INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES ("ICSID")

CASE NO. ARB/17/44

in the arbitration

THE LOPEZ-GOYNE FAMILY TRUST AND OTHERS

– Claimants –

v.

THE REPUBLIC OF NICARAGUA

– Respondent –

Arbitral Tribunal

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

Professor Brigitte Stern – Co-arbitrator

Professor Luca G. Radicati di Brozolo – President

Secretary to the Tribunal

Ms. Catherine Kettlewell

Assistant to the President of the Tribunal

Mr. Gregorio Baldoli

AWARD

Date of Dispatch to the Parties: March 1, 2023

CONTENTS

ABBREVIATIONS AND DEFINITIONS

€ [#]	Euros
Agarwal	Consolidated Agarwal Resources Ltd.
Amended Sub-Contractor Agreement	The Sub-Contractor Agreement as amended on August 10, 2004
AR- [#]	Exhibits attached to the expert reports prepared by Dra. Ana Teresa Rizo
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
Attorney General	Nicaragua's Attorney General
Bailey Petroleum	Bailey Petroleum LLC
CAFTA-DR or Treaty	Dominican Republic-Central America Free Trade Agreement
C- [#]	Claimants' Exhibit
CA$ [#]	Canadian Dollars
CLA- [#]	Claimants' Legal Authority
Claim	Claim that Nicaragua's conduct with respect to the Concession Contract constitutes an unlawful expropriation and a failure to accord fair and equitable treatment, in breach of Articles 10.7 and 10.5 of the CAFTA-DR
Claimants	The Lopez-Goyne Family Trust, the Goyne Family Trust, the Bochnowski Family Trust, the Barish Family Trust of 2008, Hills Exploration Corporation, LG Hawaii Oil & Gas, Inc., LG Hawaii Development Corporation, Mr. Michael David Goyne, Ms. Emily Lopez Goyne, Mr. David Michael Goyne, Ms. Esther Valentina Goyne, Mr. James John Bochnowski, Ms. Janet Anne Bochnowski, Mr. David A. Barish, Ms. Gale Ruth Feuer Barish, Mr. James Douglas Goyne, Mr. Raymond Gerald Bailey, Ms. Anita Mejarito-Guzman Ross, Ms. Elsbeth Irene Foster, Mr. Scott Stuart Shogreen, Ms. Eloisa Lopez Shogreen, Mr. Harold Orris Shattuck, Ms. Diane Elizabeth Radu and Mr. Walter John Bilger
Claimants' Rejoinder	Claimants' Rejoinder on the counter-claim and objection to jurisdiction dated September 14, 2021
CLEX- [#]	Exhibits attached to the expert reports prepared by Compass Lexecon

Concession	Block in the Pacific coast of Nicaragua covering approximately 850,000 acres
Concession Area or ION Block	Area of 845,779 acres (342,275 hectares) within Nicaragua's onshore Pacific region covered by the Concession
Concession Contract or Contract	Concession contract entered into by ION and Nicaragua on 23 April 2004
Counterclaim	Counterclaim submitted by Nicaragua pursuant to Article 10 of the CAFTA-DR and Articles 25 and 46 of the ICSID Convention seeking compensation for damages caused by ION's alleged breaches of applicable environmental obligations
Counter-Memorial	Respondent's Counter-Memorial on the merits, including a counter-claim and an objection to jurisdiction dated August 26, 2020
CWS-Bailey	Witness statement of Raymond Gerald Bailey dated February 22, 2021
CWS-Goyne I	Witness statement of Michael David Goyne dated January 10, 2020
Date of Valuation	December 2, 2014
Davis	Ralph E. Davis Associates Inc.
Davis Report	Report prepared by Davis in February 2013 reviewing the analysis and conclusions of the Sproule Report
Decree 43	Decree No. 43-98 issued on June 17, 1998 by President Alemán
Decree 191	Presidential Decree issued on October 28, 2015 by President Ortega
Douglas Dissent	*Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Partial Dissenting Opinion of Prof. Zachary Douglas QC, March 13, 2020
EastSiberian	EastSiberian Plc
EIA	Environmental Impact Assessment
Environmental Permit	Reglamento 45/94 de Permiso y Evaluación de Impacto Ambiental, Resolution No. 16-2004 issued by MARENA on May 18, 2005
ERM	Environmental Resources Management
ERM-[#]	Exhibits attached to the expert reports prepared by ERM

Evaluation Program	Evaluation program submitted by ION to the MEM on April 12, 2013
FET	Fair and equitable treatment
First Termination	Termination of the Contract notified by the MEM on October 22, 2013
FMV	Fair Market Value
Hearing	Hearing on jurisdiction, merits, counter-claim and *quantum* held from November 15, 2021 to November 20, 2021
High Hills	High Hills Petroleum Inc., a company incorporated in 1993 by a group of US investors including Claimants David Michael Goyne, Esther Goyne, Harold Shattuck, James Bochnowski, David Barish, and Hills Exploration Corp.
ICJ	International Court of Justice
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
INE	Nicaraguan Energy Institute
International Tender	International tender process for the granting of hydrocarbon concessions in Nicaragua carried out in 2002-2003
ION or Company	Industria Oklahoma Nicaragua S.A.
IRM	Canadian engineering company International Resource Management Canada Ltd.
IRM Program	Work Program Evaluation and Expenditure Budget Report prepared by IRM
Las Mesas	Las Mesas Gutiérrez Mendez I drilling site
Law 286	Special Law on Hydrocarbon Exploration and Exploitation No. 286, issued on March 18, 1998
Law 879	Law No. 879 of amendments to Law 286, issued on September 19, 2014
LOC4	Potential exploratory well two kilometres north of San Bartolo in Nicaragua
MARENA	Nicaragua's Ministry of the Environment and Natural Resources

MEM	Nicaragua's Ministry of Energy and Mines
Memorial	Claimants' Memorial on the merits dated January 10, 2020
MFN	Most Favored Nation provision of Article 10.4 of the Treaty
Minimum Exploration Program	Work Program submitted by ION to the MEM on October 31, 2011
MoU	Memorandum of understanding
MST	Minimum Standard of Treatment
NAFTA	North American Free Trade Agreement between Canada, the United States and Mexico
Nicaragua	Republic of Nicaragua
Non-Disputing Party Submission	Submission of the United States of America dated September 28, 2021
Norwood	Norwood Resources Ltd., together with its Nicaraguan subsidiary, Norwood Nicaragua S.A.
Norwood Nicaragua	Norwood Nicaragua S.A.
Norwood Resources	Norwood Resources Ltd.
NTE	New Times Energy
Parties	Claimants and Respondent
PAO	Pan American Oil Ltd.
PetroKamchatka	PetroKamchatka Plc
Petronic	Empresa Nicaragüense de Petróleo S.A.
QE- [#]	Exhibits attached to the expert reports prepared by Quadrant Economics
R-[#]	Respondent's Exhibit
RAA-[#]	Exhibits attached to the expert reports prepared by Reserve Analysts Associates, Inc.
RBL-[#]	Exhibits attached to the expert reports prepared by Ramboll
Rejoinder	Respondent's Rejoinder on the merits, a reply on the counter-claim and objection to jurisdiction dated July 12, 2021

RLA-[#]	Respondent's Legal Authority
Reply	Claimants' Reply on the merits, a counter-memorial on the counter-claim and objection to jurisdiction dated February 22, 2021
Request	Claimants' request for arbitration dated November 30, 2017
RER-Rizo I	Expert Report of Dra. Ana Teresa Rizo dated August 24, 2020
RER-Rizo II	Expert Report of Dra. Ana Teresa Rizo dated July 12, 2021
RER-Ryder Scott I	Expert Report of Ryder Scott dated August 25, 2020
RER-Ryder Scott II	Expert Report of Ryder Scott dated July 12, 2021
Respondent	Republic of Nicaragua
RS-[#]	Exhibits attached to the expert reports prepared by Ryder Scott
RWS-Artiles I	Witness statement of Verónica Artiles dated August 24, 2020
RWS-Charuk I	Witness statement of James Charuk dated August 21, 2020
RWS-Gago	Witness statement of Petrona Gago dated August 24, 2020
RWS Lanza I	Witness statement of Lorena Lanza Espinoza dated August 24, 2020
RWS Phipps I	Witness statement of Graeme G. Phipps dated August 22, 2020
RWS Phipps II	Witness statement of Graeme G. Phipps dated July 9, 2021
San Bartolo	San Bartolo Rodríguez Cano I drilling site
San Bartolo II	San Bartolo Rodríguez Cano II drilling site
San Bartolo Block	Block of 39,000 acres retained by ION as an exploitation area under the Concession Contract in May 2013
Spain-Nicaragua BIT	Agreement for the Reciprocal Promotion and Protection of Investments between the Kingdom of Spain and the Republic of Nicaragua of March 16, 1994
Sproule	Sproule International Ltd
Sproule Report	Independent report on an area in the proximity of San Bartolo prepared by Sproule on November 2, 2012

Sub-contractor Agreement	Sub-contractor agreement between ION and Norwood dated 23 April 2004
Termination Decision	Administrative Agreement No. 06-2016 issued on May 24, 2016 by the Nicaraguan Attorney General
Termination Letter	Letter from the MEM to ION of December 3, 2014
Tr. Day [#], p. [page:line]	Transcript of the Hearing
Tribunal	Arbitral tribunal constituted on June 19, 2019 composed of Luca G. Radicati di Brozolo (Italian/British), President, appointed by agreement of the Parties; José A. Martínez de Hoz (Argentine) appointed by Claimants; and Brigitte Stern (French), appointed by Respondent
US$ [#]	United States of America Dollars

I. INTRODUCTION

1. This award resolves a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or "**Centre**") on the basis of the Dominican Republic-Central America-United States Free Trade Agreement ("**CAFTA-DR**" or "**Treaty**") signed on August 5, 2004 and entered into force on August 2, 2005 for the United States and on April 1, 2006 for Nicaragua, and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on October 14, 1966 (the "**ICSID Convention**").

2. These proceedings are conducted in accordance with the ICSID Rules of Procedure for Arbitration Proceedings in force as of April 10, 2006 ("**Arbitration Rules**"), except to the extent modified and/or supplemented by the CAFTA-DR.

3. Claimants are the individuals with nationality of the United States of America and the enterprises constituted or organized under the laws of the United States of America identified in ¶ 9 below ("**Claimants**") who claim to hold shares in Industria Oklahoma Nicaragua S.A. ("**ION**"), a Nicaraguan company.

4. Respondent is the Republic of Nicaragua ("**Nicaragua**" or "**Respondent**").

5. The dispute arises from the termination by Nicaragua of a concession contract with ION dated April 23, 2004 (the "**Concession Contract**" or "**Contract**") for oil exploration and exploitation in a block in Nicaragua's onshore Pacific region (the "**ION Block**" or "**Concession Area**").

6. Claimants contend that Nicaragua's conduct with respect to the Concession Contract constitutes an unlawful expropriation and a failure to accord fair and equitable treatment, in breach respectively of Articles 10.7 and 10.5 of the CAFTA-DR (the "**Claim**"). Accordingly, Claimants seek compensation for the damage they allege to have suffered as a consequence of Nicaragua's actions in an amount between a minimum of US$ 35.8 million and a maximum of US$ 198 million.

7. Nicaragua objects to the *ratione materiae* jurisdiction of the Arbitral Tribunal, on the grounds that Claimants did not make an investment in Nicaragua within the meaning of Article 25.1 of the ICSID Convention and of Article 10.28 of the CAFTA-DR. It also alleges that, under the Treaty provision invoked by them (Article 10.16.1(a)), Claimants are not entitled to bring on their own behalf a claim for indirect injuries as they seek to do in these proceedings. On the merits, Respondent contends that termination of the Concession Contract was "*a lawful, bona fide termination of a contract according to the contract's governing framework*" which cannot be considered an expropriation or a violation of the standard of fair and equitable treatment.[1]

8. Nicaragua also submits a counterclaim pursuant to Article 10 of the CAFTA-DR and

[1] Counter-Memorial, ¶¶ 290, 296; Rejoinder, ¶¶ 256, 286.

Articles 25 and 46 of the ICSID Convention seeking compensation for damages caused by ION's alleged breaches of applicable environmental obligations (the "**Counterclaim**"). Claimants question the jurisdiction of the Tribunal over the Counterclaim and argue that any breach of ION's environmental obligations would not be attributable to Claimants,[2] and, in any event, would be minimal[3] and related to "*Nicaragua's arbitrary termination of the Concession Contract*".[4]

II. THE PARTIES

II.A Claimants

9. Claimants are the Lopez-Goyne Family Trust, the Goyne Family Trust, the Bochnowski Family Trust, the Barish Family Trust of 2008, Hills Exploration Corporation, LG Hawaii Oil & Gas, Inc., LG Hawaii Development Corporation, Mr. Michael David Goyne, Ms. Emily Lopez Goyne, Mr. David Michael Goyne, Ms. Esther Valentina Goyne, Mr. James John Bochnowski, Ms. Janet Anne Bochnowski, Mr. David A. Barish, Ms. Gale Ruth Feuer Barish, Mr. James Douglas Goyne, Mr. Raymond Gerald Bailey, Ms. Anita Mejarito-Guzman Ross, Ms. Elsbeth Irene Foster, Mr. Scott Stuart Shogreen, Ms. Eloisa Lopez Shogreen, Mr. Harold Orris Shattuck, Ms. Diane Elizabeth Radu and Mr. Walter John Bilger.

10. Claimants are represented in this arbitration by:

Mr. Jean-Paul Dechamps
Mr. Gustavo Topalian
Mr. Pablo Jaroslavsky
Mr. Juan Ignacio González Mayer
Mr. Marcos G. A. Sassot
DECHAMPS LAW LTD.
10 Bloomsbury Way
London – United Kingdom
WC1A 2SL

and

Dr. Tariq Baloch

3 VERULAM BUILDINGS
Gray's Inn
London – United Kingdom
WC1R 5NT

and

[2] Claimants' Reply, ¶¶ 529 – 535.

[3] Claimants' Reply, ¶ 538.

[4] Claimants' Reply, ¶ 540 ("*Nicaragua's arbitrary termination of the Concession Contract made it difficult for ION to complete the remaining remediation activity*").

Mr. Noel Vidaurre Argüello
MUNGUÍA VIDAURRE LAW
Plaza Centroamerica, Suite 407
Managua – Nicaragua
14031

II.B Respondent

11. Respondent is the Republic of Nicaragua.

12. Respondent is represented in this arbitration by:

Mr. Paul Reichler
Ms. Tafadzwa Pasipanodya
Mr. Diego Cadena
Ms. Christina Beharry
Mr. Nick Renzler
Ms. Tracy Roosevelt
FOLEY HOAG LLP
1717 K Street NW
Suite 1200
Washington, D.C. 20001
U.S.A.

and

Dirección de Integración y Administración de Tratados
MINISTERIO DE FOMENTO, INDUSTRIA Y COMERCIO
Km. 6 Carretera a Masaya
Managua, Nicaragua

13. Each of Claimants and Respondent are hereinafter referred to as a "**Party**" and jointly as the "**Parties**".

III. THE ARBITRAL TRIBUNAL AND THE SECRETARY OF THE TRIBUNAL

14. The Arbitral Tribunal ("**Tribunal**") is composed by:

- **Mr. José A. Martínez de Hoz**
  MHR LATAM
  Zonaamérica
  Local 114, Edificio@2
  Ruta 8, km 17.500
  Montevideo, República Oriental del Uruguay

  co-arbitrator appointed by Claimants.

- **Professor Brigitte Stern**
  7, rue Pierre Nicole
  Code A1672
  75005, Paris, France

co-arbitrator appointed by Respondent.

- **Professor Luca G. Radicati di Brozolo**
  ARBLIT - RADICATI DI BROZOLO SABATINI BENEDETTELLI TORSELLO
  Via Alberto da Giussano, 15
  20145 Milan, Italy

  President of the Tribunal.

15. No objection to the proper constitution of the Tribunal or to the independence and impartiality of its members was raised during these proceedings.

16. The Secretary of the Tribunal is

    - **Ms. Catherine Kettlewell**
      ICSID
      MSN C3-300
      1818 H Street, N.W.
      Washington, DC 20433 USA

17. The Assistant to the President of the Tribunal appointed by the Tribunal with the Parties' consent is

    - **Mr. Gregorio Baldoli**
      ARBLIT - RADICATI DI BROZOLO SABATINI BENEDETTELLI TORSELLO
      Via Alberto da Giussano, 15
      20145 Milan, Italy

IV. LANGUAGE

18. In Procedural Order No. 1 dated August 6, 2019, the Tribunal recorded the agreement of the Parties that English and Spanish are the procedural languages of the arbitration. In particular, the Tribunal ruled that (*i*) correspondence addressed to or sent by the ICSID Secretariat could be in either procedural language; (*ii*) written requests, applications, pleadings, expert opinions, witness statements, or accompanying documentation could be submitted by the Parties in English or Spanish, without translation; (*iii*) witnesses and experts could be examined either in English or in Spanish (or in another language), with simultaneous interpretation into the other procedural language; (*iv*) the Tribunal could make any order or decision in English and subsequently issue it in Spanish, both language versions being equally authentic; and (*v*) the Award would be rendered in English and Spanish simultaneously, both language versions being equally authentic.[5]

19. In this Award all documents in English or Spanish will be quoted in the original language.[6]

[5] Procedural Order No. 1, ¶ 12.

[6] In the Spanish version of the Award all documents will be in the Spanish original, or in translation if the original is in a different language.

V. PROCEDURAL HISTORY

20. On November 30, 2017, ICSID received a request for arbitration dated November 30, 2017 from the Lopez Goyne Family Trust and others against Nicaragua (the "**Request**").

21. On December 19, 2017, the Secretary-General of ICSID registered the Request in accordance with Article 36 of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

22. In accordance with Article 10.19.1 of the CAFTA-DR, unless the disputing parties agree otherwise, the Tribunal shall comprise three arbitrators, one arbitrator appointed by each party, and a presiding arbitrator appointed by agreement of the parties. In its Request, Claimants appointed Mr. José A. Martínez de Hoz, a national of Argentina and, by letter dated January 5, 2018, Respondent appointed Professor Brigitte Stern, a national of France, as arbitrators in this case. Both arbitrators accepted their appointments.

23. By letter dated August 30, 2018, and a communication of September 3, 2018, Claimants and Respondent, respectively, informed the Centre that they had agreed on a procedure for the selection of the President of the Tribunal. The Parties requested the Secretary-General propose a list of available candidates for a strike-and-rank list procedure.

24. By letter of September 25, 2018, the Centre acknowledged receipt of the Parties' correspondence and proposed some amendments to the language of the agreement.

25. On October 1, 2018, the Parties subsequently agreed to the Centre's amendments subject to one item.

26. On October 2, 2018, the Centre acknowledged receipt of the Parties' communications reflecting their agreement on the process for the appointment of the President of the Tribunal.

27. On October 23, 2018, the Secretary-General transmitted a list of five potential candidates for a presiding arbitrator to the Parties, pursuant to their agreement.

28. On November 2, 2018, the Centre acknowledged receipt of the Parties' forms submitted on November 1, 2018, and informed them that they did not coincide in the selection of a candidate.

29. By letter dated April 2, 2019, the Centre noted that the Parties had not taken any steps in the proceeding during the past 5 consecutive months and reminded the Parties of Rule 45 of the ICSID Arbitration Rules, which provides for the Secretary-General to discontinue the proceedings if "*the parties fail to take any steps in the*

proceeding during six consecutive months".

30. By letter of April 26, 2019, Claimants updated their list of Representatives to include Mr. Gustavo Topalian and Mr. Juan Ignacio González Mayer of Dechamps International Law and Mr. Tariq Baloch of 3 Verulam Buildings.

31. On the same date, Claimants requested the Chairman of the Administrative Council to appoint the President of the Tribunal, pursuant to Article 38 of the ICSID Convention, and Rule 4(1) of the ICSID Arbitration Rules. In response to a request for clarification from the Centre of April 29, 2019, by letter dated April 30, 2019, Claimants confirmed that their request of April 26, 2019 was made pursuant to Article 10.19.3 of the CAFTA-DR.

32. On May 1, 2019, Respondent requested that the Centre contact the co-arbitrators to reconfirm their availability. Respondent also confirmed Claimants' request of April 30, 2019.

33. The Centre confirmed on May 6, 2019, that Secretary-General planned to proceed with the direct appointment of the presiding arbitrator pursuant to Art. 10.19.3 of the CAFTA-DR, unless the Parties indicated by May 8, 2019, that they had agreed on a different, specific, procedure (*e.g.* ballot or strike-and-rank list).

34. On May 5, 2019, Claimants informed the Centre that the Parties had agreed to a procedure for the appointment of the presiding arbitrator. Respondent confirmed its agreement on the same day. The Centre acknowledged receipt of the Parties agreement on May 10, 2019.

35. On May 28, 2019, the Secretary-General transmitted a list of potential candidates for a presiding arbitrator and invited the Parties to consider them and provide their ranking by June 6, 2019.

36. On May 29, 2019, Respondent submitted observations to the Centre's proposed list of candidates. Claimants submitted a response to Respondent's observations on May 31, 2019.

37. On June 5, 2019, the Centre informed the Parties that the list of candidates met the criteria agreed upon by the Parties and expected the Parties respective strike and rank list by the deadline given.

38. On June 6, 2019, the Parties submitted their completed ballots. On June 7, 2019, the Centre informed the Parties that they agreed on the appointment of Professor Luca G. Radicati di Brozolo, a national of Italy and the United Kingdom, as the presiding arbitrator and would proceed to seek his acceptance.

39. On June 19, 2019, the Secretary-General, in accordance with Rule 6 of the Arbitration Rules, notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Catherine Kettlewell, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

40. On June 25, 2019, the Tribunal proposed to hold the first session by telephone conference on July 18, 2019. The Parties confirmed their availability on June 25, 2019. On June 28, 2019, the Tribunal confirmed the First Session would take place on the date and time specified.

41. On July 10, 2019, a draft Procedural Order No. 1 was sent to the Parties requesting them to submit a joint proposal advising the Tribunal of any agreements reached and/or of their respective positions where they were unable to reach an agreement. The Parties submitted their joint proposals to the Procedural Order No. 1 on July 16, 2019.

42. The Tribunal held a first session with the Parties on July 18, 2019, by telephone conference.

43. On July 19, 2019, the President of the Tribunal proposed that Mr. Uberto Gregorio Baldoli, an associate with ARBLIT Radicati di Brozolo Sabatini Benedettelli Torsello, be appointed as his assistant. By communications of July 22, 2019, the Parties confirmed their agreement to the appointment of Mr. Baldoli.

44. On July 31, 2019, the Parties were informed that Mr. Baldoli accepted his appointment and his declaration was transmitted to the Parties.

45. On August 6, 2019, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters. Procedural Order No. 1 provided, *inter alia*, that the applicable Arbitration Rules would be those in effect from April 10, 2006, except to the extent modified and/or supplemented by the CAFTA-DR, that the procedural languages would be English and Spanish, and that the place of proceeding would be Washington, D.C. Procedural Order No. 1 also set out a schedule for the jurisdictional/merits phase of the proceedings.

46. On December 12, 2019, the Parties agreed to amend the Procedural Calendar set forth in section 15.2 of Procedural Order No. 1. The amended version of Procedural Order No. 1 was subsequently transmitted to the Parties.

47. On January 10, 2020, Claimants submitted their memorial on the merits, together with the witness statement of Mr. Michael David Goyne; the expert report prepared by Compass Lexecon together with Exhibits CLEX-1 to CLEX-14; the expert report prepared by Reserve Analysts Associates, Inc., together with Exhibits RAA-1 to RAA- 7; Factual Exhibits C-5bis, C-21bis, C-60bis, C-63bis, and C-64 to C-167, and Legal Authorities CLA-1 to CLA-125 ("**Memorial**").

48. On February 4, 2020, Respondent informed the Tribunal that it did not wish to request bifurcation under Rule 41(3) of the Arbitration Rules. On the same date, the Tribunal acknowledged receipt and confirmed that Respondent's Counter-Memorial was to be filed no later than 187 days after the date Claimants filed their Memorial (*i.e.* Wednesday, July 15, 2020).

49. On May 29, 2020, the Parties agreed to amend the Procedural Calendar set forth in section 15.2 of Procedural Order No. 1.

50. In light of the procedural schedule of the case, on June 16, 2020, the Parties were invited to confirm their availability for a hearing for either the week starting November 16 or November 23, 2021. On June 22, 2020, the Parties confirmed their availability to hold a hearing for the week starting November 15, 2021.

51. On June 26, 2020, an amended Procedural Calendar was sent to the Parties.

52. On August 26, 2020, Respondent submitted its counter-memorial on the merits, including the Counterclaim and an objection to jurisdiction, together with the witness statements of Ms. Verónica Artiles, Mr. James Charuk, Ms. Petrona Gago, Vice-Minister Lorena Lanza, Mr. Graeme Phipps; the Expert Report of Dra. Ana Teresa Rizo; Quadrant Economics together with Exhibits QE-1 to QE-36 and Annex A; Ramboll together with Exhibits RBL-01 to RBL-31 and Appendices A-D; and Ryder Scott, together with Exhibits RS-001 to RS-023 and Appendices A-F; Factual Exhibits R-001 to R-099 and Legal Authorities RLA-001 to RLA-109 ("**Counter-Memorial**").

53. On October 30, 2020, each Party filed a request for the Tribunal to decide on the production of documents.

54. On November 13, 2020, the Tribunal issued Procedural Order No. 2 addressing the Parties' document production requests.

55. On November 27, 2020, Respondent submitted documents responsive to the Tribunal's directions contained in Procedural Order No. 2.

56. On February 3, 2021, the Parties agreed to amend the Procedural Calendar set forth in section 15.2 of Procedural Order No. 1. The amended version of Procedural Order No. 1 was subsequently transmitted to the Parties.

57. On February 17, 2021, the Parties agreed on another amendment to the Procedural Calendar set forth in section 15.2 of Procedural Order No. 1. The amended version of Procedural Order No. 1 was subsequently transmitted to the Parties.

58. On February 22, 2021, Claimants filed their reply on the merits, a counter-memorial on the Counterclaim and objection to jurisdiction; together with the second witness statement of Mr. Michael David Goyne; the witness statement of Mr. Raymond Gerald Bailey; the rebuttal expert reports of Compass Lexecon, together with Appendices A and B and Exhibits CLEX-015 to CLEX-053; Reserve Analyst Associates, together with Appendices A to D and Exhibits RAA-008 to RAA-028; and of ERM, together with Appendices A and B and Exhibits ERM-001 to ERM-014; Factual Exhibits C-0168 to C-0286; and Legal Authorities CLA-0058bis, CLA-0126 to CLA-0159 ("**Reply**").

59. On May 21, 2021, the United States of America wrote to the Tribunal requesting it to set a date for the filing of Non-Disputing Party Submissions in accordance with Article 10.20.2 of the CAFTA-DR.

60. On May 21, 2021, pursuant to Article 10.20.2 of the CAFTA-DR, the Tribunal fixed a schedule for any Non-Disputing Party that wished to file a written submission.

61. On May 25, 2021, the Tribunal invited the Parties to agree on a schedule to file comments on any Non-Disputing Party submissions.

62. On June 2, 2021, the Parties informed the Tribunal that they had agreed to "*address any such submissions as part of their opening statements at the final hearing*" and that either Party could file additional legal authorities in response to the Non-Disputing Party submissions no later than October 21, 2021. The Tribunal confirmed this agreement on June 15, 2021.

63. On July 12, 2021, Respondent filed its rejoinder on the merits, a reply on the Counterclaim and objection to jurisdiction, together with the second witness statements of Vice-Minister Lorena Lanza, Ms. Verónica Artiles, Mr. James Charuk, and Mr. Graeme Phipps, the witness statement of Mr. Eryel Monterrey, the rebuttal expert reports of Dra. Ana Teresa Rizo, together with Exhibits AR-001 to AR-004; Quadrant Economics, together with Annex A and Exhibits QE-037 to QE-080; of Ramboll, together with Appendix A and Exhibits RBL-032 to RBL-052; and of Ryder Scott, together with Appendices A to C and Exhibits RS-024 to RS-076; Factual Exhibits R-0100 to R-0140 (Exhibit R-0141 was later submitted); and Legal Authorities RLA-0035bis, RLA-0061bis, RLA-0089bis and RLA-0110 to RLA-0150 ("**Rejoinder**").

64. On July 21, 2021, the Tribunal invited the Parties to present their views with regards to the modality of the hearing, which the Parties did on August 4, 2021. Claimants' letter included Legal Authorities CLA-160 to CLA-162.

65. On August 5, 2021, Claimants wrote to the Tribunal to inform them that their Nicaraguan counsel, Mr. Noel Vidaurre Argüello, "*appear[ed] to have been accused of treason under Nicaraguan Law No. 1055 of December 2020*" and had been placed into house arrest. Claimants further urged Nicaragua "*to immediately release Mr Vidaurre Argüello and fully respect his due process rights and right to a defence*". The letter included Exhibits C-0287 to C-0295.

66. On August 6, 2021, the Tribunal wrote to the Parties requesting them to prepare for a virtual hearing.

67. On August 9, 2021, Respondent filed observations on Claimants' letter of August 5, 2021 to which the following day Claimants requested leave to respond. On August 12, 2021, the Tribunal directed that Claimants "*clarify the status of Mr. Vidaurre Argüello who does not appear as counsel of record*", which Claimants did on August 13, 2021.

68. On August 18, 2021, Claimants updated their list of Representatives to include Mr. Noel Vidaurre Argüello and Mr. Pastor Lovo Castellon, of Munguía Vidaurre Law.

69. On September 14, 2021, Claimants filed their rejoinder on the Counterclaim and objection to the jurisdiction of the Tribunal with regard to the Counterclaim together with the third witness statement of Mr. Michael David Goyne; the second expert report of ERM, with Appendix A and Exhibits ERM-015 to ERM-019; Factual

Exhibits C-0171bis, C-0296 to C-0305; and Legal Authorities CLA-0139bis, CLA-0163 to CLA-0166 ("**Claimants' Rejoinder**").

70. On September 28, 2021, the Tribunal declared its amenability to postpone the hearing if the Parties wished to hold it in person and made arrangements for the pre-hearing organizational meeting, inviting the Parties to indicate their availability on a proposed date.

71. On the same date, the Parties submitted their respective lists of witnesses and experts required for cross-examination at the hearing and the United States of America submitted a non-disputing party submission ("**Non-Disputing Party Submission**").

72. On October 5, 2021, the Tribunal confirmed that the pre-hearing organizational meeting would be held on October 15, 2021. A draft procedural order was circulated and the Parties were invited to confer and submit their joint comments or positions, which they did on October 12, 2021.

73. With the consent of the Parties and the Co-arbitrators, the President of the Tribunal held a pre-hearing telephone conference with the Parties on October 15, 2021.

74. As agreed between the Parties, on October 21, 2021, Respondent submitted Legal Authorities RLA-151 to RLA-155 and Claimants submitted Legal Authority CLA-0167 in response to the Non-Disputing Party Submission.

75. On October 22, 2021, the Tribunal issued Procedural Order No. 3 concerning the organization of the hearing.

76. On October 25, 2021, the United States Department of State requested authorization to access the Parties' opening and closing arguments at the hearing as an observer. The Parties were informed of this, and on October 27, 2021, the United States was invited to indicate its representatives that were to be present at the hearing.

77. On October 27, 2021, the Parties submitted a joint proposal regarding the logistics of witness and expert examination which was incorporated in an amended version of Procedural Order No. 3 issued the following day.

78. On November 1, 2021, Respondent advised that it had "*elected to forgo cross-examining Claimants' witness Mr. Raymond Gerald Bailey*".

79. On November 8, 2021, each Party notified the designation of their main experts and the documents containing protected information.

80. On November 11, 2021, the Parties jointly submitted an amended hearing timetable.

81. On November 12, 2021, the Parties informed the Tribunal that they would be referring to protected information during their opening and closing statements, and the examination of witnesses and experts and would later "*redact the transcripts*

and video recordings after the hearing to remove such references to protected information".

82. A hearing on jurisdiction, merits, counter-claim and quantum was held virtually from November 15-20, 2021 (the "**Hearing**"), which was attended by the following persons:

Tribunal:

Prof. Luca Radicati di Brozolo	President
Mr. José Martínez de Hoz	Arbitrator
Prof. Brigitte Stern	Arbitrator

Tribunal Assistant:

Mr. Gregorio Baldoli	Assistant to the President of the Tribunal

ICSID Secretariat:

Ms. Catherine Kettlewell	Secretary of the Tribunal
Ms. Ivania Fernandez	Paralegal

Observers:

Mr. Oscar Figueroa	ICSID Intern
Ms. Valeria Fasciani	ArbLit (Trainee)

For Claimants:

Counsel

Mr. Jean Paul Dechamps	Claimants' counsel, Dechamps
Mr. Gustavo Topalian	Claimants' counsel, Dechamps
Dr. Tariq Baloch	Claimants' counsel
Mr. Pablo Jaroslavsky	Claimants' counsel, Dechamps
Mr. Juan Ignacio Gonzalez Mayer	Claimants' counsel, Dechamps
Mr. Marcos Sassot	Claimants' counsel, Dechamps
Ms. Sofía Ottaviano	Claimants' counsel, Dechamps
Mr. Juan Pablo Blasco	Claimants' counsel, Dechamps
Mr. Noel Vidaurre Argüello	Claimants' counsel, Munguía Vidaurre Law
Mr. Pastor Lovo Castellon	Claimants' counsel, Munguía Vidaurre Law

Party representatives and witnesses:

Mr. Michael Goyne	Claimant – Claimants' witness
Ms. Emily López-Goyne	Claimant

Experts:

Mr. Allen Barron (Reserve Analysts Associates, Inc.)	Expert witness
Mr. Kevin Lant	Assistant to expert witness
Mr. Nicolás Gwyther (ERM)	Expert witness
Mr. Alejandro De Jesús (ERM)	Expert witness
Dr. Doug MacNair (ERM)	Expert witness
Ms. Carla Chavich (CompassLexecon)	Expert witness
Mr. Michael Seelhof (CompassLexecon)	Expert witness
Mr. Stephen Hurley (CompassLexecon)	Assistant to expert witnesses

For Respondent:

Counsel

Mr. Paul S. Reichler	Respondent's counsel, Foley Hoag
Ms. Tafadzwa Pasipanodya	Respondent's counsel, Foley Hoag
Ms. Christina Beharry	Respondent's counsel, Foley Hoag
Mr. Diego Cadena	Respondent's counsel, Foley Hoag
Ms. Madeleine K. Rodriguez	Respondent's counsel, Foley Hoag
Mr. Peter Shults	Respondent's counsel, Shults Law
Mr. Nicholas Renzler	Respondent's counsel, Foley Hoag
Ms. Eva Paloma Treves	Respondent's counsel, Foley Hoag
Ms. Elisa Méndez Bräutigam	Respondent's counsel, Foley Hoag
Ms. Audrey Nadler	Respondent's counsel, Foley Hoag
Ms. Christina Iruela Lane	Respondent's counsel, Foley Hoag
Ms. Rachel Tepper	Respondent's counsel, Foley Hoag

Party representatives:

Mr. Jorge Vásquez	Respondent's representative
Eng. Maria Jazmín Pérez	Respondent's representative
Ms. Luviana Bonilla	Respondent's representative
Eng. Reyna Dania Baca	Respondent's representative

Witnesses:	
Ms. Lorena Lanza	Witness
Ms. Verónica Artiles	Witness
Ms. Petrona Gago	Witness
Mr. Eryel Monterrey	Witness
Mr. James Charuk	Witness
Mr. Graeme Phipps	Witness
Experts:	
Mr. Guale Ramirez (Ryder Scott)	Expert witness
Mr. Dan Olds (Ryder Scott)	Expert witness
Mr. Miles Palke (Ryder Scott)	Expert witness
Mr. Stephen Phillips (Ryder Scott)	Expert witness
Mr. Daniel Flores (Quadrant)	Expert witness
Mr. Ivan Vásquez (Quadrant)	Assistant to Expert witness
Mr. Francisco Sánchez (Quadrant)	Assistant to Expert witness
Ms. Ana Teresa Rizo	Expert witness
Mr. Scott E. MacDonald (Ramboll)	Expert witness
Mr. Pieter N. Booth (Ramboll)	Expert witness
Support:	
Mr. Peter Fitzgerald	DOAR

United States of America/Non-Disputing Party

Mr. John Daley	Deputy Assistant Legal Adviser - U.S. Departmentof State
Ms. Nicole Thornton	Attorney-Adviser - U.S.Department of State
Ms. Anne Cusick	Attorney-Adviser - U.S.Department of State
Mr. Matthew Haskell	Attorney-Adviser - U.S.Department of State
Ms. Catherine Gibson	Attorney-Adviser - U.S.Department of State
Mr. Patrick Childress	Attorney-Adviser - U.S.Department of State

Court Reporters:

Ms. Margie Dauster	Court Reporter (English) - Worldwide Reporting, LLP
Mr. Dante Rinaldi	Court Reporter (Spanish) – DR Esteno
Ms. Micaela Sofía Fernández	Court Reporter (Spanish) – DR Esteno
Mr. Rodolfo Rinaldi	Court Reporter (Spanish) – DR Esteno

Interpreters:

Mr. Jesus Getan Bornn	English-Spanish interpreter
Mr. Luis Arango	English-Spanish interpreter
Mr. Andrew Roth	English-Spanish interpreter
Ms. Anna Sophia Chapman (interpreting the first day only)	English-Spanish interpreter

Technical Support Staff:

Mr. Mario Hernandez	Sparq

83. The following persons were examined at the Hearing:

On behalf of Claimants:

Mr. Michael David Goyne

Mr. Allen Barron (Reserve Analysts Associates, Inc.)

Ms. Carla Chavich and Mr. Michael Seelhof (Compass Lexecon)

Mr. Nicolas Gwyther (Environmental Resources Management ("ERM"))

On behalf of Respondent:

Ms. Lorena Lanza

Ms. Verónica Artiles

Ms. Petrona Gago

Mr. Graeme Phipps

Mr. Eryel Monterrey

Ms. Ana Teresa Rizo

Dr. Daniel Flores (Quadrant Economics)

Messrs. Guale Ramirez, Daniel R. Olds, and Miles R. Palke (Ryder Scott Company, L.P.)

Messrs. Scott E. MacDonald and Pieter N. Booth
(Ramboll US Consulting Inc.)

84. On December 10, 2021, the Parties were informed: (*i*) that the video and audio recordings had been uploaded to the Box case folder; (*ii*) that the deadline for the transcript corrections would be January 24, 2022; and (*iii*) that they should indicate by December 20, 2021 the section(s) of each video recording containing protected information to be excluded from the recordings to be published on ICSID's website pursuant to paragraphs 45 to 47 of Procedural Order No. 3.

85. On December 20, 2021, the Parties jointly transmitted information on the sections of the recordings that contained protected information. The Centre acknowledged receipt and confirmed that edits to the videos would be made. The videos approved by the Parties were published on ICSID's website on January 26, 2022.

86. On January 10, 2022, Mr. Martínez de Hoz made a disclosure to the Parties.

87. On January 24, 2022, the Parties submitted joint corrections to the Hearing transcripts.

88. The Parties filed their submissions on costs on November 4, 2022.

89. The proceeding was closed on November 9, 2022.

VI. FACTS

VI.A The Parties

90. Claimants are individuals who are nationals of the United States of America, as well as trusts and corporations constituted or organized under the laws of the United States of America, all of whom are stated to be shareholders of ION. ION is a company incorporated under the laws of Nicaragua on May 5, 1999 with the purpose of conducting hydrocarbon exploration and exploitation activities and marketing, importing and exporting oil and oil products.[7] Claimants' status as shareholders of ION is contested by Respondent.[8]

91. Respondent is the Republic of Nicaragua.

VI.B The background of Claimants' involvement in oil exploration in Nicaragua

92. In 1993, a group of US investors, including Mr. Harold Witcher, Mr. David Michael Goyne, Ms. Esther Goyne, Mr. Harold Shattuck, Mr. James Bochnowski, Mr. David Barish and Hills Exploration Corp., incorporated High Hills Petroleum Inc. ("**High**

[7] Certificate of Incorporation of ION, May 5, 1999, **Exhibit C-2**, Clauses 4(a), (c) and (f).

[8] See Section IX.B.1.a below.

Hills") in Oklahoma, USA[9] through which they aimed to carry out studies and search for oil onshore the Pacific coast of Nicaragua.[10] This project was to be led by Mr. Harold Witcher, who had considerable experience in the oil and gas industry and had already conducted geological studies in that country.[11]

93. After gathering technical and geological information, analyzing satellite imagery, performing groundwork to ascertain surface structures and collecting samples of oil seeps for analysis and testing, on March 31, 1995 High Hills submitted to Nicaragua a formal request for permission to conduct a six-year exploration program.[12] The request was not granted by the Nicaraguan authorities.[13] However, one of the areas identified by High Hills in its proposal was one of those subsequently awarded for exploration to ION,[14] as discussed below.[15]

VI.C The enactment of Law 286

94. In an effort to modernize its hydrocarbon legislation, on March 18, 1998, Nicaragua enacted the Special Law on Hydrocarbon Exploration and Exploitation, Law No. 286 ("**Law 286**"), which allowed private companies to bid for concessions to explore and exploit hydrocarbons in Nicaragua.[16] Law 286 was implemented by Decree No. 43-98 of June 17, 1998 ("**Decree 43"**).[17]

95. The object of Law 286 is described as follows in its Article 1:

> La presente Ley tiene por objeto fomentar, regular y establecer las condiciones básicas que regirán las actividades de reconocimiento superficial, exploración y explotación de los hidrocarburos producidos en el país, así como su transporte, almacenamiento y comercialización.

96. Article 13 of Law 286 confers on the *Instituto Nicaraguense de Energia* ("**INE**") the power to negotiate and conclude contracts for the exploration and exploitation of hydrocarbons, subject to the approval of the President of the Republic. Contracts with foreign companies can be concluded only with local subsidiaries or local

---

[9] "Solicitud para la explotación y producción de hidrocarburos y movimientos de tierras", High Hills Petroleum, Inc., March 31, 1995, **Exhibit C-65**, p. 6.

[10] CWS-Goyne I, ¶ 9.

[11] Memorial, ¶ 17.

[12] Memorial, ¶¶ 18, 19; "Solicitud para la explotación y producción de hidrocarburos y movimientos de tierras", High Hills Petroleum, Inc., March 31, 1995, **Exhibit C-65**, pp. 23, 24, 27, 53, 54.

[13] Memorial, ¶ 20; Reply, ¶ 13.

[14] Memorial, ¶ 31; Reply, ¶ 17.

[15] See ¶ 110 below.

[16] Law 286, March 18, 1998, **Exhibit C-1**, Articles 5 and 13.

[17] Decree 43, 17 June 1998, **Exhibit C-67**.

branches set up in Nicaragua by the foreign investor.[18]

97. Article 22 of Law 286, which sets out the scope of concession contracts, states:

> Las modalidades contractuales otorgan a los contratistas el derecho exclusivo de explorar, explotar, almacenar, transportar, vender localmente o exportar libremente los hidrocarburos que fueren de su propiedad conforme a las especificaciones del respectivo contrato.

98. According to Article 25 of Law 286, the contractor bears all risks, costs and responsibilities for the activities conducted under the concession contract. Article 28 of Law 286 allows the concessionaire to resort to the services of subcontractors in the following terms:

> El contratista podrá utilizar los servicios de sub-contratistas especializados, conservando el control y la responsabilidad total sobre las mismas frente al Estado. En caso que el sub-contratista no cumpla con sus obligaciones de pago de impuestos, salarios y prestaciones sociales del personal local, multas y otros tributos de los servicios del sub-contrato respectivo, el contratista deberá garantizar dicho pago.

99. Law 286 foresees two phases for concession contracts: exploration (governed by Chapter V) and exploitation (governed by Chapter VI).

100. As to the exploration phase, Article 33 of Law 286 provides that

> El contrato deberá especificar el programa de trabajo mínimo obligatorio, el cronograma de ejecución y presupuestos de gastos e inversiones que el contratista acuerde llevar a cabo durante cada sub-período de la fase de exploración, presentando las garantías requeridas para cada uno de los sub-períodos de la fase de exploración. Estos programas de trabajo tienen que ser llevados a cabo conforme a las prácticas y técnicas actualizadas e internacionalmente aceptadas por la industria petrolera, según los procedimientos establecidos en el Reglamento de la presente Ley.

101. The duration of the exploration phase is 6 years. This period could originally be extended up to one year "*para completar las perforaciones de pozos exploratorios en proceso o por necesitarse pruebas de evaluación y valoración*"[19] but, as discussed below, the maximum duration of the possible extension was increased to 6 years by Law 879.[20]

102. The obligations of the concessionaire in the event of discovery of hydrocarbons are governed as follows by Article 42 of Law 286:

> Cuando se haya hecho un descubrimiento de petróleo el contratista deberá:

---

[18] Law 286, **Exhibit C-1**, Article 11, which reads as follows: "*Las empresas extranjeras para celebrar contratos al amparo de la presente Ley, deberán establecer una sucursal o constituir una sociedad conforme a las leyes de Nicaragua; además deberán nombrar y mantener durante la vigencia del contrato, un apoderado legal con facultades suficientes para obligar a la empresa y domiciliado en el país*".

[19] Law 286, **Exhibit C-1**, Article 36.

[20] See below, ¶ 200.

> a) Notificar de inmediato al INE del descubrimiento;
>
> b) Dentro del plazo de treinta (30) días desde la fecha del descubrimiento, proporcionar por escrito al INE detalles del mismo y su opinión sobre si tiene o no potencial comercial;
>
> c) Si el contratista considera que tiene potencial comercial, en un plazo máximo de noventa (90) días a partir de la fecha del descubrimiento, deberá presentar al INE para su aprobación, un programa de trabajo de evaluación y presupuesto de gastos, para determinar sin demora si dicho descubrimiento es comercial;
>
> d) Una vez realizado el programa de evaluación y dentro de un plazo máximo de ciento ochenta (180) días, deberá presentar al INE declaración escrita de que el descubrimiento es o no comercial.

103. As to the exploitation phase, the duration of which is 30 years but may be extended by five years,[21] Article 44 of Law 286 provides as follows:

> Si el contratista en el ejercicio de sus derechos, declara la comercialidad del descubrimiento deberá someter a aprobación del INE, dentro de ciento ochenta (180) días después de cada descubrimiento comercial, un programa detallado por el primer quinquenio para el desarrollo y operación del yacimiento. Dicho programa deberá detallar la ubicación de las instalaciones de transporte y almacenamiento hasta el punto de fiscalización acordado, así como otras instalaciones de transporte y almacenamiento hasta el punto o puntos de comercialización interna o externa.
>
> El programa de desarrollo y producción deberá incorporar Estudios de Impacto Ambiental según los reglamentos y términos de referencia del Ministerio del Ambiente y los Recursos Naturales (MARENA) y planes de contingencias para combatir derrames u otras emergencias. El programa de desarrollo y producción será actualizado anualmente.

104. Article 70 of Law 286 sets forth the grounds for which Nicaragua is entitled to terminate concession contracts unilaterally in the following terms:

> Los contratos terminarán sin requisito previo en los siguientes casos:
>
> a) Al vencimiento del plazo contractual por el que han sido otorgados;
>
> 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;
>
> c) Por la renuncia expresa acordada entre las partes, presentada por escrito ante el INE con tres (3) meses de anticipación, señalando los motivos de la misma;
>
> d) Por sentencia firme de tribunal competente;
>
> e) Por las causas establecidas en los contratos, sin perjuicio de las establecidas en la legislación común, las que pueden ser entre otras las siguientes:

[21] Law 286, **Exhibit C-1**, Article 45.

