

International Centre for Settlement of Investment Disputes

MURPHY EXPLORATION AND PRODUCTION COMPANY INTERNATIONAL

(CLAIMANT)

v.

REPUBLIC OF ECUADOR

(RESPONDENT)

(ICSID Case No. ARB/08/4)

AWARD ON JURISDICTION

Rendered by an Arbitral Tribunal composed of:

Rodrigo Oreamuno Blanco, President

Dr. Horacio A. Grigera Naón, Arbitrator

Dr. Raúl E. Vinuesa, Arbitrator

Secretary of the Tribunal:

Marco Tulio Montañés-Rumayor

Date: December 15, 2010

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I. Background of the Proceeding

1. On March 3, 2008, Murphy Exploration and Production Company International ("Murphy International" or "Claimant"), filed a Request for Arbitration (the "Request") with the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre") against the Republic of Ecuador ("Ecuador" or "Respondent").
2. On March 4, 2008, the Centre sent Ecuador a copy of the Request, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings ("Institution Rules").
3. On April 15, 2008, ICSID's Acting Secretary-General registered the Request in accordance with Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention" or "Convention"). On the same date, the Acting Secretary-General dispatched the Notice of Registration to Murphy and Ecuador (together, the "Parties") and invited them to proceed, as soon as possible, to constitute an arbitral tribunal.
4. On May 12, 2008, the Parties agreed that the Tribunal would consist of three arbitrators, one arbitrator appointed by each Party and the third arbitrator, who would serve as president of the Tribunal, appointed by agreement of the arbitrators.
5. The Parties subsequently appointed the members of the Arbitral Tribunal in accordance with the agreed-upon procedure. On May 29, 2008, Claimant appointed Dr. Horacio A. Grigera Naón, a national of Argentina. On July 9, 2008, Respondent appointed Dr. Raúl E. Vinuesa, also a national of Argentina.

6. On July 29, 2008, Claimant filed a Request for Provisional Measures, in accordance with Article 49 of the Convention and Rule 39 of the ICSID Arbitration Rules.
7. On August 5, 2008, the Acting Secretary-General fixed the time limits for the parties to present observations on Claimant's Request in accordance with Rule 39(5) of the Arbitration Rules.
8. On August 13, 2008, Messrs. Grigera Naón and Vinuesa informed the Centre that an agreement could not be reached regarding the appointment of the third arbitrator and President of the Tribunal.
9. On September 5, 2008, Claimant amended its Request for Arbitration to include, among them, the following:

"First sentence of paragraph 36 should be amended to read: "The dispute between the Claimant and the Government arose, at the latest, in April of 2006, when the Government first took steps to enact Law No. 2006-42, and when the Government enacted the subsequent Regulatory Decrees."
10. On September 17, 2008, the Parties agreed that the President of the Arbitral Tribunal would be designated by the Chairman of the Administrative Council of ICSID, in accordance with Article 38 of the ICSID Convention and Rule 4 of the Arbitration Rules. The Parties also agreed that such appointment would be made within a term not to exceed 30 days to be counted from the date of such agreement.
11. On October 16, 2008, the Chairman of the Administrative Council of ICSID designated Mr. Rodrigo Oreamuno, a national of Costa Rica, as President of the Arbitral Tribunal.
12. On October 20, 2008, the Acting Secretary-General notified the parties that the three arbitrators had accepted their appointments and that the Arbitral

Tribunal shall be deemed constituted as from such date under Rule 6(1) of the Arbitration Rules.

13. In the same letter of October 20, 2008, the Acting Secretary-General informed the Parties that Mr. Marco Tulio Montañés-Rumayor would serve as Secretary of the Tribunal.
14. On November 5, 2008, Respondent submitted its Observations on the Claimant's Request for Provisional Measures.
15. On December 1, 2008, Claimant filed a Reply on Provisional Measures.
16. On December 10, 2008, the Arbitral Tribunal held its first session in Washington, D.C.
17. At the first session, the Parties confirmed that the Tribunal had been properly constituted and that they had no objections to the appointment of any of its members. In addition, several procedural issues of the session's agenda were discussed and agreed by the Parties. Said agreements were recorded in the minutes of the session, signed by the President and the Secretary of the Tribunal and dispatched to the Parties on January 9, 2009.
18. On December 22, 2008, Respondent filed a Rejoinder on Provisional Measures.
19. On January 9, 2009, the Tribunal issued Procedural Order No. 1, suspending the hearing on provisional measures at the request of the Parties.
20. On March 13, 2009, Claimant withdrew its Request for Provisional Measures.
21. On April 30, 2009, Claimant filed a Memorial on the Merits.
22. On August 15, 2009, Ecuador submitted Objections to Jurisdiction.
23. On October 16, 2009, Claimant filed a Counter-Memorial on Jurisdiction. On that same date, Ecuador filed a Counter-Memorial on the Merits.

24. On January 30, 2010, Murphy filed a Reply on the Merits.
25. On April 5 and 6, 2010, the Arbitral Tribunal held a jurisdictional hearing in Washington, D.C. In addition to the Members of the Arbitral Tribunal and the Secretary, the following party representatives attended the hearing:

(i) On behalf of Murphy:

Mr. Roger W. Landes	Murphy Exploration & Production Company International
Mr. Craig S. Miles	King & Spalding LLP
Mr. Roberto J. Aguirre-Luzi	King & Spalding LLP
Mrs. Amy Roebuck Frey	King & Spalding LLP
Mr. Esteban A. Leccese	King & Spalding LLP
Mr. Francisco Roldán Cobo	Pérez Bustamante & Ponce

(ii) On behalf of Ecuador:

Mr. Alvaro Galindo C.	Director, Patrocinio Internacional Procuraduría General del Estado Republic of Ecuador
Mr. Juan Francisco Martínez Castillo	Dirección Nacional de Patrocinio Internacional, Republic of Ecuador
Mr. Mark Clodfelter	Foley Hoag LLP
Mr. Bruno Leurent	Winston & Strawn LLP
Mr. Ricardo Ugarte	Winston & Strawn LLP
Mrs. Sarah E. Saucedo	Winston & Strawn LLP
Mrs. María Kostytska	Winston & Strawn LLP
Mrs. Mary M. Webster	Winston & Strawn LLP
Mr. Tomás Leonard	Winston & Strawn LLP
Mrs. Clara Brillembourg	Foley Hoag LLP
Mrs. Kathy E. Ames Valdivieso	Winston & Strawn LLP

26. At the hearing, Professors Pierre Lalive and Christoph Schreuer participated as expert-witnesses via videoconference.
27. Mr. Alvaro Galindo Cardona, Mr. Mark Clodfeter and Mr. Bruno Leurent presented oral arguments on behalf of Ecuador. Messrs. Craig Miles, Roberto J. Aguirre-Luzi and Esteban A. Leccese presented oral arguments on behalf of Murphy.

28. The jurisdictional hearing was recorded and transcribed *verbatim*, and copies of the sound recordings and the transcripts were subsequently delivered to the Parties.
29. On June 7, 2010, Ecuador filed a Rejoinder on the Merits.
30. The Arbitral Tribunal has deliberated and carefully considered the arguments presented by the Parties in their written and oral submissions of the jurisdictional hearing. The Tribunal shall now proceed to summarize the background of the dispute (Section II), the Parties' positions on jurisdiction (Section III), and to analyze the arguments supporting those positions (Section IV); and finally, based on this analysis, to issue a decision on jurisdiction (Section V).

II. Factual Background of the Dispute

31. Several companies, led by Conoco Ecuador Limited (hereinafter "Conoco"), entered into a Service Contract with the Republic for the Exploration and Exploitation of Hydrocarbons in Block 16 of the Ecuadorian Amazon (the "Contract") on January 27, 1986.¹
32. On July 28, 1987, Conoco assigned 10% of its rights under the Contract to "...Murphy Ecuador Oil Company Limited ('Murphy Ecuador') and Canam Offshore Limited ('Canam'), both of which were subsidiaries of Claimant."²
33. In 1993, before the seventh bidding round for new oil concessions in Ecuador, the Government amended the Hydrocarbons Law.³
34. In 2001, Repsol YPF Ecuador SA (Repsol) acquired a 35% interest in the Contract and assumed the role of Consortium operator.⁴

¹ Respondent's Objections to Jurisdiction, ¶ 17.

² *Id.*, ¶ 18.

³ *Id.*, ¶ 21.

35. On April 25, 2006, Ecuador passed Law 42-2006, which amended Article 55 of the Hydrocarbons Law to state as follows:

"State's participation in the surplus of oil sale prices, which have not been agreed upon or foreseen.—Contractor companies that have current participation contracts with the State for hydrocarbon exploration and exploitation, notwithstanding their crude oil participation volumes, when the monthly average FOB Ecuadorian crude oil sale price exceeds the monthly average FOB sale price prevailing as of the date of execution of their contracts, stated at constant prices as of the month of payment, shall grant the Ecuadorian State a participation of at least 50% of the extraordinary income arising from the price difference. For purposes of this Article, extraordinary income shall be understood to mean the above described price difference multiplied by the number of oil barrels produced."⁵

36. On October 18, 2007, the Decree 662 "increased the Law 42 participation to 99% of the difference between the market price of oil and the benchmark contract price."⁶
37. On July 24, 2006, the Government of Ecuador, through PETROECUADOR, sent an official communication to the Consortium requesting payment of sums allegedly owed under Law 42.⁷
38. On February 25, 2009, Ecuador and Repsol reached an oral agreement to amend the Contract. In order to execute such agreement, several requirements had to be met for which Repsol needed Murphy International's support.

⁴ Id., ¶ 23.

⁵ Memorial on the Merits, ¶ 163.

⁶ Id., ¶ 168.

⁷ Id., ¶ 179.

39. On March 12, 2009, Murphy International sold to Repsol its entire stock in Murphy Ecuador belonging to Canam Offshore Limited, of which Murphy International was the sole owner.⁸
40. On the same date, the Consortium and Ecuador signed the Modification Agreement.⁹
41. Claimant alleged that Ecuador did not provide a fair and equitable treatment to its investment and that by breaching the Contract, violated the BIT umbrella clause. Claimant also argued that Ecuador did not afford full protection and security to its investment; that Ecuador took arbitrary measures to the detriment of Claimant's investment and that Ecuador expropriated its investment.

III. Position of the Parties on Jurisdiction

42. Respondent raised seven objections to jurisdiction, which are summarized in the following paragraphs.
43. **First:** At the time Murphy International consented to ICSID arbitration, there was no consent on the part of Ecuador to arbitrate Murphy International's claims. Ecuador served notice to ICSID on December 4, 2007, indicating that "...it would not consent to arbitrate the class of disputes within which Murphy International's claims fall."¹⁰
44. Ecuador's notification states:

"The Republic of Ecuador will not consent to submit to the jurisdiction of the International Centre for Settlement of Investment Disputes (ICSID) disputes that arise in matters concerning the

⁸ Id., ¶ 210.

⁹ Respondent's Objections to Jurisdiction, ¶ 36.

