to the extent that that conduct ceased to exist before the date on which the treaty entered into force.

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59. From the analysis of the text and background of the BIT, the Tribunal holds that the intention of the contracting Parties with respect to its retrospective application is not evident from its clauses or in any other manner. In accordance with the norms of general international law codified in the Vienna Convention, and particularly in Article 28, the Tribunal notes that because of the fact that the BIT applies to investments existing at the time of its entry into force, the temporal effects of its clauses are not modified.

60. The Tribunal notes the temporal requirements under Article XII of the BIT, which states:

> *[This Treaty] shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter.*

61. The non-retroactivity of the BIT excludes its application to disputes arising prior to its entry into force. Any dispute arising prior to that date will not be capable of being submitted to the dispute resolution system established by the BIT. The silence of the text of the BIT with respect to its scope in relation to disputes prior to its entry into force does not alter the effects of the principle of the non-retroactivity of treaties.

62. The Tribunal distinguishes acts and omissions prior to the entry into force of the BIT from acts and omissions subsequent to that date as violations of the BIT. The Tribunal holds that a dispute that arises that is subject to its Competence is necessarily related to the violation of a norm of the BIT by act or omission subsequent to its entry into force.

63. The Tribunal recognizes that under the general international law applicable, a dispute means a disagreement on a point of fact or of law, a conflict of legal opinions or of interests as between the parties.[3] The existence of a dispute determines the critical date after which the parties cannot fail to recognize its existence.

64. With respect to acts or omissions alleged by the Claimants to be breaches of the BIT subsequent to its entry into force, the Tribunal considers that it has Competence insofar and as those facts are proven to be a violation of the BIT. This determination of the Tribunal does not prejudge the subsequent evaluation of the allegations of both parties on the existence or not of a violation at the time of a decision on the Merits.

65. The Tribunal likewise distinguishes disputes arising prior to the entry into force of the BIT from disputes arising after that date that have the same cause or background with those prior disputes.[4]

66. The Tribunal observes that a prior dispute may evolve into a new dispute,[5] but the fact that this new dispute has arisen does not change the effects of the non-retroactivity of the BIT with respect to the dispute prior to its entry into force. Prior disputes that continue after the entry into force of the BIT are not covered by the BIT.

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[3] *Mavommatis Palestine Concessions* (*Greece v. U.K.*), Jurisdiction (1924), *PSIJ Series* A, No. 2, p. 11; *Northern Cameroons* (*Cameroons v. United Kingdom*), Judgment (1963), *ICJ Reports 1963*, p. 27; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement* of 26 June, 1947, Advisory Opinion (1988), *ICJ Reports 1988*, p. 27.

[4] *Jan de Nul N.V.and Dredging International N.V. v. Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Decision of the Tribunal on Objections to Jurisdiction of June 16, 2006, para. 127.

[5] *Helnan International Hotels A/S v. Arab Republic of Egypt* (ICSID Case No. ARB/05/19), Decision of the Tribunal on Objections to Jurisdiction of October 17, 2006, para. 53.

67. The Tribunal notes the Parties agree that the BIT in principle does not have retroactive effect. Nevertheless, they do not agree as to the scope of the BIT with regard to certain acts or omissions attributable to Ecuador, prior and subsequent to its entry into force.

68. As regards the allegations put forward by the Claimants on the issue of non-retroactivity of the BIT in response to the objections to Jurisdiction raised by the Respondent, the Tribunal will now evaluate the relevance of the arguments concerning the scope and extent of continuing and composite acts (point a), obligations arising under Article 18 of the 1969 Vienna Convention on the Law of Treaties (point b), most-favored-nation clause (point c), and acts relevant in determining injury (point d).

a. Continuing and composite acts

69. The Claimants allege that Ecuador breached its BIT obligations by continuing and composite wrongful acts. They contend that Ecuador's policy of discriminating against Seacoast began on April 8, 1996 when INECEL defaulted on the first invoice from Seacoast. The act then continued until Ecuador relied on the arbitrary and illegal revocation of Seacoast's operating permit to reject Seacoast's claim in the Ecuadorian courts and refuse to arbitrate.

70. The Claimants allege that Ecuador's final refusal to pay occurred when the Liquidation Commission proceedings were considered terminated, after the BIT had entered into force. That Commission was an integral element of the Seacoast Contract. Therefore, the Claimants argue, expropriation of Seacoast's contractual rights was only complete after the Liquidation Commission proceedings were concluded.

71. The Claimants maintain that Articles 14 and 15 of the ILC Draft recognize that an act commencing before a treaty enters into force can breach the treaty if the act continues past that date or has composite elements occurring beyond that date.

72. Despite the written text of Article 14(2) of the ILC Draft, the Claimants submit that the breach of an international obligation by a continuing act of a State does not exclude the possibility that a series of acts will constitute a continuing wrongful act. In this regard they make reference to the *Tecmed v. Mexico* case in which, according to the Claimants, the Tribunal referred to "the conduct" that continues in the time before and after the entry into force of the BIT, as a factor in determining if there had been a breach of that treaty.

73. The Claimants cite a number of cases in which the Inter-American Court of Human Rights as well as the European Court of Human Rights have accepted the notion of a continuing act from a succession of acts attributable to a State.

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74. With respect to the continuing or composite character of events prior to the entry into force of the BIT, Ecuador maintains that, assuming the facts presented in the request contain the necessary elements to amount to an internationally wrongful act, such act would be neither composite nor continuing.

75. Ecuador rejects the arguments in the Claimants' Memorial on the composite and continuing nature of the alleged wrongful acts attributed to the Ecuadorian authorities with respect to the Seacoast Contract. Ecuador contends that even if there were indeed an internationally wrongful act that had commenced prior to the entry into force of the BIT, such act did not continue after that date so as to fall under the Treaty's provisions relating to internationally wrongful acts of a continuing and composite nature occurring prior to May 1997, as alleged.

76. According to Ecuador, by using this argument the Claimants are trying to elude the main issue of the non-existence of an investment at the time the Treaty entered into force. Ecuador contends that the Claimants erred in relying on the *Tecmed* case because in that case the existence of an investment at the time the treaty entered into force was not an issue.

77. Ecuador contends that in the *Tecmed* case the tribunal held that its competence extended to events that occurred prior to the date the treaty entered into force, but only after the issue of Jurisdiction had been resolved, not by reason of the retroactive application of any provision of the BIT, but because an investment actually existed at the time the BIT entered into force.

78. Ecuador argues that the Claimants failed to make a distinction between the existence of a continuing wrongful act and the effects of a consummated breach. It cites the International Law Commission's Commentaries on the ILC Draft, which states that an act does not have a continuing character merely because its effects or consequences extend in time. It must be the wrongful act as such which continues.[6]

79. According to Ecuador, the dispute concerning the payment of amounts supposedly owed by INECEL to Seacoast bears no relationship at all to the concept of an internationally wrongful act or to wrongful acts of a continuing character. Even assuming the existence of a wrongful act, such act was consummated by the alleged disregard of rights, which is clearly distinguishable from a mere consequence thereof.

80. Ecuador contends that the existence of a composite act requires a series of actions or omissions defined as a whole as wrongful. It cites the Commentary of the ILC with respect to composite acts to the effect that similar considerations apply as for completed and continuing wrongful acts in determining when a breach of international law exists; the matter is dependent upon the precise facts and the content of the primary obligation.[7]

81. Ecuador concludes that the offence alleged by the Claimants was consummated prior to the entry into force of the BIT in a completed act by which INECEL refused to recognize the rights that Seacoast claimed.

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[6] Crawford, J., *The International Law Commission's Articles on State Responsibility*, Cambridge University Press, 2002, p. 135 et seq.
[7] *Ibid*, p. 141 et seq.

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* *

82. The Tribunal holds that, in accordance with customary international law, the relevant element to determine the existence of a continuing wrongful act or a composite wrongful act is the violation of a norm of international law existing at the time when that act that extends in time begins or when it is consummated.

83. The line of reasoning adopted by intergovernmental bodies for the protection of human rights as well as human rights tribunals in order to typify acts of a continuing wrongful nature, stresses the continuity of those acts after the treaty giving rise to the breached obligation entered into force.

84. With respect to the various positions taken by the Parties regarding the case *Tecmed v. the United Mexican States*,[8] the Tribunal holds that the only interpretation possible is that which is consistent with the international law applicable to the case. In light of this, it is arguable that the *Tecmed* tribunal determined its jurisdiction on the basis of allegations that an internationally wrongful act had occurred after the treaty had entered into force. Thus, the tribunal understood that in order to determine its jurisdiction it should consider the necessary existence of a dispute that arose under the terms of the BIT after the treaty had entered into force. In the view of that tribunal, events or situations prior to the entry into force of the treaty may be relevant as antecedents to disputes arising after that date.

85. The Tribunal takes note of the content of the norms of customary international law set out in the ILC Draft in order to clarify the scope of continuing wrongful acts as well as composite wrongful acts.

86. With respect to continuing wrongful acts, Article 14 of the ILC Draft provides:

> *The breach of an international obligation by an act of a State having a continuing character extends over the entire*

[8] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States* (ICSID Case No. ARB(AF)/00/2), Award of May 29, 2003, available at <http://www.worldbank.org/icsid/cases/laudo-051903%20-English.pdf>.

> *period during which the act continues and remains not in conformity with the international obligation…*

87. In its Commentary to this Article the ILC states:

> *In accordance with paragraph 2, a continuing wrongful act, on the other hand, occupies the entire period during which the act continues and remains not in conformity with the international obligation, provided that the State is bound by the international obligation during that period.*[9]

88. With regard to composite wrongful acts, Article 15 of the ILC Draft states as follows:

> *Breach consisting of a composite act*
>
> *The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.*
>
> *In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.*

89. In its Commentary to the Draft Articles, the ILC states that in accordance with the principle of the inter-temporality of law:

> *…the State must be bound by the international obligation for the period during which the series of acts making up the breach is committed. In cases where the relevant obligation did not exist at the beginning of the course of conduct but came into being thereafter, the "first" of the actions or omissions of the series for the purposes of State Responsibility will be the first occurring after the obligation came into existence.*[10]

90. The Tribunal finds that the wrongful acts defined as continuing or composite referred to in Articles 14 and 15 of the ILC Draft are internationally wrongful acts. This means that they are identified with the violation of a norm of international law. According to Article 13 of the Draft Articles, in order for a wrongful act or omission to constitute a breach of an international obligation

[9] Crawford, J., *op.cit.*, p. 136 para. (3).
[10] *Ibid*, p. 144, para. (11).

there must have been a breach of a norm of international law in force at the time that the act or omission occurs.

91. Article 13 of the ILC Draft states:

> *International obligation in force for a State*
>
> *An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.*

92. In its Commentary to Article 13 the ILC states that:

> *The evolutionary interpretation of treaty provisions is permissible in certain cases but this has nothing to do with the principle that a State can only be held responsible for breach of an obligation which was in force for that State at the time of its conduct.*[11]

93. The Claimants' arguments with respect to the relevance of prior events considered to be breaches of the Treaty posit a contradiction since, before the entry into force of the BIT, there was no possibility of breaching it. The Tribunal holds that it has Competence over events subsequent to the entry into force of the BIT when those acts are alleged to be violations of the BIT. Prior events may only be considered by the Tribunal for purposes of understanding the background, the causes, or scope of violations of the BIT that occurred after its entry into force.

94. The non-retroactivity of treaties as a general rule postulates that only from the entry into force of an international obligation does the latter give rise to rights and obligations for the parties. Therefore, for any internationally wrongful act to be considered as consummated, continuing, or composite, there must be a breach of a norm of international law attributed to a State.

95. The Tribunal holds that the Claimants' allegations in respect of Ecuador's acts and omissions after the entry into force of the BIT serve to affirm the Competence of this Tribunal to determine whether there was a violation of the

[11] *Ibid*, p. 134, para. (9).

BIT independently of whether those acts or omissions were composite or continuing.

96. The Tribunal observes that the existence of a breach of a norm of customary international law before a BIT enters into force does not give one a right to have recourse to the BIT's arbitral Jurisdiction. A case in point is the *Mondev v. United States of America* case in which the tribunal pointed out the difference between a claim made under a Treaty and a diplomatic protection claim for conduct contrary to customary international law.[12]

97. For the above reasons, and in accordance with the principle of non-retroactivity of treaties, the Tribunal holds that the acts and omissions alleged by the Claimants as being prior to the entry into force of the BIT do not constitute continuing and composite wrongful acts under the BIT.

b. Obligation of parties signing the BIT to act in good faith: scope of application of Article 18 of the Vienna Convention on the Law of Treaties

98. The Claimants contend that Ecuador breached its obligation to act in good faith starting from the signing of the BIT. This argument is based on the wording of Article 18 of the Vienna Convention and on application of the principle set out in a passage from the *Tecmed* award characterizing the wording of Article 18 as an expression of the principle of good faith.[13]

99. Article 18 of the Vienna Convention provides:

> *Obligation not to defeat the object and purpose of a treaty prior to its entry into force*

[12] The Tribunal held that: "Nor do Articles 1105 or 1110 of NAFTA effect a remedial resurrection of claims a Canadian investor might have had for breaches of customary international law occurring before NAFTA entered into force. It is true that Articles 1105 and 1110 have analogues in customary international law. But there is still a significant difference, substantive and procedural, between a NAFTA claim and a diplomatic protection claim for conduct contrary to customary international law", *Mondev International LTD v. United States of America* (Mondev) (ICSID Case No. ARB(AF)/99/2), Award of October 11, 2002, available at <http://www.state.gov/documents/organization/14442.pdf>, para. 74.

