

**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 -

MURPHY EXPLORATION & PRODUCTION COMPANY - INTERNATIONAL

the “Claimant”

and

THE REPUBLIC OF ECUADOR

the “Respondent”, and together with the Claimant, the “Parties”

DECISION ON RESPONDENT’S REQUEST FOR BIFURCATION

19 December 2012

Tribunal:

Professor Bernard Hanotiau

Professor Kaj Hobér

Professor Georges Abi-Saab

Registry:

Permanent Court of Arbitration

Secretary to the Tribunal:

Sarah Grimmer

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I. PARTIES

1. Claimant is Murphy Exploration and Production Company – International, a company duly incorporated and existing under the laws of the State of Delaware, U.S.A. (“**Claimant**” or “**Murphy**”). Claimant is represented by Messrs. Craig Miles, Roberto J. Aguirre Luzi, Esteban Leccese of King & Spalding LLP in Houston; Mr. Kenneth Fleuriet and Ms. Amy Roebuck of King & Spalding LLP in Paris; and Mr. Francisco Roldán of Pérez Bustamante & Ponce in Quito.
2. Respondent in these proceedings is the Republic of Ecuador (“**Ecuador**” or “**Respondent**”). Respondent is represented in these proceedings by Dr. Diego García Carrión, Dra. Christel Gaibor, Dr. Luis Felipe Aguilar and Dra. Gianina Osejo at the office of the State’s Attorney General; Mr. Mark Clodfelter, Dr. Ronald Goodman, Dr. Alberto Wray, Mr. Ignacio Torterola, Dr. Constantinos Salonidis and Ms. Diana Tsutieva of Foley Hoag LLP in Washington, D.C.; and Messrs. Bruno Leurent, Thomas Bevilacqua and Ms. Angelynn Meya of Foley Hoag LLP in Paris.

II. RELEVANT LEGAL PROVISIONS

3. Claimant commenced these proceedings against Ecuador by Notice of Arbitration dated 21 September 2011 pursuant to Article VI of the Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment (the “**BIT**” or “**Treaty**”).
4. Article VI of the BIT provides:
 1. For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party’s foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.
 2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute, under one of the following alternatives, for resolution:
 - (a) to the courts or administrative tribunals of the Party that is a party to the dispute; or
 - (b) in accordance with any applicable, previously agreed dispute settlement procedures; or
 - (c) in accordance with the terms of paragraph 3.

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

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

(ii) to the Additional Facility of the Centre, if the Centre is not available; or

(iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or

(iv) to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.

(b) once the national or company concerned has so consented, either party to the dispute may initiate arbitration in accordance with the choice so specified in the consent.

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

(a) written consent of the parties to the dispute for Purposes of Chapter II of the ICSID Convention (Jurisdiction of the Centre) and for purposes of the Additional Facility Rules; and

(b) an "agreement in writing" for purposes of Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958 ("New York Convention").

5. Any arbitration under paragraph 3(a) (ii), (iii) or (iv) of this Article shall be held in a state that is a party to the New York Convention.

5. Claimant's claims implicate, *inter alia*, the following articles of the Treaty:

(i) Article II(1) (national treatment and most-favoured-nation provision):

1. Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the most favorable,

subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Protocol to this Treaty. Each Party agrees to notify the other Party before or on the date of entry into force of this Treaty of all such laws and regulations of which it is aware concerning the sectors or matters listed in the Protocol. Moreover, each Party agrees to notify the other of any future exception with respect to the sectors or matters listed in the Protocol, and to limit such exceptions to a minimum. Any future exception by either Party shall not apply to investment existing in that sector or matter at the time the exception becomes effective. The treatment accorded pursuant to any exceptions shall, unless specified otherwise in the Protocol, be not less favorable than that accorded in like situations to investments and associated activities of nationals or companies of any third country.

(ii) Article II(3)(c) (umbrella clause):

Each Party shall observe any obligation it may have entered into with regard to investments.

(iii) Article X (taxation matters):

1. With respect to its tax policies, each Party should strive to accord fairness and equity in the treatment of investment of nationals and companies of the other Party.

2. Nevertheless, the provisions of this treaty, and in particular Article VI and VII, shall apply to matters of taxation only with respect to the following:

(a) expropriation, pursuant to Article III;

(b) transfers, pursuant to Article IV; or

(c) the observance and enforcement of terms of an investment agreement or authorization as referred to in Article VI (1) (a) or (b), to the extent they are not subject to the dispute settlement provisions of a Convention for the avoidance of double taxation between the two Parties, or have been raised under such settlement provisions and are not resolved within a reasonable period of time.

6. Respondent's request for bifurcation of these proceedings implicates Article 21(4) of the UNCITRAL Arbitration Rules 1976, which provides:

In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.

III. BACKGROUND

Factual background to the dispute

7. What follows is a brief factual background to this dispute set out for the purposes of providing context to the present decision by the Presiding Arbitrator on Respondent's request for bifurcation. It should not be taken to be indicative of any factual finding on the part of the Tribunal in this case.
8. In 1985, following a bidding process, the Ecuadorian government retained the services of a consortium of oil companies led by Conoco Ecuador Limited ("**Conoco**") to exploit the petroleum resources in a zone of Ecuador's Amazon Region known as Block 16.
9. According to Claimant, its original investment in Ecuador commenced in 1987 when it, through its subsidiaries, indirectly acquired from Conoco a 20% aggregate interest in the Service Contract for the Exploration and Exploitation of Hydrocarbons in Block 16 of the Ecuadorian Amazon Region ("**Service Contract**").¹ Following this acquisition, Murphy became part of the Consortium formed by Conoco Ecuador Ltd, Overseas Petroleum and Investment Corporation, Diamond Shamrock South America Petroleum B.V., and Nomeco Latin American Inc. ("**Consortium**").² Under the Service Contract, the Consortium received a set fee for their services in extracting oil, with all of the resulting production belonging to the State.³
10. According to Ecuador, pursuant to a public deed executed in Quito on 28 July 1987, Conoco assigned 10% of its rights and obligations under the Service Contract to each of Murphy Ecuador Oil Company Limited ("**Murphy Ecuador**") and its immediate parent company, Canam Offshore Limited ("**Canam**"), which is a wholly-owned subsidiary of Claimant.⁴ Canam was organised under the laws of the Bahamas and Murphy Ecuador was organised under the laws of Bermuda.⁵
11. The Service Contract was in force until December 1996 at which time the Consortium and Ecuador executed the Modification of the Service Contract into a Participation Contract for the Exploration and Exploitation of Hydrocarbons (Crude Oil) in Block 16 of the Amazon Region of

