

UNOFFICIAL TRANSLATION

Date of dispatch to the Parties: January 8, 2007

**International Centre for Settlement of Investment Disputes
(ICSID)**

Repsol YPF Ecuador, S.A.

v.

Empresa Estatal Petróleos del Ecuador (Petroecuador)

**(ICSID Case No. ARB/01/10)
(Annulment Proceeding)**

DECISION ON THE APPLICATION FOR ANNULMENT

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Mr. Piero Bernardini

Mr. Gonzalo Biggs

Secretary of the *Ad Hoc* Committee

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I. INTRODUCTION

1. Annulment Proceeding

1. On June 7, 2004, *Empresa Estatal Petróleos del Ecuador* (“PETROECUADOR”) requested the following in relation to ICSID Case No. ARB/01/10, REPSOL YPF Ecuador S.A. (“REPSOL” or “THE CONTRACTOR”) v. *Empresa Estatal Petróleos del Ecuador* (“PETROECUADOR”):

(i) Pursuant to Article 52(1) of the Convention on the Settlement of Investment Disputes (hereinafter referred to as “the Convention”), the annulment of the proceeding and the arbitral award rendered on February 20, 2004 (hereinafter referred to as the “Award”) adopted in this case “because the tribunal (hereinafter referred to as the “Tribunal”) unlawfully and manifestly exceeded its powers;” and

(ii) The stay of enforcement of the Award that ordered PETROECUADOR to pay the sum of US\$13,684,279.23 within 60 days.

2. The application for annulment dated June 7, 2004 was based, *inter alia*, on the following factors:

(i) The ICSID Tribunal allegedly did not have jurisdiction to hear and settle a dispute, which, pursuant to Article 56 of the Hydrocarbons Law, had already been settled by the National Hydrocarbons Directorate [*Dirección Nacional de Hidrocarburos* DNH] and whose decision would have constituted an administrative *res judicata* (whereas 2);

- (ii) The alleged outstanding payment obligation arose from the Service Provision Contract¹ and not, as the Tribunal found, from Clause 26.1 of the Participation Contract or the Modified Contract² and its Annex XI³ (“whereas” clauses 3-8); and
- (iii) REPSOL did not have authority to file suit given that, in its capacity as a member of the Consortium of petroleum companies, it did not obtain prior authorization from the Operating Committee (“whereas” clause 13).

3. On July 15, 2004, pursuant to Rule 50(2)(b) of the Centre’s Arbitration Rules, the application for annulment was registered at the ICSID Secretariat which, on that same date, received the request for a stay of enforcement from PETROECUADOR, and decided, pursuant to Rule 54(2) of said Rules, to grant a provisional stay of enforcement of the Award.

4. On September 14, 2004, pursuant to Article 52(3) of the Convention, an *ad hoc* Committee (the “Committee”) was constituted to decide whether or not to annul the Award in whole or in part. The members of this Committee are:

- Judd Kessler, a US national (President);
- Piero Bernardini, an Italian national; and
- Gonzalo Biggs, a Chilean national.

Secretary of the Committee:

¹ Service Provision Contract for the Exploration and Production of Hydrocarbons in Block 16 of the Ecuadorian Amazon Region dated January 27, 1986 (“Service Provision Contract”).

² Participation Contract for the Exploration and Production of Hydrocarbons (Crude Oil) in Block 16, dated December 27, 1996 (“Participation Contract” or “Modified Contract”).

³ The complete text of the Section of Annex XI is “Annex XI. Block 16. Statement of Amounts Owed and not Paid by PETROECUADOR to the Contractor under the Service Provision Contract.”

Claudia Frutos-Peterson, Counsel, ICSID.

5. On October 4, 2004, PETROECUADOR added the following reasons to support its application for annulment: (i) that it cannot pay a figure which had not been part of the *suit*; and (ii) that the laws of Ecuador obligate State institutions to exhaust all permissible legal remedies to prevent any decision from “becoming enforceable and enforced.”

2. REPSOL’s Response

6. On October 15, 2004, REPSOL requested the rejection of the application for annulment and the termination of the stay of enforcement of the Award. Its main reasons were the following:

(i) PETROECUADOR’s principal arguments that (i) the dispute was governed by the Service Provision Contract and not by the Modified Contract; (ii) the dispute had been settled by the DNH and constituted *res judicata*; and (iii) the argument that REPSOL did not have the authorization of the Consortium to sue PETROECUADOR had already been advanced and settled in “whereas” clauses 28 and 34 of the Decision on Jurisdiction and in “whereas” clauses 112, 149, 151, and 177 of the Award;⁴

(ii) With regard to the applicable contract, “whereas” clause 28 of the Decision on Jurisdiction stated that “the dispute concerns Clause 26.1 of the Modified Contract” and that “the State Attorney General’s Office had concurred with this finding...” and that the suit also sought performance of said contract, rather than the Service Provision Contract;⁵

⁴ Hereinafter all references to the “whereas” clauses of the Award will be indicated in the following manner (Award, [number of the “whereas” clause]); likewise, all references to the “whereas” clauses of the Decision on Jurisdiction will be indicated in the following manner: (Comp., [number of the “whereas” clause]).

⁵ REPSOL’s letter dated October 15, 2006, p. 3.

(iii) The contractual nature of the dispute had been ratified by the Tribunal,⁶ the Parties, and the Attorney General's Office, when they agreed to a binding consultation process which produced the Report from Doctor Marcelo Merlo, and any challenge to an administrative decision of the DNH allegedly implied tacit disregard for the jurisdiction of the ICSID Tribunal;⁷

(iv) The Tribunal resolved that "the DNH's decision did not render this proceeding a *res judicata*;"⁸

(v) With regard to the authority to file suit against PETROECUADOR, the Tribunal resolved that "REPSOL was and is authorized to act on behalf of the other companies that comprise the Consortium;"⁹

(vi) PETROECUADOR's argument about "not being able to pay a figure that had not been part of the suit" had no validity because the suit and documentary evidence clearly mentioned the sum of "US\$13,700,000.00 plus interest as of the date on which payment should have been made up to the time it was actually made;"¹⁰

(vii) PETROECUADOR's assertion that, under its legislation, it is obligated to exhaust all legal remedies to prevent any decision from "becoming enforceable and enforced,"

⁶ Decision on Jurisdiction, 34 and Award, 151.

⁷ REPSOL's letter dated October 15, 2004 (hereinafter "REPSOL 15/10/2004").

⁸ Award, 149.

⁹ Award, 112.

¹⁰ REPSOL 15/10/2004, pp. 6-7.

must be viewed in the context of the legality principle of its Constitution and that which is permitted by its legislation and international treaties;¹¹ and

(viii) PETROECUADOR confuses annulment proceedings with an appeal and the uniform case law of ICSID does not allow, in annulment proceedings, that a committee analyze substantive matters already resolved in the Award.¹²

3. The Proceeding

7. Although the Committee scheduled its first session for November 9, 2004, it could not be held because PETROECUADOR failed to pay the fees and expenses agreed on for the proceeding. Therefore, on March 24, 2005, a decision was made to stay the proceeding, with said proceeding being resumed only after payment was made on November 16, 2005.

8. On December 22, 2005, the Committee adopted Procedural Order No. 1 whereby it decided: (i) To maintain the stay of enforcement of the Award on the condition that PETROECUADOR post an unconditional and irrevocable bond for the total amount of the Award plus the corresponding interest, before January 15, 2006; and (ii) To summon the Parties to a session in Quito on January 31, 2006.

9. On December 30, 2005, PETROECUADOR requested the reconsideration of Procedural Order No. 1, regarding the posting of the bond. This request submitted by PETROECUADOR was denied by the Committee in Procedural Order No. 2, of January 9, 2006. On that same date, the Committee decided to extend the period for the posting of a satisfactory bond to January 25, 2006 at the latest. Subsequently, by means of Procedural Order No. 3 of January 27, 2006, the

¹¹ *Ibid.*, pp. 7-8.

¹² *Ibid.*, pp. 8-9.

Committee again decided to extend the period for the posting of the satisfactory bond to February 1, 2006, maintaining the same terms and conditions stipulated in Procedural Order No. 1.

10. On January 31, 2006, the first session of the Committee was held at the *Universidad San Francisco de Quito*, and was attended by the three members of the Committee, representatives of the ICSID Secretariat, Gabriela Álvarez Ávila, Senior Counsel, by teleconference, and Natalí Sequeira Navarro, Counsel. Representing REPSOL at this session were Mr. Carlos Arnao, the General Agent of REPSOL in Ecuador, Mr. Fernando Montenegro, Manager of Legal Affairs at REPSOL in Ecuador, Mr. Francisco Roldán, Mr. Rodrigo Jijón, and Mr. Juan Manuel Marchán, from the law firm Pérez, Bustamante & Ponce. Representing PETROECUADOR were Mr. Emilio Clemente Huerta, Mr. Juan Velasco, Mr. Gonzalo Castro Espinoza, Mr. José Nikinga, Economist Fabiola Estrella, Mr. Julio César Trujillo, Mr. Rubén Darío Espinoza, and Attorney José Miguel Ledesma.

