INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

IN THE PROCEEDING BETWEEN

OCCIDENTAL PETROLEUM CORPORATION
OCCIDENTAL EXPLORATION AND PRODUCTION COMPANY

Claimants

- AND -

THE REPUBLIC OF ECUADOR

Respondent

(ICSID Case No. ARB/06/11)

DECISION ON PROVISIONAL MEASURES

Members of the Tribunal
Mr. L. Yves Fortier, C.C., Q.C., President
Professor Brigitte Stern, Arbitrator
Mr. David A.R. Williams, Q.C., Arbitrator

Secretary of the Tribunal
Gabriela Alvarez-Avila

Assistant to the Tribunal
Renée Thériault

Representing the Claimants
David W. Rivkin
Mark W. Friedman
Suzanne A. Spears
Claudio D. Salas
Gaetan J. Verhoosel
Debevoise & Plimpton LLP

Laura C. Abrahamson
Occidental Petroleum Corporation

Representing the Respondent
Paul Reichler
Janis Brennan
Clara Brillembourg
Foley Hoag LLP

Dr. José Xavier Garaicoa Ortiz
Attorney General

Dra. Claudia Salgado
Office of the Attorney General

Martha Escobar
Subdirectora de Contencioso
Office of the Attorney General

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I. INTRODUCTION

1. In this Decision, the Tribunal addresses and rules upon the Claimants' Application for Provisional Measures dated 18 October 2006 (the "Application").

2. By way of introduction, it is recalled that on 17 May 2006, the Claimants, Occidental Petroleum Corporation ("OPC") and Occidental Exploration and Production Company ("OEPC"), filed their Request for Arbitration against the Respondent, The Republic of Ecuador ("Ecuador").[1] The arbitration concerns various alleged breaches by Ecuador under both domestic law and international law, as well as under the Treaty Between the United States of America and The Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment (the "Treaty" or "BIT"). In addition, the Claimants rely on an agreement referred to as the "Participation Contract" dated 21 May 1999 between OEPC, Ecuador and Petroecuador in connection with the exploration and exploitation of hydrocarbons in what has been labelled "Block 15" of the Ecuadorian Amazon. The *Caducidad* Decree of the Participation Contract was issued by the Ecuadorian Minister of Energy and Mines on 15 May 2006, resulting in the Participation Contract's termination.

3. It is also useful to recall that the relief sought by the Claimants in their Request for Arbitration is set forth as follows (see Claimants' Request for Arbitration at paragraph 75):

> "75. Claimants respectfully request an award in their favor,

[1] The Request was initially made against both Ecuador and the Ecuadorian entity known as "Petroecuador", but the Claimants subsequently dropped the latter as a Respondent.

(a) Declaring that Respondents have breached their obligations under the Participation Contract and the Operating Agreements, the Treaty, and Ecuadorian and international law;

(b) Ordering Respondents to declare null and void the *Caducidad* Decree and to reinstate fully OEPC's rights under the Participation Contract and the Operating Agreements;

(c) Directing Respondents to indemnify Claimants for all damages caused as a result of their breaches, including costs and expenses of this proceeding, in amounts to be determined at the hearing, which Claimants believe will exceed US$1 billion;

(d) Directing Respondents to pay Claimants interest on all sums awarded, in amounts to be determined at the hearing, and to order any such further relief as may be available and appropriate in the circumstances."

4. The Claimants' Request for Arbitration further sets forth an initial iteration of the provisional measures now sought as part of the present Application (see Claimants' Request for Arbitration at paragraphs 76 and 77):

"**REQUEST FOR PROVISIONAL MEASURES**

76. Immediately following the issuance of the *Caducidad* Decree, Respondents have proceeded to seize all of OEPC's assets and have effectively taken over all of OEPC's operations in Block 15. They have also indicated their intention to enter into a contract with another company to ensure continued production from Block 15. Unless Respondents are immediately ordered to cease or refrain from such actions and to return OEPC to its rightful operation and exploitation of Block 15, they will render the consequences of Respondents' breaches irreversible and the relief of *restitutio in integrum* sought by Claimants in this arbitration impossible.

77. Therefore, in order to preserve Claimants' rights under the Treaty and OEPC's rights under the Participation Contract until the dispute has been adjudicated on the merits, Claimants request the Tribunal to order provisional measures pursuant to Arbitration Rule 39. Pursuant to paragraph 1 of that Rule, Claimants hereby specify: (i) the rights to be preserved; (ii) the measures the recommendation of which is requested; and (iii) the circumstances that require such measures:

(a) *The rights to be preserved*. As stated above, Claimants will seek final relief in the form of an order from the Tribunal requiring Respondents to declare null and void the *Caducidad* Decree and to reinstate fully OEPC's rights under the Participation Contract. Under the Participation Contract, OEPC has the exclusive right to carry out exploration and exploitation activities on Block 15.

> (b) *The measures the recommendation of which is requested*. Claimants respectfully request that, until it has rendered an award on the merits, the Tribunal: (i) order Respondents immediately to cease their occupation of Block 15 and OEPC's facilities; (ii) order Respondents immediately to take all necessary measures to enable OEPC to resume its operations in Block 15; (iii) enjoin Respondents from taking OEPC's share in the production from Block 15; and (iv) enjoin Respondents from entering into a contract with another party to carry out exploration and exploitation activities on Block 15.
>
> (c) *The circumstances that require such measures*. Claimants will suffer irreparable injury if Respondents fail to abide by any of the orders and injunctions requested in (b) above. It is widely recognized that Petroecuador does not have the resources or technical ability to operate Block 15, and any attempt by it to do so would certainly diminish the productivity of the block and damage the block's wells irreparably. It would be more difficult for the Tribunal to restore OEPC's contract rights once another oil company has been granted a contract to carry out exploration and exploitation activities on Block 15. It is also widely recognized that Ecuador, which has failed to pay the VAT Award, would not have the resources to pay a monetary award in the instant arbitration in order to make Claimants whole, since damages will be in excess of US$1 billion. Because the Tribunal would be unable to restore *the status quo ante* once it was disrupted, it must preserve the *status quo ante* through provisional measures pending the outcome of this arbitration."

5. The Claimants' request for provisional measures was further particularized in their Application dated 18 October 2006. The Respondent filed its Counter-Memorial thereto on 1 December 2006. The Claimants' Reply was filed on 15 December 2006, followed by the Respondent's Rejoinder which was filed on 30 December 2006. A two-day hearing on the Claimants' Application was subsequently held before the Tribunal on 2-3 May 2007 in Washington, during which the provisional measures ultimately sought by the Claimants were significantly amended as set forth in more detail below.

II. FACTUAL BACKGROUND AS PRESENTED BY THE CLAIMANTS

6. For purposes of this Decision, the Tribunal sets forth below a brief summary of the facts as presented in the Claimants' Request for Arbitration. However trite, the

Tribunal would observe that this summary is not to be taken as prejudging the issues of fact or law to be resolved at the jurisdictional or merits phase of this arbitration.

7. As noted earlier, OEPC, Ecuador and Petroecuador entered into a "Participation Contract" dated 21 May 1999. Pursuant to the Participation Contract and related "Operating Agreements" for the unified fields of Edén-Yuturi and Limoncocha, OEPC was granted the exclusive right to carry out exploration and exploitation activities in the area assigned to it, namely "Block 15" of the Ecuadorian Amazon. From the execution of the Participation Contract and the Operating Agreements in May 1999 until their termination on 15 May 2006, OEPC carried out its contractual obligations, including the implementation of investment and work plans as provided for in those agreements.

8. In October 2000, OEPC entered into two agreements (the "AEC Farmout Agreement" and the "AEC Operating Agreement", together the "AEC Agreements") with City Investing Company Ltd. (now known as AEC Ecuador Ltd., "AEC"), a Bermuda subsidiary of EnCana Corporation, which is a Canadian oil and gas company. Pursuant to the AEC Agreements, OEPC and AEC entered into a two-phase transaction.

9. In a first phase, OEPC granted to AEC a 40% economic interest in the share of the production from Block 15 that accrued to OEPC under the Participation Contract and the Operating Agreements. In exchange for this share in oil produced from Block 15, AEC agreed to pay to OEPC both (i) a series of certain annual amounts over a four-year period to contribute towards capital investments in Block 15 and (ii) 40% of the operating costs incurred by OEPC. Section 2.01 of Article II of the AEC Farmout Agreement states that:

> "OEPC agrees to […] farm out and transfer to AEC […] a 40% economic interest (the 'Farmout Interest') in the Farmout Property […]. The Farmout Interest to be transferred to AEC […] does not include nominal legal title to an interest in Block 15 or an interest as a party to the [Block 15] Agreements. OEPC shall continue to own 100% of the legal title to the [Block 15] Agreements and to the interest in Block 15 granted or provided for in the [Block 15] Agreements."

10. In a second phase, it was contemplated that after AEC had made all required payments at the end of the four-year period, and subject to OEPC then obtaining the necessary government approvals, OEPC would assign legal title to AEC. The second stage is described in Section 4.01 of Article IV of the Farmout Agreement:

> "[A]fter AEC has made all payments […] OEPC and AEC shall execute and deliver such documents as are required to convey legal title to AEC in and to a 40% economic interest in the [Block 15] Agreements and Block 15 and to make AEC a party to the [Block 15] Agreements as owner of such 40% economic interest (subject to obtaining required governmental approvals)."

11. On 1 November 2000, OEPC issued a press release announcing the AEC Agreements. The release confirmed that OEPC would remain the operator of Block 15 and that AEC would receive a 40% economic interest in the operations.

12. Subsequently, on 15 February 2001, the Government of Ecuador and *Oleoducto de Crudos Pesados Ecuador (OCP) S.A.* ("OCP S.A."), a wholly-owned subsidiary of OCP Ltd. in which OPC indirectly holds a 14.15% interest, executed the "Contract to Construct and Operate the Heavy Crude Oil Pipeline and Provision of Public Services for Transportation of Hydrocarbons" (the "OCP Contract"). During the implementation of the OCP Contract, OCP S.A. entered into a variety of construction commitments, including a US$700 million (approximately) construction contract with Techint International Construction Corporation on 3 July 2001.

