

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (“ICSID”)**

in the arbitration

**THE LOPEZ-GOYNE FAMILY TRUST AND OTHERS**

– Claimants –

v.

**THE REPUBLIC OF NICARAGUA**

– Respondent –

**CASE No. ARB/17/44**

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**SEPARATE CONCURRING OPINION**

**José A. Martínez de Hoz (Co-arbitrator)**

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Arbitral Tribunal

Mr. José A. Martínez de Hoz – Co-arbitrator

Professor Brigitte Stern – Co-arbitrator

Professor Luca G. Radicati di Brozolo – President

Secretary of the Tribunal

Ms. Catherine Kettlewell

Assistant to the President of the Tribunal

Mr. Gregorio Baldoli

1. I agree with the description of facts, reasoning and conclusions stated by the Tribunal in the Award (the “Award”) in relation to its jurisdiction over the Claim and Claimants’ claims regarding an alleged breach of Articles 10.5 and 10.7 of the Treaty and quantum. I also agree with the reasoning and conclusions of the Tribunal in relation to Respondent’s Counterclaim and on the allocation of costs.
2. Nevertheless, I believe it is appropriate to make some additional considerations in relation to the alleged breach by Nicaragua of Article 10.5 of the Treaty which, in my view, provide broader context to the dispute between the Parties.
3. Except as otherwise stated herein, all capitalized terms shall have the meaning ascribed to them in the Award.
4. As explained by the Tribunal, Nicaragua is not responsible for ION’s failure to establish a discovery of commercial reserves and to perform the Evaluation Program, nor for its inability to assemble the financial and technical resources for such purpose, let alone for carrying out a commercial exploitation of the Concession Area. Nevertheless, as explained below, Nicaragua’s conduct seems to have contributed to the dispute between the Parties, and though as concluded by the Tribunal, such behavior does not rise to a breach of Article 10.5 of the Treaty, it caused uncertainty as to the status of the Contract, thereby prolonging unnecessarily its continuity and the incurrence of expenses by ION and Claimants, even if these were incurred at their own risk.<sup>1</sup>
5. On October 22, 2013, upon the expiration of the 180-day period to carry out the Evaluation Program, Vice Minister Lanza sent a letter to ION communicating that the MEM was terminating the Contract according to Article 70(b) of Law 286. (“**First Termination**”).<sup>2</sup>
6. On November 6, 2013, ION requested a review of MEM’s First Termination arguing factual and legal errors. On November 20, 2013, Ms. Lanza on behalf of MEM, rejected ION’s request on grounds that the exploration phase had finalized on November 13, 2012, and that ION had been granted an opportunity to carry out an Evaluation Program to determine whether its hydrocarbons discovery was commercial, but that ION had lost this opportunity because it failed to comply with the 180-day deadline established by MEM. The MEM also argued that its decision to terminate was based on Article 70(b) of Law 286 (failure to declare commerciality upon the expiration of the exploration phase) and Article 70(e) thereof (for causes established in the Contract).<sup>3</sup>
7. In response to an administrative appeal filed by ION, on December 19, 2013, Minister Rappaccioli, acting on behalf of the MEM, upheld ION’s appeal and reinstated the Contract by formal resolution No. 22 (the “**December 19, 2013 Resolution**”).<sup>4</sup>
8. The MEM’s decision to revoke the First Termination and reinstate the Contract was based on different considerations. The December 19, 2013 Resolution expressly acknowledged that the exploration phase had finalized on November 13, 2012 and that it was now “*outside the exploration phase*”.<sup>5</sup> The resolution also stated that the Contract was in an “*evaluation phase*” considered to be an “*intermediate phase*” “*between exploration and exploitation*” that could “*take place once finalized the*

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<sup>1</sup> Concession Contract, Article 3, **Exhibit C-3**.

<sup>2</sup> Letter from the MEM to ION dated October 22, 2013, **Exhibit C-25**.

<sup>3</sup> MEM letter to ION dated November 20, 2014, **Exhibit C 131**.

<sup>4</sup> Letter from the MEM to ION dated December 19, 2013, **Exhibit C-26**.