11. At the first session on January 31, 2006, the following issues were dealt with: constitution of the Committee and statements of its members; fees and expenses of the members of the Committee; representation of the Parties; applicable arbitration rules; apportionment of the costs of the proceeding and advance payments; venue and language of the proceeding; records of the hearings; means of communication and copies of instruments; quorum; decisions by correspondence or teleconference; delegation of authority to set deadlines; preliminary hearing, written and oral phase of the proceeding; documents related to the proceeding; number, sequence, and deadlines; statements from witnesses and experts; documentary evidence, method

of presentation of documents and applications; dates of subsequent sessions; deadlines for decisions; and publication of any decision on the case.

12. On February 22, 2006, the Committee adopted Procedural Order No. 4 which, after analyzing the facts and relevant case law, and noting that PETROECUADOR did not post the required bond by the deadline specified in Procedural Orders Nos. 2 and 3, terminated the stay of enforcement of the Award.

4. Written Submissions of the Parties

13. In a Memorial dated March 2, 2006, PETROECUADOR reiterated the following arguments, among others: (i) that the dispute revolved around the applicable contract and the Award should apply the Service Provision Contract and not the Modified Contract; (ii) that the Tribunal did not have jurisdiction to make a decision on a matter already resolved by the DNH and that, in so doing, it expressly violated the law, in particular Articles 11, 52, and 56 of the Hydrocarbons Law; (iii) even if the Modified Contract were applicable, the Tribunal exceeded its powers in ordering the payment of non-existent debt, not determined by the Parties “owing to the lack of clear parameters pursuant to Annex XI of the Modified Contract;”¹³ (iv) that the arbitration proceedings were flawed inasmuch as the suit had not been authorized by the Consortium to which REPSOL belongs; and (v) that, as determined in the case of *Klöckner v. Cameroon*,¹⁴ the Tribunal exceeded its powers and violated Article 42(1) of the Convention by not applying Ecuadorian law.

¹³ PETROECUADOR’s Memorial dated March 2, 2006, p. 8.

¹⁴ *Klöckner Industrie-Anlagen GmbH and others v. Republic of Cameroon and the Société Camerounaise des Engrais* (ICSID Case No. ARB/81/2), Decision on Annulment dated May 3, 1985, ICSID Reports, Vol. 2, 1994, pp. 95 and following.

14. On March 31, 2006, REPSOL in its Counter-Memorial maintained that: (i) the basis of the dispute was not which contract should apply, but “the failure to make a specific payment, which PETROECUADOR was obligated to make pursuant to Clause 26.1 of the Modified Contract”;¹⁵ (ii) the lack of jurisdiction argument was resolved in whereas clause 28 of the Decision on Jurisdiction; (iii) it did not challenge the DNH’s decision or its audits because the dispute, as recognized by the State Attorney General’s Office, the Minister of Energy and Mining, the Decision on Jurisdiction, and the Award,¹⁶ was contractual rather than administrative in nature; that is, it arose as a result of non-compliance by PETROECUADOR with the Modified Contract; (iii) it had the authority to represent the Consortium, as recognized by the Award in its “whereas” clause 112; (iv) the claim specified the sum at issue in the suit and it was not within the purview of the Committee to assess payments that were substantive matters in an already settled dispute;¹⁷ (v) according to the well-established case law of ICSID and the opinion of scholars, annulment is a limited remedy that relies on the legal standing of the Award, and therefore, its grounds should be interpreted restrictively; in addition, annulment for excessive use of powers should be manifest and obvious, otherwise it becomes an ordinary appeal; and (vi) even if the Tribunal had unduly applied an Ecuadorian law, which is not the case, this would not annul the Award, as seen in the decision in the *Wena Hotels v. Egypt* case (page 18).¹⁸

15. In its Reply dated April 15, 2006, PETROECUADOR stated that: (i) REPSOL’s argument that the dispute was governed by Clause 26.1 of the Modified Contract was invalid given that this Contract evolved out of the Service Provision Contract which, along with the

¹⁵ REPSOL’s Counter-Memorial dated March 31, 2006, p. 3.

¹⁶ Decision on Jurisdiction, 34 and Award 149, 151 and 177.

¹⁷ REPSOL’s Counter-Memorial dated March 31, 2006, p. 11.

¹⁸ *Wena Hotels Ltd. v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Decision on Annulment of Award, February 5, 2002, 41 I. L. M. 933 (2002).

payment of the alleged amounts owed, was the object of an incontestable administrative decision “that is, an administrative *res judicata*”;¹⁹ (ii) the Award represents an *ultra vires* act in that it fails to take into account the fact that under the applicable regulations, including the accounting rules, the sale of REPSOL’s investments and the corresponding reimbursements from PETROECUADOR could be finalized only after the DNH had completed the corresponding audits;²⁰ (iii) based on the aforementioned audits, under the Service Provision Contract, PETROECUADOR could make only final, and not provisional payments; (iv) pursuant to the aforementioned legislation, the notification in 1999²¹ from the DNH to REPSOL of investment earnings and reimbursements for 1994, 1995, and 1996, converted the alleged contractual dispute into an administrative one and challenges to it were governed by Administrative Statutes. Therefore, since REPSOL did not challenge the DNH’s decision, the latter constituted an administrative *res judicata*.²²

16. In its Rejoinder dated May 2, 2006, REPSOL stated that: (i) the argument that the Tribunal did not apply Ecuadorian law confuses the annulment process with that of an appeal and overlooks the fact that no committee has established that an incorrect interpretation is tantamount to the excessive use of powers by a tribunal, which is not the case in this instance, given that the Award correctly interpreted and applied Ecuadorian law, as stipulated in the Modified Contract (Nos. 3 and 4); (ii) the opinions of the scholars Broches and Schreuer and the legal opinion set forth in the *Wena Hotels v. Egypt* case support the previous findings in respect of the powers of a committee in an annulment proceeding (Nos. 5 and 6); (iii) the amendment of the Service Provision Contract was made after all the conditions set forth in the Hydrocarbons

¹⁹ PETROECUADOR’s Reply dated April 15, 2006, p. 2.

²⁰ PETROECUADOR’s Reply dated April 15, 2006, pp. 3, 4, and 5.

²¹ Official Note No. 90002 dated January 6, 1999.

²² PETROECUADOR’s Reply dated April 15, 2006, pp. 7 – 12.

Law and in its amending law (Nos. 8.2 and 8.3) had been met; (iv) PETROECUADOR's references to the DNH's payment procedures and audits for the approval of reimbursements under the Service Provision Contract allegedly did apply to the Modified Contract (No. 8.5); (v) the argument that Clause 26.1 of the Modified Contract was invalid because the Parties were legally prevented from making final payments, violates the principle of good faith and Article 1699 of the Civil Code, which prohibits persons who sign an invalid contract from using its lack of validity to their advantage (No. 8.6); (vi) REPSOL did not challenge the payments from the DNH because the dispute was contractual and concerned Clause 26.1 of the Modified Contract, as recognized by the Minister of Energy and Mines and the State Attorney General (No. 8.7); (vii) as decided by an arbitral tribunal in Colombia, jurisdiction in reviews pertaining to administrative law is not exclusive and includes the jurisdiction of arbitrators who, by virtue of an arbitral agreement, are vested with public authority to administer justice in matters normally heard by an administrative law judge (No. 8.8); and (viii) the previous findings regarding the jurisdiction of ICSID tribunals were recognized in the *Aguas del Aconquija, S.A. y Vivendi Universal v. Argentine Republic*²³ case and are confirmed in Article 26 of the Convention which states:

“Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.”

5. Subsequent Proceeding

²³ *Compañía de Aguas del Aconquija S.A. y Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment of the Award, July 3, 2002. Available on <<http://www.worldbank.org/icsid/cases/awards>>.

17. On May 18, 2006, the Committee once again requested that PETROECUADOR, pursuant to Article 14(3)(a)(i) and paragraph (e) of ICSID's Administrative and Financial Regulations, deposit the sum of US\$100,000.00 to cover the fees and expenses of the proceeding during the next three to six months and the hearing on the merits to be held in July 2006.