> 1. Por no ejecutar el Programa Exploratorio Mínimo o el Programa de Desarrollo y Producción.
>
> 2. Por ceder total o parcialmente el contrato sin la autorización correspondiente.
>
> 3. Por no cumplir con las normas de protección y mitigación del impacto ambiental.
>
> La terminación del contrato deja existentes las obligaciones y cargas del contratista, cuyo cumplimiento aún estuvieran pendientes.

VI.D The conclusion and main terms of the Concession Contract

105. Following the enactment of Law 286, which required that concessionaires set up a branch in Nicaragua or be incorporated under the law of Nicaragua,[22] and with a view to submitting a bid for and obtaining a concession, Mr. Witcher incorporated ION on May 5, 1999[23] for the purpose of conducting hydrocarbon exploration and exploitation activities and marketing, importing and exporting oil and oil products.[24]

106. On November 2, 1999, ION applied for authorization to take part in the forthcoming international tender for the grant of concessions in certain areas of Nicaragua (the "**International Tender**").[25] The authorization was granted in mid-2000 and renewed on June 11, 2002.[26]

107. On June 4, 2002, Presidential Agreement No. 252-2002 declared certain areas of Nicaragua open for exploration and exploitation of hydrocarbons and approved the International Tender,[27] which INE launched on October 31, 2002.[28]

108. In late 2002, ION concluded a sub-contractor agreement with Consolidated Agarwal Resources Ltd. ("**Agarwal"**), which according to Claimants was "*a publicly listed Canadian oil and gas exploration company*",[29] and according to Respondent's

---

[22] See fn. 18 *supra*.

[23] Memorial, ¶ 23; Reply, ¶¶ 14-15; Certificate of Incorporation of ION, Exhibit C-2; CWS-Goyne I, ¶ 15.

[24] See ¶ 90 *supra.*

[25] Memorial, ¶ 24; Reply, ¶ 15.

[26] INE Resolution 15-2002, June 11, 2002, **Exhibit C-70.**

[27] Presidential Agreement No. 252-2002, June 4, 2002, published in the Nicaraguan Official Gazette No. 113 of June 18, 2002, **Exhibit C-69.**

[28] "Estadísticas del Suministro de los Hidrocarburos 2002" (excerpts), INE, August 2003, **Exhibit C-72**, ¶ 22. According to the procedure in place, offers were to be submitted by January 31, 2003. They would be reviewed by INE's Hydrocarbons Directorate, which would decide whether to recommend their approval to INE's Director. INE's Director would then award and negotiate concession contracts (see INE Resolution No. 08-2003, April 11, 2003, published in the Nicaraguan Official Gazette No. 100 of May 30, 2003, **Exhibit C-71**).

[29] Memorial, ¶ 30; CWS-Goyne I, ¶ 20.

witness was a company privately held by Messrs. James and Alan Charuk.[30] Under that agreement, which is not on the record, it seems that Agarwal would receive a 70% interest in the concession that ION hoped to obtain, in exchange for financing and operating activities on behalf of ION.

109. On that basis, ION submitted a bid in the International Tender for a concession area covering the ION Block. INE declared the bid compliant with the tender requirements and accordingly recommended that ION be awarded a concession over the ION Block.[31]

110. On December 18, 2003, INE awarded ION the International Tender, subject to the successful conclusion of a concession contract.[32] The Concession Contract was executed on April 23, 2004 and granted ION the exclusive right to explore and exploit hydrocarbons in the ION Block (the "**Concession**").[33]

111. During the course of the negotiations between INE and ION on the Concession Contract, Agarwal entered into an agreement with a publicly listed Canadian oil and gas exploration company, Norwood Resources Ltd. ("**Norwood Resources**"), for the sale of its rights under its sub-contractor agreement with ION.[34] James Charuk became Executive Vice-President for Exploration of Norwood Resources and Alan Charuk became President of the Nicaraguan subsidiary of the company (Norwood Nicaragua S.A., "**Norwood Nicaragua**").[35]

112. Article 9 of the Concession Contract set forth ION's obligations, of which the following are relevant for the present dispute:

> 3. El Contratista conducirá todas las operaciones descritas de forma diligente y profesional, de conformidad con las leyes aplicables y las disposiciones del presente Contrato, de conformidad con las PIAIP [Prácticas Internacionales Aceptadas en la Industria Petrolera]. […]
>
> 4. El Contratista proporcionará al INE información regular y completa concerniente a todas las operaciones bajo el presente Contrato, incluyendo un cronograma de ejecución del trabajo específico. […]

---

[30] Counter-Memorial, ¶ 28; RWS-Charuk I, ¶ 5.

[31] INE Resolution No. 08-2003, April 11, 2003, published in the Nicaraguan Official Gazette No. 100 of May 30, 2003, **Exhibit C-71**, section III.1; Memorial, ¶ 30; Counter-Memorial, ¶27. As *per* the procedure mentioned above (see fn. 28), INE's decision followed a recommendation of INE's Hydrocarbons Directorate, which was approved by INE's Director (see "Estadísticas del Suministro de los Hidrocarburos 2002"), INE, August 2003, **Exhibit C-72**, ¶ 26; INE Resolution No. 08-2003, April 11, 2003, published in the Nicaraguan Official Gazette No. 100 of May 30, 2003, **Exhibit C-71**).

[32] INE Resolution No. 58-2003, December 18, 2003, transcribed in Article 4 of the Concession Contract, **Exhibit C-3**.

[33] Concession Contract, April 23, 2004, **Exhibit C-3.**

[34] "Management's Discussion and Analysis of Financial Condition and Results of Operations for the year ended December 31, 2005", Norwood, April 21, 2006, **Exhibit C-79**, p. 4.

[35] RWS-Charuk I, ¶ 8.

> 6. El Contratista mantendrá permanentemente informado al INE de todas las operaciones bajo el presente Contrato y le entregará, sin costo alguno, en la forma y la frecuencia estipulados por INE, todos los materiales, cortes geológicos muestras de rocas en recortes o núcleos, estudios, información, documentos e información, sin procesar, procesada e interpretada, obtenida por el Contratista, incluyendo información financiera pertinente. […]
>
> 9. El Contratista será responsable de acuerdo con la Ley aplicable, por cualquier perdida o daño causado a terceros por sus empleados o Subcontratistas por actos negligentes o contrarios a la ley u omisiones […].
>
> 11. De acuerdo a la Ley No. 286 y su Reglamento, el Contratista y Subcontratista en la ejecución de sus actividades deberá cumplir con lo establecido en las normas de protección ambiental nacional[36] y las PIAIP para cada caso. Tales actividades deberán realizarse de manera compatible con la protección de la vida humana, […] evitando en lo posible daños a la infraestructura, sitios históricos, a los ecosistemas del país sean marinos o terrestres. [37] Previo al inicio del PME, el Contratista deberá presentar al MARENA, los Estudios de Impacto Ambiental (EIA), en base a los Términos de Referencia (TdR) que definirá MARENA e INE. Asimismo deberá presentar los Planes de Protección Ambiental y Planes de Contingencia […].

113. In line with Article 45 of Law 286, the Concession Contract identified two phases of the project: an exploration phase divided in three subperiods of two years[38] and

---

[36] National laws of environmental protection mentioned in Article 9.11 include *Ley 216 General del Medio Ambiente y de los Recursos Naturales, Norma Técnica Ambiental Obligatoria Nicaragüense Para las Actividades de Exploración y Explotación de Hidrocarburos* 14-003-04, which provides that MARENA in coordination with INE will review, approve and supervise the temporary or permanent closure plan submitted by the contractor (see Nicaraguan Mandatory Environmental Technical Standard for Hydrocarbon Exploration and Exploitation Activities, April 12, 2005, **Exhibit R-5**, Article 7.3).

[37] In this regard, it bears noting that Article 1.12 defines "*Desarrollo*" as "*todas las operaciones y actividades bajo el Contrato […] en conformidad con las normas del campo petrolero y las prácticas ambientales que prevalecen dentro de la industria petrolera internacional […]*."

[38] Concession Contract, Article 5.1 – 5.3

> 1. El período de Exploración será de seis (6) Años Contractuales a partir de la Fecha Efectiva […]. El derecho del Contratista para entrar al siguiente subperíodo está sujeto al cumplimento de sus obligaciones con el subperíodo anterior.
>
> 2. El Contratista notificará al INE de su decisión de entrar al siguiente subperíodo, con al menos noventa (90) días antes de la expiración del subperíodo anterior. Tal notificación deberá ser acompañada por la garantía requerida por el Artículo 8 de este Contrato, cubriendo el Plan Exploratorio Mínimo correspondiente para ese subperíodo. Si el Contratista decide no entrar al siguiente subperíodo, el Contrato se dará por terminado al final del presente subperíodo.
>
> 3. A solicitud escrita del Contratista presentada al INE dentro de un período no mayor de treinta (30) días antes del vencimiento del Período de Exploración establecido en el numeral 1 del presente Artículo, el INE podrá

an exploitation phase.[39]

114. Consistent with Article 45 of Law 286, pursuant to Article 5.3 of the Concession Contract, ION could move to the exploitation phase if it made a "commercial discovery", defined in Article 1.1. as "*un descubrimiento de hidrocarburos en el Área Contractual que el Contratista considere comercialmente explotable y lo comprometa a desarrollar y producir bajo los términos del Contrato*."

115. As for the procedure to be followed in the event of a discovery of hydrocarbons, Article 11 of the Concession Contract, which mirrored Article 42 of Law 286, provided that:

> 1. Si los hidrocarburos son encontrados en un Pozo Exploratorio, el Contratista deberá notificar inmediatamente al INE sobre dicho descubrimiento dentro de los treinta (30) días posteriores, además deberá proporcionar al INE toda la información disponible con respecto al descubrimiento, incluyendo una clasificación del descubrimiento de (i) hidrocarburos líquidos o (ii) Gas Natural. Dentro de los noventa (90) días subsiguientes al descubrimiento de dichos hidrocarburos, el Contratista notificará al INE si considera que el descubrimiento tiene potencial comercial y presentará al INE para su aprobación un programa de evaluación y presupuesto estimado de gastos.
>
> 2. El Contratista notificará por escrito al INE en un plazo máximo de ciento ochenta (180) días si el descubrimiento de Hidrocarburos Líquidos tiene potencial comercial, sobre la base del Programa de Evaluación, descrito en el numeral 1 de este artículo, el cual debe considerarse aprobado si no surgen objeciones por escrito de parte de INE dentro de los treinta (30) días siguientes al recibo del mismo. El Programa de Evaluación deberá: 2.1. especificar en forma detallada razonablemente el trabajo de evaluación, incluyendo sísmica, perforación de pozos, pruebas de producción y estudios que se llevarán a cabo, así como el marco dentro del cual el Contratista iniciará y completará el programa; e 2.2. identificar los lotes a ser evaluados ("Área de Evaluación") la cual no excederá los lotes que abarcan la estructura geológica o prospecto y un margen que no exceda los cinco (5) kilómetros circundante de dicha estructura o prospecto […]
>
> 5. El Contratista deberá llevar a cabo el Programa de Evaluación aprobado dentro del término allí especificado. Dentro de los ciento ochenta (180) días después de la terminación de dicho Programa de Evaluación, el Contratista entregará al INE un informe de evaluación completo sobre el Programa de Evaluación. […]

> otorgar una extensión del Periodo de Exploración al Contratista hasta por un Año Contractual a fin de que el Contratista pueda terminar a) la perforación de un Pozo Exploratorio en proceso o b) un programa de evaluación en los términos estipulados en el Artículo 11 numeral 2 de este Contrato o cualquier otro estudio que haya solicitado el Contratista. En todo caso, la resolución del INE otorgando la extensión solicitada, deberá estar de conformidad con lo señalado en los Artículos 97 y 99 del Reglamento.

[39] Concession Contract, Article 5.4: "*En el caso de un Descubrimiento Comercial, el término del Contrato de Explotación será de treinta (30) años a partir de la Fecha Efectiva […]".*

> 8. Si el Contratista declara conforme al numeral 6.1 de este artículo, que un descubrimiento es un Descubrimiento Comercial, el Contratista entregará junto con el informe de evaluación (a) una propuesta del Plan de Desarrollo incluyendo todas las instalaciones e infraestructura para operaciones, según el presente Contrato, (b) una propuesta de designación de los lotes que comprenden el Área de Explotación, y (c) un estudio completo sobre el impacto ambiental incluyendo la propuesta de Desarrollo y cualquier instalación e infraestructura dentro o fuera del Área Contractual y hasta o más allá del Punto de Fiscalización, siempre y cuando estas instalaciones e infraestructuras sean responsabilidad del Contratista. Los tres incisos estarán sujetos a la aprobación del INE, la cual no será retenida sin razón, y se considerará aprobada si el INE no hace ninguna objeción por escrito dentro de los ciento veinte (120) días a partir de su recibo. […]

116. Pursuant to Article 3, ION bore the risk of failure to make a commercial discovery in the following terms:

> El Contratista asume todos los riesgos, costos y responsabilidades por las actividades objeto de este Contrato, así como también por la obtención del Permiso Ambiental y otros requeridos para realizar Operaciones Petroleras y se compromete a proveer el capital, las maquinarias, equipos, materiales, personal y las tecnologías necesarias para cumplir con todas sus obligaciones aquí establecidas. El Estado no asume, bajo ningún concepto, ningún riesgo o responsabilidad ni por las inversiones, ni por las operaciones de exploración y explotación a realizarse, ni tampoco por ningún daño que podría resultar de los mismos, incluso cuando el acto o hecho, pueda resultar de una acción del Contratista que ha sido aprobada por el INE. Si no hay ningún Descubrimiento Comercial en el Área de Contrato, o si la producción del Área de Contrato es insuficiente para cubrir los costos de Operaciones Petroleras del Contratista, el Contratista deberá asumir y ser el único responsable por las pérdidas.

117. With respect to ION's "closure" obligations, Article 33.1 provided that:

> Dentro de los sesenta (60) días posteriores a la expiración de los términos del Contrato o devolución de una o toda el Área del Contrato, el Contratista deberá llevar a cabo, a satisfacción del INE, un programa de abandono acordado con el INE para todas las instalaciones proporcionadas por el Contratista que el INE decida no recibir de conformidad con el Artículo 21 numeral 1 del presente Contrato. Con respecto al área y/o instalaciones devueltas, dicho programa de abandono deberá cumplir con las normas internacionalmente aceptadas al momento del abandono.

118. Additionally, Article 32.4 specified that:

> No obstante la terminación del Contrato y sin perjuicio del Articulo 6 numeral 6 de este Contrato, el Contratista permanece responsable de la limpieza del Área del Contrato de acuerdo a los Artículos 6 numeral 7 y 33 de este Contrato.

119. As to the grounds for termination of the Concession Contract, Article 32.1 incorporated by reference Article 70 of Law 286,[40] and Article 32.3 provided the

[40] See ¶ 104 *supra*.

following:

> Si cualquiera de las Partes de este Contrato comete una violación al Contrato, que no esté cubierta por el Artículo 70 de la ley, la otra parte tendrá el derecho a terminar el Contrato, utilizando el siguiente procedimiento:
>
> 3.1. La Parte que reclama el derecho a terminar el Contrato notificará a la otra Parte especificando sobre la violación que reclama en particular, y requiriendo a la otra Parte, dentro de los noventa (90) días a partir de dicha notificación, remediar la misma o hacer una compensación razonable a la Parte reclamante, según sea el caso;
>
> 3.2. Si la Parte que recibe la notificación no cumple con lo reclamado en dicha notificación, la Parte reclamante podrá, después de la expiración de los noventa (90) días de la notificación, terminar inmediatamente con el Contrato estipulado. Sin embargo, en el caso de que la violación haya sido referida a determinación de un arbitraje o experto, según el Artículo 29 de este Contrato, entonces la Parte reclamante no podrá ejercer su derecho de terminación hasta que se conozca el resultado de la determinación del árbitro o experto; siempre que la Parte que elige referir la disputa a determinación por arbitraje o experto esté dispuesto a continuar su reclamo diligentemente bajo tales procedimientos.

120. Article 29 of the Concession Contract outlined the dispute resolution procedure for breaches other than those foreseen by Article 70 of Law 286 in the following terms:

> 1. Las Partes realizarán su mejor esfuerzo por resolver amigablemente a través de la consulta, cualquier desavenencia que surja en relación con el desempeño e interpretación de cualquier disposición del Contrato.
>
> 2. Si alguna desavenencia no fuere solucionada a través de la consulta dentro de los noventa (90) días posteriores al surgimiento de la misma, cualquiera de las Partes, mediante notificación entregada a la otra Parte, podrá proponer que la misma sea referida para su determinación a un único experto, según las disposiciones de este Artículo. El período de espera no será aplicado en los casos previstos en el Artículo 11 numeral 8 o Artículo 32 numeral 3 de este Contrato.
>
> 3. Siguiendo la notificación según el numeral anterior, las Partes podrán acordar referir la desavenencia para su decisión a un solo experto que será nombrado por acuerdo entre las Partes.
>
> 4. Si las Partes fallan al referir dicha desavenencia a un solo experto, según el numeral 3 anterior, dentro de los sesenta (60) días a partir de la notificación, de acuerdo al numeral 2 de este artículo, la disputa será referida a arbitraje de conformidad con las Reglas de Arbitraje, que estén previstas en este Contrato.
>
> 5. Para fines de arbitraje se seguirán las siguientes reglas básicas: 5.1. El idioma Español será el idioma usado durante los procedimientos de arbitraje. 5.2. todos los materiales de audiencia, documentos de reclamo o defensa, laudo y las razones que lo soportan serán en idioma Español. 5.3. el lugar del arbitraje será la ciudad de Managua y el local será designado de común acuerdo entre las partes. 5.4. Cada una de las partes nombrará a su árbitro y éstos a su vez nombrarán un tercer árbitro que será el Tercero en Discordia, en caso de no haber acuerdo entre los dos primeros. 5.5. El procedimiento

> específico a seguir será el contenido en el Código de Procedimiento Civil de Nicaragua, artos. 958 al 990 inclusive.

121. Article 28.1 of the Concession Contract provided that the Concession Contract was governed by the law of Nicaragua.

VI.E The events following the conclusion of the Concession Contract until Norwood's bankruptcy

122. On the day it executed the Concession Contract, ION concluded with Norwood Resources and Norwood Nicaragua (jointly, "**Norwood**") two identical subcontractor agreements[41] (jointly, the "**Sub-Contractor Agreement**"), which were amended on August 10, 2004 (the "**Amended Sub-Contractor Agreement**"). [42] Under those agreements, Norwood was granted a 70% working interest in the Concession Area in exchange for funding and conducting the operations required under that Contract.[43] Those agreements could be terminated by ION in the event that Norwood failed to conduct its operations diligently and in accordance with applicable laws and the Concession Contract.[44]

123. In compliance with Article 9.11 of the Concession Contract, in November 2004, ION submitted to the Ministry of the Environment and Natural Resources ("**MARENA**") its 2004 Environmental Impact Assessment ("**EIA**"), among other requirements, addressed in detail the closure and abandonment phase of the project.[45]

124. In particular, the EIA confirmed that ION was under an obligation to perform closure activities if it abandoned the Concession Area temporarily or permanently.[46] Further, the EIA prescribed that:

> Posteriormente el sitio de perforación se rehabilita quedando libre de cualquier tipo de residuo generado durante el desarrollo de las actividades de perforación exploratoria, la vegetación natural que ocupó el lugar y que se pudiera ver afectada se restablecerá con programas de reforestación o revegetación con especies nativas de la zona, la pila de depósito y tratamiento de los lodos de perforación, será rellenado y nivelado, rehabilitándolo a sus condiciones originales.[47]

---

[41] Subcontractor Agreements, April 23, 2004, **Exhibit C-4**.

[42] Amended ION-Norwood Sub-Contractor Agreement, August 10, 2004, **Exhibit R-3**.

[43] *Ibid.*, pp. 2, 6.

[44] Subcontractor Agreements, **Exhibit C-4**, pp. 3-4 and 7-8 of the pdf; Amended ION-Norwood Sub-Contractor Agreement, **Exhibit R-3**, p. 4.

[45] EIA, November 2004, **Exhibit R-4**, Chapter 4.5.

[46] EIA, **Exhibit R-4**, pp. 62-63.

[47] EIA, **Exhibit R-4**, p. 62.

125. Further to ION's submission of its March 2005 EIA,[48] on May 18, 2005, MARENA issued the *Reglamento 45/94 de Permiso y Evaluación de Impacto Ambiental*, Resolution No. 16-2004 (the "**Environmental Permit**"), which authorized the commencement of exploration activities in the ION Block.[49]

126. The Environmental Permit set forth additional environmental obligations and in particular, in ¶¶ 5, 6 and 9, the following ones:

> 5) La empresa deberá destinar los recursos humanos, técnicos, materiales y económicos necesarios para garantizar la protección del ambiente y de los recursos naturales existentes en la zona donde desarrollará su proyecto.
>
> 6) Antes de iniciar las labores de construcción del campamento, plataforma de exploración, caminos y vías de acceso, y resto de elementos que intervienen en las actividades de exploración deberán definirse físicamente sobre el terreno todos los espacios a ocupar, con el objetivo de asegurar la afectación de las áreas estrictamente necesarias *y* evitar daños innecesarios a zonas aledañas.
>
> […]
>
> 9) Una vez definida la ubicación precisa de cada pozo de exploración, la empresa deberá informar a la Dirección General de Calidad Ambiental de MARENA, a la Dirección de Control Ambiental de INE *y* a la Alcaldía Municipal respectiva dicha ubicación, debiendo proceder a precisar la magnitud de los impactos ambientales específicos y las respectivas medidas de mitigación en el sitio seleccionado.

127. Paragraph 23 of the Environmental Permit further provided that:

> Todos los espacios utilizados para servicios y desarrollo de actividades durante las operaciones y que sufrieron compactación producto del paso constante de los medios de transporte deben someterse a un proceso de recuperación ambiental mediante la escarificación o gradeo de dichos espacios con lo que se permitirá la reoxigenación del suelo y facilitará la recuperación de la cubierta vegetal. Se exceptuarán de esta medida los caminos de uso comunal.

128. After the issuance of the Environmental Permit, the preparatory exploration activities in the ION Block began.[50]

129. In March 2006, further to a request by ION, the MEM extended the first period of the exploration phase by eight months.[51]

130. In October 2006, Norwood began construction at two drilling locations, in San Bartolo Rodríguez Cano I ("***San Bartolo***") and Las Mesas Gutiérrez Mendez I ("***Las***

---

[48] EIS, ION and Norwood, March 2005, **Exhibit C-75**, p. 18.

[49] MARENA Resolution No. 16-2004, May 18, 2005, **Exhibit C-76.**

[50] Memorial, ¶¶ 62-67.

[51] Resolution of Nicaraguan Energy Institute, No. 60-04-2006, April 19, 2006, **Exhibit R-8**.

Mesas").[52] Drilling of the San Bartolo well began on December 18, 2006[53] and on February 14, 2007, Norwood issued a press release announcing it had discovered gas, condensate and light oil in those locations.[54] According to Respondent's witness, that announcement was made before the well could be tested.[55] In February 2007, drilling began at Las Mesas.[56]

131. On July 11, 2007, further to the initial testing of the San Bartolo well, Norwood announced a "*potential oil well*"[57]. In September 2007, Norwood confirmed the finding of a "*structural closure*" (*i.e.* an area where the oil is trapped and accumulated) at San Bartolo and the existence of 8 to 10 structures of significant closure size in the surrounding area.[58] In September and October 2007, Norwood obtained further reports from independent consultants (Object Reservoir and Fronterra Geosciences) that identified significant oil potential.[59] As noted below, Respondent contests the accuracy of such reports.[60]

132. As for the drillings at Maderas Negras, Norwood's reports of March 10 and May 22, 2008 mentioned the finding of oil and natural gas in early 2008[61] and "*significant hydrocarbons*" findings by mid-2008.[62] By contrast, according to Norwood's Annual Information Form for 2009 dated April 28, 2010, the testing program conducted in 2008 in the Maderas Negras and San Bartolo wells "*recovered non-commercial flows of oil*".[63]

133. In April 2008, in a public filing Norwood reported that "[n]*o proved or probable additional reserves has been assigned to the Oklanicsa Concession area. It has been*

---

[52] "Norwood Mobilizes MPG Rig #15 from Poza Rica, Mexico", Norwood, October 24, 2006, **Exhibit C-80.**

[53] Statement of Reserves Data and Other Oil and Gas Information, Norwood Resources, Form 51-101F1, April 25, 2008, **Exhibit R-10**, p. 4.

[54] "Hydrocarbon Discovery in Nicaragua", Norwood, February 14, 2007, **Exhibit C-84.**

[55] RWS-Charuk I, ¶ 14.

[56] "Norwood spuds Las Mesas", Norwood, February 27, 2007, **Exhibit C-86.**

[57] "Norwood identifies oil in 7 zones in San Bartolo", Norwood, July 11, 2007, **Exhibit C-88.**

[58] "Enhanced commerciality prospects at San Bartolo & Las Mesas", Norwood, September 27, 2007, **Exhibit C-89**, p. 2.

[59] "Enhanced commerciality prospects at San Bartolo & Las Mesas", Norwood, September 27, 2007, **Exhibit C-89**; WS Goyne I, ¶¶ 43-45.

[60] See Counter-Memorial, ¶ 58.

[61] "Norwood Hires Schlumberger; Encounters Shallow Oil at Maderas Negras", Norwood, March 10, 2008, **Exhibit C-92.**

[62] "Norwood Identifies 138 Feet of Hydrocarbons in Well # 3 at Maderas Negras", Norwood, May 22, 2008, **Exhibit C-93.**

[63] Norwood Resources Ltd., Annual Information Form ("AIF"), Fiscal Year 2009, April 28, 2010, **Exhibit R-21**, p. 3.

assessed as an unproven property".[64] In its Consolidated Financial Statements for 2007 and 2008, it reduced the value of its "*unproven Nicaraguan oil and gas property*" by over CA$ 50 million to CA$ 11.1 million "*based on the results of well testing conducted in 2008 which produced non-commercial flows of oil*".[65] According to Respondent's witness, the engineering company Schlumberger – which had been contracted for logging and testing services at Maderas Negras – had inadvertently clogged the San Bartolo well during the testing, making production impossible and forcing Norwood to plug the well and abandon it.[66]

134. On June 30, 2008, Norwood announced it would commence production testing in the Maderas Negras well,[67] but in November 2008, it reported to the MEM that it had abandoned that well soon after the start of the drilling due to well bore problems.[68]

135. In early 2009, further to a request by Norwood, the MEM extended the Contract for one year so that Norwood could secure the necessary financing.[69]

136. In October 2009, after obtaining a new line of financing,[70] Norwood restarted exploration activities near San Bartolo by drilling two "*sidetrack*" wells[71] so as to bypass the damage caused by Schlumberger during the testing and to gain access to the San Bartolo reservoir.[72] On February 19, 2010, Norwood announced that it had completed testing on the sidetrack well and noted that "[w]*hile attempts to achieve commercial production rates from basic production techniques were not achieved, the drilling of the side track well operations provided valuable data confirming the presence of producible hydrocarbons in several zones*".[73] Norwood indicated that it would plug and abandon the Las Mesas, Maderas Negras and San Bartolo wells "*in*

---

[64] Statement of Reserves Data and Other Oil and Gas Information, Norwood Resources, Form 51-101F1, April 25, 2008, **Exhibit R-10**, p. 2.

[65] Norwood's Financial Statements, p. 80, **CLEX-14** ("*During 2008, the Company recorded an impairment charge in the amount of $50,047,264 relating to the carrying costs of three wells drilled in Nicaragua during 2007 and 2008. This impairment was based on the results of well testing conducted in 2008 which produced non-commercial flows of oil*").

[66] RWS-Phipps I, ¶ 13.

[67] "Net Pay Increases At Maderas Negras, Oil Flow At San Bartolo", Norwood, June 30, 2008, **Exhibit C-94.**

[68] Counter-Memorial, ¶ 70; Norwood Nicaragua, S.A., Final Report of Well Maderas Negras-Cruz Obando I, November 2008, **Exhibit R-13**.

[69] Memorial, ¶ 80; Counter-Memorial, ¶ 63; RWS-Artiles I, ¶ 9; RWS-Lanza I, ¶ 13.

[70] Approved on August 28, 2009.

[71] "Norwood Spuds San Bartolo Sidetrack Well", Norwood, October 23, 2009, **Exhibit C-99.**

[72] Counter-Memorial, ¶ 64; RWS-Phipps I, ¶ 14.

[73] "Testing confirms the presence of recoverable oil and achieves flow rates in 3 of 4 zones evaluated at San Bartolo", Norwood, February 19, 2010, **Exhibit C-103.**

accordance with government environmental regulations", while pursuing options to capitalize on the significant potential of the Concession. [74] According to Respondent's witness, however, the wells were abandoned as exploration activities had not "*mostrado ninguna evidencia de hidrocarburos significativa*".[75]

137. In April 2010, Norwood informed the MEM that it was plugging and abandoning all three wells and assessing its data to determine the next steps.[76]

138. In January 2011, Norwood declared bankruptcy due to its "*lack of exploration success and deteriorating financial condition*".[77] On June 27, 2011, ION notified Norwood of the cancellation of the Subcontractor Agreement with immediate effect[78] and informed the MEM.[79]

VI.F The declaration of a commercial discovery by ION

139. Following Norwood's bankruptcy, at a meeting with the MEM on May 6, 2011, ION's President, Harold Witcher, introduced the oil company PetroKamchatka Plc ("**PetroKamchatka**") as the Concession Contract's new operator. ION requested a one-year extension of the exploration phase of the Contract to allow the performance of additional exploration.[80] A month later, however, the project fell through as ION and PetroKamchatka were unable to reach an agreement.[81]

140. On June 28, 2011, Mr. Witcher informed Vice Minister Lorena Lanza that he had resigned as president of ION and sold most of his shares to a company owned by David and Michael Goyne, LG Development Corporation of Hawaii.[82]

141. On August 4, 2011, ION applied to the MEM for a one-year extension of the Concession Contract in accordance with Article 36 of Law 286[83] in order to drill a

---

[74] *Ibid.*; Norwood Resources Ltd., Annual Information Form, Fiscal Year 2009, April 28, 2010, **Exhibit R-21**.

[75] RWS-Lanza I, ¶ 14; Counter-Memorial, ¶ 66.

[76] Counter-Memorial, ¶ 72; RWS-Phipps I, ¶ 12; Trimestral Report, Norwood, April 2010, **Exhibit R-20**.

[77] Norwood News Release, January 19, 2011, **Exhibit R-28**.

[78] Letter from ION (Mr. David Goyne) to Norwood Resources Ltd., June 27, 2011, **Exhibit C-10.**

[79] Memorial, ¶ 87.

[80] Executive Report, ION-Norwood, Minutes of Meeting, May 6, 2011, **Exhibit R-32**.

[81] RWS-Phipps I, ¶ 38; Counter-Memorial, ¶ 83.

[82] Letter from ION (Mr. Harold Witcher) to the MEM, June 28, 2011, **Exhibit R-34**.

[83] Letter from ION (Mr. Modesto Barrios) to the MEM, August 4, 2011, **Exhibit R-35.** Law 286, **Exhibit C-1**, Article 36: *"El INE podrá extender la fase de exploración de ser necesario, por un tiempo no mayor de un año, para completar las perforaciones de pozos exploratorios en proceso o por necesitarse pruebas de evaluación y valoración. El contratista ejecutará los programas de trabajo acordados y deberá devolver las partes del área de contrato convenidas como condiciones de la extensión."*

new exploratory well two kilometers north of San Bartolo ("**LOC4**").[84] The MEM rejected the application, noting that ION was in breach of its obligations to pay surface rights and capacity building, that data submitted with the application "*no corresponde a la información que INDOKLANICSA tiene pendiente de entrega al MEM*" and that "[*l*]*a solicitud de extensión no presenta programa de los trabajos a realizar con su respectivo presupuesto y cronograma de ejecución al detalle*".[85]

142. On October 31, 2011, ION provided to the MEM a work program ("**Minimum Exploration Program***"*) according to which it planned to undertake preparatory works during the first quarter of the extension year.[86]

143. On November 14, 2011, the MEM granted ION the one-year extension, subject to ION posting a US$ 300,000 bond guaranteeing the correct performance of the minimum exploratory program in that period.[87] The bond was posted on November 17, 2011.[88]

144. After receiving ION's first quarterly report of February 2012,[89] the MEM replied that ION had not conducted the preparatory works foreseen for that quarter, nor had it sought environmental clearance from MARENA. The MEM reminded ION that "*es de su obligación realizar los trabajos acordados en el Primer Trimestre, a fin de poder ejecutar sin retrasos las siguientes actividades previstas para los próximos nueve meses; de conformidad con el cronograma de ejecución presentado para la extensión del Período Exploratorio*".[90]

145. On May 14, 2012, after an inspection by the MEM of the LOC4 site confirmed ION's inactivity, the MEM indicated that it would partially call the performance bond, unless within ten days ION submitted proof that it was complying with its undertakings along with its second quarterly report.[91]

146. On May 28, 2012, ION presented its second quarterly report, together with a "*development program*", according to which ION would drill LOC4 as a development well and build an oil pipeline in August 2012. In October 2012, ION would start

---

[84] First Quarterly Report, ION, February 15, 2012, **Exhibit C-108**, p. 14.

[85] Letter from the MEM (Ms. Lorena Lanza) to ION, August 19, 2011, **Exhibit R-37**.

[86] Work Program by ION, October 31, 2011, **Exhibit C-106**. Respondent notes that ION provided two work programs. on October 26, 2011, **Exhibit R-41**, and October 31, 2011, **Exhibit C-106**, respectively (Counter-Memorial, fn. 136).

[87] Ministry of Energy and Mines Resolution No. 14-11-2011, November 14, 2011, **Exhibit C-12**.

[88] Letter from ION (Mr. Modesto Barrios) to the MEM, November 17, 2011, **Exhibit C-107.**

[89] First Quarterly Report, ION, February 15, 2012, **Exhibit C-108**.

[90] Letter from the MEM (Ms. Verónica Artiles) to ION, February 20, 2012, **Exhibit R-46**.

[91] Letter from the MEM (Ms. Verónica Artiles) to ION, May 14, 2012, **Exhibit R-49**.

constructing a buoy and a landing station.[92]

147. On June 4, 2012, in a letter addressed to ION, the MEM noted that ION's plan "*no es técnicamente coherente*", considering ION's failure to declare a commercial discovery and the absence of any exploratory activities. The MEM also reminded ION that it was in breach of its obligations to conduct preparatory work at LOC4 and to remediate the Concession areas at the wells that had been abandoned.[93]

148. In July 2012, Mr. Michael Goyne – who had been the secretary of ION's Board since November 2011 and had moved to Managua, Nicaragua, to oversee the Concession – was appointed ION's president. His wife, who was in charge of ION's financial aspects, joined him in Managua.[94]

149. On July 2, 2012, following an inspection of the area, the MEM reported that ION still had not advanced in its preparatory work.[95]

150. On July 18, 2012, MARENA approved an application filed by ION on June 20, 2012[96] for drilling permits for the LOC4 well.[97]

151. On July 24, 2012, the MEM convened an urgent meeting to discuss ION's "*incumplimiento del programa de trabajo para el Año de Extensión […] y la imposibilidad de poder cumplir con los compromisos acordados debido a que el período de extensión finaliza el 14 de Noviembre próximo y ya no se puede prorrogar*". At the meeting, Vice Minister Lanza reminded ION that the Contract would be terminated if ION did not submit a declaration of commercial discovery prior to the expiration of the extended exploration phase.[98] The minutes of the meeting record that ION's legal representative, Mr. Modesto Emilio Barrios, attributed the delays to "*problemas de financiamiento*" and lack of investors willing to provide financial resources in the absence of a reservoir report and a marketing plan and promised to submit an amended work program.[99] That program was submitted on August 14, 2012 and foresaw that ION would commence drilling at LOC4 between September 15 and 30 and by November 9 would submit a reservoir report and a marketing plan.[100] The MEM accepted ION's work program, but cautioned that the Contract would be terminated unless ION made a commercial

---

[92] Second Quarterly Report, ION, May 28, 2012, **Exhibit C-13**.

[93] Letter from the MEM (Ms. Lorena Lanza) to ION, June 4, 2012, **Exhibit C-14**.

[94] CWS-Goyne I, ¶¶ 2, 61, 70.

[95] MEM Inspection Report of Site Visit to LOC4, July 2, 2012, **Exhibit R-51**.

[96] Letter from ION (Mr. David Goyne) to MARENA, June 20, 2012, **Exhibit R-50**.

[97] Letter from MARENA (Ms. Hilda Espinoza) to ION, July 18, 2012, **Exhibit C-109**.

[98] Letter from the MEM (Ms. Verónica Artiles) to ION, August 3, 2012, **Exhibit C-111**.

[99] *Ibid*., p. 3.

[100] *Ibid.*; Letter from ION (Mr. Michael Goyne) to the MEM, August 14, 2012, **Exhibit R-54**.

discovery by the end of the extended exploration phase.[101]

152. Further to that meeting, ION commissioned an independent report from the consulting company Sproule International Ltd. ("**Sproule"**) to confirm the results of the explorations at the San Bartolo site.[102]

153. After an inspection of the LOC4 site in August 2012, the MEM reported that construction of the access road had been abandoned.[103]

154. On September 12, 2012, ION's representatives informed the MEM that ION was in talks with a drilling company that would be able to provide ION with equipment in ten days.[104]

155. On September 27, 2012, during an inspection, ION's Office Manager, Hans Miranda, informed the MEM that activity at LOC4 was in a *"periodo de suspensión"* for reasons unknown to him.[105]

156. On October 3, 2012, ION notified the MEM that it had made a "*descubrimiento sub comercial de Hidrocarburos*" at San Bartolo, as confirmed by Sproule's analysis, and that it was no longer necessary to drill at LOC4.[106]

157. On October 16, 2012, the MEM wrote to ION that the Company "*incumplió totalmente el PME [Programa Mínimo Exploratorio] [que] además ha sido modificado sin autorización de este Ministerio*." Further, the MEM warned ION that:

> un análisis técnico teórico de los datos existentes del Pozo San Bartolo no conduciría a una declaratoria de comercialidad tal como lo estipula el artículo 42 de la Ley 286, "Ley Especial de Exploración y Explotación de Hidrocarburos, en vista, que "declaratoria de comercialidad" solo se podría determinar

[101] Letter from the MEM (Ms. Verónica Artiles) to ION, August 3, 2012, **Exhibit C-111**. On August 6, 2021, the Vice Minister reminded ION that the one-year extension would end on November 14, 2012, and that under the law it could not be extended, so that the Concession would be terminated in the absence of a commercial discovery (Letter from the MEM (Ms. Lorena Lanza) to ION, August 6, 2012, **Exhibit R-53**).

[102] CWS-Goyne I, ¶ 73.

[103] MEM Inspection Report of Site Visit to LOC4, August 31, 2012, **Exhibit R-56**.

[104] MEM Inspection Report of Site Visit to LOC4, September 12, 2012, **Exhibit R-57**, p.1.

[105] MEM Inspection Report of Site Visit to LOC4, September 27, 2012, **Exhibit R-58**.

[106] Letter from ION (Mr. Michael Goyne) to the MEM, October 3, 2012, **Exhibit R-59**, p. 1 ("*La Junta Directiva […] concluyó que sería de suma importancia debido al factor tiempo y riesgo, evaluar y valorar el sitio de perforación LOC4, por lo que resolvió contratar los servicios de una compañía de prestigiosos Consultores en Hidrocarburos Sproule de Calgary Canada; para una interpretación detallada de información técnica obtenida en las actividades de exploración en San Bartolo. Y por analogía la nueva Locación. […] Es por estas razones, que la Junta Directiva suspendió las actividades del Programa Mínimo Exploratorio presentado para la Locación 4 y poder concentrar nuestros esfuerzos en el futuro de San Bartolo y sus alrededores*").

> después de la perforación de pozos exploratorios el que su compañía no ha realizado en este período y que por el tiempo se les dificulta perforar.[107]

158. On November 2, 2012, Sproule finalized its report (the "***Sproule Report***"),[108] which concluded the following:

> No reserves have been assigned to these lands at this time and the Oklanicsa Block has been assessed as a property that contains Discovered and Undiscovered Unrecoverable Petroleum in Place based on the results of the San Bartolo well. There is no certainty that any portion of these resources will be recoverable and there is no certainty that it will be commercially viable to produce any portion of these resources. […]
>
> In summary, it is Sproule's opinion that:
>
> - The San Bartolo well is considered to be an oil discovery in Zone 7 with a total gross Unrisked Discovered Unrecoverable Petroleum Initially in Place estimated to range from low, best and high estimates of 212 Mboe, 501 Mboe, and 1,154 Mboe, respectively.
> - The Zone 7 interval in the San Bartolo area is considered to contain Unrisked Undiscovered Unrecoverable Petroleum Initially in Place. The estimated PIIP volumes range from low, best and high estimates of 4,687 Mboe, 11,466 Mboe and 26,468 Mboe respectively.
> - The Oklanicsa block land held by Industria Oklahoma Nicaragua is considered to be prospective for oil or natural gas and could warrant further exploration.[109]

159. The implications of the conclusion reached in the Sproule Report are the subject of dispute between the Parties. According to Claimants, the Report confirmed that the San Bartolo well was "*considered to be an oil discovery*" that, according to its best estimate, contained approximately 500,000 barrels of discovered "in place" (*i.e.* in the subsurface) petroleum and an additional 11.5 million barrels of undiscovered petroleum "in place".[110] According to Respondent, instead, Sproule concluded that the area around San Bartolo bore zero recoverable reserves, contingent resources or prospective resources.[111]

160. On November 6, 2012, ION formally notified the MEM that it had made a "*descubrimiento en el Pozo de San Bartolo*" on the basis of "*la opinión obtenida a través de los resultados de pruebas de evaluación y valoración reinterpretados por la consultora Sproule International*" at the San Bartolo site. ION requested that the MEM acknowledge the "*descubrimiento*" stating that it was "*un descubrimiento significante que puede convertirse en comercial*", subject to the results of future

---

[107] Letter from the MEM (Ms. Lorena Lanza) to ION, October 16, 2012, **Exhibit R-60**, p. 1.

[108] Sproule Report, November 2, 2012, **Exhibit C-15.**

[109] Sproule Report, **Exhibit C-15**, pp. 16, 38.

[110] Sproule Report, **Exhibit C-15,** p. 38; Memorial, ¶ 97.

[111] Counter-Memorial, ¶ 122; RER-Ryder Scott I, ¶ 81.

works that ION undertook to carry out in accordance with a future exploration or evaluation program in specified areas within or outside the discovery area.[112]

VI.G The rejection of the declaration of commercial discovery and first termination of the Concession Contract

161. On November 12, 2012, Vice Minister Lanza and the Minister of Energy and Mines, Mr. Emilio Rappaccioli, gave an interview to a leading Nicaraguan newspaper, La Prensa during which Vice Minister Lanza (presenting "*la posición del Gobierno sobre el caso*") questioned that ION had made a discovery.[113]

162. On November 13, 2012, ION's representatives met with Minister Rappaccioli and other MEM officials. When Minister Rappaccioli observed that "*si entiende bien,* [ION] *quiere pasar a la etapa de Explotación para continuar explorando y realizar la perforación de pozos*", Vice Minister Lanza noted that ION could not advance to the exploitation phase without conducting drilling activities and obtaining confirmation by an independent third party that the "discovery" had commercial potential.

163. Minister Rappaccioli said he hoped "*que el grupo de trabajo de ambas entidades (MEM-INDOKLANICSA) llegue a un acuerdo razonable para que se cumpla el mandato del Presidente de apoyar la inversión extranjera y apoyar a la empresa INDOKLANICSA*". The MEM gave ION an additional 30 days to confirm the commercial potential of its "discovery" and to inform the MEM of the independent third party that would confirm it within 90 days.[114]

164. On November 19, 2012, the MEM contested the existence of a discovery with commercial potential at San Bartolo and informed ION that the Sproule Report could not excuse its failure to fulfill its contractual obligation to drill the LOC4 well during the year of extension of the exploration phase. The MEM recalled the obligations undertaken by ION at the November 13, 2012 meeting and gave ION an additional 30 days to confirm that its reported discovery had a "*commercial potential*" as required by Article 42(b) of Law 286, and to provide the name of a reputed independent consultant that would confirm such potential. It added that, within 90 days of its declaration of the commercial potential of its discovery, ION had to submit to the MEM an evaluation program, to be completed within 180 days as prescribed by Article 42(c) of Law 286, in order to confirm that the discovery was indeed commercial. The MEM also declared that "*se da por finalizado el Período de Exploración a la fecha del vencimiento del año de extensión el día 13 de noviembre de 2012*".[115]

---

[112] ION Declaration of Discovery, November 6, 2012, **Exhibit C-16.**

[113] "Alegres por Petróleo", La Prensa, November 13, 2012, **Exhibit C-113.**

[114] Executive Report, ION-MEM, Minutes of Meeting, November 13, 2012, **Exhibit R-62.**

[115] Letter from the MEM (Mr. Emilio Rappaccioli) to ION, November 19, 2012, **Exhibit C-18**.

165. On November 30, 2012, ION confirmed that its discovery of hydrocarbons had commercial potential and informed the MEM that it had instructed Ralph E. Davis Associates Inc. ("**Davis"**) to prepare a second opinion on the findings of the Sproule Report. [116] According to Claimants' witness, ION also retained the Canadian engineering company International Resource Management Canada Ltd ("***IRM***") to produce a program to evaluate and develop the ION Block.[117]

166. On February 4, 2013, ION submitted to the MEM a report prepared by Davis (the "**Davis Report**"). [118] According to Claimants, that Report endorsed the Sproule Report's conclusion that ION had discovered hydrocarbons in the ION Block.[119] By contrast, according to Respondent, the Davis Report echoed the Sproule Report's finding that "*a major conclusion following the testing program on the wells drilled by Norwood is that the productive capability of the reservoirs was not established*".[120]

167. On February 5, 2013,[121] ION submitted to the MEM a Work Program Evaluation and Expenditure Budget prepared by IRM (the "**IRM Program**") which it said would confirm the commercial nature of the ION Block.[122] According to Respondent, that Program proposed drilling and testing a well at the LOC4 site within 180 days.[123]

168. On February 25, 2013, the MEM rejected the IRM Program on the grounds that it did not comply with the requirements for an evaluation program set forth in the Concession Contract.[124]

169. On March 8 and 11, 2013,[125] ION insisted with the MEM that it would carry out

---

[116] Letter from ION (Mr. Modesto Barrios) to the MEM, November 30, 2012, **Exhibit C-19.**

[117] CWS-Goyne I, ¶ 80.

[118] Letter from ION (Mr. Modesto Barrios) to the MEM, February 4, 2013, **Exhibit C-114.**

[119] Memorial, ¶ 107; Davis Report, February 1, 2013, **Exhibit C-20**, p. 13.

[120] Counter-Memorial, ¶ 139; Davis Report, **Exhibit C-20**, p. 25.

[121] Letter from ION (Mr. Modesto Barrios) to the MEM, February 5, 2013, **Exhibit C-115.**

[122] IRM Program, February 5, 2013, **Exhibit C-116**, p. 8. The Tentative Schedule provided that "*it will be 4 and a half months before the well is ready to be started. 4. Drilling Operations: It is anticipated that the drilling operations will take approximately 16 days which includes rig up and tear down. […] 5. Completion Operations: It is anticipated that completion operations will take approximately 2 days per zone evaluated, plus another 4 days for set up and retrieval of the bridge plugs. It is not known how many zones are to be tested at this point. 6. Evaluation of results: Allow for 4-6 weeks for a full evaluation of well results.*".

[123] Counter-Memorial, ¶ 141.

