IN THE MATTER OF AN ARBITRATION BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH THE TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF ECUADOR CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT SIGNED ON 27 AUGUST 1993 (THE "BIT")

- and -

UNCITRAL ARBITRATION RULES 1976

- between -

ULYSSEAS, INC.

"Claimant"

and

THE REPUBLIC OF ECUADOR

"Respondent", and together with Claimant, the "Parties"

FINAL AWARD

Tribunal:

Prof. Piero Bernardini, Presiding Arbitrator

Prof. Michael Pryles

Prof. Brigitte Stern

Registry:

Permanent Court of Arbitration

Secretary to the Tribunal:

Martin Doe

REPRESENTATIVES OF THE PARTIES

ULYSSEAS, INC.

- Mr. Mario Restrepo
- Mr. Jan Veldwijk
  (Prime Natural Resources, Inc./Ulysseas, Inc.)
- Mr. James L. Loftis
- Mr. Tim Tyler
- Mr. Mark Beeley
- Ms. Sarah Stockley
- Mr. David Rains
  (Vinson & Elkins LLP)

ECUADOR

- Dr. Diego García Carrión
  (Procurador General del Estado)
- Dr. Francisco Grijalva
  (Director de Asuntos Internacionales y Arbitraje) (until February 2012)
- Dra. Christel Gaibor
  (Directora de Asuntos Internacionales y Arbitraje) (from February 2012)
- Mr. Jay L. Alexander
- Mr. Alejandro A. Escobar
- Ms. Dorine Farah
  (Baker Botts LLP)

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TABLE OF ABBREVIATIONS

Answer	Respondent's Answer, dated 23 November 2009
BIT	Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment signed on 27 August 1993 and entered into force on 11 May 1997
CLA	Claimant's Legal Authority
Counter-Memorial	Claimant's Counter-Memorial on Respondent's Objections to Jurisdiction, dated 19 April 2010
CPHS	Claimant's Post-Hearing Submission, dated 31 January 2012
CWS-JURI-	Claimant's Witness Statement (submitted during the Jurisdictional Phase)
CWS-	Claimant's Witness Statement (submitted during the Merits Phase)
ECT	Energy Charter Treaty, 17 December 1994
Exhibit C	Claimant's Exhibit No.
Exhibit C-JURI-	Claimant's Exhibit No. (submitted during the Jurisdictional Phase)
Exhibit R	Respondent's Exhibit No.
ILC Articles	Draft Articles on the Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission in 2001, Exhibit CLA30
Interim Award	Interim Award on Jurisdiction, dated 28 September 2010
Memorial	Respondent's Memorial on Preliminary Objections to Jurisdiction, dated 19 March 2010

Notice of Arbitration	Claimant's Notice of Arbitration, dated 8 May 2009
Rejoinder (Jurisdiction)	Claimant's Statement of Rejoinder on Objections to Jurisdiction, dated 31 May 2010
Reply (Jurisdiction)	Respondent's Statement of Reply on Objections to Jurisdiction, dated 10 May 2010
RLA	Respondent's Legal Authority No.
RPHS	Respondent's Post-Hearing Submission, dated 31 January 2012
RWS-	Respondent's Witness Statement (submitted during the Merits Phase) No.
Statement of Claim	Claimant's Statement of Claim, dated 1 March 2011
Statement of Defence	Respondent's Statement of Defence, dated 1 July 2011
Statement of Rejoinder	Respondent's Statement of Rejoinder, dated 3 October 2011
Statement of Reply	Claimant's Statement of Reply, dated 15 August 2011
Transcript	Transcript of the Hearing on the Merits held in The Hague, 5-9 December 2011
Transcript (Hearing on Jurisdiction)	Transcript of the Hearing on Jurisdiction held in The Hague, 17-18 June 2010
VCLT	Vienna Convention on the Law of Treaties, 23 May 1969

CHAPTER I – PROCEDURAL HISTORY

A. JURISDICTIONAL PHASE

1. Commencement of the Arbitration Proceedings and Constitution of the Arbitral Tribunal

1. On 8 May 2009, Claimant served a Notice of Arbitration on Respondent alleging breaches of the Treaty between The United States of America and The Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment (the "BIT").

2. By letter dated 31 July 2009 and pursuant to Article 7 of the UNCITRAL Arbitration Rules (the "UNCITRAL Rules"), Claimant informed Respondent of its appointment of Professor Michael Pryles as Arbitrator.

3. By letter dated 1 October 2009 and pursuant to Article 7 of the UNCITRAL Rules, Respondent appointed Professor Brigitte Stern as Arbitrator.

4. On 30 October 2009, the Co-arbitrators agreed on the choice of Professor Piero Bernardini as Presiding Arbitrator.

5. By letter dated 3 November 2009, the Presiding Arbitrator informed the Parties that the Tribunal had been duly constituted and invited Respondent to submit its Answer to the Claimant's Notice of Arbitration by 23 November 2009.

6. On 23 November 2009, Respondent submitted its Answer to the Claimant's Notice of Arbitration in accordance with the Tribunal's direction.

7. By letter dated 25 November 2009, the Tribunal noted the Parties' agreement to retain the Permanent Court of Arbitration (the "PCA") as administrator of the proceedings and concurred with this agreement.

8. By letter dated 27 November 2009, the Tribunal sent to the Parties draft Terms of Appointment and Procedural Rules for their review and comment by 18 December 2009, and invited the Parties to agree on a calendar for the proceedings by the same date.

9. By letter dated 9 December 2009, the Tribunal confirmed that the initial hearing would be held at the Peace Palace, in The Hague, on 15 January 2010, as agreed upon by Respondent and Claimant in their letters of 4 and 7 December 2009, respectively. The Tribunal also informed the Parties that the PCA had appointed Mr. Paul-Jean Le Cannu as the administrative secretary for the case and invited them to confirm that they agreed to the appointment by 18 December 2009.

10. By separate letters dated 18 December 2009, Claimant and Respondent successively informed the Tribunal that the Parties had been unable to agree on a procedural calendar, indicated their respective position on said calendar, and provided their comments on the draft Terms of Appointment and Procedural Rules circulated by the Tribunal. Respondent also confirmed in its letter its acceptance of the terms by which Mr. Paul-Jean Le Cannu would serve as administrative secretary to the Tribunal. Claimant did so in a subsequent letter dated 21 December 2009.

11. By letter dated 23 December 2009, the PCA, under instruction from the Tribunal, circulated updated draft Terms of Appointment and Procedural Rules in anticipation of the initial hearing.

12. By letter dated 12 January 2010, the PCA, under instruction from the Tribunal, informed the Parties that, due to bad weather conditions in Europe and additional professional commitments, Mr. Pryles would be unable to attend the initial hearing in person on 15 January 2010, but would attend by video conference.

13. By letter dated 13 January 2010, the PCA, under instruction from the Tribunal, circulated further updated draft Terms of Appointment and Procedural Rules in anticipation of the initial hearing.

2. Initial Hearing

14. On 15 January 2010, an initial hearing was held at the Peace Palace, in The Hague, The Netherlands. Present at the initial hearing were:

Tribunal:

Prof. Piero Bernardini, Presiding Arbitrator

Prof. Michael Pryles (by video conference)
Prof. Brigitte Stern

For Claimant:
Mr. James Loftis
Mr. Mark Beeley
Mr. Justin Marlles

For Respondent:
Dr. Álvaro Galindo
Mr. Alejandro Escobar
Ms. Dorine Farah

Permanent Court of Arbitration:
Mr. Paul-Jean Le Cannu

15. At the initial hearing, the Terms of Appointment were agreed upon and signed by the Parties and the Tribunal, Professor Pryles having authorized the use of its electronic signature. The Presiding Arbitrator signed the Procedural Rules on behalf of the Tribunal. Signed originals of each document were handed out to each Party and member of the Tribunal. Having heard the arguments of the Parties with respect to the case, the Tribunal decided to bifurcate the proceedings and established the procedural calendar.

3. Written Phase of the Proceedings

16. By letter dated 20 January 2010, the PCA, under instruction from the Tribunal, circulated the summary minutes of the initial hearing that took place on 15 January 2010, along with an audio-CD containing the recording of the initial hearing. The PCA invited the Parties to submit their comments on these summary minutes by 27 January 2010. The PCA also circulated on behalf of the Tribunal Procedural Order No. 1 dated 20 January 2010, which set out the procedural calendar established at the initial hearing.

17. By letter dated 20 January 2010, Claimant noted a disparity between Procedural Order No. 1 and the summary minutes of the initial hearing with respect to the date by which the first round of document productions should be made, and asked the Tribunal for clarification. By letter of the same date, the PCA, under instruction from the Tribunal, informed the

Parties that the correct date was 29 January 2010, not 27 January 2010, and circulated a duly amended Procedural Order No. 1.

18. By letter dated 22 January 2010 and in accordance with Procedural Order No. 1, Claimant submitted its First Request for the Production of Documents.

19. By letter dated 22 January 2010 and in accordance with Procedural Order No. 1, Respondent submitted its Request for Production of Documents in the form of a Redfern Schedule.

20. By letter dated 25 January 2010, Claimant submitted a Redfern Schedule relating to Claimant's document requests.

21. By letter dated 29 January 2010, Claimant submitted its responses and objections to Respondent's Request for Production of Documents dated 22 January 2010 in the form of a Redfern Schedule, along with a document entitled Responses and Objections.

22. By letter dated 29 January 2010, Respondent submitted, in the form of a Redfern Schedule, its responses to Claimant's First Request for the Production of Documents dated 22 January 2010, as well as an index of the documents it produced.

23. By letter dated 4 February 2010, Claimant submitted to the Tribunal its replies to Respondent's Response to Claimant's Request for Document Production.

24. By letter dated 5 February 2010, Respondent submitted its updated Redfern Schedule, and its responses to Claimant's Objections to Respondent's Request for Production of Documents.

25. By letter dated 5 February 2010, Claimant submitted a confidential structure chart identifying the abbreviated ownership structure of Ulysseas.

26. By letter dated 8 February 2010, Respondent informed the Tribunal that it was unable to limit or abandon its request for production of documents, as Claimant had expected in light of its submission of a structure chart identifying its abbreviated ownership structure.

27. By letter dated 10 February 2010, the PCA, under instruction from the Tribunal and in accordance with the schedule established in Procedural Order No. 1, circulated Procedural

Order No. 2 which recorded the Tribunal's decision on the Parties' Requests for Document Production. Procedural Order No. 2 provided, *inter alia*, that Claimant had to produce certain documents in response to Respondent's Request No. 4, provided that the Parties entered into a confidentiality agreement regarding these documents.

28. By letter dated 19 February 2010, Respondent drew to the Tribunal's attention that Claimant was refusing to accept certain provisions of Respondent's executed agreement on confidentiality, and on that basis was refusing to produce the documents responsive to Respondent's Request No. 4 until a confidentiality agreement has been reached. Respondent requested the Tribunal to direct the Parties as follows:

> A. to confirm that the Claimant's refusal to accept the terms of the Respondent's already executed agreement on confidentiality is unreasonable;
>
> B. to confirm that the Respondent has executed and delivered an agreement on confidentiality that is sufficient for the Claimant to produce the documents responsive to the Respondent's request No. 4, as required by Procedural Order No. 2;
>
> C. to instruct the Claimant to produce such documents forthwith and within 24 hours of the Tribunal so directing;
>
> D. to amend the procedural schedule to take account of the Claimant's delay in producing documents in accordance with Procedural Orders No. 1 and No. 2, so that the time period for submitting Respondent's Memorial on Jurisdiction extends to one month from the date on which the Claimant produces the requested documentation; and
>
> E. to draw the appropriate inferences from the Claimant's refusal to accept the Respondent's executed confidentiality agreement.

29. After further correspondence between the Parties on this issue, the PCA, by letter dated 23 February 2010 and under instruction from the Tribunal, informed the Parties that the Tribunal had examined the Parties' exchange of correspondence relating to the Confidentiality Agreement and invited the Parties to reconcile their positions without delay so as not to disrupt the agreed calendar of the proceedings.

30. Following a further exchange of correspondence between the Parties regarding Claimant's document production, and a letter from Claimant dated 24 February 2010 informing the Tribunal that the issue regarding the conclusion of the confidentiality agreement should be resolved without the need for intervention by the Tribunal, the Parties entered into a Confidentiality Agreement on 26 February 2010.[1]

[1] Letter from Claimant to Respondent dated 9 March 2010, p. 5.

31. In subsequent correspondence exchanged by the Parties on 5, 9, and 16 March 2010, the Parties further discussed Claimant's document production and compliance with Procedural Order No. 2.

32. By letter dated 19 March 2010, Respondent submitted its Memorial on Preliminary Objections to Jurisdiction with Fact Exhibits and Legal Authorities in accordance with Procedural Order No. 1.

33. By letter dated 19 April 2010, Claimant submitted its Counter-Memorial on Objections to Jurisdiction, with supporting Witness Statements, Fact Exhibits and Legal Authorities in accordance with Procedural Order No. 1.

34. By letter dated 10 May 2010, Respondent submitted its Reply with Legal Authorities in accordance with Procedural Order No. 1.

35. By letter dated 12 May 2010 and following confirmation by Respondent of its availability, the PCA, under instruction from the Tribunal, confirmed that the hearing on jurisdiction would be held on 17-18 June 2010 in The Hague in the Peace Palace and invited the Parties to agree on a hearing schedule by 7 June 2010.

36. By letter dated 20 May 2010, Claimant informed Respondent that "Elliott Associates, L.P. is willing to provide documents further supporting Mr. Veldwijk's statement regarding Paul Singer's control over the other two general partners in Elliott Associates, L.P." on the condition that "the terms of the Confidentiality Agreement between Ulysseas and the Republic of Ecuador dated February 25, 2010 are extended to include Elliott and any document produced by Elliott, and any such documents are treated as 'Confidential Material' pursuant to the terms of the Confidentiality Agreement." Claimant also enclosed a letter to this effect from Elliott Associates, L.P.

37. By letter dated 25 May 2010, Respondent replied to Claimant's letter dated 20 May 2010 stating that Claimant did not comply with Procedural Order No. 2 in a timely fashion and "may not do so now at this late stage."

38. By letter dated 31 May 2010, Claimant submitted its Rejoinder with Legal Authorities in accordance with Procedural Order No. 1.

39. By letter dated 7 June 2010, the PCA, under instruction from the Tribunal, informed the Parties of the Tribunal's following directions:

> 1. In application of Section 3.3 of the Procedural Rules of January 15, 2010, Claimant shall produce the documents indicated in its letter of May 20, 2010 regarding Paul Singer's control over the other two general partners in Elliott Associates L.P. This evidence, which is directly relevant to the question of jurisdiction to be decided by the Tribunal, is not covered by Procedural Order No. 2.
>
> 2. Claimant's request that the terms of the Confidentiality Agreement with Respondent dated February 25, 2010 be extended to cover the documents to be so produced is justified in light of Elliott Associates' counsel's letter of May 20, 2010. Respondent is therefore invited to agree to such extension.
>
> 3. These additional documents shall be produced not later that June 14, 2010. Respondent shall have an opportunity to comment on such documents either in writing soon thereafter or in the course of its oral submission at the hearing.
>
> 4. On a different matter, Claimant is invited to have available at the hearing the unredacted text of the Joint Venture Agreement (JVA) dated January 18, 2002 (C-JURI-42) and of the Amended JVA dated June 29, 2007 (C-JURI-44), should the Tribunal decide to inspect them.

40. The Tribunal having granted a one-day extension to the Parties, at their request, for the submission of a hearing schedule, Claimant, on behalf of the Parties, informed the Tribunal of the agreed schedule by letter dated 8 June 2010. The schedule indicated, *inter alia*, that Mr. Zacharia Korn, one of Claimant's witnesses, would testify before the Tribunal.

41. By letter dated 10 June 2010, the PCA, under instruction from the Tribunal, informed the Parties that the proposed hearing schedule was agreeable to the Tribunal.

42. By e-mail dated 15 June 2010, Claimant submitted electronic copies of the documents that it was requested to submit pursuant to paragraph 1 of the PCA's letter dated 7 June 2010, and informed the PCA that hard copies of the documents had previously been provided to Respondent under cover of the Parties' Confidentiality Agreement. By letter of the same date, the PCA, under instruction from the Tribunal and in accordance with paragraph 3 of the PCA's letter dated 7 June 2010, informed the Parties that Respondent was invited to submit its comments on the above-mentioned documents at the upcoming hearing on jurisdiction.

43. By letter dated 15 June 2010, Respondent submitted English translations of certain Fact Exhibits and Legal Authorities.

4. Hearing on Jurisdiction

44. On 17 and 18 June 2010, the hearing on jurisdiction was held at the Peace Palace, in The Hague, The Netherlands. Present at the hearing were:

Tribunal:
Prof. Piero Bernardini, Presiding Arbitrator
Prof. Michael Pryles
Prof. Brigitte Stern

For Claimant:
Mr. James Loftis
Mr. Mark Beeley
Mr. Justin Marlles
Mr. Mario Restrepo

For Respondent:
Dr. Álvaro Galindo
Mr. Jay Alexander
Mr. Alejandro Escobar
Ms. Dorine Farah

Permanent Court of Arbitration:
Mr. Paul-Jean Le Cannu

Court reporter:
Mr. Trevor McGowan

45. At the hearing, Claimant presented an additional confidential structure chart designed to show that Mr. Paul Singer owns and controls Elliott Associates, L.P.,[2] which, in turn, indirectly controls Ulysseas.[3] Claimant also circulated copies of the unredacted version of

[2] Transcript (Hearing on Jurisdiction), Day 1, pp. 112:22-113:9.

[3] Transcript (Hearing on Jurisdiction), Day 1, p. 111:10-18.

the Joint Venture Agreement between Elliott Associates, L.P., Elliott International, L.P., and Veredas Power, Inc. dated 18 January 2002 (the "JVA"), and the Amendment to the Joint Venture Agreement between the same parties dated 29 June 2007 (the "Amendment to JVA").[4]

46. By letter dated 28 June 2010, Claimant submitted copies of the slides used in support of Claimant's Opening and Reply Statements at the hearing on jurisdiction. By letter dated 1 July 2010, the PCA transmitted copies of these slides to Respondent, at the request of the latter.

5. Interim Award

47. By letter dated 30 September 2010, the PCA transmitted to the Parties on behalf of the Tribunal signed copies of the Tribunal's Interim Award in English and Spanish. For the reasons set out in that award, the Tribunal decided the following:

a) that the two objections presented by Respondent do not deprive the Tribunal of its jurisdiction over all treaty claims;

b) to make the necessary order for the continuation of the procedure;

c) to reserve all questions concerning the costs of arbitration, as defined by Article 38 of UNCITRAL Rules, for subsequent determination;

d) to dismiss any other relief requested by either Party, concerning the jurisdictional phase of the arbitration.[5]

B. MERITS PHASE

1. Establishment of the Calendar

48. By letter dated 1 October 2010, the Tribunal invited the Parties to agree on a procedural calendar for the continuation of the proceedings by 18 October 2010 or, failing such an agreement, each Party to file its proposed calendar.

[4] Transcript (Hearing on Jurisdiction), Day 2, p. 18:10-11. Respondent had been allowed to see an unredacted copy of the JVA and Amendment to JVA on the first hearing day, after the session. (Transcript (Hearing on Jurisdiction), Day 2, p. 19:5-9). The JVA as amended by the Amendment to JVA will be hereinafter referred to as the "Amended JVA".

[5] Interim Award, para. 193.

49. By letter dated 14 October 2010, Mr. Martin Doe informed the Parties that he would replace Mr. Paul-Jean LeCannu as administrative secretary on behalf of the PCA.

50. Following an extension until 22 October 2010 of the deadline for the Parties to agree on a procedural calendar and various exchanges regarding the Parties' and Tribunal's availability for a hearing in The Hague, the Parties informed the Tribunal by e-mail dated 22 October 2010 that they had agreed on a procedural calendar, according to which Claimant should submit its Statement of Claim by 1 March 2011; Respondent should submit its Statement of Defence by 1 July 2011; Claimant should submit its Reply by 15 August 2011 and Respondent should submit its Rejoinder by 3 October 2011. From 1 November 2011, on a date to be fixed by the Tribunal, a conference call with the Tribunal should take place to settle the order of proceedings at the hearing. The hearing on the merits was agreed to be held on 5-9 December 2011 at the Peace Palace in The Hague.

51. By letter dated 27 October 2010, the PCA, under instruction from the Tribunal, informed the Parties that the Tribunal approved the Parties' agreed procedural calendar.

2. Written Phase

52. By letter dated 1 March 2011, Claimant submitted its Statement of Claim, with supporting Witness Statements, Expert Reports, Fact Exhibits and Legal Authorities.

53. By letter dated 1 July 2011, Respondent submitted its Statement of Defence, with supporting Witness Statements, Expert Reports, Fact Exhibits and Legal Authorities.

54. By letter dated 15 August 2011, Claimant submitted its Statement of Reply, with supporting Exhibits, Witness Statements and Expert Reports.

55. By letter dated 17 August 2011, Respondent requested additional evidence to support the Third Witness Statement of Mr. Zacharia Korn and the Third Witness Statement of Mr. Jan Veldwijk, which were said not to be supported by any documentary evidence accompanying the Reply. In particular, Respondent requested Claimant to provide (i) the documents through which Mr. Korn discovered that the PBII Bareboat Charter Party was never amended or extended; (ii) the documents, including financial statements and payment schedules, showing the date of actual and prospective payments made by or due from Proteus Power, Inc. pursuant to the PBII Bareboat Charter Party; and (iii) the

documents by which, or evidencing the date on which, Ulysseas, Inc. and Proteus Power, Inc. released each other from any further obligations under the PBII Bareboat Charter Party.

56. By letter dated 19 August 2011, Claimant responded to Respondent's request for additional evidence. As to the first request, Claimant noted that, as the Charter Party had not been amended or extended, there was no document which extended or amended it. As to the second and third request, Claimant announced that it would prepare a certified schedule showing the payments that were actually made by Proteus Power to Claimant; and referred Claimant to the terms of the Charter Party as to the other questions.

57. By letter dated 23 August 2011, Respondent noted that Claimant had declined to provide the financial statements requested and expressed its view that the document alleged to support Mr. Veldwijk's assertion – "a certified schedule showing the payments" – would cause it prejudice and should not therefore be copied to the Tribunal.

58. By letter dated 24 August 2011, Claimant noted that the document was an extract of the financial records requested and affirmed that the new evidence was provided as a response to Respondent's request. On the same date, Claimant submitted an electronic copy of the Exhibit.

59. By letter dated 3 October 2011, Respondent submitted its Statement of Rejoinder, with supporting Fact Exhibits, Legal Authorities, Witness Statements and Expert Reports.

60. On 31 October 2011, the PCA held a telephone conference call with the Parties in order to discuss administrative and logistical matters relating to the hearing.

61. By letter dated 4 November 2011, the Parties submitted a list of agreed procedural issues relating to the hearing ("Procedural Agreement of the Parties").

62. On 7 November 2011, the Tribunal held a telephone conference call with the Parties in order to discuss the order of proceedings and other procedural matters relating to the hearing.

63. By letter dated 21 November 2011, Claimant submitted supplemental evidence in accordance with the Procedural Agreement of the Parties.

64. By e-mail dated 22 November 2011, Respondent submitted supplemental evidence in accordance with the Procedural Agreement of the Parties.

65. By letter dated 22 November 2011, Respondent noted that the Procedural Agreement of the Parties allowed only the submission of an update "provided it refers to events occurring after the last submission of each party" and invited Claimant to withdraw its submission of the engine log books (C-270, submitted with its supplemental evidence), which referred to facts that occurred "long before the parties' last pleading, and even before the Claimant's Statement of Claim."

66. By letter dated 24 November 2011, Claimant noted that it "ha[d] only exhibited the full log book [C-270 Eng] in light of the specific attack being led against its evidence" and requested certain translations and explanations in relation to Respondent's supplemental evidence.

67. By letter dated 28 November 2011, Claimant submitted 4 demonstrative exhibits it intended to rely on during its opening submissions.

68. After further correspondence between the Parties on this issue, Respondent stated it was prepared to accept the introduction of Exhibit C-270 into the record and further submitted R-317, containing the CENACE data corresponding to the dates covered by the engine log book contained in C-270, as "it [was] necessary to submit this data since it is the only source that serves to corroborate or correct the engine log book entries." The Claimant did not object to the presentation of R-317.

3. Hearing on the Merits

69. On 5-9 December 2011, the hearing on the merits was held at the Peace Palace, in The Hague, The Netherlands. Present at the hearing were:

Tribunal:
Prof. Piero Bernardini, Presiding Arbitrator
Prof. Michael Pryles
Prof. Brigitte Stern

For Claimant:

Mr. Mario Restrepo

Mr. Jan Veldwijk

Mr. James Loftis

Mr. Mark Beeley

Mr. Tim Tyler

Ms. Sarah Stockley

Mr. David Rains

Mr. William Teten

Mr. Javier Robalino

Ms. Carolyn Witthoft

Witnesses for Claimant

Mr. Robert Bordei

Mr. Zacharia Korn

Mr. Robert Wells

Mr. David Waller

Mr. Rory Walck

For Respondent:

Mr. Diego García Carrión

Mr. Francisco Grijalva

Ms. Christel Gaybor

Mr. Francisco Larrea

Ms. Diana Moya

Mr. Alejandro A. Escobar

Mr. Jay Alexander

Ms. Dorine Farah

Mr. Leonardo Carpentieri

Ms. Alexandra Glebova

Witnesses for Respondent

Mr. Fernando Izquierdo

Mr. Javier Lasluiza

Mr. Juan Carlos López
Mr. Juan E. López-Santini
Mr. Manuel Salazar
Mr. Francisco Vergara
Mr. Jorge Vergara

Permanent Court of Arbitration:
Martin Doe
Alberto Torró Molés

Court reporters:
Ms. Diana Burden
Mr. Dante Rinaldi

70. By e-mails dated 9 December 2011, Respondent submitted electronic copies of certain exhibits, a certificate from the Ecuadorian Ministry of Industry and Productivity and a certificate from the Ecuadorian Central Bank.