13. The OCP project required US$900 million in project financing for the OCP pipeline, which was to be secured through the signing of ship-or-pay commitments by the foreign oil companies participating in the project. On 30 January 2001, OEPC therefore entered into an Initial Shipper Transportation Agreement with OCP S.A. The ship-or-pay commitments relating to Block 15 required OEPC either to increase its production to 70,000 barrels per day, more than double its existing production, or to pay the tariff for unused capacity.

14. In order to achieve the required production levels, OEPC initiated an extensive work plan to develop the Edén-Yuturi field during the first two quarters of 2001. In 2001 alone, OEPC individually committed to nearly US$250 million in drilling and construction contracts to build a secondary pipeline to connect Edén-Yuturi to the OCP pipeline and to boost production in that field. Since 1999, OEPC has invested a total of more than US$900 million in the development of Block 15.

15. In the interim, OEPC had commenced another arbitration under the Treaty to seek certain VAT refunds. A final and binding award was issued on 1 July 2004 (the "VAT Award"), awarding OEPC US$75 million in damages and affirming OEPC's position regarding its statutory right to the VAT refunds.[2]

16. Shortly thereafter, on 15 July 2004, as AEC had satisfied all payments due under the AEC Farmout Agreement, OEPC requested approval from the Ecuadorian government to proceed with the transfer of legal titles. The government did not grant such approval. Rather, on 24 August 2004, citing the AEC Agreements, as well as a

[2] Ecuador subsequently challenged the VAT Award in the English courts. On 2 March 2006, the High Court dismissed Ecuador's challenge and upheld the VAT Award. Ecuador appealed that decision and the appeal was dismissed on 4 July 2007.

variety of alleged violations claimed by the National Hydrocarbons Department ("DNH") to be breaches of the Participation Contract, the Attorney General of Ecuador issued orders to the Ministry of Energy and Mines to terminate the Participation Contract and the Operating Agreements through a declaration of "*caducidad*".

17. On 8 September 2004, the Minister of Energy and Mines heeded the Attorney General's demand and instructed the Executive President of Petroecuador to initiate the *caducidad* procedures; the latter did so by sending OEPC a notice of alleged breaches of the Participation Contract on 15 September 2004. The notice quoted the allegations that the Attorney General had made in his 24 August 2004 letter, including that *caducidad* should be declared because OEPC had allegedly: (i) transferred rights and obligations under the Participation Contract to AEC without ministerial approval; (ii) entered into a consortium or association to carry out exploration or exploitation operations without ministerial approval; (iii) not invested the minimum amounts required under the Participation Contract; and (iv) repeatedly committed violations of the *Hydrocarbons Law* and regulations.

18. Over the following 18 months or so, OEPC made a number of submissions rebutting the allegations lodged by the Attorney General, but to no avail.

19. On 15 May 2006, the Minister of Energy and Mines notified OEPC of his decision to terminate the Participation Contract by declaring its *caducidad*, thereby dismissing OEPC's defenses. The Claimants filed their Request for Arbitration four days later on 19 May 2006.

III. OVERVIEW OF THE APPLICATION

20. In their Application, the Claimants state that they are compelled to urgently seek provisional measures because of an "imminent aggravation of the dispute and the irreversible harm it would do" (see Claimants' Application at paragraph 5). As noted earlier, the Claimants' Application has been modified significantly since it was first articulated in their initial submission on 18 October 2006. However, as a theme running throughout their Application, the Claimants have always represented that the circumstances "require measures preserving Claimants' rights from further degradation" (see Claimants' Application at paragraph 7).

21. In defining the circumstances requiring the provisional measures sought, the Claimants have referred to a "situation that existed and that should be re-established" in the following terms (see Claimants' Application at paragraphs 10-12):

> "10. […] In broad strokes, prior to confiscation the Claimants had a highly desirable, efficient and environmentally responsible operation at Block 15. At Block 15, OEPC operated a robust complex of oil fields; due to OEPC's efforts those fields steadily produced an average of approximately 100,000 barrels of oil per day; OEPC had the right to dispose of its approximately 75% share of that oil, which produced substantial revenues for it and for Respondent; that level of production was maintained by a variety of modern drilling techniques and an elaborate and demanding plan requiring several hundred million dollars of annual reinvestment in the fields; and OEPC could transport its share of the oil hundreds of kilometres through a pipeline that had been built with financing secured by the multi-year 'ship-or-pay' obligation of OEPC and other foreign oil producers to pay for substantial 'reserved capacity.' In short, Claimants had a substantial and profitable oil exploration and production operation, modern and well-maintained equipment and facilities, and dependable infrastructure.
>
> 11. Respondent has recently indicated that it is likely to act in ways that will interfere with the Tribunal's ability to re-establish that pre-existing situation. Respondent has sent mixed messages about how it will manage Block 15. However, it is clear that the options it is considering are to have Petroecuador or a separate state-owned company operate Block 15 or to offer it to a third-party operator. Either course would aggravate the dispute. If Petroecuador or another Ecuadorian state-owned company operates the Block, the Block will suffer irreparably because Petroecuador does not have the management skills,

> resources, freedom or will to maintain adequate levels of re-investment in the Block. […]
>
> 12. At the same time, because OEPC agreed to significant ship-or-pay commitments in connection with Block 15 and because Petroecuador is now transporting the Block 15 crude that it has taken from OEPC without crediting those shipments and the related tariff payments against OEPC's ship-or-pay commitments, Claimants must continue to pay for pipeline capacity that they are now unable to use, currently approximately $100,000 per day. […]"

22. The Claimants summarized their initial Application as being made "to preserve their right to effective restitutionary relief of their acquired rights regarding Block 15", including "restoration of OEPC's operatorship of Block 15 and the benefits that operatorship provides" (see Claimants' Application at paragraph 14). They have argued that without the provisional measures they seek, "Respondent is poised to take steps that will (1) threaten Claimants' right ultimately to return to Block 15, (2) degrade the integrity of the Block itself, and (3) unnecessarily cause Claimants prospectively to incur additional but avoidable damages" (see Claimants' Application at paragraph 32). Thus, in essence, the Claimants' Application is intended to preserve their alleged right to specific performance of the Participation Contract.

23. More particularly, regarding the alleged threats to their said right ultimately to resume Block 15 operations, the Claimants point to the possibility "that Ecuador will not choose Petroecuador or another state agency to operate Block 15 and instead will hand it over to a third-party operator" (see Claimants' Application at paragraph 50). They state (*ibid.* at paragraph 54):

> "54. At present, Claimants do not know what course Ecuador intends to take with respect to the future operator of Block 15. However, it is clear that the alienation of the block – should Ecuador follow that path – would be highly prejudicial to Claimants' rights and would interfere with the effectiveness of a restitutionary award by this Tribunal. Claimants would have an award against Respondent, but they would then have to displace any third-party operator who was at that time occupying the Block. Doing so has uncertain prospects and

could itself take years of litigation. Such a situation should obviously be avoided to the greatest extent possible."

24. Regarding the alleged degradation of Block 15, the Claimants have taken issue with the current involvement of Petroecuador in Block 15. They quote, *inter alia*, various press reports in support of their assertion that "various problems have created a long pattern of production declines in Petroecuador-operated fields" (see Claimants' Application at paragraph 37). The Claimants maintain that "[o]nce this production capacity is reduced, it becomes practically impossible to restore production to levels that existed at the time of Ecuador's expropriation of the fields. OEPC's interests in Block 15 will, therefore, be irreparably harmed" (*ibid.* at paragraph 33).

25. Finally, regarding the alleged additional but unavoidable damages, the Claimants have maintained that contracts related to Block 15 are being undermined, namely those entered into in connection with the OCP pipeline. They aver (see Claimants' Application at paragraph 57) that "[…] OCP ship-or-pay commitments will continue until 2018. OEPC remains obligated under the ISTA to ship 42,000 bbl/day. At the current rates, OEPC therefore owes approximately $100,000 per day in tariff payments to OCP S.A. for Block 15 reserved capacity despite the fact that, due to the expropriation, it is not shipping any oil on the pipeline" (citations omitted).

26. Turning to the specific provisional measures initially sought by the Claimants in their Application, they are identified as follows (see Claimants' Reply at paragraph 53; see also Claimants' Application at paragraphs 66-93):

(1) An order directing Ecuador to ensure, and to direct Petroecuador or any other state-owned company operating Block 15 to ensure, a minimum amount of funding for Block 15, *i.e.* annually at least $350 million in capital and operating expenditures in Block 15 to

maintain and develop the existing fields. This provisional measure is said to be required in order to prevent irreversible damage to the fields and a permanent reduction in the production capacity of Block 15.

(2) An order directing Ecuador to establish with the Claimants, and to direct Petroecuador or any other state-owned company operating Block 15 to establish with the Claimants, a Joint Supervisory Board. This provisional measure is said to be required in order to ensure effective oversight and management of Block 15 and thereby prevent a permanent loss of production capacity.

(3) An order directing Ecuador to supply the Claimants, and to direct Petroecuador or any other state-owned company operating Block 15 to supply the Claimants, with monthly reports regarding the operation of Block 15. This provisional measure is requested solely in the event the Tribunal decides not to order the establishment of a Joint Supervisory Board.

(4) An order directing Ecuador to refrain from entering into or approving agreements with third parties for the operation of Block 15 pending the outcome of this arbitration. This provisional measure is said to be required in order to prevent further aggravation of the dispute, as such third-party agreements would allegedly impair the Tribunal's ability to grant effective final relief.

(5) An order directing Ecuador to take all necessary steps to ensure, and to direct Petroecuador or any other state-owned company operating Block 15 to take all necessary steps to ensure, that the oil produced from Block 15 shipped through the OCP pipeline is credited towards OEPC's ship-or-pay obligations. This provisional measure is said to be required in order to reduce an ever-increasing form of damage that the Claimants seek to recover in this arbitration and thereby prevent further aggravation of the dispute.

