

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

In the annulment proceedings between

**PERENCO ECUADOR LIMITED**

Perenco/Claimant

and

**REPUBLIC OF ECUADOR**

Applicant/Respondent

**ICSID Case No. ARB/08/6**

---

**DECISION ON ANNULMENT**

---

**Members of the *ad hoc* Committee**

Professor Eduardo Zuleta, President

Professor Dr. Rolf Knieper, Member

Professor Mónica Pinto, Member

**Secretary of the *ad hoc* Committee**

Ms. Veronica Lavista

Date of dispatch to the Parties: May 28, 2021

## REPRESENTATION OF THE PARTIES

### Representing Perenco Ecuador Limited:

Mr. Jonathan Parr  
Ms. Josselyn Briceño de Luise  
Perenco Ecuador Limited  
Lyford Manor  
Lyford Cay  
Western Road  
Nassau, Bahamas

Mr. Mark W. Friedman  
Ms. Ina C. Popova  
Ms. Laura Sinisterra  
Ms. Sarah Lee  
Ms. Moeun Cha  
Ms. Janine Godbehre  
Debevoise & Plimpton  
919 Third Avenue  
New York, NY 10022  
United States of America

### Representing the Republic of Ecuador:

Dr. Íñigo Salvador Crespo  
Dra. Claudia Salgado Levy  
Ab. M<sup>a</sup> Nazaret Ramos  
Ab. Diana Moya  
Procuraduría General del Estado  
Av. Amazonas N39-123 y Arízaga  
Quito, Ecuador

Professor Eduardo Silva Romero  
Mr. José Manuel García Represa  
Ms. Audrey Caminades  
Ms. Gabriela González Giráldez  
Ms. Raphaëlle Legru  
Ms. Ruxandra Irina Esanu  
Dechert (Paris) LLP  
32, rue de Monceau  
75008, Paris  
France

Professor Pierre Mayer  
20, rue des Pyramides  
75001, Paris  
France

## TABLE OF CONTENTS

I.	INTRODUCTION AND PARTIES .....	1
II.	PROCEDURAL HISTORY.....	2
III.	THE APPLICABLE LEGAL FRAMEWORK .....	9
A.	ANNULMENT UNDER THE ICSID CONVENTION .....	9
(1)	The Parties' Positions .....	9
a.	Applicant's Position .....	9
b.	Perenco's Position .....	10
(2)	The Committee's Analysis.....	12
B.	MANIFEST EXCESS OF POWERS .....	14
(1)	The Parties' Positions .....	14
a.	Applicant's Position .....	14
b.	Perenco's Position .....	17
(2)	The Committee's Analysis.....	20
C.	SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE .....	22
(1)	The Parties' Positions .....	22
a.	Applicant's Position .....	22
b.	Perenco's Position .....	24
(2)	The Committee's Analysis.....	26
D.	FAILURE TO STATE REASONS .....	31
(1)	The Parties' Positions .....	32
a.	Applicant's Position .....	32
b.	Perenco's Position .....	34
(2)	The Committee's Analysis.....	36
IV.	THE SPECIFIC GROUNDS ON ANNULMENT .....	38
A.	GROUNDS RELATED TO THE TRIBUNAL'S FINDINGS ON JURISDICTION.....	39
(1)	Grounds on the Tribunal's finding that the Treaty extends jurisdiction to a company only indirectly controlled by French nationals.....	39
a.	The Parties' Position .....	39
b.	The Committee's Analysis .....	41
(2)	Grounds on the Tribunal's finding that Perenco was controlled by French nationals .....	43

a. The Parties' Position .....	43
b. The Committee's Analysis .....	45
(3) Grounds on the Tribunal's finding that it had jurisdiction over Perenco's claims that <i>caducidad</i> breached the Block 21 Participation Contract.....	48
a. The Parties' Position .....	48
b. The Committee's Analysis .....	51
B. GROUNDS ON THE TRIBUNAL'S FINDINGS ON THE MERITS .....	57
(1) Grounds on the Tribunal's finding that Ecuador's non-compliance with the Provisional Measures amounted to a breach of contract .....	57
a. The Parties' Position .....	57
b. The Committee's Analysis .....	58
(2) Grounds on the Tribunal's finding that Perenco was entitled to suspend operations under the <i>exceptio non adimpleti contractus</i> principle .....	60
a. The Parties' Position .....	60
b. The Committee's Analysis .....	64
(3) Grounds on the Tribunal's finding that Decree 662 breached the Participation Contracts and that the enactment of Decree 662 and the ensuing measures breached Article 4 of the Treaty .....	68
a. The Parties' Position .....	68
b. The Committee's Analysis .....	71
(4) Grounds on the Tribunal's finding that Ecuador's declaration of <i>caducidad</i> breached the Block 21 Participation Contract and expropriated Perenco's contractual rights.....	77
a. The Parties' Position .....	77
b. The Committee's Analysis .....	79
C. GROUNDS ON THE TRIBUNAL'S FINDINGS ON DAMAGES .....	81
(1) Grounds on the Tribunal's finding that the Parties would have agreed to Law 42 being stabilized at 33% as of October 5, 2008.....	82
a. The Parties' Position .....	82
b. The Committee's Analysis .....	87
(2) Grounds on the Tribunal's decision to award value to Perenco's loss of opportunity to extend the Block 7 Participation Contract .....	95
a. The Parties' Position .....	95
b. The Committee's Analysis .....	98
(3) Grounds on the Tribunal's finding that Perenco would have drilled 23 new wells on Block 7.....	103

a. The Parties' Position .....	103
b. The Committee's Analysis .....	104
(4) Grounds on the Tribunal's decision to award Perenco damages amounting to US\$448,820,400 .....	107
a. The Parties' Position .....	107
b. The Committee's Analysis .....	110
(5) Grounds on the Tribunal's decision to apply a post-award interest rate equivalent to LIBOR for three-month borrowings plus two percent, compounded annually, until the date of payment .....	123
a. The Parties' Position .....	123
b. The Committee's Analysis .....	124
(6) Grounds on the Tribunal's finding that the OCP ship-or-pay costs were fully tax-deductible.....	125
a. The Parties' Position .....	125
b. The Committee's Analysis .....	127
(7) Grounds on the Tribunal's finding that Perenco's decision to suspend operations did not contribute to its own losses .....	128
a. The Parties' Position .....	128
b. The Committee's Analysis .....	129
D. GROUNDS ON THE TRIBUNAL'S FINDINGS ON COUNTERCLAIMS.....	129
(1) Grounds on the Tribunal's finding that the strict liability regime of the 2008 Constitution does not have retroactive effect.....	129
a. The Parties' Position .....	129
b. The Committee's Analysis .....	130
(2) Grounds on the Tribunal's finding that Perenco is only liable for the mud pits it built or used .....	132
a. The Parties' Position .....	132
b. The Committee's Analysis .....	133
(3) Grounds on the Tribunal's decision to allocate liability between Perenco and other operators of Blocks 7 and 21 .....	138
a. The Parties' Position .....	138
b. The Committee's Analysis .....	140
(4) Grounds on the Tribunal's decision to apportion liability for environmental remediation between Perenco, Petroamazonas, and prior operators.....	141
a. The Parties' Position .....	141
b. The Committee's Analysis .....	143

(5) Grounds on the Tribunal’s decision to treat the amount paid by Burlington to Ecuador as a down payment on the counterclaims .....	151
a. The Parties’ Position .....	151
b. The Committee’s Analysis .....	153
E. COMMITTEE’S CONCLUSIONS .....	161
V. COSTS .....	162
A. APPLICANT’S COSTS SCHEDULE .....	162
B. PERENCO’S COSTS SCHEDULE .....	163
C. THE COMMITTEE’S DECISION ON COSTS .....	163
VI. DECISION .....	164

## TABLE OF SELECTED DEFINED TERMS

AAE-[#]	Ecuador’s exhibit
AALA-[#]	Ecuador’s legal authority
Applicant	Republic of Ecuador
Application for Annulment	Application for Annulment dated October 2, 2019
Arbitration Rules	Arbitration Rules of Procedure for Arbitration Proceedings, in force as of April 10, 2006
Award	Award rendered on September 27, 2019 by the Arbitral Tribunal composed of H.E. Judge Peter Tomka, President, Mr. Neil Kaplan, C.B.E., QC, SBS, and Mr. J. Christopher Thomas, QC in the arbitration proceedings between Perenco Ecuador Limited and the Republic of Ecuador, ICSID Case No. ARB/08/6
CAA-[#]	Perenco’s legal authority
CEA-[#]	Perenco’s exhibit
Committee	<i>Ad hoc</i> committee composed of Professor Eduardo Zuleta Jaramillo, a national of Colombia, as President; Professor Dr. Rolf Knieper, a national of Germany, and Professor Mónica Pinto, a national of Argentina
Counter-Memorial on Annulment	Perenco’s Counter-Memorial on Annulment dated July 16, 2020
Decision on the Environmental Counterclaim	Interim Decision on the Environmental Counterclaim dated August 11, 2015, in the arbitration proceedings between Perenco Ecuador Limited and the Republic of Ecuador, ICSID Case No. ARB/08/6
Decision on Jurisdiction	Decision on Jurisdiction dated June 30, 2011 in the arbitration proceedings between Perenco Ecuador Limited and the Republic of Ecuador, ICSID Case No. ARB/08/6
Decision on Jurisdiction and Liability	Decision on Remaining Issues of Jurisdiction and on Liability dated September 12, 2014 in the arbitration proceedings between Perenco Ecuador Limited and the Republic of Ecuador, ICSID Case No. ARB/08/6

Decision on Reconsideration	Decision on Ecuador's Reconsideration Motion dated April 10, 2015, in the arbitration proceedings between Perenco Ecuador Limited and the Republic of Ecuador, ICSID Case No. ARB/08/6
Decision on Provisional Measures	Decision on Provisional Measures of May 8, 2008, in the arbitration proceedings between Perenco Ecuador Limited and the Republic of Ecuador, ICSID Case No. ARB/08/6
First Decision on Counterclaims	Decision on Perenco's request for dismissal of the Respondent's counterclaims dated August 18, 2017, in the arbitration proceedings between Perenco Ecuador Limited and the Republic of Ecuador, ICSID Case No. ARB/08/6
Second Decision on Counterclaims	Decision on Perenco's request for dismissal of the Respondent's counterclaims dated July 30, 2018, in the arbitration proceedings between Perenco Ecuador Limited and the Republic of Ecuador, ICSID Case No. ARB/08/6
Decisions	Tribunal's decisions incorporated by reference into the Award: (a) the Decision on Jurisdiction dated June 30, 2011, (b) the Decision on Remaining Issues of Jurisdiction and on Liability dated September 12, 2014, (c) the Decision on Ecuador's Reconsideration Motion dated April 10, 2015, (d) the Interim Decision on the Environmental Counterclaim dated August 11, 2015, and (e) the decisions on Perenco's two requests for dismissal of the Respondent's counterclaims dated August 18, 2017 and July 30, 2018. In the Award, the Tribunal further referred to the Decision on Provisional Measures of May 8, 2008
Decision on the Stay	Committee's Decision on the Stay of Enforcement of the Award dated February 21, 2020
Ecuador	Republic of Ecuador
Ecuador's Costs Schedule	Ecuador's Costs Schedule submitted on February 19, 2021
Hearing on Annulment	Hearing on Annulment held virtually via Zoom and administered by Sparq on January 12 and 13, 2021
ICSID or the Centre	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States dated March 18, 1965



Independent Expert	Mr. Scott MacDonald, independent expert appointed by the Tribunal on July 6, 2016
Memorial on Annulment	Ecuador's Memorial on Annulment dated April 16, 2020
Minister's Letter	Letter submitted by Ecuador signed by Mr. Richard Martínez Alvarado, Minister of Economy and Finance of the Republic of Ecuador, dated April 20, 2020
Parties	Republic of Ecuador and Perenco Ecuador Limited
Parties' Agreement	Agreement between the Parties during the Underlying Arbitration regarding the joint expert process, communicated to the Tribunal on May 31 and June 1, 2016
Perenco	Perenco Ecuador Limited
Perenco's Costs Schedule	Perenco's Costs Schedule submitted on February 19, 2021
Rejoinder on Annulment	Perenco's Rejoinder on Annulment dated November 16, 2020
Reply on Annulment	Ecuador's Reply on Annulment dated September 16, 2020
Tr. Day [#] ([Speaker(s)]), [page:line]	Transcript of the Hearing on Annulment (as revised by the Parties on February 1, 2021)
Tribunal	Arbitral Tribunal composed of H.E. Judge Peter Tomka, President, Mr. Neil Kaplan, C.B.E., QC, SBS, and Mr. J. Christopher Thomas, QC
Underlying Arbitration	Arbitration proceedings between Perenco Ecuador Limited and the Republic of Ecuador, ICSID Case No. ARB/08/6
VCLT	Vienna Convention on the Law of Treaties, done on May 23, 1969

## I. INTRODUCTION AND PARTIES

1. This case concerns an application for annulment by the Republic of Ecuador (the “**Application for Annulment**”) of the award rendered on September 27, 2019 (the “**Award**”) by the Arbitral Tribunal composed of H.E. Judge Peter Tomka, President, Mr. Neil Kaplan, C.B.E., QC, SBS, and Mr. J. Christopher Thomas, QC (the “**Tribunal**”) in the arbitration proceeding between Perenco Ecuador Limited and the Republic of Ecuador, ICSID Case No. ARB/08/6 (the “**Underlying Arbitration**”).
2. The Tribunal incorporated by reference into its Award (a) the Decision on Jurisdiction dated June 30, 2011 (“**Decision on Jurisdiction**”), (b) the Decision on Remaining Issues of Jurisdiction and on Liability dated September 12, 2014 (“**Decision on Jurisdiction and Liability**”), (c) the Decision on Ecuador’s Reconsideration Motion dated April 10, 2015 (“**Decision on Reconsideration**”), (d) the Interim Decision on the Environmental Counterclaim dated August 11, 2015 (“**Decision on the Environmental Counterclaim**”), and (e) the decisions on Perenco’s two requests for dismissal of the Respondent’s counterclaims dated August 18, 2017 (“**First Decision on Counterclaims**”) and July 30, 2018 (“**Second Decision on Counterclaims**”). Furthermore, in the Award, the Tribunal referred to the Decision on Provisional Measures of May 8, 2008 (“**Decision on Provisional Measures**”) (together, the Decision on Jurisdiction, Decision on Jurisdiction and Liability, Decision on Reconsideration, Decision on the Environmental Counterclaim, First Decision on Counterclaims, Second Decision on Counterclaims, Decision on Provisional Measures, the “**Decisions**”).
3. The Applicant is the Republic of Ecuador (the “**Applicant**” or “**Ecuador**”).
4. The party opposing Ecuador’s Application is Perenco Ecuador Limited (“**Perenco**” or “**Claimant**”).
5. The Applicant and Perenco are hereinafter collectively referred to as the “**Parties**”, and individually referred to as a “**Party**.” The Parties’ representatives and their addresses are listed above on page (i).
6. Ecuador seeks the annulment of the Award under Article 52(1) (b) (the Tribunal manifestly exceeded its powers); (d) (there was a serious departure from a fundamental rule of procedure), and (e) (the Award failed to state the reasons on which it was based) of the ICSID Convention.

## II. PROCEDURAL HISTORY

7. On October 2, 2019, Ecuador presented an Application for Annulment of the Award dated September 27, 2019 (the “**Application for Annulment**”), issued in the Underlying Arbitration. Pursuant to Article 52(5) of the ICSID Convention, the Applicant requested the ICSID Secretary-General to notify the provisional stay of enforcement of the Award until the *ad hoc* Committee rules on such request, and that the stay be maintained until a decision on the Application for Annulment is rendered by the Committee.<sup>1</sup> On that same day the Application for Annulment was transmitted to Perenco.
8. By letter dated October 4, 2019, the Acting ICSID Secretary-General registered the Application for Annulment and notified the provisional stay of enforcement of the Award, in accordance with ICSID Arbitration Rule 54(2).
9. On October 15, 2019, the Secretary-General informed the Parties the intention of ICSID to propose to the Chairman of the ICSID Administrative Council the appointment to the *ad hoc* committee of Professor Eduardo Zuleta Jaramillo, a national of Colombia, as President, Professor Dr. Rolf Knieper, a national of Germany, and Professor Mónica Pinto, a national of Argentina, as committee members (the “**Committee**”).
10. On November 6, 2019, the Secretary-General informed the Parties that the Centre had taken note of the correspondence of the Parties and Professors Zuleta and Knieper, and that it would inform the Parties once the appointments had been made. On that same day the Chairman of the ICSID Administrative Council appointed Professor Eduardo Zuleta, Professor Dr. Rolf Knieper and Professor Mónica Pinto to the *ad hoc* Committee, and ICSID proceeded to seek their acceptance of the appointments.
11. On November 8, 2019, Perenco submitted its Opposition to Ecuador’s Request to Continue the Provisional Stay of Enforcement, dated November 7, 2019, accompanied by Annex A (Decisions on Stays of Enforcement since November 2014), as well as Exhibits CEA-001 to CEA-039 and Legal Authorities CAA-001 to CAA-044. In its Opposition to the Stay, Perenco requested that the Committee lift the provisional stay of enforcement of the Award pending its decision on the Application for Annulment, or in the alternative, that the *ad hoc* Committee order Ecuador to provide, within 30 days of its decision on the issue of the stay, a deposit for the net amount of the Award, including accrued interest, into an escrow account; or an unconditional and irrevocable bank guarantee or letter of credit for the net amount of the Award, including accrued interest.<sup>2</sup>

---

<sup>1</sup> Respondent’s Application for Annulment, October 2, 2019, ¶¶ 250-252.

<sup>2</sup> Claimant’s Opposition to the Stay, ¶ 40; Claimant’s Rejoinder to Ecuador’s Request to Continue the Provisional Stay of Enforcement, December 18, 2019, ¶ 107.

12. On November 18, 2019, the Committee was constituted in accordance with ICSID Arbitration Rules 6, 52(2), and 53. Ms. Veronica Lavista, ICSID Legal Counsel, was designated to serve as the Secretary of the Committee.
13. In separate communications dated November 19, 2019 and November 21, 2019, Applicant and Perenco, respectively, presented their comments regarding the schedule of submissions and the hearing on the issue of the stay.
14. By letter dated November 25, 2019, the Committee fixed the schedule of written submissions regarding the issue of the stay. The timetable was set as follows: on or before December 6, 2019 Ecuador would file its reply to Perenco's opposition to the request for continuation of the stay; on or before December 18, 2019 Perenco would file its rejoinder on the request for continuation of the stay; and an oral hearing on the continuation of the stay would take place in Washington, D.C., which would be conducted together with the First Session of the annulment proceeding. In the same letter, the Committee decided to maintain the stay of enforcement until it issued its decision on the continuation of the stay.
15. On December 6, 2019, Ecuador filed its Reply to Perenco's Opposition to the Request to Continue the Provisional Stay of Enforcement, along with Exhibits AAE-0001 to AAE-0029 and Legal Authorities AALA-0001 to AALA-0038.
16. On December 18, 2019, Perenco filed its Rejoinder to Ecuador's Request to Continue the Provisional Stay of Enforcement, along with Exhibits CEA-040 to CEA-064 and Legal Authorities CAA-039, CAA 041, CAA-042, CAA-045 to CAA-054.
17. The first session and oral hearing on the continuation of the stay took place in person on January 13, 2020 in Washington, D.C. The following persons were present:

Committee:

Professor Eduardo Zuleta	President
Professor Dr. Rolf Knieper	Member
Professor Mónica Pinto	Member

ICSID Secretariat:

Ms. Veronica Lavista	Secretary of the Committee
----------------------	----------------------------

For Perenco Ecuador Limited:

<u>Counsel</u>	
Mr. Mark W. Friedman	Debevoise & Plimpton
Ms. Ina C. Popova	Debevoise & Plimpton
Ms. Laura Sinisterra	Debevoise & Plimpton

Mr. Gregory A. Senn

Debevoise & Plimpton

Parties

Mr. Jonathan Parr

Perenco Group General Counsel

Ms. Josselyn Briceño de Luise

Perenco Latin America Legal Advisor

Hearing Consultant

Mr. James Haase

Immersion Legal

For the Republic of Ecuador:

Counsel

Mr. Eduardo Silva Romero

Dechert (Paris) LLP

Mr. José Manuel García Represa

Dechert (Paris) LLP

Ms. Gabriela González Giráldez

Dechert (Paris) LLP

Ms. Ruxandra Esanu

Dechert (Paris) LLP

Mr. Amir Farhadi

Dechert (Paris) LLP

Parties

Dr. Íñigo Salvador Crespo

Procurador General del Estado de la  
República del Ecuador

Dr. Claudia Salgado Levy

Directora Nacional de Asuntos  
Internacionales – Procuraduría General  
del Estado de la República del Ecuador

Court Reporter:

Ms. Dawn Larson

Worldwide Reporting, LLP

Interpreters:

Ms. Silvia Colla

Ms. Estela Zaffaroni

Mr. Charles Roberts

18. On January 16, 2020, the Committee issued its Procedural Order No. 1, recording the Parties' agreements on procedural matters and the decisions of the Committee on the disputed issues.
19. On February 21, 2020, the Committee issued its Decision on the Stay of Enforcement of the Award (the "**Decision on the Stay**") and granted the request for the stay of enforcement of the Award subject to Ecuador presenting a letter stating that it will voluntarily comply with the Award in full within 60 days if the application for annulment is rejected.
20. Paragraph 82(a) of the Decision on the Stay provided that:

a. Respondent is ordered to provide the *ad hoc* Committee, within 60 days following this decision, with a letter signed by Ecuador's Minister of Finance or the official having full authority to bind Ecuador, committing to pay the Award unconditionally, voluntarily and in full, within 60 days after the Committee decides on the Application for Annulment, if the Application for Annulment were not to be upheld in full or in part, and attesting that such payment shall not be subject to any enforcement proceedings or to the intervention of Ecuador's courts.

21. Paragraph 82(b) of the Decision on the Stay further provided that:

b. If Ecuador were not to provide the letter under ¶ 82(a) with a text in form and substance satisfactory to the Committee within 60 days following the issuance of this decision, the stay shall be lifted if by such date or at any time thereafter Claimant has provided or provides the *ad hoc* Committee with a letter signed by an officer having full authority to bind Perenco S.A. committing to unconditionally, voluntarily and in full reimburse Ecuador for any payments received under the Award, within 60 days after the Committee decides on the Application for Annulment, if the Application for Annulment were to be upheld in full or in part and attesting that such payment shall not be subject to any enforcement proceedings or court intervention.

22. On April 16, 2020, in accordance with the procedural calendar set out in Procedural Order No. 1, Ecuador filed its Memorial on Annulment ("**Memorial on Annulment**"), accompanied by a Consolidated Index of Exhibits and Legal Authorities, Exhibits AAE-0031 to AAE-0209, and Legal Authorities AALA-0039 to AALA-0109.

23. On April 20, 2020, Ecuador submitted a letter signed by Mr. Richard Martínez Alvarado, Minister of Economy and Finance of the Republic of Ecuador (the "**Minister's Letter**"), stating as follow:

To whom it may concern,

In my capacity as Minister of Economy and Finance of the Republic of Ecuador, in compliance with the Committee's decision of February 21, 2020 in the arbitration proceeding ICSID No. ARB/08/06 between Perenco Ecuador Limited and the Republic of Ecuador, in case Ecuador's application for annulment were not to be upheld in full or in part, the Republic of Ecuador commits to pay the Award unconditionally, voluntarily and in full, within 60 days counted as from the decision of the Committee on the application. for annulment, without such payment being subject to enforcement proceedings or to the intervention of Ecuador's courts.

Sincerely,

[SIGNATURE]

Econ. Richard Martínez Alvarado

Minister of Economy and Finance

Republic of Ecuador

24. On April 21, 2020, the Committee issued its Procedural Order No. 2 deciding that (i) the text of the Minister's Letter complied in form and substance with the requirement of paragraph 82(a) of the Decision on the Stay; and (ii) the order under paragraph 82(a) of the Decision on the Stay had been complied with by Ecuador, the stay of the award was maintained. The Committee further stated that it may revisit its decision to maintain the stay at any time during the proceedings if the circumstances so merit and unless otherwise indicated by the Committee, any lifting of the stay will require compliance by Perenco with paragraph 82(b) of the Decision on the Stay.
25. On July 16, 2020, in accordance with the procedural calendar set out in Procedural Order No. 1, Perenco filed its Counter-Memorial on Annulment ("**Counter-Memorial on Annulment**"), accompanied by a Consolidated Index of Exhibits and Legal Authorities, Exhibits CEA-065 to CEA-146, and Legal Authorities CAA-055 to CAA-092.
26. On September 16, 2020, in accordance with the procedural calendar set out in Procedural Order No. 1, Ecuador filed its Reply on Annulment ("**Reply on Annulment**"), accompanied by a Consolidated Index of Exhibits and Legal Authorities, Exhibits AAE-0210 to AAE-0221, and Legal Authorities AALA-0110 to AALA-0126.
27. In the light of the restrictions on travel and movement resulting from the COVID-19 pandemic, on October 16, 2020, the Committee invited the Parties to submit by October 30, 2020 their views on the possibility to organize the hearing on annulment remotely.
28. On October 28, 2020, the Parties informed the Committee of their agreement to hold a 2-day hearing remotely via Zoom on January 12 and 13, 2021. The Parties also agreed on the duration of opening statements and rebuttals, which was submitted to the Committee's consideration. The Parties requested that, in order for the hearing to best serve the Committee's needs, they would be grateful to receive any questions that the Committee may have for the Parties in advance.
29. On November 16, 2020, in accordance with the procedural calendar set out in Procedural Order No. 1, Perenco filed its Rejoinder on Annulment ("**Rejoinder on Annulment**"), accompanied by a Consolidated Index of Exhibits and Legal Authorities, Exhibits CEA-147 to CEA-163, and Legal Authorities CAA-056 (resubmitted) and CAA-093 to CAA-107.

30. On December 8, 2020, the Committee and the Parties were notified that Ms. Anneliese Fleckenstein, ICSID Legal Counsel, would serve as Acting Secretary of the *ad hoc* Committee during the absence of Ms. Lavista.
31. On December 21, 2020, the Committee held a pre-hearing organizational meeting with the Parties by videoconference pursuant to Section 16 of Procedural Order No. 1. The Committee and the Parties discussed logistical questions, procedures and administrative items in relation to the preparation of the virtual hearing.
32. On December 21, 2020, the Committee issued Procedural Order No. 3 on the organization of the hearing.
33. On January 7, 2021, the Committee sent the Parties a list of issues it invited them to address at the hearing.
34. The Hearing on Annulment was held virtually on January 12 and 13, 2021 via Zoom and administered by Sparq (the “**Hearing on Annulment**”). The following persons were present at the Hearing on Annulment:

Committee:

Professor Eduardo Zuleta	President
Professor Dr. Rolf Knieper	Member
Professor Mónica Pinto	Member

ICSID Secretariat:

Ms. Anneliese Fleckenstein	Secretary of the Committee
----------------------------	----------------------------

For Perenco Ecuador Limited:

Counsel

Mr. Mark W. Friedman	Debevoise & Plimpton
Ms. Ina C. Popova	Debevoise & Plimpton
Ms. Laura Sinisterra	Debevoise & Plimpton
Ms. Sarah Lee	Debevoise & Plimpton

Parties

Mr. Jonathan Parr	Perenco
Ms. Josselyn Briceño de Luise	Perenco

For the Republic of Ecuador:

Counsel

Mr. Eduardo Silva Romero	Dechert
--------------------------	---------



Mr. José Manuel García Represa	Dechert
Ms. Audrey Caminades	Dechert
Ms. Gabriela González Giráldez	Dechert
Mr. Raphaëlle Legru	Dechert
Ms. Ruxandra Irina Esanu	Dechert
Mr. Amir Farhadi	Dechert

Parties

Dr. Íñigo Salvador Crespo	Procurador General del Estado de la República del Ecuador
Dr. Claudia Salgado Levy	Directora Nacional de Asuntos Internacionales – Procuraduría General del Estado de la República del Ecuador
Dr. María Nazaret Ramos	Procuraduría General del Estado de la República del Ecuador
Dr. Diana Moya	Procuraduría General del Estado de la República del Ecuador

Administrative Assistant to the President of the Committee:

Ms. María Camila Rincón	Zuleta Abogados
-------------------------	-----------------

Court Reporter:

Mr. David Kasdan	Worldwide Reporting, LLP
------------------	--------------------------

Zoom Technician / Sparq:

Mr. Mike Young	Sparq
----------------	-------

35. On February 1, 2021, the Parties submitted agreed corrections to the Hearing transcripts.
36. On February 19, 2021, the Parties filed their respective Costs Schedules.
37. On April 23, 2021, the Committee and the Parties were notified that Ms. Lavista would resume her functions as Secretary of the *ad hoc* Committee.
38. On May 13, 2021, the Committee declared the proceeding closed.
39. The Committee has carried out its deliberations by video conferences and exchange of correspondence and, in issuing this decision, it has considered all the written submissions and oral arguments put forward by the Parties. The fact that certain arguments, documents, or legal authorities are not mentioned in the following sections does not mean that the Committee has not considered them.

40. In Section III of the present decision, the Committee addresses the applicable legal framework to annulment proceedings under the ICSID Convention, including the grounds raised by Ecuador provided for in Article 52(1)(b), (d) and (e) of the ICSID Convention. In Section IV, the Committee addresses each of the specific grounds raised by the Applicant. These grounds are classified in matters of jurisdiction, merits, damages, and counterclaims. In Section V, the Committee addresses the costs of the annulment proceeding. And, in Section VI, the Committee sets out its decision.

### **III. THE APPLICABLE LEGAL FRAMEWORK**

#### **A. ANNULMENT UNDER THE ICSID CONVENTION**

##### **(1) The Parties' Positions**

##### **a. Applicant's Position**

41. For the Applicant, Article 52(1) of the ICSID Convention should not be interpreted in a restrictive manner. Article 52(1) already limits the annulment of an award to five specific grounds. Accordingly, the purview of *ad hoc* committees should not be restricted further than what Article 52(1) provides,<sup>3</sup> or any part thereof if appropriate. Article 52(1) of the ICSID Convention should be interpreted neither narrowly nor broadly.<sup>4</sup>
42. The ICSID Convention must be interpreted in light of its object and purpose, which in the context of annulment, is to secure the fundamental integrity of the ICSID system. Thus, in the presence of one of the limited grounds for annulment set forth in Article 52, a committee should annul the award.<sup>5</sup> Ecuador states that “without this safeguard some States parties might not have accepted the ICSID Convention.”<sup>6</sup>
43. Ecuador further claims that Perenco mischaracterizes the nature of ICSID annulment.
44. First, Perenco purports to establish a “high threshold” and a “high bar for annulment in general” that is absent from the text of the ICSID Convention. For Ecuador, there is no presumption in favor of the validity of the award in the Convention, nor is it required that *ad hoc* committees preserve the finality of ICSID awards favoring validity over annulment. The committee in *Soufraki* rejected such presumption. Likewise, the committees in *MINE*, *Amco II*, and *Klöckner II* rejected any alleged privilege to finality.<sup>7</sup> Ecuador claims that

---

<sup>3</sup> Memorial on Annulment, ¶¶ 180-181.

<sup>4</sup> Application for Annulment, ¶ 25; Memorial on Annulment, ¶ 181.

<sup>5</sup> Memorial on Annulment, ¶ 182.

<sup>6</sup> Reply on Annulment, ¶ 15.

<sup>7</sup> Reply on Annulment, ¶¶ 10-13.

Perenco encourages the Committee to adopt a “restrictive” interpretation of the grounds for annulment. Yet, as expressed by the committee in *Total*, “Article 52 should be interpreted in accordance with its object and purpose, neither narrowly nor broadly.”<sup>8</sup> In any event, for Ecuador it is unclear what legal consequences Perenco seeks to derive from the high threshold it proposes given that there is no special burden or standard of proof applicable to ICSID annulment proceedings.<sup>9</sup>

45. Second, Perenco appears to suggest that because annulment is not an appeal, the Committee should reject Ecuador’s arguments that would involve “‘extensive’ or ‘detailed’ analysis”<sup>10</sup> of the Award. However, no such limitation exists in the Convention. The questions presented to an *ad hoc* committee require varying degrees of inquiry depending on the specific circumstances of the case.<sup>11</sup> As such, when an award reflects a complex legal and factual background, a review of that background is required.<sup>12</sup>
46. Third, Perenco contends that even if a ground for annulment is established, *ad hoc* committees should exercise their discretion to decline annulment. Nonetheless, Perenco fails to mention that, as expressed by the committee in *CEAC v. Montenegro*, such “discretion is by no means unlimited [...]” And, in any event, no *ad hoc* committee has ever declined to annul an award after having found one of the grounds provided in Article 52(1) to be engaged.<sup>13</sup>

#### **b. Perenco’s Position**

47. Perenco argues that Ecuador mischaracterizes and ignores the explicit terms of Article 52(1) of the ICSID Convention and its context and purpose.
48. Under Article 52, annulment is an “exhaustive, exceptional and narrowly circumscribed” derogation from the principle of finality of awards. Thus, the threshold for annulment is high. Annulment is a remedy reserved for “egregious violations of certain basic principles,”<sup>14</sup> and “for unusual and important cases involving situations that are grossly illegitimate.”<sup>15</sup> The narrow purpose of the annulment remedy is to “prevent flagrant cases

---

<sup>8</sup> Reply on Annulment, ¶ 14.

<sup>9</sup> Reply on Annulment, ¶ 16.

<sup>10</sup> Reply on Annulment, ¶¶ 17-18.

<sup>11</sup> Reply on Annulment, ¶¶ 17-18.

<sup>12</sup> Memorial on Annulment, ¶ 183.

<sup>13</sup> Reply on Annulment, ¶¶ 20-23.

<sup>14</sup> Counter-Memorial on Annulment, ¶¶ 65-66.

<sup>15</sup> Rejoinder on Annulment, ¶ 6.

of excess of jurisdiction and injustice.”<sup>16</sup> Thus, annulment exists to safeguard the arbitral process, not to second-guess its substance.<sup>17</sup>

49. Perenco observes that, according to the ICSID Secretariat’s Updated Background Paper on Annulment, “‘*ad hoc* committees are not courts of appeal, annulment is not a remedy against an incorrect decision, and an *ad hoc* committee cannot substitute the Tribunal’s determination on the merits for its own[.]’ Committees must ‘take as their premise the record before the Tribunal.’ A committee cannot replace an annulled award by ‘its own decision on the merits,’ nor can annulment be a forum to ‘make new arguments on the merits that were not made in the original proceedings.’ Otherwise, ‘the annulment mechanism of Article 52 would slide into an appeal.’”<sup>18</sup>
50. Perenco contends that annulment is not automatic. Even if a tribunal committed an error contemplated in Article 52(1), an *ad hoc* committee has the discretion to annul or to confirm the award. This discretion follows from the language of Article 52(3), which provides that the Committee “shall have the authority to annul an award or any part thereof on any grounds set forth in paragraph (1)” —not that the Committee “shall” annul the award. In exercising this discretion, committees “must take account of all relevant circumstances, including the gravity of the circumstances which constitute the ground for annulment and whether they had—or could have had—a material effect upon the outcome of the case, as well as the importance of the finality of the award and the overall question of fairness to both Parties.”<sup>19</sup>
51. According to Perenco, several *ad hoc* committees have recognized that they should not exercise their discretion to annul an award “if and when annulment is clearly not needed to remedy procedural injustice and annulment would unwarrantably erode the binding force and finality of ICSID Awards.”<sup>20</sup> As noted by the *Vivendi II* committee, there is an “overriding principle that all litigation must come to an end unless there are strong reasons for it to continue.”<sup>21</sup>
52. Perenco further contends that an annulable error does not necessarily entail annulment of the entire award. Under Article 52(3), an *ad hoc* committee has the authority to annul an award or any part thereof.<sup>22</sup>

---

<sup>16</sup> Counter-Memorial on Annulment, ¶ 66.

<sup>17</sup> Counter-Memorial on Annulment, ¶ 66.

<sup>18</sup> Counter-Memorial on Annulment, ¶ 67.

<sup>19</sup> Counter-Memorial on Annulment, ¶¶ 70-72; Rejoinder on Annulment, ¶ 3.

<sup>20</sup> Counter-Memorial on Annulment, ¶ 70.

<sup>21</sup> Counter-Memorial on Annulment, ¶ 70.

<sup>22</sup> Counter-Memorial on Annulment, ¶ 71.

53. As regards the question of whether or not a presumption of validity exists, Perenco asserts that it is an irrelevant and unhelpful distinction given that the Convention establishes an award's presumed validity because it provides that an ICSID award is "binding on the parties." Thus, the Award's validity is presumed unless and until Ecuador carries its burden to demonstrate that it should be annulled.<sup>23</sup>
54. As described below, Perenco refutes Ecuador's characterization of the grounds provided in Article 52(1) of the ICSID Convention, under which it requests the annulment of the Award.

## **(2) The Committee's Analysis**

55. It is undisputed between the Parties that ICSID awards are binding on the disputing parties, may not be appealed, and are not subject to any remedies except those provided for in the Convention.<sup>24</sup>
56. Under Article 52(1) of the ICSID Convention:
- (1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:
    - (a) that the Tribunal was not properly constituted;
    - (b) that the Tribunal has manifestly exceeded its powers;
    - (c) that there was corruption on the part of a member of the Tribunal;
    - (d) that there has been a serious departure from a fundamental rule of procedure; or
    - (e) that the award has failed to state the reasons on which it is based.
57. Albeit the Claimant states that Article 52 must be restrictively interpreted, the Committee observes that nothing in the ICSID Convention provides for a restrictive or a broad interpretation of Article 52 or any other provision applicable to annulment proceedings. Accordingly, Article 52 and the other relevant rules on annulment, shall be interpreted in the light of Articles 31 and 32 of the Vienna Convention on the Law of Treaties (the "VCLT"), which are customary international law.
58. In light of "the ordinary meaning of the terms of [Article 52 of the ICSID Convention] in their context and in the light of its object and purpose," the Committee finds that the grounds set out in Article 52(1) are exhaustive, and therefore *ad hoc* committees have no power to annul an award under any other grounds.
59. The Committee stresses that finality of awards is one of the cornerstones of the ICSID system. As an exception to such rule, annulment is a limited remedy designed to safeguard

---

<sup>23</sup> Rejoinder on Annulment, ¶ 8.

<sup>24</sup> Updated Background Paper on Annulment for the Administrative Council of ICSID, May 5, 2016, ¶ 11.

the fundamental fairness and integrity of the underlying arbitration.<sup>25</sup> Consequently, an *ad hoc* committee shall not act as an appellate court to review the substance of the Award and it is not entitled to substitute its views for those of the tribunal because it disagrees with the substantive outcome of the award. This analysis is confirmed by Article 53 of the ICSID Convention, which stresses that the “award [...] shall not be subject to any appeal.”

60. The *travaux préparatoires* of the ICSID Convention—a supplementary means of interpretation according to Article 32 of the VCLT—further shed light on the scope of Article 52, confirming the interpretation of said provision under Article 31 of the VCLT. As noted in the Updated Background Paper on Annulment for the Administrative Council of ICSID,

[T]he drafting history of the ICSID Convention also demonstrates that annulment ‘is not a procedure by way of appeal requiring consideration of the merits of the case, but one that merely calls for an affirmative or negative ruling based upon one [of the grounds for annulment.]’ It does not provide a mechanism to appeal alleged misapplication of law or mistake in fact [...].<sup>26</sup>

61. Following the general principle *onus probandi incumbit ei qui agit non qui negat*, the Applicant has the burden of demonstrating that the Award or any part thereof should be annulled under one or more of the grounds provided in Article 52(1) of the ICSID Convention.<sup>27</sup>
62. The degree of inquiry and analysis that an *ad hoc* committee must undertake to determine if one or more of the annulment grounds have been engaged is not merely a superficial or formal one. Although Perenco claims that no extensive analysis is required, the Committee finds no reference in the ICSID Convention suggesting that there is a limitation to the extension or detail of a committee’s analysis, provided, of course, that it remains within the limits of its powers. To the contrary, by conducting a superficial or narrow review of an award, a committee may omit critical premises to understand the tribunal’s decision. Moreover, some premises must be read in context so that their scope and meaning is properly understood.
63. The Claimant argues that Article 52(3) of the ICSID Convention confers discretion to *ad hoc* committees not to annul an award even if a tribunal committed an annulable error. For Perenco, if annulment is not necessary to preserve the fundamental integrity of the ICSID

---

<sup>25</sup> *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Decision on Annulment, July 10, 2014, ¶ 32 (CAA-023); *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *ad hoc* Committee on the Application for Annulment of Mr. Soufraki, June 5, 2007, ¶ 20 (AALA-039).

<sup>26</sup> Updated Background Paper on Annulment for the Administrative Council of ICSID, May 5, 2016, ¶ 72.

<sup>27</sup> *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited*, ICSID Case No. ARB/10/20, Decision on Annulment, August 22, 2018, ¶ 461 (CAA-083); *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, December 27, 2016, ¶ 160 (AALA-062).

system, an award should not be annulled. The Committee is of the view that while it is true that Article 52(3) of the ICSID Convention states that an *ad hoc* committee “shall have the authority” to annul the award or any part thereof [...],” the discretion resulting from such provision should not be interpreted to defeat the object and purpose of the annulment remedy—“[the] safeguard against ‘violations of the fundamental principles of law governing the Tribunal’s proceedings’”<sup>28</sup>—or to erode the binding force and finality of awards. To the Committee’s knowledge, even though Article 53 provides discretion to *ad hoc* committees, no *ad hoc* committee has ever found an annullable error under one or more of the grounds set out in Article 52(1) but has refused to annul the Award or any part thereof on such grounds.

64. In sum, as explained in ICSID’s Updated Background Paper on Annulment, “(1) the grounds listed in Article 52(1) are the only grounds on which an award may be annulled; (2) annulment is an exceptional and narrowly circumscribed remedy and the role of an *ad hoc* [c]ommittee is limited; (3) *ad hoc* [c]ommittees are not courts of appeal, annulment is not a remedy against an incorrect decision, and an *ad hoc* [c]ommittee cannot substitute the Tribunal’s determination on the merits for its own; (4) *ad hoc* [c]ommittees should exercise their discretion not to defeat the object and purpose of the remedy or erode the binding force and finality of awards; (5) Article 52 should be interpreted in accordance with its object and purpose, neither narrowly nor broadly; and (6) an *ad hoc* [c]ommittee’s authority to annul is circumscribed by the Article 52 grounds specified in the application for annulment, but an *ad hoc* [c]ommittee has discretion with respect to the extent of an annulment, i.e., either partial or full.”<sup>29</sup>

## **B. MANIFEST EXCESS OF POWERS**

### **(1) The Parties’ Positions**

#### **a. Applicant’s Position**

65. Ecuador states Article 52(1)(b) of the ICSID Convention provides for the annulment of an award when “the Tribunal has manifestly exceeded its powers.” Said ground is engaged if two requirements are met: that the tribunal exceeded the scope of its powers and the excess of powers was manifest.<sup>30</sup>
66. As to the excess of powers, the scope of a tribunal’s powers is defined by reference to the parties’ consent to arbitration, the applicable law, and the issues submitted by the parties for the tribunal’s decision. A tribunal exceeds its powers when it purports to exercise

---

<sup>28</sup> Updated Background Paper on Annulment for the Administrative Council of ICSID, May 5, 2016, ¶ 71.

<sup>29</sup> Updated Background Paper on Annulment for the Administrative Council of ICSID, May 5, 2016, ¶ 74.

<sup>30</sup> Memorial on Annulment, ¶ 189.

jurisdiction that it does not have, fails to apply the applicable law, or makes egregious errors of fact or weighs the evidence irrationally.<sup>31</sup>

67. First, a tribunal exceeds its powers when it exercises its jurisdiction over a person or entity which is not an investor over which the tribunal has jurisdiction under the applicable treaty, or over a subject matter that does not constitute a protected investment within the meaning of the ICSID Convention or the applicable treaty.<sup>32</sup>
68. Second, a tribunal exceeds its powers when it fails to apply the proper applicable law to the dispute, or when it fails to apply any law at all.<sup>33</sup> A distinction must be drawn between a failure to apply the law and a mere error in its application. “Where the tribunal’s analysis is a gross misapplication or misinterpretation of the law amounting to effective disregard or non-application of the law, it constitutes a failure to apply the law,” as recognized by the *ad hoc* committees in *Sempra*, *Soufraki*, *Caratube*, and *Pey Casado*.<sup>34</sup> A committee’s review of a tribunal’s application of the law must be objective rather than subjective.<sup>35</sup>
69. Third, a tribunal exceeds its powers when it commits egregious errors of fact or provides an irrational assessment of the evidence before it.<sup>36</sup>
70. As to the requirement that a tribunal’s excess of power be manifest, *ad hoc* committees agree that such requirement “refers to how readily apparent the excess is, rather than to its gravity.” From the ordinary meaning of the word “manifest”, the excess of power must be plain, clear, obvious, or evident.<sup>37</sup>
71. Ecuador observes that both Parties agree that Article 52(1)(b) imposes a two-part test requiring that the Committee determine (i) whether an excess of powers has occurred, and if so, (ii) whether it was manifest. The Parties also agree that a tribunal manifestly exceeds its powers whenever it assumes jurisdiction it does not have, or rules *ex aequo et bono* without the Parties’ consent.<sup>38</sup> Yet, Ecuador contends that Perenco mischaracterizes the legal standard for manifest excess of power in three ways:
72. First, Perenco misrepresents the Applicant’s position. Ecuador’s position is not that a misapplication or misinterpretation of the law is an excess of powers, its position is that “[w]here the tribunal’s analysis is a gross misapplication or misinterpretation of the law

---

<sup>31</sup> Memorial on Annulment, ¶¶ 191-192.

<sup>32</sup> Memorial on Annulment, ¶¶ 193-194.

<sup>33</sup> Memorial on Annulment, ¶¶ 195-196.

<sup>34</sup> Memorial on Annulment, ¶ 198.

<sup>35</sup> Memorial on Annulment, ¶¶ 199-200.

<sup>36</sup> Memorial on Annulment, ¶¶ 201-202.

<sup>37</sup> Memorial on Annulment, ¶¶ 203-204.

<sup>38</sup> Reply on Annulment, ¶ 26.



amounting to effective disregard or non-application of the law, it constitutes a failure to apply the law.”<sup>39</sup> The essential inquiry therefore is not just whether the tribunal erred in the application of the law, but whether that error is “so gross or egregious as substantially to amount to failure to apply the proper law.”<sup>40</sup>

73. Perenco encourages the application of a “subjective” approach to determine whether the Tribunal has applied the proper law, i.e. that “so long as ‘the Tribunal correctly identified the applicable law and endeavoured to apply it,’ it cannot have exceeded its powers.”<sup>41</sup> Ecuador argues that the prevailing approach in ICSID annulment is the “objective” one; namely that “it is necessary for the Committee to review what the Tribunal actually analyzed and held, rather than what the Tribunal declared having done,” as expressed by the committee in *Iberdrola*. Therefore, as observed by the committee in *Amco II*, “[...] an *ad hoc* committee may find that the misapplication, etc. of national law is of such nature or degree as to constitute objectively (regardless of the Tribunal’s actual or presumed intentions) its effective nonapplication.” This objective approach has been endorsed also by the *Total* committee.<sup>42</sup>
74. According to Ecuador, Perenco appears to consider that a minor and innocuous misapplication of the law is the equivalent of a misapplication that is so egregious as to render the legal framework unrecognizable to an objective observer. Yet, “the line between non-application of the proper law and its misapplication may be difficult to draw but it exists.” To draw such line, the Committee must determine whether the Tribunal “stayed within the limits of th[e] applicable law,”<sup>43</sup> as expressed by the committee in *SAUR*.
75. Although Perenco claims that an excess of powers arises only when the tribunal “committed a complete failure to apply the correct body of law,” it is widely accepted that it is “an excess of power for a tribunal to fail to apply the law applicable to the case or to the particular issue in the case.”<sup>44</sup>
76. Second, Article 52(1)(b) refers in general to “powers.” It is not restricted to jurisdiction or failure to apply the law. Therefore, it is possible that a tribunal exceeds its power to assess the evidence. Ecuador advances that “when a tribunal reaches a conclusion –whether factual or otherwise– that ‘shocks, or at least surprises, a sense of juridical propriety,’ that tribunal has exceeded its adjudicatory powers under the Convention.”<sup>45</sup> As recognized by

---

<sup>39</sup> Reply on Annulment, ¶ 28.

<sup>40</sup> Reply on Annulment, ¶ 30.

<sup>41</sup> Reply on Annulment, ¶ 30, referring to Counter-Memorial on Annulment, ¶ 76.

<sup>42</sup> Reply on Annulment, ¶¶ 36-37.

<sup>43</sup> Reply on Annulment, ¶¶ 38-39.

<sup>44</sup> Reply on Annulment, ¶ 40.

<sup>45</sup> Reply on Annulment, ¶ 46.

arbitral tribunals and annulment committees, ICSID tribunals enjoy no unfettered discretion. Any discretion enjoyed by a tribunal is limited by the applicable law.<sup>46</sup>

77. Third, Perenco attempts to add non-existent requirements into the word “manifest.” In the first place, it tries to discredit the position that determining whether a manifest excess of powers has occurred may require “extensive argumentation and analysis.” For Perenco, that is “irreconcilable with the ordinary meaning of the term ‘manifest,’ in light of its object and purpose.” Yet, the word “manifest” must also be interpreted in the context of investor-State arbitration, where complex legal and technical issues are discussed.<sup>47</sup> Then, Perenco tries to discredit Ecuador’s position that an excess of powers need not be grave to be manifest. Nonetheless, the prevailing view among committees is that “‘manifest’ refers to how readily apparent the excess is, rather than to its gravity.” This has been also recognized by Prof. Schreuer. Albeit Perenco claims that an excess of power must be both textually obvious and substantively serious, as expressed by the committee in *Soufraki*, Ecuador remarks that the *Soufraki* committee was simply underscoring that a “manifest excess of powers” will not only be obvious, but also inherently serious, given that it implicates a transgression of the tribunal’s mandate.<sup>48</sup>

#### **b. Perenco’s Position**

78. Perenco submits that Ecuador is wrong that a “misapplication or misinterpretation of the law” is an excess of powers. As its name implies, an “excess of powers” arises in the case of an award *ultra, extra, or citra petita*: one that goes beyond the scope of the parties’ arbitration agreement by deciding points that had not been submitted for decision or fails to carry out its mandate by completely disregarding the applicable law and deciding the dispute on some other basis.<sup>49</sup>
79. As confirmed by the *travaux préparatoires* of the ICSID Convention, mistakes are not an excess of powers. In fact, the drafters of the ICSID Convention rejected a “serious misapplication of the law” as a ground for annulment. Accordingly, an excess of powers arises only when the tribunal committed a “complete failure to apply the correct body of law.” So long as “the Tribunal correctly identified the applicable law and endeavoured to apply it,” it cannot have exceeded its powers.<sup>50</sup>
80. Perenco notes that Ecuador’s position that “gross” or “egregious” errors of law are annulable is mistaken. Conceptually, there is no difference between one incorrect interpretation of the law and another one regardless of the adjectival qualification given.

---

<sup>46</sup> Reply on Annulment, ¶¶ 46-47.

<sup>47</sup> Reply on Annulment, ¶¶ 49-50.

<sup>48</sup> Reply on Annulment, ¶¶ 51-53.

<sup>49</sup> Counter-Memorial on Annulment, ¶ 74.

<sup>50</sup> Counter-Memorial on Annulment, ¶¶ 75-76.