71. By letter dated 12 December 2011, Claimant submitted a power of attorney in relation to Claimant's representatives.

72. By letter dated 14 December 2011, the PCA, under instruction from the Tribunal, circulated Procedural Order No. 3, which set out a calendar for the corrections to be made to the transcripts, the submission of Post-Hearing Briefs and the submission of Statements of Costs by the Parties.

73. Following a further exchange of correspondence between the Parties regarding the corrections to be made to the transcripts, the Parties agreed on a final version of the Spanish version of the transcript on 14 January 2012, and on a final version of the English version of the transcript on 25 January 2012.

74. By letters dated 31 January 2012, Claimant and Respondent submitted their respective Post-Hearing Briefs.

75. By letters dated 29 February 2012, Claimant and Respondent submitted their respective Statements of Costs and supporting documentation.

CHAPTER II – FACTUAL AND LEGAL BACKGROUND

76. Chapter II of the Interim Award has already given a summary description of the facts relevant to the preliminary objections to jurisdiction. The present Chapter shall deal with the facts of the case to the extent they are relevant for the merits phase of the proceedings. Limited repetitions of what has already been mentioned in the Interim Award are justified by the need to ensure a logical sequence to the present summary.

77. In the early 1990s, the productivity of the electricity sector in Ecuador began deteriorating. Starting in 1993, Respondent, in the context of a broader programme of privatisation of public services, opened up this sector to private investment in order to satisfy rapidly growing demands. At the time, Ecuador had in fact experienced a significant shortfall in the available power generation capacity due to the crisis of 1992 and 1993-1996, resulting in increasing disparity between supply and demand in the sector.[6]

78. The privatisation programme was formally commenced in the electricity sector with the enactment by the Ecuadorian Parliament of the Power Sector Regime Law on 10 October 1996 ("Power Sector Regime Law").[7] This Law established a new legal framework by providing a series of mechanisms to create a competitive electricity market promoting efficiency and private participation in the sector. In addition to separating power generation, transmission and distribution activities into separate corporate entities, the new law encouraged further development of electricity capacity by authorising private companies to enter the market through concession agreements.[8]

79. By the time Claimant executed the PBII Contract, on 12 September 2006, the legal and regulatory framework established by the Power Sector Regime Law was essentially made up of the following laws and regulations:

- The 1998 Constitution;[9]
- The Power Sector Regime Law;

[6] See Statement of Defence, paras. 39-41; Statement of Claim, para. 18.

[7] The Power Sector Regime Law 1996, dated 10 October 1996, Exhibit CLA10, R86.

[8] *Id.* See also Statement of Claim, para. 18.

[9] Constitution of Ecuador, dated 11 August 1998, Exhibit CLA19.

- The Power Sector Regime Law Regulations 1997;[10]
- The Concession Regulations;[11]
- The SNI Regulation 1999;[12]
- The WEM Regulations 2003 establishing the Wholesale Electricity Market (*Mercado Eléctrico Mayorista*) consisting of generators, distributors and large consumers integrated into the National Interconnected System;[13]
- The Inter-Institutional Agreement to Implement National Policy of the Electricity Sector introduced in 2003 to substantially reform the sector and make it more transparent in order to promote investments and eventually reduce tariffs to the end consumer;[14]
- CONELEC's National Electrification Plan for 2002-2011 and National Electrification Plan for 2004-2013 containing detailed incentives to invest.[15]

80. Under Article 13 of the WEM Regulation 2003, the price of electricity in the spot market was determined according to the economic cost of producing electricity. The price was to be uniform and calculated to reward the most efficient (i.e., most economical) power generators in terms of variable production cost.[16]

81. In accordance with SNI Regulation 1999, generators were to declare to CENACE their variable cost of producing of electricity in a "*truthful and timely manner*" and on a monthly basis.[17] The variable cost was principally a function of the cost of fuel multiplied by its efficiency in generating electricity from that fuel.[18]

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[10] Presidential Decree No. 754, dated 28 October 1997, Exhibit CLA12.

[11] Concessions Regulations, dated 31 March 1998, Exhibit R87.

[12] National Interconnected System Regulation, dated 23 February 1999, Exhibit R95.

[13] Presidential Decree No. 923, dated 16 October 2003, Exhibit CLA42.

[14] Inter-Institutional Agreement to Implement a National Policy of the Electricity Sector, dated 21 July 2003, Exhibit C34.

[15] Plan Nacional de Electrificación 2002-2011, Exhibit C24 and Plan Nacional de Electrificación 2004-2013, Exhibit C44.

[16] Article 13 of the WEM Regulations, *supra* note 13 ("*The energy is priced with the instantaneous marginal economic cost obtained from the actual dispatch of generation at the end of each hour. Instantaneous marginal cost of energy in the Market Bar is given by the last source of generation which, under economic dispatch conditions, meets the system demand* […]").

[17] Article 14 of the SNI Regulations, *supra* note 12 ("*The generators synchronized to the electrical system are required to provide CENACE, in a truthful and timely manner, information upon its request to conduct operational planning, the*

82. Upon receiving this information, CENACE determined the price of electricity in the spot market on an hourly basis. It did so by calculating the demand and supply of electricity based on the relevant data provided by the generators.[19] CENACE set the uniform variable cost at the variable cost of the least efficient generator for which there was demand.[20] CENACE then called upon the generators to dispatch electricity until demand was met, in an ascending order of the variable cost declared by each generator. As a result, a generator that declared a low variable cost was able to sell all of the electricity that it was able to make available. The least efficient generators (i.e., those with higher variable costs) were ranked lower in the order of dispatch and would not be able to dispatch the electricity generated if there was no corresponding demand.[21]

83. Unlike sales on the spot market, forward contracts, also called power purchase agreements ("PPAs"), were those that were negotiated freely between generators and distributors, between generators and large consumers and between distributors and large consumers. The parties to the PPA, therefore, agreed on a price that applied over the term of the agreement. Generators selling power under PPAs, however, still had to declare their variable costs to CENACE which would then determine their ranking in the order of dispatch based on their efficiency according to the same principles as those applicable to spot sales.[22]

84. At the time of the signature of PBI Contract (*infra*, para. 94), the basic structure for payment for electricity was as follows:

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central dispatch and the integrated operation of the Electric System, as established by the Dispatch and Operating Procedures").

[18] See Article 5 of CONELEC Regulation No. 003/03, dated 13 August 2003, Exhibit CLA40.

[19] Article 8(b) of the SNI Regulations 1999, *supra* note 11 ("*CENACE* […] *shall calculate the economic dispatch schedule for generation resources subject to central dispatch and energy transfers through international interconnections, in such a form that the scheduled demands are met and the operating costs are minimized, considering* […] *the Variable Costs of Generating Units* […]").

[20] Article 13 of the WEM Regulations, *supra* note 13 ("*Instantaneous marginal cost of energy in the source of generation* [which] *under economic dispatch conditions meets the system demands* […]").

[21] Statement of Defence, para. 47.

[22] Statement of Defence, para. 49. See also Article 29 of the WEM Regulations 2003, *supra* note 13.

(a) End users paid distribution companies for electricity, which the distribution companies purchased from generators, either by way of the spot market or under longer-term PPAs.

(b) The distribution companies had historically failed to make payments to the generation companies and had attempted to make the generation companies bear the risk of consumer non-payments or low tariffs (which were centrally regulated). Respondent had previously acknowledged that the end user tariffs were not set at a sufficiently high level to cover the generation and transmission costs, and had previously made a 'Tariff Deficit' payment in the period 1999/2001 to make up the shortfall.

(c) In an attempt to improve the situation, a system of *fideicomisos* ("Payment Trusts") was established in July 1999. The Payment Trusts were to provide a safe, reliable and transparent handling of payments and collections within the WEM. Under this system, each distribution company created a trust, which received payments from the end users and who then paid the generators (and other expenses of the distribution companies).

(d) The priority order set forth in the Payment Trusts positioned the private generators (like Claimant) in second place, immediately after the distribution company who was entitled to receive certain State regulated distribution costs or valor agregado de distribución ("VAD"). The VAD was set on the basis of a calculation which was designed to arrive at the average costs of a theoretical efficient transmission company.

(e) The priority order is important because the ultimate tariff charged to end users is capped at such a level that there are insufficient funds for all the expenses incurred by the distribution companies to be covered and to fully pay each generation company. Accordingly, if the generators are high on the priority list, they will be promptly and fully paid by the Payment Trusts; if they are low, they will only get part or no payment at all.[23]

[23] Statement of Claim, para. 26.

85. The priorities were modified in July 2003 through the Inter-Institutional Agreement to Implement National Policy of the Electricity Sector, which established an annex to be incorporated in the Trust Agreements. The Annex established the following priority order:

(a) **PRIORITY 0**: Return of billings based on FERUM rates, Fire Fighter, Waste Collection, and others existing at the Distributing Companies.

(b) **PRIORITY 1**

i. **PRIORITY 1-A**: Payment of 100% of imported power;

ii. **PRIORITY 1-B**: Payment of 100% of power delivered by private capital stock companies (**i.e. Claimant**);

iii. **PRIORITY 1-C**: Payment of the amount billed by PETROCOMERCIAL for the supply of fuel oil and diesel to State-owned generating companies, including distributing companies with thermal power generations;

iv. **PRIORITY 1-D**: Payment made proportionally, with the balance, to State-owned thermoelectric and hydroelectric power generating companies and to distributing companies holding non-split hydraulic and thermal power plants.

(c) **PRIORITY 2**: To cover payments to TRANSELECTRIC.

(d) **PRIORITY 3:** To cover payments to distributing companies in terms of VAD.

(e) **PRIORITY 4:** To cover payments to generating and transmission companies with balances pending billing for the immediately preceding month.

(f) **PRIORITY 5:** To cover payments to generating and transmission companies with accounts receivable from the distributors.[24]

86. In December 2004, another revision was introduced with the following priority order:

1st *Fondo de Electrificación Rural* (FERUM), fireman and refuse collection taxes;

2nd VAD payments;

3rd Transelectric;

4th Generation companies based outside of Ecuador, i.e. Colombia;

5th Private generation (**i.e. Claimant**);

6th State-owned generations companies.[25]

[24] Annex to be incorporated in the trust agreements based on the Inter-Institutional Agreement to Implement a National Policy of the Electricity Sector, see *supra* note 14, Exhibit C34.

87. The Payment Trusts were further amended in May 2005 by Presidential Decree No. 105/2005, which modified the priority payment order and established "the following order:

1. Balances pending to hydroelectric generating companies that are carrying out investment projects in hydroelectric generation that have liquidity problems in developing the aforesaid projects, in accordance with the corresponding schedule and the instructions of the Solidarity Fund and the CENACE.
2. Balances pending to thermoelectric generating companies from the Solidarity Fund and CATEG-Generación, to finance the 2005 annual maintenance plan of the units of the generating companies owned by the Solidarity Fund and CATEG-Generación approved by the CENACE and the purchase of fuel according to instructions from the Solidarity Fund and the CENACE in all cases.
3. Balances pending to private generating companies.
4. Balances pending to other hydroelectric generating companies.
5. Balances pending for the rest of generation.
6. Restitution to distribution companies of funds used to pay for power generation.
7. Balances pending for fuel purchases owed to PETROECUADOR."[26]

88. In 2005, by Presidential Decree No. 436/2005, Respondent formalised what was known as the "Fuel for Power" programme.[27] This was an emergency measure introduced in an attempt to provide an incentive to private generation companies to generate power despite the collection difficulties. In essence, the programme allowed private generators to purchase fuel from State-held PETROECUADOR on credit, which credit could later be settled by way of sale of electricity to State-owned transmission companies or end users. This programme was a particularly attractive measure as fuel costs (which would normally be suffered upfront) typically account for some 60-70% of a private generator's operating costs.[28] The *Fuel for Power* programme ended in October 2007.[29]

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[25] Statement of Claim, para. 35; Statement of Defence, para. 58.

[26] Article 2 of Presidential Decree No. 105, dated 20 May 2005, Exhibit CLA86.

[27] Presidential Decree No. 436, dated 24 August 2005, Exhibit CLA59.

[28] Statement of Claim, para. 43.

89. In August 2006, the payment priority order was again modified as follows:

1. VAD
2. Transelectric

3A. Energy import

3B. Private generation with agreement

3C. Private generators for spot market

3D. Hydro generators from the Solidarity Fund

3E. Private generators for spot market purchasing fuel from Petroecuador

4. Remainder generation and transmission

4A. Hydropaute, Termoesmeraldas, Electroguayas, Termopichincha, generation, distribution, Termoelectric

4B. Petrocomercial

5. Distributor, generation and transmission.[30]

90. On 18 April 2007, the Executive Committee for Electrical Policy (who by this time was in charge of advising CONELEC on policy matters and ensuring the implementation of the same) revised the payment priority, "ratifying the following order:

ITEM	*PERCENTAGE*
1. Transmitter	*67%*
2. Importation of energy	*100%*
3. Payment for power made available	*100%*
4. Private hydroelectric generators: sale of energy by contract	*100%*
5. Private thermoelectric generators: sale of energy by contract	*100%*

[29] Claimant asserts that the "*Fuel For Power*" programme was terminated by Presidential Decree No. 683, dated 31 October 2007, Exhibit CLA69, while Respondent has argued that the programme was not abolished, but "*it expired on its own terms*." (Statement of Defence, para. 138). In addition, Respondent contends that analogous measures were in force after the termination of the "Fuel for Power" programme (RPHS, para. 11).

[30] Expert Report of Mr. F. Muñoz, dated 28 February 2011, filed by Claimant ("Muñoz Report"), pp. 41-42.

6. Variable cost of private thermoelectric power plants	*100%*
7. Private unconventional generation	*100%*
8. Variable cost of state thermoelectric power plants	*100%*
9. Private spot market thermoelectric generation (up to 75%)	*53%*
10. Any other costs of state thermoelectric generation	*25%*
11. Private spot market thermoelectric generation (remaining 25%)	*0%*[31]

Claimant has contended that its payments fell into priorities 3, 5, 9 and 11.[32]

91. On 23 July 2008 Constituent Mandate No. 15 was enacted.[33] It was subsequently implemented via CONELEC's Regulations No. 006/08 and No. 013/08.[34] These measures made PPAs a better viable business model without eliminating the prospects of collection on spot market sales.[35]

92. Claimant imported and installed PBI and PBII in Ecuador in late March/early April 2003 and on 16 April 2005, respectively, allegedly in order to take advantage of the more liberal market conditions introduced by Respondent.[36]

93. PBII was eventually installed at Las Esclusas. Before its arrival in Las Esclusas, Claimant had attempted to locate this barge at several other moorings in Ecuador, including at Puerto Hondo, allegedly investing significant time and funds in dredging and building out port facilities.[37]

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[31] Letter from Ministry of Energy & Mines to Electricity Generation Companies (CATEG, Termoguayas Generation, Intervisa Trade S.A., Machala Power and Fondo de Solidaridad), dated 18 April 2007, Exhibit C233; Statement of Claim, para. 44.

[32] Statement of Claim, para. 44.

[33] Constituent Mandate No. 15, dated 23 July 2008, Exhibit CLA73.

[34] CONELEC Regulation 013/08, dated 27 November 2008, Exhibit CLA75.

[35] The Parties disagree as to the exact effect of the Mandate on the electricity market. According to Respondent, Mandate No. 15 improved the market by improving the rate of collection of generators and allowed generators to continue selling to the spot market (RPHS, paras. 14-15). Claimant contends that after the enactment of Mandate No. 15, PPAs represented the only potentially viable business model, since the business on the spot market was no longer possible (CPHS, para. 11).

[36] Statement of Claim, paras. 23 and 37.

[37] Statement of Claim, paras. 40-41.

94. The concession contract for PBI was signed between Claimant and CONELEC on 15 August 2005 ("PBI Contract")[38] and the one for PBII on 12 September 2006 ("PBII Contract", sometimes also referred to as "Licence Contract").[39] The latter was amended on 6 June 2007 to take account of the new location of PBII in Las Esclusas, the amendment confirming all other provisions of the PBII Contract.[40] Under the PBII Contract, the concessionaire had to generate electricity for a period of fifteen (15) years starting from the date of signature.[41]

95. Claimant never started power generation operations from PBII even after the extension by the 6 June 2007 amendment of the deadline for commencement of power generation. According to Claimant, the ever-worsening situation of the electricity sector, with no prospects of profitable operations, left no other options available than to attempt to conclude a PPA before commencing power generation.[42]

96. Following meetings on 5 and 12 December 2007 and 31 January 2008 with the then Minister of Electricity Mosquera, Claimant attempted in early 2008 to conclude a PPA with CATEG (a distribution company wholly under the control of CONELEC) as well as with other entities, at a price that would allow PBII to both cover its costs and make a return on its investment. Negotiations failed, these companies only being willing to enter into cheaper PPAs than Claimant could accept.

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[38] Contrato de Permiso Para Generación de Energía between the Claimant and CONELEC in relation to PBI, dated 15 August 2005, Exhibit C9.

[39] Contrato de Permiso Para Generación de Energía between the Claimant and CONELEC in relation to PBII, dated 12 September 2006, Exhibit C10 ("PBII Contract").

[40] Amendment to the PBII Licence Contract, dated 6 June 2007, Exhibit R31.

[41] Article 7 of PBII Contract, *supra* note 39 ("**SEVEN: PERMIT TERM AND EFFECTIVE DATE.** *The term of this contract is fifteen (15) years calculated beginning on the signature date of this document, at which time the Permit will become effective. During this period of time, the PERMIT HOLDER will hold all rights granted by Ecuadorian law, specifically the legal security described in Article twenty-three, number twenty-six and Article two hundred forty-nine of the Constitution. Prior to the end of the term of the contract, if the PERMIT HOLDER expresses an interest in continuing to operate, the GRANTOR will analyze the request, qualify the service provided during the term of the Contract and verify the condition of the equipment, and will authorize an extension of the PERMIT, if warranted. CONELEC may extend the term of the permit pursuant to the provisions of Article fifty-six of the Concessions Regulations. Extension of the Permit may not be granted for a period of time which exceeds the original period*.")

[42] Statement of Claim, para. 47.

97. Considering that performance of PBII Contract had become impossible in view of the degraded business environment for the electricity sector, on 21 December 2007 Claimant gave notice of force majeure under Article 25 of PBII Contract.[43]

By letter of 17 July 2008 CONELEC rejected Claimant's grounds, stating that it was under no obligation to ensure that Claimant had to receive commercially viable compensation in return for generation.[44]

98. In Claimant's view, the prospect of sales on the spot market leading to collectable payment was non-existent; thus, on 23 April 2008, it requested that CONELEC agree to the termination of the PBII Contract.[45] The request was denied on 12 September 2008 with the demand that power generation be commenced.[46]

99. Shortly thereafter, CONELEC imposed a fine of US $63.647,51 on Claimant for having failed to commence generating power until that date.[47]

100. A subsequent attempt to sell PBII to a State-owned entity, Termoesmeraldas, also failed. Respondent contends that a stalemate arose in the negotiations because of the conditions that Claimant wanted to impose, in particular those regarding operational tests.[48] However, Termoesmeraldas also confessed, after seven months of negotiations, that it did not have the money to complete the purchase.[49]

101. In April 2009, the Ministry invited PPA proposals from private generators, including Claimant, and drew up terms of reference for the negotiation of regulated PPAs with distribution companies ("Terms of Reference"). Under the Terms of Reference, private generators had to submit proposals based on two PPAs models. Proposals were received

[43] Letter from Claimant to CONELEC, dated 21 December 2007, Exhibit C92.

[44] Letter from CONELEC to Claimant, dated 17 July 2008, Exhibit C111.

[45] Letter from Claimant to CONELEC, dated 23 April 2008, Exhibit C107.

[46] Letter from CONELEC to Claimant, dated 12 September 2008, Exhibit C116 ("*Consequently, based on the conclusions stated in such Report, I insist to you that the Barge PBII initiate the appropriate operating tests, prior to its commercial operation, before Monday, September 22, 2008; otherwise, CONELEC reserves right to apply the provisions of the Power Sector Regime Law* […]")

[47] Letter from CONELEC to Claimant, dated 17 October 2008, Exhibit C118.

[48] Statement of Defence, para. 125.

[49] Statement of Claim, para. 50.

but not from Claimant, the latter alleging concerns about the "Payment Trust" mechanism as security for payment under a PPA.[50]

102. By letter dated 24 September 2009, CONELEC informed Claimant that "since it had not initiated generation activities […] CONELEC w[ould] temporarily assume, through a delegate, the generation activities arising from the PBII Licence Contract."[51] On 7 October 2009 a further letter from CONELEC was sent to Claimant informing it that "under Article 3 of [Resolution No. 89/09], CONELEC, through a designated party, temporarily assumes generation activities that arise from the Permit Contract of Power Barge II."[52] This letter also stipulated that "CORPORACIÓN ELÉCTRICA DEL ECUADOR S.A., CELEC, ha[d] been designated as Temporary Administrator."[53]

103. On October 8 2009, CONELEC proceeded to take actual control of PBII on 8 October 2009 by physically evicting Claimant's crew from the vessel.[54]

104. On 19 March 2010, CONELEC indicated that it was prepared to hand back PBII requiring that "a representative of [Claimant] receive Power Barge II and sign a corresponding Record of Delivery-Receipt, to be signed on the abovementioned date."[55] It was Claimant's understanding that signing the receipt would not only acknowledge the return of the vessel, but also confirm that there was nothing improper in CONELEC's actions and that no harm had been done to the vessel.[56] After 6 months, agreement was reached to the release of the vessel without these conditions.[57] According to Claimant, a further fine was imposed on it in the meantime for not having generated power.[58]

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[50] Statement of Rejoinder, paras. 37-39.

[51] Letter from CONELEC to Claimant, dated 24 September 2009, Exhibit C130.

[52] Letter from CONELEC to Claimant, dated 7 October 2009, Exhibit C132.

[53] *Id.*

[54] Statement of Claim, para. 56.

[55] Letter from CONELEC to Claimant, dated 19 March 2010, Exhibit C143.

[56] Statement of Claim, para. 61.

[57] Claimant's letter to CONELEC, dated 8 September 2010, Exhibit C167 ("*Ulysseas will take possession of Power Barge on September 27, 2010. At that time, representatives of Ulysseas will record the state and condition of PBIl and its equipment. In connection therewith, a third-party expert shall conduct a safety and operational inspection of PBII and its associated equipment. Ulysseas will inform CONELEC of the date and time for such inspection as soon as it can do so*.").

[58] Statement of Claim, para. 61.

105. On 27 September 2010, Claimant regained access to PBII, allegedly discovering that serious damages had been caused to the engines.[59] In particular, Claimant accuses Respondent, *inter alia*, of having failed to properly perform the running-in program, despite knowing the risks involved.[60] It also contends that the engines were run with low heavy-fuel-oil temperatures, resulting in further damage to these engines.[61] Moreover, Claimant notes the logbook entries for 11 and 12 March 2010, which indicate that Engine No. 3 reached unsafe temperature levels of 577º and 610º.

106. On 17 March 2011, CONELEC terminated the PBII Contract, allowing Claimant to remove it from Ecuador.[62]

CHAPTER III – THE MERITS OF THE CASE

107. The Tribunal has given consideration to the extensive factual and legal arguments presented by the Parties in their written and oral submissions, all of which the Tribunal has found very helpful. In this Award, the Tribunal discusses the arguments of the Parties most relevant for its decision and formulates its conclusions as to each issue regarding the merits of this case.

108. Based on the respective contentions, the issues raised by the Parties in this merits phase center around the following principal questions:

a) whether the actions of certain entities of the public sector in the field of electricity are attributable to Respondent and whether their conduct was in breach of the BIT;
b) whether the measures taken by Respondent were a temporary expropriation or tantamount to indirect expropriation and thus violated Article III(1) of the BIT;
c) whether Respondent breached its obligation to provide fair and equitable treatment by changing the legal and regulatory framework that was in place at the time the Claimant invested in Ecuador and thus breached Article II(3)(a) of the BIT;

[59] *Id.*, para. 62.

[60] *Id.*, paras. 33-36.

[61] *Id.*, paras. 37-40

[62] CONELEC Resolution No. 014/11, dated 17 March 2011, Exhibit R222.

d) whether Respondent breached its obligation to provide full protection and security to the Claimant's investment under Article II(3)(a) of the BIT;
e) whether Respondent took any discriminatory measure against Claimant in violation of Article II(3)(b) of the BIT;
f) whether Respondent took any arbitrary measure against Claimant in violation of Article II(3)(b) of the BIT;
g) whether Claimant is entitled to compensation for violation of the BIT by Respondent and, in the affirmative, for what amount.

A. APPLICABLE LAW

109. In order to reach a decision on the above issues, the law applicable to the merits of the present dispute must be determined.

110. Article 33 (1) of the UNCITRAL Rules provides as follows:

> *"The Arbitral Tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of law rules which it considers applicable."*

111. The Tribunal agrees with Respondent that the rules of law applicable to the present dispute are primarily the provisions of the BIT.[63] Some provisions of the BIT refer to international law,[64] so that also the latter shall apply whenever necessary to complement the provisions of the BIT.

[63] Statement of Defence, para. 214.