27. The Tribunal notes that during the first day of hearing, *i.e.* on 2 May 2007, following extensive oral submissions made by counsel and ensuing discussions amongst the parties and their representatives, the Claimants significantly amended their Application. The revised Application sought the following:

"Claimants request that the Tribunal order Respondent:

> 1. To invest, and to cause Petroecuador to invest, in accordance with the plan submitted as exhibit 15 to the witness statement of Wilson Pastor, approximately US$497.5 million in the development and operation of Block 15 and the Unified Fields during 2007, consisting of approximately US$292.3 million in CAPEX and approximately US$205.2 million in OPEX; and to invest, and to cause Petroecuador to invest, a comparable amount under a comparable plan for each year until the issuance of a final award; [hereinafter identified as the "minimum investment" request]
>
> 2. To give, and to cause Petroecuador to give, the Tribunal and Claimants advance notice of no less than sixty days before entering into any contractual arrangement with a third party for the operation of Block 15 and the Unified Fields; [hereinafter identified as the "third-party transfer notice" request]
>
> 3. To produce, and to cause Petroecuador to produce, to the Tribunal and to Claimants, monthly reports regarding the operation of Block 15 and the Unified Fields, including (i) production, by field and by reservoir, and (ii) capital and operating expenditures, detailed by category of expense, until the issuance of a final award; [hereinafter identified as the "monthly reports" request]
>
> 4. To cause Petroecuador to enter into a contractual arrangement with OEPC for the shipment of 42,000 barrels per day of crude on OEPC's unused reserved capacity on the OCP at a tariff of US$ 1.46 per barrel. [hereinafter identified as the "OCP pipeline" request]

Should the Tribunal decide not to grant Claimants the relief requested under (1), (2), and (3) above, Claimants request in the alternative that the Tribunal order Respondent to establish, and to cause Petroecuador to establish, with Claimants a joint supervisory board with the composition, mandate, and powers set forth in Claimants' Application for Provisional Measures of October 18, 2006."

28. Subsequently, at the hearing on 3 May 2007, the Claimants withdrew their alternative request for the establishment of a Joint Supervisory Board.

29. Following representations made by Ecuador's Attorney General before the Tribunal, the "minimum investment" request, *i.e.* the request for an order directing Ecuador to invest, or cause Petroecuador to invest, in Block 15 as defined above, was also withdrawn. The representations on the basis of which the Claimants withdrew this request were the following:

> "In my capacity as Procurador General del Estado, I have the authority to be able to issue opinions of a binding nature for the Public Sector, regarding the correct interpretation and scope of the existing laws and regulations.
>
> In this context, I can affirm that:
>
> a) In the Operations and Budget Plan for the development and operation of Block 15 and the unified fields, approved by the Board of Directors of Petroecuador via Resolution 17-DIR-2007, approximately $497 million are dedicated for the development and operations of Block 15 and the unified fields during the year 2007, consisting of approximately $292.3 million in CAPEX and approximately $205.2 million in OPEX.
>
> b) These provisions are binding and, in conformity with Organic Law 2006-57, carry with them a legal requirement to dedicate the budgeted funds for the corresponding activities.
>
> c) All the institutions of the State, including supervising agencies and also State-owned companies like Petroecuador, are consequently obligated by law to take the best measures within the scope of their authority to assure compliance with the obligations described above, especially considering that it is in the highest national interest that they be complied with. The Procuraduría General del Estado, as a supervising agency, will comply with its legal obligations."

30. At this point, the Tribunal was thus left to rule on the three following outstanding requests for provisional measures:

(1) the "third-party transfer notice" request (as per paragraph 2 of the revised Application);

(2) the "monthly reports" request (as per paragraph 3 of the revised Application); and

(3) the "OCP pipeline" request (as per paragraph 4 of the revised Application).

31. Subsequently, on 25 May 2007, the Claimants wrote to the Tribunal advising "of an agreement on one more of the requests for provisional measures" as follows:

> "Ecuador has advised Claimants that the documents sought in paragraph 3 of Claimants' revised request for provisional measures presented by counsel on May 2, 2007 – namely, monthly financial reports and quarterly production reports pertaining to Block 15 – are publicly accessible pursuant to the provisions of Ecuador's Transparency Law. Ecuador has given its assurance that if Claimants submit a request under this law to Mr. Wilson Pastor, General Manager of Block 15, he will promptly furnish them with the documents as the

> law requires. Based on this assurance, Claimants believe there is no need for a provisional measure requiring the production of these documents, and they withdraw paragraph 3 of their revised request."

32. In the next section of this Decision, the Tribunal will therefore review the parties' respective positions and arguments to the extent that they are relevant to the two outstanding requests of the Claimants' revised Application, namely the "third-party transfer notice" request and the "OCP pipeline" request, respectively. Naturally, it is not meant to serve as an exhaustive review of the parties' submissions in connection with the Application at issue, but rather as a summary of arguments relevant to the Tribunal's analysis and findings on the remaining items thereof.

IV. THE PARTIES' POSITIONS

A. The Claimants' Position

33. As briefly indicated earlier, it is the Claimants' position that the provisional measures they seek, be they as initially formulated or as subsequently amended, "are carefully tailored to maintain the *status quo ante* without requiring the tribunal to prejudge the merits or to afford Claimants the full relief they will seek on the merits" (see Claimants' Reply at paragraph 4).

34. More particularly, in support of their Application, the Claimants rely on "the primacy of the remedy of restitution" (see *e.g.* Claimants' Reply at paragraph 10). Citing passages from various international tribunals, the Claimants argue that international law jurisprudence recognizes that, unless restitution is impossible, it is "the preferred remedy for internationally wrongful acts by a State" (see Claimants' Reply at paragraphs 29-30).

35. According to the Claimants, "Ecuador has not shown, and has not even seriously attempted to show, that restitution is impossible as that term is used in international law" (see Claimants' Reply at paragraph 30). Characterizing the Respondent's position as being based on the erroneous proposition that an injured party has no international law right to restitution in kind, the Claimants maintain (see Claimants' Reply at paragraph 3):

> "3. Respondent's authorities provide no support for its contention. In the cases Respondent has cited, either the Claimant [*sic*] chose not to seek restitution in kind or restitution in kind was impossible. Hence, these authorities reinforce the urgent need for provisional measures to prevent restitution in kind from becoming impossible. Without such measures, the right to restitution will be eviscerated."

36. It follows that the Claimants' concern that Block 15 may be transferred to a third party is central to their contention that, without the provisional measures sought such as notification in the event of a third-party transfer, restitution will become impossible. In the words of the Claimants (see Claimants' Reply at paragraph 63):

> "63. […] Claimants here are not asking for the benefits of the Participation Contract, or for any of the oil produced from Block 15 or the substantial revenues it will generate. They are asking only for measures that will preserve the possibility of such relief in a final award."

37. Regarding the "third-party transfer notice" request, it was emphasized at the hearing that this request remains premised on the Claimants' alleged right of restitution (see Hearing Day 1 at page 119 and Hearing Day 2 at page 343):

> "We would say it's not necessary for you to rule today that they are not allowed to cede or transfer Block 15 to any other party. But, rather, we would ask you simply to order that if Ecuador changes its intention, it provide the Tribunal and us with 60 days' notice of any plan to cede or transfer Block 15 to any other party, and that would allow us to come back to you at the appropriate time and ask for the order that we have sought so that restitution would be possible.
>
> Obviously, if they do cede or transfer the block to any other party, then restitution will become almost impossible."

> "There can be little doubt that few things would be more prejudicial to our right to restitution than such a transfer because, once it took place, it would be very difficult to unscramble the egg."

38. As for their "OCP pipeline" request, the Claimants made the following additional observations (see Claimants' Reply at paragraphs 64-65):

> "64. Finally, Respondent's argument that the provisional measures requested will prejudice their right, as owner and operator, to decide how to transport the crude oil produced from Block 15 is difficult to understand. The provisional measures requested by Claimants will not 'decide' anything for Respondent. Respondent has already decided for itself that it will transport oil through the OCP pipeline. Indeed, Petroecuador has no other option: the OCP pipeline is at present the only way to transport Block 15's heavy crude from the depths of the Amazon to the Esmereldas coast. Witness statement of Gerald Ellis at ¶ 34. To that end, Petroecuador has signed contracts with other private companies with capacity on the OCP to ship its oil produced from Block 15 through that pipeline. The sole question remaining is to which of the private companies' capacity will that oil be credited. The order sought by Claimants requiring Respondent to ensure that the percentage of oil corresponding to Claimants' participation be credited to OEPC's capacity will substantially reduce an ever-increasing form of damage that Claimants will seek to recover, and it will do so *at no cost* to Petroecuador. Petroecuador is already paying other private companies to ship through the OCP. Furthermore, the order requested by Claimants will not force Respondent to breach or otherwise abrogate these contracts, because those contracts do not mandate a minimum level of shipment by Petroecuador, but simply permit Petroecuador to use and to pay for the OCP capacity of those private companies.
>
> 65. Despite Respondent's claim to the contrary, there is indeed international authority for such a measure in these circumstances. While *Distributor A v. Manufacturer B*, cited by Claimants, naturally involved different facts than those present here, the principle underlying the provisional measure ordered in that case is not fact dependent. This principle bears repeating: it is 'unreasonable to expect that a party wait for the final award' when its losses mount merely with the passage of time and when further economic harm 'should be avoided rather than remedied.' Cl. Auth. 6, *Distributor A v. Manufacturer B*, Case No. 10596, Interlocutory Award of 2000, Yearbook Commercial Arbitration, Vol. XXX 66, 72-73 (2005)." (emphasis in original)

39. At the hearing, the Claimants' final position regarding the "OCP pipeline" request was put to the Tribunal in the following terms (see Hearing Day 2 at pages 430-431):

> "[W]e would tell the panel that we would offer that we will provide as soon as possible – hopefully within a week or so – to Petroecuador a contract that would reflect the terms that we have asked for here; namely, that they would ship

> 42,000 barrels of oil at the current price that they have, because they don't have any other price from anybody else, and with a best-price offer within it, that if they could show a *bona fide* contract to ship other volumes, we would have the opportunity to accept or release those volumes. We will offer that to Ecuador, and we will report back to the Tribunal in 30 days about whether we have a deal or not. And if Mr. Reichler is serious that they are willing to enter into the best commercial deal with anybody, including Occidental, then since we are offering the best price, since we have best-price protection in this, we hope very much they will accept it. If they don't, perhaps that will say something about whether this needs to be imposed or whether this really is just commercial issues operating there."