Both entail a qualification of how the tribunal applied the correct body of law, not whether it endeavored to apply it. Thus, when the tribunal in fact applies the proper law, but does so incorrectly—no matter how “gross” or “egregious” that error—there is no excess of powers. Furthermore, Perenco notes that none of the decisions Ecuador invokes found that the tribunal committed a gross or egregious error of law warranting annulment.<sup>51</sup>

81. Ecuador is wrong that a tribunal exceeds its powers when it makes egregious errors of fact or weighs the evidence irrationally. As noted in the annulment decision in *Dogan*, “it is not within the *ad hoc* committee’s remit to re-examine the facts of the case to determine whether a tribunal erred in appreciating or evaluating the available evidence.” Furthermore, the decisions referred to by Ecuador do not support its position.<sup>52</sup>
82. As to the qualification of “manifest” set out in Article 52(1)(b) of the ICSID Convention, Perenco observes that while Ecuador accepts that “manifest” means that the excess of powers must be “obvious,” “clear,” or “evident,” it asserts that an excess of powers may be manifest even if an “extensive argumentation and analysis may be required to prove” it. Such approach is irreconcilable with the ordinary meaning of the term “manifest,” in light of its object and purpose. Perenco further objects Ecuador’s contention that “committees agree” that an excess of powers need not be grave in order to be “manifest.” “[I]t is well established that an excess of powers must be both ‘textually obvious and substantively serious’ to qualify as ‘manifest.’”<sup>53</sup>
83. In its Rejoinder on Annulment, Perenco remarks that the specific grounds Ecuador “labels as ‘manifest excess of power’ are not that the Tribunal exceeded its mandate by, for example, deciding a dispute not submitted to it, or arrogating to itself some extraordinary power it did not have. Rather, Ecuador alleges that the Tribunal made legal or factual errors in the way it decided the issues that were within its mandate to decide.”<sup>54</sup>
84. First, Ecuador failed to find a single decision in which an award was annulled for an error of law, even a gross or egregious one. Ecuador also misquotes the ICSID Background Paper and the *CEAC* decision.<sup>55</sup> Contrary to Ecuador’s claim that the *travaux* of the ICSID Convention “stand for the uncontroversial proposition that a simple error of law is not ground for annulment, whereas failure to apply the applicable law is,” the *travaux* unequivocally confirm that the drafters rejected the proposition that “serious” or

---

<sup>51</sup> Counter-Memorial on Annulment, ¶¶ 77-78.

<sup>52</sup> Counter-Memorial on Annulment, ¶¶ 79-80; Rejoinder on Annulment, ¶ 7.

<sup>53</sup> Counter-Memorial on Annulment, ¶¶ 81-83.

<sup>54</sup> Rejoinder on Annulment, ¶ 11.

<sup>55</sup> Rejoinder on Annulment, ¶ 14.

“erroneous” errors of law warrant annulment. As to the *CEAC* decision, the committee rejected *CEAC*’s argument that the tribunal had committed an “egregious mistake.”<sup>56</sup>

85. Ecuador advocates for an “objective” approach to a tribunal’s analysis. However, the alleged distinction between “objective” and “subjective” review is too facile to be meaningful, and dangerous in its implications. Because a tribunal’s role is to decide disputed matters, a tribunal will necessarily decide a dispute with some degree of subjectivity. Furthermore, Ecuador’s proposed approach would make subjectivity worse. “For if this Committee examined how the Tribunal ought to have decided legal issues, as Ecuador suggests it should, it would be substituting its own necessarily subjective interpretation of the law for the Tribunal’s findings—and doing so without the benefit of the entire record, oral evidence or detailed argument on the substance of the issues.”<sup>57</sup> Perenco further claims that even the cases Ecuador cites for this subjective/objective distinction do not support the approach it urges.<sup>58</sup>
86. Second, Ecuador has completely failed to address the proposition that alleged errors in assessing factual evidence cannot comprise a manifest excess of powers because assessing and weighing evidence lies at the core of a tribunal’s mandate, not outside it. Perenco states that there is committee consensus on this position.<sup>59</sup>
87. Third, in its Reply on Annulment, Ecuador presented the novel argument that committees should review jurisdictional decisions *de novo*. This argument contradicts its own position in the Memorial, i.e., that “a lack of jurisdiction *ratione personae* will constitute a manifest excess of powers if the excess of jurisdiction is obvious or evident,” and is wrong. As explained by Prof. Schreuer, the stability of the system could be threatened “if an *ad hoc* committee could simply substitute its view on jurisdiction for that of the tribunal.”<sup>60</sup> Also, “Ecuador’s argument that ‘[t]he questions presented to an *ad hoc* committee will require varying degree of inquiry depending on the specific ground involved’ is similarly unavailing.”<sup>61</sup>
88. Fourth, Ecuador’s argument that “extensive argumentation” can be used to show an obvious error fails to recognize that the drafters of the ICSID Convention made a conscious decision to limit annulable errors to only those that were “manifest” to alleviate concerns that, without it, there would be a risk of frustration of awards. Ecuador does not dispute that the ordinary meaning of “manifest” is “obvious” or “[c]learly revealed to the eye,

---

<sup>56</sup> Rejoinder on Annulment, ¶ 14.

<sup>57</sup> Rejoinder on Annulment, ¶ 16.

<sup>58</sup> Rejoinder on Annulment, ¶ 18.

<sup>59</sup> Rejoinder on Annulment, ¶ 20.

<sup>60</sup> Rejoinder on Annulment, ¶¶ 21-24.

<sup>61</sup> Rejoinder on Annulment, ¶ 24.

mind, or judgement.” If a legal point requires extensive argumentation and analysis, then is not an obvious one.<sup>62</sup>

89. Ecuador’s argument that an error need not be serious to be manifest is also unavailing. Minor or inconsequential errors do not undermine the ICSID system’s integrity so should not be annulable. Ecuador also ignores committee consensus that a “manifest” excess of powers is one that is both “textually obvious and substantively serious.” Although Ecuador states that the *Soufraki* committee did not take a position on whether ‘manifest’ means ‘serious’ in addition to ‘obvious’, said committee clearly stated that the excess of powers “should at once be textually obvious and substantively serious.”<sup>63</sup>
90. Finally, Perenco does not agree with Ecuador that the “manifest” requirement must be determined only after first assessing whether there has been an excess of powers. The reverse approach is more efficient and more consistent with the proposition that an excess of powers must be obvious to satisfy annulment.<sup>64</sup>

## **(2) The Committee’s Analysis**

91. Both Parties agree that two requirements must be fulfilled to meet the threshold of Article 52(1)(b): (i) that the tribunal exceeded the scope of its powers and (ii) that such excess of powers was manifest.<sup>65</sup>
92. An excess of powers occurs when, for instance, a tribunal goes beyond the scope of the Parties’ arbitration agreement, decides points which had not been submitted to it, or fails to apply the law agreed to by the Parties.<sup>66</sup> In the case at hand, the Parties focus the debate on the Tribunal’s alleged “excess of jurisdiction” and its alleged failure to apply the proper law.<sup>67</sup>
93. As regards the scope of the arbitration agreement, *ad hoc* committees have held that there may be an excess of powers if a tribunal incorrectly concludes that it has jurisdiction when it lacks thereof, or when the Tribunal exceeds the scope of its jurisdiction. Likewise, a

---

<sup>62</sup> Rejoinder on Annulment, ¶ 26.

<sup>63</sup> Rejoinder on Annulment, ¶ 28.

<sup>64</sup> Rejoinder on Annulment, ¶ 29.

<sup>65</sup> Memorial on Annulment, ¶ 189.

<sup>66</sup> Updated Background Paper on Annulment for the Administrative Council of ICSID, May 5, 2016, ¶ 81.

<sup>67</sup> In the Introduction to its Memorial on Annulment (¶ 12), Ecuador manifests that: “the Tribunal also manifestly exceeded its powers when it made various *ultra petita* decisions. A telling illustration is the Tribunal’s decision to apply a post-award interest rate even higher than the risk-free rate claimed by Perenco and its economic expert.” The Committee observes, however, that Ecuador did not elaborate on why and how an *ultra* or *extra petita* decision is an excess of powers.

Tribunal's rejection of jurisdiction when jurisdiction exists also amounts to an excess of powers.<sup>68</sup>

94. Under the principle of *compétence de la compétence*, a tribunal is the judge of its own competence and has the power to determine whether it has jurisdiction under the parties' arbitration agreement. ICSID annulment proceedings do not avail for a *de novo* review of jurisdiction. That would be tantamount to an appeal. As explained by Prof. Schreuer, "the stability of the system could be threatened if an *ad hoc* committee could simply substitute its view on jurisdiction for that of the tribunal."<sup>69</sup>
95. As regards the failure to apply the law agreed to by the Parties, the Parties differ on whether a gross misapplication or misinterpretation of the law amounts to a non-application of the law. On the one hand, the Applicant advances its case in favor of said position. On the other hand, the Claimant contends that as long as the Tribunal correctly identified the applicable law and endeavored to apply it, it cannot have exceeded its powers.<sup>70</sup>
96. The Committee considers that under the limited scope of Article 52(1)(b), it cannot annul an award based on the fact that it has a different understanding of the facts, interpretation of the law, or appreciation of the evidence from that of the Tribunal.<sup>71</sup> By so doing, a committee would be acting as a court of appeals; it would be reviewing the substance of the Tribunal's decision. In this regard, the Legal Committee of the ICSID Convention confirmed that even a "manifestly incorrect application of the law" is not a ground for annulment."<sup>72</sup> Accordingly, the Committee is of the view that the applicable standard of review is whether the Tribunal correctly identified and endeavored to apply the law agreed to by the Parties.<sup>73</sup> It is not for an *ad hoc* committee to determine whether there was a misapplication or misinterpretation of the law agreed to by the parties or whether such misapplication or misinterpretation was gross or minor. This would imply an unacceptable intromission on the merits of the Tribunal's decision, not permitted by the ICSID Convention.
97. The Parties further dispute whether the Committee's review of the Tribunal's application of the law must be "objective" rather than "subjective." Regardless of the academic debate between the Parties on the contours of the terms "objective" or "subjective," the Committee considers that its duty is to analyze whether *in fact* the Tribunal properly identified the body of law as agreed by the Parties and endeavored to apply that law. For such purpose,

---

<sup>68</sup> Updated Background Paper on Annulment for the Administrative Council of ICSID, May 5, 2016, ¶ 87.

<sup>69</sup> Christoph H. Schreuer, *The ICSID Convention – A Commentary* (2nd ed.), Cambridge University Press 2009, ¶ 148 (CAA-067).

<sup>70</sup> Counter-Memorial on Annulment, ¶¶ 75-76.

<sup>71</sup> *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Award, November 27, 2013, ¶ 175 (CAA-097).

<sup>72</sup> Updated Background Paper on Annulment for the Administrative Council of ICSID, May 5, 2016, ¶ 72.

<sup>73</sup> Updated Background Paper on Annulment for the Administrative Council of ICSID, May 5, 2016, ¶ 21.

the Committee must undertake an assessment of the Award, the Treaty, and the relevant documents in the Underlying Arbitration.

98. As to the requirement that a tribunal's excess of power be manifest, the Applicant contends that such requirement refers to how apparent the excess is, rather than to its gravity. The Claimant argues, in turn, that an excess of powers must be both textually obvious and substantively serious to qualify as manifest. The Committee considers that, in principle, the word "manifest" is to be interpreted under its ordinary meaning: something that is clear, patent, or apparent to the eye. However, the analysis does not stop there. In the light of the object and purpose of the annulment remedy, that is to safeguard the integrity of ICSID proceedings, the Committee considers that "manifest" also encompasses a substantive element. Thus, on the one hand, minor or inconsequential errors that do not undermine the integrity of the ICSID system should not be annulable; on the other hand, and as stated above, a superficial analysis or reading of the award is not sufficient to determine whether the excess is manifest.
99. The Committee further notes that the excess of powers has to be "manifest" for the members of an *ad hoc* committee that ought to be constituted by qualified persons with "[...] competence in the fields of law, commerce, industry, or finance, who may be relied upon to exercise independent judgment,"<sup>74</sup> not to anyone that may read the Award. Therefore, an *ad hoc* committee may need to review complex facts and legal issues to determine whether an error is tantamount to a manifest excess of powers. The extent and complexity of such review depends on the circumstances of each case.

## **C. SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE**

### **(1) The Parties' Positions**

#### **a. Applicant's Position**

100. Ecuador refers to Article 52(1)(d) of the ICSID Convention. It provides for the annulment of an award when "there has been a serious departure from a fundamental rule of procedure." Ecuador presents the following analysis:
101. To analyze whether there has been a serious departure from a fundamental rule of procedure, a three-prong test applies: (i) the procedural rule must be fundamental, (ii) the Tribunal must have departed from it, and (iii) the departure must have been serious.
102. As to the fundamental rules of procedure, the Applicant contends that these are "procedural rules that are essential to the integrity of the arbitral process." Such rules form a "set of

---

<sup>74</sup> ICSID Convention, Article 14.

minimal standards of procedure to be respected as a matter of international law.”<sup>75</sup> In its Background Paper on Annulment, the ICSID Secretariat refers to a set of examples of these rules identified by *ad hoc* committees, such as: equal treatment of the Parties, the right to be heard, an independent and impartial Tribunal, treatment of evidence and burden of proof, and the deliberations among members of the Tribunal.<sup>76</sup>

103. As to the departure, Ecuador advances that a tribunal departs from a fundamental procedural rule when, in the exercise of its discretion, it overlooks due process and procedural fairness. Such departure occurs when, for example, a tribunal awards damages resulting from a treaty breach despite the parties never pleaded such damages, or when a tribunal admits new evidence submitted by one party after the closure of the proceedings without giving the other party an opportunity to rebut it, as recognized by the *ad hoc* committees in *Pey Casado* and *Fraport*.<sup>77</sup>
104. As to the seriousness of the departure, the Applicant claims that “to constitute a serious departure, the fundamental rule must have been flouted in a significant way that deprived the rule of its intended effect.” In the same vein, Ecuador notes that *ad hoc* committees “have considered that a ‘serious’ departure is one which causes the tribunal to reach a result substantially different from that which it would have reached had such a rule been observed.”<sup>78</sup>
105. Finally, the Applicant argues that a serious departure from a fundamental procedural rule need not be manifest, nor it has to be outcome determinative for it to be serious. Such analysis would be a highly speculative exercise for an *ad hoc* committee to undertake. “Rather than assessing whether the outcome of the proceeding would have been different, the *ad hoc* committee’s task is to determine ‘whether the tribunal’s compliance with a rule of procedure could potentially have affected the award.’”<sup>79</sup>
106. Ecuador further claims that Perenco makes at least three errors in its presentation of the standard of “serious departure from a fundamental rule of procedure.”
107. First, as regards the “right to be heard,” Perenco quotes Prof. Schreuer for the proposition that a tribunal is not “precluded from adopting legal reasoning that was not put forward by one of the parties without first seeking the parties’ opinion.” Perenco, however, fails to mention that this proposition is not without exceptions. As noted by the committee in *TECO*, “[o]ne such exception is when a tribunal effectively surprises the parties with an

---

<sup>75</sup> Memorial on Annulment, ¶ 208.

<sup>76</sup> Memorial on Annulment, ¶¶ 208-213.

<sup>77</sup> Memorial on Annulment, ¶¶ 214-215.

<sup>78</sup> Memorial on Annulment, ¶ 216.

<sup>79</sup> Memorial on Annulment, ¶¶ 217-221.



issue that neither party has invoked, argued or reasonably could have anticipated during the proceedings.”<sup>80</sup> Therefore, “when a tribunal relies on a concept that is in fact ‘surprising’ and has not ‘been discussed by the parties’ it could infringe the parties’ right to be heard.”<sup>81</sup>

108. Second, Perenco claims that a serious departure from a fundamental rule of procedure must have been “outcome-determinative.” This approach, however, has been rejected by committees for being highly speculative and impractical. As noted by the committee in *Pey Casado I* it is sufficient to ascertain that had the tribunal observed the fundamental procedural rule, “there is a distinct possibility (a ‘chance’) that it may have made a difference on a critical issue,” or, as expressed by the committee in *TECO*, that compliance with the rule “could potentially have affected the award.”<sup>82</sup> This position has also been recently adopted by the *Eiser* committee.<sup>83</sup>
109. Third, Perenco asserts that “a party cannot seek annulment on the grounds of a serious departure from a fundamental rule of procedure if it failed to promptly raise that alleged departure before the tribunal.” Perenco, however, neglects to mention a key condition for the application of this rule: that the “objecting party must know of the conduct of the tribunal and have a reasonable opportunity to raise its objection.” As expressed by the committee in *Fraport*, “[...] a party cannot be treated as having waived an objection to a course of action of which it was unaware.”<sup>84</sup>

#### **b. Perenco’s Position**

110. According to Perenco, Ecuador fails to acknowledge key limitations on annulment on the basis of a “serious departure from a fundamental rule of procedure” under Article 52(1)(d).<sup>85</sup>
111. First, it is uncontroversial that the right to be heard and the right to equal treatment are fundamental procedural rules. Yet, “the right to be heard entails a reasonable and fair opportunity to present one’s case, not an absolute and unlimited one.” Tribunals are not required to give express consideration to every argument advanced by the Parties; moreover, when they decline to consider an issue that they deemed irrelevant.<sup>86</sup>

---

<sup>80</sup> Reply on Annulment, ¶ 76.

<sup>81</sup> Reply on Annulment, ¶ 78.

<sup>82</sup> Reply on Annulment, ¶ 80.

<sup>83</sup> Reply on Annulment, ¶ 81.

<sup>84</sup> Reply on Annulment, ¶ 82.

<sup>85</sup> Counter-Memorial on Annulment, ¶ 94.

<sup>86</sup> Counter-Memorial on Annulment, ¶ 95.

112. Second, “contrary to Ecuador’s position, the right to be heard does not constrain the tribunal to adopt wholesale either one party’s arguments or the other’s, without conducting its own analysis.” Perenco refers to Prof. Schreuer’s observations on this matter to support its position.<sup>87</sup>
113. Third, a departure from a fundamental rule of procedure must be “serious.” Therefore, overlooking due process and procedural fairness is not enough to satisfy Article 52(1)(b). Furthermore, Ecuador’s position that the Tribunal’s position need not be outcome determinative counters its own admission that in order to qualify as “serious,” “the departure must have ‘deprived the rule of its intended effect’ and ‘cause[d] the tribunal to reach a result substantially different from that which it would have reached’ had it observed the rule.”<sup>88</sup>
114. Perenco claims that a party cannot seek annulment on the grounds of a serious departure from a fundamental rule of procedure if it failed to promptly raise the alleged departure before the tribunal. It is not enough for a Party to simply state that it is reserving its rights without actually bringing the alleged procedural defect to the Tribunal’s attention only to attack the award later in annulment proceedings.<sup>89</sup>
115. In its Rejoinder on Annulment, Perenco asserts that Ecuador’s position that the Tribunal seriously departed from a fundamental rule of procedure does not identify a breach of due process. Instead, seven out of eight of Ecuador’s alleged instances of a serious departure from a fundamental rule seek to fault the Tribunal for not having engaged in an additional process that the Tribunal had no obligation to provide and would have paralyzed proceedings if adopted, namely giving Ecuador advance notice of the Tribunal’s findings.<sup>90</sup>
116. Ecuador’s complaints are simply that it disagrees with the Tribunal’s analysis and thinks it should have had a chance to say so and change the Tribunal’s mind. That amounts, in essence, to a complaint that the Tribunal did not expressly tell the Parties what its Award would say before issuing it. But even Ecuador concedes that the Tribunal could adopt its own reasoning on the points submitted for decision and was not limited to accepting either one or the other Party’s view. Ecuador therefore resorts to claiming that the Tribunal could not adopt its own legal reasoning when to do so would “effectively surprise the parties,”<sup>91</sup>
117. Perenco adds that “[a]dopting Ecuador’s formulation—that all it has to show is that there is a ‘distinct possibility’ that the departure affected the outcome of the Award—would

---

<sup>87</sup> Counter-Memorial on Annulment, ¶ 96.

<sup>88</sup> Counter-Memorial on Annulment, ¶ 97.

<sup>89</sup> Counter-Memorial on Annulment, ¶¶ 98-99.

<sup>90</sup> Rejoinder on Annulment, ¶ 44.

<sup>91</sup> Rejoinder on Annulment, ¶ 45.

mean diluting the express terms of the ICSID Convention that the departure from the fundamental rule of procedure must be ‘serious.’”<sup>127</sup> “The only reason Ecuador provides for its disregard of the language of the ICSID Convention—that some committees have found the ‘outcome-determinative’ test ‘impractical to apply’—cannot justify departing from the express terms of Article 52(1)(d), more so when many *ad hoc* committees have applied that test.” In *OI European Group*, for example, the committee refused to find a serious departure. Even the decisions on which Ecuador relies do not support its case.<sup>92</sup>

## (2) The Committee’s Analysis

118. The Parties agree that to determine whether there has been a serious departure from a fundamental rule of procedure two requirements must be met: (i) the procedural rule must be fundamental, and (ii) the departure from the fundamental rule of procedure must be serious.
119. In relation to the fundamental character of the procedural rules, the drafters of the ICSID Convention understood that such rules are principles concerned with the integrity and fairness of the arbitral process,<sup>93</sup> not ordinary arbitration rules. Article 52(1)(d) refers to procedural rules which may constitute “general principles of law”, insofar as these rules involve international arbitration procedure.<sup>94</sup>
120. *Ad hoc* committees have identified examples of fundamental procedural rules, including: (i) the equal treatment of the Parties; (ii) the right to be heard; (iii) an independent and impartial Tribunal; (iv) the treatment of evidence and burden of proof; and (v) the deliberations among members of the Tribunal.<sup>95</sup>
121. The Parties discussed at length the scope and contours of the “right to be heard”.
122. As regards the right to be heard, the *Fraport* committee noted that said right is the right to present one’s case, including the right to reply or comment on new evidence, the alteration of the legal basis of a claim, or the amendment of an original submission. This procedural rule also includes the right to a fair hearing.<sup>96</sup>
123. Similarly, the *Wena* committee concluded that the “right to be heard” includes the right to state its claims or its defence and to produce all the arguments and evidence to support its

---

<sup>92</sup> Rejoinder on Annulment, ¶ 48.

<sup>93</sup> Updated Background Paper on Annulment for the Administrative Council of ICSID, May 5, 2016, ¶ 98.

<sup>94</sup> *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on Annulment, December 23, 2010, ¶¶ 186-187 (AALA-079).

<sup>95</sup> Updated Background Paper on Annulment for the Administrative Council of ICSID, May 5, 2016, ¶ 99.

<sup>96</sup> *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on Annulment, December 23, 2010, ¶¶ 195-199 (AALA-079).

position. This “fundamental right has to be ensured on an equal level, in a way that allows each party to respond adequately to the argument and evidence presented by the other.”<sup>97</sup>

124. The Parties focus their discussion on the right to be heard on two main points: (i) whether tribunals are required to give express consideration to every argument advanced by the parties;<sup>98</sup> and (ii) whether the right to be heard constrains a tribunal to base its analysis on arguments forwarded by one or the other party.
125. As to the first point, the Committee observes that Article 48(3) of the ICSID Convention states that “[t]he award shall deal with every question submitted to the tribunal, and shall state the reasons upon which it is based.” This provision does not envisage that the Award shall address every argument, piece of evidence, or fact presented by the Parties. A Tribunal is therefore not obliged to give express consideration to every argument or issue raised by the Parties to guarantee their right to be heard. As concluded by the *Azurix* committee, “it is not a serious departure from a fundamental rule of procedure for a tribunal to decline to consider an issue that it considers to be irrelevant, merely because one of the parties considers it to be important.”<sup>99</sup> Nonetheless, the Committee considers that a failure to consider a question or a point raised by a Party that is critical to the Tribunal’s decision may, in certain cases, amount to a serious departure from a fundamental rule of procedure.<sup>100</sup>
126. As to the second point, the Committee observes that a tribunal does not necessarily depart from the right to be heard by not adopting either of the positions raised by the Parties. A tribunal may conduct its own analysis based on the documents, evidence, pleadings, and legal authorities presented by the Parties and reach a conclusion different from the positions submitted by the Parties. In its Commentary to the ICSID Convention, Prof. Schreuer states that:

[The right to be heard] principle does not mean that it is the tribunal’s task to draw the parties’ attention to an aspect of a legal question that they may have failed to address. Nor is the tribunal precluded from adopting legal

---

<sup>97</sup> *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Annulment Proceeding, February 5, 2002, ¶ 57 (AALA-046); *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, March 21, 2007, ¶ 50 (AALA-076).

<sup>98</sup> The Committee observes that in its assessment on the standards of annulment, Ecuador raises this issue solely with respect to Article 52(1)(d) of the ICSID Convention. However, in the specific grounds on annulment, Ecuador raises this issue also under Article 52(1)(e). The Committee considers that its analysis of whether tribunals are required to give express consideration to every argument advanced by the Parties is applicable indistinctly if the issue is raised under Article 52(1)(d) or under Article 52(1)(e). Thus, it must be understood that the analysis conducted by the Committee as of paragraph 121 is also part of its analysis of the “failure to state reasons” ground for annulment.

<sup>99</sup> *Azurix Corp. v. the Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Annulment, September 1, 2009, ¶ 244 (CAA-068).

<sup>100</sup> *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Decision on the Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic, September 16, 2011, ¶ 97 (AALA-089).

reasoning that was not put forward by one of the parties without first seeking the parties' opinion.<sup>101</sup>

127. A similar position has been adopted by the *Klöckner I* and *Caratube I* committees, concluding that a tribunal does not violate the parties' right to be heard if they ground their decision on legal reasoning not specifically argued by the parties, insofar as the tribunal's reasoning can be fitted within the legal framework argued during the procedure.<sup>102</sup> In case that the tribunal prefers to use a distinct legal framework, or to bring attention to other issues not raised by the parties, the tribunal shall give an opportunity to the parties to comment on such new legal framework. Likewise, a decision may be considered *ultra petita* when a tribunal decides on issues that were not pleaded by the parties.
128. To the Committee's knowledge, in only two cases an award has been annulled under Article 52(1)(d) as a result of a breach to the "right to be heard": *Fraport* and *Amco II*.
129. In *Fraport*, the committee decided to annul the tribunal's finding that the investment was not made in accordance with the applicable Philippine law and therefore that it lacked jurisdiction under the treaty. The committee found (i) that the tribunal's decision was largely based on documents submitted by the respondent after the procedure was officially closed—and not re-opened—, and (ii) that the parties were not allowed to comment on such documents. The committee held that the tribunal's conduct was incompatible with its fundamental obligation to allow both parties to present their case in relation to the new material. The tribunal should not have considered the said documents in its deliberations "without having afforded the parties the opportunity to make submissions on it, and availed itself of the benefit of those submissions."<sup>103</sup>
130. In *Amco II*, the committee annulled the tribunal's supplemental decision to the award because the tribunal seriously departed from a fundamental rule of procedure. The committee concluded that the tribunal neither fixed a time limit for Indonesia's submission on Amco's request for a supplementary decision, nor did it give reasons in the supplementary award for not doing so. The committee considered that by so doing, the tribunal disregarded Rule 49(3) of the Arbitration Rules, providing that "[t]he Tribunal shall fix a time limit for the parties to file their observations on the request and shall determine the procedure for its consideration." The committee concluded that such rule was fundamental because it provided an opportunity for both parties to present its case

---

<sup>101</sup> Christoph H. Schreuer, *The ICSID Convention – A Commentary* (2nd ed.), Cambridge University Press 2009, ¶ 317 (CAA-067).

<sup>102</sup> *Klöckner v. Republic of Cameroon*, ICSID Case No. ARB/81/2, Decision of the *ad hoc* Committee on the Application for Annulment submitted by Klöckner, May 3, 1985, ¶ 91 (AALA-049); *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP, February 21, 2014, ¶¶ 92-93 (AALA-059).

<sup>103</sup> *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on Annulment, December 23, 2010, ¶¶ 230-231 (AALA-079).

equally. The committee further determined that the departure from said fundamental rule was serious because the tribunal simply ignored it without even acknowledging its existence in the supplementary decision. Accordingly, the committee concluded that Indonesia was deprived of the benefit of the protection the rule is intended to provide, and therefore, it annulled the supplementary award.<sup>104</sup>

131. In relation to the “seriousness” of the departure, the Parties debate on whether the departure from the fundamental procedural rule must have a material impact on the outcome of the case to be considered “serious”.
132. For Ecuador, an *ad hoc* committee’s task is to determine whether the tribunal’s compliance with a rule of procedure could potentially have affected the award. To the contrary, Perenco considers that the departure must have caused the tribunal to reach a result substantially different from that which it would have reached had it observed the rule.<sup>105</sup>
133. The Committee considers that for a departure from a procedural rule to be serious, it must have deprived the rule of its intended effect.<sup>106</sup> Yet, to conclude that the departure is serious, the Committee need not determine if the outcome of the decision would have been different. Such analysis would be highly speculative. Thus, in the Committee’s view, a breach is serious if the Tribunal’s decision would have been *potentially* different had the breach not been committed.<sup>107</sup>
134. A similar position was first adopted by the *Pey Casado I* committee,<sup>108</sup> and has been endorsed by, among others, the *ad hoc* committees in *Iberdrola I v. Guatemala*,<sup>109</sup> *CEAC*

---

<sup>104</sup> *Amco Asia Corp. and Others v. Republic of Indonesia* (“Amco II”), ICSID Case No. ARB/81/1, Decision on Annulment of Award of June 5, 1990 and of Supplemental Award of October 17, 1990, December 3, 1992, ¶¶ 9.05-9.10 (AALA-074).

<sup>105</sup> Counter-Memorial on Annulment, ¶ 97.

<sup>106</sup> *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision of the *Ad hoc* Annulment Committee, December 22, 1989, ¶ 5.05 (AALA-048); *Daimler Financial Services A.G. v. Republic of Argentina*, ICSID Case No. ARB/05/1, Decision on Annulment, January 7, 2015, ¶ 264 (CAA-074).

<sup>107</sup> *Iberdrola Energia S.A. v. Republic of Guatemala I*, ICSID Case No. ARB/09/5, Decision on Annulment, January 13, 2015, ¶ 104 (AALA-073) (emphasis not included in the original text). Committee’s free translation from Spanish: “*el quebrantamiento grave supone, potencialmente, una decisión diferente a la que se habría dictado si la norma procesal infringida hubiese sido observada.*”; *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8, Decision on Annulment, May 1, 2018, ¶¶ 91-93 (AALA-077).

<sup>108</sup> *Víctor Pey Casado and President Allende Foundation v. Republic of Chile I*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile, December 18, 2012, ¶ 78 (AALA-071).

<sup>109</sup> *Iberdrola Energia S.A. v. Republic of Guatemala I*, ICSID Case No. ARB/09/5, Decision on Annulment, January 13, 2015, ¶ 61 (AALA-073).

*v. Montenegro*,<sup>110</sup> *Occidental v. Ecuador*,<sup>111</sup> *Tulip v. Turkey*,<sup>112</sup> and *TECO v. Guatemala*.<sup>113</sup>

135. In this regard, the *Occidental* committee noted—and the Committee shares its view—that:

To require an applicant to prove that the award would have been different had the rule of procedure been observed, may impose an unrealistically high burden of proof. Where a complex decision depends on a number of factors, it is almost impossible to prove with certainty whether the change of one parameter would have altered the outcome.<sup>114</sup>

136. Likewise, the Committee is persuaded by the *ad hoc* committee’s reasoning in *CEAC v. Montenegro* that:

Requiring an applicant to show that it would have won the case or that the result of the case would have been different if the rule of procedure had been respected is a highly speculative exercise. An annulment committee cannot determine with any degree of certainty whether any of these results would have occurred without placing itself in the shoes of a tribunal, something which it is not within its powers to do. What a committee can determine however is whether the tribunal’s compliance with a rule of procedure could potentially have affected the award.<sup>115</sup>

137. Accordingly, the Committee considers that for a departure to be serious it need not be outcome determinative in the sense that the Applicant has to demonstrate that the Tribunal’s decision would have been different had the fundamental procedural rule been observed. The Applicant, however, has the burden to demonstrate that there is a distinct possibility that the departure may have made a difference on a critical issue of the Tribunal’s decision.

138. Finally, the Parties dispute whether a Party can seek annulment on the grounds of Article 52(1)(d) if it failed to promptly raise the alleged departure before the Tribunal. Perenco argues that a simple “reservation of rights” is not enough, as opposition must be express.

---

<sup>110</sup> *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8, Decision on Annulment, May 1, 2018, ¶¶ 91-93 (AALA-077).

<sup>111</sup> *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, November 2, 2015, ¶ 62 (AALA-061).

<sup>112</sup> *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, December 30, 2015, ¶ 78 (AALA-083).

<sup>113</sup> *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, September 5, 2016, ¶ 85 (AALA-085).

<sup>114</sup> *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, November 2, 2015, ¶ 62 (AALA-061).

<sup>115</sup> *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8, Decision on Annulment, May 1, 2018, ¶ 93 (AALA-077).

Ecuador contends, in turn, that “[...] a party cannot be treated as having waived an objection to a course of action of which it was unaware.”<sup>116</sup>

139. The Committee remarks that pursuant to Arbitration Rule 27, if a party is aware of a departure from a fundamental rule of procedure and does not positively oppose such violation, it waives its right to object it, and thereby to request the annulment on such basis.<sup>117</sup> However, some violations of procedural rules may become visible only after the tribunal has rendered the award, and therefore, the concerned party is not estopped from requesting annulment on that basis. As explained by Prof. Schreuer:

Some violations of procedural principles will be evident to the affected party in the proceeding before the tribunal. Others may become visible only after the award has become available. A party that is aware of a violation of proper procedure must react immediately by stating its objection and by demanding compliance.<sup>118</sup>

140. In like manner, the *ad hoc* committee in *Fraport* concluded that:

[A] party forfeits its right to seek annulment under Article 52(1)(d) if it has failed promptly to raise its objection to the tribunal’s procedure, upon becoming aware of it. [...] However, if such a principle is to be invoked so as to preclude a party from its right to seek annulment for an otherwise serious departure from a fundamental rule of procedure by the tribunal, the objecting party must know of the conduct of the tribunal and have a reasonable opportunity to raise its objection. This point is, in the view of the Committee, an elementary one, since a party cannot be treated as having waived an objection to a course of action of which it was unaware.<sup>119</sup>

141. Among other committees, the *ad hoc* committees in *Klöckner I*,<sup>120</sup> and *CDC v. Seychelles*<sup>121</sup> have adopted similar views.

#### **D. FAILURE TO STATE REASONS**

---

<sup>116</sup> Reply on Annulment, ¶ 82.

<sup>117</sup> See Rules 27 and 53 of the ICSID Arbitration Rules.

<sup>118</sup> Christoph H. Schreuer, *The ICSID Convention – A Commentary* (2nd ed.), Cambridge University Press 2009, ¶ 334 (CAA-067).

<sup>119</sup> *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on Annulment, December 23, 2010, ¶¶ 206-207 (AALA-079).

<sup>120</sup> *Klöckner v. Republic of Cameroon*, ICSID Case No. ARB/81/2, Decision of the *ad hoc* Committee on the Application for Annulment submitted by Klöckner, May 3, 1985, ¶ 88 (AALA-049).

<sup>121</sup> *CDC Group plc v. The Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision of the *ad hoc* Committee on the Application for Annulment, June 29, 2005, ¶ 53 (AALA-081).



## **(1) The Parties' Positions**

### **a. Applicant's Position**

142. Ecuador submits that Article 52(1)(e) of the ICSID Convention provides for the annulment of an award in the event that it “has failed to state the reasons on which it is based” and presents the following arguments:
143. It is a tribunal’s duty to state the reasons leading to its decision. An award is deemed to have failed to state the reasons on which it is based when the reasons stated do not allow the reader to follow the reasoning of the tribunal, that is, when the sequence of arguments within an award does not put forth “a logical chain of reasoning that is apt to lead to the conclusion that was reached by the tribunal.” According to the Applicant, there are three main ways in which an award fails to state the reasons on which is based.
144. First, an award does not enable the reader to follow a tribunal’s reasoning if it provides no reasons altogether or if it fails to provide reasons for one particular aspect of the award.<sup>122</sup>
145. Second, an award does not enable the reader to follow a tribunal’s reasoning if the stated reasons are so contradictory as to cancel each other out, thereby resulting in no reasoning. This is so, for instance, “where the basis for a tribunal’s decision on one question is the existence of fact A, when the basis for its decision on another question is the non-existence of fact A.”<sup>123</sup>
146. Third, an award does not enable the reader to follow a tribunal’s reasoning if the reasons that are provided are “frivolous,” that is when they are “manifestly irrelevant and knowingly so to the tribunal,” or “cannot logically explain the decision they are purportedly supporting.” Insufficient and inadequate reasons may also be frivolous.<sup>124</sup>
147. Ecuador contends that Perenco misconstrues the ground on failure to state the reasons on which the Award is based in five ways:
148. First, Perenco insists that the reasoning requirement is “a minimum standard” that must be subject to “strict” review and the “threshold for annulment is high.” Yet, these assertions have no basis in the text of Article 52(1)(e), and they obscure the provision’s object and purpose. Ecuador remarks that such “restrictive” approach was rejected by the committee in *Tenaris II* by refusing to deprive the provision of its *effet utile*.<sup>125</sup>

---

<sup>122</sup> Memorial on Annulment, ¶ 228.

<sup>123</sup> Memorial on Annulment, ¶ 230.

<sup>124</sup> Memorial on Annulment, ¶ 231.

<sup>125</sup> Reply on Annulment, ¶ 58.

149. Second, Perenco states that any assessment of quality of the Award. “shades easily into an appeal.” Yet, this position ignores that *ad hoc* committees have established criteria for objectively determining whether a tribunal’s purported statement of reasons amounts to a failure to state reasons. For instance, when reasoning is “frivolous”, i.e. “manifestly irrelevant and knowingly so to the tribunal,” and “so flawed that it amounts to no reasons at all;” or when reasoning is inadequate, that is to say that it “cannot logically explain the decision [it is] purportedly supporting.”<sup>126</sup> Perenco quotes the annulment decisions in *Tidewater* and *Tenaris II* out of context; read as a whole, none of these decisions support its position.<sup>127</sup> Accordingly, assessing the quality of a tribunal’s reasoning is required to ensure that such reasoning is not so flawed that it amounts to no reasons at all.
150. Third, Perenco claims that the Committee should “seek to understand the motivation of the Award in the light of the record before the Tribunal,” “prefer an interpretation that confirms an award’s consistency,” and even “infer or reconstruct implicit reasons for a decision from the terms of the award and the record before the tribunal.” This is impermissible under Article 52(1)(e) for at least three reasons: (i) no presumption in favor of the validity of the Award exists; (ii) the exercise of reconstructing the Award defeats the object and purpose of Article 52(1)(e); and (iii) there is a tension between the arguments advanced by Perenco: on the one hand it advocates for a proactive role of the Committee for reconstructing the reasoning in the Award, and on the other hand, it endorses a hands-off approach to annulment.<sup>128</sup>
151. Fourth, Perenco attempts to minimize the extent of the reasoning requirement by stating that the failure to state reasons must affect an issue necessary to the Tribunal’s decision or essential to the outcome of the case. Yet, to give a fully reasoned award, a tribunal is required to answer every “question” put to it. While a tribunal need not deal explicitly with every detail of every argument advanced by the parties or refer to every authority which they invoke, it must deal with every relevant argument; in particular, arguments that might affect the outcome of the case, as well as those in which a Party ‘has a major interest’ in seeing them resolved.<sup>129</sup>
152. Finally, Perenco appears to confuse the reasoning requirement with the right to be heard within the meaning of Article 52(1)(d). “Whether or not a failure to address every question submitted to it is also a departure from a fundamental rule of procedure does not change

---

<sup>126</sup> Reply on Annulment, ¶ 61.

<sup>127</sup> Reply on Annulment, ¶¶ 62-63.

<sup>128</sup> Reply on Annulment, ¶¶ 67-70.

<sup>129</sup> Reply on Annulment, ¶ 72.

the fact that it is unequivocally a failure to state reasons within the meaning of Article 52(1)(e).”<sup>130</sup>

### **b. Perenco’s Position**

153. According to Perenco, Ecuador “improperly attempts to turn an award that ‘has failed to state the reasons on which it is based’ into an award that *has* stated reasons, but one party finds them ‘insufficient and inadequate.’”<sup>131</sup>
154. First, Ecuador acknowledges that Article 52(1)(e) is concerned with the existence of reasons, rather with the quality of such reasons. This is confirmed by the *travaux préparatoires* of the ICSID Convention. *Ad hoc* committees have held that Article 52(1)(e) is a minimum standard intended to ensure that a reasonable reader may understand the award, and that the scope of review under Article 52(1)(e) is strict and the threshold for annulment is high. Two conditions must be fulfilled for an annulment to be warranted under this ground: “first, the failure to state reasons must leave the decision on a particular point essentially lacking in any expressed rationale; and second, that point must itself be necessary to the tribunal’s decision.”<sup>132</sup>
155. Perenco observes that Ecuador’s objections are not premised on the minimum standard provided by Article 52(1)(e) “to ensure that a reasonable reader may understand the award.” “Through its repeated assertions that “frivolous” and “inadequate” reasons are annulable, Ecuador is trying to force this Committee to second-guess the Tribunal by reviewing not whether the Tribunal provided reasons, but rather the quality of the reasons it provided.”<sup>133</sup> There is no dispute that the Tribunal must state reasons, but it need not meet the high gauntlet Ecuador tries to raise.<sup>134</sup> Perenco further remarks that Ecuador’s attacks to the decisions Perenco relies on as regards this matter (*Tidewater* and *Tenaris II*) are misguided.<sup>135</sup>
156. Second, Ecuador is wrong that stating reasons that are “insufficient and inadequate” amount to a failure to state reasons. Ecuador supports its position almost exclusively on the 35-year-old *Klöckner I* annulment decision, which has been criticized for improperly drawing *ad hoc* committees into a review of the substance of arbitral decisions. Although Ecuador recognizes that committees must “avoid an approach which would result in the qualification of a tribunal’s reasoning as deficient, superficial, sub-standard, wrong, bad or otherwise faulty,” it qualifies the Tribunal’s reasoning as “frivolous,” “arbitrary,” “gross,”

---

<sup>130</sup> Reply on Annulment, ¶ 73.

<sup>131</sup> Counter-Memorial on Annulment, ¶ 84.

<sup>132</sup> Counter-Memorial on Annulment, ¶¶ 85-87.

<sup>133</sup> Rejoinder on Annulment, ¶ 33.

<sup>134</sup> Rejoinder on Annulment, ¶ 34.

<sup>135</sup> Rejoinder on Annulment, ¶ 36.

etc. Conceptually, there is no distinction between assessing whether reasons are “frivolous” or whether they are “inadequate.” Both are quality assessments. Contrary to Ecuador’s position, Article 52(1)(e) concerns the “absence” or “essential lack” of any reasons. Such reasons may be implicit and inferred from the decision.<sup>136</sup> Accordingly, “an award is not subject to annulment if the Committee can infer implicit reasons for a decision from the terms of the Award and the record before the Tribunal”.<sup>137</sup>

157. Even if the Committee were to apply Ecuador’s standard of review and assess whether the Tribunal’s reasoning was “frivolous,” “the few [c]ommittees that have—incorrectly—endorsed a ‘frivolous’ standard emphasize that the threshold under Article 52(1)(e) is ‘very high’ and that ‘frivolous’ reasons are not ‘incorrect or unconvincing reasons.’”<sup>138</sup> In fact, “none of the decisions Ecuador cites as endorsing the ‘frivolous’ test annulled the award because the reasoning was ‘frivolous’ or ‘inadequate.’”<sup>139</sup>
158. Third, Perenco notes that only “genuinely contradictory” reasons that are “incapable of standing together on any reasonable reading” give rise to an annulable error. Yet, such circumstances are extremely rare. Reasoning that reflects conflicting considerations or a compromise is not genuinely contradictory. Moreover, as recognized by *ad hoc* committees, “in reviewing the apparent contradictions, the *ad hoc* committee should, to the extent possible and considering each case, prefer an interpretation which confirms an award’s consistency as opposed to its alleged inner contradictions.”<sup>140</sup>
159. Finally, Ecuador fails to mention that, as recognized by *ad hoc* committees, the failure to state reasons must affect an issue “necessary to the tribunal’s decision” or “essential to the outcome of the case.” Perenco refers to the annulment decision in *Venezuela Holdings* and *Adem Dogan*, which addressed decisions on jurisdiction.<sup>141</sup>
160. In its Rejoinder on Annulment, Perenco objects Ecuador’s argument “that the Tribunal must have provided reasons for each and every point the parties disputed”. Perenco claims that annulment cases have overwhelmingly confirmed that “a tribunal need only provide reasons for its decisions, and not reasons for its reasons.”<sup>142</sup> In fact, “even the cases on which Ecuador relies agree with this principle”.<sup>143</sup> Perenco further opposes Ecuador’s proposition that a tribunal should state its reasons for issues “in which a party ‘has a major

---

<sup>136</sup> Counter-Memorial on Annulment, ¶¶ 88-90.

<sup>137</sup> Rejoinder on Annulment, ¶ 42.

<sup>138</sup> Rejoinder on Annulment, ¶ 37.

<sup>139</sup> Rejoinder on Annulment, ¶ 37.

<sup>140</sup> Counter-Memorial on Annulment, ¶ 91.

<sup>141</sup> Counter-Memorial on Annulment, ¶ 92.

<sup>142</sup> Rejoinder on Annulment, ¶ 38.

<sup>143</sup> Rejoinder on Annulment, ¶ 40.

interest’ in seeing resolved,” as it ignores that Article 52(1)(e) requires only that an award be reasoned, not that an award be satisfactory to all parties.<sup>144</sup>

## (2) The Committee’s Analysis

161. It is undisputed between the Parties that a statement of reasons for a judicial or an arbitral decision is fundamental for adjudication of justice, particularly in ICSID arbitration. “The purpose of a statement of reasons is to explain to the reader of the award, especially to the parties, how and why the tribunal reached its decision in the light of the facts and the applicable law.”<sup>145</sup> Arbitral tribunals have thereby the duty to identify and let the parties know the factual and legal premises leading to their decision.<sup>146</sup> Under the ICSID Convention, the Tribunal’s duty to state reasons for its decision is provided in Article 48(3). A violation to this requirement is embodied as a ground for annulment under Article 52(1)(e) of the ICSID Convention.
162. The drafting history of the ICSID Convention shows that “the tribunal’s obligation to state reasons is mandatory and not subject to the parties’ disposition.”<sup>147</sup> Therefore, an agreement contrary to the Tribunal’s duty to provide reasons would be invalid and would not preclude a subsequent application for annulment on this ground.<sup>148</sup>
163. The Committee observes that the core of the dispute between the Parties is whether a failure to state reasons takes place when there are no reasons at all supporting a tribunal’s reasoning, or whether “frivolous” or “contradictory” reasons may be tantamount to a failure to state reasons. The Parties also dispute whether implicit reasons are considered “reasons” within the scope of Article 52(1)(e).
164. In the first place, the Committee stresses that Article 52(1)(e) does not concern the failure to state correct or convincing reasons. As correctly noted by the *CDC v. Seychelles* committee “the more recent practice among *ad hoc* Committees is to apply Article 52(1)(e) in such a manner that the Committee does not intrude into the legal and factual decision-making of the Tribunal.”<sup>149</sup> It is not on an *ad hoc* committee to assess the quality, extension, or correctness of the reasons provided by a tribunal, much less to annul an award on that

---

<sup>144</sup> Rejoinder on Annulment, ¶ 41.

<sup>145</sup> Christoph H. Schreuer, *The ICSID Convention – A Commentary* (2nd ed.), Cambridge University Press 2009, ¶ 363 (CAA-067).

<sup>146</sup> *Wena Hotels Ltd. v. Egypt*, ICSID Case No. ARB/98/4, Decision on Application for Annulment, January 28, 2002, ¶ 79 (AALA-046).

<sup>147</sup> Christoph H. Schreuer, *The ICSID Convention – A Commentary* (2nd ed.), Cambridge University Press 2009, ¶¶ 339-340 (CAA-067).

<sup>148</sup> Christoph H. Schreuer, *The ICSID Convention – A Commentary* (2nd ed.), Cambridge University Press 2009, ¶ 340 (CAA-067).

<sup>149</sup> *CDC Group plc v. The Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision of the *ad hoc* Committee on the Application for Annulment, June 29, 2005, ¶ 70 (AALA-081).

basis. If a tribunal provides reasons on how and why it reached its decision, there is no room for annulment under Article 52(1)(e).

165. Furthermore, as recognized in the *Amco II* annulment, “not every gap or ambiguity in a judgment constitutes a failure to state reasons.”<sup>150</sup> “Statements have to be read in context. The ‘reasons’ for a position or a statement may be found in the developments that follow.”<sup>151</sup> This observation is of particular relevance in the case at hand given that the Award is constituted by five Decisions, plus a Decision on Provisional Measures. To determine whether the Tribunal failed to state the reasons that led to its decisions, the Committee must read the Award in context.
166. As regards the issue of implicit reasons, the Committee observes that the premises leading to a decision may be either implicit or explicit. What is paramount is that the Tribunal’s conclusions follow from a set of premises. Furthermore, as noted by the committee in *Wena*:

Neither Article 48(3) nor Article 52(1)(e) specify the manner in which the Tribunal’s reasons are to be stated. The object of both provisions is to ensure that the Parties will be able to understand the Tribunal’s reasoning. This goal does not require that each reason be stated expressly. The Tribunal’s reasons may be implicit in the considerations and conclusions contained in the award, provided they can be reasonably inferred from the terms used in the decision.<sup>152</sup>

167. As regards the issue of “frivolous” reasons, the Committee is of the view that irrelevant or absurd arguments apparently supporting a conclusion do not amount to reasons.<sup>153</sup> The determination on whether an argument is “frivolous” depends on the circumstances of each case.
168. As regards the issue of “non-contradictory reasons,” *ad hoc* committees have considered that contradictory reasons might result in annulment under Article 52(1)(e).<sup>154</sup> Some

---

<sup>150</sup> *Amco Asia Corp. and Others v. Republic of Indonesia* (“Amco II”), ICSID Case No. ARB/81/1, Decision on Annulment of Award of June 5, 1990 and of Supplemental Award of October 17, 1990, December 3, 1992, ¶ 7.56 (AALA-074).

<sup>151</sup> *Amco Asia Corp. and Others v. Republic of Indonesia* (“Amco II”), ICSID Case No. ARB/81/1, Decision on Annulment of Award of June 5, 1990 and of Supplemental Award of October 17, 1990, December 3, 1992, ¶ 7.57 (AALA-074).

<sup>152</sup> *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Annulment Proceeding, February 5, 2002, ¶ 81 (AALA-046).

<sup>153</sup> Christoph H. Schreuer, *The ICSID Convention – A Commentary* (2nd ed.), Cambridge University Press 2009, ¶ 344 (CAA-067).

<sup>154</sup> *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *ad hoc* Committee on the Application for Annulment of Mr. Soufraki, June 5, 2007, ¶¶ 122-126 (AALA-039).

committees have concluded that for there to be a “failure to state reasons”, the reasons must be so contradictory that they “cancel each other out.”<sup>155</sup>

169. The Committee considers that although contradictory reasons could amount to a failure to state reasons, such assessment should not be one of coherence of the Tribunal’s reasoning. That approach could easily derive in an assessment of the quality of the Tribunal’s reasons. For the Committee, a failure to state reasons may take place when two (or more) contradictory premises supporting a conclusion cannot stand together and cannot both be true. Furthermore, such failure must be critical to the Tribunal’s decision. The fact that a tribunal fails to state reasons on a minor and inconsequential issue is not enough to annul an award or a part thereof under Article 52(1)(e).
170. In sum, a decision is reasoned when the Tribunal’s conclusions clearly follow from a set of either express or implicit premises. If there are no reasons supporting a conclusion, or a conclusion is based on contradictory premises, an award or any part thereof is annulable under Article 52(1)(e) of the ICSID Convention.