[64] Such as Article II(3)(a), according to which "fair and equitable treatment" and "full protection and security" are accompanied by treatment no "*less than that required by international law*", or Article II(10)(b) providing that the most favoured nation provisions of the BIT shall not apply to advantages accorded to nationals or companies of any third party, by virtue of either Party's "*binding obligations under any multilateral international agreement under the framework of the General Agreement on Tariffs and Trade*", or Article III(2) according to which "*expropriation and any associated compensation*" must conform "*to the principles of international law.*"

B. ATTRIBUTION TO RESPONDENT OF MEASURES TAKEN BY CERTAIN ENTITIES

1. Claimant's contentions

112. In determining whether Ecuador is responsible for the conduct of its own State entities, Claimant refers to Article II(2)(b) of the BIT, to Articles 4 and 5 of the ILC Articles,[65] to the award in the ICSID case of *Jan de Nul v. Egypt*,[66] and to the expert opinion provided by Professor Fabien Corral. According to the latter, CONELEC, CENACE, CATEG, PETROECUADOR and PETROCOMERCIAL "*fell under the definition of agencies of the State, this being understood as part of the organization or set of agencies that make up the Public Administration and the State.*"[67]

113. Claimant argues that, under Article 4 of the ILC Articles, the conduct of CONELEC should be attributed to Respondent as CONELEC is an organ of the Ecuadorian State.[68] According to Claimant, Article 225(1) of the Ecuadorian Constitution of 2008 describes CONELEC as an entity "*created by the Constitution or the Law for exercising governmental authority in order to provide public services or to develop activities assumed by the Government.*"[69] Claimant also notes that CONELEC is an entity created "*and controlled by*" the State solely to discharge the State's electricity regulatory function, and that CONELEC is forbidden to engage in commercial activities.[70]

114. Claimant further contends that, even if CONELEC were not formally an organ of Respondent, its conduct would be still attributed to Respondent under Article 5 of the ILC Articles, Article 225(1) of the Ecuadorian Constitution, Articles 13(a), 13(i) and 39 of the Power Sector Regime Law, and in light of its entitlement to exercise elements of governmental authority and its conduct, which also reflects its legal and regulatory function.[71] As examples of such conduct, Claimant refers, in particular, to "*(i) its granting*

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[65] ILC Articles, Exhibit CLA30.

[66] *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, Award, dated 6 November 2008, ICSID Case No. ARB/04/13, Exhibit RLA45

[67] Second Report of Dr. F. Corral, dated 8 August 2011, submitted by Claimant, para. 23 ("Corral Second Report").

[68] Statement of Claim, para. 11.

[69] Constitution of Ecuador, dated 20 October 2008, Exhibit CLA74.

[70] Statement of Reply, para. 35.

[71] Statement of Claim, paras. 11-13. Claimant refers to The Power Sector Regime Law, *supra* note 7.

a concession to Ulysseas to enter into and participate in a regulated sector; (ii) its participation in the setting market wide tariffs and altering the collection priority waterfall; and (iii) its acting in the State's shoes in stepping in and seizing control of a vessel in order to generate at a declared 'time of emergency'."[72] Claimant also refers to the Interim Award, where the Tribunal contended that the conduct of CONELEC may be attributed to the State insofar as it exercises "*puissance publique*", which, in Claimant's opinion, was the case in all instances relevant to the present matter.[73]

115. In the Claimant's view, the PBII Contract is not a commercial agreement, but rather a permit to allow certain regulated activities to be performed. Claimant refers to the clause regarding the purpose of the contract, to the 1996 Power Sector Regime Law, and to the prohibition against CONELEC engaging in commercial activity in the electricity sector as evidence against ascribing a commercial character to the PBII Contract.[74]

116. With respect to CENACE, Claimant asserts that this administrative entity should be considered an "institution of the State" under the Ecuadorian Constitutions of 1998 and 2008 and that it is specifically empowered to discharge the State's functions under the 1996 Power Sector Regime Law.[75]

117. Claimant also notes that PETROCOMERCIAL is a subsidiary of the State oil company PETROECUADOR, which is wholly owned by Respondent. Claimant submits that, given the terms of Article II(2)(b) of the BIT, entities that are entirely held or controlled by the State cannot fail to give rise to liability on the part of Respondent when such entities exercise "*any regulatory, administrative or other governmental authority that Respondent has delegated to it*." Claimant also asserts that PETROCOMERCIAL was created for the specific purpose of serving as the State oil company and the sole supplier of fuel under the

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[72] Statement of Reply, para. 35(c).

[73] Statement of Reply, para. 35(d). Claimant refers to the Interim Award as well as *Impregilo S.p.A. v. Islamic Republic of Pakistan*, Decision on Jurisdiction, dated 22 April 2005, ICSID Case No.ARB/03/3, Exhibit RLA6 to note that the bar set in the case was at the high water mark; and to *Bayindir Insaat Turizim Ticaret Ve Sanayi A. S. v. Islamic Republic of Pakistan*, Decision on Jurisdiction, dated 14 November 2005, ICSID Case No. ARB/03/29, Exhibit CLA97 ("*When an investor invokes a breach of a BIT by the host State, the alleged treaty violation is by definition an act of 'puissance publique.'*")

[74] Statement of Reply, paras. 16-19.

[75] Statement of Claim, para. 11; Statement of Reply, para. 37.

Fuel for Power scheme and therefore it amounts to an instrumentality of the State.[76] Claimant thus argues that the conduct of both PETROCOMERCIAL and PETROECUADOR should be attributed to Respondent, if not as organs of the Ecuadorean State, then under Article 5 of the ILC Articles due to the exercise of governmental authority.[77]

2. Respondent's contentions

118. Respondent submits that Claimant's efforts to attribute the conduct of CENACE, CATEG, PETROCOMERCIAL and, in particular, CONELEC to the State of Ecuador are without basis in international law.

119. Relying first on the on the Interim Award, Respondent argues that CONELEC is not an organ of the State and that, therefore, Article 4 of the ILC Articles does not apply to it.[78] On the contrary, in Respondent's view, the provision of the ILC Articles governing whether the actions of CONELEC are attributable to Respondent is Article 5. Accordingly, the Respondent submits, the Parties' dispute on attribution is in reality confined to whether CONELEC was exercising *puissance publique* when it performed the actions complained of by Claimant. Relying on the decision in *Impregilo v. Pakistan*, among other sources, Respondent argues that Claimant would need to prove that the acts in question involved an "*activity beyond that of an ordinary contracting party ('puissance publique')."*[79]

120. Respondent submits that the "*fundamental nature*" of the PBII Contract asserted by Claimant is irrelevant for the purposes of establishing attribution. Referring to *Jan de Nul v. Egypt* and to *Suez v. Argentina*, Respondent contends that in both cases the nature of the

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[76] Statement of Reply, para. 38; *Defense Industry of State X v. European Company*, Interim Award, dated 15 August 1991, ICC Case No. 6465, Exhibit CLA105, p. 29.

[77] Statement of Claim, paras. 14-15.

[78] Statement of Defence, para. 216. Respondent points to the Interim Award, para. 156, referring to CONELEC: "*Ecuador has created a special entity with separate legal personality, having its own assets and resources, capable of suing and being sued and entrusted with functions and powers to regulate the electricity sector on behalf of the State*."

[79] Statement of Defence, paras. 218-220; *Impregilo S.p.A v. Islamic Republic of Pakistan*, *supra* note 73, para. 266(b); *Siemens A.G. v. The Argentine Republic*, Award, dated 6 February 2007, ICSID Case No. ARB/02/08, Exhibit CLA64; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, Award, dated 24 July 2008, ICSID Case No. ARB/05/22, Exhibit RLA7.

contract was not considered as the applicable test for determining whether the actions in question were an exercise of *puissance publique*.[80]

121. Respondent further contends that Article 12 of the 1996 Power Sector Regime Law does not prevent CONELEC from using private law mechanisms, "*as plainly evidenced in the Licence Contract,*" to discharge its duties.[81] In Respondent's opinion, "*that provision means only that CONELEC may not enter the power generation, distribution or transmission businesses, but does not speak to the governmental or commercial character of CONELEC's specific actions.*"[82]

122. In sum, Respondent argues, CONELEC's actions amount merely to an exercise of the remedies available to it under the PBII Contract, governed by the Ecuadorian Civil Code. In exercising such remedies, Respondent contends CONELEC acted like any contracting party – "*by refusing to release the Claimant from its contractual obligations*" – when it declined to accept Claimant's request to terminate the PBII Contract. The imposition of fines for non-performance, Respondent notes, was specifically stipulated in the Licence Contract and, when taking control over PBII, CONELEC was employing enforcement powers available to it under the PBII Contract. In addition, Respondent claims that the decision to temporarily administer PBII was not based on Presidential Decree No. 124, but was made pursuant to Article 22 of the PBII Contract.[83]

123. In short, CONELEC "*was acting as a party to the PBII Contract*."[84] Respondent also notes that Resolution 089/2009, through which CONELEC ordered the temporary administration of PBII, states in its Recitals and Articles that it is based on "*contractual non compliance*."[85]

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[80] Statement of Rejoinder, paras. 64-67; *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, supra* note 66; *Suez, Sociedad General de Aguas de Barcelona, S.A., and InterAguas Servicios Integrales de Agua, S.A. and Vivendi Universal S.A. v. Argentine Republic*, Decision on Liability, dated 30 July 2010, ICSID Case No. ARB/03/17, Exhibit RLA21.

[81] Article 12 of the Power Sector Regime Law 1996, *supra* note 7: "CONELEC shall not exercise corporate activities in the electric sector" ("*no ejercerá actividades empresariales en el sector eléctrico.*").

[82] RPHS, para. 18.

[83] Statement of Rejoinder, paras. 70-76.

[84] Transcript, Day 5, p. 1026: 23-24.

[85] Transcript, Day 5, p. 1029: 2-3.

3. The Tribunal's analysis and conclusion

124. Both Parties have made reference in this regard to the ILC Articles and to Article II(2)(b) of the BIT. The latter provides that "[e]*ach Party shall ensure that any state enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Party's obligations under this Treaty wherever such enterprise exercises any regulatory, administrative or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licences, approve commercial transactions, or impose quotas, fees or other charges.*"

125. Claimant has made reference to a number of entities of the Ecuadorian State, specifically CONELEC, the Minister of Electricity, CENACE, CATEG, PETROCOMERCIAL and PETROECUADOR, holding that their conduct is attributable to Respondent as organs of the Ecuadorian State according to Article 4 of the ILC Articles or as exercising governmental authority according to Article 5 of the ILC Articles and Article II (2)(b) of the BIT.[86]

126. Article 4(2) of the ILC Articles provides that "[a]*n organ includes any person or entity which has that status in accordance with the internal law of the State.*" Other decisions in investment treaty cases have confirmed that to determine whether an entity is a State organ one must look to the State's domestic law.[87]

127. With the exception of the Minister of Electricity, who is obviously an organ of the Ecuadorian State, all other entities mentioned by Claimant (the "Entities") enjoy separate legal personality, have their own assets and resources to meet their liabilities. It remains to be determined whether each of CONELEC, CENACE, CATEG, PETROECUADOR and PETROCOMERCIAL is an organ of the Ecuadorian State or, in the negative, whether in its relations with Claimant it has exercised "*regulatory, administrative or other governmental authority*" delegated to it by the Ecuadorian State.[88]

128. The circumstance that under the Ecuadorian legal system, both the Constitution of 1998 and that of 2008 define all Entities as part of the public sector in the area related to electric

[86] Statement of Reply, paras. 34-38.

[87] See *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, supra* note 66, para. 160.

[88] Interim Award, para. 156.

power[89] is not *per se* sufficient to attribute their conduct to the State as the latter's organs. The Tribunal has already indicated that CONELEC is not an organ of the Ecuadorian State.[90]

129. CONELEC (The National Electricity Council – *El Consejo Nacional de Electricidad*) is a legal entity created by law, with the objective of regulating and controlling electric power activity, issuing generally binding rules, imposing legal, regulatory and contractual penalties for violations in the electric power matters, exercising the functions of granting authority in the name of the State, taking decisions with respect to taking over, termination, extension of concessions, licenses and permits.[91]

130. CENACE (The National Energy Control Center – *El Centro Nacional de Control de Energía*), according to the Power Sector Regime Law (which defines it as a *"non-profit corporation subject to the civil code"*), performs tasks related to the exercise of the State's regulatory power with respect to the WEM by exercising market control and by carrying out activities for the safeguard of safety conditions of the operation of the National Interconnected System and the preservation of the overall efficiency of the sector, as well as for the control of the operation of generation facilities.[92]

131. CATEG (Corporation for the Temporary Administration of Electric Power of Guayaquil-*Corporación para la Administración Temporal Eléctrica de Guayaquil*), created by Executive Decree No. 712 of 18 August 2003 as a private non-profit organization, performs activities relating to the distribution and marketing of electric power in the city of Guayaquil.[93]

132. PETROECUADOR, the State-owned company Pétroleos del Ecuador, created by Law No. 45 of 26 September 1989 with legal personality and its own assets, performs activities that

[89] Corral Second Report, *supra* note 67, para. 7. According to Professor Corral, his report "*does not try to cover or analyze public international law*" (para. 2).

[90] Interim Award, para. 154.

[91] Corral Second Report, para. 8.

[92] Corral Second Report, para. 9.

[93] Corral Second Report, paras. 12-13.

are directly related to the exercise of the State powers in the petroleum sector referred to in Article 247 of the 1998 Constitution.[94]

133. PETROCOMERCIAL, a State-owned company affiliated with PETROECUADOR, was created under the same Special Law which created PETROECUADOR, which provided also for the creation of first-tier subsidiaries for marketing and transportation activities in the petroleum sector.[95]

134. All Entities are subject to a system of controls under the 1998 Constitution, which is exercised by the Office of the Comptroller General of Ecuador as to their revenues, expenses and investments and the utilization and custody of public property[96]. The 2008 Constitution reinforced the public nature of the Entities by providing that they "*shall operate as companies subject to public law…*" and that "*the State shall always hold a majority of the stock for the participation in the management of the strategic sector and provisions of public services.*"[97]

135. The circumstance that the Entities are part of the Ecuadorian public sector and are subject to a system of controls by the State in view of the public interests involved in their activity does not make them organs of the Ecuadorian State for the purposes of Article 4 of the ILC Articles. Each of the Entities may nonetheless fall within the purview of Article 5 of the ILC Articles and Article II(2)(b) of the BIT to the extent governmental authority has been delegated to it with the consequence that some of their acts can be attributed to the State, provided that they are "*acting in that capacity in the particular instance.*"[98]

136. Claimant's contentions regarding the conduct of the Entities show that, except in specific instances that shall be mentioned, none of them have exercised elements of governmental authority in their relations with Claimant, as indicated hereafter.

137. CONELEC has exercised governmental authority delegated to it by Articles 2 and 3 of the Power Sector Regime Law when it granted the License. However, when it entered into the

[94] Corral Second Report, para. 14.

[95] Corral Second Report, para. 15.

[96] Corral Second Report, para. 16.

[97] Corral Second Report, paras. 19 and 22 (iii); 2008 Constitution, Article 315.

[98] ILC Articles, *supra* note 65, Article 5.

Licence Contract with Claimant regarding PBII and once the Licence Contract was executed, CONELEC's conduct in the contractual performance is to be evaluated on the basis of the contractual provisions accepted by Claimant when it signed the Licence Contract on 12 September 2006 and confirmed by it when the Licence Contract was amended on 6 June 2007.

138. As held by the tribunal in *Impregilo v. Pakistan*, only measures taken by the State "i" may come into consideration for purposes of attribution.[99] Likewise, in *Jan de Nul v. Egypt* it was held that what matters is "*not the 'service public' element but the use of 'prérogatives de puissance publique' or governmental authority.*"[100]

139. The circumstance that the Licence Contract is not a private law contract but rather an administrative contract, as asserted by Claimant,[101] does not change this conclusion. As indicated by the Interim Award, the Licence Contract shows by its terms that only CONELEC, not the Ecuadorian State, is a contracting party.[102] CONELEC's conduct is to be attributed only to it, not to the State of Ecuador, unless it uses governmental authority in its dealings with the investor. Claimant's claims mostly relate to contractual conduct, not to acts done by CONELEC outside of the Licence Contract as "*puissance publique.*" To the extent any such acts have been performed, outside the scope of the Licence Contract, CONELEC's conduct is attributable to the State according to Article 5 of the ILC Articles and Article II(2)(b) of the BIT.[103] The subsequent analysis shall show that no claims for breach of the BIT may validly be asserted against Respondent by reason of CONELEC's exercise of its regulatory powers.

140. CENACE's conduct, as the conduct of a public entity created and controlled by the Ecuadorian State, administering the technical and financial transactions under the WEM according to Article 23 of the Power Sector Regime Law, is attributable to the Ecuadorian

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[99] *Impregilo S.p.A v. Islamic Republic of Pakistan*, *supra* note 73, para. 143. It was similarly held in *Siemens A. G. v. The Argentine Republic*, *supra* note 79; *Biwater Gauff (Tanzania) Itd. v. United Republic of Tanzania*, *supra* note 79.

[100] *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, *supra* note 66, paras. 166-167.

[101] Statement of Reply, para. 19.

[102] Interim Award, paras. 157-161.

[103] This is the case of Claimant's reference to the fact that CONELEC participated with the Minister of Energy and CENACE "*in repeatedly altering the payment priority scheme to the detriment of private generators*"*:* Statement of Reply, para. 35 (e)(i). However, Exhibit C77 referred to by Claimant in this context records a decision of a Commission of the Ministry of Energy of 7 June 2007, which does not involve CONELEC.

State. Such conduct had limited impact on Claimant's activity considering that the latter has never operated in the WEM. The analysis that shall be further conducted below shows that no claims for breach of the BIT may be validly asserted against Respondent by reason of CENACE's exercise of its regulatory powers.

141. CATEG was involved only regarding the failed attempt by Claimant to secure a PPA following Minister Mosquera's indication, in January 2008, that this Company would enter into such an agreement with Claimant at acceptable conditions. CATEG, as a separate juridical entity, did not consider itself bound by what had been indicated to Claimant by the Minister and declined to conclude a PPA with Claimant on the offered conditions. CATEG's acts, prompted as they were by purely commercial considerations, are not attributable to Respondent, as it will be further discussed.

142. The same conclusion applies to PETROECUADOR's and PETROCOMERCIAL's conduct, considering that no direct relations had been entertained by Claimant with such companies due to the absence of any power generating activity by PBII.[104]

143. In conclusion, none of the acts performed by the Entities in their relations with Claimant or otherwise having an impact on its activities is attributable to Respondent.

C. THE ALLEGED EXPROPRIATION BY RESPONDENT OF CLAIMANT'S INVESTMENT

144. Claimant submits that the expropriation of its assets by Respondent has taken two forms: a temporary expropriation, which consisted of a direct physical seizure of PBII for nearly a year, and an indirect expropriation, arising from Respondent's effective stripping of all economic value from Claimant's investment.[105]

[104] PETROCOMERCIAL provided fuel to Claimant which was used by PBI (Statement of Claim, para. 106), therefore outside the scope of the present dispute.

[105] Statement of Claim, para. 102.

1. The Parties' positions

(i) *Temporary expropriation*

a. Claimant's contentions

145. As to the temporary expropriation, Claimant states that Respondent took control of PBII against Claimant's wishes, and therefore deprived Claimant of both the use of PBII and the enjoyment of its benefits.[106] Although PBII was ultimately returned, Claimant refers to the decision in *Wena Hotels Ltd v. Arab Republic of Egypt*,[107] in which the tribunal found that a temporary expropriation had taken place when Egypt seized the investors' hotel for a period of approximately one year, such deprivation being sufficient to constitute expropriation as it was "*more than an ephemeral interference in the use of that property or in the enjoyment of its benefits*."[108]

146. Claimant alleges that, although Respondent ultimately returned PBII, it made no effort to restore it to its original condition prior to the seizure. Claimant also submits that the offer of compensation (approximately US$2 million) did not amount to "*prompt, adequate and effective compensation*."[109] In any event, Claimant argues that no payment was actually made, due to the concerted and coordinated efforts of CONELEC and PETROCOMERCIAL.[110]

147. Finally, Claimant considers that Respondent's conduct violated not only Respondent's international law obligations, but also its contractual commitments to maintain a stable legal environment in which the barge was to operate.[111] Claimant notes that both as a

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[106] Statement of Claim, para. 104.

[107] *Wena Hotels Ltd v. Arab Republic of Egypt*, Award, dated 8 December 2000, ICSID Case No. ARB/98/4, Exhibit CLA29.

[108] Statement of Claim, para. 103.

[109] Transcript Day 1, p. 55: 6-15: "They rely upon the fact they paid some indemnity, but the standard for indemnity under Ecuadorian law is not the standard for compensation for expropriation under international law, and they don't allege that it is. The evidence shows that the value of the property taken was substantially higher than that provided by the State."

[110] Statement of Claim, paras. 105-106.

[111] Statement of Claim, para. 107(b).

matter of international law and Ecuadorian law, "*the responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations.*"[112]

b. Respondent's contentions

148. Respondent contends that there has been no temporary expropriation because: (i) CONELEC's actions were those of a contracting party and cannot amount to expropriation; (ii) the Temporary Administration did not deprive Claimant of any economic value, but to the contrary created value for Claimant; (iii) CONELEC's actions were fully justified under the Licence Contract and Ecuadorian Law and (iv) Claimant did not lose its control, use and enjoyment of PBII during the Temporary Administration.[113]

149. Respondent first claims that CONELEC is not an organ of the State and, therefore, that only its actions that fall within the ambit of Article 5 of the ILC Articles are attributable to Respondent. In particular, Respondent asserts that a breach of contract does not amount to expropriation under international law if the State is acting as a contracting party. In Respondent's view, CONELEC merely acted in accordance with the Licence Contract. Even if its actions had been in breach of the Licence Contract, however, they did not constitute an exercise of governmental authority and are not attributable to Respondent.[114]

150. Second, Respondent insists that the Claimant suffered no deprivation because it was Claimant that persistently refused to operate PBII or to cooperate with CONELEC and the Temporary Administrator. According to Respondent, Claimant refused to act as CONELEC's delegate operator or to resume the operation of PBII. Claimant also refused to accept the return of PBII for more than six months and to cooperate with CONELEC in securing a joint inspection of PBII.[115]

151. Third, Respondent claims that CONELEC's measures were justified under Article 22 of the Licence Contract as well as under the 1996 Power Sector Regime Law and the

[112] Statement of Claim, para. 107(a); VCLT, Article 27, Exhibit CLA5; ILC Articles, *supra* note 65, Article 32.

[113] Statement of Defence, para. 228. See also RPHS, para. 36.

[114] Statement of Defence, paras. 260-267; *Biwater Gauff (Tanzania) Itd. v. United Republic of Tanzania*, *supra* note 79; *Impregilo S.p.A v. Islamic Republic of Pakistan*, *supra* note 73; *Waste Management Inc. v. United Mexican States*, Award, dated 30 April 2004, ICSID Case No. ARB(AF)/00/3 (NAFTA), Exhibit RLA23; *Azurix Corp. v. Argentine Republic*, Award, dated 14 July 2006, ICSID Case No. ARB/01/12, Exhibit CLA62.

[115] Statement of Defence, paras. 268-275.

Concessions Regulations. The powers to take possession of PBII if Claimant refused to generate power was expressly provided for by Ecuadorian law, as incorporated by reference into the Licence Contract.

152. In any event, citing *LG&E v. Argentina* and *Gustav F W Hamester v. Ghana*, Respondent submits that, as a rule, only an interference that is permanent can constitute expropriation. In its opinion, this is especially true if the intervention is made for the purposes of keeping "*the Concession alive*", as noted by the tribunal in *Gemplus*. Respondent further refers to *Wena Hotels*, whose facts are not, in its opinion, analogous. Respondent further argues that *Wena Hotels*, relied upon by Claimant, is distinguishable on the facts, as Egypt did not dispute that the actions of the State tourism holding company were wrong. In Respondent's opinion, however, not only did CONELEC act within the express terms of the Licence Contract, but "*there was no question here of any interruption of business when CONELEC took over the Temporary Administration. CONELEC was merely giving effect to the purpose of the Licence Contract*."[116]

153. Finally, Respondent contends that Claimant delivered PBII "*voluntarily and was paid for its use*" during the Temporary Administration. Respondent insists that Claimant was free to retake and operate PBII at any time but "*persistently refused to do so*."[117] In addition, Respondent accuses Claimant of having deliberately and unreasonably delayed the return of PBII by six months, which resulted in the extension of the Temporary Administration until the end of the electricity emergency, due to expire on 7 May 2010. PBII was thereafter at Claimant's disposal for more than four months until Claimant chose to receive it on 27 September 2010.[118]

[116] Statement of Defence, paras. 276-282; *LG&E v. Argentina*, Decision on Liability, dated 3 October 2006, ICSID Case No. ARB/02/1, Exhibit RLA18; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, Award, dated 18 June 2010, ICSID Case No. ARB/07/24, Exhibit RLA9; *Gemplus S. A. and Talsud S. A. v. United Mexican States*, Award, dated 16 June 2010, ICSID Case Nos. ARB(AF)/04/3 and ARB(AF)/04/4, Exhibit RLA27; *Wena Hotels Ltd. v. Arab Republic of Egypt, supra* note 107.

[117] RPHS, para. 36.

[118] RPHS, paras. 36-39.

(ii) *Indirect expropriation*

a. Claimant's contentions

154. Claimant also alleges that Respondent took measures which are tantamount to expropriation. Claimant refers to the *Metalclad* and *Revere Cooper* cases. According to the decision in *Metalclad*, expropriation also covers "*covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be expected economic benefit of property even if not necessarily to the obvious benefit of the host State*."[119]

155. Claimant argues that the changes in the regulatory framework introduced by Respondent left Claimant with only one choice: generate at a loss or hand over control to Respondent. Claimant further asserts that, as a consequence of the damage Respondent inflicted on PBII, Claimant is no longer able to generate at all: "[Claimant] *got back a broken vessel requiring several million dollars worth of repairs. This amounts to expropriation* […] *under the Wena Hotel principles. It is not a temporary expropriation. Ecuador has permanently deprived Ulysseas of an essential component of the vessel as it was, i.e. its functionality*."[120] In Claimant's view, this course of action amounts to an indirect expropriation.[121]

156. According to Claimant, at the time of the seizure PBII was in operating condition.[122] It accuses Respondent of having failed to properly perform the running-in program, which resulted in the damages to the barge.[123] Claimant also contends that the damage found by MAN when it inspected PBII and Mr. Salazar's statement are consistent with the engines having been run with low heavy-fuel-oil temperatures.[124]

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[119] Statement of Claim, para. 108; *Metalclad Corp. v. Mexico*, Award, dated 30 August 2000, ICSID Case No. ARB(AF)/97/1, Exhibit CLA28; *Revere Copper & Brass Inc. v. Overseas Private Investment Corp*, (1978), 17 Int'l Legal Materials 1321, Exhibit CLA6.