[13] *Tecmed*, para. 70.

> *A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:*
>
> *a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or*
>
> *b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.*

100. With reference to Article 18 of the Vienna Convention, the Claimants state that the Tribunal in *Tecmed* based its decision on the *Megalidis v. Turkey* case. The Claimants argue that the tribunal in *Megalidis*, applying customary international law, rejected Turkey's argument that it was not obliged to restore the property claimed because that obligation arose from the Treaty of Lausanne, which it had signed, but which was not yet in force.

101. The Claimants also referred to the *Opel Austria v. Council of the European Union* case in which, according to them, the European Court of First Instance invoked the application of Article 18 of the Vienna Convention to establish the liability of the Council of the European Union when it imposed certain tariffs on Austrian products after having signed a treaty (but before ratifying it) that established the European Economic Area which prohibited the imposition of those tariffs.

102. The Claimants conclude that the conduct of Ecuador after it had signed the BIT, and before the BIT had entered into force, amounted to a breach of its obligation to act in good faith imposed by Article 18 of the Vienna Convention.

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103. Ecuador contends that Article 18 of the Vienna Convention cannot be invoked as the basis for the retroactive application of the BIT. Ecuador rejects the allegation in the Claimants' Memorial that when the BIT comes into force, its provisions produce effect from the time the parties signed the Treaty.

104. Ecuador argues that the obligation imposed upon the Contracting States by Article 18 of the Vienna Convention does not constitute an exception to the principle of the non-retroactivity of treaties, nor to the other norms of the Vienna Convention on the entry into force of treaties.

105. Ecuador contends that Article 18 only admits two exceptions expressly set out in the Vienna Convention on the provisional application of a treaty and the treaty provisions regulating the authentication of its text and other issues inevitably arising before the treaty enters into force.

106. Ecuador further contends that in the *Tecmed v United Mexican States* case the BIT between Spain and Mexico applied because there was an existing investment at the time the treaty entered into force. According to the Respondent, the tribunal ruled that its competence also extended to certain acts that took place before the BIT entered into force, provided such conduct or acts, upon consummation or completion of their consummation after the entry into force of the treaty, constitute a breach of the BIT. According to Ecuador, the approach taken by the tribunal in *Tecmed* does not involve or give rise to retroactive application of the BIT.

107. Ecuador argues that events occurring after the BIT entered into force did not give rise to rights in favor of the Claimants nor obligations on the part of Ecuador, given that those events do not constitute an investment, nor are they related to any investment that existed on the date when the BIT entered into force. Moreover, it contends that the dispute alleged by the Claimants is prior to the entry into force of the BIT.

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108. The Tribunal holds that Article 18 of the Vienna Convention is an application of the principle of good faith to ensure that the object and purpose of a treaty are not defeated by acts or omissions of the Contracting Parties prior to its entry into force. The wording of Article 18 is not aimed at triggering the early application

of the clauses of a treaty, that is, it does not warrant retroactive application of the treaty.

109. The precedents cited by the Claimants in support of their arguments have their own specific facts that distinguish them from the factual situations that are relevant in the present case.

110. In *Megalidis v. Turkey*, the Greek-Turkish arbitral tribunal in its award of July 26, 1928 held that the ownership of certain property, rights and interests of Megalidis were expropriated by Turkish authorities in August 1923, that is, shortly after the Treaty of Lausanne had been signed, but before it had entered into force.[14]

111. The Tribunal observes that the Treaty of Lausanne of July 24, 1923 applied to situations that arose, starting from October 29, 1914, having to do with property, rights and interests of nationals of Allied Powers that were still in existence on the date that the treaty entered into force and could be identified in the territories that continued to be Turkish.

112. The Tribunal understands that Article 65 of the Treaty of Lausanne created an obligation on the part of Turkey to restore certain properties, rights, and interests affected by consummated acts or omissions prior to the Treaty's entry into force. In other words, the Parties clearly intended this Article to have retroactive effect.

113. The Treaty of Lausanne contemplated a retroactive supplementary provision to facilitate performance of the required obligation of Turkey to restore those properties, rights, and interests that, at the date of signing of the Treaty, had already been liquidated by the authorities of the Contracting Parties.[15]

114. The Tribunal holds that the reference in the *Megalidis* case to the obligation of Contracting States to refrain from prejudicing a treaty or the validity of its clauses from the time it is signed to its entry into force was not the basis for the retroactive application of certain clauses of the Treaty. The Tribunal notes that

[14] *Aristotelis A. Megalidis v. Turkey*, 8 Recueil des Decisions des Tribunaux Mixtes (1927-1928).
[15] Treaty of Lausanne, Article 66.

the retroactive enforcement of the Treaty of Lausanne was the direct consequence of that tribunal's enforcement of the retroactive clauses of the treaty for purposes of determining the existence of an obligation on the part of Turkey to make reparation.

115. With regard to the other relevant case cited by the Claimants, the Tribunal notes that in *Opel Austria v. Council of the European Union* the Court of First Instance of the European Union held that the principle of good faith is a rule of customary international law which was codified in Article 18 of the Vienna Convention.[16] The Tribunal notes that the application of Article 18 was based on the exceptional circumstances arising from the adoption of measures that contradicted and defeated the object and purpose of the treaty after it was signed and before it entered into force but after the treaty had been ratified and when a specific date had been set for its entry into force. The decision of that tribunal pointed to the fact that the tariffs prohibited under the treaty were imposed when the Contracting States had already deposited their instruments of ratification and a specific date set for the treaty's entry into force. Another relevant point was the allegation that the date of the measure imposed had been falsified.[17]

116. In the opinion of the Tribunal, the distinction between the extent of the obligation not to defeat the object and purpose of a treaty and the retrospective application of clauses of that treaty to situations prior to the date of entry into force of the treaty should not be confused. It has not been proven in the present case that the actions and omissions prior to the entry into force of the BIT and attributable to the Respondent had defeated the object and purpose of the Treaty. The case law precedents cited demonstrate, on one hand, that the retroactive enforcement of the treaty provisions were based on its own retroactive clauses: The other case demonstrates the extraordinary nature of the enforcement of the customary norm set out in Article 18 of the Vienna Convention.

117. The Tribunal is mindful of the fact that Article 18 of the Vienna Convention is an application of the general principle of good faith, it being understood that its

[16] *Opel Austria v. EU Council*, Case T-115/94; pg 1 [1997] All ER, 90, 97.
[17] *Ibid*, para. 94.

scope is limited to not defeating the object and purpose of the treaty, and not to the retroactive application of its clauses.

c. Most-Favored-Nation Clause

118. The Claimants allege that Article II(1) of the BIT sets out the Treaty's aim to have limited retrospective effects. This Article gives recognition to the most-favored-nation clause (hereinafter referred to as the MFNC), which the Claimants associate with Article VII of the Argentina-Ecuador BIT.

119. Article II(1) of the BIT provides as follows:

> *Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the most favorable…*

120. In the Claimants' opinion, Article VII of the Argentina-Ecuador BIT grants to Argentine investors part of the protection offered by the Ecuador-United States BIT from December 1995. The Claimants contend that they are simply seeking the protection afforded by this Article.

121. Article VII of the 1994 Treaty between Argentina and Ecuador states:

> *Application of other rules*
>
> *If the provisions of the law of either Contracting Party or obligations under international law existing at present or that are established in the future between the Contracting Parties in addition to this Treaty or if any Agreement between an investor of one Contracting Party and the other Contracting Party contain rules, whether general or specific entitling investments by investors of the other Contracting Party to treatment more favorable than is provided for in this Treaty, such rules shall, to the extent that they are more favorable, prevail over this Treaty. (Tribunal's Translation).*

122. The Claimants contend that their claim under the MFNC is substantially different from that referred to by the claimant in the *Tecmed* case, as they are simply seeking the protection offered by a key clause of another BIT.

123. In interpreting the abovementioned Article VII, the Claimants contend that the reference made to treaties entered into *"between the Contracting Parties"* refers to Contracting Parties of treaties that had not yet entered into force, and not the Contracting Parties of the Argentina-Ecuador BIT.

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124. Ecuador rejects the Claimants arguments on the scope of Article VII of the Treaty between Argentina and Ecuador as they are seeking to assert the retroactive effect of the BIT by invoking the MFNC.

125. Ecuador contends, following the precedent of the *Tecmed* case, that the clause cannot be invoked in the particular circumstances of the present case since the application of the investment treaty goes to the core of matters that must be deemed to be specifically negotiated by the Contracting Parties.

126. Ecuador contends that what Article VII states is simply that the rules of international law which may be established in the future "between the Contracting Parties" (Ecuador and Argentina) "shall to the extent that they are more favourable, prevail over this Treaty." Thus, Ecuador concludes, there is no reason to incorporate the provisions of the Ecuador-United States BIT, nor does the Article deem its application to be retroactive.

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127. From the wording of Article VII of the Argentina-Ecuador BIT, the Tribunal concludes that, in accordance with the interpretation rules of Article 31 of the Vienna Convention, the references made in the text of that Article to "either

Contracting Party," "between the Contracting Parties," "an investor of one Contracting Party and the other Contracting Party," and "the other Contracting Party" unquestionably refer to the Contracting Parties of the Argentina-Ecuador BIT.

128. Consequently, the Tribunal rejects the possibility of considering the application of the most-favored-nation clause, in the terms, and with the effects, claimed by the Claimants.

d. Acts prior to the entry into force of the BIT relevant in determining injury

129. The Claimants allege that the events prior to the entry into force of the BIT are relevant in determining injury. Article 18 of the Vienna Convention as well as Article 13 of the ILC Draft do not limit the powers of a tribunal to examine events that occurred prior to the entry into force of a treaty for purposes of determining the extent of injury caused by the events that occurred after that date.

130. In their Memorial the Claimants allege that Ecuador had breached its obligations to negotiate in good faith at the Liquidation Commission and frustrated other dispute resolution attempts by relying on the arbitrary revocation of the operating permit of Seacoast's branch in Ecuador. The Claimants contend that the Tribunal must examine the contractual breaches occurring before the BIT came into force in order to determine the injury caused by these breaches.

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131. Ecuador alleges that acts prior to the entry into force of the BIT cannot be invoked as violations of a treaty that had not yet generated obligations for the Contracting States. Consequently, neither can they be invoked for purposes of determining compensation for a non-existent wrongful act.

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132. The Tribunal finds that the Claimants' argument regarding the relevance of events occurring before the BIT entered into force in determining the injury caused is restricted to the ILC's Commentary on Article 13 *in fine* of its Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries.

133. In referring to the inter-temporality of law in ensuring that a State will only be found liable for breach of an obligation in force for a State at the time of the breach, the ILC commented:

> *Nor does the principle of the inter-temporal law mean that facts occurring prior to the entry into force of a particular obligation may not be taken into account where these are otherwise relevant. For example, in dealing with the obligation to ensure that persons accused are tried without undue delay, periods of detention prior to the entry into force of that obligation may be relevant as facts, even though no compensation could be awarded in respect of the period prior to the entry into force of the obligation.*[18]

134. On this matter the ILC also stated:

> *In cases where the relevant obligation did not exist at the beginning of the course of conduct but came into being thereafter, the "first" of the actions or omissions of the series for the purposes of State responsibility will be the first occurring after the obligation came into existence. This need not prevent a court taking into account earlier actions or omissions for other purposes (e.g. in order to establish a factual basis for the later breaches or to provide evidence of intent).*[19]

135. This Tribunal, following the opinion of the ILC in its Commentaries on the customary norms set out in Articles 13, 14 and 15 of its Draft Articles on State Responsibility, will take into account events prior to the date of entry into force

[18] Crawford, J., *op. cit*., p. 135.
[19] *Ibid*, p. 144, para. (11).

of the BIT solely in order to understand and determine precisely the scope and effects of the breaches of the BIT after that date.

136. The Tribunal reiterates its views on the possibility of exercising Competence over all acts or omissions alleged by the Claimants to have occurred after the entry into force of the BIT and as having been in violation thereof. Acts or omissions prior to the entry into force of the BIT may be taken into account by the Tribunal in cases in which those acts or omissions are relevant as background, causal link, or the basis of circumstances surrounding the occurrence of a dispute from the time the wrongful act was consummated after the entry into force of the norm that had been breached. The Tribunal, however, finds that it has no Competence to determine damages for acts that do not qualify as violations of the BIT as they occurred prior to its entry into force.

3. SUBSIDIARY OBJECTIONS

a. First subsidiary objection to the Competence of the Tribunal: existence of an investment

137. Ecuador alleges that the Seacoast Contract does not fit the concept of investment as understood within the framework of the ICSID Convention. It states that it had not given its written consent to submit the dispute to ICSID arbitration because when the BIT took effect beginning on May 11, 1997, the Claimants did not have any investment whatsoever, so that the treaty relied on in the claim to make up for the lack of express consent, is not applicable in this case. Ecuador alleges that the Seacoast Contract had expired in July 1996 and the Claimants had sold all their shares in Ecuapower in March 1997.

138. Ecuador contends that neither the ICSID Convention nor the BIT defines the actual meaning of the concept of investment. Ecuador admits that in the absence of a definition, case law has tended to give the term "investment" a broad interpretation. Nevertheless, it contends that no matter how broad the definition, it cannot go so far as to distort the meaning of the term itself. Ecuador argues, therefore, that for an investment to be deemed to exist in the terms of Article 25

of the ICSID Convention, certain requirements must be present, such as that the project must have duration, the expectation of return or the obtaining of profits, the assumption of risks, the existence of a substantial commitment, and significance for the host State's development.