#### **IV. THE SPECIFIC GROUNDS ON ANNULMENT**

171. In the Annulment Application, Ecuador requests the annulment of the Award or parts of it under twenty-one (21) “specific grounds on annulment”. Ecuador claims that twenty-one of the Tribunal’s findings in the Award or the Decisions should be annulled under one or more grounds provided in Article 52(1) of the ICSID Convention.
172. Both in the Memorial on Annulment and the Reply on Annulment, the Applicant raised twenty (20) specific grounds on annulment; it did not include the specific ground raised in the Annulment Application titled: “The Tribunal manifestly exceeded its powers when it decided that the notion of environmental harm is defined by reference to permissible limits.”<sup>156</sup> Likewise, at the Hearing, Ecuador expressly stated that it raised “20 grounds for annulment.”<sup>157</sup> Accordingly, the Committee understands that Ecuador declined to pursue said specific ground and therefore the Committee does not address such ground in the present decision.

---

<sup>155</sup> *Klöckner v. Republic of Cameroon*, ICSID Case No. ARB/81/2, Decision of the *ad hoc* Committee on the Application for Annulment submitted by Klöckner, May 3, 1985, ¶ 116 (AALA-049). *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision of the *ad hoc* Committee, March 25, 2010, ¶ 82 (AALA-086); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Argentine Republic’s Request for Annulment of the Award rendered on August 20, 2007, August 10, 2010, ¶ 65 (CAA-070).

<sup>156</sup> Application on Annulment, ¶¶ 195-201.

<sup>157</sup> Tr. Day 1 January 12, 2021, 16:7.

173. For the purpose of clarity and consistency, the Committee has classified the specific grounds on matters related to (a) jurisdiction, (b) merits, (c) damages, and (d) counterclaim.
174. For the sake of efficiency, the Committee classifies Ecuador’s claims on the Tribunal’s findings that “Decree 662 breached the Participation Contracts”, and that “Decree 662 and ensuing measures breached Article 4 of the Treaty” under the same category.<sup>158</sup>

**A. GROUNDS RELATED TO THE TRIBUNAL’S FINDINGS ON JURISDICTION**

**(1) Grounds on the Tribunal’s finding that the Treaty extends jurisdiction to a company only indirectly controlled by French nationals**

**a. The Parties’ Position**

**(i) Applicant’s Position**

175. Ecuador contends that, notwithstanding the text of Article 9(2) of the Treaty, the Tribunal asserted its jurisdiction on the basis of Article 1(3)(ii) of the Treaty. By so doing, the Tribunal manifestly exceeded its powers and failed to state the reasons on which the Award is based.
176. As to the manifest excess of powers, Ecuador argues that the Tribunal founded its jurisdiction on an incorrect and incoherent interpretation of the Treaty’s provisions. The Tribunal asserted its jurisdiction on the basis of Article 1(3)(ii) of the Treaty, despite Article 9(2) of the Treaty which requires that the shares of a company incorporated in the host State be held in majority by a national or a juridical person of the other Contracting Party. With this finding, the Tribunal failed to abide by its duty to read the Treaty as a whole and to ensure its effectiveness. Therefore, the Tribunal manifestly exceeded its powers.<sup>159</sup>
177. As to the failure to state reasons, Ecuador states that the Tribunal’s reasoning is limited to ambiguous and unsupported assertions and provides no explanation as to why it discarded Ecuador’s key argument, i.e., that Perenco’s proposed interpretation of the Treaty results in a manifest inconsistency of the Treaty “whereby indirectly-controlled foreign companies benefit from rights under the Treaty pursuant to Article 1(3)(ii), but are unable to invoke the jurisdiction of the Centre to protect these rights pursuant to Article 9(2)”.<sup>160</sup>
178. Ecuador thereby requests the annulment of “the decision that the Treaty extends jurisdiction to a company only indirectly controlled by French nationals,” “along with the

---

<sup>158</sup> See Section IV.B.3.

<sup>159</sup> Memorial on Annulment, ¶¶ 233-235.

<sup>160</sup> Memorial on Annulment, ¶ 247.



entirety of the Award itself, as the entirety of the Award is premised on the Tribunal's supposed jurisdiction over Perenco."<sup>161</sup>

## **(ii) Perenco's Position**

179. Perenco contends that Ecuador's claim that the Tribunal manifestly exceeded its powers and failed to state reasons in finding that the Treaty extends jurisdiction to companies indirectly controlled by French nationals has no merit. The Tribunal had the power to interpret the Treaty and it provided clear reasons explaining why the unqualified term "controlled" in Article 1(3) covered both direct and indirect control.<sup>162</sup>
180. As to the manifest excess of powers, Perenco stresses that Ecuador's contention that the Tribunal found its jurisdiction on an "incorrect and incoherent interpretation of the Treaty" and therefore exceeded its powers, is flawed and concedes that the Tribunal applied, or endeavored to apply, the applicable body of law, i.e., the Treaty.<sup>163</sup> Errors of law are not a manifest excess of powers, including when it comes to jurisdiction. The contrary would allow the Committee to consider the Tribunal's jurisdiction *de novo* and assume the role of an appellate body.<sup>164</sup>
181. In any event, the Tribunal's interpretation of the Treaty was tenable and was correct. The Tribunal founded its jurisdiction based on the ordinary meaning of the terms in Articles 3 and 1(3) of the Treaty and in light of the Treaty's object and purpose. It also considered the Treaty's *travaux préparatoires* and the Parties' submissions.<sup>165</sup> "Article 1(3)(ii) in conjunction with Article 9(2)" does not change the analysis. As found by the Tribunal, Article 9(2) is "a special rule that, consistent with Article 25(2)(b) *in fine* of the ICSID Convention, is intended to extend ICSID jurisdiction to instances where a national of the State party to the dispute would otherwise have no standing to bring a claim against its own State."<sup>166</sup> Article 9(2) does not provide for the meaning of the general definitions in Article 1(3). Moreover, Ecuador does not demonstrate how any such excess of powers would be 'manifest'.<sup>167</sup>
182. As to the failure to state reasons, Perenco contends that the Tribunal provided reasons for rejecting Ecuador's objection that reading Article 1(3) to encompass indirect control results in a manifest inconsistency of the Treaty.<sup>168</sup> Even under the *Klöckner I* standard, it is

---

<sup>161</sup> Memorial on Annulment, ¶ 250.

<sup>162</sup> Counter-Memorial on Annulment, ¶ 102.

<sup>163</sup> Counter-Memorial on Annulment, ¶ 103.

<sup>164</sup> Counter-Memorial on Annulment, ¶ 104.

<sup>165</sup> Counter-Memorial on Annulment, ¶¶ 107-109.

<sup>166</sup> Counter-Memorial on Annulment, ¶ 110.

<sup>167</sup> Counter-Memorial on Annulment, ¶¶ 111-113.

<sup>168</sup> Counter-Memorial on Annulment, ¶ 114.

possible to “discern how and why the Tribunal could reach its decision on this point,” as it explained: (i) why the ordinary meaning of the unqualified word “controlled” encompasses indirect control, (ii) why Article 9(2) expands ICSID jurisdiction in the specific factual setting of a legal entity of the host State seeking to claim against its own State, and (iii) why it makes more sense to apply the general Article 1 definitions throughout the Treaty and the specific test of control under Article 9(2) in the specific situation envisaged therein.<sup>169</sup>

183. Therefore, the Tribunal neither manifestly exceeded its powers in finding that the Treaty extends jurisdiction to companies indirectly controlled by French nationals, nor failed to state its reasons for doing so.

#### **b. The Committee’s Analysis**

184. The Applicant claims that by deciding that the Treaty extends to a company only indirectly controlled by French nationals, the Tribunal manifestly exceeded its powers and failed to state the reasons for its decision.
185. As to the manifest excess of powers, Ecuador’s argument is based on the premise that the Tribunal incorrectly applied the law, not that the Tribunal did not apply the proper law.<sup>170</sup> As analyzed in Section III.B.2, the Committee considers that to determine whether the Tribunal manifestly exceeded its powers it must examine whether the Tribunal properly identified the applicable law and endeavored to apply such law.
186. It is undisputed between the Parties that the Treaty is the applicable law to the Tribunal’s jurisdiction. It is also undisputed that to decide on its jurisdiction, the Tribunal identified and applied the Treaty. Based on its interpretation of the Treaty, the Tribunal concluded that:<sup>171</sup>

Having regard to the fact that the text of the applicable provision of the Treaty refers simply to ‘controlled’, the Tribunal is persuaded by the fact that the formal transfer of the shares of the late Mr. Hubert Perrodo to his heirs was an administrative or ministerial act. It is true that it occurred after the consent to ICSID arbitration was given, but it is also true that it could have occurred at any time after the heirs became the owners of the estate under French law, and that occurred at the time of death, namely, 29 December 2006, over 10 months prior to the giving of consent.

Moreover, the evidence of French control is so substantial, so compelling and un-contradicted that it is the Tribunal’s view that in the circumstances of this case, it is most consonant with the approach taken by international

---

<sup>169</sup> Counter-Memorial on Annulment, ¶ 116.

<sup>170</sup> Memorial on Annulment, ¶¶ 236-245.

<sup>171</sup> Decision on Jurisdiction, ¶¶ 69-73 (AAE-033); Decision on Jurisdiction and Liability, ¶¶ 509-530 (AAE-163).

law to give weight to the fact of Bahamian law's recognition that the heirs owned the shares as a matter of French law and as a result they had beneficial ownership of the shares as a matter of Bahamian law prior to their formal re-registration in the names.<sup>172</sup>

187. It is not on the Committee to examine whether the Tribunal's interpretation of the Treaty was correct or incorrect. That assessment would be equivalent to an appeal and to a *de novo* review of the Tribunal's jurisdiction, which is beyond the Committee's powers under the ICSID Convention. Thus, the Committee finds no ground to conclude that the Tribunal manifestly exceeded its powers.
188. As to the failure to state reasons, Ecuador argues that the Tribunal provided no explanation on why it discarded its key argument on the matter, namely that Article 9(2) of the Treaty expressly excludes from ICSID jurisdiction entities that are incorporated under the laws of the Contracting Party and that are not directly owned in majority by national or legal entities of the other Contracting Party. For Ecuador, when reading Article 1(3) in conjunction with Article 9(2), the "only plausible interpretation is that Article 1(3) requires direct ownership, as opposed to indirect interest in the company."<sup>173</sup> Ecuador further claims that the Tribunal failed to engage with Ecuador's proposition that Perenco's reading of the Treaty results in a manifest internal inconsistency of the Treaty "whereby indirectly-controlled foreign companies benefit from rights under the Treaty pursuant to Article 1(3)(ii), but are unable to invoke the jurisdiction of the Centre to protect these rights pursuant to Article 9(2)."<sup>174</sup>
189. The Committee is not persuaded by Ecuador's position and finds that the Tribunal expressly addressed Ecuador's alleged "key argument" and explained the reasons for rejecting it.
190. In the Decision on Jurisdiction, the Tribunal upheld Claimant's characterization of Article 9(2) by concluding that it is "as special rule that, consistent with Article 25(2)(b) *in fine* of the ICSID Convention, is intended to extend ICSID jurisdiction to instances where a national of the State party to the dispute would otherwise have no standing to bring a claim against its own State."<sup>175</sup> The Tribunal then rejected Ecuador's interpretation of the Treaty by concluding that:

The Tribunal does not agree with the Respondents that the Article 9, second paragraph, test of control must be read back into and dictate the meaning of the general definitions of Article 1. While the Respondents disavowed any intent to extrapolate the rules applicable to Article 25(2)(b)

---

<sup>172</sup> Decision on Jurisdiction and Liability, ¶¶ 528-529 (AAE-163).

<sup>173</sup> Memorial on Annulment, ¶¶ 239-240.

<sup>174</sup> Memorial on Annulment, ¶ 247.

<sup>175</sup> Decision on Jurisdiction, ¶ 71 (AAE-033).

*in fine* to the more general definitions contained in Article 1, in the Tribunal's view, this is what the objection does. It seems more plausible to apply the Article 1 definitions throughout the Treaty and, when it comes to Article 9 and the special situation envisaged there, to apply that article's specific test of control to a juridical person that is a national of the host State that seeks to claim against its own State. The Tribunal sees no absurdity in this interpretation, nor does it see, to use the Respondents' words, an "internal inconsistency" in the Treaty resulting from such an interpretation.

Given Article 9's purpose, it is reasonable for the Contracting Parties to require that foreign control be established in a particular way, in this case choosing to do so by requiring that a majority of the shares of the local company belong to nationals or a juridical person of a Contracting Party other than the respondent party. But it does not follow inexorably that the requirements of Article 9 must dictate the interpretation of Article 1. Accordingly, the first limb of the Respondents' objection is dismissed."<sup>176</sup>

191. The Committee observes that the Tribunal clearly explained the reasons for its decision to interpret the Treaty in the sense proposed by the Claimant and to reject Ecuador's interpretation of the Treaty. The fact that the Applicant disagrees with the Tribunal's reasoning or considers that more reasons should have been given is not a ground to annul the Award under Article 52(1)(e) (See Section III.D.2).
192. Consequently, the Committee finds that the Tribunal neither manifestly exceeded its powers nor failed to state reasons for its decision that the Treaty extends jurisdiction to a company only indirectly controlled by French nationals.

**(2) Grounds on the Tribunal's finding that Perenco was controlled by French nationals**

**a. The Parties' Position**

**(i) Applicant's Position**

193. Ecuador contends that the Tribunal seriously departed from fundamental rule of procedure—its right to equal treatment—by providing Perenco with a further opportunity to attempt to establish that the Tribunal had jurisdiction *ratione personae*.<sup>177</sup>
194. Ecuador argues that by the end of the jurisdictional phase, Perenco had not been able to establish that it was an investor under the Treaty.<sup>178</sup> However, instead of denying jurisdiction, the Tribunal provided Perenco with a further opportunity to attempt to establish that the Tribunal had jurisdiction *ratione personae* even though Perenco had had

---

<sup>176</sup> Decision on Jurisdiction, ¶¶ 72-73 (AAE-033).

<sup>177</sup> Memorial on Annulment, ¶¶ 254, 258-259

<sup>178</sup> Memorial on Annulment, ¶ 251.

more than three years to do so.<sup>179</sup> What is more, the Tribunal advised Perenco of the issues it needed to prove and the evidence it needed to adduce in order for the Tribunal to find jurisdiction.<sup>180</sup> It was only on the basis of the evidence subsequently adduced by Perenco “that the Tribunal was able to find in its Decision on Jurisdiction and Liability that the evidence of French control was so ‘substantial, so compelling and un-contradicted’ that is compelled the dismissal of Ecuador’s objection to jurisdiction *ratione personae*.”<sup>181</sup>

195. Ecuador does not contest that it was given the opportunity to discuss the new arguments and evidence adduced by Perenco. Instead, it submits that it was manifestly unfair to grant Perenco an additional opportunity to correct its case—a treatment that was not accorded to Ecuador.<sup>182</sup>
196. Accordingly, Ecuador requests the annulment of “the decision that Perenco was controlled by French nationals [...], along with the entirety of the Award itself, as the entirety of the Award is premised on the Tribunal’s supposed jurisdiction over Perenco.”<sup>183</sup>

#### **(ii) Perenco’s Position**

197. Perenco objects Ecuador’s claim that the Tribunal seriously departed from a fundamental rule of procedure by providing “Perenco with a further opportunity to establish that the Tribunal had jurisdiction *ratione personae* during the merits phase.”<sup>184</sup> As Ecuador acknowledges, it had “the opportunity to discuss the new arguments and evidence adduced by Perenco.”<sup>185</sup>
198. It was within the Tribunal’s powers to call on both Parties to produce additional evidence and Ecuador admits that it had the opportunity to be heard about that evidence. There are no rules of procedure in ICSID preventing the Tribunal from ordering Perenco to produce further evidence of French control and joining jurisdictional issues to the merit. Conversely, Articles 42(2) and 43 of the ICSID Convention, and Arbitration Rule 19 confer broad powers to the Tribunal to, at any stage of the proceedings, consider jurisdictional issues or call upon the parties to produce documents or other evidence.<sup>186</sup>
199. Perenco counters Ecuador’s proposition that the Tribunal’s conduct was “unfair”. Perenco provided additional evidence of French control four months prior to Ecuador’s Counter-

---

<sup>179</sup> Memorial on Annulment, ¶ 252.

<sup>180</sup> Memorial on Annulment, ¶ 253.

<sup>181</sup> Memorial on Annulment, ¶ 254.

<sup>182</sup> Memorial on Annulment, ¶ 258.

<sup>183</sup> Memorial on Annulment, ¶ 260.

<sup>184</sup> Counter-Memorial on Annulment, ¶ 118.

<sup>185</sup> Counter-Memorial on Annulment, ¶ 118.

<sup>186</sup> Counter-Memorial on Annulment, ¶ 119.

Memorial, so as to allow Ecuador sufficient time to address such evidence in its pleading. Ecuador addressed that additional evidence in its Counter-Memorial on Liability, in its Rejoinder on Liability, through two expert reports on Bahamian law, and through cross-examination of Perenco's witnesses and experts at the hearing. In its Decision on Jurisdiction and Liability, the Tribunal carefully considered and rejected Ecuador's arguments and evidence.<sup>187</sup> Likewise, in the Decision on Reconsideration, the Tribunal rejected Ecuador's complaints by noting, among other, that both Parties were given the opportunity over two rounds of written pleadings to adduce further factual and expert evidence and to make submissions.<sup>188</sup>

200. Ecuador conveniently omits that the Tribunal also deferred certain issues and called for more evidence with respect to Ecuador's own counterclaim. If requesting additional information is an annulable error, then the counterclaim phase should never have taken place and the record should rest on the Tribunal's finding that Ecuador's counterclaims failed.<sup>189</sup>
201. Finally, even if the Committee were to find an annulable error, the Committee cannot annul the entirety of the Award. The Award is not just premised on the Tribunal's Treaty jurisdiction over Perenco. It is also premised on the Tribunal's jurisdiction pursuant to the participation contracts for Blocks 7 and 21 (the "**Participation Contracts**").<sup>190</sup>

#### **b. The Committee's Analysis**

202. Ecuador contends that the Tribunal seriously departed from a fundamental rule of procedure by according unequal treatment to the Parties by requesting Perenco to present evidence to demonstrate "(i) that the shares of what is now called Perenco International Limited in fact form part of the estate under French law and are being or will be distributed to the heirs of Mr. Perrodo in accordance with that law; and (ii) the means and instrument(s) through which the heirs have exercised control over the Claimant."<sup>191</sup> According to the Applicant, it was manifestly unfair that, after a full jurisdictional phase, the Tribunal allowed Perenco to correct its jurisdictional case, by indicating specifically the points that needed to be evidenced further.<sup>192</sup> What is more, the Tribunal did not accord the same opportunity to Ecuador.<sup>193</sup>

---

<sup>187</sup> Counter-Memorial on Annulment, ¶¶ 119, 124.

<sup>188</sup> Counter-Memorial on Annulment, ¶ 125.

<sup>189</sup> Counter-Memorial on Annulment, ¶ 126.

<sup>190</sup> Counter-Memorial on Annulment, ¶ 127.

<sup>191</sup> Decision on Jurisdiction, ¶ 106 (AAE-033).

<sup>192</sup> Memorial on Annulment, ¶ 255.

<sup>193</sup> Memorial on Annulment, ¶ 256.

203. In relation to the treatment accorded to the Parties, the Committee will analyze: (i) the Tribunal's powers under the ICSID Convention to request evidence from the Parties' *sua sponte* and the Tribunal's opportunity to do so; (ii) whether the Tribunal accorded Ecuador an opportunity to comment on the evidence presented by the Claimant in relation to the indirect control of Mr. Perrodo's heirs over Perenco; and (iii) whether the Tribunal unfairly gave Perenco an opportunity that it did not afford Ecuador in similar circumstances.
204. As to the first issue, the Committee remarks that under Rule 34(2) of the Arbitration Rules, "[t]he Tribunal may, if it deems it necessary at any stage of the proceeding: (a) call upon the parties to produce documents, witnesses and experts [...]." This rule clearly states that the Tribunal is empowered to request evidence from the Parties *sua sponte* and that it can do so "at any stage of the proceeding", as long as it deems it necessary.
205. In the Decision on Jurisdiction, the Tribunal expressly stated that:
- It has not yet arrived at a conclusion on whether the deletion of the words "directly or indirectly" could have the effect ascribed to it by the Respondents or whether it is necessary to consult supplementary materials in order to determine the meaning of Article 1(3)(ii). It has decided that it requires further evidence and submissions before it determines the Claimant's standing to invoke the Treaty.<sup>194</sup>
206. Following that statement, the Tribunal invited both Parties to produce evidence on the Treaty's negotiating history in France's possession. Likewise, the Tribunal requested the Claimant to produce certain evidence on the alleged indirect control of Mr. Perrodo's heirs over the Claimant.<sup>195</sup>
207. The Committee considers that although the jurisdictional phase had already concluded, nothing precluded the Tribunal from leaving certain jurisdictional matters to a subsequent phase in the proceeding and from requesting evidence to the Parties at that point of the proceeding. That is all the more since the Tribunal had explicitly decided to join certain jurisdictional issues to the merits.<sup>196</sup> In this perspective, Rule 34(2) expressly provides that a Tribunal may request evidence to the Parties "at any stage of the proceeding." The Committee is of the view that the Tribunal has wide discretion to request to the Parties the evidence that it considers necessary, and therefore, depending on the circumstances of each case, it may request evidence to one party or both Parties. As explained by the Tribunal in its Decision on Reconsideration:

It is not unusual for tribunals to defer consideration of jurisdictional objections pending a further development of the evidentiary record and

---

<sup>194</sup> Decision on Jurisdiction, ¶ 86 (AAE-033).

<sup>195</sup> Decision on Jurisdiction, ¶¶ 94, 105-106 (AAE-033).

<sup>196</sup> Decision on Jurisdiction, ¶ 86 (AAE-033).

tribunals commonly join jurisdictional issues to the merits, as indeed the Tribunal did in the instant case. Thus, the Decision on Jurisdiction did not signal the end of the jurisdictional phase. Having reflected on the parties' submissions and the evidence, the Tribunal decided it was appropriate to provide both parties with a further opportunity to address certain issues in respect of which the Tribunal was not yet prepared to rule.<sup>197</sup>

208. As to the second issue, the Committee observes that Ecuador had ample opportunity to rebut the evidence and arguments submitted by the Claimant following the Tribunal's request. In fact, Ecuador acknowledges "that it was given the opportunity to discuss the new arguments and evidence adduced by Perenco in support of its jurisdictional case."<sup>198</sup> As noted by the Tribunal in its Decision on Reconsideration:

Both parties were [...] given the opportunity over two rounds of written pleadings to adduce further factual and expert evidence and to make submissions. With respect to questions of Bahamian law, both sides adduced expert evidence on questions such as the status of shares owned by an individual who died intestate and the steps required under Bahamian law to effect the transfer of title to the shares. Both parties also addressed the Treaty's negotiating history, with Ecuador urging the Tribunal to pay particularly close attention to the evolution of the relevant provisions (as recorded in paragraphs 492 to 499 of the Decision), while Perenco's main argument was that the plain meaning of the text prevailed, and further that the negotiating history was too fragmentary and incomplete to be reliable.<sup>199</sup>

209. Thirdly, Ecuador's case is mainly based on the allegation that the Tribunal did not accord the same opportunity to Ecuador. The Committee observes that the Applicant's allegation is made in the abstract; namely, that the Tribunal did not accord to Ecuador the opportunity to present its case with evidence specifically requested by the Tribunal, as it did with Perenco. Equal opportunity is not "same number of opportunities." In any event, for the sake of discussion, the opportunity that the Tribunal granted to the Claimant as regards Perenco's French control is similar to the opportunity granted to Ecuador as regards the environmental counterclaim, as explained below.
210. Akin to the Decision on Jurisdiction, in the Decision on the Environmental Counterclaim, the Tribunal concluded that it was not yet prepared to rule given the significant gaps between the Parties' experts and therefore informed the Parties of its intention "to appoint its own independent environmental expert."<sup>200</sup> The Tribunal explained that: although it had "arrived at the point where it narrowed the counterclaim on the principal issues of law and fact," "with regard to many of the IEMS/GSI differences, the Tribunal does not feel able

---

<sup>197</sup> Decision on Reconsideration, ¶ 91 (AAE-139).

<sup>198</sup> Memorial on Annulment, ¶ 258.

<sup>199</sup> Decision on Reconsideration, ¶ 92 (AAE-139).

<sup>200</sup> Decision on the Environmental Counterclaim, ¶ 587 (AAE-106).



to prefer one above the other.”<sup>201</sup> “Accordingly, the Tribunal has concluded that it must require an additional phase of fact-finding in order to arrive at a proper and just conclusion. It is not content to issue a final determination on the extent of Perenco’s liability on the basis of the current expert reports.”<sup>202</sup>

211. The Committee remarks that the Tribunal decided to take this choice after acknowledging that:

The Tribunal well understands that the onus of proof is on a party who makes an allegation and it could be said that because of the doubt in which the Tribunal finds itself Ecuador could be said to have failed in tipping the burden in its favour. However, as the Tribunal is satisfied that there has been some damage for which it seems likely that Perenco is liable, the Tribunal is not disposed to dismiss the counterclaim *in limine*.<sup>203</sup>

212. Based on the foregoing reasons, the Committee concludes that there are no reasons to believe that the Tribunal seriously departed from a fundamental rule of procedure.

**(3) Grounds on the Tribunal’s finding that it had jurisdiction over Perenco’s claims that *caducidad* breached the Block 21 Participation Contract**

**a. The Parties’ Position**

**(i) Applicant’s Position**

213. Ecuador contends that the Tribunal’s decision to assert its jurisdiction over Perenco’s claim that Ecuador breached the Block 21 Participation Contract when it declared *caducidad* is a manifest excess of powers, a failure to state reasons, and a serious departure from a fundamental rule of procedure.
214. As to the manifest excess of powers, Ecuador argues that the dispute regarding the *caducidad* declaration was a legal one and therefore fell outside the scope of the arbitration agreement contained in Annex XVI of the Block 21 Participation Contract, which was limited to the resolution of technical and/or economic disputes.<sup>204</sup> The Tribunal not only found that it was sufficient for there to be “economic consequences,” but also omitted to apply the requirement set out in the arbitration agreement that the dispute must be one “arising out of the application of the Participation Contract.” Thus, it is clear that the Tribunal failed to apply the arbitration agreement between the Parties and therefore, in asserting its jurisdiction, the Tribunal acted in a manifest excess of powers.

---

<sup>201</sup> Decision on the Environmental Counterclaim, ¶ 581(AAE-106).

<sup>202</sup> Decision on the Environmental Counterclaim, ¶ 586 (AAE-106).

<sup>203</sup> Decision on the Environmental Counterclaim, ¶ 585 (AAE-106).

<sup>204</sup> Memorial on Annulment, ¶ 261.

215. As to the departure from a fundamental rule of procedure, Ecuador states that the Tribunal denied its right to be heard, considering that the Tribunal upheld jurisdiction over Perenco’s contractual *caducidad* claim on the basis of the “economic consequences” test, not previously advanced or discussed by either of the Parties.<sup>205</sup>
216. As to the failure to state reasons, Ecuador claims that, with its holding in the Decision on Jurisdiction and Liability, the Tribunal contradicted previous findings in its Decision on Jurisdiction. First, the Tribunal contradicted its holding that it did not have jurisdiction *ratione materiae* over Perenco’s allegation that Ecuador violated the Ecuadorian Constitution—and thereby its obligations under the Participation Contracts—by the enactment of Law 42 because such allegation concerned “essentially legal matters.”<sup>206</sup> Second, it contradicted its previous finding that the arbitration agreement is conditional on two requirements: (i) the dispute being of a technical or economic nature, and (ii) the dispute arising out of the application of the Block 21 Participation Contract. Ecuador claims that the contradiction is such that the Tribunal’s reasons cancel each other out, amounting to a failure to state reasons.
217. For the above reasons, Ecuador requests the annulment of the decision to assert jurisdiction over Perenco’s claim that Ecuador breached the Block 21 Participation Contract when it declared *caducidad*. “Accordingly, the Tribunal’s ensuing decisions to (i) uphold the claim of breach of the Block 21 Contract as a result of the declaration of *caducidad*, and (ii) order Ecuador to pay US\$448,820,400 to Perenco, insofar as it includes Perenco’s contract claims under the Block 21 Participation Contract, should also be annulled.”<sup>207</sup>

### **(ii) Perenco’s Position**

218. Perenco counters Ecuador’s claim that the Tribunal manifestly exceeded its powers, failed to state reasons, and seriously departed from a fundamental rule of procedure “by finding that Ecuador’s declaration of *caducidad* fell within the scope of the arbitration agreement in the Block 21 Participation Contract.”<sup>208</sup> Perenco submits the following argumentation:
219. As to the manifest excess of powers, although Ecuador claims that the Tribunal manifestly exceeded its powers by committing “gross errors of law” in finding that *caducidad* fell within the Contract’s arbitration agreement, errors of law—even if labelled as “gross”—are not annulable under the ICSID Convention. Ecuador neither argues that the Tribunal incorrectly identified the applicable law, i.e., Clause 20.2 and Annex XVI of the Block 21

---

<sup>205</sup> Memorial on Annulment, ¶¶ 280-282.

<sup>206</sup> Memorial on Annulment, ¶¶ 274-279.

<sup>207</sup> Memorial on Annulment, ¶ 283.

<sup>208</sup> Counter-Memorial on Annulment, ¶ 129.

Participation Contracts and Ecuadorian law, nor that the Tribunal failed to endeavor to apply that law.<sup>209</sup>

220. In any event, the Tribunal's findings were not erroneous, they were based on the language of the Participation Contract as interpreted under Ecuadorian law. The Tribunal explained that Clause 20.2 of Block 21 Participation Contract expressly provided that *caducidad* disputes fell within the scope of its arbitration provisions. The Tribunal also explained that pursuant to Annex XVI, "contractual claims advanced by Perenco that concerned a 'technical' or 'economic' dispute relating to the Block 21 Participation Contract fell within the Tribunal's jurisdiction."<sup>210</sup> Having considered these provisions and the Parties' submissions, the Tribunal determined that the Parties' dispute, including the declaration of *caducidad*, fell within the scope of the Block 21 Participation Contract's arbitration agreement because it was an "economic" dispute within the meaning of Annex XVI. In paragraphs 138, 140, 141, 142, 146, 235, 306, 315 and 316 of the Decision on Jurisdiction and Liability, the Tribunal set out in detail the reasons why it found that the dispute was "economic."<sup>211</sup>
221. As to the serious departure from a fundamental rule of procedure, Ecuador's complaint that the Tribunal violated its right to be heard by determining that *caducidad* had "economic consequences" is nonsensical. Ecuador had the opportunity to be heard and exercised it, but the Tribunal appropriately rejected its arguments as meritless. Ecuador seems to be objecting that neither party used the precise words "economic consequences" in its submissions. Yet, both parties made extensive submissions on the impact of *caducidad* and the economic consequences of the participation formula, on the economic equilibrium of the contracts, and on the economic effects of Ecuador's actions on Perenco's overall share. Also, a tribunal is not "precluded from adopting legal reasoning that was not put forward by one of the parties without first seeking the parties' opinion."<sup>212</sup> In any event, even if the Committee were to uphold Ecuador's argument, there would be no demonstrable difference in the outcome of the case given that the Tribunal found that *caducidad* breached both the Block 21 Contract and the Treaty.
222. As to the failure to state reasons, Ecuador is wrong that the Tribunal "contradicted its previous holding in its Decision on Jurisdiction" and thereby failed to state reasons for why it had jurisdiction over *caducidad*. Perenco contends that the Tribunal did state reasons for

---

<sup>209</sup> Counter-Memorial on Annulment, ¶¶ 132-133.

<sup>210</sup> Counter-Memorial on Annulment, ¶¶ 133-134.

<sup>211</sup> Counter-Memorial on Annulment, ¶ 135.

<sup>212</sup> Counter-Memorial on Annulment, ¶ 146.

its decision and there was no contradiction on its reasoning, much less contradictions genuinely amounting to a complete failure of reasoning.<sup>213</sup>

223. Ecuador’s first alleged contradiction—that the Tribunal acknowledged that “essentially legal matters” were excluded from the scope of the arbitration agreement but then failed to exclude *caducidad*—ignores the Tribunal’s finding that *caducidad* was both legal and economic in nature.<sup>214</sup>
224. Ecuador’s second alleged contradiction—that the Tribunal disregarded the requirement that the dispute arise out of the application of the Block 21 Participation Contract—ignores that the Tribunal interpreted Clause 20.2 of the Contract in conjunction with Annex XVI. On the one hand, Annex XVI provides that “technical and/or economic disputes arising out of the application of the Participation Contract” shall be resolved through ICSID arbitration. On the other hand, Clause 20.2 contains a special rule which “contemplates that a dispute regarding a declaration of caducity which is related to technical or economic aspects may be submitted to arbitration.” In the light of these provisions, the Tribunal explained that “Annex XVI does not single out caducity, placing upon the subject-matter jurisdiction of the Tribunal the sole limitation that the claim should concern a ‘technical’ or ‘economic’ dispute.”<sup>215</sup> Therefore, there are no contradictions in the Tribunal’s reasoning.

#### **b. The Committee’s Analysis**

225. Ecuador contends that the Tribunal failed to state its reasons, manifestly exceeded its powers, and seriously departed from a fundamental rule of procedure when it declared having jurisdiction over Perenco’s claim that Ecuador breached the Block 21 Participation Contract by declaring *caducidad*.
226. As regards the manifest excess of powers, Ecuador claims that in deciding that “the declaration of *caducidad* has economic consequences and therefore falls within its subject-matter jurisdiction,”<sup>216</sup> the Tribunal failed to apply the arbitration agreement. Yet, the Committee is not convinced by Ecuador’s position.
227. In the first place, the Committee notes that when deciding whether it had jurisdiction over Perenco’s contractual claim that Ecuador breached the Block 21 Participation Contract by declaring *caducidad*, the Tribunal identified the proper law applicable to its jurisdiction, that is Clause 20.2 and Annex XVI of Block 21 Participation Contract.

---

<sup>213</sup> Counter-Memorial on Annulment, ¶¶ 139-141.

<sup>214</sup> Counter-Memorial on Annulment, ¶ 141.

<sup>215</sup> Counter-Memorial on Annulment, ¶ 144.

<sup>216</sup> Decision on Jurisdiction and Liability, ¶ 316 (AAE-163).

228. In its Decision on Jurisdiction the Tribunal explained that “[w]hen the Block 21 Participation Contract was executed in 1995, Ecuador was not a Contracting Party to the ICSID Convention. This explains the language used in Clause 20.2.12 providing for the arbitration to be governed by different rules depending on whether Ecuador was or was not a Contracting Party to the ICSID Convention at the moment of the institution of the arbitral proceedings.”<sup>217</sup>

229. Annex XVI provides in its relevant parts that:

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

For the application of the Convention on the Settlement of Disputes Relating to Investments, ICSID, the following procedural rules shall also apply:

1. The Parties agree to submit to the INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES any technical and/or economic dispute relating to this Participation Contract...through the [system] of arbitration, which for all effects is hereafter referred to as “THE CENTRE.”

2. The Parties acknowledge that the object of the Participation Contract implies the making of investments, so that the ICSID Arbitration procedure is applicable to the Contract.

3. The Parties acknowledge that the Contractor’s right to submit any technical and/or economic dispute to the CENTRE shall not affect the Contractor’s ability to receive total or partial compensation from any third party in relation to any damage or loss of the object in dispute.

230. Considering that Ecuador was already a Contracting Party to the ICSID Convention when the Claimant filed its Request for Arbitration on April 30, 2008, the Tribunal concluded that the Underlying Arbitration is precisely the scenario in which the aforementioned contractual provision is applicable,<sup>218</sup> and “has to be looked at when determining the Tribunal’s competence over contractual claims.”<sup>219</sup>

---

<sup>217</sup> Decision on Jurisdiction, ¶ 127 (AAE-033).

<sup>218</sup> Decision on Jurisdiction, ¶ 128 (AAE-033).

<sup>219</sup> Decision on Jurisdiction, ¶ 130 (AAE-033).

231. The Tribunal then interpreted Annex XVI as follows:

The Tribunal is of the view that this interpretation based on the opposition of ‘legal’ versus ‘technical and/or economic’ cannot be accepted as it would result in depriving Annex XVI of its applicability in general. The ICSID Convention requires the dispute to be a legal one. [...]

The Parties to the Block 21 Participation Contract agreed, in its Annex XVI, ‘to submit to the INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES any technical and/or economic dispute relating to this Participation Contract.’ It is thus the task of the Tribunal to ascertain whether the contractual claims advanced by Perenco in this arbitration concern a ‘technical’ or ‘economic’ dispute relating to the Block 21 Participation Contract. The language ‘and/or’ suggests that the dispute does not need to be of a cumulative nature, i.e., ‘technical and economic’.<sup>220</sup>

232. In turn, in its Decision on Jurisdiction and Liability, the Tribunal concluded that:

[...] Clause 20.2 of the Block 21 Contract contemplates that a dispute regarding a declaration of caducity which is related to technical or economic aspects may be submitted to arbitration. Annex XVI does not single out caducity, placing upon the subject-matter jurisdiction [sic.] of the Tribunal the sole limitation that the claim should concern a ‘technical’ or ‘economic’ dispute.

Having regard to the Tribunal’s findings in its Decision on Jurisdiction, the Tribunal considers that the declaration of *caducidad* has economic consequences and therefore falls within its subject-matter jurisdiction. The Tribunal accordingly finds that it has jurisdiction to entertain Perenco’s claim that Ecuador breached the Block 21 Contract when it declared *caducidad*.<sup>221</sup>

233. In view of the Tribunal’s decision, Ecuador claims that the Tribunal allegedly failed to apply the proper law for two main reasons. First, because under the arbitration agreement, jurisdiction *ratione materiae* is conditioned upon a dispute being of a “technical” or “economic” nature and, therefore, it is insufficient for a dispute to have mere “economic consequences” to be covered by the arbitration agreement. And second, because the Tribunal omitted to apply the requirement that the dispute must be one “arising out of the application of the Participation Contracts,” given that the *caducidad* declaration does not arise out of the application of the Block 21 Participation Contract.<sup>222</sup>

---

<sup>220</sup> Decision on Jurisdiction, ¶¶ 134-135 (AAE-033).

<sup>221</sup> Decision on Jurisdiction and Liability, ¶¶ 315-316 (AAE-163).

<sup>222</sup> Memorial on Annulment, ¶ 268.

234. The Committee observes that although Ecuador argues that the Tribunal failed to apply the proper law, the Applicant’s contention is in fact an allegation of misapplication of the proper law, not a claim of non-application of the proper law.
235. The Tribunal identified the applicable law—Clause 20.2 and Annex XVI of the Block 21 Participation Contracts—to define its jurisdiction and endeavored to apply such law. The Committee may or may not agree with the Tribunal’s interpretation that “technical” or “economic” nature is equivalent to “economic consequences”; however, it is beyond its competence to adjudge the Tribunal’s interpretation of the arbitration agreement. By so doing, the Committee would be acting as a court of appeals. Therefore, the Committee finds no grounds to conclude that the Tribunal manifestly exceeded its powers.
236. As regards the serious departure from a fundamental rule of procedure, Ecuador contends that by *sua sponte* espousing and applying the “economic consequences” test, the Tribunal denied Ecuador the right to address and reject such test. To resolve Ecuador’s contention, the Committee will examine whether the Tribunal’s finding on the “economic consequences” fits the legal framework discussed by the Parties, so as to determine whether the Tribunal had to give an opportunity to the Parties to comment on such conclusion or not (see Section III.C.2).
237. The Committee observes that although the Parties did not incorporate in their submissions the specific words “economic consequences,” the Parties disputed at length the scope of the terms “technical and/or economic” dispute. This is clearly noted in the Tribunal’s Decision on Jurisdiction.
238. On the one hand, Ecuador claimed, *inter alia*, that:
- Under Clause 20.2 of the Contract, entitled ‘technical and/or economic arbitration,’ only ‘technical matters involving economic aspects,’ or ‘economic matters involving technical aspects’ arising out of the Block 21 Participation Contract may be submitted to ICSID arbitration. Annex XVI, which also addresses arbitration of any ‘technical and/or economic disputes,’ must be interpreted in light of Clause 20.2.<sup>223</sup>
239. On the other hand, Perenco contended, *inter alia*, that:
- Annex XVI of the Block 21 Contract permits arbitration of ‘any [...] economic dispute related to’ that Contract. [...] The language of Annex XVI, which covers ‘any’ dispute, that is either technical ‘and/or’ economic, is expansive.<sup>224</sup> [...]

---

<sup>223</sup> Decision on Jurisdiction, ¶ 110 (AAE-033).

<sup>224</sup> Decision on Jurisdiction, ¶ 117 (AAE-033).

Ecuador is wrong to rely on the narrow language of Clause 20.2 for its assertion that only ‘technical matters involving economic aspects and vice versa’ can be arbitrated under the Contract, because this language is not included in Annex XVI. First, Annex XVI expressly displaced Clause 20.2, by providing after ratification of Convention, technical and/or economic disputes shall be resolved in accordance with the provisions of the Convention, ‘thus leaving without effect the arbitration procedure set out in clause twenty of the Contract.’ [...] Second, the Parties intended that Annex XVI would replace the prior dispute resolution clause in its entirety. [...] Third, Ecuador is wrong to assert that Clause 20.2 and Annex XVI are to be read together, such that ‘technical matters involving economic aspects and vice versa’ language of Clause 20.2 defines the ‘technical and/or economic’ language of Annex XVI. According to Perenco, ‘Clause 20.2 was self-evidently meant to apply before congressional approval of the ICSID Convention, while Annex XVI was meant to apply after congressional approval of the ICSID Convention.’<sup>225</sup>

240. Furthermore, it is undisputed that both Parties presented submissions “on the impact of *caducidad* and the economic consequences of the participation formula, on the economic equilibrium of the contracts, and on the economic effects of Ecuador’s actions on Perenco’s overall share.”<sup>226</sup>
241. Thus, the Committee finds that the Tribunal’s conclusion fits within the legal framework discussed by the Parties regarding the interpretation on the scope and contours of Annex XVI. The fact that the Tribunal did not adopt the exact same position or terminology advanced by the Parties does not mean that the Tribunal created a new and unexpected legal framework that ought to be commented by the Parties. Consequently, the Committee finds that the Tribunal did not seriously depart from Ecuador’s right to be heard.
242. As regards the failure to state reasons, Ecuador claims that by contradicting its previous findings, the Tribunal failed to state the reasons for its finding that it had jurisdiction over Perenco’s contractual claim regarding Ecuador’s breach of Block 21 Participation Contract by the *caducidad* declaration.
243. As regards the first alleged contradiction, Ecuador claims that in the Decision on Jurisdiction, the Tribunal concluded that “essentially legal matters” were excluded from the scope of the arbitration agreement; however, in the Decision on Jurisdiction and Liability, the Tribunal failed to exclude *caducidad*. Nonetheless, the Committee finds no contradiction in the Tribunal’s Decisions, much less a contradiction tantamount to a failure to state reasons that gives rise to annulment as explained in Section III.D.2.

---

<sup>225</sup> Decision on Jurisdiction, ¶¶ 118-120 (AAE-033).

<sup>226</sup> Counter Memorial on Annulment, ¶ 146.



244. The Committee observes that even though the Tribunal indeed reasoned that “essentially legal matters” were excluded from the scope of the arbitration agreement, neither in its Decision on Jurisdiction nor in any other decision, the Tribunal concluded that *caducidad* was “essentially a legal matter” so as to clearly contradict its subsequent decision not to exclude the *caducidad* declaration from the scope of the arbitration agreement. To the contrary, as explained above, the Tribunal found that the dispute related to the *caducidad* declaration was both legal and economic.
245. As regards the second alleged contradiction, Ecuador submits that in its Decision on Jurisdiction, the Tribunal concluded that the arbitration agreement was conditional on “(i) being of a technical or economic nature, and (ii) arising out of the application of the Block 21 Participation Contract.”<sup>227</sup> Yet, in the Decision on Jurisdiction and Liability, the Tribunal concluded that the sole condition for its jurisdiction *ratione materiae* was that a claim concerns a “technical” or “economic” dispute. For Ecuador, these contradictory reasons amount to failure to state reasons.
246. The Committee is not persuaded by Ecuador’s argument. In its Decision on Jurisdiction and Liability, the Tribunal explained that Clause 20.2 of Block 21 Participation Contract expressly “states that if a caducity proceeding has been initiated, and the cause is related to technical or economic aspects, and the parties ‘have differing views’, either party may submit the matter to arbitration.”<sup>228</sup> Annex XVI provides that “technical and/or economic disputes arising out of the application of the Participation Contract” shall be resolved according to the provisions of the ICSID Convention.<sup>229</sup> Following this conclusion, the Tribunal then recalled that “[in its Decision on Jurisdiction] the Tribunal found that Annex XVI had to be considered when determining the scope of its *ratione materiae* competence over contractual claims.”<sup>230</sup> The Tribunal then emphasized that Annex XVI did not single out *caducidad* from the scope of the arbitration agreement—contrary to Clause 21.3 of the Block 7 Participation Contract<sup>231</sup>—, “placing upon the subject-matter jurisdiction of the Tribunal the sole limitation that the claim should concern a ‘technical’ or ‘economic’ dispute.”<sup>232</sup>
247. The Committee stresses that the Tribunal’s decision must be read as whole and in context. Read in isolation, the last sentence in paragraph 315 might indicate that the Tribunal disregarded the requirement that the dispute be one “arising out of the application of the Participation Contract.” Yet, it is enough to read the previous paragraph (para. 314),

---

<sup>227</sup> Memorial on Annulment, ¶¶ 276-278.

<sup>228</sup> Decision on Jurisdiction and Liability, ¶ 314 (AAE-163).

<sup>229</sup> Decision on Jurisdiction and Liability, ¶ 314 (AAE-163).

<sup>230</sup> Decision on Jurisdiction and Liability, ¶ 315 (AAE-163).

<sup>231</sup> Decision on Jurisdiction and Liability, ¶ 312 (AAE-163).

<sup>232</sup> Decision on Jurisdiction and Liability, ¶ 315 (AAE-163).

quoting Annex XVI, to understand that the Tribunal acknowledges that the dispute must be technical and/or economical, and be one arising out of the application of the Participation Contract. Furthermore, the Tribunal did not expressly reject the latter criterion so as to conclude that there is a clear contradiction between the Tribunal's decisions.

248. Therefore, the Committee finds no contradictions in the Tribunal's reasoning and therefore it finds no ground to conclude that the Tribunal failed to state the reasons for its finding on jurisdiction.

**B. GROUNDS ON THE TRIBUNAL'S FINDINGS ON THE MERITS**

**(1) Grounds on the Tribunal's finding that Ecuador's non-compliance with the Provisional Measures amounted to a breach of contract**

**a. The Parties' Position**

**(i) Applicant's Position**

249. Ecuador claims that the Tribunal failed to state reasons when, in its Decision on Jurisdiction and Liability, it concluded that Ecuador had breached the Participation Contracts by not complying with the Tribunal's Decision on Provisional Measures.
250. Pursuant to Clause 22.2.2 of the Participation Contracts, the Parties "agreed that they would comply not only with a final award (i.e., in Spanish, the '*laudo*' issued by a tribunal), but in addition, they would observe and comply with the decisions (i.e., in Spanish, the '*decisiones*') of the tribunal."<sup>233</sup> Yet, nowhere in its reasoning, did the Tribunal address Ecuador's key argument: that the Tribunal's recommendation in the Decision on Provisional Measures did not amount to "decisions" for the purposes of Clause 22.2 of the Participation Contracts. Furthermore, the Tribunal's decision contradicts its previous Decision on Provisional Measures, in which it expressly stated that the provisional measures were "recommendations."<sup>234</sup>
251. Based on the above reasons, Ecuador requests the annulment of the Tribunal's decision to uphold Perenco's claim of breach of Contract in respect of Law 42 at 99%, and "the Tribunal's ensuing decision to order Ecuador to pay US\$448,820,400 to Perenco, insofar as it includes Perenco's breach of Contract claim."<sup>235</sup>

**(ii) Perenco's Position**

---

<sup>233</sup> Memorial on Annulment, ¶ 285.

<sup>234</sup> Memorial on Annulment, ¶ 295.

<sup>235</sup> Memorial on Annulment, ¶ 299.

252. Perenco contends that the Tribunal did not fail to state reasons when finding that Ecuador's violations of the Decision on Provisional Measures breached its obligation under the Participation Contracts to comply with the Tribunal's decisions.<sup>236</sup>
253. Contrary to Ecuador's assertion that the Tribunal did not explain how its Decision on Provisional Measures amounted to a decision covered under Clause 22.2 of the Participation Contract, the Tribunal did provide reasons for finding that the Decision on Provisional Measures was a "decision." In fact, the Tribunal rejected Ecuador's argument that "decisions" only included awards. In any event, Ecuador's complaint does not meet the high threshold to establish a failure to state reasons.<sup>237</sup>
254. Ecuador claims that the Tribunal's finding that the non-compliance with the Provisional Measures breached the Participation Contracts directly contradicts its Decision on Provisional Measures in which it expressly stated that provisional measures were "recommendations". Yet, the Tribunal made clear that the decisions of provisional measures under Article 47(1) of the ICSID Convention are binding. Therefore, there is no contradiction.<sup>238</sup>
255. Finally, Ecuador's request to annul the Tribunal's decision to uphold Perenco's claim of breach of Contract in respect of Law 42 at 99% is nonsensical. The Tribunal's finding that Decree 662 breached the Participation Contracts was not based on Ecuador's breach of the Provisional Measures, but on the Tribunal's finding "that Decree 662 sought to coerce Perenco to 'unilaterally conver[t] the Participation Contracts into *de facto* service contracts.'"<sup>239</sup>

#### **b. The Committee's Analysis**

256. Ecuador claims that the Tribunal failed to state the reasons for its finding that Ecuador breached the Participation Contracts by not complying with the Decision on Provisional Measures. According to Ecuador, the Tribunal failed to address its key argument, namely that the Tribunal's recommendations in the Decision on Provisional Measures did not amount to decisions ("*decisiones*") under Clause 22.2.2 of the Participation Contracts. The Applicant further claims that the Tribunal's finding in the Decision on Jurisdiction and Liability that the recommendations made in the Decision on Provisional Measures were binding, contradicts the Decision on Provisional Measures itself.<sup>240</sup>

---

<sup>236</sup> Counter-Memorial on Annulment, ¶ 151.

<sup>237</sup> Counter-Memorial on Annulment, ¶¶ 151, 153-155.

<sup>238</sup> Counter-Memorial on Annulment, ¶¶ 156-159.

<sup>239</sup> Counter-Memorial on Annulment, ¶ 161.

<sup>240</sup> Memorial on Annulment, ¶¶ 284-299; Reply on Annulment, ¶¶ 221-236.

257. For the reasons explained below, the Committee finds that the Tribunal did provide reasons for its decision that Ecuador’s non-compliance with the Decision on Provisional Measures amounted to a breach of the Participation Contracts.