¹⁰ Id., ¶ 37.

treatment of an investment in economic activities related to the exploitation of natural resources, such as oil, gas, minerals or others. Any instrument containing the Republic of Ecuador's previously expressed will to submit that class of disputes to the jurisdiction of the Centre, which has not been perfected by the express and explicit consent of the other party given prior to the date of submission of the present notification, is hereby withdrawn by the Republic of Ecuador with immediate effect as of this date."¹¹

45. According to Ecuador, "Murphy International did not give its consent to ICSID arbitration until February 29, 2008, so no consent by the Republic on or before that date was possible. Indeed, on that date, the Republic had already limited the scope of its consent to ICSID, and 'Murphy could obviously not have modified, and especially broaden its scope by its own statement of acceptance.'"¹²
46. **Second:** The Treaty between the Republic of Ecuador and the United States of America on the Promotion and Reciprocal Protection of Investments (BIT) "provides jurisdiction over claims by investors for losses which they have suffered. But Murphy International has not alleged losses suffered by it. Instead, Murphy International alleges only harms and losses to Murphy Ecuador, its former wholly-owned Bermudan subsidiary."¹³ According to Ecuador, Claimant, as a shareholder-investor in Murphy Ecuador, has utterly failed to identify, much less quantify, the alleged injury Murphy International suffered.¹⁴ On that same note, Respondent argued that Claimant's claims raised the specter of double recovery because Murphy International has

¹¹ Notice of the Republic of Ecuador to ICSID, December 4, 2007, document submitted by Ecuador in the Respondent's Objections to Jurisdiction, CEX-78.

¹² Respondent's Objections to Jurisdiction, ¶ 63.

¹³ *Id.*, ¶ 67.

¹⁴ *Id.*, ¶ 82.

already been compensated through the sale of Murphy Ecuador “...for the value of Murphy Ecuador's right to recover for any losses to it.”¹⁵

47. **Third:** “Murphy International has not complied with the requirement that parties seek an amicable settlement of disputes through consultation and negotiation before submitting them to arbitration. It is only when those efforts have been attempted and actually failed that a tribunal established under the BIT has jurisdiction.”¹⁶ Article VI(2) of the BIT conditions an investor's right to invoke the BIT's dispute resolution provisions on the impossibility of an amicable settlement ascertained after efforts at consultation and negotiation have failed.¹⁷ To Ecuador, Murphy International “...made no efforts to consult or negotiate with the Republic concerning its BIT claims.”¹⁸ Claimant first notified Ecuador of an investment dispute under the Ecuador-US BIT in a letter on Friday, February 29, 2008, and filed its ICSID Request for Arbitration the very next business day, Monday, March 3, 2008.¹⁹ In the same memorial, Ecuador further argued that: “Murphy International points to a letter submitted to the Republic by Repsol on November 12, 2007, as evidence of its own efforts to consult and negotiate ... the letter does not pertain to any claims by Murphy International, but rather to claims of the Consortium, of which Murphy Ecuador, and *not* Murphy International, was a member.”²⁰
48. **Fourth:** Murphy International did not comply with “...the mandatory six-month waiting period required by the BIT before claims may be submitted to arbitration.”²¹ Ecuador added that: “[b]ecause Murphy International has not

¹⁵ Id., ¶ 83.

¹⁶ Id., ¶ 85.

¹⁷ Id., ¶ 86.

¹⁸ Id., ¶ 95.

¹⁹ Id., ¶ 96.

²⁰ Id., ¶ 98.

²¹ Id., ¶ 104.

complied with the six-month waiting period, this Tribunal must dismiss the claims for want of jurisdiction. Article VI(3) of the BIT provides a national or company may invoke binding arbitration only '[p]rovided that ... six months have elapsed.' This provision is not optional, but is an express condition precedent to arbitral jurisdiction."²²

49. **Fifth:** Murphy International argues that it was affected by the measures imposed by Law 42 and such Law "... is treated as a tax measure within the meaning of the Treaty. The 'participation in extraordinary income' introduced by Law 42 being a mandatory levy of a percentage of excess profits, its characterization as a tax measure under the Treaty leads to the exclusion of most of Murphy International's claims relating to Law 42 from this Tribunal's jurisdiction...."²³
50. **Sixth:** Murphy International alleges the violation of the 'umbrella clause' set forth in Article II(3)(c) of the BIT, but Murphy International failed to show that Ecuador entered into any applicable obligation by the Participation Contract nor does it demonstrate that Ecuador entered into any obligation with respect to any investment within the meaning of the BIT because Murphy Ecuador is not a protected investment by that Treaty inasmuch as it is not a company legally constituted in Ecuador but rather in Bermuda.²⁴
51. **Seventh:** Murphy International alleges that the breach of the Participation Contract amounts to a violation of an investment agreement under Article VI(1) (a) of the BIT, but "... [w]hat Murphy International deliberately fails to mention, however, is that the BIT refers to an investment agreement with a national or company of a Party to the BIT ... Murphy International is not a Party to the Participation Contract, ... And while Murphy Ecuador is a party to the Participation Contract, it is not a 'company of the other Party.' Murphy

²² Id., ¶ 114.

²³ Id., ¶ 121.

²⁴ Id., ¶¶ 158 and 159.

Ecuador is a company of Bermuda, and Bermuda has no BIT with the Republic."²⁵

52. In its Counter-Memorial on Jurisdiction, Claimant addressed these objections and replied:
53. **First:** Ecuador's notification to ICSID does not preclude jurisdiction. In 1986 Ecuador signed and ratified the ICSID Convention and did not object with respect to any aspect of the Convention. On August 27, 1993, Ecuador signed the BIT which contains Ecuador's consent to investor-State arbitration under the ICSID Convention.²⁶ Based on the opinions of professors Schreuer and Broches, Claimant argues that "... notifications under Article 25(4) of the ICSID Convention are for information purposes only and neither create new consent nor detract from prior consent to arbitrate a dispute under the ICSID Convention."²⁷ Later in the same Memorial, Murphy International asserts that to the extent that Ecuador might argue that its Article 25(4) notification directly affects the scope of the consent offer in Article VI of the BIT, that jurisdictional objection would still fail because a notification under the ICSID Convention cannot unilaterally modify the scope of consent in a second treaty.²⁸
54. **Second:** Claimant considers that the BIT includes "shares of stock" as an investment and the fact that the local operating company (in this case, Murphy Ecuador), is not formally incorporated in the host State (Ecuador), but rather is legally registered to do business there, has no bearing.²⁹ Based on numerous ICSID tribunal decisions, Claimant argues that "... all affirmed the ability of a shareholder like Murphy to claim in its own name for measures that caused direct damage to the shareholder's local operating company and

²⁵ Id., ¶¶ 223 and 224.

²⁶ Id., ¶¶ 18 and 19

²⁷ Claimant's Counter-Memorial on Jurisdiction, ¶ 23.

²⁸ Id., ¶ 45.

²⁹ Id., ¶ 70.

thereby damaged the shareholder's investment."³⁰ In regard to the other argument raised by Ecuador under this same title, Murphy International denies the existence of any risk of double-recovery and argues that "...when Murphy sold its assets to Repsol, it 'retained all rights to continue to pursue its claims in this arbitration with respect to the impact of Law 42 on Murphy's investments in Ecuador.'"³¹

55. **Third:** Claimant asserts that it complied with the requirements of Article VI of the BIT and that "[e]ven if it had not, further negotiation with Ecuador would have been futile. (...) a provision prescribing a time period for consultation and negotiation is procedural in nature and therefore constitutes no bar to this Tribunal's jurisdiction."³²
56. **Fourth:** According to Murphy International, the waiting period runs from the date on which the Republic of Ecuador became aware of the dispute, not from the date on which Murphy formalized its claims.³³ It also argues that Ecuador was aware of the dispute through the United States Embassy in that country when the embassy criticized Law 42.³⁴ Besides "...Murphy, through its subsidiary, Murphy Ecuador, and the Consortium Operator, Repsol, have protested the enforcement of the measures while working with the Government to negotiate an amicable resolution."³⁵ Regarding the outcome of these negotiations, it argues that "[e]ven had Murphy not complied with Article VI of the BIT—which it did—it would have been excused from doing so due to the futility of further negotiations with Ecuador."³⁶

³⁰ Id., ¶ 71.

³¹ Id., ¶ 86.

³² Id., ¶ 100.

³³ Id., ¶ 104.

³⁴ Id., ¶ 110.

³⁵ Id., ¶ 111.

³⁶ Id., ¶ 117.

57. **Fifth:** Claimant alleges that Article X of the BIT plays no role in this dispute because the measures that prejudiced Murphy's investment in Ecuador are not matters of taxation³⁷ and, besides, any objection based on Article X is in fact related to the merits of the claim, not the Tribunal's jurisdiction.³⁸ Claimant also argues that "...Ecuador is estopped from invoking the present defense; and ... Ecuador's conduct in invoking this objection amounts to an abuse of rights (*abus de droit*), revealing not only bad faith but a lack of transparency towards Claimant."³⁹
58. **Sixth:** To Murphy International, Ecuador ignores Article I(1)(a)(ii) of the BIT, which clearly states that it does not require that a company be incorporated in the territory of a Party to the BIT to constitute an investment.⁴⁰ Likewise, the "Umbrella Clause" says nothing about the specific identity of the counter-party to the host State's obligation; but only that such an obligation must have been entered into with regard to investments.⁴¹ To Claimant "...Murphy Ecuador's incorporation in Bermuda in no way detracts from or erases the indisputable fact that Murphy has made 'investments' in Ecuador to which the Government has agreed to observe obligations."⁴²
59. **Seventh:** Murphy International argues that "... the Umbrella Clause is not limited to 'investment agreements' but instead covers any type of obligation entered into 'with regard to investments.' As a result, this Tribunal has jurisdiction over disputes pertaining to Claimant's investments in Ecuador as

³⁷ Id., ¶ 206.

³⁸ Id., ¶ 207.

³⁹ Id., ¶ 207.

⁴⁰ Id., ¶ 142.

⁴¹ Id., ¶ 142.

⁴² Id., ¶ 144.

set forth in Section VI(A) above, including the Participation Contract, pursuant to Article VI(1)(c) of the Treaty."⁴³

IV. Analysis

1. Ecuador's Lack of Consent pursuant to its Article 25(4) Notice

60. The first objection raised by Ecuador refers to the Tribunal's lack of jurisdiction to hear Murphy International's arbitration claim because, at the time Murphy International consented to ICSID arbitration, there was no consent on the part of Ecuador to ICSID arbitration.

61. By invoking Article 25(4) of the ICSID Convention, Ecuador argues that, before Claimant consented to ICSID arbitration, on February 29, 2008, Ecuador had submitted to ICSID, on December 4, 2007, a notice stating that it would not consent to arbitrate the class of disputes in which Murphy International's claims falls.⁴⁴ Ecuador further argues that the Tribunal must respect the Republic's sovereign right under Article 25(4) of the Convention to withhold its consent to arbitrate certain categories of claims.⁴⁵

62. On the other hand, Claimant argues that Ecuador's Article 25(4) notice of December 4, 2007, does not preclude the jurisdiction of this Tribunal to hear the present claim.

63. Murphy International considers that Respondent's argument, contained in its Objections to Jurisdiction in relation with the scope of Article 25(4) of the Convention, ignores the nature and significance of notifications under Article

⁴³ Id., ¶ 197.

⁴⁴ Respondent's Objections to Jurisdiction, ¶ 37.

⁴⁵ Id., ¶ 41.

25(4) of the ICSID Convention and also ignores the inability of a State to alter its commitments undertaken under a Treaty unilaterally.⁴⁶

64. In analyzing the Parties' positions regarding this objection, the Tribunal must evaluate the effects of Ecuador's notice dated December 4, 2007, in line with Article 25(4) of ICSID Convention.

65. Article 25(4) states:

"Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1)."

66. Claimant argues that notifications under Article 25(4) of the Convention are for informational purposes only because said Article does not provide States with the power to amend their obligations under the ICSID Convention or any other treaty.⁴⁷

67. Ecuador considers that any interpretation of Article 25(4) restricting the effects of such notifications to informational purposes only would deprive such notifications of any practical purpose and would deny the State of the right to limit or restrict at any time the scope of ICSID jurisdiction "...that it may have already accepted in principle or would consider accepting."⁴⁸ In support of its position, Ecuador cites *CSOB v. The Slovak Republic*⁴⁹ *Fedax v. Venezuela*;⁵⁰ *CAA and CGE v. Argentina*.⁵¹

⁴⁶ Claimant's Counter-Memorial on Jurisdiction, ¶ 20.