¹ Notice of Arbitration, para. 3; Statement of Claim, para. 4 and paras. 54-57, 70-74; Objections to Jurisdiction, para. 14.

² Notice of Arbitration, para. 3; Statement of Claim, para. 69; Objections to Jurisdiction, para. 13.

³ Notice of Arbitration, para. 3.

⁴ Objections to Jurisdiction, para. 15.

⁵ Objections to Jurisdiction, para. 16.

Ecuador (“**Participation Contract**”).⁶ Under the Participation Contract, the Consortium received a percentage of its production of oil and the right to freely market its share.⁷ The Participation Contract was intended to remain in force until 31 January 2012.⁸ According to Claimant, through its subsidiaries, it indirectly owned 20% of the rights and obligations under the Participation Contract.⁹

12. From the early 2000s, global oil prices rose sharply and led to dramatic increases in revenue for oil companies.
13. In April 2006, Ecuador passed Law 42,¹⁰ an amendment to its Hydrocarbons Law, under which the Consortium was obliged to pay an “additional participation” of at least 50%.¹¹
14. On 11 July 2006, Ecuador issued Decree No. 1672, a regulatory decree that formally set the payment percentage of the additional participation at 50%.¹²
15. In October 2007, Ecuador issued Decree No. 662, a further regulatory decree that increased the additional participation to 99%.¹³
16. Claimant contends that it and the other members of the Consortium asserted their right to have the Participation Contract enforced according to its original terms and, for a time, made Law 42 payments under protest. It states that it paid over USD118 million in protest.¹⁴ Ecuador contends that Claimant became the sole dissenting member of the Consortium with regard to the continuance of operations in Block 16.¹⁵
17. On 29 February 2008, Claimant notified the Government that a dispute had arisen in April 2006 with the introduction of Law 42, and that Murphy would seek international arbitration under the

⁶ Notice of Arbitration, para. 5; Statement of Claim, para. 5 and paras. 58-62, 68, 78-131; Objections to Jurisdiction, paras. 19-25.

⁷ Notice of Arbitration, para. 5; Statement of Claim, para. 2.

⁸ Notice of Arbitration, para. 3.

⁹ Notice of Arbitration, para. 5.

¹⁰ Law No. 42, Official Gazette No. 257 (Supplement), Apr. 25, 2006, **CEX-47**.

¹¹ Notice of Arbitration, para. 7; Statement of Claim, paras. 8-9, 132-141; Objections to Jurisdiction, paras. 29-38.

¹² Notice of Arbitration, paras. 8, 30; Statement of Claim, paras. 10, 145.

¹³ Notice of Arbitration, para. 30; Statement of Claim, paras. 10, 146; Objections to Jurisdiction, para. 36.

¹⁴ Notice of Arbitration, para. 9; Statement of Claim, paras. 179-181.

¹⁵ Objections to Jurisdiction, para. 40.

BIT.¹⁶ Claimant contends that the six-month notice period provided for at Article VI(3)(a) of the BIT expired in or around October 2006.¹⁷

Procedural history of previous ICSID proceedings

18. In March 2008, Claimant initiated ICSID proceedings under the Treaty ("**ICSID Arbitration**").¹⁸ Shortly thereafter, Murphy Ecuador initiated a separate ICSID arbitration together with the Consortium members relating to the same facts (ICSID Case No. ARB/08/10) ("**Murphy Ecuador ICSID Arbitration**").¹⁹
19. After May 2008, Claimant alleges that Ecuador forced investors to convert their participation contracts into new service contracts or risk having their contracts unilaterally terminated by the Government and being forced to abandon their investment in Ecuador altogether.²⁰ As a result, on 12 March 2009, Murphy sold its interest in the Participation Contract to the Consortium's operator, Repsol YPF Ecuador S.A., at what it describes as a substantially diminished value, and without compensation for the USD118 million that Murphy had already paid under protest.²¹ Respondent contends that Claimant sold its investment at no loss.²²
20. The tribunal in the ICSID Arbitration was fully constituted in October 2008 ("**ICSID Tribunal**"). Those proceedings lasted approximately 3.5 years during which time the parties fully pleaded their respective positions on jurisdiction and the merits.
21. On 15 December 2010, an Award on Jurisdiction ("**ICSID Award on Jurisdiction**")²³ was issued in the ICSID Arbitration in which the majority found that it did not have jurisdiction over the dispute. According to Claimant, that tribunal "rejected all of Ecuador's remaining objections to jurisdiction by finding that they were not questions of jurisdiction but should only be considered during the merits phase. Thus...the only bar to a new tribunal's having jurisdiction over the

¹⁶ Notice of Arbitration, para. 31; Murphy's Letter to Ecuador dated 29 February 2009, **Exhibit C-4**.

¹⁷ Notice of Arbitration, para. 31.