[124] Letter from the MEM (Ms. Verónica Artiles) to ION, February 25, 2013, **Exhibit R-67**.

[125] Letters from ION (Mr. Modesto Barrios) to the MEM, March 8, 2013, **Exhibit R-69**, p. 1 ("*A partir de la presentación ante el MEM de la presente, mi representada dentro un plazo máximo de ciento ochenta días (180), deberá presentar al MEM declaración escrita de que el descubrimiento es o no comercial*") and of March 11, 2013, **Exhibit R-71**, p. 2 ("*Este programa de Trabajo y Evaluación tendrá una duración de 180 días de acuerdo al Contrato de Concesión*").

the IRM Program within 180 days.[126]

170. At a meeting on March 19, 2013, the MEM and ION discussed the parameters of ION's evaluation program and agreed that the MEM would send ION the technical specifications of the evaluation program,[127] which it did on March 20, 2013.[128] It was also agreed that the evaluation program would be submitted by April 15, 2013, and that ION would execute the program within 180 days from MEM's approval.[129]

171. According to Claimants, that letter rejected the IRM Program on formal grounds and required ION to submit a new evaluation program by April 15, 2013.[130] Claimants allege that the MEM imposed that ION complete the evaluation program within 180 days of its approval and submit a third-party report analyzing the results of the program within 30 days of its completion.[131]

172. On April 12, 2013, ION submitted an evaluation program (the "**Evaluation Program"**).[132] Claimants highlight that such Program included a tentative schedule, pursuant to which ION estimated it would take "*un tiempo aproximado de 6 meses continuos de trabajo*" to drill a new well at the San Bartolo site ("**San Bartolo II**") and to evaluate the results.[133] Respondent, however, notes that the program provided that, between mid-April to mid-June 2013, ION would perform preparatory works and secure environmental clearance from MARENA and planned to start drilling at the beginning of the third month of its program.[134]

173. On April 19, 2013, the MEM approved the Evaluation Program, noting that – in accordance with Article 42(c) of Law 286 – the notification of that approval (which ION received on April 22, 2013[135]) marked the start of the 180 days deadline.[136] The MEM also ordered ION to relinquish all acreage of the ION Block, except for the portions identified as "*Área[] de Explotación*".[137]

174. On May 9, 2013, as requested by the MEM, ION returned to Nicaragua all the

---

[126] Counter-Memorial, ¶ 142.

[127] Executive Report, ION-MEM, Minutes of Meeting, March 19, 2013, **Exhibit R-72**.

[128] Letter from the MEM (Ms. Lorena Lanza) to ION, March 20, 2013, **Exhibit C-118**.

[129] Executive Report, ION-MEM, Minutes of Meeting, March 19, 2013, **Exhibit R-72**.

[130] Letter from the MEM (Ms. Lorena Lanza) to ION, March 20, 2013, **Exhibit C-118.**

[131] *Id.*; Memorial, ¶ 119.

[132] Evaluation Program, April 12, 2013, **Exhibit C-22.**

[133] *Ibid*., pp. 9-10; Memorial, ¶ 121.

[134] Evaluation Program, **Exhibit C-22**, p. 10; Counter- Memorial, ¶ 147.

[135] Letter from the MEM (Ms. Lorena Lanza) to ION, October 11, 2013, **Exhibit R-76**.

[136] Letter from the MEM (Ms. Lorena Lanza) to ION, April 19, 2013, **Exhibit C-23**.

[137] *Id*.

acreage of the Concession Area except for approximately 39,000 acres that it retained as "*Área[] de Explotación*" (the "**San Bartolo Block**").[138]

175. On July 3, 2013, Engineer Jorge Lopez of MARENA advised ION's representatives that ION only needed to seek a "no objection" from MARENA, which ION requested the same day.[139]

176. On July 5, 2013, Engineers Lopez and Gago of MARENA visited the San Bartolo site.[140] According to Claimants, MARENA requested that ION submit technical documents, which ION did that same day.[141]

177. On July 16, 2013, in response to the MEM's announcement of its intention to inspect the ION Block,[142] ION explained that it had been unable to make material progress since no activities could be undertaken until it obtained environmental clearance from MARENA.[143]

178. On August 6, 2013, MARENA requested that ION submit "*información fundamental para poder analizar la factibilidad ambiental de la perforación del nuevo pozo*".[144]

179. On August 13, 2013, a MEM inspection reported a lack of activity at the San Bartolo site.[145]

180. On September 13, 2013, ION asked to meet Vice Minister Lanza to discuss "*temas relativos al programa de evaluación*",[146] but the Vice Minister declined, citing prior commitments and requesting a written report,[147] which apparently was not submitted.[148]

---

[138] Letter from the MEM (Ms. Lorena Lanza) to ION, April 19, 2013, **Exhibit C-23** ("*de conformidad con el Contrato de Concesión Petrolera entre el Gobierno de la República de Nicaragua e Industria Oklahoma Nicaragua. S.A, numeral 2 del Artículo Sexto, Devolución de Áreas, INDOKLANICSA al final del último Subperíodo debe devolver todas las porciones del Área de Contrato excepto las áreas de Explotación*"); Letter from ION (Mr. Modesto Barrios) to the MEM, May 9, 2013, **Exhibit C-24**. See also Letter from ION (Mr. Michael Goyne) to the Attorney General, January 4, 2016, p. 52, **Exhibit C-50**.

[139] Letter from ION (Mr. Michael Goyne) to MARENA, July 3, 2013, **Exhibit C-119.**

[140] Inspection report, MARENA, July 5, 2013, **Exhibit C-120.**

[141] CWS-Goyne I, ¶ 97; Memorial, ¶ 127.

[142] Email from the MEM (Ms. Reyna Baca Rodríguez) to ION, July 16, 2013, **Exhibit C-122.**

[143] Email from ION (Mr. Hans Miranda) to the MEM, July 16, 2013, **Exhibit C-121.**

[144] Letter from MARENA (Ms. Hilda Espinoza) to ION, August 6, 2013, **Exhibit C-123.**

[145] MEM Inspection Report of Site Visit to San Bartolo, August 13, 2013, **Exhibit R-75**.

[146] Letter from ION (Mr. Modesto Barrios) to the MEM, September 13, 2013, **Exhibit C-124**.

[147] Letter from the MEM (Ms. Lorena Lanza) to ION, September 17, 2013, **Exhibit C-125.**

[148] RWS-Lanza I, ¶ 24.

181. On October 11, 2013, the MEM warned ION that the 180-day period referred to in its correspondence of April 19, 2013 would expire on October 22, 2013 and that ION's breaches would entitle Nicaragua to terminate the Concession Contract pursuant to Article 70 of Law 286.[149]

182. ION responded on October 15, 2013, noting that it had not obtained an approval from MARENA and that "*el proceder a trabajar sin los permisos de MARENA es ilegal y solo podremos empezar a trabajar hasta que obtengamos estos permisos, por lo cual nuestros 180 días otorgados por el Articulo 42 de la Ley 286 no han empezado a correr*".[150] Vice Minister Lanza rejected that response on the grounds that the signatories did not have the legal capacity to represent ION.[151]

183. On October 22, 2013, Vice Minister Lanza notified ION that, due to its failure to comply with the Evaluation Program within 180 days from its approval, the Concession Contract was terminated in accordance with Article 70 of Law 286,[152] without referring to any of the specific grounds for termination foreseen by that provision (the "**First Termination**").[153]

VI.H The reversal of the First Termination

184. By correspondence of October 29, 2013, ION filed with the MEM a request for review of the First Termination,[154] which was rejected on November 20, 2013.[155]

185. On November 26, 2013, ION filed an administrative appeal against that rejection on the grounds that the First Termination for lapse of the 180-day deadline lacked legal basis. In particular, ION noted that:

> No existe fuente jurídica que respalde las actuaciones de la Ing. Lanzas [sic], pretende cancelar la concesión de mi representada mediante interpretaciones de las leyes antojadizas o creativas, totalmente sesgadas a un interés que hoy desconocemos. He probado y resaltado claramente con ley expresa, el irrespeto manifestado por escrito a la legislación del MARENA. Además, recordemos el evento no regulado, inexistente, de imponer plazos a mi representada para culminar la primera etapa de la exploración. La imposición de los 180 días vencidos surgió de la fértil imaginación de la funcionaria, ya que la legislación orienta el cumplimiento de 180 días para otros propósitos distantes al que nos ocupa. En la resolución no existen partes

[149] Letter from the MEM (Ms. Lorena Lanza) to ION, October 11, 2013, **Exhibit R-76**.

[150] Letter from ION (Mr. Michael Goyne) to the MEM, October 15, 2013, **Exhibit R-77**.

[151] Letter from the MEM (Ms. Lorena Lanza) to ION, October 17, 2013, **Exhibit C-127.**

[152] Letter from the MEM (Ms. Lorena Lanza) to ION, October 22, 2013, **Exhibit C-25**.

[153] Memorial, ¶ 133.

[154] ION Request for Review, November 6, 2013, **Exhibit C-129.**

[155] Letter from the MEM (Ms. Lorena Lanza) to ION, November 20, 2013, **Exhibit C-131.**

> considerativas que justifiquen con claridad meridiana la decisión de cancelar la concesión.[156]

186. ION also submitted that, following the approval of the Evaluation Program by the MEM, ION had advanced to the exploitation phase. [157]

187. By a Resolution dated December 19, 2013, Minister Rappaccioli upheld the appeal and reinstated the Concession Contract. The Resolution declared that (*i*) the exploration phase had ended on November 13, 2012 and that the Contract was now "*outside the exploration phase*"[158]; (*ii)* the Contract was in an "*etapa intermedia*" of evaluation "*between exploration and exploitation*"; (*iii*) ION had a further 180 days to evaluate its claimed discovery and to confirm that it was commercially exploitable; (*iv*) ION did not need a new environmental permit, but only had to submit the information requested by MARENA; and (*v*) the 180-day period for ION to carry out the Evaluation Program would only start to run after its approval by MARENA.[159]

188. Respondent alleges that Minister Rappaccioli's decision was driven by policy reasons, as Nicaragua had no other onshore prospects for hydrocarbon exploration and no other investors interested in developing that area.[160]

VI.I The events following the reinstatement of the Concession Contract

189. In early 2014, Mr. Raymond Gerald Bailey, a former senior executive of ExxonMobil with five decades of experience in the oil and gas sector, joined ION as its new Chief Operating Officer.[161]

190. On February 5, 2014, MARENA reminded ION to provide the information mentioned in its letter of August 6, 2013 within 30 days.[162]

191. On February 17, 2014, the MEM requested that ION submit the updated Evaluation Program as well as technical information concerning the planned activities at San Bartolo II.[163] On February 28, 2014, ION responded that it was still

---

[156] ION Appeal, November 26, 2013, p. 11, **Exhibit C-132**.

[157] Letter from the MEM (Ms. Lorena Lanza) to ION, April 19, 2013, **Exhibit C-23**. Reply, ¶ 116.

[158] Letter from the MEM to ION, December 19, 2013, **Exhibit C-26** ("*por lo anterior nos encontramos fuera de la etapa de exploración").*

[159] MEM Resolution No. 22, December 19, 2013, **Exhibit C-26.**

[160] Counter-Memorial, ¶ 160.

[161] CWS-Bailey, ¶¶ 3-5, 18.

[162] MARENA Resolution No. E001-2014, February 5, 2014, **Exhibit C-134**, p. 3.

[163] Letter from the MEM (Ms. Lorena Lanza) to ION, February 17, 2014, **Exhibit C-135**. In particular, the MEM requested that ION submit "*el Programa de Trabajo actualizado, así como el Cronograma y Presupuesto de las actividades a realizar durante la fase actual de Evaluación*" as well as information on

working on the details of the drilling plan and associated budget[164] and on March 17, 2014, it explained that it continued to work on MARENA's and the MEM's requests, but was prioritizing MARENA's ones.[165]

192. On May 8, 2014, ION forwarded the requested information to MARENA,[166] which issued its environmental clearance on May 28, 2014, and notified it to ION on June 3, 2014.[167]

193. Claimants allege that, during that period, ION engaged in discussions relating to a potential partnership to develop the Concession with a Hong Kong publicly listed company, New Times Energy ("**NTE"**), which "*promptly started developing a drilling plan for ION's Block and contacting Chinese drilling companies with a view to implementing those plans*".[168] According to Respondent, ION did not mention the identity of NTE to the MEM until October 31, 2014[169] and Nicaragua only obtained documents relating to ION's interactions with NTE during the document production phase of this Arbitration.[170]

194. On April 12, 2014, ION wrote to NTE that "*ION just needs funds to get drilling soonest*", but "*if you decide to participate and want to provide the drilling and other service support then of course Michael [Goyne] would support having that discussion with you*" [171] and, on May 5, 2014, it sent NTE a draft memorandum of understanding.[172] NTE apparently did not reply[173] but, on June 1, 2014, wrote to ION that it was looking into costs to transport a rig to Nicaragua.[174] On June 25, August 16 and September 25, 2014, ION urged NTE to sign a revised memorandum of

---

"*Operador de perforación con su debida certificación. Proveedor de los equipos y materiales a utilizar en la perforación. Programa de registros en detalle y las zonas donde se correrán. Diseño de la cementación. Esquema de la perforación del pozo San Bartolo II indicando la litología. Listado de productos químicos y tipos de lodos*".

[164] Letter from ION (Mr. Michael Goyne) to the MEM, February 28, 2014, **Exhibit C-136.**

[165] Letter from ION (Mr. Michael Goyne) to the MEM, March 17, 2014, **Exhibit C-137.**

[166] Letter from ION (Mr. Michael Goyne) to MARENA, May 8, 2014, **Exhibit C-140.**

[167] Letter from MARENA (Ms. Hilda Espinoza) to ION, May 28, 2014, **Exhibit C-141**, notified to ION on June 3, 2014.

[168] Memorial, ¶ 146. Respondent contends that ION misrepresented to Nicaragua NTE's willingness to invest in the Concession (Rejoinder, ¶ 116).

[169] Counter-Memorial, ¶ 181.

[170] Rejoinder, ¶ 116.

[171] Email from ION (Mr. R. Gerald Bailey) to NTE, April 12, 2014, **Exhibit R-114**.

[172] Email from ION (Mr. Michael Goyne) to NTE, May 5, 2014, **Exhibit R-115**.

[173] Rejoinder, ¶ 117.

[174] Email from NTE (Mr. Tommy Cheng) to ION, June 1, 2014, **Exhibit C-201**.

understanding.[175] On October 3, 2014, it indicated that "[i]*t is imperative that NTE execute the agreement without delay if indeed NTE is seriously in with ION*",[176] but NTE's only reaction seems to have been to send ION an unsigned "Indicative Term Sheet" for an investment of US$ 11 million on October 31, 2014.[177]

195. Meanwhile, ION wrote to the MEM on June 30, 2014 that it was engaged in conversations with "*una empresa petrolera de renombre internacional con mucha experiencia que nosotros proponemos como la compañía operadora y perforadora de la concesión, con el objetivo de iniciar el proceso de perforación en el menor tiempo posible*"[178] and, on July 31, 2014, ION stated that it was in conversations with several "[e]*mpresas de nivel mundial con suficiente capacidad técnica para iniciar la perforación*" and expected that "*las negociaciones se concluyan en el mes de agosto*".[179] ION also indicated that, while it hoped to be able to agree to the original schedule, it forecast that the transportation of the rig to Nicaragua would take "*un poco más del previsto*".[180]

196. On August 5, 2014, the MEM urged ION to honor outstanding payments for US$ 32,388.[181] On the same day, Ms. Verónica Artiles updated Vice Minister Lanza on ION's progress regarding the Concession, noting that ION "*está[] negociando* [un] *contrato de operación con una compañía perforadora, que no dicen quién es, y esperan concluir negociaciones en Agosto 2014*" and that "*considerando el óptimo de los casos que la perforación inicie en la primer*[a] *semana de Octubre-2014; estarían finalizando la perforación en Diciembre 2014, incluyendo las pruebas de producción; quedando pendiente la evaluación y el informe final de los resultados de la perforación*".[182]

197. During a MEM inspection on August 28, 2014, the owner of the land of the San Bartolo site reported that ION's representatives had not been seen there since

[175] Email from ION (Mr. Michael Goyne) to NTE, June 25, 2014, **Exhibit C-205**; Email from ION (Mr. Michael Goyne) to NTE, August 16, 2014, **Exhibit C-213**; Email from ION (Mr. Michael Goyne) to NTE, September 25, 2014, **Exhibit C-220**, p. 1.

[176] Email from ION (Mr. R. Gerald Bailey) to NTE, October 3, 2014, **Exhibit R-122.**

[177] NTE, Project Nicaragua - Indicative Term Sheet, **Exhibit R-100**; Email from NTE (Mr. Joseph Wan) to ION, October 31, 2014, **Exhibit R-124**.

[178] Letter from ION (Mr. Michael Goyne) to the MEM, June 30, 2014, **Exhibit R-84**.

[179] Letter from ION (Mr. Michael Goyne) to the MEM, July 31, 2014, **Exhibit C-145**, p. 1. Claimants' witness attests that, at that time, ION was in discussions not only with NTE, but also with Noble Energy and Glencore, but the conversation "*progressed much faster*" with NTE (CWS-Goyne, I, ¶ 114).

[180] Memorial, ¶ 153; Letter from ION (Mr. Michael Goyne) to the MEM, July 31, 2014, **Exhibit C-145**, p. 2.

[181] Letter from the MEM (Ms. Verónica Artiles) to ION, August 5, 2014, **Exhibit C-146**.

[182] Email from Ms. Verónica Artiles to Ms. Lorena Lanza, August 5, 2014, **Exhibit C-212**.

May 2013.[183]

198. On August 29, 2014, ION informed the MEM that it had arranged to sign an operation agreement for the development of the Concession,[184] without identifying its partner or providing evidence.[185] At that time, the MEM apparently did not seek additional information.[186]

199. On September 11, 2014, Minister Rappaccioli stated in a press interview that he would terminate the Concession Contract because ION would not be able to drill another well by November 2014.[187]

200. On September 19, 2014, Nicaragua adopted Law No. 879 ("**Law 879**") which amended Articles 36 and 45 of Law 286 to allow the MEM to extend the exploration phase by up to six years and require the participation of Nicaragua's state-owned oil company, Empresa Nicaragüense de Petróleo S.A. ("***Petronic***"), as a partner of private investors in hydrocarbon projects.[188] When submitting the bill to Parliament on August 7, 2014, President Daniel Ortega had justified the increase in duration of the exploration phase as follows:

> Como una lección aprendida hemos podido constatar que los plazos del período de exploración resultan insuficientes cuando el resultado de la perforación no es un descubrimiento comercial y consecuentemente se requiere de más evaluación […]. Hemos comprobado que las compañías petroleras requieren períodos de exploración con mayor duración, que les permitan superar las dificultades que enfrentan en zonas emergentes, como nuestro país.[189]

201. On September 29, 2014, Minister Rappaccioli informed ION that he was concerned by the latter's inactivity and insisted that it complete the Evaluation Program within the 180-day timeframe proposed by ION.[190] Claimants observe that, in that letter, Minister Rappaccioli did not mention any potential consequences of ION's failure to perform the Evaluation Program by early December 2014.[191]

202. On September 30, 2014, ION requested a meeting with Petronic to discuss the

---

[183] MEM Inspection Report of Site Visit to San Bartolo, August 28, 2014, **Exhibit R-86**, p. 1.

[184] Letter from ION (Mr. Michael Goyne) to the MEM, August 29, 2014, **Exhibit C-148.**

[185] Counter-Memorial, ¶ 177.

[186] Reply Memoria, ¶ 151.

[187] "Reformas a la Ley de Hidrocarburos y Tumarín ya tienen dictamen", El Nuevo Diario, September 11, 2014, **Exhibit C-149.**

[188] Law 879, September 17, 2014, **Exhibit C-27.**

[189] President Ortega's Message, August 7, 2014, **Exhibit C-147**, pp. 1-3.

[190] Letter from the MEM (Mr. Emilio Rappaccioli) to ION, September 29, 2014, **Exhibit C-151**.

[191] Memorial, ¶¶ 165-166.

terms of a future collaboration to develop the ION Block[192] and requested that the MEM adapt the Concession Contract to Law 879.[193]

203. On October 7, 2014, Minister Rappaccioli rejected ION's request, on the grounds that Law 879 only applied to concession contracts still in the exploration phase – unlike the Concession Contract, whose exploration phase had expired in November 2012 – and repeated that the Evaluation Program had to be completed within 180 days, which he underscored was a peremptory deadline.[194]

204. On October 20, 2014, ION's representatives met with Minister Rappaccioli and Vice Minister Lanza. According to Claimants' witness, they indicated that the Concession Contract would be terminated in early December and Vice Minister Lanza acknowledged that the MEM had discussed granting a concession over the San Bartolo Block with individuals related to Norwood.[195] At the end of the meeting, the Minister requested that ION present to the MEM "*una compañía petrolera calificada en el control operativo del proyecto y un plan financiero comprometido por una empresa cualificada que muestre un programa que muestre el tiempo de ejecución del programa*".[196] ION apparently promised to identify its new partner.[197]

205. On the same day, ION wrote to NTE informing it that Minister Rappaccioli "*was adamant that we produce a formal letter showing that we have an agreement and that we show him our plans going forward*".[198]

206. On October 31, 2014, ION informed the MEM that it had reached an agreement with NTE for the performance of the Evaluation Program from 2015 onwards.[199]

207. On November 14, 2014, ION requested a meeting with Minister Rappaccioli to present and discuss NTE's involvement.[200] The MEM rejected the request on November 17, 2014, noting that ION had provided no evidence that it was performing any works under the Evaluation Program and that the 180-day deadline

---

[192] Letter from ION (Mr. Michael Goyne) to Petronic, September 30, 2014, **Exhibit C-28.** There was no response to the letter and ION renewed its request on November 21, 2014 (Letter from ION (Mr. Michael Goyne) to Petronic, 21 November 2014, **Exhibit C-33**).

[193] Letter from ION (Mr. Michael Goyne) to the MEM, September 30, 2014, **Exhibit C-29.**

[194] Letter from the MEM (Mr. Emilio Rappaccioli) to ION, October 7, 2014, **Exhibit C-30.**

[195] CWS-Goyne I, ¶¶ 132-133; Memorial, ¶¶ 168, 170. For a slightly different account of that meeting see Minutes of meeting between ION and MEM, October 27, 2014, **Exhibit C-227**.

[196] Letter from ION (Mr. Michael Goyne) to the MEM, November 14, 2014, **Exhibit C-31.**

[197] Counter-Memorial, ¶ 181.

[198] Email from ION (Mr. R. Gerald Bailey) to NTE, October 20, 2014, **Exhibit R-123**.

[199] Letter from ION (Mr. Michael Goyne) to the MEM, October 31, 2014, **Exhibit C-152.**

[200] Letter from ION (Mr. Michael Goyne) to the MEM, November 14, 2014, **Exhibit C-31.**

would expire on December 2, 2014.[201]

208. On November 17, 2014, NTE wrote to ION that it was "*committed to the drilling of the first well […]. NTE will be the operator; however, we will keep it as a mutual participation with NTE at 51% and ION at 49%*" and observed that "[a]*lthough the project seems to be good, it is an exploration project and there are* [sic] *considerable risk*."[202] On November 19, 2014, ION requested NTE to formalize the agreement and to initiate the necessary steps to begin drilling.[203]

209. On November 20, 2014, ION wrote to the MEM explaining that ION had *"logrado acuerdos de asociación con dos empresas de prestigio internacional para poder impulsar hacia Adelante la Concesión de Explotación*" and that NTE and the Texan company Bailey Petroleum LLC ("**Bailey Petroleum**") – whose CEO was Mr. Gerald Bailey – would deal, respectively, with the financial and the technical aspects of the project. ION requested the MEM's approval of a revised drilling program that it attached [204] and an extension of the 180-day period for completion of the program.[205]

210. On December 1, 2014, ION sent to the MEM documents allegedly demonstrating that ION, NTE and Bailey Petroleum "*cuentan con los recursos Técnicos y Financieros suficientes para proceder con el Desarrollo de la Concesión de Explotación*"[206] but, according to Respondent, still not providing evidence of NTE's commitment to finance or partner with ION.[207]

VI.J The second termination of the Concession Contract

211. On December 3, 2014, the MEM addressed a letter to ION ("**Termination Letter**") stating that:

> habiéndose comprobado por parte de este Ministerio que Indoklanicsa ha incumplido con la ejecución en tiempo y forma de todas y cada una de las actividades comprometidas en el Programa de Trabajo de Evaluación y Presupuesto de Gastos aprobado y en consecuencia, no presentó ante este Ministerio su declaración escrita de que el descubrimiento declarado por su representada es o no comercial, de conformidad a lo estipulado en el inciso

[201] Letter from the MEM (Mr. Emilio Rappaccioli) to ION, November 17, 2014, **Exhibit C-32.**

[202] Email from NTE (Mr. Joseph Wan) to ION, November 17, 2014, **Exhibit R-125**, p. 1.

[203] Email from ION (Mr. Michael Goyne) to NTE, November 19, 2014, **Exhibit C-229**.

[204] Letter from ION (Mr. Michael Goyne) to the MEM, November 20, 2014, **Exhibit C-153.**

[205] *Ibid.*; Counter-Memorial, ¶ 182.

[206] Letter from ION (Mr. Michael Goyne) to the MEM, December 1, 2014, **Exhibit C-154.**

[207] Counter-Memorial, ¶ 183.

> b) del referido Artículo 70 de la Ley 286 **se da por terminado sin requisito previo el Contrato de Concesión Petrolera**.[208] (emphasis added)

212. After receiving the Termination Letter, ION continued to urge NTE to close the deal.[209] According to Claimants' witness, however, in January NTE stopped responding to communications regarding the Concession, allegedly because "*they found out about the Nicaraguan Government's actions and decided to invest their capital elsewhere*".[210]

213. On January 19, 2015, ION contested the termination and invoked Article 29 of the Contract urging "*que de inmediato se agote el procedimiento establecido para resolver bilateralmente las desavenencias*".[211] ION also noted that the invocation of Article 70(b) of Law 286 was misplaced because that provision only allowed the State to terminate the Contract upon the expiration of the exploration phase in the absence of a declaration of commerciality, but that phase had ended two years earlier in November 2012.

214. On January 27, 2015, officials of the MEM and MARENA conducted a joint inspection of the Concession area, which found that ION had failed to perform the Evaluation Program and to comply with its environmental obligations.[212]

215. On February 16, 2015, the new Minister of Energy and Mines, Mr. Salvador Mansell, declared that the termination of the Contract pursuant to Article 70(b) of Law 286 was due to ION's failure to perform the Evaluation Program within the six-month deadline proposed by ION itself and had become final as ION had not filed an administrative challenge against the Termination Letter.[213]

216. On March 6, 2015, ION filed an administrative challenge against the MEM's decision of February 16, 2015 on grounds that the termination of the Concession was wrongful (arguing that the MEM had declared that the exploration period had ended in November 2012 and could not reverse its position to rely on Article 70(b)), and that the MEM had ignored ION's referral to the dispute resolution clause in the Contract.[214]

---

[208] Letter from the MEM (Mr. Emilio Rappaccioli) to ION, December 3, 2014, **Exhibit C-34**.

[209] Email from ION (Mr. R. Gerald Bailey) to NTE, December 5, 2014, **Exhibit R-127**; Email from ION (Mr. R. Gerald Bailey) to NTE, January 3, 2015, **Exhibit R-129**; Email from ION (Mr. R. Gerald Bailey) to NTE, June 2, 2015, **Exhibit R-130**.

[210] CWS-Bailey, ¶ 45.

[211] Letter from ION (Mr. Modesto Barrios) to the MEM, January 19, 2015, **Exhibit C-35.**

[212] Decree 191, October 28, 2015, **Exhibit C-45**, Section III; MEM and MARENA Inspection Report of San Bartolo I and II, January 27, 2015, **Exhibit R-92**.

[213] Letter from the MEM (Mr. Salvador Mansell) to ION, February 16, 2015, **Exhibit C-36.** See also Memorial, ¶ 178.

[214] ION Request for Review, March 6, 2015, **Exhibit C-37.**

217. On March 25, 2015, Minister Mansell rejected that administrative challenge on the basis that the Termination Letter and the MEM's letter of February 16, 2015 were not administrative acts or resolutions. According to the Minister, the latter letter was a "*reiteración*" of the Termination Letter which constituted "*un aviso, previo a la 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*".[215] On April 21, 2015, ION filed an administrative appeal against this decision as well,[216] which was rejected by the MEM on May 20, 2015.[217]

218. On June 16, 2015, ION again wrote to the MEM complaining of a contradiction between the Termination Letter and its characterization by Minister Mansell as a mere "aviso" and requesting a meeting to attempt to settle the dispute amicably pursuant to Article 29 of the Concession Contract.[218] Claimants' witness says that, at that point, ION suspended its activities in the Concession Area "*until the MEM clarified the status of our Concession"*.[219]

219. On October 28, 2015, President Ortega issued a Presidential Decree (the "**Decree 191**") authorizing Nicaragua's Attorney General (the "**Attorney General**") to "*inici[ar] y ejecut[ar] el proceso de Terminación*" of the Concession Contract pursuant to Article 70(b) and (e) of Law 286[220] and indicating that the Termination Letter was an "*Acto Administrativo Firme*".[221]

220. On November 10, 2015, the Attorney General informed ION that he would proceed with the formal termination of the Concession Contract and invited it to the signing of the termination of the Contract on November 13, 2015.[222]

221. On November 12, 2015, ION replied rejecting the termination and alleging "*diversas nulidades, violaciones consuetudinarias e interpretaciones desviadas del contrato de concesión y la ley de la materia, que se derivan de una mala práctica del debido proceso administrativo por parte del MEM en perjuicio del Estado de Nicaragua*". Inter alia, ION noted that:

---

[215] Letter from the MEM (Mr. Salvador Mansell) to ION, March 25, 2015, **Exhibit C-40.**

[216] ION Appeal, April 21, 2015, **Exhibit C-41.**

[217] MEM Resolution No. 45, May 20, 2015, **Exhibit C-42.**

[218] Letter from ION (Mr. Michael Goyne) to the MEM, June 16, 2015, **Exhibit C-43.** See also Memorial, ¶ 186.

[219] Memorial, ¶ 188; CWS-Goyne I, ¶ 143.

[220] Decree 191, **Exhibit C-45.**

[221] *Ibid*., Section II.

[222] Letter from the Attorney General (Mr. Hernán Estrada Santamaría) to ION, November 10, 2015, **Exhibit C-47.**

> El MEM pretende aplicar medidas extremas incluyendo la cancelación del contrato de concesión en contra de los intereses de mi representada por tecnicismo empírico y sin apoyo legal, el MEM pretende anular una concesión petrolera a la que se le ha realizado inversión millonaria (U$ 70,000,000.00), y convenientemente ahora que ya se dio la etapa más difícil de la inversión exploratoria, no sabemos con qué fines o grises razones que desconocemos a ciencia cierta pero que más o menos estamos enterados, se nos pretende arrebatar este megaproyecto histórico para el país y para mi representada.[223]

222. ION again wrote to the Attorney General on November 23, 2015, requesting a negotiation, since it had secured a $ 200 million bank guarantee for the development of the Concession,[224] and again on January 4, 2016, stating it was "*lin[ing] up funding to drill up to 100 development wells*" for which it was in "*advanced discussions*" with investors.[225]

223. At a meeting with ION on January 18, 2016, the Attorney General's deputy apparently confirmed that Nicaragua had chosen a third party to develop the San Bartolo Block and indicated that ION could participate in the development if it relinquished its rights under the Concession Contract, but ION rejected the proposal.[226]

224. On June 24, 2016, the Attorney General issued Administrative Agreement No. 06-2016 (the "**Termination Decision**") terminating the Concession Contract in accordance with Article 70(b) and 70(e) of Law 286.[227]

225. On July 10, 2017, Claimants notified Nicaragua of the existence of a dispute under the Treaty.[228] After the 90-day consultation period foreseen by Articles 10.15 and 10.16 of the Treaty elapsed without a settlement, Claimants initiated this arbitration.[229]

VI.K The interest of third parties in the Concession

226. As of 2014, other parties began to express interest in prospecting for oil on Nicaragua's Pacific coast.

227. In May 2014, EastSiberian Plc, a publicly listed Canadian company chaired by a former director of Norwood, Mr. Graeme Phipps ("**EastSiberian**"), approached

---

[223] Letter from ION (Mr. Michael Goyne) to the Attorney General, November 12, 2015, **Exhibit C-48.**

[224] Letter from ION (Mr. Michael Goyne) to the Attorney General, November 23, 2015, **Exhibit C-49**, p. 1.

[225] Letter from ION (Mr. Michael Goyne) to the Attorney General, January 4, 2016, **Exhibit C-50**.

[226] CWS-Goyne I, ¶ 147; Memorial, ¶ 196.

[227] Termination Decision, May 24, 2016, **Exhibit C-55.**

[228] Notice of Intent, **Annex C-57 to the Notice of Arbitration**, July 10, 2017.

[229] Notice of Arbitration, ¶ 5.

Petronic[230] – the necessary partner of hydrocarbon projects in Nicaragua pursuant to Law 879[231] – and in the following months formalized its interest in partnering with it and in particular in exploring an area that included the San Bartolo Block.[232]

228. On March 19, 2015, EastSiberian announced[233] that, on January 9, 2015, it had concluded a cooperation agreement and heads of joint operating agreement with Petronic.[234] On that basis, on May 12, 2015, it applied to the MEM for contractor status,[235] which it obtained in October 2015.[236]

229. On August 26, 2016, EastSiberian entered into a memorandum of understanding ("**MoU**") with Pan American Oil Ltd ("**PAO**") for the sale of its assets related to its "*Nicaraguan opportunity*", including the cooperation agreement with Petronic.[237]

230. On April 27, 2017, President Ortega issued Decree No. 52-2017 authorizing the MEM to enter into concession contracts by direct negotiation with PAO.[238] On June 28, 2017, the MEM published in the Official Gazette notices that PAO had applied for three oil concessions, two of which apparently covering almost the entire San Bartolo Block.[239]

231. On June 30, 2017, EastSiberian announced that its MoU with PAO had expired[240]

---

[230] Timeline of negotiations between Petronic, EastSiberian and PAO, Petronic, **Exhibit C-281**, row 1.

[231] RWS-Phipps, II, ¶ 21.

[232] Letter from EastSiberian (Mr. Graeme Phipps) to Petronic, June 4, 2014, **Exhibit C-202**; Letter from EastSiberian (Mr. Jorge Solís) to Petronic, June 5, 2014, **Exhibit C-203**; Letter from EastSiberian (Mr. Graeme Phipps) to Petronic, June 5, 2014, **Exhibit C-204**; Letter from EastSiberian (Mr. Graeme Phipps) to Petronic, September 17, 2014, **Exhibit C-218**, pp. 1 and 3; Letter from EastSiberian (Mr Graeme Phipps) to Petronic, September 17, 2014, **Exhibit C-219** ("*nuestra primera prioridad es el área que fue asignada a Indoklanicsa en el Oeste Costa-Adentro*"); RWS-Phipps, I, ¶ 38; RWS-Phipps, II, ¶ 21.

[233] "EastSiberian Plc signs Cooperation Agreement with Petronic Regarding Oil and Gas Opportunities in Nicaragua", EastSiberian, March 19, 2015, **Exhibit C-156.** See also Memorial, ¶ 181.

[234] Cooperation Agreement between EastSiberian and Petronic, January 9, 2015, **Exhibit C-231**; Heads of Joint Operating Agreement between EastSiberian and Petronic, January 9, 2015, **Exhibit C-232**.

[235] Letter from EastSiberian (Mr. Álvaro Molina Vaca) to the MEM, May 12, 2015, **Exhibit R-131**.

[236] MEM, Certificate of Notification - Granting Contractor Qualification, August 5, 2015, **Exhibit R-133**.

[237] "EastSiberian Plc Announces Expiry of Memorandum of Understanding with Pan American Oil Ltd.", EastSiberian, June 30, 2017, **Exhibit C-162;** "EastSiberian Plc Announces Memorandum of Understanding for Proposed Sale Transaction and Reports Financial Results for the year ended May 31, 2016", EastSiberian, September 2, 2016, **Exhibit C-157.**

[238] Decree No. 52-2017, April 27, 2017, published in the Nicaraguan Official Gazette No. 116 of June 21, 2017, **Exhibit C-158**.

[239] Applications for oil concessions by Pan American Oil, June 21, 2017, published in the Nicaraguan Official Gazette No. 121 of June 28, 2017, **Exhibit C-159**; Memorial, ¶ 199.

[240] "EastSiberian Plc Announces Expiry of Memorandum of Understanding with Pan American Oil Ltd.", EastSiberian, June 30, 2017, **Exhibit C-162**.

and that it was considering legal action against PAO for having independently applied for "*the very same concessions introduced to PAO by EastSiberian*" in 2016.[241]

VI.L The events related to the Counterclaim

232. This section illustrates the events occurred in the period considered above that are specifically relevant to Nicaragua's Counterclaim.

233. As illustrated above,[242] ION was subject to environmental obligations arising from the Concession Contract, which incorporates by reference the Nicaraguan laws of environmental protection, the EIA and its Environmental Permit.

234. After Norwood announced that it was plugging and abandoning the Las Mesas, Maderas Negras, and San Bartolo wells on February 19, 2010,[243] a MARENA inspection of March 24, 2010, recorded that the San Bartolo site was in need of remediation.[244]

235. On April 29, 2010, the MEM and MARENA sent Norwood the terms of reference for the elaboration of a plan for the closure phase at San Bartolo, *i.e.* the "*caracterización y remediación ambiental del sitio de la plataforma San Bartolo y su entorno*".[245]

236. On May 18, 2010, representatives of Norwood met the MEM and MARENA with the objective of defining the state of the Maderas Negras and Las Mesas sites, for which Norwood was to present a summary of the environmental situation. The MEM and MARENA instructed Norwood to identify the measures to be taken at the San Bartolo site and to submit a closure phase report outlining the steps it would undertake to fulfill its environmental obligations.[246]

237. After an inspection of the San Bartolo site on July 8, 2010 established that "*no se estaba realizando ninguna actividad referente a los* [Términos de Referencia] *enviados*",[247] on July 21, 2010 MARENA ordered Norwood to comply immediately

---

[241] "EastSiberian Plc (TSX NEX: ESB.H) Reports Interim Financial Results for the period ended August 31, 2017 plus update on Nicaragua situation", EastSiberian, November 6, 2017, **Exhibit C-163**.

[242] See ¶¶ 112, 117-118, 123-124, 126-127 *supra*.

[243] Norwood News Release on Testing Evaluations at San Bartolo, February 19, 2010, **Exhibit R-18**.

[244] MARENA Inspection Report of Site Visit to San Bartolo, February 3, 2012, **Exhibit R-44**.

[245] Letter from MARENA (Mr. Norman Henríquez) to Norwood, April 29, 2010, **Exhibit R-22**.

[246] MARENA Inspection Report of Site Visit to San Bartolo, February 3, 2012, **Exhibit R-44**.

[247] MARENA Inspection Report of Site Visit to San Bartolo, February 3, 2012, **Exhibit R-44**. See also MEM and MARENA Inspection Report of San Bartolo, July 8, 2010, **Exhibit R-25**, p. 8 ("*La situación ambiental actual genera incumplimientos por parte de NORWOOD a los requerimientos técnicos y ambientales demandados por MARENA-Managua en la Fase de Cierre del proyecto de Exploración PETROLERA SAN*

with the terms of reference.[248]

238. At a meeting on August 3, 2010, Norwood promised to appoint an environmental manager to execute the closure and remediation activities identified in MEM's and MARENA's terms of reference.[249] The final report of the geologist hired by Norwood to carry out bio-remediation activities in San Bartolo found that "*solamente una muestra de suelos de la pila de aguas residuales presentó un valor de DRO diésel de 2,100 mg/kg que está alto, sobre los límites máximos permisibles*".[250]

239. After an inspection of April 25, 2011 determined that certain closure and remediation activities were still pending,[251] on May 6, 2011 MARENA "*solicitó la elaboración de un Plan de Cierre General de las actividades de "Exploración de los Recursos Petroleros de las tres Plataformas: Maderas Negras, San Bartolo y Las Mesas" […] a más tardar el 19 de mayo 2011*".[252] Thereafter, there was no further contact between MARENA and Norwood.[253]

240. In its application of August 4, 2011 for an extension of the Contract mentioned above, [254] ION pledged to endeavor to "*cuidar de los pozos, para abordar de inmediato las preocupaciones ambientales, para completar el cierre de la primera prueba del pozo de San Bartolo* […]".[255]

241. On November 16, 2011, ION agreed to submit to MARENA a quarterly timeline for closing the three drilling sites within fifteen days[256] but apparently did not do so. Instead, in January 2012, it requested additional information on the requirements for closure of the San Bartolo, Las Mesas, and Maderas Negras drilling sites. Further to such request, MARENA told ION to inspect the Concession Area, following which

---

BARTOLO, tales como: 1. Al requerimiento establecido según el numeral 7.3 de la NTON 14 003-04 […]. 2. No se atendió a los Términos de Referencia para la fase de cierre, emitidos por MARENA-Managua a la empresa NORWOOD el pasado 29 de Abril de los corrientes".)

[248] MARENA Inspection Report of Site Visit to San Bartolo, February 3, 2012, **Exhibit R-44**.

[249] *Id.*

[250] Norwood Technical Environmental Evaluation of San Bartolo (April/May), May 2011, **Exhibit R-31**, p. 21. The report concluded that "*no se encontraron contaminaciones en los suelos de las parcelas de remediación, pila de aguas residuales y dos pozos de aguas subterráneas muestreados que fueron perforados por la empresa Norwood, el sitio de la plataforma petrolera donde perforó Norwood está libre de contaminaciones de hidrocarburos*".

[251] MARENA Inspection Report of Site Visit to San Bartolo, February 3, 2012, **Exhibit R-44**.

[252] *Id.*

[253] *Id.*

[254] See ¶ 141 *supra*.

[255] Letter from ION (Mr. David Goyne) to the MEM, August 4, 2011, **Exhibit R-0036**, p. 3.

[256] Letter from the MEM (Mr. Geovanni Carranza) to ION, November 16, 2011, **Exhibit R-42**.

ION reported finding some concerning situations, such as the open-air storage of chemicals and asked for an official visit of the San Bartolo site.[257]

242. The report of the visit by ION's representatives and MARENA's inspectors which took place on February 3, 2012 described the situation at the site as follows:

> Actualmente se han retirado los tanques y maquinaria, solo han quedado una gran cantidad de químicos propios de la actividad, así como residuos de combustible, lodos de las lagunas, distintos tipos de residuos sólidos, entre otros. Gran cantidad de los químicos aún se encuentra empolinados y con las etiquetas de desaduanaje, su empaque se encuentra en buenas condiciones. Otra gran cantidad presentan los empaques deteriorados y en algunos no se reconoce su etiqueta.[258]

243. As a consequence, MARENA instructed ION, which it identified as the entity responsible for the remediation of the Concession Area, to execute a closure plan.[259]

244. ION having allegedly failed to comply with its environmental obligations, on March 5, 2012, MARENA initiated administrative proceedings against it, the outcome of which was administrative decision No. DTM 070312/009 which imposed a fine and ordered ION immediately to comply with its closure and remediation obligations at San Bartolo.[260]

245. On February 8, 2013, MARENA opened a second administrative proceeding against ION for breach of administrative decision No. DTM 070312/009 and the Environmental Permit.[261] MARENA's and the Office of the Attorney General's subsequent inspection of San Bartolo on February 25, 2013 confirmed that ION was not complying with its obligations.[262]

246. On February 21, 2013, ION submitted to MARENA a cleanup and remediation plan for the San Bartolo site,[263] which, according to Respondent, was never implemented.[264] Claimants challenge Respondent's presentation of the facts, noting that in February 2013 "*MARENA reported that ION had already removed 70 percent of the chemical products and was collecting the remaining sacks for transport away from the site. MARENA also reported that compacted soils were being moved to*

---

[257] MARENA Inspection Report of Site Visit to San Bartolo, February 3, 2012, **Exhibit R-44**.

[258] *Id.*

[259] *Id.*

[260] Administrative Order No. DTM 070312/009, March 5, 2012, **Exhibit R-47;** RWS-Gago, ¶ 16.

[261] Procuraduría para la Defensa del Medio Ambiente y los Recursos Naturales, File No. PNA-23-2013, February 8, 2013, **Exhibit R-64**.

[262] MARENA Inspection Report of Site Visit to San Bartolo, February 25, 2013, **Exhibit R-94**; Counter-Memorial, ¶ 421.

[263] Letter from ION (Mr. Michael Goyne) to MARENA, February 21, 2013, **Exhibit R-66**.

[264] Counter-Memorial, ¶ 422.

allow placement of 'stockpiled topsoil' on the site".[265]

247. Following a joint inspection by MEM officials and ION representatives on May 16, 2013, the MEM concluded that:

> En el sitio San Bartolo I no estaban ubicados los químicos que habían sido almacenados posterior al cierre del pozo. Representantes de INDOKLANICSA durante la inspección informaron que han sido retirados y dispuestos en una bodega de alquiler. […] La LOCACIÓN 4, se encuentra abandonada y descuidada sin ningún tipo de mantenimiento. El área de la plataforma ha sido afectada por socavación producto de las lluvias formando drenajes que arrastran el material de relleno hacia la parte más baja, esto podría afectar directamente al drenaje principal provocando sedimentación y estancamiento de la corriente natural que ocurre en invierno.[266]

248. In a report dated January 31, 2014, ION stated that it had closed the Maderas Negras and Las Mesas sites and returned the lands to their respective owners.[267] Respondent notes that the closure was not approved by the MEM and MARENA, which had not confirmed ION's compliance with its remedial obligations.[268]

249. In a January 27, 2015, inspection report, the MEM and MARENA noted that:

> El sitio San Bartolo I se encuentra en completo estado de abandono de parte del concesionario INDOKLANICSA. Las condiciones de almacenamiento de suelo de descapote y suelo tratado no son adecuadas para su posterior incorporación en las actividades de restauración del área. El terreno no ha sido nivelado, constatando la excavación en la antigua área de almacenamiento de aceites lubricantes usados y pila de lodos. El suelo presenta un alto grado de compactación en la mayor parte del área, por lo cual en las condiciones actuales no es apto para realizar actividades agrícolas.[269]

and reiterated that ION had to submit an environmental restoration and closure plan.[270]

250. On March 20, 2020, after a new inspection of San Bartolo, Las Maderas Negras and Las Mesas, MARENA and MEM concluded that ION remained in violation of its environmental obligations.[271]

---

[265] Reply Memorial, ¶ 544, summarising MARENA's Inspection Report of Site Visit to San Bartolo of February 25, 2013, **Exhibit R-94**, p. 2.

[266] MEM Technical-Environmental Inspection, May 16, 2013, **Exhibit R-74**.

[267] Letter from ION (Mr. Michael Goyne) to the MEM, January 31, 2014, **Exhibit C-133**.

[268] Counter-Memorial, ¶ 427.

[269] MEM and MARENA Inspection Report of San Bartolo I and II, January 27, 2015, **Exhibit R-92**.

[270] *Id.*

[271] MARENA Inspection Report of Site Visit to Maderas Negras and San Bartolo I and II, March 19, 2020, **Exhibit R-0097**; MARENA Inspection Report of Site Visit to Las Mesas, March 20, 2020, **Exhibit R-98**.

VII. OVERVIEW OF THE DISPUTE

251. As mentioned, the dispute submitted to the Tribunal concerns Claimants' claim that Nicaragua breached several of its obligations under the CAFTA-DR by a series of actions which led to the termination of the Concession Contract and the loss of Claimants' investment in Nicaragua. The Tribunal is also called upon to decide on the Counterclaim, relating to ION's alleged failure to comply with its environmental obligations under the Concession Contract, Environmental Permit and Nicaraguan law.