[120] Transcript Day 1, p. 44: 1-7.

[121] Statement of Claim, para. 111.

[122] CPHS, paras. 30-32.

[123] *Id.*, paras. 33-36.

[124] *Id*., paras. 37-40

157. Furthermore, Claimant notes the logbook entries for 11 and 12 March 2010, which indicate that Engine No 3 reached unsafe levels of 577º and 610º. Mr. Lasluiza, Respondent's witness, contended during the hearing that those levels had to be a "*typing mistake*".[125] Claimant states that such evidence "*places the Tribunal in a difficult position: either Termopichincha was operating the engines well outside their parameters* […] or *they could not be trusted to fill in simple and basic data in logs*."[126]

158. Claimant argues that, as a result of those actions, it has suffered a substantial deprivation in that it has lost the entire value of its investment. Claimant contends that Respondent's actions deprived Claimant of any expectation of either generating accounts receivable that had any reasonable prospect of collection. Claimant emphasizes that it could not even recover a sum that would at least cover its upfront costs. Claimant also notes that it was unable to find a buyer willing to step into its shoes in the surrounding circumstances.[127]

159. In considering the question of whether there has been a "*substantial deprivation*" of its investment, Claimant first relies on *Suez v. Argentina* and *CMS v. Argentina*, according to which "'*the essential question is to establish whether the enjoyment of the property has been effectively neutralized,' because 'the standard where indirect expropriation is contended is that of substantial deprivation.*'"[128] After questioning the relevance of "*a 1934 State-State arbitration case*" mentioned by Respondent (referring to *Oscar Chinn*), Claimant insists that this is not a case of making bad business decisions, but a situation where Claimant's investment has been plunged into a legal and regulatory regime which did not allow it to operate so as to recover its reasonable costs or generate return.[129]

160. In relation to the contention by Respondent that similarly situated entities had been able to make a profit, Claimant sustains that no proof has been offered by Respondent to support this allegation. In addition, Claimant states that press reports seem to tell "*a very different story*." Claimant refers to *Noble Energy Inc. v. Ecuador*, in which it was recorded that the generator was not operating at a profit, and to Mr. Veldwijk's report, in which he states

[125] Transcript, Day 4, p. 758:8-9.

[126] CPHS, paras. 41-45.

[127] Statement of Reply, para. 81.

[128] Statement of Reply, para. 80; *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales de Agua S.A. and Vivendi Universal S.A. v. Argentine Republic*, *supra* note 80.

[129] Statement of Reply, para. 82.

that he was receiving similar information in relation to Termoguayas. Claimant also cites *Duke v. Ecuador* and *Noble v. Ecuador*, where the claimants, who had entered into contracts with Ecuador, struggled to obtain any collections.[130]

161. Claimant also argues that Respondent fails to offer any proof that discussions were entered into between Claimant and distribution companies to enter into a PPA or any evidence that those discussions broke down due to Claimant's unreasonableness.[131] Claimant states that "*all of the Claimant's proposals were rejected by the distributors (all state-owned), without any counter-offer or further effort to reach agreeable terms*."[132]

162. Finally, Claimant refutes Respondent's contention that it cannot complain that it has been substantially deprived of the value of its investment because "*it voluntarily agreed under the PBII Contract to keep the Barge in Ecuador for 15 years*." Claimant notes the entry into the PBII Contract was premised on the assumption that CONELEC would ensure that its end of the bargain was upheld, "*which did not happen*."[133]

b. Respondent's contentions

163. In Respondent's view, there was no indirect expropriation because Respondent did not radically or substantially deprive Claimant of the economic value of PBII. According to Respondent, in order to establish indirect expropriation Claimant must prove, *inter alia*, that (i) Respondent has deprived Claimant of the value of PBII and (ii) such deprivation cannot be justified as an instance of reasonable regulation.[134]

164. As to the "*substantial deprivation*" requirement, Respondent notes that (i) "*substantial deprivation*" is a demanding standard which is not met here, (ii) the lack of feasibility of

[130] *Id.*, para. 82; *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, Award, dated 18 August 2008, ICSID Case No. ARB/04/19, Exhibit RLA2; *Noble Energy Inc. and Machalapower CIA. LTDA v. Ecuador and Consejo Nacional de Electricidad*, Decision on Jurisdiction, dated 5 March 2008, ICSID Case No. ARB/05/12, Exhibit RLA3.

[131] Statement of Reply, para. 86.

[132] CPHS, para. 18.

[133] Statement of Reply, paras. 83-84.

[134] Statement of Defence, para. 229.

Claimant's purported PBII project was not due to any actions of Respondent and (iii) Respondent acted reasonably in connection with PBII.[135]

165. With regard to the applicable standard, Respondent relies, *inter alia*, on *Glamis Gold v. United States* to explain that "*deprivation*" entails a high threshold of interference by the host State. Respondent refers to *LG&E v. Argentina*, *Enron v. Argentina* and *CMS v. Argentina* in order to show that investment tribunals have consistently held that there is no expropriation when the investor continues to enjoy the ownership or control of the investment.[136]

166. Respondent also argues that, even if Respondent's actions had diminished the expected profitability of Claimant's investment, this would not amount to direct or indirect expropriation. Respondent refers to several cases, including *Occidental v. Ecuador*, *Waste Management* and *Oscar Chinn*, where tribunals held that "*substantial deprivation*" was not present despite a finding that economic profitability had been interfered with. Respondent also claims that Claimant's reliance on *Revere Copper* is misplaced. Respondent contends that in *Revere Copper* a newly elected government increased the royalties to be paid by the investor so drastically that it ceased operating. However, in Respondent's view, there has been no repudiation of the Licence Contract in this case: on the contrary, CONELEC just insisted that Claimant abide by the terms of the Licence Contract and operate PBII.[137]

167. Respondent notes that the burden of proof in establishing an expropriation lies with Claimant and asserts that Claimant has failed to satisfy its burden because it has offered no proof that it would only have been able to operate PBII at a loss. Moreover, Respondent

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[135] *Id.*, para. 229

[136] *Id.*, paras. 230-234; *Glamis Gold v. United States of America*, Award, dated 8 June 2009, UNCITRAL, Exhibit RLA10; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, Award, dated 22 May 2007, ICSID Case No. ARB/01/3, Exhibit RLA16; *CMS v. Argentine Republic*, Award, dated 12 May 2005, ICSID Case No. ARB/01/8, Exhibit RLA17; *LG&E v. Argentine Republic*, *supra* note 116.

[137] Statement of Defence, paras. 234-242; *Case concerning Oscar Chinn (UK v. Belgium)*, Judgement, PCIJ Ser.A/B No. 63, dated 12 December 1934, Exhibit RLA20; *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales de Agua S.A. and Vivendi Universal S.A. v. Argentine Republic*, *supra* note 80; *Waste Management Inc. v. United Mexican States*, *supra* note 114; *Metalclad Corp. v. Mexico*, *supra* note 119; and *Revere Copper & Brass Inc. v. Overseas Private Investment Corp*, *supra* note 119.

argues that Mr. Veldwijk's witness statement concedes that Claimant could have at least achieved "break even."[138]

168. Even if Claimant can establish that it was somehow deprived of the value of PBII, Claimant's expropriation claim would in Respondent's view still fail because Respondent did not cause such deprivation.[139] Respondent argues that Claimant cannot meet the stringent burden of a "*suitable causal link*", as set out in *Olguín v. Paraguay*.[140] Respondent also disputes that Claimant's complaint that the amount paid by CONELEC was insufficient and states that Claimant had never indicated that the amount was inadequate.[141]

169. According to Respondent, PBII simply turned out to be less profitable than expected due to Claimant's own conduct. It contends that Claimant incurred wasteful and illegitimate expenditures when attempting to install the barge in Puerto Hondo and Santa Elena without approval, and that it failed to secure a PPA – resulting in further problems, including a worse position in the payment priority order – because of its insistence on unreasonable terms.[142] Respondent also notes that CONELEC terminated the PBII Licence Contract on 17 March 2011.[143] As to the complaint by Claimant that it could not find a buyer for PBII, Respondent says that "it is absurd" and argues that Claimant cannot complain of deprivation on the basis that it still possesses its investment.[144]

170. Further, Respondent claims that, even if it was proved that its actions deprived the PBII project of all value, Claimant would fail to demonstrate that it was the entity which suffered as a result. Respondent asserts that Proteus Power, as charterer, was the entity with the right to have "*exclusive use, dominion, control, possession and command of*

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[138] Statement of Defence, paras. 243-245; *Tokios Tokelés v. Ukraine*, Award, dated 26 July 2007, ICSID Case No. ARB/02/18, Exhibit RLA24.

[139] Statement of Defence, para. 247.

[140] Statement of Defence, paras. 248-250; *Tradex Hellas S.A. v. Republic of Albania*, Award, dated 29 April 1999, ICSID Case No. ARB/94/2, Exhibit RLA25; *Otis Elevator Company v. Iran*, Award, Iran-U.S. Claims Tribunal, dated 29 April 1987, Case No. 294, Exhibit RLA15 and *Olguín v. Republic of Paraguay*, Award, dated 26 July 2001, ICSID Case No. AB/98/5, Exhibit RLA26.

[141] Statement of Rejoinder, para. 89.

[142] Statement of Defence, para. 251.

[143] Statement of Rejoinder, para. 82.

[144] *Id.*, para. 82.

[PBII]," and as such the only party who could claim damages.[145] As to the Claimant's complaints regarding the conduct of CONELEC in "compounding" the expropriation, Respondent argues (i) that CONELEC's actions are again not attributable to Respondent, (ii) that Claimant willingly entered into a fifteen year contract for the operation of PBII and (iii) that "there is no support in arbitral practice for the proposition that a contractual party's insistence on the specific performance of a contract can amount to expropriation by the host State."[146]

171. With regard to the second requirement for indirect expropriation stated by Respondent – the need to establish that the regulatory measures were unreasonable – Respondent argues that all the measures were taken for a public purpose, namely, addressing the payment problems and promoting the efficiency of the power sector. Respondent relies on *Methanex v. USA*, where the Tribunal found there was no expropriation because the ban of a gasoline additive was adopted for a public purpose, and concludes there has been no indirect expropriation here either.[147]

2. The Tribunal's analysis and conclusion

172. Article III(1) of the BIT states that "*investment shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ('expropriation').*" According to Claimant, Respondent has breached this Article by expropriating its investment.

(i) *Temporary expropriation*

173. The temporary expropriation, one of the two forms of expropriation of its investment alleged by Claimant, would have consisted in the physical seizure of PBII for nearly a year.[148] This action would have deprived Claimant of the use and enjoyment of PBII and its benefits, thus violating Article III (1) of the BIT by expropriating its investment,

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[145] Statement of Defence, para. 253.

[146] Statement of Defence, para. 254; *Gemplus S.A. and Talsud S.A. v. United Mexican States*, *supra* note 116.

[147] Statement of Defence, para. 258; *Methanex v. United States*, Award, dated 3 August 2005, UNCITRAL, Exhibit RLA28.

[148] Statement of Claim, para. 102.

PBII.[149] The offer of compensation for approximately US$ 2 million does not amount to a "*prompt adequate and effective compensation*" under said scenario.[150] This head of Claimant's expropriation claim may not be accepted for the following reasons.

174. CONELEC's seizure of PBII in 2009 was not an expropriation of Claimant's investment but the exercise by CONELEC of the power recognized to it under Ecuadorian law[151] and Article 22 of the Licence Contract (which refers to the Concessions Regulations).[152] This Article entitles CONELEC's to intervene in the Licence Contract by, among other actions, taking temporary possession of the licensee's assets in case of failure by Claimant to commence power generating activity within the agreed time limit.

175. The time-limit for commencing commercial operations had long since expired when CONELEC, in view of the insufficient electrical supply for the country, by letter of 24 September 2009 informed Claimant of its Board of Directors' Resolution "*to declare that as of this date ULYSSEAS INC. is held to be in breach of contract due to the fact that commercial operation did not begin on the date established in the Permit Agreement and Amendment Agreement signed with this Council and in the duly authorized extensions.*…"(Article 1).[153]

176. CONELEC Board's Resolution offered Claimant to commence generation by operating PBII within 3 business days, failing which generation would be assumed by means of a third party (Articles 2 and 3). Claimant's refusal to act as temporary administration of the barge led CONELEC to temporarily assume generation activities by operating PBII. It so informed Claimant on 7 October 2009, designating CELEC, through Termopichincha, as temporary administrator of the barge. PBII was transferred to CELEC-Termopichincha for such Temporary Administration the following day. Claimant's continuing ownership over PBII and its right to compensation for the use of the property was recognised. The

[149] Statement of Claim, para. 104.

[150] Statement of Claim, para. 106.

[151] Power Sector Regime Law, s*upra* note 7, Article 13(m); Concessions Regulations, *supra* note 11.

[152] Respondent refers to Article 22 of the Licence Contract as the contractual basis for CONELEC's obligation to resort to the Temporary Administration of PBII by stating: "*This obligation was expressly referenced and authorised by Article 22 of the Licence Contract*" (Statement of Defence, para. 175; *Id.*, also para. 261).

[153] Letter from CONELEC to Claimant, dated 24 September 2009 and enclosed Resolution No. 089/09 of the Board of Directors, Exhibit C129.

temporary loss of control of the barge is attributable to Claimant, considering also CONELEC's repeated invitations to Claimant to resume control of the barge to operate the same.

177. Under CONELEC Resolution 089/09 of 24 September 2009, PBII had to be administered temporarily and, in any case, not for more than six months. Claimant would have therefore regained possession of the barge as early as 25 March 2010. However, due to a number of reasons that, in the Tribunal's opinion are not attributable only to Respondent, possession of the barge was regained by Claimant only at the end of September 2010. On 5 May 2010 CONELEC, in accordance with Article 9 of Resolution 089/09, authorised payment of USD 2,125,158.21 as compensation for the temporary use of PBII.[154]

178. The Temporary Administration of PBII was an action done by CONELEC in the exercise of a right granted under the Licence Contract in the presence of a breach by Claimant of its contractual obligation to generate electricity for 15 years. It was "*the ordinary behaviour of a contractual counterparty*",[155] therefore not an exercise of governmental authority as "*puissance publique*" attributable to the Ecuadorian State. As held by another award involving Ecuador,

> "*Private contract parties can agree to empower one of them to impose sanctions on the other for unlawful performance of the contract. Such mutually agreed delegation of power derives from the parties' autonomy under the law of contracts. It must be distinguished from the power of the State to impose sanctions in the exercise of its sovereign power.*"[156]

179. The contractual nature of CONELEC's actions excludes the possibility that the Temporary Administration gave rise to an expropriation of Claimant's assets, and therefore to a violation by Respondent of Article III(1) of the BIT. This also entails that any claims asserted by Claimant in that regard, including for damages allegedly caused to the barge during the Temporary Administration, should be settled in accordance with the applicable provisions of the Licence Contract.

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[154] The amount of compensation was not paid to Claimant but was withheld in favour of PETROCOMERCIAL due to the latter's entitlement to recover USD 2,007,812.27 for fuel purchased by Claimant for the operation of PBI (*supra* note 122).

[155] To use the words of the Award of 24 July 2008, in *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania supra* note 79, para. 492.

[156] *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, *supra* note 130.

(ii) *Indirect expropriation*

180. The other form of expropriation of the investment claimed by Claimant relates to the alleged interference by the Ecuadorian State with the use of property, with the effect of "*depriving the owner, in whole or in a significant part, of the use or reasonably to be expected economic benefit of property*."[157] According to Claimant, the changes in the regulatory framework introduced by Respondent left it with no other alternative than to generate at a loss, thus permanently depriving it of all expected economic benefit from its investment in Ecuador. This, in Claimant's view, amounts to an indirect expropriation.

181. This "*regulatory evisceration*", as so characterised by Claimant, was compounded by Respondent, via CONELEC, holding it to its long-term concession agreement without allowing a risk mitigation by simply sailing away from Ecuador.[158] To substantiate its claim, Claimant refers to arbitral cases where indirect expropriation has been said to exist when government measures entail a *substantial deprivation* of the investment or its economic benefits.[159]

182. The *Suez v. Argentina* award, relied upon by Claimant, specifies that to effect a substantial deprivation the measures "*must also be permanent*."[160]

183. Two changes in the regulatory framework in place at the time of its investment are mentioned in particular by Claimant in support of its claim for expropriation, both mentioned in the written statement of Mr. Jan Veldwijk, a witness for Claimant: (i) the changes in the priority regime in 2007 and 2008, making it impossible for Claimant "*to generate electricity, sell it on the spot market, and actually receive money for doing so*," and (ii) the impossibility of reaching agreement to obtain a viable PPA (after two and-a-half years of fruitless negotiations) "*as a consequence of the way the Respondent negotiated and the huge advantages of State-owned generation companies.*"[161] In addition,

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[157] In the words of the Award of 30 August 2000 in *Metalclad Corp. v. Mexico*, *supra* note 119, para. 103, referred to by Claimant (Statement of Claim, para. 108).

[158] Statement of Claim, para. 109.

[159] Statement of Reply, paras. 79-80, referring (in para. 80) to the reasoning in *Suez v. Argentina*, *supra* note 80, relied upon also by Respondent (Statement of Defence, para. 237).

[160] *Suez v. Argentina*, *supra* note 80, para. 123.

[161] Statement of Claim, para. 110.

Respondent fined Claimant for not producing electricity and "*capped the process by taking forced possession of PBII, then wrecking it.*"[162]

184. These aspects of Claimant's claim for indirect expropriation or for measures tantamount to expropriation have been confirmed by Claimant in further submissions,[163] with some developments regarding the meaning of *substantial deprivation* (specifically, according to the tribunal in *Suez v. Argentina*). Claimant's alleged loss of the entire value of its investment is motivated by the circumstance that it could not generate electricity and have an expectation of being paid at least to cover its upfront costs or, alternatively, that it was not allowed to quit Ecuador and earn profits elsewhere or find a buyer for the barge.[164] The discontinuance of the fuel credit system is alleged by Claimant as another cause of substantial deprivation of its investment.[165] These various aspects of Claimant's claim will be examined in turn.

185. Fines for Claimant's failure to produce electricity is a sanction that Claimant knew could be imposed by CONELEC under the Licence Contract (Article 16). This measure therefore is not attributable to Respondent for the same reason mentioned above regarding the Temporary Administration, namely that it was an action based on a contract and not an exercise of *puissance publique*. Moreover, the exercise of a contractual power by CONELEC may not amount to a breach of the BIT in the absence of proof that such exercise resulted in a violation of a specific standard of treatment. As to the "*taking of forced possession of PBII,*" the Tribunal has already excluded that the Temporary Administration of the barge is attributable to Respondent as a temporary expropriation of Claimant's investment and, moreover, that it resulted in a breach of the BIT.[166]

186. The changes in the priority regime were not, in themselves or in combination with the lack of a viable PPA, the cause of such a substantial deprivation of the economic value of Claimant's investment as to amount to its indirect expropriation. The situation confronting Claimant in 2007 and 2008 was the consequence of the failure by power generators to be

[162] *Id*.

[163] Statement of Reply, para. 76.

[164] Statement of Reply, para. 81.

[165] Statement of Reply, para. 82(a)(i).

[166] *Supra*, paras. 173-174.

able to operate economically and to actually receive payment for the power generated by them due to the low-level end-user electricity tariff that had historically prevented the rates paid by consumers to be sufficient to cover the actual costs of power generation and transmission and allow for a reasonable return.

187. Claimant, which had planned since 2003 to enter Ecuador to produce and sell electricity, was well aware of the State's efforts to regulate the power sector so as to ensure power generators' ability to sell at a price that was economic to their business. However, there was no guarantee of profitability of the regulatory system, as made clear, among other law provisions, by Article 40 of the Power Sector Regime Law of 1996, according to which "*the Ecuadorian State shall not guarantee the production price or profitability of investment and market for electricity to any generator whatsoever*."

188. Between 2003 and 2009 a series of changes to the payment priority order were introduced. Claimant's complaint regarding changes in 2007 and 2008 is ill-founded since, based on the experience of the past, it had to expect these and possible further changes in the priority order for payment to private generators. Claimant has not proven the substantial deprivation of the value of its investment that would have been caused by these changes in the payment priority order. According to one of Respondent's witnesses, Ing J. Vergara, the 2007 change improved the prospects of collection of private generators selling to the spot market which continued to enjoy a high ranking, with only payments for the margin on spot sales ranking one level before the last one (similarly to 2006).[167] There is no mention in the record of these proceedings of a change in 2008.[168] According to Mr. Z. Korn, one of Claimant's witnesses, Claimant did not base its decision to sign the Licence Contract on a particular payment priority order.[169]

[167] RPHS, para. 8. Mr J. Vergara confirmed this at the hearing by stating: "*There is this priority list, and there is a better improvement of the payment trust in 2007 and a better payment order in 2009. This has allowed all generators, especially private generators, to be paid in full for the invoices they submitted*" (Transcript, Day 3, p. 581: 16-22).

[168] Muñoz Report, *supra* note 30, submitted by Claimant, does not mention a new payment priority order in 2008.

[169] Mr. Z. Korn stated the following at the hearing: "we were not so much inclined to worry about payment priorities…nobody presumed that being in a priority 3 or 4 meant you did not get paid or you would be paid less than what you were owed" (Transcript, Day 2, pp. 265:19; 266:10). Mr. Korn also confirmed that Claimant was aware that "many things kept on changing in Ecuador" (Transcript, Day 2, p. 266; 5-6).

189. The evolutionary character of the changes in priority order due to the need to ensure a better stability of the electricity market condition deprives the alleged substantial deprivation of the value of Claimant's investment of the required *permanent* character.

190. The alleged impossibility to reach agreement for a commercially viable PPA cannot be imputed to Respondent. As a matter of fact, Claimant was unable to secure a PPA because it proposed price and other terms and conditions that no distribution company was willing to accept. This is confirmed by the fact that all generators, except Claimant, had secured viable PPAs.

191. Even if some public authorities or officials might have given an expectation to Claimant by statements made in meetings that a viable PPA would be concluded by Claimant, the evidence in the file shows that no firm assurances had been given to Claimant in that regard.

192. In a meeting on 12 December 2007 with the Minister of Electricity, Mr. Alecksey Mosquera, the latter indicated to Claimant that it would recover its variable costs, its PPA sales price would be US$ 0.017 - US$ 0.018 above its declared variable costs and that it would receive US$ 9 million in free cash flow per annum.[170] In a subsequent meeting with CONELEC's Executive Director, Mr. Fernando Izquierdo, the latter indicated an opportunity for Claimant to enter into a PPA with CATEG, a State entity wholly controlled by CONELEC, at a price that would allow to cover its costs and make a return. This was confirmed by Minister Mosquera in a meeting on 31 January 2008, stating that CATEG would enter into a PPA on the same terms granted to another power company, Termoguayas, and outlining the terms to be incorporated in a PPA.[171]

193. The minutes of the meeting of 31 January 2008 with Minister Mosquera confirm what is stated by Claimant in this arbitration.[172] Following the meeting, by letter of 25 February 2008. Claimant proposed the terms of a PPA to CATEG conforming to those indicated by

[170] Statement of Claim, para. 47 (b).

[171] *Id.*, para. 47 (c) (d).

[172] Email from Mr. Mario Restrepo to Mr. John Hager, Mr. Jan Veldwijk and Mr. Robert Wells (including attachment), dated 4 Feb 2008, Exhibit C98. The content of these minutes is not disputed by Respondent, who makes reference to them (Statement of Rejoinder, note 68).

Minister Mosquera.[173] When viewed in the light of statements made by such high levels of authority in the electricity sector, Claimant's surprise in learning from CATEG that the latter was not available to enter into a PPA is understandable.[174]

194. The conduct of Minister Mosquera in these circumstances is not exempt from criticism for having created an expectation that Claimant would be able to conclude a PPA with CATEG on favourable commercial terms. However, further circumstances bear mentioning in that regard.

195. Firstly, as shown by the minutes of the 31 January 2008 meeting (under point 4(f)), the Minister called CATEG in the presence of Claimant to schedule an appointment "*to negotiate (and try to execute) the PPA under the conditions set forth herein.*" This shows that there was no firm assurance that a PPA would be entered into with CATEG and, more specifically, on defined terms. Further, by letter of 6 March 2008, addressed to CATEG and Claimant, Minister Mosquera made it clear that CATEG was "*free to negotiate and establish power purchasing contracts with the company that offers the best technical and economic conditions.*"[175]

196. In its letter of 25 March 2008, CATEG mentions as the reason for declining Claimant's proposal for a PPA the fact that CONELEC's Regulation No. 002/07 of October 2007 had imposed "*a severe limitation on the energy that CATEG may acquire under contracts with other generators.*" Presumably when Claimant's proposal for a PPA was received by CATEG, the latter had already reached that limitation on the energy it might acquire. It is somewhat surprising that Minister Mosquera was unaware of this limitation when indicating to Claimant the prospects of a PPA with CATEG. This conduct, although lacking of the transparency and straightforwardness required from such a high level of authority when dealing with a foreign investor, is not sufficient *per se* to rise to the level of a breach of the BIT. It became in fact clear to Claimant in less than two month time after the meeting with Minister Mosquera that no PPA would be entered into with

[173] Letter by Claimant to CATEG, dated 25 February 2008, Exhibit C100.

[174] Letter by CATEG to Claimant of 25 March 2008, Exhibit C101. This letter refers to Claimant's proposal for a PPA of 25 February 2008, so that Claimant's statement that it learnt of CATEG's impossibility to enter into a PPA "*that year only after two months of serious negotiations*" (Statement of Claim, para. 47(e)) is surprising. Moreover, as indicated by Claimant, already in a meeting of 7 February 2008, it had learnt from CATEG that the latter would not sign a PPA with Claimant (CPHS, Chart attached as Exhibit A).

[175] Letter from Minister Mosquera to CATEG and Claimant dated 6 March 2008, Exhibit R151.

CATEG. Claimant's prejudice deriving from such conduct, if any, was therefore very limited.