139. According to Ecuador, in the Seacoast Contract the requirements of duration and shared risk do not exist. It is in fact a supply contract of uncertain duration, conceived as a response to a temporary emergency. The power generators were imported into the country under the temporary admission of imports regime. The supplier charges for the power it sells and the buyer pays for the power it buys. According to Ecuador, given that this transaction is purely commercial, it is excluded from the Jurisdiction of ICSID.

140. Ecuador contends that neither does the BIT contain a definition of "investment." There has not been an intention to define the term with exactitude. The enumeration contained in Article I(1)(a) of the BIT continues to refer to the term "investment" by referring to relationships or property often included in the whole complex of operations known as investment.

141. Ecuador summarizes its position by stating that the list in Article I(1)(a) of the BIT in no way modifies its conclusions on the scope of the term "investment" in Article 25 of the ICSID Convention. The Seacoast Contract expired before the entry into force of the BIT and after that date Seacoast had nothing but expectations in respect of a contractual claim that was neither recognized, nor could in any way be considered an investment under the ICSID Convention.

142. Ecuador contends, moreover, that the dispute concerning the Ecuapower Contract did not arise directly out of an investment. The Claimants' allegations concerning the intentional delays of the Ecuadorian officials in the signing of the contract between INECEL and Ecuapower and the alleged subsequent forced sale of the supposed interests of the Claimants in Ecuapower have no bearing on the matter and therefore do not arise directly out of any investment.

143. Ecuador argues that there is no connection between the Seacoast Contract and the Ecuapower Contract and that any transaction with the latter cannot amount to an intention, or offer, to renew the former. Ecuador was under no obligation to renew the Seacoast Contract. Ecuador contends that Seacoast and Ecuapower are two distinct legal entities, and hence the rights and obligations of one are not transferable to the other.

144. Ecuador alleges that Seacoast's operating permit cannot be deemed to be connected to an existing investment protected or covered by the BIT, nor can it be considered in itself as an investment. Ecuador moreover asserts that the revocation of Seacoast's operating permit cannot have any impact on its activities, since the company was not running any operation whatsoever and found it manifestly impossible to do so, having transferred all its assets to another company.

145. Faced with the Claimants' allegation regarding the existence of an investment consisting of rights which they have against INECEL and the State at the time of entry into force of the BIT, Ecuador alleges that what really exists are mere claims, not rights. It asserts that in a bilateral relationship, a right does not exist simply because one of the parties claims it for itself. If the other party denies the very existence of the alleged right, what really exists is a claim, not a right. According to Ecuador, that fact was corroborated by Seacoast's filing of a claim on July 31, 1996, against INECEL before the Ecuadorian courts. Ecuador alleges that the substance of this claim and the reply submitted by INECEL unquestionably demonstrate that the existence of the alleged rights of Seacoast was not recognized by INECEL.

146. Ecuador referred to the events that occurred after the entry into force of the BIT, insofar as they are related in the claim, and relates them to three aspects (i) negotiations on the liquidation of the contract; (ii) negotiation aimed at resolving the dispute through arbitration; and (iii) revocation of Seacoast's so-called "operating permit." According to Ecuador, none of these events constitutes an investment, therefore, the BIT is not applicable to the events that occurred after it entered into force.

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147. The Claimants, for their part, allege that when the BIT entered into force there was an investment in place under that Treaty and in this regard they contend that the Seacoast branch in Ecuador and its intangible assets qualify as investments under the broad definition of "investments" in the BIT. That is the definition applicable for purposes of complying with the provisions of the ICSID Convention.

148. The Claimants base their contention on the fact that ICSID tribunals have repeatedly interpreted the term "investments" in a broad sense when determining their jurisdiction. They cite as precedents the *Fedax v. Republic of Venezuela* and the *CSOB v. Slovakia* cases to affirm that the ICSID Convention does not limit the scope and extent of the term "investments," which is also broadly defined in the BIT.

149. The Claimants maintain that the BIT defines the investments that can be brought to ICSID. The decision on jurisdiction in the *Tokios Tokéles v. Ukraine* case is cited in support. In that case the tribunal found that as the ICSID Convention did not define the term "investment" the parties have a broad discretion to decide what transactions do or do not constitute an investment. Evidence of this discretionary power lies in the wording of the definitions accepted under the BIT. Thus, any transaction falling within the definition of "investment" under the BIT, also qualifies as an investment under Article 25 of the ICSID Convention.

150. The Claimants contend that Ecuador appears to confuse the relationship between the ICSID Convention and Article I(1)(a) of the BIT when, in order to determine the existence of an investment, it demands that certain requirements such as the existence of returns, a certain duration, risk, commitment and contribution to the economic development of the host State must exist. In any event, the Claimants argue that the requirements of duration and risk were present in the conception and design of the Seacoast project and investment in Ecuador.

151. According to the Claimants, at the date on which the BIT entered into force there existed an investment in intangible assets, in an existing branch, and in other contractual rights against INECEL. Ecuapower acquired only Seacoast's power generating assets. Seacoast kept its rights concerning INECEL's commitment to negotiate a long term contract. The negotiations continued through the establishment of the Liquidation Commission and until the annulment of Seacoast's lawsuit in October 1999.

152. The Claimants allege that their investment falls within the definition of investment in the BIT. They contend that the Seacoast branch and its intangible assets qualified as investments under the BIT both before and after the sale of the power generating plants because: Seacoast had a contract; Seacoast had an operating permit; Seacoast had a branch that owned assets in Ecuador; and the BIT applies to investments existing at the time of its entry into force.

153. The Claimants contend that the Seacoast contract also qualifies as an investment under Article I(1)(a)(iii) and I(1)(a)(v). Under these provisions, a claim for money and any right conferred by contract are investments.

154. The Claimants also argue that Seacoast's operating permit falls within the definition of investment in the BIT. Article I(1)(a)(v) of the BIT describes "any licenses or permits pursuant to law" as investments. The granting and subsequent revocation of the permit were more than mere administrative acts because the Attorney General and the Civil Judge of Ecuador used the revocation of the permit as grounds to annul Seacoast's lawsuit and the Attorney General also used the revocation to refuse to sign the arbitration agreement that had been previously negotiated.

155. According to the Claimants, their interests in Seacoast fall within the definition of investment under Article I(1)(a)(ii) of the BIT. The Claimants are the owners of the Seacoast branch in Ecuador. The branch owned rights in Ecuador against INECEL both under the Seacoast Contract and under the Clarification Contract. Seacoast actively pursued those rights through its legal representative's efforts at

the Liquidation Commission to have Seacoast's accounts receivable paid, and also to manage Seacoast's lawsuit against INECEL.

156. Consequently, the Claimants assert that, pursuant to Article XII(1), the BIT applies to investments in existence. Moreover, they allege that Article I(3) confirms that any alteration of the form in which the assets are invested or reinvested shall not change their character as investments.

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157. The Tribunal reiterates that the main rules to be borne in mind for purposes of determining its own Competence in the present case are to be found basically in the ICSID Convention and in the Ecuador-United States BIT.

158. Article 25(1) of the ICSID Convention states as follows:

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

159. From a simple reading of Article 25(1), the Tribunal recognizes that the ICSID Convention does not define the term "investments". The Tribunal notes that numerous arbitral precedents confirm the statement in the Report of the Executive Directors of the World Bank that the Convention does not define the term "investments" because it wants to leave the parties free to decide what class of disputes they would submit to the ICSID.[20]

[20] *Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 18/03/1965, 1 ICSID Reports, p. 28.

160. The BIT indicates in its Article 1 which investments are to be protected under it. Thus, the BIT complements Article 25 of the ICSID Convention, for purposes of defining the Competence of the Tribunal with respect to any legal dispute arising directly out of an investment.

161. Article I of the BIT provides as follows:

> *1. For the purposes of this Treaty.*
> *(a) "investment" means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes:*
> *(i) tangible and intangible property, including rights, such as mortgages, liens and pledges;*
> *(ii) a company or shares of stock or other interests in a company or interests in the assets thereof;*
> *(iii) a claim to money or a claim to performance having economic value, and associated with an investment;*
> *(iv) intellectual property …;*
> *(v) any right conferred by law or contract, and any licenses and permits pursuant to law;…*
> *3. Any alteration of the form in which assets are invested or reinvested shall not affect their character as investment.*

162. The Tribunal also notes that the temporal requirements of Article XII of the BIT apply to investments existing at the time of its entry into force. The Tribunal therefore has to determine if *prima facie* the investment continued to exist upon entry into force of the BIT, as alleged by the Claimants.

163. The Tribunal concludes that for purposes of determining if it has Competence it is sufficient to consider the events as alleged by the Claimants insofar and inasmuch as, if proven true, they would constitute a breach of the BIT.[21] This statement does not preclude the right of the Respondent to question the occurrence of the alleged events for purposes of determining whether the Tribunal has Competence. However, any allegation about the scope of events alleged and the legal

[21] Consistent with *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Decision on Jurisdiction of September 25, 1983, 23 *ILM* 351 (1984), para. 38; Azurix Corp. *v. Argentine Republic* (ICSID Case No. ARB/01/12), Decision on Jurisdiction of December 8, 2003, para. 76; *Pope & Talbot Inc. v. the Government of Canada*, para. 25; *Emilio Agustín Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7), Decision on Jurisdiction of January 25, 2000, available at <http://www.worldbank.org/icsid/cases/emilio_DecisiononJurisdiction.pdf>, para. 69.

consequences thereof are matters that should be discussed when the Merits of the issues submitted are being analyzed and evaluated.

164. The Tribunal concludes that Article I(a) of the BIT gives a broad definition of investment and that the rights and interests alleged by the Claimants to have subsisted as a consequence of the Seacoast project, after the entry into force of the BIT—such as the intangible assets of accounts receivable, the existence of an operating permit—would fit that definition.

165. The Tribunal states that the requirements that were taken into account in some arbitral precedents for purposes of denoting the existence of an investment protected by a treaty (such as the duration and risk of the alleged investment) must be considered as mere examples and not necessarily as elements that are required for its existence. Nevertheless, the Tribunal considers that the very elements of the Seacoast project and the consequences thereof fall within the characterizations required in order to determine the existence of protected investments.

166. Regarding the events that the Claimants allege are breaches of the BIT by Ecuador, the Tribunal holds that as it is impossible to make distinction between the events that, if proven, would be breaches of the BIT, and those that, even if proven, would not constitute breaches of the BIT.

167. Considering that the Seacoast Contract was an investment prior to the entry into force of the BIT, the subsistence of that investment on the date of its entry into force should be taken into account. Additionally, the principle of non-retroactivity of treaties limits the application of the BIT and its clauses on jurisdiction to those disputes that are alleged to be violations of that Treaty after it entered into force.

168. For all these reasons, the Tribunal concludes that claims relating to the Seacoast Contract and the Clarification Contract, as well as the Ecuapower Contract, could not involve breaches under the BIT as the latter was not in force at the time that those alleged contractual breaches occurred. Applying the customary rules

relating to State Responsibility, the contractual breaches prior to the entry into force of the BIT do not contain the elements necessary to amount to violations of the BIT.

169. Regarding the events alleged by the Claimants to be breaches of the BIT after it entered into force, the Tribunal finds that the effects of an investment that was in existence before the treaty entered into force, continued, *prima facie,* after that date. The Tribunal, therefore, has Competence to hear the Claimants' arguments alleging breaches of the BIT by Ecuador for acts or omissions after it entered into force, which affected their investment.

170. It will fall to the Tribunal, in analyzing the arguments and the evidence of the Merits of the dispute, to determine whether the Claimants' allegations founded on Ecuador's breaches of the BIT by acts or omissions after it entered into force have, in fact, been proven to constitute breaches of the BIT.

b. Second subsidiary objection to the Competence of the Tribunal: the "fork-in-the-road" clause

171. Ecuador alleges that the arbitration option under the BIT has been precluded, owing to the submission of the dispute to its domestic courts.

172. Ecuador maintains that pursuant to Articles VI(2)(a) and VI(3)(a) of the BIT, there had been consent to the "fork-in-the-road" option. That means that once a Jurisdiction has been chosen, it remains the forum, regardless of the results of the proceedings. According to Ecuador, once the claim had been submitted for resolution to the Ecuadorian administrative tribunals, the claiming party gives up the possibility of resorting to international arbitration; because once the national court option is chosen, this choice becomes definitive and irrevocable.

173. Ecuador alleges that the claims submitted by Seacoast before the Ecuadorian tribunals in 1996 are the same claims that serve now as the basis of the present

claim, which have been submitted, for a second time, by the Claimants to an ICSID tribunal.

174. In support of its arguments, Ecuador maintains that the grounds for annulment of the claim submitted to the Ecuadorian tribunals arose after the submission of its claim; instead of objecting to the nullity plea, Seacoast accepted it in a letter dated October 15, 1999. The fact that Seacoast accepted the grounds for annulment would not prevent it from initiating a complementary action that could lead to a decision on the Merits.

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175. The Claimants allege that they have not triggered the "fork-in-the-road" clause because the claim before the Ecuadorian tribunals involved different parties and different issues and that the claim was not a free election of forum and was annulled without a decision being made on the Merits.