⁴⁷ Claimant's Counter-Memorial on Jurisdiction, ¶ 22.

⁴⁸ Expert opinion of Professor Pierre Lalive, ¶ 43, RE 1, submitted by Ecuador in the Respondent's Objection to Jurisdiction.

⁴⁹ Respondent's Objections to Jurisdiction ¶ 44.

⁵⁰ *Id.*, ¶ 45.

68. As regard to the cases cited by Respondent in support of its position, Murphy International argues that in none of these cases the tribunals actually interpret the effect of a notification under Article 25(4).⁵² Thus, Claimant concludes that Ecuador's cited case law does not offer any information on the true effects of such notices.
69. In interpreting the scope of Article 25(4) of the Convention, the Tribunal will limit itself to determine whether notices made pursuant to such text may withdraw the consent previously given by the notifying State. In this context, it is the Tribunal's understanding that Respondent's legal authorities do not expressly refer to the withdrawal of a prior consent and, therefore, do not provide evidence of the existence of such an alleged right of withdrawal of a prior consent.
70. Murphy International cites the *Tza Yap Shum v. Peru*⁵³ decision on jurisdiction to argue that Article 25(4) states that notifications made under this provision do not restrict the scope of the parties' consent to the ICSID Convention. Claimant also refers to the decision on jurisdiction in *PSEG v. Turkey* to argue that a notification under Article 25(4) could not withdraw the consent previously given in a BIT. Claimant concludes that the Tribunal rejected Turkey's argument that its notification under Article 25(4) could affect the scope of its prior consent under either the ICSID Convention or the BIT.⁵⁴
71. Taking into account the general rule on the interpretation of treaties of Article 31(1) of the Vienna Convention on the Law of Treaties of 1969, the Tribunal considers that the language of Article 25(4) is clear and unambiguous. It also considers unnecessary to resort to supplementary means of interpretation, in

⁵¹ *Id.*, ¶ 46.

⁵² Claimant's Counter-Memorial on Jurisdiction, ¶ 30.

⁵³ *Id.*, footnote no. 45, ¶ 37.

⁵⁴ Claimant's Counter-Memorial on Jurisdiction, ¶ 39.

accordance with Article 32 of the Vienna Convention, in order to interpret the ICSID Convention in good faith, within its context and considering its purpose.

72. The Tribunal finds that Article 25(4) of the ICSID Convention allows the Contracting States to notify the Centre of the class of disputes they would submit to the jurisdiction of the Centre *in the future*. This notification may be sent at any time by means of a unilateral declaration to the Centre and the Secretary-General shall forthwith transmit such notification to all Contracting States. However, the Tribunal finds that the effect of notifications under Article 25(4) is to inform the contracting parties of the class or classes of disputes which the notifying State would or would not consider submitting to the jurisdiction of the Centre *in the future*. The text itself clarifies that such notification shall not constitute the consent required by paragraph (1) of Article 25.
73. In the Tribunal's view, an Article 25(4) notification may not unilaterally modify the consent given in another treaty. The consent of the State in this case is given in a treaty between two sovereign States (the BIT between Ecuador and the United States of America) granting rights to the investors of both States. The *pacta sunt servanda* principle requires good faith compliance with all obligations under the BIT. In this sense, Article 26 of the Vienna Convention on the Law of Treaties, under title "*Pacta sunt servanda*" provides that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."
74. Ecuador also argues that the Tribunal lacks jurisdiction if there is no consent by both Parties. For Ecuador, consent is only perfected after it has been accepted by both parties.⁵⁵ Within this context, Ecuador affirms that any consent which may not be unilaterally withdrawn results from a meeting of minds between the State and the investor.⁵⁶

⁵⁵ Respondent's Objections to Jurisdiction, ¶¶ 59, 60.

⁵⁶ *Id.*, ¶ 56.

75. According to Respondent, since it submitted the Article 25(4) notification to the ICSID on December 4, 2007, it excluded the possibility of perfecting mutual consent with regard to disputes as stated by Murphy International. Therefore, Ecuador concludes that when the notification was sent, no withdrawal of consent took place if, in fact, it has never been perfected.
76. Claimant argues Ecuador's consent to submit to ICSID jurisdiction was stated in Article VI of the BIT and said consent may not be unilaterally withdrawn by this State, which is part of the ICSID Convention and the BIT.
77. Article VI(4) of the BIT reads as follows:

"Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3. Such consent, together with the written consent of the national or company when given under paragraph 3 shall satisfy the requirement for:

- (a) written consent of the parties to the dispute for Purposes of Chapter II of the ICSID Convention (Jurisdiction of the Centre)...."

78. Ecuador believes the option of ICSID arbitration under the BIT is operational only within the limits set forth in the ICSID Convention.⁵⁷ Therefore, it argues that, when agreeing to the terms of the BIT and including an option for ICSID jurisdiction, both Parties retained their right to act under Article 25(4) to limit the availability of their consent.⁵⁸
79. Claimant alleges that Ecuador's Article 25(4) notice has no impact on the scope of the offer of consent of the Nation in the BIT. Claimant further adds

⁵⁷ Id., ¶ 51.

⁵⁸ Id., ¶ 50.

that the sole offer of consent contained in the BIT is enough to submit to ICSID jurisdiction.

80. In the Tribunal's view, the offer of consent to ICSID jurisdiction by the signatory States of bilateral investment treaties may not be withdrawn or revoked other than by the mechanisms expressly agreed upon by the parties. Article 25(4) notifications are useful to alter those mechanisms in the future only and in absence of another legal instrument as the BIT which make them mandatory.

81. After analyzing the scope of Article 25 (4), the Tribunal will now assess the effects of Ecuador's notification to ICSID of December 4, 2007.

82. Ecuador's notification states:

"The Republic of Ecuador will not consent to submit to the jurisdiction of the International Centre for Settlement of Investment Disputes (ICSID) disputes that arise in matters concerning the treatment of an investment in economic activities related to the exploitation of natural resources, such as oil, gas, minerals or others. Any instrument containing the Republic of Ecuador's previously expressed will to submit that class of disputes to the jurisdiction of the Centre, which has not been perfected by the express and explicit consent of the other party given prior to the date of submission of the present notification, is hereby withdrawn by the Republic of Ecuador with immediate effect as of this date."

83. Claimant does not object to the first sentence of said notification. However, it argues the second sentence tries to render invalid the offer of consent to ICSID arbitration under the BIT.

84. The Tribunal finds that the first sentence of Ecuador's notification falls under the general context of Article 25(4) of the Convention. As regards the content of the second sentence, the Tribunal believes Respondent pretends to achieve legal effects not falling under the scope of such Article.

85. Claimant argues that Ecuador's notification is not an adequate means to validly terminate the BIT and the obligations acquired in it by Ecuador.⁵⁹
86. The Tribunal finds that the withdrawal, termination or amendment of the BIT must be governed by the provisions contained in that Treaty, and in a suppletory manner, by general International Law, as codified in the Vienna Convention on the Law of Treaties. In this sense, Article 54 of the Vienna Convention provides that "[t]he termination of a treaty or the withdrawal of a party may take place: (a) in conformity with the provisions of the treaty; or (b) at any time by consent of all the parties after consultation with the other contracting States." As regards the amendment of a Treaty, Article 39 of the Vienna Convention provides that "[a] treaty may be amended by agreement between the parties...." On the other hand, Article XII (2) of the BIT states that "[e]ither Party may, by giving one year's written notice to the other Party, terminate this Treaty at the end of the initial ten year period or at any time thereafter."
87. The Tribunal agrees with Claimant⁶⁰ in that neither the ICSID Convention nor the BIT allows parties to withdraw from its application with immediate effect. Therefore, Ecuador is not authorized to unilaterally modify any of those treaties with immediate effect. Moreover, the Tribunal believes that since there is no agreement between the parties, it is not possible to extinguish the obligations of a treaty by withdrawal, termination or unilateral modification of such instrument.
88. The Tribunal concludes that Ecuador intends to disregard the scope and future effect of the second sentence of its December 2007 notification, to ignore the irrevocability of its consent to ICSID arbitration under the BIT and

⁵⁹ Claimant's Counter-Memorial on Jurisdiction, ¶ 50 and Opinion of Professor Schreuer quoted in such paragraph.

⁶⁰ Claimant's Counter-Memorial on Jurisdiction, ¶ 52.

to violate the rules applicable to withdrawal and modification of obligations undertaken by the Nation, in both the BIT and the ICSID Convention.

89. For all the reasons stated above, the Tribunal rejects the objection on the lack of jurisdiction alleged by Ecuador based on the notification of December 4, 2007, as regards its consent to ICSID arbitration.

2. Prior Consultation or Negotiation; "Cooling-Off Period" (Third and Fourth Objections of Ecuador to the Jurisdiction of the Tribunal)

90. The Republic of Ecuador's objections to the Tribunal's jurisdiction contained in paragraphs 85 to 119 of the Respondent's memorial of August 15, 2009, may be summarized as follows:

a) Article VI(3) of the BIT requires that in the event of a dispute, the Parties should initially seek a resolution through consultation and negotiation for a period of six months before submitting a Request for Arbitration to ICSID.

b) It is only when those efforts have been attempted and actually failed during a six-month period that one of the parties may resort to arbitration; Murphy International did not prove that such efforts had failed.

c) Negotiations by Repsol with officers of the Government of Ecuador do not satisfy Murphy International's obligation to negotiate.

91. Claimant disagrees with the position of Ecuador, it argues that Murphy International complied with the waiting period provided for in Article VI 3(a) of the BIT, and claims, in sum, that:

a) The dispute arose in April 2006 when the Government of the Republic of Ecuador enacted Law 42, and subsequently its related regulations.⁶¹

⁶¹ Murphy's notification to the Government of Ecuador of February 29, 2008, CEX-10.

b) Murphy International, through Repsol, the Consortium Operator, attended a number of meetings with officers of the Government of Ecuador to discuss the dispute arising from the passing of Law 42 and related regulations.⁶²

c) Any further negotiation by Murphy International with Ecuador would have been futile.⁶³

d) A "... provision prescribing a time period for consultation and negotiation is procedural in nature and therefore constitutes no bar to this Tribunal's jurisdiction."⁶⁴

92. The Tribunal will now proceed to review the Parties' positions as regards the origin of dispute; the existence of prior negotiations; the futility of negotiations and the nature of the six-month waiting period.

A. *The dispute*

93. Ecuador argues that Murphy International notified the Republic of Ecuador, through a letter dated February 29, 2008, of its claim against it arising out of an investment made pursuant to the BIT. From this date, Ecuador was on notice of the existence of such dispute under the BIT. Therefore, because Murphy International filed its Request for Arbitration with ICSID on March 3, 2008, it did not comply with the mandatory six-month waiting period prescribed in Article VI of the BIT.

94. In turn, the Claimant argues that the dispute arose in April 2006, when the Government passed Law No. 42 and therefore, the six-month waiting period

⁶² Claimant's Counter-Memorial on Jurisdiction, ¶ 111.

⁶³ *Id.*, ¶ 117.

⁶⁴ *Id.*, ¶ 100.

running from this date on was met in September 2006.⁶⁵ According to Murphy International, the waiting period runs from the date on which Ecuador became aware of the dispute, not from the date on which Murphy formalized its claims.⁶⁶

95. Article VI of the BIT between the Republic of Ecuador and the United States of America provides in the relevant part:

“2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute, under one of the following alternatives, for resolution:

...