18. On June 27, 2006, the Committee issued Procedural Order No. 5, whereby and on the basis of the considerations indicated therein: (i) without prejudice to the acknowledgement of PETROECUADOR's right to present true copies of documents, it refused to reproduce the record favorable to PETROECUADOR; (ii) it reserved the right to certify various procedures related to the DNH's decision; (iii) it reserved the right to rule on the alleged lack of independence of some witnesses; and (iv) it confirmed that the next hearing would take place in Quito on July 10, 2006.

19. On July 10, 2006, the first hearing of the Committee was held in Quito, which was attended by representatives of the Parties and their attorneys, and oral arguments were heard and evidence presented. An electronic copy with the complete transcript of this hearing was subsequently distributed by the Secretariat.²⁴

20. On the day of the hearing, REPSOL submitted a final document with its arguments against the application for annulment and insisted that PETROECUADOR had simply "repeated the same arguments advanced during the arbitration proceedings that had been analyzed, discussed, and resolved by the Tribunal" and had confused the application for annulment with an appeal. It added furthermore, among other arguments, that the Parties had expressly agreed that the dispute would be submitted to ICSID arbitration and cited the relevant

²⁴ Hereinafter, references to the Transcript of the Hearing will be indicated in the following manner "Tran., [Page No.]."

case law. It reiterated compliance with Clause 26.1 of the Modified Contract; namely that “a transaction by virtue of which the mutual obligations arising from the previous Service Provision Contract had been honored.” The aforementioned clause stipulates:

“TWENTY-SIXTH: TRANSITIONAL PROVISION

TWENTY-SIX (ONE) (26.1).- PETROECUADOR will pay the Contractor the amounts indicated in Annex XI, which constitute the amounts owed and not paid by PETROECUADOR to the Contractor under the Service Provision Contract, as set forth in said Annex.”

21. Citing the relevant documents and ICSID case law, REPSOL analyzed and rebutted PETROECUADOR’s arguments regarding: (i) the lack of jurisdiction or excessive use of powers by the Tribunal; (ii) the point that the Tribunal could not issue a ruling with respect to the DNH’s decision; (iii) the point that the claimant did not have the authority to represent the companies in the Consortium; (iv) the point that it could not pay a figure that was not the object of the suit; and (v) the point that Ecuadorian legislation obligates companies to exhaust all remedies to prevent a decision from becoming enforceable and enforced.

22. On July 22, 2006, PETROECUADOR submitted a transcription of Dr. Julio César Trujillo’s statement at the hearing on July 10, 2006 and copies of the slides used by Dr. José Nikinga at that same hearing. In summary, Dr. Trujillo’s statement indicated that: (i) Clause 26.1 of the Participation Contract is provisional and does not determine any amount whatsoever owed to REPSOL; however, reference is made to Annex XI, which provides estimated figures, subject to revision, and which should be approved by PETROECUADOR’s Office of the CEO;

(ii) pursuant to the aforementioned Annex XI, the office of the President of PETROECUADOR approved the various revised payments, which were challenged by REPSOL, but which the DNH ratified by Official Note 004-DNH-EH-AH-1 dated January 21, 2000; (iii) pursuant to Article 56 of the Hydrocarbons Law, the DNH's previous resolution was an administrative *res judicata*; (iv) REPSOL did not avail itself in a timely manner of any of the remedies provided by the Constitution and Ecuadorian laws; consequently, the DNH's resolution, which ratified the revised payments by the office of the President of PETROECUADOR remained enforceable; (v) in its "whereas" clauses Nos. 146 to 151, the Award, in a contradictory and unclear manner, referred to the DNH's resolution and indicated that the Committee should determine whether or not the Tribunal had the jurisdiction to "...rule on a matter that had already been resolved by the DNH through a decision that had been made final or an administrative *res judicata*";²⁵ (vi) that the Award implicitly disregarded the validity of the DNH's resolution, which constitutes another reason to request its annulment, given that the ICSID Convention only became part of Ecuadorian legislation on April 19, 2001,²⁶ that is, several months after the DNH's Decision became an administrative *res judicata*; (vii) the Award does not specify that the accounts payable are based on the Service Provision Contract and not the Participation Contract, nor does it analyze the effects of Annex XI; had this been done, it would have been concluded that these accounts were subject to revision, should have been approved by the office of the President of PETROECUADOR and made subject to the DNH's control; (viii) the argument in paragraph 149 of the Award that the DNH's decision did not become a *res judicata*, given that the discussion focuses on the scope and effect of Clause 26.1 of the contract, is invalid because this clause did not determine any sum whatsoever; rather, reference was made to Annex XI whose amounts

²⁵ Transcript presented by PETROECUADOR of Dr. Julio César Trujillo's statement at the hearing of July 10, 2006, section 5.2.1, paragraph 5.

²⁶ Date of publication in the Official Gazette [*Diario Oficial*].

were not definitive; (ix) paragraph 150 of the Award erroneously states that: (i) the DNH's powers to control PETROECUADOR would arise out of the contract whenever these powers are based in law; and (ii) the DNH could not change the figures stipulated in the Participation Contract in instances where this contract did not set any figure whatsoever; instead, as indicated, reference was made to Annex XI.

23. In his document, Doctor Nikinga: (i) describes the objective and grounds of REPSOL's original suit and the amounts owed under the applicable legal framework: the Service Provision Contract, Article 25 of the Accounting Rules, and the Implementing Regulations to Law No. 101 amending the Hydrocarbons Law; (ii) designates the DNH as the entity with the legal authority to finalize payment of the relevant costs, expenses, and investments; (iii) refers to Clause XXVI and Annex XI of the Participation Contract and indicates that the DNH's decision did not declare payment under Annex XI as final; (iv) cites as primary objections of PETROECUADOR: (a) ICSID's lack of jurisdiction to hear and settle REPSOL's claim; (b) that, pursuant to Article 56 of the Hydrocarbons Law, REPSOL's suit was settled by the DNH three months before the matter was submitted to the consultant for a decision and two years before the case was brought before ICSID; (c) that an administrative *res judicata* had resulted and REPSOL had not exercised the administrative and legal remedies provided in Ecuadorian legislation; (d) that the amounts appearing in Annex XI of the Modified Contract and Clause 26.1 of the Contract are amounts corresponding to the Service Provision Contract and not to the Participation Contract in force as of January 1, 1997; (e) that any outstanding payment or revised payment from the Service Provision Contract should be governed by said contract and the laws and regulations applicable thereto; (f) that the basis of the dispute is legal and revolves around the issue of whether or not, as asserted by REPSOL, Clause 26 of the Modified Contract should

apply or, as asserted by PETROECUADOR, the Service Provision Contract should apply; (g) that the Tribunal manifestly exceeded its powers by indicating that the dispute pertains to Clause 26.1 of the Amendment Agreement and the alleged failure by PETROECUADOR to fulfill an obligation which originated therein (“whereas” clauses 28 and 31); and (v) the Committee was morally obligated to avoid any illegal and unjust enrichment.

24. Owing to PETROECUADOR’s failure to pay, the ICSID Secretariat reported on July 24, 2006 that it had received a deposit of US\$100,000.00 from REPSOL to cover the fees and expenses of the proceeding.

25. On July 27, 2006, PETROECUADOR presented a summary of the statement of Economist Fabiola Estrella at the July 10, 2006 session, where she indicated that: (i) the applicable legal framework is the Service Provision Contract, the Accounting Rules, the Implementing Regulations to Law No. 101 amending the Hydrocarbons Law (Articles 38 and 40); (ii) the payments and reimbursements are procedures subject to law and that only the DNH, through annual audits, has the authority to determine whether reimbursements related to costs and expenditure are final or definitive; (iii) REPSOL’s request was resolved by the DNH three months before the opinion of Dr. Merlo (the consultant) was sought; (iv) the DNH’s resolution has the force of an administrative *res judicata*; (v) if the dispute is legal, the Tribunal should first declare the rights of the claimant and, subsequently, based on the adjustments resulting from the DNH audit, order the fulfillment of an obligation, through payments, arising from this alleged violation of rights, and (vi) the Committee is required by law to declare the annulment of the Award and “the moral obligation to avoid unlawful, unjust enrichment.”

II. ANALYSIS OF THE GROUNDS FOR ANNULMENT

26. Pursuant to Article 52(1)(b) of the Convention, PETROECUADOR requested the annulment of the award, claiming that the Tribunal manifestly and unlawfully exceeded its powers. In support of its claim, PETROECUADOR argued that the Tribunal exceeded its powers by violating Article 52(1)(b) of the Convention when it failed to apply Ecuadorian law and: (i) declaring that it had jurisdiction to resolve the dispute based on the Modified Contract and not the Service Provision Contract, as it should have done; (ii) disregarding and not giving the administrative decision of the DNH the force of a *res judicata*; and (iii) acceding to REPSOL's request despite its failure to receive prior authorization from the Operating Committee pursuant to the Joint Operating Agreement signed on February 7, 1996, and Rules 1 and 2(1) of the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules).²⁷

PETROECUADOR subsequently added to the aforementioned grounds for annulment that: (iv) the Tribunal should not have ordered the payment of a sum that was not part of the dispute; and (v) the laws of Ecuador obligate the State and its institutions to exhaust all permissible legal remedies to prevent enforcement of any decision against it. During the annulment proceedings, PETROECUADOR added that the Tribunal's decision regarding REPSOL's power of representation constitutes a serious departure from a rule of procedure pursuant to Article 52(1)(d) of the Convention.