176. According to the Claimants, the ICSID jurisprudence is consistent to the effect that a party to a dispute triggers the "fork-in-the-road" clause if the proceedings initiated involve the same parties, have the same issues and are based on the same cause of action. The Claimants cite the *Benvenuti v. Republic of the Congo* case which makes reference to the existence of *lis pendens.* They cite the *Azurix Corp. v. Argentine Republic* and the *CMS v. Argentine Republic* cases. They allege that in the latter case the tribunal distinguished the fact that the claim before the domestic tribunals referred to contractual breaches whereas the claim before the ICSID referred to treaty breaches. They argue that the same reasoning was followed in numerous ICSID arbitration cases.

177. The Claimants state that they were not parties in the proceedings before the Ecuadorian courts. The proceedings in the domestic courts and before the ICSID involve different causes of action and different issues. In the former, Seacoast sought damages for breach of contract; in the latter, the Claimants are seeking damages for breach of the BIT. Furthermore, the proceedings before the ICSID

address actions taken by Ecuador before and after the entry into force of the BIT. Seacoast's claim before the Ecuadorian courts did not include claims for arbitrary and discriminatory acts on the part of Ecuador; for breach of promise to negotiate a long-term contract; for breach of the obligation to negotiate in good faith at the Liquidation Commission; for revocation of Seacoast's operating permit, for its refusal to agree to arbitration; and for annulling the claim presented to the domestic tribunals. The Claimants insist that they have not triggered the "fork-in-the-road" mechanism because the proceedings were ultimately annulled before the judge could make a decision on the Merits of the dispute.

178. The Claimants allege that they did not elect freely to initiate domestic legal proceedings. That decision was taken under pressure from the incoming Ecuadorian authorities in order to facilitate the parties reaching a settlement in the future. They cite the precedent of *Occidental v. Ecuador* in which the tribunal declared that the "fork-in-the-road" rule pre-supposes that the investor has made a choice between alternative avenues without any form of pressure. They allege that when the claim was presented to the Ecuadorian tribunals the possibility of making a choice of forum did not exist.

179. In response to Ecuador's allegation that mere submission of the suit to the domestic courts triggers the "fork-in-the-road" mechanism, the Claimants contend that the rule reflects the domestic and international law principle of *lis pendens*. According to the Claimants, the purpose of the principle is to ensure efficiency and avoid inconsistent decisions. The annulment of the proceedings in the local courts and Ecuador's contention that Seacoast may still present a claim to the Ecuadorian tribunals, do not, in the opinion of the Claimants, alter the effects of the *lis pendens* rule.

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180. The Tribunal takes due note of the fact that the Claimants' first submission to the ICSID, that is, the first request for arbitration, was in 1998, at which time the proceedings before the Civil Judge of Ecuador had not yet been annulled, which

event occurred on October 21, 1999. Seacoast's consent to have the proceedings annulled took place after the first request for ICSID arbitration had been withdrawn.

181. The Tribunal holds that the "fork-in-the-road" rule is different from the *lis pendens* rule because the former rule refers to an option, expressed as a right to choose irrevocably between different jurisdictional systems. Once the choice has been made there is no possibility of resorting to any other option. The right to choose once is the essence of the "fork-in-the-road" rule.

182. The Claimants' allegation that the "fork-in-the-road" mechanism was not triggered because the proceedings were ultimately annulled without a decision on the Merits having been made by the judge, is not relevant for purposes of determining Jurisdiction because if there had been a right to choose an option and if that right had in fact been exercised that would in any case have been irrevocable, whether or not there had been a final decision on the Merits.

183. Thus, the submission of the Claimants as to why they did not again commence proceedings under Ecuadorian law after the nullity of the proceedings in 1999, is irrelevant for purposes of determining the issue of the triggering of the "fork-in-the-road" provision since, in the Tribunal's view, the Claimants' arguments on the likely ruling of the Ecuadorian tribunal, when the submissions of the Attorney General are taken into account, are purely subjective speculation.

184. Independently of the foregoing observations, the Tribunal finds that Seacoast's claim before the Ecuadorian courts does not constitute the exercise of the "alternative" referred to in Article VI(2) of the BIT.

185. Article VI (2) of the BIT states:

> *In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute, under one of the following alternatives, for resolution: (a) to the courts or administrative tribunals of the Party that is a party to the*

> *dispute; or (b) in accordance with any applicable, previously agreed dispute-settlement procedures; or (c) in accordance with the terms of paragraph 3.*

186. The Tribunal holds that the claim before the Ecuadorian courts could never have been based on violations of the Treaty since the latter was not then in force, but was based instead on allegations of contractual breaches. Seacoast could not then exercise any choice under the BIT but commenced proceedings for breach of contract in the domestic court. The Tribunal notes that in the *Vivendi v. Argentine Republic* case on partial nullity it was inferred that having recourse to the domestic forum for breaches of contract does not involve exercising the right to choose an alternative under the BIT, unless the claim in the domestic forum is based on a breach of the BIT.[22]

187. The Tribunal finds that the Claimants are aware that part of the dispute submitted to the ICSID had already been submitted to the Ecuadorian courts by Seacoast. Consequently, the Claimants recognized that they had no right of choice at that time, as the BIT was not in force.

188. The Tribunal is aware that in the proceedings commenced before the Ecuadorian courts, Seacoast claimed for contractual breaches under the Seacoast Contract and the Clarification Contract. On the other hand, the present action submitted to the ICSID by the Claimants is based on breach of contract and of the BIT and takes account of events before, as well as after, the submission of the claim to the Ecuadorian courts.

189. The Tribunal considers that the Respondent's reliance on the Claimants exercise of the option of the jurisdiction of the Ecuadorian courts is irrelevant in view of the special circumstances of the present case. Indeed, the Tribunal is of the view that the suits submitted by Seacoast to the jurisdiction of the Ecuadorian Courts related to disputes that arose prior to the entry into force of the BIT. Thus, in accordance with the principle of the non-retroactivity of treaties, those disputes remain outside the temporal Competence of this Tribunal. It is not necessary to

[22] *Compañía de Aguas de Aconquija S.A. and Vivendi Universal* (previously CGE) *v. Argentine Republic*, Decision on Annulment, para. 55.

determine if a breach of the contract implies a breach of the BIT because the BIT was not in force and therefore, it did not give rise to obligations on the part of Ecuador on the date those disputes arose. Furthermore, the Respondent's invocation of the "fork-in-the-road" rule is also irrelevant with respect to the Claimants' allegations regarding acts and omissions of Ecuador constituting violations of the BIT after its entry into force.

190. The Tribunal holds that it does not have Competence over disputes that arose prior to the entry into force of the BIT. The Tribunal confirms that it does have Competence over acts that are alleged by the Claimants to have given rise to disputes that arose or became evident after the entry into force of the BIT, independently of whether they had a causal link with, or served as the basis of, allegations concerning acts or disputes prior to the entry into force of the BIT.

4. CONCLUSIONS

191. For the reasons given above, the Tribunal concludes:

1. To allow the Respondent's main objections to the Tribunal's Competence in respect of the non-retroactivity of the BIT; and

2. To reject the objections to the Tribunal's Competence with respect to the non-existence of an investment and the preclusion of the "fork-in-the-road" provision and consequently exercise its Competence over the Respondent's alleged violations of the BIT by acts or omissions after the entry into force of the BIT.

III. MERITS

1. INTRODUCTION TO THE MERITS OF THE DISPUTE

192. After conducting an exhaustive analysis of each of the arguments submitted by the Parties with respect to the matters on which it determined it had Competence, the Tribunal will refer here only to those arguments that it deems essential for determining the rights and obligations of the parties.

193. The Tribunal believes that its conclusions on Competence indicated in paragraph 191 above in no way pre-judge the rights and obligations of each of the Parties with respect to the issues that do not fall under the Jurisdiction of the Tribunal, and on which the Tribunal will express no opinion in this Award.

a. Relevant Facts

194. The Claimants, M.C.I. Power Group L.C. and New Turbine Inc., are companies incorporated in the United States of America. They maintain that they own and control Seacoast, a company established in 1922 under the laws of the State of Texas, originally controlled by Briggs-Cockerham LLC.

195. Against the background of an energy crisis in Ecuador in 1995, on November 17, 1995 the INECEL signed a contract with Seacoast for the sale of electricity for a period of six months (Seacoast Contract). Seacoast agreed to install and operate two electrical power generation plants in Santa Elena and in Santo Domingo (Ecuador), and sell that energy to INECEL.

196. On that same day, the parties signed a Memorandum of Clarification for the Execution of the Contract (Clarification Contract) relating to the scope of some of the clauses of the Seacoast Contract.

197. After signing the Seacoast Contract, and for purposes of its execution, the owners of Seacoast decided to enter into a "joint venture" with three other American companies.

198. The "joint venture" brought together the Claimants in this arbitral proceeding, M.C.I. Power Group L.C. (hereinafter called MCI), and New Turbine Inc., as well as Old Dominion Electric Cooperative (hereinafter ODEC). New Turbine at that time operated under the name Energy Services Inc. (hereinafter called ESI).

199. At the end of 1995, MCI, ESI, and ODEC, as investors in Seacoast, established two limited companies under the laws of the State of Virginia, identified collectively in the Claimant's Memorial as Power Ventures. Power Ventures incorporated Power Services Ecuador Ecuapower Cia. Ltda (Ecuapower), as its subsidiary under the laws of Ecuador

200. At the beginning of 1996, differences arose between the Parties herein with respect to the execution of the Seacoast Contract relating to the date of commencement, the duration of the contract, the payment for energy under the "Take or Pay' modality, reimbursement for the cost of fuel, and the imposition of fines and penalties.

201. On April 12, 1996 Seacoast suspended the operation of the two plants and delivery of power, invoking the non-payment by INECEL for invoiced amounts payable under the terms of the Seacoast Contract.

202. On May 26, 1996 INECEL declared the Seacoast Contract to be terminated, alleging the expiration of the agreed term of six months.

203. In June 1996, upon the original investors withdrawing from the "joint venture," Seacoast and Ecuapower continued under the joint control of MCI, ESI, and ODEC.

204. On July 12, 1996, the Seacoast equity interests in power generation were transferred to Ecuapower.

205. On July 31, 1996, Seacoast submitted a claim against INECEL to the Administrative Court of the District of Quito requesting approximately 25 million U.S. dollars for damages for breach of contract.

206. On December 1, 1996, Seacoast's accounts receivable were sold to MCI, ESI, and ODEC, with Seacoast retaining the responsibility to recover the amounts claimed against INECEL.

207. On December 17, 1996, the shares of the MCI, ESI, and ODEC "joint venture" in Ecuapower were sold to a third party, the Anglo Energy Company.

208. On January 24, 1997, INECEL and Ecuapower signed a contract for the provision of electrical power for three years.

209. On April 7, 1997 the first meeting of the Liquidation Commission contemplated in the Seacoast Contract was held.

210. In 1998, ODEC transferred all the rights and interest that it had in the "joint venture" to MCI and ESI, these latter companies remaining as the only owners of the accounts receivable and other claims of Seacoast against Ecuador.

211. On February 8, 1999, the Superintendent of Companies by "Nota" Resolution. 99.1.2.1.00372 notified Seacoast of the revocation of its operating permit.

212. On March 31, 1999, the meetings of the Liquidation Commission were considered terminated.

213. On October 21, 1999 the Pichincha Civil Judge held that the claim submitted by Seacoast against INECEL was null and void.

b. The law applicable to the Merits of the issues raised

214. The Claimants contend that the only law applicable in the present case is international law. They argue that the BIT includes an implicit agreement on the applicability of international law, and that the first part of Article 42(1) of the ICSID Convention must therefore be respected. They argue further that, if the Tribunal should consider that no such agreement exists, the force of the second part of Article 42(1) of the Convention is such that international law must be applied.

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215. Ecuador argues that the law applicable to the disputes submitted by the Claimants is exclusively the domestic law of Ecuador, because that is the law agreed to by the parties for dealing with alleged default under the contract.

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216. Article 42(1) of the ICSID Convention provides as follows:

> *The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.*

217. From the supporting documentation supplied by the parties during the proceedings, the Tribunal finds no evidence of any agreement on the law applicable to this dispute. Therefore, the Tribunal considers that it must respect the provisions of the second part of Article 42(1) of the ICSID Convention, i.e., in the absence of an agreement, the Tribunal shall apply Ecuadorian law, including its rules of private international law and such rules of international law as may be applicable. With respect to the latter rules, the Tribunal finds that the rules contained in the BIT, as well as the other pertinent rules of general international law, are applicable in the present case. The Tribunal's Competence over the Merits of the disputes submitted is limited, in this respect, to considering the contentions of the Claimants relating to violation of the BIT after it came into force.

218. In the event of possible contradictions between the rules of Ecuadorian law and the BIT and other applicable rules of general international law, the Tribunal will decide on their compatibility, bearing in mind the contents and purpose of those

rules in light of the precedence that international rules take over the domestic legislation of a State.

c. The relationship between INECEL and Ecuador

219. The Claimants contend that INECEL is an organ of the Ecuadorian State, directed and controlled by Ecuador through its government officials. The Claimants maintain that the object and functions of INECEL include those reserved generally to State regulatory bodies.

220. Among other points, the Claimants maintain that, upon liquidating INECEL, the Attorney General (*Procurador General*) became, by law, the State's representative with respect to all its rights and obligations.

221. The Claimants also insist that there is a contradiction in the Respondent's argument that INECEL enjoyed special prerogatives in the contracts it signed in its capacity as a State entity.

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222. Ecuador contends that the BIT does not apply to the Seacoast contract because, among other reasons, that contract was not signed with the State but rather with INECEL, an autonomous entity that is legally independent of the State.

223. The Respondent maintains that a distinction must be drawn between the sovereign obligations assumed by the State and the commercial obligations assumed by INECEL under the Contract. It cites recent ICSID awards[23] to the effect that not all defaults under a contract result in breach of the BIT.