252. This section outlines the main elements of the Parties' positions, which will be analyzed in detail in the reasoning on each of the issues to be decided by the Tribunal.

VII.A Claimants' position

253. Claimants argue that Nicaragua's termination – which they refer to as "repudiation" – of the Concession Contract caused them direct and substantial harm. According to Claimants, the termination gave rise to a two-fold breach of the Treaty by Respondent.

- The first alleged breach concerns the obligation to accord the minimum standard of treatment ("**MST**") set forth in Article 10.5 of the Treaty. Claimants assert that this provision embodies a standard of treatment of aliens that is equal to the fair and equitable standard ("**FET**"). This would follow both from the text of the provision itself, which states that the FET is a component of the MST, and from the investor-State case-law that considers that over time the MST and the FET have converged. According to Claimants, in terminating the Concession Contract, Respondent breached the MST/FET by (*i*) violating Claimants' legitimate expectations based on the Contract, (*ii*) failing to act in a consistent, transparent and predictable manner, (*iii*) imposing on Claimants a measure (*i.e.* the termination of the Contract) not proportional to the breach at stake, (*iv*) acting in an arbitrary and unreasonable manner in choosing to terminate the Contract, and (*v*) failing to respect procedural propriety and to provide due process in the termination procedure.
- The second alleged breach concerns Article 10.7 of the Treaty on the prohibition of expropriation. Claimants contend that the termination of the Contract also constituted an impermissible expropriation of Claimants' investments (both their shares in ION and the Concession they indirectly held through the Company). According to Claimants, that provision is not only applicable when a State exercises its sovereign powers (which is in any case what Nicaragua did), but also when a State acts in the exercise of its contractual rights. Claimants argue that the termination breached Article 10.7 because it was wrongful, fraught with procedural errors, driven by hidden purposes and unlawful, as it failed to comply with the conditions set in Article 10.7 itself.

254. Claimants contend that those Treaty violations caused them to lose the contractual rights to exploit the Concession they held through ION, as well as the economic value of their shares in that company. According to Claimants, the corresponding damages should be quantified based on the FMV of the Concession as of December 2, 2014 ("**Date of Valuation**"). Claimants claim 58.02% of such amount, corresponding to their collective share of ownership of ION.

255. Claimants contest all of Respondent's jurisdictional objections. In particular, they maintain that they have proven their status as shareholders of ION and that they qualify as investors under the Treaty and the ICSID Convention. Further, they argue that, contrary to Respondent's allegation, the Claim can proceed under the legal basis invoked by them, *i.e*. Article 10.16.1(a) of the Treaty.

256. On the other hand, Claimants argue that the Tribunal does not have jurisdiction over the Counterclaim, which they maintain falls outside the scope of the Parties' consent to arbitration. According to them, the Treaty cannot be interpreted so as to permit counterclaims. Even if it could be so interpreted, jurisdiction over the Counterclaim should still be denied, as the Counterclaim concerns purported breaches of contracts and of Nicaraguan laws, not Treaty breaches. In any case, Claimants assert that the Counterclaim is unfounded on the merits.

VII.B Respondent's position

257. Respondent objects to the Claim, both on jurisdictional grounds and on the merits.

258. On jurisdiction, Respondent raises two main objections:

(i) *First*, it submits that Claimants have not made an investment in Nicaragua, and therefore do not satisfy the jurisdictional requirements of Article 25 of the ICSID Convention and of Article 10.28 of the Treaty, according to which only disputes relating to investments can be brought to arbitration under these instruments. Respondent contends that, because the Claim – which is for the damages suffered by them as shareholders of the Company that supposedly made an investment – was brought by Claimants on their own behalf, rather than on behalf of ION itself, jurisdiction can only exist if Claimants, as well as ION, qualify as investors. According to Respondent this two-tier test is not satisfied because neither Claimants nor ION have proven that they qualify as investors under the ICSID Convention and the Treaty. Further, according to Respondent, Claimants have not even proven that they own shares in ION.

(ii) *Second*, Respondent argues that the Claim is not admissible, because it was brought under an incorrect Treaty basis. Specifically, Respondent contends that the Claim is for reflective losses (losses suffered by the Company of which Claimants assert they are shareholders) and should accordingly have been brought under Article 10.16.1(b) of the Treaty rather than under Article

10.16.1(a), which is the basis invoked by Claimants.

259. On the merits, Respondent denies it violated Articles 10.5 and 10.7 of the Treaty, objecting to Claimants' arguments on both the characterization of the standards imposed by the two provisions and the application of those provisions to the case at hand.

260. As for the alleged violation of Article 10.5, Respondent contests the standard applied by Claimants, alleging that, by referring to the MST, the parties to the Treaty opted for a standard of treatment which is different from FET and entails a higher threshold for liability. But even if the FET applied, Respondent's behavior would be consistent with it. In fact, according to Respondent, the termination of the Contract was a lawful exercise of its contractual rights under the Concession and was respectful of the procedural rules of Nicaraguan law.

261. As for the alleged violation of Article 10.7, Respondent argues that termination of a contract by a State can only be considered an expropriation when the State acts on the basis of superior sovereign authority, outside the legal framework of the contract. As the termination of the Concession Contract was a legitimate measure adopted in accordance with Nicaragua's contractual rights under Article 32.1 of the Contract, rather than an exercise of sovereign authority, it cannot qualify as an expropriation.

262. Finally, Respondent brings the Counterclaim pursuant to Article 10 of the CAFTA-DR and Articles 25 and 46 of the ICSID Convention. Respondent thereby seeks compensation for environmental damages caused by critical violations by ION of environmental closure and remediation activities required under the Concession Contract, the Environmental Permit and ION's Environmental Impact Assessment, as well as under Nicaraguan law, which – by virtue of Articles 10.9.3.c and 10.11 of the Treaty – also amount to violations of the Treaty. According to Respondent, Claimants, as ION's majority shareholders, are jointly and severally liable for the resulting damages.

263. For Respondent, the Tribunal has jurisdiction over the Counterclaim, as this satisfies the jurisdictional requirements for counterclaims under the ICSID Convention and the Treaty. Indeed, Respondent alleges that the Counterclaim:

(i) falls within the scope of the Parties' consent to arbitration, which is established in the Treaty, and

(ii) is sufficiently connected to the principal claim, as it arises from a Treaty violation incurred by ION in the performance of the Contract the termination of which is the basis of the Claim.

264. ION's violations of the closure and remediation activities assertedly caused substantial environmental harm requiring Respondent to incur remediation and restoration costs estimated at between US$ 4.920 million and US$ 5.561 million. Therefore, Respondent requests that Claimants be ordered to cover the costs of

closure and restoration measures required to remedy the harm caused by them.

VIII. THE RELIEF SOUGHT

VIII.A Claimants

265. Claimants request from the Tribunal the following relief:[272]

(i) Declare that Nicaragua has breached articles 10.5 and 10.7 of the Treaty;

(ii) Order Nicaragua to compensate the Claimants for their losses resulting from Nicaragua's breaches of the Treaty and international law for an amount of (*a*) US$ 35.8 million, as per the Claimants' DCF valuation, or (*b*) US$ 198 million, or US$ 139.2 million, or US$ 61.6 million, as per the different scenarios in the Claimants' loss of opportunity valuation, or in subsidy (*c*) US$ 44.1 million, as per the Claimants' sunk costs valuation, in all cases, as of the Date of Valuation;

(iii) Order Nicaragua to pay pre- and post-award interest on the amounts set out in item (*ii*) above at a rate of 12.1 percent, or at any other rate that ensures full reparation, compounded annually from the Date of Valuation until full payment has been made;

(iv) Declare that: (*a*) the award of damages and interest in items (*ii*) and (*iii*) be made net of all Nicaraguan taxes; and (*b*) Nicaragua may not tax or attempt to tax the award of damages and interest and/or order Nicaragua to indemnify the Claimants with respect to any Nicaraguan taxes imposed on such amounts;

(v) Declare that it lacks jurisdiction over Nicaragua's Counterclaim;

(vi) In case the Tribunal found it had jurisdiction over Nicaragua's Counterclaim, dismiss the claims brought by Nicaragua in their entirety;

(vii) In every case, order Nicaragua to pay all the costs and expenses incurred in these arbitration proceedings, including the Claimants' legal and expert fees, the fees and expenses of any experts appointed by the Tribunal, the fees and expenses of the Tribunal, and ICSID's costs, plus interest at a rate of 12.1 percent, or at any other rate that ensures full reparation, compounded annually until full payment has been made; and

(viii) Award such other relief as the Tribunal considers appropriate.

[272] Reply, Section VII.

VIII.B Respondent

266. Respondent requests that the Tribunal issue an Award: [273]

(i) Finding that it lacks jurisdiction over all claims brought by Claimants and dismissing the claims in their entirety and with prejudice;

(ii) With respect to any claim not dismissed for lack of jurisdiction, finding that Nicaragua has not breached any obligation under the CAFTA-DR, and dismissing the claims in their entirety and with prejudice;

(iii) In the event and to the extent that Nicaragua is found to have breached any obligation under the CAFTA-DR, (1) finding that Claimants have suffered no compensable loss, (2) denying the compensation requested by Claimants, and (3) denying all interest claims made by Claimants;

(iv) Denying an order that any award granted to Claimants would not be subject to taxation within Nicaragua;

(v) With regard to Nicaragua's Counterclaim, in the event that the Tribunal determines it has jurisdiction, (1) finding and declaring that Claimants are responsible for failing to complete environmental closure and restoration activities at all affected areas within the Concession area, and that Claimants' failure to timely and properly perform its environmental closure and restoration obligations has caused environmental damage there, and (2) rendering a damages award in Nicaragua's favor to cover the costs of implementing appropriate closure and restoration measures at the sites and remedying the environmental harm caused by Claimants;

(vi) In all events, ordering Claimants to pay all costs and expenses related to this arbitration, including but not limited to the fees and expenses of the Tribunal, the administrative fees and expenses of ICSID, and all costs of Nicaragua's legal representation and expert assistance; and

(vii) Granting any other or additional relief as may be appropriate under the circumstances or as may otherwise be just and proper.

***

267. Considering the above prayers for relief, the Tribunal will analyze in succession Respondent's objections to jurisdiction over the Claim (**Section IX**), Respondent's alleged liability for the breach of Articles 10.5 and 10.7 (**Section X**), quantum (**Section XI**) and the Counterclaim (**Section XII**).

[273] Rejoinder, Section X.

IX. JURISDICTION OVER THE CLAIM

IX.A Respondent's objections to jurisdiction

268. As mentioned above, Respondent first challenges the Tribunal's jurisdiction over the Claim arguing that Claimants have not made a protected investment in Nicaragua either under Article 25 of the ICSID Convention or under Article 10.28 of the CAFTA-DR,[274] according to both of which only disputes relating to investments can be brought to arbitration under the Convention and the Treaty. This first objection is discussed in **Section IX.B** below.

269. Respondent also submits that Claimants' claims are barred because they were brought under an incorrect Treaty basis, *i.e.* Article 10.16.1(a) of the CAFTA-DR. In Respondent's view, the Claim is for reflective losses, *i.e.* losses suffered by the company of which Claimants are shareholders, and should therefore have been brought under Article 10.16.1(b) of the Treaty. This second objection is addressed in **Section IX.C** below.

270. The Tribunal notes that pursuant to Article 41(1) of the ICSID Convention it "*shall be the judge of its own competence*" and that none of the Parties has raised any objection on this point.

IX.B Whether Claimants have made a protected investment

IX.B.1 The Parties' position

IX.B.1.a Respondent's position

271. Respondent submits that, since Claimants brought the Claim on their own behalf, for the damages suffered by themselves, as shareholders of the Company that supposedly made an investment (ION), rather than on behalf of ION, a two-tiered test is required in order to establish whether the Tribunal has jurisdiction. That test requires demonstrating that each Claimant made an investment in ION and as well as that ION made an investment in the exploration for hydrocarbons in Nicaragua.[275]

272. In support of this two-tiered test, Respondent relies on *Société Civile v. Guinea*, in which the tribunal noted that "*the Arbitral Tribunal cannot take jurisdiction over the Claimant on the basis of a contribution that is not its own, even if the transaction in question could itself be qualified as an investment under the applicable law*"[276] and that "*it is necessary that the expenses in connection with the relevant*

[274] Counter-Memorial, Section V; Rejoinder, Section V.

[275] Counter-Memorial, ¶ 222; Rejoinder, ¶ 165.

[276] *Société Civile Immobilière de Gaëta v. Republic of Guinea*, ICSID Case No. ARB/12/36, Award, December 17, 2015, **Exhibit RLA-89*bis***, ¶ 223. See RD-6, slide 22.

transaction are incurred by the person availing himself of the protection granted by the ICSID Convention or is in some way responsible for them".[277] Respondent also highlights that the *Caratube* tribunal held that "*there […] needs to be some economic link between that capital [used to make an investment] and the purported investor that enables the Tribunal to find that a given investment is an investment of that particular investor*".[278]

273. According to Respondent, the test to determine whether an investment has been made is the same at both levels, that of ION and that of Claimants, and in both cases must be performed under Article 25 of the ICSID Convention as well as under Article 10.28 of the CAFTA-DR, as the "*jurisdictional requirement of an investment under Article 25(1) is independent of a requirement in an investment treaty that an investor make an investment*".[279] For Respondent such a two-pronged test is required for two reasons. First, because the concept of "investment" has a different focus – and thus a different meaning – in investment treaties compared to the ICSID Convention.[280] Second, because that test ensures that only disputes that State parties to the ICSID Convention consented to submit to arbitration are actually adjudicated by ICSID tribunals.[281]

274. The relevant test under Article 25 of the ICSID Convention is the so-called *Salini* test according to which the elements of an investment are (*i*) contribution of money or other resources; (*ii*) participation in the risks of the transaction; (*iii*) a duration of performance; and (*iv*) contribution to the economic development of the host State.[282]

275. According to Respondent, these elements are "*the accepted starting point to determine whether there is an 'investment' within the meaning of Article 25(1)*".[283]

---

[277] *Id.*, ¶ 231. See RD-6, slide 22.

[278] *Caratube Int'l Oil Co. LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award, June 5, 2012, **Exhibit RLA-124**, ¶ 355. See RD-6, slide 23.

[279] Counter-Memorial, ¶ 229. See also Rejoinder, ¶ 175, quoting *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award, December 1, 2010, **Exhibit RLA-0050**, ¶ 43.

[280] Counter-Memorial, ¶ 230, citing *Abaclat and Others v. The Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, August 4, 2011, **Exhibit RLA-54**, ¶ 347, and noting that "*the concept of "investment" in investment treaties focuses 'on the rights and the value that potential contributions from investors may generate,' while 'the concept of investment as contemplated by the ICSID Convention relates more to the contribution itself*'."

[281] Counter-Memorial, ¶ 231.

[282] *Salini Costruttori S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, July 23, 2001, **Exhibit RLA-10,** ¶ 52. See Counter-Memorial, ¶ 233.

[283] Counter-Memorial, ¶ 233 and fn. 418, referring to a number of disputes in which tribunals took into account the *Salini* test to ascertain whether the investors had made a protected investment under the ICSID Convention. See also Rejoinder, ¶ 178.

Respondent observes that Claimants' denial of the crucial role of the *Salini* test in international investment law[284] is contradicted by the very authorities quoted by them and that the case-law is settled on the point. In fact, for Nicaragua the only disagreement is on the indispensability of the fourth factor of the *Salini* test, the contribution to the host State's economic development, so that even if the Tribunal were unconvinced of the need to apply that factor, each Claimant would still have to satisfy the first three.[285]

276. As for the meaning of "investment" under the CAFTA-DR, Respondent argues that for an investment to qualify as such, it is insufficient that it takes a form listed by Article 10.28. In fact, it must also "*have* 'the characteristics of an investment,' *which expressly include, but are not limited to,* 'the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk'". [286] Respondent maintains that, contrary to Claimants' position, these characteristics are not alternative, but that the point is in any case immaterial, as investment treaty tribunals have found that an asset has the characteristics of an investment if the investor "*at minimum, make*[s] *an active contribution over a period of time that requires a degree of risk*".[287]

277. Finally, according to Nicaragua, the characteristics listed in Article 10.28 of the Treaty "*are virtually identical to the first three Salini factors*", so that "*regardless of whether the Tribunal determines that Claimants must satisfy the investment requirements of both Article 25 and DR-CAFTA (as Nicaragua contends), or only the requirements of DR-CAFTA (as Claimants argue), it must still decide whether each Claimant has satisfied the first three Salini criteria*".[288]

278. According to Respondent, Claimants have not shown that either they or ION made an investment that satisfies that test.[289]

279. As to ION, Respondent alleges that it does not qualify as an investor because:

(i) Contribution: ION made no contribution to the purported investment. In fact, the responsibility for financing and performing exploration activities in the Concession Area was transferred to Norwood on the day of the signing of the Concession Contract.[290] Thus, while Norwood would certainly qualify as an

---

[284] Reply, ¶¶ 240 ff.

[285] Rejoinder, ¶¶ 179-181.

[286] Rejoinder, ¶ 184, quoting Article 10.28 of the CAFTA-DR.

[287] Rejoinder, ¶ 185 and fn. 365.

[288] Rejoinder, ¶ 186.

[289] Counter-Memorial, ¶¶ 222-223; Rejoinder, ¶ 165.

[290] Subcontractor Agreements between ION and Norwood Resources Ltd. and ION and Norwood Nicaragua S.A., April 23, 2004, **Exhibit C-4**, p. 3; Operating Agreement between Norwood and ION, August 22, 2005, **Exhibit R-7**, Arts. 4.1, 5.1, quoted in Counter-Memorial, ¶ 240.

investor under the ICSID Convention and the Treaty, Respondent argues that the same is not true of ION.[291] Respondent disagrees that resources contributed by Norwood can be imputed to ION, since ION and Norwood were separate entities and the latter operated according to its own interests, so much so that the Amended Sub-Contractor Agreement stated that Norwood was "*acting independently of* [ION] *and not as a partner in any capacity, whether in oil and gas exploration and/or development or otherwise*".[292] As a matter of principle, according to the text of Article 25 of the ICSID Convention and case-law, a claimant cannot "*piggyback off*" the investment made by another entity, but instead must offer its own contributions in order to satisfy the contribution criterion. Further, even if in principle it were possible to ascribe contributions of one entity to a different entity, ION's behavior does not allow this conclusion.[293] Indeed, according to Respondent's account, ION made no contribution to exploration activities and did not even support Norwood.[294] Further, Respondent notes that ION did not make any contribution even after Norwood exited the Concession, but merely requested extensions of the Concession while it looked for another company to provide resources and technical capacity.[295] On this point, Respondent alleges that none of the activities listed by Claimants in their Reply[296] satisfies the contribution criterion of an investment, apart from one check from ION to the MEM for US$ 2,385 dated March 11, 2014 on which Claimants, however, do not offer any information.[297] Indeed:

- the performance bond posted by ION on November 17, 2011 was paid by Claimant LG Hawaii Oil & Gas Co. and was collected for ION's failure to invest in exploration activities;[298]
- ION's planned remediation activities were never executed (or at least properly executed), but in any case, would qualify as mitigation of damages activities and not as contributions to exploration activities;[299]
- activities related to the LOC4 well cannot amount to contributions, as ION

[291] Rejoinder, ¶ 226.

[292] See Amended ION-Norwood Sub-Contractor Agreement, August 10, 2004, **Exhibit R-3**, p. 3, as quoted in Rejoinder, ¶ 226.

[293] Rejoinder, ¶ 230.

[294] Rejoinder, ¶¶ 227, 229.

[295] Counter-Memorial, ¶¶ 241-246.

[296] Reply, ¶ 263.

[297] Rejoinder, ¶¶ 214, 217.

[298] Counter-Memorial, ¶ 247; Rejoinder, ¶ 211.

[299] Rejoinder, ¶ 212.

never conducted exploration work at the site;[300]

- the Sproule and Davis Reports and a proposal for services by IRM were not paid for by ION (but by Claimant LG Hawaii Oil & Gas Co.) and anyway do not amount to exploration contributions;[301]
- Claimants have submitted no information about the office ION opened in Nicaragua and how its activities amount to a contribution.[302]

(ii) Risk: ION did not assume the risks associated with the alleged investment. In fact, ION's strategy in Nicaragua was always to insulate itself from risks associated with exploration activities.[303] Norwood initially assumed the risk associated with the Concession, as demonstrated by the operating agreement between Norwood and ION,[304] the Sub-Contractor Agreement and Amended Sub-Contractor Agreement.[305] That ION did not bear any risk of the sort is evidenced by the fact that "*ION did not similarly impair the value of its property or suffer financially as Norwood did*".[306] After Norwood's bankruptcy, consistent with its strategy to insulate itself from risk, "*ION searched for another company to bear the investment risk*" rather than bearing such risk itself.[307]

(iii) Contribution to the economic development of the host State: ION failed to satisfy the fourth requirement of the *Salini* test.[308] Any such contribution should be imputed to Norwood and Claimants' argument that those contributions were made on ION's account is unavailing.[309] After Norwood exited the Concession, ION not only failed to contribute to Nicaragua's development,[310] but even hampered it.[311]

---

[300] Rejoinder, ¶ 213.

[301] Rejoinder, ¶ 215.

[302] Rejoinder, ¶ 216.

[303] Counter-Memorial, ¶ 256.

[304] Operating Agreement between Norwood and ION, August 22, 2005, **Exhibit R-7**, Arts. 4.1, 5.1, quoted in Rejoinder, ¶ 220.

[305] Amended ION-Norwood Sub-Contractor Agreement, August 10, 2004, **Exhibit R-3**, p. 3; Subcontractor Agreements between ION and Norwood Resources Ltd. and ION and Norwood Nicaragua S.A., April 23, 2004, **Exhibit C-4**, p. 3, quoted in Rejoinder, ¶ 241.

[306] Counter-Memorial, ¶ 254.

[307] Counter-Memorial, ¶ 255. See also Rejoinder, ¶ 242.

[308] Rejoinder, ¶ 251.

[309] Rejoinder, ¶ 252.

[310] Rejoinder, ¶ 253.

[311] Counter-Memorial, ¶ 263. See also Rejoinder, ¶ 253.

280. As to Claimants, Respondent submits that not even they satisfy the *Salini* test, because there is no proof that any one of them invested in ION.[312]

281. On a first level, Respondent contends that Claimants failed to prove their ownership of shares in ION, as the evidence on the record, *i.e.* the "*photograph of a handwritten, often illegible, ledger*", is unreliable.[313] The shareholders' ledger is difficult to read and there is no proof of its truthfulness and completeness.[314] Moreover, Respondent remarks that two pages relating to the issuance of new "Series B" shares are missing from the ledger, suggesting that that could conceal a dilution of Claimants' shareholding.[315] Further, Respondent argues that the photographs contradict the additional documentation submitted by Claimants in an attempt to prove their ownership of ION.[316] There would even be inconsistencies between Claimants' assertions in these proceeding and the photographs of the ledger, as to whether the Lopez-Goyne Family Trust, Nancy Cederwall Trust and Ms. Diane Elizabeth Radu own shares of ION.[317] Finally, it submits that none of the "Trust Claimants" would have submitted together with the trust documents a schedule of trust property showing that the trusts own shares of ION.[318]

282. On a second level, Respondent submits that even if Claimants' ownership of shares in ION were proven, this would not be sufficient to prove that they made a protected investment. By contrast, in order to satisfy the contribution criterion, Claimants should have proven that they committed resources to ION.[319] In support

---

[312] Counter-Memorial, ¶ 234; Rejoinder, ¶ 165.

[313] Rejoinder, ¶¶ 190-199. Respondent confirmed its position in the Hearing (Tr. Day 6, pp. 1379:8 ff.)

[314] Rejoinder, ¶ 191.

[315] Rejoinder, ¶ 192.

[316] Rejoinder, ¶ 194.

[317] As for the Lopez-Goyne Family Trust, Respondent notes two inconsistencies, namely that (*i*) while Claimants state that the Trust holds 110,000 shares of ION, the ledger would indicate otherwise, and that (*ii*) the ledger shows that the Trust held shares in ION as a result of ION's stock split of February 2013, while the Trust would have been created in March 2014 and executed in May 2014 (Rejoinder, ¶ 195).

As for the Nancy Cederwall Trust, Respondent observes that while Claimants assert that it holds 10,000 shares in ION, the ledger evidences ownership of 20,000 B shares only, first recorded after ION's stock split, with no indication of a transfer of shares in the Trust's favor. Additionally, Respondent claims that the terms of the Trust provided that it should have dissolved before the ION stock split and the ION shares distributed amongst the beneficiaries. Finally, Respondent argues that "*if the shares were and still somehow are Trust property, Claimant Radu cannot bring a claim on behalf of the Trust without the other Co-Trustee, or without the other Co-Trustee's executed special power in favor of Radu allowing her to bring the claim*" (Rejoinder, ¶¶ 196-197).

[318] Rejoinder, ¶ 198.

[319] Counter-Memorial, ¶¶ 238-239.

of this theory, Respondent cites decisions in *Quiborax S.A. v. Bolivia*[320] and *KT Asia Investment Group B.V. v. Kazakhstan*, [321] which according to it – contrary to Claimants' assertion – are "*directly analogous to this case*",[322] as well as *Caratube v. Kazakhstan*[323] and *Société Civile Immobilière de Gaëta v. Republic of Guinea*.[324]

283. According to Respondent, Claimants failed to meet this burden, as the ledger submitted in these proceedings "*does not show that any Claimant bought shares of ION, transacted for ownership of shares in ION, or otherwise contributed money, assets, or other resources to ION*".[325]

284. According to Nicaragua, like ION, Claimants do not meet any of the requirements of the *Salini* test, because:

(i) Contribution: there is no evidence that Claimants made a financial contribution to their alleged investment. Even if Claimants had proven their status as ION's shareholders, the mere ownership of shares would not be evidence of a contribution. In fact, the Respondent argues, Claimants should have proven that they committed resources to ION.[326] Respondent argues that the evidence of contributions of resources relates only to some of the Claimants and thus cannot be imputed to all of them. The contribution criterion requires a personal contribution of resources directly related to the investment.[327] A different interpretation would not only entail an excessively broad interpretation of Article 25 that would allow an investor to "*piggyback off another individual's or entity's investment*",[328] but would also be at odds with case-law, as "[t]*ribunals have consistently found that a claimant must satisfy the contribution criterion through their* [sic] *own contributions, not through the contributions of others*".[329] In this case, even if "*one Claimant's investment could impute to*

[320] *Quiborax S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, September 27, 2012, **Exhibit RLA-62**, ¶¶ 232-233.

[321] *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, October 17, 2013, **Exhibit RLA-72**, ¶¶ 204-206 *("KT Asia agreed to buy the BTA shares at undervalue, and in the event paid nothing for those shares […] KT Asia has made no contribution with respect to its alleged investment*").

[322] Rejoinder, ¶¶ 201 ff.

[323] *Caratube Int'l Oil Co. LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award, June 5, 2012, **Exhibit RLA-124**, ¶ 117.

[324] *Société Civile Immobilière de Gaëta v. Republic of Guinea*, ICSID Case No. ARB/12/36, Award, December 17, 2015, **Exhibit RLA-89bis**, ¶¶ 219-231.

[325] Counter-Memorial, ¶ 238 (emphasis in the original).

[326] Counter-Memorial, ¶¶ 238-239.

[327] Rejoinder, ¶ 231.

[328] Rejoinder, ¶ 220.

[329] Rejoinder, ¶¶ 221 ff.

another Claimant, no Claimant would satisfy the contribution requirement because no Claimant contributed directly to the exploration for hydrocarbons in the Concession area".[330] In particular,

- some of the individuals who allegedly made contributions are not shareholders of ION, but rather bring the Claim against Nicaragua as trustees. Any personal contributions of these individuals cannot satisfy the contribution element for shareholding trusts;[331]
- some of the alleged contributions relate to exploration activities conducted in the 1990s.[332] Not only is there no evidence that those contributions were made by Claimants, but, in any case, those contributions would also not amount to contributions to the investment at issue;[333]
- the US$ 900,000 allegedly spent by LG Hawaii Oil & Gas and LG Hawaii Development Corp. were not spent on exploration, but rather to obtain the issuance of the performance bond and "*for unidentified purposes*".[334]

(ii) Risk: Claimants did not participate in the risks of the alleged investment. According to Nicaragua, that requirement is satisfied if *(i)* the investor "*stands to either lose or win its commitment of resources towards* [its] *investment*", *(ii)* the risk is related to the investment, and *(iii)* the investor does not use methods to shield itself from risk.[335] None of these requisites is met. In fact, Nicaragua maintains that "*because Claimants here have not shown that they contributed money or other resources to ION, they have not shown that they assumed any risk of losing money or resources*".[336] Nicaragua further notes that even if a contribution in ION had been established, Claimants still would not have assumed the risks associated with the alleged investment (*i.e.* the Concession), as "*ION's strategy in Nicaragua was always to ensure that another company*

[330] Rejoinder, ¶ 231.

[331] Rejoinder, ¶¶ 233, 236. Respondent further notes that some of the contributions ascribed to these individuals would have occurred before the trusts were even constituted. Further, as far as Michael Goyne and Emily Lopez-Goyne are concerned, Nicaragua argues that "*moving to Nicaragua and working for ION does not demonstrate a contribution to exploration activities*" as ION did not perform any exploration activity.

[332] Reply, ¶ 256; Claimants' Rejoinder, ¶ 67.

[333] Rejoinder, ¶ 234.

[334] Rejoinder, ¶ 235. According to Respondent, that money could not have been spent on exploration activities, as ION performed none.

[335] Counter-Memorial, ¶ 251 and case-law referred to therein.

[336] Counter-Memorial, ¶ 252. See also Rejoinder, ¶ 238.

bore all the risk associated with exploration activities in the Concession area".[337]

(iii) Duration: Claimants' alleged investment does not satisfy the duration requirement, pursuant to which the investment must last for at least two to five years.[338] Even if Claimants had proven a contribution in ION, a number of them would have become ION's shareholders in March or April 2014, at best nine months before the termination of the Concession Contract,[339] while others in February 2013.[340] Respondent disagrees that the relevant timeframe to assess the duration of an investment is "*the duration foreseen at the time an asset or property is acquired*"[341] and notes that even if that were the case, in February 2013 "*Claimants could not reasonably foresee that ION's Concession Contract would last the two-to-five years needed to satisfy the duration requirement*".[342]

(iv) Contribution to the economic development of the host State: Claimants did not contribute to the economic development of Nicaragua, as no such contribution was made through ION.

IX.B.1.b Claimants' position

285. Claimants contend that there is no basis for requiring a two-pronged analysis of the investment on the grounds that the definition of "investment" under Article 25(1) of the ICSID Convention would be distinct from that in Article 10.28 of the CAFTA-DR.

286. In fact, quoting *Abaclat v. Argentina*, Claimants argue that "*the term* 'investment' *had been deliberately left undefined in the ICSID Convention*" so that "*the critical criterion adopted was the consent of the parties*" under the relevant treaty.[343] Accordingly, Claimants allege that, under the prevailing view in both doctrine and case-law, Article 25(1) of the ICSID Convention should not be saddled with requirements, such as the ones of the *Salini* test, which are additional to those listed by the applicable treaty.[344] Rather, in considering whether an investment falls under the purview of the ICSID Convention, tribunals would generally defer to the

---

[337] Counter-Memorial, ¶ 256.

[338] Counter-Memorial, ¶ 257, referring to *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, October 17, 2013, **Exhibit RLA-72**, ¶ 208; *Salini Costruttori S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, July 23, 2001, **Exhibit RLA-10**, ¶ 54.

[339] Counter-Memorial, ¶ 259. See also Rejoinder, ¶ 247.

[340] Rejoinder, ¶ 246.

[341] Reply, ¶ 271.

[342] Rejoinder, ¶ 246.

[343] Reply, ¶ 245, quoting *Malaysian Historical Salvors Sdn Bhd v. Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, April 16, 2009, **Exhibit RLA-39**, ¶ 71.

[344] Claimants' Rejoinder, ¶¶ 44-48 and doctrine and case-law cited therein.

notion of "investment" in the relevant treaty, which crystallizes the intention of the signatory States on the point.[345]

287. Case law therefore, far from recognizing the *Salini* test as a standard starting point, shows that "*the correct understanding of the meaning of the word "investment" in Article 25(1) of the ICSID Convention is that it is more or less coterminous with the term as it appears in the relevant BIT*".[346] This would be particularly relevant in the case at stake, as Article 10.28 of the CAFTA-DR already defines the characteristics of an investment.[347]

288. Claimants add that even when tribunals have taken into account the factors of the *Salini* test, they have not considered them as "*mandatory legal requirements that an investor must satisfy*",[348] but rather "*as* 'typical features of investments' *that may be of assistance* 'in extreme cases', *provided that they are not invoked to defeat the definition of investment in the relevant treaty*".[349] The one at stake is not such an extreme case. Claimants deny that their position is contradicted by the case-law they rely on.[350] They accuse Nicaragua of selectively quoting *Abaclat v. Argentina*, *Deutsche Bank AG v. Sri Lanka*, *Ambiente Ufficio v. Argentina* and *Hassan Awdi v. Romania*, all of which rejected the notion that the *Salini* factors are mandatory requirements for an investment to be protected.[351]

289. Further, Claimants contest that Article 10.28 of the CAFTA-DR, in listing the characteristics of a protected investment, imposes a standard virtually identical to the first three requirements of the *Salini* test.

290. First, Claimants highlight that, since *Salini v. Morocco* was issued years before the negotiations of the CAFTA-DR even began, the Contracting States would have included the *Salini* factors in the definition of "investment" under Article 10.28 had they intended them to be a condition for bringing claims under the CAFTA-DR.[352]

---

[345] Claimants' Rejoinder, ¶ 49.

[346] Reply, ¶ 239, quoting J.A. Bischoff and R. Happ, "*The Notion of Investment*", in M. Bungenberg *et al*. (eds), *International Investment Law: A Handbook* (2015), **Exhibit CLA-144**, p. 3. See also Claimants' Rejoinder, ¶ 44 and ¶ 50, where Claimants recognize that some tribunals have applied the *Salini* test as mandatory, but state that "*the existing divergence confirms that, at the very least, the test is far from being an accepted standard*".

[347] Reply, ¶ 246; Article 10.28 of the CAFTA-DR.

[348] Reply, ¶¶ 240-243 and case-law quoted therein.

[349] Reply, ¶ 244, quoting *Philip Morris Brand Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction, July 2, 2013, **Exhibit CLA-142**, ¶ 206.

[350] Rejoinder, ¶¶ 176, 179-181.

[351] Claimants' Rejoinder, ¶¶ 45-49.

[352] Reply, ¶ 246. See also Claimants' Rejoinder, ¶ 53.

291. Claimants submit that the "*characteristics of an investment*" listed in Article 10.28 of the Treaty are not cumulative and mandatory, but rather, indicative examples expressed as alternatives, as evidenced by the use of "*or*" and by the expression "*including such characteristics as*".[353] Thus, Claimants assert that, as underscored by case-law cited by Nicaragua itself,[354] Article 10.28 simply requires an assessment of whether their assets have any of the characteristics of an investment, which are not limited to the three identified in its text.[355] On this point, Claimants note that in any event the ownership of shares in an oil company presents the "*quintessential characteristics of an investment*", *i.e.* the expectation of profit and the related assumption of risk.[356]

292. Against this backdrop, Claimants conclude that Nicaragua is attempting to re-write the ICSID Convention and the Treaty by "*impos*[ing] *restrictions on the concept of investment that neither the initial signatories of the ICSID Convention nor Nicaragua, both in the context of the ICSID Convention and of the Treaty, intended to apply*".[357]

293. Likewise, Claimants argue that there is no basis for the two-tiered test employed by Respondent, and its "*attempt to defeat jurisdiction by separating 'ION's contributions' from the 'Claimants' contributions' is misconceived*" and inapposite.[358]

294. In any case, even under the *Salini* test and Respondent's two-pronged test, the Tribunal would have jurisdiction over the Claim, as both ION and Claimants qualify as investors.

295. As for ION, it contributed to the investment. First, Norwood's contributions can be attributed to ION, as Norwood acted on ION's account and behalf, as established by the Sub-Contractor Agreement.[359] Contrary to Respondent's assertion,[360] the lack of a direct relation between Nicaragua and Norwood and the fact that Article 28 of Law 286 established that "[e]*l contratista podrá utilizar los servicios de sub-*

---

[353] Claimants' Rejoinder, ¶ 18.

[354] *Ibid*., with reference to *Jin Hae Seo v. Government of the Republic of Korea*, HKIAC Case No. 18117, Final Award, September 27, 2019, **Exhibit RLA-143**, ¶¶ 94-95.

[355] Claimants' Rejoinder, ¶ 19.

[356] Claimants' Rejoinder, ¶ 18.

[357] Claimants' Rejoinder, ¶ 54.

[358] Reply, ¶ 259. See also Claimants' Rejoinder, ¶ 73.

[359] Sub-Contractor Agreement between Norwood and ION, April 23, 2004, **Exhibit C-4**, p. 2, quoted in Reply, ¶ 260: "*The duties of the Sub-Contractor are to conduct, at its own expense, specific work relative to Operations as defined in the Contract under the supervision and for the account of the Contractor*". See also Claimants' Rejoinder, ¶ 69.

[360] Rejoinder, fn. 450.

contratistas especializados, conservando el control y la responsabilidad total sobre las mismas frente al Estado"[361] is relevant for this point, as it confirms that Norwood acted on ION's behalf in connection to the Concession.[362] ION also made direct contributions both before[363] and after[364] Norwood's involvement in the Concession. On this point, Claimants object to Respondent's argument that only "direct" contributions satisfy the contribution criterion for an investment. In any case, all the activities mentioned in the Reply can be considered "*exploration-related*",[365] also considering that "*ION's sole business activity was the exploration and development of hydrocarbons under the Concession Contract. It follows that all of ION's actions and expenses were inevitably related to that activity*".[366]

296. ION also satisfies the risk requirement. Claimants reject Respondent's assertion that ION shielded itself from the risks of operating the Concession and transferred them to Norwood,[367] noting that "*ION remained liable to Nicaragua for performance of the Concession Contract*"[368] in accordance with Article 3 of the Concession Contract.[369] Moreover, the operating agreement between Norwood and ION assigned liability to both ION and Norwood in proportion to their respective working interests[370] and limited Norwood's liability as an operator to losses sustained or

---

[361] Law 286, 18 March 1998, **Exhibit C-1**, Article 28, as quoted in Reply, ¶ 261.

[362] Claimants' Rejoinder, ¶ 69.

[363] Representatives of ION "*liaised with the INE for several years with the view to obtaining the right to explore and exploit the concession*", ION participated in the bidding process for the Concession and representatives of ION found partners to develop the Concession. See Reply, ¶ 262; CWS-Goyne I, ¶ 17.

[364] After Norwood's bankruptcy and subsequent exit from the Concession, ION maintained an office with full-time employees in Nicaragua, paid the performance bond that Nicaragua later collected, commissioned cleaning activities in San Bartolo, prepared and filed an environmental planning document for LOC4, performed a topographic survey on the LOC4 well and carried out road construction work, commissioned the Sproule and the Davis Reports as well as the IRM Program, prepared and filed a closure plan for San Bartolo and an environmental characterization of San Bartolo II and paid area rights and fees to the MEM. See Reply, ¶ 263. In response to Respondent's argument that the payment for the performance bond, the Sproule and Davis Reports and the IRM Program cannot be qualified as contributions by ION as payments were made by some of the Claimants and not directly by ION, Claimants observe that "[e]*ach of these payments was evidently made for the benefit of ION irrespective of the party wiring the funds*", thus "*Nicaragua cannot artificially discard them and pretend that they were not made*" (Claimants' Rejoinder, ¶ 74).

[365] Claimants' Rejoinder, ¶ 78.

[366] Claimants' Rejoinder, ¶ 78.

[367] Counter-Memorial, ¶¶ 253-254.

[368] Reply, ¶ 267.

[369] Reply, ¶ 266. See also Claimants' Rejoinder, ¶ 85.

[370] Operating Agreement between Norwood and ION, August 22, 2005, **Exhibit R-7**, Article 3.1. Reply, ¶ 270. See also Claimants' Rejoinder, ¶ 85.

liabilities incurred resulting from gross negligence or willful misconduct.[371] Further, any payment made by Norwood in relation to the Concession was made for the account of ION, which therefore remained liable.[372] Finally, Claimants argue that "*even if Norwood had shielded ION from all the risks while the Subcontractor Agreements remained in place (which it did not), this could no longer be the case after those agreements were terminated*".[373]

297. ION likewise satisfies the requirement of contribution to the host State's economic development, which in any case is not a necessary element for an investment under the ICSID Convention.[374] First, Norwood's contribution consisted in activities Norwood performed "*on ION's behalf and for ION's account*".[375] Moreover, ION directly contributed to the economic development of Nicaragua by maintaining an office there, hiring advisors, consultants and geologists, producing technical studies on the Concession, and seeking a deal to finance additional drilling and exploration.[376] According to Claimants, "[i]*t was Nicaragua's own conduct, not ION's, that has meant that valuable resource remains untapped*".[377]

298. As for Claimants, they were all shareholders of ION "*at the time of Nicaragua's measures, at the time the claim was submitted to arbitration, and they are still shareholders as of today*".[378] Claimants argue that Respondent's objection is made in bad faith, as Respondent has been dealing with Claimants for years in relation to ION's affairs.[379] In any event, copies of ION's stock ledger are sufficient to prove ownership of shares according to the Nicaraguan Commercial Code.[380] Claimants also note that the photographs are a "*perfectly legible*" reproduction which Respondent received with the Notice of Arbitration.[381] As for the two missing pages,

---

[371] Reply, ¶ 267, quoting Operating Agreement between Norwood and ION, August 22, 2005, **Exhibit R-7**, Article 4.1(b). See also Claimants' Rejoinder, ¶ 85.

[372] Claimants' Rejoinder, ¶ 85.

[373] Claimants' Rejoinder, ¶ 86.

[374] Reply, ¶ 274 and fn. 667 to 669.

[375] Reply, ¶ 275.

[376] Reply, ¶¶ 275-276; Claimants' Rejoinder, ¶ 95.

[377] Reply, ¶ 276.

[378] Tr. Day 6, pp. 1242:21-1243:4. See also CD-5, slide 10, noting – for each Claimant – date and manner of acquisition of shares in ION.

[379] Reply, ¶ 233.

[380] Reply, ¶ 233; Claimants' Rejoinder, ¶ 23.

[381] Claimants' Rejoinder, ¶ 26. Claimants further note that the stock ledger must be assumed to be authentic, as Nicaragua has not "*specifically objected*" to its authenticity as per Section 18.6 of the PO1. Claimants nonetheless "*offer*[ed] *the stock ledger for physical inspection by Nicaragua if required*" (Claimants' Rejoinder, ¶¶ 27-28).

the nature of the missing content was reported to Respondent, and its counsel did not raise follow-up queries.[382] In regard to the alleged inconsistencies between the stock ledger and other documents, Claimants note that "*Claimants' share certificates — which Nicaragua has not challenged in any way — confirm the Claimants' ownership of ION's shares as asserted*".[383] Finally, Claimants consider misconceived Respondent's assertion on the confusion as to how and whether the Lopez-Goyne Family Trust, Nancy Cederwall Trust and Diane Elizabeth Radu own shares of ION.[384]

299. Claimants contend that ownership of shares should be enough for them to qualify as investors. Nicaragua's contrary position was rejected by numerous investment treaty tribunals and Nicaragua misconstrues the cases on which it relies which dealt with specific and extreme circumstances "*clearly distinguishable*" from the instant case.[385] By contrast, the case-law shows that there is no principled basis for excluding an investor from treaty protection because it has acquired shares gratuitously or for low amounts,[386] as confirmed by the text of Article 10.28 of the CAFTA-DR [387] and, according to Claimants, recognized by Respondent in its Rejoinder.[388] In any case, Claimants argue that none of them acquired shares in ION

---

[382] Claimants' Rejoinder, ¶¶ 28-30. According to Claimants, the missing information would be irrelevant for the purpose of the Claim, given that it reflected a transfer of shares dated October 2015.

[383] Claimants' Rejoinder, ¶ 32. Claimants add that "*clerical mistakes in a meeting transcript […] may not rebut the information included in the stock ledger (which is in turn supported by the Claimants' share certificates)*" (Claimants' Rejoinder, ¶ 34).

[384] With respect to the Lopez-Goyne Family Trust, Claimants argue that the 110,000 shares in ION the Trust holds were validly transferred to it. The transfer resulted from the share split of February 2013, but the new shareholdings could only apply after the Nicaraguan authorities approved the amendment of ION's governing laws (February 2014). The Trust was created in March 2014 and the new shares resulting from the split were registered as belonging to it (Claimants' Rejoinder, ¶ 38).

With respect to the Nancy Cederwall Trust and Diane Elizabeth Radu, Claimants note that "*Claimants brought a claim for 10,000 of the 20,000 shares owned by the Nancy Cederwall Trust, which – contrary to Nicaragua's claims – has not been dissolved (as no provision in the trust documents provides for its dissolution). In any case, upon the distribution of the assets of the trust, Ms. Radu (who is a Claimant) would receive the 10,000 shares for which claims have been brought in this arbitration*" (Claimants' Rejoinder, ¶ 40).

[385] Reply, ¶ 251, fn. 581, ¶¶ 252-254; Claimants' Rejoinder, ¶ 28, fn. 108, ¶¶ 58 ff. In particular, Claimants argue that Respondent misconstrues *KT Asia Investment Group B.V. v. Kazakhstan* and *Caratube v. Kazakhstan*.

[386] Reply, ¶ 251 and fn. 582; Claimants' Rejoinder, ¶ 61. In particular, Claimants quote *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award, June 26, 2009, **Exhibit CLA-163**, ¶¶ 187-189, in support of their position.

[387] Claimants' Rejoinder, ¶ 62.

[388] Claimants' Rejoinder, ¶ 62, referring to Rejoinder, ¶ 206, stating that "*tribunals have found that in some instances involving transfers of assets and rights, the transferee may not need to show a new contribution when the transferor [already] made a contribution*".

gratuitously.[389] As a matter of fact, it would "*def*[y] *credulity that shareholders of an oil company holding a 30-year Concession Contract would simply give away their shares for free. That the relevant purchase agreements (in some cases going back several decades) may not be located due to the passage of time cannot result in such an unreasonable conclusion*".[390]

300. In any event, the Claimants allege that they satisfy the *Salini* test.

301. As for contribution, proof of the ownership of shares in ION has been offered (owning shares in ION is by itself evidence of a contribution) and even if additional contributions of resources on Claimants' part were required, Claimants have met this burden. On the one hand, none of them acquired shares in ION gratuitously.[391] On the other hand, Claimants made disbursements to finance administrative and operating costs ION incurred in connection to the Concession Contract.[392] On this point, Claimants submit that Respondent misrepresents their position when it asserts that they are attempting to piggyback off investments made by others when they impute the "contributions" of some Claimants to the whole group. Indeed, Claimants' position is that even if Claimants were required to contribute resources beyond the ownership of shares, they have met this burden as they "*evidently made significant contributions*".[393] Notably,

- some Claimants "*raised capital and invested their time and money to gather technical and geological information*" in the context of the early 1990s exploration activities in Nicaragua;[394]
- representatives of ION negotiated the Concession Contract;[395]
- through ION, ION's shareholders sought and found partners to develop the Concession. Amongst them Norwood, which "*was able to obtain financing to perform activities in the Concession area relying on the information obtained through Claimants' early exploration activities"* and *"carried out works in the Concession in its capacity as ION's sub-contractor and on ION's behalf*";[396]
- after Norwood's bankruptcy, "*Claimants financed (directly or indirectly) ION's administrative and operating expenses in the amount of approximately US$ 1 million*" and Mr. Michael Goyne and Ms. Emily Lopez-Goyne "*moved to*

[389] Claimants' Rejoinder, ¶ 63.