1. Lack of Jurisdiction of the Tribunal

27. Grounds previously mentioned in PETROECUADOR's application for annulment will now be analyzed.

a) Decision of the Tribunal

²⁷ Application for annulment, June 7, 2004, "whereas" clause N° 14.

28. In its July 23, 2003 Decision on Jurisdiction, the Tribunal, after considering the arguments of the Parties and the evidence submitted, issued its statement with regard to PETROECUADOR's objection to the jurisdiction of ICSID and its competence. First, the Tribunal is of the view that the dispute pertains to Clause 26.1 of the Modified Contract (Comp., 28) and later reiterates that "*the dispute arose with regard to the second contract entitled the Modified Contract.*"²⁸

29. The Tribunal notes that, "*the State Attorney General's Office appears to concur with this view in its Official Notes Nos. 08085 of October 14, 1999, and 10994 of March 3, 2000, referring to the Modified Contract as the source of the conflict. In the first Official Note cited, the subject of the consultation mentioned in Clause 20.1 of the Modified Contract was discussed, and the Attorney General's Office stated: "...it is legally appropriate, given that it constitutes an alternative means of resolving the disputes that have arisen between the parties and as stipulated in the aforementioned Modified Contract and in Official Note No. 156-PRO-A-99-1812 signed by the office of the President of PETROECUADOR and the General Agent of YPF Ecuador Inc. Contractors are therefore obligated to honor the July 7, 1999 opinion of the consultant mutually agreed upon (...).*" The second Official Note addressed the same subject and the Attorney General's Office noted the following: "*With the contract's stipulation that the consultant's opinion would be final and binding for the Parties, the terms of reference were modified to make the opinion final and binding, when its scope is simply that of a report. For this reason, numeral 44.2 of these terms of reference stipulates that the consultant's opinion shall be used as a frame of reference, whereas the arbitral award shall be binding upon the Parties; in other words, the consultant's report is nonbinding and, moreover, not definitive.*" Both texts analyzed the

²⁸ Comp., 29.

*Modified Contract and the dispute that arose between the Parties with regard to the effect of the consultation process agreed under that contract.”*²⁹

30. The Tribunal adds that it *“considers that the difference between the Parties is, definitively, of a legal nature because it refers to the alleged failure by PETROECUADOR to fulfill an obligation derived from the Modified Contract.”*³⁰

31. The Tribunal adds moreover that PETROECUADOR has expressed its irrevocable consent to submit to ICSID arbitration under both Clause 20.3 of the Amendment Agreement and Official Note No. 380-PRO-P-2001 of July 9, 2001, in which it stated the following to REPSOL: *“I hereby reply to your letter No. DR-PE-013/2001 of June 19 this year, which declares that once the Convention on the Settlement of Investment Disputes between States and Nationals of Other States has been ratified by the State of Ecuador through its agencies, it accepts ICSID’s jurisdiction to resolve any dispute. In this respect, I hereby declare my agreement with such a procedure; consequently, the differences in the definitive settlement of the Block 16 Service Provision Contract may be brought before ICSID under the provisions of Clause 20.3 of the Modified Contract...”*³¹

32. Clause 20.3 of the Modified Contract stipulates that from the date that the Convention on the Settlement of Investment Disputes between States and Nationals of Other States *“is approved by the Ecuadorian Congress, the Parties undertake to submit disputes or differences related to or arising from the implementation of this Contract to the jurisdiction and competence of the International Centre for Settlement of Investment Disputes (“ICSID”) so that they may be settled and resolved pursuant to the provisions of said Convention.”*

²⁹ Comp., 28.

³⁰ Comp., 31.

³¹ Comp., 41.

33. The Tribunal subsequently adds that “*PETROECUADOR’s argument regarding the existence of an administrative res judicata has no effect on the jurisdiction of the Tribunal. In other words, whether the decision of the National Hydrocarbons Directorate cited by PETROECUADOR did or did not definitely put an end to the dispute, does not affect and cannot affect the jurisdiction of the Tribunal; however, it does have a profound influence on the merits of the dispute*”.³² The Tribunal concludes that: “*These considerations are exclusively related to the aspects of the objection to a res judicata appearing in the subject referred to in the previous decision, in other words, in that referring to the jurisdiction of the Tribunal. In issuing its decision, the Tribunal should therefore ascertain whether the matter that is the subject of the dispute has already been resolved, totally or partially, by the competent national authorities and determine the legal ramifications of said decision.*”³³

34. Finally, the Tribunal notes that the ICSID Convention, approved by the Ecuadorian Congress by means of legislative resolution No. R-22-053 of February 7, 2001, takes precedence over the domestic laws of the Republic of Ecuador, in accordance with Article 163 of the Constitution,³⁴ the reason for which “*the regulations applicable to this matter are the ICSID Convention, and, in the absence of an agreement to the contrary between the Parties, “the Arbitration Rules.*”³⁵

35. The aforementioned “*leads the Arbitral Tribunal to conclude, categorically, that this matter is subject to ICSID jurisdiction and that the Arbitration Tribunal is competent to settle the dispute that has arisen between the Parties.*”³⁶

³² Comp., 46.

³³ Comp., 47.

³⁴ Comp., 53.

³⁵ Comp., 55.

³⁶ Comp., 57.

b) Analysis of the Committee

36. As previously mentioned (*supra*, 38), PETROECUADOR maintains that the Tribunal manifestly exceeded its powers in deciding that the dispute is within ICSID's jurisdiction and its competence. The Committee observes that, first, if excessive use by an Arbitration Tribunal of its powers is to constitute valid justification for the annulment of an award pursuant to Article 52(1)(b) of the ICSID Convention, it must be "*manifest*." It is generally understood that exceeding one's powers is "*manifest*" when it is "*obvious by itself*" simply by reading the Award, that is, even prior to a detailed examination of its contents (see in this regard *Wena Hotels Limited v. Arab Republic of Egypt*).³⁷ As Professor Schreuer states, "*The word relates not to the seriousness of the excess or the fundamental nature of the rule that has been violated but rather to the cognitive process that makes it apparent. An excess of powers is manifest if it can be discerned with little effort and without deeper analysis.*"³⁸

37. A first reading of the Decision on Jurisdiction issued by the Tribunal in January 2003 reveals it to be clear, convincing, well-reasoned, and free of contradictions. Furthermore, the Committee observes that the rules of the Ecuadorian legal system were taken into account and applied by reputable and experienced arbitrators, two of whom were Ecuadorian nationals.

38. Even assuming that the Tribunal had erroneously applied the laws of Ecuador, it should be recalled that, in ICSID's annulment system, the errors made in the application of a law, in contrast with the breach of said law (or of legal rules agreed upon by the parties), do not constitute, pursuant to Article 42 of the Convention, grounds for annulment of an award. The respective precedents confirm the relevance of this distinction in the context of a request for

³⁷ *Wena Hotels Ltd. v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Decision on Annulment of Award, February 5, 2002, 41 I. L. M. 933 (2002), paragraph 25.

³⁸ Schreuer, C. *The ICSID Convention: A Commentary*, 2001, p. 933.

annulment, clarifying as well that the latter must not be confused with an appeal, which is not available pursuant to Article 53 of the Convention.

39. In the *Klöckner v. Cameroon* case, the Committee, having referred (in paragraph 60) to “*the fine distinction between the ‘non-application’ of the applicable law and mistaken application of this same law*” stated (in paragraph 61): “*It is clear that the ‘error in judicando’ could not be admitted as is as cause for annulment under penalty of indirectly reintroducing the appeal against the arbitral award, and the annulment process of Article 52 of the Convention does not, any more than the Permanent Arbitration Court in the Orinoco case, have ‘the mission to state whether the issues were properly or poorly judged, but whether the judgment is to be annulled.’*”³⁹

40. The Committee’s Annulment Decision in the *Amco v. Indonesia* case was equally categorical:

“23. *The law applied by the Tribunal will be examined by the ad hoc Committee, not for the purpose of scrutinizing whether the Tribunal committed errors in the interpretation of the requirements of applicable law or in the ascertainment or evaluation of the relevant facts to which such law has been applied. Such scrutiny is properly the task of a court of appeals, which the ad hoc Committee is not. The ad hoc Committee will limit itself to determining whether the Tribunal did in fact apply the law it was bound to apply to the dispute. Failure to apply such law, as distinguished from mere misconstruction of that law, would constitute a manifest excess of powers on the part of the Tribunal and a ground for nullity under Article 52(1)(b) of the Convention. The ad hoc Committee has*

³⁹ *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais (ICSID Case No. ARB/81/2)*, Decision on Annulment of May 3, 1985, ICSID Reports, Vol. 2, 1994, pp. 95 and seq.; p. 119.