¹⁸ Statement of Claim, para. 31.

¹⁹ Objections to Jurisdiction, paras. 41, 49.

²⁰ Notice of Arbitration, paras. 10-11; Statement of Claim, paras. 182-201.

²¹ Notice of Arbitration, para. 11; Statement of Claim, paras. 12, 202-209.

²² Objections to Jurisdiction, para. 51.

²³ *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, December 15, 2010, **Exhibit C-3**.

present dispute was the majority's finding that Murphy had not consulted and negotiated with Ecuador for a six-month period before filing for arbitration."²⁴

22. According to Ecuador, on 23 November 2010, the Consortium, which included Murphy Ecuador, reached a final settlement with Ecuador. In exchange for a new Modification Contract to the Block 16 Participation Contract (replacing the Participation Contract with a Service Contract for the Exploration and Exploitation of Hydrocarbon), Murphy Ecuador and the other Consortium members agreed to withdraw with prejudice all of the claims made in the Murphy Ecuador ICSID Arbitration.²⁵
23. By letter dated 30 December 2010, Murphy invited Ecuador to participate in consultations and negotiations regarding their dispute under the Treaty.²⁶ By letter dated 31 January 2011, Ecuador responded stating, *inter alia*, that the "six-month period begins to run only from January 3, 2011."²⁷
24. Between February and July 2011, the Parties exchanged correspondence and met to discuss the dispute, but no resolution was reached as a result of these efforts.²⁸
25. On 13 July 2011, Murphy filed a Request for Arbitration with ICSID, to which Ecuador filed jurisdictional objections. Murphy states that it later "accepted Ecuador's offer to submit this dispute to a non-ICSID alternative—specifically to arbitration under the UNCITRAL Rules—, with a view to avoiding further jurisdictional delays." On 19 August 2011, Murphy withdrew its Request for Arbitration from ICSID.²⁹

Procedural history of these proceedings

26. By a Notice of Arbitration dated 21 September 2011, Claimant commenced these proceedings against Ecuador under the UNCITRAL Arbitration Rules 1976.
27. On 14 March 2012, Claimant appointed Professor Kaj Hobér as arbitrator. On 12 April 2012, Ecuador appointed Professor Georges Abi-Saab as arbitrator. On 25 May 2012, the co-arbitrators jointly appointed Professor Bernard Hanotiau as presiding arbitrator.

²⁴ Notice of Arbitration, para. 38.

²⁵ Objections to Jurisdiction, para. 46.

²⁶ Notice of Arbitration, para. 38.

²⁷ Notice of Arbitration, para. 38.

²⁸ Notice of Arbitration, paras. 39-47; Statement of Claim, paras. 32-42.

²⁹ Notice of Arbitration, para. 49; Statement of Claim, paras. 43-44.

28. The Parties and Tribunal agreed Terms of Appointment that were signed on 3 September 2012.
29. A procedural hearing was held by teleconference on 19 July 2012, following which the Presiding Arbitrator signed Procedural Order No. 1 on behalf of the Tribunal. This set forth, *inter alia*, the procedural timetable for the first phase of these proceedings.
30. On 17 September 2012, Claimant filed a Statement of Claim ("**Statement of Claim**") accompanied by (1) the witness statement of Ignacio Herrera; (2) the expert report of Dr. Hernán Pérez Loose and annexes; (3) the expert report of Brent C. Kaczmarek, CFA, with attachments; and (4) exhibits CEX-1 to CEX-167 and legal authorities CLA-001-CLA-108. Relevant Spanish translations were dispatched by courier on 15 October 2012, along with English translations of selected documents and a corrected Statement of Claim, Errata Sheet and missing exhibits (including CEX-168).
31. On 18 October 2012, Ecuador submitted its Objections to Jurisdiction ("**Objections to Jurisdiction**") accompanied by exhibits REX-1 to REX-33 and legal authorities RLA-1 to RLA-194. In it, Respondent requested the Tribunal to "bifurcate these proceedings and address in a preliminary fashion the serious jurisdictional issues hereto raised so that they can be separately assessed and resolved at the outset of this dispute."³⁰ On 23 October 2012, Ecuador submitted a revised version of this submission (to correct minor errors) and an errata sheet. Relevant Spanish translations were submitted on 15 November 2012.
32. On 16 November 2012, Claimant filed its Response to Respondent's Objections to Jurisdiction ("**Response**") accompanied by exhibits CEX-169 to CEX-192 and legal authorities CLA-109 to CLA-232. In its cover letter, Claimant set forth its response to Respondent's request for bifurcation.
33. In a message dated 17 November 2012, the Parties were informed that Professor Abi-Saab was to undergo surgery in the week beginning 19 November 2012 and thereafter enter a convalescence period through March 2013 during which he would not be able to fulfil his obligations as arbitrator in this case. The Parties were invited to comment on this development, and, in particular, to clarify their positions with respect to the issuance of this decision without the contribution of Professor Abi-Saab.

³⁰ Objections to Jurisdiction, para. 321.

34. In a letter dated 10 December 2012, Respondent offered to stipulate with Claimant that the Presiding Arbitrator take this decision alone. By e-mail of 13 December 2012, Claimant agreed to Respondent's stipulation. Accordingly, this decision is made by the Presiding Arbitrator alone.
35. In addition to brief summaries of, among other things, the Parties' positions on jurisdiction, this decision contains summaries of the Parties' pleadings concerning Respondent's request for bifurcation. Such summaries are made and included without prejudice to the Parties' full pleadings on the issues at hand that the Presiding Arbitrator has taken into account when reaching the present decision.