(b) in accordance with any applicable, previously agreed dispute-settlement procedures”.

96. Paragraph 3(a) of the same Article further provides that:

“Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2(a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:”

(i) to the International Centre for the Settlement of Investment Disputes (“Centre”) established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 (“ICSID convention”), provided that the Party is a party to such Convention....”

⁶⁵ Claimant’s Counter Memorial on Jurisdiction, ¶ 103; Murphy International’s Notice to the Government of Ecuador CEX-10.

⁶⁶ Claimant’s Counter Memorial on Jurisdiction, ¶ 104.

97. In the Tribunal's view, the need for the six-month period to elapse before the interested Party can resort to ICSID is intended to allow the Parties to seek "through consultation and negotiation" a resolution, pursuant to the aforementioned Article VI. Some authors have properly called this term a "cooling- off period."⁶⁷
98. The Parties have discussed at length the meaning of the expression "the date on which the dispute arose" in paragraph 3(a) of Article VI of the BIT.
99. The Tribunal considers that the six-month waiting period calculated "from the date on which the dispute arose" under Article VI(3)(a) of the BIT comprises every "investment dispute," according to the definition set forth in Article VI(1) of the BIT.
100. Article VI(1) of the BIT reads as follows:
- "For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to: (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment."
101. This Tribunal sides with the *Burlington* tribunal which, when referring to Article VI(1)(c) of the same BIT applicable hereto, held in its decision on jurisdiction that [the tribunal] "considers that the meaning of 'dispute' in Article VI(3)(a) refers back to the definition of 'investment dispute' in Article VI(1)(c). Indeed, Article VI(1) defines investment dispute 'for purposes of this Article [VI],' of which paragraph 3 is no doubt a part."⁶⁸

⁶⁷ See Lucy Reed, Jan Paulsson, Nigel Blackaby, among others, quoted by Defendant in the RLA-36 document.

⁶⁸ *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on Jurisdiction of June 2, 2010, ¶ 334.

102. Claimant based its Request for Arbitration on the breach of the BIT⁶⁹ and, thereby, the dispute that the Tribunal must consider in order to establish if there has been a non-compliance with the six-month waiting period as from the date it arose, is the “investment dispute” arising out of or relating to an alleged breach of any right conferred or created by the Treaty with respect to an investment, in accordance with Article VI(1)(c) of the BIT.
103. The Tribunal finds that in order for a dispute to be submitted to ICSID arbitration, in accordance with Article VI of the BIT, a claim on an alleged breach of the BIT must previously exist. Disputes referred to in paragraph (1) of that provision arise when a Treaty breach is alleged. Therefore, the six-month waiting period shall run from the date of such allegation.
104. The Tribunal sides with Claimant in that Article VI does not impose a formal notice requirement. However, without the prior allegation of a Treaty breach, it is not possible for a dispute to arise which could then be submitted to arbitration under Article VI of the BIT. In this sense, the Decision on Jurisdiction in the *Burlington* case holds that “... as long as no allegation of Treaty breach is made, no dispute will have arisen giving access to arbitration under Article VI.”⁷⁰
105. The Tribunal understands that it is necessary for the Respondent to have been aware of the alleged Treaty breaches in order to resort to arbitration under Article VI of the BIT. Under the Treaty, it would suffice for Claimant to inform its counterpart of the alleged Treaty breach. In the Tribunal’s view, Claimant did not offer evidence showing that Ecuador was aware of the existence of a dispute with Murphy International based on the BIT prior to February 28, 2008.

⁶⁹ Request for Arbitration, ¶ 9, Section III.

⁷⁰ *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on Jurisdiction of June 2, 2010, ¶ 335.

106. Claimant's statement that a U.S. government representative warned Ecuador of the possible breach of the BIT,⁷¹ in order to ascertain that said Nation was informed of Murphy International's claim under the BIT, is irrelevant and furthermore, undermines the content of Article 27 of the ICSID Convention.
107. The Tribunal finds that the six-month waiting period under Article VI(3)(a) starts running once there is evidence that a BIT claim exists. It follows that in order for the six-month term to effectively start running, the dispute based on an alleged BIT breach must be known to Respondent.
108. Since the purpose of the six-month waiting period is to allow the interested parties to seek to resolve their dispute through consultation and negotiation, it is clear that for the negotiations to commence, it is essential that both parties are aware of the existence of the dispute. As long as this does not take place, negotiations cannot begin. As explained in the *Lauder v. Czech Republic* award:

"However, the waiting period does not run from the date [on] which the alleged breach occurred, but from the date [on] which the State is advised that said breach has occurred. This results from the purpose of the waiting period, which is to allow the parties to enter into good-faith negotiations before initiating the arbitration."⁷²

109. It is evident in this case, because of the way in which Claimant proceeded to file its Request for Arbitration with ICSID on March 3, 2008 (the first business day after giving notice to Ecuador that it had a claim against that Nation), there was no possibility that the Parties could have availed themselves of a time frame in which they could have tried to resolve their disputes amicably.

⁷¹ Claimant's Counter Memorial on Jurisdiction, ¶ 110. Hearing on Jurisdiction, Aguirre Luzi, p. 467; line 18 et seq.

⁷² *Ronald S. Lauder v. The Czech Republic* (UNCITRAL Case), Award of September 3, 2001, ¶ 185

B. The Alleged Existence of Prior Consultation and Negotiation

110. The Tribunal will now examine Claimant's position that the negotiations between Repsol and Ecuador meet the requirement of prior consultations and negotiations under Article VI(2) of the BIT.
111. Respondent argues that Claimant cannot rely on the negotiations entered into by Repsol and Ecuador to assert that, in this case, Murphy International complied with its obligations under Article VI(2) of the BIT. The letter Repsol sent to Ecuador on November 12, 2007 does not amount to an attempt by Murphy International to negotiate the dispute that Murphy International submitted to ICSID on March 3, 2008. Such letter refers to claims raised by Repsol and the Consortium, of which Murphy Ecuador, and not Murphy International, was a member. Repsol's letter to Ecuador is based on the BIT between Spain and the Republic of Ecuador, and not on the US-Ecuador BIT, on which Murphy International's claim is based.
112. Claimant alleges that Repsol, as the operator of the Consortium, had negotiated with Ecuador on behalf of all the members of the Consortium, including Murphy Ecuador. It further states that "Murphy, through its subsidiary, Murphy Ecuador, and the Consortium Operator, Repsol, protested the enforcement of the measures while working with the Government to negotiate an amicable resolution."⁷³
113. Claimant makes reference to negotiations prior to April 2006, date when it alleges that the dispute submitted to this arbitration arose, as well as to negotiations after November 12, 2007, the date when Repsol sent the letter to ICSID.⁷⁴
114. In the aforementioned letter of November 12, 2007, Repsol notified Ecuador of the existence of an investment dispute and requested "that a formal

⁷³ Claimant's Counter Memorial on Jurisdiction, ¶ 111.

⁷⁴ *Idem*, footnote 164, ¶ 111.

consultation period be entered into between Ecuador and REPSOL, for a maximum period of six months, in order to try to reach, through an amicable agreement, full satisfaction of the obligations which, directly or indirectly, pertain to the Ecuadorian State under the Treaty....”⁷⁵

115. It follows for the Tribunal that Repsol, as the Consortium Operator, officially notified the existence of a dispute under the Spain-Ecuador BIT to the Republic of Ecuador on the date of its claim, i.e. November 12, 2007.
116. Therefore, the Tribunal understands that the negotiations and consultations entered into by Repsol, as Operator of the Consortium, on the one hand, and Ecuador, on the other, prior to the existence of the dispute between Murphy International and Ecuador, and under the Spain-Ecuador BIT, cannot be identified as or likened to the negotiations required under Article VI(2) of the US-Ecuador BIT.
117. Now, it is necessary to examine whether the negotiations that might have been conducted as from November, 12, 2007, between Repsol and Ecuador under the respective Treaty, can replace the negotiations required of Murphy International and Ecuador under Article VI of the BIT, concerning the dispute that Murphy International submitted to ICSID arbitration on March 3, 2008.
118. The Tribunal has no doubt whatsoever that the enactment of Law No. 42 and the subsequent regulations caused the Republic of Ecuador to have conflicts with foreign oil companies operating in its territory (Repsol, Petrobas, Andes Petroleum, Perenco and Burlington). Some of those disputes were resolved (or are being resolved), at least partially, through negotiation. In the case of Murphy International, even when the Consortium in which Murphy Ecuador was a member and to which Repsol was the operator, participated in negotiations with representatives of the Government of Ecuador, it is true that Murphy International’s particular claim against Ecuador, based on a BIT different from the one on which Repsol based its claim, arose later.

⁷⁵ Claimant’s Exh. 3, ¶ 3.

119. Bilateral investment treaties and the ICSID framework, in general, have the purpose of providing investors with the guarantees that their investments will be protected, hence, foreign investment is promoted in the host countries, aiding in their development. In some cases, foreign investors choose to incorporate companies or branches in the country where they invest (sometimes in order to abide by the country's legislation). In such cases, it could be discussed whether the investment belongs to the foreign company or the company incorporated in the country where the investment was made. Therefore, to avoid any doubt of the intention to protect such investments, the different BITs establish that the shares of the business entities that belong to foreign companies are considered investments protected by the BITs. Evidently, this system, that has a defined purpose, cannot disregard the fact that Murphy Ecuador and Murphy International are two independent legal entities. Murphy Ecuador Oil Company Ltd. is a company incorporated in Bermuda, that established a branch in Ecuador and its shares belonged to another company called Canam Offshore Limited, incorporated under the laws of the Bahamas and was wholly owned by Murphy Exploration and Production Company International, incorporated under the laws of the State of Delaware, United States of America. Regardless of the fact that for purposes of the protections afforded by the BIT Murphy Ecuador's shares are considered to be an investment of Murphy International, they are different companies, incorporated under the laws of different countries.
120. As stated in the previous paragraph, it is clear that Murphy Ecuador, the Bermudan company, and not Murphy International, the American company, was part of the Consortium led by Repsol. As a result, any action by Repsol, on behalf of the Consortium, before the Ecuadorian authorities, would have been done on behalf of the legal persons composing the Consortium (i.e., Murphy Ecuador) and not on behalf of the owners of the shares of the companies forming the Consortium (i.e., Canam and Murphy International.)

121. As previously mentioned, but now restate for purposes of further development, Repsol wrote to the authorities of the Republic of Ecuador on November 12, 2007.⁷⁶ The Tribunal highlights the following from that document:

a) In the first paragraph, Repsol states as follows: This notice is made “pursuant to Article 11 of the Treaty between the Kingdom of Spain and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment...” Throughout that letter, Repsol repeatedly states that it bases its claim on the BIT between the Kingdom of Spain and the Republic of Ecuador.

b) In the second paragraph of such section, it states that "...it must be understood that REPSOL also acts here as Consortium Operator of Block 16 and, therefore, it acts in the interest of the contracting members of the consortium and with their consent."

c) In paragraph 3 of the letter, Repsol states the following in the relevant part:

“The purpose of this notice is to officially inform the Republic of Ecuador, through its Government and its authorities, of the unfair and arbitrary treatment that our investments in Ecuador are receiving, as well as to request that a formal consultation period be entered into, for a maximum period of six months, between Ecuador and REPSOL, in order to try to reach, through an amicable agreement, full satisfaction of the obligations which, directly or indirectly, pertain to the Ecuadorian State under the Treaty, with respect to REPSOL’s investments in such country.”