*approached this task with caution, distinguishing failure to apply the applicable law as a ground for annulment and misinterpretation of the applicable law as a ground for appeal.”*⁴⁰

41. This opinion was shared by the Committee in the *MINE v. Guinea* case. After explaining the reason for which failure to apply the respective law constitutes a form of exceeding one’s powers, the Committee added:

*“5.05 A distinction must be made between failure to consider the legal rules applicable and the erroneous application of said rules, which, even if manifestly unjustified, does not provide grounds for annulment (see the history of the Convention, Vol. II, pages 340 and 854).”*⁴¹

42. In light of the foregoing, PETROECUADOR has made an error in maintaining at the hearing that the Tribunal *“In exceeding its powers broadly interpreted these Ecuadorian legal provisions, which are part of public law.”*⁴²

43. Moreover, it is considered that whichever contract is applicable (that is, the Service Provision Contract or Modified Contract), the Parties agreed to submit all disputes to ICSID arbitration. By virtue of this agreement between the Parties, the jurisdiction of ICSID and the competence of the ICSID Tribunal should not be questioned if they meet the other conditions established in Article 25 of the ICSID Convention, as occurred in this case. As shown, ICSID’s jurisdiction and the competence of the Tribunal shall not be set aside by an objection because the

⁴⁰ *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Decision on Annulment, May 16, 1986, ICSID Reports, Vol. 1, 1193, pp. 515-16.

⁴¹ *Maritime International Nominees Establishment v. Republic of Guinea* (ICSID Case No. ARB/84/4), Partial Annulment Decision of December 22, 1989, 5 ICSID Review - FILJ 95 (1990).

⁴² Tran., p. 168, lines 4-7.

object of the dispute is related to an administrative act with the force of an unappealable ruling or a *res judicata*.⁴³

44. Even if excess of powers is analyzed from a broader perspective, the Award also withstands any criticism in this regard. In fact, the Tribunal did not decide on matters that had not been submitted for its consideration (in this regard, see paragraph 84, *infra*), nor did it fail to refer to matters that had been submitted by the Parties, or fail to comply with the applicable law.

45. The foregoing leads the Committee to conclude that the grounds for annulment submitted by PETROECUADOR with respect to the decision of the Tribunal on the jurisdiction of ICSID and on its own competence cannot be accepted. For this reason, it rejects the application for annulment under this ground.

2. Basis of the Dispute, Administrative *Res Judicata*

46. During the hearing, PETROECUADOR made two important points regarding competence. PETROECUADOR alleged that the Tribunal manifestly exceeded its powers by (i) setting out in the Award that PETROECUADOR's legal obligations emanate not from the Service Provision Contract but rather from the Modified Contract and its Annex XI; and (ii) by failing to legally recognize the decision of the DNH (that had not been refuted, and consequently, has remained final) as an administrative *res judicata*.⁴⁴ An analysis of each of these arguments will follow.

A) Legal Nature of the Dispute

a) Decision of the Tribunal

⁴³ See *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* (ICSID Case No. ARB/00/4), Decision on Jurisdiction, July 23, 2001, 42 I. L. M. 609 (2003), paragraph 27.

⁴⁴ The Tribunal clarified that its Decision on Jurisdiction did not include a decision on the merits of the case. (Comp., 46 and 47; Award, 177). The Tribunal did decide that that dispute had arisen from obligations emanating from a contract, and as such it should be considered as eminently legal (Comp., 33-34).

47. In addition to the conclusions of the Tribunal in its Decision on Jurisdiction, summarized in Nos. 28-35, *supra*, the Tribunal reached the following conclusions:

a) That the Modified Contract resulted from PETROECUADOR's initiative, that in August 2006 it declared to REPSOL its intention to replace the Service Provision Contract with a Joint Operating Contract for hydrocarbons exploration and production. The Contractor agreed in principle to the proposed amendment.⁴⁵

b) The proposed change in this contractual agreement was approved by: the Board of Directors of PETROECUADOR; the Minister of Energy and Mines; the Attorney General; and the Chief of the Joint Command of the Armed Forces.⁴⁶ After receiving approval, the Parties negotiated the Modified Contract in detail and it became legally binding upon the Parties.

c) Signature of the Modified Contract ended the Service Provision Contract. The Modified Contract specifically includes transitional provision 26.1, not with the objective of extending the period of validity of the previous contract, but in order to end it, establishing the duty of PETROECUADOR to make certain payments as a result of the closure of accounts related to the termination of the Service Provision Contract.⁴⁷

b) Analysis of the Committee

48. As previously mentioned, PETROECUADOR maintains that the Tribunal manifestly exceeded its powers in deciding that the dispute originated in the Modified Contract, when it should have been decided that the dispute originated in the Service Provision Contract dated

⁴⁵ Award, 115.

⁴⁶ Award, 116.

⁴⁷ Award, 122.

January 1, 1997. As indicated in paragraph 36, *supra*, the conditions for the annulment of an award pursuant to Article 52(1)(b), with regard to which “the Tribunal has manifestly exceeded its powers” are well defined. This Committee has not found in the Tribunal’s decision the violation referred to, with respect to the contractual origin of the dispute. Indeed, in some respects, the evidence of these facts is clear and indisputable.

49. There is ample proof to support the conclusion of the Tribunal,⁴⁸ for example, that the change in the contractual agreement was requested by PETROECUADOR in Official Note No. 254-PEP-96 dated August 20, 1996, which officially notifies the Contractor of its decision to modify the Service Provision Contract and replace it with a Joint Operating Contract for the Exploration and Mining of Hydrocarbons.⁴⁹ The negotiations that led to the new Modified Contract were detailed and extensive, involving high-level legal and technical representatives of both Parties. The Parties also requested and obtained favorable reports about the new proposed agreements from competent institutions in Ecuador, including the Ministry of Energy and Mines, the State Attorney General, the Chief of the Joint Command of the Armed Forces, and the Special Bidding Committee.⁵⁰

50. It is also clear that, during the negotiations, both Parties made commitments with regard to the pending requests and matters in dispute with reference to the previous Service Provision Contract. As a result, Clause 26.1 of the Modified Contract states:

“PETROECUADOR shall pay the Contractor the amounts set forth in Annex XI, which constitute the amounts owed and not paid by

⁴⁸ Award, 115.

⁴⁹ Award, 53.

⁵⁰ Award, 58-61.

PETROECUADOR to the Contractor under the Service Provision Contract, as set forth in the aforementioned Annex.”

51. Clause 26.1 refers to Annex XI in which the Parties, following exhaustive negotiations, agreed to provisional figures for certain payment categories. These were subject to subsequent changes or adjustments after certain figures and other defined variables were finalized. However, the final figures would require the approval of the office of the President of PETROECUADOR.⁵¹

52. Despite the disputes between the Parties on the nature of the obligation undertaken in Clause 26.1 and its related Annex XI, the Committee holds the view that these stipulations were understood by both Parties as full payment,⁵² discharging the obligations corresponding to the finalized Service Provision Contract. According to the *Real Academia* Dictionary, the word “*finiquito*” means: “settlement of accounts or certification providing evidence that the full amount of what is owed has been paid.”

53. While it is indisputable that some elements of the dispute between the Parties “originated” in certain costs and claims that arose during fulfillment of the Service Provision Contract, is also clear, and with greater legal validity, that, at the request of PETROECUADOR, the original Service Provision Contract was finalized by the Parties in a two-part process: (i) the negotiation of the “full release” of amounts from prior claims,⁵³ and (ii) the negotiation of the remaining provisions of the Modified Contract to cover future agreements. As indicated in

⁵¹ “The amounts pending PETROECUADOR’s approval are estimates, and as such must be disbursed through orders from the office of the President of PETROECUADOR.” (Annex XI).

⁵² See Tran., p. 17, lines 16-19; See also transcript presented by PETROECUADOR of statement by Dr. Julio César Trujillo at the hearing of July 10, 2006, Section 5.2.4.