40. The Tribunal notes that the Claimants did seek Ecuador's voluntary acceptance of an OCP pipeline arrangement with Petroecuador by preparing and submitting to Ecuador a draft agreement to that effect. On 19 July 2007, Ecuador informed the Tribunal that it considered the Claimants' draft agreement "inadmissible", citing legal, economic and commercial reasons. By letter dated 26 July 2007, the Claimants accordingly renewed their "OCP pipeline" request, in addition to their "third party notice" request.

41. Finally, in connection with Petroecuador and its relationship to Ecuador, it is the Claimants' position that the provisional measures they seek are appropriately directed against Ecuador given that Petroecudor is one of its state instrumentalities. They submit (see Claimants' Reply at paragraph 68):

> "68. In sum, it is clear that Petroecuador is an agent of Ecuador. Petroecuador implements Ecuador's hydrocarbons policy (Cl. Auth. 49, Hydrocarbons Law Art. 6) and carries out functions – such as entering into hydrocarbons contracts on behalf of the state – which are necessary for the administration of natural resources; these functions and resources pertain and belong to the state. RA ¶¶ 32-33. Because it has been created by law to exercise the rights of the state, Petroecuador is an 'institution of the state' under the Ecuadorian Constitution. Cl. Auth. 50, Ecuadorian Constitution, Art. 118(5). In his witness statement submitted with Respondent's Answer ('Álvarez WS'), Petroecuador General Counsel, Dr. Raúl Moscoso Álvarez acknowledges that the Hydrocarbons Act provides 'that the State is to explore and exploit deposits directly through Petroecuador' and that Petroecuador 'is a State Enterprise created by law to exercise a public power.' Alvarez WS at 1. The fact that it has been organized in a corporate form with 'its own legal personality,' Alvarez WS at 1, does not make Petroecuador any less of an instrumentality of the Respondent." (footnotes omitted)

B. The Respondent's Position

42. The Respondent rejects the Claimants' assertion regarding the alleged availability of restitution in the circumstances of this case. The Respondent maintains (see Respondent's Counter-Memorial at paragraphs 3-5):

> "3. The fatal flaw in this argument is that the 'right' that Claimants seek to preserve by means of their requested provisional measures is nonexistent. There is no right to specific performance of a natural resources concession agreement that has been terminated or cancelled by a sovereign State; the lawful remedy in the event of wrongful or illegal action by the State is payment of monetary compensation. Accordingly, Claimant [*sic*] has no right to obtain 'restitution' in the form of an order reinstating the Participation Contract and returning the Block 15 oil field to Claimants. Claimants' remedy, if they prevail at the merits phase of these proceedings, is monetary compensation. Since the 'right' on which Claimants' provisional measures request is based does not exist, it follows that the request must be denied.
>
> 4. In their Request for Arbitration, Claimants sought by way of relief either specific performance of the Participation Contract or, in the alternative, monetary compensation to make them 'whole' for the economic injury they purportedly suffered as a result of what they alleged to be Respondent's 'expropriation' of their contract rights. Their Request for Arbitration is therefore an admission that they can, in fact, be made whole by monetary compensation. This in itself is a reason to deny them the specific performance they seek by means of the Request for Provisional Measures, since it is axiomatic that specific performance is unavailable when monetary compensation will make whole the injured party.
>
> 5. It is also axiomatic that when monetary compensation is sufficient to redress an injury there is no irreparable harm. This is still another reason why Claimants' Request for Provisional Measures must be denied. To warrant provisional measures the requesting party must show that the requested measures are necessary to preserve a right in dispute that is threatened with imminent and irreparable harm. Not only is there no right to specific performance of the Participation Contract, there is also no irreparable harm since any injury Claimants might have suffered as a result of Respondent's termination of the Contract is fully compensable by a monetary award."

43. The Respondent further emphasizes that the Claimants have the burden of proof of establishing "that there is a right to be preserved and that provisional measures are urgently needed to prevent irreparable prejudice to that right" and that they have failed to do so (see Respondent's Counter-Memorial at paragraph 4). To the extent that the Claimants are in fact seeking to enforce a right to obtain specific performance of the

Participation Contract, the Respondent reiterates that no such right exists. In the words of the Respondent (see Respondent's Counter-Memorial at paragraph 11):

> "11. […] The entire Request for Provisional Measures is premised on the existence of Claimants' purported right to a restoration of the Participation Contract and a return of Block 15. The specific measures Claimants seek are all for the purpose of preserving that 'right' and none other. It follows then that if this 'right of restitution' does not exist – that is, if Claimants do not have a right to specific performance of the Participation Contract – then the provisional measures request must be denied. In that case, they will have failed to show that any rights 'which are the object of the dispute' are threatened with irreparable harm and urgently in need of protection. In fact, Claimants have no right to specific performance of the Participation Contract, or otherwise to the restoration of the Contract or the return of Block 15. They have failed to advance any solid legal basis for the existence of such a right because there is none." (footnote omitted)

44. Reviewing international case law on this point, the Respondent stresses that the Claimants' Application erroneously conflates the right of restitution and specific performance (see *e.g.* Respondent's Rejoinder at paragraph 16). It is the Respondent's position that "[s]pecific performance is but one form of restitution" (*ibid.*), monetary compensation being another (see Respondent's Rejoinder at paragraph 6):

> "6. The restitution, if any, to which Claimants ultimately may be entitled, is in the form of monetary compensation in an amount sufficient to 'make them whole.' By itself, the availability of monetary compensation as a form of restitution defeats their provisional measures request."

45. The Respondent emphatically states that "not a single arbitral tribunal has ordered a sovereign State to unwind an expropriation or to specifically perform an investment agreement" (see Respondent's Rejoinder at paragraph 31). The reason for the absence of such a ruling is, in the Respondent's view, simple (see Respondent's Rejoinder at paragraph 27):

> "[A] sovereign State may not be ordered against its will to restore to a private investor an investment or concession that it has terminated or expropriated. In

> such circumstances, the State can only be required to pay monetary compensation."

46. Moreover, the Respondent argues that the Claimants' Application seeks to place the Claimants in the position they were in prior to the termination of the Participation Contract. This implies securing rights via judicial processes in Ecuador which the Claimants did not do (see Respondent's Counter-Memorial at paragraphs 44-45):

> "44. In this case, the termination decree ending the Participation Contract was issued by the Ministry of Energy and Mines on May 15th, 2006, and was notarized on the same date, such that the right to file a judicial complaint [*recurso de plena jurisdicción*], requesting that the court declare the act illegal and remedy the rights violated has expired. The only remaining possibility is for Claimants to raise a claim of nullity before the Administrative Appeals Chamber in order to qualify a tribunal – in a separate proceeding, if Claimants succeed in the original case – to hear any actions related to the performance of the Contract.
>
> 45. Consequently, under Ecuadorian law, Claimants cannot themselves create any legal right to be placed in the position they held prior to the termination decree, not even through a judgment by the Ecuadorian courts that the decree was illegal. In order to create such a right, Claimants must have successfully initiated and completed two judicial processes and, as stated by the tribunal in *Maffezini v. Kingdom of Spain*, the presumption of success or failure on the merits is pure speculation and does not provide a sufficient basis to support an actual, existing right." (footnote omitted)

47. This argument regarding illegality as a prerequisite for the provisional relief sought by the Claimants is further particularized as follows (see Respondent's Rejoinder at paragraph 13):

> "13. Claimants' purported 'right of restitution,' which they interpret as a right to specific performance, is at best highly debatable. But if this right exists (which Ecuador denies, as shown below), there must be a prior showing of illegality on Ecuador's part. Absent illegality, there is no right to restitution, let alone specific performance. Since illegality has not been, and cannot be demonstrated or presumed at this stage of the proceedings, Claimants cannot show that they possess any 'right' that urgently requires protection from irreparable harm, let alone the form of 'protection' that they have requested."

48. It follows, according to the Respondent, that restitution cannot be deemed to be a "right" held by the Claimants in the circumstances and that there is, hence, no irreparable

prejudice or urgent need to protect it, as required by Article 47 of the ICSID Convention and Arbitration Rule 39 (see Respondent's Counter-Memorial at paragraph 47). In this regard, the Respondent adds that the Claimants have implicitly acknowledged that the rights at issue in this arbitration are purely economical (*ibid.*). This "admission" on the part of the Claimants is said to be determinative given the "well established principle of international law that losses that may be compensated in the final award do not warrant protection through provisional measures" (see Respondent's Counter-Memorial at paragraph 48). Interpreting Article 47 of the ICSID Convention and Arbitration Rule 39, the Respondent states (see Respondent's Counter-Memorial at paragraph 53):

> "53. […] Although neither Article 47 of the Convention nor Arbitration Rule 39 uses the words 'urgency' or 'imminent danger,' the ICSID cases uniformly employ these standards – as do the cases decided by the International Court of Justice under Article 41 of the ICJ Statute, upon which Article 47 of the Convention was based – and award provisional measures only in circumstances where there is an urgent need to protect rights that are in imminent danger of irreparable harm such that the affected party cannot await the final resolution of the case on the merits." (footnote omitted)

49. The Respondent expanded this argument during the hearing and referred to the "seven principles" regarding the appropriateness of provisional measures in international law:

(i) there must be an urgent necessity to prevent irreparable prejudice to the rights which are the subject of the dispute;

(ii) the threatened harm must be imminent and more than a mere possibility;

(iii) the irreparable injury must not be capable of being remedied by the payment of monetary compensation;

(iv) the provisional measures must be forward-looking;

(v) the provisional measures must be ordered to preserve the rights at issue, not to give the requesting party the benefit or enjoyment of those rights before the final award;

(vi) the provisional measures may not be awarded to protect rights in dispute of the requesting party if those same measures would cause irreparable prejudice to the rights in dispute of the other party; and

(vii) the burden of proof falls upon the party requesting the measures.