258. Between paragraphs 413 and 417 of the Decision on Jurisdiction and Liability, the Tribunal addresses the question on whether Ecuador was contractually obliged to comply with the Tribunal’s Decision on Provisional Measures. The Tribunal begins its analysis by referring to Clause 22.2.2 of the Participation Contracts. Then, it refers to the Parties’ positions on the matter, expressly mentioning Ecuador’s “key argument”, as follows:

Ecuador’s position is that while the parties undertook in the Contracts to submit to ICSID arbitration specified disputes and to abide by the Tribunal’s ‘final award’, they did not undertake to, and these obligations could not inferentially amount to, an undertaking to comply with a tribunal’s recommendation of provisional measures. It submitted that clause 22.2.2 was generally worded and, according to principles of contract interpretation in Ecuadorian law, must be ‘read in accordance with the other clauses of the Participation Contracts which specifically refer to these topics’ and which in its view establish ‘only that the Parties agree to abide by the final award rendered by an ICSID tribunal.’ Where it was intended to give a tribunal the power to provide for binding and enforceable provisional measures, the Contracts did so expressly (as was done elsewhere in the Contracts with respect to the power of a domestic arbitral tribunal to order provisional measures).<sup>241</sup>

259. After referring to the Parties’ positions, the Tribunal concluded that:

[A] plain reading of clauses 22.2.2 indicates that the contracting parties agreed that they would comply not only with a final award (i.e., in Spanish, the ‘*laudo*’ issued by a tribunal), but in addition, they would observe and comply with the decisions (i.e., in Spanish, the ‘*decisiones*’) of the tribunal. The latter term constitutes a more capacious category of tribunal decisions of which the final award forms a part. Thus, under the Participation Contracts, Ecuador was bound to comply with the Decision on Provisional Measures and its failure to do so constituted a breach of contract.<sup>242</sup>

260. The Committee observes that the Tribunal not only interpreted Clause 22.2.2, but also explained that its interpretation was based on the fact that the word “decisions” (*decisiones*) is a more “capacious” category of tribunal decisions of which the final award (*laudo*) is part.

261. The Committee cannot conclude that the Tribunal did not analyze and decide Ecuador’s “key argument” solely because there is no wording in the Decision on Jurisdiction and

---

<sup>241</sup> Decision on Jurisdiction and Liability, ¶ 415 (AAE-163).

<sup>242</sup> Decision on Jurisdiction and Liability, ¶ 417 (AAE-163).

Liability expressly rejecting Ecuador's position. It is clear in the aforementioned decision that the Tribunal did not uphold Ecuador's interpretation of the clause because it considered that the word "decisions" was a general category of arbitral decisions that encompassed the final award and other decisions. Likewise, although the Tribunal does not expressly indicate that the Decision on Provisional Measures is also part of the more general category of "decisions", such conclusion follows from the Tribunal's finding that "Ecuador was bound to comply with the Decision on Provisional Measures [...]." <sup>243</sup>

262. The Committee finds therefore that the Tribunal did answer the question on whether the Decision on Provisional Measures was a "decision of the competent [...] arbitrators" under Clause 22.2.2 of the Participation Contracts. Consequently, the Tribunal satisfied the requirement set out in Article 48(3) of the ICSID Convention that "[t]he award shall deal with every question submitted to the tribunal, and shall state the reasons upon which it is based."
263. Furthermore, the Committee finds no contradiction between the Tribunal's Decision on Provisional Measures and the Decision on Jurisdiction and Liability as regards the binding character of the "recommendations" made by the Tribunal as provisional measures.
264. In its Decision on Provisional Measures, the Tribunal expressly manifested that "[i]t is now generally accepted that provisional measures are tantamount to orders, and are binding on the party on which they are directed [...]." <sup>244</sup> Thereafter, in its Decision on Jurisdiction and Liability, the Tribunal concluded that Ecuador was bound to comply with the Decision on Provisional Measures. Accordingly, there is no contradiction between these decisions given that in both the Tribunal considered that its "recommendations" under the Decision on Provisional Measures were binding. The Tribunal's conclusion should come as no surprise, as it is widely accepted among ICSID arbitral tribunals and *ad hoc* committees that recommendations under Article 47 of the ICSID Convention are binding to the Parties.
265. In conclusion, the Committee finds no ground to annul the Tribunal's decision that Ecuador breached the Participation Contracts by not complying with the Decision on Provisional Measures.

**(2) Grounds on the Tribunal's finding that Perenco was entitled to suspend operations under the *exceptio non adimpleti contractus* principle**

**a. The Parties' Position**

**(i) Applicant's Position**

---

<sup>243</sup> Decision on Jurisdiction and Liability, ¶ 417 (AAE-163).

<sup>244</sup> Decision on Provisional Measures, ¶ 74 (CAA-013).

266. Ecuador claims that the Tribunal seriously departed from a fundamental rule of procedure, manifestly exceeded its powers, and failed to state its reasons when it decided *sua sponte* on the interpretation of the *exceptio non adimpleti contractus* theory.
267. The Applicant refers to the Tribunal's decision that Ecuador's non-compliance with the Decision on Provisional Measures breached the Participation Contracts and that such non-compliance justified Perenco's invocation of the *exceptio non adimpleti contractus* defense to suspend its operations in the Blocks. The Tribunal concluded erroneously that the *exceptio* defense was valid because Article 1568 of the Ecuadorian Civil Code is worded in general terms so that it covers administrative contracts.<sup>245</sup>
268. Ecuador contends that the Tribunal's decision to apply the *exceptio* rule must be annulled *in limine*, as it is based on the Tribunal's finding that Ecuador's non-compliance with the Provisional Measures amounted to a breach of the Participation Contracts. Yet, even if the Committee were to uphold such finding, the Tribunal in any event (i) committed a serious departure from a fundamental rule of procedure; (ii) manifestly exceeded its powers; and (iii) failed to state the reasons for deciding *sua sponte* on the interpretation of the *exceptio non adimpleti contractus* theory.<sup>246</sup>
269. As to the serious departure from a fundamental rule of procedure, Ecuador claims that the Tribunal violated its right to be heard for two reasons: first, the Tribunal's interpretation of Article 1568 of the Ecuadorian Civil Code was not advanced by either of the Parties; and second, the Tribunal did not afford either Party the opportunity to comment upon its novel theory.<sup>247</sup>
270. As to the manifest excess of powers, Ecuador states that the Tribunal's interpretation of Article 1568 of the Ecuadorian Civil Code amounts to at least two gross errors under Ecuadorian law. First, the Tribunal grossly erred when concluding that the provisions of the Ecuadorian Civil Code apply with equal force and in all circumstances to private and administrative law contracts. Second, the Tribunal grossly erred when applying the *exceptio* rule, as it failed to recognize that the Ecuadorian Constitution equates hydrocarbons production with a public service and subjects it to the constitutional principle of continuity, thereby prohibiting its interruption.<sup>248</sup> When a tribunal's analysis is a gross misapplication or misinterpretation of the law amounting to effective disregard or non-application of the law, it must be deemed a failure to apply the law. In this sense, given

---

<sup>245</sup> Memorial on Annulment, ¶¶ 301-302.

<sup>246</sup> Memorial on Annulment, ¶¶ 303-304.

<sup>247</sup> Memorial on Annulment, ¶¶ 305-308.

<sup>248</sup> Memorial on Annulment, ¶¶ 309-313.

that the Tribunal “grossly disregarded Ecuadorian constitutional principles and failed to apply Ecuadorian administrative law,” it exceeded its powers.<sup>249</sup>

271. As to the failure to state reasons, the Applicant alleges that the Tribunal’s reasoning on its decision that Ecuadorian law permits the party not in breach to suspend performance of its contractual obligations is limited to a two-line sentence in the Decision on Jurisdiction and Liability. Such reasoning simply declares that Ecuadorian law permits the said performance suspension without demonstrating where this permission can be found in the law or without any analysis of the theories advanced by the legal experts.<sup>250</sup>
272. Accordingly, Ecuador requests the annulment of the Tribunal’s decision to uphold Perenco’s claim of breach of contract in respect of Law 42 at 99%, insofar as such decision is in part based on the Tribunal’s finding that the *exceptio non adimpleti contractus* defense could be invoked in relation to the Participation Contracts. Likewise, Ecuador requests the annulment of the Tribunal’s ensuing decision to order Ecuador to pay US\$448,820,400 to Perenco, to the extent that it includes Perenco’s breach of contract claim.<sup>251</sup>

#### **(ii) Perenco’s Position**

273. Perenco objects Ecuador’s position that the Tribunal departed from a fundamental rule of procedure, manifestly exceeded its powers, and failed to state reasons in reaching the decision that the principle of *exceptio non adimpleti contractus* in Article 1568 of the Ecuadorian Civil Code entitled Perenco to suspend operations when Ecuador’s violations of provisional measures made its operations commercially impossible.<sup>252</sup>
274. As to the serious departure from a fundamental rule of procedure, Perenco remarks that the Tribunal reached its decision based on the plain language of the applicable provisions of the Ecuadorian Civil Code, after the Parties and their experts addressed that language in their submissions, arguments, and even on cross-examination.<sup>253</sup>
275. As to the manifest excess of powers, Ecuador is also wrong to contend that the Tribunal’s reliance on the text of the applicable Ecuadorian Civil Code provision was a “gross error under Ecuadorian law”.<sup>254</sup> The Tribunal acted within its powers as it endeavored to apply Ecuadorian law, in particular Article 1568 of the Civil Code. Accordingly, even if mistaken, the Tribunal’s conclusion that “Article 1568 of the Civil Code is worded in general terms and does not support the position that it may only be invoked by the public

---

<sup>249</sup> Memorial on Annulment, ¶ 313.

<sup>250</sup> Memorial on Annulment, ¶¶ 316-317.

<sup>251</sup> Memorial on Annulment, ¶ 319.

<sup>252</sup> Counter Memorial on Annulment, ¶ 162.

<sup>253</sup> Counter-Memorial on Annulment, ¶¶ 162-166; Rejoinder on Annulment, ¶¶ 104-109.

<sup>254</sup> Counter-Memorial on Annulment, ¶ 167.

contracting entity that is party to the contract” cannot amount to a manifest error as Ecuador asserts.<sup>255</sup>

276. Ecuador further complains that the Tribunal failed to recognize that the Ecuadorian Constitution equates hydrocarbons production with a public service and subjects it to the constitutional principle of continuity, thereby prohibiting its interruption. However, as the Tribunal explained in accordance with its mandate, Article 1568 of the Civil Code could apply to a private party to an administrative contract. Moreover, the Tribunal analyzed and accepted that “‘Participation Contracts, are aimed at exploiting a natural resource and target the provision of financial income to the national treasury’ and are thus unrelated to public services that are subject to the principle of continuity.”<sup>256</sup> Hence, the Tribunal’s rejection of Ecuador’s argument was correct, and even if it had been incorrect it could not have amounted to a manifest excess of power.
277. As to the failure to state reasons, Perenco states that Ecuador’s mischaracterization of the Tribunal’s decisions or the alleged brevity of the Tribunal’s reasoning cannot establish any failure to state reasons, much less a complete failure to do so. The standard for a failure to state reasons is not whether the reasons given are sufficient, but whether reasons exist at all. In any event, Ecuador is wrong that the Tribunal’s analysis on Perenco’s right to suspend its performance under the Participation Contracts is contained in just two sentences. Ecuador omits to mention that the Tribunal took careful account of the different theories the Parties and their respective legal experts provided, and then found Perenco’s permission to suspend operations in the express language of Article 1568 of the Ecuadorian Civil Code.<sup>257</sup> Furthermore, Ecuador failed to establish why the Tribunal’s finding is essential to the outcome of the case, as it must in order to establish an annulable error.<sup>258</sup>
278. Ecuador’s arguments do not justify its requested relief that the Committee annul the Tribunal’s decision finding that Law 42 at 99% breached the Participation Contracts and awarding US\$448.8 million in damages to Perenco. Ecuador failed to explain how the Tribunal’s finding regarding the permission to suspend operations affects that Decree 662 breached the Participation Contracts, and how the entirety of the Tribunal’s quantum determination should be annulled.<sup>259</sup>

---

<sup>255</sup> Counter-Memorial on Annulment, ¶ 169.

<sup>256</sup> Counter-Memorial on Annulment, ¶ 171.

<sup>257</sup> Counter-Memorial on Annulment, ¶ 175.

<sup>258</sup> Counter-Memorial on Annulment, ¶ 174.

<sup>259</sup> Counter-Memorial on Annulment, ¶ 176.



## **b. The Committee's Analysis**

279. Ecuador claims that the Tribunal seriously departed from a fundamental rule of procedure, manifestly exceeded its powers, and failed to state the reasons when deciding that Perenco was entitled to suspend operations under the *exceptio non adimpleti contractus* principle.
280. As regards the serious departure from a fundamental rule of procedure, Ecuador claims that the Tribunal breached the Applicant's right to be heard by upholding a novel interpretation of Article 1568 of the Ecuadorian Civil Code that was not advanced by either Party, and by not affording the Parties the opportunity to comment upon its novel interpretation.
281. Ecuador's claim is based on the Tribunal's decision that:

[T]he [*exceptio non adimpleti contractus*] defence may be invoked by a private party to an administrative contract. Article 1568 of the Civil Code is worded in general terms and does not support the position that it may only be invoked by the public contracting entity that is party to the contract.

282. The Committee observes that contrary to Ecuador's claim, the Parties had the opportunity to present their positions on whether the *exceptio* provided in Article 1568 applied to administrative contracts.
283. First, in his Fourth Expert Report<sup>260</sup> and at the Hearing on Jurisdiction and Liability,<sup>261</sup> Dr. Hernán Pérez Loose, Perenco's legal expert, explained that, in his view, the *exceptio non adimpleti contractus* applied to public contracts in Ecuador. For instance, at the Hearing on Jurisdiction and Liability, following a question from Ecuador on whether the *exceptio* is to be applied to public contracts, Dr. Perez Loose answered that "the first source is the Civil Code, clearly. This is something that you can find in the Civil Code, and as you read it, the Civil Code provisions doesn't make any difference between private or administrative contracts. It just refers to contracts."<sup>262</sup>
284. Second, in its Reply to Ecuador's Counter-Memorial on Liability and Counterclaims, Perenco expressly referred to Dr. Pérez Loose conclusions by noting that

Perenco's conduct was not illegal under Ecuadorian law. As explained by Dr. Pérez Loose, Perenco's suspension was legitimate under the principle of *exceptio non adimpleti contractus*, which applies to bilateral contracts such as the Participation Contracts under Ecuadorian law.<sup>263</sup>

---

<sup>260</sup> Fourth Expert Report of Hernán Pérez Loose, August 5, 2011, ¶¶ 36-57 (CEA-077).

<sup>261</sup> *Perenco v. Republic of Ecuador*, Transcript, Hearing on Jurisdiction and Liability, Day 6, 1507:6-21 (CEA-091).

<sup>262</sup> *Perenco v. Republic of Ecuador*, Transcript, Hearing on Jurisdiction and Liability, Day 6, 1507:6-21 (CEA-091); Rejoinder on Annulment, ¶ 106.

<sup>263</sup> Perenco's Reply to Counter-Memorial on Liability and Counterclaims, ¶ 421 (CEA-081).

285. Third, in its Third Expert Report, Dr. Juan Pablo Aguilar Andrade, Ecuador’s legal expert, addressed the question on whether the *exceptio* incorporated in Article 1568 of the Civil Code is applicable to administrative contracts:

The possibility of opposing the *exceptio non adimpleti contractus* to administrative contracts is an issue that clearly reflects the difference between the general law of contracts as regulated by the Civil Code, and that which applies to contracts entered into by the State and its institutions.

The Civil Code adopts this *exceptio* in Article 1568, pursuant to which ‘in bilateral contracts, none of the parties will be in default for non-performance, insofar as the other party does not perform his or her obligations, or agrees to perform them in due time and form.’

This rule, of mandatory application in the field of Private Law, loses its general character and is only applicable in extraordinary circumstances in the field of Administrative Law, where collective interests have priority. Again, this is not a specificity of Ecuadorian law, but rather, as in other matters of Administrative Law, is the application of the leading opinions of authors, legislation and case law.<sup>264</sup>

286. Thereafter, Dr. Aguilar referred to French, Spanish and Argentinean doctrine on the application of the *exceptio* to public contracts.
287. It is worth noting that, in its Decision on Jurisdiction and Liability, the Tribunal expressly referred to (i) Dr. Pérez Loose’s Fourth Expert Report and to his intervention at the Hearing on Jurisdiction and Liability, and (ii) Dr. Aguilar’s Third Expert Report before concluding that “Article 1568 of the Civil Code is worded in general terms and does not support the position that it may only be invoked by the public contracting entity that is party to the contract.”<sup>265</sup>
288. In view of the documents, legal expert reports, pleadings and transcripts available on the record, the Committee concludes that the Tribunal did not exceed the legal framework argued during the Underlying Arbitration when interpreting that the *exceptio* provided in Article 1568 may be invoked by a private party to an administrative contract.
289. Likewise, the Committee finds that each Party had ample opportunity to present its case and to rebut the other Party’s position regarding the application of the *exceptio* rule to administrative contracts.
290. Consequently, the Committee concludes that the Tribunal did not depart from Ecuador’s right to be heard when concluding that the *exceptio non adimpleti contractus* rule provided

---

<sup>264</sup> Third Expert Report of Juan Pablo Aguilar Andrade, November 5, 2011, ¶¶ 80-82 (CEA-078).

<sup>265</sup> Decision on Jurisdiction and Liability, ¶ 431 (AAE-163).

in Article 1568 of the Civil Code was applicable to administrative contracts and thereby Perenco was entitled to suspend operations under such principle.

291. As regards the manifest excess of powers, Ecuador claims that the Tribunal committed a gross error when concluding that the *exceptio* principle set forth in Article 1568 of the Civil Code applied to administrative contracts. Ecuador further argues that the Tribunal failed to recognize that interruption of hydrocarbons production is prohibited in Ecuadorian Law given that it is considered a public service under the Constitution, and thereby, it is subject to the continuity principle.
292. The Committee stresses that it cannot act as a court of appeals and judge whether the Tribunal correctly or incorrectly interpreted or applied the Ecuadorian Law. The Committee may even disagree with the Tribunal's interpretation of the law; however, the fact is that the Tribunal did identify the proper body of law and endeavored to apply it. This can be observed in the Tribunal's Decision on Jurisdiction and Liability between paragraphs 418 and 435. It is not for the Committee to assess whether the interpretation of the Tribunal is merely incorrect or "grossly incorrect". The Committee cannot review the substance of the case. Therefore, the Committee concludes that the Tribunal did not manifestly exceed its powers when deciding that the *exceptio* rule applied to administrative contracts and therefore Perenco was entitled to suspend operations under said principle.
293. As regards the failure to state reasons, Ecuador claims that the Tribunal's reasoning on its conclusion that Ecuadorian law permits the Party not in breach to suspend performance of its contractual obligations is limited to a two-line sentence in the Decision on Jurisdiction and Liability.
294. As a preliminary remark, the Committee notes that Ecuador's claim is based on the argument that the Tribunal's reasoning is insufficient. Yet, as explained in Section III.D.2 above, it is not on the Committee to assess the quality or extension of the reasons provided by the Tribunal. To determine whether the Tribunal complied with the requirement that the Award shall state reasons for its decision, the Committee must analyze whether the Tribunal's conclusions follow from a set of premises, either implicit or explicit.
295. Between paragraphs 418 to 425 of the Decision on Jurisdiction and Liability the Tribunal presented its analysis to resolve the following question: "[c]an Perenco invoke the defence of *exceptio non adimpleti contractus* for its decision to suspend operations?"
296. The Tribunal begins its analysis by noting that, having found that Ecuador breached the Participation Contracts by not complying with the Decision on Provisional Measures, the question was whether as a matter of Ecuadorian law Perenco was entitled to suspend

performance of its contractual obligations.<sup>266</sup> Thereafter, the Tribunal devoted twelve paragraphs to present the opinions of the Parties' legal experts.

297. The Committee finds that there are two particular references that are paramount to the subsequent Tribunal's conclusion.
298. First, the Tribunal referred to Dr. Pérez Loose's view on the interpretation of Article 1568 of the Civil Code, as follows:

Article 1568 of Ecuador's Civil Code provides more generally that '[i]n bilateral contracts no party shall be considered to be in default by failing to comply with the agreed terms, while the other party has not complied with its obligations or refuses to comply in due manner and time.' During cross-examination, Dr. Pérez Loose asserted that in his view Article 1568 must apply to administrative contracts since it makes no distinction in terms between private and administrative contracts, referring only to the generally worded 'contracts.' He referred to the defence as a 'transitory' or 'transient' right intended to exert pressure on the other contracting party to comply with its contractual obligations. In order to invoke this defence, the invoking party must demonstrate: (i) a reciprocal connection between the obligation breached and the obligation it purports to breach; (ii) that the original breach was material in nature (it cannot relate to ancillary, secondary, or obligations relatively insignificant in the larger context of the legal relationship between the parties); and (iii) that it was or is ready to perform its obligations.<sup>267</sup>

299. Second, the Tribunal referred to certain views presented by Professor Aguilar, as follows:

Professor Aguilar asserted further that the writers supported his view that the *exceptio* can only apply to administrative contracts in circumstances where the State's conduct has made it 'reasonably impossible' for the private contracting entity to fulfill its obligations. [...]

Professor Aguilar accepted that his view was derived from the views of foreign legal theorists, but asserted that this was necessarily the case as '[t]here has been no explicit development in Ecuador by authors on the subject, nor has a concrete case presented itself that resulted in applicable jurisprudence.' He rejected Dr. Pérez Loose's reliance on two judicial decisions of the First Civil and Commercial Chamber of the Supreme Court of Justice, stating they demonstrated instead that a claim invoking the *exceptio* will not be entertained when the private contractor is itself in default of its contractual obligations. He similarly asserted that contrary to Dr. Pérez Loose's submission, the two opinions of the Attorney-General in Ecuador demonstrate that the *exceptio* may be invoked by the private contracting entity to an administrative contract, there was in one case a specific contractual provision providing that no fine would be imposed on

---

<sup>266</sup> Decision on Jurisdiction and Liability, ¶ 418 (AAE-163).

<sup>267</sup> Decision on Jurisdiction and Liability, ¶ 421 (AAE-163).

the contractor for non-performance if the public contracting entity was in default, and the other case supports his view that the *exceptio* did not apply as the ‘Attorney General argues that a delay in payment by a public institution does not authorize an extension of the contractual term’ in favour of the contractor (i.e., permitting non-performance for a time until payment is received).<sup>268</sup>

300. Based on the foregoing premises, the Tribunal concluded that:

Having considered the parties’ submissions, although it accepts Professor Aguilar’s view that the law is not well developed in this point in Ecuador, the Tribunal finds that the defence may be invoked by a private party to an administrative contract. Article 1568 of the Civil Code is worded in general terms and does not support the position that it may only be invoked by the public contracting entity that is party to the contract.<sup>269</sup>

301. Accordingly, the Committee observes that, read as a whole and in context, the Decision on Jurisdiction and Liability provides reasons supporting the Tribunal’s conclusion that Ecuadorian law permits the Party not in breach to suspend performance of its contractual obligations. Thus, the Committee finds no ground to annul under Article 52(1)(e) of the ICSID Convention.

**(3) Grounds on the Tribunal’s finding that Decree 662 breached the Participation Contracts and that the enactment of Decree 662 and the ensuing measures breached Article 4 of the Treaty**

**a. The Parties’ Position**

**(i) Applicant’s Position**

302. Ecuador claims that the Tribunal manifestly exceeded its powers and failed to state the reasons on which the Award is based, when it decided that the enactment of Decree 662—increasing to 99% the levy on extraordinary revenue above the reference prices underlying the Participation Contracts—, breached said Contracts.<sup>270</sup>

303. As to the manifest excess of powers, Ecuador notes that the Tribunal failed to apply Ecuadorian administrative law when finding that Decree 662 was not a lawful exercise of the *jus variandi* power under Ecuadorian law. Ecuador stresses that, under Ecuadorian law, the *jus variandi* power is only relevant when the terms of an administrative contract have been modified. Nonetheless, the *jus variandi* power had no bearing in the present case, as the Tribunal itself had found that neither Law 42 nor Decree 662 modified the terms and

---

<sup>268</sup> Decision on Jurisdiction and Liability, ¶¶ 425-426 (AAE-163).

<sup>269</sup> Decision on Jurisdiction and Liability, ¶ 431 (AAE-163).

<sup>270</sup> Memorial on Annulment, ¶ 321.

conditions of the Participation Contracts.<sup>271</sup> Ecuador further claims that the Tribunal assessed whether Decree 662 breached the Participation Contracts pursuant to a mandate akin to that of an *amiable compositeur* or *ex aequo et bono*. Ecuador thereby contends that the Tribunal’s misapplication of Ecuadorian law is so egregious that it amounts to a non-application.<sup>272</sup>

304. As to the failure to state reasons, Ecuador observes that in its Decision on Jurisdiction and Liability, the Tribunal held both that Law 42 did not amount to a breach of the Participation Contracts, and that Decree 662 was “entirely different” and amounted to such a breach. Ecuador remarks that “where it is not possible to follow a tribunal’s reasoning because the stated reasons are so contradictory as to cancel each other out, this amounts to a failure to state reasons. Likewise, *ad hoc* committees have consistently held that ‘frivolous’ or arbitrary reasoning amounts to a failure to state reasons warranting annulment. In the present case, the Tribunal’s reasoning is replete with contradictory findings that cannot be reconciled. It is also based on arbitrary statements that cannot form the basis of a reasoned decision.”<sup>273</sup>
305. Likewise, Ecuador argues that the Tribunal manifestly exceeded its powers and failed to state the reasons on which the Award is based when it decided that moving beyond 50% to 99% with the application of Decree 662 breached Article 4 of the Treaty.
306. As to the manifest excess of powers, Ecuador contends that the Tribunal’s holding that Decree 662 breached the Participation Contracts was based on a gross misapplication of Ecuadorian law. The Tribunal “erroneously invoked, and limited its assessment of the alleged contractual breach to, the *jus variandi* power under Ecuadorian law even though such principle was plainly inapplicable in the circumstances, thereby assessing whether Decree 662 breached the Participation Contracts pursuant to a mandate akin to that of an *amiable compositeur* or *ex aequo et bono*. In so doing, the Tribunal manifestly exceeded its powers.”<sup>274</sup>
307. As to the failure to state reasons, Ecuador claims that the Tribunal’s holding that “the application of Decree 662 to Perenco as well as the ensuing measures” breached Article 4 of the Treaty is based on contradictory and arbitrary reasoning, which amounts to failure to state reasons. To support its position, Ecuador advances similar arguments to the ones

---

<sup>271</sup> Memorial on Annulment, ¶ 325.

<sup>272</sup> Memorial on Annulment, ¶¶ 327-328.

<sup>273</sup> Memorial on Annulment, ¶ 341.

<sup>274</sup> Memorial on Annulment, ¶ 347.

presented in regard to the finding that Ecuador breached the Participation Contracts by enacting Decree 662.<sup>275</sup>

308. Accordingly, Ecuador requests the annulment of the Tribunal’s findings that Decree 662 breached the Participation Contracts and that Decree 662 and the ensuing measures breached Article 4 of the Treaty. Likewise, Ecuador requests the annulment of the Tribunal’s ensuing decision to order Ecuador to pay US\$448,820,400 to Perenco.<sup>276</sup>

**(ii) Perenco’s Position**

309. Perenco objects Ecuador’s position that the Tribunal manifestly exceeded its powers and failed to state its reasons when concluding that Decree 662 breached the Participation Contracts and that Decree 662 and the ensuing measures breached Article 4 of the Treaty.<sup>277</sup>
310. As to the manifest excess of powers, Perenco notes that Ecuador claims that the Tribunal manifestly exceeded its powers because it misapplied Ecuadorian law when finding that the *jus variandi* doctrine applied to Decree 662, and that such an error of law cannot constitute a ground for annulment. The Tribunal did apply the Ecuadorian law. Ecuador’s argument that the “Tribunal erroneously invoked the *jus variandi* power under Ecuadorian law” cannot amount to a manifest excess of power since a mere substantive error cannot qualify as such manifest excess. Furthermore, Ecuador mischaracterizes the Tribunal’s reasoning. The Applicant claims that the Tribunal “erroneously invoked the *jus variandi* power under Ecuadorian law” “in circumstances where the *jus variandi* principle is plainly inapplicable” because Law 42 did not unilaterally amend the Participation Contracts. This assertion is false because the Tribunal *did* find that Decree 662 effectively amended the Participation Contracts.<sup>278</sup>
311. Ecuador’s proposition that the Tribunal also manifestly exceeded its powers when finding that Decree 662 and ensuing measures violated the FET standard in Article 4 of the Treaty is doomed to fail because it is based on the false argument that the Tribunal’s holding on the contract claim is incorrect. In any event, even if the Tribunal’s finding were incorrect, the Tribunal endeavored to apply the applicable law—the Treaty—when assessing the Treaty claim, therefore, it could not have manifestly exceeded its powers.<sup>279</sup>
312. As to the failure to state reasons, Perenco notes that the Tribunal’s holding that Decree 662 breached the Participation Contracts and the Treaty is consistent with its finding that Law

---

<sup>275</sup> Memorial on Annulment, ¶ 375; Reply on Annulment, ¶¶ 213-218.

<sup>276</sup> Memorial on Annulment, ¶ 342.

<sup>277</sup> Counter-Memorial on Annulment, ¶ 177.

<sup>278</sup> Counter-Memorial on Annulment, ¶¶ 180-181; Rejoinder on Annulment, ¶¶ 121-129.

<sup>279</sup> Counter-Memorial on Annulment, ¶¶ 183-184.

42 at 50% did not similarly violate Ecuador's obligations. Among other contentions, Perenco further stresses that Ecuador's challenge to the Tribunal's finding that Decree 662 was a coercive act that was fundamentally different from Law 42 at 50% is no basis for annulment.<sup>280</sup>

313. Accordingly, Perenco contends that Ecuador failed to establish that the Tribunal manifestly exceeded its powers or failed to state reasons when finding that Decree 662 breached the Participation Contracts and Decree 662, along with ensuing measures, violated Article 4 of the Treaty.

#### **b. The Committee's Analysis**

314. Ecuador claims that the Tribunal manifestly exceeded its powers and failed to state the reasons for deciding that Ecuador's enactment of Decree 662 breached the Participation Contracts and that the enactment of Decree 662 and the ensuing measures breached the Treaty.
315. The Committee will first address Ecuador's claim regarding the Tribunal's finding that Decree 662 breached the Participation Contracts.
316. As to the manifest excess of powers, Ecuador claims that the Tribunal erroneously applied the *jus variandi* power under Ecuadorian Law considering that the terms of the Participation Contracts were not modified and therefore said principle was not applicable. Also, the Tribunal assessed whether Decree 662 breached the Participation Contracts pursuant to a mandate akin to that of an *amiable compositeur*.<sup>281</sup>
317. The Committee notes that Ecuador does not claim that the Tribunal failed to apply Ecuadorian law but that it misapplied Ecuadorian law. Yet, the Committee's task is limited to review whether the Tribunal identified the proper body of law and endeavored to apply it.
318. In this regard, the Committee observes that in its Decision on Jurisdiction and Liability, the Tribunal expressly identified Ecuadorian law as the applicable body of law:

Both Contracts were negotiated within the broader context of Ecuadorian law. Clause 22.1 (in both Contracts) stated that the Contract was governed exclusively by Ecuadorian legislation, and the laws in force at the time of its execution were understood to be incorporated in it. The 'Legal Framework' then set out a non-exhaustive list of 'legal standards' applicable to the Contract (including the Hydrocarbons Law, the Law

---

<sup>280</sup> Counter-Memorial on Annulment, ¶¶ 187-192.

<sup>281</sup> Memorial on Annulment, ¶¶ 324-327.



amending the Hydrocarbons Law and various regulations pertaining thereto, as well as certain other general Ecuadorian laws).<sup>282</sup>

319. Thereafter, to determine whether Ecuador lawfully exercised its *jus variandi* power when enacting Decree 662, the Tribunal applied the *jus variandi* principle, recognized in Ecuadorian law, and the four-prong test on *jus variandi* referred to by Ecuador's Constitutional Court in its Decision on Law 42.<sup>283</sup>
320. Accordingly, the Committee finds that the Tribunal identified the proper law and endeavored to apply it. Ecuador disagrees with the Tribunal's interpretation, but the Committee cannot not substitute itself for the Tribunal and assess whether it correctly or incorrectly applied the *jus variandi* principle when examining the lawfulness of Law 42 at 50%.<sup>284</sup> Thus, it finds that the Tribunal did not manifestly exceed its powers when concluding that the enactment of Decree 662 breached the Participation Contracts.
321. As to the failure to state reasons, Ecuador contends that the Tribunal's reasoning is so contradictory, and that some of the reasons provided are so "arbitrary" and "frivolous" that the reasoning amounts to a failure to state reasons.
322. The Committee will begin by addressing the alleged "contradictions" in the Tribunal's reasoning. Ecuador refers to four alleged contradictions.
323. First, Ecuador claims that the Tribunal found, on the one hand, that the Participation Contracts did not preclude Ecuador from introducing new taxes and that Law 42 was a tax modification, and on the other hand, it concluded that Law 42 at 99% was a "conceptual modification of the Participation Contracts."<sup>285</sup> The Committee, however, finds no contradiction on the Tribunal's reasoning.
324. In its Decision on Jurisdiction and Liability, the Tribunal clearly indicated that Law 42 at 50% did not breach the Participation Contracts:
- (i) Law 42 fell within the taxation modification clauses of both Contracts;
  - (ii) as the party claiming that the law had an impact on the Contracts' economy, it was incumbent upon Perenco to pursue negotiations with the new administration at least until they were shown to be futile; and (iii)
  - Perenco did not do so, preferring instead to adopt a 'wait and see' approach with the new Correa Administration. In these circumstances, the Tribunal does not find a breach of clauses 11.12 and 11.7 of the two Contracts.<sup>286</sup>

---

<sup>282</sup> Decision on Jurisdiction and Liability, ¶ 356 (AAE-163).

<sup>283</sup> Decision on Jurisdiction and Liability, ¶¶ 404-406 (AAE-163).

<sup>284</sup> Decision on Jurisdiction and Liability, ¶¶ 404-406 (AAE-163).

<sup>285</sup> Memorial on Annulment, ¶ 331; Reply on Annulment, ¶¶ 182-184.

<sup>286</sup> Decision on Jurisdiction and Liability, ¶ 400 (AAE-163).

325. The Tribunal then analyzed whether Law 42 at 99% was also lawful. The Tribunal, observed that “[t]he situation in relation to the application of Decree 662 to Perenco is entirely different because of the magnitude of the ‘extraordinary revenues’ claimed by the State and the demands made around the time of the decree’s promulgation and thereafter that Perenco migrate to a service contract.”<sup>287</sup> The Tribunal then applied the four-prong test analyzed by Ecuador’s Constitutional Court in its Decision on Law 42, finding that Decree 662 did not comply with limbs (i) and (ii):

The Tribunal is of the view that Law 42 at 99% constituted a breach of contract. Having regard to limb (i), in the Tribunal’s view, there was no possible reasonable justification for the State to claim 99% of ‘extraordinary revenues’ above the reference price. While the nature of a ‘deviation of power’ is not precisely defined, the writings of the civil law theorists cited by Dr. Pérez Loose indicate that it concerns the misuse of power. In the Tribunal’s view, Decree 662 constituted an act of coercion when viewed within the context of the parties’ contractual relations and therefore it can be regarded to be a deviation of power. [...]”

Limb (ii) was also violated. In the Tribunal’s view, as of 4 October 2007, Perenco’s Contracts were participation contracts in name only; Decree 662 completely modified the Contracts’ objective as it was understood under Ecuadorian law. It follows that Decree 662 cannot be justified as a lawful exercise of the *jus variandi* power under Ecuadorian law.

326. Finally, the Tribunal concluded that:

[I]n moving beyond 50% up to 99% the Respondent breached the Participation Contracts. Whatever might have transpired in clause 11 negotiations on the impact of Law 42 at 50% on the Contracts’ economy (had they occurred), moving from 50% to 99%, in the Tribunal’s view, was no longer an attempt to claim an equitable distribution of the windfall revenues generated by an unexpected and significant increase in oil prices, and could not be justified under the applicable Ecuadorian legal standards for the exercise of the *jus variandi* power.<sup>288</sup>

327. The Committee is of the view that there is no contradiction between the Tribunal’s finding that Ecuador did not breach the Participation Contracts by enacting Law 42 at 50%, and its finding that Decree 662 did violate the Participation Contracts. For the Tribunal, the former lawfully fitted within the taxation modification clauses, while the latter constituted an act of coercion and completely modified the Contracts’ objective. Since the Tribunal drew a clear distinction between Law 42 at 50% and Law 42 at 99%, no contradiction arises between the Tribunal’s propositions.

---

<sup>287</sup> Decision on Jurisdiction and Liability, ¶ 402 (AAE-163).

<sup>288</sup> Decision on Jurisdiction and Liability, ¶ 411 (AAE-163).

328. Second, Ecuador contends that, in respect of Law 42, the Tribunal found, on the one hand, that Perenco failed to resort to the taxation modification mechanisms in Clauses 11.12 and 11.7 of the Participation Contracts, and on the other hand, it found that Perenco's failure to resort to the aforementioned taxation modification mechanism was irrelevant to assessing whether or not Decree 662 breached the Participation Contracts.<sup>289</sup>
329. The Committee finds no contradiction between the Tribunal's findings given that, as explained above, the Tribunal clearly distinguished Law 42 at 50% and at 99%. As noted by the Tribunal in relation to the enactment of Decree 662,
- [T]his was no longer a question of the State seeking an adjustment of an otherwise acceptable contractual relationship which, in its view, had been disrupted by price increases of an unanticipated magnitude. Rather, Law 42 at 99% unilaterally converted the Participation Contracts into *de facto* service contracts while the State developed a new model of such contracts which it demanded the contractor to sign.<sup>290</sup>
330. Therefore, for the Tribunal given that Law 42 at 99% was no longer an attempt to claim an equitable distribution of the windfall revenues and, on the contrary, was an act of coercion, it would have been futile to pursue a negotiation after the enactment of Decree 662. Accordingly, the Tribunal considered that to analyze whether Decree 662 breached the Participation Contracts, it was irrelevant whether Perenco had pursued the taxation modification process for Law 42 at 50%.<sup>291</sup>
331. Third, Ecuador argues that the Tribunal found, on the one hand, that Decree 662 did not impair Perenco's rights of ownership and control over its investment, and on the other hand, held that Decree 662 modified the terms of the Participation Contracts.<sup>292</sup>
332. The Committee does not see how the Tribunal's finding that Decree 662 was not an impairment to Perenco's ownership and control over its investment contradicts the conclusion that Decree 662 modified the terms of the Participation Contracts. The Committee does not find that both propositions cannot stand together, much less that they cannot be both true. Therefore, the Committee finds no contradiction amounting to a failure to state reasons.
333. Fourth, Ecuador states that the Tribunal concluded that "Decree 662 did not amount to a 'complete or very substantial deprivation of the [...] rights in the totality of the investment,'

---

<sup>289</sup> Memorial on Annulment, ¶ 332; Reply on Annulment, ¶¶ 185-187.

<sup>290</sup> Decision on Jurisdiction and Liability, ¶ 409 (AAE-163).

<sup>291</sup> Decision on Jurisdiction and Liability, ¶¶ 402-411 (AAE-163).

<sup>292</sup> Memorial on Annulment, ¶ 333; Reply on Annulment, ¶¶ 188-189.

which were derived from the Participation Contracts,”<sup>293</sup> and on the other hand, held that Decree 662 converted the Participation Contracts into *de facto* service contracts.<sup>294</sup>

334. Akin to the preceding reasoning, the Committee does not find that the Tribunal’s propositions cannot stand together or that both cannot be true. The Committee does not see any contradiction between both premises, much less a contradiction amounting to a failure to state reasons.
335. In sum, the Committee considers that there are no contradictions in the Tribunal’s reasoning that amount to a failure to state reasons, and thereby rejects Ecuador’s contentions on the matter.
336. Now, the Committee will address the Tribunal’s alleged “frivolous” or “arbitrary” reasoning. Ecuador claims that the Tribunal’s statements (i) that Decree 662 “was no longer an attempt to claim an equitable distribution of the windfall revenues,”<sup>295</sup> and (ii) that “the invocation by Perenco of the tax modification clauses in the Participation Contracts would have been futile,”<sup>296</sup> are arbitrary. The Committee observes, however, that Ecuador is actually contesting the quality and sufficiency of the Tribunal’s reasoning. As explained, in Section III.D.2 above, the Committee is not competent to assess the quality, consistency or extension of the Tribunal’s reasoning. The Committee already established that the Tribunal stated its reasons when concluding that Decree 662 breached the Participation Contracts; therefore, it finds no failure to state reasons under Article 52(1)(e) of the ICSID Convention.
337. The Committee will turn to address Ecuador’s claim that the Tribunal manifestly exceeded its powers and failed to state its reasons when deciding that Decree 662 and the ensuing measures breached the Treaty.
338. As regards the manifest excess of powers, Ecuador alleges that the Tribunal “(i) erroneously invoked, and limited its assessment of the alleged contractual breach to, the *jus variandi* power under Ecuadorian law even though such principle was plainly inapplicable in the circumstances, thereby (ii) assessing whether Decree 662 breached the Participation Contracts pursuant to a mandate akin to that of an *amiable compositeur* or *ex aequo et bono*.”<sup>297</sup>

---

<sup>293</sup> Memorial on Annulment, ¶ 334.

<sup>294</sup> Memorial on Annulment, ¶ 334; Reply on Annulment, ¶¶ 190-191.

<sup>295</sup> Memorial on Annulment, ¶ 336.

<sup>296</sup> Memorial on Annulment, ¶ 339.

<sup>297</sup> Memorial on Annulment, ¶ 347.

339. The Committee finds that the Tribunal did not manifestly exceed its powers when deciding that Decree 662 breached the Treaty. The Tribunal identified the proper law—the Treaty—and endeavored to apply such law.
340. Between paragraphs 556 and 564, the Tribunal analyzed the scope and contours of the standard of fair and equitable treatment provided in Article 4 of the Treaty. Thereafter, the Tribunal proceeded to analyze the facts of the case, including the enactment of Decree 662, in the light of such standard. After conducting its analysis, the Tribunal concluded that “(i) Law 42’s enactment did not breach Article 4; (ii) moving beyond 50% to 99% with the application of Decree 662 to Perenco as well as the ensuing measures [...] breached Article 4.”<sup>298</sup> Accordingly, to assess whether the Tribunal correctly or incorrectly interpreted or applied Article 4 of the Treaty is not on the Committee. Thus, it concludes that the Tribunal did not manifestly exceed its powers when finding that Decree 662 and the ensuing measures breached Article 4 of the Treaty.
341. As regards the failure to state reasons, Ecuador argues that “the Tribunal’s holding that ‘the application of Decree 662 to Perenco as well as the ensuing measures’ breached Article 4 of the Treaty is based on contradictory and arbitrary reasoning.”<sup>299</sup>
342. Ecuador claims that the Tribunal’s reasoning is based on a contradiction because it concluded, on the one hand, that Perenco had failed to resort to the tax modification clauses under the Participation Contracts in respect of Law 42, and, on the other hand, it failed to apply this finding to its assessment of whether Decree 662 breached the Treaty.<sup>300</sup> For the same reasons explained in paragraphs 327, 328 and 329 *supra*, the Committee finds no contradiction in the Tribunal’s reasoning, much less a contradiction that amounts to a failure to state reasons.
343. Ecuador further argues that the Tribunal’s conclusion that the invocation by Perenco of the tax modification clauses would have been futile is unsupported and thereby the Tribunal’s finding that Decree 662 breached the Treaty is arbitrary. The Committee observes, however, that Ecuador’s claim is one of substance: it is based on the quality of the Tribunal’s reasoning. The fact that Ecuador does not agree with the Tribunal’s finding does not mean that the Tribunal did not state the reasons for concluding that invoking the tax modification clauses would have been futile after Decree 662. In fact, the Tribunal explained that the enactment of Decree 662 was an act of coercion, not an attempt to claim an equitable distribution of the windfall revenues, and therefore invoking the tax

---

<sup>298</sup> Decision on Jurisdiction and Liability, ¶ 627 (AAE-163).

<sup>299</sup> Memorial on Annulment, ¶ 350.

<sup>300</sup> Memorial on Annulment, ¶ 351.

modification clauses would have been futile. Thus, the Committee finds that the ground set out in Article 52(1)(e) is not met.

344. Based on the foregoing the Committee concludes that the Tribunal neither manifestly exceeded its powers nor failed to state its reasons when deciding that Decree 662 breached the Participation Contracts and that the enactment of Decree 662 and the ensuing measures breached Article 4 of the Treaty.

**(4) Grounds on the Tribunal's finding that Ecuador's declaration of *caducidad* breached the Block 21 Participation Contract and expropriated Perenco's contractual rights**

**a. The Parties' Position**

**(i) Applicant's Position**

345. Ecuador argues that the Tribunal's decision that the declaration of *caducidad* effected an expropriation and breached the Block 21 Contract constitutes a manifest excess of powers and a serious departure from a fundamental rule of procedure.<sup>301</sup>
346. As to the manifest excess of powers, Ecuador contends that the Tribunal's holding that Ecuador's declaration of *caducidad* breached both the Block 21 Participation Contract and the Treaty is based on a flagrant misapplication of Ecuadorian law. According to Ecuador, "it was not for the Tribunal to place itself in the shoes of the Ministry and, with the benefit of hindsight, hypothesize that, if it had been the Ministry, it could, and would have, waited before declaring *caducidad*. Rather, having found that the Ministry (i) was lawfully entitled to declare *caducidad* and (ii) acted within the bounds of that discretion, the Tribunal was neither required nor permitted, under Ecuadorian law, to review the Ministry's exercise of its lawful discretion."<sup>302</sup> The error committed by the Tribunal in interpreting Ecuadorian law violates the basic distinction between private and public law. Such grave error amounts to a non-application of Ecuadorian law.<sup>303</sup>
347. As to the departure from a fundamental rule of procedure, Ecuador observes that the Tribunal found that Ecuador's declaration of *caducidad* breached both the Treaty and the Participation Contracts without having heard either Party on this topic and without ever giving the Parties the opportunity to address the Tribunal on the scope or exercise of the Ministry's discretion to declare *caducidad* under Article 74 of the Hydrocarbons Law. In so doing, the Tribunal seriously departed from a fundamental rule of procedure.<sup>304</sup>

---

<sup>301</sup> Memorial on Annulment, ¶ 358.

<sup>302</sup> Memorial on Annulment, ¶ 366.

<sup>303</sup> Memorial on Annulment, ¶ 368.

<sup>304</sup> Memorial on Annulment, ¶¶ 359-363.

348. Ecuador requests that the Committee annul the Tribunal's decisions to (i) uphold Perenco's claim of breach of the Block 21 Contract as a result of the declaration of *caducidad*, and (ii) uphold Perenco's claim that the declaration of *caducidad* constituted a breach of Article 6 of the Treaty. Likewise, Ecuador requests the annulment of the Tribunal's ensuing decision to order Ecuador to pay US\$448,820,400 to Perenco, insofar as it includes Perenco's breach of the Block 21 Contract claim and Perenco's breach of Article 6 of the Treaty claim.<sup>305</sup>

**(ii) Perenco's Position**

349. Perenco claims that the Tribunal neither manifestly exceeded its powers, nor seriously departed from a fundamental rule of procedure, when it found that Ecuador's unilateral termination of Perenco's contractual rights by declaring *caducidad* breached the Block 21 Participation Contract and expropriated Perenco in violation of the Treaty.<sup>306</sup>
350. As to the manifest excess of powers, Perenco stresses that the Tribunal evidently endeavored to apply the Ecuadorian Hydrocarbons Law to conclude that Ecuador had the discretion, but not the obligation, to declare *caducidad*. Likewise, the Tribunal endeavored to apply the Treaty when holding that Ecuador had expropriated Perenco's rights. Ecuador's disagreement with the substance of the conclusion is no basis to find an annulable error.<sup>307</sup>
351. As to the serious departure from a fundamental rule of procedure, Perenco notes that although Ecuador asserts that it did not have an opportunity to address the Tribunal's holding that the Ministry's power to declare *caducidad* under Ecuadorian law was discretionary, the Tribunal's decision was based on Ecuador's own interpretation of the applicable law and both Parties argued this issue throughout the arbitration. Also, Perenco states that the Tribunal may conduct its own analysis and "is not limited by the arguments made by the parties when its interpretation, unlikely to be surprising to either party, is drawn from the terms of the provision which have been discussed by the parties."<sup>308</sup> Thus, Ecuador's claim is factually incorrect and legally insufficient to establish a serious departure from a fundamental rule of procedure.<sup>309</sup>
352. Accordingly, Ecuador failed to establish that the Tribunal manifestly exceeded its powers and seriously violated a fundamental rule of procedure when it found that *caducidad*

---

<sup>305</sup> Memorial on Annulment, ¶ 369.

<sup>306</sup> Counter-Memorial on Annulment, ¶ 193.

<sup>307</sup> Counter-Memorial on Annulment, ¶¶ 195-196; Rejoinder on Annulment, ¶¶ 145-151.

<sup>308</sup> Rejoinder on Annulment, ¶ 157.

<sup>309</sup> Rejoinder on Annulment, ¶¶ 152-158.

breached the Block 21 Participation Contract and expropriated Perenco's rights in violation of Article 4 of the Treaty.

**b. The Committee's Analysis**

353. Ecuador claims that the Tribunal manifestly exceeded its powers and seriously departed from a fundamental rule of procedure when finding that that Ecuador's unilateral termination of Perenco's contractual rights by declaring *caducidad* breached the Block 21 Participation Contract and expropriated Perenco in violation of the Treaty.
354. As regards the manifest excess of powers, the Committee observes that Ecuador does not contest that the Tribunal properly identified the applicable law but considers that the Tribunal misapplied such law. As explained in Section III.B.2 above, a misapplication of the proper law, regardless of how "erroneous" it could be, is not a basis for annulment under Article 52(1)(b).
355. The Committee observes from the Decision on Jurisdiction and Liability that the Tribunal identified the proper law, that is the Hydrocarbons Law and the Treaty, and endeavored to apply it. In paragraph 706 of said decision, the Tribunal expressly referred to the Hydrocarbons Law and presents its interpretation thereof:

While it accepts that the State had the right to intervene and operate the blocks, the Tribunal does not accept that the State was bound to bring the Claimant's contracts to an end by means of a *caducidad* declaration. The Tribunal notes in this regard that under Chapter IX of the Hydrocarbons Law, Article 74, the Ministry 'may declare the *caducidad* of contracts, if the contractor' engages in any of thirteen different types of acts including suspending operations 'without cause justifying it, as determined by PETROECUADOR.' The Tribunal attaches particular importance to the fact that the opening phrase of Article 74 is expressed in permissive rather than mandatory terms. That is, the Ministry is empowered to declare the caducity of contracts in any of the specified circumstances, but it is not obliged to do so.<sup>310</sup>

356. The Tribunal then explains why, under its interpretation of the Hydrocarbons Law, the *caducidad* declaration breached Article 6 of the Treaty and the Block 21 Contract:

The Tribunal accepts Ecuador's submission that this was not done without fair warning to the Consortium. The Ministry and Petroecuador wrote to the Consortium on four occasions requesting it to resume operations and warned that a failure to do so could lead to the termination of their Contracts.