197. The events that followed in 2009 do not support Claimant's assertion that it was unable to enter into a PPA for reasons attributable to Respondent. On 17 April 2009, the Ministry of Electricity invited all private generators, including Claimant, to negotiate PPAs with distribution companies, sending them Terms of Reference for such negotiations.[176] According to the Terms of Reference, generators were required to submit their proposals by 23 April 2009. Claimant failed to submit a PPA proposal and was thus excluded from the negotiations for a PPA. All other private generators submitted PPA proposals and many of them had executed a PPA already in August 2009.

198. According to Mr. Jan Veldwijk, one of Claimant's witnesses, Claimant was concerned about the "*trust fund*" mechanism as security for payment under a potential PPA.[177] However, according to the priority order under the Payment Trusts of 25 June 2009, private generators with PPAs would rank among the first generators to be paid. All other private generators executed PPAs considering the trust fund to be an acceptable security for payment. Mr. Veldwijks's description of the various meetings held during the "*Round Two PPA*" negotiations shows that Claimant's reasons for not executing a PPA were purely commercial and that Claimant was never excluded from the relevant negotiations.[178]

199. The fact that Claimant was not allowed to quit Ecuador may not be imputed to Respondent considering that it had undertaken to produce electricity for fifteen years under freely accepted contractual conditions by entering into the PBII Contract and that under the PBII Contract termination without sanction could only come about by mutual agreement

[176] Letter from the Ministry of Electricity to all private generators, dated 13 April 2009, Exhibit R261; Terms of Reference for Power Purchase Agreements between distribution companies and private generators, dated 9 April 2009, Exhibit R262.

[177] Third Witness Statement of Mr. Jan Veldwijk, CWS-12, para. 33.

[178] *Id.*, paras. 32-42. In an e-mail addressed to Mr. Jon Pollock and Mr. German Efromovich on December 8, 2009 regarding presentation to CONELEC of Claimant's financials in relation to a prospective PPA, Mr. Jan Veldwijk admits that "*our numbers are significantly higher than some of the other provide, explainable through the additional costs we have incurred over the past years (US$ 25 Million*) *and the high value of our barge*" (Exhibit C139). More than one year before, the CEO of a distribution company, Empresa Eléctrica Regional El Oro S.A., replying on April 16, 2008 to an offer for a PPA submitted by Claimant, stated: "*After performing this analysis, we have concluded that the price offered by ULYSSEAS, INC. is not in the interest of the institution I represent*" (Exhibit C16).

(Article 17.2). Likewise, the failure to find a buyer for PBII may not be imputed to Respondent. As to the alleged discontinuance of fuel credits, the analysis that will be made hereafter will show the lack of merit also of this argument for a substantial deprivation of its investment alleged by Claimant.[179]

200. In conclusion, whether considered in isolation or by their combined effects, the reasons alleged by Claimant do not constitute a sufficient basis for the claimed *substantial deprivation* of the value of its investment resulting in its indirect expropriation or in measures tantamount to expropriation.

201. In the light of all the foregoing reasons, Claimant's claim of expropriation of its investment must be dismissed.

D. THE ALLEGED BREACH OF THE FAIR AND EQUITABLE TREATMENT STANDARD

1. The Parties' positions

(i) *The level of protection under the BIT*

a. Claimant's contentions

202. Claimant submits that there is a close nexus between legitimate expectations and fair and equitable treatment and states that the level of protection is at least that of customary international law, if not higher.[180]

203. Claimant contends that Respondent breached its obligation under Article II(3)(a) of the BIT to provide fair and equitable treatment. Claimant refers to the definition of fair and equitable treatment provided by the tribunal in *Tecmed*, according to which fair and equitable treatment means "*treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment*."[181] Claimant also relies on *Saluka*, *Siemens* and *Alpha v. Ukraine* for the idea that "*governments must avoid*

[179] More will be said on the subject when dealing with the attempted sale of PBII to Termoesmeraldas (*infra*, para. 321).

[180] Statement of Claim, paras. 73-77.

[181] Statement of Claim, para. 73; *Técnicas Medioambientales Tecmed SA v. United Mexican States*, Award, dated 29 May 2003, ICSID Case No. ARB(AF)/00/2, Exhibit CLA37.

arbitrarily changing the rules of the game in a manner that undermines the legitimate expectations of, or the representations made to an investor."[182]

204. With reference to *EDF v. Romania* and *Duke v. Ecuador*, Claimant argues that it is widely accepted that the level of protection is at least that of customary international law, and that it may be higher depending on the context of the BIT in question.[183] It also relies on the language of the Preamble to the BIT and on the observation made by Dolzer and Schreuer in their treatise, to conclude that the protection offered under the BIT is capable of supporting a promise of maintaining a stable legal and regulatory framework. As to Respondent's reliance on the 2004 US Model BIT and NAFTA, Claimant notes that the instant BIT entered into force prior to either of the other two instruments and contends that the specific language adopted in the NAFTA treaty renders it unhelpful in interpreting what the present BIT means.[184]

b. Respondent's contentions

205. Respondent argues that the BIT does not protect Claimant against commercial risk and accuses Claimant of distorting international law obligations to protect itself against the consequences of its own poor business decisions. Respondent also claims that international law only protects reasonable expectations based on legitimate investment, and only in the context of proscribing arbitrary measures.[185]

206. Respondent notes that Article II(3)(a) must be interpreted in light of the object and purpose of the BIT, in accordance with Article 31(1) of the Vienna Convention. In its view, and by relying on the decisions in *Occidental v. Ecuador* and *CMS v. Argentina*, and on the 2004 US Model Bilateral Investment Treaty, the fair and equitable treatment standard embodied in Article II(3)(a) does not establish a higher standard than the

[182] Statement of Claim, para. 76; *Saluka Investments BV (The Netherlands) v. Czech Republic*, Partial Award, dated 17 March 2006, Exhibit CLA60; *Siemens v. Argentina*, *supra* note 79; *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, dated 8 November 2010, Exhibit CLA82.

[183] Statement of Reply, para. 61(d); *EDF (Services) Limited v. Romania*, Award, ICSID Case No. ARB/05/13, dated 8 October 2009, Exhibit RLA35; *Duke Energy Electroquil Partners & Electroquil S.A.* v. *Republic of Ecuador*, *supra* note 130.

[184] Statement of Reply, paras. 60-64.

[185] Statement of Defence, para. 285.

customary international law minimum standard of treatment.[186] Respondent also refers to several cases where a showing of a serious misconduct – e.g. conduct that is "*arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory which exposes the claimant to sectional or rational prejudice, or involves a lack of due process leading to an outcome which offends judicial property*" – was required in order to consider that the minimum standard of treatment had been breached.[187]

207. In Respondent's view, the authorities relied upon by Claimant support the position that, in any event, the content of the fair and equitable standard is "*essentially the same*" as the customary international law minimum standard of treatment. Respondent notes that, by the time Claimant was formed in February 2003, and before the execution of the Licence Contract in September 2006, both Ecuador and the United States "*had settled harmonious views on the confined scope of fair and equitable treatment*."[188]

208. Respondent claims that the fair and equitable treatment standard preserves the right of a host State to change the legal and regulatory framework applicable to an investment. In Respondent's view, the high threshold of this standard places the burden on the investor to proceed "with awareness of the regulatory situation."[189] Respondent submits that this view is supported by *Duke v. Ecuador* and *EDF v. Romania*, among other decisions. It also compares the case with *Parkerings-Compagniet v. Lithuania*, where the tribunal did not find any breach of the BIT despite Lithuania having introduced legislative modifications which had a negative impact on Claimant's investment.[190] Respondent further contends that the legitimate expectations at the time an investor made its investment must be judged objectively. Respondent also recalls that, according to *EDF v.*

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[186] Statement of Defence, paras. 289-291; *Occidental Exploration and Production Company v. Ecuador*, Final Award, dated 1 July 2004, LCIA Case No. UN3467, Exhibit CLA49; *CMS Gas Transmission Co v. Argentine Republic*, *supra* note 136.

[187] Statement of Defence, paras. 293-296; *Waste Management Inc. v. United Mexican States*, *supra* note 114; *Saluka Investments BV v. Czech Republic*, *supra* note 182; *SD Myers v. Canada*, First Partial Award, dated 13 November 2000, UNCITRAL, Exhibit RLA31; *Mondev International Ltd. v. USA*, Award, dated 11 October 2002, ICSID Case No. ARB(AF)/99/2, Exhibit RLA32.

[188] Statement of Rejoinder, para. 98; *Duke Energy Electroquil Partners & Electroquil S.A.* v. *Republic of Ecuador*, *supra* note 130; *CMS Gas Transmission Co v Argentine Republic*, *supra* note 136; *Azurix Corp. v. Argentine Republic*, *supra* note 114.

[189] Statement of Defence, para. 298; *Grand River Enterprises et al. v. United States of America*, Award, dated 12 January 2011, UNCITRAL, Exhibit RLA33.

[190] Statement of Rejoinder, para. 101; *Parkerings-Compagniet AS v. Lithuania*, Award, dated 11 September 2007, ICSID Case No. ARB/05/8, Exhibit CLA68.

Romania and to *Saluka*, the BIT was not intended to protect investors from unwise business decisions.[191]

(ii) *The date of the investment into Ecuador*

a. Claimant's contentions

209. Claimant is of the view that the effective date of the investment is 31 March 2003, the date of the importation of PBI into Ecuador.[192]

210. Claimant contends it had been exploring the possibility of investing into Ecuador in 2002. Claimant claims that its legitimate expectation was formed during that period and crystallized by 31 March 2003 – when PBI was imported into Ecuador. For this purpose, it insists on the unitary nature of the investment, as conceived in *Holiday Inns v. Morocco.*[193] In Claimant's view, it was its legitimate expectation that the regulatory framework in place when it started to invest would remain stable and unchanged to the extent that it would be allowed to continue to receive a reasonable return on its investment.[194] According to Claimant, PBI's importation "*was the beginning part of a long-term series of acts, all of which would have individually qualified as an investment but which together certainly did*."[195]

211. Claimant asserts that, even if its position on the unity of the investment were not accepted, the latest date its legitimate expectations would have been fixed would be 16 April 2005, when PBII was imported into Ecuador. Claimant argues that its legitimate expectations, either formed in 2003 or 2005, were violated by Respondent.[196]

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[191] Statement of Defence, paras. 303-305; *EDF (Services) Limited v. Romania*, *supra* note 183; *Saluka Investments BV v. Czech Republic*, *supra* note 182.

[192] Statement of Claim, para 80.

[193] Statement of Claim, para. 79; *Holiday Inns v. Morocco*, Decision on Jurisdiction, dated 12 May 1974, ICSID Case No. ARB/72/1, Exhibit CLA4; *CSOB v. Slovakia*, Decision on Jurisdiction, dated 24 May 1999, ICSID Case No. ARB/97/4, Exhibit CLA88; *Duke Energy v. Peru*, Decision on Jurisdiction, dated 1 February 2006, ICSID Case no. ARB/03/28, Exhibit CLA89.

[194] Statement of Claim, para. 80.

[195] Transcript, Day 5, p. 906:16-17.

[196] Statement of Reply, paras. 72-73.

b. Respondent's contentions

212. With regard to the date when any legitimate expectations might have been formed, Respondent notes that Claimant did not exist in 2002 and was only incorporated on 26 February 2003. In Respondent's view, the relevant dates are those regarding PBII, since Claimant is not bringing any claim in relation to PBI.[197] Respondent argues thus that the relevant date is 12 September 2006, when Claimant executed the PBII Licence Contract and "*its investment in PBII as a power generating plant crystallised*."[198] Respondent notes that PBII could not have generated commercially in Ecuador without the Licence Contract and thus the date of the Licence Contract is the critical date to be considered.[199]

213. Respondent notes that both Parties agree that the relevant date for determining when legitimate expectations are fixed is the date on which an investment is made. The problem lies, therefore, in identifying the investment in this case. Respondent submits that the relevant investment is PBII in combination with the Licence Contract, because it was only upon conclusion of the Licence Contract that Claimant was allowed to operate PBII.[200]

214. Respondent rejects the concept of the unity of the investment. In its view, the cases upon which Claimant relies all concern the separate question of whether there was an investment for the purposes of establishing ICSID jurisdiction.[201] Respondent notes that PBI and PBII had different locations, different Licence Certificates and Contracts and contends that the success of the one was not dependent on the success of the other. According to Respondent, they constituted distinct investments.[202]

215. In addition, Respondent submits that the PBII Charter Party was in force both on 31 March 2003 and on 16 April 2005 (the dates invoked by Claimant). In its view, only Proteus Power, the charterer of PBII, could therefore have had expectations at that time.[203] According to Respondent, Ulysseas was "*the bare owner of PBII*" and it was only with the

[197] Statement of Defence, para. 308.

[198] RPHS, para. 3.

[199] Statement of Rejoinder, para. 111.

[200] Statement of Rejoinder, para. 108.

[201] Transcript, Day 5, p. 1002: 11-14.

[202] Statement of Rejoinder, para. 109.

[203] Statement of Rejoinder, para. 112.

execution of the Licence Contract that "*Ulysseas came to the fore, as it were, and committed itself with liabilities under the Licence Contract*."[204]

(iii) *The violation of Claimant's legitimate expectations*

a. Claimant's contentions

216. Claimant argues that its expectation of stability in the regulatory framework in the power sector was reasonable in light of promises contained or expectations engendered by (i) the PBI and PBII Contracts (in particular, Articles 7, 12.1.14, 23 and 24); (ii) the 1998 Constitution, which contained a number of relevant provisions regarding foreign investors (Articles 23, 244, 249(a) and 271); (iii) Articles 5 and 23 of the Power Sector Regime Law and (iv) the general course of conduct of Respondent, which included the establishment of the Payment Trusts, the tariff deficit payments and the Fuel for Power program.[205]

217. In particular, Claimant refers to "*the promises embodied*" in Article 5 of the Power Sector Regime Law:

> *"Objectives – The following fundamental national policy objectives are established in the matter of generation, transmission and distribution of electricity:*
>
> …
>
> *f) Regulate the transmission and distribution of electricity, ensuring that the applicable rates are fair to the investor as well as to the consumer;*
>
> *g) Establish rate systems which stimulate conservation and the rationale use of energy;*
>
> *h) Promote high-risk private investments in the generation, transmission and distribution of electricity, protecting the market's competitiveness…"*[206]

218. Claimant argues that Article 5 of the Law provides "*an expectation* […] *that the market will be there and that the State will be attempting to implement as it said it would this fundamental policy of protecting and promoting private investment in generation*."[207]

219. Claimant thus argues that it held a legitimate expectation, created by Respondent, that generators such as Claimant would be entitled to charge a price for generation that would

[204] Transcript, Day 5, pp. 1006:6-1007:8.

[205] Statement of Claim, para. 80.

[206] Statement of Reply, para 66.

[207] Transcript, Day 5, p. 910: 11-15.

at least cover its costs, and further that it would actually receive such price. In Claimant's view, those legitimate expectations were however violated as a consequence of the following measures, all allegedly attributable to Respondent:

(i) changes in the priority order, the legislation introduced in 2008;

(ii) the elimination of the emergency measures in 2007;

(iii) the more favorable treatment afforded to State-owned generation and transmission companies;

(iv) the PPAs entered by State generation companies at a price well below the level that would sustain a private generation company;

(v) Respondent's failure to exercise its power to penalize those end-users and transmissions companies who failed to pay for electricity they used in full;

(vi) Respondent's negative to allow Claimant to terminate its contractual obligations;

(vii) the empty and negligent negotiations;

(viii) the seizure of PBII; and

(ix) the imposition of fines on Claimant for failing to generate power.[208]

220. With regard to Mandate No. 15, Claimant understands Respondent's position – according to which the enactment of Mandate No. 15 was irrelevant because Claimant's investment had already been rendered worthless by that time – as a tacit admission that Mandate No. 15 violated Claimant's legitimate expectations. Claimant relies on Mr. Veldwijk's witness statement to insist on the impact of Mandate No. 15. In its view, Mandate No. 15 effectively eliminated the spot market and thus limited viable generation activities to only one option: PPAs. Claimant contends that not only did this force a fundamental change in Claimant's business model but this also handed substantial bargaining power to Claimant's counterparties in negotiations.[209]

[208] Statement of Claim, para. 83.

[209] Statement of Reply, para. 73(c).

b. Respondent's contentions

221. Respondent considers that Ecuador neither included assurances that Claimant's operations would be profitable nor guaranteed price or collection of payment. In Respondent's view, Claimant should have been aware that investing in Ecuador's electricity entailed risks. Respondent refers to various elements that reflect the risks that Claimant undertook:

(i) Article 40 of the Power Sector Regime Law;

(ii) the Licence Contract, which did not guarantee price or collection of payment and under which Claimant assumed all commercial risks;

(iii) various Presidential Decrees, which had acknowledged the payment deficit existing in the electricity sector (deficits which are also said to be widely reported);

(iv) the PBII Licence Certificate, which stated that Respondent did not ensure electric power production, price or market;

(v) the fact that prices in the spot market were regulated by CENACE, whose role did not include paying generators through Payment Trusts; and

(vi) the absence of guarantee that a generator would be able to charge a particular price for electricity sold to distribution company under a PPA.[210]

222. Respondent refutes as the existence of any "*purported representations*" made by way of the legal provisions invoked by Claimant. Respondent argues that Article 7 of the Licence Contract is a general provision that merely provided that the Licence holder would be entitled to all rights granted under Ecuadorian law, but did not guarantee profitability. As to Article 24 of the Licence Contract, Respondent argues that it is inapplicable because Claimant's rights were not altered or otherwise prejudiced. Article 249 of the 1998 Constitution is also inapplicable for the same reason. In addition, Respondent indicates that CONELEC did not treat Claimant any less favorably than other generators and thus Article 12.1.4 of the Licence Contract and Article 23 of the Power Sector Regime Law are also irrelevant.[211]

223. Respondent also describes Article 5 of the 1996 Power Sector Regime Law as a general provision that merely set forth policy objectives. Respondent argues that the Article is to be read in the light of "*all circumstances* […] *also the political, socioeconomic, cultural*

[210] Statement of Defence, para. 312.

[211] Statement of Defence, para. 313.

and historical conditions," which included Article 40 of the 1996 Power Sector Regime Law. In any case, Respondent contends that the objectives set forth in Article 5 were not violated but, on the contrary, the payment deficit in the market was reduced and the measures proved to be a success.[212]

224. In short, Respondent concludes that Claimant had no legitimate expectation that it would be guaranteed market, profitability, price or collection of payments. In Respondent's view, the reasoning in *Duke v. Ecuador* should thus apply here as well.[213]

225. Respondent next addresses the regulatory changes which allegedly breached Claimant's legitimate expectations. First, Respondent denies having downgraded Claimant in the payment priority order and affording State-owned generation companies more favorable treatment.[214] In particular, Respondent argues that the 2007 payment priority order improved the prospects of collection of private generators selling power on the spot market.[215] Second, Respondent contends that Claimant was never assured that it would rank in a particular order or that the priority orders would not change over time. Respondent argues that Claimant should have been aware of the collection problems faced by generation companies in the electricity sector. Respondent notes in this respect that "*Mr. Korn confirmed that Ulysseas did not base its decision to sign the fifteen-year Licence Contract on a particular priority order*."[216] Third, Respondent asserts that, since 2004, generation companies had been ranking below the transmission companies. Fourth, Claimant's allegation that the changes to the payment priority order preferred State-owned generation companies is, according to Respondent, not true and contradicted by the evidence (including Claimant's expert, Ing. Muñoz). Fifth, Respondent points to adjustments that had been routinely made to the payment priority order since 2003 and argues that Claimant should not have been surprised by further changes. Finally, Respondent argues that Claimant alone is to blame for its failure to secure a PPA.[217]

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[212] Statement of Rejoinder, para. 106.

[213] Statement of Defence, para. 314; *Duke Energy Electroquil Partners & Electroquil S.A.* v. *Republic of Ecuador*, *supra* note 130.

[214] Statement of Defence, para. 321.

[215] RPHS, para. 8.

[216] RPHS, para. 7; Transcript, Day 2, pp. 265:10-266:10.

[217] Statement of Defence, para. 321.

226. Respondent also responds to Claimant's argument that the cancellation of the *Fuel for Power* program amounted to a breach of Claimant's legitimate expectations. First, Claimant did not have any legitimate expectation that the program would continue indefinitely.[218] Respondent notes that fuel credits were only available to generators through a series of decrees, "*each of a limited duration and with no guarantee of renewal*."[219] Second, Respondent contends that fuel credits were not withdrawn in 2007, since private generators (such as foreign-owned Intervisatrade or Electroquil) were able to continue to benefit from an equivalent credit structure by entering into credit agreements with PETROCOMERCIAL. In Respondent's view, Claimant would have enjoyed these fuel credits had it declared itself available to generate, which it never did.[220] Third, the fuel credits were short term benefits, limited in time. According to Respondent, this fuel credit system based on emergency decrees was improved through the 2007 scheme.[221] Finally, the introduction of measures to reduce historical debts was a general measure and not a specific assurance to Claimant that it would be able to recover payments due to it. [222]

227. With respect to Mandate No. 15, Respondent contends that it could not have caused the failure of Claimant's PBII project since Claimant had determined from as early as December 2007 that it was "nonviable" for PBII to operate. Respondent argues that Mandate No. 15 was intended to stabilize the electricity sector for the benefit of all generators and that the regime was explained to all participants in the market, including Claimant.[223] In Respondent's view, Mandate No. 15 improved the market, requiring the Ministry of Finance to cover, on a monthly basis, any shortfalls in payments to generators operating in the electricity sector. Respondent disputes that Mandate No. 15 somehow prevented generators from continuing to sell on the spot market.[224] In any event, Respondent argues that Claimant was never assured of its continued participation in the spot market and that Claimant could have concluded a PPA, as all private generators did.

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[218] Statement of Defence, paras. 322-326.

[219] RPHS, para. 10; Article 2 of Presidential Decree No. 2427, dated 31 December 2004, Exhibit CLA52; Transcript, Day 3, pp.551:25-552:6.

[220] RPHS, para. 11; Statement of Defence, para. 141; Statement of Rejoinder, para. 28.

[221] RPHS, para. 12; Transcript, Day 3, pp. 550:12-21, 551:19-24 and 552:7-14.

[222] Statement of Defence, paras. 322-326.

[223] Statement of Defence, paras. 327-332.

[224] RPHS, paras. 13-16.

In Respondent's view, many distribution companies sought to enter into a PPA with Claimant.

228. Finally, Respondent maintains that neither CONELEC's initial refusal to terminate the Licence Contract nor the Temporary Administration of PBII amounted to a breach of the fair and equitable treatment standard. With regard to the former, Respondent reiterates that CONELEC's actions are not attributable to it and that those actions were justified in the circumstances by Claimant breach of the Licence Contract through its unjustified refusal to operate PBII as required by the Licence Contract. Regardless, Respondent asserts that Claimant had no legitimate expectation that it would be entitled to withdraw PBII from Ecuador following the termination of the Licence Contract and that, in any event, CONELEC terminated the Licence Contract on 17 March 2011.[225]

(iv) *The effect of Article 24 of the Licence Contract*

229. Article 24 of PBII Contract states:

> "***TWENTY-FOUR: INDEMNIFICATION PAID TO THE PERMIT HOLDER***. *Article two hundred seventy-one of the Constitution of the Republic of Ecuador stipulates that the State, through the GRANTOR, may establish special guarantees and security assurances to the investor to ensure that the agreements will not be modified by laws or other provisions of any type which have an impact on their clauses. If laws or standards are enacted which prejudice the investor or change the contract clauses, the State will pay the investor the respective compensation for damages caused by those situations, in such a way as to at all times restore and maintain the economic and financial stability which would have been in effect if the acts or decisions had not occurred*."[226]

230. During the hearing on the merits, the Tribunal circulated a list of questions to be addressed by the Parties either in their closing arguments at the hearing or in their Post-Hearing submissions. The Parties were asked, *inter alia*, to express their views on the effect of Article 24 of PBII Contract and to indicate whether Claimant had accepted the possibility of a change in the laws and regulations subject only to a right to compensation.

[225] Statement of Defence, para. 338.

[226] PBII Contract, *supra* note 39.

a. Claimant's contentions

231. In Claimant's view, through Article 24, CONELEC was offering protection to its counterparty for acts taken by a distinct party, the Republic of Ecuador. CONELEC would be standing as "*an indemnitor*" and Article 24 would cover an "*indemnity claim*."[227]

232. Claimant argues that such a clause has no effect in the instant case – with the exception of one remote possibility discussed below. First, Claimant argues that Article 24 allowed it to make an indemnity claim against its contractual counterparty, but it did not limit other legal avenues: "*the fact that we have a right to make that claim against our contractual party does not mean that we must make it first or that it constitutes a waiver of the claim against the party who caused the injury*."[228]

233. Second, Claimant relies on the Interim Award to illustrate there is a distinction between CONELEC and Respondent. Claimant contends that the concession agreement sets up the potential for claims against one party, CONELEC, for one set of claims. On the other hand, the BIT permits a range of claims against another party, the State.[229] Thus, the remedy available under the Treaty is claimed to be broader than the stability promise contained in the concession agreement.[230]

234. Third, Claimant invokes policy and treaty interpretation reasons as a final argument. It refers to the decision of the Annulment Committee in *Vivendi*, where it was stated that "*it is not open to an ICSID tribunal having jurisdiction under a BIT in respect of a claim based upon a substantive provision of that BIT, to dismiss the claim on the ground that it could or should have been dealt with by a national court*."[231]

235. Finally, Claimant concedes that Article 24 could have had an effect on the case: "[Respondent] *might have a failure to mitigate argument*." Nonetheless, it notes that

[227] Transcript, Day 5, pp. 911:1-914:1.

[228] Transcript, Day 5, pp. 913:19-914:1.

[229] Transcript, Day 5, pp. 914:16-915:1.

[230] Transcript, Day 1, p. 81:14-23.

[231] Transcript, Day 5, p. 917:15-20; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, Decision on Annulment, dated 3 July 2002, ICSID Case No. ARB/97/3, Exhibit RLA30.