IV. SUMMARY OF CLAIMANT'S CLAIMS UNDER THE TREATY

36. Claimant alleges that Respondent's conduct with respect to its investment in Ecuador violated the Treaty. In particular, Murphy impugns Respondent's, *inter alia*, enactment of Law 42; promulgation and enforcement of the regulatory degrees without compensation to Murphy; imposition of negotiations on Murphy in an attempt to force it to convert the Participation Contract into a service contract under threat of being expelled from Ecuador; and creating conditions that ultimately forced the sale of Murphy's investment in Ecuador.³¹
37. Murphy claims that Ecuador's violations of its Treaty obligations include, but are not limited to, its duty (1) to accord fair and equitable treatment to investments, (2) to accord full protection and security to investments; (3) to treat Murphy's investment on a basis no less favourable than that accorded in like situations to nationals; (4) not to impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments; (5) to ensure that Murphy receives national or most-favoured-nation treatment, whichever is better, and (6) not to unlawfully expropriate or nationalise investments.³² Claimant also argues that because Ecuador's measures also amount to breaches of the Participation Contract, they violate the Treaty's umbrella clause and constitute breaches of an investment agreement.³³

V. SUMMARY OF RESPONDENT'S JURISDICTIONAL OBJECTIONS

38. Respondent argues that by its earlier election of ICSID arbitration, Claimant exhausted all opportunity afforded to it by the Treaty to arbitrate its claims. It contends that the jurisdictional provisions of Article VI of the Treaty operate as successive forks-in-the-road, precluding Claimant from revisiting its initial election of remedies or having a second election of international

³¹ Notice of Arbitration, para. 21.

³² Notice of Arbitration, para. 22.

³³ Notice of Arbitration, para. 23.

arbitration.³⁴ Respondent insists that Article VI of the BIT allows investors a single opportunity to vindicate their claims before an international arbitral tribunal.³⁵ Ecuador rejects Claimant's reliance on a passage in Ecuador's objections to Claimant's second request for ICSID arbitration that reads: "if an ICSID tribunal declines jurisdiction over a dispute, a party may take that dispute to another forum for a decision on the merits"; this, Ecuador says, does not signal its agreement to the initiation of this arbitration which it claims is precluded by the wording of the Treaty.³⁶

39. In addition, Respondent raises the following jurisdictional objections:

- (i) **Shareholder claims:** Ecuador argues that Claimant's claims are really those of its former subsidiary, Murphy Ecuador. All of the losses alleged are the losses of that former subsidiary. Claimant has failed to allege any losses to itself that are distinct and separate from the losses alleged to have been suffered by that former subsidiary. But the latter was never able to claim under the Treaty because it is a national of Bermuda, not the United States. After Claimant caused that subsidiary to be sold to another member of the Consortium, the subsidiary withdrew its own claims from the ICSID arbitration that it had commenced under the concession contract. It did so *with* prejudice, in exchange for a new long term oil production agreement. Claimant lacks standing to pursue those claims here.³⁷
- (ii) **Article X of the Treaty:** Ecuador submits that the State Parties expressly excluded from the application of the Treaty, and specifically from arbitration, matters of taxation like the law which informs all of Claimant's claims. They thereby preserved the broad latitude they enjoy under international law to determine fiscal policy and fund public needs. The only exception to this express exclusion pertinent here is with respect to Claimant's expropriation claim. Therefore, even if they were not outside of the Tribunal's jurisdiction because of the first two jurisdictional objections, none of Claimant's other claims survives this tax-matter exclusion clause. Moreover, Claimant's threat to invoke the Treaty's most-favoured-nation treatment clause to avoid application of the tax-matter exclusion is meritless; the MFN clause is beyond Claimant's standing and cannot be applied in the manner suggested by Claimant.³⁸

³⁴ Respondent's Objections to Jurisdiction, para. 8, pages 16-25.

³⁵ Objections to Jurisdiction, para. 60.

³⁶ Objections to Jurisdiction, para. 60.

³⁷ Objections to Jurisdiction, para. 85.

³⁸ Objections to Jurisdiction, para. 10, pages 43-85.

(iii) **Umbrella clause:** According to Ecuador, the claim Claimant raises under the Treaty's so-called umbrella clause meets none of the tests for its application under the Treaty. The contract obligations at the heart of Claimant's claim are not the kind of obligations contemplated by the Treaty. That contract does not, as required, include obligations with respect to any investment in Ecuador within the meaning of the Treaty. And in any event, Claimant is not a party to that contract – an essential element of the umbrella clause's application. Moreover, the Participation Contract includes a dispute settlement clause which removes the contract's obligations from any possibility of adjudication by this Tribunal.³⁹

VI. SUMMARY OF CLAIMANT'S RESPONSE TO RESPONDENT'S JURISDICTIONAL OBJECTIONS

40. Claimant rejects Ecuador's characterisation of Article VI as containing successive forks in the road.⁴⁰ It argues that Ecuador's former position was that Murphy did not have just one choice of forum; indeed, it invited Murphy to withdraw its ICSID claims and institute UNCITRAL proceedings instead. Claimant states that Ecuador is precluded from reversing its position now by principles of estoppel and good faith.⁴¹ Claimant characterises the BIT as containing a "three-prong" test for UNCITRAL arbitration: i.e., provided that the investor has not submitted the dispute for resolution to (i) "the courts or administrative tribunals of the Party that is a party to the dispute", or (ii) "in accordance with any applicable, previously agreed dispute settlement procedures," and that (iii) six months have elapsed since the date on which the dispute arose, the national or company may consent in writing to a dispute under the UNCITRAL Rules. Murphy claims that it has fully complied with this test.⁴²
41. Claimant argues that Ecuador's remaining objections should be decided with the merits of the case. It claims that the ICSID Tribunal already decided that these objections "by their nature" should be resolved together with the merits of the case.⁴³ Claimant contends that the ICSID Tribunal's decision is *res judicata*.⁴⁴ In addition, Claimant responds to each of Respondent's jurisdictional objections as follows:

³⁹ Objections to Jurisdiction, para. 11, pages 86-115.