But in all the circumstances of the case, the Tribunal considers that the Ministry should have stayed its hand and awaited the outcome of this

---

<sup>310</sup> Decision on Jurisdiction and Liability, ¶ 706 (AAE-163).



arbitration. It was not contrary to Article 6 for Ecuador to have continued to operate the oilfields in the face of the Claimant's refusal to return until the *coactiva* matter had been addressed to its satisfaction. But the decision to initiate caducity proceedings and thereby bring Perenco's contractual rights to an end during the midst of this arbitration leads the Tribunal to find a breach of Article 6.[...]

[T]he Ministry had the discretion not to commence *caducidad* proceedings and it is the Tribunal's judgment that this discretion should have been exercised in favour of not pursuing caducidad while the Parties' respective rights and obligations were being determined in this proceeding. Accordingly, the Tribunal finds that as of the date of *caducidad* having been declared and the Consortium's interests were finally brought to an end, the Respondent effected an expropriation of Perenco's contractual rights contrary to Article 6 of the Treaty. This is the date of the expropriation; for the reasons given above, the Tribunal rejects the creeping expropriation argument advanced by Perenco.

This declaration of caducity was for the same reason equally a breach of the Block 21 Contract because, having occupied the blocks in order to safeguard the oilfields, it was unnecessary for the Ministry to then bring the Contract to an end.<sup>311</sup>

357. Considering that the Tribunal properly identified the applicable law and endeavored to apply it, and that what Ecuador really pleads is a disagreement with the interpretation of the Tribunal, the Committee finds no manifest excess of the powers of the Tribunal.
358. As regards the serious departure from a fundamental rule of procedure, Ecuador argues that the Tribunal breached the Applicant's right to be heard by holding that the *caducidad* declaration breached the Block 21 Participation Contract and the Treaty on the basis of a proposition that "neither Party had advanced or had the opportunity to comment upon."<sup>312</sup> Yet, the Committee considers that the Tribunal did not depart from the Parties' right to be heard.
359. As a starter, the Committee observes that Ecuador does not contest that both Parties had the opportunity to present their case on the interpretation and application of the Hydrocarbons Law, particularly on Article 74 thereof. Ecuador's claim is based on the allegation that the Tribunal departed from the Parties' submissions and adopted its own interpretation of the law. In this regard, the Committee finds that, although the Tribunal's interpretation of the Hydrocarbons Law was not expressly advanced by either Party, the discretion of the Ministry to declare *caducidad* was referred to by the Legal Expert

---

<sup>311</sup> Decision on Jurisdiction and Liability, ¶¶ 707-708, 710 (AAE-163).

<sup>312</sup> Memorial on Annulment, ¶ 359.

presented by Ecuador, Mr. Juan Pablo Aguilar Andrade,<sup>313</sup> the Tribunal did not depart from the legal framework argued during the arbitration.

360. The Tribunal's conclusion was not based on a novel legal framework, it was based on the interpretation and application of the Hydrocarbons Law, amply debated by the Parties. As noted in Section III.C.2 above, as long as the Tribunal's analysis is framed within the legal framework argued during the arbitration, the Tribunal may conduct its own analysis of the evidence available in the record and reach a different conclusion if it is not satisfied with the Parties' interpretation of the applicable law. Accordingly, the Committee finds that the Tribunal did not breach Ecuador's right to be heard when deciding that the declaration of *caducidad* breached the Treaty and Block 21 Contract.

361. In sum, the Committee concludes that by finding that the *caducidad* declaration breached both the Treaty and Block 21 Contract, the Tribunal neither manifestly exceeded its powers, nor seriously departed from a fundamental rule of procedure.

### C. GROUNDS ON THE TRIBUNAL'S FINDINGS ON DAMAGES

362. Before assessing each of the specific grounds advanced by Ecuador on the Tribunal's findings on damages, the Committee considers necessary to briefly refer to an issue debated by the Parties in their written and oral pleadings: the scope and contours of the arbitral Tribunal's discretion when calculating damages in an ICSID arbitration.

363. *Ad hoc* committees have consistently recognized that tribunals have a considerable measure of discretion in deciding issues of quantum.<sup>314</sup>

364. As noted by the *Rumeli ad hoc* committee:

[T]he tribunal must be satisfied that the claimant has suffered some damage under the relevant head as a result of the respondent's breach. But once it is satisfied of this, the determination of the precise amount of this damage is a matter for the tribunal's informed estimation in the light of all the evidence available to it.<sup>315</sup>

365. As to the mathematical calculations undertaken by a tribunal, the *Rumeli ad hoc* committee further stated that:

---

<sup>313</sup> Fourth Expert Report of Juan Pablo Aguilar Andrade, July 26, 2012, ¶ 20 (CEA-084).

<sup>314</sup> *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, November 2, 2015, ¶¶ 412, 417 (AALA-061); *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment, February 5, 2002, ¶ 91 (AALA-046); *UAB E ENERGIJA (LITHUANIA) v. Republic of Latvia*, ICISD Case No. ARB/12/33, Decision on Annulment, April 8, 2020 (AALA-110).

<sup>315</sup> *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16 (Annulment), Decision of the *ad hoc* Committee, March 25, 2010, ¶¶ 144-145, and 147 (AALA-086).

The Committee well understands the grounds for the Applicant on Annulment’s objection in this regard. It is highly desirable that tribunals should minimise to the greatest extent possible the element of estimation in their quantification of damages and maximise the specifics of the ratiocination explaining how the ultimate figure was arrived at. But, nevertheless, the Committee does not consider that the award of damages is one which it ought to annul, since the Tribunal did not fail to give reasons for its award of damages. On the contrary, the Tribunal examined the position as to damages with considerable care and set out the reasons for its award in terms appropriate to the circumstances of the case and the evidence available to it.<sup>316</sup>

366. Likewise, in regard to the allocation of interests, the *Vivendi v. Argentina ad hoc* committee stressed that “the allocation of interest, like the evaluation of damages, falls within the discretionary power of the Tribunal in the light of all relevant circumstances of the case.”<sup>317</sup>
367. The Committee shares the point of view of the above mentioned *ad hoc* committees. Arbitral tribunals have a margin of discretion to estimate the quantification of the damages, including the allocation of interest. To meet the duty of stating the reasons for its decisions, an arbitral tribunal need not reveal or explain each mathematical calculation that supports its conclusions. However, tribunals must show the premises leading to their conclusion.

**(1) Grounds on the Tribunal’s finding that the Parties would have agreed to Law 42 being stabilized at 33% as of October 5, 2008**

**a. The Parties’ Position**

**(i) Applicant’s Position**

368. Ecuador notes that in its Decision on Jurisdiction and Liability, the Tribunal dismissed Perenco’s claims regarding Law 42, but upheld its claims regarding Decree 662. The Tribunal concluded that Law 42 fell within the scope of the Participation Contracts’ clauses for the negotiation of an adjustment factor if new taxation measures affected the economy of the contracts (the “**Renegotiation Clauses**”). The Tribunal concluded that if Perenco believed that a modification to the tax system had an impact on the economy of the Participation Contracts, it should have raised the issue and pursued negotiation with Ecuador to agree on a correction factor for absorbing that impact—not any general increase in Perenco’s tax burden.<sup>318</sup> Perenco, however, did not pursue the negotiation process under the Renegotiation Clauses and therefore the Tribunal found no breach of the Participation

<sup>316</sup> *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16 (Annulment), Decision of the *ad hoc* Committee, March 25, 2010, ¶ 178 (AALA-086).

<sup>317</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3 (formerly *Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic*), Decision on Annulment, August 10, 2010, ¶ 256 (AALA-070).

<sup>318</sup> Memorial on Annulment, ¶¶ 372-373.

Contracts. Further, the Tribunal held that increasing the windfall tax rate to 99% by enacting Decree 662 constituted a breach of the Participation Contracts as it “was no longer an attempt to claim an equitable distribution of the windfall revenues generated by an unexpected and significant increase in oil prices, and could not be justified under the applicable Ecuadorian legal standards for the exercise of the *jus variandi* power.”<sup>319</sup> Likewise, it found that Decree 662 constituted a breach to Article 4 of the Treaty.

369. In the Award, the Tribunal calculated the quantum of the damages to Perenco resulting from Decree 662 under the premise that “after Decree 662 entered into effect, Perenco would have been prompted to trigger negotiations and the Parties would have agreed to Law 42 being stabilised at 33% starting 5 October 2008, to be applied prospectively, for both contracts.”<sup>320</sup> In so doing, the Tribunal manifestly exceeded its powers, failed to state the reasons upon which its findings were based, and seriously departed from a fundamental rule of procedure.<sup>321</sup>
370. As to the manifest excess of powers, Ecuador claims that in deciding that Law 42’s 50% rate would have been stabilized at 33%, the Tribunal awarded Perenco damages for what the Tribunal itself had previously held to be a lawful measure—the enactment of Law 42—which complied with the Participation Contracts and the Treaty.<sup>322</sup> Ecuador further argues that in concluding that the Parties would have agreed to stabilize Law 42 at 33%—below Law 42’s 50%—, the Tribunal carried out an irrational assessment of the evidence. The Tribunal also substituted itself for the Parties and proceeded to divine what the outcome of their negotiations would have been and acted *ex aequo et bono*.
371. As to the failure to state reasons, Ecuador claims that in deciding that the Parties would have agreed to stabilize Law 42 at 33% as of October 5, 2008, the Tribunal: i) contradicted its own reasoning in the Decision on Jurisdiction and Liability in such a way that it failed to state any reasons, and ii) failed to state the reasons for such finding.<sup>323</sup>
372. First, the Tribunal’s finding that “the Parties would have agreed to Law 42 being stabilized at 33% starting 5 October 2008, to be applied prospectively, for both contracts” contradicts three of the Tribunal’s findings in the Decision on Jurisdiction and Liability now vested with *res judicata* effect:<sup>324</sup> (1) that “no damages can flow for Law 42 dues at 50%,”<sup>325</sup> 2) that it was incumbent upon Perenco to pursue negotiations with Ecuador at least until they

---

<sup>319</sup> Memorial on Annulment, ¶ 375.

<sup>320</sup> Memorial on Annulment, ¶ 377.

<sup>321</sup> Memorial on Annulment, ¶ 377.

<sup>322</sup> Memorial on Annulment, ¶ 379.

<sup>323</sup> Memorial on Annulment, ¶ 395.

<sup>324</sup> Memorial on Annulment, ¶ 396.

<sup>325</sup> Memorial on Annulment, ¶ 397.

were shown to be futile and Perenco did not do so;”<sup>326</sup> and 3) that it refused to substitute itself to the Parties and divine the outcome of the negotiations, as “it would be wholly speculative for the Tribunal to try to estimate what the parties would have done[;]” moreover, when it lacked Perenco’s analysis demonstrating Law 42’s impact on the Contracts, and the Parties’ determination that the new or modified tax have had an impact on the economy of the Contracts.<sup>327</sup>

373. Second, the Tribunal did not explain why it concluded that the Parties would have agreed to the stabilization of Law 42 at 33%. Also, by deciding that the Parties would have stabilized the effects of Law 42 at 33%, the Tribunal implicitly decided that Law 42 affected the economy of the Contracts, but it gave no reasons for this finding. Also, the Tribunal gave no explanation as to why Ecuador would accept a windfall tax rate below 50%,<sup>328</sup> considering that in the new contracts they were negotiating, the Parties had agreed to increase the rate of the windfall tax from 50% to 70% under the *Ley de Equidad Tributaria*. Finally, there is nothing in the Award explaining why the 33% stabilized windfall tax rate would apply starting on October 5, 2008 as opposed to any other date.<sup>329</sup>
374. As to the departure from a fundamental rule of procedure, Ecuador states that by concluding “*sua sponte* to adopt a stabilized rate of 33% for the windfall tax enacted by Law 42, the Tribunal did not afford the Parties an opportunity to comment upon such rate. In so doing, the Tribunal seriously departed from a fundamental rule of procedure.”<sup>330</sup>
375. Accordingly, Ecuador requests the annulment of the Tribunal’s decision to order Ecuador to pay US\$448,820,400 to Perenco, insofar as the calculation of such amount is based on the application of Law 42 at 33% as of October 5, 2008.

## **(ii) Perenco’s Position**

376. Perenco objects Ecuador’s position that the Tribunal’s holding that by deciding that the Parties would have agreed to stabilize Law 42 at 33%, the Tribunal manifestly exceeded its powers, failed to state the reasons for its decision, and seriously departed from a fundamental rule of procedure.<sup>331</sup>
377. As regards the manifest excess of powers, Perenco argues that, in quantifying damages, the Tribunal clearly had the power to determine what would have occurred in the ‘but for’

---

<sup>326</sup> Memorial on Annulment, ¶ 398.

<sup>327</sup> Memorial on Annulment, ¶¶ 399-404.

<sup>328</sup> Memorial on Annulment, ¶¶ 405-412.

<sup>329</sup> Memorial on Annulment, ¶¶ 413-416.

<sup>330</sup> Memorial on Annulment, ¶ 413.

<sup>331</sup> Counter-Memorial on Annulment, ¶ 203.

world had Ecuador not breached the Treaty and Contracts.<sup>332</sup> Even under Ecuador's diluted annulment standard, "by determining that the Parties would have agreed to Law 42 at 33%, the Tribunal simply made a factual finding about what would have occurred, on the balance of probabilities, if Ecuador had complied with its obligations under the Treaty and Contracts to 'absorb the increase [...] in the tax burden.'"<sup>333</sup> In so doing, the Tribunal endeavored to apply international law to fully compensate Perenco.

378. Perenco further states that the Tribunal did not reopen its previous finding that Perenco did not sufficiently press its rights under the Contracts' absorption clauses to offset Law 42 at 50%.<sup>334</sup> Far from re-opening its Liability Decision or granting Perenco "damages for a lawful measure," the Tribunal's findings reflected the fact that Perenco had valuable absorption rights under the Contracts and that Perenco would have exercised those rights but for Decree 662.<sup>335</sup>
379. While Ecuador claims that the Tribunal's factual findings are annulable because it carried out an irrational assessment of the evidence or acted *ex aequo et bono*,<sup>336</sup> Perenco recalls that while the Tribunal found that Perenco initially did not "test" the clauses, it also found that the clauses were not adequately pursued such as to be shown to have been futile until the application of Decree 662 in 2007.
380. Similarly, the Tribunal did not "rewrite the facts" by allegedly disregarding that the Parties "had agreed to increase the rate of the windfall tax from 50% (under Law 42) to 70% (under the *Ley de Equidad Tributaria*)." For Perenco, this is a misleading comparison because the 70% rate, expressed in an unconsummated agreement, was based on a much higher reference price of US\$42.50/barrel. As Perenco demonstrated with respect to the Block 7 extension damages it sought, "it was roughly equivalent economically (at least under certain price assumptions) to Law 42 with its original reference price at 37.50%."<sup>337</sup> Furthermore, the Tribunal held that this agreement was negotiated under unlawful conditions of duress.<sup>338</sup>
381. Accordingly, the Tribunal's conclusion that in the 'but for' world the Parties would have offset Law 42 to 33% was a tenable one, and it certainly was not so "egregious" and "irrational" that it amounted to a manifest excess of powers.<sup>339</sup> It is not for the Committee to second-guess whether the Tribunal correctly ascertained the facts or whether it correctly

---

<sup>332</sup> Counter-Memorial on Annulment, ¶ 205; Rejoinder on Annulment, ¶ 160.

<sup>333</sup> Rejoinder on Annulment, ¶ 161.

<sup>334</sup> Rejoinder on Annulment, ¶ 162.

<sup>335</sup> Counter-Memorial on Annulment, ¶ 209.

<sup>336</sup> Reply on Annulment, ¶¶ 305-312.

<sup>337</sup> Counter-Memorial on Annulment, ¶ 211.

<sup>338</sup> Counter-Memorial on Annulment, ¶ 211.

<sup>339</sup> Rejoinder on Annulment, ¶ 167.

appreciated the evidence, in particular given that a tribunal has an especially wide margin of discretion in fact-finding when considering damages.<sup>340</sup>

382. As regards the failure to state reasons, Perenco objects to Ecuador's contention that the Tribunal's findings regarding Law 42 at 33% "directly contradict" and "cancel out" three of the Tribunal's prior findings in the Decision on Jurisdiction and Liability. According to Perenco, the Tribunal's reasons would have to be so genuinely contradictory that they amount to a total absence of reasons, which is an extremely high bar that occurs in extremely rare cases and cannot be lightly assumed.<sup>341</sup> Ecuador did not meet this extremely high bar.
383. First, there is no contradiction between the Tribunal's liability findings on Law 42 at 50% and its decision to grant damages to Perenco under Decree 662. While the Decision on Jurisdiction and Liability "precludes awarding damages for Law 42's effect prior to Decree 662," beyond Decree 662 "the Tribunal did *not* pass on what might be considered in the damages phase with respect to the possible exercise of the tax modification clauses."<sup>342</sup> According to Perenco, that was a question for the Tribunal to answer based on the Parties' evidence and submissions on quantum, as it did.
384. Second, there is no contradiction between the finding that Perenco did not sufficiently test the absorption clauses prior to the enactment of Decree 662, and the finding that it would have relied on the rights it had under those clauses after Decree 662.<sup>343</sup>
385. Third, there is no contradiction between the Tribunal declining to determine what absorption rate the Parties would have agreed to under Law 42 at 50%, and the Tribunal finding that Perenco did prove futility after Decree 662 and that "the evidence as whole" showed that 'but for' that futility, the Parties would have agreed to a 33% rate. Perenco notes that "the 'evidence as whole' at the damages phase encompassed multiple additional written briefs, witness statements, expert reports, and two oral hearings discussing precisely what would have occurred but for Ecuador's unlawful conduct."<sup>344</sup>
386. Furthermore, Ecuador's position that the Tribunal failed to state any reasons for its finding that the stabilized rate would have been 33% as of October 2008 ignores the Award. Perenco contends that the Tribunal provided its reasons in paragraphs 366-387, 394-411,

---

<sup>340</sup> Counter-Memorial on Annulment, ¶ 212.

<sup>341</sup> Counter-Memorial on Annulment, ¶ 214.

<sup>342</sup> Counter-Memorial on Annulment, ¶ 215; Rejoinder on Annulment, ¶ 169.

<sup>343</sup> Counter-Memorial on Annulment, ¶ 216; Rejoinder on Annulment, ¶ 169.

<sup>344</sup> Counter-Memorial on Annulment, ¶ 217; Rejoinder on Annulment, ¶ 169.

592, 603-627, 686 of the Decision on Jurisdiction and Liability, and 127-146, 215, 385 of the Award.<sup>345</sup>

387. As regards the serious departure from a fundamental rule of procedure, Perenco claims that Ecuador is wrong that the Tribunal seriously departed from a fundamental rule of procedure because it adopted a specific absorption rate that neither Party advanced: Law 42 at 33%. Perenco observes that ICSID arbitration is not “baseball” arbitration and the right to be heard does not constrain tribunals to adopt the arguments of either one party or another. Perenco further argues that the right to be heard requires that Ecuador have a reasonable opportunity to present its case and Ecuador admits that it had such an opportunity.<sup>346</sup>
388. Consequently, the Tribunal did not manifestly exceed its powers, fail to state reasons, or seriously depart from a fundamental rule of procedure in finding that the Parties would have agreed to Law 42 at 33%.<sup>347</sup>

#### **b. The Committee’s Analysis**

389. Ecuador claims that in deciding that Law 42’s 50% rate would have been stabilized at 33%, the Tribunal awarded Perenco damages for what the Tribunal itself had previously held to be a lawful measure—the enactment of Law 42—which complied with the Participation Contracts and the Treaty, therefore manifestly exceeding its powers. Ecuador further argues that in concluding that the Parties would have agreed to stabilize Law 42 at 33%—below Law 42’s 50%—, the Tribunal carried out an irrational assessment of the evidence and substituted itself for the Parties by proceeding to divine what the outcome of their negotiations would have been and acted *ex aequo et bono*.
390. Ecuador also considers that in deciding that the Parties would have agreed to stabilize Law 42 at 33% as of October 5, 2008, the Tribunal not only contradicted its own reasoning in the Decision on Jurisdiction and Liability in such a way that it failed to state any reasons, but also failed to state the reasons for such finding.
391. Finally, according to Ecuador, the Tribunal departed from a fundamental rule of procedure by concluding *sua sponte* to adopt a stabilized rate of 33% for the windfall tax enacted by Law 42 without affording the Parties an opportunity to comment on such rate.
392. The Committee stresses that the Award cannot be read in isolation. A review in context with other Decisions of the Tribunal incorporated in the Award—including the Decision on Jurisdiction and Liability—is required to determine whether the grounds for annulment

---

<sup>345</sup> Counter-Memorial on Annulment, ¶ 218; Tr., Day 1 January 12, 2021, Perenco’s Opening Statement, p. 47.

<sup>346</sup> Counter-Memorial on Annulment, ¶ 219; Rejoinder on Annulment, ¶ 170.

<sup>347</sup> Counter-Memorial on Annulment, ¶ 220; Rejoinder on Annulment, ¶ 173.



invoked by Ecuador should stand. Such review in context requires a review of the timing, elements, and scenarios analyzed by the Tribunal in each instance.

393. In its Decision on Jurisdiction and Liability, the Tribunal arrives, *inter alia*, at the following conclusions in relation to the Participation Contracts’ stabilization clauses and Law 42:
394. Clauses 11.7 and 11.12 of the Participation Contracts did not preclude the State from introducing new taxes or modifying existing ones, but in the event that measures were introduced that had “consequences for the economy of” the Contract, the obligation arose to negotiate a “correction factor” that would absorb the increase or decrease in the tax burden.<sup>348</sup> “[T]he predicate for the introduction of any correction factor was the demonstration (and subsequent agreement of the parties) that the new or modified tax had ‘consequences for the economy’ of the contract; a new or modified tax that did not have such consequences would not require a correction factor.”<sup>349</sup> According to the Tribunal, Clause 11 did not stipulate how the correction factor would be calculated; however, it did stipulate the ultimate result, namely, “a change in the parties’ respective participations ‘which absorbs the increase or decrease in the tax burden.’ The process envisaged was one of the negotiation in good faith of a mutually agreeable offset that would result in an amended contract.”<sup>350</sup>
395. As a taxation measure, Law 42 modified the tax regime governing the Participation Contracts with the result that Perenco was entitled to require Petroecuador to engage in negotiations to determine the effects of Law 42 on the economy of the Participation Contracts and to arrive at a consequent correction factor (in the event the Parties agreed that the tax affected the economy of the Contract).<sup>351</sup>
396. It was incumbent upon Perenco to pursue negotiations with the new administration until they were shown to be futile. Yet, Perenco did not do so although it was the Party claiming that Law 42 had an impact on the Participation Contracts’ economy.<sup>352</sup> The Tribunal acknowledged that any such negotiations would have been challenging given that: (i) Ecuador would have advanced that Law 42 did not have an impact on the economy of the contracts; (ii) the Parties would have debated the meaning of “economy of the contract”; (iii) had Perenco submitted its study on its financial performance prior to and after Law 42—which it did not submit at the time—, Petroecuador would have found that Perenco had performed well; and (iv) all the evidence that has been presented by both Parties in the Underlying Arbitration (pricing and profitability expectations at the time of the Contracts’

---

<sup>348</sup> Decision on Jurisdiction and Liability, ¶ 362 (AAE-163).

<sup>349</sup> Decision on Jurisdiction and Liability, ¶ 365 (AAE-163).

<sup>350</sup> Decision on Jurisdiction and Liability, ¶ 365 (AAE-163).

<sup>351</sup> Decision on Jurisdiction and Liability, ¶ 378 (AAE-163).

<sup>352</sup> Decision on Jurisdiction and Liability, ¶ 400 (AAE-163).

making, general industry expectations of returns on investment, etc.) would have been discussed. Nonetheless, the complexity of such negotiation does not support a finding of futility.<sup>353</sup>

397. The Tribunal did not consider it necessary or appropriate in the circumstances<sup>354</sup> to pursue the issue of whether or not Law 42 at 50% affected the economy of the Participation Contracts. If that was the case, the Tribunal was of the view that it was incumbent to Perenco to pursue the procedure set out in Clauses 11.12 of the Block 7 Contract and 11.7 of Block 21.
398. In the Decision on Jurisdiction and Liability the Tribunal stated three additional reasons for declining to divine what would have happened in the negotiation should Perenco had invoked Clause 11 under Law 42 at 50%:
399. First, the clause required the Parties to determine whether Law 42 had an impact on the contract's economy, and if so, to calculate an adjustment to absorb that impact. However, the precise means of correction could only be determined through negotiations that arrived at a mutually agreeable outcome (or, if such negotiations foundered, thereafter by a tribunal armed with all of the relevant documentation produced by both Parties during the negotiations).<sup>355</sup>
400. Second, with the passage of time and the absence of critical contemporaneous data, it would be wholly speculative for the Tribunal to try to estimate what the Parties would have done.
401. Third, Perenco did not produce to the Tribunal the contemporaneous analysis that Perenco prepared to demonstrate the impact of Law 42 on the Participation Contracts.
402. As regards Decree 662, the Tribunal decided that in moving beyond 50% up to 99% the Respondent breached the Participation Contracts. In the Tribunal's view, whatever might have transpired in Clause 11 negotiations on the impact of Law 42 at 50% on the economy of the Participation Contract (had they occurred), moving from 50% to 99% was no longer an attempt to claim an equitable distribution of the windfall revenues generated by an unexpected and significant increase in oil prices, and could not be justified under the applicable Ecuadorian legal standards for the exercise of the *jus variandi* power. The Tribunal also concluded that Decree 662 was intended to prompt negotiations with oil

---

<sup>353</sup> Decision on Jurisdiction and Liability, ¶ 393 (AAE-163).

<sup>354</sup> The circumstances at the time period being evaluated in the Decision on Jurisdiction and Liability did not include Decree 662 (which had not been issued) and did not include *caducidad* and the breach resulting from the abrupt termination of the negotiations.

<sup>355</sup> In the view of the Committee this understanding in the Decision on Jurisdiction and Liability is crucial for the Tribunal's decision in the Award.

companies, and unilaterally converted the Participation Contracts into *de facto* service contracts while the State developed a new model for such contracts.<sup>356</sup>

403. In the Award, the Tribunal proceeded to value the damages caused by Ecuador's breaches. For that purpose, the Tribunal decided to take different valuation dates for Decree 662 and *caducidad*.<sup>357</sup> For the first breach (Decree 662), the Tribunal built a "but for" scenario between October 4, 2007 to July 20, 2010.<sup>358</sup> For the second breach (*caducidad*), the Tribunal took an *ex-ante* approach.
404. As regards a "hypothetical tax threshold" between 50% and 99%, the Tribunal considered that Brattle did not explain why such threshold was appropriate when the Tribunal's task was to eliminate Decree 662 in its entirety.<sup>359</sup> By rejecting the aforementioned threshold and taking 50% as a departing point of the negotiation envisaged in the "but for" scenario, the Tribunal eliminated Decree 662.
405. With respect to the question on whether Law 42 would have been completely absorbed, the Tribunal concluded that, consistent with its finding in its Decision on Jurisdiction and Liability, no damages can flow prior to the issuance of Decree 662, that is, before October 4, 2007.<sup>360</sup>
406. On the above point the Tribunal stated in the Award that in its Decision on Jurisdiction and Liability it "did not pass on what might be considered in the damages phase with respect to the possible exercise of the tax modification clauses (except to note how the contract's provisions were expected to operate)."<sup>361</sup> Therefore, at the time of its Decision on Jurisdiction and Liability, the Tribunal decided not to engage in determining a "but for" scenario for a damage quantification and reserved that decision for the damages phase of the arbitration.
407. In the "but for scenario" for the damages phase in the Award, the Tribunal concluded that if Perenco exercised its contractual rights in the 'but for' scenario, Ecuador would have responded in good faith by negotiating an absorption of the additional tax burden. After considering the evidence, the Tribunal found that in the 'but for' scenario for the period after Decree 662 came into effect, Perenco would have sought an offset. But having regard to the evidence as whole, the Tribunal was not convinced that Perenco would have sought the complete elimination of Law 42 (which would result in a 0% rate). Rather, it would

---

<sup>356</sup> Decision on Jurisdiction and Liability, ¶¶ 409-411. (AAE-163).

<sup>357</sup> Award, ¶ 77 (AAE-031).

<sup>358</sup> Award, ¶ 111 (AAE-031).

<sup>359</sup> Award, ¶ 93 (AAE-031).

<sup>360</sup> Award, ¶ 140 (AAE-031).

<sup>361</sup> Award, ¶ 140 (AAE-031).

have sought to undo the effect of Decree 662 and, to the extent reasonably possible, Law 42.

408. At paragraph 143 of the Award, the Tribunal explains the reasons why it considers that in the ‘but for’ world, Perenco would have most likely sought a negotiation under the tax modification clauses that would have reduced the State’s take of the extraordinary revenues, whilst maximizing the company’s chances of its obtaining an extension of its operatorship of Block 7. Accordingly, the Tribunal concluded that Perenco’s interests in the two Contracts would have been adjusted to Law 42 at 33% as of October 5, 2008 through the expiration of the Participation Contracts (August 2010).
409. Finally, to arrive at the NPV of the DCF that would have been derived from Blocks 7 and 21, the Tribunal devised the “harmonised model,” i.e., the “Model” in the present annulment proceedings. As such, the Tribunal forecasted the production in both Blocks in the two periods already mentioned: 1) between October 4, 2007 and July 20, 2010 (for the first breach under the “but for” scenario, i.e. with Law 42 at 33% after October 5, 2008<sup>362</sup>); and (ii) after *caducidad* (on an *ex ante* basis).
410. The Tribunal noted that it used Perenco’s contemporaneous NPV calculations of the impact of Law 42 at 50% and 99% as a check of its assessment. These calculations were made after Decree 662 was issued. For the Tribunal, it was good evidence of the Block’s estimated value with Law 42 at 50% and 99% at the time of the first breach.<sup>363</sup>
411. The above review of the analysis of the Tribunal in the Decision on Jurisdiction and Liability and the Award leads the Committee to conclude that, for the reasons below, the grounds for annulment invoked by Ecuador in connection with the stabilization of Law 42 and 33% do not stand.
412. In relation to the manifest excess of powers ground, it was invoked by Ecuador in two instances, first, arguing that in deciding that Law 42’s 50% rate would have been stabilized at 33%, the Tribunal awarded Perenco damages for what the Tribunal itself had previously held to be a lawful measure. Second, that in concluding that the Parties would have agreed to stabilize Law 42 at 33%—below Law 42’s 50%—, the Tribunal carried out an irrational assessment of the evidence and substituted itself for the Parties by proceeding to divine what the outcome of their negotiations would have been and acted *ex aequo et bono*.

---

<sup>362</sup> From the Award it may be inferred that the Tribunal’s decision to fix October 5, 2008 as the date after which Law 42 applied at 33% is related to the fact that the last negotiations conducted by the Parties (in which they were apparently negotiating in good faith until before the abrupt termination of the negotiations, which termination the Tribunal considers as a breach) date to October 2008.

<sup>363</sup> Award, ¶¶ 119, 123 (AAE-031).

413. As explained above, regarding the first issue, the scenarios that the Tribunal analyzed in the Decision on Jurisdiction and Liability and the Award were different and what the Tribunal “declined to divine” in each scenario as regards the negotiations between the Parties are also different. What the Tribunal did in the Decision on Jurisdiction and Liability was to indicate that it would not make an assessment for purposes of liability in the abstract, which it did not, but did not indicate or suggest that it would not make such assessment during the damages phase for purposes of calculating the damages.
414. In the Decision on Jurisdiction and Liability and for purposes of liability before Decree 662 (which had not been issued at the time), the Tribunal only declined to guess what would have happened had Perenco triggered Clause 11 under Law 42 at 50%. In the Award, in turn, the Tribunal determined what would have happened in the “but for world”, i.e., in a scenario where Decree 662 had been issued, where there was a change in the policies of Ecuador as regards participation contracts, where the negotiations had commenced and were abruptly terminated and where *caducidad* had been declared. Therefore, the Committee sees no contradiction between the Decision on Jurisdiction and Liability and the Award, as claimed by Ecuador, and no manifest excess of power.
415. In relation to the second issue, in the view of the Committee, the finding by the Tribunal in the Decision on Jurisdiction and Liability that Law 42 at 50% was lawful and did not constitute a breach to the Participation Contracts or the Treaty, did not prevent the Tribunal from analyzing, as it did, what would be the quantum of the damages emerging from the issuance of Decree 662. In other words, under the Tribunal’s reasoning read in context, the fact that Law 42 at 50% was declared lawful by the Tribunal under the Treaty or the Participation Contracts did not prevent the Tribunal from considering that in a negotiation in good faith under the “but for scenario”, excluding Decree 662 and assuming the Parties would have negotiated in good faith on a rate that was acceptable to both and that was not necessarily 50%.
416. In sum, the “but for world” of the Tribunal is one in which: it eliminated the disputed measure Decree 662 and the frustrated negotiation from the equation; assumed therefore that the departing point was a negotiation where Ecuador would have sought no offset despite the 50% provided for in Law 42 (i.e., charge the 50% and not to absorb any impact), and Perenco would have sought an offset (i.e., for Ecuador to assume all the impact as if the 50% did not exist); assumed that the Parties would have interest in maintaining the Blocks (not the same contract but the operation of the Blocks) and thus in reaching an agreement (evidence of the will of the Parties to negotiate is cited elsewhere in the Decision on Jurisdiction and Liability and the Award) they would have reached an agreement at 33%.

417. As regards the claim by Ecuador that the Tribunal carried out an irrational assessment of the evidence and acted *ex aequo et bono*, on the one hand, it is not for *ad hoc* committees to second guess the valuation of the evidence by the arbitral tribunals, and on the other, the exercise of the discretion of a tribunal, as in this case, does not mean that the Tribunal acted *ex aequo et bono*. The Tribunal did not decide *ex aequo et bono*, it applied the law that it had already considered applicable, i.e. the Participation Contracts which, in the absence of Decree 662, would have led to a successful negotiation between the Parties. Again, there is no manifest excess of power in this instance.
418. Now, Ecuador additionally claims that the Tribunal did not provide reasons for its conclusion that the Parties would have agreed to 33% and as to why the Tribunal picked October 5, 2008.
419. The Committee considers that, in addition to the standards that have already been explained in Section III.D.2, which include the possibility of finding implied reasons in the analysis of the Tribunal, three additional points must be considered:
420. The Parties in the Underlying Arbitration agreed that their experts would provide the Tribunal with a joint model for calculation of the damages and that reference to such agreement and the joint model would not be included in the Award. The Parties debate whether or not the Tribunal was under the obligation to disclose the joint model to the Parties, but it is not for this Committee to decide such difference. The Award, therefore, does not include, by agreement of the Parties, references to the calculations made on the basis of the joint model. The Tribunal cannot, therefore, be blamed for not being able to refer to such joint model if the numbers in the Award were based on such model.
421. A “but for” scenario is a hypothetical scenario, it does not refer to what has occurred but to what may have occurred in the absence of certain measures or conducts. Therefore, a “but for” scenario requires a certain degree of speculation as it would not be possible to determine with absolute certainty what would have likely occurred absent the measures or the conduct.
422. As noted above,<sup>364</sup> ICSID tribunals and *ad hoc* committees have consistently held that in determining damages tribunals enjoy a margin of discretion.<sup>365</sup>

---

<sup>364</sup> See ¶¶ 362-367 of the present Decision.

<sup>365</sup> *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, November 2, 2015, ¶¶ 412, 417 (AALA-061); *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment, February 5, 2002, ¶ 91 (AALA-046); *UAB E ENERGIJA (LITHUANIA) v. Republic of Latvia*, ICISD Case No. ARB/12/33, Decision on Annulment, April 8, 2020 (AALA-110); *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16 (Annulment), Decision of the *ad hoc* Committee, March 25, 2010, ¶¶ 144-145, and 147 (AALA-086).

423. In the instant case, the Committee considers that the reasons for the Tribunal to have picked October 5, 2008 (and not any other date) are implied in the Award. October 2008 corresponds to the period where the “*Actas de Acuerdo Parcial*” were signed and the negotiations terminated (October 3 and 17) and in the “but for” scenario explained in the Award, the negotiations would have been made in good faith and would have concluded with an agreement.<sup>366</sup> The selection of October 5 is within the margin of discretion of the Tribunal to determine the date on which the negotiations would likely have not been terminated if the assumption in the “but for” scenario of the Award is that the negotiations would have been made in good faith.
424. With respect to the selection of 33%, the Committee has already found that in the “but for” scenario the Tribunal eliminated Decree 662 and assumed that negotiations would be conducted in good faith. The Committee further finds that the Tribunal’s decision that Law 42 was legal neither contradicts the Tribunal’s findings on the “but for” scenario nor resulted in an obligation for the Tribunal to consider that a negotiation would necessarily result in a rate of 50%.
425. The Award, based on the available evidence, concludes that the Parties would have negotiated and explains that, in the “but for” scenario, Perenco would have sought an offset, but the Tribunal was not convinced that Perenco would have sought the complete elimination of Law 42 (which would result in a 0% rate), rather it would have sought to undo the effect of Decree 662 and, to the extent reasonably possible, Law 42. In sum, the negotiation in good faith, according to the Award, in a “but for” scenario, would have resulted in a rate higher than 0% (which could have been the rate should an offset under the Participation Contracts had applied) but lower than 50%.<sup>367</sup> The rate of 33% is within the range explained by the Tribunal for the “but for” scenario and is a tenable figure considering the facts explained in the Award and a reasonable exercise of the discretion of the Tribunal as regards the determination of damages. The Committee finds that there is no failure to state reasons in this regard in the Award.
426. Therefore, for the reasons above, the grounds claimed by Ecuador regarding manifest excess of powers and failure to state reasons fail.
427. With respect to the alleged departure from a fundamental rule of procedure, the Committee has already found (See Section III.C.2) that a tribunal does not necessarily depart from the right to be heard by not adopting either of the positions raised by the Parties. Tribunals may conduct their own analysis based on the documents, evidence, pleadings, and legal authorities presented by the Parties and reach a conclusion different from the positions submitted by the Parties. The Committee further found that the Tribunal has reached the

---

<sup>366</sup> Award, ¶¶ 136-137.

<sup>367</sup> Award, ¶¶ 141-143 (CAA-043).

33% based on its analysis of the “but for” world, which implies a degree of reasoned speculation, and in the degree of discretion tribunals have as regards damages. The Committee, therefore, finds that there was no violation of a fundamental rule of procedure for the Tribunal not having requested the opinion of the Parties about the 33% rate.

428. The ground related to departure from a fundamental rule of procedure thus fails.

**(2) Grounds on the Tribunal’s decision to award value to Perenco’s loss of opportunity to extend the Block 7 Participation Contract**

**a. The Parties’ Position**

**(i) Applicant’s Position**

429. Ecuador states that the Tribunal’s decision to award US\$25 million to Perenco to compensate its loss of opportunity on the extension of its operation of Block 7 constitutes a manifest excess of powers, a serious departure from a fundamental rule of procedure, and a failure to state reasons.<sup>368</sup>

430. As to the manifest excess of powers, Ecuador contends that the Tribunal failed to apply the applicable law for two reasons. First, the Tribunal failed to apply the proper method for calculating the value of a lost opportunity, which consists in determining the value of loss or benefit and multiplying it by the probability of such loss or benefit. The Tribunal simply came up with a value, exceeding mere discretion.<sup>369</sup> Second, although Perenco neither quantified its alternative loss of opportunity claim, nor estimated the probability of its chance to secure an extension of the term of the Block 7 Participation Contract, the Tribunal awarded it US\$25 million to compensate for its lost opportunity. In so doing, the Tribunal failed to apply the applicable evidentiary law, and manifestly exceeded its powers.<sup>370</sup>

431. As to the departure from a fundamental rule of procedure, Ecuador states that because Perenco neither quantified its loss of opportunity claim nor estimated the probability of its chance to secure an extension of the term of the Block 7 Participation Contract, Ecuador never had the opportunity to debate either issue and therefore the Tribunal violated its right to be heard.<sup>371</sup>

432. As to the failure to state reasons, the Tribunal did not provide a single line of reasoning as to its calculation of the hypothetical loss or benefit, and the probability of such loss of benefit occurring.

---

<sup>368</sup> Memorial on Annulment, ¶¶ 417-420.

<sup>369</sup> Memorial on Annulment, ¶¶ 422-426.

<sup>370</sup> Memorial on Annulment, ¶ 429.

<sup>371</sup> Memorial on Annulment, ¶¶ 431-432.



433. Ecuador thereby requests that the Committee annul the Tribunal's decision to order Ecuador to pay US\$448,820,400 to Perenco, to the extent that the calculation of such amount includes the value of Perenco's lost opportunity to extend the Block 7 Participation Contract.<sup>372</sup>

**(ii) Perenco's Position**

434. Perenco objects Ecuador's position that the Tribunal manifestly exceeded its powers, failed to state reasons, and seriously departed from a fundamental rule of procedure by granting Perenco US\$25 million for the lost opportunity to extend the Block 7 Contract. According to Perenco, the Tribunal had discretion to determine the appropriate measure of damages to compensate Perenco, without having to apply a specific-mathematical formula, for a proven valuable asset that Perenco would likely have obtained 'but for' Ecuador's wrongful acts.<sup>373</sup>
435. As regards the manifest excess of powers, Perenco contends that Ecuador failed to demonstrate that under the applicable law the Tribunal lacked discretion and had to apply a specific-mathematical formula to calculate the damages emerging from Perenco's loss of opportunity.<sup>374</sup> In the Award, the Tribunal carefully analyzed the law on loss of chance, including the ILC Articles on State Responsibility, investment treaty decisions such as *Gemplus* and *Murphy*, and damages commentators such as Ripinsky & Williams. According to Perenco, these sources confirm that the standard of full reparation does not determine the valuation methodology and thereby the Tribunal enjoyed a large margin of appreciation to assess Perenco's loss of chance damages, including through an "equitable quantification of the harm sustained."<sup>375</sup>
436. Although Ecuador claims that the law on the calculation of loss of opportunity requires (i) determining the value of the loss or benefit, and (ii) multiplying it by the probability of such loss or benefit occurring, it has not identified a single authority supporting its contention that tribunals must apply this formula.<sup>376</sup> In any event, if the Tribunal had applied Ecuador's proposed mathematical formula, it should have granted Perenco damages that were at least 51% of US\$626 million, that is US\$319 million at a minimum.<sup>377</sup>
437. In relation to the existence of Perenco's loss, the Tribunal found that "but for the breaches, the parties more likely than not' would have extended the Block 7 Participation Contract,

---

<sup>372</sup> Memorial on Annulment, ¶ 438.

<sup>373</sup> Counter-Memorial on Annulment, ¶ 221; Rejoinder on Annulment, ¶ 174.

<sup>374</sup> Counter-Memorial on Annulment, ¶¶ 223-226; Rejoinder on Annulment, ¶¶ 176-177.

<sup>375</sup> Rejoinder on Annulment, ¶ 176.

<sup>376</sup> Rejoinder on Annulment, ¶ 177.

<sup>377</sup> Rejoinder on Annulment, ¶ 181.

including because (i) Block 7 was a proven field with valuable oil reserves; (ii) there is no question Perenco wanted to stay in Ecuador; and Perenco submitted ‘substantial’ and ‘considerable’ evidence showing that the State itself would have preferred Perenco to stay in Ecuador.”<sup>378</sup>

438. As regards the failure to state reasons, Perenco argues that Ecuador’s claims are misplaced because the Tribunal did not have to develop a mathematical calculation to determine the damages Perenco is entitled to for its proven loss of opportunity to extend its operatorship in Block 7. Ecuador’s claims are also false because the Tribunal explained that the probability of Perenco’s loss occurring was greater than 50% and confirmed that there was “a substantial body of evidence on the record” supporting Perenco’s contention that it would have obtained an extension in Block 7 ‘but for’ Ecuador’s wrongful acts. According to Perenco, the Tribunal’s reasons are provided in paragraphs 206-222, 312 -326 of the Award.<sup>379</sup>
439. As regards the serious departure from a fundamental rule of procedure, Perenco contends that Ecuador’s position is flawed because Ecuador had ample opportunity to debate both the probability of Perenco’s chance to secure an extension and the quantification of such lost opportunity. Yet, Ecuador chose not to rebut either point.<sup>380</sup> Although Ecuador states that it was not permitted to address the Tribunal on its “novel” findings regarding the probability of the extension and the US\$25 million, Ecuador had a reasonable and fair opportunity to present its case on Perenco’s claim for loss of opportunity.<sup>381</sup> Perenco further contends that, contrary to Ecuador’s suggestion, the Tribunal was not limited to adopting a figure previously submitted by one of the Parties, nor did it have to give the Parties a draft of the Award for comments.<sup>382</sup>
440. Accordingly, the Tribunal did not manifestly exceed its powers, fail to state reasons, or seriously depart from a fundamental rule of procedure in finding that Perenco is entitled to damages for its lost opportunity to extend the valuable Block 7 Contract. If, however, the Committee were to apply Ecuador’s proposed formula, it would have to multiply the maximum possible damages (US\$626 million) by the probability of such loss or benefit occurring (at least 51%), thereby granting Perenco at least US\$319 million in loss of chance damages.<sup>383</sup>

---

<sup>378</sup> Counter-Memorial on Annulment, ¶ 228.

<sup>379</sup> Tr., Day 1 January 12, 2021, Perenco’s Opening Statement, p. 47.

<sup>380</sup> Counter-Memorial on Annulment, ¶ 235.

<sup>381</sup> Rejoinder on Annulment, ¶ 188.

<sup>382</sup> Rejoinder on Annulment, ¶ 189.

<sup>383</sup> Rejoinder on Annulment, ¶ 191.

## **b. The Committee's Analysis**

441. Ecuador claims that the Tribunal's decision to award US\$25 million to Perenco to compensate its loss of opportunity on the extension of its operation of Block 7 constitutes a manifest excess of powers, a serious departure from a fundamental rule of procedure, and a failure to state reasons.
442. According to Ecuador, there is an excess of powers because the Tribunal failed to apply the proper method for calculating the value of a lost opportunity—which consists in determining the value of loss or benefit and multiplying it by the probability of such loss or benefit—and because the Tribunal awarded it US\$25 million to compensate for its lost opportunity despite the fact that Perenco neither quantified its loss of opportunity claim or estimated the probability of its chance to secure an extension of the Participation Contract.
443. Nowhere in the applicable law is there a mathematical formula to quantify loss of opportunity. As mentioned before, tribunals enjoy a degree of discretion to assess damages and it is not for *ad hoc* committees to question the methodology used by a tribunal to reach its conclusions on damages or to impose a certain method for calculation of the damages. This ground therefore fails.
444. Ecuador claims a serious departure from a fundamental rule of procedure, because Perenco neither quantified its loss of opportunity claim nor estimated the probability of its chance to secure an extension of the term of the Block 7 Participation Contract, and Ecuador never had the opportunity to debate either issue and, therefore, the Tribunal violated its right to be heard.
445. Again, the Tribunal was under no obligation to apply a specific and exclusive methodology to calculate the loss of opportunity. It is true that in the Award it did not estimate the probability of Perenco's chance to obtain an extension, but the consequence thereof, as will be analyzed below, is that the decision on this point lacks reasoning not that the Tribunal violated a fundamental rule of procedure. As already stated in Section III.C.2, the Tribunal is not under the obligation to discuss with the Parties every step of its decision making process and can make its own assessment of the evidence, legal authorities, documents, pleadings, expert reports and witness statement presented by the Parties, so long as the Tribunal's decision remains within the legal and factual framework of the debate in the arbitration. The Committee finds no serious departure from a fundamental rule of procedure.
446. As to the failure to state reasons, Ecuador claims that the Tribunal did not provide a single line of reasoning as to its calculation of the hypothetical loss or benefit, and the probability of such loss of benefit occurring. The Committee finds that the premises referred to by the Tribunal in its Award do not lead to the conclusion that the value of the loss of opportunity

should be a nominal one and that the nominal value should be US\$25 million and therefore agrees that the Tribunal failed to state the reasons for such conclusion.

447. In the Award the Tribunal accepted that Ecuador had a substantial measure of discretion when it came to deciding whether to grant an extension of the Participation Contract and indicated that in the “but for” world, an extension would at its best not have entailed an extension of the existing Participation Contract, but rather the Parties would have agreed on a new model.<sup>384</sup> The Tribunal remarked that “it is not possible, on the evidence before it, [...] to know what contractual terms might have been arrived at in a successful negotiation but for the unlawful acts.”<sup>385</sup>
448. The Tribunal explained that there is an inherent difficulty of choosing a proxy for the Block 7 extension scenario based on the October 2008 *Acta de Acuerdo Parcial* and referred to Perenco’s characterization of the *Acta* as a “vague, incomplete and risky substitute contract.”<sup>386</sup> The Tribunal further considered that “employing a services contract like the Block 10 AGIP Contracts as a proxy for what might or might not have been agreed for Block 7 [as proposed by Perenco], is in the end a bridge too far for the Tribunal.”<sup>387</sup>
449. The Tribunal disregarded Perenco’s analysis indicating that “much of Perenco’s damages analysis is based on what Petroamazonas has done since it assumed operations of the Blocks.” Yet, the Tribunal stated that it “is not convinced that the economics of the operations of Petroamazonas, a State-owned entity, provides an appropriate ‘apples to apples’ comparator of what Perenco would have done in the ‘but for’ scenario.” The Tribunal remarked that the adjudicator must seek to avoid speculative damages.<sup>388</sup>
450. Based on the foregoing, the Tribunal rejected Perenco’s extension argument as “too remote, uncertain and ultimately too speculative, particularly when Perenco itself accepted that it is necessary to use other contractual models as a proxy for what might have been agreed between the Parties.”<sup>389</sup> The Tribunal then acknowledged that the Parties might have been unable to reach an agreement or that the State might have decided not to extend the Block 7 Contract. Accordingly, the Tribunal concluded that in the present case there is an “insufficient degree of confidence as to the terms of the contract that might have been concluded such that there could be an estimate of lost cash flows.”<sup>390</sup>

---

<sup>384</sup> This is consistent with the Tribunal’s reasoning on the Law 42 at 33%.

<sup>385</sup> Award, ¶ 212 (AAE-031).

<sup>386</sup> Award, ¶ 215 (AAE-031).

<sup>387</sup> Award, ¶¶ 216-217 (AAE-031).

<sup>388</sup> Award, ¶¶ 218-219 (AAE-031).

<sup>389</sup> Award, ¶ 220 (AAE-031).

<sup>390</sup> Award, ¶ 220 (AAE-031).

451. The Tribunal then turned to the valuation of the loss of opportunity to negotiate an agreement to continue to operate Block 7 until August 2018 and stressed that this exercise differed from valuing the loss of profits expected under an executed contract.<sup>391</sup>
452. The Tribunal discussed the relevance of the *Gemplus* award and concluded that although it was facing dramatically different factual circumstances than the present case “the *Gemplus* tribunal highlighted two points on ‘loss of opportunity’ that resonate with the present Tribunal.” First, there was “no certainty or realistic expectation of this project’s profitability as originally envisaged, but there was nonetheless a reasonable opportunity” and that “opportunity, however small, has a monetary value” at international law. Second, “it would be wrong in principle to deprive or diminish the Claimants of the monetary value of that lost opportunity on lack of evidential grounds when that lack of evidence is directly attributable to the Respondent’s own wrongs.”<sup>392</sup>
453. The Tribunal, after summarizing the facts of the case, concluded that ‘but for’ the breaches the Parties more likely than not would have arrived at a solution whereby Perenco would be operating Block 7 under a different contractual regime. But the Tribunal has also found that it “cannot engage in the kind of speculation about a specific contractual model which would then be married with Mr. Crick’s projections in order to arrive at an amount of damages.”<sup>393</sup>
454. Quoting from Perenco’s submissions, the Tribunal referred to Ripinsky and Williams’s *Damages in International Investment Law*, where the authors observed:

Loss of chance can thus be used as a tool allowing the injured party to receive some form of compensation for the loss of chance to make profit. In theory, the loss of chance is assessed by reference to the degree of probability of the chance turning out in the plaintiff’s favour, although in practice the amount awarded on this account is often discretionary. [...] In some other cases, arbitral tribunals have determined the amount of lost profits in a discretionary manner. Where this lack of numerical support was due to the fact that a tribunal could not estimate the loss of profits with satisfactory precision, such awards may be classified as compensation for the loss of business opportunity. Amounts awarded under this head of damage are likely to be conservative and reflect a tribunal’s view of an equitable, reasonable and balanced outcome rather than being a result of a mathematical calculation.<sup>394</sup>

---

<sup>391</sup> Award, ¶ 312 (AAE-031).