122. On November 12, 2007, Repsol also informed ICSID that “...it has on this date given notice of an investment dispute to the Government of the Republic

⁷⁶ Claimant’s Exhibit 3.

of Ecuador. In this regard, REPSOL acts on its own name and, in the pertinent parts, in its capacity as Operator of the Contractor." It further stated that it based its claim on "the provisions of Article 11 of the Treaty between the Kingdom of Spain and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment...."⁷⁷

123. In the second paragraph of its letter to ICSID, Repsol stated that if "... such disputes could not be resolved through an amicable agreement, REPSOL shall submit such claims to arbitration under the jurisdiction of ICSID as prescribed in Article 11.2 of the Treaty and/or Article 20.3 of the Participation Contract."⁷⁸

124. On February 29, 2008, Murphy International also wrote to the respective authorities of such Nation with the purpose of notifying "...the Government of Ecuador (the "Government") of Murphy's written consent to submit to the jurisdiction of the International Centre for Settlement of Investment Disputes ("ICSID") ... the ongoing dispute between Murphy and the Government arising from the violations of the Treaty between the United States of America and Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investments, signed in Washington D.C. on August 27, 1993 (the "BIT")."⁷⁹ It is worth highlighting the following points of the letter:

- a) Murphy International bases its claim on the Treaty between the Republic of Ecuador and the United States of America ("BIT").
- b) Murphy International expressly quotes Article VI(3) of the Ecuador-United States BIT and acknowledges that "... the company concerned may submit the dispute to ICSID if six months have elapsed from the date on which it arose." It added that "[c]onsidering that the protests and the complaints to the acts and omissions of the Government in relation to

⁷⁷ Claimant's Exhibit 3.

⁷⁸ Claimant's Exhibit 3.

⁷⁹ Claimant's Exhibit 2.

the investments were made both by Murphy's subsidiary in Ecuador as well as by its partners since 2001, and the failure in the resolution of these disputes despite the continuous efforts to negotiate since then, there is no doubt that more than six months have elapsed from the date the dispute arose."

125. On March 3, 2008, Murphy International filed its Request of Arbitration to ICSID. Paragraph 3 of such submission provides that:

"Murphy is one of four investors in these projects, also including Repsol YPF Ecuador S.A., Overseas Petroleum and Investment Corporation, and CRS Resources Ecuador LDC (collectively, the "Investors"). Pursuant to the Joint Operating Agreement of February 7, 1986...." "Repsol YPF Ecuador S.A. is the "Operator" of Block 16, and as such it operates Block 16 and on behalf of all the members of the consortium."⁸⁰

126. When comparing the documents submitted by Repsol and Murphy International, the following becomes evident.

127. In the documents submitted to the Ecuadorian authorities and to ICSID, Repsol states that it acts "...for whatever purposes as may be necessary, as the Operator of the Consortium of Block 16 and, therefore, in the interest of the contracting members of the consortium and with their consent." Murphy International also acknowledges this fact as indicated above in paragraph 124.

128. On November 12, 2007, Repsol (in its capacity as the Operator of the Consortium, which includes Murphy Ecuador) stated its claim before the Republic of Ecuador and ICSID. Less than four months later, on February 29, 2008, Murphy International acted similarly before the Ecuadorian authorities and, three days later, submitted its Request for Arbitration.

⁸⁰ Request for Arbitration, ¶ 3.

129. This leads to one of two conclusions: i) either the claim of Murphy International (as an indirect owner of Murphy Ecuador) was covered by Repsol's claim, in which case Murphy International could not claim anything thereafter, or ii) there were two different claims. If the second is accepted, we must conclude that, before submitting its Request for Arbitration, Murphy International should have sought consultations and negotiations with Ecuador, and only after the six-month period computed from the beginning of such negotiations had lapsed, could it resort to ICSID arbitration.
130. The Tribunal finds that the analysis of the preceding paragraphs shows, without a doubt, that Murphy International as well as Repsol were fully aware that they had to comply with the six-month period established in Article VI of the US-Ecuador BIT and Article XI(2) of the Spain-Ecuador BIT, respectively.
131. This Tribunal holds that the negotiations and consultations entered into by Repsol, as the Operator of the Consortium, with Ecuador, are not the negotiations required by Article VI(2) of the BIT for this case. The negotiations and consultations of Repsol were prior to the date the dispute between Murphy International and Ecuador arose. Furthermore, it becomes evident that the negotiations and consultations between Repsol and Ecuador, pursuant to the Spain-Ecuador BIT differ, with regards to the parties and applicable law, from the dispute between Murphy International and Ecuador, which is governed by the US -Ecuador BIT.
132. Therefore, this Tribunal concludes that the six-month period established in Article VI(3) of the BIT is a mandatory requirement, and that both Repsol and Murphy International acknowledge this fact in their respective letters. Furthermore, the Tribunal finds that the claims of Repsol and Murphy International are different, and consequently, Repsol's attempts to negotiate since November 12, 2007 and thereafter, do not meet Murphy International's obligation to comply with that BIT requirement before resorting to ICSID.

133. The Tribunal will now analyze Claimant's futility allegations concerning the negotiations required under Article VI of the BIT, and based on the supposedly failed negotiations of other companies.

C. *The Alleged Futility of the Negotiations*

134. Murphy International argues that it complied with the requirement established in Article VI of the BIT of seeking to resolve the dispute with Ecuador through consultation and negotiation, and adds that, even if it had not, "...it would have been excused from doing so due to the futility of the negotiations with Ecuador."⁸¹ In support of its argument, it cites to several awards and to Professor Schreuer's opinion.⁸²

135. In the Tribunal's opinion, the obligation to negotiate is an obligation of means, not of results. There is no obligation to reach, but rather to try to reach, an agreement. To determine whether negotiations would succeed or not, the parties must first initiate them. The obligation to consult and negotiate falls on both parties, and it is evident that there were none in this case because as has been reiterated above, on Friday, February 29, 2008 Murphy International sent a letter to Ecuador stating that it had a claim against the Republic based on the BIT, and then on Monday, March 3, 2008, it submitted the Request for Arbitration to ICSID. Murphy International's conduct to decide, *a priori* and unilaterally, that it would not even try to resolve its dispute with Ecuador through negotiations constitutes a grave breach of Article VI of the BIT.

136. Moreover, what happened to other foreign oil companies does not support Murphy International's position that the negotiations with Ecuador would have been fruitless because of the impossibility to reach an agreement. On the contrary, the facts contradict this statement: in August 2008, City Oriente reached an agreement with the Republic of Ecuador and withdrew its ICSID

⁸¹ Claimant's Counter Memorial on Jurisdiction, ¶ 117.

⁸² Christoph Schreuer, *Travelling the BIT Route of Waiting Periods, Umbrella Clauses and Forks in the Road*, *The Journal of World Investment & Trade*, Vol. 5, No. 2, April 2004, (CLA-87).

claim; Petrobrás and Andes Petroleum also negotiated their disputes with Ecuador and signed with the Republic contracts different from the ones in existence. Repsol itself, the operator of the Consortium of which Murphy Ecuador was a member, reached a preliminary agreement with the Republic of Ecuador on March 12, 2009, and, as stated by Ecuador in its Memorial on Objections to Jurisdiction "...the Consortium and the Republic entered into the previously-negotiated Modification Agreement on March 12, 2009, the same day as the sale of Murphy Ecuador to Repsol.⁸³"

137. In support of its case, Claimant also cites the *Burlington* case (letter of April 30, 2010). According to Murphy International, that company did strictly comply with the obligation to negotiate with Ecuador during six months prior to submitting its request for arbitration, and was unsuccessful in its negotiations. Based on that fact, it asserts that had it tried to negotiate during six months, it would not have obtained a positive result either and concludes that, for this reason it was exempted from engaging in such negotiations. In the Tribunal's opinion, such line of argument is unacceptable: the fact that in similar circumstances (the Tribunal lacks information to determine if they are identical), Burlington was not successful in its negotiations with the Republic of Ecuador, does not necessarily mean that Murphy International would have been unsuccessful as well. In any case, the alleged failure of Burlington's negotiations does not authorize Murphy International to decide, by and for itself, to ignore the requirement of seeking to negotiate during six months prior to resorting to ICSID.
138. It is possible that Murphy International considers the agreements reached by other oil companies with the Republic of Ecuador unacceptable; however, such subjective consideration cannot support the general conclusion that the negotiations would have been futile because there was no possibility of reaching an agreement with Ecuador.

⁸³ Respondent's Memorial on Jurisdiction, ¶ 36.

139. For the reasons stated above, the Tribunal rejects Claimant's argument about the futility of the negotiations required under Article VI of the BIT based on the alleged failure of other negotiation attempts between investors and Ecuador.

D. The Nature of the Six-Month Waiting Period

140. Murphy international contends that "...the failure to comply with a waiting period is not a bar to jurisdiction."⁸⁴ It further claims that "[t]he majority of ICSID tribunals addressing this issue have taken the position that waiting periods constitute procedural, rather than jurisdictional requirements."⁸⁵

141. Claimant seems to assert that the requirements prescribed in certain rules (the "jurisdictional") are of a category such that its non-compliance leads to the lack of competence of the tribunal hearing the dispute. Instead, the "procedural requirements," can be breached without having any consequence whatsoever. The Tribunal does not share this view.

142. The Tribunal also does not accept the consequences Claimant seeks to derive between "procedural" and "jurisdictional" requirements. According to Murphy International, "procedural requirements" are of an inferior category than the "jurisdictional requirements" and, consequently, its non-compliance has no legal consequences. It is evident that in legal practice this does not occur, and that non-compliance with a purely procedural requirement, such as, for example, the time to appeal a judgment, can have serious consequences for the defaulting party.

143. Article 31 of the Vienna Convention on the Law of Treaties, which contains the general rules of interpretation, provides as follows in paragraph 1:

"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

⁸⁴ Claimant's Counter Memorial on Jurisdiction, ¶ 129.

⁸⁵ *Id.*, ¶ 130.

144. In accordance with that text, it is not possible to ignore the existence of the norms contained in Article VI of the BIT, regarding the obligation of the parties to attempt negotiations in order to resolve their disputes and the impossibility to resort to ICSID before the six-month term has elapsed.
145. Claimant's interpretation of Article VI of the BIT simply ignores the existence of provisions mandating the parties to have consultations and negotiations to resolve their disputes (paragraph 2) and preventing them from resorting to ICSID before six months have elapsed from the date on which the dispute arose (paragraph 3).
146. The Tribunal's interpretation of paragraph 3 of Article VI is that in order for the investor ("the company or national concerned") to request that its claim be resolved by an ICSID arbitral tribunal, the following two circumstances shall be present:
- a) that it has not submitted the dispute to the courts or to any dispute resolution proceeding; and
 - b) that "six months have elapsed from the date on which the dispute arose", during which the concerned party sought to resolve it through consultation and negotiation.
147. The tribunal in the *Lauder* case concluded that the six-month waiting period "...is not a jurisdictional provision, *i.e.* a limit set to the authority of the Arbitral Tribunal to decide on the merits of the dispute, but rather a procedural rule that must be satisfied by the Claimant...."⁸⁶ That Tribunal however, does not decide what happens if claimant does not comply with such obligation. It is contrary to the fundamental rules of interpretation to state that while it constitutes a "procedural rule that must be satisfied by the claimant", non-compliance does not have any consequence whatsoever. Such a way of interpreting the obligation simply ignores the "object and the purpose" of the

⁸⁶ *Ronald S. Lauder v. The Czech Republic* (UNCITRAL Case), Award of September 3, 2001, ¶ 187

rule, which is contrary to Article 31(1) of the aforementioned Vienna Convention.