[23] *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Award of May 12, 2005, available at <http://www.worldbank.org/icsid/cases/CMS_Award.pdf>, para. 269 and ss.; *Impregilo S.p.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/3), Decision on Jurisdiction of April 22, 2005, available at < http://www.worldbank.org/icsid/cases/impregilo-decision.pdf>, para. 220 y ss.

224. In its Rejoinder, Ecuador accepts that INECEL was a public-sector agency and that official representatives or delegates constituted a majority of its board. It also recognizes that INECEL was empowered to exercise certain public powers. Nevertheless, Ecuador argues that, because it had a separate legal personality, its own capital, and autonomous management, INECEL must not be confused with the State.

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225. The Tribunal finds that INECEL, in light of its institutional structure and composition as well as its functions, should be considered, in accordance with international law, as an organ of the Ecuadorian State. In this case, the customary rules codified by the ILC in their Articles on Responsibility of States for Internationally Wrongful Acts are applicable. Therefore, any acts or omissions of INECEL in breach of the BIT or of other applicable rules of general international law are attributable to Ecuador, and engage its international responsibility.[24]

2. ACTS ALLEGED AS BEING SUBSEQUENT TO THE ENTRY INTO FORCE OF THE BIT OVER WHICH THE TRIBUNAL HAS COMPETENCE

226. The Tribunal considers that the Claimants allege, mainly, as breaches of the BIT subsequent to its entry into force, the bad faith and discrimination demonstrated by Ecuador in settling the disputes in question, through its acts and omissions in various areas. They allege, in the first place, the illegality, under the BIT, of the acts and omissions of INECEL within the Liquidation Commission stipulated in the Contract.

227. In the second place, the Claimants contend, because the procedures expected of the Liquidation Commission were frustrated, that they attempted to resolve the

[24] *See*, International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Article 5.

disputes in question through an arbitration agreement. According to the Claimants, Ecuador promised to sign an arbitration agreement but renounced their promise after Seacoast's operating license was revoked.

228. The Claimants also contend that the revocation of that license was expropriatory. In addition, they argue that the revocation was used by Ecuador to provoke and obtain annulment of the only other possible route for the remedy of grievances, through a legal action before the Ecuadorian courts.

229. The Claimants argue further that Seacoast and its legal representative were subject to constant harassment, as part of Ecuador's policy of discrimination against Seacoast.

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230. The Tribunal will consider each of these questions raised by the Claimants on the grounds that, in accordance with its conclusions on Competence, any act or omission attributable to Ecuador, subsequent to the BIT's entry into force, is in principle sufficient to constitute a breach of the BIT, and consequently engages the Jurisdiction of this Tribunal to consider the Merits of those claims.

231. After analyzing these questions, the Tribunal will consider the contents and the scope of the BIT rules that the Claimants consider to have been violated by acts or omissions attributable to the Respondent, in order to evaluate the latter's legal position with regard to those rules.

3. ALLEGATIONS ON BREACHES OF THE BIT

232. The Claimants base their position with respect to the issues over which the Tribunal decided to exercise Competence on the failure of the Respondent to comply with the obligations imposed by the BIT with respect to: (a) fair and

equitable treatment; (b) no discriminatory or arbitrary treatment; (c) full protection and security; and (d) expropriation.

a. Fair and equitable treatment

233. The Claimants argue that Ecuador violated its obligation under the BIT to grant to the investors of the other contracting party treatment no less favorable than that required by the standards of international law. They cite Article II(3)(a), which provides:

> *Investments shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.*

234. The Claimants maintain that Article II(3)(a) sets out a minimum requirement upon States to provide treatment at least as favorable as that required by international law to investments of foreign investors. This international level of treatment includes fair and equitable treatment and full protection and security.

235. According to the Claimants, ICSID jurisprudence confirms that the minimum standards of international law are independent of the domestic law of the State hosting an investment. On this point, they cite the award in the case of *Genin v. Estonia*,[25] in which the Tribunal held that "under international law, the requirement of fair and equitable treatment is generally understood as a treatment that provides a basic and general standard which is different from the standards under domestic laws". Examples of acts that violate this treatment would be "a willful neglect of duty, an insufficiency of action falling far below international standards and even subjective bad faith."

236. The Claimants contend that the fair and equitable treatment required by the BIT includes the obligation to act in good faith. Good faith, according to the Claimants, is then an essential element of fair and equitable treatment.

[25] *Alex Genin et al. v. the Republic of Estonia* (Genin) (ICSID Case No. ARB/99/2), Award of June 25, 2001, available at < http://www.worldbank.org/icsid/cases/genin.pdf>.

237. The Claimants maintain that the obligation to act in good faith implies respect for the basic assumptions on which the investor made the investment. They cite the award in the *Tecmed* case, where the Tribunal held that as part of those expectations are included that the State will conduct itself in a coherent manner, without ambiguity and transparently, in order for the investor to be able to plan its activities and adjust its conduct to the statutes or regulations that will govern them, the policies embedded therein, and relevant practices and administrative directives.[26]

238. The Claimants maintain that good faith has to do with legal security, in the sense that the investor must expect that the government will act in such a way that it may enforce its own rights. The State may not act capriciously to abuse the rights of investors and it may not obstruct access to an independent review when those rights have been violated.

239. The Claimants argue that the requirement for fair and equitable treatment also protects investors from threats and other abuse of authority on the part of government officials. They refer to the conclusion of the tribunal in *Pope & Talbot*, with respect to an unjustified and invasive audit of the investor that was undertaken after a complaint was filed in the NAFTA system.[27]

240. The Claimants maintain that violation of fair and equitable treatment includes abusive exercise of State powers, which may manifest itself through the malicious application of law. They cite in particular the tribunal that heard and decided the *Azinian v. United Mexican States* case, which held that there would be a fourth type of denial of justice, namely clear and malicious misapplication of the law.[28]

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[26] *Tecmed*, para. 154.
[27] *Pope & Talbot*, Award on the Merits of Phase Two of April 10, 2001, para. 181, available at <http://www.investmentclaims.com/decisions/Pope-Canada-Award-10Apr2001.pdf>.
[28] *Robert Azinian, Kenneth Davitian y Ellen Baca v. United Mexican States* (ICSID Case No. ARB (AF)/97/2), Award of November 1, 1999, available at <http://www.worldbank.org/icsid/cases/robert_award.pdf >, para. 103.

b. No discriminatory or arbitrary treatment

241. The Claimants contend that Ecuador is in breach of its obligation under the BIT not to treat them in a discriminatory or arbitrary manner.

242. Article II(3)(b) of the BIT provides:

> *Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. For purposes of dispute resolution under Articles VI and VII, a measure may be arbitrary or discriminatory notwithstanding the fact that a party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a Party.*

243. The Claimants maintain, following the precedent of the *Lauder v. Czech Republic* case, that the government has conducted itself arbitrarily if its act was not founded on reason or fact, or on the law.[29]

244. The Claimants refer to the ruling of the International Court of Justice in the *ELSI* case, which defined an arbitrary act as a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.[30] They cite arbitral precedents in which an arbitrary act on the part of government was defined as inequitable treatment, regardless of whether there was denial of justice.[31]

c. Full protection and security

245. The Claimants contend that Article II(3)(a) of the BIT refers expressly to the obligation of the contracting parties to grant full protection and security to the investors of the other contracting party.

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[29] *Ronald S. Lauder v. the Czech Republic*, Final Award of September 3, 2001, available at <http://www.investmentclaims.com/decisions/Lauder-Czech-FinalAward-3Sept2001.pdf>, para. 308.
[30] *Case concerning Elettronica Sicula* (ELSI), Judgment, *ICJ Reports 1989*, available at <http://www.icj-cij.org/docket/files/76/6707.pdf>, p. 76, para. 128.
[31] *Pope & Talbot*, para. 177-181; *Mondev*, para. 125.

246. On this point, the Claimants cite the case of *CME v. Czech Republic*, in which the Tribunal held that a government is only obliged to provide protection which is reasonable in the circumstances.[32] They also cite, among other precedents, the case of *AAP v. Sir Lanka* Due diligence is nothing more nor less than the reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances.[33]

d. Expropriation

247. The Claimants allege violation of article III(1) of the BIT, which provides:

> *Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ("expropriation") except: for a public purpose; in a nondiscriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(3).*

248. The Claimants cite the definition of expropriation used by the Iran-United States Claims Tribunal in the *Sola Tiles* case where it was indicated that a right cannot be affected through interference by a State in the use of the property or the enjoyment of its benefits amounting to a deprivation of the fundamental rights of ownership.[34]

249. Citing the decision in *Pope & Talbot*, the Claimants contend that, for a government act to be deemed an expropriation, that act must have substantially deprived the investor of his fundamental rights of ownership and disposal of property.[35]

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[32] *CME Czech Republic B.V. v. the Czech Republic*, Partial Award of September 13, 2001, available at <http://www.investmentclaims.com/decisions/CME-Czech-PartialAward-13Sept2001.pdf>, para. 353.
[33] *Asian Agricultural Products Ltd. v. the Republic of Sri Lanka* (ICSID Case No. ARB/87/3), Award of June 27, 1990, available at <http://www.investmentclaims.com/decisions/AsianAgricultural-SriLanka-FinalAward-27Jun1990.pdf >, para. 558.
[34] *Sola Tiles v. Iran* (1987), Iran US C.T.R., para. 29.
[35] *Pope & Talbot*, Interim Award of June 26, 2000, paragraph 103, available at http://www.investmentclaims.com/decisions/Pope-Canada-InterimAward-26June2000.pdf.

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250. In maintaining that the applicable law is Ecuadorian law, Ecuador rejects the application of the BIT or other international law to the issues raised by the Claimants. However, Ecuador recognizes the principles of fair and equitable treatment as an obligation contained within the minimum standards required by international law. It refers to the contents of customary international law in this matter, and its evolving nature, citing precedents in the cases of *Genin*[36] *Mondev*,[37] *Azinian*[38] and *ELSI*[39] to conclude that none of the Claimants' arguments based on events subsequent to entry into force of the BIT exhibit the nature or the characteristics required to be deemed in international law as arbitrary or discriminatory, or to reflect bad faith or overt negligence, or in any way to fall short of the standards required by international law.

251. Ecuador does not deny the scope of Article III of the BIT on expropriation, but rejects its application to the facts alleged by the Claimants.

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252. On the basis of the positions taken by the Parties, the Tribunal notes that there is no discrepancy between them as to the contents of the rules invoked, but rather to their scope and effects with respect to the situations and circumstances of the points in dispute. The Tribunal will refer, first, to each of the Parties' contentions on the questions over which it has determined it has Competence. The Tribunal will then determine, for each contention and in the context of its circumstances and particular features, whether or not the BIT has been breached.

[36] *Genin*, para. 367.
[37] *Mondev*, para. 125.
[38] *Azinian*, para. 99, cited in *Mondev*, para. 126.
[39] *ELSI*, para. 128; cited in *Mondev*, para. 127.

4. THE CLAIMANTS' CONTENTION OF LACK OF GOOD FAITH ON ECUADOR'S PART WITH RESPECT TO THE ACTS AND OMISSIONS OF INECEL IN THE LIQUIDATION COMMISSION

253. The Claimants maintain that the Seacoast Contract and Ecuadorian legislation alike provide for the creation of a Liquidation Commission so that the parties may negotiate in good faith to resolve any disputes arising from execution of the Contract. They argue that the treatment granted by Ecuador to Seacoast in the Liquidation Commission was neither fair and equitable nor in good faith. Consequently, Ecuador has violated the rules both of customary international law and of Ecuadorian law and the Contract, by not acting in good faith during the liquidation process.

254. Clause 17 of the Contract provides that:

> *LIQUIDATION OF THE CONTRACT. 17. 01. Once the term of this contract has expired, or if it has not been possible to continue with the relationship arising from this instrument, the parties shall prepare an act of liquidation, which shall contain a detailed account of the technical and economic aspects of the contract, recording the volume of power and energy supplied during the term, the values that INECEL has paid to the contractor, and those that have yet to be paid, those that must be deducted or refunded for any reason, with the appropriate adjustments. For this purpose, any compensation owing may be made. If there is no agreement on liquidating the contract, the parties shall proceed in accordance with Articles 87 and 88 of the Public Procurement Law, wherever applicable. This act of liquidation will be deemed as the act of delivery and receipt and must be signed by the representative of the contractor and in the name of INECEL, a commission appointed by the General Manager shall be present, constituted by the Operations Director of the SIN, the Director of Planning and Rates, and a technical expert who has not been involved in execution of this contract. The administrator of this contract shall appear as an observer, providing any appropriate information. If necessary, INECEL shall appoint other delegates to appear on its behalf at the signature of the act of liquidation stipulated in this clause. The members of the commission who, on behalf of INECEL, sign the act referred to in this clause shall have*

administrative, civil and criminal liability for the data and information contained therein.

255. The Claimants interpret Clause 17 of the Contract as producing an obligation for the Parties to the Contract to negotiate in good faith with the object of resolving any dispute over enforcement and execution of the Contract.

256. The Claimants assert that Seacoast accepted establishment of the Liquidation Commission on August 12, 1996, i.e. after the date on which it deemed the Contract to have expired. They argue that INECEL did not activate the Commission procedure as required in the Contract, until April 7, 1997, constituting a delay of almost seven months.

257. The Claimants maintain that Ecuador violated its contractual obligation to negotiate in good faith in the Liquidation Commission. They also argue that INECEL did not give Seacoast a reasonable explanation of its position, thereby demonstrating greater intransigence.