<sup>392</sup> Award, ¶ 316 (AAE-031).

<sup>393</sup> Award, ¶ 317 (AAE-031).

<sup>394</sup> Award, ¶¶ 318-319 (AAE-031). Footnotes omitted.

455. Thereafter, the Tribunal stressed that a claim for loss of opportunity is not to be equated to a lost profits claim based upon a final, executed contract, because in the former there is an element of uncertainty that must be taken into consideration.<sup>395</sup>
456. The Tribunal proceeded then to mention that in arriving at its decision, it considered the ILC Articles, particularly Article 36, and the commentaries (specifically (27) and (32) thereto) to conclude that financial damage must not only be proximately caused by the unlawful act(s), but that it also be “assessable”, that is, capable of being assessed and seek to avoid granting “inherently speculative” claims or to put it the other way, seek to determine whether there are “sufficient attributes to be considered a legally protected interest of sufficient certainty to be compensable.”<sup>396</sup>
457. According to the Tribunal, the circumstances of the case are unusual. “The parties arrived at an ‘in principle’ negotiated change to their contractual relationship which contemplated the extension of Block 7’s term. However, it was Ecuador, and not Perenco, which, due to Burlington’s recalcitrance, balked at its implementation. The Tribunal found this refusal was a breach of the Treaty by Ecuador which deprived Perenco of the chance to reach an agreement on extension. Therefore, the Tribunal considers that Perenco is entitled to compensation for the loss of that opportunity.”<sup>397</sup>
458. The Tribunal thereafter “frankly acknowledges that any estimation of the value of the loss of opportunity is an exercise of discretion and therefore it has decided to award a nominal value”.<sup>398</sup>
459. The Tribunal repeated that since a loss of opportunity to have the contract is different from the loss of a fully crystallised legal right to an extension of a contract, “the expected cash flows of which could be modelled on a DCF basis, such value must necessarily be significantly lower than the amount claimed by Perenco based on the AGIP contract model applied by Mr. Crick’s drilling forecasts for Block 7 through to 2018.”<sup>399</sup>
460. Finally, the Tribunal concluded that “[i]n all of the circumstances, the Tribunal holds that an award of US\$25 million is appropriate. It cannot but note that the equities tend strongly in favour of the granting of this relief. This however is not a decision *ex aequo et bono*. It is one grounded in law.”<sup>400</sup>

---

<sup>395</sup> Award, ¶ 320 (AAE-031).

<sup>396</sup> Award, ¶¶ 321-322 (AAE-031).

<sup>397</sup> Award, ¶ 323 (AAE-031).

<sup>398</sup> Award, ¶ 324 (AAE-031).

<sup>399</sup> Award, ¶ 325 (AAE-031).

<sup>400</sup> Award, ¶ 326 (AAE-031).

461. In the view of the Committee the Tribunal reached a decision that does not follow from its analysis and therefore fails to state reasons for its conclusion on loss of opportunity.
462. Throughout paragraphs 323-326 of the Award, the Tribunal disregarded all possible comparative scenarios proposed by Perenco to support its quantum claim on the loss of opportunity: the *Acta de Acuerdo Parcial*, the economics of Petroamazonas, the Block 10 AGIP Contracts, and acknowledged not only that the Parties might have been unable to reach an agreement, but that Ecuador might have decided not to extend the Block 7 Contract.
463. Then, it stressed several times that a loss of opportunity is not the same as a contract extension or a loss of profit claim based on a final executed contract and that it is not possible to apply a DCF model to determine a loss of opportunity and therefore the value must necessarily be significantly lower than the amount claimed by Perenco based on the AGIP contract model applied by Mr. Crick's drilling forecasts for Block 7 through to 2018.
464. Likewise, the Tribunal indicated that it cannot engage in the kind of speculation about a specific contractual model and apply Mr. Crick's projections in order to arrive at an amount of damages.
465. The quote from Ripinsky and Williams referred to by the Tribunal in the Award indicates that the loss of opportunity can be used as a tool to determine the compensation for the loss of chance to make profit and that, at least in theory, the loss of chance is assessed by reference to the degree of probability of the chance turning out in favour of a claimant, although in practice the amount awarded on this account is often discretionary. In the same quote, the authors add that this type of damages awarded is likely to be conservative and reflect a tribunal's view of an equitable, reasonable and balanced outcome rather than being a result of a mathematical calculation.
466. However, rather than explaining whether it disregarded the degree of probability as a tool and the reasons therefore, or what, in the Tribunal's view, an equitable, reasonable and balanced outcome is, or what could have been the impact of the degree of discretion that Ecuador had not to extend the Participation Contract or, generally, refer to a conclusion from the premises contained in paragraphs 312 to 326, the Tribunal simply "acknowledged" that it has discretion and decided to award "a nominal value." No explanation whatsoever is given as to what is the concept of a nominal value or the reason to award a nominal value as opposed to any other value.
467. There is no doubt that tribunals have discretion in the awarding of damages, however the Committee fails to see, because the Tribunal does not explain, how merely acknowledging that the Tribunal has discretion is the consequence of the analysis proposed by the Tribunal as regards loss of opportunity. The acknowledgement that a tribunal has discretion is

merely a general affirmation of one of the powers of a tribunal, but such general affirmation, in the context of the Award, cannot be the sole reason to award a nominal value of damages. The acknowledgement by the Tribunal of its discretion is a stand-alone affirmation that has no clear connection with the preceding paragraphs so that the reasoning of the Tribunal from the premises to the conclusion can be followed.

468. The Tribunal seems to be aware of the lack of sufficient reasoning for its conclusion when it considers necessary to stress that the decision on loss of opportunity is not a decision *ex aequo et bono* but rather grounded in law.
469. Based on the standard referred to in Section III.D.2, the Committee considers that the Tribunal failed to state reasons to conclude that loss of profit should be awarded and the amount therefor.
470. However, the Committee finds no basis, and Ecuador has not even invoked the basis, to annul the entirety of the Award as a result of the absence of reasons in a specific point that can be clearly isolated from the remaining of the Award. The fact that one part of the Tribunal's decision that can be isolated from the remainder of the Award is not reasoned is not enough to annul the whole process of calculation of damages performed by the Tribunal, much less the entirety of the Award. The Committee therefore concludes that the US\$25 million awarded as damages for loss of opportunity must be deducted from the US\$416.5 million awarded to Perenco, prior to the adjustment factor.

**(3) Grounds on the Tribunal's finding that Perenco would have drilled 23 new wells on Block 7**

**a. The Parties' Position**

**(i) Applicant's Position**

471. In the Award, the Tribunal held that "23 additional wells would have been drilled during the life of the Block 7 Participation Contract [i.e., even more than the 21 claimed by Perenco]," assuming the contract term would not have been extended. Specifically, the Tribunal held that "the Consortium would have drilled four wells by January 2008 and 19 wells from February 2008 to August 2009." Ecuador submits that in so deciding, the Tribunal seriously departed from a fundamental rule of procedure and failed to state the reasons for this decision.<sup>401</sup>
472. As to the departure from a fundamental rule of procedure, prior to deciding *sua sponte* that 23 new wells would have been drilled on Block 7 (i.e., 2 more than what Perenco asserted that it would have drilled), the Tribunal never invited the Parties to comment on a drilling

---

<sup>401</sup> Memorial on Annulment, ¶¶ 441-442.



program even more ambitious than that put forward by Perenco. In so doing, the Tribunal also seriously departed from a fundamental rule of procedure, insofar as it infringed Perenco's right to state its claim, and Ecuador's correlative right to state its defense, and to produce all arguments and evidence in support of it.<sup>402</sup>

473. As to the failure to state reasons, the Tribunal has not provided any reasons regarding the number of wells that would have been drilled on Block 7 absent Decree 662, nor the period of time across which such drilling by Perenco would have taken place.<sup>403</sup>
474. Accordingly, Ecuador requests the annulment of the Tribunal's decision to order Ecuador to pay US\$448,820,400 to Perenco, insofar as the calculation of such amount is based on the volume of oil that Perenco's 23 new Block 7 wells would have produced.<sup>404</sup>

### **(ii) Perenco's Position**

475. According to Perenco, Ecuador's complaints about the Tribunal's finding that Perenco would have drilled 23 new wells on Block 7 'but for' Ecuador's unlawful conduct are based on a mischaracterization of the Award.<sup>405</sup>
476. The Tribunal granted Perenco damages based on 23 'but for' wells that represent two wells Perenco actually drilled right after Ecuador imposed Decree 662 plus 21 new wells that Perenco would have drilled 'but for' Decree 662. For the sake of coherence, the Tribunal uniformly labelled these 23 wells as 'but for' wells. That was exactly the same number of wells that Perenco requested when it claimed future production from the two actual wells that it drilled right after Decree 662 plus 21 new wells, that is a total of 23 wells after Decree 662.<sup>406</sup>
477. Consequently, the Tribunal neither failed to state reasons, nor seriously departed from a fundamental rule of procedure by deciding that Perenco would have drilled 23 new wells on Block 7.<sup>407</sup>

### **b. The Committee's Analysis**

478. Ecuador argues that the Tribunal seriously departed from a fundamental rule of procedure and failed to state reasons when deciding that Perenco would have drilled 23 new wells on Block 7.

---

<sup>402</sup> Memorial on Annulment, ¶ 443.

<sup>403</sup> Memorial on Annulment, ¶ 444.

<sup>404</sup> Memorial on Annulment, ¶ 447.

<sup>405</sup> Counter-Memorial on Annulment, ¶ 241.

<sup>406</sup> Counter-Memorial on Annulment, ¶¶ 242-247.

<sup>407</sup> Counter-Memorial on Annulment, ¶ 255; Rejoinder on Annulment, ¶ 193.

479. As to the serious departure from a fundamental rule of procedure, Ecuador states that the Tribunal breached the Parties’ right to be heard by deciding *sua sponte* that Perenco would have drilled 23 new wells on Block 7 in a ‘but for’ scenario (two more wells than the ones claimed by Perenco) and by not allowing the Parties to comment on this thesis. The Committee, however, does not find that the Tribunal breached the Parties’ right to be heard.
480. In the first place, the Committee observes that both Parties had ample opportunity to present their case as regards the damages caused by Decree 662 and the impact on Perenco’s drilling plans on Block 7. In fact, Ecuador does not dispute that the Parties had several procedural opportunities to debate the number of wells that Perenco would have drilled in a ‘but for’ scenario, absent Decree 662. As stressed by Perenco, these opportunities include four rounds of written pleadings on quantum, witness statements, expert reports and oral submissions at the Quantum Hearing and the Closing Arguments Hearing.<sup>408</sup> Ecuador’s case is thus mainly based on the allegation that the Tribunal departed from the exact pleadings advanced by the Parties and decided *sua sponte* that Perenco would have drilled 23 wells.
481. Yet, as repeatedly stated throughout this decision, the Committee is of the view that the Tribunal was not obliged to adopt either of the positions exactly as advanced by each Party. As long as the Tribunal’s decision fits the legal framework argued during the arbitration, the Tribunal can make its own assessment of the evidence, legal authorities, documents, pleadings, expert reports and witness statement presented by the Parties. The fact that, based on the evidence in the record, the Tribunal arrived at a number of 23 wells—instead of 21 or 24 wells—does not amount to a serious departure from a fundamental rule of procedure. The Tribunal’s conclusion is based on the Parties’ submission on whether in a ‘but for’ scenario Perenco would have drilled the Oso fields and/or the Lobo and Coca-Payamino fields, the number of wells it could have drilled, and the time extension of the drilling. The Committee does not see that the Tribunal based its decision on external or novel arguments, documents, or legal authorities not pleaded by the Parties. To the contrary, the Committee observes that the Tribunal paid due consideration to the opinion of the quantum experts, particularly to Mr. Crick’s production profiles.<sup>409</sup> Thus, Ecuador’s argument that the Tribunal seriously departed from a fundamental rule of procedure fails.
482. As to the failure to state reasons, Ecuador contends that the Tribunal did not provide “reasons for its conclusion regarding the number of wells that would have been drilled on Block 7 absent Decree 662, nor the period of time across which such drilling by Perenco

---

<sup>408</sup> Counter-Memorial on Annulment, ¶ 241; Rejoinder on Annulment, ¶ 199.

<sup>409</sup> Award, ¶¶ 206-255 (AAE-031).

would have taken place.”<sup>410</sup> The Committee is not persuaded by Ecuador’s argument given that the Tribunal did state the reasons leading to its decision.

483. The Committee finds that five premises referred to by the Tribunal in its Award are critical to the conclusion that in a ‘but for’ scenario Perenco would have drilled 23 new wells: (i) no damages can flow at least until October 4, 2007 when Ecuador committed the unlawful act of enacting Decree 662;<sup>411</sup> (ii) it cannot be assumed that the “the extension of Block 7 would have been based on the AGIP contract or some other proxy”, thus drilling plans for Block 7 for the period after the date of the Block 7 Contract’s expiry on 16 August 2010 cannot be taken into consideration;”<sup>412</sup> (iii) “in absence of a contract extension, Perenco would have stopped drilling in Block 7 in August 2009 in order to ensure an adequate payback on the new wells;”<sup>413</sup> (iv) Perenco would have concentrated in the less challenging Oso field than in the riskier and more expensive waterflooding Lobo and Coca-Payamino fields;<sup>414</sup> and (v) “the sharply rising price of oil leading up to October 2007 would have induced Perenco to seek to drill as many wells as were economically possible in the Oso field in the time remaining in that Contract.”<sup>415</sup>
484. From the said premises it follows that, contrary to Ecuador’s assertion, the Tribunal did identify the period in which the drilling would have taken place in a ‘but for’ scenario: between October 2007 and August 2009. As regards the number of wells, the Committee observes that although the Tribunal does not expressly mention how it arrives to the number of 23 wells, it can be inferred that the Tribunal derived its conclusion from Perenco’s assertion that:

But for Decree 662, Perenco argued, it would have continued to drill one well per month in Oso, just as it was doing at the time that Decree 662 came into effect and it would have continued this drilling programme for as long as it remained profitable to do so. Perenco asserted that this ought not to be controversial: further Oso wells would undeniably produce new reserves and Perenco indisputably had previously achieved a one-well-per-month drilling schedule in Oso.<sup>416</sup>

485. The number of 23 new wells is correlated to the number of months in which the drilling would have taken place: one-well-per-month.

---

<sup>410</sup> Memorial on Annulment, ¶ 444.

<sup>411</sup> Award, ¶ 127 (AAE-031).

<sup>412</sup> Award, ¶ 223 (AAE-031).

<sup>413</sup> Award, ¶ 252 (AAE-031).

<sup>414</sup> Award, ¶¶ 253-254 (AAE-031).

<sup>415</sup> Award, ¶ 252 (AAE-031).

<sup>416</sup> Award, ¶ 229 (AAE-031).

486. This conclusion finds further support on the fact that the Tribunal expressly indicated that “the Consortium would have drilled four wells by January 2008 and 19 wells from February 2008 to August 2009.”
487. Thus, the Committee finds that the Tribunal did not fail to state the reasons for its decision that absent Decree 662, Perenco would have drilled 23 new wells.
488. In sum, the Committee concludes that the Tribunal neither seriously departed from a fundamental rule of procedure nor failed to state the reasons for its decision.

**(4) Grounds on the Tribunal’s decision to award Perenco damages amounting to US\$448,820,400**

**a. The Parties’ Position**

**(i) Applicant’s Position**

489. Ecuador states that to reach the amount of US\$448,820,400 of damages awarded to Perenco, the Tribunal relied on an adjusted discounted cash flow model (the “**Model**”) which it neither disclosed nor explained, although the Parties had agreed on such disclosure. Thus, neither Party is in a position to know how the various components of its calculations led to the final amount of compensation indicated in the Award. In awarding said damages to Perenco, the Tribunal failed to state the reasons for its decision and also manifestly exceeded its powers.<sup>417</sup>
490. As to the failure to state reasons, Ecuador refers to the agreement reached by the Parties and the Tribunal that the quantum experts be made the Tribunal’s experts. Ecuador notes that it accepted the Tribunal’s proposal on the understanding that “in its award, the Tribunal may use the figures provided by the economic experts, but will not mention this agreement nor the process resulting therefrom.”<sup>418</sup> Perenco, in turn, acceded to the proposal, including Ecuador’s condition, but sought to add other conditions.
491. The Tribunal decided to follow the Parties’ agreement without expressing any further concerns. One year later, on May 30, 2017, the Tribunal confirmed to the Parties that it would disclose the joint calculations provided by the quantum experts in the Model, simultaneously with the dispatch of the Award.<sup>419</sup> In the Award, however, the issues related to the quantification of Perenco’s damages are dealt with in less than 13 pages, and the Model is neither enclosed nor explained.<sup>420</sup>

---

<sup>417</sup> Memorial on Annulment, ¶ 449.

<sup>418</sup> Memorial on Annulment, ¶ 451.

<sup>419</sup> Memorial on Annulment, ¶ 455.

<sup>420</sup> Memorial on Annulment, ¶ 457.

492. On October 2, 2019, five days after the Award was rendered, Ecuador requested that the Tribunal disclose to the Parties the “harmonised model” on which it relied to calculate Perenco’s compensation. However, on October 9, ICSID informed Ecuador that the Tribunal was *functus officio* and therefore the Parties would not receive the Model.<sup>421</sup> Accordingly, it was impossible for Ecuador to discern how and why the Tribunal had reached its decision on this point.
493. Furthermore, the Tribunal did not provide any reasons for the adjustments made to the Parties’ calculations. The Tribunal failed to include a description of the precise inputs of the Model and the adjustments the Tribunal applied to the Parties’ models to come up with its own Model. Whilst the Tribunal indicated some numerical values in certain paragraphs of the Award, these values are insufficient for Ecuador to follow the reasoning through which the Tribunal derived said values. In contrast, in the counterclaims stage of the proceedings, the Tribunal conveyed to the Parties the report issued by the environmental expert appointed by it, and the Parties had the opportunity to question the expert at the hearing convened at The Hague.<sup>422</sup>
494. Likewise, the Tribunal failed to state its reasons when it decided that a “fair amount” for the ‘true-up’ should be US\$36.4 million, as it did not provide any reasoning regarding the third component of the ‘true-up’, i.e., “the confluence of events and the Parties’ various actions surrounding the *coactivas*,” it did not indicate the values of the first three components of the ‘true-up’ nor the process through which it allegedly determined such values; and given that it did not indicate the numerical values of the first three components, it is impossible for Ecuador to determine how the Tribunal concluded that their balance was of US\$-5.9 million.<sup>423</sup>
495. As to the manifest excess of powers, in the Award, the Tribunal concluded “that a fair amount for the ‘true-up’ should be US\$36.4 million.” Instead of ascribing value to each component of the ‘true-up’, the Tribunal came up with what it subjectively deemed to be a “fair” amount. In so doing, the Tribunal acted as an *amiable compositeur*, exercising a power which the Parties had not vested in it and thus manifestly exceeded its powers.<sup>424</sup>
496. For the above reasons, Ecuador requests that the Committee annul the Tribunal’s decision to order Ecuador to pay US\$448,820,400 to Perenco, insofar as (i) the Tribunal’s determination on compensation is also based on the Tribunal’s decisions that the Parties would have agreed to stabilize Law 42 at 33% and that Perenco is entitled to US\$25 million

---

<sup>421</sup> Memorial on Annulment, ¶ 458.

<sup>422</sup> Memorial on Annulment, ¶¶ 463-465.

<sup>423</sup> Memorial on Annulment, ¶¶ 467-479.

<sup>424</sup> Memorial on Annulment, ¶ 480.

for the lost opportunity to extend the Block 7 Participation Contract,<sup>425</sup> and (ii) the calculation of such amount is based on the application of a ‘true-up’ of US\$36.4 million.<sup>426</sup>

### **(ii) Perenco’s Position**

497. Perenco states that although Ecuador challenges the Tribunal’s damages assessment claiming that it is a “black box” because the Tribunal allegedly did not “disclose” or “explain” the adjusted discounted cash flow model on which it relied, the Award is fully reasoned and explains the adjusted calculations that the Tribunal relied on, as agreed by the Parties. Therefore, the fact that the “Model” was not rendered with the Award is neither a failure to state reasons nor a manifest excess of powers.<sup>427</sup>
498. Perenco argues that “the Tribunal explained ‘the methodology that was used to estimate the damages to be awarded for each individual claim in light of the factual and legal findings’ and the ‘harmonised model’ [that] could be produced through the adjustments of the models [provided by the Parties’ economic experts] to implement the Tribunal’s findings.”<sup>428</sup> The Tribunal then described in detail each of the steps taken in relation to the harmonised model, including production forecasts, its reasoning on oil prices, CAPEX costs for the Block 7 wells, and the 1.0776 adjustment factor to account for pre-award interest rates.
499. Perenco stresses that the Tribunal worked confidentially with both Parties’ quantum experts as joint tribunal experts. Yet, for political reasons, Ecuador insisted that in the Award, “the Tribunal may use the figures provided by the economic experts but will not mention this agreement nor the process resulting therefrom” and that “Ecuador cannot agree with the Tribunal stating in the award that it followed a process agreed by the parties to determine the amount of compensation.” Ironically, Ecuador is now alleging that the Tribunal was not sufficiently transparent, and the Award must be annulled. Such position, however, cannot succeed. More than 100 pages in the Award contain reasons for the Tribunal’s damages assessments. Furthermore, both Ecuador’s agreement with Perenco and the Tribunal about the post-hearing process and fundamental fairness prevent Ecuador from now trying to take advantage of its politically motivated efforts to hamper the Tribunal’s ability to freely write the Award.<sup>429</sup>
500. Although Ecuador contends that the “Parties allegedly agreed that the quantum experts’ discounted cash flow model ‘would be communicated to the Parties together with the

---

<sup>425</sup> Memorial on Annulment, ¶ 466.

<sup>426</sup> Memorial on Annulment, ¶ 481.

<sup>427</sup> Counter-Memorial on Annulment, ¶ 256.

<sup>428</sup> Counter-Memorial on Annulment, ¶ 259.

<sup>429</sup> Counter-Memorial on Annulment, ¶ 265.

Award’ and that the Tribunal ‘failed to disclose the Model,’ it does not support its claim with the actual record in the arbitration. Perenco notes that in the May 2017 letter, the Tribunal stated to the Parties that ‘[i]f the Parties so wish, the Tribunal [...] will disclose to the Parties [...] the joint calculations provided by the economic experts,’ subject to the ‘redaction of any and all instructions from the Tribunal to the experts which describe or otherwise disclose the Tribunal’s consideration of the Parties’ submissions and its internal thinking.’”<sup>430</sup> Nonetheless, none of the Parties responded to the Tribunal that they “wished” to receive the experts’ joint calculations subject to the redactions described by the Tribunal. Accordingly, the Tribunal did not disclose the Model, as it was not obliged to do it in accordance with the Parties’ agreement.<sup>431</sup> In any event, if Ecuador considered that the Tribunal committed an annulable error in not disclosing any calculations or model, it could have petitioned the Tribunal to rectify or supplement its Award pursuant to Article 49(2) of the ICSID Convention. It did not.<sup>432</sup>

501. According to Perenco, Ecuador wrongly claims that the Tribunal failed to state reasons and manifestly exceeded its powers when it deducted US\$36.4 million from Perenco’s compensation to account for amounts owed by Perenco to Ecuador, i.e., the ‘true-up’. The Tribunal explained its reasoning on the true-up, including the *coactivas* issue and the values of the other three components. In the same line, the Tribunal did not act as an *amiable compositeur* merely because it used the word “fair”, its findings regarding the true-up were based on the Parties’ fact and expert evidence.<sup>433</sup>
502. Accordingly, the Tribunal neither failed to state reasons nor manifestly exceeded its powers in finding that Perenco is entitled to US\$448.8 million in damages.

#### **b. The Committee’s Analysis**

503. The Committee notes that Ecuador’s claims are focused on two main points: (i) the Tribunal’s alleged failure to disclose the Model with the Award and its alleged failure to state the reasons for its decision to award damages to Perenco amounting to US\$448,820,400; and (ii) the Tribunal’s alleged failure to state reasons and manifest excess of powers when deciding that the “true-up” amounted to US\$36.4 million.
504. The Committee will address the first issue. For the purpose of illustrating the scope of the agreement between the Tribunal and the Parties on the joint expert calculations, and the Tribunal’s alleged obligation to disclose the Model with the Award, the Committee will

---

<sup>430</sup> Rejoinder on Annulment, ¶ 204.

<sup>431</sup> Counter-Memorial on Annulment, ¶ 266; Rejoinder on Annulment, ¶ 204.

<sup>432</sup> Counter-Memorial on Annulment, ¶ 270.

<sup>433</sup> Counter-Memorial on Annulment, ¶¶ 271-274; Rejoinder on Annulment, ¶¶ 213-216.

recount the facts related to the Parties' agreement, as submitted and alleged by the Parties in this annulment proceeding.

505. At the Hearing on Quantum, the Tribunal proposed to the Parties that the quantum experts be made the Tribunal's experts. On April 26, 2016, the Tribunal communicated the following message to the Parties:

The Tribunal notes that the parties are still discussing the Tribunal's proposal that the quantum experts be made the Tribunal's experts. The Tribunal understands that this matter is still under discussion and that the Tribunal will be informed shortly.

The Tribunal strongly recommends to the parties that they adopt the Tribunal's proposal. If they do not, the Tribunal will be obliged to appoint another financial expert to assist it in arriving to at the appropriate figure for quantum. This will lead to additional costs and delay and in any event such expert will need access to the computer programs, schedules, etcetera that have been used by the parties' experts to date.

The Tribunal therefore looks forward to hearing from the Parties at their earliest convenience that the Tribunal's proposal is acceptable.<sup>434</sup>

506. On May 3, 2016, Ecuador confirmed its agreement with the Tribunal's proposal as follows:

[...] Ecuador agrees to proceed as per the Tribunal's proposal with the understanding that, in its award, the Tribunal may use the figures provided by the economic experts, but will not mention this agreement nor the process resulting therefrom [...].<sup>435</sup>

507. On May 6, 2016, Perenco presented its comments on Ecuador's proposal:

Perenco writes at the Tribunal's 3 May 2016 invitation to comment on Ecuador's proposal that the Tribunal's award "not mention" the Tribunal's proposed process to determine the damages due to Perenco or the parties' agreement to that process. As Perenco has previously stated, it accepts the Tribunal's proposal to have the parties' respective valuation experts conduct joint analyses at the Tribunal's direction, to do so confidentially without conferring with the parties, at the parties' expense. Ecuador now appears also to accept that proposal, but provided that the Tribunal not disclose that it used such a process.

While Perenco wishes to be flexible and constructive, it has serious reservations about Ecuador's condition. Ecuador's condition is objectionable in principle, in that it seeks to constrain the Tribunal in how it explains its award. Moreover, it is potentially dangerous. The parties mutually expect the Tribunal to provide reasons for its decision. If the

---

<sup>434</sup> Tribunal Email to the Parties, April 26, 2016 (CEA-043).

<sup>435</sup> Ecuador Email to the Tribunal, May 3, 2016, p. 1 (CEA-044).



Tribunal simply presents certain figures with no explanation as to how it arrived at them, it could leave a potentially serious gap in the reasoning. This gap might undermine the purpose of providing reasons, and might provide an argument for annulment of the Tribunal's award.

Perenco would therefore strongly prefer transparency about the process the Tribunal will use to determine the particular amount due to Perenco. To be transparent, the Tribunal should describe the process that it used, as well as the calculations the experts have jointly made.

Despite these reservations, Perenco wishes to be as accommodating and pragmatic as possible without prejudicing its rights. Accordingly, Perenco would be prepared to accept Ecuador's condition, provided that (1) it is acceptable to the Tribunal; (2) in the award the Tribunal states that it has followed a process agreed by the parties to determine the amount of compensation owed to Perenco (without describing that process in detail); (3) the Tribunal discloses to the parties, and is free to describe in the award, the joint calculations (although without disclosing in the award that they reflect the joint work of the experts); and (4) that Ecuador provides an iron clad representation and undertaking that it will in no way use the absence of additional detail about the Tribunal's assessment of the compensation amount as any kind of basis for seeking annulment.

Should the Tribunal reject Ecuador's condition, then Perenco continues to believe that the most fair and efficient process would for the Tribunal simply to issue an interim decision and direct the parties' experts to provide, jointly or singly, analyses of the ensuing valuation consequences within a short and defined time frame.<sup>436</sup>

508. On May 13, 2016, Ecuador sent the following message to the Tribunal:

To avoid protracted discussions and since Ecuador has already stated its position in its communication of 3 May 2016, Ecuador will only address the four conditions Perenco seeks to impose on Ecuador and the Tribunal in its email of 6 May 2016.

Ecuador has no objection to conditions 1 and 3 as they mirror Ecuador's position.

However, Ecuador cannot agree to conditions 2 and 4. In particular:

On condition 2, Ecuador cannot agree with the Tribunal stating in the award that it followed a process agreed by the parties to determine the amount of compensation; and

Condition 4 proceeds on a false premise. Indeed, the process proposed by Ecuador in no way limits the Tribunal's ability to give reasons for its decision in the award, as tribunals most often do when deciding quantum issues. Ecuador's proposal allows the Tribunal to explain how it arrived at

---

<sup>436</sup> Ecuador Email to the Tribunal, May 13, 2016, pp. 2-3 (CEA-045).

a certain amount, if any. While Ecuador is willing to make its experts available to the Tribunal—to limit the time and costs involved in the Tribunal appointing its own expert—it cannot accept that any agreement or agreed process be referred to in the award. Should Perenco maintain its position, Ecuador understands that the Tribunal will appoint its own expert to assist it in the decision of the quantum phase of these proceedings.<sup>437</sup>

509. On May 31 and June 1, 2016, the Parties informed the Tribunal that they had reached an agreement (the “**Parties’ Agreement**”), and communicated the agreed conditions as follows:

First, the Award will not mention the joint expert process nor the parties’ agreement to that process.

Second, the Tribunal will disclose to the parties, and is free to describe and use in the Award, the joint calculations provided by the economic experts (although without disclosing in the Award that they reflect the joint work of the experts).

Third, Ecuador specifically acknowledges, for the avoidance of doubt, that Perenco may submit to an annulment committee, should one be constituted, the parties’ exchanges showing Ecuador’s consent to the process regarding the quantum experts.

Fourth, the parties’ experts should respect the relevant confidentiality rules in their invoices to the parties, and each expert should send its invoices to the party that had initially hired the expert, copying the Tribunal secretary and counsel for the other party.

Additionally, this agreement by the parties is of course subject to the approval of the Tribunal, for it is the Tribunal that ultimately must write the Award and provide its reasons. Nothing in this agreement is intended to interfere with the Tribunal’s ability to do so. The parties would be happy to answer any questions the Tribunal may have about the foregoing agreement. If the Tribunal finds it acceptable, we would be grateful for confirmation that the Tribunal will proceed along the lines that the parties have proposed.<sup>438</sup>

510. On June 10, 2016, the Tribunal sent a letter to the Parties taking note of the Parties’ Agreement and informing them that “it has decided to follow the [...] agreement.”<sup>439</sup>
511. On May 30, 2017, the Tribunal sent a letter to the Parties communicating “its decisions on various pending requests of the Parties,” including that:

---

<sup>437</sup> Ecuador Email to the Tribunal, May 13, 2016, p. 1 (CEA-045).

<sup>438</sup> Correspondence between the Parties and the Tribunal, May 31, 2016 (AAE-171).

<sup>439</sup> Tribunal Letter to the Parties, June 10, 2016, p. 2 (CEA-046).

The Tribunal will not seek the comments of the Parties on the joint calculations performed for it by the quantum experts. If the Parties so wish, the Tribunal, in accordance with the Parties' agreement as reflected in the Tribunal's letter of 10 June 2016, "will disclose to the Parties [...] the joint calculations provided by the economic experts." This will be done simultaneously with the dispatch of the Award in which the Tribunal, in accordance with the above-mentioned agreement of the Parties, cannot "disclos[e] [...] that [the calculations] reflect the joint work of the experts." Since the Tribunal cannot make such a disclosure in the publicly available version of its Award, subject to the redaction of any and all instructions from the Tribunal to the experts which describe or otherwise disclose the Tribunal's consideration of the Parties' submissions and its internal thinking, the Tribunal sees no impediment to the experts' joint calculations being disclosed with the Award after the deliberations are concluded. The Tribunal directs the Parties' attention in this regard to Rule 15(1) of the ICSID Arbitration Rules, which provides that: 'The deliberations of the Tribunal shall take place in private and remain secret.'<sup>440</sup>

512. None of the Parties manifested that it wished that the Tribunal disclose the joint expert calculations provided by the economic experts with the dispatch of the Award.
513. On September 27, 2019, the Tribunal issued the Award. It did not enclose with the Award the "Model" with the joint calculations performed by the quantum experts.
514. On October 2, 2019, Ecuador requested that the Tribunal disclose to the Parties the "harmonised model" on which it had relied to calculate Perenco's compensation.<sup>441</sup>
515. On October 9, 2019, ICSID sent a letter to Ecuador with the following message:

[...] [W]e remind the parties that the above case concluded on September 27, 2019, when the Acting Secretary-General dispatched certified copies of the Tribunal's Award in accordance with Article 49(1) of the ICSID Convention.

We also note that on October 4, 2019, the Acting Secretary-General registered Ecuador's Application for Annulment dated October 2, 2019, in accordance with Article 52 of the ICSID Convention and Arbitration Rule 50.<sup>442</sup>

516. In the light of the above mentioned documents, the Committee finds: (1) that it was the Applicant who required the special agreement on the joint expert report and that the Parties' Agreement was freely and jointly entered into by the Parties; (2) that the Tribunal accepted to follow the Parties' Agreement; (3) that the Tribunal could not mention in the Award the

---

<sup>440</sup> Tribunal Letter to the Parties, May 30, 2017, pp. 3-4 (CEA-048).

<sup>441</sup> Ecuador's letter to the Tribunal, October 2, 2019 (AAE-174).

<sup>442</sup> Letter from ICSID to the Parties, dated October 9, 2019 (AAE-175).

joint expert process nor the Parties' Agreement; (4) that the Parties' Agreement provides that the "Tribunal will disclose to the parties, and is free to describe and use in the Award, the joint calculations provided by the economic experts," not that the Tribunal must disclose the spreadsheet with the experts' joint calculations (5) that the Tribunal could not disclose in the Award that the calculations reflected the joint work of the quantum experts; (6) that the Parties' Agreement is not intended to interfere in the Tribunal's ability to provide reasons for its decisions in the Award; and (7) that despite being asked by the Tribunal, the Parties did not indicate that they wished that the Tribunal disclose the joint expert calculations with the dispatch of the Award.

517. Based on the foregoing, the Committee concludes that although the Tribunal was not obliged to enclose to the Award a spreadsheet with the joint experts' calculation—such as the "Model"—, the Tribunal was obliged to state the reasons for its decision. As noted in Section III.D.2, the Parties to an ICSID arbitration cannot validly waive the obligation of the Tribunal to "state reasons". Therefore, the Parties' Agreement cannot be understood in the sense that it relieves the Tribunal's duty to state the reasons for its decision. In fact, the Parties' Agreement expressly states that "[n]othing in this agreement is intended to interfere with the Tribunal's ability to [state its reasons]."<sup>443</sup>
518. Notwithstanding the above, the Committee is of the view that the Parties' Agreement made the Tribunal's duty to state reasons more complex given that it could not refer to such agreement or the joint expert process, and it could not disclose that the calculations reflected the joint work of the experts in the Award. What is more, the Parties did not manifest that they wished that the Tribunal disclose the joint experts' calculations provided by the economic experts with the dispatch of the Award. These circumstances made the Tribunal's task a challenging one.
519. The Committee stresses that ICSID arbitral tribunals have a margin of discretion to determine the amount of the damages awarded to a party.<sup>444</sup> Furthermore, the duty to state reasons does not oblige arbitral tribunals to disclose each mathematical calculation supporting its estimation of the damages. Thus, the Committee considers that the Tribunal did not breach its duty to state reasons merely because it did not enclose the "Model" to the Award. In the Committee's view, what is paramount is that the Tribunal's conclusions are supported by a set of implicit or explicit premises.
520. In view of the aforesaid, the Committee will now turn to examine whether the Tribunal provided reasons for its decision to award damages to Perenco amounting to US\$448,820,400.

---

<sup>443</sup> Correspondence between the Parties and the Tribunal, May 31, 2016 (AAE-171).

<sup>444</sup> See ¶¶ 362-367 of the present Decision.

521. The Committee observes that the Tribunal developed its analysis on damages in approximately 268 pages. The Tribunal began its analysis by referring to the Parties' positions in the damages phase.<sup>445</sup> Then, it identified the four main issues that separated the Parties: (i) restitution, i.e., whether Perenco's damages should be calculated at the date of the Award or at the date of the breach; (ii) production, i.e., whether the calculation of the number of wells that Perenco would have drilled and the volumes of oil should be based on Mr. Crick's or RPS's forecast; (iii) absorption, i.e., whether Perenco's right to absorption of all Law 42 should be valued or not; (iv) extension, i.e., whether Perenco should be accorded value for the extension of the Block 7 Contract that would have been agreed absent Ecuador's breaches.<sup>446</sup>
522. The Tribunal then proceeded to explain how it "intends to deal with the principal issues identified by the Parties," and indicated that certain issues are addressed at the outset, including: (i) the dates of valuation of damages, (ii) the Tribunal's decision to employ two valuation dates; and (iii) the use of contemporaneous evidence in the valuation.
523. As to the valuation date, after referring to Article 36(1) of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts, and analyzing and contrasting the Parties' positions and the experts' opinions, the Tribunal concluded that "Decree 662 and *caducidad* [...] cannot be lumped together so as to land on a single date that is then used to value the breaches' collective impact."<sup>447</sup> Thus, the Tribunal "decided that it is appropriate to seek to value the damages caused by different breaches occurring at different times."<sup>448</sup> The Tribunal further analyzed whether the FET breaches that took place after Decree 662 and before the *caducidad* declaration "have been shown to result in a recognisable harm."<sup>449</sup> In this regard, the Tribunal concluded that "the financial impact of the non-Decree 662 breaches has either been accounted for in the 'but for' analysis of Decree 662 as of 4 October 2007 or was not quantified by the expert reports submitted with the Claimant's pleadings on quantum."<sup>450</sup>
524. As to the Tribunal's decision to employ two valuation dates, the Tribunal explained why it decided to account for an initial valuation of the damages caused by Decree 662 and then a second valuation (a "clean sheet") of the damage caused by the *caducidad* declaration.<sup>451</sup> The Tribunal further explained that, "[t]he result is an initial award of damages for Decree 662's impact during the roughly 33-month period between the first completed breach and

---

<sup>445</sup> Award, ¶¶ 55-65 (AAE-031).

<sup>446</sup> Award, ¶ 68 (AAE-031).

<sup>447</sup> Award, ¶ 77 (AAE-031).

<sup>448</sup> Award, ¶ 100 (AAE-031).

<sup>449</sup> Award, ¶ 102 (AAE-031).

<sup>450</sup> Award, ¶ 107 (AAE-031).

<sup>451</sup> Award, ¶¶ 108-117 (AAE-031).

the last breach. Then, because of the effect of the expropriation, a new valuation is performed, based on pricing and market information available as of the date of the expropriation. The initial award of damages attributable to Decree 662 is capped at that point; this then requires the Tribunal to make certain determinations as to the nature of the contractual rights that were terminated. These are included in the calculation and the value of the one-month interest in Block 7 as well as the approximately 10-year period left on Block 21 will be estimated.”<sup>452</sup> The Tribunal also decided to calculate the *caducidad* damages primarily under an *ex ante* approach and explained the reasons for doing so.<sup>453</sup>

525. As to the use of contemporary evidence of value, the Tribunal referred to the availability of Perenco’s net present value (NPV) of the impact of Law 42 at 50% and 99% on both Blocks, which were performed immediately after Decree 662’s announcement.<sup>454</sup> For the Tribunal, “these documents of the Claimant’s own making are, in the Tribunal’s view, good evidence of the Blocks’ estimated value with Law 42 at 50% and 99% in light of the existing and expected market circumstances at the time of the first breach,”<sup>455</sup> and therefore “it is a good way to check the results that the Tribunal arrives at.”<sup>456</sup>
526. Thereafter, before estimating the quantum of damages awarded to Perenco under the “harmonised model”,<sup>457</sup> the Tribunal proceeded to address the following issues: (i) the financial impact of Decree 662 on Perenco’s interests in the Blocks as of October 4, 2007;<sup>458</sup> (iii) the impact of Decree 662 on Perenco’s drilling plans for Blocks 7 and 21;<sup>459</sup> (iii) the impact of *caducidad* declaration of the balance of Perenco’s contractual rights in Blocks 7 and 21;<sup>460</sup> (iii) whether, in the ‘but for’ world, Perenco would have enjoyed an extension of its operatorship in Block 7 after August 2010 (Perenco’s loss of opportunity to operate Block 7),<sup>461</sup> (iv) Perenco’s alleged contributory negligence;<sup>462</sup> and (v) the ‘true-up’ issue.<sup>463</sup>
527. The Tribunal then continued to estimate the financial consequences on Blocks 7 and 21 of Ecuador’s breaches. The Tribunal explained that as methodology used to award damages for each individual claim a “‘harmonised model’ was devised through which the Tribunal

---

<sup>452</sup> Award, ¶ 114 (AAE-031).

<sup>453</sup> Award, ¶¶ 115-117 (AAE-031).

<sup>454</sup> Award, ¶ 118 (AAE-031).

<sup>455</sup> Award, ¶ 119 (AAE-031).

<sup>456</sup> Award, ¶ 124 (AAE-031).

<sup>457</sup> Award, ¶¶ 125-127 (AAE-031).

<sup>458</sup> Award, ¶¶ 127-149 (AAE-031).

<sup>459</sup> Award, ¶¶ 150-304 (AAE-031).

<sup>460</sup> Award, ¶¶ 305-311 (AAE-031).

<sup>461</sup> Award, ¶¶ 312-326 (AAE-031).

<sup>462</sup> Award, ¶¶ 327-363 (AAE-031).

<sup>463</sup> Award, ¶¶ 364-380 (AAE-031).

has calculated the damages to be awarded.”<sup>464</sup> The Tribunal further noted that the “harmonised model” could be produced through the adjustments of Professor Kalt’s and Brattle’s models to implement the Tribunal’s findings described above.<sup>465</sup> The Tribunal proceeded to describe the changes implemented to the models of the quantum experts and also described the “harmonised model.”

528. In this regard, the Tribunal noted that “[t]he ‘harmonised model’ assumes away the effect of Decree 662 and *caducidad* in order to arrive at the net present value of the discounted cash flows that would have been derived from Blocks 7 and 21.”<sup>466</sup>

529. According to the Tribunal, such calculations were based on the following premises incorporated in the ‘harmonised model’:

- “The production decisions that the Tribunal has found Perenco would have made but for the unlawful measures.”<sup>467</sup>
- The Model was employed to make “an initial valuation of the damage caused by Decree 662 and then a second valuation of the damage caused by the declaration of *caducidad*.”<sup>468</sup>
- “[I]n the ‘but for’ world, Law 42 at 50% would have continued to apply from October 2007 until 5 October 2008 at which point, by party agreement, the rate would have been 33%, which rate would have applied from that date through to the respective expiry dates of the two Participation Contracts.”<sup>469</sup>
- The Tribunal forecasts the production in both Blocks in the ‘but for’ world for the first period and for Block 21 for the second period on an *ex ante* basis.<sup>470</sup>
- “After estimating the production levels, the production is then priced on the basis of *ex ante* expectations at the relevant times.”<sup>471</sup>
- The estimation of the amount of CAPEX and OPEX, and other costs, associated with the assumed levels of production.<sup>472</sup>

---

<sup>464</sup> Award, ¶ 382 (AAE-031).

<sup>465</sup> Award, ¶ 383 (AAE-031).

<sup>466</sup> Award, ¶ 384 (AAE-031).

<sup>467</sup> Award, ¶ 384 (AAE-031).

<sup>468</sup> Award, ¶ 384 (AAE-031).

<sup>469</sup> Award, ¶ 385 (AAE-031).

<sup>470</sup> Award, ¶ 386 (AAE-031).

<sup>471</sup> Award, ¶ 386 (AAE-031).

<sup>472</sup> Award, ¶ 386 (AAE-031).

- “The cash flows are then discounted to the relevant date of valuation, and then brought forward to the date of the Award at pre-award interest rates.”<sup>473</sup>
  - “Finally, the true-up is applied to reflect the acts discussed previously that affect the quantum calculation.”<sup>474</sup>
530. Thereafter, between paragraphs 389 and 419, the Tribunal explains “each of these steps taken in relation to the ‘harmonised model.’”<sup>475</sup>
531. The Committee observes that besides the aforesaid “steps”, in paragraphs 420 and 421 of the Award, the Tribunal accounted for the “OCP deductibility” and the “value of loss of opportunity.” Finally, at paragraph 422 the Tribunal concluded that:
- The sum of US\$416.5 million arrived at above is then brought forward to the date of this Award by means of multiplying that sum by an adjustment factor of 1.0776 to arrive at a final figure of US\$448,820,400.00. This sum is the damages that are awarded to Perenco and shall be paid by the Respondent, the Republic of Ecuador.
532. After having analyzed the Tribunal’s reasoning, the Committee concludes that contrary to Ecuador’s contention, the Tribunal did state the reasons for the adjustments made to the quantum experts’ models to arrive to a “harmonised model,” and it did state the premises leading to its decision to award US\$448,820,400 to Perenco. Notwithstanding the previous finding, the Committee will address four specific elements of the Tribunal’s reasoning that Ecuador particularly emphasizes:
533. First, the oil production. For Ecuador, the Tribunal “slightly adjusted Perenco’s forecasts, but failed to identify either the specific adjustments or the manner in which they were implemented in such forecasts.”<sup>476</sup> According to Ecuador “without the Model, it is impossible to understand how the Tribunal altered Perenco’s production profiles to arrive at the total oil production figures stated in paragraphs 394 and 397 of the Award.”<sup>477</sup>
534. The Committee observes that Ecuador acknowledges that in the Award, the Tribunal “(i) indicated the number of new wells that would have been drilled on the Blocks absent Decree 662, (iii) provided the aggregate production figures for the ‘base’ and ‘incremental’ productions, and (iii) disclosed the risk adjustment factors it had applied.”<sup>478</sup> The fact that Ecuador considers that the Tribunal’s reasoning is incomplete or insufficient does not

---

<sup>473</sup> Award, ¶ 386 (AAE-031).

<sup>474</sup> Award, ¶ 387 (AAE-031).

<sup>475</sup> Award, ¶ 388 (AAE-031).

<sup>476</sup> Reply on Annulment, ¶ 384.

<sup>477</sup> Reply on Annulment, ¶ 384.

<sup>478</sup> Reply on Annulment, ¶ 384.



amount to a failure to state reasons. Furthermore, the duty to state reasons does not require that the Tribunal explain every single argument or mathematical calculation supporting its estimation of damages.<sup>479</sup> Therefore Ecuador's argument fails.

535. Second, the oil prices. Ecuador claims that the "Award does not contain a single line of reasoning as to how the Tribunal calculated 'the *ex ante* prices for oil production from each Block and over different time periods.'"<sup>480</sup> Ecuador further alleges that "[a]bsent the Model, Ecuador cannot know what such prices actually were. Nor did the Tribunal indicate the 'periods of time' over which it calculated such prices."<sup>481</sup>
536. The Committee finds that the Tribunal did provide reasons regarding its assessment of the oil prices. This is evidenced between paragraphs 398 and 401 of the Award, where the Tribunal explained that the oil quality of each Block differed and therefore the *ex ante* prices for oil production from each Block and over different time periods had to be calculated. The Tribunal further explained (i) that WTI prices (NYMEX future prices) were used at the two key dates of valuation: October 2007 and July 2010, (ii) that these prices were adjusted to reflect the differences in the quality of the oil referenced in WTI crude oil and that produced in Ecuador, (iii) that these prices were adjusted to reflect the specific quality of the oil produced in Blocks 7 and 21, and (iv) that the field-specific adjustment factors were applied to the benchmark oil prices in Ecuador to generate field-specific prices. Albeit Ecuador might consider these reasons insufficient, that is not tantamount to a failure to state reasons. Thus, Ecuador's argument fails.
537. Third, the CAPEX. Ecuador contends that it is not sufficient that the Tribunal state that it relied on Professor Kalt's calculations, adjusted to reflect the schedule pursuant to which the new wells would have been drilled. For the Applicant, "the particulars of such adjustment are nowhere to be found in the Award."<sup>482</sup>
538. The Committee observes that Ecuador's contention is based on the allegation that the Tribunal's reasons are insufficient. As previously explained, the fact that a Party considers the reasoning insufficient does not amount to a failure to state reasons. In any event, the Committee finds that the Tribunal provided reasons for its conclusions regarding the CAPEX in Blocks 7 and 21.
539. As to Block 7, the Tribunal explained that (i) the Oso capital expenditure is based on Mr. Crick's evidence which was utilised by Professor Kalt in his financial model, (ii) all assumed capital expenditures reflect the same essential build-up of individual per-well and

---

<sup>479</sup> See ¶¶ 362-367 of the present Decision.

<sup>480</sup> Reply on Annulment, ¶ 387.

<sup>481</sup> Reply on Annulment, ¶ 388.

<sup>482</sup> Reply on Annulment, ¶ 390.

facilities costs reflected in Professor Kalt's first Quantum calculations, (iii) said calculations were adjusted to reflect the Tribunal's conclusions that 4 wells would have been drilled by January 2008 and 19 wells drilled between February 2008 to August 2009, and (iv) that the starting point for calculations should be on an *ex ante* basis.

540. As to Block 21, the Tribunal explained that (i) CAPEX was estimated following cost information contained in Mr. Crick's Yuralpa development plan, and (ii) said CAPEX was adjusted to reflect the Tribunal's findings on the 16-well programme and the water sensitivities.<sup>483</sup>
541. Therefore, the Committee finds that the Tribunal did not fail to state reasons for its conclusion regarding CAPEX.
542. Fourth, the adjustment factor of 1.0776. Ecuador states that "nowhere in the Award is there any statement to the effect that the 1.0776 adjustment factor accounts for pre-award interest."<sup>484</sup> The Committee, however, finds that at paragraph 386 of the Award, after explaining the steps for estimating damages, the Tribunal concluded that "[t]he cash flows are then discounted to the relevant date of valuation, and then brought forward to the date of the Award at pre-interest rates." Then, at paragraph 410 of the Award, the Tribunal explained the process for determining the applicable pre-award interests. Although it is true that in paragraph 422 the Tribunal did not explicitly state that the 1.0776 adjustment factor accounts for pre-award interest, such premise is implicit and can be found at paragraphs 386 and 410 of the Award.
543. In sum, the Committee concludes that the Tribunal did not fail to state reasons by not disclosing the Model and that it did provide reasons for its decision to award Perenco damages amounting to US\$448,820,400.
544. The Committee will now turn to Ecuador's contention that the Tribunal failed to state reasons and manifestly exceeded its powers when deciding that the "true-up" amounted to US\$36.4 million.
545. As to the failure to state reasons, Ecuador argues (i) that the Tribunal failed to provide as much as a single line of reasoning regarding the third component of the 'true-up'; (ii) that the Tribunal failed to indicate the values of any of the first three components of the 'true-up', nor did it explain the process through which it allegedly determined such values;<sup>485</sup>

---

<sup>483</sup> Award, ¶¶ 403-405 (AAE-031).