⁴⁰ Response, para. 33.

⁴¹ Response, para. 33, and pages 12-44.

⁴² Statement of Claim, paras. 46-50.

⁴³ Response, para. 109.

⁴⁴ Response, paras 110-122.

- (i) **Shareholder claims:** In response to Ecuador's argument that Claimant's claims are really those of its former subsidiary, Murphy Ecuador, Claimant argues that Ecuador ignores the plain terms of the BIT, which protect all forms of covered "investment," including Murphy's interests in Murphy Ecuador, the local branches, and the Participation Contract. Claimant asserts that arbitral practice on this issue is extensive and uniform. In response to Ecuador's argument that Murphy Ecuador withdrew its claims from the ICSID arbitration, with prejudice, in exchange for a new long term oil production agreement, Claimant argues that the relevant transaction documents clearly left the BIT claim with Murphy, so there was no claim pertinent to this case for Murphy Ecuador to settle.⁴⁵
- (ii) **Article X of the Treaty:** Claimant describes Ecuador's argument that Murphy's claims other than expropriation should be dismissed under Article X of the BIT, which limits disputes over "measures of taxation" to claims of expropriation, transfers of returns, or violations of an investment agreement as misplaced. Law 42, Claimant argues, is not a tax, as Ecuador expressly admits. Claimant contends that Ecuador, having deliberately structured Law 42 as a non-tax under domestic law so as to avoid liability under the tax-stabilisation provisions of the Participation Contract, cannot belatedly re-classify Law 42 as a "tax measure" so as to avoid liability under the BIT and international law. Such conduct is precluded by the doctrines of estoppel and abuse of rights. In any event, Claimant asserts that there is no basis for dismissing Murphy's claims on this point because Murphy has asserted that Law 42 is both expropriatory and violative of an investment agreement, either of which would bring the claim within Article X even if Ecuador could permissibly re-classify Law 42 as a tax after the fact (which it cannot do). Further, to the extent necessary, Murphy has invoked the BIT's MFN clause to obtain the benefits of other Ecuador BITs that provide more favourable treatment to investors by not including a tax carve-out provision like that in Article X of the BIT.⁴⁶
- (iii) **Umbrella clause:** Claimant contests Ecuador's argument that Murphy's claim under the BIT's umbrella clause should be dismissed because Ecuador entered into no "obligations" with regard to any "investment" of Murphy. This argument, Claimant says, ignores the text of the BIT, which defines "investment" broadly and in a non-exclusive manner; it covers Murphy's interests in, among others, Murphy Ecuador and its branches, as well as the Participation Contract, and the right to ensure the obligations arising therefrom. Similarly, Claimant contends that Ecuador's argument that there was no "investment

⁴⁵ Response, para. 10, pages 49-71.

⁴⁶ Response, para. 11, pages 72-107.

agreement” between Ecuador and Murphy does not honour the terms of the BIT and imposes additional requirements that do not exist in the BIT itself.⁴⁷ Claimant argues that while Ecuador makes five objections to this Tribunal’s jurisdiction under the guise of the umbrella clause, only one is truly a jurisdictional issue: i.e., that the Participation Contract’s dispute settlement provisions bars Murphy from asserting international law claims under the BIT; the others are for the merits.⁴⁸

VII. RESPONDENT’S REQUEST THAT THESE PROCEEDINGS BE BIFURCATED

The Respondent’s Position

42. Respondent requests that the Tribunal “bifurcate these proceedings and address in a preliminary fashion the serious jurisdictional issues hereto raised so that they can be separately assessed and resolved at the outset of this dispute.”⁴⁹ Respondent argues that States are subject to arbitration only to the extent that they have consented, and that they should not be obliged to defend the merits before a tribunal that lacks jurisdiction or whose jurisdiction has not yet been established.⁵⁰
43. Respondent contends that the overarching principle behind a decision to bifurcate is the efficient and effective administration of the arbitral process.⁵¹
44. Respondent argues that these principles are reflected in the UNCITRAL Arbitration Rules 1976, which, at Article 21(4), establish a presumption in favour of bifurcation.⁵² Accordingly, Respondent contends that (1) it is for the party opposing bifurcation to demonstrate that the jurisdiction of the tribunal is clear enough to warrant jurisdictional pleas to be joined to the merits;⁵³ and, (2) bifurcation may not be dispensed with “without good cause”.⁵⁴
45. Ecuador adds that resolving jurisdictional objections in a preliminary fashion is commonplace for ICSID and other international tribunals, and tribunals have virtually unfettered discretion to bifurcate.⁵⁵ This discretion is informed by a wide variety of factors,⁵⁶ including (1) efficiency;⁵⁷

⁴⁷ Response, para. 12.

⁴⁸ Response, para. 310, pages 107-180.

⁴⁹ Objections to Jurisdiction, para. 321.

⁵⁰ Objections to Jurisdiction, para. 322.

⁵¹ Objections to Jurisdiction, paras. 323-324.

⁵² Objections to Jurisdiction, paras. 326-327; Respondent’s letter of 10 December 2012, pp. 2-3.

⁵³ Objections to Jurisdiction, para. 327.

⁵⁴ Respondent’s letter of 10 December 2012, p. 4.

⁵⁵ Objections to Jurisdiction, para. 328.