50. This list, the Tribunal notes, does not include the principle of "aggravation of the dispute". The Respondent objects to the Claimants' allegations of an "aggravation of the dispute" in connection with the "third-party transfer notice" and "OCP pipeline" requests. The Respondent argues as follows: (see Respondent's Counter-Memorial at paragraphs 91 and 95):

> "91. Moreover, there are no cases in ICSID or any other tribunal in which the principle of aggravation of the dispute has been applied to grant anything remotely close to the kind of extraordinary measures Claimants seek, which are tantamount to specific performance of the Contract. The principle of avoiding aggravation of a dispute was developed – and has been uniformly applied – in the case law of ICSID and the International Court of Justice (including in all of the cases on which Claimants rely) *only* to address conduct by either or both parties after the arbitration has commenced that threatens the peace between them while a case is ongoing, or to prevent a party from resorting to its national courts and, thereby, prejudicing the other party's ability to have the dispute determined by the international forum provided for in the contract or treaty at issue. Fundamentally, it is a principle of orderly conduct of an international arbitration to prevent the parties from engaging in conduct that would hinder the arbitration itself.
>
> […]
>
> 95. Respondent is not engaging in any of the types of conduct that provisional measures against aggravation of the dispute are intended to address. It is doing nothing to provoke Claimants or make it more difficult for the Tribunal to resolve this dispute, and it has not made any attempt to have the dispute determined by its own courts instead of by this Tribunal. Therefore, there is no basis for provisional measures to prevent Respondent from

> 'aggravating the dispute' because there is no act by, or contemplated by, Respondent that constitutes aggravation of this dispute." (emphasis in original)

51. At the hearing, referring to the above-listed "seven principles", the Respondent summarized its objection to the "third-party transfer notice" request as follows (see Hearing Day 2 at pages 388-389):

> "[…] The rights in dispute have to be protected for both parties. But everyone agrees – it is uncontroverted now that there is no effort, there is no plan, there is no intention, there is no indication of a likelihood of change in intention regarding the nontransfer of Block 15. There is no evidence of imminent harm, even assuming that the transfer would be harm, again it might make more difficult a right which they claim, but which we say they don't have in any event, which is restitution in kind, but we will come to a little later. But even if they had this right, again, what is the evidentiary basis here? We agree, no effort, no plan, no intention, no indication of any change in intention now or at any time in the future.
>
> Mr. Rivkin's argument boils down to this, he used the words, just imagine, just imagine if President Chavez – living in Washington, we know why his name is invoked from time to time, but if President Chavez appeared and made a deal with President Correa, well, let's take that at face value. Just imagine is exactly what the Tribunal cannot do on a Request for Provisional Measures. The Tribunal cannot just imagine a harm that might theoretically happen. The Tribunal has to have some evidentiary basis for concluding an imminent, proximate likelihood – not certainty – likelihood of harm. Not a mere possibility.
>
> Now, the cases are very clear on this. I read from them. I not only cited, I quoted them in my remarks. They are in the transcript, and obviously you are free to confirm this, but there is a long line of authority before the court now on what are the standards for provisional measures. And mere possibility, imagined harm does not authorize the court, this Tribunal, or any other to issue a provisional measure."

52. As for the "OCP pipeline" request, the Respondent stated as follows: (see Respondent's Counter-Memorial at paragraph 107):

> "107. In addition, the difficulties Claimants say they are experiencing as a result of their inability to meet the daily crude oil transport quota through the private OCP pipeline (of which Claimants claim to be shareholders), have nothing to do with the Participation Agreement or the rights in dispute, nor would these difficulties provoke damages incapable of redress through monetary damages. Accordingly, they cannot serve as the basis for the adoption of provisional measures, as has been demonstrated above. Moreover, Occidental del Ecuador Inc. received, as did the other shareholders of the OCP, an invitation

from Petroecuador to negotiate the transport of crude from Block 15 through the pipeline on terms favorable to both parties, using the excess credits in each party's quota. As the Executive President of Petroecuador has testified, that possibility remains open, provided the two parties can agree on mutually agreeable terms." (footnote omitted)

53. At the hearing, the Respondent maintained its objection in principle to the "OCP pipeline" request. Its counsel said: (see Hearing Day 1 at pages 246-249):

> "So, where does this take us? If the court were to grant Claimants' request and order Ecuador to designate that its oil must be credited against the pipeline capacity of OEPC, Petroecuador would be stripped of its right to designate and negotiate a lower price for the shipment of its oil, and would suffer economic losses in the form of higher tariff payments per barrel of oil that could amount to many millions of dollars.
>
> The requested provisional measure would not only prejudice Petroecuador economically in this fashion, but it would also prejudice and cause economic losses to the four other pipeline shareholders not parties to these proceedings not here to defend themselves, whose current allocation of the shipped oil would be either be removed or at least reduced to accommodate OEPC's receipt of an allocation of 42,000 barrels a day.
>
> […]
>
> Now, the indication of this requested provisional measure would necessarily constitute, however unintentionally on the part of the Tribunal, it would necessarily constitute a prejudgment on the merits of the case. It's clear that OEPC could only be entitled to compensation, monetary compensation, of this nature from Ecuador for its payments to the OCP pipeline if it were to prevail on the merits of the case. Yet, in effect, the provisional measure requested by Claimants would award them this compensation now. Even worse, it would penalize Ecuador by obligating Petroecuador to pay a higher tariff on the oil it ships through the pipeline.
>
> Absent an expropriation or breach of contract, there could be no justification whatsoever for penalizing Ecuador or Petroecuador in this manner. Accordingly, by imposing such a penalty at this time, the Tribunal would effectively be labeling or prejudging them as guilty parties. This is strictly inappropriate on provisional measures.
>
> Now, Ecuador is not averse to designating that Block 15's oil should be credited against OEPC's pipeline capacity in the right circumstances, meaning that an offer of its pipeline capacity by OEPC that provides the best terms, including the lowest tariff, would be well-received by Petroecuador. That is their position. This is the business transaction.
>
> […]
>
> In the end, this is still a situation where, as Claimants themselves admit, the only harm suffered by them is economic. They can be made whole by the payment of

> monetary compensation, and therefore, their injury is not irreparable. There is nothing about this case that justifies a departure from the well-established principle that provisional measures should not be indicated when the harm or threatened harm is not irreparable."

54. Finally, in connection with the Respondent's dominion over Petroecuador, the Respondent concludes as follows (see Respondent's Counter-Memorial at paragraph 111):

> "111. In any event, Respondent cannot order Petroecuador to put into practice measures such as those requested by Claimants without infringing its internal law. The provisions of the Legal-Administrative Statute for Executive Function [*Estatuto Jurídico Administrativo de la Función Ejecutiva*], which Claimants invoke in paragraph 61 of the Request for Provisional Measures, do not support their conclusion, because those provisions exclusively concern the formulation of policies and the orientation of Petroecuador's plans and programs, not decisions on concrete situations, and though the Petroecuador Board members are Executive Branch officials and have been appointed by the President of the Republic, they are personally responsible and liable for their performance, and as such, are responsible for their own acts."

V. THE TRIBUNAL'S ANALYSIS

A. Authority to grant provisional measures and scope thereof

55. Whilst the Tribunal need not definitely satisfy itself that it has jurisdiction in respect of the merits of the case at issue for purposes of ruling upon the requested provisional measures, it will not order such measures unless there is, *prima facie*, a basis upon which the Tribunal's jurisdiction might be established. In their Request for Arbitration, the Claimants invoke two such bases of jurisdiction: they state first that "the parties consented to the submission of the dispute to the jurisdiction of the Centre on May 17, 2006, pursuant to Article VI(3) of the Treaty" (see Claimants' Request for Arbitration at page 5); alternatively, the Claimants aver that they and the Respondent "consented to the submission of the dispute to the jurisdiction of the Centre on May 21, 1999, pursuant to the Participation Contract". They refer to clauses 20.2.1 and 20.3 thereof (see

Claimants' Request for Arbitration at page 6).[3] *Prima facie* bases of jurisdiction, therefore, exist in the present case.

56. The authority of the Tribunal to recommend provisional measures is governed by Article 47 of the ICSID Convention, which provides:

"**Article 47**

> Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party."

57. Provisional measures are also addressed at ICSID Arbitration Rule 39:

"**Rule 39**
Provisional Measures

> (1) At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.
>
> (2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).
>
> (3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.
>
> (4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.
>
> (5) If a party makes a request pursuant to paragraph (1) before the constitution of the Tribunal, the Secretary-General shall, on the application of either party, fix time limits for the parties to present observations on the request, so that the request and observations may be considered by the Tribunal promptly upon its constitution.

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[3] It is noted, however, that the Claimants' position was subsequently modified as they state in their Reply that "[c]lause 20.3 of the Participation Contract is not the basis for the Tribunal's jurisdiction. As explained above, the Tribunal derives its jurisdiction exclusively from Article VI of the Treaty" (see Claimants' Reply at paragraph 36).

> (6) Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to or after the institution of the proceeding, for the preservation of their respective rights and interests."

58. The Tribunal wishes to make clear for the avoidance of doubt that, although Article 47 of the ICSID Convention uses the word "recommend", the Tribunal is, in fact, empowered to order provisional measures. This has been recognized by numerous international tribunals, among them the ICSID tribunal in the *Tokios Tokelés* case. The tribunal stated:

> "It is to be recalled that, according to a well-established principle laid down by the jurisprudence of the ICSID tribunals, provisional measures 'recommended' by an ICSID tribunal are legally compulsory; they are in effect 'ordered' by the tribunal, and the parties are under a legal obligation to comply with them."[4]

59. It is also well established that provisional measures should only be granted in situations of necessity and urgency in order to protect rights that could, absent such measures, be definitely lost. It is not contested that provisional measures are extraordinary measures which should not be recommended lightly. In other words, the circumstances under which provisional measures are required under Article 47 of the ICSID Convention are those in which the measures are necessary to preserve a party's rights and where the need is urgent in order to avoid irreparable harm. The jurisprudence of the International Court of Justice dealing with provisional measures is well established: a provisional measure is necessary where the actions of a party "are capable of causing or of threatening irreparable prejudice to the rights invoked".[5] A measure is

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[4] *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Procedural Order No. 1 dated 1 July 2003 at paragraph 4.