[390] Claimants' Rejoinder, ¶ 64.

[391] Claimants' Rejoinder, ¶ 63.

[392] Claimants' Rejoinder, ¶ 75 and fn. 171.

[393] Claimants' Rejoinder, ¶ 65.

[394] Reply, ¶ 256; Claimants' Rejoinder, ¶ 67.

[395] Claimants' Rejoinder, ¶ 67.

[396] Reply, ¶ 257; Claimants' Rejoinder, ¶¶ 67-69.

Managua, Nicaragua to work full-time for ION, devoting years of their lives to the project".[397]

302. In response to the argument that some of the disbursements were made "*for unidentified purposes*", [398] Claimants allege that such disbursements financed administrative and operating costs incurred by ION in connection with the Concession Contract.[399] They also contest that those disbursements cannot amount to contributions as they were not directly spent on exploration.[400] According to Claimants, this is not a basis to exclude expenses, as the Treaty protects both direct and indirect investments.[401] Finally, in response to the assertion that the trustees' personal contributions do not satisfy the contribution element for the trusts that are shareholders of ION,[402] Claimants argue that the Treaty only requires that the investment, not the investor, have certain characteristics. Claimants add that Respondent's argument is "*particularly untenable*" given that such trustees are also settlors of their respective trusts (and therefore hold in trust assets of their own), with the consequence that "*the contributions made by those Claimants are necessarily reflected in the shares they hold in trust*".[403]

303. As to risk, Claimants faced the risk of a diminution on the value of their shares in ION as a result of a potential loss of value of the Concession.[404] Claimants reject the assertion that they shielded themselves from the risks connected to the Concession by transferring them to Norwood.[405]

304. As for duration, even assuming it is a requirement, the relevant framework to assess the duration of an investment would be "*the duration foreseen at the time an asset or property is acquired*".[406] In this context, Claimants argue that their investment would certainly meet the standard of a minimum of two to five years duration of, as (*i*) "*there are no fixed time limits to be a shareholder*", (*ii*) ION "*was incorporated in 1999 for a duration of 99 years*", and (*iii*) a "*long-term contract for the exploration and exploitation of a concession area over several decades similarly*

---

[397] Reply, ¶ 258; Claimants' Rejoinder, ¶ 72.

[398] Rejoinder, ¶ 235. See ¶ 284 *supra*.

[399] Claimants' Rejoinder, ¶ 75 and fn. 171.

[400] Claimants' Rejoinder, ¶ 76.

[401] Claimants' Rejoinder, ¶ 77, quoting Article 10.28 of the CAFTA-DR, pursuant to which protected investments include "*every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment*".

[402] Rejoinder, ¶¶ 233, 236.

[403] Claimants' Rejoinder, ¶ 80.

[404] Reply, ¶ 265. See also Claimants' Rejoinder, ¶ 83.

[405] Counter-Memorial, ¶¶ 253-254.

[406] Reply, ¶¶ 270-271.

must satisfy any duration characteristic".[407] Moreover, Claimants argue that, although in February 2013 there was a substantial increase in ION's capital and number of shares,[408] at that date all of the Claimants were already shareholders in ION, with the exception of Mr. Bailey, who became ION's COO in late 2013 and received his shares as consideration for his professional services.[409] In response to the argument that in February 2013 they could not reasonably foresee that ION's Concession Contract would last two to five years, Claimants note that their expectations as to this were justified as at that time they "*were fully embarked in the process of developing the Concession*", having confirmed to the MEM a discovery with commercial potential, received clearance to continue activities, submitted the Davis Report and proceeded in negotiations with prospective partners.[410] In any case, according to Claimants, "*Nicaragua cannot rely on its own interference and ultimately its illegitimate termination of the Concession Contract to argue that an alleged "duration" requirement was not met*".[411]

305. As for the "contribution to the economic development of Nicaragua", Claimants contend that they did make such a contribution. Not only did Norwood's contribution (accepted by Nicaragua as such) result from activities it performed "*on ION's behalf and for ION's account*".[412] ION also *(i)* had an office with full-time employees in Nicaragua, *(ii)* hired advisors and consultants, *(iii)* involved consultants and geologists in its activities, *(iv)* commissioned and produced "valuable technical studies on the ION Concession", and *(v)* was about to reach a deal with NTE for the financing of "*additional drilling and exploration of the hydrocarbon discovery*".[413] According to Claimants, "[i]*t was Nicaragua's own conduct, not ION's, that has meant that valuable resource remains untapped*".[414]

IX.B.2 The Tribunal's analysis and decision

306. It is uncontroversial that in ICSID arbitrations tribunals must satisfy themselves that they have jurisdiction under both Article 25 of the ICSID Convention and the relevant instrument providing consent to arbitration, which in this case is the Treaty. For ease of reference these instruments are reproduced here.

---

[407] Reply, ¶ 271. See also Claimants' Rejoinder, ¶ 89.

[408] ION Shareholders Meeting, February 22, 2013, **Exhibit C-194**, p. 3.

[409] Reply, ¶ 272 and fn. 660 and 661.

[410] Claimants' Rejoinder, ¶ 91.

[411] Claimants' Rejoinder, ¶ 91.

[412] Reply, ¶ 275.

[413] Reply, ¶¶ 275-276; Claimants' Rejoinder, ¶ 95.

[414] Reply, ¶ 276.

307. Article 25.1 of the ICSID Convention provides that:

> The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

308. Under Articles 10.15[415] and 10.16[416] of the Treaty, "*investment dispute*(s)" may be submitted to the dispute settlement mechanisms (including arbitration) foreseen by the Treaty. The provision of the Treaty that establishes the meaning of the expression "*investment dispute*" is Article 10.28, which contains the definition of the terms "*investor*" and "*investment*". Article 10.28 reads as follows:

> **investment** means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:
>
> (a) an enterprise;
>
> (b) shares, stock, and other forms of equity participation in an enterprise;
>
> (c) bonds, debentures, other debt instruments, and loans;
>
> (d) futures, options, and other derivatives;
>
> (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
>
> (f) intellectual property rights;
>
> (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and
>
> (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges; […]
>
> **investor of a Party** means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party; provided, however, that a natural

---

[415] "*In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures such as conciliation and mediation*".

[416] "1*. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation: (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim (i) that the respondent has breached (A) an obligation under Section A. (B) an investment authorization, or (C) an investment agreement; and (ii) that the claimant has incurred loss or damage by reason of, or arising out, that breach; and (b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this section a claim (i) that the respondent has breached (A) an obligation under Section A, (B) an investment authorization, or (C) an investment agreement; and (ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach* […]".

> person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality […].

309. It follows from these provisions that an ICSID tribunal has jurisdiction over a dispute under the Treaty if: (*i*) there exists an investment, (*ii*) the dispute submitted to arbitration is a legal dispute arising directly out of the investment, (*iii*) the investor is a national of a Contracting State other than the host State and (*iv*) the parties to the dispute consent in writing to submit the dispute to the Centre.

310. In this case, the last three requirements are not controversial. The objection raised by Respondent only relates to the first requirement: the existence of a protected investment. Specifically, the Tribunal must establish whether there exists an investment pursuant to the ICSID Convention and the Treaty, and whether such investment is attributable to Claimants as investors.

311. The Treaty claims against Nicaragua are brought by Claimants acting on their own behalf, for damages they claim to have suffered as shareholders of ION, which is the direct owner of the alleged investment. For this reason, and in light of Respondent's objections, the questions for analysis are the following:

(i) whether to qualify as investors it is sufficient that Claimants are shareholders of ION (**Section IX.B.2.a**),

(ii) whether Claimants have proven their ownership of their shares in ION (**Section IX.B.2.b**),

(iii) Whether ION made an investment under the ICSID Convention and the Treaty (**Section IX.B.2.c**).

IX.B.2.a Whether to qualify as investors it is sufficient that Claimants are shareholders of ION

312. Given how Respondent has framed its objection to jurisdiction, the first question is whether the fact that the Claim is brought under Article 10.16.1(a) of the Treaty implies that, in order to qualify as an investor, each Claimant must prove that it contributed resources to ION or whether, instead, it is sufficient to establish that they are shareholders of ION, the owner of the supposed investment, as argued respectively by Respondent and Claimants.

313. Respondent's position is that, because the claims against Nicaragua were brought by Claimants on their own behalf, rather than on behalf of ION, the *Salini* test must be satisfied not only in respect of ION, which is the direct investor, but also in respect of each one of Claimants, in their capacity as shareholders of ION.

314. This reasoning implies that, if shareholders bring a claim for indirect damages under Article 10.16.1(b) of the Treaty acting on behalf of the enterprise they own or control, they would only need to prove that the enterprise made a protected investment. Conversely, if for whatever reason (including because they do not control the enterprise or the enterprise no longer exists) they choose to bring a claim

on their own behalf for the direct damages suffered by them, as they are permitted to do under Article 10.16.1(a), they would need to prove not only that the enterprise made an investment and is therefore an investor, but also that they too made an investment, beyond the acquisition of their shareholding.

315. This position seems difficult to accept. First, such an additional burden on the shareholder who elects to bring a claim under Article 10.16.1(a) – as opposed to Article 10.16.1(b) – does not result from the Treaty. This would seem to be conclusive since, whenever the Contracting States wished to impose different procedural or substantive requirements for the two pathways, they did so expressly.

316. Moreover, a differentiation such as the one proposed by Respondent would lack any justification. Although there are authorities which could be held to support Respondent's position,[417] the more convincing view is that – save possibly in specific circumstances where there may be a risk of abuse or circumvention of the jurisdictional requirements[418] – there is no need to investigate how a shareholder acquired its interest in the entity holding the investment or whether it satisfies additional conditions to the ownership of shares. This is for instance the position taken by the tribunals in *Saluka*,[419] *Víctor Pey Casado*,[420] *Renée Rose Levy de Levi*,[421] *RREEF Infrastructure*[422] and *Ryan v. Poland.*[423]

317. As noted by a leading commentary apropos the views requiring an "*active contribution*" by each investor as a requirement for protection, these "*would seriously undermine the position of shareholders as investors*" and "*lead*[] *to the unsatisfactory result that a person who has not been involved in the making of an investment but acquires an existing investment does not enjoy the status of an*

---

[417] See, *e.g., Quiborax S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, September 27, 2012, **Exhibit RLA-62**, ¶¶ 232-233; *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, October 17, 2013, **Exhibit RLA-72**, ¶¶ 200-206; *Société Civile Immobilière de Gaëta v. Republic of Guinea*, ICSID Case No. ARB/12/36, Award, December 21, 2015, **Exhibit RLA-89**, ¶¶ 221 ff.; *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, April 15, 2009, **Exhibit RLA-118**, ¶¶ 119-121.

[418] See, for instance, case-law mentioned in ¶ 320.

[419] *Saluka Investment BV v. The Czech Republic*, UNCITRAL IIC 210, Partial Award, March 17, 2006, **Exhibit CLA-44**, ¶ 211.

[420] *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, May 8, 2008, **Exhibit CLA-62**, ¶ 542.

[421] *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award, February 26, 2014, **Exhibit CLA-143**, ¶ 148.

[422] *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, June 6, 2016, **Exhibit CLA-151**, ¶ 158.

[423] *Vincent J. Ryan, Schooner Capital LLC, and Atlantic Investment Partners LLC v. Republic of Poland*, ICSID Case No. ARB(AF)/11/3, Award, November 24, 2015, **Exhibit CLA-149**, ¶ 207.

investor".[424] Respondent's position on this point would in many circumstances also make it difficult to characterize indirect investments as "investments", notwithstanding that under many treaties indirect investments are expressly considered qualifying investments, as is the case with Article 10.28 of the Treaty.

318. Additionally, it would potentially require complex and time-consuming factual investigations to ascertain how each investor acquired ownership of the interest in the company, and entail differences between one shareholder and the other, in many cases without objective justification.

319. In any event, the Tribunal is not convinced of the relevance of the cases relied upon by Respondent to argue that the mere ownership of shares is insufficient to grant an investor protection under the Treaty and the ICSID Convention.[425] As a matter of fact, ownership of shares generally is considered sufficient, save in special circumstances.

320. For example, *Quiborax* and *KT Asia* invoked by the Respondent deals precisely with peculiar circumstances distinguishable from the ones of this case. In *Quiborax*, a decisive ground for the tribunal's denial of jurisdiction over one of the claimants was that it had received one share gratuitously and solely in order to comply with a formality under the host State's corporate law.[426] In *KT Asia*, the claimant was a foreign company that held a minority shareholding in a bank from the host State, designed to conceal the identity of the economic beneficiary of the shareholding. The company had never held any assets except for the shares in the bank, for which it had not paid anything, and had never made a contribution of any kind to the alleged investment.[427]

321. The circumstances of the present case are markedly different. First, Claimants allege, credibly in the Tribunal's view, that they acquired shares in ION at a price, but are unable to reconstruct the paper-trail due to the passage of time.[428] Second, as noted below, some of the Claimants made substantial disbursements and personal non-monetary contributions related to ION. Since ION's only asset is the Concession, such disbursements and contributions may be presumed to be related to the Concession.

322. To conclude, in the Tribunal's judgment, it is not necessary to verify that Claimants directly made an investment. All that has to be proven in order for them

---

[424] R. Dolzer, U. Kriebaum and C. Schreuer, *Principles of International Investment Law*, 3rd ed. 2022, p. 79.

[425] See Rejoinder, ¶¶ 201-205.

[426] *Quiborax S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, September 27, 2012, **Exhibit RLA-62**, ¶¶ 232-233.

[427] *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, October 17, 2013, **Exhibit RLA-72**, ¶¶ 188-206.

[428] Claimants' Rejoinder, ¶ 63.

to be considered investors entitled to protection under the Treaty and to bring their claims is that they hold title to their respective shares in ION and that ION itself qualifies as an investor.

IX.B.2.b Whether Claimants have proven their shareholding in ION

323. Moving to the question of whether Claimants are shareholders of ION, the Tribunal accepts that the documents on the record[429] confirm that such was the case for all of them at least as of April 10, 2014 and also confirm that the date on which each one of them acquired its shares is the one indicated in Claimants' Closing Statement.[430] Further, the shareholders' ledger shows the number of shares each Claimant held in ION as of March 28, 2014 and the data contained therein matches the share certificates on the record.[431] For this reason, the Tribunal rejects Respondent's argument on the alleged contradictions between the photographs of the ledger and certain additional documents submitted by Claimants (*i.e.* shareholder-meeting records), as well as the objection that "*none of the Trust Claimants submitted with its trust documents a Schedule of trust property showing that it actually owns shares of ION*".[432]

324. As for the objection concerning the Lopez-Goyne Family Trust's ownership of 110,000 shares,[433] the ledger and the share certificates confirm that Michael David Goyne and Emily Lopez Goyne – in their capacities as trustees of the Lopez-Goyne Family Trust – hold 110,000 shares in ION.[434] As demonstrated by Claimants,[435] this equity interest can be traced to the 11 shares held by various trusts under the trusteeship of Michael David Goyne and Emily Lopez Goyne and is the result of a stock split (at a 1:10,000 ratio) approved by ION's shareholders' meeting on February 22, 2013,[436] effective as of 17 February 2014 upon confirmation by the competent Nicaraguan authority.[437]

---

[429] In particular, **Exhibit C-62** and **Exhibit C-198**.

[430] See CD-5, slide 10. Tr. Day 6, pp. 1242:17-1243:4.

[431] See **Exhibit C-198**, dated April 10, 2014. The certificates further show that Claimants hold registered shares, the transfer of requires a note on the security as well as an entry in the shareholders' ledger.

[432] Rejoinder, ¶ 198.

[433] The Tribunal notes that the trust was created in 2014 and that its shares can be traced back to the combined holdings of shares of other trusts under the trusteeship of Michael David Goyne and Emily Lopez-Goyne (see **Exhibit C-198.M** and **Exhibit C-62**).

[434] See **Exhibit C-198.M** and **Exhibit C-62**, p. 58. As noted above (¶ 323), the data contained in the ledger and in the shares certificates cannot be rebutted by shareholder-meeting records.

[435] **Exhibit C-62**, pp. 35, 45, 58.

[436] **Exhibit C-194**.

[437] **Exhibit C-296**.

325. As for the objections in relation to the Nancy Cederwall Trust, it appears that:

(i) the ledger confirms that, as Claimants submit, the Nancy Cederwall Trust and the Nancy Cederwall Living Trust are the same trust, which has held shares in ION since April 20, 2004.[438] Indeed, when recording the number of shares held by Ms. Diane Elizabeth Radu in her capacity as trustee of the Nancy Cederwall Trust as of March 28, 2014, the ledger refers to the entry at page 22 which notes the Nancy Cederwall Living Trust's acquisition of shares dated April 20, 2004;[439]

(ii) the Claim is brought in respect of 10,000 of the 20,000 ION shares owned by the Nancy Cederwall Trust, corresponding to the portion to be allocated – upon distribution of the trust's assets – to the co-trustee Ms. Radu, the other trustee being Ms. Susan Mueller;[440]

(iii) Respondent's objection to Ms. Radu's standing to bring the Claim without the authorization of the other co-trustee of the Nancy Cederwall Trust[441] is moot as Claimants have submitted a special power of attorney executed by Ms. Susan Mueller ratifying any action undertaken by Ms. Radu.[442]

326. Based on the above, the Tribunal concludes that all the Claimants were shareholders of ION at least from April 10, 2014, and collectively represent 58.02% of ION's shareholding. Respondent's jurisdictional objection based on Claimants' alleged lack of status as shareholders of ION is thus dismissed.

IX.B.2.c Whether ION made an investment under the ICSID Convention and the Treaty

327. Having concluded that it is unnecessary to establish that Claimants are investors independently of their status as shareholders of ION and that they hold title to their shares in ION, the next question is whether ION itself can be considered a protected investor that has made an investment.

328. It is common ground that this must be verified under both the ICSID Convention and the Treaty. The Parties disagree on whether, in particular with respect to Article 25 of the ICSID Convention, this analysis must be conducted on the basis of the *Salini* test which, as recalled above,[443] postulates that an investment requires (*i*)

---

[438] See **Exhibit C-62**, p. 73, p. 22.

[439] See **Exhibit C-62**, p. 73, referring to p. 22.

[440] See **Exhibit C-198.D** and **Exhibit C-62**, p. 73. See Memorial, fn. 491: "*Diane Elizabeth Radu confirms that she is bringing this claim in her capacity as trustee of the Nancy Cederwall Trust, which holds 10,000 shares in ION. The Nancy Cederwall Trust (of which Ms Radu is also a beneficiary) is therefore also listed in this Memorial as one of the Claimants in this arbitration*."

[441] See ¶ 281, fn. 317 *supra*.

[442] Exhibit C-303.

[443] See ¶ 274 *supra*.

contribution of money or other resources, (*ii*) participation in the risks of the transaction, (*iii*) a duration of performance, and (*iv*) contribution to the economic development of the host State.

329. In the present case, the Tribunal finds it unnecessary to engage in the debate on the applicability of the *Salini* test. This is because in the chapeau of Article 10.28 of the Treaty an investment is defined a "*every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain and profit, or the assumption of risk*".

330. This definition in essence embodies the first three criteria of the *Salini* test. As discussed below, in the present case all three of these criteria are satisfied. This renders moot the Parties' debate both as to whether the criteria of Article 10.28 are cumulative (as Respondent contends) or merely alternative (as Claimants say) and as to whether the *Salini* test is mandatory for the purposes of Article 25 of the ICSID Convention.

331. On this basis, the Tribunal can turn to consider whether ION is the holder of an investment.

332. The starting point is that ION is undisputedly the holder of the Concession, which is the asset affected by Nicaragua's actions purportedly in breach of the Treaty. The Concession is one of the forms of investment listed in the definition of Article 10.28 of the Treaty, which specifically mentions "concessions" in lit. (e), and also has the features of an investment listed in the chapeau of the definition. Indeed, the Concession required a "*commitment of capital [and] other resources*" in order to obtain and operate it; carried the "*expectation of gain or profit*" arising out of the exploitation of hydrocarbons in the Concession Area; and necessarily implied the "*assumption of risk*" associated with concessions in general and with the exploration and exploitation of hydrocarbons in particular.

333. Respondent does not seem to contest that the Concession in itself can be an investment. The point of contention between the Parties is whether the Concession can be considered an investment in accordance with Article 10.28 of the Treaty which is attributable to ION. In fact, according to Respondent, none of the requirements (contribution, risk and duration) is satisfied.

334. As to contribution, Respondent submits that whatever contribution was made, it was made by Norwood, and as such cannot be attributed to ION.

335. It is true and undisputed that the most substantial disbursements for the exploration of the Concession (approximately US$ 74 million) were made by Norwood,[444] which performed exploration activities in the ION Block, including construction at the drilling locations, drilling and testing from 2004 to 2011.

[444] Reply, ¶ 45; Counter-memorial, ¶ 5.

However, it is noteworthy that Norwood was not acting as assignee of the Concession Contract, but was acting on ION's behalf as a subcontractor, as permitted by the Concession Contract and Article 28 of Law 286, subject to ION maintaining "*el control y la responsabilidad total sobre las mismas frente al Estado*". Furthermore, pursuant to Article 25 of Law 286, ION bore all risks, costs and responsibilities for the activities conducted under the Concession Contract, including therefore those conducted by Norwood. ION's control of the investment is also demonstrated by the fact that it was entitled to terminate the Sub-Contractor Agreement in the event that Norwood failed to conduct its operations diligently and in accordance with applicable laws and the Concession Contract.[445] Nicaragua never objected to such arrangement.

336. Moreover, ION undertook to compensate Norwood for the works performed on its behalf. The Sub-Contractor Agreement between ION and Norwood[446] granted the latter a 70% working interest in the Concession Area in exchange for funding and conducting the operations required under that Contract.[447] In the Tribunal's view, it is irrelevant that the consideration for the works performed by Norwood consisted of a percentage of any future profits generated by the Concession instead of payments from ION.

337. In any event, following Norwood's bankruptcy in 2011, ION (or more precisely Claimants on its behalf) covered certain expenses and until the termination of the Concession its shareholders provided funding to ION and substantial non-monetary contributions.[448] Claimants allege that between 2012 and 2014 they directly or indirectly financed ION's expenses for approximately US$ 1 million.[449] The most significant disbursement made in that period was for the US$ 300,000 performance bond posted by ION on November 17, 2011 and paid for by one Claimant, LG Hawaii Oil & Gas Co,[450] which also paid for other relevant expenses, such as the Sproule and the Davis Reports and the IRM Program.[451] Finally, it is uncontested that Claimants Michael Goyne (secretary of ION's board since November 2011 and president of ION since July 2012) and Emily Lopez-Goyne (in charge of ION's financial aspects) moved

---

[445] Subcontractor Agreement, **Exhibit C-4**, pp. 3-4 and 7-8 of the pdf; Amended ION-Norwood Sub-Contractor Agreement, **Exhibit R-3**, p. 4.

[446] Subcontractor Agreement, April 23, 2004, **Exhibit C-4**; Amended ION-Norwood Sub-Contractor Agreement, August 10, 2004, **Exhibit R-3**.

[447] *Ibid.*, pp. 2, 6.

[448] Claimants' Rejoinder, ¶¶ 72 ff.

[449] Reply, ¶ 258; Claimants' Rejoinder, ¶ 72; Summary of Alleged Exploration-Related Expenses, **Exhibit C-283**, and documents referred to therein.

[450] Summary of Alleged Exploration-Related Expenses, **Exhibit C-283.**

[451] *Id.*

to Managua, Nicaragua, to work for ION.[452]

338. The Tribunal does not accept Respondent's suggestion that these disbursements do not amount to contributions under the Treaty as they do not directly relate to exploration.[453] Preliminarily, the Tribunal notes that the relevant test is not whether contributions are "*exploration-related*", as argued by Respondent, but rather whether they are related to the Concession. The performance bond, the expenses related to the Sproule Report, the Davis Reports and IRM Program, and the personal contributions of Michael Goyne and Emily Lopez-Goyne undoubtedly satisfy that test since ION had no business other than the Concession Contract.

339. In light of these considerations, the Tribunal concludes that ION contributed to the Concession, thus satisfying the first requirement under Article 10.28 of the Treaty.

340. As for the requirement of "assumption of risk", the Tribunal is persuaded that, contrary to Respondent's position, ION bore the risk of a failure of the project even during the time Norwood was acting as contractor. Considering that the Concession was ION's sole asset, its loss or any diminution of its value (in particular due to poor testing results) would certainly have negatively affected ION's value. This constitutes a significant operational risk.

341. The Tribunal rejects Respondent's suggestion that Norwood alone bore that risk, as would be demonstrated by the fact that only it, and not ION, impaired the Concession's value in its financial statements.[454] The way the risk was treated by Norwood for accounting purposes does not detract from the fact that ION did run the risks of the Concession. Since, as mentioned above, Norwood was publicly listed, it was subject to reporting requirements which did not apply to ION as a closed company. Neither Norwood's involvement nor the *inter partes* risk sharing agreements between it and ION shielded ION completely from the risks arising from losses incurred in the exploration and development of the Concession, because ION remained responsible for those losses vis-à-vis Nicaragua through the entire lifespan of the Concession Contract.[455] This is confirmed by the fact that Nicaragua holds ION liable for the breach of its environmental obligations, which confirms the sharing of

---

[452] CWS Goyne I, ¶¶ 2, 61, 70.

[453] See ¶ 279(i) *supra*.

[454] Counter-Memorial, ¶ 254.

[455] Not only ION remained liable vis-à-vis Nicaragua, but it could not even expect to be kept indemnified by Norwood for any claim by Nicaragua for two main reasons. First, the 2005 operating agreement between ION and Norwood allocates liabilities between ION and Norwood in the proportion of their respective working interests (See Operating Agreement between Norwood and ION, August 22, 2005, **Exhibit R-7**, Article 3.1) so that ION would have been solely liable for claims falling within its scope of work. Second, ION could not expect to recoup from Norwood any losses arising from claims made by Nicaragua should Norwood go bankrupt, as it eventually did.

the risk between Norwood and ION.

342. Moreover, from 2011 onwards, after Norwood's bankruptcy, the relevant risk was entirely borne by ION itself. Respondent appears to implicitly acknowledge this by arguing that after Norwood's departure "*ION searched for another company to bear the investment risk*".[456] Given ION's lack of success in identifying a suitable or willing business partner, from 2011 until the termination of the Concession Contract ION was the only one that faced the risk of the investment.

343. Finally, there can be no discussion that the requirement of duration is satisfied, in light of the fact that a project for petroleum exploration is by definition a long-term venture.[457]

344. In light of these considerations, the Tribunal concludes that ION made an investment in accordance with the ICSID Convention and the Treaty. Accordingly, considering that the Tribunal has concluded above that Claimants are shareholders of ION, Respondent's first jurisdictional objection is rejected.

IX.C Whether 10.16.1(a) of the Treaty is the proper basis for the Claim

345. Respondent's second objection to jurisdiction is predicated on the assumption that the Claim cannot be brought under the legal basis invoked by Claimants, which is Article 10.16.1(a) of the Treaty, but should instead have been brought under Article 10.16.1(b).

346. This objection was raised by Respondent only at the very last minute, in its Closing Statements at the Hearing, and only after the question of the legal basis for direct and indirect claims had been addressed in the Non-Disputing Party Submission and the Tribunal had directed the Parties to address it in their Closing Statements with the following questions:[458]

- Question no. 1: "*the Tribunal understands that Claimants' claim is brought under Article 10.16.1(a) of the CAFTA-DR. What kind of damages can Claimants claim thereunder? Do they include damages suffered by ION*?"
- Question no. 2: "*the Tribunal understands that Claimants' damages calculation focuses on the damages alleged to have been suffered by ION. What is the correlation between these damages and those claimed by Claimants?*"

IX.C.1 Non-Disputing Party Submission

347. The Tribunal first wishes to refer to the Non-Disputing Party Submission, which addresses the question of the jurisdictional bases under which claims against a

[456] Counter-Memorial, ¶ 255. See also Rejoinder, ¶ 242.

[457] Concession Contract, **Exhibit C-3**, Article 5.

[458] See ¶¶ 368 ff. below.

Treaty Party can be brought under the CAFTA-DR that is the subject of Respondent's second jurisdictional objection.

348. The United States take the position that there are two such bases, Articles 10.16.1(a) and 10.16.1(b), "*which serve to address discrete and non-overlapping types of injury*". Specifically, the United States argues that:

> [w]here the investor seeks to recover loss or damage that it incurred directly, it may bring a claim under Articles 10.16.1(a). However, where the alleged loss or damage is to '*an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly*', the investor's injury is only indirect. Such derivative claims must be brought, if at all, under Article 10.16.1(b).[459]

349. According to the United States, this follows from the structure of Article 10.16.1 of the Treaty which provides for two distinct avenues for bringing claims – lit. (a) and lit. (b) – and was purposefully drafted in that way taking into account two principles of customary international law:[460] first, the principle "*that no claim by or on behalf of a shareholder may be asserted for loss or damage suffered directly by a corporation in which that shareholder holds shares*",[461] second, the principle that "*no international claim may be asserted against a State on behalf of the State's own nationals*".[462]

350. While Article 10.16.1(a) fully reflects the first principle, Article 10.16.1(b) introduces a "*narrow and limited derogation*" from the second of those principles of customary international law, by allowing "*an investor of a Party that owns or controls that enterprise to submit a claim on behalf of the enterprise for loss or damage incurred by that enterprise*". In this context, the United States conclude that, if shareholders could bring a claim on their own behalf for indirect injury under Article 10.16.1(a), the narrow exception provided for by Article 10.16.1(b) would be superfluous.[463]

351. Finally, the United States note that it cannot be inferred from the text of Article 10.16.1(a) of the Treaty that the contracting States intended to derogate from customary international law restrictions on the assertion of shareholder claims.[464]

---

[459] Non-Disputing Party Submission, ¶ 29.

[460] Non-Disputing Party Submission, ¶ 30.

[461] Non-Disputing Party Submission, ¶ 30, referring to *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo*), Judgment, November 30, 2010, I.C.J. 639, ¶¶ 155-156 and *Barcelona Traction, Light and Power Company, Ltd. (Belgium v. Spain)*, Judgment, February 5, 1970, I.C.J. 3, 35, ¶¶ 44-47.

[462] Non-Disputing Party Submission, ¶ 33.

[463] Non-Disputing Party Submission, ¶¶ 33-34.

[464] Non-Disputing Party Submission, ¶ 35.

352. As provided by CAFTA-DR Article 10.20.2, the United States' submission concerns the interpretation of the Treaty and makes no reference to the facts of the case.

IX.C.2 The Parties' positions

IX.C.2.a Respondent's position

353. Following the Tribunal's questions, Respondent only briefly addressed the issue of the legal basis of the Claim in its Closing Statements. It asserted that it is for Claimants to state "*whether their claim is for damages allegedly suffered by ION*" and, referring to their statement at the Hearing discussed below, argued that the Claim is brought by Claimants "*on their own behalf, which has clear implications for jurisdiction and damages*".[465] Referring to the Non-Disputing Party Submission, Respondent states that the Claim is not permitted under the Treaty since Article 10.16.1(a) thereof only allows a shareholder to bring a claim on its own behalf for direct losses[466] and does not afford an avenue for redress against indirect injuries such as the ones Claimants allege to have suffered.[467].

354. Respondent "*acknowledges*" that the tribunal in *Kappes v. Guatemala*[468] found "*that reflective losses could be brought under DR-CAFTA*", but notes that there was a dissent on the point. Moreover, it highlights that in the present arbitration "*we have the benefit of the submission of a Contracting State telling us precisely what the meaning and intention of Article 10.16.1 is*".[469]

355. As to the Tribunal's second question, Respondent argued that "*any damages suffered by ION cannot be presumed to flow automatically to the Claimants*" and alleged that the damages claim is unsupported, as Claimants have not established (*i*) "*the existence and quantitative impact of the alleged harm to their shareholding*", and (*ii*) *"any value for their shares in ION prior to the termination of ION's concession*".[470]

IX.C.2.b Claimants' position

356. In their Closing Statements, Claimants submitted that in the Rejoinder, Nicaragua expressly stated that it did not challenge Claimants' right to bring a claim

---

[465] Tr. Day 6, p. 1374.

[466] Tr. Day 6, pp. 1375-1376.

[467] Tr. Day 6, p. 1374. Respondent submits that "*[i]f a shareholder seeks to claim any loss of value to their share, that claim would need to be brought under 10.16.1(b)*" (*id.*, p. 1378).

[468] *Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections, March 13, 2020, **Exhibit CLA-167**.

[469] Tr. Day 6, p. 1376.

[470] Tr. Day 6, p. 1377.

for reflective loss.[471]

357. In response to the Tribunal's first question, Claimants submitted that they "*are claiming damages suffered by them as a result of Nicaragua's measures against ION. So, it is a reflective loss claim*".[472] They added that, in any case, the "*plain text*" of Article 10.16.1(a) of the Treaty makes it clear that the Treaty does not impose "*any limitation whatsoever*" on an investor's ability to bring reflective loss claims thereunder.[473] For this interpretation, they rely on the majority's finding in *Kappes v. Guatemala* that "*there is nothing in the Treaty that prevents you from claiming reflective loss, and the opposite is true*".[474]

358. As to the Tribunal's second question, Claimants noted that the termination of the Contract "*caused harm to ION and, in doing so, it reduced the value of the aggregate shares of ION in the same amount of the harm. As Claimants collectively owned 58.02 percent of the shares in ION, the damages sought in this Arbitration are consistent with that percentage of ownership*".[475]

IX.C.3 The Tribunal's analysis and decision

359. With respect to Respondent's second objection, the Tribunal will first consider certain preliminary issues relating to whether such objection can be considered, having regard to the moment when it was raised, and then will discuss the merits of the objection.

IX.C.3.a Preliminary issues

360. Given the timing of Respondent's second jurisdictional objection and the way it arose and was addressed, three preliminary issues ought to be considered:

(i) whether the objection is belated; and

(ii) whether Respondent waived its right to raise this objection, as argued by Claimants.

361. As to timeliness, Respondent raised this objection at the end of the Hearing.[476] Neither the Arbitration Rules nor the ICSID Convention seem to preclude objections raised at a late stage of the proceedings. Rule 41(1) provides that any jurisdictional objection

---

[471] Tr. Day 6, p. 1240, referring to Rejoinder, fn. 344.

[472] Tr. Day 6, p. 1239: 18-21.

[473] Tr. Day 6, p. 1240.

[474] Tr.- Day 6, pp. 1240-1241, summarizing *Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, **Exhibit CLA-167**, ¶¶ 119, 144, 157.

[475] Tr. Day 6, p. 1371.

[476] Tr. Day 6, pp. 1373:9-1376:9.

> shall be made **as early as possible**. A party shall file the objection with the Secretary-General **no later than the expiration of the time limit fixed for the filing of the counter-memorial** […] **unless the facts on which the objection is based are unknown to the party at that time** (emphasis added).

362. On the other hand, Rule 41(2) provides that:

> The Tribunal **may** on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence (emphasis added).

363. Similarly, Article 41 of the ICSID Convention states that:

> (1) The Tribunal shall be the judge of its own competence. (2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

364. By reference to these provisions, case-law and academic literature largely endorse the view that, save for fringe cases,[477] pursuant to Article 41 of the ICSID Convention, tribunals must address jurisdictional objections irrespective of when they were raised.[478] On this basis, considering its duty to verify that it has jurisdiction over the case presented to it, the Tribunal concludes that Respondent's objection is not time-barred.

365. As to the alleged waiver of the objection, Claimants suggest that, in its written submissions, Respondent asserted that it did not challenge Claimants' right to bring a reflective loss claim.[479] They base this assertion on the following language in a footnote of the Rejoinder: "*In RREEF Infrastructure, the respondent argued that shareholders could not bring a claim for the investments of companies or partnerships in which they held shares, which is not an argument Nicaragua makes in this arbitration*".[480] The Tribunal does not find this language sufficiently precise and clear to constitute a waiver of Respondent's right to raise this objection. Moreover, it is contained in a section of the Rejoinder that is concerned not with the admissibility of the Claim, but rather with the requirements of a protected investment.

---

[477] *Waguih Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Decision on Jurisdiction, April 11, 2007.

[478] *AIG v. Kazakhstan*, ICSID Case No. ARB/01/6, Award, October 7, 2003. In *Vestey Group v. Venezuela* and *Generation Ukraine v. Ukraine*, the tribunals found the objections to be inadmissible, but considered them nonetheless (see *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, April 15, 2016, ¶ 150; *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, September 16, 2003, ¶ 16.1). See also Schreuer, Malintoppi *et al*., *The ICSID Convention: A Commentary* (Cambridge University Press, 2009), p. 528, ¶ 42.

[479] Tr. Day 6, pp. 1239-1240.

[480] Rejoinder, fn. 344.

366. Accordingly, the Tribunal holds that it is not precluded from considering Respondent's second jurisdictional objection.

IX.C.3.b Can the Claim be brought under Article 10.16.1(a) of the Treaty?

367. As mentioned, Respondent's objection is that the Tribunal lacks jurisdiction over the Claim because, in its view, it is a claim for losses suffered not directly by Claimants, but by ION, and is therefore a claim for indirect, or reflective, losses. As such, says Respondent, the Claim should not have been brought under lit. (a) of Article 10.16.1, which is the Treaty provision invoked by Claimants, but rather under lit. (b) of that Article.

368. To decide this objection, the Tribunal must address two discrete questions:

- does Article 10.16.1 of the Treaty bar prospective claimants from bringing reflective loss claims under lit (a)?
- is the Claim a claim for reflective or for direct losses?

369. As to the first question, Claimants maintain that indirect claims can be brought under lit. (a) because that provision does not exclude them from its ambit, while Respondent contests this. Claimants rely on the majority's decision in *Kappes v. Guatemala*, whereas Respondent relies on Prof. Zachary Douglas' Partial Dissenting Opinion in the same case ("**Douglas Dissent**"),[481] as well as on the Non-Disputing Party Submission.

370. As to the second question, as recalled above, at the Hearing Claimants alleged that the Claim was "*a reflective loss claim*" and Respondent accepted that characterization.

371. Neither Party engaged with the elaborate reasoning of the majority and the Douglas Dissent in *Kappes v. Guatemala* and the Non-Disputing Party Submission on the construction of Article 10.16.1, or substantiated its position on the direct or indirect nature of the Claim.

372. Article 10.16.1, lit. (a) and (b), of the Treaty provide respectively that a foreign investor can bring claims for breaches of the Treaty by the host State on its own behalf, as well as on behalf of an enterprise directly or indirectly owned or controlled by it. Article 10.16.1 reads as follows:

> 1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:
>
> (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim
>
> (i) that the respondent has breached

[481] *Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Partial Dissenting Opinion of Prof. Zachary Douglas QC, March 13, 2020.

> (A) an obligation under Section A.
>
> (B) an investment authorization, or
>
> (C) an investment agreement;
>
> and
>
> (ii) that the claimant has incurred loss or damage by reason of, or arising out, that breach; and
>
> (b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this section a claim
>
> (i) that the respondent has breached […]
>
> and
>
> (ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

373. The relationship between the two pathways foreseen by lit (a) and (b) of Article 10.16.1 for bringing the different types of claims, and specifically whether indirect claims can be brought under lit. (a) (in addition to under lit. (b)), was analyzed extensively by the majority and by the Douglas Dissent in *Kappes v. Guatemala* by reference to that same provision of the CAFTA-DR. The majority and the minority came to opposite conclusions on the strength of an analysis according to the interpretative canons of Article 31 of the Vienna Convention on the Law of Treaties.

374. The majority held that those canons support the conclusion that indirect claims can be brought indifferently under both prongs of Article 10.16.1 of the Treaty.[482] Conversely, the Douglas Dissent held that the second and third canons of Article 31 – context, taking into account other provisions of the Treaty (specifically Articles 10.18.2, 10.26 and Annex 10-E), as well as object and purpose – predicate that only direct claims can be brought under the first prong, lit. (a).[483] The Non-Disputing Party Submission takes the same position.[484]

375. Without prejudice to their divergence on whether Article 10.16.1(a) is available for indirect claims, both the majority and the minority in *Kappes* concurred that claims for injury to a claimant's shareholder rights, including where the assets of the investor's enterprise have been expropriated, "*which would leave the shareholder with bare title to a stripped entity*",[485] can be brought under Article 10.16.1(a), as they are direct claims. In Professor Douglas' words,

> [E]ven on my reading of Article 10.16.1, the Claimants would not be precluded from pursuing their claim for the expropriation of their shares in Exmingua because such a claim is cognizable under Article 10.16.1(a) – it is a claim to

[482] *Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ¶ 157.

[483] Douglas Dissent, ¶ 26.

[484] See Section IX.C.1.

[485] *Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ¶ 137.

> vindicate their legal rights as shareholders rather than their mere economic interest in the value of Exmingua's shares.[486]

376. The Non-Disputing Party Submission reaches the same conclusion. At ¶ 32, it reasons as follows:

> Examples of claims that would allow a shareholding investor to seek direct loss or damage include where the investor alleges that it was denied its right to a declared dividend, to vote its shares, or to share in the residual assets of the enterprise upon dissolution. Another **example of a direct loss or damage suffered by shareholders is where the disputing State wrongfully expropriates the shareholders' ownership interests** – whether directly through an expropriation of the shares or indirectly by expropriating the enterprise as a whole. (emphasis added)[487]

377. The Tribunal is convinced by this shared conclusion of the *Kappes* majority and the Douglas Dissent, as well as of the Non-Disputing Party Submission that the expropriation of a company directly affects its shareholders. In light of this, the Tribunal need not take a position on the debate on whether indirect claims can be brought under Article 10.16.1(a) and on the conflicting arguments of Claimants, Respondent and the Non-Disputing Party Submission. Indeed, as discussed below, in the Tribunal's judgment in this case the Claim is for expropriation and therefore for direct, and not reflective, damages.

378. It is true that, when specifically questioned on this point, Claimants took the position that the Claim was brought "*under 10.16.1(a), and Claimants are claiming damages suffered by them as a result of Nicaragua's measures against ION. So, it is a reflective loss claim*".[488].

379. The legal characterization of claims in order to establish the proper jurisdictional requirement for their submission to arbitration is a matter for the Tribunal. For this purpose, what is relevant is the conduct of the State that a claimant considers harmful, the legal basis invoked in support of the request for the finding that such conduct constitutes a treaty breach, and the relief sought.

380. In this case, the object of the Claim, and Nicaragua's act stigmatized by Claimants as a breach of the Treaty, is the termination of the Concession Contract,[489] to which Claimants consistently refer as the "repudiation" of that Contract.[490] Claimants' case is encapsulated in this statement at the beginning of the Memorial:

---

[486] Douglas Dissent, ¶ 28.

[487] Non-Disputing Party Submission, ¶ 32.

[488] Tr. Day 6, p. 1239.

[489] Reply, ¶ 301.

[490] See in particular Reply, ¶¶ 5, 277, 328, 390, 395, 398, 405, 409.

> This is a straightforward case of the Nicaraguan state abusing its sovereign powers to **expropriate** a valuable hydrocarbon concession belonging to the Claimants. (emphasis added)[491]

381. It is this alleged "*abuse of sovereign powers to expropriate*" their investment that Claimants deem has given rise to the breach of both of the Treaty obligations on which they hinge the Claim. In fact, although Claimants plead that Respondent breached the obligation to accord the standard of treatment of Article 10.5[492] as well as the prohibition of expropriation of Article 10.7,[493] both breaches are alleged to flow from the same conduct. In their words, "*Nicaragua's repudiation of the Concession Contract sounds in two breaches of the Treaty*".[494] Despite being pled cumulatively, the two legal bases can be read in the alternative, inasmuch as each one is capable of supporting the finding of illegality under the Treaty of Respondent's conduct that is the ground for the request for compensation.

382. The fact that, even though Claimants plead two distinct legal breaches, the object of the Claim is a single main conduct – the "repudiation" of the Contract – is demonstrated by the fact that Claimants identify only one head of damage, which is the "destruction" of their investments.[495] Again in their words,

> Whatever the legal characterization of the breach (*i.e.*, MST/FET or expropriation), it deprived ION (and therefore the Claimants) of their rights under the Concession Contract and rendered the Claimants' shares in ION worthless[496]

383. The same concept is repeated elsewhere:

> the injury caused by Nicaragua's breach is the deprivation of the contractual rights under the Concession Contract (as well as the diminution of the value of the Claimants' shares in ION, which were rendered worthless).[497]

384. The Claim is thus unquestionably one for compensation for the deprivation of the benefits of ownership of ION. Following the termination of the Contract, which was ION's sole asset, Claimants were left as mere shareholders "*with bare title to a stripped asset*", as the majority in *Kappes* put it.[498] As Professor Douglas

---

[491] Memorial, ¶ 4.

[492] Reply, ¶ 328.

[493] Reply, ¶ 390.

[494] Reply, ¶ 277. See also Reply, ¶ 409: "T*he Claimants have explained in **Section IV** that Nicaragua's repudiation of the Concession Contract was in breach of Articles 10.5 (MST/FET) and 10.7 (expropriation) of the Treaty*".

[495] Reply, ¶ 394.

[496] Reply, ¶ 417.

[497] Reply, ¶ 410.

[498] *Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ¶ 137.

characterized it in his dissent in that case, concurring on this point with the majority, this type of claim is "*a claim to vindicate* [Claimants'] *legal rights as shareholders rather than their mere economic interest in the value of* [the expropriated entity's] *shares*".[499]

385. Since the Contract was ION's only asset, its termination wiped out any present or future potential value of ION's shares. Therefore, the effect of the termination of the Concession, that is the object of the Claim, is not a mere reduction in the value of ION's shares, but a complete elimination of their value.

386. It follows that, despite Claimants' hurried answer to the Tribunal's question and contrary to Respondent's characterization, the Claim is not for reflective loss, for a decrease in the value of their shareholding caused by injury to ION, but rather for direct loss. It is not by chance that Claimants right from the start submitted that *"*[the] *Treaty breaches caused direct and substantial harm to the Claimants*".[500]

387. The direct nature of the Claim is confirmed by the relief sought. Claimants seek damages corresponding to their collective equity interest in ION, which is 58% of ION's share capital. Specifically, they claim 58.02% of the Concession's net value (according to their primary method, a DCF analysis)[501] or the same percentage of the costs borne by both ION and certain Claimants with respect to the Concession (according to their alternative sunk costs quantification).[502] They do not apply any of the discount factors that could come into play for the quantification of derivative claims (*e.g.* the enterprise's debt or its policy of reinvesting profits rather than paying dividends) or, even just explain why such factors should not apply to their case.

388. In sum, if properly characterized having regard to its object, which is redress for the deprivation of the benefits of ownership of ION, Claimants' Claim is for direct, and not reflective, damages. On that basis, it "*is cognizable under Article 10.16.1(a)*" [503] and was therefore properly submitted to the jurisdiction of the Tribunal.

389. For these reasons, also Respondent's second jurisdictional objection is dismissed.

X. LIABILITY

390. The question for the merits is whether, as Claimants contend, Respondent

[499] Douglas Dissent, ¶ 28.

[500] Memorial, ¶ 293.

[501] Memorial, ¶ 346.

[502] Memorial, ¶ 350.

[503] Douglas Dissent, ¶ 28.

breached its obligations under Article 10.5 of the Treaty, by failing to accord to Claimants the standard of treatment required by that provision, as well as under Article 10.7, by expropriating their investment.

391. These two alleged breaches will be addressed separately below in **Sections X.A** and **X.B**.

X.A The alleged breach of Article 10.5 of the Treaty (MST)

392. In order to assess Respondent's liability for breach of the standard of treatment under Article 10.5, it is necessary to establish first the content of the standard of treatment enshrined therein (**Section X.A.1**) and then whether, considering all the relevant circumstances of the case, Respondent's termination of the Contract breached that standard (**Section X.A.2**).