<sup>5</sup> *Ibid*, p. 3. (Spanish original version: “...por lo anterior nos encontramos fuera de la etapa de exploración...”).

exploration phase (six years plus a one year extension) as occurs in the present case".<sup>6</sup>

9. According to Respondent, this decision was driven by "policy reasons", because "determining whether there was commercial potential in the Concession area was a matter of high national priority" since Nicaragua "had no other onshore prospects for hydrocarbon exploration, and no other investors interested in developing this area".<sup>7</sup>
10. The so called "intermediate phase" is not expressly regulated by Law 286 or the Contract, and Nicaragua's witnesses and legal expert confirmed at the Hearing that the Contract only included two phases: exploration and exploitation.<sup>8</sup> Nicaragua's legal expert Ms. Rizo and Respondent's witness Ms. Artilles that monitored the Contract, stated that, under normal circumstances, the Evaluation Program should have been completed during the exploration phase.<sup>9</sup> Moreover, Ms. Artilles and Vice Minister Lanza were not able to identify at the Hearing the legal basis supporting the "intermediate phase" of the Contract invoked to support the reinstatement of the Contract.<sup>10</sup>
11. The discussion between the Parties on this point arises largely because the situation that presented itself with the performance of the Contract was not foreseen by Law 286 nor the Contract. In fact, the law seems to assume that the discovery would be made sufficiently in advance of the end of the exploration phase to leave time for the 180-day evaluation process provided for in Article 42(d) of Law 286 so that, in case of successful completion of said process, contractors could make a declaration of a commercial discovery and transition directly to the exploitation phase at the end of the exploration phase. In the case at hand, however, since ION only announced its purported "*descubrimiento*" at the very last moment of the exploration phase, there was no time left for the evaluation to take place before the end of that phase.
12. Law 286 and the Contract do not contemplate specifically the situation described above. From this, however, it does not follow that simply by declaring "*un descubrimiento significativa que puede convertirse en comercial*"<sup>11</sup> at the end of the exploration phase (the six-year duration of which had been extended several times to approximately ten years),<sup>12</sup> ION could without more enter the

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<sup>6</sup> *Ibid*, pp. 3-4. The existence of an "intermediate phase" was also advocated by Nicaragua's witnesses Ms. Lanza (RWS-Lanza I, ¶ 28 and RWS- Lanza II, ¶ 30) and Ms. Artilles (RWS-Artiles I ¶ 46 and RWS- Artiles II, ¶ 26).

<sup>7</sup> Counter-Memorial, ¶ 160.

<sup>8</sup> Legal expert Ms. Rizo's cross examination (Tr. ENG, Day 3, p. 775: 12 and 20; Tr. SPA, Day 3, p. 783: 14-21; p. 784: 1; p. 785: 10-17); and Ms. Artilles' cross examination, Tr. ENG, Day 3, p. 687: 12-19.

<sup>9</sup> Ms. Rizo cross examination, Tr. SPA, Day 3, p. 785: 10-21; and p. 786: 1-2; and Ms. Artilles' cross examination, Tr. ENG, Day 3, p. 690: 2-9.

<sup>10</sup> Nicaragua's witness Ms. Artilles that monitored the Contract as director of Oil Development of MEM between 2007 and 2017, admitted in her cross examination that she did not have a legal answer to that question ("*I don't have a legal answer that I can give you*"). Tr. ENG, Day 3, p. 776: 5-16; p. 728: 16-22 and p. 729: 1-6. Ms. Lanza, Vice Minister of MEM and General Director of Hydrocarbons between 2007 and 2015 also stated in her cross examination that she "did not know" the legal basis for the reinstatement of the Contract. Tr. ENG, Day 2, p. 520: 2-11, p. 587: 12-22 and p. 588: 1.

<sup>11</sup> ION Declaration of Discovery, November 6, 2012, **Exhibit C-16**. See ¶ 160 *supra*.

<sup>12</sup> The Contract was first extended for one year in early 2009, upon request by Norwood (see ¶ 135 *supra*). ION was then granted a one-year extension under Article 36 of Law 286 on November 14, 2011 (see ¶ 143 *supra*). Afterwards, ION was granted two 180-day extensions to undergo the evaluation procedure under Article 42(c) of Law 286: the first one on November 19, 2012, after ION's purported declaration of discovery

exploitation phase. Moreover, the aforementioned lack of specification does not provide a legal basis for continuing with the exploitation of the Concession Area in the absence of a commercial discovery, particularly in light of Article 70(b) of Law 286 which before listing the causes of automatic termination of the Contract (including absence of a commercial discovery upon the termination of the exploration phase), clarifies that [the contracts] “*terminarán sin requisito previo*”. Sound international practice consistent with the system of Law 286 and the Contract would have suggested that Nicaragua could have evaluated the commerciality of the discovery on the basis of the information reported by ION as of such time and could have conditioned the continuity of the Contract to the outcome of that analysis. Instead, Nicaragua allowed the Contract to continue for more than two years on the basis of “policy reasons”.