⁵³ Award, 123.

paragraph 49, *supra*, Clause 26.1 and particularly in Annex XI certainly do not clearly specify the precise amounts to be paid by PETROECUADOR; however, it is also clear that the categories of costs and the principles used to calculate the final amounts were negotiated in detail. Moreover, apparently no mention was made in the negotiations of the role of the DNH in this aspect of the contract, let alone any suggestion that the figures determined by the DNH would be final and binding.

54. PETROECUADOR has emphasized that even the language of Annex XI of the Modified Contract refers to the amounts owed to the Contractor by PETROECUADOR that have not been paid “in accordance with the Service Provision Contract...,” and as such argues that the terms of the Service Provision Contract, including the application to this contract of a variety of Ecuadorian laws and administrative procedures, are critical for the correct legal analysis of this dispute.

55. However, as previously indicated, the Modified Contract (including Clause 26.1 and Annex XI), was duly signed by both Parties after receiving broad prior approval from high-level institutions in the Ecuadorian Government. As indicated in Articles 1480 and 1588 of the Ecuadorian Civil Code, at the time of signature of the Modified Contract, the latter replaced the Service Provision Contract and became the “law of the Parties.” Owing to this, the Tribunal found no reason for its deliberations to be founded on the provisions of any contract preceding the Modified Contract. Even if this conclusion did reflect erroneous application of the law⁵⁴ (which, in the case of the Committee, is not true), it does not constitute grounds for annulment of the Award.

⁵⁴ See No. 38, *supra*.

56. Based on the history of the negotiations and the language of the Modified Contract, this Committee is of the opinion that the Tribunal has sufficient grounds to endorse the Report of Dr. Merlo, the consultant, indicating that the figures contained in Annex XI “[...] allow only the readjustment of the variables which, as indicated in the 1996 Audit Report of the National Hydrocarbons Directorate, correspond to audited production, percentages of contribution to the domestic market, prices, transportation costs, and marketing costs.”⁵⁵ There is no doubt that, when the dispute later arose between the Parties regarding the right principles for calculating the final figures, it was agreed that the correct approach was to use the procedures set forth in the Modified Contract, that is, the Consultancy (Section 20.1) and its subsequent arbitration (Section 20.2). For this reason, the Committee is of the opinion that the past records reviewed do not support grounds for annulment based on the claim that the Tribunal manifestly exceeded its powers in deciding that substantively the dispute revolved around interpretation of the Modified Contract. In light of the foregoing, the request for annulment of the Award of the Tribunal is denied.

B) Decision of the DNH as an Administrative Res Judicata

57. The following basis of the annulment request presented by PETROECUADOR, also expressed during the discussion on competence, refers to the fact that the Tribunal manifestly exceeded its powers by hearing and making a determination in a dispute which, pursuant to Article 56 of the Hydrocarbons Law, had already been resolved by the DNH without it being contested by the Contractor, and thus had the force of an administrative *res judicata*.

a) Decision of the Tribunal

⁵⁵ Award, 96.

58. After analyzing the arguments presented in relation to the DNH audit, the Tribunal found that on March 25, 1997, PETROECUADOR had notified REPSOL of its decision to review payments that had been prepared for the period 1994 to 1996. Subsequently, by Resolutions 97131-33, the office of the President of PETROECUADOR approved the adjusted payments made by the representatives of PETROECUADOR after the latter and the representatives of REPSOL failed to reach an agreement on the final figures. Nevertheless, on July 15, 1997, before the issuing of these Resolutions (Official Note GA-180/97), REPSOL notified PETROECUADOR that it was not in agreement with the adjusted payments, nor with the changed procedures established by PETROECUADOR to calculate them.⁵⁶ After extensive deliberations and an exchange of correspondence between the Parties, the office of the President PETROECUADOR's Office of the CEO notified the Contractor as follows:

“[...] if YPF Company persists in its unfounded dissent, although it participated in the preparation of and also signed off on the revised payments, it is the responsibility of the National Hydrocarbons Directorate [*Dirección Nacional de Hidrocarburos*], under Article 11 of the Hydrocarbons Law, to conduct the respective audits in order to establish the final figures, without any restrictions whatsoever since, under Article 56, it is empowered to adjust retroactively payments and revised payments made.”⁵⁷ (Official Note PEP-97 of September 26, 1997).

59. According to the Tribunal, this situation became complicated when the DNH, in the context of its work, questioned the methodology used by the Parties to determine the figures set

⁵⁶ Award, 144.

⁵⁷ Award, 80.

forth in Annex XI.⁵⁸ In the Award, the Tribunal also analyzed the relationship between Article 56⁵⁹ and other legal principles set forth in paragraphs 120-123 of the Award, including the provisions of Ecuador's Constitution, and Articles 1588, 1589 and 1603-1607 of the Civil Code.

60. The Tribunal then held that the decision of the DNH had not given rise, for purposes of the arbitration process, to an administrative *res judicata*, because the substance of this dispute was not related to the rules set forth in the Hydrocarbons Law, but to a contractual agreement that contained a final agreement on the settlement of accounts.⁶⁰ Although the DNH was definitely authorized by law to audit the accounts relating to the operations of the Service Provision Contract, the Tribunal held that the law does not authorize the DNH to amend the terms of the subsequent contract approved by the Parties, to which the DNH was not a party, and which included principles and provisional guidelines aimed at finalizing outstanding amounts. To accept such a statement by the DNH would be a violation of the principle of legal certainty provided for in Article 23(26) of Ecuador's Constitution. Moreover, Article 244 of the Constitution binds the State, and therefore government agencies, to guarantee economic development in keeping with the law and equal treatment under the law for all Parties.⁶¹ While the findings of the DNH audit may have legal implications for government officers who act negligently, act against certain private individuals, or engage in fraudulent conduct, the DNH audit cannot result in the unilateral amendment of the agreement negotiated, nor can it change the nature of the dispute from a contractual one (and therefore subject to an agreement and/or

⁵⁸ Award, 146.

⁵⁹ The cited Article 56 states as follows: "Contractors or associates should grant the powers necessary for the portfolio Ministry to supervise, audit, and review, data and records retroactively, depending on the circumstances of the case. The audits carried out by the National Hydrocarbons Directorate, whether directly or through the hiring of independent auditors or experienced and competent auditors that are pre-certified by the National Hydrocarbons Directorate, shall be binding administrative acts and are so deemed, unless the right to object is exercised in accordance with law."

⁶⁰ Award, 149.

⁶¹ Award, 150.

arbitration) to one that is extra-contractual because of a dispute that is principally an administrative matter.⁶²

61. In Sections 153-161, the Tribunal reviewed events leading up to the decision to submit the dispute to the Consultant, Dr. Merlo, and declared that before agreeing to submit the dispute to Dr. Merlo, PETROECUADOR had asked the Minister of Energy and Mines, a high-level administrative officer, for an opinion. The Minister, after reviewing the matter, recommended that the Parties use the ICSID dispute resolution mechanism established in the Contract. The Tribunal concluded, therefore, that PETROECUADOR could not ignore the Minister's authority, nor the decision of Dr. Merlo, and argue that the Director of the DNH, an officer of a lower rank than the Minister, was instead the person legally authorized to settle the dispute.⁶³

The Tribunal also noted that PETROECUADOR had not taken any steps under Ecuadorian law to appeal the decision of the Consultant. Instead, after waiting for several months, it decided not to recognize or implement the Consultant's Report. When REPSOL then requested that the matter be submitted for ICSID arbitration, PETROECUADOR consented.⁶⁴

b) Analysis of the Committee

62. In the discharge of its duties, the Committee takes seriously its obligation to comply with the laws of the Republic of Ecuador, and is extremely vigilant when there is an allegation of excessive use of powers by a tribunal involving failure to properly comply with said laws. The Committee, in preparing its decision with respect to the scope of the Hydrocarbons Law (and other related provisions, such as Law 101 and the Accounting Rules applicable to Service

⁶² Award, 151.

⁶³ Award, 161.

⁶⁴ Comp., 41.

Provision Contracts), has researched not only Ecuadorian legal documents cited by the Parties but also other references to case law and legal comments related to certain disputes that are not considered “arbitrable,” given that they refer to issues that fall exclusively within the jurisdiction of domestic courts, or for other public policy reasons.⁶⁵

63. The legal requirements for the annulment of an award have already been described above (see 38, *supra*). On reading the parts of the Award that refer to this matter, the Committee notes that the Tribunal gave broad consideration to the provisions of the Hydrocarbons Law and other legal provisions in Ecuador. Moreover, this Committee notes that two of the three members of the Tribunal were experienced and respected Ecuadorian lawyers. Also, *prima facie*, the unanimous decision of the Tribunal does not in any way suggest that Ecuadorian law was not considered. Moreover, as indicated in paragraph 38 hereof, the Committee cannot annul the Award on the basis of a mere error in the application of the law, but may do so only when the pertinent law has not been applied.