X.A.1 The legal standard of protection of Article 10.5 of the Treaty

393. The threshold question to establish whether Nicaragua incurred in a breach of Article 10.5 of the Treaty is that of the standard of treatment of foreign investors foreseen by that provision, which is the first point of contention between the Parties.

X.A.1.a The Parties' positions

a) Claimants' position

394. Claimants argue that Article 10.5 requires Nicaragua to accord their investment a "fair and equitable treatment" (FET) equivalent to the minimum standard of treatment of aliens under customary international law (MST).[504] According to Claimants, as a result of the development of customary international law over time, the two standards have merged "*to the point that they cannot be distinguished from one another*".[505] Based on these considerations, Claimants object to Respondent's argument that the Treaty imposes a lower standard of treatment than the FET.

395. As to the content of this alleged combined MST/FET standard, Claimants refer to *Waste Management II*, which found that the MST is breached if the State's conduct is "*arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety*" and that "[i]*n applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant*".[506] Claimants

[504] Memorial, ¶¶ 249-250, and case-law mentioned in fn. 557 and 558.

[505] Memorial, ¶ 249.

[506] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, **Exhibit CLA-34**, ¶ 98.

contend that other tribunals recognized that the MST imposes an obligation on the State to act in good faith, in a transparent manner and to respect the investor's reasonable and legitimate expectations.[507]

396. According to Claimants, Respondent's assertion that "legitimate expectations" are not part of the MST standard is inconsistent with numerous awards and ignores that the concept stems from the principle of good faith and "*has been recognized as one of the core elements of the FET, which forms part of the MST guaranteed under Article 10.5 of the Treaty*".[508] Moreover, Respondent's attempt to exclude the duty of transparency from MST/FET is unfounded and inconsistent with the flexibility accorded by Article 10.5.[509]

397. Finally, Claimants make a passing mention to the Most Favored Nation provision of Article 10.4 of the Treaty ("**MFN**") as a ground for invoking the FET accorded by Nicaragua to Spanish investors under the Agreement for the Reciprocal Promotion and Protection of Investments between the Kingdom of Spain and the Republic of Nicaragua of March 16, 1994 (the "**Spain-Nicaragua BIT**").[510] On that basis, they contend that "*to the extent that there is any difference between MST and FET under the Treaty (and there is none […]), the Claimants would be entitled to FET*".[511]

b) Respondent's position

398. Respondent maintains that Claimants "*seek to apply a higher, autonomous standard*" of treatment than the one set by Article 10.5.[512] According to it, that provision does not entitle Claimants to FET, since it prescribes the higher liability threshold of MST. As to Claimants' argument on the Treaty's MFN provision, Respondent observes that Claimants offer no evidence that the Spain-Nicaragua BIT provides for the autonomous FET standard and adds that the MFN clause "*can only work prospectively with respect to treaties concluded after DR-CAFTA*", while the Spain-Nicaragua BIT was concluded nearly 10 years earlier.[513]

399. In Respondent's view, the MST enshrined in Article 10.5 of the Treaty provides neither for the protection of legitimate expectations[514] nor for a general and

---

[507] Memorial, ¶¶ 253-255; Reply, ¶ 287.

[508] Reply, ¶¶ 289-290.

[509] Reply, ¶¶ 291-294.

[510] **Exhibit C-172**, Article IV.1.

[511] Reply, fn. 693. See also Memorial, ¶ 232.

[512] Counter-Memorial, ¶¶ 286, 289-291; Rejoinder, ¶¶ 275-278. Hence, the standard to which Claimants refer was "*deliberately rejected by the parties to DR-CAFTA*".

[513] Rejoinder, ¶ 285.

[514] Respondent refers to the decision of the International Court of Justice in *Bolivia v. Chile*, which

autonomous duty of transparency,[515] which are not part of customary international law. It also notes that under customary international law the threshold for proving a breach of MST is high.[516] Hence, in order to establish a violation of Article 10.5 of the Treaty, Claimants would have to show that the termination of the Concession Contract was "*sufficiently egregious and shocking — a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons — so as to fall below accepted international standards*".[517]

X.A.1.b Non-Disputing Party Submission

400. According to the Non-Disputing Party Submission, the formulation of Article 10.5 of the Treaty "*demonstrates the Parties' express intent to establish the customary international law minimum standard of treatment as the applicable standard*".[518]

401. Annex 10-B clarifies that the Contracting Parties intended to apply the standard two-element approach of State practice and *opinio juris* to identify the content of the MST.[519] According to the jurisprudence of the International Court of Justice ("**ICJ**"), State practice is embodied in national court decisions, domestic legislation dealing with the alleged norm of customary international law and official declarations by relevant State actors on the subject.[520] By contrast, arbitral awards and international court decisions interpreting FET as a concept of customary international law are not themselves instances of State practice, but can help determine that practice when they examine it.[521] According to the Non-Disputing

---

"*constitutes the* opinio juris *the parties to DR-CAFTA determined should inform the customary international law standard they adopted in Article 10.5*" (Rejoinder, ¶¶ 280-282. See also Counter-Memorial, ¶ 291).

[515] Counter-Memorial, ¶¶ 292-293; Rejoinder, ¶ 282.

[516] Counter-Memorial, ¶¶ 294-295; Rejoinder, ¶ 283.

[517] See Counter-Memorial, ¶ 295, quoting *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, June 8, 2009, **Exhibit RLA-40**, ¶ 627. See also case-law cited at Counter-Memorial, fn. 523. This would be proven also by *Waste Management II* (see *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, **Exhibit CLA-34**, ¶ 98).

[518] Non-Disputing Party Submission, ¶ 15.

[519] Non-Disputing Party Submission, ¶ 16.

[520] Non-Disputing Party Submission, ¶ 17, referring to *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, February 3, 2012, I.C.J. 99, 122, ¶ 55; International Law Commission, *Draft Conclusions on Identification of Customary International Law, with Commentaries*, U.N. Doc. A/73/10, Conclusion 6 (2018); *Comments from the United States on the International Law Commission's Draft Conclusions on the Identification of Customary International Law as Adopted by the Commission in 2016 on First Reading*, ¶ 18 (under cover of diplomatic note dated January 5, 2018).

[521] Non-Disputing Party Submission, ¶ 19, relying on *Glamis Gold, Ltd. v. The United States of America*,

Party Submission, it is the claimant who bears the burden of establishing the existence and applicability of a relevant rule as part of the MST.[522]

402. The Submission also takes the position that the FET under customary international law does not give rise to independent host State obligations based on the concepts of legitimate expectations, good faith and transparency.[523]

X.A.1.c The Tribunal's analysis and decision

403. Article 10.5 requires Contracting States to accord to foreign investments "*treatment in accordance with customary international law*", and specifically with "*the minimum standard of treatment of aliens*", in the following terms:

> 1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
>
> 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide: (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world […].

404. The parameters for the interpretation of the concepts of "*customary international law*" and "*minimum standard of treatment of aliens*" referred to in Article 10.5 are elucidated as follows in Annex 10-B of the Treaty:

> The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Articles 10.5, 10.6, and Annex

---

UNCITRAL, Award, June 8, 2009, **Exhibit RLA-40**, ¶ 605. By contrast, the United States allege that arbitral awards interpreting "autonomous" FET provisions in other treaties, outside the context of customary international law, cannot constitute evidence of the content of the customary international law standard under Article 10.5 (Non-Disputing Party Submission, ¶ 18).

[522] Non-Disputing Party Submission, ¶ 20, relying – *inter alia* – on *Cargill Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, **Exhibit RLA-44**, ¶ 273; *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, January 9, 2003, **Exhibit RLA-14**, ¶ 185; *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, June 8, 2009, **Exhibit RLA-40**, ¶ 601.

[523] Non-Disputing Party Submission, ¶¶ 23-26. As for good faith, the United States assert that (*i*) the principle of customary international law that *"every treaty in force is binding on the parties to it and must be performed by them in* 'good faith'" is not established in Section A of the Treaty, and thus claims alleging breach of the good faith principle do not fall within the jurisdiction of the Tribunal; and that (*ii*) while good faith is one of the basic principles governing the creation and performance of legal obligations, it is not in itself a source of obligation where none would otherwise exist (Non-Disputing Party Submission, ¶¶ 27-28).

> 10-C results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 10.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

405. The Parties disagree on the relationship between "*the customary international law minimum standard of treatment of aliens*", which according to Article 10.5.2 is the required standard of treatment of investors under the CAFTA-DR, and the FET standard. For Claimants, the two standards have converged. Respondent disagrees, alleging that the parties to the CAFTA-DR have chosen a standard of treatment of investments different from FET, with a higher threshold. In support of their respective positions, Claimants and Respondent rely heavily on case-law, predominantly on NAFTA, but none specifically interpreting Article 10.5 of the Treaty.

406. This divergence between the Parties raises the vexed question of the content of the MST and its relation to the FET. As highlighted by the Parties, while some tribunals have held that the FET has become part of customary international law,[524] others have found that MST "*is meant to serve as a floor, an absolute bottom, below which conduct is not accepted by the international community*"[525] and that the standard for proving a breach of the MST is particularly high.[526]

407. Before analyzing that case-law, it is necessary to start from the relevant Treaty provision. Indeed, as noted by prominent scholars, the starting point of any analysis of the content of the MST and its relationship with FET is the language of the applicable instrument and, in particular, the degree of linkage it establishes between

---

[524] See, *inter alia*, *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, August 22, 2016, **Exhibit CLA-112**, ¶ 520; *Merrill and Ring Forestry L.P. v. The Government of Canada*, ICSID Case No. UNCT/07/1, Award, March 31, 2010, **Exhibit CLA-81**, ¶¶ 210-213.

[525] *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, June 8, 2009, **Exhibit RLA-40**, ¶ 615.

[526] *Cargill Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, **Exhibit RLA-44**, ¶ 286: "*If the conduct of the government toward the investment amounts to gross misconduct, manifest injustice or, in the classic words of the Neer claim, bad faith or the willful neglect of duty, whatever the particular context the actions take in regard to the investment, then such conduct will be a violation of the customary obligation of fair and equitable treatment*"; *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Award, January, 26 2006, **Exhibit RLA-21**, ¶ 194: "*the threshold for finding a violation of the minimum standard of treatment still remains high […]* [T]*he Tribunal views acts that would give rise to a breach of the minimum standard of treatment prescribed by the NAFTA and customary international law as those that, weighed against the given factual context, amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards*"; *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award, June 25, 2001, **Exhibit RLA-9**, ¶ 367, requiring "*showing a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith*".

FET, on the one hand, and customary international law and MST on the other.[527]

408. By stating that the Parties must accord investments "*treatment in accordance with customary law, including fair and equitable treatment*", Article 10.5.1 of the Treaty indicates that FET is considered part of customary international law. However, in clarifying the rule of Article 10.5.1, Article 10.5.2 specifies that "*the concept of FET*" does not "*require treatment in addition to or beyond that which is required by the MST and does not create additional substantive rights*". This can only mean that fair and equitable treatment is prescribed by Article 10.5 to the extent that standard of treatment is mandatory under the customary international law minimum standard.[528]

409. This is the position of a significant body of case-law based on treaties with similar language. For example, in analyzing a treaty provision almost identical to Article 10.5 of the Treaty in the US-Oman Free Trade Agreement, the tribunal in *Adel A Hamadi Al Tamimi v. Oman* concluded that

> [a] strict "minimum standard of treatment" provision such as Article 10.5 [of the US–Oman FTA], particularly when considered in the light of Annex 10-A in the present case, cannot be interpreted in the expansive fashion in which some autonomous fair and equitable treatment or full protection and security provisions of other treaties have been interpreted. Indeed, the language of Article 10.5.2 makes very clear that Article 10.5 does "not require treatment in addition to or beyond" that required by the minimum standard of the treatment of aliens under customary international law.[529]

410. This, however, begs that question of the content of the MST and of the FET obligation incorporated into it.

411. It is now broadly accepted that, in light of the evolutionary character of the concept of the international minimum standard of treatment, the high threshold test formulated almost a century ago in *Neer*[530] and upheld by a number of

---

[527] R. Dolzer, U. Kriebaum, C. Schreuer, *Principles of International Investment Law*, 2022, p. 200.

[528] On this point, see *United Nations Conference On Trade And Development, Fair And Equitable Treatment: a sequel*, UNCTAD Series on Issues in International Investment Agreements II, 2012, pp. 28-29: "*An explicit link between the FET obligation and the minimum standard of treatment is used in these treaties to prevent overexpansive interpretations of the FET standard by arbitral tribunals and to further guide them by referring to an example of gross misconduct that would violate the minimum standard of treatment of aliens – denial of justice. […] from the host country perspective, linking the FET standard to the minimum standard of treatment of aliens may be seen as a progressive step, given that this will likely lead tribunals to apply a higher threshold for finding a breach of the standard, as compared with unqualified FET clauses*".

[529] *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, October 27, 2015, ¶ 382.

[530] *L. F. H. Neer and Pauline Neer (USA) v. United Mexican States* (1926), 4 RIAA 60, pp. 61-62.

subsequent awards, including some recent ones,[531] is no longer the applicable standard. Thus, most investment tribunals have strongly rejected the idea that today a breach of the MST can only be found in the presence of the kind of "*outrageous*" behavior described in *Neer* and its progeny.

412. As explained by the *Mondev v. United States of America* tribunal:

> both the substantive and procedural rights of the individual in international law have undergone considerable development. In the light of these developments it is unconvincing to confine the meaning of "fair and equitable treatment" and "full protection and security" of foreign investments to what those terms - had they been current at the time - might have meant in the 1920s when applied to the physical security of an alien. To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious.[532]

413. Even if some tribunals have held that there is a convergence between the treatment guaranteed under MST and the FET,[533] the majority view amongst investment tribunals is that the threshold for a breach of the MST is high. This has been highlighted, for instance, in *International Thunderbird*, where the tribunal held that "[n]*otwithstanding the evolution of customary law since decisions such as Neer Claim in 1926, the threshold for finding a violation of the minimum standard of*

---

[531] *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, June 8, 2009, **Exhibit RLA-40**, ¶¶ 612-615; *Cargill Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, **Exhibit RLA-44**, ¶ 286.

[532] *Mondev International Ltd v. United States of America*, ICSID Additional Facility Case No. ARB (AF)/99/2, Award, October 11, 2002, **Exhibit CLA-29**, ¶ 116. See also, *ADF Group Inc. v. United States of America,* ICSID Case No. ARB(AF)/00/1, Award, January 9, 2003, **Exhibit RLA-14**, ¶¶ 179-181; *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, **Exhibit CLA-34**, ¶ 93; *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, June 29, 2012, **Exhibit CLA-92**, ¶¶ 116, 218; *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, August 18, 2008, **Exhibit CLA-65**, ¶¶ 336-337; and *Merrill & Ring Forestry LP v. The Government of Canada*, ICSID Case No. UNCT/07/1, Award, March 31, 2010, **Exhibit CLA-81**, ¶¶ 195-213.

[533] *Rusoro Mining Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB (AF)/12/5, Award, August 22, 2016, **Exhibit CLA-112**, ¶¶ 519-521; *Merrill & Ring Forestry LP v. The Government of Canada*, ICSID Case No. UNCT/07/1, Award, March 31, 2010, **Exhibit CLA-81**, ¶ 208, 210-213; *Union Fenosa Gas S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, August 31, 2018, **Exhibit CLA-120**, ¶ 9.51; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, July 29, 2008, **Exhibit CLA-64**, ¶ 611; *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, August 18, 2008, **Exhibit CLA-65**, ¶¶ 332-337*; Murphy Exploration & Production Company International v. The Republic of Ecuador II,* PCA Case No. 2012-16 (formerly AA 434), Partial Final Award, May 6, 2016, **Exhibit CLA-110**, ¶ 208; *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, July 1, 2004, **Exhibit CLA-36**, ¶ 190; *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, October 31, 2012, **Exhibit CLA-98, ¶¶** 419-420; and *Saluka Investments BV v. Czech Republic*, PCA Case No. 2001-04, Partial Award, March 17, 2006, **Exhibit CLA-44**, ¶ 291.

treatment still remains high".[534] The tribunal in *Murphy v. Canada* made a similar determination, finding that the minimum standard guaranteed by Article 1105 of NAFTA is "*set* […] *at a level which protects against egregious behavior*".[535] Also analyzing the MST in the context of Article 1105 of the NAFTA, the *S.D. Myers, Inc. v. Government of Canada* tribunal ruled that "*a breach of Article 1105* [NAFTA] *occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective*" and considered that a finding that the MST has been breached "*must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders*".[536] Similarly, in the already mentioned *Adel A Hamadi Al Tamimi v. Oman* award, the tribunal concluded that

> [a]lthough a number of subsequent arbitral decisions have acknowledged that with the passage of time the standard has likely advanced beyond these basic requirements [set out in the *Neer* decision], tribunals have continued to employ descriptions which emphasize the high threshold for breach.[537]

414. Likewise, in *Mondev*, the tribunal noted that in applying the international minimum standard,

> [i]n the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment.[538]

415. Even *Waste Management II*, on which Claimants rely to define the standard of treatment they were entitled to, implies that State conduct constitutes a breach of MST if it is "*arbitrary, grossly unfair, unjust or idiosyncratic*", or amounts to a "*complete lack of transparency and candour*", or "*a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest*

---

[534] *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award, January 26, 2006, **Exhibit RLA-21**, ¶ 194.

[535] *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, May 22, 2012, **Exhibit RLA-59**, ¶¶ 152-153.

[536] *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL (NAFTA), Partial Award, November 13, 2000, **Exhibit RLA-7**, ¶ 263.

[537] *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, October 27, 2015, ¶ 383.

[538] *Mondev International LTD v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002, **Exhibit CLA-29**, ¶ 127.

failure of natural justice in judicial proceedings".[539] The choice of words of that tribunal (and particularly the adjectives "*gross*" and "*manifest*") underscores the stringency of the standard. This approach is consistent with the growing understanding of the need to reduce the perception of an almost unfettered discretion of tribunals that may derive from a self-standing reference to fair and equitable treatment not anchored to the parameters of customary international law on the treatment of aliens.

416. Whilst malicious intention, willful neglect of duty or bad faith are not required elements of the MST under customary international law,[540] there must be some aggravating factor such that the acts of the State in question consist of more than a minor derogation from what is deemed to be internationally acceptable.

417. In addition to the level of protection to which investors are entitled under the MST, the Parties disagree on which specific obligations are comprised in the MST protection of Article 10.5 of the Treaty. On the one hand, Respondent does not seem to contest Claimants' position that the MST is in principle violated by arbitrary, unreasonable and disproportionate conduct, as well as by failure to respect procedural propriety and to provide due process, if such conduct reaches a certain level of seriousness. And, indeed, there appears to be a broad consensus that the prohibition of such behavior forms part of the MST.[541] Nevertheless, Respondent submits that the MST does not include the concepts of legitimate expectations and transparency.

418. As to legitimate expectations, Claimants argue that the MST includes an obligation for the State to respect such expectations of the investor. Respondent contests this, relying on the holding of the ICJ in *Bolivia v. Chile* that:

> references to legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment. It does not follow from such references that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation.[542]

---

[539] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, **Exhibit CLA-34**, ¶ 98.

[540] *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, **Exhibit CLA-90**, ¶ 357 citing *The Loewen Group Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, June 26, 2003, ¶ 132.

[541] See, *inter alia*, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, **Exhibit CLA-34**, ¶ 98; *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award, January 26, 2006, **Exhibit RLA-21**, ¶ 194; *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, October 27, 2015, ¶ 390.

[542] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Judgment, October 1, 2018, I.C.J. Reports 2018, **Exhibit RLA-104**, ¶ 162.

419. In this Tribunal's view, that judgment is not apposite for the question under consideration here. That is because *Bolivia v. Chile* was a State-to-State dispute concerning Chile's alleged obligation to negotiate Bolivia's sovereign access to the sea and the Court had to determine, on the basis of customary international law applicable to relations between States, what types of expectations could acquire relevance in that context. It is impossible to extrapolate anything from that finding of the Court as to the type of expectations that can arise and be protected in the completely different context of relations between a State and aliens governed by a treaty on the protection of investments. The Court's dictum dismissing the relevance of investor-State jurisprudence is to be understood simply as denying that such awards can be invoked as evidence of the existence of a rule of customary international law on legitimate expectations applicable to the relations between States. In this Tribunal's opinion, it is not dispositive in a completely different context to infer the existence of a rule of customary international rule specifically on the treatment of aliens denying effects to legitimate expectations engendered by States in the specific context of their relations with foreign investors.

420. For the Tribunal, what is more relevant is that many investment treaty tribunals have brought the concept of legitimate expectations within the purview of provisions on the treatment of aliens under the MST. Indeed, according to the case-law, the protection of the investor's legitimate expectations stems from the good faith principle in customary international law.[543]

421. For instance, in relation to Article 1105 of the NAFTA, the tribunal in *Waste Management II* held that:

> [i]n applying [the minimum standard of treatment of fair and equitable treatment] it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.[544]

422. Nevertheless, the requirements for a finding of a violation by a State of an investor's legitimate expectation are stringent. In accordance with the case-law, in

---

[543] See *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award, January 26, 2006, **Exhibit RLA-21**, ¶ 147; *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Separate Opinion of Mr. Thomas Wälde, January 26, 2006, **Exhibit CLA-133**, ¶ 25; *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, **Exhibit CLA-90**, ¶ 348.

[544] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, **Exhibit CLA-34**, ¶ 98. That reasoning was followed by *William Ralph Clayton, William Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015, **Exhibit CLA-146**, ¶¶ 442-445; *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, June 29, 2012, **Exhibit CLA-92**, ¶ 219. Even *Glamis Gold*, which adopted a restrictive view of the concept of MST, noted that said standard may be breached by "*the creation by the State of objective expectations in order to induce investment and the subsequent repudiation of those expectations*" (*Glamis Gold Ltd. v. The United States of America*, UNCITRAL, Award, June 8, 2009, **Exhibit RLA-40**, ¶ 627).

order to establish an investor's entitlement to rely on expectations, tribunals must conduct an objective analysis of the overall context, disregarding the subjective views of the investor, and taking into account the specific facts of the case to determine whether (*i*) the State made assurances or representations that the investor relied on in making the investment, and (*ii*) the reliance on those assurances was reasonable.[545]

423. For these reasons, the Tribunal concludes that the standard of treatment under Article 10.5 of the Treaty includes an obligation for the host State not to frustrate the investor's legitimate expectations, provided they are reasonable and objective in light of the circumstances and the State's conduct.[546]

424. As to transparency, Claimants and Respondent disagree on whether the MST imposes on the State a self-standing duty of transparency. Respondent argues that it does not, and relies on *Cargill v. Mexico*, which held that:

> Claimant has not established that a general duty of transparency is included in the customary international law minimum standard of treatment owed to foreign investors *per* Article 1105 [of the NAFTA]'s requirement to afford fair and equitable treatment.[547]

425. Claimants for their part refer to *Waste Management II*, which, according to them, considered "*complete lack of transparency*" as an example of treatment infringing the MST.[548] However, that award does not support their position since it did not find transparency to be an autonomous component of the MST, but rather

---

[545] *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, October 3, 2006, **Exhibit CLA-47**, ¶ 130; *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, September 11, 2007, **Exhibit RLA-30**, ¶¶ 330-332; *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, September 5, 2008, **Exhibit CLA-66**, ¶ 261; *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, **Exhibit CLA-90**, ¶¶ 356 ff.

[546] See, for instance, *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, **Exhibit CLA-90**, ¶¶ 356-359, 375-377.

[547] *Cargill Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 11, 2009, **Exhibit RLA-44**, ¶ 294, whose reasoning was followed by *Mercer International Inc. v. Canada*, ICSID Case No. ARB(AF)/12/13, Award, February 2, 2018, **Exhibit RLA-101**, ¶ 7.77. Respondent also mentions *Merrill and Ring Forestry L.P. v. The Government of Canada*, ICSID Case No. UNCT/07/1, Award, March 31, 2010, **Exhibit CLA-81**, ¶ 208.

Claimants argue that these cases are inapposite because they "*offer a cursory consideration of the issue*" and do not undertake "*a detailed analysis*" (Reply, ¶ 291). While this argument may stand for *Merril v. Canada*, where the tribunal merely noted that "[t]*ransparency as noted was unsuccessfully linked to this concept* [of fair and equitable treatment]", it does not for *Cargill v. Mexico* (and *Mercer v. Canada*), which clearly excluded transparency was part of the customary international law minimum standard in the context of a NAFTA provision similar to Article 10.5 of the Treaty.

[548] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, **Exhibit CLA-34**, ¶ 98; Reply, ¶ 292.

held that a complete lack of transparency in an administrative process might be evidence of "*lack of due process*", which, instead, is a component of the MST.[549]

426. The Tribunal is likewise unconvinced by the argument that transparency constitutes a self-standing requirement of the MST due to the alleged flexibility of the standard of Article 10.5 of the Treaty.[550] Even if most investment tribunals concur that the circumstances of each case must be taken into consideration to establish a violation of the MST,[551] the fact that Article 10.5 of the Treaty anchors MST to customary international law implies the need to identify whether an obligation of transparency is part of the customary international law minimum standard of treatment of aliens. This position was upheld in the finding of *Glamis Gold* that "[a]*lthough the circumstances of the case are of course relevant, the standard is not meant to vary from state to state or investor to investor*".[552]

427. Based on the foregoing, the Tribunal cannot share Claimants' position that an obligation of transparency constitutes an autonomous requirement under the MST, although lack of transparency becomes relevant if it adversely impacts due process or propriety of process.[553]

428. To conclude, the Tribunal considers that the standard of protection of investments enshrined in Article 10.5 of the Treaty by reference to the customary international law minimum standard of treatment of investments:

(i) imposes a high threshold for a finding of State liability in the treatment of the investor, without however requiring that the State's conduct be outrageous according to the standard set out in *Neer* in 1926;

(ii) subject to that high threshold, prohibits State conduct that is arbitrary, grossly unreasonable and disproportionate or manifestly fails to respect procedural propriety and due process;

(iii) protects the investor's legitimate expectations that are reasonable and

---

[549] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, **Exhibit CLA-34**, ¶ 98: "*the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct […] involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process*".

[550] Reply, ¶ 293.

[551] See, *inter alia*, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, **Exhibit CLA-34**, ¶ 99; *Mondev International LTD v United States of America*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002, **Exhibit CLA-29**, ¶ 127.

[552] *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, June 8, 2009, **Exhibit RLA-40**, ¶ 615.

[553] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, **Exhibit CLA-34**, ¶ 98.

objective in light of the circumstances and the State's conduct;

(iv) does not incorporate a general duty of transparency, but only sanctions lack of transparency that leads to a serious breach of due process.

429. There remains Claimants' argument that the FET standard provided for by Article IV.1 of the Spain-Nicaragua BIT – supposedly imported into the Treaty by virtue of the MFN clause of Article 10.4 of the Treaty – is applicable, should that standard be more favorable than the MST foreseen by Article 10.5.

430. The Tribunal is not persuaded by Respondent's position that the MFN clause would operate prospectively, thereby only allowing the investor to "import" favorable provisions of treaties concluded *after* CAFTA-DR.[554] In fact, Article 10.4(1) provides that *"*[e]*ach Party shall accord to investors of another Party treatment no less favorable than that it* ***accords****, in like circumstances, to investors of any other Party or of any non-Party*"[555] without any restriction to the MFN clause's *ratione temporis* application. Moreover, when referring to the standard of treatment that may be invoked by virtue of the MFN clause, Article 10.4 employs the present tense (*i.e.* the treatment that the host State "*accords*") rather than the future tense. By doing so, Article 10.4 expressly encompasses the treatment to which, at the time CAFTA-DR was concluded, investors were already entitled under preexisting investment treaties.

431. That said, Claimants only allude to the MFN argument cursorily,[556] without discussing the content of the FET standard of Article IV.1 of the Spain-Nicaragua BIT[557] and much less showing that it is more favorable than the standard of Article 10.5 of the Treaty. The Tribunal need therefore not deal with this. In any case, given the Tribunal's findings in the following sections, even if Claimants were right on this point, the outcome would not change.

X.A.2 Whether Nicaragua failed to accord MST to Claimants' investment

432. Having identified the standard of treatment to which Claimants were entitled pursuant to Article 10.5 of the Treaty, the Tribunal turns to whether Nicaragua's conduct breached that standard. Claimants' position is that Nicaragua did fall foul

---

[554] Rejoinder, ¶ 285.

[555] Article 10.4(1) (emphasis added). Article 10.4(2) of the Treaty similarly provides that: "*Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments*".

[556] Memorial, ¶ 232; Reply, fn. 693.

[557] The letter of Article IV.1 of the Spain-Nicaragua BIT, which reads "*Cada Parte Contratante garantizará en su territorio un tratamiento justo y equitativo a las inversiones realizadas por inversores de la otra Parte Contratante*", provides no indication on the content of the FET standard set forth therein.

of its obligations under that provision by frustrating their legitimate expectations, by failing to act in a consistent, transparent and predictable manner, by violating the principle of proportionality, by acting arbitrarily and unreasonably and by failing to respect procedural propriety and due process.

X.A.2.a The Parties' positions

a) Frustration of Claimants' legitimate expectations

i. Claimants' position

433. Claimants maintain that Nicaragua frustrated their legitimate expectation[558] that (*i*) Article 70 of Law 286 would be applied "*in the very specific and objective circumstances set out therein*" and that (*ii*) any dispute on the termination of the Concession Contract not falling within Article 70 would be settled in accordance with the alternative procedure set out in Article 29 of the Contract.[559]

434. In response to Respondent's assertion that "*Claimants could only have 'l*egitimately expected*' that they would be held to their obligations under the Concession Contract*",[560] Claimants posit that Nicaragua did not have a contractual right to terminate that Contract when it did (*i.e.* on December 2014),[561] as Article 70(b) of Law 286 can only apply "*al término de la fase de exploración*", which Claimants contend occurred in November 2012.[562] Since Law 286 only foresees an exploration and an exploitation phase, following the end of the exploration phase the Contract necessarily entered the exploitation phase.[563]

435. Lastly, they argue that, "[g]*iven that the actions of the MEM in purporting to terminate the Concession Contract were wrongful*", even if Nicaragua had been entitled to terminate the Contract, its "*failure to reverse the decision to terminate*

---

[558] According to Claimants, legitimate expectations arise from specific legal obligations assumed by a State (*e.g.* contracts), as well from general expectations that a host State provide an appropriate investment environment (Memorial, ¶¶ 260-261 and case-law cited therein). A State will also frustrate an investor's legitimate expectations "*if it uses its legal and regulatory powers for a purpose other than that for which it was intended, to impair or deprive it of its investment*" or if it fails to guarantee due process (Memorial, ¶¶ 263-264 and case-law cited therein).

[559] Memorial, ¶ 264.

[560] Counter-Memorial, ¶ 297.

[561] Reply, ¶ 331. Further, "*Regardless of the specific circumstances surrounding the Concession Contract, any investor has a legitimate expectation that a host State will not unlawfully terminate the contract that serves as the basis for the establishment of its entire investment*" (Reply, ¶ 335).

[562] Tr. Day 6, p. 1268, referring to the Letter from the MEM (Mr. Emilio Rappaccioli) to ION, November 19, 2012, **Exhibit C-18**: "*se da por finalizado el Período de Exploración a la fecha del vencimiento del año de extensión el día 13 de noviembre de 2012*".

[563] Memorial, ¶ 265; Reply, ¶¶ 311-313; Tr. Day 6, p. 1271 ff.

was inconsistent with the Claimants' legitimate expectation that Nicaragua would exercise its contractual rights in good faith".[564]

ii. Respondent's position

436. Respondent takes the position that, even if the frustration of an investor's legitimate expectations constituted a violation of the MST, no such breach occurred.[565]

437. Indeed, Article 70(b) of Law 286 entitled Nicaragua to terminate the Contract upon ION's failure to declare a commercial discovery after the conclusion of the exploration phase and the extensions granted to it[566] and the MEM repeatedly reminded ION of that.[567]

438. Respondent contests Claimants' case that Nicaragua was not entitled to invoke Article 70(b) on the grounds that the Contract had entered the exploitation phase as of November 2012. Respondent says that at that point the MEM rightfully did not permit ION to move to the exploitation phase, but rather granted it an additional evaluation period to complete the procedure envisaged in Article 42 of Law 286, which is a condition for any contractor to begin exploitation. In particular, Nicaragua granted that additional extension of time to complete the Evaluation Program so as to give ION an opportunity to make a declaration of commercial discovery, thereby gaining the right to move to the exploitation phase.[568] Since ION never completed that procedure, it could not have moved to exploitation.[569]

439. Claimants were therefore not entitled to expect that Nicaragua would refrain from exercising its right of termination.[570] In fact, Claimants' only legitimate expectation was "*that Nicaragua would exercise its contractual right to terminate the Contract pursuant to Article 70(b) of Law 286*".[571]

---

[564] Reply, ¶ 337.

[565] Counter-Memorial, ¶ 296.

[566] Rejoinder, ¶ 292. According to Respondent, "*Whether or not Nicaragua had the discretion to terminate the Contract under Article 32.1, as well, is irrelevant*" (Counter-Memorial, ¶ 298).

[567] Rejoinder, ¶ 292.

[568] Rejoinder, ¶ 133; Tr. Day 6, pp. 1405-1409. This is also the position of Dra. Rizo (see Tr. Day 3, pp. 768:22-769:7).

[569] Counter-Memorial, ¶¶ 191-194.

[570] Counter-Memorial, ¶ 297; Rejoinder, ¶ 289.

[571] Rejoinder, ¶ 293.

b) Failure to act in a consistent, transparent and predictable manner

i. Claimants' position

440. Claimants' position is that the duty to treat foreign investments in a consistent, transparent and predictable manner is part of a State's duty to act fairly and equitably.[572] According to them, Nicaragua breached that duty, because:

(i) the MEM imposed a hard 180-day deadline for ION to perform the Evaluation Program (claiming that it had been proposed by ION itself) despite the Nicaraguan President having clearly recognized "*the need to grant concessionaires enough time to complete such evaluations by extending the exploration phases*";[573]

(ii) Nicaragua publicly announced its decision to terminate the Contract three months before the issuance of the Termination Letter;[574]

(iii) between December 2014 and May 2016 "*Nicaragua changed every aspect of its purported termination of the Concession Contract*";[575]

(iv) Nicaragua refused to participate in the contractually agreed dispute resolution mechanism provided by Article 29 of the Contract;[576]

(v) Nicaragua was in talks with a third-party with the view to granting it a concession over the ION Block before the termination of the Contract.[577]

ii. Respondent's position

441. Nicaragua raises the following defenses in response to these arguments:

(i) the 180-day deadline was sufficient since the MEM granted ION multiple extensions to allow it to declare a commercial discovery;[578]

(ii) there was no "systematic" refusal by MEM to discuss ION's plans to work with NTE on the Concession and Claimants did not prove that NTE (or any other

---

[572] See Memorial, ¶¶ 266-271 and case-law cited therein.

[573] Memorial, ¶ 272; Reply, ¶ 371. In fact, Claimants note that ION – and only ION – was excluded from the benefits of Law 879.

[574] Memorial, ¶ 275.

[575] Reply, ¶ 372. See also Memorial, ¶¶ 273-274.

[576] Reply, ¶ 373.

[577] Memorial, ¶ 275; Reply, ¶ 373.

[578] Counter-Memorial, ¶ 304; Rejoinder, ¶ 295. As for the fact that Law 879 was not applied to ION, Respondent notes that, as explained by Dra. Rizo in her Second Expert Report, that law could not be retroactively applied to the Contract. Claimants did not submit an expert statement rebutting this point (Rejoinder, ¶ 294).

company) would support ION;[579]

(iii) since "*ION never initiated a dispute resolution mechanism under Article 29*" of the Contract, there was no "refusal" by Nicaragua to participate in the procedure foreseen by that provision.[580]

c) Lack of proportionality of measures

i. Claimants' position

442. According to Claimants, the termination of the Contract on the day following the expiration of the 180-day deadline to perform the Evaluation Program was a disproportionate measure if assessed against the standard set out in *Occidental Petroleum v. Ecuador*, pursuant to which:

> any penalty the State chooses to impose must bear a proportionate relationship to the violation which is being addressed and its consequences. […] In cases where the administration wishes to impose a severe penalty, then it appears to the Tribunal that the State must be able to demonstrate (i) that sufficiently serious harm was caused by the offender; and/or (ii) that there had been a flagrant or persistent breach of the relevant contract/law, sufficient to warrant the sanction imposed; and/or (iii) that for reasons of deterrence and good governance it is appropriate that a significant penalty be imposed, even though the harm suffered in the particular instance may not have been serious.[581]

443. Claimants contend that, even assuming that the delay in the performance of the Evaluation Program "*was attributable to ION and not to the MEM's withdrawal of collaboration, the Termination Letter did not identify any serious breaches by the Claimants nor any serious prejudice for Nicaragua that would merit terminating the Concession Contract*".[582] Claimants rely on the fact that ION had invested considerable resources in the Concession, made a discovery with massive potential and was about to finalize a deal with NTE for the financing of further exploration. Furthermore, they plead that the extension of the duration of the exploration phase of concession contracts by Law 879 is evidence that Nicaragua did not consider ION's breach significant. In that context, the appropriate sanction would have been a

---

[579] Counter-Memorial, ¶ 302. Respondent states that "*Nicaragua was under no obligation to continue indulging Claimants' fantasies*".

[580] Rejoinder, ¶ 299. According to Respondent, the "*mere mention of Article 29 in passing does not suffice to initiate such a mechanism*".

[581] Claimants refer to the standard adopted in *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, October 5, 2012, **Exhibit CLA-97**, ¶ 416, quoted in Reply, ¶ 368.

[582] Memorial, ¶ 278. The fact that President Ortega had earlier recognized that concessionaires should be allowed sufficient time to evaluate the results of their exploration activity "*only underscores the disproportionate nature of the MEM's Measures*".

lesser penalty, such as a fine.[583]

ii. Respondent's position

444. Respondent argues that termination of the Contract was proportionate, as "*the Parties had agreed to this very measure in the event the contractor did not submit a declaration of commercial discovery pursuant to Article 32.1 of the Contract*".[584] It also submits that the present case cannot be compared to *Occidental v. Ecuador* where the contract was only terminated because the investor had transferred contractual rights to a third party without authorization. Here, instead, the termination of the Contract was triggered by ION's failure to perform the most significant contractual requirement.[585]

d) Arbitrary and unreasonable conduct

i. Claimants' position

445. Claimants submit that Nicaragua's conduct was arbitrary and unreasonable,[586] because it terminated the Contract "*without any traces of a rational decision-making process*"[587] and for "*ulterior motives*".[588] Further, "*Nicaragua not only failed to deal fairly with Claimants, but also abused its sovereign powers to circumvent the contractually-agreed forum and unilaterally terminate the Concession Contract*".[589]

446. In reply to Respondent's contention that, due to ION's failure to perform the

---

[583] Reply, ¶¶ 369-370.

[584] Counter-Memorial, ¶ 306. Relying on *Convial Callao S.A. y CCI – Compañía de Concesiones de Infraestructura S.A. v. Republic of Peru*, ICSID Case No. ARB/10/2, Award, May 21, 2013, **Exhibit RLA-70**, ¶ 613, Respondent argues that "*there is nothing disproportionate about Nicaragua's exercise of a right that the Parties mutually and voluntarily agreed to incorporate in the Concession Contract*" (Counter-Memorial, ¶ 307).

[585] Rejoinder, ¶ 263.

[586] For a definition of "arbitrary" conduct, see Memorial, ¶¶ 280-281 and case-law cited therein.

[587] The Termination Letter did not state any legal basis nor invoked any source of the MEM's authority to terminate the Contract. Nicaragua also failed to justify its actions and sew confusion about the status of the Contract for nearly two years, and then sought "*to retroactively justify the Termination Letter through Decree 191, effectively admitting it had not been a reasoned decision in the first place*" (Memorial, ¶¶ 283-284).

[588] That is, to award the ION Block to a third-party with whom it was already negotiating.

[589] According to the Claimants, this would run afoul of the duty of the host State to accord Claimants fair and equitable treatment. Indeed, as held in *Swisslion v. Macedonia*, a State may breach the fair and equitable standard if it submits a dispute for adjudication without previously engaging with the investor in a fair manner and ignoring its prior commitments (see *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia, ICSID Case No. ARB/09/16*, Award, July 6, 2012, **Exhibit CLA-93**, ¶ 287, referred to in Memorial, ¶¶ 282, 285).

Evaluation Program despite the multiple extensions granted to it, it was "*entirely reasonable"* for the MEM *"not to exercise whatever additional discretion it might have had under the 2014 modifications to Law 286*", Claimants argue that:

(i) such assertion is inconsistent with the reason given to ION for denying it the benefits of Law 879, *i.e*. that such law was only applicable to concession contracts still in the exploration phase, which was no longer the case for the Contract, for which the exploration phase had expired in November 2012;[590]

(ii) the suggestion that ION had to prove it had technical and financial support to evaluate and exploit the Concession "*confirms that Nicaragua had ceased to operate as a good faith partner by 2014*";[591]

(iii) had ION been granted additional time in accordance with Law 879, it would have used it to fulfill its contractual obligations, and "*ION's track record should have given Nicaragua* cause for optimism".[592]

ii. Respondent's position

447. According to Respondent, Claimants did not show that the termination of the Concession Contract was in any way arbitrary, "*much less manifestly arbitrary, as required by Article 10.5*".[593]

448. For a start, the termination was reasonable, given that ION failed to declare a commercial discovery despite being granted multiple extensions,[594] and the process was conducted in accordance with Nicaraguan law.[595]

449. Further, given ION's record, the MEM's decision "*not to exercise whatever additional discretion it might have had under the 2014 modifications to Law 286, when Claimants offered no evidence that they would be able to use the extra time to fulfill their contractual obligations*" was "*entirely reasonable*".[596] Respondent rejects Claimants' argument that ION's track record should have given Nicaragua cause for optimism. This would in any case be immaterial, as the Contract "*did not grant ION an indefinite period to obtain the technical and financial capacity required to fulfill*

[590] Reply, ¶ 362.

[591] Reply, ¶ 359.

[592] Reply, ¶ 364.

[593] Counter-Memorial, ¶ 310.

[594] Rejoinder, ¶ 295.

[595] Counter-Memorial, ¶ 309.

[596] Counter-Memorial, ¶ 305. Further, Respondent argues that Law 879 could not be retroactively applied to the Concession.

its obligations".[597]

450. Finally, contrary to Claimants' assertions, Nicaragua's conduct is in no way similar to that of Macedonia in the *Swisslion* case. Nicaragua repeatedly informed Claimants of their failure to carry out their contractual obligations;[598] in fact "[o]*nly ION can be blamed for its failure and inability to redress those concerns and declare a commercial discovery*".[599]

e) Failure to respect procedural propriety and to provide due process

i. Claimants' position

451. Claimants allege that Nicaragua had decided already in September 2014 that it would terminate the Contract.[600] It "*just waited for the 180-day deadline that it had imposed on ION to elapse to formalize its preordained conclusion*", leaving ION no chance "*to escape its fate*".[601] In their view, the termination of the Contract was not only substantially wrongful (as the Contract could not be terminated according to Article 70(b)), but also fraught with procedural irregularities.[602]

452. According to Claimants, the MEM did not have the power to terminate the Contract, as it sought to do with the Termination Letter, since it could only do so with the authorization of the President.[603]

453. Furthermore, the MEM refused to engage in any constructive dialogue with ION and issued a Termination Letter that, according to Minister Mansell's own admission,[604] did not respect due process and therefore "*did not meet basic formal and substance requirements to qualify as an administrative act*".[605] Even the qualification given by the MEM to the Termination Letter is controversial, because, according to Claimants,

> while the February 2015 letter treated the 2014 Termination Letter like an administrative act, in the March 2015 decision, only weeks later, the MEM is

[597] Rejoinder, ¶¶ 296, 297.

[598] Counter-Memorial, ¶¶ 311-312.

[599] Counter-Memorial, ¶ 313.

[600] Memorial, ¶ 290.

[601] Memorial, ¶ 291.

[602] Tr. Day 1, p. 74 ff.; Memorial, ¶ 290.

[603] Reply, ¶ 304; Tr. Day 1, pp. 74-75.

[604] Letter from the MEM (Mr. Salvador Mansell) to ION, March 25, 2015, **Exhibit C-40**.

[605] Memorial, ¶ 292.

> saying that the 2014 Termination Letter was, in fact, not an administrative act.[606]

454. Claimants posit that the MEM itself recognized the invalidity of the termination, and Decree 191 was issued as a "*poorly disguised attempt to retroactively validate the 2014 Termination Letter*".[607] However, notwithstanding Respondent's portrayal of Decree 191 as a mere implementation of the termination put in motion in 2014 through the Termination Letter, the Decree invoked a new ground for termination,[608] Article 70(e) of Law 286.[609]

455. Moreover, Nicaragua's conduct in the 18 months during which the status of the Contract remained unclear "*violated basic requirements of due process*".[610] Not only was ION not given an opportunity to be heard and to explain why the termination was unlawful.[611] Nicaragua also ignored ION's requests to resort to the dispute settlement procedure of Article 29 of the Contract which, contrary to Dra. Rizo's assessment, was available to ION.[612]

456. As a whole, according to Claimants, "*Nicaragua's conduct deprived ION of the ability to manage its business and engage in rational decision-making over an 18-month period*" in which ION faced significant potential exposure to Nicaragua and to third parties, pending the formal termination of the Contract.[613]

457. Claimants highlight that Respondent "*has not even attempted to justify the 18-month delay in 'formally' terminating the contract*"[614] and note that, even if Nicaragua had the right to terminate the Contract, "*the manner in which Nicaragua chooses to exercise those rights must also comply with the standard of treatment that Nicaragua guaranteed in the Treaty. It plainly did not*".[615]

ii. Respondent's position

458. Respondent disagrees that Nicaragua did not guarantee Claimants' due process.

---

[606] Tr. Day 1, p. 77.

[608] Tr. Day 1, p. 78.

[608] Reply, ¶¶ 211, 301(e), 309, 320.

[609] Tr. Day 6, p. 1304 ("*If, as we are told, this decree was simply implementing the 2014 termination, it follows that no new termination grounds could be incorporated, however groundless they were in this case*"). See also Reply, ¶ 320.

[610] Reply, ¶ 343.

[611] Reply, ¶¶ 344-345.

[612] Reply, ¶¶ 350-354.

[613] Reply, ¶¶ 346-347.

[614] Reply, ¶ 348.

[615] Reply, ¶ 349.

459. First, Minister Mansell never admitted that the Termination Letter did not meet basic formal and due process requirements. Rather, he clarified that the letter was a notification and that "*further steps to implement the termination, as required by Nicaraguan law, would follow suit*".[616]

460. Further, the MEM was entitled to issue the Termination Letter: as the agency responsible for the administration of the Contract, it was standard practice for the MEM to formally notify to ION the grounds for termination.[617] The termination was later formalized first by the decree of the President of Nicaragua and then by the Attorney General whom he had designated, as foreseen by Nicaraguan law.[618]

461. Moreover, the fact that Decree 191 identified Article 70(e) of Law 286 as an additional basis for termination was "*entirely appropriate*". Respondent takes the position that only after the termination under Article 70(b) could MEM and MARENA determine that Article 70(e) provided an additional basis for termination, since ION's failure to perform the remediation activities required after the termination of the Contract was established by an inspection carried out on January 27, 2015, following the termination.[619]

462. Also, it is not true that Nicaragua ignored Claimants' attempt to invoke the dispute resolution mechanism of Article 29 of the Contract, as ION failed properly to initiate that procedure.[620]

463. Additionally, Nicaragua regularly expressed to ION its concerns regarding its failure to perform its contractual obligations, underscoring the consequences of such failure. ION was notified of every step of the termination process and "*had ample opportunities to challenge each one of* MEM's *and the Attorney General's Office's actions. […] ION time and again failed to avail itself of the legal mechanisms available to it*".[621] Against this background, Claimants cannot assert they were denied their right to be heard.[622] Further, Claimants are barred from challenging the

---

[616] Counter-Memorial, ¶ 308.