258. They also contend that, since December 1997, the Commission had remained inactive with respect to the claims submitted by Seacoast, and that it ceased to exist on or before March 31, 1999.

259. The Claimants assert that the Liquidation Commission met approximately 11 times. While the Claimants affirm that at various meetings they accepted several of the demands of INECEL, they maintain that INECEL at no time recognized any claim submitted by Seacoast.

260. The Claimants maintain that a delegate of INECEL on the Liquidation Commission gave a promise that was never fulfilled. That promise was to request an opinion from the Attorney General as to the validity of the Clarification Contract, and Seacoast was to be permitted to examine and comment on the contents of the consultation document before it was sent.

261. The Claimants declare expressly that the Liquidation Commission was supposed to resolve differences over the term of the contract, over Seacoast's claims for unpaid invoices, and over the penalties imposed unilaterally on Seacoast by INECEL.

262. In their Reply, the Claimants cited the recognition by the Contract Administrator of the debts resulting from the failure by INECEL to pay for fuel.

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263. Ecuador argues that the Liquidation Commission is not a mechanism for resolving disputes over the interpretation and enforcement of the Contract, but is rather a mechanism for settling outstanding accounts. Ecuador affirms that INECEL convened the first meeting of the Liquidation Commission. That commission was fully constituted on August 16, 1996 with the appointment of the Seacoast representatives subsequent to the date on which Seacoast understood the contract to have terminated.

264. Ecuador contends that INECEL did not activate the mechanisms stipulated in the Liquidation Commission because on August 28, 1996 it was notified of the lawsuit filed by Seacoast, from which it concluded that the differences over the Contract between the parties were now converted formally into a judicial dispute.

265. Ecuador also maintains that, as the judicial complaint remained inactive, it again moved for action in the Liquidation Commission in April 1997.

266. Ecuador complains of lack of transparency on the part of Seacoast for having presented itself at meetings of the Liquidation Commission as the holder of rights to accounts receivable deriving from the Contract, despite the fact that in December of 1996 it had sold those accounts to third parties. This lack of transparency, Ecuador argues, was an indicator of bad faith.

267. Ecuador maintains that Seacoast evidenced its intention to reject any settlement not based on the recognition of its judicial claims. Ecuador considers that the settlements proposed by the two parties constituted no more than a reiteration of their respective positions. It contends that the negotiations in the Liquidation Commission were called off at the request of Seacoast.

268. Ecuador denies the existence of any unfulfilled obligation allegedly assumed in the negotiations in the Liquidation Commission relating to a consultation to be addressed to the Attorney General on the scope of the Clarification Contract.

269. Ecuador also denies the Claimants' argument that in the Liquidation Commission the Contract Administrator recognized Seacoast's claim for unpaid fuel bills. Ecuador maintains that the Claimants were referring to a draft minute that was never agreed to by INECEL.

270. Ecuador asserts that those involved in the liquidation cannot assume the function of resolving disputes, and that neither party was authorized to impose its view of the liquidation on the other party.

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271. The Tribunal notes that at the first meeting of the Liquidation Commission there was agreement on the issues that should be considered for liquidating the Contract. Among those issues were a series of questions over the differences arising prior to entry into force of the BIT, and relating to interpretation and enforcement of the Contract.

272. The Tribunal considers that there was no agreement on the divergent positions of each party with respect to the effects of the Clarification Contract, the date for initiation of the Seacoast Contract, and the date for its termination, nor with respect to the characteristic of the Contract as generating an obligation of "Take or Pay".

273. The Tribunal considers that, with the entry into force of the BIT on May 22, 1997, the lack of agreement on outstanding questions became clear in the refusal to sign the minutes of any of the Liquidation Commission's meetings which took place after that date. Consequently, in December 1997, each party presented its own settlement proposal. According to Seacoast, the total amount owing from INECEL on November 30, 1997 was US$19,753,874. According to the settlement proposal prepared by INECEL, Seacoast owed it the amount of US$1,104,486.

274. The Tribunal considers the Claimants' argument that final settlement or liquidation of the Contract produces its termination, as well as the Respondent's argument that liquidation is a post-contract stage, to be irrelevant for purposes of determining if there was a breach of the BIT, in light of the alleged lack of fair and equitable treatment and nondiscriminatory treatment on the part of Ecuador during negotiations within the Liquidation Commission subsequent to the BIT's entry into force.

275. The Tribunal interprets Clause 17 of the Contract as establishing a mechanism for liquidation of the Contract, once its term has expired. The Liquidation Commission is not intended to implement a dispute settlement mechanism. The intransigent positions of both parties during the Commission's meetings reflected the positions they took before the Ecuadorian courts. Clause 17 of the Contract provides the possibility to activate the remedies that are available to both parties in case of lack of agreement on liquidation.

276. The Tribunal finds no evidence from the actions of the Liquidation Commission that would prove or even suggest bad faith on the part of INECEL in not accepting Seacoast's claims.

277. The Tribunal considers that the failure to agree on liquidation of the Contract was due to the prior existence of an unresolved dispute between the parties. The Claimants cannot base their claim of bad faith on the part of INECEL, and hence of Ecuador, on the Liquidation Commission's failure to recognize their claims.

278. The investor's expectations of fair and equitable treatment and good faith, in accordance with the BIT, must be paired with a legitimate objective. The legitimacy of the expectations for proper treatment entertained by a foreign investor protected by the BIT does not depend solely on the intent of the parties, but on certainty about the contents of the enforceable obligations.[40]

279. Consequently, Seacoast's legitimate expectations as to the outcome of the negotiations in the Liquidation Commission cannot be disassociated from the scope and legal effects of the applicable rules, i.e. Clause 17 of the Contract. This clause does not give rise to an obligation to resolve existing disputes between the parties relating to the interpretation and application of the Contract. The fact that the parties did not achieve a definitive settlement at the Liquidation Commission could not give rise to a breach of the fair and equitable treatment standards by Ecuador based on Seacoast's expectation, not based on a valid and binding obligation.

280. Likewise, Ecuador was unable to substantiate or prove bad faith on the part of Seacoast on the grounds that it concealed information on its legal status as representative rather than owner of the contractual rights submitted to the Liquidation Commission.

5. REVOCATION OF SEACOAST'S OPERATING PERMIT AND ITS EFFECTS

281. The Claimants maintain that the revocation of Seacoast's operating permit was contrary to the fair and equitable treatment required by the BIT. They cite that revocation as grounds for claiming expropriation of their investment.

[40] See *MTD Equity Snd. Bhd. and MTD Chile S.A. v. Republic of Chile*—Annulment Proceeding (ICSID Case No. ARB/01/7), Decision on Annulment of the *ad hoc* Committee of March 21, 2007, available at <http://ita.law.uvic.ca/documents/MTD-Chile_Ad_Hoc_Committee_Decision.pdf>, para. 67: "The obligations of the host State towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have. A tribunal which sought to generate from such expectations a set of rights different from those contained in or enforceable under the BIT might well exceed its powers, and if the difference were material might do so manifestly."

282. As a result of the revocation of that permit, the Claimants maintain that Ecuador violated its obligation to act in good faith, as part of fair and equitable treatment, with respect to the negotiations to reach an arbitration agreement to settle the outstanding differences.

283. Also as a result of that revocation, the Claimants maintain that Ecuador sought and obtained cancellation of judicial proceedings initiated by Seacoast before the Ecuadorian courts, contrary to its obligations to foreign investors protected by the BIT.

284. The Tribunal will now consider each of these arguments, beginning with that relating to revocation of the permit.

a. Revocation of the permit

285. According to the Claimants, Seacoast had received a note from the Superintendent of Companies on February 8, 1999, notifying it that its permit was being cancelled because it was no longer conducting activities related to the business purpose for which it had been incorporated.

286. While the Claimants admit that Seacoast was aware of some administrative problems with the operating permit, Seacoast did not realize that those problems had anything to do with its ability to assert its rights. Thus, according to the Claimants, Seacoast filed a petition on February 8, 1999 requesting that its operating permit be extended until the end of the process under way for reaching an arbitration agreement.

287. The Claimants maintain that, according to Ecuadorian law, cancellation of the operating permit should have had no effect on the settlement of Seacoast's affairs, including the possibility of pursuing outstanding accounts receivable.

288. The Claimants clarified in their Reply that they are not challenging the power of the Superintendent of Companies to cancel the Seacoast permit, as according to

Ecuadorian legislation they continued to have the legal capacity to liquidate their affairs. They maintain that the cancellation of the permit took on a new dimension with the effects it had on the negotiations for an arbitration agreement and on the judicial proceedings.

289. The Claimants contend that the operating permit is a license to invest. They maintain that this license is in itself an investment and that its revocation therefore constitutes an expropriation.

290. The Claimants maintain that Seacoast's operating permit falls within the definition of investment of Article I of the BIT. Consequently, Ecuador's actions in cancelling that permit imply an expropriation according to the jurisprudence of international tribunals and courts. Citing the decision in the *Sola Tiles* case, as was argued by the tribunal that decided *Pope & Talbot*, the Claimants declare that Ecuador interfered with the rights flowing from Seacoast's operating permit, thereby interfering with Seacoast's rights of ownership when it revoked Seacoast's license, and then unlawfully relied on the revocation of the license to refuse to arbitrate and to reject Seacoast's judicial claim.

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291. Ecuador contends that the operating permit cannot be considered an investment, since it has no economic or financial content in itself. Ecuador maintains that its revocation was legal and did not affect Seacoast's rights or those of the Claimants. Ecuador argues that Seacoast continued to be the owner of all its rights, excluding the accounts receivable that had been sold to the Claimants. What Seacoast could not do was to act through its legal representative in Ecuador, because its Ecuadorian branch was in the process of liquidation. Consequently, for Ecuador, this was a problem of representation and not one of ownership of rights.

292. Ecuador maintains that the operating permit is a simple certificate of domiciliation and is therefore inseparable from the establishment of the foreign company's branch in Ecuador. The operating permit bears no relation to the

licenses, permits, or concessions to which the Claimants refer in their Reply. According to the Respondent, Ecuadorian law requires, for contracting with public-sector institutions, that a foreign company must be previously domiciled in Ecuador. Consequently, there is no requirement to obtain any permit or authorization. A foreign company may also conduct business in Ecuador through an agent, without the need to be domiciled.

293. Even if such rights could qualify as an investment, Ecuador argues, revocation of the operating permit produced no permanent impairment of the investor's rights, a requirement for claiming expropriation.

294. Ecuador maintains that cancellation of Seacoast's operating permit was based, in accordance with the Companies Act, on the fact that the company had advised the Superintendent of Companies that it had no assets after July 12, 1996, and that consequently it had no operations of any kind in Ecuador.

295. Ecuador declares that the granting of an operating permit implies recognition by the Superintendent of Companies that a foreign company has a branch within Ecuadorian territory and that it is capable of conducting regular business in Ecuador; it is not a question of a State concession or a permit to exploit or make use of productive assets or State resources.

296. Ecuador argues that if Seacoast felt that the Superintendent's decision was unlawful or arbitrary, it could have appealed that decision to the Administrative Tribunal (*Tribunales en lo Contencioso Administrativo*), as provided by law, but it did not do so.

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297. The Tribunal concludes, from the grounds cited in the Resolution of the Superintendent of Companies (Resolution 99.1.2.1.00374) revoking the Seacoast permit, that there is no element to justify qualifying that measure as a breach of fair and equitable treatment *per se* or as being an expropriation under the BIT.

298. The Tribunal notes that the introductory clauses of the Resolution of the Superintendent of Companies stated that from the reports of the Directorate of Inspection and Audit it appeared that Seacoast Inc. was not carrying out activities related to the purposes of the company for which it had obtained an Ecuadorian domicile, as a result of which the branch was implicated in the reasons for the cancellation of the operating permit granted under Law 31 of the Company Law Reform Law.

299. The Tribunal holds that the operating permit is fundamentally related to the requirement to install, put into operation, and operate the electricity generating plants. At the time that the permit was revoked Seacoast had transferred its rights over the plants and was therefore not the owner, nor did it manage said plants.

300. The Tribunal holds that, in accordance with Article III of the BIT, and under general international law, among the requirements necessary for an expropriation there must definitely be a substantial interference on the part of the State that affects the use and enjoyment of the protected investment. Consequently, as there was no ownership of the investment relating to the installation and operation of the plants, the possibility of alleging a revocation of the operating permit as an expropriation is limited.

301. The facts cited in the introductory portion of the Resolution of the Superintendent of companies correspond with the information supplied by Seacoast to the Ecuadorian authorities. Seacoast was promptly informed of the Resolution and, while it requested an extension of its effects because Seacoast was negotiating an arbitration agreement, at no time was the Resolution contested by Seacoast.

302. In addition, the Tribunal considers that Seacoast acquiesced in cancellation of the permit by not seeking an administrative review of the decision. The fact that Seacoast argues that it was not aware of the effects of the cancellation on the capacity of its legal representative to take action through the courts did not prevent it from appealing the order of the Fifth Court with respect to the effects of

cancellation of the permit on the capacity to litigate in defense of its alleged rights or those of the persons it represented.

303. Among the legitimate expectations that Seacoast might invoke in arguing a violation of the fair and equitable treatment and good faith, the Tribunal cannot consider relevant the mere claim of ignorance of the legal effects of the revocation or of the existence of a remedy for challenging it.