64. The Committee has already summarized the background to the negotiation of the Modified Contract as noted in the Award, including the open disagreement between the Parties in July 1997 with respect to the final calculations to be done pursuant to Annex XI.

65. The Tribunal also found that the Parties continued deliberating on the DNH’s alleged powers and the appropriate scope of the alleged adjustment by DNH. However, at the same time, they began to consider appointing a consultant to settle the dispute, in accordance with Section 20.1 of the Modified Contract. Section 20.1 states that: “Disagreements on matters of a

⁶⁵ For a summary of this topic see *Redfern and Hunter, Law and Practice of International Arbitration* (2004), pp. 138-135. See also the New York Convention, Art. II.1 and Art. V.2(a); UNCITRAL Model Law Art. 34(2)(b)(i) and Art. 36 (1)(b)(i), or the deliberations between the Parties on amendments to be made to the provisional figures, in accordance with Annex XI.

technical nature involving finances and vice versa, except technical matters which, under this Contract or by law, must be decided by a competent authority, arising from the application of this Contract, shall be submitted to the legal representatives of the Parties for resolution. If within ten days of submission of the dispute it has not been resolved, the Parties shall submit disputes on matters expressly indicated in this Contract, as well as those mutually agreed upon, to a consultant” (*emphasis added*).

66. There is no evidence whatsoever of a suggestion, at any point during the deliberations between the Parties, that this dispute would fall under the preliminary objection provision, that is, there is no evidence that PETROECUADOR had ever contended that the dispute, according to Ecuadorian law, should be determined by the DNH and should therefore not be resolved by the Consultant.

67. On the contrary, the Tribunal held that in early 1999, through Official Note 129-PRO-A-99 (undated), the new Executive President of PETROECUADOR consulted the Minister of Energy and Mines with respect to the legality of submitting the dispute to the Consultant, especially as the DNH had already issued its opinion on the figures, the subject of the dispute.⁶⁶ On May 20, 1999, the Minister replied, approving the submission of the dispute to the Consultant and expressly rejecting the submission of the matter to third parties unconnected to the contract⁶⁷ (referring supposedly to the DNH).

68. Additionally, subparagraph (g) of Section 20.1.1 of the Modified Contract states the following: “the decision of the Consultant shall be final and binding on the Parties, unless there is mutual consent of the parties to the contrary prior to the submission of the dispute to the

⁶⁶ Award, 90.

⁶⁷ Award, 91.

Consultant” (*emphasis added*). PETROECUADOR could therefore have alleged, had it so wished, that the opinion of the Consultant should not be considered final, and argued that the decision, under Ecuadorian law, was subject to the review of, and audit by, the DNH. Nevertheless, PETROECUADOR did not advance this argument. The dispute was submitted to Dr. Merlo on May 27, 1999 with the express mutual consent of the Parties, and his Report – which made specific reference to its binding effect pursuant to Article 20.1 of the Amendment Agreement –was issued on July 7, 1999.⁶⁸

69. Subsequently, on September 13, 1999, the office of the President of PETROECUADOR asked the Attorney General of Ecuador for his views regarding whether the opinion of the Consultant was final and binding and ought to be complied with. On October 14, 1999, the Attorney General confirmed that the opinion of the Consultant was final and binding, and that the parties to the contract were required to comply with it.

70. Nevertheless, on February 17, 2000, for unexplained reasons, the then Deputy State Comptroller General (Contralor General del Estado Subrogante) asked the Attorney General for another opinion⁶⁹ on the matter. On March 3, 2000, the Deputy Attorney General (Procurador General Subrogante) responded, in summary, that “the opinion of the Consultant served as a frame of reference and was not binding upon the Parties” since, according to this opinion, among other legal provisions, Article 19 of the Hydrocarbons Law prevailed over the terms of the Modified Contract.⁷⁰ Further, on May 5, 2000, the Deputy Attorney General made it clear that he intended to nullify retroactively the original opinion of the Attorney General of October 14, 1999, which stated that the opinion of the Consultant was final and binding. The opinion of the

⁶⁸ Award, 95.

⁶⁹ Apparently, the Attorney General who had signed the original opinion had resigned or had been dismissed.

⁷⁰ Award, 99.

Deputy Attorney General, dated May 5, 2000, was, for reasons unknown, not made available to the Tribunal until July 2003.⁷¹

71. In conclusion, the Tribunal stated that the Parties continued their discussions on resolution of the dispute regarding whether the opinion of Dr. Merlo should be considered final. This matter was resolved by a letter (Official Note 380-PRO-P-2001) dated July 9, 2001, from the office of the President of PETROECUADOR to the Contractor, which stated that once the Ecuadorian Congress had completed ratification of the ICSID Convention, the dispute would be submitted to ICSID for its decision. The Convention was ratified by the Ecuadorian Congress on February 7, 2001, which gave it precedence over all domestic laws of the Republic of Ecuador, pursuant to Article 163 of the Constitution.⁷²

72. Having reviewed the allegations of PETROECUADOR, the Committee finds that there is no basis on which to hold that the Tribunal manifestly exceeded its authority with respect to the DNH's decision as an administrative *res judicata*. On the contrary, the file clearly shows a pattern of conduct on the part of PETROECUADOR that simply is not consistent with the existence of an administrative *res judicata* and which, on the contrary, amply supports the conclusions of the Tribunal.

73. As part of the new contract (Modified Contract), the Parties agreed to settle all accounts arising out of the Service Provision Contract. Abundant proof exists, including the recognition by PETROECUADOR that this contract was put forth as a final release.⁷³ When a dispute arose

⁷¹ Award, 100.

⁷² Comp., 41. Article 163 of the Political Constitution states: "The rules contained in international treaties and conventions, once promulgated in the Official Register, shall form a part of the laws of the Republic and shall have precedence over laws and legislation of inferior rank."

⁷³ N° 52, pp. 28-29, *supra*.

between the Parties with respect to the calculation of the final figures adjusted pursuant to said contract, PETROECUADOR threatened that if the Contractor did not accept PETROECUADOR's figures, PETROECUADOR would delegate the matter to the DNH, which according to the file, had never before been involved in any way with the negotiation of Clause 26.1 or Annex XI of the Modified Contract. If, as PETROECUADOR now alleges, the DNH's competence to conclusively settle the figures in dispute pursuant to Annex XI was binding under Ecuadorian law, then (i) PETROECUADOR would not have had the legal authority to settle the claims of the Contractor under the Service Provision Contract, and (ii) the role of determining the final figures could not have been performed by any other party but the DNH. Nevertheless, PETROECUADOR tried first to calculate the figures on its own account (without any reference to DNH) and then, when REPSOL objected, PETROECUADOR agreed to submit the dispute to the Consultant, Dr. Merlo, pursuant to the provisions of Article 20.1. In the process of submitting the matter to the Consultant, PETROECUADOR again had the opportunity, if Ecuadorian law had so required, to try to exclude from the consideration of the Consultant certain aspects of the dispute, on the basis that they were reserved for exclusive determination by the DNH,⁷⁴ but PETROECUADOR did not do this. When Dr. Merlo issued his opinion, and the Attorney General ordered that PETROECUADOR should comply with the opinion of the Consultant as final and binding, PETROECUADOR failed to exercise this option, apparently based on the subsequent conflicting opinion of the Deputy Attorney General.⁷⁵

74. Finally, even assuming that the decision of the DNH is truly considered to be final and binding and thus not subject to review by the other Party, it would be logical for PETROECUADOR to have refused to submit the matter to ICSID for its decision, since,

⁷⁴ Footnote No. 9, p. 10, *supra*.

⁷⁵ As indicated in paragraphs 69-70, *supra*.

following the logic of the argument to its conclusion, the matter would not have had to be arbitrated because, based on PETROECUADOR's arguments, no other party had the right to review the decision of the DNH. Nevertheless, PETROECUADOR did not do this and instead decided to submit the dispute to ICSID under Section 20.2 of the Modified Contract⁷⁶ and, nevertheless, subsequently challenged the jurisdiction of the Tribunal. When the Tribunal decided the matter of jurisdiction against the arguments of PETROECUADOR, the latter participated in the hearing on the merits, and relied on the very same argument of administrative *res judicata*. Those same arguments have been reiterated in this annulment proceeding.

75. Under Article 52(1) of the ICSID Convention, the Committee is empowered to annul awards containing manifest errors only when they are serious enough to cast doubt on the legitimacy of the proceedings. This Committee sees no error, let alone any serious and manifest error, in relation to the argument that the decision of the DNH must be considered as binding or as an "administrative *res judicata*." For this reason, PETROECUADOR's application for annulment on this ground is denied.