[617] Tr. Day 1, pp. 267-268. See also RER-Rizo I, ¶ 49: "*no puede confundirse la potestad conferida al Presidente de la República para aprobar ciertos aspectos del Contrato, tales como su firma, su negociación o su modificación según lo establecido en el artículo 24 de la Ley No. 286, con la potestad de notificar la ocurrencia de una causal de terminación de un contrato de concesión con efectos inmediatos de los previstos en el artículo 70 de la Ley No. 286. Tal como se ha mencionado, el MEM es quien tiene la potestad de supervisar el cumplimiento de las obligaciones de los contratos de exploración y explotación; por lo tanto, tiene la potestad de notificar un incumplimiento cuya consecuencia necesaria es la terminación de dicho contrato, sin necesidad de previa autorización del Presidente*".

[618] Counter-Memorial, ¶ 309.

[619] Tr. Day 6, pp. 1418, 1424.

[620] See ¶ 441(iii) *supra.*

[621] Rejoinder, ¶ 302.

[622] Rejoinder, ¶ 303.

termination for breach of MST, due to their failure to avail themselves of the legal avenues provided by the Contract's legal framework.[623]

464. Finally, Respondent argues that Claimants cannot "*conjure a treaty violation by complaining that the termination procedure took too long*", as "*the 18-month period that Nicaragua took to finalize the termination procedure was consistent with the time that the State has taken to terminate other hydrocarbon concession contracts*" and – generally speaking – with termination processes involving the government.[624]

X.A.2.b The Tribunal's analysis and decision

465. Before analyzing Claimants' claim that Respondent breached Article 10.5 of the Treaty, the Tribunal considers it useful to address three issues that are relevant for the decision of that matter, and which, as will be seen in due course, are also relevant for the decision on the claim for expropriation.

466. These issues are the following: (*i*) did Nicaragua terminate the Concession in the exercise of its contractual rights or of its sovereign authority? (*ii*) was Nicaragua entitled to terminate the Contract? and (*iii*) was the Contract terminated in compliance with the relevant legal framework? These questions are examined below in **Sections a)**, **b)** and **c)** respectively.

a) Whether Nicaragua terminated the Concession in the exercise of its contractual rights or of its sovereign authority

467. The first issue to be tackled for the assessment of the alleged breach of Article 10.5 of the Treaty (which, as will be seen below, is also particularly relevant for the alleged breach of Article 10.7) is whether Nicaragua terminated the Concession Contract in the exercise of its rights thereunder or of its sovereign powers.

468. As noted above, Claimants argue that, under the legal framework governing the Concession, the role of Nicaragua was that of a regulator rather than of a contractual partner.[625] Claimants point to the following circumstances which, in their submission, are evidence that Nicaragua acted in the exercise of its sovereign authority in respect of the Contract:

(i) in November 2013, the MEM imposed on ION the 180-day deadline for the evaluation of its commercial discovery despite the fact that neither Law 286

---

[623] Rejoinder, ¶ 304.

[624] Rejoinder, ¶¶ 305-306.

[625] Reply, ¶¶ 384-386. First, the Contract "*is a contract between a private company and a State for the exploration and exploitation of that State's natural resources (i.e., hydrocarbons), which was entered into to give effect to Nicaragua's sovereign objectives as memorialized in Law 286*". Second, "[b]*y law, the President of Nicaragua is the party to contracts entered into pursuant to Law 286, including the Concession Contract, and maintains ultimate decision-making control over all important decisions*".

nor the Contract provided for such a deadline;[626]

(ii) in December 2013,[627] the MEM "*unilaterally amended the Concession Contract in practice by introducing a new* 'intermediate' *phase*";

(iii) Nicaragua terminated the Contract by legislative decree, "*a classic example of a sovereign act*";

(iv) Nicaragua sought to grant third parties a concession over the ION Block.[628]

469. Respondent replies that the grounds invoked by Nicaragua for terminating the Contract are "*the very* [ones] *upon which the Contract entitled Nicaragua to terminate it*".[629] It adds that the wording of Decree 191 confirms that the Contract was terminated in accordance with Nicaragua's contractual rights.[630]

470. The Tribunal is not persuaded that Nicaragua's actions in relation to the Concession can be characterized as an exercise of sovereign authority.

471. *First*, the fact that the State was a party to the Contract is not conclusive for the assessment of the capacity in which Nicaragua entered into the Contract and acted in relation to it. As also noted by the case-law quoted by Respondent, it is well established that sovereign States can act in their capacity as contractual counterparties when concluding and performing contracts.[631] In this case, the assumption of the role of contracting party by the State is consistent with the nature and object of the Contract, which related to the exploration and exploitation of national resources and, which, like all concession contracts, was required by Nicaraguan law to be concluded by the President of Nicaragua.[632] *Second*, the MEM's decision of November 20, 2013 to reject ION's request for review of the First Termination[633] and Minister Rappaccioli's reversal of the First Termination and reinstatement of the Contract of December 19, 2013[634] cannot be characterized as an exercise of sovereign authority. In both cases, the MEM adopted its decisions by

---

[626] Claimants refer to Letter from the MEM (Ms. Lorena Lanza) to ION, November 20, 2013, **Exhibit C-131**, p. 3, in which they say that "*the MEM openly admitted that it was acting pursuant to its regulatory powers during that* 'intermediate phase' *when it purported to impose the 180-day period for evaluating the hydrocarbon discovery on ION*", Reply, ¶ 386.

[627] Reply, ¶ 386, citing December 2013 Resolution, December 19, 2013, **Exhibit C-26**.

[628] Reply, ¶ 386.

[629] Counter-Memorial, ¶¶ 280-281; Rejoinder, ¶ 268.

[630] Rejoinder, ¶ 268.

[631] See *Swisslion Doo Skopje v. Former Yugoslav Republic of Macedonia*, ICISD Case No. ARB/09/16, Award, July 6, 2012, **Exhibit CLA-93**, ¶ 286, quoted in Counter-Memorial, ¶ 314.

[632] See Article 18 of Law 286.

[633] See ¶ 184 *supra*.

[634] See ¶ 187 *supra*.

reference to contractual clauses or provisions of Law 286 which had been incorporated into the Contract.[635]

472. In any case, even if it were held that on some occasions the MEM did exercise its regulatory powers in relation to the Concession, what is relevant for the purposes of the Claim is that in terminating the Contract, and taking the action alleged by Claimants to constitute a Treaty violation, Nicaragua purported to exercise its contractual rights under Article 32.1 of the Contract.[636] This is confirmed in the Termination Letter, Decree 191 and the Termination Decision, all of which only referred to the grounds for termination enshrined in Article 70 of Law 296, which Article 32.1 incorporates by reference. The fact that the termination of the Contract was accomplished by virtue of an order by legislative decree to Nicaragua's Attorney General is simply a reflection of the relevant legal framework; it does not undermine the fact that Nicaragua exercised the contractual right to terminate the Contract unilaterally, much like ION could have done in other circumstances.[637]

473. Further, there is no evidence for Claimants' insinuation that the termination was the result of a hidden political agenda[638] to grant a concession over the ION Block to third parties.

474. To recall, the MEM and Petronic[639] engaged in conversations with potential investors, some of which were interested in the ION Block. The conversations between Petronic and EastSiberian, a company run by Mr. Graeme Phipps, a former Norwood director, started in mid-2014.[640] Mr. Phipps sent a letter to Petronic confirming that its priority was the ION Block and Petronic requested due diligence material from EastSiberian.[641] Further, on January 15, 2015, Petronic signed a cooperation agreement and heads of joint operating agreement with EastSiberian

---

[635] See Letter from the MEM (Ms. Lorena Lanza) to ION, November 20, 2013, **Exhibit C-131**, making reference to Article 11 of the Contract and Article 42 of Law 286. See December 2013 Resolution, December 19, 2013, **Exhibit C-26**, making reference to Articles 42, 44 and 51 of Law 286, Article 14 of the Contract.

[636] A similar conclusion was reached in *Suez, Sociedad General de Aguas de Barcelona, InterAgua Servicios Integrales del Agua v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, July 30, 2010, **Exhibit RLA-49**, ¶ 143: "*While Argentina exercised its public authority on various occasions during the crisis, the Tribunal does not consider that the Province's termination of the Concession Contract was an exercise of such authority. Rather, its actions were taken according to the rights it claimed under the Concession Contract and the legal framework*".

[637] See Article 32.5 of the Contract.

[638] As argued by Claimants in their Closing Statements (see Tr. Day 6, pp. 1330:18 – 1331:9, 1337:1-4).

[639] Minister Rappaccioli was a member of Petronic's board of directors. See Minutes of Petronic Board of Directors' Meeting of January 9, 2015, **Exhibit C-233**.

[640] RWS-Lanza I, ¶¶ 37-40; Reply, ¶¶ 135-141.

[641] Reply, ¶¶ 157-158, ¶166; **Exhibits C-218** and **C-219, C-222** to **C-226**.

which included the ION Block and announced it publicly on March 19, 2015.[642] On October 28, 2015, EastSiberian announced that it had been granted contractor status by Nicaragua.[643] Finally, on May 16, 2016, Petronic signed a cooperation agreement and heads of joint operating agreement with PAO, to which EastSiberian sold its interests in Nicaragua on August 26, 2016.[644] This notwithstanding, Claimants have not proven that these conversations impacted on ION's prospects of finding funders or investors willing to acquire an interest in the ION Block, nor that they were the cause of the MEM's decision to terminate the Contract. In fact, in the Tribunal's view, the only relevant contact between the MEM and third parties allegedly interested in exploiting the Concession was the granting of contractor status to EastSiberian which, however, occurred when the process for the termination of the Contract was well underway and it was normal that Nicaragua would look for another potential contractor for the ION Block. In any event, it is undisputed that to this day no third party has been granted a concession over the ION Block.

475. Thus, the Tribunal reasons that the evidence on the record confirms that, in terminating the Contract, Nicaragua exercised its contractual rights rather than its sovereign authority.

b) Whether Nicaragua was entitled to terminate the Contract

476. The second preliminary issue for the decision on Nicaragua's purported breach of its Treaty obligations is whether, in the circumstances, Nicaragua was entitled to terminate the Contract. This is relevant because the core of Claimants' position on the breach of MST is premised on the alleged illegality of the termination of the Contract.[645]

477. As set forth in Decree 191 and the ensuing Termination Decision, in terminating the Contract, Nicaragua purported to exercise its rights pursuant to Articles 70(b) and 70(e) of Law 286,[646] both of which are incorporated in Article 32.1 of the Contract.

478. Article 70(b) of Law 286 provides that:

> Los contratos terminarán sin requisito previo en los siguientes casos: […] (b) Al término de la fase de exploración, sin que el contratista haya hecho

[642] Reply, ¶ 191; **Exhibits C-231** and **C-232** cited in Reply, fn. 441 and 442. Respondent admitted that on this occasion the ION Block was included. See also Rejoinder, ¶ 140.

[643] Reply, ¶ 211; **Exhibits C-46, C-237, C-239** and **C-240**.

[644] Reply, ¶ 219; Exhibits cited in fn. 517-520.

[645] The facts relevant for the termination and the proceeding that led to it are set out in Section VI.J.

[646] Termination Decision, May 24, 2016, **Exhibit C-55.**

> declaración de descubrimiento comercial y no esté vigente un período de retención.

479. As acknowledged by both Parties,[647] under this provision, Nicaragua was expressly entitled to unilaterally terminate the Contract *ipso iure* if ION failed to make a commercial discovery pursuant to Article 42 of Law 286 by the end of the exploration phase.

480. It is undisputed that in the instant case ION did not make a declaration of commercial discovery as required by the Contract and Nicaraguan Law.[648] There is instead a dispute as to whether the status of the Contract allowed Nicaragua to invoke Article 70(b) as of December 2014. Claimants suggest that it did not, since the exploration phase had ended in November 2012[649] and since Law 286 only foresees an exploration and an exploitation phase, following the end of the exploration phase the Contract necessarily entered the exploitation phase.[650] On the other hand, Respondent asserts that, as of November 2012, the Contract entered an evaluation phase, during which ION had to undergo the procedure envisaged in Article 42 of Law 286 in order to prove that its discovery was commercial, which would have allowed it to move to the exploitation phase.[651] Both Parties agree that ION never completed such procedure.

481. It is correct – as underscored by Claimants and recognized at the Hearing by Respondent's Nicaraguan law expert, Dra. Rizo,[652] and its witness, Ms. Artiles,[653] who was in charge of monitoring the Contract – that Law 286 only provides for two phases, exploration and exploitation, and does not provide for an "evaluation phase".[654] Indeed, Dra. Rizo and Ms. Artiles said that, under normal circumstances, the Evaluation Program should have been completed during the exploration phase.[655] From this, however, it does not follow that simply by declaring "*un descubrimiento significante que puede convertirse en comercial*"[656] at the end of the exploration phase (the six-year duration of which had been extended several times

---

[647] Reply, ¶ 34; Counter-Memorial, ¶¶ 280-281.

[648] Reply, ¶ 442.

[649] Tr. Day 6, p. 1268, referring to Letter from the MEM (Mr. Emilio Rappaccioli) to ION, November 19, 2012, **Exhibit C-18**: "*se da por finalizado el Período de Exploración a la fecha del vencimiento del año de extensión el día 13 de noviembre de 2012*".

[650] Tr. Day 6, p. 1271 ff.

[651] Tr. Day 6, pp. 1405-1409. This is also the position of Dra. Rizo (see Tr. Day 3, pp. 768:22-769:7).

[652] Tr. Day 3, p. 775:12-20.

[653] Tr. Day 3, p. 687: 12-19.

[654] See Article 45 of Law 286.

[655] Tr. Day 3, p. 786: 1-2 (Dra. Rizo); Tr. Day 3, p. 690:2-9 (Ms. Artiles).

[656] ION Declaration of Discovery, November 6, 2012, **Exhibit C-16.** See ¶ 160 *supra*.

to approximately ten years),[657] ION could without more enter the exploitation phase. The discussion between the Parties on this point arises in large part because the situation that presented itself with the performance of the Contract was not foreseen by Law 286. In fact, the Law seemed 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.

482. 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.[658] Since it is common ground that ION never performed the evaluation required by said provision nor established the existence of commercial reserves,[659] 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.[660] Nevertheless, at that time, the MEM decided not to avail itself of its right to terminate and, in its discretion, 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.[661] 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, it is unsustainable that ION was entitled to continue directly with the exploitation of the Concession Area without completing the Evaluation Program and proving the existence of a commercial discovery.

---

[657] 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 (see,¶ 164 *supra*), and the second one on December 19, 2013, when the First Termination was reversed (see ¶ 187 *supra*).

[658] See Article 45 of Law 286 and Article 5 of the Contract.

[659] 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).

[660] 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)*".

[661] See Section VI.G *supra*.

483. It is equally unsustainable that Nicaragua acted wrongfully by granting ION a 180-day period to carry out the evaluation needed to confirm the commercial nature of the discovery because that was not foreseen by the law. In so doing, Nicaragua chose not to exercise its right to terminate the Contract at that moment so as to give ION an opportunity to satisfy the inescapable condition for the passage to the subsequent phase. By such indulgence, which was clearly in ION's interest, Nicaragua certainly cannot be understood to have forfeited its right to terminate the Contract pursuant to Article 70(b) of Law 286 if the condition was ultimately not satisfied.

484. There is a serious paradox inherent in Claimants' position that, by not terminating the Contract upon the end of the exploration phase despite the lack of a declaration of commercial discovery, Nicaragua waived its right to invoke the lack of compliance with that condition and to terminate the Contract under Article 70(b). Indeed, that position would imply that, by automatically entering the exploitation phase without having demonstrated the existence of a commercial discovery, ION would have acquired the right to "exploit" the Concession Area for 35 years, with no possibility for Nicaragua to oust it. This is unsustainable.

485. Claimants' remark that "*Nicaragua could still seek to terminate the concession pursuant to the process set out in Article 32.3* [of the Contract]"[662] is meritless. In fact, the dispute resolution procedure of Article 32.3 of the Contract was only applicable for breaches not falling under Article 70 of Law 286. Accordingly, it would not have permitted Nicaragua to terminate the Contract on the ground of ION's failure to make a commercial discovery, which was the core condition that ION had to satisfy for the right to exploit the Concession, and with which it did not comply.

486. Claimants submit that the MEM's letter of November 19, 2012[663] established that the Contract was entering into the exploitation phase. This does not follow from the text of that letter. To recall, that letter simply acknowledged that the exploration phase had finished on November 13, 2012 and 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 exploration phase (six years plus a one year extension) as occurs in the present case".*[664]

487. While in that letter, Minister Rappaccioli did declare that the exploration phase had expired,[665] he did not say that the Contract had entered the exploitation phase. Rather, the Minister simply said that, since ION's declaration of discovery had been

---

[662] Tr. Day 6, p. 1288.

[663] Letter from the MEM (Mr. Emilio Rappaccioli) to ION, November 19, 2012, **Exhibit C-18**.

[664] *Ibid*., pp. 3-4.

[665] *Id.*: "*Primero: […] se da por finalizado el Período de Exploración a la fecha del vencimiento del año de extensión el día 13 de noviembre del 2012. […]*".

made at the end of the exploration period, he granted ION a further deadline to complete the evaluation procedure under Article 42 in order to establish whether a commercial discovery had been made,[666] which was the condition to be satisfied for a concession contract to move to the exploitation phase. That statement can only be reasonably interpreted as indicating that, after the expiration of that deadline, ION would be allowed to perform the Evaluation Program. It cannot be read as an assurance that Nicaragua would not terminate the Contract should ION continue to fail to prove the existence of a commercial discovery as required by Article 42, which is what ultimately happened. The Tribunal likewise sees no basis for Claimants' argument based on the MEM's refusal to apply Law 879 to ION. To recall, Law 879 amended Articles 36 and 45 of Law 286 to allow the MEM to extend the exploration period by up to six years.[667] When ION requested the application of that law to the Contract, Minister Rappaccioli refused on the grounds that ION was no longer in the exploration phase.[668] According to Claimants, this would be an indication that ION had entered the exploitation phase.[669] The Tribunal finds this argument untenable, as Law 879 did not purport to amend Article 42 of Law 286 requiring the completion of the procedure enshrined therein to enter the exploitation phase.

488. In support of their position that Nicaragua accepted that ION had entered the exploitation phase as of November 2012, Claimants also emphasize Minister Rappaccioli's assertions at the meeting between the MEM and ION of November 13, 2012, the minutes of which record that:

> [e]l Ministro expone que si entiende bien, el Concesionario quiere pasar a la etapa de Explotación para continuar explorando y realizar la perforación de pozos. […] El Ing. Rappaccioli expone que si la empresa quiere seguir

[666] *Id.*: "*Tercero: tomando en consideración las disposiciones del artículo 42 de la ya referida Ley No. 286, este Ministerio concluye, que para valorar pertinente la declaratoria de descubrimiento hecha por su representada […] es necesario que nos presenten una Certificación de otra firma consultora de prestigio, que certifique lo expresado por la Consultora Sproule lnternational sobre el descubrimiento […]. De igual manera, para poder valorar la posibilidad de aprobar que su representada inicie la Fase de Desarrollo y considerar la aprobación del Plan de Producción para dicha Fase, es necesario que dentro del plazo de los 30 días a partir de la fecha de notificación de descubrimiento hecho por su representada, conforme lo establecido en el acápite b) del referido artículo 42, proporcione por escrito al MEM comunicación donde su representada sea concluyente expresándose sobre si dicho descubrimiento "si tiene o no potencial comercial' y asimismo dentro de ese término deberá informar sobre el nombre de la firma que otorgara la certificación solicitada. Dicha certificación deberá ser presentada en un plazo máximo de noventa (90) días a partir de la fecha de notificación de descubrimiento hecho por su representada, coincidiendo con los requisitos de Ley que dentro de tal plazo deberá completar en concordancia a los requerimientos dispuestos en el acápite c) del artículo 42 de la Ley* […]".

[667] See ¶ 200 *supra*.

[668] See ¶ 203 *supra*.

[669] Reply, ¶¶ 163-165, 193.

> invirtiendo y están conscientes que los riesgos son de ellos; "pues sigan adelante."[670]

489. That statement, however, is very generic. If Minister Rappaccioli's words are read in context, together with the statements of the other representatives of the MEM[671] and the MEM's communication of November 19, 2012, it is doubtful that they can be interpreted as Claimants allege.

490. In light of the foregoing, the Tribunal is satisfied that, under Nicaraguan law, Nicaragua was entitled to terminate the Contract pursuant to the first one of the provisions invoked by it, Article 70(b) of Law 286, incorporated in Article 32.1 of the Contract.

491. The conclusion that Nicaragua was rightfully entitled to terminate the Contract in accordance with the first ground for termination invoked by it, renders moot Claimants' argument that the second ground for termination invoked by Nicaragua, Article 70(e)3 of Law 286, could not be relied upon in the circumstances.[672] The Tribunal will accordingly not discuss it.

c) Whether the termination of the Contract complied with the applicable procedural rules

492. The third preliminary matter to be addressed is whether Nicaragua's termination of the Contract complied with the applicable procedures. This is relevant because one of the arguments on which Claimants base their claim of violation of the MST is that the termination of the Contract was fraught with procedural irregularities that breached due process.

493. The answer is not straightforward. As explained by Dra. Rizo in her expert report and cross-examination, Law 286 does not set forth a procedure for the unilateral termination of a concession contract by the State,[673] since ION was the first concession holder to make a declaration of alleged discovery.[674]

494. Consequently, according to Dra. Rizo, the termination was governed by the general rules of Nicaraguan law.[675] In the expert's view, Nicaragua respected these provisions, since (*i*) it notified ION of the termination through the Termination

---

[670] Executive Report, ION-MEM, Minutes of Meeting of November 13, 2012, **Exhibit R-62**, pp. 3-4.

[671] Especially Ms. Lanza, who made it clear to ION's representatives that "*no pueden pasar a la etapa de Explotación sin haber agotado las actividades de perforación y demostrar que el yacimiento es comercialmente viable*" (*ibid*.).

[672] See ¶ 454 *supra.*

[673] Tr. Day 3, p. 793; RER-Rizo I, ¶ 47.

[674] Tr. Day 3, p. 764:8-10.

[675] Tr. Day 3, p. 793:14-17; RER-Rizo I, ¶ 47; RER-Rizo II, ¶ 29.

Letter, (*ii*) it issued Decree 191, authorizing the Attorney General to proceed with the formal termination, and (*iii*) it formalized the termination with the Termination Decision.[676]

495. Claimants do not offer an alternative version of the procedure that should have been followed for the termination of the Concession, nor do they provide evidence from an expert of Nicaraguan law to contest Dra. Rizo's opinion on the point. Nonetheless, their position that the termination process incurred in inconsistencies appears to have some merit.

496. When Nicaragua decided to terminate the Contract, it did so through a 18-month process characterized by certain inconsistencies and procedural irregularities. It is beyond dispute that ION repeatedly failed to perform the Evaluation Program in spite of the numerous *de facto* extensions that were given by the MEM, and that it was unable to obtain the necessary monetary and technical resources. However, and setting aside the issue of whether this behavior rises to a breach of Article 10.5 of the Treaty (which the Tribunal will analyze below), Nicaragua acted somewhat inconsistently during the termination process.

497. Claimants submit that the issuance of the Termination Letter was not preceded by an administrative proceeding and that during the document production phase Nicaragua did not produce any evidence of that it had occurred[677] and in a letter dated March 25, 2015, the MEM actually recognized that no such proceeding had taken place. However, the Tribunal can find no evidence that Article 70 required the MEM to follow administrative proceedings *before* putting the concessionaire on notice of its decision to terminate. The text of the provision suggests the contrary.

498. Additionally, it is unclear whether the MEM had the authority to terminate the Contract itself or whether the termination required a Presidential Decree. The latter seems to be suggested by Minister Mansell's March 25, 2015 letter stating that the Termination Letter was not an administrative resolution or act, and was only meant to notify ION of the MEM's intention to terminate the Contract, 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****."*[678] Moreover, on October 27, 2015, the Attorney General of Nicaragua sent a letter to President Ortega's secretary requesting the President's authorization to initiate and execute the termination process of the Contract.[679] This letter could suggest that the Attorney General was not satisfied that the MEM had the authority to terminate the Contract. Minister

[676] Tr. Day 3, p. 793:16-17; RER-Rizo I, ¶¶ 48-51.

[677] Reply, ¶ 186 and fn. 420.

[678] MEM letter dated March 25, 2015, **Exhibit C-40.** Emphasis added**.**

[679] Letter from the Attorney General to Mr. Oquist dated October 27, 2015, **Exhibit C-243.**

Mansell's letter of March 25, 2015 cited in the Termination Decision – had stated that the Termination Letter and the 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. The subsequent administrative procedure referred to in Minister Mansell's letter could be interpreted to be the procedure for termination that Dra. Rizo suggested in her expert report and at the Hearing.[680]

499. Although the above referred matters lost relevance in the light of Decree 191 and the Termination Decision, they indicate that the termination process was not entirely flawless and transparent. Whether this caused confusion to the detriment of due process and procedural propriety in breach of the high standard of Article 10.5 of the Treaty will be discussed below.

d) Whether Nicaragua breached Article 10.5 of the Treaty by failing to grant the minimum standard of protection

500. Having addressed the foregoing preliminary questions and identified the standard of treatment under Article 10.5, the Tribunal may now proceed to analyze whether, considering all the relevant circumstances, Respondent breached that standard in terminating the Contract.

501. Claimants' grievances, which are described in detail above,[681] can be summarized as follows. First, they argue that Nicaragua was not entitled to terminate the Contract under Article 70(b) of the Contract, as that ground should have been invoked at the end of the exploration phase of the Contract, *i.e.* in November 2012, and was only invoked more than one year later. According to Claimants, the invocation of such ground was merely a pretext for the MEM to get rid of ION and grant the concession to third parties. Claimants also take issue with Respondent's behavior in connection with the Concession both before and after the activation of the termination process. For instance, Claimants refer to the alleged imposition of a hard 180-day deadline for ION to perform the Evaluation Program (which they contend was not established by the law), to the public declarations of the MEM's officials' intention to terminate the Contract (which allegedly prejudiced ION's dealings with potential investors), as well as to Minister Rappaccioli's refusal to grant ION additional time for the exploration of the ION Block in accordance with Law 879. As for the termination process itself, Claimants denounce its undue length (which according to them generated a situation of uncertainty over the future of the Concession), several procedural irregularities on Nicaragua's part, as well as the circumvention of the dispute resolution procedure provided by Article 29 of the Contract and invoked by Claimants.

[680] See ¶ 494 *supra*.

[681] See Section X.A.2.a.

502. Claimants assert that by these actions, Nicaragua breached Article 10.5 of the Treaty because (*i*) it frustrated their legitimate expectations, (*ii*) it failed to act in a transparent and predictable manner, (*iii*) its measures were disproportionate, (*iv*) it acted in an arbitrary and unreasonable manner, and (*v*) failed to respect procedural propriety and due process.

503. These contentions are considered separately below.

i. Legitimate expectations

504. Claimants' argument on the asserted violation of their legitimate expectations rests on the assumption that Claimants were entitled to expect that Nicaragua would comply with the terms of the Contract and would refrain from unlawfully terminating it.[682] This argument is based on a confusion between legitimate expectations and contractual obligations. The compliance with the Contract is clearly a contractual obligation and nothing more. As the Tribunal has established above, although the Contract did not contemplate situations in which a purported discovery was reported towards the end of the exploration phase, Nicaragua did indeed comply with the Contract and terminated it lawfully according to its terms. Claimants were perfectly aware that those terms included the contractual obligation for ION to perform the Evaluation Program as a condition for moving to the exploitation phase and Nicaragua's right to terminate if it did not. Moreover, it is undisputed that ION was unable to prove a commercial discovery in spite of the additional time granted to it. ION was even repeatedly and explicitly warned that failure to perform that Program within the original and then the extended deadline would lead to the termination of the Contract. In that context, the Tribunal finds it impossible to hold that Claimants could reasonably expect that Nicaragua would refrain from at some point exercising its contractual right to terminate the Contract.[683]

505. The Tribunal also sees no ground for Claimants' argument that, even if Nicaragua was entitled to terminate the Contract, its failure to reverse the MEM's decision to terminate "*was inconsistent with the Claimants' legitimate expectation that Nicaragua would exercise its contractual rights in good faith*".[684] The argument is premised on the wrongfulness of the issuance of the Termination Letter. However, as illustrated above, [685] Claimants have not shown that the MEM's actions were contrary to the standard procedure for terminating concession contracts and even less to good faith. Despite the administrative inconsistencies of the process

[682] Reply, ¶¶ 334-335.

[683] See Section X.A.2.b b).

[684] Reply, ¶ 337.

[685] See ¶ 495 *supra*.

discussed above,[686] ultimately the Contract was lawfully terminated by Decree 191 and the Termination Decision, since, despite its extension beyond the deadline of the exploration phase set forth therein, ION was unable to prove a commercial discovery, which was a condition for maintaining the Contract, the failure to satisfy which entitled Nicaragua to terminate pursuant to Article 70(b) of Law 286, incorporated in Article 32.1 of the Contract.

506. In light of all the above, the Tribunal concludes that Claimants could not reasonably believe that Respondent would not terminate the Contract in accordance with the contractual provisions.

ii. Lack of proportionality

507. Claimants suggest that the termination of the Contract was a disproportionate reaction to ION's failure to perform the Evaluation Program within the prescribed deadline. It thereby allegedly violated the principle of proportionality that, as enounced in *Occidental v. Ecuador*, dictates that any penalty imposed by a State (even if contractually established) must be proportional to the breach to which it responds.[687] According to them, the appropriate sanction would instead have been a fine.[688]

508. The Tribunal cannot follow this argument. Claimants in fact ignore the fundamental nature of the obligations set forth in Article 42 of Law 286 relating to the steps to be taken by the concessionaire as a condition for moving to the exploitation phase, and in particular the performance and completion of the Evaluation Program and the submission of a declaration of commercial discovery. Those obligations were instrumental to ensuring that the concessionaire diligently carried out the tasks needed for the development of the potential oil reserves. As recalled, ION also knew that the breach of those fundamental obligations carried with it the risk of termination of the Contract and was conscious of its inability to find oil and lack of technical and financial resources for such purpose.

509. In light of these circumstances, Nicaragua's exercise of its fundamental contractual right in the face of ION's well documented inability to meet its obligations and to show its ability to develop the Concession Area can in no way be characterized as a disproportionate remedy.

510. Claimants' position is further weakened by the fact that, as discussed, before exercising its right to terminate the Contract, Nicaragua granted ION multiple

---

[686] See ¶¶ 496 ff. *supra*.

[687] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, October 5, 2012, **Exhibit CLA-97**, ¶ 416; Memorial, ¶¶ 276-277; Reply, ¶ 368.

[688] Reply, ¶¶ 369-370.

extensions of the deadlines which gave it further opportunities to comply with its obligations, imposing only once a minimal penalty for the delays (the posting in 2011 of the US$ 300,000 bond guaranteeing the correct performance of the minimum exploratory program).[689] Nor, contrary to Claimants' position, can the extension of the duration of the exploration phase of concession contracts by Law 879 be taken as evidence that the duration of that phase provided for by Law 286 and by the Contract was unreasonably short. A change in the law is not a demonstration of the disproportionality of the previous regime. In any event, nothing in the record suggests that a lengthier term would have changed the outcome due to ION's inability to assemble the necessary technical and financial resources to comply with the Evaluation Program.

511. This leads the Tribunal to conclude that also the claim of lack of proportionality of Nicaragua's measures must be rejected.

iii. Arbitrariness and unreasonableness

512. Claimants' argument that Nicaragua acted arbitrarily and unreasonably rests essentially on the allegation that it terminated the Contract without a rational decision-making process and for ulterior motives, and that it failed to deal fairly with Claimants and abused its sovereign powers to unilaterally terminate the Contract.

513. The Tribunal considers that these allegations are contradicted by the findings made above that:

(i) Nicaragua was entitled to terminate the Contract in accordance with Article 70(b) of Law 286, incorporated in Article 32.1 of the Contract;[690]

(ii) Claimants have failed to provide evidence that Nicaragua terminated the Contract as a pretext for granting another party (*i.e.* EastSiberian) a concession over the San Bartolo Block;[691]

(iii) Nicaragua did not make use of its sovereign powers to terminate the Contract, but rather exercised its contractual rights.[692]

514. In support of their assertion that Nicaragua failed to deal fairly with them, Claimants rely on *Swisslion v. Macedonia* to argue that the fair and equitable standard might be infringed if the State fails to engage with the investor in a fair manner and ignores its prior commitments.[693] Claimants rely on the following

[689] Letter from ION (Mr. Modesto Barrios) to the MEM, November 17, 2011, **Exhibit C-107**.

[690] See Section X.A.2.b b).

[691] See ¶¶ 473-474 *supra*.

[692] See Section X.A.2.b a).

[693] Memorial, ¶¶ 282, 285.

passage of that decision:

> [a]n issue of contractual compliance arose in which the investor sought to explain the basis for its performance of the terms of the contract with a view to persuading its counterparty that this was not a breach and then sought confirmation of its claimed compliance. In such circumstances, the State had a duty to deal fairly with the investor by engaging with it, in particular to advise it of any concerns it may have had that the investment might not be in compliance with the investor's contractual obligations.[694]

515. This pronouncement is not pertinent. In *Swisslion*, the investor sought confirmation from the Ministry of the host State that it was complying with its contractual obligations, but the Ministry did not respond. It is against that background that the tribunal found that:

> [i]t was unfair for the Ministry not to respond to Swisslion, thereby effectively permitting it to continue to operate the business and make further investments while the Ministry caused other agencies of the government to conduct assessments of the Claimant's contractual compliance. Then, one year later, without prior notice, the Ministry commenced legal proceedings to annul the contract (a proceeding in which the prayer for relief was later amended to a request for termination of the contract).[695]

516. The present case is markedly different. Contrary to the Macedonian authorities in *Swisslion*, Nicaragua did engage with ION in relation to its activities in the Concession and the requirements under the Contract. Critically, it confronted ION regarding its failures to perform the Evaluation Program and put it on notice multiple times that the Contract would be terminated if ION did not make a proper declaration of commercial discovery within the established deadlines. Moreover, unlike in the situation in *Swisslion*, ION did not continue to make investments relying on an assumption induced by the State that its conduct was in compliance with the applicable rules.

517. For these reasons, the Tribunal decides that there is no ground for a finding that Nicaragua acted arbitrarily and unreasonably in its treatment of Claimants and their investment.

iv. Disregard of procedural propriety and due process

518. As concluded in Section X.A.2.b c) above, there is some merit in Claimants' position that the termination process was not entirely immune from procedural irregularities.

519. However, even if that were so, it would not automatically entail a breach of

---

[694] *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia, ICSID Case No. ARB/09/16*, Award, July 6, 2012, **Exhibit CLA-93**, ¶ 287.

[695] *Id.*, ¶ 288.

Article 10.5 of the Treaty by Nicaragua.

520. According to case-law, and consistent with the proper interpretation of the MST standard,[696] procedural irregularities only amount to breaches of the MST when they are "*grave enough to shock a sense of judicial propriety*" [697] and, when administrative procedures are involved, the threshold to establish a breach of due process is high.[698] In the words of *AES v. Hungary*,

> it is not every process failing or imperfection that will amount to a failure to provide fair and equitable treatment. The standard is not one of perfection. It is only when a state's acts or procedural omissions are, on the facts and in the context before the adjudicator, manifestly unfair or unreasonable (such as would shock, or at least surprise a sense of juridical propriety) […] that the standard can be said to have been infringed.[699]

521. Moreover, certain tribunals rejected claims of breach of the MST based on procedural irregularities on the ground that the alleged procedural error "*was corrected quickly and effectively through domestic channels, a process that does not evince* 'a complete lack of due process'".[700] This is what happened in the case at stake where, despite the inaccuracies of the Termination Letter, Nicaragua ultimately rendered moot the issue of the MEM's role in the termination process by terminating the Contract properly through a decision of the Attorney General mandated by Nicaragua's President, as prescribed by Nicaraguan administrative law.[701]

522. In any case, if the Nicaraguan authorities' conduct is considered holistically, in the judgment the Tribunal, Claimants have not shown that they violated the high standard required for a breach of MST.

523. In fact, although the process of termination of the Contract could have been more straightforward, it was not fraught with shocking or egregious irregularities. ION was put on notice of the consequences of a failure to perform the agreed evaluation activities within the 180-days deadline. Further, the Termination Letter,

---

[696] See Section X.A.1.c *supra*.

[697] *International Thunderbird Gaming Corporation v. United Mexican States*, **Exhibit RLA-21**, ¶ 200. See also *Alex Genin, Eastern Credit Limited, INC. and A.S. Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award, June 25, 2001, **Exhibit RLA-9**, ¶ 371.

[698] See *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award, January 26, 2006, **Exhibit RLA-21**, ¶ 200 ("*The administrative due process requirement is lower than that of a judicial process*").

[699] *AES Summit Generation Limited and AES-Tisza Erömü Kft v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, September 23, 2010, **Exhibit CLA-84**, ¶ 9.3.40.

[700] *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Final Award, June 8, 2009, **Exhibit RLA-40**, ¶ 771.

[701] RER-Rizo I, ¶¶ 47-48.

Decree 191 and the Termination Decision were reasoned and, notwithstanding the inconsistencies mentioned above, were detailed so as to allow Claimants to understand the legal and factual basis for the termination.[702] Accordingly, the Tribunal finds that the termination was not – in the words of the *Mondev* tribunal – "*clearly improper and discreditable*".[703]

524. It also bears reminding that, between 2010 and early 2014, the MEM had exercised its discretion in a manner that benefitted ION (regardless of whether it was also driven by policy considerations), by giving it multiple opportunities to fulfill its contractual obligations even though the deadline for ION to declare a commercial discovery had expired without the Company conducting the Evaluation Program. In particular, the Contract was extended for one year in early 2009, for another year on November 14, 2011 and for additional 180 days on November 19, 2012 and on December 19, 2013, for a total of 39 months.[704] In these circumstances, Claimants cannot credibly assert that ION was given no chance "*to escape its fate*". In any event, ION's inability to perform the Contract and, particularly, to carry out the Evaluation Program was certainly not impacted by the inaccuracies described above.

525. Moreover, even if one were to accept Claimants' grievances and find that the MEM lacked the authority to issue the Termination Letter and that the Letter did not respect fundamental formal requirements, this still would not elevate the termination to a Treaty breach. Indeed, any assumed procedural irregularity affecting the Termination Letter was corrected by Decree 191[705] and by the Termination Decision.[706]

526. As for Nicaragua's asserted failure to heed ION's requests to resort to the dispute resolution mechanism of Article 29 of the Contract, the Tribunal finds that Claimants failed to properly pursue that procedure.

527. ION made several references to that dispute settlement mechanism and reserved its rights on several occasions (including January 19, 2015,[707] March 6,

[702] Letter from the MEM (Mr. Emilio Rappaccioli) to ION, December 3, 2014, **Exhibit C-34**.

[703] *Mondev International LTD v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002, **Exhibit CLA-29**, ¶ 127.

[704] Rejoinder, ¶ 264.

[705] Decree 191, **Exhibit C-45.**

[706] Termination Decision, May 24, 2016, **Exhibit C-55.**

[707] Letter from ION to the MEM dated January 19, 2015, **Exhibit C-35**.

2015,[708] April 21, 2015,[709] June 16, 2015[710] and November 12, 2015[711]), but did not initiate arbitral proceedings.

528. In any case, Article 29 of the Contract only applied to breaches other than those foreseen by Article 70 of Law 286,[712] which was precisely the breach that Nicaragua invoked to terminate the Contract. Nicaragua cannot be blamed for not resorting to an inapplicable procedure.

529. As to Nicaragua's alleged 18-month delay in formally terminating the Contract, the Tribunal accepts that it might have been due to the fact that, as discussed above,[713] Law 286 did not set forth the procedure for the unilateral termination of a concession contract by the State, especially in the peculiar circumstances of this case, and ION was the first concession holder to make a declaration of alleged discovery in Nicaragua. In any event, since it is uncontested that ION did not carry out any evaluation during that 18-month period, that delay cannot have had any harmful consequences for ION.

530. Finally, not even Claimants' grievances in relation to the lawfulness of Decree 191 are persuasive. For one, Claimants offered no evidence rebutting Dra. Rizo's expert testimony that termination of a Contract by an executive decree was standard practice under Nicaraguan law. Further, the fact that Decree 191 invoked an additional ground for termination (*i.e.* Article 70(e) of Law 286) does not render that Decree incompatible with the termination process initiated with the Termination Letter since, as discussed above, termination was justified pursuant to Article 70(b). In any case, Claimants could have contested the admissibility of the new ground for termination (*i.e*. Article 70 (e)) by challenging Decree 191 before the Nicaraguan courts. ION, however, chose not to do so even though Claimants' counsel acknowledged that the remedy was available to it.[714]

531. The Tribunal accordingly concludes that Nicaragua did not breach procedural propriety and due process in a way capable of qualifying as a breach of the MST.

---

[708] ION's administrative motion dated March 6, 2015, **Exhibit C-37**.

[709] ION's administrative appeal dated April 21, 2015, **Exhibit C-41**.

[710] Letter from ION to the MEM dated June 16, 2015, **Exhibit C-43**.

[711] Letter from ION to the Attorney General dated November 12, 2015, **Exhibit C-48**.

[712] Article 32(3) of the Contract, **Exhibit C-3**.

[713] See ¶ 493 *supra*.

[714] According to Claimants' counsel, ION chose not to pursue an action against the decree as it "*would have been a much more complex type of proceedings that would have taken several years to be completed*" (Tr. Day 6, pp. 1308:20-1310:8).

v. Lack of transparency and predictability

532. As discussed above,[715] the standard of treatment of Article 10.5 of the Treaty does not incorporate a general duty of transparency, and lack of transparency is only relevant if it reaches the threshold of a serious breach of due process. As discussed above, in the view of the Tribunal, Respondent's actions in terminating the Contract do not meet that threshold.[716] Claimants also cannot argue that Nicaragua acted in an unpredictable manner when it chose to terminate the Contract, since ION was indisputably put on notice that failure to adhere to the Evaluation Program would lead to termination.

533. The Tribunal accordingly concludes that Nicaragua's alleged lack of transparency did not amount to a breach of Article 10.5 of the Treaty.

vi. The Tribunal's conclusion on the claim for breach of Article 10.5 of the Treaty

534. To recap, despite having been given ample opportunity to prospect for oil in the ION Block, well beyond the initial 6-year exploration term of the Contract, ION never made a commercial discovery and did not even conduct an evaluation of its purported "*descubrimiento*" in order to establish its commercial potential. The terms of Law 286 and of the Contract were clear in this respect and well understood by ION: a declaration of commercial discovery, preceded by the performance of an evaluation program, was an inescapable condition for the passage from the exploration phase to the exploitation phase, and failure to satisfy that condition was an explicit ground for termination of the Contract, pursuant to Article 70(b) of Law 286, incorporated into the Contract by virtue of Article 32.1.

535. Although, according to the Contract, Nicaragua was entitled to terminate it as of November 2012, when ION reached the end of the exploration phase without making a declaration of commercial discovery, Nicaragua granted it a 180-day period to conduct the evaluation which, if successful, would have allowed it to enter the exploitation phase. Not even with the benefit of that extension did ION succeed in performing such an evaluation. Actually, during that period, ION did not carry out any meaningful activity, but rather merely continued its unsuccessful search for a potential partner which would be able to deal with the financial and the technical aspects of the project. Claimants could not reasonably hold an expectation to maintain the Contract in force indefinitely, in the hope that at some point they would have been able to assemble the necessary technical and financial resources to carry out the Evaluation Program or find a suitable investor for such purpose.

536. Because of all this, the Tribunal cannot accept Claimants' allegations that it was the MEM's declarations to the press, threats of termination and the Termination

[715] See ¶ 427 *supra*.

[716] See Section X.A.2.b d) iv. *supra*.

Letter that dissuaded potential investors from entering the project. The record indicates that the lack of interest of investors in the ION Bock was due to a number of other factors. These included the fact that Nicaragua had no known reserves of hydrocarbons[717] and that the disappointing results of the tests carried out by ION lead to presume the absence of recoverable, let alone commercial, reserves in the ION Block,[718] as well as the drop of crude oil prices commencing in mid-2014 after the cycle of high prices from 2011 to 2014.[719] Ryder Scott's[720] and Quadrant's[721] examinations were persuasive on these points.

537. In the view of the Tribunal, neither by its formal actions nor by its behavior, did Nicaragua ever give any indication that it would refrain from ultimately exercising its right to terminate the Contract if ION did not comply with its terms. Claimants cannot complain that, because they were given an opportunity to remedy their default and were granted a grace period not explicitly provided for by Law 286 to carry out the Evaluation Program, that would have entitled them to continue indefinitely their operations (which were actually almost non-existent).

538. The Tribunal has not found that Nicaragua committed any serious impropriety or violation of due process throughout its relationship with ION that rises to the level of a breach of Article 10.5 of the Treaty, including in the way it handled the termination of the Contract and the time it took for that process to come to fruition. If any such impropriety was committed, it was minor and could be explained by the uncertainties of the applicable legal framework and the absence of precedents of termination of similar concession contracts. In any case, as noted above, any procedural errors affecting the initial phase of the termination procedure (in particular, those regarding the Termination Letter and its controversial status as an administrative act) were eventually cured by the issuance of Decree 191 and the subsequent Termination Decision. There is likewise no evidence that ION suffered any prejudice from Nicaragua's actions in the final phases of the relationship. ION incurred no significant costs or other loss or damage as a result of Nicaragua's assumed improprieties.

539. In these circumstances, the Tribunal is satisfied that Nicaragua's conduct has not fallen foul of the standard of treatment prescribed by Article 10.5 of the Treaty and

---

[717] Tr. Day 5, p. 1147: 1-7.

[718] Sproule Report, **Exhibit C-15**, pp. 1-4, 20; RER-Ryder Scott I, ¶¶ 13-17, 49-54, ¶ 120; RER-Ryder Scott II, ¶¶ 20-32, 40, 46, 80, ¶¶ 111-113; Tr. Day 4, p. 914: 11-22, p. 915: 1, 9-13, 21-22, p. 916: 1-2. See also Tr. Day 5, p. 1149: 1-19, p. 1157: 8-16.

[719] Tr. Day 5, p. 1151: 18-22, p. 1152: 1-21.

[720] Examination of Ryder Scott, Tr. Day 4, p. 909:2-21; p. 910:4-9; p. 914:11-22.

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

that Claimants' complaints in this respect must be denied.