304. The Tribunal notes that the Claimants recognize the power of the Superintendent of Companies to revoke the permit. What the Claimants are challenging, in fact, is the effect that that revocation had on the negotiations for an arbitration agreement and on the annulment of the lawsuit initiated before the Ecuadorian courts. In this context, the Tribunal deems unfounded the claim that the revocation of the permit constitutes an expropriation.

305. Consequently, the Tribunal finds that the action of the Ecuadorian authorities in revoking Seacoast's permit to operate in Ecuador did not in itself constitute an act in conflict with domestic law or with the BIT. However, the legality of that revocation order does not authorize the Tribunal to prejudge the legality or illegality of its effects, in light of the obligations assumed by Ecuador through the BIT with respect to the consequences of that order for the negotiations concerning an arbitration agreement and on the annulment of the lawsuit.

306. The Tribunal will now examine these allegations of the Claimants with respect to the effects and scope of the revocation of Seacoast's operating permit.

b. The Claimants' allegation of Ecuador's bad faith in frustrating an arbitration process for resolving the questions at issue

307. With the failure of the Liquidation Commission, the Claimants maintain that Ecuador reneged on its promise to submit the dispute to arbitration, and then obstructed judicial proceedings before the courts of Ecuador, thereby denying the possibility of resolving the dispute in any forum.

308. According to the Claimants, Seacoast had suggested to the Attorney General of Ecuador that there could be recourse to private arbitration under the UNCITRAL Arbitration Rules. On this point, the Claimants contend that the Attorney General gave an official opinion, in a note dated January 29, 1999, that arbitration was the preferred way of proceeding to resolve the dispute.

309. According to the Claimants, negotiations began in April 1999 and draft arbitration agreements were exchanged without reaching agreement on the content of an arbitration agreement.

310. The Claimants refer to a ninth draft of the arbitration agreement that, having been approved by the Attorney General in June 1999, was awaiting signature by the President of the Republic. They claim that in a meeting held in Washington on August 2, 1999, representatives of the Attorney General advised Seacoast that it was impossible to sign that agreement, because Seacoast's permit to operate in Ecuador had been revoked and it therefore no longer had legal standing.

311. The Claimants maintain that on August 13, 1999 the Deputy Attorney General (*Procurador General Subrogante*) sent a note to Seacoast confirming that signature of the arbitration agreement was not possible, because its operating permit had been cancelled.

312. Moreover, the Claimants contend that although Seacoast had transferred the right to its accounts receivable, it continued to be responsible for collecting those accounts and was therefore the appropriate party to enter into the arbitration agreement.

313. In their Reply, the Claimants maintain that, contrary to the arguments of the Respondent, they did not consider that they had an assured right to resort to international arbitration. What they argued was the bad faith on the part of the Attorney General in reversing his position to conclude an arbitration agreement.

314. The Claimants contend that Seacoast made concerted efforts to obtain public support for reaching an arbitration agreement, but those efforts were in vain, in the face of Ecuador's opposition. Instead, the Claimants maintain, Ecuador responded by moving to annul Seacoast's lawsuit and initiating various proceedings against Seacoast and its representatives.

315. The Claimants maintain that, in light of this situation, Seacoast first considered resorting to ICSID arbitration, filing a Request for Arbitration against Ecuador on March 25, 1998. Seacoast then withdrew its claim on a "without prejudice" basis on April 17, 1998, and finally submitted a new claim.

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316. For its part, Ecuador maintains that the State Attorney General considered that domiciliation of a foreign company was a prerequisite for signing an arbitration agreement. Ecuador argues that Seacoast had never revealed that it was a collection agent acting on behalf of third parties. If Seacoast, MCI and New Turbine had proceeded transparently, the revocation of Seacoast's operating permit, which was considered in this case a formal requirement for signing the agreement, could not have posed an obstacle to MCI and New Turbine, because it affected Seacoast exclusively, and only in its capacity to sign an arbitration agreement with the State at that time. Ecuador also contended that Seacoast was no longer the owner of rights to the accounts receivable to which the drafts of the arbitration agreement referred, because it had sold those rights, among others, to the Claimants in December 1996.

317. Ecuador contends that international law does not recognize a right to arbitration in the absence of the necessary consent of the parties involved in the dispute.

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318. The Tribunal finds that the only evidence provided by the Claimants with respect to an alleged promise by Ecuadorian officials to reach an arbitration agreement is the statement of the Seacoast representative, Charles Moseley, and in the e-mails he sent to other members of Seacoast on the feasibility, but not the certainty, of signing an agreement.

319. The Tribunal considers that the note from the Attorney General of January 29, 1999 was addressed to INECEL in response to a request for an opinion on the feasibility of arbitration. The contents of that note do not reveal any obligation to sign an arbitration agreement, but rather the possibility of such an agreement under Ecuadorian Law.

320. The Tribunal finds that, in the note of August 13, 1999, the Attorney General included a copy of the Resolution of the Superintendent of Companies, No. 99.1.2.1.00374, dated February 8, 1999, reporting that the operating permit granted to Seacoast had been cancelled. The note stated that "under the circumstances, it is not appropriate to proceed with arbitration, because of the effects of cancellation of the operating permit for the company's branch, and had that cancellation been known sufficiently in advance its petitions would not have been processed."[41]

321. In the Tribunal's view, the alleged obligation of Ecuador to negotiate an arbitration agreement would be an obligation of means and not of result. If there was an intention, it was to negotiate the possibility of an arbitration agreement, not to reach an arbitration agreement. From the evidence produced before the Tribunal, there is no proof of bad faith on the part of the Attorney General in refusing to sign an arbitration agreement.

322. Seacoast's expectations with respect to signature of an arbitration agreement cannot be based on any acquired right to reach that agreement as a consequence of an obligation assumed by Ecuador. The Claimants did not prove the existence

[41] Letter No. 06767 of August 13, 1999 from Dr. Leonello Bertini Arbeláez, Deputy State Attorney General (*Procurador del Estado Subrogante*) to Charles Moseley, Seacoast Inc., para. 5.

of the obligation on the part of the Ecuadorian authorities to reach an arbitration agreement.

323. Under general international law, any obligation to submit for arbitration a dispute involving a State requires the existence of an agreement. That agreement, which may be verbal, must be proven by the party alleging it.[42]

324. In the Tribunal's view, the failure of the negotiations for an arbitration agreement did not violate the BIT standard of fair and equitable treatment, and hence did not engage Ecuador's responsibility for any expectations that Seacoast might have entertained for reaching such agreement.

325. Seacoast could not ignore that the arbitration agreement implied for Ecuador the acceptance of an exception to the jurisdiction in favor of its courts for resolving the dispute existing at that time. Nor can the Claimants argue that they were unaware that the State was free to give or withhold its consent to bind itself through an arbitration agreement. All that could be proven in the present arbitration procedure was that Seacoast was firmly resolved to achieve this agreement, and that the Attorney General recognized the feasibility of such an agreement under Ecuadorian law. It has also been proven that there was no enforceable obligation on Ecuador's part to sign an arbitration agreement, but only to negotiate such an agreement. The Claimants recognize this in limiting their complaints to bad faith on the part of the Attorney General in the handling of the negotiations, and not the failure to fulfill an obligation of reaching an arbitration agreement. The mere possibility or intent of achieving an arbitration agreement did not in itself create an enforceable obligation for Ecuador, nor could Seacoast entertain a legitimate expectation on that basis, given the absence of an unfulfilled obligation to proceed steadily to signature of an arbitration agreement.

[42] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan* (ICSID Case No. ARB/02/13), Award of January 31, 2006, available at <http://www.worldbank.org/icsid/cases/SalinivJordanAward_IncludingAnnex.pdf>, para. 70, "It is a well established principle of law that it is for a claimant to prove the facts on which it relies in support of his claim – Actori incumbat probation."

c. The annulment of the lawsuit

326. The Claimants maintain that revocation of Seacoast's permit was the pretext used by Ecuador to deny Seacoast any opportunity to resolve its dispute. Not only did Ecuador use this argument to set aside its promise to sign an arbitration agreement, but it also sought and obtained annulment of the lawsuit filed by Seacoast before the Ecuadorian courts. The Claimants assert that the lawsuit, which had been filed several years earlier, was the only remaining option that Seacoast had for resolving its contract dispute.

327. Seacoast filed the lawsuit against INECEL on July 31, 1996, claiming approximately US$25 million in damages for breach of contract. The Claimants argue that the lawsuit was presented at the suggestion of the future Minister of Economy of Ecuador, for whom there could be no solution of the dispute unless Seacoast were to file a lawsuit before he took office.

328. According to the Claimants, after INECEL responded to the lawsuit on September 25, 1996, the parties took no judicial action for more than two years. The Claimants maintain that Seacoast's primary interest was to exhaust remedies through the Liquidation Commission and then negotiate an arbitration agreement under the UNCITRAL Rules.

329. According to the Claimants, on August 7, 1999 the Attorney General made a submission to the Fifth Court in which he contended that cancellation of Seacoast's permit meant loss of its legal standing, and he claimed that the lawsuit had not been properly filed, because it lacked a signed authorization by the Seacoast representative.

330. The Claimants maintain that on September 1, 1999, Mr. Moseley notified the court of his position that cancellation of the permit did not imply the loss of Seacoast's legal standing. They contend however that, according to legal advice received by Seacoast, the alternative ground presented by the Attorney General for annulling the lawsuit, i.e. the absence of an authorizing signature, was technically valid.

331. Consequently, on September 23, 1999 Seacoast asked the judge to determine whether the lawsuit had been validly lodged and whether Mr. Moseley continued to be Seacoast's legal representative. On October 15 Seacoast told the judge that it would accept a ruling of annulment based solely on inappropriate submission of the lawsuit by Seacoast's lawyers, but he did not admit that he had lost his powers of legal representation. Thus, Mr. Moseley, in a letter addressed to the judge, declared that, confirming the request in his previous letter, "I expressly agree to such a ruling, and accept in advance your judgment, and would ask you to declare the lawsuit annulled as of the date it was submitted."[43]

332. On October 21, 1999, the judge declared the lawsuit annulled as of the day of its presentation. In the Claimants' contention, that decision did not distinguish between annulment based on the technical arguments agreed to by Seacoast and annulment based on the Attorney General's objections over the continued legal standing of Seacoast's branch.

333. The Claimants argue that on October 10, 2002, the representative of the Attorney General appealed the judge's decision and that on December 12, 2002, the Superior Court of Justice of Quito declined jurisdiction because the Attorney General was not the party to have been detrimentally affected by the decision and had not reasoned its request for appeal.

334. In their Reply, the Claimants contend, contrary to Ecuador's position, that Seacoast had not agreed to withdraw the lawsuit on the basis of its lack of legal standing. Nevertheless, they recognized that Seacoast had agreed to withdraw the lawsuit on the basis of the absence of an authorized signature by its legal representative. The Claimants, however, consider that the judge's decision annulling the lawsuit was based on recognition of the two objections presented and argued by the Attorney General.

[43] Note to Juez Quinto de lo Civil de Pichincha (Judge of the Fifth Civil Court of Pichincha) signed by Mr. Charles Moseley Hall and Yolanda Vinuesa, Esq. Mat. 1726-Quito, para. 3.

335. In their Reply, the Claimants recognize that they are not challenging the judge's decision to annul the lawsuit as a denial of justice, but rather as indicating bad faith on the part of the Attorney General in submitting formal objections to Seacoast's claim.

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336. For its part, Ecuador maintained that on the date the BIT entered into force the Claimants had agreed that their claim against INECEL should be pursued through the local courts of Ecuador, which should decide on the Claimants' litigious and contingent rights, if any.

337. In Ecuador's view, the Ecuadorian judges did not issue any ruling on the pertinence of the Attorney General's argument as to the impact of the operating permit's revocation on continuation of the legal proceedings. Ecuador maintains that the judge's decision was based exclusively on the agreement of the parties.

338. In Ecuador's view, then, the cancellation of the legal proceedings came not as a consequence of revocation of the permit itself, but rather as a result of agreement among the parties, based on Seacoast's express acquiescence in the Respondent's petition. Cancellation of the legal proceedings, Ecuador argues, does not imply a denial of justice through an arbitrary court ruling.

339. Ecuador argues that in the worst of cases, revocation of the operating permit might have limited temporarily the agent's capacity for action, but not the right of the Claimants. MCI and New Turbine could have taken action directly, for which they would not have required either domicile or permits. In the same manner as they are pursuing this claim, they could by themselves have filed suit before the competent Ecuadorian courts. If they could do so, that means that their legitimate expectations, in keeping with the law, were in no way frustrated or limited by liquidation of Seacoast's branch in Ecuador.

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340. From the arguments and documentation supplied by the parties, the Tribunal notes that on March 23, 1999, as a result of liquidation of INECEL, the Attorney General's Office took over the defense in the judicial proceedings initiated by Seacoast.

341. The Tribunal also notes that, in the application of decisions regarding the administration of justice, the Administrative Tribunal that heard the case transferred it on April 12, 1999 to the Judge of the Fifth Civil Court of Pichincha.

342. The Tribunal finds that the lawsuit filed by Seacoast challenged an official notice from the General Manager of INECEL in which he declared that the contract signed between Seacoast and INECEL on November 7, 1995 terminated on May 26, 1996. Seacoast also demanded payment for available energy, under the "Take or Pay" provisions of the Contract; payment for the fuel consumed, which INECEL had not settled; return of amounts improperly withheld as penalties imposed by INECEL; payment of interest; and payment of all damages sustained.[44]

343. The Tribunal notes that in its response to the lawsuit of September 25, 1996, INECEL addressed the issues put forward and invoked the absence of legal representation of Seacoast, and the absence of a signature by the legal representative of Seacoast.