Respondent has not pleaded that and that it has not "*lead any evidence on it, so theoretically, it may have impact, but there is no evidence that it applies*."[232]

b. Respondent's contentions

236. Respondent asserts that Claimant, in agreeing to Article 24, accepted the possibility of a change in laws and regulations subject only to a right of compensation. Respondent maintains that the guarantee of compensation is not automatic – "*it needs to be implemented under the applicable law, which is Ecuadorian law*."[233]

237. Respondent refers to the 1997 Protection Guarantee Act and its Regulations, which had a method for implementing the protection of Article 271 of the Ecuadorian Constitution at the time. Respondent notes that Claimant has ignored the procedure foreseen in that legal regime and goes further to argue that "*Article 24 speaks about maintaining the legal stability in exchange for any monetary compensation that might be paid to establish or re-establish that stability, but the whole premise of Article 24 is to require the investor to fulfill its obligations under the contract and to continue generating*."[234]

238. Respondent insists that its allegations with regard to the PBII Contract are not allegations of jurisdiction. In Respondent's view, the core question is whether the fundamental basis of the claim is a contract or a treaty claim. Respondent refers to *RSM Production v. Grenada*, in which an ICSID tribunal rejected the claim because the fundamental basis of the claim was a contract claim that had already been attempted previously.[235]

2. The Tribunal's analysis and conclusion

239. Article II(3)(a) of the BIT states that "[i]*nvestment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law*." According to Claimant, Respondent has failed to accord its investment such treatment.

[232] Transcript, Day 5, pp. 917:23-918:14.

[233] Transcript, Day 5, p. 1016:13-20.

[234] Transcript, Day 5, pp. 1013:22-1015:9.

[235] Transcript, Day 5, pp. 1011:5-1012:17.

(i) *The level of protection under the BIT*

240. The reference made by Claimant to the holding of other awards in investments treaty arbitration[236] makes it clear that in its view the essential element of the fair and equitable treaty standard are the legitimate expectations of the investor in "*the stability of the legal and business framework*."

241. According to Claimant, as held by another tribunal, "*the obligation not to upset an investor's legitimate expectations*" means that "*government must avoid arbitrarily changing the rules of the game in a manner that undermines the legitimate expectations of, or the representations made to, an investor*."[237] Other awards have held that, in addition to be "*legitimate*", the investor's expectations must be "*reasonable*".[238] Others, that this standard is breached by the manner in which the State administration conducts individual relations with an investor short of handling negotiations "*competently and professionally*".[239]

242. It is Claimant's main contention that when it started to invest in Ecuador it legitimately expected that the regulatory framework in place at the time "*would remain stable and unchanged to the extent that it would be allowed to continue to receive a reasonable return on its investment.*"[240] The core of Claimant's claim is that "*the fundamental change of policy which occurred in 2007 altered the overall framework of the Claimant's investment*" and this "*change in the legal framework for electricity was so radical that it amounted to a breach of legitimate expectations under the BIT.*"[241]

243. According to Respondent, the fair and equitable treatment standard as interpreted by Claimant has no basis under international law, the standard under the BIT being more demanding. It does not require States to ensure that laws and regulations in place at a

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[236] In the Statement of Claim (paras. 73-79), Claimant cites to the awards in *Técnicas Medioambientales Tecmed SA v. United Mexican States*, *supra* note 181, para.154; *Occidental Exploration and Production Company v. Ecuador*, *supra* note 186, para.183; *Saluka Investments BV (The Netherlands*) *v. Czech Republic*, *supra* note 182, paras.101-102; *Siemens v. Argentina*, *supra* note 79, para. 299.

[237] *Alpha Projektholding GmbH v. Ukraine*, *supra* note 182, paras 419-420.

[238] *Saluka Investments BV (The Netherlands) v. Czech Republic*, *supra* note 182, para. 302.

[239] *PSEG Global Inc. et al. v. Republic of Turkey*, Award, dated 19 January 2005, ICSID Case No. ARB/02/5, para. 246.

[240] Statement of Claim, para. 76

[241] Transcript, Day 5, p. 956: 12-14.

particular time will never be modified or that investment in their territory will be profitable.[242]

244. By reference to the *Waste Management*[243] case, Respondent points to the type of serious misconduct that would be required in order to breach the minimum standard of fair and equitable treatment. This standard would be infringed by a State's conduct that is "*arbitrary, grossly unfair, unjust, idiosyncratic, is discriminatory and exposing the claimant to sectional or racial prejudice or involves a lack of due process leading to an outcome which offends judicial propriety.*" Respondent refers also to the fact that the high threshold of the standard places upon the investor the burden to proceed "*with awareness of the regulatory situation.*"[244]

245. As to the reference made by Article II (3)(a) of the BIT to the minimum standard of treatment required by international law, the Tribunal notes that the international minimum standard has evolved over time. What matters in our case is that the treatment of foreign investors do not fall below this minimum international standard, regardless of the protection afforded by the Ecuadorian legal order.[245]

246. The term "*fair and equitable*" treatment is not defined by the BIT. Pursuant to Article 31(1) of the VCLT, a treaty is to be interpreted "*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*." As noted by the Annulment Committee in the CMS case, "*the fair and equitable standard has been invoked in a great number of cases brought to ICSID arbitration and there is some variation in the practice of arbitral tribunals in this respect*."[246]

247. As held by another tribunal with reference to the same BIT, "[a]*lthough fair and equitable treatment is not defined in the Treaty, the Preamble clearly records the agreement of the*

[242] Statement of Defence, paras. 287-288.

[243] *Waste Management Inc. v. United Mexican States*, *supra* note 114, para. 98.

[244] *Grand River Enterprises et al. v. United States of America*, *supra* note 189, para. 44.

[245] *El Paso Energy International Company v. The Argentine Republic*, Award, dated 31 October 2011, ICSID Case No. ARB/03/15, para. 337.

[246] *CMS Gas Transmission Company v. The Argentine Republic*, Decision of the *ad hoc* Committee on the Application for Annulment, dated 25 September 2007, ICSID Case No. ARB/01/8, note 86.

parties that such treatment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources. The stability of the legal and business framework is thus an essential element of fair and equitable treatment."[247]

248. This conception was also adopted by other investment treaty tribunals.[248] There are, however, tribunals that have adopted much narrower conceptions of the fair and equitable standard in the context of the recognition that one of the major components of this standard is the parties legitimate and reasonable expectations,[249] subject to the State's normal regulatory power. The BIT Preamble makes reference in effect also to the need to maintain "*maximum effective utilization of economic resources*."

249. It is not the Tribunal's intent to formulate another description of this standard. It adheres to the holding of one of the awards referred to above, which appears particularly suited to the present case:

> "*The idea that legitimate expectations, and therefore FET* [fair and equitable treatment], *imply the stability of the legal and business framework, may not be correct if stated in an overly-broad and unqualified formulation. The FET might then mean the virtual freezing of the legal regulation of economic activities, in contrast with the State's normal regulatory power and the evolutionary character of economic life. Except where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework. Such expectation would be neither legitimate nor reasonable.*"[250]

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[247] *Occidental Exploration and Production Company v. The Republic of Ecuador*, *supra* note 186, para. 183.

[248] *CMS v Argentina*, *supra* note 136, para. 274; *LG&E v. Argentina*, *supra* note 116, paras. 124-125.

[249] *Alex Genin and others v. The Republic of Estonia*, Award, dated 25 June 2001, ICSID Case No. ARB/99/2, para. 367; *EDF (Services) Limited v. Romania*, *supra* note 183, paras. 216-217; *Parkerings-Compagniet AS v. Lithuania*, *supra* note 190, para. 332.

[250] *EDF (Services) Limited v. Romania*, *supra* note 183, para. 217. See also *Saluka Investments BV (The Netherlands) v. Czech Republic*, *supra* note 182, para. 304; *Parkerings-Compagniet AS v. Lithuania*, *supra* note 190, para. 332; *El Paso Energy International Company v. The Argentine Republic*, *supra* note 245, paras. 366-367.

A violation of the standard cannot be determined in the abstract, what is fair and reasonable depending on a confrontation of the objective expectations of the investor and the regulatory power of the State in the light of the circumstances of the case.[251]

(ii) *The date of the investment into Ecuador*

250. In order to establish whether the investor's legitimate expectations have been breached by the State's conduct, it is essential to determine the point in time to which reference should be made to that purpose. According to Claimant, its legitimate expectations originated in 2003 or, at the latest, on 16 April 2005 when PBII was imported into Ecuador.[252] Respondent is rather of the view that Claimant's legitimate expectations were fixed as of 12 September 2006, when Claimant entered into the Licence Contract for PBII.[253]

251. The Tribunal shares Respondent's view. As held by many ICSID tribunals, the ordinary conception of an investment includes several basic characteristics, essentially: (a) it must consist of a contribution having an economic value; (b) it must be made for a certain duration; (c) there must be the expectation of a return on the investment, subject to an element of risk; (d) it should contribute to the development of the economy of the host State.[254] While the last condition has been criticised, the others have been generally accepted by other tribunals and commentators in the field of investment treaty arbitration. Regardless of the definition of an "investment" under Article I(1)(a) of the BIT, these factors inform the determination of the moment when Claimant "invested" in Ecuador in the ordinary sense and began relying on any legitimate expectations that it may have formed.

252. In order for an "investment" to arise in this sense, there must be an actual transfer of money or other economic value from a national (whether a physical or a judicial person) of a foreign State to the host State through the assumption of some kind of commtiment ensuring the effectiveness of the contribution and its duration over a period of time. The

[251] *Saluka Investments BV (The Netherlands) v. Czech Republic*, *supra* note 182, para. 82; *El Paso Energy International Company v. The Argentine Republic*, *supra* note 245, para. 364; *Continental Casualty Company v. Argentina*, Award, 5 September 2008, ICSID Case No. ARB/03/9, para. 255.

[252] Transcript, Day 5, p. 907:7-13.

[253] RPHS, para. 3.

[254] According to the so-called "*Salini test*", *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Morocco*, Decision on Jurisdiction, dated 23 July 2001, ICSID Case No. ARB/00/4, para. 57.

entering into Ecuador of PBII and its attempt to moor it in different locations do not satisfy these conditions to the extent Claimant was still free, both subjectively and objectively, to leave Ecuador at any time in the absence of commitments compelling it to remain in the country. Only by entering into the Licence Contract for PBII on 12 September 2006 may Claimant's investment (which by its own definition includes the PBII Contract[255]) be deemed to have been made by an actual contribution of economic value to the host State for a given duration in the expectation of a return but subject to an element of risk.[256] The date of 16 September 2006 must therefore be retained as the reference date for examining Claimant's legitimate expectations.

(iii) *The violation of Claimant's legitimate expectations*

253. As already mentioned,[257] Claimant was well aware that the electricity regulatory framework had been for many years undergoing a process of constant evolution in order to meet the growing demand for electricity based on conditions that would be economically acceptable to all operators of the system: generators, transmission companies, distributors and end-consumers. The adjustments that had been routinely made since 2003 to the payment priority order are an example of this evolution. Claimant did not ignore the collection problem faced by generation companies in the electricity sector, the changes made to the payment priority order demonstrating Respondent's attention to this problem as well.

254. Regarding the "*Fuel for Power*" scheme, before the end of 2007, when the system was changed, fuel credits were available to all generators through a series of emergency decrees[258] which were all subject to a limited duration with no guarantee of renewal.[259] There could not therefore be legitimate expectations by Claimant that fuel credits would

[255] "*Both PBII and the PBII Contract constitute 'investments' for the purposes of Article I (1)(a) of the BIT*" (Statement of Claim, para. 38). It may be noted that the definition of "investment" under Article I(1)(a) of the BIT includes "*any license and permits pursuant to law*" (under (v)).

[256] Under the Licence Contract Claimant assumed "*all commercial risks inherent to the activities in question*", i.e. the electricity generation activities (Article 6.2).

[257] *Supra*, para. 187.

[258] Presidential Decrees No. 2627, dated 31 December 2004; No. 436, dated 24 August 2005; No. 1331, dated 19 April 2006.

[259] As acknowledged by one of Claimant's witnesses, Mr. Z. Korn, at the hearing (Transcript, Day 2, pp. 259:10-12, 261:6-8).

continue to be available in the absence of a specific commitment in that regard by the State. Fuel credits continued in any case to be available after 2007 through arrangements between PETROCOMERCIAL and the Ministry of Finance.[260]

255. As for Constituent Mandate No.15, it improved the electricity market. Its Article 2 requires that the Ministry of Finance cover on a monthly basis the difference between generation, transmission and distribution costs and the flat rate fixed for end consumers, as determined by CONELEC.

256. In conclusion, Claimant could not expect, in September 2006, the immutability of the regulatory framework in the electricity sector,[261] more specifically that "*generators such as the Claimant would be entitled to charge a price for generators to at least cover its costs and further that it would actually receive such price.*"[262] It has not been proven that regulatory changes in payments to power generators made Claimant business prospects worse than in September 2006, even assuming – which has not been demonstrated – that it could legitimately expect the stability of the electricity regulatory framework.

(iv) *The effect of Article 24 of the Licence Contract*

257. The Tribunal has taken note of the Parties' contentions regarding Article 24 of the Licence Contract following a question put to them at the hearing on the merits.[263] Specifically, the Tribunal's question was whether Claimant, by entering into the Licence Contract, has accepted that a change in laws and regulations could be made by Respondent which might prejudice it as an investor, this being the core of Claimant's claim of breach of its legitimate expectations.

258. The Tribunal believes that Article 24 of the Licence Contract has a bearing on the determination of Claimant's claim that it had a legitimate expectation that no prejudicial changes would be made to the electricity regulatory system. In effect, this provision shows that Claimant had accepted in September 2006 that changes might be introduced to laws

[260] As explained by one of Respondent's witnesses, Mr. F. Vergara, at the hearing (Transcript, Day 3, pp. 553:25, 555:21).

[261] Claimant has acknowledged at the hearing that its "case is not that Respondent was not entitled to change its law or have a policy direction shift. Clearly, that is its prerogative" (Transcript, Day 5, p. 474: 1-4).

[262] Statement of Claim, para. 82.

[263] *Supra*, para. 231 *et seq*. The text of Article 24 is reproduced in para. 229.

"*or other provisions of any nature*" which "*would prejudice the investor*" and that, should this occur, compensation would be paid for damages so caused to it. Having elected to bring a claim based on the BIT, Claimant has waived its right to see compensation under Article 24 of the Licence Contract.

259. In the light of all the foregoing, Claimant's claim of breach by Respondent of the fair and equitable treatment under the BIT must be dismissed.

E. THE ALLEGED BREACH OF THE OBLIGATION TO PROVIDE FULL PROTECTION AND SECURITY BY RESPONDENT

1. The Parties' positions

(i) *Claimant's contentions*

260. Claimant affirms that Respondent has breached its obligations under Article II(3)(a) of the BIT by failing to accord to Claimant's investment full protection and security. Claimant relies on *Occidental* to argue that "full protection and security" and "fair and equitable treatment" can be considered together.[264] Therefore, to the extent that the Tribunal finds that there has been a breach of the fair and equitable treatment standard, the promise of full protection and security would have also been violated.[265] Claimant also asserts that investment treaty tribunals have moved away from the original restrictive approach to full protection and security and have stated that the standard "*can apply to more than physical security of an investor or its property, because either could be subject to harassment without being physically harmed or seized*."[266]

261. In addition, Claimant argues that Respondent has violated the promise of full protection and security, even under a narrow definition of the protection, through the direct physical damage its agents and representatives caused to PBII during the Temporary Administration.[267] Claimant references its previous allegations as to the attribution of CONELEC's and Termopichincha's actions to Respondent and further states that "*this*

[264] *Occidental Exploration and Production Company v. Ecuador*, *supra* note 186.

[265] Statement of Claim, paras. 86-88.

[266] Statement of Claim, para. 87; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina*, Final Award, dated 20 August 2007, ICSID Case No. ARB/97/3, Exhibit CLA67.

[267] Statement of Claim, para. 89. Statement of Reply, para. 88 b).

was a vessel directly in the control of the State and the way they operated it did not comply with the basic duty of due diligence. If the State is going to take our barge away, the State is going to take Ulysseas's barge and operate it, at the very least; the State should be required to operate it with a basic standard of care so that it is not doing damage to the barge while doing so."[268]

262. Finally, Claimant alleges that there is no need to show an exhaustion of local remedies and that the jurisprudence cited by Respondent in this regard is not on point.[269]

(ii) *Respondent's contentions*

263. In Respondent's view, it is not responsible for any damage allegedly caused to PBII during the period of Temporary Administration and that the duty of full protection and security is one of due care to protect against external force and which does not apply to the use of contractual remedies.[270]

264. Respondent asserts that it is not widely accepted that the obligation to provide full protection and security reaches beyond physical interferences or that the standard extends beyond a due diligence obligation applicable in civil strife and circumstances of physical violence.[271]

265. Respondent also claims that, even if the standard of full protection and security could be equated with the standard of fair and equitable treatment, Respondent did not breach the standard of fair and equitable treatment. Respondent relies on *Occidental*, in which the tribunal stated that "*a treatment that is not fair and equitable automatically entails an absence of full protection and security of the investment*."[272]

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[268] Transcript, Day 5, pp.940:3-940:15.

[269] Statement of Reply, para. 88 e).

[270] RPHS, para. 17; *Saluka Investments BV (The Netherlands*) *v. Czech Republic*, *supra* note 182; *El Paso Energy International Company v. The Argentine Republic*, *supra* note 245, submitted by the Claimant during the Hearing on the Merits.

[271] Statement of Defence, para. 340; *Saluka Investments BV (The Netherlands) v. Czech Republic*, *supra* note 182; *Técnicas Medioambientales Tecmed SA v. United Mexican States*, *supra* note 181; *Wena Hotels Ltd. v. Arab Republic of Egypt*, *supra* note 107.

[272] Statement of Defence, para. 341. Transcript, Day 1, pp.67:24-68:4.

266. Respondent contends that CONELEC's Temporary Administration of PBII does not amount to a breach of the obligation to provide full protection and security by Respondent under the BIT for three reasons. First, it insists that neither CONELEC nor Termopichincha's actions are attributable to Respondent, since there was no exercise of governmental authority involved.[273] In its view, the Temporary Administration was carried out pursuant to, and in order to enforce, the provisions of the Licence Contract.[274] As to Termopichincha, Respondent claims that Termopichincha was acting as CONELEC's agent only under Ecuadorian law; attribution in this case is, however, governed by the *lex specialis* of Article II(2)(b) of the BIT.[275]

267. Second, Respondent claims that no damage was caused to PBII. It argues that the certificate prepared by the notary contains nothing of substance on the operational condition of the barge, nor on the state of its engines.[276] As to the reports by Waller Marine and MAN Diesel, Respondent claims that they simply comment on the state of the barge at the time it was inspected in late 2010 (not immediately prior to the Temporary Administration).[277] Finally, Respondent asserts that Mr. Bordei's statement heavily relies on these two reports and is therefore not sufficient on its own to establish that Termopichincha caused any damage to the barge.[278]

268. Third, Respondent alleges that, even if some damage had been caused to PBII, this would still not amount to a breach by Respondent of the full protection and security standard. Respondent relies on *Saluka* to argue that the standard only requires due care and reasonable behavior.[279] In its view, both CONELEC and Termopichincha exercised due

[273] Statement of Rejoinder, para. 119.

[274] RPHS, para. 18.

[275] RPHS, para. 20.

[276] Video (including accompanying Notarial Certification dated 27 September 2010), dated 27 September 2010, Exhibit C144.

[277] Condition Survey of PBII prepared by Waller Marine, dated 11 November 2010, Exhibit C145; Report prepared by MAN Diesel, dated 14 February 2011, Exhibit C146.

[278] Statement of Rejoinder, para. 120.

[279] *Saluka Investments BV (The Netherlands) v. Czech Republic*, *supra* note 182.

care, since they conducted the Temporary Administration of PBII "*professionally and diligently*."[280]

269. Finally, Respondent notes that Claimant failed to pursue the domestic legal and other avenues available to it to prevent the alleged harm. While it recognizes that the failure to invoke domestic legal channels is not a procedural bar to bringing a BIT claim, it argues that the fact that legal channels were available at all times to Claimant allowing it to seek redress for any physical damage caused to PBII during, or injunction of, the Temporary Administration further supports the position that Respondent did not fail to protect Claimant's investment.[281] In Respondent's view, its obligation is confined to ensuring that adequate legal channels are made available, for which it refers to *Lauder v. Czech Republic*.[282]

270. Respondent also asserts that Claimant refused CONELEC's offer to assume the Temporary Administration of PBII, did not provide handover assistance and never made use of its right to take over the Temporary Administration or to monitor Termopichincha's operation of PBII.[283]

2. The Tribunal's analysis and conclusion

271. It is Claimant's view that "full protection and security" and "fair and equitable treatment" can be considered together, "*as both treatments require the State to provide stability and predictability*".[284]

272. The Tribunal does not share this view. Full protection and security is a standard of treatment other than fair and equitable treatment, as made manifest by the separate reference made to the two standards by Article II (3)(a) of the BIT. This standard imposes an obligation of vigilance and care by the State under international law comprising a duty of due diligence for the prevention of wrongful injuries inflicted by third parties to persons

[280] Statement of Rejoinder, paras. 44 and 121.

[281] Statement of Rejoinder, paras. 122-123.

[282] Statement of Rejoinder, para. 123; *Ronald Lauder v. Czech Republic*, Final Award, dated 3 September 2011, UNCITRAL, para. 314, Exhibit RLA48.

[283] Statement of Rejoinder, para. 124.

[284] Statement of Claim, para. 86. Claimant relies for this proposition on the Award in *Occidental Exploration and Production Company v. Ecuador*, *supra* note 186, para. 191.

or property of aliens in its territory or, if not successful, for the repression and punishment of such injuries.[285]

273. The Temporary Administration of PBII having been performed by a third party, but pursuant to the Licence Contract, any physical damage caused to PBII should be settled according to this Contract. There was therefore no breach of full protection and security under the BIT, as contended by Claimant.[286]

274. The claim that the State has breached the full protection and security standard of treatment under the BIT must be dismissed.

F. THE ALLEGEDLY DISCRIMINATORY MEASURES ADOPTED BY RESPONDENT

1. The Parties' positions

(i) *Claimant's contentions*

275. Claimant alleges that Respondent's conduct has been discriminatory in contravention of Article II(3)(b). Claimant relies on *Antoine Goetz et consorts* for the idea that a measure is discriminatory in effect if it results in a treatment of an investor different from that accorded to other investors in a similar or comparable situation.[287] Claimant asserts that an investor is entitled to have the same relevant legislative and regulatory framework, including any subsidies or benefits built into that framework applied to it as to others engaged in the same economic activity. According to Claimant, this standard of protection requires that Respondent not discriminate between Claimant and comparable entities – which in this case mostly concerns entities owned by the State.[288]

276. In Claimant's view, the guarantee of protection has been violated for several reasons. First, it claims that private generators have consistently been pushed down the payment priority ranking at a faster rate than State-owned generators. Second, it argues that the State-owned transmission companies have been effectively rendered immune after the

[285] *El Paso Energy International Company v The Argentine Republic*, *supra* note 245, paras. 522-523 and cases referred to therein.

[286] Statement of Claim, para. 89; Statement of Reply, paras. 87-88.

[287] Statement of Claim, para. 92; *Antoine Goetz and Ors v. Burundi*, Award, dated 10 February 1999, ICSID Case No.ARB/95/3, para. 121, Exhibit CLA21.

[288] Statement of Claim, para. 93.

changes in priority order. Third, it affirms that Respondent has created an electricity sector whose cost structure is set up in such a manner as to benefit the State-owned generators which have no requirement to make any form of profit margin, so as to flood the market with low-cost PPAs, making it impossible for privately held generators to win economically viable PPAs.[289] Finally, Claimant argues that other private generators were treated more favorably than itself. For example, Claimant refers to Termoguayas, whose project "*received a much improved collection priority in respect of old debts which allowed Termoguayas to skip up the payment priority waterfall, in effect to go to the top of the payment waterfall in a manner that was simply not contemplated under Mandate 15. The State decided not to follow its own rules and gave Termoguayas a pass on the payment property waterfall*."[290]

277. Claimant contends that Article II(3)(b) offers protection against discrimination in general terms. It relies on *CMS v. Argentina*, among other decisions, to argue that investment treaty tribunals have confirmed that such protection includes the prevention of discrimination against an investment within a sector rather than by nationality.[291] It also insists that both generators and transmission companies are engaged in the same economic activity, since the presence of one in the payment waterfall impacts on the other in terms of their ability to collect from that waterfall. Claimant thus asks the Tribunal to look at economic impact when establishing comparators.[292]

278. Finally, Claimant contends that any reliance on the public interest to excuse the treaty violations must fall within the scope of the doctrine of necessity, described at Article 25 of the ILC Articles.[293]

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[289] Statement of Claim, para. 94.

[290] Transcript, Day 1, pp. 69:24-70:12.

[291] Statement of Reply, para. 92(a); *CMS Gas Transmission Co v. Argentine Republic*, *supra* note 136; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, *supra* note 136; *Sempra Energy International v. Argentina*, Award, dated 28 September 2007, ICSID Case No. ARB/02/16, Exhibit CLA98.

[292] Statement of Reply, para. 92(b).

[293] Statement of Reply, para. 92(c); ILC Articles, *supra* note 65, Article 25.

(ii) *Respondent's contentions*

279. Respondent contends that the BIT does not define the term "*discriminatory*" and that the standard proffered by Claimant is unsupported by law.[294] In Respondent's view, the Commentary to the 1967 OECD Draft Convention on the Protection of Foreign Property makes clear that discrimination must be based on nationality, for which it also relies on *Feldman v. Mexico, Parkerings-Compagniet AS v. Lithuania* and *Pope & Talbot.*[295] Respondent also argues that the cases relied on by Claimant do not support its proposition that the protection against discrimination is confined to discrimination on the grounds of nationality.[296]

280. Respondent makes three points to support its contention that there is only one standard for discriminatory treatment, discrimination on the basis of nationality. First, Respondent refers to *Parkerings* to assert that "*in order to determine whether there has been discrimination, the treatment of foreign investors must be compared to the treatment of domestic investors*."[297] Second, Respondent argues that the cases against Argentina on which Claimant relies do not provide support for the position that the discrimination protection under a BIT extends beyond discrimination on the basis of nationality. Respondent remarks that in all three cases the tribunal in question held that there had been no discriminatory treatment.[298] Finally, Respondent claims that such a broad interpretation of the discrimination clause would be contrary to the object and purpose of the BIT, which is, "*after all, about the protection of foreign investment*."[299] Nonetheless, Respondent maintains that no breach is established even under a broad approach to the protection against discriminatory treatment.