148. Similarly, the *SGS v. Pakistan*⁸⁷ tribunal held that “...Tribunals have generally tended to treat consultation periods as directory and procedural rather than as mandatory and jurisdictional in nature.” This Tribunal cannot agree with that statement which implies that, even though there is an explicit treaty requirement, the investor may decide whether or not to comply with it as it deems fit.
149. This Tribunal finds the requirement that the parties should seek to resolve their dispute through consultation and negotiation for a six-month period does not constitute, as Claimant and some arbitral tribunals have stated, “a procedural rule” or a “directory and procedural” rule which can or cannot be satisfied by the concerned party. To the contrary, it constitutes a fundamental requirement that Claimant must comply with, compulsorily, before submitting a request for arbitration under the ICSID rules.
150. This was recognized by the tribunal which resolved the jurisdictional issues in the arbitration brought by Burlington Resources Inc., which held that:

“...by imposing upon investors an obligation to voice their disagreement at least six months prior to the submission of an investment dispute to arbitration, the Treaty effectively accords host States the right to be informed about the dispute at least six months before it is submitted to arbitration. The purpose of this right is to grant the host State an *opportunity* to redress the problem before the investor submits the dispute to arbitration. In this case, Claimant has

⁸⁷ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Decision on Jurisdiction of August 6, 2003 at ¶ 184.

deprived the host State of that opportunity. That suffices to defeat jurisdiction.”⁸⁸

151. With the goal to “...promote greater economic cooperation” and stimulate “the flow of private capital and the economic development”, as stated in the preamble of the BIT, as well as to create a harmonious relationship between the investors and States, the Governments who signed that Treaty and those signing similar ones, enshrined the six-month negotiation period requirement. The purpose of such requirement is that during this "cooling-off period," the parties should attempt to resolve their disputes amicably, without resorting to arbitration or litigation, which generally makes future business relationships difficult. It is not an inconsequential procedural requirement but rather a key component of the legal framework established in the BIT and in many other similar treaties, which aims for the parties to attempt to amicably settle the disputes that might arise resulting of the investment made by a person or company of the Contracting Party in the territory of the another State.
152. In its Memorial on Objections to Jurisdiction, Ecuador makes reference to the *Enron v. Argentina*⁸⁹ case in which, although the Tribunal found that the waiting period provision in the US-Argentina BIT (which is practically identical to the one contained in the US-Ecuador BIT) had been complied with, it held that:

“...the Tribunal wishes to note in this matter, however, that the conclusion reached is not because the six-month negotiation could be a procedural and not a jurisdictional requirement as has been argued by the Claimants and affirmed by other tribunals. Such requirement is in the view of the Tribunal very much a jurisdictional

⁸⁸ *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on Jurisdiction of 2 June 2010 ¶ 315.

⁸⁹ Respondent’s Memorial on Jurisdiction, ¶ 115.

one. A failure to comply with that requirement would result in a determination of lack of jurisdiction.”⁹⁰

153. Claimant minimizes the importance of the *Enron* tribunal’s findings and considers it as *obiter dicta*. This Tribunal does not share that view and finds that, contrary to Murphy International’s opinion, the *Enron* tribunal wanted to include that statement in its Decision precisely because of the importance it attributed to the issue, even though the waiting period having been complied with in that case, it was not essential to resolve the issue on jurisdiction.
154. The tribunal in *SGS v. Pakistan* held that “...it does not appear consistent with the need for orderly and cost-effective procedure to halt this arbitration at this juncture and require the Claimant first to consult with the Respondent before re-submitting the Claimant's BIT claims to this Tribunal.”⁹¹ Claimant raises this same argument in its letter dated April 30, 2010, which has already been cited. This Tribunal finds that rationale totally unacceptable: it is not about a mere formality, which allows for the submission of a request for arbitration although the six-month waiting period requirement has not been met, and if the other party objects to it, withdraws and resubmits it. It amounts to something much more serious: an essential mechanism enshrined in many bilateral investment treaties, which compels the parties to make a genuine effort to engage in good faith negotiations before resorting to arbitration.
155. Of course, this Tribunal does not ignore the fact that if both parties cling obstinately to their positions, the possibilities for having a successful negotiation become null. However, there have been many cases in which parties with seemingly irreconcilable points of view at first, manage to reach amicable solutions. To find out if it is possible, they must first try it. Evidently,

⁹⁰ *Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic* (ICSID Case No. ARB/01/3), Decision on Jurisdiction of January 14, 2004, ¶ 88.

⁹¹ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Decision on Jurisdiction of August 6, 2003, ¶ 184.

the way in which Murphy International proceeded in this case prevented Ecuador and Murphy itself from even commencing the negotiations required by the BIT.

156. For the above reasons, the Tribunal rejects Claimant's argument that the six-month waiting period required by Article VI(3)(a) does not constitute a jurisdictional requirement.

157. Based on the statements above, the Tribunal concludes that Murphy International did not comply with the requirements of Article VI of the Bilateral Investment Treaties entered into by the Republic of Ecuador and the United States of America; that such omission constitutes a grave noncompliance, and that because of such noncompliance, this Tribunal lacks competence to hear this case.

3. Other Objections to Jurisdiction

158. Although irrelevant in light of what has been resolved, the Tribunal states for the record that, in its view, the remaining objections to its jurisdiction raised by the Republic of Ecuador which have not been expressly addressed in this award could not have been known at this stage because by their nature they would have been resolved together with the merits of the case.

4. Costs

159. The Tribunal recognizes that the circumstances surrounding this dispute, which led to the resolution herein, were not clear at first; therefore, each Party shall bear its own fees and costs incurred in instituting this matter. Each Party shall also pay one half of the fees and expenses incurred by the Members of the Arbitral Tribunal, and of the charges for the use of the facilities of the Centre.

160. Section IV, paragraphs 1 and 3 of this award and the corresponding decisions in paragraph 161, are adopted unanimously by the Members of the Tribunal. Section IV, paragraphs 2 and 4, and the corresponding decisions in


paragraph 161, are adopted by majority, with the dissent of Dr. Horacio A. Grigera Naón.

V. Decision

161. For the reasons stated above and pursuant to Rules 41 and 47 of the Arbitration Rules of the International Centre for Settlement of Investment Disputes, Article 61(2) of the Convention on the Settlement of Investment Disputes between States and Nationals of the other States, and Article VI of the Bilateral Investment Treaty between the Republic of Ecuador and the United States of America of August 27, 1993, the Arbitral Tribunal resolves as follows:

- a) Unanimously rejects the objection to ICSID jurisdiction raised by the Republic of Ecuador based on its unilateral declaration under Article 25(4) of the ICSID Convention.
- b) By majority sustains the objection to ICSID jurisdiction based on the Claimant's non-compliance with the six-month consultation and negotiation period prescribed in Article VI of the Bilateral Investment Treaty between the Republic of Ecuador and the United States of America of August 27, 1993.
- c) By majority declares that ICSID lacks jurisdiction over this proceeding and this Arbitral Tribunal lacks competence to resolve it.
- d) By majority declares that each party shall pay one half of the fees and expenses incurred by the Members of the Arbitral Tribunal, and of the charges for the use of the facilities of the Centre.
- e) By majority declares that each party shall bear its legal fees and the costs incurred in instituting this arbitration proceeding.

Subject to the dissenting
opinion attached hereto.



Dr. Raúl E. Vinuesa
Arbitrator
BoA Nov. 7, 2010



Rodrigo Oreamuno Blanco
President
Nov. 16th, 2010



Dr. Horacio A. Grigera Naón
Arbitrator

Horacio A. Grigera Naón
Doctor en Derecho

Partial Dissenting Opinion

In the

Arbitration proceeding between

Murphy Exploration and Production Company International

“Murphy” or “Claimant”

v.

The Republic of Ecuador

“Ecuador” or “Defendant”

(hereinafter, both parties shall be collectively called the “Parties”)

ICSID Case No. ARB/08/4

A. Introduction

1. I shall depart from the reasoning and the conclusions of the award issued on these proceedings (the “Award”) only and exclusively since the Arbitral Tribunal's jurisdiction is denied therein due to the fact that the prior negotiation period or “cooling period” as provided in the Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, dated April 22, 1997 (the “BIT”) has not been completed.

2. It is undisputed that as from September 2005¹ and with the consent of the then President of Ecuador some negotiations were entered into between oil companies transacting business in said country and the state oil company Petroecuador, acting on behalf of Ecuador, due to Ecuador's intention to improve, given the increase in the oil price, its economic participation in the existing oil contracts with Petroecuador, structured as product sharing agreements (the “Oil Contracts”), that is to say, according to the modality assigning to each of the parties to such contracts a certain participation in the extraction of crude.

3. It is also undisputed that Repsol S.A. (“Repsol”) participated in such negotiations concerning Block 16 and the contract signed on September 27, 1996 between Petroecuador, on behalf of Ecuador, and the undersigning contractors (the “Contract”),² that Murphy Ecuador Oil Company Ltd. (“Murphy Ecuador”)

¹ *Ecuador Inmediato*, September 21, 2005, CEX-48.

² *El Comercio*, November 22, 2005, Annex A-1 referred to in the Hearing held on April 6, 2010.

was included among the non-operating parties of the contractor, and that Repsol acted in its capacity as operator of the area covered by the Contract.³

4. It is likewise undisputed that Ecuador, unsatisfied with what it considered the oil companies' resistance to negotiate given their adherence to existing Oil Contracts to which they were parties, put an end to said negotiations and enacted Law No. 42 ("Law No. 42"), published on April 25, 2006, which amended the Hydrocarbons Law, which unilaterally introduced Ecuador's 50% participation in the surplus between the monthly average FOB sale price of Ecuadorian crude oil and the monthly average sale price of such crude upon the celebration of the Oil Contracts.⁴

B. The Dispute under the BIT and its Manifestation

5. Murphy claims that the dispute between Ecuador and Murphy under the BIT arises in the moment mentioned in the previous paragraph 4, moment as from which the period regarding negotiations between the Parties provided for in the BIT starts running. Upon expiration thereof, the dispute may be submitted for settlement by binding arbitration, pursuant to Article VI(3) of the BIT, that is to say, much earlier than the commencement date of these arbitration proceedings instituted by Murphy on March 3, 2008 and the letter dated February 29, 2008 whereby Murphy communicates Ecuador its consent to submit the existing dispute between Murphy and Ecuador to ICSID jurisdiction as established in the BIT, pursuant to said letter (the "Letter".) Respondent claims that it was aware of the existence of Murphy's claims when it received the Letter and that the dispute between Murphy and Ecuador under the BIT could not have originated before March 3, 2008; that is to say, before the commencement of these arbitration proceedings instituted by Murphy.⁵ The fact that the dispute between Murphy and Ecuador has arisen only on the last date is implicit in Ecuador's claim.

6. It is generally admitted that the mere presence of a legal conflict of interests is sufficient to originate a difference or a dispute. Therefore, the International Court of Justice, in line with its decisions on prior cases, has decided that:

"According to the consistent jurisdiction of the Court and the Permanent Court of International Justice, a dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between parties [several phrases omitted.] Moreover, for the purposes of verifying the existence of a legal dispute it falls to the Court to determine whether "the claim of one party is positively opposed by the other."⁶

³ The evidence, not contrasted by Ecuador, reveals that even before the passing of Law No. 42, there have been negotiations with the other oil companies, including Repsol, in which it acted in its own and in the non-operating parties' best interest, and that upon the failure of such negotiations, Ecuador enacted such Law (journalistic articles dated September 21, 2005 (*Ecuador Inmediato*); November 21 and 22, 2005 (*El Comercio*), after Ecuador's Minister of Economy, Mr. Diego Borja, put an end to the negotiations (*El Comercio* journalistic article, dated August 2, 2006) and announced that Ecuador was going to exercise its sovereign will to that respect.