13. Starting in 2014, the record shows that MEM changed its view towards ION and the continuity of the Contract. On December 3, 2014, Minister Rappaccioli, on behalf of MEM, sent the Termination Letter terminating the Contract on grounds that ION had failed to carry out the activities undertaken in the Evaluation Program and had not declared the commerciality of the discovery.<sup>13</sup> The decision was based on Article 70(b) of Law 286, that was made part of the Contract by Article 32.1 thereof. ION’s continuing delay in performing the Evaluation Program and its inability to find economic and technical resources for such purpose was one of the main reasons for MEM’s decision to terminate the Contract. The record also shows that other factors could have also been relevant, such as the conversations maintained by MEM and Nicaragua’s national oil company, Petronic, with potential investors, some of which were interested in ION’s Block.
14. However, as concluded by the Tribunal, Claimants have been unable to prove that the conversations and negotiations between MEM, Petronic and certain potential investors were a decisive factor for ION’s failure to find funders or investors interested in acquiring an interest in ION’s Block nor a decisive cause of Nicaragua’s decision to terminate the Contract, and, in any event, based on the available evidence, these conversations do not seem to have materialized in any concrete investment.
15. In any case, pursuant to the available evidence, Nicaragua was not responsible for ION’s shortcomings and particularly its lack of economic and technical resources. The record indicates that the lack of interest of investors in ION’s Block was due to a number of factors, including the fact that Nicaragua was an oil frontier territory with no developed reserves of hydrocarbons,<sup>14</sup> the absence in ION’s Block of recoverable, let alone commercial reserves,<sup>15</sup> the disappointing results of the tests carried out by ION and the reduced prospects of an up-grade of the prospective and contingent resources of ION’s Block,<sup>16</sup> all this compounded by the drop of the crude oil prices commencing in mid-2014 after the

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(see ¶ 164 *supra*), and the second one on December 19, 2013, when the First Termination was reversed (see ¶ 168 *supra*).

<sup>13</sup> Termination letter of MEM dated December 3, 2014, **Exhibit C-34**.

<sup>14</sup> Examination of Dr. Flores, Tr. Day 5, p. 1147: 1-7.

<sup>15</sup> Sproule Report, **Exhibit C-15**, pp. 1-4 and 20; Ryder Scott First Expert Report ¶¶ 13-17, ¶¶ 49-54, and ¶ 120; Ryder Scott Second Expert Report ¶¶ 20-32, ¶ 40, ¶ 46, ¶ 80 and ¶¶ 111-113; and examination of Ryder Scott, Tr. Day 4, p. 914: 11-22; p. 915: 1, 9-13 and 21-22; p. 916: 1-2. See also Examination of Dr. Flores, Tr. Day 5, p. 1149: 1-19; p. 1157: 8-16.

<sup>16</sup> Ryder Scott Second Expert Report ¶¶ 24-29; and examination of Ryder Scott, Tr. Day 4, p. 909: 11-21; p. 910: 4-9; p. 912: 4-22; p. 913: 1-9. See also examination of Dr. Flores, Tr. Day 5, p. 1153: 1-11.

cycle of high prices between 2011 and 2014.<sup>17</sup> Ryder Scott's<sup>18</sup> and Quadrant's<sup>19</sup> examinations were persuasive on these points.