(2) whether jurisdictional issues are intertwined with the merits of the case,⁵⁸ (3) the possible degree of delay,⁵⁹ and (4) whether bifurcation facilitates the parties' ability to fully address issues in an organised fashion.⁶⁰

46. In terms of efficiency, Ecuador submits that unless the tribunal's jurisdiction is clear, there is no need to undertake lengthy and costly proceedings to resolve other issues.⁶¹ Ecuador argues that its jurisdictional objections go to the core of the Tribunal's jurisdiction, and, contrary to what Claimant argues, would not involve "rehashing" of arguments that have been previously addressed because the present objections were never addressed by the ICSID Tribunal. Ecuador submits that their objections meet any applicable standard of substantiality.⁶² Ecuador notes that another tribunal addressed whether Law 42 is a tax in the sense of Article X of the BIT as a preliminary matter, and "decided that several [of] Claimant's claims were not within [its] jurisdiction";⁶³ that case, Respondent argues, was greatly narrowed by the tribunal's decision on jurisdiction.⁶⁴
47. Ecuador maintains that its objections are not intertwined with the merits and their resolution in no way requires assessment of Claimant's substantive claims: (1) Ecuador's objection that Claimant has exhausted its opportunity to arbitrate under the Treaty is a question of interpreting the extent of the State Parties' consent under the Treaty; (2) Ecuador's objection concerning Murphy's claims as shareholder of Murphy Ecuador require no more than the application of recognised legal principles to the claims as they appear on the face of the Notice of Arbitration and Statement of Claim, and can "easily be determined on the basis of the jurisdictional submissions made and to be made";⁶⁵ (3) Ecuador's objections concerning Article X of the Treaty require the application of international legal principles to the assessment of the measure at issue and the claims on their face; and (4) Ecuador's objections to Claimant's claims under the umbrella clause do not require an

⁵⁶ Objections to Jurisdiction, para. 329.

⁵⁷ Objections to Jurisdiction, paras. 330, 333.

⁵⁸ Objections to Jurisdiction, para. 331-332.

⁵⁹ Objections to Jurisdiction, para. 333.

⁶⁰ Objections to Jurisdiction, para. 334.

⁶¹ Objections to Jurisdiction, paras. 330, 333.

⁶² Respondent's letter of 10 December 2012, p. 4.

⁶³ Objections to Jurisdiction, para. 330; Respondent's letter of 10 December 2012, p. 5, citing *Burlington Resources Inc. v Republic of Ecuador*, ICSID Case No. ARB/08/5 (formerly *Burlington Resources Inc. and others v. Republic of Ecuador & Empresa Estatal Petróleos del Ecuador (PetroEcuador)*).

⁶⁴ Respondent's letter of 10 December 2012, p. 6.

⁶⁵ Respondent's letter of 10 December 2012, p. 5.

enquiry into the merits of the dispute.⁶⁶ In Respondent's view, "arbitral practice shows that the factual issues raised in their context can very well be decided separately from the consideration of the factual issues underlying the merits."⁶⁷

48. Ecuador rejects Claimant's argument that the ICSID Tribunal rejected its jurisdictional objections that were unrelated to consent because they were merits-based;⁶⁸ Ecuador clarifies that the ICSID Tribunal merely stated that it would have deferred resolution of those objections to the merits phase.⁶⁹ It also claims that the ICSID Tribunal did in fact bifurcate its objections from the merits as evidenced by the separate briefing of all jurisdictional issues and the holding of a jurisdictional hearing relating to all jurisdictional issues prior to the conclusion of the briefing on the merits.⁷⁰
49. Ecuador submits that the question of bifurcation is not covered by any doctrine of *res judicata*.⁷¹
50. In addition, Ecuador submits that bifurcation will permit the best resolution of the jurisdictional question because both Parties will be able to focus on the relevant jurisdictional issues.⁷²
51. Finally, Ecuador rejects Claimant's allegation that Ecuador's request for bifurcation constitutes a further delay tactic on Ecuador's part in this dispute.⁷³ It argues that it is a result of Claimant's own conduct that Claimant has been waiting for more than five years to have the merits of its case heard.⁷⁴

The Claimant's Position

52. Claimant opposes Ecuador's application for bifurcation and what it characterises as Ecuador's request for a suspension of the merits until its Objections to Jurisdiction are decided.⁷⁵ Claimant notes that these claims went through a full jurisdictional phase before the ICSID Tribunal, which considered virtually all of the objections that Ecuador seeks to re-litigate here. A majority of that tribunal sustained one of Ecuador's objections and unanimously rejected the other jurisdictional

⁶⁶ Objections to Jurisdiction, para. 332; Respondent's letter of 10 December 2012, p. 5.

⁶⁷ Respondent's letter of 10 December 2012, p. 5.

⁶⁸ Respondent's letter of 10 December 2012, pp. 4-5.

⁶⁹ Respondent's letter of 10 December 2012, p. 5.

⁷⁰ Respondent's letter of 10 December 2012, p. 5.

⁷¹ Respondent's letter of 10 December 2012, p. 5.

⁷² Objections to Jurisdiction, para. 334.

⁷³ Respondent's letter of 10 December 2012, p. 6.

⁷⁴ Respondent's letter of 10 December 2012, p. 6.