[5] *Aegean Sea Continental Shelf Case (Greece v. Turkey)*, Request for the Indication of Interim Measures of Protection, Order dated 11 September 1976, Separate Opinion of President Jiménez de Aréchaga, 1976 *I.C.J. Rep.* 3 at page 11.

urgent where "action prejudicial to the rights of either party is likely to be taken before such final decision is given".[6]

60. The Tribunal also emphasizes that the purpose of provisional measures is to guarantee the protection of rights whose existence might be jeopardized in the absence of such measures. The ICSID tribunal in the *Maffezini* case elaborated on the meaning of an "existing right":

> "12. Rule 39(1) specifies that a party may request
>
> '… provisional measures for the preservation of its rights …'
>
> 13. The use of the present tense implies that such rights must exist at the time of the request, must nor be hypothetical, nor are ones to be created in the future.
>
> 14. An example of an existing right would be an interest in a piece of property, the ownership of which is in dispute. A provisional measure could be ordered to require that the property not be sold or alienated before the final award of the arbitral tribunal. Such an order would preserve the *status quo* of the property, thus preserving the rights of the party in the property."[7]

61. In other words, in order for an international tribunal to grant provisional measures, there must exist both a right to be preserved and circumstances of necessity and urgency to avoid irreparable harm. The Tribunal will thus examine, first, the alleged existence of rights of the Claimants deserving of protection and, second, the alleged existence of a situation of necessity and urgency relative to these rights.

62. The rights to be preserved in the present case, according to the Claimants, are twofold: firstly, their right to specific performance, in other words their "exclusive right to carry out exploration and exploitation activities on Block 15" (see Claimants' Request

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[6] *Case Concerning Passage Through the Great Belt (Finland v. Denmark)*, Request for the Indication of Provisional Measures, Order dated 29 July 1991, 1991 *I.C.J. Rep.* 12 at page 17.

[7] *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2 dated 28 October 1999 at paragraphs 12-14.

for Arbitration at paragraph 77), a right which their "third-party transfer notice" request is designed to protect; secondly, their right to "prevent further aggravation of the dispute" (see Claimants' Application at paragraph 84), a right which their "OPC pipeline" request seeks to protect.

B. Clarification on the "rights" that can be protected by way of provisional measures

63. As a further preliminary observation, the Tribunal wishes to make clear that although a right may not yet have been recognized by the Tribunal, such a right may nonetheless be deserving of protection by way of provisional measures. The Tribunal therefore does not agree with the Respondent's contention that "the presumption of success or failure on the merits is pure speculation and does not provide a sufficient basis to support an actual existing right" (see Respondent's Counter-Memorial at paragraph 45).[8] Rather, the Claimants at this stage "need only show that they allege the kind of claims that – if ultimately proven – would entitle Claimants to substantial relief" (see Claimants' Application at paragraph 15). The Respondent's position would have far reaching consequences. It would mean, for example, that a tribunal could never order protection by way of provisional measures in connection with a right whose existence and alleged violation are precisely the subject-matter of the arbitration.

64. At this stage, the Tribunal reiterates that the right to be preserved only has to be asserted as a theoretically existing right, as opposed to proven to exist in fact. The Tribunal, at the provisional measures stage, will only deal with the nature of the right

[8] The Respondent cites, in this regard, *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2 dated 28 October 1999: "Expectations of success or failure in an arbitration or judicial case are mere conjectures" (at paragraph 20).

claimed, not with its existence or the merits of the allegations of its violation. This approach was adopted by the ICSID tribunal in *Víctor Pey Casado v. Chile* where, in its long and thoughtful decision on a request for provisional measures, it stated:

> "For its part, the Tribunal can neither prejudge nor even, to put it correctly, 'assume in an anticipatory fashion'. […] It must therefore reason, at this preliminary stage of the arbitration process, on the basis not of 'assumptions' but of *hypotheses*, in particular that by which it may come to recognise its own jurisdiction on the substance of the case, and in such a case, the hypothesis whereby the rights that the decision may recognise for one or the other of the parties in question could be placed in danger or compromised by the *absence* of provisional measures."[9] (emphasis in original)

65. What is meant by a theoretically existing right? Clearly, the facts must show an actual right or legally protected interest, by opposition to a simple interest which does not entail legal protection. This right or legally protected interest must also potentially form part of the Claimants' individual rights and obligations. Thus, the Tribunal must first determine whether or not the Claimants can theoretically invoke the rights whose protection they now seek. As was seen earlier, those rights are, first, their alleged right to specific performance of their Block 15 contracts and, second, their alleged right to the non aggravation of the dispute.

C. The alleged right to specific performance

66. The Tribunal will first consider whether "the exclusive right to carry out exploration and exploitation activities on Block 15" as claimed by the Claimants theoretically exists. The Tribunal recalls that the Claimants consider that they have a right of restitution in the form of reinstatement of their acquired rights derived from the

[9] ICSID Case No. ARB/98/2, Decision dated 25 September 2001 at paragraph 46.

Participation Contract and the Operating Agreements. In other words, the Claimants are seeking to be restored in their oil concession.

67. The totality of the provisional measures initially requested by the Claimants were predicated on the assumption that the Claimants possess a right to specific performance of their Block 15 contracts, given that the requested provisional measures were all intended to protect such a right. It is still on the basis of this alleged right to specific performance that the Claimants submit their "third-party transfer notice" request, which is one of their two remaining requests.

68. At this juncture, the Tribunal further notes that while the Claimants have repeatedly expressed their fear that the Ecuadorian Government may enter into a contract for the exploration and exploitation of Block 15 with another company, the provisional relief they seek in this regard has evolved over time. At first, the Claimants asked the Tribunal to "enjoin Respondents from entering into a contract with another party" (see Claimants' Request for Arbitration at paragraph 77). In their Application, the Claimants requested an order from the Tribunal directing the Respondent "to refrain from entering into or approving any agreements with third parties for the operation of Block 15 pending the outcome of this arbitration" (see Claimants' Application at paragraph 92). In their Reply, they were still asking for "[a]n order requiring Respondent to refrain from entering into or approving agreements with third parties for the operation of Block 15" (see Claimants' Reply at paragraph 53). It is only during the hearing that this requested measure was modified and became a request that the Tribunal order the Respondent to give the Tribunal and the Claimants advance notice of no less than sixty days before entering into any contractual arrangement with a third party for the operation of Block

15.[10] But regardless of its evolution, the Claimants' Application proceeds on the basis that a right to specific performance exists. The Tribunal must therefore determine whether in this respect the Application is well founded. In other words, have the Claimants established that they have a strongly arguable right to the specific performance which they seek.

1. Linguistic clarification

69. At the outset, the Tribunal feels compelled to clarify an issue of vocabulary. To date, in their pleadings and during the hearing, the parties have played and interplayed with, and sometimes confused, the words and expressions "restitution", "*restitutio in integrum*", "restitution in kind" and "specific performance".

70. The Respondent has argued that the "Claimants conflate a 'right to restitution' with a right of specific performance. They are not the same. Specific performance is but one form of restitution" (see Respondent's Rejoinder at paragraph 16). Some paragraphs later in its Rejoinder, the Respondent commented that "[i]n *LIAMCO*, the investor's principal claim was for restitution in kind ('restitutio in integrum') […]. The arbitrator rejected LIAMCO's claimed right to specific performance of the concession agreement […]" (see Respondent's Rejoinder at paragraph 19). Based on these two passages from the Respondent's submissions, the Respondent appears to argue that restitution is the relief to be obtained, either through, on the one hand, an action indifferently called restitution in kind, "*restitutio in integrum*" or specific performance or, on the other hand, compensation.

[10] This request was reiterated by the Claimants in their letter to the Tribunal of 26 July 2007.

71. However, elsewhere in its submissions, the Respondent assimilates the relief of restitution with "*restitutio in integrum*" and, indeed, the Respondent's reliance on the definition of "*restitutio in integrum*", as given by Lauterpacht implies this assimilation. Lauterpacht's definition reads as follows: "That principle means that the injured person is placed in the position he occupied before the occurrence of the injurious act or omission; it means that […] not only the *damnum emergens* but also the *lucrum cessans* is taken into consideration"[11] (see Respondent's Rejoinder at paragraph 24). Here, the relief sought is *restitutio in integrum* and it can be obtained by compensation encompassing *damnum emergens* and *lucrum cessans*. It appears that *restitutio in integrum* is assimilated here to what was first called restitution.

72. In the Tribunal's view, it is not very helpful to use the specific expression of "restitution", whether it is distinguished from *restitutio in integrum* or assimilated to it, given the confusion it creates. However, this is not the end of the Tribunal's reasoning, as the expression "*restitutio in integrum*" does not have an unequivocal utilisation in the international sphere: indeed, the two different meanings used by the Respondent, as underscored above, are but one example of the dual use of this expression in international doctrine and jurisprudence. *Restitutio in integrum* is in fact sometimes used as meaning full reparation, and sometimes used as meaning restitution in kind.

73. Accordingly, the Tribunal prefers to proceed on the basis of the principle that a party injured by an illegal act must be made whole, and that the relief is full reparation, rather than "restitution", or "*restitutio in integrum*", even if full reparation is sometimes labelled *restitutio in integrum*. Full reparation can be achieved through restitution in

[11] *Private Law Sources and Analogies of International Law* (1927) at page 147.

kind – synonymous with specific performance – but if restitution in kind is not possible, then it can be achieved through monetary compensation corresponding to the value which restitution in kind would carry. Although it is the Tribunal's view that the expression "*restitutio in integrum*" should, strictly speaking, be reserved to making an injured party whole, and that the expressions "restitution in kind" and "specific performance" should be used solely to designate one of the modalities of reparation (compensation being the other), this is not the manner in which these expressions are uniformly used, and this is a source of difficulty. As will be seen later, the Claimants' position rests precisely on a confusion between *restitutio in integrum*, which is an obligation of result – to which they could indeed be entitled, and restitution in kind, which is an obligation of means – to which they are not entitled.