16. Notwithstanding the absence of legal basis of the "intermediate phase" theory described above, both Law 286 and the Contract were clear in requiring a "declaration of commercial discovery" pursuant to Article 42(d) of Law 286 as a condition for entering the exploitation phase.<sup>20</sup> Since it is undisputed that ION never performed the evaluation required by said provision nor established the existence of commercial reserves,<sup>21</sup> the MEM was unquestionably entitled to terminate the Contract already in November 2012 on the ground provided by Article 70(b) of Law 286, as even Claimants admit.<sup>22</sup> Nevertheless, at that time the MEM decided not to avail itself of its right to terminate and granted ION 180 days to complete an evaluation program (*i.e.* the same period foreseen for such a program under Article 42(d) of Law 286) and to confirm that its discovery was indeed commercial.
17. In these circumstances, and particularly in light of the clear requirement that contractors complete the procedure envisaged in Article 42 of Law 286 to prove a commercial discovery before moving to the exploitation phase, ION was not entitled to continue directly with the exploitation of the Concession Area without completing the Evaluation Program and proving the existence of a commercial discovery. The fact that Law 286 did not provide a legal basis for the "intermediate phase" invoked by Nicaragua to predicate the continuity of the Contract after the expiration of the exploration phase in spite of the absence of a commercial discovery, and Nicaragua's policy to grant extensions, cannot be interpreted as a waiver by Nicaragua for ultimately terminating the Contract on the basis of Article 70(b) thereof, particularly in light of ION's repeated failure to perform the Evaluation Program and establish the existence of commercial reserves.
18. MEM's approach in relation to the extension of the Contract beyond the expiration of the exploration phase could have created confusion as to its status. Moreover, Nicaragua's subsequent conduct when terminating the Contract raises issues as to its administrative propriety as described below. Nevertheless, none of these circumstances, including certain inconsistencies incurred by the MEM, that are described below, are sufficient to alter the fundamental fact that - in spite of Nicaragua having allowed the Contract to continue for more than two years after its scheduled expiration - ION was unable to assemble the technical and economic resources to drill a new well and perform the Evaluation Program. In the absence of a successful outcome of such drilling and Evaluation Program, ION was unable to evidence the existence of a commercial discovery, as required to continue with the

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<sup>17</sup> Examination of Dr. Flores, Tr. Day 5, p. 1151: 18-22; and p. 1152: 1-21.

<sup>18</sup> Examination of Ryder Scott, Tr. Day 4, p. 909: 2-21; p. 910: 4-9; p. 914: 11-22.

<sup>19</sup> Examination of Dr. Flores, Tr. Day 5, p. 1147: 1-7; p. 1149: 1-19; p. 1150: 3-22; p. 1151: 1-12 and 18-22; p. 1152: 1-21; p. 1153: 1-11; p. 1157: 8-16; Day 4, p. 912: 4-22; p. 913: 1-9; p. 915: 9-13 and 21-22; and p. 916: 1-2.

<sup>20</sup> See Articles 44 and 45 of Law 286 and Article 5 of the Contract.

<sup>21</sup> The fact that ION did not satisfy that necessary condition to move to exploitation is also dispositive of Claimants' argument that ION being requested to relinquish all the areas of the Concession except for the "exploitation areas" would imply that it had moved to the exploitation phase (see Tr. Day 6, p. 1268: 17-22).

<sup>22</sup> Tr. Day 6, p. 1285: "Now, at that stage, November 2012, the 6-year-plus-1 of the exploration period had expired, and the MEM then had two options. Option 1 was to terminate ION's Concession under Article 70(b) precisely for not declaring commerciality under Article 42(b)".

Contract.