⁴ Official Registry, dated April 25, 2006, CEX-49.

⁵ Ecuador's jurisdictional objections, dated August 15, 2009, No. 104, pages 47-48.

⁶ ICJ, "*Case concerning certain property (Liechtenstein v. Germany)*", judgment of February 10, 2005, No. 24, page 16, (Preliminary Objections Judgment, ICJ Reports 2005, p. 6).

7. Undoubtedly, on the one hand, the resistance of the oil companies to accept changes regarding what they understand as their rights under the Oil Contracts in force and, on the other hand, Ecuador's decision to exercise its sovereign power to impose, through the enactment of Law No. 42, an economic participation regime of the Ecuadorian Government in such companies which, according to the oil companies, implies a violation of such rights, constitutes a conflict of interests with strong legal connotations, in relation to which the involved parties maintain radically opposed views; and that, therefore, from then on, on April 25, 2006, a dispute that may be characterized as a dispute under international law arises or originates.

8. In its relevant parts, Article VI(2) and VI(3)(a) of the BIT recites as follows:

(...)

"2. Cuando surja una diferencia en materia de inversión, las partes en la diferencia procurarán primero resolverla mediante consultas y negociaciones. Si la diferencia no se soluciona amigablemente, la sociedad o el nacional interesado, para resolverla, podrá optar por someterla a una de las siguientes vías, para su resolución:

c) Conforme a lo dispuesto en el párrafo 3 de este artículo.

3. a) Siempre y cuando la sociedad o el nacional interesado no haya sometido la diferencia, para su solución, según lo previsto por el inciso a) o el inciso b) del párrafo 2, y hayan transcurrido seis meses desde la fecha en que surgió la diferencia, la sociedad o el nacional interesado podrá optar por consentir por escrito a someter la diferencia, para su solución, al arbitraje obligatorio."

(...)

9. Article VI(2) and VI(3)(a) of the BIT, as opposed to other similar Treaties, such as the Treaty between the Republic of Ecuador and the Kingdom of Spain concerning the Encouragement and Reciprocal Protection of Investment, dated June 26, 1996, does not define when a dispute regarding investments arises nor does it require or demand it to be alleged, raised in a written or any other way or claimed under a specific modality to constitute it, become aware of it, formulate it, manifest it or to initiate or continue the prior negotiations process; and it establishes, on the other hand, that the six-month period shall start running as from the moment when the dispute arises.

10. Article VI of the BIT makes reference to "investment disputes" exclusively. Clearly, contractual disputes may simultaneously constitute disputes under investment protection agreements which are relevant for the case;⁷ and according to the claims in these arbitration proceedings, Murphy alleges that Law No. 42 constitutes a violation to the Contract and the BIT.⁸ To jurisdictional effects (which are the

⁷ Principle recently ratified by the decision of the *Ad hoc Committee* on annulment in ICSID case No. ARB/01/3 "Enron Creditors Recovery Corp. Ponderosa Assets, L.P. and The Argentine Republic" no. 134, page 54 (Parties' dispatch date: July 30, 2010.)

⁸ Memorial on the Merits, dated April 30, 2009, No. 298.

only ones which shall be considered at this stage of the proceedings), as acknowledged by continuous case law, it is only important to evaluate such *prima facie* allegations and to take them as true upon presentation, as long as there is no reason, upon evaluation, to understand that such allegations are improbable, frivolous or reckless.⁹ It shall be concluded that, to such effects, the dispute under the Contract and the BIT "arose" or "erupted" at the same time – that is to say April 25, 2006.

11. As already decided by the *Ad-Hoc Committee* in the case *Vivendi* when deciding a jurisdictional question, "Read literally, the requirements for arbitral jurisdiction in [Article 8] do not necessitate that the Claimant allege a breach of the BIT itself: it is sufficient that the dispute relate to an investment made under the BIT."¹⁰ The first and second paragraphs of Article 8 of the Argentina-France BIT referred to in the *Ad-Hoc Committee* decision relate to the dispute as from which the six-month term shall start running for the negotiated resolution thereof. This same construction corresponds to Article VI(2) and VI(3) of the BIT, the text of which is clear, unambiguous and unequivocal as its literal meaning.

12. Undoubtedly, Law No. 42 and the subsequent decrees are related to Murphy's investments and its investor's rights with reference to the Contract and its investments in Ecuador in Block 16 within the scope of the BIT. The fact that, for example, the written complaints issued by Repsol, in its capacity as operator, related to the enactment or the application of such law¹¹ do not make specific reference to the BIT does not prevent such complaints from reflecting and manifesting the existence of a pending dispute previously raised under the BIT as from the enactment of Law No. 42, which had already triggered the six-month term of prior negotiations.

13. Therefore: (a) on April 25, 2006, the dispute raised in relation to the enactment of Law No. 42 was configured and established, at the same time, as a dispute under the Contract and as an international law dispute covered by the provisions of international investment protection treaties eventually applicable to investment cases such as , in the case of Murphy, the BIT, because it is, at the same time, a foreign investment dispute; and (b) it is not necessary to notify that a dispute has been raised or to configure it as a BIT violation or to allege it or to raise it as a claim under it, or, otherwise, for the period established in its Article VI(3)(a) to start running.

14. Such conclusion is not shaken by the fact that Repsol has sent a note to Ecuador on November 12, 2007, (the "Note") with the consent and in the interest of the then members of the contractor, with the aim to list the violations under the aforementioned Agreement between the Kingdom of Spain and the Republic of Ecuador for the Promotion and Reciprocal Protection of Investments (the "Agreement") for which, according to Repsol, Ecuador is responsible, and to open the negotiation period as a step prior to Repsol's instituting international arbitration proceedings under the ICSID system, pursuant to said Agreement. Sending the Note or its content has nothing to do with Murphy's satisfaction of BIT

⁹ Award on jurisdiction on "*Amco Asia Corp. and others v. Indonesia*", dated September 25, 1983, 1 ICSID Reports no. 38, pages 405 (1993). "*Methanex Corp vs United States*" (TLCAN), First Partial Award on Jurisdiction and Admissibility, August 7, 2002, no. 121, pages 54-55, CLA-160.

¹⁰ ICSID Case ARB/97/3, no. 55, pages 115 (*Annulment Decision*).

¹¹ For example, Repsol's note to the Chief of the Oil Contracts Administration Unit of Petroecuador, dated October 18, 2007, where it states for the record that Repsol made the payments in protest on behalf of the contracting consortium as from April, 2006 of such sums of money claimed under the Law No. 42 and the regulatory decrees, CEX-057.

requirements in respect of its claims as individually falling under any of its Articles, including, without limitation, Article VI(2) and VI(3)(a), nor with its rights under the BIT.

15. The reference to the Note in Murphy's request for arbitration, dated March 3, 2008, was solely aimed at illustrating Murphy's complaints through the operator, Repsol, in respect of the governmental measures which are subject to the request and Ecuador's actions that, according to Murphy, would violate the BIT – that is to say, as an illustration of the dispute on the basis of which Murphy raises its claims under this treaty –¹² as confirmed in the Hearing by its legal representative.¹³ It is worth mentioning that the Note also identifies the enactment of Law No. 42 as the source of and the moment when the controversies or differences invoked under the Agreement arose, as Murphy does in this arbitration in relation to the dispute it raised under the BIT.¹⁴ In a way, Murphy states or suggests that the Note – issued with respect to a different treaty – constitutes or intends to constitute the moment as from which the six-month term under Article VI(3)(a) of the BIT has to start running or a manifestation of the existence of the dispute under said treaty. This is perfectly detailed in the Letter whereby Murphy submits to the jurisdiction of ICSID all its claims against Ecuador under the BIT, where no reference to the Note is made, and where it is stated, on the contrary, that six months have elapsed since the dispute arose upon the enactment of Law No. 42 without having been resolved by negotiation (hence, said six-month period expired well before the date of the Note.)¹⁵ For that reason and due to the fact that the dispute, as already indicated, also arose in relation to Murphy upon the enactment of Law No. 42, it is incorrect to state that the negotiation and consultation conducted by Repsol as an operator occurred before the outbreak of the dispute.

16. The Note seems to find its explanation in the text of Article XI(1) and (2) of the Agreement, which, unlike Article VI(2) of the BIT, requires express notice of the dispute to declare and deem the period for prior negotiation started, as provided for in the Agreement, to enable Repsol to resort to arbitration under the Agreement.¹⁶ Murphy Ecuador's consent to the Note does not preclude Murphy's right to

¹² Request for arbitration, dated March 3, 2008, No. 37, page 9: *"Since the enactment of the Government's measures adversely affecting its investment, Claimant, through its subsidiary and the Operator, has protested its application while working with the Government to negotiate an amicable resolution. This and the details of the Government's other actions in violation of the Treaty are outlined in two letters, both dated November 12, 2007, sent to the Government by the Block 16 Operator on behalf of the Claimant."*

¹³ Hearing, transcription of April 5, 2010, pages 259-261.

¹⁴ Note, No.13, page.5: *"Estas medidas normativas, entre otras, constituyen una violación de las obligaciones de Ecuador bajo el Tratado..."*.

¹⁵ Note dated February 29, 2008 addressed to the President of Ecuador, among others, page 4: *"Estas y otras medidas crean una "disputa en materia de inversión" entre Murphy y el Gobierno según el Artículo VI del TBI. El Artículo VI(3) prevé que una sociedad afectada puede someter la disputa ante el CIADI si han transcurrido seis meses desde la fecha en que la misma surgió. Considerando que las objeciones y protestas a los actos y omisiones del Gobierno relacionados a las inversiones fueron hechas tanto por la subsidiaria de Murphy en el Ecuador como por los socios desde 2001, y el fracaso en la resolución de esas diferencias, no obstante los continuos intentos para negociarlas desde entonces, no queda duda que más de seis meses han transcurrido desde que la disputa surgió"*.

¹⁶ Official Gazette of Ecuador No. 8 dated April 10, 1998: *"Artículo XI 1. Toda controversia relativa a las inversiones que surja entre una de las Partes Contratantes y un inversionistas (Sic) de la otra Parte Contratante respect a cuestiones reguladas por el presente Acuerdo será notificada por escrito, incluyendo una información detallada, por el inversionista a la Parte Contratante receptora de la inversión. En la medida de lo posible las partes tratarán de*

enforce its investor rights separately under a treaty other than the Agreement -the BIT- nor, in doing so, to invoke a different moment triggering the cooling-off period set forth in the BIT. Whether Murphy's BIT claim in this arbitration is part of Repsol's claim under the Agreement or not is a question regarding the merits of this case which cannot be determined now, hence, such question cannot be the subject of conjectures at this stage at which, as mentioned before, Claimant's allegations as regards jurisdiction are established *prima facie*.