74. In conclusion, since *restitutio in integrum* is used sometimes synonymously with full reparation and sometimes – and in fact more frequently – with restitution in kind,[12] the Tribunal, in the circumstances, will use the expression "specific performance" in relation to the Claimants' request for the reinstatement of their acquired rights in Block 15, unless of course a reference is made to the submissions of the parties or international decisions using the expression "*restitutio in integrum*" in either one of the two possible meanings.

[12] This is, indeed, the most common approach. For example, in the ICSID case of *Víctor Pey Casado v. Chile*, *supra*, the tribunal addressed the consequence of a finding of an illegal act committed by Chile and stated that it "could only be either to return the shares sought to their legitimate owners (that is to say restitution in kind) or, in the case of impossibility of *restitutio in integrum*, the obligation to compensate" (at paragraph 63). In other words, in this sentence there is an assimilation between restitution (of the actions), *restitutio in integrum*, and restitution in kind (*restitution en nature*).

2. The Claimants have not established, at this stage, a strongly arguable right to specific performance

75. The Claimants have not contended that specific performance is the unique, absolute and compulsory remedy in international law where there has been an illegal act causing damages. In fact, they recognize that specific performance is merely the "preferred remedy" (see *e.g.* Claimants' Reply at paragraph 10, paragraph 12 and paragraphs 29-30), or the "primary remedy" (see *e.g.* Claimants' Reply at paragraph 14), or the "normal remedy" (see *e.g.* Claimants' Reply at paragraph 13) and that it can only be granted where possible. Specific performance is, of course, a conditional right, as it is precisely conditioned on the possibility of performance, and consequently hindered by its impossibility. Restitution in kind is never guaranteed to an injured claimant. Whether restitution in kind is possible or impossible must necessarily and logically be ascertained when a tribunal is seized of the matter. At that point, it is not disputed that for purposes of making an injured claimant whole, specific performance should be granted to it, unless impossible or disproportionate when compared to compensation. In other words, in the event of injury suffered as a result of an illegal act, the injured claimant has a right to specific performance unless specific performance is impossible. It does not mean that the injured claimant has a right to obtain specific performance from a tribunal. Yet, this is precisely what the Claimants are seeking, as noted for example in their Request for Arbitration (see Claimants' Request for Arbitration at paragraph 76):

> "Unless Respondents are immediately ordered to cease or refrain from such actions and to return OEPC to its rightful operation and exploitation of Block 15, they will render the consequences of Respondents' breaches irreversible and the relief of *restitutio in integrum* sought by Claimants in this arbitration impossible." (emphasis added)

76. Therefore, what the Tribunal must ascertain is whether the specific performance requested by the Claimants is possible or impossible in the circumstances of this case.

77. If property has been destroyed, for example, it is quite clear that restitution in kind is impossible. The issue becomes more complicated where the alleged illegal act has put an end to a legal situation, such as a license or a contract. When can it be said that restitution in kind, *i.e.* specific performance, of rights stemming from a legal situation existing before the alleged illegal act was committed is impossible?

78. The Claimants consider that specific performance is not impossible in cases such as the one at issue where the claim is based on termination of a natural resources concession by a State. They assert that "restitution in kind is a valid international law remedy" to recover a concession, license or other property unlawfully expropriated by the State (see Claimants' Reply at paragraph 24). Yet, the Tribunal is not aware of any case where an ICSID tribunal has granted the kind of specific performance against a State that the Claimants seek in the present arbitration. However, and of course, this is not a sufficient reason to refuse such remedy. As stated by the ICSID tribunal in the *Maffezini* case, "the lack of precedent is not necessarily determinative of our competence to order provisional measures in a case where such measures fall within the purview of the Arbitration Rules and are required under the circumstances".[13] In its Rejoinder, the Respondent says that "Claimants are asking the Tribunal to make international legal history" (see Respondent's Rejoinder at paragraph 1). Naturally, this Tribunal would not shy away from making legal history if it reached a conclusion that was legally well

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[13] *Maffezini v. Spain*, *supra* at paragraph 5. See also *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/08, Procedural Order No. 3 dated 18 January 2005, where the ICSID tribunal stated that "Respondent is […] incorrect when it argues that a request for provisional measures must be supported by precedent in ICSID jurisprudence" (at paragraph 11).

founded. But, in the Tribunal's view, the conclusions sought by the Claimants, in the present case, are not legally well founded.

79. It is well established that where a State has, in the exercise of its sovereign powers, put an end to a contract or a license, or any other foreign investor's entitlement, specific performance must be deemed legally impossible. The Tribunal recognizes that one international arbitrator in the *Texaco v. Libya* case granted such specific performance – under the name of *restitutio in integrum* – in the context of a nationalization, but that case is both unique and fact specific. Indeed, the arbitrator in that case insisted on the fact that specific performance could not be considered impossible because the respondent State had not presented itself before the tribunal in order to provide information regarding the impossibility of specific performance:

> "[T]he Tribunal does not lose sight of the consideration that the solution in principle which is constituted by restitutio in integrum should be disregarded when there is absolute impossibility of envisaging specific performance, or when an irreversible situation has been created. This does not seem, at least until further information is available, to be the case here […]. […] The Tribunal must note that only the defendant could have been in a position to bring forward information tending to establish that there was an absolute impossibility, beyond its control, that eliminated the possibility of restoring things to the previous state, and the Tribunal can only regret, once again, the default in which the defendant seems to have thought it necessary to take shelter."[14]

80. In two other Libyan cases, *restitutio in integrum* was also used as meaning specific performance or restitution in kind. In both instances, this relief was not granted. The tribunals reasoned that such a remedy of specific performance was impossible in the context of a nationalization. In the case of *LIAMCO v. Libya*, the arbitrator cited V.S. Friedman's 1953 treatise entitled *Expropriation in International Law*: "[I]t is impossible

[14] *Texaco Overseas Petroleum Co. & California Asiatic Oil Co. v. Libyan Arab Republic*, 17 I.L.M. 1 (1978) at paragraph 112.

to compel a State to make restitution, this would constitute in fact an intolerable interference in the internal sovereignty of States".[15] The arbitrator concluded that LIAMCO's demands concerning the remedy of *restitutio in integrum* is "not legally founded and should be rejected".[16] In the *BP v. Libya* case, the arbitrator's analysis and conclusions were the same:

> "A rule of reason therefore dictates a result which conforms both to international law, as evidenced by State practice and the law of treaties, and to the governing principle of English and American contract law. This is that, when by the exercise of sovereign power a State has committed a fundamental breach of a concession agreement by repudiating it through a nationalization of the enterprise and its assets in a manner which implies finality, the concessionaire is not entitled to call for specific performance by the Government of the agreement and reinstatement of his contractual rights, but his sole remedy is an action for damages."[17]

81. In the more recent ICSID case of *CMS Gas Transmission v. Argentine*, while the Tribunal recognized that "[r]estitution is by far the most reliable choice to make the injured party whole as it aims at the reestablishment of the situation existing prior to the wrongful act", it concluded that "it would be utterly unrealistic for the Tribunal to order to turn back to the regulatory framework existing before the emergency measures were adopted".[18]

82. But specific performance must not only be possible in order to be granted to a claimant. Specific performance, even if possible, will nevertheless be refused if it imposes too heavy a burden on the party against whom it is directed. Article 35 of the ILC Articles on State Responsibility is worthy of mention in this regard:

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[15] *Libya American Oil Company (LIAMCO) v. Libyan Arab Republic*, 20 I.L.M. 1 (1981) at page 63. The same citation was made by the Respondent (see Respondent's Counter-Memorial at paragraph 23).
[16] *Ibid*. at page 65.
[17] *BP Exploration Company (Libya) Limited v. Libyan Arab Republic*, 52 I.L.R. 297 (1974) at page 354.
[18] *CMS Gas Transmission Company v. Argentine*, ICSID Case No. ARB/01/8, Award dated 12 May 2005 at paragraph 406.

"*Article 35*
Restitution

> A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation, which existed before the wrongful act was committed, provided and to the extent that restitution:
>
> (*a*) Is not materially impossible;
>
> (*b*) Does not involve a burden out of proportion to the benefits deriving from restitution instead of compensation."

83. This point was well exposed in the *CMS* case, where the tribunal stated the following:

> "Restitution is the standard used to reestablish the situation which existed before the wrongful act was committed, provided this is not materially impossible and does not result in a burden out of proportion as compared to compensation."[19] (citation omitted)

84. The second requirement can be summarized as follows. In order to decide whether specific performance is possible, the Tribunal must consider both the Claimants' and the Respondent's rights. To impose on a sovereign State reinstatement of a foreign investor in its concession, after a nationalization or termination of a concession license or contract by the State, would constitute a reparation disproportional to its interference with the sovereignty of the State when compared to monetary compensation.

85. Legal commentators have also expressed the conclusion that it is impossible to oblige a State to reinstate a foreign investor in a concession terminated by the State. Oscar Schachter, for example, has commented that "[a]lthough the duty to re-establish the situation that existed prior to the violation is required in principle, there may be reasons of a material and social character that make it 'impossible' or 'impracticable' for

[19] *Ibid*. at paragraph 400.

the offending State to restore the situation to its prior state".[20] The adequate remedy where an internationally illegal act has been committed is compensation deemed to be equivalent with restitution in kind. Such a solution strikes the required balance between the need to protect the foreign investor's rights and the right of the host State to claim control over its natural resources.

86. In conclusion, it is the Tribunal's view that the Claimants have not established a strongly arguable case that there exists a right to specific performance where a natural resources concession agreement has been terminated or cancelled by a sovereign State. The view of the Tribunal at this stage of the proceedings is that no such right exists. As a result, the Claimants have failed to establish that it would be appropriate for the Tribunal to grant a provisional measure such as the one sought by the Claimants pursuant to their "third-party notice" request.