3. Legal Position of REPSOL

76. PETROECUADOR alleges that the Tribunal engaged in excessive use of its powers, given that, contrary to statements in the Award, REPSOL had no *locus standi* to represent all the companies comprising the Consortium. During the annulment proceeding, PETROECUADOR also argued that the decision of the Tribunal with respect to REPSOL's powers of representation constitutes a serious breach of a rule of procedure as set forth in Article 52(1)(d) of the Convention.

⁷⁶ The Committee pointed out that Section 20.2 expressly states that dispute resolution by submission to arbitration is "in accordance with the provisions of the second paragraph of Article ten (10), as amended, of the Hydrocarbons Law and the rules and procedures set forth in this clause."

a) **Decision of the Tribunal**

77. In its Decision on Jurisdiction, the Tribunal held that this matter “*should be settled inasmuch as it will serve as the basis of the award that will resolve this dispute.*”⁷⁷ The Award of February 20, 2004 highlighted the lack of evidence to support PETROECUADOR’s argument that REPSOL did not have the power to represent the other companies comprising the Consortium. Furthermore, the Tribunal considered that all those companies ratified the actions of REPSOL through letters signed by their legal representatives and attached to REPSOL’s Memorial of March 12, 2003.

78. The Tribunal decided, therefore, “*that REPSOL was and is authorized to act on behalf of the other companies comprising the Consortium.*”⁷⁸

b) **Analysis of the Committee**

79. It bears repeating that in the ICSID system annulment proceedings have nothing to do with the appeal process. The role of the Committee, therefore, is not to review the case again, but only to determine whether or not the grounds for annulment on which PETROECUADOR based its arguments for annulment have been violated.

80. It has been demonstrated that in the arbitration process REPSOL was authorized to represent the other companies comprising the Consortium, pursuant to communication from said companies wherein they ratified REPSOL’s actions on their behalf in the arbitration proceedings. In view of the clear evidence on this issue presented in the Award, there is no reason to even consider that the Tribunal exceeded its powers, especially since this must be manifest, and this

⁷⁷ Comp., 38.

⁷⁸ Award, 112.

requirement is clearly has not been met in the present case. The application for annulment on this ground is therefore denied.

81. The ground for annulment under Article 52(1)(d) assumes that “*the departure from the rule must be serious and the rule concerned must be fundamental.*”⁷⁹ Although in the Spanish text of Article 52(1)(d) of the Convention, the word “*fundamental*” is omitted (before the words “rule of procedure),” this word is included in the other two equally authentic texts of the Convention, English and French. As a guide, the Vienna Convention on the Law of Treaties of May 22, 1969 signed by the Republic of Ecuador states that when a comparison of authentic texts of a treaty discloses a difference of meaning “*the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted*” (Article 33(4)).

The purpose of the grounds for annulment under Article 52 of the Convention is to allow a limited exception to the finality of ICSID awards, which is highlighted by Article 53⁸⁰. A departure from a rule of procedure is justification, therefore, for the annulment of an ICSID award, only if the violation “caused the Tribunal to reach a result substantially different from what it would have awarded had such a rule been observed.”⁸¹

82. Having reviewed the Award of February 20, 2004, and having considered the arguments of the Parties, this Committee concludes that in the present case there are no indications of any departure, much less any serious departure from a rule of procedure, whether or not fundamental. PETROECUADOR’s application for annulment on this ground is, therefore, denied.

⁷⁹ Schreuer, *op. cit.*, page. 970.

⁸⁰ Schreuer, *op. cit.*, page 889.

⁸¹ *Wena Hotels Ltd. v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Decision on Annulment of Award, February 5, 2002, 41 I. L. M. 933 (2002), paragraph 58.

4. Other Arguments Submitted by PETROECUADOR

83. PETROECUADOR, in its written submission of October 4, 2004, added the following arguments to its application for annulment:

(a) A moral argument:—one cannot pay a debt that was not pleaded in litigation. To this end, PETROECUADOR asked the Committee to examine certain PETROECUADOR resolutions; and

(b) A public order argument:— the laws of the Republic of Ecuador, such as the Law of the State Attorney General’s Office and the Law of the State Prosecutor’s Office, respectively, obligate State institutions to exhaust all permissible legal remedies to prevent any decision from becoming enforceable and enforced.

a) Analysis of the Committee

84. Having considered the additional pleadings, the Committee finds that they were not put forward by PETROECUADOR as grounds for annulment, but as additional pleadings in support of the grounds pleaded. With respect to PETROECUADOR’s argument (on moral rather than legal grounds) that it could not pay an amount that was not put in evidence, said argument was not raised during the arbitration proceedings. In any event, after analyzing PETROECUADOR’s second ground for annulment,⁸² the Committee concludes that that argument has no merit. Indeed, an assessment of that ground of annulment clearly demonstrates that from the time the arbitration was requested as well as during the proceedings, REPSOL had asked for a specific sum of money, which the Tribunal finally granted, after making adjustments to the relevant sum based on the available evidence.

⁸² Pp. 26-31, *supra*.

85. With regard to the argument that a public entity such as PETROECUADOR has the right to use all its resources “*to prevent a decision of any kind from becoming enforceable and enforced,*” the Committee holds that this position is not objectionable in principle. Nevertheless, it is inherent in the duty referred to by PETROECUADOR that the possibilities for succeeding by any available means should be examined, given the merits of the case, the legal position of the parties, and the cost that will be incurred in maintaining this position to the end. The Committee, however, considers this argument irrelevant when proving that the Tribunal, in any event, manifestly exceeded its powers.

86. Having considered the allocation of costs between the Parties, the Committee notes that the grounds for the possible annulment of an award rendered by an ICSID Tribunal are clearly set forth in Article 52 of the Convention. The Parties are aware that the annulment proceedings are designed to grant reparation for damages only in cases of serious violations of certain fundamental principles.⁸³ Such procedures should not be confused with the proceedings of an Appeals Tribunal and, therefore, should be adopted only in special situations. Thus, annulment proceedings should not be applied routinely, or as a means of delaying the objectives of an award, or the enforcement thereof.

87. With respect to the present annulment proceeding, the Committee holds that the arguments for annulment did not pose novel or complex questions and that none of the arguments raised were considered valid with respect to the claim that the Tribunal exceeded its powers or that there was a serious breach of a rule of procedure on the part of the Tribunal.

⁸³ Schreuer, *op. cit.*, p. 894.

88. The Committee also noted the exceptional delay that resulted from PETROECUADOR's tardiness in making the first advance payment requested by the Centre, in accordance with the ICSID Administrative and Financial Regulations, on September 22, 2004, and its continual refusal to pay the subsequent advances requested in relation to the annulment proceedings. In these circumstances, the Committee considers it appropriate that PETROECUADOR bear all costs incurred by the Centre in connection with this proceeding, including the fees and expenses of the members of the Committee, which amount to US\$307,677.15 (three hundred and seven thousand six hundred and seventy-seven United States dollars and fifteen cents). Given that PETROECUADOR made a single payment of US\$100,000.00 (one hundred thousand United States dollars) PETROECUADOR should pay REPSOL the sum of US\$207,677.15 (two hundred and seven thousand six hundred and seventy-seven United States dollars and fifteen cents). The Committee also considers it appropriate that PETROECUADOR bear half the professional fees and related expenses incurred by REPSOL in defending this annulment proceeding, amounting to US\$20,500 (twenty thousand United States dollars) pursuant to REPSOL's communication of September 19, 2006.

III. DECISION

89. FOR THE FOREGOING REASONS, THIS COMMITTEE HEREBY DECIDES:

(a) To reject totally the Application for Annulment of Award filed by PETROECUADOR on September 20, 2004, on the grounds that the Tribunal did not commit any annulable error; consequently, the Arbitral Award rendered on February 20, 2004 is confirmed.

(b) By virtue of the authority conferred upon the Committee by Article 61(2) of the ICSID Convention, PETROECUADOR shall pay to REPSOL:

(i) All expenses incurred by the Centre in relation to this proceeding, including the fees and expenses of the Committee members, amounting to US\$307,677.15 (three hundred and seven thousand six hundred and seventy-seven United States dollars and fifteen cents), from which should be deducted US\$100,000.00 (one hundred thousand United States dollars) corresponding to the single advance payment made by PETROECUADOR, that is, **US\$207,677.15** (two hundred and seven thousand six hundred and seventy-seven United States dollars and fifteen cents).

(ii) Half the professional fees relating to this proceeding and reasonably incurred by REPSOL in defending this annulment proceeding in the sum of **US\$20,500.00** (twenty thousand five hundred United States dollars).

[/s/]

Judd L. Kessler
President of the Committee
January 4, 2007

[/s/]

Piero Bernardini
Member
December 21, 2006

[/s/]

Gonzalo Biggs
Member
January 2, 2007