344. The Tribunal considers that the decision of the judge of the Fifth Civil Court of Pichincha was issued in the first *considerandos* of his Order, on Mr. Charles Moseley's lack of legal standing in the proceedings. In the later *considerandos* of that Order, the judge ruled: "6) The last written submission […] by Mr. Charles Moseley Hall, legal representative of Seacoast Inc. and of Seacoast Inc., Ecuador branch, in which he expressly acquiesces in the annulment requested by the Attorney General, is relevant; and 7) this legal situation noted in those *considerandos* means omission of one of the substantial formalities that must

[44] Claim submitted by Seacoast before the First District Tribunal of Quito for Administrative Disputes (First Chamber), July 31, 1996.

definitively influence the decision of the case, for which reason, on the basis of Article 355(3) of the Code of Civil Procedure, all proceedings are declared null and void, as of the date of submission of the suit, which may not be reinstated."[45]

345. Consequently, the Tribunal assumes that the Judge of the Fifth Civil Court of Pichincha ruled in favor of the objections brought by the Attorney General in his letter demanding annulment of the lawsuit presented by Seacoast.

346. The Tribunal finds a degree of confusion in the arguments advanced by the judge as to the effects of the revocation on the capacity of Seacoast's representative to take action before the courts. From the decision of the Judge of the Fifth Civil Court of Pichincha it appears that Mr. Moseley was not Seacoast's legal representative, and yet in sections 6 and 7 of that decision he accepted as valid Mr. Moseley's acquiescence with respect to the lack of signature on the claim for purposes of cancelling the proceedings. The Tribunal takes note of the fact that, if Mr. Mosley was no longer the legal representative of Seacoast, his acquiescence could not have produced a valid withdrawal of Seacoast's lawsuit.

347. The Tribunal takes note of the appeal of the Order of the Judge of the Fifth Civil Court of Pichincha filed by the Attorney General on October 10, 2002.

348. The Tribunal understands that, on this appeal, the Superior Court of Justice of Quito ruled that the right of appeal lies with the person who has suffered irreparable harm as a result of the ruling. The court found that the ruling affected Seacoast Inc. and that it had not filed any appeal against the annulment ruling. Consequently, the court ruled that it lacked jurisdiction to hear the appeal filed by the Attorney General.[46]

349. The Tribunal holds that the alleged legitimate expectations of an investor with respect to the behavior required of a host State cannot include merely subjective assessments as to the impossibility of achieving a viable solution through the

[45] Numbers 6 and 7 of the decision of October 21, 1999, Fifth Civil Court of Pichincha.
[46] Decision of the Superior Court of Quito in civil case No. 194-2000 filed December 12, 2000 by Seacoast against INECEL.

State's domestic judicial remedies, when those remedies have not been properly pursued. Seacoast accepted cancellation of the lawsuit containing its claims over INECEL's contractual breaches and it did not challenge any portion of the justifications for the cancellation Order issued by the Ecuadorian judge with jurisdiction to settle the disputes in question. It is clear that Seacoast agreed to the cancellation of its lawsuit. Nor did Seacoast show any interest in investigating the possibilities of submitting a new claim on behalf of the owners of the rights that Seacoast had transferred, i.e. on behalf of the Claimants in the present case.

350. It is evident to the Tribunal that Seacoast, through its acts and omissions, desisted from the legal action it had initiated before the Ecuadorian courts. Nevertheless, that move did not prejudge the viability of future actions or recourses.

351. The Tribunal considers that the fact that the injured party did not question the annulment ruling, even in part, and that it did not attempt to file a new claim does not prevent the Claimants from pursuing their asserted rights through the Ecuadorian courts.

352. The Tribunal notes that the statements of the parties contained in the arbitration proceedings express, in specific circumstances, the recognition of a pre-existing obligation or create a new enforceable obligation of the other party. This was the case in *Joy Mining v. Egypt*, where the Tribunal decided that the respondent was obligated by the statement of its legal counsel, expressed during the oral hearing, that it would comply fully with the UNCITRAL proceeding agreed in the contract, and that the award would be the basis on which a decision would be taken to release, or not, the bank guarantee that was the object of the dispute.[47] Similarly, the *Ad Hoc* Committee in the case of *CMS v. Argentina* decided to stay enforcement of the award on the basis of a statement by the respondent's agent committing the respondent to honor the annulment decision.[48]

[47] *Joy Mining Machinery Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/03/11), Award on Jurisdiction of August 6, 2004, available at < http://www.worldbank.org/icsid/cases/joy-mining-award.pdf >, para. 95.
[48] *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8)-Annulment Proceeding,, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (September 1, 2006), para. 49.

353. In this context, the Tribunal interprets the Respondent's statements on the judicial remedies available in Ecuador[49] as formal recognition that the Claimants have a right to appeal to the Ecuadorian courts. Consequently, the Claimants may file suit before the Ecuadorian courts with respect to all the disputes over which the Tribunal, in its Decision on Competence, decided that it did not have Competence.

6. ECUADOR'S HARASSMENT OF SEACOAST REPRESENTATIVES

354. The Claimants maintain that cancellation of the operating permit was part of a broader campaign by Ecuador to frustrate Seacoast's attempts to enforce its rights. They argue that, in the course of just a few weeks after petitioning for nullification of the lawsuit, Ecuador threatened Seacoast with a tax audit, began to investigate its legal representative, and opened judicial proceedings through a lawsuit submitted by the State-owned oil company.

355. On this point, the Claimants contend that on July 22, 1999, a few days after publication of their claims in the newspapers of Quito, the Ministry of Labor informed Seacoast that the dividends that should be paid to the employees must be distributed by March 31 each year, according to the Labor Code, and that failure to do so would result in penalties.

356. They also claim that a representative of the Ministry of Labor showed up unannounced at Seacoast's offices to inspect the documentation of two travel agencies-- represented by Mr. Moseley and his wife-- with which Seacoast shared offices, and that on August 8, 1999 a representative of the Social Security Office went to Mr. Moseley's home to investigate the labor relationship of his housemaid. They also argue that on August 16, 1999 the State oil company launched collection proceedings to recover penalties, although the dispute over the fuel charges was dormant, and that it gave notice a few days later it could seize its property.

[49] Respondent's Reply, para. 200.

357. The Claimants consider the threat of a tax audit of Seacoast to be part of this harassment.

358. The Claimants maintain that these events were not mere coincidence, but part of a policy of discrimination to which Seacoast had been subjected since first making its investment in Ecuador.

359. The Claimants summarize their argument by stating that, in the circumstances, after annulment of the lawsuit on October 21, 1999, Seacoast decided that further effort to pursue its claims in Ecuador would be fruitless. They maintain that, since the establishment of the Liquidation Commission in August 1996, Seacoast had been trying to resolve its contractual disputes with Ecuador in the Liquidation Commission, through the negotiation of an arbitration agreement and in the domestic courts, but that these efforts had proved unsuccessful.

360. The Claimants conclude that Seacoast reasonably believed that the government, by its responses in late July and early August 1999, was sending it a message that it was unwelcome in Ecuador and that it could not expect justice in its courts.

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361. For its part, Ecuador argued that the exercise of State powers established by law for the enforcement of labor and fiscal obligations does not constitute persecution or harassment, since those measures can themselves be subjected to judicial review.

362. With respect to the tax audit requested by the Superintendent of Companies in its resolution declaring Seacoast's permit expired, Ecuador maintains that this constitutes compliance with a valid legal requirement. In turn, it denies the allegations that the activation of judicial remedies could be considered harassment.

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363. As to the allegations of harassment by the Ecuadorian authorities concerning labor issues, a simple reading of the note of July 22, 1999 persuades the Tribunal that this was a routine notice from the Ministry of Labor, issued pursuant to Articles 105, 626 and 627 of the Labor Code. Article 105 sets the time limit for the payout of profits and imposes fines for nonobservance of that time limit, consistent with Article 626 of the Labor Code.

364. As to the Claimants' allusions to the visit of an inspector to the offices that Seacoast shared with two tourism agencies, and the visit of another inspector to Mr. Moseley's home, the Tribunal does not consider these visits to constitute significant evidence of systematic discrimination, because the Claimants' Memorial asserted that, a few days after those events, the Social Security Office issued a certificate to the effect that Seacoast had no outstanding obligations.

365. With respect to the threat of audits, the Tribunal finds that, in his note of August 13, 1999, the Attorney General referred to Seacoast's claims concerning its debts with the Internal Revenue Service (SRI). In that note, the Attorney General declared that "the Resolution of the Superintendent of Companies orders that the Director General of the SRI be notified for purposes of a tax audit of the branch of Seacoast Inc. in Ecuador, which SRI will perform immediately for the fiscal years 1996, 1997 and 1998, including the sale of Seacoast's equity interests in Ecuapower, and the transfer of the associated assets."[50]

366. The Tribunal notes that the audits mentioned in the Resolution of the Superintendent of Companies of February 1999 represent a routine procedure related to revocation of the permit. From the information contained in that Resolution, no unfair or inequitable, arbitrary or discriminatory treatment can be inferred that would violate the standards of general international law required by

[50] Letter No. 06767 of August 13, 1999 from Dr. Leonello Bertini Arbeláez, Deputy State Attorney General (Procurador del Estado Subrogante) to Charles Moseley, Seacoast Inc.

Article II(3)(a) of the BIT. Moreover, the documentation supplied by the parties offers no proof that those audits were conducted or, if they were, that they violated those standards of international law.

367. Finally, the Tribunal finds that the claim by the State oil company for unpaid debts does not constitute a discriminatory or arbitrary act. From a simple reading of the note claiming those payments, the Tribunal considers that this demand falls within the normal and routine activity of public administration. Moreover, the mention of a possible embargo for default on debts due and payable flows from existing legislation. The documentation supplied by the parties provides no evidence that the debt was executed or that embargoes were constituted that might have affected the Claimants' rights to fair and equitable treatment under the BIT.

368. As to the Claimants' assertions that Seacoast believed it could not obtain justice through the Ecuadorian courts, the Tribunal considers that such subjective assessments point to a certain degree of negligence in Seacoast's decisions concerning the eventual resolution of its disputes.

369. The Tribunal notes that fair and equitable treatment conventionally obliges States parties to the BIT to respect the standards of treatment required by international law. The international law mentioned in Article II of the BIT refers to customary international law, i.e., the repeated, general, and constant practice of States, which they observe because they are aware that it is obligatory. Fair and equitable treatment, then, is an expression of a legal rule. Inequitable or unfair treatment, like arbitrary treatment, can be reasonably recognized by the Tribunal as an act contrary to law.[51]

370. In this sense, fair and equitable treatment cannot be confused with the application of the rule of *ex aequo et bono*, which presupposes the broad exercise of discretion by arbitrators in seeking a solution to a dispute. In the *Mondev* case, the tribunal held that:

[51] *Tecmed*, para. 102.

> *…Article 1105(1) did not give a NAFTA tribunal an unfettered discretion to decide for itself, on a subjective basis, what was 'fair' or 'equitable' in the circumstances of each particular case…. The Tribunal is bound by the minimum standard as established in State practice and in the jurisprudence of arbitral tribunals. It may not simply adopt its own idiosyncratic standard of what is 'fair' or 'equitable,' without reference to established sources of law.*[52]

371. The Tribunal concludes that the acts alleged by the Claimants as continuing harassment by Ecuador against Seacoast may betray an unfriendly attitude but, when evaluated individually or as a whole, they do not constitute unfair or inequitable, discriminatory or arbitrary treatment in violation of the parameters established by international law as reflected in the BIT.

IV. COSTS

372. On the basis of reasonableness and prudence, the Tribunal, having no valid grounds to depart from precedent and general trends on the assessment of costs and expenses incurred in arbitration proceedings, considers that each party should pay its own costs and expenses for legal representation and that the parties should each pay half of the costs and expenses incurred by the Centre with regard to the present arbitration proceedings, both on Jurisdiction and on the Merits.

V. DECISION

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

a. To allow the Respondent's main objections to the Tribunal's Competence in respect of the non-retroactivity of the BIT;

[52] *Mondev*, para. 119

b. To reject the other objections to the Tribunal's Competence and consequently exercise its Competence over the Respondent's alleged violations of the BIT by acts or omissions after the entry into force of the BIT;

c. To reject the Claimants' claims on which the Tribunal previously decided that it had Competence, for it considers that the Claimants have failed to prove violation of the standards of fair and equitable treatment, including the obligation to act in good faith, or the standards of non-discriminatory or non-arbitrary treatment that the BIT requires of Ecuador as a State party.

d. To reject the Claimants' claim relating to the expropriation of their rights to the investment as a result of revocation of Seacoast's permit to operate in Ecuador.

e. To formally take note of the statements of the Respondent's attorneys as to the Claimants' right to take judicial action before the Ecuadorian courts to settle the outstanding disputes over what they allege to be contractual breaches.

f. Each party shall bear in equal portions the costs and expenses incurred in the arbitration proceedings on Jurisdiction and on the Merits.

g. Each party shall bear its own costs and expenses incurred for legal representation in the arbitration proceedings on Jurisdiction and on the Merits.

Made in Washington D.C., in English and Spanish, both versions equally authentic.

[*Signed*]

Judge Benjamin J. Greenberg, Q.C.
Arbitrator
Date: July 16, 2007

[*Signed*]

Professor Jaime Irarrázabal C.
Arbitrator
Date: July 18, 2007

[*Signed*]

Professor Raúl E. Vinuesa
President
Date: July 26, 2007