<sup>484</sup> Reply on Annulment, ¶ 393.

<sup>485</sup> Memorial on Annulment, ¶ 474.

and (iii) that the reasoning provided by the Tribunal in the Award is insufficient to replicate the calculations that led the Tribunal to the total value of the ‘true-up’.<sup>486</sup>

546. The Committee observes that between paragraphs 364 and 380 of the Award, the Tribunal addressed Ecuador’s ‘true-up’ case. After presenting the Parties’ positions,<sup>487</sup> the Tribunal explained its views on the ‘true-up’: (i) to the extent that a ‘true-up’ is appropriate with respect to unpaid Law 42 levies, after the Consortium suspended payment in April 2008, the true-up must adhere to the *ex ante* assumptions of future oil prices; (ii) the applicable level of taxation is that of Law 42 at 50% up to October 2008 and an assumed agreement at 33% thereafter; (iii) the ‘true-up’, as originally calculated by Brattle, was adjusted to take out Brattle’s initial use of *ex post* pricing data; (iv) when calculating the ‘true-up’, the Tribunal took into consideration that the Consortium paid Law 42 dues at 99% from October 4, 2007 until April 30, 2008 in the off-shore bank account, but it did not actually remit the Law 42 fees to Ecuador; (v) the ‘true-up’ was adjusted to reflect the Tribunal’s findings that Law 42 at 50% was lawful, that Law 42 at 99% was unlawful, and that as of October 2008 the Parties would have agreed to stabilization of Law 42 at 33%; (vi) the ‘true-up’ was adjusted to address Perenco’s share of termination costs related to the implementation of Decree 662; (vii) the ‘true-up’ was adjusted to address Ecuador’s claimed expenses during the time of Perenco’s operatorship; and (viii) the ‘true-up’ was adjusted to address the *coactivas* issue in line with the Tribunal’s finding that Law 42 at 50% was lawful, while Law 42 at 99% was unlawful.<sup>488</sup>
547. Thereafter, in paragraphs 412-419 of the Award, the Tribunal describes the steps it took to determine the amount of the true-up, expressly referring to certain calculations provided by the quantum experts.
548. Although the Tribunal did not provide the mathematical model supporting its reasoning and calculations, as explained in Section III.D.2 above, it is enough that the Tribunal explains the premises leading to its conclusion and that the conclusion follows from the premises. The Committee observes that the Tribunal did explain the elements that it took into consideration when calculating the damages.<sup>489</sup> Therefore, the Committee concludes that Ecuador’s claim under Article 52(1)(e) fails.
549. As to the manifest excess of powers, Ecuador seems to take issue with the fact that the Tribunal refers to a “fair amount” when concluding that the ‘true-up’ should be US\$36.4 million. However, as explained in the previous paragraphs, the Tribunal explained that it based its calculations on the Parties’ positions and on the opinions of the quantum experts,

---

<sup>486</sup> Memorial on Annulment, ¶ 475.

<sup>487</sup> Award, ¶¶ 364-371 (AAE-031).

<sup>488</sup> Award, ¶¶ 372-380 (AAE-031).

<sup>489</sup> Award, ¶¶ 414-418 (AAE-031).

and applied the pertinent adjustments to reflect its findings on various matters. The Committee therefore concludes that the Tribunal did not act as an *amiable compositeur*, as Ecuador claims. Thus, Ecuador's case regarding the Tribunal's manifest excess of powers fails.

550. In conclusion, by deciding to award Perenco damages amounting to US\$448,820,400 the Tribunal neither manifestly exceeded its powers, nor failed to state reasons for its decision. The only amounts to be deducted from the amount of damages of US\$448,820,400 are the ones resulting from the Committee's findings at paragraphs 470 and 574 of the present decision.

**(5) Grounds on the Tribunal's decision to apply a post-award interest rate equivalent to LIBOR for three-month borrowings plus two percent, compounded annually, until the date of payment**

**a. The Parties' Position**

**(i) Applicant's Position**

551. Ecuador contends that by deciding to apply a post-award interest "at a rate of LIBOR for three-month borrowing plus two percent, compounded annually," the Tribunal (i) manifestly exceeded its powers, and (ii) failed to state the reasons for its decision.<sup>490</sup>

552. As to the manifest excess of powers, Ecuador observes that the Tribunal granted Perenco an interest rate which that Party had not requested, and which, in December 2019, when post-award interest started to accrue, was twice as high as the rate Perenco actually requested: the equivalent to the historical yield of the 10-year of U.S Treasury note (on December 1, 2019, the rate was of 1.86%). In so deciding, the Tribunal manifestly exceeded its powers.<sup>491</sup>

553. As to the failure to state reasons, Ecuador contends that the Tribunal did not devote even a single sentence in the Award to explain the reasoning underpinning its decision to grant post-award interest at the higher LIBOR 3-month borrowing rate plus 2%, instead of the yield of the 10-year U.S. Treasury note requested by Perenco.

554. For these reasons, Ecuador requests the annulment of the Tribunal's decision to grant Perenco post-award interest at the LIBOR 3-month borrowing rate plus 2%, compounded annually.<sup>492</sup>

---

<sup>490</sup> Memorial on Annulment, ¶ 483.

<sup>491</sup> Memorial on Annulment, ¶ 488.

<sup>492</sup> Memorial on Annulment, ¶ 491.

## **(ii) Perenco's Position**

555. Perenco states that the Tribunal neither exceeded its powers nor failed to state reasons in finding that Perenco was entitled to post-award interest accruing at a rate of LIBOR for three-month borrowing plus two percent, compounded annually.<sup>493</sup>
556. As regards the manifest excess of powers, Perenco notes that Ecuador is wrong that the Tribunal exceeded its powers by allegedly granting Perenco “higher-than-claimed post-award interest,” considering that Perenco requested post-award interest at “commercial, annually compounding rates.”<sup>494</sup> Furthermore, the Tribunal had wide discretion to assess the post-award interest rate. Albeit Ecuador claims that Ecuadorian law allegedly prohibits compound interest, it does not explain why domestic law prohibitions on payment of interest would apply to claims under an investment treaty that are also governed by international law. Moreover, Ecuador itself requested in the counterclaim that the Committee order Perenco to pay compound interest at an adequate commercial interest rate.<sup>495</sup>
557. As regards the failure to state reasons, Perenco contends that the Tribunal need not justify its decision to fully compensate Perenco by ordering Ecuador to pay post-award interest at a commercial, annually compounding rate. International tribunals usually dispose of a large margin of discretion when fixing interest. Also, “reasons ‘may be implicit and inferred’ from the decision or record and not every ‘gap’ constitutes a failure to state reasons.”<sup>496</sup>
558. Consequently, the Tribunal neither exceeded its powers nor failed to state reasons in finding that Perenco was entitled to post-award interest accruing at a rate of LIBOR for three-month borrowing plus two percent, compounded annually.

### **b. The Committee's Analysis**

559. Ecuador claims that the Tribunal manifestly exceeded its powers, and failed to state the reasons for its decision to apply a post-award interest “at a rate of LIBOR for three-month borrowing plus two percent, compounded annually.”<sup>497</sup>
560. As to the manifest excess of powers, Ecuador contends that the Tribunal awarded an interest rate that was not pleaded by the Parties. The Committee, however, finds that

---

<sup>493</sup> Counter-Memorial on Annulment, ¶ 276.

<sup>494</sup> Counter-Memorial on Annulment, ¶ 277.

<sup>495</sup> Rejoinder on Annulment, ¶ 225.

<sup>496</sup> Counter-Memorial on Annulment, ¶ 280; Rejoinder on Annulment, ¶ 226.

<sup>497</sup> Memorial on Annulment, ¶ 483.

Perenco requested a compound interest at a commercial rate,<sup>498</sup> and so did Ecuador.<sup>499</sup> It is undisputed by the Parties that the rate of LIBOR for three months borrowing is a commercial rate of interest. Thus, the Committee finds that the Tribunal's decision is circumscribed to the Parties' requests.

561. Ecuador also manifests that the rate of interest awarded by the Tribunal does not comply with Ecuadorian law. Nonetheless, on the one hand, it is not for this Committee to determine whether or not a given rate complies or not with Ecuadorian law. That determination exceeds the limited powers of *ad hoc* committees. But in addition, even if the Committee had the power to second guess the law applicable to interest, which it does not, it cannot ignore that Ecuador also requested a compound interest at a commercial rate and that it is not challenging the Tribunal's decision to grant interests to Ecuador at exactly the same rate as the one awarded to Perenco. Ecuador's claim regarding the Tribunal's manifest excess of powers fails.
562. As to the failure to state reasons, Ecuador claims that the Tribunal did not explain why it decided to grant post-award interest at the higher LIBOR 3-month borrowing rate plus 2%, instead of the yield of the 10-year U.S. Treasury note requested by Perenco. Yet, as explained above, the Tribunal granted a "commercial rate", as requested by both Parties.
563. Furthermore, the Committee stresses that the Tribunal was not obliged to follow the rate proposed by the experts, and to the contrary, it had discretion to determine the rate of interest. The Tribunal did explain that the amount of damages had to account for full reparation under international law in order to "wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."<sup>500</sup> Given that interest is part of the full reparation standard, the Tribunal was not obliged to provide further reasons on this point. The Committee therefore finds that the Tribunal did not fail to state reasons for its decision to apply a post-award interest "at a rate of LIBOR for three-month borrowing plus two percent, compounded annually."

**(6) Grounds on the Tribunal's finding that the OCP ship-or-pay costs were fully tax-deductible**

**a. The Parties' Position**

**(i) Applicant's Position**

---

<sup>498</sup> Decision on Jurisdiction and Liability, ¶¶ 282, 286(g) (AAE-163); Award, ¶ 61 (AAE-031).

<sup>499</sup> Decision on Jurisdiction and Liability, ¶¶ 284, 287(g) (AAE-163); Award, ¶ 1009 (AAE-031).

<sup>500</sup> Award, ¶ 324 (AAE-031), referring to *Murphy v. Ecuador*, Partial Final Award, May 6, 2016, ¶ 481.

564. According to Ecuador, only the portion of the shipping costs corresponding to amounts actually transported through the OCP pipeline was tax deductible. With the exception of three months in 2004, Perenco was never able to produce enough crude from Block 21 to meet its 20,000 barrels per day ship-or-pay commitment with the OCP consortium. Nonetheless, the Tribunal decided that “there should be full tax deductibility in relation to Block 21’s OCP ship-or-pay costs” and that “this adds US\$9 million to the quantum to be awarded to Perenco.” By so deciding, the Tribunal manifestly exceeded its powers and failed to state the reasons for its decision.
565. As to the manifest excess of powers, Ecuador contends that the Tribunal failed to apply Ecuadorian law (specifically the Accounting Rules applicable to the Participation Contracts) to the question of the tax deductibility of Perenco’s full ship-or-pay commitment.<sup>501</sup>
566. As to the failure to state reasons, Ecuador states that the Tribunal failed to provide a single line of reasoning to reach its conclusion that the OCP ship-or-pay costs were fully deductible in Ecuador, disregarding mandatory provisions of the Accountability Rules applicable to Participation Contracts. Likewise, the Tribunal failed to provide any explanation for its decision that the costs were worth an additional US\$9 million to Perenco, despite the fact that Perenco’s expert quantified the value of such deduction at US\$10.6 million.<sup>502</sup>
567. For the above reasons, the Tribunal’s decision to order Ecuador to pay US\$448,820,400 to Perenco, insofar as the calculation of such amount includes the value of the deduction to which Perenco was entitled as a result of the full deductibility of its OCP ship-or-pay obligation, must be annulled.<sup>503</sup>

## **(ii) Perenco’s Position**

568. Perenco states that the Tribunal neither failed to state reasons nor manifestly exceeded its powers by finding that the OCP ship-or-pay costs were fully tax deductible.<sup>504</sup>
569. As to the manifest excess of powers, Perenco contends that deciding a contested issue that was submitted by the Parties for adjudication, namely the tax treatment for the OCP ship-or-pay costs is within the Tribunal’s powers. The Parties debated whether or not Ecuadorian law and practice allowed for full tax deductibility, presented arguments and evidence supporting their positions, and the Tribunal sided with Perenco.<sup>505</sup> Although

---

<sup>501</sup> Memorial on Annulment, ¶¶ 511-512.

<sup>502</sup> Memorial on Annulment, ¶¶ 505-509.

<sup>503</sup> Memorial on Annulment, ¶ 513.

<sup>504</sup> Counter-Memorial on Annulment, ¶ 282.

<sup>505</sup> Rejoinder on Annulment, ¶ 234.

Ecuador claims that the Tribunal did not apply Ecuadorian law and therefore manifestly exceeded its powers, there is no indication that the Tribunal decided to apply a different body of law.<sup>506</sup> Furthermore, Perenco alleges that, on the value of the OCP ship-or-pay costs, Ecuador has also failed to demonstrate any prejudice or material effect upon the outcome of the case. To the contrary, Ecuador's damages expert itself expressly agreed that the value of such costs was US\$10.6 million. Thus, if anything, the Tribunal gave Ecuador a discount of US\$1.6 million in tax-deductible costs.<sup>507</sup>

570. As to the failure to state reasons, Ecuador ignores both the Tribunal's overall damages analysis and that reasons may be inferred from the Award or record. According to Perenco, an award is not subject to annulment if the committee can infer or reconstruct implicit reasons for a decision from the terms of the award and the record before the tribunal.<sup>508</sup>
571. Accordingly, the Tribunal neither manifestly exceeded its powers nor it failed to state the reasons for its decision that that the OCP ship-or-pay costs were fully tax-deductible.

#### **b. The Committee's Analysis**

572. The Committee has been unable to find one single reason in the Decision on Jurisdiction and Liability, in the Award, or in any of the other decisions that form part of the Award, that supports the Tribunal's conclusion stated in paragraph 420 of the Award.
573. Albeit in footnote 13 of the Award the Tribunal stated that the quantum experts disagreed on the tax treatment of tariffs applicable to the OCP Pipeline, the Tribunal did not explain what the position of the Parties was in this regard, or whether it agreed with the position of one of the Parties, as claimed by Perenco at the Hearing on Annulment.
574. The Committee therefore finds that the Tribunal failed to state the reasons for its decision that that the OCP ship-or-pay costs were fully tax-deductible. This decision, however, is without prejudice to the Committee's previous finding that the Tribunal did not fail to state reasons or manifestly exceeded its powers when deciding to Award Perenco damages amounting to US\$448,820,400. As already mentioned in Section III.D.2, the fact that one part of the Tribunal's decision is not reasoned is not enough to annul the whole process of calculation of damages performed by the Tribunal. The Committee therefore concludes that the US\$9 million awarded in paragraph 420 of the Award must be deducted from the US\$416.5 million awarded to Perenco, prior to the adjustment factor.

---

<sup>506</sup> Counter-Memorial on Annulment, ¶ 290.

<sup>507</sup> Counter-Memorial on Annulment, ¶ 291.

<sup>508</sup> Counter-Memorial on Annulment, ¶ 283; Rejoinder on Annulment, ¶¶ 232-233.



575. In view of the aforesaid conclusion and for the sake of efficiency, the Committee does not consider necessary to address Ecuador's claim regarding the Tribunal's alleged manifest excess of powers.

**(7) Grounds on the Tribunal's finding that Perenco's decision to suspend operations did not contribute to its own losses**

**a. The Parties' Position**

**(i) Applicant's Position**

576. Ecuador claims that by deciding that "Perenco's decision to suspend operation of the two Blocks in July 2009 [...] cannot be viewed as a wilful or negligent act which contributed to the harm that it ultimately suffered," the Tribunal seriously departed from a fundamental rule of procedure, manifestly exceeded its powers, and failed to state the reasons for its decision. This, considering that the Tribunal "based its decision on the fact that, as it decided in the Decision on Jurisdiction and Liability, Perenco's suspension of operations was justified under Ecuadorian law pursuant to the *exceptio non adimpleti contractus* defense."<sup>509</sup>

577. Ecuador observes that the Tribunal's conclusion that Perenco did not contribute to its losses by suspending operations is based on the Tribunal's decision that Ecuador's non-compliance with the provisional measures amounted to a breach of contract and that Ecuador breached the Participation Contracts by issuing Decree 662. Such decisions, in turn, led the Tribunal to its decision to order Ecuador to pay US\$448,820,400 to Perenco. Therefore, the Tribunal's decision on Perenco's compensation must also be annulled.<sup>510</sup>

**(ii) Perenco's Position**

578. Perenco contends that the Tribunal did not manifestly exceed its powers, seriously depart from a fundamental rule of procedure, or fail to state reasons when deciding that Perenco did not contribute to its own losses by suspending operations.<sup>511</sup>

579. Ecuador "cannot appeal the Tribunal's finding that 'the various claims of contributory negligence are unavailing' and that 'Perenco's decision to suspend operation of the two Blocks in July 2009, which the Tribunal has already found in its Decision could be justified under Ecuadorian law, cannot be viewed as a willful or negligent act which contributed to the harm that it ultimately suffered.'"<sup>512</sup>

---

<sup>509</sup> Memorial on Annulment, ¶ 515.

<sup>510</sup> Memorial on Annulment, ¶ 522.

<sup>511</sup> Counter-Memorial on Annulment, ¶ 293.

<sup>512</sup> Counter-Memorial on Annulment, ¶ 294.

580. Accordingly, there are no grounds to annul the Tribunal’s finding that Perenco did not contribute to its own losses.

**b. The Committee’s Analysis**

581. According to Ecuador, when deciding that Perenco’s decision to suspend operations in the two Blocks did not contribute to its own losses, (i) “the Tribunal relied on a textual interpretation of Article 1568 of the Ecuadorian Civil Code which neither Party had advanced,”<sup>513</sup> and therefore seriously departed from a fundamental rule of procedure; (ii) “the Tribunal assumed that the provisions of the Ecuadorian Civil Code apply in all circumstances to private and administrative law contracts,”<sup>514</sup> and by so doing, the Tribunal grossly misapplied the law, which amounts to a manifest excess of powers; and (iii) “the Tribunal failed to state the reasons upon which it based its decision that Ecuadorian law permitted Perenco to suspend performance of its contractual obligations.”<sup>515</sup>

582. The Committee observes that Ecuador bases its claim on the same arguments advanced in regard to the Tribunal’s decision that Perenco was entitled to suspend operations under the *exceptio non adimpleti contractus* principle, already addressed in Section IV.B.2.b of the present Decision. The Committee therefore does not consider necessary to repeat its assessment on the same issues, as the same reasoning applies.

583. Given that the Committee already dismissed Ecuador’s arguments regarding the Tribunal’s interpretation and application of the *exceptio non adimpleti contractus*, Ecuador’s claims regarding Perenco’s contributory negligence are dismissed too. The Committee therefore finds no ground to annul the Tribunal’s finding that Perenco’s decision to suspend operations did not contribute to its own losses.

**D. GROUNDS ON THE TRIBUNAL’S FINDINGS ON COUNTERCLAIMS**

**(1) Grounds on the Tribunal’s finding that the strict liability regime of the 2008 Constitution does not have retroactive effect**

**a. The Parties’ Position**

**(i) Applicant’s Position**

584. Ecuador notes that in its Decision on the Environmental Counterclaim, the Tribunal concluded that the strict liability regime for environmental harm provided for in Article 396 of the 2008 Constitution does not have retroactive effects, and therefore, the fault-

---

<sup>513</sup> Memorial on Annulment, ¶ 517.

<sup>514</sup> Memorial on Annulment, ¶ 519.

<sup>515</sup> Memorial on Annulment, ¶ 521.

based liability regime applied to Perenco from the date it acquired its interests in the Blocks until October 20, 2008, when the amended Constitution entered into force.<sup>516</sup> In so deciding, the Tribunal disregarded the public policy exception to the Constitution's prohibition against the retroactive application of law, failed to apply Article 396 of the 2008 Constitution to all the environmental harm identified in Blocks 7 and 21, and reduced Perenco's liability in the amount of US\$73,897,100. In so doing, the Tribunal so grossly misapplied Ecuadorian law that it should be considered that it did not apply Ecuadorian law at all and, thereby, manifestly exceeded its powers.<sup>517</sup>

585. For these reasons, Ecuador requests the annulment of Tribunal's decision to apply the fault-based regime between September 4, 2002 (when Perenco first acquired its interests in the Blocks) and October 19, 2008.<sup>518</sup>

### **(ii) Perenco's Position**

586. Perenco objects Ecuador's position that the Tribunal manifestly exceeded its power because it wrongly dismissed Ecuador's arguments that the strict liability regime should also apply before October 2008. Perenco states that Ecuador's argument that the Tribunal made an error of law in the way it applied the correct body of law is not a basis for annulment. Ecuador is also wrong that the Tribunal applied Ecuadorian law incorrectly. In fact, the Tribunal addressed and rejected the same arguments that Ecuador presents before the Committee, explaining in detail why the record did not support Ecuador's unprecedented and unprincipled argument that the strict liability regime of the 2008 Constitution should apply retroactively. Finally, even if the Tribunal had exceeded its power in so interpreting Ecuadorian law, it would make no difference to the outcome of the Award, because the difference between the fault-based regime and the strict liability regime was negligible.<sup>519</sup>

### **b. The Committee's Analysis**

587. The Committee observes that Ecuador's claim is based on the allegation that the Tribunal "grossly" misapplied Ecuadorian law when concluding that Article 396 of the 2008 Constitution does not have retroactive effects, and therefore manifestly exceeded its powers. As explained in Section III.B.2, "misapplication" of the law is not a manifest excess of powers annulable under the ICSID Convention. The Committee in turn must determine whether the Tribunal identified the proper law and endeavored to apply it, which it deems to be the applicable standard.

---

<sup>516</sup> Memorial on Annulment, ¶ 528.

<sup>517</sup> Memorial on Annulment, ¶¶ 523-525.

<sup>518</sup> Memorial on Annulment, ¶ 543.

<sup>519</sup> Counter-Memorial on Annulment, ¶¶ 298-303.

588. The Committee notes that in its Decision on the Environmental Counterclaim, the Tribunal properly identified the applicable law, namely, Ecuadorian law. In fact, as recognized by Ecuador:

In this case it was not disputed that Ecuadorian law was the applicable law to Ecuador's environmental counterclaim. Accordingly, the Tribunal's discussion of "The Framework of the Applicable Law" in section III.B of its Interim Decision on the Environmental Counterclaim was entirely devoted to discussing Ecuadorian law (i.e., the 2008 Constitution, the Environmental Management Law, the Reglamento Ambiental para las Operaciones Hidrocarburíferas en el Ecuador ("RAOHE"), and the Texto Unificado de Legislación Ambiental Secundaria ("TULAS")) as well as the contracts governed by Ecuadorian law (i.e., the Participation Contracts).<sup>520</sup> (Emphasis of the Tribunal)

589. Likewise, the Tribunal endeavored to apply such law:

With respect to Ecuador's contention that the entirety of Perenco's operatorship is to be adjudged under the 2008 Constitution's strict liability regime, the Tribunal does not read the "immediate application" text of the Constitution to have retroactive effect. The general rule under Ecuadorian law is that laws may not in principle be given retroactive effect and that rule has been continued in the 2008 Constitution. The Tribunal is aware of the "public order" exception to the Constitution's prohibition against the retroactive application of law, but it has not been satisfactorily shown that this has occurred in Ecuadorian legal practice. The Tribunal therefore does not agree with Ecuador's arguments in favour of giving the Constitution's regime of strict liability an application which to the Tribunal appears to be retroactive. Based on its understanding of the Ecuadorian case law that the Parties put before the Tribunal in their pleadings and reviewed with the legal experts at the hearing, a distinction must be drawn between the pre-and post-2008 constitutional regimes.<sup>521</sup>

590. The fact that the Tribunal did not uphold Ecuador's interpretation of the Ecuadorian law that Article 396 of the 2008 Constitution applied retroactively, and conversely concluded that the strict liability environmental regime set out in Article 396 could not be applied retroactively is not a ground for annulment. Even if the Committee were to find that Ecuador's interpretation is correct, a difference of interpretation on the applicable law is not a ground for annulment.

591. The Committee thus finds that Ecuador's claim fails as the Tribunal did not manifestly exceed its powers by deciding that Article 396 of Ecuador's Constitution did not apply retroactively.

---

<sup>520</sup> Memorial on Annulment, ¶ 527.

<sup>521</sup> Decision on the Environmental Counterclaim, ¶ 356 (AAE-106).

**(2) Grounds on the Tribunal's finding that Perenco is only liable for the mud pits it built or used**

**a. The Parties' Position**

**(i) Applicant's Position**

592. Ecuador objects the Tribunal's decision that Perenco can only be held liable for the period commencing on September 4, 2002 and, therefore, "Perenco cannot be held liable for pits constructed by prior operators which it itself did not use, because by definition it would be able to show that any damage caused from leachates escaping from such pits cannot be attributed to it." As a result, the Tribunal's Environmental Expert did not evaluate all mud pits in the Blocks, and, in the Award, the Tribunal held Perenco liable only for mud pits it built or used.<sup>522</sup>
593. Under Ecuadorian law, Perenco had an obligation to monitor, maintain and remediate mud pits built by prior operators, thus, it should be held liable for all mud pits that—although built by prior operators—ruptured or leached (for example, due to lack of maintenance or monitoring by Perenco) under Perenco's watch. In deciding otherwise, the Tribunal failed to apply Ecuadorian law, thereby manifestly exceeding its powers.<sup>523</sup>
594. At the same time, the Tribunal failed totally to discuss Perenco's failure to monitor, maintain and remediate all mud pits, including those that had been built by prior operators. This complete lack of reasoning clearly amounts to a failure to state its reasons and an annulable error.<sup>524</sup>
595. For these reasons, the Tribunal's decision to limit Perenco's liability to mud pits it built or used after September 2002 must be annulled. Accordingly, the Tribunal's ensuing decision to exclude Perenco's liability for mud pits built by prior operators (which has an impact of US\$35.3 million, as quantified by the Independent Expert) should also be annulled.<sup>525</sup>

**(ii) Perenco's Position**

596. Perenco contends that the Tribunal did not manifestly exceed its powers. When insisting on causation as a necessary element of liability, it applied Ecuadorian law to conclude that Perenco was not liable for contamination that it did not cause. It correctly limited its investigation of mud pits to the ones that Perenco built or used.<sup>526</sup>

---

<sup>522</sup> Memorial on Annulment, ¶ 553.

<sup>523</sup> Memorial on Annulment, ¶¶ 554-559.

<sup>524</sup> Memorial on Annulment, ¶¶ 560-572.

<sup>525</sup> Memorial on Annulment, ¶ 573.

<sup>526</sup> Counter-Memorial on Annulment, ¶¶ 305-309.

597. Likewise, the Tribunal did not fail to state reasons on this issue. Although Ecuador alleges that the Tribunal “simply limited itself to stating” its reasoning in one sentence, “it ignores the Tribunal’s extensive analysis in no fewer than 233 *paragraphs*, in which it set out the applicable legal framework and its reasoning in detail and in a manner that the Parties can understand.”<sup>527</sup>

#### **b. The Committee’s Analysis**

598. Ecuador claims that the Tribunal manifestly exceeded its powers and failed to state reasons when deciding that Perenco was only liable for the mud pits it built or used.

599. As to the failure to state reasons, Ecuador alleges that the Tribunal’s reasoning is limited to a single sentence stating that Perenco could not be held liable for contamination in mud pits that it did not build or use. The Committee is not persuaded by Ecuador’s position.

600. The Committee observes that between paragraphs 319 and 448 of its Decision on the Environmental Counterclaim, the Tribunal conducted an extensive analysis on the legal framework governing the dispute.<sup>528</sup> Among other findings, the Tribunal concluded that:

601. First, the 2008 Constitution does not establish *per se* the applicable legal standards governing the environmental conditions on the Blocks and therefore the Tribunal must look at the Ecuadorian technical standards as promulgated by relevant authorities and as applied before and after the promulgation of the 2008 Constitution.<sup>529</sup>

602. Second, Article 396 of Ecuador’s Constitution had no retroactive effects and thus the strict liability regime—instead of the fault-based regime—applies to post-October 20, 2008 damages resulting from regulatory exceedances.<sup>530</sup>

603. Third, despite the previous conclusion, the Tribunal “does not see major differences between the two regimes given that: (i) it appears that ultimately all of the experts agreed that even under the strict liability regime there are still questions of causation; and (ii) Ecuadorian law prior to 2008 presumed that the party engaged in a harmful activity was responsible for any environmental damage and the burden shifted to that party to demonstrate that some other party was responsible.”<sup>531</sup>

---

<sup>527</sup> Counter-Memorial on Annulment, ¶¶ 304, 310-314.

<sup>528</sup> Decision on the Environmental Counterclaim, ¶¶ 319-448 (AAE-106).

<sup>529</sup> Decision on the Environmental Counterclaim, ¶ 352 (AAE-106).

<sup>530</sup> Decision on the Environmental Counterclaim, ¶¶ 353-359 (AAE-106).

<sup>531</sup> Decision on the Environmental Counterclaim, ¶ 358 (AAE-106).

604. Fourth, Perenco is only liable for the regulatory exceedances that predate Petroamazonas' operatorship of the Blocks and which have not been overtaken by Petroamazonas' works.<sup>532</sup>
605. Fifth, as regards the fault-based regime, "if a regulatory exceedance occurred, Perenco is to be taken to have fallen below the requisite duty of care and will be held liable unless it can prove on a preponderance of evidence: (i) an occurrence of a *force majeure* event; (ii) that it did not fall below the standard of care in respect of that specific instance of contamination; or (iii) that some other person caused the harm."<sup>533</sup>
606. Sixth, the evidence in the record shows that there were environmental problems predating Perenco's operatorship at the Coca-Payamino Field and the Oso 1 platform. Yet, evidence does not suggest major environmental problems.<sup>534</sup>
607. Seventh, the evidence in the record shows that Perenco was not a responsible environmental manager.<sup>535</sup>
608. Thereafter, between paragraphs 750 and 811 of the Award, the Tribunal specifically addressed the issue of causation and attribution, departing from two fundamental principles: (i) that Perenco cannot be held responsible for any contamination caused by Petroamazonas after it took over the Blocks in July 2009; and (ii) that although Perenco was *prima facie* liable for the contamination in the Blocks, it cannot be held responsible for any contamination that the evidence shows was caused by other operators prior to its assumption of operations in 2002.<sup>536</sup>
609. After analyzing the evidence in the record as regards the state of contamination of the Blocks before Perenco assumed operations, the Tribunal explained that there was a potential of layering of contamination by different operators, which "mitigates in favour of allocating responsibility based on the length of tenure or based on some other weighting factor."<sup>537</sup> According to the Tribunal:

Given the documentary evidence showing substantial drilling of such wells prior to 2002, it follows that barium exceedances at those sites have been shown by Perenco, on a preponderance of evidence, to have resulted from the actions of its predecessors. Given the location of those wells, together with the mud pits constructed and used by Perenco's

---

<sup>532</sup> Decision on the Environmental Counterclaim, ¶¶ 365-370 (AAE-106).

<sup>533</sup> Decision on the Environmental Counterclaim, ¶ 379 (AAE-106).

<sup>534</sup> Decision on the Environmental Counterclaim, ¶¶ 380-405 (AAE-106).

<sup>535</sup> Decision on the Environmental Counterclaim, ¶¶ 406-447 (AAE-106).

<sup>536</sup> Award, ¶¶ 764-765 (AAE-031).

<sup>537</sup> Award, ¶ 807 (AAE-031).

predecessors, and the Tribunal has been able to exclude liability, either wholly or partially, for different parts of the various sites investigated.<sup>538</sup>

610. Finally, in view of its previous findings, the Tribunal explained the methodology it employed for allocating liability between Perenco and previous or succeeding operators:

To be clear: before using a time-based weighting system in respect to a particular site, areas within the site that could be clearly designated as “non-Perenco” or “Perenco” were segregated and placed in the corresponding “bucket” of responsibility. In addition, where other criteria could be used, these were applied in lieu of the time-weighted approach. But sometimes it has been necessary to allocate responsibility between successive operators. So far as prior operators are concerned, the time of first well drilling at a specific site is used as the starting point and July 2009, when Perenco ceased operations in the Blocks, is used as the end date (with the exception of sites where the ‘Petroamazonas temporal issue’ applies). This tends to bias in favour of Perenco, and therefore is a conservative estimate of its responsibility, because it does not consider the possibility of later contaminant release dates and the fact that some fields were drilled but not heavily exploited until Perenco arrived (i.e., Oso and Yuralpa). As for any allocation as between Perenco and Petroamazonas, to the limited extent that it is used (for the reasons previously given), the time-weighted system uses July 2019 as the end date. This is relevant only for a few sites for groundwater (Coca 2/CPF, Gacela 1/CPF and Payamino 1/CPF) and therefore assumes much less importance than the system used for Perenco and prior operators.<sup>539</sup>

611. The Committee thus observes that the Tribunal did provide reasons for its decision that Perenco is only liable for the mud pits it built or used.
612. The Committee will now delve into the specific issues raised by the Applicant as regards the Tribunal’s alleged failure to state reasons.
613. Ecuador stresses that without reason the Tribunal excluded three mud pits at Coca 8 and the mud pit contamination at Jaguar 2. The Committee however finds that the Tribunal did provide reasons for so doing.
614. First, the Tribunal stated that Perenco was only liable for the damage caused by the mud pits it built or used. This issue has already been discussed in the preceding paragraphs of this Decision. Second the Tribunal remarked, specifically referring to the Coca-Payamino field, that “in [its] view, it is more likely than not that *Petroproducción* and other operators at the time caused damage.”<sup>540</sup> Therefore, it can be inferred from the above reasoning that the three mud pits at Coca 8 were not included because the Tribunal considered that the

---

<sup>538</sup> Award, ¶ 809 (AAE-031).

<sup>539</sup> Award, ¶ 811 (AAE-031).

<sup>540</sup> Award, ¶ 800 (AAE-031).



contamination at the sites had been caused by *Petroproducción* and not by Perenco. The Committee stresses that the Award must be read as a whole and therefore the overall analysis of causation and liability made by the Tribunal must be considered.

615. As to the Jaguar 02 field, the Tribunal explained that “in Jaguar 02, drilled in January 1994 and taken out of service in 2000, and therefore only operated by Perenco’s predecessors, there was a pre-existing non-Perenco mud pit which experienced a slope failure. This was not attributed to Perenco.”<sup>541</sup> The Committee finds that such proposition is consistent with the Tribunal’s decision that Perenco could not be held liable for damage caused by other operators.
616. The Committee thus finds that the Tribunal stated either implicit or explicit reasons for excluding the contamination from the three mud pits at Coca 8 and the mud pit at Jaguar 02 from the allocation of responsibility to Perenco.
617. Ecuador further stresses that the Tribunal did not provide reasons to explain “why the fact that mud pits were built by prior operators would excuse Perenco of its obligation in Articles 12 and 59 of the RAOHE to regularly monitor, maintain and remediate the environmental conditions around mud pits.”<sup>542</sup>
618. The Committee notes that although the Tribunal did not expressly refute Ecuador’s interpretation of Articles 12 and 59 of the RAOHE, in its Decision on the Environmental Counterclaim, the Tribunal did explain its “findings on the regulatory standards that should be applied.”<sup>543</sup> Particularly, the Tribunal addressed the following issues:

(i) whether RAOHE Annex 2, Table 6 represents the comprehensive list of contaminants when testing for environmental damage as a result of hydrocarbon operations or whether TULAS Tables 2 or 3 provide additional remediation criteria that should be applied; (ii) whether the regulatory criteria in Ecuador requires the use of “indicator parameters” when testing for contamination of the environment by hydrocarbon activities; (iii) which land-use classification should be applied under Ecuador’s regulatory criteria; (iv) whether Table 7(a) or Table 7(b) of RAOHE applies to the testing of the mud pits in the two Blocks; and (v) in relation to groundwater testing, whether Ecuadorian regulatory criteria for groundwater testing admit of filtration in collecting samples.<sup>544</sup>

619. Moreover, when explaining “the approach to the testing and evaluation of mud pits,” the Tribunal indicated that:

---

<sup>541</sup> Award, ¶ 885 (AAE-031).

<sup>542</sup> Reply on Annulment, ¶ 502.

<sup>543</sup> Decision on the Environmental Counterclaim, ¶¶ 457-569 (AAE-106).

<sup>544</sup> Decision on the Environmental Counterclaim, ¶ 458 (AAE-106).

Although it recognises that Ecuador's primary case was premised principally on the full restoration objective, the Tribunal considers that drilling muds and cuttings are properly disposed of under the current regime if: (i) they are placed in properly constructed and graded pits as required by law; (ii) the operator properly treated the contents of the pits so as to ensure that it did not deposit muds and cuttings that contained analytes in quantities in excess of the applicable regulations; (iii) the pits have been properly covered and closed; and (iv) soil sampling at places around the pits shows no sign of leaching.

620. After presenting its assessment of the evidence and the applicable standards,<sup>545</sup> the Tribunal presented its conclusions on the mud pits issue, as follows:

(a) Table 7 of Annex 2 of RAOHE provides the applicable technical standard.

(b) Perenco has no obligation to dig up and remediate properly constructed and confined mud pits whose contents do not exceed the applicable regulatory standard.

(c) At the same time, it was not improper for IEMS to sample the contents of closed mud pits to determine whether or not they exceeded the permissible tolerances contained in Table 7 of Annex 2 of RAOHE or contained substances that should not have been deposited in the first place.

(d) Drilling muds and cuttings are properly disposed of under the current regime if: (i) they are placed in proper pits as required by law; (ii) the operator properly treated the contents of the pits so as to ensure that it did not deposit muds and cuttings that contained analytes in quantities in excess of the applicable regulations or other substances that should not have been deposited therein; (iii) the pits have been properly covered and closed; (iv) such pits are constructed with proper berms and at grade; and (v) that soil sampling at places around the pits shows no sign of leaching.

(e) As to whether regard should be had to Table 7(a) or 7(b), if a pit has an impermeable liner, Table 7(b) applies. Conversely, if there is no impermeable liner, Table 7(a) applies. The Appendix A to Claimant's Reply Post-Hearing Brief on Counterclaims, Schedule of Closed Pits in Blocks 7 and 21 as of 2009, shows that the Parties continue to have substantial disagreements as to whether or not certain pits have been closed with impermeable liners. This will be the subject of further investigation (as to which see below). In any case of doubt, the more environmentally protective standard set out in Table 7(a) shall be applied.

621. Thus, the fact that the Tribunal did not explicitly reason the Award by expressly refuting Ecuador's interpretation of the law—but rather by explaining how, in the view of the Tribunal, the law should be interpreted—, does not mean that the Tribunal did not explain

---

<sup>545</sup> Decision on the Environmental Counterclaim, ¶¶ 501-525 (AAE-106). Footnotes omitted.

its views on whether Perenco could be held liable for the pits built and used prior to its operatorship. It is not on the Committee to second-guess what the Tribunal's approach should have been and how the Tribunal should have answered the question posed by the Parties. That is part of the Tribunal's choice of methodology.

622. As explained in Section III.C.2,<sup>546</sup> pursuant to Article 48(3) of the ICSID Convention, the Tribunal had the obligation to address every question submitted to it. The question submitted by the Parties was whether Perenco was responsible for the contamination caused by its predecessors. The Tribunal answered the question and provided reasons for its conclusion. The Committee thus finds that the Tribunal did not fail to state reasons under Article 52(1)(e) of the ICSID Convention.
623. As to the manifest excess of powers, Ecuador claims that the Tribunal failed to apply Ecuadorian law by ignoring that “oilfield operators are bound to regularly monitor, maintain and remediate the environmental conditions of and around existing mud pits, including historical mud pits (i.e., built by prior operators) in the areas where they operate.”<sup>547</sup>
624. The Committee stresses that while Ecuador may disagree with the Tribunal's interpretation and application of the law, as explained above, the Tribunal properly identified the applicable law—which is undisputed by the Applicant—and endeavored to apply such law. The Committee therefore has no basis to conclude that the Tribunal manifestly exceeded its powers under Article 52(1)(b) of the ICSID Convention.

**(3) Grounds on the Tribunal's decision to allocate liability between Perenco and other operators of Blocks 7 and 21**

**a. The Parties' Position**

**(i) Applicant's Position**

625. The Applicant contends that by reducing Perenco's liability for the environmental harm found in Blocks 7 and 21 on account of the purported liability of other prior and successive operators of such Blocks, the Tribunal asserted jurisdiction over entities beyond its limited jurisdiction and failed to apply Ecuadorian law on joint liability. Thereby, the Tribunal manifestly exceeded its powers.<sup>548</sup>
626. In relation to the excess of jurisdiction over third parties, the Applicant notes that despite the Tribunal having acknowledged that “it lacks jurisdiction to assess damages payable by

---

<sup>546</sup> See footnote No. 98.

<sup>547</sup> Memorial on Annulment, ¶ 556.

<sup>548</sup> Memorial on Annulment, ¶ 576.

non-parties to the arbitration,”<sup>549</sup> it did assess damages payable by non-parties to the arbitration when it reduced Perenco’s liability by US\$73,897,100 on account of the liability attributed by the Tribunal to prior operators and to Petroamazonas, over whom it did not have jurisdiction. In so doing the Tribunal manifestly exceeded its powers.<sup>550</sup>

627. In relation to the applicable law, Ecuador argues that in accordance with Ecuadorian law (Article 2217 of the Ecuadorian Civil Code), where the environmental harm has been caused by several polluters (i.e., responsible for the same tort), each one of them is jointly liable to compensate the full amount of the relevant harm. Yet, despite being aware of Ecuadorian law on joint liability, the Tribunal disregarded it, manifestly exceeding its powers.<sup>551</sup>
628. Based on the above reasons, Ecuador requests the annulment of the Tribunal’s decision to limit Perenco’s liability to environmental harm occurring in the Blocks between September 4, 2002 and July 16, 2009, and the ensuing decision to reduce the damages Perenco owes to Ecuador by US\$73,897,100.<sup>552</sup>

#### **(ii) Perenco’s Position**

629. Perenco argues that the Tribunal did not manifestly exceed its powers in apportioning liability between Perenco and other operators.<sup>553</sup> The Tribunal not only endeavored to apply the proper law, but also applied it correctly. The Tribunal based its decision on principles of causation and joint and several liability under Ecuadorian law. The fact that the Tribunal did not uphold Ecuador’s mistaken interpretation of Article 2217 of the Ecuadorian Civil Code is no ground for annulment.<sup>554</sup>
630. Also, the Tribunal did not exercise jurisdiction over non-party operators in finding Perenco liable for only part of the damages.<sup>555</sup> Upon obtaining the Tribunal Expert’s quantification of the total extent of the remediation required in the Blocks, the Tribunal allocated the relevant part of that total to Perenco.<sup>556</sup>

---

<sup>549</sup> Award, footnote 886 (AAE-031). See also, Decision on the Environmental Counterclaim, ¶ 166 (AAE-106).

<sup>550</sup> Memorial on Annulment, ¶ 586.

<sup>551</sup> Memorial on Annulment, ¶¶ 577-582.

<sup>552</sup> Memorial on Annulment, ¶ 590.

<sup>553</sup> Counter-Memorial on Annulment, ¶ 316; Rejoinder on Annulment, ¶¶ 267-268.

<sup>554</sup> Rejoinder on Annulment, ¶ 269.

<sup>555</sup> Rejoinder on Annulment, ¶¶ 274-276.

<sup>556</sup> Rejoinder on Annulment, ¶ 276.

631. Hence, Ecuador failed to establish that the Tribunal manifestly exceeded its powers when deciding to apply the principles of joint and several liability and causation under Ecuadorian law in order to apportion liability between Perenco and other operators.<sup>557</sup>

**b. The Committee's Analysis**

632. Ecuador contends that the Tribunal manifestly exceeded its powers by failing to apply the proper law and by exercising jurisdiction over third parties.
633. As to the failure to apply the law, Ecuador states that the Tribunal failed to apply Article 2217 of the Ecuadorian Civil Code, providing for joint and several liability for environmental harm. The Committee however is not convinced by Ecuador's position.
634. The Applicant does not contest that the Tribunal properly identified the applicable law, but that it failed to apply Article 2217 of the Ecuadorian Civil Code, as interpreted by Ecuador. Even though the provision invoked by Ecuador does provide for a rule on joint and several liability, as explained in Section IV.D.2.b above, pursuant to its interpretation of Ecuadorian law—mainly as regards the fault-based regime—the Tribunal concluded that causation was paramount when determining the allocation of responsibility and therefore Perenco could not be held liable for environmental damages it did not cause. The Tribunal did not uphold Ecuador's interpretation that Article 2217 was the applicable rule of Ecuadorian law to allocate responsibility and thereby Perenco and prior operators were jointly and severally liable. The Tribunal opted for a theory of causation under Ecuadorian law to allocate liability based on who may have caused the damage. One may disagree with such interpretation, but a mere disagreement on the interpretation is not a ground for annulment. The Tribunal identified the proper law—Ecuadorian law—and endeavored to apply it. Whether the interpretation of Ecuadorian law is or not correct is not for this Committee to review.
635. As to the “excess of jurisdiction”, the Committee finds that the Tribunal did not exercise jurisdiction over third parties. Under its interpretation of Ecuadorian law as regards causation, the Tribunal decided what should be the starting point in time to allocate liability to Perenco and then proceeded to allocate the quantum of remediation corresponding to Perenco.
636. In deciding the amount attributable to Perenco, the Tribunal did not exercise jurisdiction over other operators nor allocated liability to other operators for three main reasons:

---

<sup>557</sup> Rejoinder on Annulment, ¶ 277.

637. First, the decision of the Tribunal as regards its jurisdiction and the merits is only binding on Perenco, not on the operators that were not a party to the arbitration. This is undisputed between the Parties.
638. Second, neither the Award nor any of the other decisions of the Tribunal determined the total extent and amount of the liability of each of the operators of the Blocks, other than Perenco and Burlington, or whether their liability is joint and several or not.
639. Last but not least, in the Award, the Tribunal calculated the remediation costs attributed to Perenco by deducting from the total quantum of remediation the damages that were found to be caused by other operators. That does not mean, as suggested by Ecuador, that the Tribunal exercised jurisdiction over the other operators of the Blocks. The only amount that is final and binding is the one allocated to Perenco.
640. In sum, the Committee concludes that the Tribunal did not manifestly exceed its powers when deciding to allocate liability between Perenco and other operators of Blocks 7 and 21.

**(4) Grounds on the Tribunal’s decision to apportion liability for environmental remediation between Perenco, Petroamazonas, and prior operators**

**a. The Parties’ Position**

**(i) Applicant’s Position**

641. Ecuador observes that in the Award the Tribunal decided that for ground water remediation costs, the Tribunal not only allocated costs as between Perenco and its predecessors, but also included Petroamazonas in the time-weighted allocation, using July 2019 as the end date. In so doing, the Tribunal manifestly exceeded its powers, and failed to state the reasons for its decision.<sup>558</sup>
642. As to the failure to state reasons, the Applicant argues that the Tribunal failed to state any reasons (i) for its decision to apportion liability between Perenco and Petroamazonas for ground water contamination at Coca 2/CPF, Gacela 1/CPF and Payamino 1/CPF, as well as (ii) for its calculation of the groundwater remedial costs attributed to Petroamazonas.<sup>559</sup>
643. As to the manifest excess of powers, Ecuador contends that in deciding to attribute liability for groundwater contamination at Coca 2/CPF, Gacela 1/CPF and Payamino 1/CPF between Perenco, Petroamazonas and prior operators, the Tribunal resorted to its own notion of equity and adopted a “time-based weighing system”, disregarding the application

---

<sup>558</sup> Memorial on Annulment, ¶ 592.

<sup>559</sup> Memorial on Annulment, ¶¶ 593-618.

of Article 2217 of the Ecuadorian Civil Code. Furthermore, the Tribunal asserted jurisdiction it did not have over Petroamazonas and prior operators. In so doing, the Tribunal manifestly exceeded its powers.<sup>560</sup>

644. For the above reasons, Ecuador requests that the Committee annul the Tribunal’s decision to limit Perenco’s liability to groundwater contamination occurring in the Blocks between September 4, 2002 and July 16, 2009. Accordingly, the Tribunal’s ensuing decision to allocate liability for groundwater contamination between Perenco, Petroamazonas and prior operators using a time-weighting system—exonerating Perenco from payment of US\$4,717,790 in remediation costs for groundwater at Coca 2/CPF, Gacela 1/CPF and Payamino 1/CPF<sup>641</sup>—should also be annulled.

**(ii) Perenco’s Position**

645. Perenco argues that the Tribunal neither manifestly exceeded its powers nor failed to state reasons when deciding to allocate groundwater liability between Perenco and other operators.<sup>561</sup>
646. As to the manifest excess of powers, Perenco asserts that the Tribunal applied Ecuadorian law and it did so correctly because Perenco cannot be jointly and severally liable with prior or successor operators. Also, the Tribunal did not assert jurisdiction over Petroamazonas and prior operators when determining that those other operators would be liable for environmental harm.<sup>562</sup>
647. As to the failure to state reasons, Perenco contends that while Ecuador may disagree with the substance of the Tribunal’s findings, the Tribunal gave reasons for its decision to rely on a time-based weighing method to allocate groundwater costs at Gacela 1/CPF, Coca 2, and Payamino 1/CPF.<sup>563</sup> Likewise, the Tribunal did not fail to state reasons when quantifying damages owed for groundwater liability; “the standard for a failure to state reasons does not require that Ecuador be able to reverse engineer the Tribunal’s calculations on quantum, but solely that ‘reasons—albeit “very limited”—must be given.’<sup>564</sup>” Finally, the Tribunal did not fail to state reasons when relying on July 2019 as the end date for allocating groundwater liability on a time basis. In its Decision on the Environmental Counterclaim, the Tribunal “explained that ‘[s]ince Perenco ran the Blocks from late 2002 until mid-July 2009 (roughly six and a half years) and Petroamazonas has operated them from mid-July 2009 *to the present day* (roughly five and a half years) the

---

<sup>560</sup> Memorial on Annulment, ¶¶ 619-624.

<sup>561</sup> Rejoinder on Annulment, ¶ 278.

<sup>562</sup> Counter-Memorial on Annulment, ¶ 327.

<sup>563</sup> Counter-Memorial on Annulment, ¶¶ 328-334; Rejoinder on Annulment, ¶ 280; Tr., Day 1 January 12, 2021, Perenco’s Opening Statement, p. 47.