3. In any case, there is no necessity nor urgency to grant the measure sought in order to avoid imminent and irreparable harm

87. An order for provisional measures will only be made where such measures are found to be necessary and urgent in order to avoid imminent and irreparable harm. The Tribunal is convinced by the evidence that even if the right to specific performance had existed, there is no imminent plan on the part of the Ecuadorian Government to hand over Block 15 and hence no risk of irreparable harm.

(a) There is no necessity or urgency

88. In their Application, the Claimants proceeded on the assumption that Ecuador was "threatening to commit Block 15 to other companies" (see Claimants' Application at

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[20] Oscar Schachter, *International Law in Theory and in Practice*, 178 *Collected Courses (Academy of International Law)* 188 (1982) at 190.

paragraph 4, as well as paragraphs 50 and following). But, as recognized by the Claimants' themselves, "[a]t present, Claimants do not know what course of action Ecuador intends to take with respect to the future operator of Block 15" (see Claimants' Application at paragraph 54). In their Application, the Claimants refer to a vague undertaking of the Government of Ecuador in this connection. They wrote (see Claimants' Application at paragraph 53):

> "However, on August 15, after announcing that a separate state-owned company would operate Block 15, the Foreign Ministry and the Indonesian Embassy in Ecuador announced that they had signed an agreement on August 2 for the Indonesian state-owned oil company, PT Pertamina, to develop operations in an unidentified petroleum area in Ecuador in cooperation with Petroecuador." (emphasis added)

89. In other words, the Claimants are seeking a provisional measure in order to prevent an action which they are not even sure is being planned. This is not the purpose of a provisional measure. Provisional measures are not meant to protect against any potential or hypothetical harm susceptible to result from uncertain actions. Rather, they are meant to protect the requesting party from imminent harm.

90. In the view of the Tribunal, the harm that the Claimants seek to be protected against is even more hypothetical today given the Ecuadorian Government's repeated assertions at the hearing that no imminent project exists to hand over Block 15 to a third company. And while it was repeatedly represented to the Tribunal during the hearing that Ecuador had no intention to cede Block 15 to another company, the Tribunal for the purposes of this decision need only quote the very clear and emphatic statement by counsel for the Ecuadorian Government: "[T]here is no plan, there is no intention, there is no indication of a likelihood of change of intention regarding the non transfer of Block 15. […] We agree, no effort, no plan, no intention, no indication of any change of

intention now or at any time in the future" (see Hearing Day 2 at page 388).[21] The burden rested on the Claimants to make out their case of urgent necessity. They have failed to do so.

91. The Tribunal therefore concludes that there is no imminent danger of harm, and not even an imminent likelihood of harm, justifying the Claimants' request for advance notice in the event the Ecuadorian Government decided to enter into a contract with a third party for the exploration and exploitation of Block 15.

(b) There is no risk of irreparable harm

92. Moreover, the Tribunal can see no irreparable harm to the rights of the Claimants even if the Respondent did enter into such a contract. Any prejudice suffered as a result of the termination of the Block 15 contracts, if subsequently found illegal by the Tribunal, can readily be compensated by a monetary award.

93. Finally, the Tribunal notes that provisional measures may not be awarded for the protection of the rights of one party where such provisional measures would cause irreparable harm to the rights of the other party, in this case, the rights of a sovereign State. Even if a right to be reinstated in the Block 15 concession were to exist, it would only exist in the event that the termination of the concession contract was found to have been illegal. Absent such a finding, the Respondent has the right to control and operate Block 15 as it deems fit, and a provisional measure obliging Ecuador to give prior notice in the event it decides to enter into a new contract would infringe on its sovereign rights to dispose freely of its lawfully held property. Such a provisional measure would

[21] See also *e.g.* the witness statement of Mr. Wilson Pástor Morris (General Manager of Block 15) dated 18 April 2007, stating as follows (at paragraph 34): "There are no plans to cede or transfer Block 15 to any other party. No consideration has ever been given to any such cession or transfer by Petroecuador, Petroproducción or the Block 15 Unit."

contravene the well-established rule that provisional measures must "preserve the respective rights of either party" (Article 47 of the ICSID Convention). This rule is acknowledged by the Claimants in their Application where they state that "[i]t is settled law that provisional measures are appropriate when 'action prejudicial to the rights of either party is likely to be taken before [a] final decision is given" (see Claimants' Application at paragraph 31, emphasis added).[22]

94. For all these reasons, the Claimants' "third-party transfer notice" request as amended, asking the Tribunal to order the Ecuadorian State "[t]o give, and to cause Petroecuador to give, the Tribunal and Claimants advance notice of no less than sixty days before entering into any contractual arrangement with a third party for the operation of Block 15 and the Unified Fields" is denied by the Tribunal.

D. The alleged right to non aggravation of the dispute

95. The "OCP pipeline" request is made by the Claimants for the purpose of preventing aggravation of the dispute. In this regard, the Tribunal recalls that the financing of the OCP pipeline was to be secured through the signing of ship-or-pay commitments by the foreign oil companies participating in the OCP project. On 30 January 2001, OEPC entered into an Initial Shipper Transportation Agreement and accepted ship-or-pay commitments relating to Block 15. These commitments required OEPC either to ship 70,000 barrels per day or to pay the tariffs for unused capacity. OEPC therefore owes approximately $100,000 per day in tariff payments to OCP S.A. for Block 15 reserved capacity despite the fact that, due to the expropriation, it is not

[22] Citing the *Case Concerning Passage Through the Great Belt*, *supra* at paragraph 23; *Tokios Tokelés v. Ukraine,* ICSID Case No. ARB/02/18, Procedural Order No. 3 dated 18 January 2005 at paragraph 8 (quoting the *Great Belt* case, *supra*), as well as *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 1 dated 31 March 2006 at paragraph 76.

shipping any oil on the pipeline. As the Claimants are no longer in a position to ship oil from Block 15, they have to fulfill their obligation to pay for unused capacity. For this reason, they request from the Tribunal an order requiring the Respondent to ensure that the percentage of oil shipped from Block 15 and corresponding to the Claimants' participation be credited to OEPC's capacity.

1. The existence in international law of a right to non aggravation of the dispute

96. It is not contested that provisional measures can be granted in order to avoid aggravation of a dispute, and international tribunals have often done so. This general principle has been invoked by the tribunal in the following terms in the ICSID case of *Víctor Pey Casado v. Chile*:

> "It relates to the general principle, frequently affirmed in international case-law, whether judicial or arbitration proceedings are in question, according to which 'each party to a case is obliged to abstain from every act or omission likely to aggravate the case or to render the execution of the judgment more difficult'."[23]

97. However, provisional measures, when granted as measures required to prevent aggravation of the dispute, have always been directed at the behavior of the parties to the dispute, whether they consisted of measures required to maintain – or restore – peace between them, or to prevent one party from initiating or pursuing parallel litigation, for example in the national courts, thereby directly undermining the international proceedings. Provisional measures are not designed to merely mitigate the final amount of damages. Indeed, if they were so intended, provisional measures would be available to a claimant in almost every case. In any situation resulting from an illegal act, the mere

[23] *Supra* at page 593.

passage of time aggravates the damages that can be ultimately granted and it is well known that this is not a sufficient basis for ordering provisional measures.

2. The requested provisional measure does not guarantee non aggravation of the dispute

98. Although there exists a general right to non aggravation of the dispute, in the instant case, the purpose of the "OCP pipeline" request, in the view of the Tribunal, is not to avoid aggravation of the dispute *per se*, but rather aggravation of the monetary damages resulting from an already existing dispute. In their Application, the Claimants accept that "[p]urely economic loss readily compensable by money damages typically does not warrant provisional measures" (see Claimants' Application at paragraph 89). The Respondent makes the same point by emphasizing that "[i]t is axiomatic that injury is not irreparable if the injured party can be made whole by money damages" (see Respondent's Rejoinder at paragraph 6; see also Respondent's Counter-Memorial at paragraph 5). It is quite clear that the Claimants, at this stage of the proceedings, are merely seeking to reduce the amount of money they will request as damages at the conclusion of these proceedings, as evidenced by their own submissions. In their Application, the Claimants explain that this measure is requested because the existing situation "unnecessarily cause[s] Claimants prospectively to incur additional but avoidable damages" (see Claimants' Application at paragraph 32) and, in their Reply, they insist on the fact that this measure is "required to reduce an ever-increasing form of damages" (see Claimants' Reply at paragraph 84). As the "OCP pipeline" request is not directed at the non aggravation of the dispute, but merely at the non increase of alleged damages, it is not a provisional measure that the Tribunal can order.

99. The harm in this case is only "more damages", and this is harm of a type which can be compensated by monetary compensation, so there is neither necessity nor urgency to grant a provisional measure to prevent such harm. In any event, the Tribunal finds it difficult to see how the non order of the "OCP pipeline" measure would render the existing dispute more difficult to resolve.

100. For all these reasons, the Tribunal therefore rejects what amounts to a claim for mitigation of damages, and more precisely denies the Claimants' "OCP pipeline" request "[t]o cause Petroecuador to enter into a contractual arrangement with OEPC for the shipment of 42,000 barrels per day of crude on OEPC's unused reserved capacity on the OCP at a tariff of US$1.46 per barrel".

VI. ORDER

101. For the reasons set forth herein, the Tribunal finds, unanimously, after having reviewed the parties' respective arguments as presented both in writing and orally, that the Claimants' case, at this juncture of the proceedings, does not warrant the grant of the measures they seek. In summary, the Claimants have failed to demonstrate that an order for provisional measures is justified in the circumstances. Accordingly, the Tribunal hereby rejects the Claimants' amended Application.

102. This Decision is without prejudice to all substantive issues in dispute and should not be considered as prejudging any issue of fact or law concerning jurisdiction or the merits of this case.

103. There shall be no order as to costs at this stage of the proceedings.

Made in Washington, D.C.

[signature]

Professor Brigitte Stern

[signature]

David A.R. Williams, Q.C.

[signature]

L. Yves Fortier, C.C., Q.C.

President

Date : August 17, 2007