⁷⁵ Claimant's letter of 16 November 2012, p. 1.

objections, either outright, or because they were merits-based.⁷⁶ Murphy claims that it has now cured the lone jurisdictional defect as determined by the ICSID Tribunal and that this case is ready to go to the merits.⁷⁷

53. Murphy contends that the issue as to whether Ecuador's jurisdictional objections (that are unrelated to consent) are linked to the merits has already been decided by the ICSID Tribunal. That issue is now *res judicata*.⁷⁸ The ICSID Tribunal concluded that Ecuador's jurisdictional objections (unrelated to consent) were so intertwined with the merits that it would not be possible to determine them without a full briefing on the merits.⁷⁹ Claimant argues that this holding is substantively correct and has implications on the present proceeding; Ecuador cannot re-argue issues that have been decided, just because they were decided by a different tribunal.⁸⁰ Claimant denies Respondent's assertions that arbitral practice shows that factually-intensive issues can be decided at the jurisdictional phase, and distinguishes *Burlington v. Ecuador* from the present case.⁸¹
54. Claimant contests Respondent's assertion that Article 21(4) of the UNCITRAL Arbitration Rules 1976 establishes a presumption in favour of bifurcation.⁸² In support, Claimant refers to the practice of the Iran-US Claims Tribunal (i.e., that unless it strongly appears that the tribunal lacks jurisdiction, it will join jurisdictional objections to the merits) and ICSID figures (i.e., more than two-thirds of cases are not bifurcated) to argue that there is no "investment arbitration practice" in favour of bifurcation; rather, each tribunal must assess a bifurcation request by considering the applicable rules and the particular circumstances of the case. Claimant argues that all Article 21(4) does is give a tribunal the discretionary power to bifurcate.⁸³
55. In terms of efficiency, Claimant points out that this case has already been fully briefed once on the merits. The final hearing is scheduled for October 2013, so there is no efficiency to be gained from suspending the merits between now and then to rehash arguments against jurisdiction that (1) have previously been addressed; (2) arise out of settled areas of law; or (3) rightly belong to the merits. Suspending the merits now would only lead to further delay in what has already been a

⁷⁶ Claimant's letter of 16 November 2012, p. 2.

⁷⁷ Claimant's letter of 16 November 2012, p. 2.

⁷⁸ Claimant's letter of 16 November 2012, p. 2; Claimant's letter of 12 December 2012, p. 4.

⁷⁹ Claimant's letter of 16 November 2012, pp. 2-3.

⁸⁰ Claimant's letter of 12 December 2012, p. 4.

⁸¹ Claimant's letter of 12 December 2012, p. 5.

⁸² Claimant's letter of 16 November 2012, p. 2; Claimant's letter of 12 December 2012, pp. 3-4.

⁸³ Claimant's letter of 16 November 2012, pp. 2-3.

protracted dispute. At a minimum, Ecuador's jurisdictional objections could be briefed and heard in parallel with the merits.⁸⁴

56. According to Claimant, in order to decide to bifurcate, the Tribunal must be convinced that Ecuador's objections to jurisdiction are likely to fully dispose of the case. However, they raise complex issues of international law, and as such, it cannot be clear at this stage that any one of Ecuador's objections would be dispositive. Therefore, Claimant argues, it is more likely that bifurcation would result in unnecessary delays and cost than enhance efficiency.⁸⁵
57. Claimant also requests that this Tribunal bear in mind that throughout this dispute, Ecuador has acted in a way that appears designed to obstruct the resolution of Murphy's claim.⁸⁶ As such, Claimant beseeches the Tribunal to be cautious of Ecuador's motives to bifurcate and wary to bifurcate without good cause.⁸⁷

VIII. REQUESTS FOR RELIEF

58. Respondent requests the Tribunal to "resolve Respondent's Objections to Jurisdiction in a separate, preliminary phase of the proceedings."⁸⁸
59. Claimant requests that the Tribunal "rule that the jurisdictional issues raised by Ecuador be carried with the merits. Alternatively, at most the Tribunal should allow any further briefing and oral argument on jurisdiction without suspending the deadlines for the remaining merits pleadings and merits hearing set for October 2013."⁸⁹

IX. ANALYSIS

Introductory remarks

60. The Parties' have agreed that I determine Respondent's request for bifurcation on my own. I consider that pursuant to the Parties' agreement and Article 21(4) of the UNCITRAL Arbitration Rules 1976, I have full discretion to make this decision. The exercise of my discretion will be informed by two principal considerations: (1) whether Respondent's objections are so intertwined with the merits that it would be more appropriate to decide them at that later stage; and (2) whether

⁸⁴ Claimant's letter of 16 November 2012, p. 3.

⁸⁵ Claimant's letter of 12 December 2012, p. 5.

⁸⁶ Claimant's letter of 16 November 2012, p. 4; Claimant's letter of 12 December 2012, p. 5.

⁸⁷ Claimant's letter of 16 November 2012, p. 4.

⁸⁸ Objections to Jurisdiction, para. 336.

⁸⁹ Claimant's letter of 16 November 2012, p. 6; see also p. 2.

determining any of Respondent's jurisdictional objections in a preliminary phase would enhance the overall efficiency of these proceedings. I do not consider it necessary to make a pronouncement on whether Article 21(4) of the UNCITRAL Arbitration Rules establishes a presumption in favour of bifurcation.

61. I do note that the point has been made that the Parties have already fully pleaded this dispute on jurisdiction and merits in the ICSID Arbitration (with the exception of Ecuador's Article IV jurisdictional objections) and therefore that bifurcation will make little difference in terms of efficiency. However, I am wary of discounting the time and cost that the Parties will devote to these proceedings because of that fact; this is a new and separate proceeding to the ICSID Arbitration. It has been commenced at a later date, under a distinct procedural regime, and before a different Tribunal. It will thus present new procedural and substantive issues that will need to be pleaded by the Parties, as we are currently witnessing with the present application.
62. I will now address each of Ecuador's jurisdictional objections in turn.