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[294] Statement of Defence, para. 345.

[295] Statement of Defence, paras. 346-349; *Marvin Feldman v. Mexico*, Award, dated 16 December 2002, ICSID Case No. ARB(AF)/99/1, Exhibit RLA4; *Parkerings-Compagniet AS v. Lithuania*, *supra* note 190; *Pope & Talbot Inc. v. The Government of Canada*, Interim Award, dated 2 April 2001, UNCITRAL, Exhibit RLA3.

[296] Statement of Rejoinder, para. 129

[297] Transcript, Day 1, pp. 118:1-119:10; *Parkerings-Compagniet AS v. Lithuania*, *supra* note 190.

[298] Transcript, Day 1, pp. 119:11-120:14; *CMS Gas Transmission Co v Argentine Republic*, *supra* note 136; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, *supra* note 136; *Sempra Energy International v. Argentina*, *supra* note 291.

[299] Transcript, Day 1, pp. 120:5-120:15.

281. As to the first Claimant's point, the alleged discrimination of private generators, Respondent claims that Claimant must show that it was (i) treated differently from other thermal generators; (ii) that such differential treatment was due to a measure taken by Respondent; and that (iii) there was no legitimate object or purpose that justified the less favorable treatment. Respondent claims that Claimant has failed on each of these requirements.[300]

282. Respondent asserts that it is not true that changes in priority order resulted in reducing private generators down the priority ranking. On the contrary, Respondent argues that "*private generators were in fact treated better*,"[301] and were continuously ranked above State-owned generators.[302]

283. With regard the alleged preferential treatment of State-owned transmission companies, Respondent considers that transmission companies are not in the same business or economic sector as thermal generators and are therefore irrelevant for the purposes of determining whether there was discriminatory treatment.[303] Respondent argues that generation and transmission companies perform entirely different functions, despite operating in the same sector, and notes that without the transmission companies, the generators would not be able to access the market altogether.[304] In addition, Respondent submits that transmission companies have ranked before generation companies since 2004, long before PBII was imported into Ecuador.[305]

284. Respondent also rejects the Claimant's allegation that Respondent created a market situation where it was impossible for private generators to win economically viable PPAs. Respondent argues that this allegation is "*absurd*" and Claimant has provided no evidence that it would have been able to secure a PPA if the regulatory changes had not been introduced. In Respondent's view, this was a result of business planning and commercial

[300] Statement of Defence, para. 350.

[301] Transcript, Day 1, p. 120:16-120:17.

[302] Statement of Defence, para. 352; Witness Statement of Jorge Vergara, Exhibit RWS-8.

[303] Statement of Defence, para. 353.

[304] Transcript, Day 1, pp. 121:7-122:20.

[305] Statement of Defence, para 353.

considerations and not of the changes of the regulatory framework, and that the allegation is belied by the examples of the PPAs concluded by Electroquil and Termoguayas.[306]

285. Respondent also argues that Claimant offers no evidence whatsoever that State-owned generators "*have no requirement to make any form of profit margin*," and that, even if such evidence were provided, this would not amount to a breach of the BIT. In addition, Respondent notes that all thermal generators (local and foreign) were equally affected by the payment difficulties and none of the measures distinguished between local and foreign generators. Moreover, Respondent claims that these measures were in the public interest and necessary to respond to the state of emergency.[307]

286. As to the allegedly more favorable treatment afforded to other private generators, and to Termoguayas in particular, Respondent contends that circumstances were different as between Termoguayas and Claimant. Respondent notes that it was not the State that granted Termoguayas a higher priority, but CATEG, through the PPA they entered in 2008. Respondent also notes that Termoguayas was not given a higher ranking in the payment priority order for its spot sales.[308]

287. Finally, Respondent argues that it does not need to rely on the doctrine of necessity under Article 25 of the ILC Articles. Instead, Respondent claims that there has been no breach of the BIT and therefore no wrongful conduct. In Respondent's view, for a finding of a discriminatory treatment, there must be at least evidence of "*capricious, irrational or absurd differentiation in the treatment accorded to the Claimant as compared to other entities*", which, in its opinion, cannot be found in this case.[309]

2. The Tribunal's analysis and conclusion

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

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[306] *Id.*, para. 354.

[307] *Id.*, para. 354.

[308] Transcript, Day 1, pp. 122:21-124:1.

[309] Statement of Rejoinder, para. 130; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, *supra* note 136.

> "*Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal of investments*."

289. Relying on *Goetz v. Burundi*, Claimant asserts that "*a measure is discriminatory in effect if it results in a treatment of an investor different from that accorded to other investors in a similar or comparable situation*".[310] This protection is provided also by the Ecuadorian Constitution of 1998, which guarantees equal treatment to public and private business activities and equal conditions to local and foreign investment.[311]

290. It is Claimant's position that this guarantee has been violated by: a) changes in priority order, so that private generators have always been ranked below State-owned generators; b) State-owned transmission companies being consistently prioritised by rendering them immune at the expense of private generators; c) the cost structure of the electricity sector being such as to benefit the State-owned generators since the latter have no requirement to make profit, thus flooding the market with low-cost PPAs making it impossible for private generators to win viable PPAs.[312]

291. Claimant's alleged discrimination relates to national State-owned entities operating in more favourable conditions than private generators, whether national or foreign, in similar situations.

292. As already mentioned, Respondent contends that there is only one standard for discriminatory treatment, which is discrimination on the basis of nationality. It relies on the OECD Draft Convention on the Protection of Foreign Property and on a certain number of cases.

293. In the Tribunal's view, for a measure to be discriminatory it is sufficient that, objectively, two similar situations are treated differently. As stated by the ICSID tribunal in *Goetz v. Burundi*, "*discrimination supposes a differential treatment applied to people who are in similar situations*".[313] As such, discrimination may well disregard nationality and relate to

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[310] Statement of Claim, para.92; *Goetz and Ors v. Burundi*, *supra* note 287.

[311] 1998 Constitution, *supra* note 9, Article 244(1), referred to in the Statement of Claim, para.93.

[312] Statement of Claim, para. 94.

[313] *Goetz and Ors v. Burundi*, *supra* note 287, para. 121.

a foreign investor being treated differently from another investor whether national or foreign in a similar situation.

294. Regarding the first situation of discrimination alleged by Claimant, in September 2006, when the Licence Contract was signed, State-owned generators continued to rank below similarly situated private generators in the payment priority order.[314] The same applied in 2007[315] and 2009[316] for private generators with PPA's, while in these two years private generators purchasing on the spot market were ranked below State-owned generation companies with PPAs. To the extent that having a PPA is a situation which may be considered not similar to purchasing on the spot market, it may be held that there was no discrimination to the prejudice of private generation companies when compared to the State-owned generation companies. There was clearly a State policy to prompt generation companies, whether private or State-owned, to enter into PPAs. It appears that Claimant, in any case, did not attach much significance to payment priorities.[317]

295. Regarding the second situation of alleged discrimination, transmission companies are in a situation different from that of generation companies, so that no discrimination between the two categories may be deemed to exist, as pointed out by Respondent.[318]

296. As to the third situation of alleged discrimination, Respondent notes that the changes in the cost structure of the electricity sector in 2008 are not relevant since Claimant had already determined in September 2007 that the PBII was non-viable economically and commercially.[319] This argument cannot be accepted since Claimant's position at the end of 2007 might have changed in the presence of more favourable conditions of the electricity sector in 2008. Such was the case with the enactment of Constituent Mandate No. 15 in July 2008, a measure introduced to address the payment deficit in the electricity sector.

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[314] Muñoz Report, *supra* note 30, pp. 41-42.

[315] *Id.*, pp. 43-44.

[316] *Id.*, pp. 45-46.

[317] At the hearing, Mr. Z. Korn, one of Claimant's witnesses, stated: "*we were not so much inclined to worry about payment priorities*…" (Transcript: Day 2, pp. 265:19, 266:10).

[318] Statement of Defence, para. 353. Respondent has also pointed out that transmission companies have always ranked above generation companies since 2004, therefore long before Claimant entered into the Licence Contract for PBII.

[319] Statement of Defence, para. 354 (first bullet point).

297. Under Article 2 of the Constituent Mandate No. 15 the Ministry of Finance was required to cover, on a monthly basis, any shortfalls in payments to generators operating in the electricity sector. The new system proved successful, the rate of collection of generators having gradually improved to reach 94% in 2010.[320] The system would have equally applied to Claimant had it elected to sell on the spot market or under a PPA. Regarding the latter option, the Tribunal has already concluded that Claimant was unable to secure a PPA not because of changes in the regulatory framework, but rather due to its own commercial considerations.[321]

298. For all the above reasons, Claimant's claim of discriminatory measures taken by Respondent against it must be dismissed.

G. THE ALLEGED ARBITRARY TREATMENT BY RESPONDENT

1. The Parties' positions

(i) *Claimant's contentions*

299. Claimant argues that Respondent has violated its obligation under Article II(3)(b) of the BIT to provide protection against arbitrary treatment. Claimant relies on *Occidental* to argue that "*where a State has presented a conflicting and uncertain regulatory framework and/or series of representations, it is acting in an arbitrary fashion*."[322]

300. In Claimant's view, Respondent acted arbitrarily towards Claimant in the following situations: (i) the alleged promise made by Minister Mosquera that CATEG would enter into a PPA with Claimant and the subsequent denial by CATEG that Minister Mosquera had the authority to act on its behalf; (ii) the alleged creation by Respondent of a pricing structure highly favorable to State entities, while suggesting at the same time that Claimant would enter into a profitable PPA; (iii) the negotiations with Termoesmeraldas for seven months, after which Termoesmeraldas allegedly confirmed it did not have the funds to purchase the barge; and (iv) the contention by Minister Mosquera that PBII would "*die in Ecuador*," which was made without offering "*any sensible solution to help the*

[320] Letter from CONELEC to the National Directorate of International Affairs and Arbitration, dated 28 November 2011, Exhibit R316.

[321] *Supra*, para. 198.

[322] Statement of Claim, paras. 96-97; *Occidental Exploration and Production Company v. Ecuador*, *supra* note 186.

barge make money" or allowing PBII to leave Ecuador and produce electricity elsewhere.[323]

301. Claimant argues that such conduct was arbitrary in the sense that Claimant was being presented with inconsistent and conflicting representations from varying facets of Respondent.[324] Claimant refers again to *Occidental*, in which the tribunal held that "*it was that very confusion and lack of the clarity that resulted in some form of arbitrariness, even if not intended by the* [State body]".[325]

302. In particular, when comparing its situation to the one in *Occidental*, it argues that after Constituent Mandate No. 15 was enacted, Claimant was subjected to a circular process of being handed from government minister to State-owned company, to regulatory body, to central government, on the key question of who could authorize a modality of selling power which let Claimant cover costs and collect payments.

303. In relation to the discussions with the Minister, Claimant refers to the witness evidence by Mr. Veldwijk.[326] Claimant describes the meetings with Minister Mosquera on 5 and 12 December 2007 and with CONELEC's Executive Director, Fernando Izquierdo, on 19 December 2007, during which both representatives led Claimant to believe that it would sign a PPA in the short term.[327]

304. Claimant goes on to relate its meeting with Minister Mosquera on 31 January 2008, where it alleges that Minister Mosquera told Claimant that it could sign a PPA with CATEG on the same terms as a PPA Termoguayas had just signed days earlier.[328] Claimant further cites the witness evidence of Mario Restrepo and Mr. Restrepo's contemporaneous written summary of the meeting.[329] Claimant also notes that Respondent has failed to present

[323] Statement of Claim, para. 98.

[324] *Id.*, para. 99.

[325] Transcript, Day 1, p. 70:16-70:20.

[326] Statement of Reply, para. 90.

[327] CPHS, paras. 12-14. Claimant contends that, after reviewing Ulysseas' financial information, Minister Mosquera assured, *inter alia*, that: (i) PBII could be a *good business*; (ii) there would be a sole buyer of electricity that would sign PPAs with generators; and (iii) Claimant would be asked to sign a PPA. Claimant also relies on the minutes of a meeting with Mr. Izquierdo, according to which Mr. Izquierdo told Claimant that it "would be able to sign a PPA according to a term and above all according to a price that could make PBII viable."

[328] CPHS, para. 14.

[329] *Id.*, at para. 14 a).

Minister Mosquera to rebut the statements contained in Mr. Restrepo's contemporaneous written summary.[330]

305. With respect to the negotiations with Termoesmeraldas, Claimant contends that it always acted in a reasonable manner. Claimant refutes Respondent's argument that the negotiations failed because Claimant unreasonably demanded a "*firm, binding purchase agreement, subject to acceptable test program*."[331] In Claimant's view, its demands were reasonable and prudent in light of the high costs and risks to start-up and test the barge, and in any event, on 20 January 2009, Claimant learned Termoesmeraldas had "*neither the money nor the authority*" to purchase PBII.[332]

306. Finally, Claimant notes that Respondent does not seek to justify how seizing control of PBII and fining Claimant for not generating power in a period where it no longer had control of the vessel can be "*anything other than arbitrary treatment*."[333]

(ii) *Respondent's contentions*

307. Respondent contends that there is nothing confusing or lacking in clarity neither in the regulatory framework that operates in Ecuador's electricity sector nor in the way Respondent treated Claimant and its investment.[334]

308. In Respondent's view, Claimant's reliance on *Occidental* is misplaced. In that case, the Tribunal noted that the framework under which the investor had been operating had been changed in an important manner and indicated that the clarifications sought by the Claimant only found unclear and vague answers. Respondent argues that the situations are not comparable because there was no significant change in the regulatory framework governing the electricity sector in Ecuador.[335]

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[330] *Id.*, at para. 14 b).

[331] E-mail from Mr. Jan Veldwijk to Mr. Jon Pollock and Mr. German Efromovich (including attachment) dated 30 September 2008, Exhibit C117.

[332] CPHS, para. 19. Claimant refers to the e-mail from Mr. Jan Veldwijk to Mr. Jon Pollock and Mr. German Efromovich dated 21 January 2009, Exhibit C123. See also Statement of Reply, para. 90.

[333] Statement of Reply, para. 91.

[334] Statement of Defence, para. 355.

[335] Statement of Defence, para. 356.

309. According to Respondent, the allegation that Mandate No. 15 was, of itself, arbitrary, is entirely unsupported. First, Respondent argues that Mandate No. 15 did not cause the failure of the PBII project, which had already been described by Claimant as "*nonviable*" as early as December 2007.[336] Second, Respondent argues that a finding of arbitrary treatment requires some measure of "*impropriety*", which is absent in the present case where Mandate No. 15 was a measure introduced in good faith to improve the functioning of the electricity sector.[337] Third, Respondent notes that Mandate No. 15 is applied equally to all participants in the sector. Finally, Respondent contends that after Mandate No. 15 was enacted, steps were taken to ensure that it was explained to all private generators (through two CONELEC regulations, meetings with generation and distribution companies and negotiation committees).[338]

310. Respondent also refutes one by one the actions described by Claimant as amounting to arbitrary treatment. First, Respondent claims that the actions of CATEG are not attributable to it. However, even assuming attribution, Respondent maintains that CATEG did not act arbitrarily in its negotiations with Claimant since (i) Claimant was too late in submitting its formal proposal to CATEG in February 2008, by which time CATEG had already secured its energy demand for that year; (ii) Claimant made undisclosed proposals to two distribution companies, who rejected them because they "*deemed the asking price too high*"; and (iii) Mr. Veldwijk confirmed that Ulysseas was not interested in executing a PPA once it submitted its Notice of Arbitration in December 2008.[339]

311. Second, Respondent insists that Minister Mosquera never guaranteed that Claimant would execute a PPA with CATEG. In particular, Respondent notes the Minister "*contemporaneously informed the Claimant in writing that he made no such promise*."[340] In Respondent's view, "*Minister Mosquera only illustrated to Ulysseas possible terms on which it may be able to negotiate and eventually execute a PPA with CATEG*."[341] For this

[336] Letter from Ulysseas to CONELEC, dated 21 December 2007, Conclusion 3, Exhibit C92.

[337] Statement of Rejoinder, para. 136; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, supra* note 136.

[338] Statement of Rejoinder, paras. 134-138.

[339] RPHS, paras. 25-28.

[340] Statement of Rejoinder, para. 143.

[341] RPHS, para. 23.

purpose, Respondent remarks that Dr. Restrepo confirmed Ecuador's understanding of the meeting notes and admitted at the Hearing that Minister Mosquera's letter was consistent with the meeting notes of 31 January 2008.[342]

312. Third, Respondent claims not to have behaved arbitrarily in connection with the "cost structure" that applied to the electricity sector and argues that the reason why Claimant was unable to secure a PPA was because of its insistence on an inordinately high price. Respondent also claims not to have behaved arbitrarily in connection with the negotiations with Termoesmeraldas – which, in its view, reached a stalemate because Claimant refused to bear the testing costs and insisted on unreasonable terms – and notes that there were no formal or legal impediments that prevented Claimant from selling PBII.[343] Respondent argues that negotiations were entered into by Termoesmeraldas on a purely commercial basis, without any *puissance publique* element involved, and so cannot engage its responsibility. In addition, Respondent argues that it was perfectly reasonable for Termoesmeraldas to refuse Claimant's conditions. In Respondent's view, it would have been premature for the parties to execute a binding agreement before the negotiations were finalized.[344] Respondent refers to Mr. Wells, who in his testimony confirmed that Termoesmeralda's requirement that PBII must be tested at full load before sale completion was "*reasonable*".[345] Respondent also contends that it was Termoesmeraldas who gave Claimant a draft letter of intent for the commercial testing of PBII prior to purchase, to which Claimant never responded.[346]

313. Furthermore, Respondent contends not to have behaved arbitrarily in connection with Minister Mosquera's alleged remark that "*PBII would die in Ecuador*." Respondent asserts that, "*even if* [it] *were true*", it would not amount to a breach of the BIT, because Claimant had no automatic entitlement to withdraw PBII from Ecuador. Respondent emphasizes that Mr. Wells confirmed his understanding that CONELEC had the stipulated option to acquire PBII upon the termination of the Licence Contract and noted that the Licence

[342] *Id.* Respondent refers to Transcript, Day 2, pp. 311:25-312:5 and Transcript, Day 2. pp. 320:8-321:1.

[343] Statement of Defence, para. 357.

[344] Statement of Rejoinder, paras. 144-146.

[345] *Id.* Respondent refers to Transcript, Day 1, pp. 358:22-359:6, Witness Statement of Mr. Robert Wells, Exhibit CWS-8.

[346] RPHS, para. 29.

Contract terminated on 17 March 2011 and Ulysseas has since removed PBII from Ecuador.[347] In relation to the complaint by Claimant that the Minister did not offer "*any sensible solution to help the barge make money*", Respondent says it had no obligation to do so.[348]

314. With respect to the imposition of fines by CONELEC during the Temporary Administration, Respondent claims that these are not attributable to it because they were actions of a contractual party, pursuant to Article 14.5 of the PBII Licence Contract, and they were not imposed in exercise of any governmental authority or *puissance publique.* It relies on *Bayindir*, where the Tribunal stated that "*there was no basis for the Claimant to expect that* [CONELEC] *would not avail itself of its contractual rights*."[349]

315. In addition, Respondent explains that CONELEC executed penalties under the Licence Contract against Claimant for two reasons. In the first instance, Claimant was fined for its failure to commence commercial operations on 3 October 2009.[350] Second, Claimant was imposed a penalty for its failure to perform the Licence Contract. This non-performance penalty, which accrued just once and not on a time basis, was triggered well before the Temporary Administration. Respondent thus argues that CONELEC never penalized Claimant for failing to operate during the period of Temporary Administration.[351] Respondent finally notes that Claimant could have ended the Temporary Administration and, therefore, could have avoided the imposition of the fines at any point had it indicated that it would comply with its obligations under the Licence Contract.[352]

2. The Tribunal's analysis and conclusion

316. According to Claimant, Respondent acted arbitrarily in the following situations:

> a. when Minister Mosquera conveyed to Claimant that CATEG would enter into a PPA on terms acceptable to Claimant;

[347] RPHS, para. 24.

[348] Statement of Defence, para. 357.

[349] Statement of Rejoinder, paras. 139-141; *Bayindir Insaat Turizim Ticaret Ve Sanayi A. S. v. Islamic Republic of Pakistan*, Award, dated 27 August 2009, ICSID Case No. ARB/03/29, Exhibit RLA49.

[350] RPHS, para. 30

[351] *Id.*, paras. 30-33.

[352] Statement of Rejoinder, para.142.

> b. by creating a price structure favourable to State entities, thus undercutting Claimant's ability to enter into a profitable PPA;
>
> c. when Termoesmeraldas, a State owned company, negotiated for 7 months the purchase of PBII to then confirm that it did not have the necessary funds; and
>
> d. when Minister Mosquera informed Claimant that PBII would "*die in Ecuador*" without offering any sensible solution or allowing PBII to leave the Country.

317. Claimant was thus presented with inconsistent and conflicting representations in violation of Article II(3)(b) of the BIT.[353] As already mentioned, the imposition of fines for lack of power generation is also cited by Claimant as constituting arbitrary treatment.[354]

318. The Tribunal has already expressed the view that Minister Mosquera's conduct, by creating an expectation that Claimant might conclude a favourable PPA, is not exempt from criticism but has concluded that such conduct, considering all relevant circumstances, does not amount to a breach of the BIT.[355] Apart from the expression used Minister Mosquera,[356] it was Claimant's obligation, freely undertaken by the signature of the Licence Contract, to generate electricity for the country. In the absence of conditions that might have justified the termination of the Licence Contract or the occurrence of a *force majeure* situation, Claimant was bound to perform power generation activities for 15 years. It was not for Minister Mosquera to offer Claimant alternative solutions or allow PBII to leave Ecuador in the absence of grounds for terminating of the Licence Contract.

319. Claimant contends that Respondent acted arbitrarily by presenting a conflicting and uncertain regulatory framework. Respondent replies that there was no significant changes in the regulatory framework that governed the electricity sector, including its cost structure[357]. As held by another tribunal, "…*a finding* of *arbitrariness requires that some important measure of impropriety is manifest*".[358] This is not given in the present case. Specifically, Constituent Mandate No. 15 was enacted in the frame of a series of measures

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[353] Statement of Claim, paras. 98-99; Statement of Reply, para. 89.

[354] Statement of Reply, para.91.

[355] *Supra*, paras. 194-195.

[356] "PBII would die in Ecuador".

[357] Statement of Defence, paras. 355 and 357 (second bullet point).

[358] *Enron Corporation and Ponderosa Assets L.P. v Argentine Republic, supra* note 136, para. 281.

taken over many years to solve the payment problem and to improve the functioning of the electricity sector by favouring long-term supply agreements, the PPAs.[359]

320. There was nothing "*improper*" in the enactment of Constituent Mandate No. 15 on 23 July 2008 and in its implementation through CONELEC's subsequent regulations. There is no evidence that the cost structure applied differently to generation companies, whether public or private. Further, as already mentioned, all private generation companies were able to secure viable PPAs; Claimant was not excluded from the relevant negotiation process but failed to secure a PPA for commercial considerations.[360]

321. In its dealings with Claimant, Termoesmeraldas did not exercise governmental authority but acted merely on a commercial basis. Its conduct as a State entity is therefore not attributable to the Ecuadorian State. Whether it misbehaved in its negotiations with Claimant for the purchase of PBII is not for the Tribunal to judge in the absence of attribution of its conduct to the State. Claimant would have had means available under Ecuadorian law to pursue any claims it might have had in that regard.

322. Imposition of fines was CONELEC's entitlement under the Licence Contract in case of failure by Claimant to commence generating electricity within the prescribed deadline (Article 14.5). This is what occurred. There was no arbitrary treatment of Claimant's investment by CONELEC's exercise of a contractual right, as held by another ICSID tribunal in similar situations.[361]

323. For all the reasons mentioned above, Claimant's claim of breach of the BIT for arbitrary treatment by Respondent must be dismissed.

H. THE EXPIRATION OF THE CHARTER PARTY

324. The Parties were also asked at the Hearing to indicate whether the Charter Party with Proteus – that was to expire in June 2007 after having been amended – was extended *de facto*. The Parties were specifically asked to explain the relevance of the indication in

[359] Statement of Rejoinder, para. 136. See also *supra*, para. 255.

[360] *Supra*, para. 198.

[361] *Bayindir Insaat Turizim Ticaret Ve Sanayi A. S. v. Islamic Republic of Pakistan*, *supra* note 349, para. 197.

Ulysseas' tax returns that its main activity was "*boat leasing*", as well as the relevance of the letterhead referring to "*Proteus*" and "*Ulysseas, Associate of Proteus Power, Co. Inc*."

1. The Parties' positions

(i) *Claimant's contentions*

325. Claimant insists that the Charter Party expired on its own terms in July 2005. In Claimant's view, no evidence whatsoever has been offered to suggest otherwise.[362] For this purpose, Claimant relies on Mr. Veldwijk's testimony, "*which was not challenged in cross-examination on his evidence that the charter party was not renewed*."[363]

326. Claimant also notes that the amendment to the Charter Party was never signed and not even finalized or completed, and contends that "*the one cited by the Respondent in closing arguments refers to an entirely different barge*" (PBIII, which was sold on 4 March 2004).[364] It also stresses that no payments have been made under the Charter Party since 2004.[365]

327. Moreover, Claimant notes that Respondent itself "*required the owner of PBII to sign* [the PBII Contract.]" Therefore, Claimant finds it inequitable for Ecuador to argue that Claimant is not the proper party having demanded "*that the true investor sign the Concession*."[366]

328. After the expiration of the Charter Party, Proteus allegedly stayed on as a domestic agent operating the vessel in the country and liaising with the local authorities, which – according to Claimant – "*explains why both companies are still on the letterhead even after the charter expires*."[367] According to Claimant, Proteus provided services to it under a Services Agreement dated 25 April 2004, by and between Interoil and Claimant.[368]

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[362] CPHS, para. 6.