19. When Nicaragua decided to terminate the Contract, it did so through a lengthy 18-month process between December 2014 and May 2015, characterized by several inconsistencies and administrative irregularities.
20. On December 3, 2014, Minister Rappaccioli sent the Termination Letter terminating the Contract on grounds that ION had failed to carry out the activities undertaken in the Evaluation Program and had not declared the commerciality of the discovery.<sup>23</sup> There is no evidence of any preceding administrative termination proceeding. Nicaragua did not produce during the document production phase any evidence in this regard<sup>24</sup> and through a letter dated March 25, 2015, MEM recognized the absence of such administrative proceeding taking place. Although it can be interpreted that Article 70(b) of Law 286 dispensed with this requirement because it provided for the automatic termination of the Contract ("*terminarán sin requisito previo*"), due process and administrative propriety would have suggested a prior proceeding in which ION could defend its position. It is nevertheless equally true, that even in the absence of a formal administrative proceeding, ION had the opportunity to defend its position in the context of the numerous correspondence exchanged with the MEM.
21. It is also unclear whether the MEM had the authority to terminate the Contract itself rather than through a Presidential Decree. This was suggested by Minister Mansell's March 25, 2015 letter stating that the Termination Letter was not an administrative resolution or act, and that it only intended to notify ION of MEM's intention to terminate the Contract due to ION's failure to perform the Evaluation Program, and thus would be followed by "*[una] resolución administrativa que en su momento deberán emitir los funcionarios competentes de este Ministerio, con el fin de cumplir con el sumario administrativo y el debido proceso.*"<sup>25</sup> Moreover, on October 27, 2015, the Attorney General of Nicaragua sent a letter to President Ortega's secretary requesting authorization from the President to initiate and execute the termination process of the Contract.<sup>26</sup> This letter indicates that Nicaragua's Attorney General was also skeptical about MEM's authority to terminate the Contract.
22. Second, the invocation of Article 70(b) of Law 286 as a legal basis for terminating the Contract could be deemed to contradict MEM's former position that the exploration phase had finalized in November 2012.<sup>27</sup> Although the Tribunal has concluded that Nicaragua was entitled to terminate the Contract due to ION's failure to make a commercial discovery, its reliance on the "intermediate phase" theory had no legal support. Nicaragua also incurred in these inconsistencies when in October 2014, the MEM informed ION that it could not avail itself of the lengthier periods established by Law 879.<sup>28</sup> ION wrote

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<sup>23</sup> Termination Letter of MEM dated December 3, 2014, **Exhibit C-34**.

<sup>24</sup> Reply, ¶ 186 and footnote 420.

<sup>25</sup> MEM letter dated March 25, 2015, **Exhibit C-40**. Emphasis added.

<sup>26</sup> Letter from the Attorney General to Mr. Oquist dated October 27, 2015, **Exhibit C-243**.

<sup>27</sup> Article 70 of Law 286 (**Exhibit C-1**): "*Los contratos terminarán sin requisito previo en los siguientes casos: ... b) Al término de la fase de exploración, sin que el contratista haya hecho declaración de descubrimiento comercial y no esté vigente un período de retención*".

<sup>28</sup> Law 879 of September 17, 2014, **Exhibit C-27**. The new law extended the exploration periods up to six years and the exploitation period for up to ten years.

to MEM requesting that Law 879 be applied to the Concession.<sup>29</sup> But Minister Rappaccioli informed ION that it was excluded from the new law because the Contract was no longer in the exploration phase that had finalized in November 2012.<sup>30</sup> The issue at stake is not whether Law 879 modified Law 286 or the Contract in relation to the completion of the Evaluation Program (which it did not), but rather Nicaragua's inconsistency in respect of the grounds for denying the application of Law 879 and those invoked for terminating the Contract.

23. The Attorney General's Termination Decision of May 24, 2016 added confusion. Minister Mansell's letter of March 25, 2015 had stated that the December 3, 2014 Termination Letter and MEM's letter of February 16, 2015 were not administrative acts and, on that basis, rejected ION's administrative appeal and ION'S referral to arbitration under the Contract. However, the Termination Decision specifically referred to these two letters as valid and relevant background for its decision to terminate the Contract without providing any explanation to reconcile both positions.
24. Although the above referred matters lost relevance in the light of Decree 191 and the Termination Decision that overcame the issue of MEM's role in the Contract termination process, they are indicative of the procedural and transparency-related flaws in the termination process.
25. The inconsistencies described above could have caused confusion to the detriment of transparency and procedural propriety, and contributed to prolong the continuity of a situation (*i.e.* maintaining the life of the Contract in the absence of a commercial discovery and low prospects of new drilling efforts) that had been tolerated by Nicaragua on the basis of policy reasons. The Tribunal has explained the reasons why these improprieties did not raise the level of a breach of Article 10.5 of the Treaty. Additionally, those circumstances did not change the outcome of the termination of the Contract by Decree 191 and the Termination Decision, nor were relevant factors in ION's inability to perform the Evaluation Program and find monetary and technical resources for such purpose.

[signed]

Mr. José A. Martínez de Hoz

February 22, 2023

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<sup>29</sup> Letter from ION to MEM dated September 30, 2014, **Exhibit C-29**.

<sup>30</sup> Letter from MEM to ION dated October 7, 2014, **Exhibit C-30**.