Ecuador's objections concerning the interpretation of Article VI of the Treaty

63. The first of Ecuador's jurisdictional objections concerns the interpretation of the dispute resolution clause contained at Article VI of the Treaty.
64. I consider that this objection is a purely jurisdictional one, entirely separate from the merits of Claimant's claims. For this reason, I believe that it is the type of jurisdictional objection that lends itself well to determination in a discrete phase. The next question is whether the proceedings would be rendered more efficient if this objection were determined on a preliminary basis.
65. In terms of efficiency, two considerations bear noting. The first is that Ecuador's present objection, if upheld, in principle, could dispose of this entire dispute. It goes to Ecuador's overall consent to these proceedings. Determining it early could thus have a major impact on the time and expense devoted by the Parties to this case. The second consideration is that, if Ecuador's present objection were dismissed at a preliminary stage, there would be one less issue to address during the remainder of the case. This would have obvious benefits in terms of, among other things, allocating use of hearing time.
66. For these reasons, I consider that deciding Ecuador's jurisdictional objection concerning the interpretation of Article VI of the Treaty in a preliminary phase is appropriate and would have a positive impact on the efficiency of these proceedings.

Ecuador's objections concerning Murphy's shareholder claims

67. Ecuador's jurisdictional objections concerning Murphy's shareholder claims involve issues that are intertwined with the merits of the case. They appear to me to include factual and legal issues concerning, *inter alia*, Claimant's interests in Murphy Ecuador and the Participation Contract, the definition of protected investment under the Treaty, and an assessment of the scope and nature of Murphy Ecuador's undertakings under the settlement agreement. I do not accept Ecuador's submission that determining this objection requires no more than the application of recognised legal principles to the claims as they appear on the face of the Notice of Arbitration and Statement of Claim, and that they can "easily be determined on the basis of the jurisdictional submissions made and to be made". Given the significant overlap between the factual and legal issues raised as between Ecuador's jurisdictional objections here and the merits of Claimant's claim, it would be prudent to defer this objection for determination with the merits.

Ecuador's objections concerning Article X of the Treaty

68. My finding is the same with respect to Ecuador's jurisdictional objections concerning Article X of the Treaty. They involve issues that are so intertwined with the merits of the case—including whether Law 42 is a matter of taxation and whether Ecuador is estopped from so alleging—that it is prudent to defer their determination to the merits phase. I do not accept Respondent's contention that factual issues raised in the context of such a jurisdictional objection can "very well be decided separately from the consideration of the factual issues underlying the merits."⁹⁰

Ecuador's objections concerning the umbrella clause

69. I also direct that Ecuador's objections concerning the umbrella clause be deferred to the merits phase of this case. I find them to be so intertwined with the substantive issues that they are not suitable for determination in a preliminary phase. Without being exhaustive, they concern questions of privity of contract and nationality, the nature of the signatory parties' obligations under the Participation Contract, Claimant's alleged losses, and the nature and scope of the substantive obligations embodied in the Treaty's umbrella clause. The Respondent's jurisdictional objections are so closely related to factual and legal issues of substance that it is only feasible that they be heard together in the merits phase.
70. The ICSID Tribunal stated that Ecuador's jurisdictional objections concerning Murphy's shareholder claims, Article X of the Treaty, and the umbrella clause "could not have been known at [that] stage because by their nature they would have been resolved together with the merits of

⁹⁰ Respondent's letter of 10 December 2012, p. 5.

the case.”⁹¹ I do not consider it necessary to determine whether the comments of that tribunal have any *res judicata* effect on the question of whether Ecuador's jurisdictional objections should be decided with the merits in this proceeding. To the extent that the ICSID Tribunal considered that they should, I agree. Apart from Ecuador's “successive forks-in-the-road” jurisdictional objection, all of their present objections are so intertwined with the merits of the case that they are not suitable for determination in a preliminary phase.

Remaining procedural matters

71. With respect to the remaining deadlines for written submissions in the jurisdictional phase (i.e., 14 January 2013 for Respondent's Reply on Jurisdiction and 14 February 2013 for Claimant's Rejoinder on Jurisdiction), those dates are adjusted to 20 January and 20 February 2013, respectively. Paragraph 1.2.1 of Procedural Order No. 1 is hereby adjusted.
72. The previously scheduled hearing dates in the case of bifurcation (18 and 19 March 2013) are no longer suitable. It will be necessary to find other hearing dates. Alternatively, and in light of the exceptional circumstances surrounding Professor Abi-Saab, I invite the Parties to discuss the possibility of the Tribunal deciding this objection on the papers alone.
73. A hearing on jurisdiction and merits was scheduled for 14 to 18 October 2013 to cater for the event of no bifurcation.⁹² The Parties are directed to maintain these dates subject to the Tribunal's decision on Ecuador's Article VI jurisdictional objections. In the event that the Tribunal rejects Ecuador's bifurcated jurisdictional objection, the Tribunal will consult with the Parties to establish the remaining procedural timetable with a view to keeping the current October 2013 hearing dates.

⁹¹ ICSID Award on Jurisdiction, para. 158.

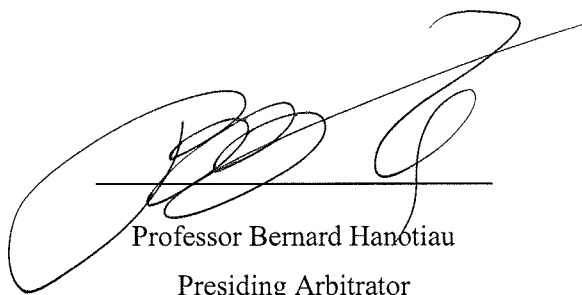
⁹² Procedural Order No. 1, para. 1.2.2(m).

X. DECISION

74. I hereby direct that:

- (i) Ecuador's jurisdictional objections based on an interpretation of Article VI of the Treaty as containing successive "forks-in-the-road" shall be determined in preliminary phase;
- (ii) All of Ecuador's remaining jurisdictional objections shall be determined with the merits.

Done at The Hague on 19 December 2012.



Professor Bernard Hanotiau
Presiding Arbitrator