[363] Transcript, Day 5, pp. 920:8-921:4; Third Witness Statement of Mr. Z. Korn, Exhibit CWS-5.

[364] CPHS, paras. 6, 52.

[365] *Id*.

[366] CPHS, para. 53.

[367] Transcript, Day 5, p. 924:15-24.

[368] CPHS, para. 51. Claimant refers to Services Contract Ulysseas, Inc and Interoil, SA (now Proteus Power Ecuador SA), dated 5 (or 25) April 2004, Exhibit C-JURI-45.

Claimant explains that Proteus is still acting as an agent, but it no longer holds the Charter Party: "*that part of the arrangement that came with the vessel has lapsed and it hasn't been renewed. Because it is convenient, Ulysseas keeps Proteus on as the agent because the people in Ecuador know them and they are kept on for a period of time*."[369]

329. As to the tax returns, Claimant maintains that Respondent has not offered any evidence to suggest there was anything "*relevant or inappropriate as to how US tax treatment of an investment assists this Tribunal in understanding whether Ulysseas is a qualified investor under the BIT and* […] *that is a jurisdictional point that has already been resolved*."[370]

330. Finally, Claimant refuted in its written pleadings Respondent's contention that it was not the party which suffered loss.[371] In its view, such an accusation ignores the fact that Respondent does not deny that Claimant is the owner of PBII, which is "an investment in its own right." It is also belied by (i) the fact that Ulysseas and not Proteus Power is the counterparty to PBII Contract; (ii) the fact that it was Ulysseas and not Proteus Power (or any other entity) which was attempting to conclude a PPA, and who the various counterparties were negotiating with; (iii) the fact that the Charter Party only governs the conditions of use of PBII between Proteus Power and Claimant and "[i]*t does not in any way impact or waive any right the Claimant (*qua *owner of the asset) may have against the Respondent*"; and (iv) the fact, as already mentioned, that the bareboat Charter Party between Ulysseas and Proteus Power expired by its own terms in July 2005.[372]

(ii) *Respondent's contentions*

331. In Respondent's view, the "*the status of the Charter Party is ambiguous and should be presumed to be ongoing*."[373] Respondent submits that its view that "*the record is not complete and* […] *there must be more to the parties' relationship*" is supported by the amendment to the Charter Party, the schedule of payments and the absence of any paper

[369] Transcript, Day 5, p. 925:5-11.

[370] Transcript, Day 5, p. 926:3-10.

[371] Statement of Defence, para. 253.

[372] Statement of Reply, para. 12. See also Transcript, Day 5, p. 922:7-13.

[373] Statement of Rejoinder, para. 155.

confirming that Charter Party hire payments were to be made only when the vessel became operational.[374]

332. Respondent argues that Claimant has failed to explain the precise status of the Charter Party. In particular, Claimant has allegedly failed to show whether the Charter Party terminated, and if so on what date and to deny that Proteus Power owes it the balance of the charter hire. In addition, Respondent claims that the record is not consistent with the termination of the Charter Party.[375]

333. Respondent refers to the changes in Mr. Korn's statements and to the amendment to the payment schedule of the Charter Party to conclude that Claimant's own evidence with regard to the alleged termination of the Charter Party "*is inconsistent and incomplete, and thus at best ambiguous*."[376] Respondent also contends that "*Claimant does not say or show anything to dispel the presumption that Proteus Power still owes the charter hire payments to the Claimant*."[377] Moreover, Respondent asserts that "*Claimant's evidence is inconsistent with the termination of the Charter Party*." Respondent observes that Mr. Korn had stated that Proteus Power was to begin payment only upon the commencement of power generation by PBII, which would imply the further extension of the Charter Party's term.[378]

334. Respondent also notes that under the Charter Party agreement between Proteus Power and Ulysseas, Proteus Power – as charterer – held the right of "*exclusive use, dominion, control, possession and command of said Facility* [PBII]" in exchange for paying Ulysseas – as owner of PBII – monthly charter hire payments.[379] According to Respondent, only Proteus Power, the charterer of PBII, could have had any expectation of a reasonable return from the operations of PBII in Ecuador on those dates.[380] Respondent thus

[374] Transcript, Day 5, pp. 1017:8-1020:16. See also RPHS, para. 48 ("*Ulysseas discloses selected and incomplete documentation on its relationship with Proteus Power, and has not always documented that relationship contemporaneously*.").

[375] Statement of Rejoinder, para. 155.

[376] *Id.*, paras. 156-161.

[377] *Id.*, paras. 162-164.

[378] *Id.*, para. 165.

[379] Statement of Defence, para. 253; Statement of Rejoinder, para. 149.

[380] Statement of Rejoinder, para. 112.

concludes that "*in any event, the Claimant has failed to prove that even if, assuming* arguendo*, the Respondent's actions deprived the PBII project of all value, the Claimant was the entity that suffered as a result*."[381]

335. In Respondent's view, Claimant's own evidence undermines its contention that Proteus Power is its agent. Respondent refers to the following events: "*(i) Prime asks the shareholders of Proteus Power, not Ulysseas, to authorise a November 2008 deal envisaging the sale of PBII; (ii) Ulysseas's unaudited balance sheets do not mention PBII; (iii) Ulysseas's U.S. tax returns describe its business as boat leasing; (iv) Dr. Restrepo, Ulysseas's representative and lawyer, fails to mention the supposed agency in his response to the Chairman; and (v) 2006 invoices are made out to Proteus Power with no documents connecting them to Ulysseas*."[382]

336. Finally, Respondent claims that this unexplained relationship is relevant because fair and equitable treatment "*does require a degree of openness and candour on the part of the investor as well as the State*."[383] In particular, Respondent contends that, if Claimant describes its business as boat leasing for the purposes of paying taxes, then it should also call itself a boat leaser when it deals with Respondent.[384] By invoking legitimate and reasonable reliance, Respondent states that "*if an investor wants to legitimately and reasonably rely on what it can expect in the host country, it must act consistently just as much as the host state must*."[385]

2. The Tribunal's conclusion

337. There is no evidence in the file that the bareboat Charter Party was extended beyond its original duration. Respondent's claim under this head must be dismissed.

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[381] Statement of Defence, para. 253.

[382] RPHS, para. 47.

[383] Transcript, Day 5, p. 1023:1-7.

[384] *Id.*, p. 1023:10-24.

[385] *Id.*, p. 1024:1-6.

I. COMPENSATION DUE FOR BIT VIOLATIONS

1. The Parties' positions

(i) *Claimant's contentions*

338. Claimant refers to the standard in the *Chorzow Factory Case* to assert that the compensation due for the harm caused by Respondent should amount to *restitutio in integrum*.[386] In Claimant's view, *fair value* – and not *fair market value* – is the relevant reference in this case, since *fair value* "*has been recognized as a valid guidepost for damages for breach of national treatment and violations other than expropriation, as it reflects the value to the specific investor when that value might be outside the fair market value of an investment*."[387]

339. In order to calculate the loss of its investment, Claimant relies on a "*lease model*", an approach consisting of treating "*the Respondent's effective conversion of the Claimant's investment into part of the State infrastructure, as though it were a 'lease to own' scheme*".[388] In Claimant's view, such a model represents "*the best alternative method for producing a realistic damages calculation*" and is fairer than a DCF method.[389]

340. According to Mr. Walck, on whose reports Claimant's contentions are based, Claimant's damages amount to a total of USD 49.834 million. Claimant links Respondent's abandonment of the power sector as it existed to the alleged breaches of Respondent's promise to afford Claimant's investment fair and equitable treatment and full protection and security, Respondent's promise not to engage in indirect expropriation and Respondent's promise to afford Claimant protection from discriminatory treatment.[390] Claimant's claim, inclusive of principal and interest stands at not less than USD 57 million.[391]

341. Alternatively, Claimant claims damages of USD 15.066 million for having lost the use of PBII for a period of a year and an amount of USD 7 million for the physical damage

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[386] Statement of Reply, paras. 123-124.

[387] CPHS, para. 57; *The Factory at Chorzow*, Merits, 1928, PCIJ Series A, No. 17, Exhibit CLA2.

[388] Statement of Claim, paras. 113-115.

[389] Statement of Reply, paras. 123-124.

[390] Statement of Claim, paras. 115-116. See also Letter from Claimant dated 29 November 2011, p. 2.

[391] Letter from Claimant dated 29 November 2011, p. 2.

inflicted by Respondent's agents to PBII.[392] With regard to the alleged arbitrary treatment, Claimant further claims such damages "*as the Tribunal may deem appropriate*."[393] As explained by Mr. Walck during the hearing, the alleged damages for the loss of the use of PBII and the physical damage caused to the barge are subsumed within Claimant's principal claim, since they refer to a certain period of time within a claim for permanent deprivation of its investment.[394]

342. Claimant's damages include an interest component using an interest rate of 15%, since "*independent publications were using a rate in this range for comparable transactions in this part of the world*" and "*Ecuador's own bonds in this period yielded about 15 per cent, slightly over*."[395] In Claimant's view, this interest should accrue from 1 January 2008 until 10 October 2011.[396] In addition, Claimant argues that only compound interest would offer full restitution of the loss suffered. In Claimant's opinion, Ecuadorian domestic law is irrelevant on this point and, "*as a general matter simple interest is only appropriate for short periods*."[397]

343. Claimant also addresses the issue of causation to conclude that "*Respondent is the proximate cause of the Claimant's loss.*" It describes the list of actions through which Respondent allegedly breached the BIT promises and states that "*in each instance the Respondent was aware of the Claimant's investment and must have been aware of the likely negative impact*."[398]

344. Finally, Claimant refers to Respondent's complaint about the inclusion of dry docking, personnel charges and certain facilities. Claimant argues that dry docking is an "*essential part*" of the maintenance of any vessel and it is thus included in its fixed costs; that personnel charges are included as "*Claimant was required to bear them*" and, in relation to the inclusion of various facilities, Claimant concludes that "*ha*[ving] *deprived the*

[392] Statement of Reply, para. 120.

[393] *Id.*

[394] Transcript, Day 4, pp. 818:21-822:12.

[395] Transcript, Day 1, p. 74:15-23.

[396] Statement of Claim, para. 117; Supplemental Expert Reply Report of Richard E. Walck.

[397] Statement of Reply, paras. 127-128. Transcript, Day 1, p. 74:24-75:5.

[398] *Id.*, para. 116.

Claimant of the entire value of its investment, [Respondent] *should not be entitled to cherry pick which parts of the investment it is to be held accountable for*."[399]

(ii) *Respondent's contentions*

345. Respondent argues that Claimant's request for damages has no basis. In particular, Respondent argues that the Charter Party remains in force (*supra* para. 331), and thus concludes that "*Claimant is unable to point any prejudice arising from any actions of the Respondent*."[400] In Respondent's view, the unexplained relationship between Proteus Power and Claimant renders any loss to Claimant speculative, precluding damages.[401] Respondent argues that, even though under PBII Contract Claimant had the nominal right to operate the barge, that right "*was assigned or otherwise conferred onto Proteus Power under the terms of the Charter Party*."[402] Respondent relies on *RosInvestCo* for the proposition that at international law, the rules concerning international claims have consistently protected "*only the real, equitable or beneficial interest in property or an enterprise, not the interest of the bare or nominal owner*."[403]

346. Respondent also observes that Mr. Walck includes a personnel charge in his calculations of damages, despite Claimant never having obtained an employer registration number in Ecuador. In Respondent's view, "*Claimant's quantum claim should therefore be dismissed outright as inadmissible*."[404]

347. In addition, Respondent contends that Claimant has failed to prove that Respondent's alleged BIT violations caused it any injury. Respondent argues that Claimant is not entitled to damages because it has not shown that Respondent caused it any loss or injury and it notes that Claimant "*assumes without any basis that any BIT breach entails total loss of use of PBII, declining to show any causal link between any non-expropriation*

[399] *Id.*, para. 126.

[400] Statement of Defence, para. 358.

[401] RPHS, para. 47.

[402] Statement of Rejoinder, para. 153.

[403] *Id.*, para. 151; *RosInvestCo UK Ltd. v. The Russian Federation*, Final Award, dated 12 September 2010, SCC Case No. Arb.V079/2005, Exhibit RLA57.

[404] Statement of Defence, para. 359.

breach and the extent of injury, if any."[405] In Respondent's view, "*rather than proving any link between supposed wrongful conduct and supposed injury, the Claimant would like the Respondent simply to pay for what the Claimant's business 'should have been.'*"[406]

348. In this regard, Respondent argues that Claimant has not shown loss due to an alleged "*inability to recover operating costs or to withdraw its investment*." Respondent insists that Claimant has always been allowed to generate electricity and to employ the available legal means to enforce payments of any credits for sale of power, that it has always been allowed a high payment preference, and that it has never been denied the ability to withdraw its investment.[407] Respondent also notes that Claimant has failed to show loss due to the "*opportunity of signing a PPA or selling the barge*."[408] Finally, Respondent explains that Claimant has not been able to show loss due to the alleged depression of its collection potential or due to the physical occupation of PBII and alleged damage to the barge.[409]

349. Lastly, Respondent criticises Claimant's approach on *quantum*, deeming the lease model unhelpful and arguing that Claimant should not be awarded damages for uncertain loss.[410] Regarding the lease model, Respondent makes four basic points. First, in Respondent's view, the lease model is more of a "*hypothetical business that has never existed*" rather than an approximation to what would have happened in reality to Claimant had it attempted to generate. Second, according to Respondent, the lease model does not resemble the business model of a power generation company, but rather is more similar to the bareboat leasing model of the Charter Party. Third, Respondent considers that the value attributed by Mr. Walck to PBII (USD 22 million) is based on valuing PBII as if it were a new asset. Fourth, Mr. Walck refuses to acknowledge Claimant's land facilities and the possibility of recovering their value.[411] In addition, Respondent notes that Claimant's damages calculation is based on some assumptions that "*find no support on the record*."[412]

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[405] RPHS, para. 41.

[406] Statement of Defence, para. 362.

[407] Statement of Rejoinder, para. 173.

[408] *Id.*, paras. 174-175.

[409] *Id.*, paras. 175-177.

[410] *Id.*, para. 178.

[411] *Id.*, paras. 179-183. Statement of Defence, paras. 375-376.

[412] Statement of Defence, para. 377.

350. With respect to the alleged uncertainty of the loss, Respondent observes that arbitral tribunals "*have consistently required a reasonable degree of certainty for awarding compensation for future profits*."[413] In its view, the "*speculative character*" of seeking compensation for future profit when a project has no history of revenues should make the Tribunal refrain from compensating Claimant. Respondent further argues that, even if the Tribunal were inclined to award compensation to Claimant for its purported loss, both the amount of compensation and the awarding of interest should be moderated by the requirement of certainty. In this regard, Respondent notes that simple interest would satisfy the requirements of both international and Ecuadorian law.[414]

2. The Tribunal's conclusions

351. In the absence of any BIT violations by Respondent, no compensation is due to Claimant.

CHAPTER IV – THE COSTS OF ARBITRATION

352. In accordance with Procedural Order No. 3, the Parties submitted on February 29, 2012 their applications for costs.

1. The Parties' positions

(i) *Claimant's contentions*

353. In its costs application, Claimant requests that the Tribunal, in accordance with Article 38(e) of the UNCITRAL Rules, "*award costs on the basis of the parties' relative success on the merits of the case*."[415] Pursuant to this principle Claimant claims the entire sum of its "*reasonable legal fees, disbursements and other expenses incurred in the matter to date*."[416]

354. In addition, Claimant argues that, irrespective of the Tribunal's determination of the overall merits of the case, "*it should be entitled to recover its costs of both the disclosure*

[413] Statement of Rejoinder, para. 186; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, *supra* note 266.

[414] *Id.*, paras. 185-188; *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, Final Award, dated 23 September 2003, ICSID Case No. ARB/00/5, Exhibit CLA41; *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, *supra* note 130.

[415] Claimant's Cost Application, p. 1.

[416] *Id.*

phase of this matter and, more significantly, the jurisdiction phase."[417] Claimant's position is based on two arguments. First, it contends that the vast majority of the document production requests were resolved in its favor or with the Tribunal accepting that Claimant's offer of production was adequate. Second, it argues that Respondent's jurisdictional objections "*were decisively held to be badly founded*." In its view, those objections "*unnecessarily delayed matters and raised the costs of the proceedings significantly*" and therefore "*it is particularly appropriate that the Respondent bear the Claimant's cost of the jurisdictional phase*."[418]

355. Claimant claims, in relation to its costs of legal representation and assistance in the arbitration, USD 5,185,928.67 in total, comprising of USD 3,590,662.32 for legal fees and USD 1,595,266.35 for disbursements and other expenses.[419]

(ii) *Respondent's contentions*

356. In its costs application, Respondent notes that the UNCITRAL Rules recognize the prevailing party principle, but "*generally grant the Tribunal broad discretion*."[420] In addition, Respondent indicates that pursuant to Article 40(2) of the UNCITRAL Rules the Tribunal has full discretion to take into account the circumstances of the case to order one party to bear the costs of legal representation and assistance or to apportion them as it determines to be reasonable.[421]

357. Respondent considers that, if its claims prevail, it should be entitled to its reasonable costs, including its cost of legal representation. However, even if its claims do not prevail entirely, Respondent argues that it should still be entitled to a reasonable apportionment of costs in its favor.[422]

358. On the assumption that all claims are dismissed, Respondent argues that "*there are strong circumstances in this case that justify an order of costs against Ulysseas*," including the

[417] *Id.*

[418] *Id*, p. 2.

[419] *Id.*, p. 3.

[420] Respondent's Application for Costs, para. 8.

[421] *Id.*, 8-11.

[422] *Id.*, para. 12.

fact that Claimant had other remedies available to it and exacerbated the dispute and its damages through its conduct.[423] In Respondent's view, such an apportionment of costs in its favor should not be altered by the fact that the Tribunal did not accept Respondent's jurisdictional objections because it was necessary to determine whether the promise contained in PBII Contract that Claimant would not make international claims had been made only to CONELEC or also to Respondent and the ownership and control of Claimant was completely opaque at the outset of the proceedings.

359. Even if Respondent does not prevail entirely, it claims that it should be entitled to a reasonable apportionment of the arbitration costs in its favor because Claimant can only prevail "*in part, at the most*" and Claimant's conduct has caused Respondent to incur unnecessary extra arbitration costs.[424] In this regard, Respondent argues that Claimant has failed to pursue a substantial portion of its claims, having forced Claimant "*to incur substantial yet wasted costs in preparing to defend them.*"[425] In particular, Respondent notes that Claimant claimed in its Notice of Dispute and Notice of Arbitration, and confirmed afterwards in the Terms of Appointment that it claimed that (i) Respondent had expropriated PBI; (ii) Claimant was entitled to damages for berthing expenses prior to Las Esclusas; and (iii) Claimant owed no outstanding amounts to PETROCOMERCIAL and CONELEC's contractual penalties were invalid.[426] However, Respondent asserts that Claimant has completely failed to rebut "*or even respond*" to Respondent's argument or evidence conclusively disproving these claims.[427] In Respondent's view, those claims must be deemed abandoned and dismissed with prejudice.

360. In addition, Respondent accuses Claimant of "*unnecessarily wasteful conduct*" that has caused Respondent to incur additional costs.[428] In particular, Respondent contends that (i) Claimant resisted disclosing its full relation with Prime, Elliot Associates and the Synergy Group,[429] (ii) Claimant misled its evidence on the PBII Charter Party and the role of

[423] *Id.*, paras. 13-18.

[424] *Id.*, para. 12.

[425] *Id.*, para. 21.

[426] *Id*.

[427] *Id.*, paras. 22-30; Statement of Defence, paras. 66-78.

[428] *Id.*, para. 5.

[429] *Id*., paras. 32-35.

Proteus Power,[430] and (iii) Claimant introduced new arguments and documentary evidence in an untimely fashion just prior to the Hearing and in its Post-Hearing Brief.[431] Respondent further asserts that numerous unsupported factual allegations were made by Claimant, that Claimant introduced documents that it had erroneously redacted and that it "*unnecessarily resisted*" Respondent's request to provide certain powers of attorney.[432]

361. Respondent claims a total amount of USD 6,297,557.44, including the arbitrators' fees and expenses, the administrative costs, the cost of producing expert and witness evidence and costs of legal representation and assistance, including the costs incurred by Ecuador's Attorney General's Office for this matter and its costs for outside counsel. Respondent also seeks an award of interest on any costs awarded in its favor, from the date of the award until full payment by Claimant. In Respondent's view, "*simple interest at LIBOR would be fair and reasonable in the circumstances*."[433]

2. The Tribunal's analysis and conclusion

362. Article 38 of the UNCITRAL Arbitration Rules states that the arbitral tribunal shall fix the costs of arbitration in its award and defines the term "costs" as including only:

> *"a. The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;*
>
> *b. The travel and other expenses incurred by the arbitrators;*
>
> *c. The costs of expert advice and of other assistance required by the arbitral tribunal;*
>
> *d. The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;*
>
> *e. The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;*

[430] *Id.*, paras. 36-39.

[431] *Id*., paras. 40-41. Respondent refers to Various entries from Log Book of PBII, dated 2010, Exhibit C270 and to Certificate from Gateway Transit Ltd., attached as Exhibit B to Claimant's Post-Hearing Submission.

[432] *Id.*, paras. 42-47.

[433] *Id.*, paras. 50-53.

f. Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague."

363. According to Article 40(1) of the UNCITRAL Rules, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case. According to Article 40(2) regarding specifically the costs of legal representation and assistance, the arbitral tribunal, taking into account the circumstances of the case, is free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

364. Among the circumstances of the case that the Tribunal has taken into account is its finding that Claimant has been successful as to the jurisdiction of the Tribunal while Respondent has been successful as to the merits of the case.

365. Taking all the circumstances of the case into account, the Tribunal decides as follows. Each Party shall pay one half of the fees and expenses of the Tribunal and of the PCA and that Claimant shall bear its own costs for legal representation and assistance. Having examined each Party's costs, the Tribunal has determined that the amount of Respondent's costs for legal representation and assistance is reasonable. Claimant shall reimburse Respondent's costs for legal representation and assistance in the amount of USD 2.000,000.00 (two million United States dollars). This amount shall be paid within 30 (thirty) days following receipt of the Award, failing which simple interest shall run on such amount at LIBOR (annual), as requested by Respondent.[434]

366. Under Article 41(5) of the UNCITRAL Arbitration Rules, the Tribunal has to render an accounting of the deposits received. The advances made by the Parties to cover the fees and expenses of the Tribunal and of the PCA are as follows:

Claimant:	EUR 425,000.00
Respondent:	EUR 425,000.00

367. The advances having being paid in equal shares, there shall be no settlement between the Parties in that regard.

[434] *Id.*, para. 52.

368. The total costs for fees and expenses regarding the arbitrators and PCA are fixed at EUR 778,100.62, divided as follows:

Prof. Piero Bernardini:	EUR 255,675.00 (fees), EUR 8,698.40 (expenses)
Prof. Michael Pryles:	EUR 149,887.50 (fees), EUR 15,653.27 (expenses)
Prof. Brigitte Stern:	EUR 125,475.00 (fees), EUR 32,425.19 (expenses/VAT)
PCA:	EUR 76,353.69
Tribunal expenses:	EUR 113,932.57

369. The Parties' respective portions of these tribunal costs, amounting to EUR 389,050.31 for each side, shall be deducted from the deposit and the PCA shall reimburse the amount of EUR 35,949.69 to each side in accordance with Article 41(5) of the UNCITRAL Arbitration Rules.

CHAPTER V – PRAYER FOR RELIEF

370. Claimant's prayer for relief is as follows:

> "*Claimant claims*:
>
> (1) *damages in the amount of not less than US$ 56.1 MILLION;*
>
> (2) *pre and post judgement interest assessed on a compound basis and at a rate of 15%, and running from 1 January 2008;*
>
> (3) *its legal and other costs of bringing these proceedings; and*
>
> (4) *such other relief that the Tribunal finds to be just and proper.*"[435]

371. Respondent's prayer for relief is as follows:

> "*The Respondent respectfully requests that the Tribunal enter a decision*:
>
> (1) *That the Respondent has not breached any of its obligations under the BIT in relation to the Claimant's investment;*
>
> (2) *Rejecting all of the Claimant's investment;*
>
> (3) *Ordering the Claimant to pay all of the Respondent's costs associated with these proceedings, including the arbitrators' fees and administrative costs, and the legal costs (including attorneys' fees) incurred by the Respondent, in an amount to be quantified; and*
>
> (4) *Ordering any other relief that the Tribunal sees fit.*"[436]

[435] Statement of Claim, para. 124.

[436] Statement of Rejoinder, para. 189.

CHAPTER VI – DISPOSITIVE PART OF THE DECISION

372. Having carefully considered the Parties' arguments in their written and oral submissions as well as the evidence produced by each of them, for all the foregoing reasons, the Tribunal unanimously decides and orders as follows:

(1) Respondent has not breached any of its obligations under the BIT in relation to Claimant's investment;

(2) All of Claimant's claims in that regard are dismissed;

(3) The Parties shall share equally all fees and expenses of the Tribunal as well as PCA's fees and expenses, which are paid out of the advances made by the Parties;

(4) Claimant is ordered to pay to Respondent the sum of USD 2,000,000.00 (two million United States dollars) on account of Respondent's costs for legal representation and assistance, increased by simple interest at LIBOR (annual) from the date of receipt by Claimant of this Award in case of failure to make payment within 30 (thirty) days from said award receipt;

(5) The PCA shall reimburse EUR 35,949.69 to each Party in respect of the unexpended balance of the deposit;

(6) All other claims and requests by the Parties are dismissed.

Date: 12 June 2012

Michael Pryles

(*Arbitrator*)

Brigitte Stern

(*Arbitrator*)

Piero Bernardini

(*Presiding Arbitrator*)