<sup>564</sup> Rejoinder on Annulment, ¶ 286.

allocation will be based on the amount of time in which the Blocks have been under the stewardship of the two operators (e.g., 55/45%).”<sup>565</sup>

648. Therefore, the Tribunal neither manifestly exceeded its powers nor failed to state reasons when holding that, under Ecuadorian law, Perenco was only liable for the groundwater contamination that the Consortium—and not the prior or successor operators—caused.<sup>566</sup>

#### **b. The Committee’s Analysis**

649. Ecuador claims that the Tribunal manifestly exceeded its powers and failed to state reasons when deciding to apportion liability for groundwater remediation between Perenco, Petroamazonas and prior operators on the basis of the time-period each had operated the Blocks until July 2019.<sup>567</sup>
650. As to the manifest excess of powers, the Committee notes that the arguments advanced by Ecuador to support its position regarding the Tribunal’s alleged failure to apply the law are very similar to those presented to request the annulment of the Tribunal’s decision to allocate liability between Perenco and the other operators of Blocks 7 and 21, analyzed in Sections IV.D.2.b and IV.D.3.b above. The Committee thereby refers the Parties to the analysis conducted in those sections for the substantiation of its decision that the Tribunal did not manifestly exceed its powers when deciding to apportion liability for environmental remediation between Perenco, Petroamazonas, and prior operators.
651. As to the failure to state reasons, Ecuador claims that the Tribunal failed to state reasons (i) for its decision to allocate liability between Perenco and Petroamazonas for ground water contamination at Coca 2/CPF, Gacela 1/CPF and Payamino 1/CPF, (ii) for its calculation of liability pursuant to the “time-based weighting system”; and (iii) for its decision to rely on July 2019 as the end date for allocating groundwater liability on a time basis.<sup>568</sup>
652. In relation to allocation of liability, the Committee observes that the Tribunal did state reasons for its decision to allocate liability between Perenco and Petroamazonas for ground water contamination at the three sites.
653. In the Award, the Tribunal explained its application of the “time-weighted sharing” approach to allocate remedial costs for groundwater, indicating that:

Time-weighted sharing was used for soil contamination (when the record evidence could not be used to allocate costs, as noted in paragraph 883

---

<sup>565</sup> Rejoinder on Annulment, ¶ 290.

<sup>566</sup> Rejoinder on Annulment, ¶ 295.

<sup>567</sup> Reply on Annulment, ¶¶ 530-561.

<sup>568</sup> Reply on Annulment, ¶¶ 533-554.



above), and groundwater impairment. For example, with respect to the Gacela 02/CPF, for the groundwater impairment downstream of the API separator, the Tribunal considered it appropriate to allocate some responsibility to Petroamazonas due to its continued use of the separator. For the groundwater impairment to the southeast of the facility, the soil samples were collected shortly after Perenco's tenure came to an end and responsibility therefor is allocated as between Perenco and its predecessors. As a result, Perenco was assigned US\$452,530 in remedial costs, its predecessors were assigned US\$458,990, and Petroamazonas was assigned US\$485,480 in remediation costs.<sup>569</sup>

654. Then, the Tribunal explained that the results of such application are set out in Annex A to the Award:

The approach taken by the Tribunal, as just described, had been applied to each site and the results of this process are set out in Annex A to this Award which sets forth the Tribunal's findings in tabular form for: (i) sites where Perenco used mud pits and/installed crude oil production wells; (ii) sites where responsibility for soil remediation is allocated between prior operators and Perenco; (iii) groundwater sites where responsibility is allocated between prior operators, Perenco, and Perenco's successor; and (iv) certain other sites that the Tribunal has accepted give rise to responsibility on Perenco's part.<sup>570</sup>

655. At Table 3 of Annex A to the Award "Allocation of Remedial Responsibilities – Sites Affected with Groundwater)"<sup>571</sup>, the Tribunal indicated the time-based allocation of remedial costs for groundwater, and presented its analysis on, among other, Coca 2/CPF, Gacela 1/CPF and Payamino 1/CPF sites.

656. In respect to Coca 02/CPF, the Tribunal explained that:

The affected areas of groundwater next to the non-Perenco mud pit and the pre-Perenco formation water pit are attributed to Perenco's predecessors. In the swampy area to the southeast of the CPF, potential contributions by Petroamazonas to groundwater from continued use of the API separator cannot be discounted.<sup>572</sup>

657. As regards Gacela 1/CPF, the Tribunal observed that:

In the affected area of groundwater downstream of the API separator at Gacela 1/CPF, potential contributions by Petroamazonas to groundwater from continued use of the API separator cannot be discounted. For the groundwater to the southeast of the facility, the soil samples were collected

---

<sup>569</sup> Award, ¶ 887 (AAE-031).

<sup>570</sup> Award, ¶¶ 887-888 (AAE-031).

<sup>571</sup> Award, Annex A, Table 3, p. 4 (AAE-031).

<sup>572</sup> Award, Annex A, Table 3, p. 4 (AAE-031).

shortly after Perenco's tenure and limit responsibility to Perenco and its predecessors.<sup>573</sup>

658. As to Payamino 01, CPF, the Tribunal stated that:

In the affected area of groundwater impairment adjacent to the stream to the northwest of the Payamino 1/CPF, potential contributions by Petroamazonas to groundwater resulting from its continued use of the CPF cannot be discounted. For the affected area of groundwater in the catchment area to the west of the CPF, the soil samples were collected shortly after Perenco's tenure and limit responsibility to Perenco and its predecessors.<sup>574</sup>

659. The Committee finds that the reasons provided by the Tribunal are not frivolous, absurd or irrelevant. The record of the Underlying Arbitration shows that the Tribunal based its decision on the findings of the Tribunal's Independent Expert and are pertinent to resolve the question posed by the Parties.<sup>575</sup> Albeit Ecuador may consider said reasons to be "insufficient" or "inadequate",<sup>576</sup> as noted in Section III.D.2 above, "insufficient reasons" is not a ground for annulment under Article 52(1)(e). Ecuador's argument thus fails.
660. Ecuador also claims that the Tribunal contradicted itself on three main points, thereby failing to state reasons.
661. The first alleged contradiction is that, in the Section "the Tribunal's Findings", the Tribunal concluded on the "'*Petroamazonas issue*' that the use of a generally applicable discounting factor based exclusively upon a split between the length of time that Perenco and Petroamazonas' operated in the Blocks, would, by itself, be too crude a method for allocating responsibility and insufficiently connected to the record evidence."<sup>577</sup> Yet, in the section "The Tribunal's quantification of the damages payable by Perenco," the Tribunal stated in respect to groundwater contamination that "allocating responsibility based on time of operation is, in the Tribunal's view, an appropriate method to deal with the uncertainty."<sup>578</sup>
662. The Committee does not find a contradiction between the Tribunal's statements. When read as a whole, the Tribunal's reasoning regarding how to allocate responsibility between

---

<sup>573</sup> Award, Annex A, Table 3, p. 4 (AAE-031).

<sup>574</sup> Award, Annex A, Table 3, p. 4 (AAE-031).

<sup>575</sup> Report of the Tribunal's Environmental Expert with Parties' Consolidated Comments, pp. 149, 219 (AAE-100); Tribunal's Expert Report, Attachment 1-2, Site Dossier, Coca 2-CPF, p. 19 (CEA-161).

<sup>576</sup> Reply on Annulment, ¶ 539.

<sup>577</sup> Award, ¶ 785 (AAE-031).

<sup>578</sup> Memorial on Annulment, ¶ 596

Perenco and the other operators of the Blocks, including Petroamazonas, shows no contradiction.

663. The Committee observes that after explaining its assessment of the evidence in relation to the possible contamination caused by Petroamazonas,<sup>579</sup> the Tribunal concluded that:

In sum, in relation to what might be called the ‘Petroamazonas temporal issue’, given the totality of the circumstances (including the Independent Expert’s restricted mandate, his and his team’s consultations with the Parties’ experts and counsel throughout his sampling activities, and the spill reports and other documents produced by Ecuador), the Tribunal has concluded that the use of a generally applicable discounting factor based exclusively upon a split between the length of time that Perenco and Petroamazonas’ operated in the Blocks would, by itself, be too crude a method of allocating responsibility and insufficiently connected to the record evidence. The Tribunal concluded that a closer look at the sites where contamination was found was required before using any discounting factor based on, for example, the respective length of the two operators’ tenures.<sup>580</sup>

664. Thereafter, when presenting its conclusions regarding contamination caused by prior operators at paragraph 811, the Tribunal explained the methodology it implemented to allocate responsibility between Perenco and the other operators of the Blocks, including Petroamazonas:

To be clear: before using a time-based weighting system in respect to a particular site, areas within the site that could be clearly designated as “non-Perenco” or “Perenco” were segregated and placed in the corresponding “bucket” of responsibility. In addition, where other criteria could be used, these were applied in lieu of the time-weighted approach. But sometimes it has been necessary to allocate responsibility between successive operators. [...] As for any allocation as between Perenco and Petroamazonas, to the limited extent that it is used (for the reasons previously given), the time-weighted system uses July 2019 as the end date. This is relevant only for a few sites for groundwater (Coca 2/CPF, Gacela 1/CPF and Payamino 1/CPF) and therefore assumes much less importance than the system used for Perenco and prior operators.<sup>581</sup> (emphasis by the Committee).

665. The analysis in both paragraphs reflects that given its concerns, the Tribunal did not automatically use “a generally applicable discounting factor based exclusively upon a split between the length of time that Perenco and Petroamazonas operated the Blocks.” Instead, if required, the Tribunal “took a closer look at each site.” This is consistent with the

---

<sup>579</sup> Award, ¶¶ 767-784 (AAE-031).

<sup>580</sup> Award, ¶ 785 (AAE-031).

<sup>581</sup> Award, ¶ 811 (AAE-031).

Tribunal's statements at paragraph 811 noting that (i) "where other criteria could be used, these were applied in lieu of the time-weighted approach", and (ii) as regards the allocation between Perenco and Petroamazonas, that the time-weighted system is used to a "limited extent," for the reasons previously explained by the Tribunal in the Award. Therefore, the Committee finds no contradiction, much less a contradiction that amounts to a failure to state reasons.

666. The second alleged contradiction is that the Tribunal employed the time-based weighting method, although it considered said method to be "insufficiently connected to the record evidence,"<sup>582</sup> namely because of the lack of evidence of contamination caused by Petroamazonas. Ecuador develops its argument under two main contentions:
667. First, that the Tribunal's statement at paragraph 771 of the Award,<sup>583</sup> indicates that "had the Parties' experts identified fresh traces of contamination attributable to Petroamazonas in the months it had been operating since July 2009, they would have noted so."<sup>584</sup>
668. Second, that the contamination confirmed by the Tribunal's Independent Expert relates to the same locations and contaminants that had been identified by the Parties' experts. Yet, none of the Parties' representatives, Ecuador's environmental expert (IEMS), Perenco's environmental expert (GSI), Walsh, the Parties, their counsel, or Burlington observed environmental incidents after July 2009 in the areas analyzed by the Tribunal and the Tribunal's Independent Expert.<sup>585</sup> As noted by the Tribunal in the Award, that "there was no mention in the Independent Expert Report of any recent spills witnessed at sites where Ramboll [i.e., the Tribunal's Environmental Expert] tested."<sup>586</sup> In sum, Perenco did not satisfy the burden of proving that the contamination identified at the Blocks was caused by Petroamazonas.<sup>587</sup> The Tribunal therefore concluded that "the use of a generally applicable discounting factor based exclusively upon a split between the length of time that Perenco and Petroamazonas operated in the Blocks would, by itself, be too crude a method of allocating responsibility and insufficiently connected to the record evidence."<sup>588</sup> Despite all the above, the Tribunal reduced Perenco's liability by US\$1,218,5550, corresponding to the groundwater remediation costs identified at Cica 2/CPF, Gacela 1/CPF, and

---

<sup>582</sup> Memorial on Annulment, ¶ 599.

<sup>583</sup> Award, ¶ 771 (AAE-031): "Although it cannot be completely ruled out that some contamination was caused by Petroamazonas prior to IEMS commencing its work (or during the time that it took IEMS and GSI to complete their studies), the Tribunal is satisfied that it is unlikely that one or the other of the Parties' experts, particularly Perenco's experts, would have identified any new contamination that they thought occurred after Perenco's operatorship and included it as being caused by Perenco."

<sup>584</sup> Memorial on Annulment, ¶ 601.

<sup>585</sup> Memorial on Annulment, ¶ 603.

<sup>586</sup> Memorial on Annulment, ¶ 603, citing Award, ¶ 784 (AAE-031).

<sup>587</sup> Memorial on Annulment, ¶¶ 603-605.

<sup>588</sup> Memorial on Annulment, ¶ 605, citing Award, ¶ 785 (AAE-031).

Payamino 2/CPF. Ecuador argues that this alleged contradiction between the Tribunal's assessment of the evidence and its other findings amounts to a failure to state reasons.<sup>589</sup>

669. The Committee does not see a contradiction between the Tribunal's assessment of the evidence and its other findings. After presenting its assessment of the evidence in the record on whether Petroamazonas also had caused contamination at the Blocks, the Tribunal concluded that "given the totality of the circumstances," "the use of a generally applicable discounting factor based exclusively upon a split between the length of time that Perenco and Petroamazonas' operated in the Blocks would, by itself, be too crude a method of allocating responsibility and insufficiently connected to the record evidence." The Tribunal therefore decided "that a closer look at the sites where contamination was found was required before using any discounting factor [...]."<sup>590</sup>
670. Then, when presenting a site-by-site analysis in Table 3 of Annex A to the Award, the Tribunal explained the reasons to allocate responsibility between Perenco, its predecessors, and Petroamazonas for the contamination caused at the Blocks. For the Tribunal, there could be "potential" contributions by Petroamazonas to groundwater at Coca 02/CPF, Gacela 01/CPF, and Payamino 01/CPF, and therefore it partially allocated responsibility to Petroamazonas for the "potential" contamination caused at those sites.<sup>591</sup>
671. Ecuador is not satisfied with the fact that the Tribunal decided to allocate remedial costs for groundwater to Petroamazonas at the three sites based on a "potential" contribution. While the Committee considers that there is room for more clarity in the Tribunal's assessment of the evidence and the conclusions presented at Table 3 of Annex A to the Award, the Tribunal did not contradict itself. At paragraph 785 of the Award, the Tribunal recognized that it could not merely apply a time-based weighting method, but that it had to take a closer look at the sites. When conducting its site-by-site analysis, the Tribunal found that Petroamazonas could have potentially contributed to groundwater contamination at Coca 02/CPF, Gacela 01/CPF, and Payamino 01/CPF, and thereby partially allocated responsibility to Petroamazonas.
672. Although Ecuador may disagree with the Tribunal's decision to allocate responsibility on the basis of a "potentiality", such allegation goes to the merits of the case, particularly to the Tribunal's assessment of the evidence. While the Committee may not entirely agree with the Tribunal, annulment under the ICSID Convention has no room for second-guessing the Tribunal's assessment of the evidence. If the Tribunal considered that the burden of proof to allocate responsibility for environmental contamination was satisfied

---

<sup>589</sup> Memorial on Annulment, ¶ 606.

<sup>590</sup> Award, ¶ 785 (CAA-043).

<sup>591</sup> Award, Annex A, Table 3, p. 4 (CAA-043).

with a “potential contribution”, the Committee must not intervene in the Tribunal’s decision.

673. In conclusion, the Committee finds no contradiction and thus no failure to state reasons.
674. The third alleged contradiction is that although the Tribunal manifested that it purported to have “a closer look” at the three sites, in Annex A to the Award, the Tribunal merely stated that “the potential contributions by Petroamazonas to groundwater contamination cannot be discounted.”<sup>592</sup> Ecuador further alleges that the Tribunal’s weighing of the evidence was “irrational.”<sup>593</sup>
675. The Committee observes that Ecuador’s contention is based on the sufficiency of the reasons stated by the Tribunal. As noted in Section III.D.2, the Committee shall not adjudge whether the reasons given by the Tribunal are “sufficient” or “adequate”. As regards Ecuador’s contention on the Tribunal’s assessment of the evidence, the Committee notes that such allegation referring to the “irrational” assessment of the evidence goes into the correctness of such assessment. This is not a ground for annulment under Article 52(1)(e), nor under any other ground. The Committee is not competent to determine whether the Tribunal correctly or incorrectly assessed the evidence. By doing so, it would be acting as a court of appeal, which is clearly outside its competence. Ecuador’s claim in this regard thus fails.
676. Turning to the issue of the Tribunal’s calculation of the groundwater remedial costs, as already noted at Section IV.D.2.b above, the Tribunal did explain the reasons for applying a time-based weighting approach. For efficiency, the Committee does not consider necessary to address this point again and refers the Parties to the pertinent section.
677. Finally, the Committee will address Ecuador’s contention that “the Tribunal did not provide reasons for adopting July 2019 as the end date for its time-weighted system of attributing liability for groundwater contamination between Perenco, Petroamazonas and other operators.”<sup>594</sup>
678. Perenco claims that July 2019 is a “proxy for the date of issuance of the Award”<sup>595</sup> and, as explained below, Ecuador does not entirely disagree with such a view.
679. The Committee notes that in the Decision on the Environmental Counterclaim, the Tribunal indicated that:

---

<sup>592</sup> Memorial on Annulment, ¶ 607.

<sup>593</sup> Reply on Annulment, ¶ 543

<sup>594</sup> Memorial on Annulment, ¶ 608.

<sup>595</sup> Counter-Memorial on Annulment, ¶ 340.

This issue is complicated by the effluxion of time. The Tribunal considers that the only equitable solution is for a new, proper groundwater campaign to be conducted under its expert's supervision and then an allocation of any remediation costs (if remediation is required) to be made as between Perenco and Petroamazonas. Such sampling shall be taken at the same sites at which the experts took samples. Since Perenco ran the Blocks from late 2002 until mid-July 2009 (roughly six and a half years) and Petroamazonas has operated them from mid-July 2009 to the present day (roughly five and a half years) the allocation will be based on the amount of time in which the Blocks have been under the stewardship of the two operators (e.g. 55/45%).<sup>596</sup> (emphasis of the Tribunal)

680. The Committee observes that the Blocks remained under the stewardship of Petroamazonas beyond the issuance of the Award and therefore it is apparent that the end date fixed by the Tribunal for allocating liability would be the date of the Award. The issue is, however, that July 2019 is not the actual date on which the Tribunal issued the Award (September 27, 2019).
681. Perenco provides an explanation for such difference between the dates. On November 21, 2018, the Tribunal stated that it expected to issue the Award by the end of June 2019. Thereafter, the Tribunal held its final deliberation on June 3, 2019, completed the English text of the Award by June 19, 2019, and closed the proceedings as of August 30, 2019. However, the issuance of the Award was delayed because the Independent Expert requested that the Parties agree on and sign a waste manifest for the removal of waste derived from the Tribunal's investigation.<sup>597</sup>
682. Ecuador recognizes that such explanation is "plausible". Yet, "implicit reasons are not enough."<sup>598</sup>
683. The Committee considers that the above explanation is in fact plausible. The Tribunal did explain that the allocation of liability based on the time-weighting system it implemented would be based on the amount of time in which the Blocks have been under the stewardship of the two operators. Given that Petroamazonas continued operating through the date of issuance of the Award, it is apparent that the end date would be the date of issuance of the Award. When concluding the Award's drafting on June 2019, the Tribunal estimated that the date of issuance would be July 2019, however, the Tribunal did not release the Award until September 2019.
684. Although the Tribunal might have committed an error by not updating the July 2019 date at paragraph 811 of the Award, the remedy of annulment as provided by the ICSID

---

<sup>596</sup> Decision on the Environmental Counterclaim, ¶ 608 (AAE-106).

<sup>597</sup> Counter-Memorial on Annulment, ¶ 340.

<sup>598</sup> Reply on Annulment, ¶¶ 545, 547.

Convention is not envisaged for correcting errors, another remedy is available for that purpose. The Committee notes that under Article 49 of the ICSID Convention, the Parties could have requested that the Tribunal rectify any clerical, arithmetical or similar error in the Award within 45 days after the Award was rendered. However, none of the Parties requested that the Tribunal correct the July 2019 date. Annulment is not the opportunity to make such correction.

685. Based on the foregoing, the Committee concludes that the Tribunal neither manifestly exceeded its powers nor failed to state reasons when it decided to apportion liability for environmental remediation between Perenco, Petroamazonas, and prior operators

**(5) Grounds on the Tribunal’s decision to treat the amount paid by Burlington to Ecuador as a down payment on the counterclaims**

**a. The Parties’ Position**

**(i) Applicant’s Position**

686. Ecuador states that the Tribunal assumed without any basis or reasoning that 100% of the damages awarded by the *Burlington* tribunal corresponded exactly to the same damages it ascertained in its Award. The Tribunal treated, without any analysis, the full amount awarded by the *Burlington* tribunal as a down payment by Perenco both with respect to the environmental and infrastructure counterclaims, as if there was a perfect overlap between the harm identified by each tribunal. However, this was not the case. In so doing, the Tribunal manifestly exceeded its powers, and failed to state the reasons upon which its assumption is based.<sup>599</sup>
687. As to the manifest excess of powers, the Tribunal failed to assess whether the “same damage” had been compensated by the *Burlington* tribunal both for environmental and infrastructural damages. Instead, the Tribunal simply assumed, without any basis or reasoning that 100% of the environmental harm for which the *Burlington* tribunal had ordered remediation was already part of the same harm identified by the Tribunal’s Independent Expert. Likewise, the Tribunal treated the amounts awarded by the *Burlington* tribunal as a lump sum, instead of comparing the harm to be compensated. As a result, the Tribunal deprived Ecuador of damages amounting to US\$81,384.96 for the infrastructure in Blocks 7 and 21.<sup>600</sup> In so deciding, the Tribunal resorted to its own subjective notions of fairness and equity, and substituted itself to Perenco, who did not demonstrate the existence of double recovery. Thereby, the Tribunal acted as an *amiable compositeur*, manifestly exceeding its powers.

---

<sup>599</sup> Memorial on Annulment, ¶¶ 629-630.

<sup>600</sup> Memorial on Annulment, ¶¶ 632-654.



688. As to the failure to state reasons, Ecuador submits that the Tribunal did not provide reasons for deducting over US\$39 million from the Tribunal's Award of remediation costs, nor did the Tribunal provide reasons for not asking its Independent Expert to perform the analysis of double recovery proposed by Ecuador to identify any true overlaps in the environmental and infrastructure damages.<sup>601</sup> Furthermore the Tribunal contradicted itself by, on the one hand, holding that "it cannot be right for the Tribunal to award the same or part of the same sum twice," and on the other hand, not verifying whether it was awarding the same sum twice. In so deciding, the Tribunal failed to state the reasons.

### (ii) Perenco's Position

689. Perenco argues that contrary to Ecuador's argument, the Tribunal neither manifestly exceeded its power nor failed to state reasons when it rejected Ecuador's argument that the *Perenco* and *Burlington* tribunals did not determine the "same loss" or 'same harm' caused by the Consortium's operations. "Ecuador's mere disagreement with the Tribunal's application of the prohibition against double recovery, which Ecuador agreed should apply in this case, cannot amount to a manifest excess of power. Nor can its mischaracterization of the Tribunal's reasoning establish any failure to state reasons, when the Tribunal amply explained and determined that because both the *Burlington* and *Perenco* tribunals were adjudicating the 'same liability,' Burlington's payment of US\$42.8 million to satisfy the full infrastructure and environmental liability of the Consortium (*i.e.* both *Burlington* and *Perenco*) had to be offset from the damages that Perenco owed Ecuador."<sup>602</sup>

690. As to the manifest excess of powers, Perenco objects Ecuador's position that the Tribunal failed to apply the proper law on double recovery because it failed to assess whether the same damage had been compensated by the *Burlington* tribunal. According to Perenco, the Tribunal endeavored to and did apply the principle of double recovery in its decision. Ecuador's disagreement with the Tribunal's decision or an alleged error in interpreting the applicable law cannot establish an excess of power.<sup>603</sup> Furthermore, the *Perenco* and *Burlington* tribunals assessed the same liability since "the underlying claim for which Ecuador has sought compensation in the two arbitrations is exactly the same—*i.e.*, infrastructure and environmental counterclaims arising under the Participation Contracts as a result of Perenco's operations in the Blocks on behalf of the Consortium—and Perenco's and Burlington's underlying joint and several liability is exactly the same."<sup>604</sup>

691. As to the failure to state reasons, Perenco asserts that the Tribunal did expressly provide reasons for its approach. In fact, the Tribunal rejected Ecuador's approach to assess double

---

<sup>601</sup> Memorial on Annulment, ¶¶ 655-660.

<sup>602</sup> Counter-Memorial on Annulment, ¶ 343.

<sup>603</sup> Counter-Memorial on Annulment, ¶¶ 345-347.

<sup>604</sup> Counter-Memorial on Annulment, ¶ 347; Rejoinder on Annulment, ¶ 298.

recovery on a site-by-site basis, and instead adopted Perenco's approach of offsetting the *Burlington* Settlement from the counterclaim liability. Also, the Tribunal did not contradict itself when it deducted the *Burlington* Settlement from the counterclaim liability.<sup>605</sup> "Contrary to Ecuador's assertion, the Tribunal rejected Ecuador's argument that the 'harm' assessed in *Burlington* and *Perenco* was not the same, and therefore did not have to 'verify whether it was awarding the same sum twice' by comparing the damages in both arbitrations on a site-by-site basis. There is thus no ground to annul the Tribunal's conclusion that the *Burlington* Settlement compensated Ecuador for the same infrastructure and environmental liability that the *Perenco* tribunal had to assess."<sup>606</sup>

#### **b. The Committee's Analysis**

692. Ecuador claims that the Tribunal manifestly exceeded its powers and failed to state reasons for its decision to offset the amounts paid by Burlington to Ecuador as a down payment on the counterclaim.
693. As regards the manifest excess of powers, Ecuador contends that the Tribunal did not apply the proper law. Although the Tribunal acknowledged that it had to apply the law on double recovery and avoid compensation of the same or part of the same sum twice, it failed to assess whether the same damage was compensated by the *Burlington* tribunal.<sup>607</sup>
694. The Committee must in turn examine whether the Tribunal identified the proper law and endeavored to apply it. It is common ground between the Parties that the Tribunal properly identified the existence of the law on double recovery. In this regard, the Tribunal emphasized in the Award that:

Mindful of the *Burlington* tribunal's statement that 'as a matter of principle, the present Decision cannot serve and may not be used to compensate Ecuador twice for the same damage' the Tribunal has thought long and hard about how to protect against double recovery.<sup>608</sup>

695. The Tribunal also endeavored to apply such law. In paragraphs 890 to 899 of the Award, the Tribunal explained its approach to assess the issue of double recovery on the environmental claim. While Ecuador may disagree with the reasoning or approach of the Tribunal, a mere disagreement is not a ground to annul an award for manifest excess of powers. Therefore, the Committee finds no ground for annulment under Article 52(1)(b) of the ICSID Convention.

---

<sup>605</sup> Counter-Memorial on Annulment, ¶¶ 347-350.

<sup>606</sup> Counter-Memorial on Annulment, ¶ 350.

<sup>607</sup> Memorial on Annulment, ¶¶ 632, 636.

<sup>608</sup> Award, ¶ 896 (AAE-031).

696. As regards the failure to state reasons, Ecuador argues that the Tribunal treated the amount paid by Burlington as a down payment without engaging in the specific assessment of whether there was any double recovery.
697. After carefully analyzing the submissions and evidence presented by the Parties in this annulment proceeding, the Committee finds that the Tribunal did not fail to state reasons for its decision to offset the amounts paid by Burlington to Ecuador as a down payment on the counterclaim.
698. The Tribunal's approach to resolve the double recovery issue can be recapped as follows: (i) the Tribunal decided to appoint an Independent Expert to calculate the environmental damage caused by Perenco in the Blocks; (ii) the Independent Expert found that the extent of the contamination caused by Perenco was subject to a larger compensation than the one awarded by the *Burlington* tribunal; (iii) the Tribunal departed from the findings of the *Burlington* tribunal because it considered that the independent expert appointed by the Tribunal calculated and quantified the environmental damage caused by Perenco—i.e. by the Consortium—in the Blocks more accurately than the *Burlington* tribunal; (iv) the Tribunal considered that Perenco and Burlington were jointly and severally liable as members of the Consortium for the environmental damage caused in the Blocks;<sup>609</sup> and (vi) given that Burlington had already paid US\$39,199,373 for the contamination caused by the Consortium, the Tribunal deducted such payment from the compensation of US\$93,638,890 awarded to Ecuador under the Award.
699. The Tribunal decided in sum that the environmental contamination caused by the Consortium in the Blocks had been partially remediated by Burlington—one of the members of the Consortium—and therefore decided to set off such payment from the total amount awarded to Ecuador to avoid double recovery.
700. The Committee is mindful that the site-by-site methodology proposed by Ecuador could be more precise and probably could have been more accurate than the overall approach taken by the Tribunal. However, the Committee cannot go into question the Tribunal's methodology. This would be adjudging the merits of the case, which is not the purpose of the annulment remedy, much less of Article 52(1)(e) of the ICSID Convention.
701. Given that the whole spectrum of the Tribunal's reasoning on the double recovery issue is to be found in the Decision on the Environmental Counterclaim and in the Award, the Committee will refer to the relevant sections of both decisions to address in more detail the Tribunal's reasoning.

---

<sup>609</sup> Award, ¶¶ 511, 997 (AAE-031).

702. In paragraphs 890 and 899 of the Award, the Tribunal presented its reasoning regarding the “Effect of the *Burlington* award”. To reach its conclusion that Perenco shall pay US\$54,439,517 to Ecuador under the environmental counterclaim the Tribunal based its decision on the following premises:

- The *Burlington* tribunal left to the Tribunal the question of potential double recovery of damages.<sup>610</sup>
- Although there is a substantial territorial overlap between the contamination to be remediated as estimated by the Independent Expert and that estimated by the *Burlington* tribunal, the Independent Expert estimated larger areas and additional contamination, and used higher in-country remediation costs than the *Burlington* tribunal.<sup>611</sup>
- Ecuador proposed a site-by-site comparison of areas. Under such methodology it estimated that Perenco was liable for US\$130,801,100, plus abandonment costs in addition to the US\$929,722 granted by the *Burlington* tribunal for the seven sites listed in Perenco’s November 2008 Well Site Abandonment Plan.<sup>612</sup>
- Perenco, in turn, argued that the payment made by Burlington under the Settlement Agreement, “‘irrevocably, fully and finally paid and discharged, and satisfied’ all of the Consortium’s obligations and liabilities related to Ecuador’s counterclaims.” In the alternative, Perenco claimed that the amount paid by Burlington must be set off from any remediation costs granted to Ecuador, which in any event should result on zero counterclaims damages.<sup>613</sup>
- The Tribunal did not adopt either of the positions advanced by the Parties. Moreover, the Tribunal partially departed from the findings of the *Burlington* tribunal considering that: (i) the Tribunal had doubts on the work of the Party appointed experts (IEMS and GSI)—the same experts of the *Burlington* case—and therefore appointed an independent expert; and (ii) in the Tribunal’s view, it was more likely that the work performed by the Independent Expert and his team comprehensively and accurately analyzed the work of IEMS/GSI than the *Burlington* tribunal.<sup>614</sup>
- For these reasons, the Tribunal arrived to a sum on remediation costs different from the ones awarded by the *Burlington* tribunal. As noted in paragraph 889 of the Award,

---

<sup>610</sup> Award, ¶ 890 (AAE-031).

<sup>611</sup> Award, ¶ 891 (AAE-031).

<sup>612</sup> Award, ¶¶ 892-893 (AAE-031).

<sup>613</sup> Award, ¶ 894 (AAE-031).

<sup>614</sup> Award, ¶¶ 896-898 (AAE-031).

the remedial responsibilities estimated by Mr. MacDonald amounted to US\$85,938,890, the Tribunal then adjusted this sum to add up US\$7.7 million to account for certain sites identified by Ecuador.<sup>615</sup> The total sum is US\$93,638,890. This amount is not only different but greater than the US\$39,199,373 paid by Burlington under the Settlement Agreement.

- The Tribunal thereby decided to treat the US\$39,199,373 paid by Burlington as a down payment for the total amount of damages, which results in a figure of US\$54,439,517.

703. The Committee will now turn to Tribunal’s methodology to quantify the damage caused by Perenco, which is the inherent reason explaining the Tribunal’s departure from the findings of the *Burlington* tribunal.
704. In its Decision on the Environmental Counterclaim, the Tribunal set out the environmental standard and the legal basis of the Consortium’s liability and presented the Parties’ experts’ contradictory methods of assessing the environmental harm. It found that both Party-appointed experts were not reliable and therefore chose an independent expert (the “**Independent Expert**”), whose major task was to quantify the totality of the environmental damage by sampling and analysing soil, mud pits, etc. Between paragraphs 568 and 608 of the Decision on the Environmental Counterclaim, the Tribunal explained the steps and methodology to be followed by the Parties and the Independent Expert, so that the latter could determine the extent of contamination of the Blocks for which compensation is owed.<sup>616</sup>
705. In the Award, the Tribunal concluded that “Mr. MacDonald and Ramboll conducted the sampling exercise transparently and considered suggestions made by the Parties’ experts and representatives.” In this regard, the Tribunal referred to the Consolidated Independent Expert Report, where the Independent Expert indicated that:

It is important to note that the Parties have had the opportunity to pose questions and comment on my work throughout this engagement including before and during the performance of the field campaign. In addition, representatives of the Parties were present during all onsite activities, including the initial exploratory visit to the Blocks as well as during the performance of sample mark-outs and collection of samples from all investigated media. The field program was implemented over a four-month period and issues raised by the Parties during that time were always considered; in certain cases, my approach was adjusted to incorporate expanded information or to address concerns (when these were reasonable and technically valid). It was not always possible to reach full agreement

---

<sup>615</sup> Award, ¶ 889 (AAE-031).

<sup>616</sup> Decision on the Environmental Counterclaim, ¶¶ 568-608 (AAE-106).

with both Parties, as their commitments to their clients and strategic approaches differed from my own. However, in all cases, a respectful dialogue was established with both Parties, and to my knowledge neither expressed concerns regarding bias for or against either Party in this matter. Relevant correspondence, emails, and other documentation of this dialogue between the Parties and myself or field personnel is included in Appendix B.<sup>617</sup>

706. The Tribunal further clarified that the Parties were given an opportunity to make submissions and insert comments into the Independent Expert Report, were given the opportunity to cross-examine Mr. MacDonald on both days of the Expert Hearing, and were able to conduct their own laboratory analysis to check the results of the Independent Expert.<sup>618</sup>

707. After having reviewed the Consolidated Independent Expert Report, the Parties' separate written submissions, and the testimony and closing submissions given at the Expert Hearing, the Tribunal observed that:

Most of the questions and objections that the Parties have raised concern technical matters that fall within the Expert's expertise and judgement and the Tribunal considers that it is not appropriate to second-guess his technical determinations. That is why he was appointed in the first place: to provide, in an objective and neutral fashion, the expertise and judgement which the Tribunal considered the Parties' experts had failed to provide.<sup>619</sup>

708. Thereafter, the Tribunal analyzed two sets of issues: (i) the allocation of responsibility between Perenco, its predecessors and successor, and (ii) the scope of the Expert's mandate and whether he acted consistently with it.<sup>620</sup> The first issue has been extensively analyzed in the present Decision.

709. As to the mandate of the Independent Expert, some of the Tribunal's propositions and conclusions relevant to the Tribunal's methodology to define the double recovery are noted below:

- Mr. MacDonald was instructed not to perform a *de novo* study of the environmental condition of the two Blocks. This meant that there could be contamination that was not captured by the Parties' experts or the Independent Expert.<sup>621</sup> The Tribunal recalled that "the present exercise is concerned with the accurate and impartial

---

<sup>617</sup> Award, ¶ 743 (AAE-031).

<sup>618</sup> Award, ¶¶ 745-746 (AAE-031).

<sup>619</sup> Award, ¶ 748 (AAE-031).

<sup>620</sup> Award, ¶ 749 (AAE-031).

<sup>621</sup> Award, ¶ 816 (AAE-031).

analysis of the work that was done by the experts—who had ample opportunity to examine the Blocks.”<sup>622</sup>

- Mr. MacDonald was also instructed not to consider the allocation of responsibility between the Blocks’ operators, and to perform its work without regard to the determinations made by the *Burlington* tribunal.<sup>623</sup>
- Mr. MacDonald stated that his “investigation of soil and groundwater was restricted to areas already sampled by the Parties.” And, his “investigation of mud pits was limited to those known to have been used by Perenco.”<sup>624</sup> The Tribunal considered that this interpretation of the instructions provided by the Tribunal was not unreasonable and was consistent with the Tribunal’s intention to have all mud pits used by Perenco assessed, and not to hold Perenco liable for the damage caused by other operators.<sup>625</sup> Thus, the Tribunal considered that Mr. MacDonald acted within the Tribunal’s mandate.
- Ecuador claimed that the Independent Expert did not sample every site where contamination was found by the either of the Parties’ experts. The Tribunal agreed with Ecuador and therefore decided to adjust upward by US\$7.7 million the damages estimated by Mr. MacDonald.<sup>626</sup>
- In regard to the land use, the Tribunal found that Mr. MacDonald and his team surveyed the situation in the two Blocks, studied the record of the counterclaim, and consulted Ministry of Agriculture maps. After conducting the sampling activities, they plotted the delineated areas of contamination on some 51 sites (using aerial photographs). The Tribunal considers that it is not in position to second-guess Mr. MacDonald’s determinations and declines to interfere with them.<sup>627</sup>
- Albeit Perenco contested the fact that Mr. MacDonald chose the most stringent standard on mud pits, the Tribunal concluded that in the light of the evidence available, Mr. MacDonald was entitled to choose that standard.<sup>628</sup>

---

<sup>622</sup> Award, ¶ 816 (AAE-031), citing: Decision on the Environmental Counterclaim, ¶ 596 (AAE-106).

<sup>623</sup> Award, ¶ 817 (AAE-031).

<sup>624</sup> Award, ¶ 819 (AAE-031).

<sup>625</sup> Award, ¶¶ 824, 827 (AAE-031).

<sup>626</sup> Award, ¶ 830 (AAE-031).

<sup>627</sup> Award, ¶ 841 (AAE-031).

<sup>628</sup> Award, ¶¶ 842-850 (AAE-031).

- The Tribunal decided to leave the Independent Expert approach regarding groundwater contamination undisturbed.<sup>629</sup>

710. It follows from the Tribunal’s reasoning that its intention was that the Independent Expert make an impartial calculation of the damages, independent from the positions of the Parties’ experts and the findings of the *Burlington* tribunal.
711. Then, based on the calculations and quantifications made by the Independent Expert, and after some adjustments, the Tribunal proceeded to quantify the damages payable by Perenco, which amounted to US\$93,638,890.<sup>630</sup>
712. After reviewing the Tribunal’s decisions as a whole and read in context, the Committee also finds that the Tribunal concluded that the contamination caused by Perenco in the Blocks was the same contamination caused by Burlington “given that Perenco was the operator, the party with first-hand knowledge of the operations, and therefore the actual (as opposed to the nominal [i.e., Burlington]) author of some of the contamination that the Tribunal’s Independent Expert has found in the oilfields.”<sup>631</sup> As members of the Consortium, both companies were jointly and severally liable for the damage caused in the Blocks, and therefore the US\$39,199,373 paid by Burlington partially covered the remediation costs awarded by the Tribunal to Ecuador. For these reasons, the Tribunal deducted Burlington’s payment from the US\$93,638,890 compensation.
713. The Committee sees no failure to state reasons herein, and therefore finds no ground to annul the Tribunal’s Decision on the Environmental Counterclaim under Article 52(1)(e) of the ICSID Convention.
714. Finally, in regard to the infrastructure counterclaim, the Tribunal finds no manifest excess of powers and no failure to state reasons either.
715. In regard to the manifest excess of powers, it is uncontested that the Tribunal identified the proper body of law on double recovery. Likewise, in paragraphs 905-963 of the Award, the Tribunal endeavored to apply such law. While Ecuador may not agree with the Tribunal’s application of the law, that is not a manifest excess of powers.
716. Likewise, in regard to the failure to state reasons, the Committee finds that the Tribunal did state reasons for deciding that Ecuador has been made whole on the infrastructure counterclaim by Burlington’s payment under the Settlement Agreement.

---

<sup>629</sup> Award, ¶ 860 (AAE-031).

<sup>630</sup> Award, ¶¶ 876-889 (AAE-031).

<sup>631</sup> Award, ¶ 1002 (AAE-031).



717. In the Award, the Tribunal departed its analysis from the facts that the *Burlington* tribunal had already ruled on and awarded damages in respect of the infrastructure counterclaim. What is more, both tribunals “heard virtually the same evidence about the same breaches and considered the same allegations as to damage, but personally observed the climatic and other conditions when it conducted its site visit.”<sup>632</sup>
718. Notwithstanding, the Tribunal noted that “consistent with [its] independent duty to consider the case presented to it, the Tribunal will briefly express its views.”<sup>633</sup> The Tribunal further stressed that it based its determination of the counterclaim on the following considerations: (i) that “in the declining years of the Blocks Perenco would, on the balance of probabilities, have been less concerned about maintaining the facilities than hitherto;”<sup>634</sup> (ii) that there were challenging conditions of operating in the Amazon rainforest and a predisposition towards rust and corrosion in that climate; and (iii) that the Blocks had been operated before and after Perenco’s tenure.<sup>635</sup>
719. The Tribunal then proceeded to conduct its own analysis of the infrastructure counterclaim. It analyzed specific issues and presented its own conclusions in relation to the tanks, fluid lines and pipelines, generator engines, pumps, electrical systems, IT equipment and road maintenance, and other claims such as the purchase of back-up equipment, spare parts and materials to bring the operations into line with industry standards.<sup>636</sup> From such analysis, the Tribunal decided to grant US\$2,315,969.15 to Ecuador under its infrastructure counterclaim.
720. Finally, the Tribunal noted that under the Settlement Agreement, Burlington had already paid US\$2,577,119 for Ecuador’s infrastructure counterclaim. Therefore, to avoid double recovery, the Tribunal concluded that “Ecuador has been made whole on the infrastructure counterclaim” by Burlington’s payment.<sup>637</sup>
721. The Committee observes that, in an analysis similar to the one performed on the environmental counterclaim, the Tribunal conducted its own assessment of the submissions and evidence in the record and reached its own conclusion on the calculation and quantification of the infrastructure counterclaim. The Tribunal thereby reached a sum different from the one awarded by the *Burlington* tribunal. However, given that the amount awarded by the *Burlington* tribunal was higher, the Tribunal considered that Ecuador’s

---

<sup>632</sup> Award, ¶ 906 (AAE-031).

<sup>633</sup> Award, ¶ 909 (AAE-031).

<sup>634</sup> Award, ¶ 911 (AAE-031).

<sup>635</sup> Award, ¶ 912 (AAE-031).

<sup>636</sup> Award, ¶¶ 927-963 (AAE-031).

<sup>637</sup> Award, ¶ 966 (AAE-031).

damage had been totally remediated and therefore decided not to include the US\$2,315,969.15 as part of Ecuador's counterclaim damages to avoid double recovery.

722. In this sense, the Committee concludes that the Tribunal did not fail to state reasons in regard to its decision on Ecuador's infrastructure counterclaim.
723. In sum, the Tribunal finds that the Tribunal neither manifestly exceeded its powers nor failed to state reasons when deciding to treat the amount paid by Burlington to Ecuador as a down payment on the environmental and infrastructure counterclaims.

#### **E. COMMITTEE'S CONCLUSIONS**

724. The Committee rejects all but two of the twenty specific grounds raised by Ecuador to request the annulment of the Award.
725. The Committee decides to annul the Tribunal's decision to award US\$25 million to Perenco's loss of opportunity to extend the Block 7 Participation Contract,<sup>638</sup> and the Tribunal's finding that the OCP ship-or-pay costs were fully tax-deductible.<sup>639</sup>
726. In paragraphs 381 to 422 of the Award, the Tribunal explained how it summed-up the different components to reach the final amount of compensation of US\$448,820,400; thereby, at paragraph 411 of the Award, the Tribunal concluded that "the initial amount of damages estimated to be awarded for Block 7 is calculated to be US\$145.2 million and the amount of damages to be awarded for Block 21 is calculated to be US\$273.7 million, totalling US\$418.9 million (as of September 2016)." The Tribunal then decided to make further adjustments: the 'true-up', the OCP Deductibility, and the value of loss of opportunity.
727. As regards the 'true-up', the Tribunal concluded that "a fair amount for the 'true-up' should be US\$36.4 million (after discounting and bringing forward the relevant cash flows). Thus, the total compensation for Blocks 7 and 21 is reduced by that sum to US\$382.5 million."<sup>640</sup>
728. As to the "OCP Deductibility", the Tribunal concluded "that there should be full tax deductibility in relation to Block 21's OCP ship-or-pay costs. Accordingly, this adds US\$9 million to the quantum to be awarded to Perenco. The amount of US\$382.5 million is therefore increased by US\$ 9 million to amount to US\$391.5 million."<sup>641</sup>

---

<sup>638</sup> See ¶¶ 469-470 of the present Decision.

<sup>639</sup> See ¶ 574 of the present Decision.

<sup>640</sup> Award, ¶ 419 (AAE-031).

<sup>641</sup> Award, ¶ 420 (AAE-031).

729. In relation to the “Value of Loss of Opportunity”, the Tribunal concluded that “[loss of opportunity] should be valued at US\$25 million. This sum is added to the amount of US\$391.5 million to arrive at a total of US\$416.5 million as of September 2016.”<sup>642</sup>
730. Thereafter the Tribunal multiplied the US\$416.5 million by an adjustment factor of 1.0776 to bring this sum forward to the date of the Award to arrive to a final figure of US\$448,820,400.<sup>643</sup>
731. Given that the Committee decides to annul the Tribunal’s decision to add US\$25 million corresponding to the loss of opportunity, and US\$9 million corresponding to the ‘OCP Deductibility’ to the amount of damages awarded to Perenco, the total compensation should be reduced as follows:
732. The US\$34 million resulting from the sum of the aforementioned amounts, the only amounts affected by the partial annulment of the Award, should be deducted from the US\$416.5 million before applying the 1.0776 adjustment factor. This amounts to US\$382.5 million, i.e. the sum reached by the Tribunal after the ‘true-up’ adjustment but before the “OCP-Deductibility” and the loss of opportunity. This sum US\$382.5 is then multiplied by the 1.0776 adjustment factor to arrive to a final sum of US\$412,182,000.
733. In conclusion, the total compensation owed to Claimant at paragraph 1023(a) of the Award should be reduced from US\$448,820,400 to US\$412,182,000. The rest of the Award remains unaffected.
734. Finally, the Committee recalls the commitment made by the Applicant in the Minister’s Letter on April 20, 2020 as a condition requested by the Committee to grant the stay of enforcement of the Award pending the annulment decision.

## **V. COSTS**

### **A. APPLICANT’S COSTS SCHEDULE**

735. The Applicant submitted the following schedule of costs:

Professional fees: US\$1,049,543.95  
Administrative costs: US\$512,238.37

---

<sup>642</sup> Award, ¶ 421 (AAE-031).

<sup>643</sup> Award, ¶ 422 (AAE-031).

**B. PERENCO’S COSTS SCHEDULE**

736. Perenco submitted the following schedule of costs:

Professional fees: US\$3,037,668.50  
Administrative costs: US\$100,615.75

**C. THE COMMITTEE’S DECISION ON COSTS**

737. Article 61(2) of the ICSID Convention provides:

In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

738. Under this provision, applicable to this Annulment Proceeding by virtue of Article 52(4) of the ICSID Convention, the Committee has broad discretion in allocating the costs of the proceeding and the Parties’ legal costs and expenses.

739. Ecuador alleged twenty (20) grounds for annulment seeking either the total or a partial annulment of the Award. Three (3) of such grounds related to the jurisdiction of the Tribunal which, if successful, would have resulted in the total annulment of the Award. The Committee rejected all of these grounds. Five (5) grounds referred to findings of the Award on the merits,<sup>644</sup> which the Committee also rejected. Seven (7) grounds were related to decisions in the Award concerning damages, all of which, but two, were rejected by the Committee. Finally, Ecuador submitted five (5) grounds related to sections of the Award dealing with counterclaims by Ecuador. All of them were rejected by the Committee.

740. Two (2) of the petitions on annulment presented by Ecuador have succeeded. The Committee found that the Tribunal failed to state reasons in its decisions on loss of opportunity,<sup>645</sup> and tax deductibility of OCP ship-or-pay costs,<sup>646</sup> with the result that the total compensation owed to Claimants is reduced from US\$448,820,400 to US\$412,182,000. The rest of the Award remains unaffected.

741. Considering, on the one hand, the partial success of Ecuador’s application and on the other, the fact that a number of the grounds submitted by Ecuador were rejected because they

---

<sup>644</sup> In its submissions Ecuador invokes five specific grounds on the merits, but the Committee classified them under four headings, given that the Committee classified Ecuador’s claims on the Tribunal’s findings that “Decree 662 breached the Participation Contracts”, and that “Decree 662 and ensuing measures breached Article 4 of the Treaty” under the same category.

<sup>645</sup> See ¶¶ 469-470 of the present Decision.

<sup>646</sup> See ¶ 574 of the present Decision.

were considered by the Committee as mere appeals of the Award, the Committee has decided that Applicant shall bear 90% and Claimant 10% of the arbitration costs in relation to these proceedings, and that each side shall bear its own litigation costs and other expenses.

742. The costs of the arbitration, including the fees and expenses of the Committee, ICSID's administrative fees and direct expenses, amount to:

Committee's fees and expenses	
Prof. Zuleta	US\$166,199.37
Prof. Dr. Knieper	US\$78,394.23
Prof. Pinto	US\$70,567.00
ICSID's administrative fees	US\$84,000
Direct expenses (estimated)	US\$36,299.33
<b>Total</b>	<b><u>US\$435,459.93</u></b>

743. Claimant shall therefore reimburse Applicant the amount of US\$43,545.99 corresponding to 10% of the arbitration costs in relation to these annulment proceedings. The Committee finds no grounds to award interest on the aforementioned amount.

## **VI. DECISION**

744. For the reasons set forth above, the *ad hoc* Committee decides, unanimously, as follows:

- a. To partially annul the Award rendered on September 27, 2019 by the Arbitral Tribunal in the arbitration proceedings between Perenco Ecuador Limited and the Republic of Ecuador, ICSID Case No. ARB/08/6, solely and exclusively as regards the Tribunal's decision to award US\$25 million to Perenco's loss of opportunity to extend the Block 7 Participation Contract,<sup>647</sup> and the Tribunal's finding that the OCP ship-or-pay costs were fully tax-deductible.<sup>648</sup>
- b. The rest of the Award remains unaffected, but as a result of the partial annulment the amount awarded to Perenco Ecuador Limited at paragraph 1023(a) of the Award is US\$412,182,000.

---

<sup>647</sup> See ¶¶ 469-470 of the present Decision.

<sup>648</sup> See ¶ 574 of the present Decision.

- c. Applicant shall bear 90% and Claimant 10% of the arbitration costs in relation to these proceedings, and each side shall bear its own litigation costs and other expenses. Claimant shall therefore reimburse Applicant the amount of US\$43,545.99 corresponding to 10% of the arbitration costs in relation to these annulment proceedings.
- d. The stay of enforcement of the Award is lifted.

[Signed]

Professor Dr. Rolf Knieper  
Member of the *ad hoc* Committee

Date: 22 May 2021

---

Professor Mónica Pinto  
Member of the *ad hoc* Committee

Date:

---

Professor Eduardo Zuleta  
President of the *ad hoc* Committee

Date:

[Signed]

---

Professor Dr. Rolf Knieper  
Member of the *ad hoc* Committee

Professor Mónica Pinto  
Member of the *ad hoc* Committee

Date:

Date: 22 May 2021

---

Professor Eduardo Zuleta  
President of the *ad hoc* Committee

Date:



---

Professor Dr. Rolf Knieper  
Member of the *ad hoc* Committee

Date:

---

Professor Mónica Pinto  
Member of the *ad hoc* Committee

Date:

[Signed]

---

Professor Eduardo Zuleta  
President of the *ad hoc* Committee

Date: 27 May 2021