17. Be that as it may, what happens is that this case features, specifically, the issue that the same set of facts is the basis for two different claims under two different treaties. However, this does not exclude the existence of conducts related to such facts which are common to both treaties; that is to say, not susceptible of being viewed from the perspective of one treaty only. This common feature does not either authorize to label such conducts as relating to one treaty only with the sole purpose of depriving them of their effects or autonomous meaning under the terms of another treaty. For example, it is incorrect to label the Note as having the sole effect of subsuming the negotiation, consultation, notes and payments under protest of amounts required by Ecuador under Law No. 42 and later decrees effected by Repsol -as Contractor's operator- as conduct exclusively related to the Agreement or exclusively relevant to such Agreement, and not also related to Murphy's rights under the BIT and its provisions. Moreover, it is not proper to assign to the Note the retroactive or future effect of neutralizing the meaning under the BIT and from the perspective of Murphy's rights thereunder to the conduct of Repsol as operator, to determine Murphy's position with regard to Law No. 42 and later decrees or such consultations or negotiations and the futility or not of the negotiating efforts before or after the Note during the cooling-off period under the BIT in the relation between Murphy and Ecuador. It is important to highlight that the Parties do not distinguish between the period of negotiations before and after the Note. Ecuador only marks a difference between the negotiations stage which led to the execution of the contract modifying the Contract dated March 12, 2009 and the negotiations after such date¹⁷ and does not distinguish between negotiations before and after the Note.

C. The Parties to the Dispute under the BIT

18. The fact that Repsol was the operator under the Contract acting in representation of the remaining parties of the contractor (which is not disputed) and, besides, that Murphy Ecuador, controlled by Murphy, is a party to such Contract, allows to conclude that said difference, which has arisen as from the enactment of Law No. 42, emerged simultaneously with relation to Murphy Ecuador and Murphy itself. However, the Award suggests that in the communications exchanged with Petroecuador or with the Ecuadorian authorities, the scope of Repsol's conduct did not cover the rights and interests of the persons who have invested indirectly in Block 16 as per the Contract and, therefore, that the difference did not arise as well in respect of Murphy, since Murphy Ecuador, a company incorporated under the laws of Bermuda and indirectly controlled by Murphy by way of the company of the Bahamas Canaam Offshore Ltd., is not a party to the Contract. I do not agree with this position.

arreglar esas diferencias mediante un acuerdo amistoso. 2. Si la controversia no pudiera ser resuelta de estas forma en un plazo de seis meses a contar de la fecha de notificación escrita mencionada en el párrafo 1, sera sometida a elección del inversionista.... [there follows a list of arbitral instances to which the investor may resort].

¹⁷ Declaration of the representative of Ecuador in the Hearing of April 5, 2010, p. 273.

19. Murphy Ecuador –it is undisputed that during the stage relevant to the analysis, it was wholly and indirectly controlled by Murphy¹⁸ – was also ran by Murphy and subject to the directions of said company as regards the positions to be adopted vis-à-vis the requirements of Ecuador and Law No. 42, the negotiations of the consortium with Ecuador in connection with the adoption of such Law, and payment, or lack of payment, of the amounts required under Law No. 42 , which, actually, has been acknowledged by Ecuador 's representative.¹⁹ Therefore, the conduct of the operator Repsol before Ecuador both during the course of negotiations and when stating its position (such as payments under protest) regarding the legitimacy of Law No. 42 reflects – while Murphy Ecuador remained under the control of Murphy –Murphy's position, although neither Murphy Ecuador nor Murphy have participated directly in such negotiations or signed the letters evidencing payment under protest. In consequence, the dispute, which arose upon the adoption of Law No. 42 in relation to the Contract and its parties, was also automatically established in relation to Murphy, and not only Murphy Ecuador.

20. As pointed out in an ICSID case:²⁰

[11] *"...in general, ICSID tribunals do not accept the view that their competence is limited by formalities, and rather they rule on their competence based on a review of the circumstances surrounding the case, and, in particular, the actual relationship among the companies involved. This jurisprudence reveals the willingness of ICSID tribunals to refrain from making decisions on their competence based on formal appearances, and to base their decisions on a realistic assessment of the situation before them.*

[12] *It is for this reason that ICSID tribunals are more willing to work their way from subsidiary to the parent company rather than the other way round..."*

21. This reasoning, relevant to determine who are the parties involved or affected in the stage of negotiations preceding the arbitration claim, has received recent confirmation in the *Burlington* case, which also partially referred to similar differences as those of these arbitration proceedings, although concerning different Blocks located in Ecuador. In such case, under similar circumstances, it was recognized that, given that the conduct of the operator *Perenco* was attributable to a subsidiary of the foreign investor, such conduct was not only attributable to such subsidiary but it must be deemed carried out on behalf of the claimant investor, even when the subsidiary forming part of the contractor party was controlled only by 50% by said investor.²¹

D. The Futility of Negotiations

22. Evidence also reveals the futility of the negotiations with chances of success between the Parties due to their strongly antagonistic positions after the enactment of Law No. 42, which were repeatedly manifested through the request for payment of amounts calculated in accordance with Law No. 42 as

¹⁸ Hearing, transcription of April 5, 2010, p. 261.

¹⁹ Murphy International *"...puso reparos [objections to the negotiations with the Ecuadorian authorities] e impidió un pronto acuerdo con el objetivo de apalancar su capacidad de negociación con Repsol..."*, transcription, April 5, 2010, p. 61.

²⁰ *"Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema S.A.R.L v. Democratic Republic of the Congo"*, (ICSID Case No. ARB/98/7, Award, September 1, 2000), 17 FILJ 382 (2002).

²¹ ICSID Case No. ARB/08/5, *"Burlington Resources Inc. vs. Republic of Ecuador"*, Award, June 2, 2010, p. 68, nos. 326-329.

from July 6, 2006 and Repsol's payments under protest with monies of the parties to the Contract. In the letters where Repsol states such protests, it also notes that they are based on the fact that the requests for payment as per Law No. 42 constitute a unilateral modification of the Oil Contracts, thus violating Contractor's rights. This last concept includes Murphy Ecuador. As already shown, in formulating such protests, Repsol was also representing the interests and position of Murphy, controlling company of Murphy Ecuador at that time.

23. Law No. 42 was followed by regulatory decree No. 662 passed on October 18, 2000, which by increasing Ecuador's participation under Law No. 42 from 50% to 99% stressed the already clear differences between Ecuador's and Murphy's positions, since this measure caused a substantial increase in the economic contribution in favor of Ecuador that originated the dispute.

24. Under the BIT (Article VI(2)), both parties to the dispute – not only the investor - should initially seek a resolution through consultation and negotiation. The BIT does not state who must initiate or promote the negotiation, it is rather a requirement directed to both parties equally.

25. The only negotiating possibility offered by Ecuador after the adoption of said regulatory decree, according to the declarations of its new President Rafael Correa,²² was the transformation of the Oil Contracts in contracts for services, *i.e.*, in agreements inspired, as deduced from the allegations in this case, in a legal and economic concept different from the regime evidenced by the Oil Contracts. Moreover, President Correa has declared that the only possible alternative for negotiation was that of this type of contract, and that, if not accepted, the participation of 99 % set forth in regulatory decree No. 662 for the Ecuadorian State will be increased to 100 %.²³

26. The evidence in these proceedings shows that, before and after the issuance of the Note, and even after the sale by Murphy of its participation in Murphy Ecuador, Ecuador, by way of declarations of President Correa, kept its strong position that the only option for negotiation was the transformation of the Oil Contracts into contracts for services.²⁴ It is pertinent to point out that nothing in these proceedings shows that such President Correa's declarations or those cited above have been officially denied. Neither has the Defendant questioned the truthfulness or authenticity of the evidence provided by Murphy reflecting such declarations.

27. Murphy did not accept – and had no obligation to accept – said option, presented by Ecuador in such unconditional and categorical terms, as the only option Ecuador was willing to consider as a negotiated solution between the Parties, which eventually led to the fact that Murphy Ecuador did not sign the contract modifying the already mentioned Contract (entered into by Repsol on March 12, 2009), by means of which a transition regime is established while the negotiations carried on during a calendar year (later extended under information provided by Ecuador during the Hearing²⁵) in order to transform the Contract into a contract for services.

²² Declarations which appeared in El Universo newspaper, dated October 23, 2007, CEX-108.

²³ Declarations which appeared in El Comercio newspaper, October 6, 2007, CEX-133.

²⁴ Declarations which appeared in La Hora newspaper, April 23, 2009, CEX-77.

²⁵ Transcription of the Hearing of April 6, 2010, p. 370.

28. Clearly, positions so radically different conspire in a decisive manner against reaching a possible agreement between Murphy and Ecuador leading to a useful negotiation. Such positions evidence the futility of any negotiating effort during the six-month period provided for in Article VI(3)(a) of the BIT and even after such period, without the need of determining, for reaching such conclusion, whether such period is of procedural or jurisdictional nature. Given the circumstances, only if it were taken for granted that Murphy had the obligation to accept the only negotiating option formulated by Ecuador consisting of the transformation of the Contract into a contract for services, it may be concluded that following the negotiating process would not be futile. In fact, such hypothesis must be ruled out, since it is not compatible with the idea of a free negotiation without conditions set forth beforehand.

29. Article VI(2) of the BIT does not set forth any obligation to negotiate, it only requires the parties “to commit efforts” (“*procurar*”) to reach a negotiated solution. The BIT does not demand the parties to reach a positive solution, nor does it set forth a minimum level of attempts or efforts to be applied to such end or to reach a solution, nor prescribes any intensity in their application, nor imposes a minimum period in which the will or effort to negotiate is to be maintained.

30. It is worth contrasting the soft character of the provisions of Article VI(2) of the BIT with the categorical and peremptory character of the language of Article VI(3)(a), which automatically triggers the right to resort to arbitration upon the expiration of a period of six months after the date on which the dispute arose, without making any reference as to whether the negotiation efforts were appropriately undertaken or fulfilled. In accordance to adequate criteria for drafting clauses for the solution of disputes providing for, in a combined manner, a period of negotiation prior to an arbitral instance, Article VI(3)(a) of the BIT sets a clear and precise dividing line between the negotiation stage and the arbitral stage by fixing a time limit between both stages, surely with the purpose of avoiding delays which may arise due to debates or opposing views about whether such negotiations were duly attempted or effectively carried out, avoiding undue delays because of disputes over whether the negotiation stage was fulfilled and minimize the possibility of interposing jurisdictional objections to the detriment of the legitimate right of access to justice of the party seeking to resort to an arbitral proceeding to enforce its rights. Even in case of doubt as to the futility of the negotiations between Murphy and Ecuador, the presumption is that, in absence of a negotiated solution reached by the Parties within the time limit set forth in Article VI(3)(a) of the BIT, the arbitral stage provided therein becomes automatically available.

E. Conclusions

31. From the above it is to be understood that a clear difference between Murphy and the Ecuadorian State under Article VI of the BIT arose as from the adoption of Law 42 by Ecuador, and that all the conditions for triggering the six-month previous negotiations period in respect of Murphy’s claims in accordance with said Article were fulfilled as from then. Taking into account the date of enactment of Law No. 42 (April 25, 2006) and the submission of the Request for Arbitration by Murphy before ICSID on March 3, 2008, this is, long after such date, the negotiations period under Article VI of the BIT has already expired and, anyway, due to the circumstances of the case, such negotiations, negotiating efforts or their permanence had already been proven futile by then.

32. In any case, it seems difficult not to notice, having regard to the framework of the particular circumstances of this case, that forcing Murphy, after more than two years and a half in arbitration, to envisage now a negotiating stage of uncertain future given the history of the relationship between the Parties depicted here, but with the plausible ending of Murphy having to reinstate later the claim filed

herein in a new proceeding should Murphy desire to enforce what it considers to be its rights, does not marry well with the concept of a reasonably fast and efficient access to the arbitral instances provided for in the BIT and seriously impairs Murphy's right to access arbitral justice under its Article VI(3).

33. Therefore, I reject the jurisdictional objection of Ecuador based upon the fact that the negotiation period provided for in Article VI of the BIT has not elapsed, with costs and fees to be borne by Defendant.

Washington D.C., 19 November 2010.

Horacio A. Grigera Naón

[The text above is a translation of the original text in Spanish]