X.B The alleged breach of Article 10.7 of the Treaty (expropriation)

X.B.1 The Parties' positions

X.B.1.a Claimants' position

540. Claimants base their claim of expropriation of their investment on Article 10.7 of the Treaty, which protects investors from direct and indirect[722] expropriation except under certain conditions listed in Article 10.7.1.[723]

541. According to Claimants, the analysis of whether an expropriation occurred must begin by "*identifying the assets or investments that have been allegedly expropriated*".[724] On this point, they argue that "*contractual rights are susceptible of expropriation under international law*".[725] They argue that whether State conduct amounts to an expropriation does not depend on whether the State exercises contractual rights.[726] Instead, faced with an allegation of expropriation, tribunals assess the compliance of the State with the treaty standard in light of *all* circumstances.[727] Moreover, a "*State cannot avoid liability by self-certifying its conduct as commercial, not sovereign*"[728] and – in any case – "*Nicaragua was acting as sovereign at all times*" as a consequence of the legal framework governing the Concession.[729]

542. Claimants also object to Respondent's assertion that an incorrectly executed termination based on a State's contractual rights would, at most, lead to a contract breach.[730] In fact, failure to rectify an incorrect termination leads to an unlawful expropriation if it "*results in the cessation of the investment activity*", and "*that the same conduct breached the Concession Contract, as well as the Treaty, does not*

---

[722] Annex 10-C of the Treaty defines indirect expropriations as a situation "*where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure*" and adds that "*whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry*" considering factors identified in the Annex.

[723] Memorial, ¶¶ 233-234; Reply, ¶¶ 374-375.

[724] Memorial, ¶ 237.

[725] Memorial, ¶ 239.

[726] Reply, ¶ 379, and case-law quoted in fn. 905 and 906.

[727] Reply, ¶¶ 379-382.

[728] Reply, ¶ 384.

[729] Reply, ¶¶ 384-386.

[730] Counter-Memorial, ¶ 267.

undermine the Claimants' claims under the Treaty".[731]

543. Claimants contend that the termination of the Contract resulted in the direct expropriation of Claimants' indirect contractual rights, and the indirect expropriation of their shares in ION, which have been rendered worthless.[732]

544. The termination was "*clearly wrongful*", as the MEM purported to terminate the Contract without the authority to do so and relying on a ground that was no longer available to Nicaragua.[733] Claimants deny that this is "*simply a case of Nicaragua making a series of errors in its termination of the Concession Contract*", as "*Nicaragua's true purpose was to get rid of ION and transfer its rights in the Concession to a favoured third party*" through a conduct that "*would not withstand scrutiny*".[734]

545. Moreover, the expropriation was unlawful, as it failed to comply with the conditions in Article 10.7.[735]

X.B.1.b Respondent's position

546. Respondent rejects Claimants' construction of the standard of Article 10.7.

547. In particular, Respondent highlights that case-law is consistent in showing that termination of a contract by a State can be considered expropriation only when the State acts "*outside the legal framework of the contract on the basis of superior sovereign authority*". By contrast, when a State incorrectly terminates a contract in the exercise of its contractual rights, it "*would, at most, incur a contract breach to be addressed pursuant to the dispute resolution mechanism established in the contract; it would not be a treaty violation*".[736] On this point, Claimants ignore the "*black letter law*" and the consistent jurisprudence cited in the Counter-Memorial, incorrectly focusing "*on inapposite cases that address an irrelevant matter pertaining to jurisdiction over contract claims, not whether an expropriation has occurred*".[737]

548. In order to determine whether the termination of the Contract is an expropriation under international law, the Tribunal should "*(1) identify the relevant*

---

[731] Reply, ¶¶ 388-389.

[732] Reply, ¶¶ 390, 394-398. In the Memorial, Claimants qualified these grounds as alternative (see Memorial, ¶¶ 240-241).

[733] Reply, ¶ 392.

[734] Reply, ¶ 393.

[735] Memorial, ¶¶ 244-245; Reply, ¶ 399. Under Article 10.7, an expropriation is lawful if it is performed "*(a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation […]; (d) in accordance with due process of law and Article 10.5*".

[736] Counter-Memorial, ¶ 267; Rejoinder, ¶ 256.

[737] Rejoinder, ¶ 257.

rights and obligations of the Parties *under the legal framework of the Contract; and (2) determine whether Nicaragua terminated the Contract on the basis of its rights within that legal framework or on the basis of superior sovereign authority*".[738]

549. Respondent contends that the termination of the Contract was a legitimate measure adopted pursuant to Article 70(b) of Law 286 (incorporated into the Contract by virtue of Article 32.1), which provided for a termination "*sin requisito previo*" failing a commercial discovery at the end of the exploration phase.[739]

550. Thus, as evidenced by the Termination Letter, in terminating the Contract Nicaragua exercised its contractual rights, rather than its sovereign authority.[740]

551. Further, the termination was "*by definition proportionate: It is the only consequence explicitly contemplated by the law for ION's failure to make a commercial discovery*".[741] Moreover, it was not a mere pretext for Nicaragua to achieve its political goals, as Claimants imply. In fact, on the one hand, Nicaragua "*attempted to help ION […] make a commercial discovery – by extending the time it had to make such a discovery […] of some 39 months*".[742] On the other hand, the evidence refutes Claimants' accusation that Nicaragua was negotiating over the ION Block with EastSiberian before the MEM terminated the Contract. As a matter of fact, "*Nicaragua has never granted rights over this block to any third party*".[743]

552. In light of this, Respondent argues that Claimants' assertion that Nicaragua expropriated its contractual rights or other property has no legal basis or evidentiary support.[744]

X.B.2 The Tribunal's analysis and decision

553. The subject of Claimants' expropriation claim is the same conduct of Nicaragua that is the subject of the claim for breach of the MST, in other words the termination of the Contract. According to Claimants, in addition to constituting a breach of Article 10.5 of the Treaty, the termination of the Contract was a taking of property

---

[738] Counter-Memorial, ¶ 275.

[739] Counter-Memorial, ¶¶ 276-278; Rejoinder, ¶ 258. According to Respondent, "*Nicaragua's decisions to grant ION two additional time periods at the end of the exploration phase to further attempt to make a commercial discovery did not waive or extinguish its right to terminate the Contract under Article 70(b) of the Law and Article 32.1 of the Contract, which it was free to exercise at the end of these additional periods if no commercial discovery had been declared*" (Rejoinder, ¶ 259).

[740] Counter-Memorial, ¶¶ 280-281; Rejoinder, ¶ 268, referring to Letter from the MEM (Mr. Emilio Rappaccioli) to ION, December 3, 2014, **Exhibit C-34**.

[741] Rejoinder, ¶ 263.

[742] Rejoinder, ¶ 264.

[743] Rejoinder, ¶ 265.

[744] Rejoinder, ¶ 270.

in violation of Article 10.7 because it resulted in the direct expropriation of the contractual rights indirectly held by them, and in the indirect expropriation of their shares in ION.[745]

554. Article 10.7 of the Treaty prescribes that

> 1. No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except:
> (a) for a public purpose;
> (b) in a non-discriminatory manner;
> (c) on payment of prompt, adequate, and effective compensation in accordance with paragraphs 2 through 4; and
> (d) in accordance with due process of law and Article 10.5 [of the Treaty].

555. Respondent's principal defense to this claim is that its termination of the Contract cannot be characterized as an expropriation because it was "*a 'valid,' 'legitimate,' and 'justifiable' exercise of its contractual right*".[746]

556. It is undisputed that, as Claimants submit, contractual rights are susceptible to expropriation. The question here is whether the termination of a contract by the State can in and of itself amount to an expropriation.

557. The unanimous position in the case-law and doctrine[747] is that the termination of a contract by a State acting as private contracting party, in conformity with the private rules governing it, does not constitute an expropriation. It can only rise to the level of an expropriation if it involves an act of sovereign authority.

558. This position, which Respondent terms black letter law, is set forth in clear terms in countless awards. For example, in *Vannessa Ventures v. Venezuela*, the tribunal held that:

> [i]t is well established that, in order to amount to an expropriation under international law, it is necessary that the conduct of the State should go beyond that which an ordinary contracting party could adopt.[748]

---

[745] See ¶ 543 *supra*.

[746] Counter-Memorial, ¶ 279.

[747] A. Reinisch, *Expropriation*, in P. Muchlinski et al. (eds.), *Oxford Handbook Of International Investment Law*, 2008, **Exhibit RLA-31**, p. 418; R. Dolzer, C. Schreuer, *Principles Of International Investment Law*, 2008, **Exhibit RLA-32**, p. 117 (see also R. Dolzer, U. Kriebaum, C. Schreuer, *Principles Of International Investment Law*, 3rd ed., 2022, p. 151-153).

[748] *Vannessa Ventures v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/06, Award, January 16, 2013, **Exhibit RLA-68**, ¶ 209.

559. This position is reiterated in *Suez v. Argentina*,[749] *Malicorp v. Egypt*,[750] *Impregilo v. Argentina*,[751] *Bayindir v. Pakistan*,[752] and countless other cases.[753]

560. It is true, that, as Claimants remark, case-law also holds that "*the fact that a State exercises a contract right or remedy does not in and of itself exclude the possibility of a treaty breach*" [754] and that "*tribunals take into account all the circumstances to determine whether the State's conduct constitutes an expropriation for the purposes of the relevant treaty*".[755] This, however, does not detract from the principle that, if the State terminates a contract acting *iure*

---

[749] *Suez, Sociedad General de Aguas de Barcelona, InterAgua Servicios Integrales del Agua v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, July 30, 2010, **Exhibit RLA-49**, ¶ 143: "*In the present case, did the Province act in the exercise of its sovereign powers (*acta iure imperii*) or as an ordinary contracting party (*acta iure gestionis*) when it terminated the Concession Contract with APSF? If the former, then Argentina may have expropriated the contractual rights of APSF and the Claimants. If the latter, then no expropriation has taken place and the Claimants have only contractual claims under the legal framework described above*".

[750] *Malicorp Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, February 7, 2011, **Exhibit RLA-51**, ¶ 126: if the State "*had the right to discharge itself from the Contract pursuant to the private law rules governing it, […] it is unnecessary to examine whether the* [State] *also took a measure under its public powers ('measures de* puissance publique'*), not as a party to the Contract but as a State*"; ¶ 143: "[T]*the reasons on which Respondent relied in order to bring the Contract to an end appear serious and adequate; the termination, justified in fact and law, could not be interpreted as an expropriation*".

[751] *Impregilo SpA v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, June 21, 2011**, Exhibit CLA-89**, ¶ 272: "*the termination of the concession is not necessarily equal to expropriation. In fact, the Concession Contract provided for termination in various defined circumstances, and if the Contract is terminated in conformity with these provisions, this is not an act of expropriation by the State but an act performed by the public authorities in their capacity as a party to the Contract*".

[752] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, August 27, 2009, **Exhibit RLA-41**, ¶ 458: "*if the* [termination] *was lawful under the Contract, then there would be no taking of or interference with Bayindir's rights*".

[753] See, in particular, the following case-law quoted in Counter-Memorial, fn. 507: *Siemens AG v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, February 6, 2007, **Exhibit CLA-51**, ¶ 253; *Gosling et al v. Republic of Mauritius*, ICSID Case No. ARB/16/32, Award, February 18, 2020, **Exhibit RLA-107**, ¶ 277; *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, September 11, 2007, **Exhibit RLA-30**, ¶ 447; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, September 22, 2014, **Exhibit CLA-103**, ¶¶ 664, 667; *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, July 14, 2006, **Exhibit CLA-45**, ¶ 315; *Vigotop Limited v. Republic of Hungary*, ICSID Case No. ARB/11/22, Award, October 1, 2014, **Exhibit RLA-82**, ¶ 280. See also *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, **Exhibit CLA-34**, ¶ 160: "*an enterprise is not expropriated just because* […] *contractual obligations are breached* […]. *It is not the function of Article 1110* [of NAFTA] *to compensate for failed business ventures, absent arbitrary intervention by the State amounting to a virtual taking or sterilising of the enterprise*".

[754] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, August 27, 2009, **Exhibit RLA-41**, ¶ 138. See also *Vigotop Limited v. Republic of Hungary*, ICSID Case No. ARB/11/22, Award, October 1, 2014, **Exhibit RLA-82**, ¶¶ 313, 327.

[755] Reply, ¶ 381.

gestionis rather than *iure imperii*, there is no ground for a finding of expropriation.

561. In all the cases relied on by Claimants to plead that the circumstances surrounding the termination must be taken into account, the tribunals carried out such an analysis precisely with a view to determining the basis on which the termination was carried out and to establish whether – albeit ostensibly based on private law reasons – it was actually driven by motives related to the exercise of sovereign authority. That is the case in particular of *Crystallex v. Venezuela*,[756] where the tribunal found that Venezuela's purported exercise of a contractual right evidenced the characteristics of the exercise of sovereign power and was thus to be characterized as a sovereign act.[757]

562. Ultimately, in all those awards, the decision on whether an expropriation had occurred was made on the basis of whether the State did or did not act in the exercise of its private law rights. In all the cases cited by Claimants in which the State's termination of the contract was found to constitute an expropriation, the tribunals determined that the State had acted in its sovereign capacity.

563. In the case at hand, the Tribunal has already found that Nicaragua terminated the Contract acting not in its capacity as a sovereign, but rather as a private commercial contracting party, and according to the Tribunal, in accordance with the grounds for termination foreseen by the Contract and its applicable law.[758] The Tribunal has also established that the termination was not driven by ulterior motives or in any way abusive.[759] Moreover, the Tribunal has also established that ION had no right to the continuity of the Contract for an indefinite period.

564. This is sufficient for the Tribunal to exclude that Nicaragua's termination of the Contract can qualify as an expropriation in violation of Article 10.7 of the Treaty. Accordingly, also Claimants' claim for expropriation is rejected.

XI. QUANTUM

XI.A The Parties' position

XI.A.1 Claimants' position

565. Claimants argue that, due to Nicaragua's conduct, they have lost their

---

[756] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, April 4, 2016, **Exhibit CLA-109**.

[757] *Id.*, ¶ 683: "*a decision at the highest level of the Venezuelan state had been taken to oust Crystallex from Las Cristinas, and to take the mine back in governmental hands, with a view to developing it in collaboration with new partners*". The case is thus distinguishable from the one at stake, for the reasons set out in Section a).

[758] See Section X.A.2.b a) and b) *supra*.

[759] See ¶¶ 473-474, Section X.A.2.b d) *supra*.

contractual rights to exploit the Concession held through ION and the economic value of their shares. The corresponding damages should be quantified according to the FMV[760] of the Concession[761] at the Date of Valuation. Claimants claim 58,02% of such amount, corresponding to the shares in ION they collectively own.

566. On this basis, Claimants submit four alternative valuations: (*i*) the Discounted Cash Flow Valuation, resulting in damages of US$ 35.8 million as of the Date of Valuation, (*ii*) the Loss of Opportunity Valuation based on Sunk Costs, resulting in damages of US$ 44.1 million as of the Date of Valuation, (*iii*) the Loss of Opportunity Valuation based on Norwood's Net Present Value projections, resulting in damages of US$ 139.2 million in the low case and of US$ 198 million in the base case as of the Date of Valuation, and finally (*iv*) the Loss of Opportunity Valuation based on Norwood's expenditures, resulting in damages of US$ 61.6 million as of the Date of Valuation.[762]

XI.A.2 Respondent's position

567. According to Respondent, Claimants' claim for damages is unfounded and speculative. Indeed, Claimants have not proven the damages they allege to have suffered, since they failed to prove that they purchased their shares or financially contributed to the alleged investment.[763] They have likewise not proven a causal link between the alleged breaches and the alleged damages, in other words "*that but-for the State's unlawful act, the harm would not have occurred and that the injury was proximately caused by the State's actions*".[764] According to Respondent, even if the Contract had not been terminated, the Concession would still not have been operational, as the Concession Area was not shown to be commercially exploitable, and Claimants lacked the financial and technical capability to exploit it and would have failed to comply with the legal requirements to exploit the Concession.[765]

568. Finally, Respondent asserts that Claimants have not proven the amount of damages they claim, since the FMV standard they rely on is not useful in relation to non-expropriatory breaches[766] and their multiple and wide-ranging valuations are

---

[760] Defined as "*the price that a willing buyer would reasonably be expected to pay to a willing seller in an arms-length and informed transaction if the measures would not have occurred*" (Memorial, ¶ 309; Reply, ¶ 431).

[761] Claimants note that the "*San Bartolo Block has enormous untapped potential and, as a result, had significant market value by the time Nicaragua terminated the Concession Contract*" (Reply, ¶ 440).

[762] Reply, ¶ 497.

[763] Rejoinder, ¶¶ 312-318. Further, any damage suffered by ION "*cannot be presumed to flow automatically through to its shareholders*".

[764] Counter-Memorial, ¶ 330 and case-law quoted therein. See also Rejoinder, ¶ 324.

[765] Rejoinder, ¶¶ 319-323.

[766] Rejoinder, ¶¶ 340-344.

speculative.[767]

XI.B The Tribunal's analysis and decision

569. The Tribunal having unanimously established that there has been no breach of Article 10.5 or 10.7 of the Treaty, Claimants' request for damages has no basis and is dismissed. Even had it found that Respondent did commit some form of breach, the Tribunal still would not have been able to award damages because Claimants have not established the nature of such damages, nor the causal link between any supposed loss and Nicaragua's conduct. In any case, as explained above, there are no damages to be awarded both because of the absence of a commercial discovery and because the repeated tests conducted in the ION Block demonstrated the lack of a flow of hydrocarbons in sufficient quantities to be commercial and the low prospects of upgrading the contingent and prospective resources into recoverable reserves.

570. This conclusion renders moot Claimants' claim for interest on the amounts claimed.

XII. RESPONDENT'S COUNTERCLAIM

571. The Tribunal now turns to Nicaragua's Counterclaim submitted pursuant to Article 10 of the CAFTA-DR and Articles 25 and 46 of the ICSID Convention. As mentioned above, by the Counterclaim, Nicaragua seeks compensation for damages caused by alleged breaches of ION's environmental obligations that it contends would be attributable to Claimants. For their part, Claimants question the jurisdiction of the Tribunal over the Counterclaim and argue that any breach of ION's environmental obligations would not be attributable to them and, in any event, would be minimal and related to Nicaragua's arbitrary termination of the Contract.

572. The Tribunal will begin by addressing jurisdiction.

XII.A Jurisdiction over the Counterclaim

XII.A.1 The Parties' positions

XII.A.1.a Claimants' position

573. Claimants posit that the Counterclaim should be dismissed for lack of

[767] Rejoinder, ¶¶ 345-349. In particular, the DCF Valuation is as grounded on speculative and unreliable data, and based on a method which is inappropriate both from an industry and a legal perspective (Rejoinder, ¶¶ 350-355). As for the Sunk Costs Valuation, "*Claimants do not justify why they, as alleged shareholders of ION, should be entitled to recover Norwood's sunk costs*" and the fact that the Concession's sunk costs are higher than its DCF Valuation "*defies common sense*" (Rejoinder, ¶¶ 356-363). Finally, the Loss of Opportunity Valuations lack foundation and are "*extremely flawed*" (Rejoinder, ¶¶ 364-375).

jurisdiction, as it falls outside the scope of the Parties' consent to arbitration.

574. First, they observe that if the parties to the CAFTA-DR had wished to permit counterclaims, they would have included an express provision to that effect in the Treaty.[768] The lack of such a provision is "*unsurprising*" in light of the formulation of Article 10.16 of the Treaty, which only allows investors to submit disputes to arbitration as claimants[769] and which has been interpreted by case-law and commentators alike as excluding the ability of the respondent to bring a counterclaim.[770] Claimants submit that this is consistent with the framework of Article 10 of the Treaty, which limits the scope of that provision to "*measures adopted or maintained by*" a State (Article 10.1), stipulates that claims can be submitted for breaches of "*an obligation under Section A [of the Treaty]*", which refers to obligations of the State (Article 10.16), refers to "Awards" as a "*final award against a respondent*" (Article 10.26.1)[771] and defines a "*claimant*" as an "*investor of a Party*" and a "*respondent*" as "*the Party [i.e. a contracting State] that is a party to an investment dispute*".[772]

575. Claimants dispute Respondent's reading of Article 10.20.7 of the Treaty that would allow counterclaims not captured by the exceptions mentioned therein. In Claimants' submission jurisdiction over counterclaims under investment treaties cannot be inferred. In this respect, they also observe that the references to *Urbaser v. Argentina*[773] and *Goetz v. Burundi*[774] are misplaced.

576. Furthermore, Claimants say that the authorities relied on by Nicaragua confirm that the NAFTA (on which Article 10.16 is modeled) excludes the possibility of counterclaims, even though it contains a provision virtually identical to Article 10.20.7 of the Treaty.[775]

577. Claimants also suggest that Respondent's appeals to efficiency are inapposite.[776]

578. Lastly, Claimants assert that the findings in the *Aven v. Costa Rica* case are fatal

---

[768] Claimants' Rejoinder, ¶ 101.

[769] Claimants' Rejoinder, ¶ 98.

[770] Reply, ¶ 520 and fn. 1161, ¶ 521; Claimants' Rejoinder, ¶ 99 and fn. 245, 246.

[771] Claimants' Rejoinder, ¶ 100.

[772] Reply, ¶ 519(e).

[773] *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, December 8, 2016, **Exhibit RLA-94**.

[774] *Antoine Goetz & Consorts and S.A. Affinage des Metaux v. Republic of Burundi*, ICSID Case No. ARB/01/2, Award, June 21, 2012, **Exhibit RLA-61**.

[775] Claimants' Rejoinder, ¶ 105.

[776] Claimants' Rejoinder, ¶ 109.

to the Counterclaim.[777] In particular, according to Claimants, Nicaragua's quotation of the decision is misleading.[778] Indeed, while Claimants concede that the *Aven* tribunal "*erroneously*" found that counterclaims "*could theoretically be brought under the Treaty*",[779] Claimants note that the tribunal also required that counterclaims be based on breaches of the Treaty and rejected that a breach of domestic environmental obligations "*will amount to a breach of the Treaty which could be the basis of a counterclaim*".[780] In this case, while Respondent accepts that a breach of Section A of the Treaty must be established to submit a dispute to arbitration under the Treaty, the Counterclaim is grounded on purported breaches of contracts and of Nicaraguan laws.[781] This means that "*Nicaragua's counterclaims are defeated by its own admissions*", since no jurisdiction exists under the Treaty if there is no asserted breach of any positive obligations under Section A of the Treaty.[782]

XII.A.1.b Respondent's position

579. Nicaragua contends that the Tribunal has jurisdiction over the Counterclaim, as it satisfies the two conditions to which investment tribunals generally subject the admissibility of counterclaims: it falls within the scope of the Parties' consent to arbitration and is sufficiently connected to the principal claim.[783] Respondent notes that Claimants have not contested the second requirement[784] and that their objections to the satisfaction of the first one are meritless.[785]

580. In particular, Respondent argues that the Parties' consent to the Counterclaim required by Article 46 of the ICSID Convention, and the jurisdiction of ICSID, are established in the CAFTA-DR.[786] On this point, Respondent refers to the decision in *Aven v. Costa Rica*, which concluded that "*there are no substantive reasons to exempt foreign investor of the scope of claims* [sic] *for breaching obligations under*

---

[777] Claimants' Rejoinder, ¶ 110, referring to *David Aven et al v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award, September 18, 2018, **Exhibit RLA-103**.

[778] Claimants' Rejoinder, ¶ 110.

[779] Claimants' Rejoinder, ¶ 112.

[780] Claimants' Rejoinder, ¶ 112, quoting *David Aven et al v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award, September 18, 2018, **Exhibit RLA-103**, ¶ 743.

[781] Rejoinder, ¶ 394.

[782] Claimants' Rejoinder, ¶ 114.

[783] Rejoinder, ¶¶ 388 ff.

[784] Rejoinder, ¶ 388.

[785] Rejoinder, ¶ 389.

[786] Rejoinder, ¶ 390.

Article 10 Section A DR-CAFTA, particularly in the field of environmental law".[787] In this context, Respondent submits that Articles 10.9.3.c and 10.11 of the Treaty render mandatory the measures adopted by Nicaragua for the protection of the environment.[788]

581. Respondent also considers irrelevant the *Aven* tribunal's finding that Articles 10.9.3.c and 10.11 of the Treaty do not impose affirmative obligations on investors or provide that any violation of national environmental regulations will amount to a Treaty breach.[789] Indeed, Respondent notes that this does not contradict its position, as Nicaragua is not "*seeking to impose affirmative obligations arising from the Treaty*" or "*asserting that every violation of a State's environmental regulations amounts to a breach of the Treaty*".[790] Instead, Respondent highlights that it "*has set forth specific, critical violations of environmental closure and remediation requirements explicitly included in the Concession Contract, Environmental Permit, and ION's Environmental Impact Assessment, as well as Nicaraguan laws*".[791] Therefore, Respondent submits that the present case falls within the reasoning of the *Aven* tribunal that *prima facie* jurisdiction over a counterclaim is established under the CAFTA-DR.[792]

582. Further, Respondent observes that an *a contrario* reading of Article 10.20.7 of the Treaty implies that Nicaragua has the right to file a counterclaim save for the exceptions mentioned in that provision.[793] In response to Claimants' criticism of that reading, Respondent notes that if Article 10 did bar all counterclaims, "*it would be unnecessary to note, as Article 10.20.7 does, that a respondent may not assert one specific type of counterclaim*". By contrast, in Respondent's view, Article 10.20.7 is aimed at defining the limits of a respondent's ability to hold investors responsible for breaches of obligations, including environmental obligations.[794]

583. Lastly, Respondent notes that support for the aforementioned position is found in case-law – notably in the decisions in *Urbaser v. Argentina* and *Goetz v. Burundi*,

[787] Rejoinder, ¶ 392, quoting *Aven v. Costa Rica*, **Exhibit RLA-103**, ¶ 739.

[788] Rejoinder, ¶ 392.

[789] Reply, ¶¶ 522-523, referring to *Aven v. Costa Rica*, **Exhibit RLA-103**, ¶ 743.

[790] Rejoinder, ¶ 393.

[791] Rejoinder, ¶ 394.

[792] Rejoinder, ¶ 394.

[793] Rejoinder, ¶ 395.

[794] Rejoinder, ¶ 396.

as well as in the dissenting opinion in *Roussalis v. Romania* –[795] and in doctrinal works.[796]

XII.B The Tribunal's analysis and decision

584. There is no general rule on the jurisdiction of investment tribunals over counterclaims. Whether jurisdiction over such claims exists in a given case therefore depends, like for principal claims, on the applicable legal instruments, which in the case at hand are the ICSID Convention and the Treaty. The need to establish consent under the relevant treaty is acknowledged also by Respondent,[797] which initially suggested that Article 46 of the ICSID Convention was sufficient to establish jurisdiction over a counterclaim.[798]

585. Article 46 of the ICSID Convention empowers ICSID tribunals to decide "*counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Center*". In the present case, it is common ground between the Parties that the Counterclaim is sufficiently connected to the principal claim, so that the first condition of Article 46 of the ICSID Convention is satisfied.[799]

586. The Parties' disagreement focuses on whether counterclaims are admissible under the Treaty.

587. Respondent's position is that the Parties' consent to jurisdiction over counterclaims is given in Articles 10.15, 10.16 of the Treaty and is confirmed by an *a contrario* reading of Article 10.27. Claimants, instead, contend that the Treaty does not allow counterclaims, because none of the provisions cited by Respondent provide for them while others, such as Article 10.1, 10.26.1 and 10.28, are incompatible with counterclaims.[800]

---

[795] Rejoinder, ¶ 397, referring to *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, December 8, 2016, **Exhibit RLA-94**, ¶ 1155; *Antoine Goetz & Consorts and S.A. Affinage des Metaux v. Republic of Burundi*, ICSID Case No. ARB/01/2, Award, June 21, 2012, **Exhibit RLA-61**, ¶¶ 278-279; *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Declaration of W. Michael Reisman, November 28, 2011, **Exhibit RLA-55**.

[796] Rejoinder, ¶ 398 and fn. 795 and 796.

[797] Rejoinder, ¶ 390.

[798] Counter-Memorial, ¶ 435.

[799] Counter-Memorial, ¶¶ 442-443 where Respondent cites *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Decision on Jurisdiction over the Czech Republic's Counterclaim, May 7, 2004, **Exhibit RLA-17**, ¶ 81. Claimants do not dispute the Counterclaim's connection to the Claim since their position is that ION's alleged failure to comply with environmental obligations is "*connected to Nicaragua's unlawful termination of the Concession Contract*" (Claimants' Rejoinder, ¶ 96).

[800] Claimants' Reply, ¶ 519.

588. For ease of reference, the Treaty provisions referred to by the Parties, in discussing the basis for the Counterclaim, are reproduced below:

589. Article 10.1 reads as follows:

> This Chapter applies to measures adopted or maintained by a Party relating to:
>
> (a) investors of another Party;
>
> (b) covered investments; and […]

590. Article 10.15 provides that:

> In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures such as conciliation and mediation.

591. The main provision on which Respondent relies is Article 10.16 which reads as follows:

> 1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:
>
> (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim
>
> (i) that the respondent has breached
>
> (A) an obligation under Section A,
>
> (B) an investment authorization, or
>
> (C) an investment agreement;
>
> and
>
> (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach; and […][801]

592. Article 10.20.7 reads as follows[802]:

> A respondent may not assert as a defense, counterclaim, right of set-off, or for any other reason that the claimant has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract.

593. Article 10.26.1 reads as follows:

---

[801] Article 10.16.1(b) reproduces the wording of Article 10.16.1(a) with the sole exception of the identification of the entity on behalf of which the claim may be brought: "*on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly*".

[802] "*A respondent may not assert as a defense, counterclaim, right of set-off, or for any other reason that the claimant has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract*".

> Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination, only:
>
> (a) monetary damages and any applicable interest;
>
> (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution.
>
> A tribunal may also award costs and attorney's fees in accordance with this Section and the applicable arbitration rules […]

594. Finally, Article 10.28 provides that:

> […] **claimant** means an investor of a Party that is a party to an investment dispute with another Party […][803]

595. Contrary to Claimants' assertion, Article 10 of the Treaty could be read as permitting counterclaims. In particular, the wording of Articles 10.16 and 10.17, respectively headed "Submission of a Claim to Arbitration" and "Consent of Each Party to Arbitration", is in principle broad enough to encompass counterclaims.[804] Indeed, in line with the trend that conceives investment treaty arbitration as a potentially bidirectional avenue, Article 10.16 employs the neutral terms "claimant" and "respondent" (rather than "investor" or "State", as customary in earlier treaties) to identify the individuals or entities entitled to submit claims to arbitration. In this respect, the situation is analogous to the one considered in *Urbaser v. Argentina* where the tribunal found, based on treaty provisions similar to the ones at hand, that "[t]*his provision is completely neutral as to the identity of the claimant and respondent in an investment dispute '*between the parties*'. It does not indicate that a State Party could not sue an investor in relation to a dispute concerning an investment*".[805]

596. The above conclusion is supported by the text of Article 10.20.7 of the Treaty. The reference to counterclaims that may be brought by a respondent – albeit to exclude a specific type of counterclaim (those in which the respondent alleges that "*the claimant has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract*") – could indeed be interpreted as allowing all other types of counterclaims.[806] The

---

[803] Emphasis in the original.

[804] A. Hoffmann, *Chapter 36: Counterclaims*, in Building International Investment Law: The First 50 Years of ICSID, **Exhibit RLA-86**, p. 509; Z. Douglas, *The International Law of Investment Claims*, 2009, **Exhibit RLA-57**, p. 256; *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Decision on Jurisdiction over the Czech Republic's Counterclaim, May 7, 2004**, Exhibit RLA-17**, Preliminary Objections.

[805] *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, December 8, 2016, **Exhibit RLA-94**, ¶ 1143.

[806] The Tribunal does not share Respondent's position that its reading of Article 10.20.7 is supported by

Tribunal is not persuaded that consent to counterclaims cannot be inferred from Article 10.20.7 on the grounds that, as contended by Claimants,[807] this provision is modelled on Article 1137.3 of the NAFTA, a treaty that bars counterclaims. This is because the Treaty differs considerably from the NAFTA. Indeed, contrary to Article 10.16.1 of the Treaty, which as mentioned above, employs the neutral term "claimant" to identify the individual or entity bringing a claim, Articles 1116 and 1117 of the NAFTA – respectively headed "*Claims by an Investor of a Party on its behalf*" and "*Claims by an Investor on behalf of an enterprise*" – are strictly "unidirectional", in the sense that they only contemplate claims brought by an "investor". This major discrepancy prevents the Tribunal from accepting that the NAFTA provides guidance on whether the Treaty reflects the consent to counterclaims.

597. Based on the above provisions taken by themselves, Nicaragua would therefore be entitled to bring a counterclaim.

598. The other provisions of Article 10 of the Treaty cursorily mentioned by Claimants do not detract from this conclusion. In fact, since, as noted above, Article 10.16 is neutral as to the identity of the claimant and respondent, the fact that Article 10.26.1 mentions a "*final award against a* ***respondent***"[808] cannot be read as ruling out counterclaims brought by the State against an investor. Likewise, the definition of claimant as "*an investor*" provided in Article 10.28 implies that States may not initiate arbitration proceedings under the Treaty but does not bar States from putting forward a counterclaim at a later stage. Lastly, contrary to Claimants' suggestion, the text of Article 10.1 of the Treaty ("*This Chapter applies to measures adopted or maintained by a Party relating to: (a) investors of another Party; (b) covered investments; […]*) is in principle broad enough to encompass obligations imposed on the investor by the State, the breach of which could form the basis for a counterclaim.

599. The foregoing considerations are however not sufficient to conclude that the Tribunal has jurisdiction over the Counterclaim. This is because Article 10.16.1(a)

Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic, ICSID Case No. ARB/07/26, Award, December 8, 2016, **Exhibit RLA-94**, ¶ 1155, and *Antoine Goetz & Consorts and S.A. Affinage des Metaux v. Republic of Burundi*, ICSID Case No. ARB/01/2, Award, June 21, 2012, **Exhibit RLA-61**, ¶¶ 278-279. *Urbaser* was based on a treaty providing – unlike the CAFTA-DR – that *either party* may submit a claim to arbitration (Claimants' Rejoinder, ¶ 106). *Goetz*, instead, like Professor Reisman's dissent in *Spyridon Roussalis v. Romania* (ICSID Case No. ARB/06/1, Declaration of W. Michael Reisman, November 28, 2011, **Exhibit RLA-55**) on which *Goetz* relies is based on the legal theory – rejected by the majority in *Roussalis* (*Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, December 7, 2011, **Exhibit RLA-56**., ¶ 869) and now abandoned by Nicaragua – that the ICSID Convention grants an ICSID tribunal jurisdiction over counterclaims regardless of whether the relevant treaty contains consent to the submission of counterclaims (Claimants' Rejoinder, ¶ 107).

[807] Claimants' Rejoinder, ¶ 105.

[808] Emphasis added.

lays down a further requirement, namely that the (counter)claim relate to a breach of either "*an obligation under Section A [of the Treaty]*", an investment authorization or an investment agreement. This means that, for a claim (or a counterclaim) to fall within the jurisdiction of the Tribunal, the claimant or counterclaimant must establish a cause of action under the Treaty. As a matter of fact, both Parties accept that for the Tribunal to have jurisdiction over the Counterclaim, this would have to be predicated on a breach of Section A of the Treaty. **[809]**

600. The core issue is thus whether ION's alleged breaches of its environmental obligations do indeed constitute breaches of Section A of the Treaty, as Respondent asserts. This requires ascertaining whether Articles 10.9.3(c)[810] and 10.11[811] of the Treaty, on which Respondent relies, set out environmental obligations.

601. In the Tribunal's judgment, on a plain reading, those provisions do not themselves directly lay down environmental obligations for investors. They are mere "safeguard clauses", the purpose of which is to allow States to pursue and enforce their environmental policies without the risk of their actions in furtherance of those policies being held to breach their obligations towards investors under the Treaty. As underscored by Claimants,[812] the *Aven* tribunal reached a similar conclusion noting that Articles 10.9.3(c) and 10.11 of the Treaty "*do not – in and of themselves – impose any affirmative obligation upon investors. Nor do they provide that any violation of state-enacted environmental regulations will amount to a breach of the Treaty which could be the basis of a counterclaim*".**[813]**

602. Having established this, the next question is whether Articles 10.9.3(c) and 10.11 of the Treaty relating to State-mandated environmental measures could be read as incorporating into the Treaty environmental obligations arising under domestic law or in a contractual instrument binding on the investor. If that were so, it could be possible to establish a cause of action under the Treaty by alleging breaches of the type that underpin the Counterclaim, which, to recall, are alleged breaches of

---

[809] Rejoinder, ¶ 392, citing to *Aven v. Costa Rica*, **Exhibit RLA-103**, ¶ 739; Claimants' Rejoinder, ¶ 103.

[810] "*Provided that such measures are not applied in an arbitrary or unjustifiable manner, and provided that such measures do not constitute a disguised restriction on international trade or investment, paragraphs 1(b), (c), and (f), and 2(a) and (b), shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures: (i) necessary to secure compliance with laws and regulations that are not inconsistent with this Agreement; (ii) necessary to protect human, animal, or plant life or health; or (iii) related to the conservation of living or non-living exhaustible natural resources*".

[811] "*Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns*".

[812] Reply, ¶¶ 522-523; Claimants' Rejoinder, ¶¶ 111-112.

[813] *Aven v. Costa Rica*, **Exhibit RLA-103**, ¶ 743.

provisions of Nicaraguan law and of the Contract, the Environmental Permit and ION's Environmental Permit.[814]

603. However, this is not the case. The references in Chapter 10 of the Treaty to State-mandated environmental measures (such as the ones listed in Articles 10.9.3(c) and 10.11) are generic, are addressed to the State (the Parties to the CAFTA-DR) rather than to the investor and concern a typical State prerogative (Article 10.11 mentions "*adopting, maintaining or enforcing any measure*"). For these reasons, they cannot be read as entailing that breaches of obligations not directly arising from the Treaty – such as those of the Contract, the Environmental Permit, ION's Environmental Impact Assessment and Nicaraguan environment protection laws alleged by Respondent – can be elevated to violations of the Treaty.

604. The following conclusion of the *Rusoro v. Venezuela* tribunal rejecting a counterclaim by the State, recalled by Claimants, aptly encapsulates the situation here:

> [t]here are three reasons why the Tribunal has no jurisdiction to adjudicate this dispute:
>
> - First, the Tribunal's power is limited to adjudicating disputes which arise from the BIT, and the obligations allegedly breached by Rusoro do not derive from and have no connection with the Treaty;
> - Second, the Tribunal must decide the dispute in accordance with the Treaty and the principles of international law, and the dispute underlying the counterclaim – that Rusoro breached the mine plan – and [sic] cannot be adjudicated by applying the Treaty or principles of international law;
> - Third, the Treaty does not afford host States a cause of action against an investor of the other Contracting Party, be it by way of claim or of counterclaim.[815]

605. Having concluded that the Treaty does not confer jurisdiction in respect of the Counterclaim, the Tribunal must reject Nicaragua's argument that deciding counterclaims in the same proceedings as claims would foster efficiency and avoid conflicting results. As was decided in *Iberdrola v. Guatemala*, the Tribunal's role "*is limited to applying the treaty on the basis of which it is seized in accordance with its terms. It cannot go beyond or else it would engage in policy choices which are the domain of States*".[816]

606. On this basis, the Tribunal judges that, since Respondent is not asserting a

---

[814] Respondent accepts that the Counterclaim is based on a breach on ION's part of environmental obligations grounded in the Contract, the Environmental Permit, ION's Environmental Impact Assessment and Nicaraguan laws (see Rejoinder, ¶ 394).

[815] *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, August 22, 2016, **Exhibit CLA-112**, ¶ 628. See also *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, December 7, 2011, **Exhibit RLA-56**, ¶ 871.

[816] *Iberdrola Energía, S.A. v. Republic of Guatemala*, PCA Case No. 2017-41, Final Award, August 24, 2020, **Exhibit CLA-159**, ¶ 392.

breach by Claimants of environmental obligations incorporated in the Treaty, the Tribunal lacks jurisdiction to decide the Counterclaim, which is accordingly denied.

XIII. COSTS

XIII.A Claimants' cost submissions

607. In their submission on costs, Claimants contend that Respondent should bear their entire arbitration costs totaling US$ 524,970 and € 2,912,957.30, plus interest at the rate requested for their primary monetary claims (12.1%) "*or at any other rate that ensures full reparation, compounded annually until full payment has been made*".[817] The arbitration costs are broken down as follows:

(i) advance payments of fees and expenses of the Tribunal and administrative costs of ICSID for US$ 524,970;[818]

(ii) fees and expenses of international counsel for € 2,173,759.75;[819]

(iii) fees and expenses of local counsel for € 35,884.36;[820]

(iv) fees and expenses of experts for € 407,456.85 to Compass Lexecon and Michael Seelhof, € 176,965.55 to Reserve Analysts Associates, and € 96,467.68 to ERM;[821]

(v) travel costs and compensation for the time of witnesses for € 22,423.11.[822]

608. Claimants argue that they are entitled to recover these costs because Nicaragua's conduct in the proceedings was dilatory and caused unnecessary expense to them.[823] Claimants identify instances of such conduct in Respondent's (*i*) raising frivolous jurisdictional and merits defenses,[824] (*ii*) withdrawing its request to examine a witness (Dr. Raymond Gerald Bailey) only two weeks before the Hearing, once substantial time and expense had been incurred in his preparation,[825] and (*iii*)

---

[817] Claimants' Submission on Costs, ¶ 17(ii).

[818] Of this amount, US$ 499,970 relate to an advance of the fees and expenses of the Tribunal and ICSID, and US$ 25,000 relate to the non-refundable lodging fee paid by Claimants (Claimants' Submission on Costs, ¶ 12).

[819] Of this amount, € 2,028,500.00 relate to professional fees of the firm Dechamps International Law and Dr. Tariq Baloch, while € 145,259.75 relate to expenses reasonably incurred by them, including fees of external consultants (Claimants' Submission on Costs, ¶ 13).

[820] Claimants' Submission on Costs, ¶ 14.

[821] Claimants' Submission on Costs, ¶ 15.

[822] Claimants' Submission on Costs, ¶ 16.

[823] Claimants' Submission on Costs, ¶ 6.

[824] Claimants' Submission on Costs, ¶ 7.

[825] Claimants' Submission on Costs, ¶ 8.

bringing a counterclaim falling manifestly outside the jurisdiction of the Tribunal, which led to Claimants engaging ERM to respond to it.[826]

XIII.B Respondent's cost submissions

609. In its submission on costs, Respondent submits that Claimants should bear all the costs and expenses of these proceedings, totaling US$ 8,010,198.32, broken down as follows:

(i) legal fees of Foley Hoag LLP and paralegal staff for US$ 5,260,332.42;

(ii) fees and expenses of the oil and gas, environment, valuation, and Nicaraguan law experts for US$ 1,839,270.71;

(iii) administrative costs for US$ 410,645.19;

(iv) advance payments to ICSID for US$ 499,950.00.[827]

610. Respondent argues that it is entitled to recover these costs on the basis of the "*general rule*" applied by ICSID tribunals that the successful party receive reimbursement from the unsuccessful party.[828] Thus, Claimants should pay the full costs incurred by Respondent both in case the Tribunal were to accept Nicaragua's jurisdictional objections,[829] and in case Respondent prevailed on the merits.[830] Finally, Respondent argues that Claimants must also bear the costs incurred to bring the Counterclaim, whether the Tribunal accepts it or not. Respondent would still be the prevailing party if the Tribunal were to dismiss the Claim regardless of the outcome of the Counterclaim, which is only ancillary to it. Further, Respondent alleges "*it would be unjust*" not to award it costs related to the Counterclaim, because Respondent "*was compelled to bring its counterclaim when Claimants advanced unmeritorious claims based on the termination of the Contract*".[831]

XIII.C The Tribunal's decision on costs

611. Each Party seeks an award of the entirety of the costs borne by it in connection with the present arbitration.

---

[826] Claimants' Submission on Costs, ¶ 9.

[827] Respondent's Submission on Costs, ¶ 24.

[828] Respondent's Submission on Costs, ¶ 5 and case-law mentioned therein.

[829] Respondent's Submission on Costs, ¶ 7, relying on *Blue Bank Int'l & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Award, April 26, 2017, **Exhibit CLA-117**, ¶¶ 173, 209-211.

[830] Respondent's Submission on Costs, ¶ 9.

[831] Respondent's Submission on Costs, ¶¶ 20-21. Indeed, Respondent argues that in defending itself from the Claim, which Claimants failed to prove caused them damages, it "*could not stand idly by and not identify damages it actually suffered and continues to suffer to this day*".

612. Claimants' overall costs – comprehensive of legal fees and expenses, advance payments of fees and expenses of the Tribunal and the ICSID costs, expert fees and witness expenses – amount to US$ 524,970 and € 2,912,957.30 [832] while Respondent's overall costs – comprehensive of legal fees, expert fees and expenses, administrative costs and advance payments to ICSID – amount to US$ 8,010,198.32.

613. The estimated costs of the arbitration, including the fees and expenses of the Tribunal and the President's Assistant, ICSID's administrative fees and direct expenses, amount to (in US$):[833]

Arbitrators' fees and expenses	
Luca G. Radicati Di Brozolo, President	US$ 192,295.33
José Martínez de Hoz, Co-arbitrator	US$ 190,624.86
Brigitte Stern, Co-arbitrator	US$ 113,999.00
Assistant's fees and expenses	US$ 82,300.00
ICSID's administrative fees	US$ 252,000.00
Direct expenses (estimated)	US$ 121,197.62
Total	**US$ 952,416.81**

614. Article 61(2) of the ICSID Convention provides:

> In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

615. The Parties do not dispute that this provision gives arbitral tribunals discretion to allocate all costs of the arbitration, including attorney's fees and other expenses,

[832] Specifically, Claimants claim € 2,173,759.75 in respect of the fees and expenses of their international counsel, Dechamps International Law and Dr. Tariq Baloch, and € 35,884.36 in respect of those of their local counsel, Munguía Vidaurre.

[833] The costs of the arbitration have been paid out of the advances made by the Parties. The Tribunal notes that the advance payments made by the Parties and the final costs of the arbitration will be reflected in ICSID's final financial statement. The remaining balance in the ICSID case account will be reimbursed to the Parties in proportion to the payments advanced to ICSID.

between the Parties as it deems appropriate. In exercising this discretion, ICSID tribunals tend to take into account the outcome of the arbitration,[834] the length and complexity of the proceedings and the parties' procedural conduct.[835]

616. The Tribunal has considered all the circumstances of the case and observes in particular that: (*i*) the Parties' conduct has been irreproachable throughout these proceedings, including during the Hearing which they conducted with great efficiency; (*ii*) while Respondent ultimately prevailed on the merits of the Claim, it raised two unsuccessful jurisdictional objections (to which the Parties and the Tribunal devoted considerable time) and an equally unsuccessful Counterclaim; (*iii*) Respondent's overall costs are more than twice those of Claimants.

617. In light of the foregoing, in the exercise of the discretion granted to it by Article 61(2) of the ICSID Convention, the Tribunal orders that Claimants bear their own costs and pay US$ 1,500,000.00 to Respondent in respect of Nicaragua's costs and expenses.

XIV. DECISION

618. For the reasons set out above, the Tribunal decides that:

(i) the Tribunal has jurisdiction over the Claim;

(ii) Respondent has not breached Articles 10.5 and 10.7 of the Treaty;

(iii) the Tribunal lacks jurisdiction over the Counterclaim;

(iv) all other claims and defenses are rejected;

(v) Claimants shall pay US$ 1,500,000.00 to Respondent in respect of Nicaragua's costs and expenses.

---

[834] See *ADC Affiliate Ltd. and ADC & ADMC Management Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, October 2, 2006, **Exhibit CLA-46**, ¶ 533; *Itisaluna Iraq LLC and others v. Republic of Iraq*, ICSID Case No. ARB/17/10, Award, April 3, 2020, **Exhibit RLA-161**, ¶ 255.

[835] *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, September 5, 2008, **Exhibit CLA-66**, ¶ 318; *Georg Gavrilovic and Gavrilovic D.O.O v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, July 26, 2018, **Exhibit CLA-155**, ¶ 1317. See also *Caratube Int'l Oil Co. LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, September 27, 2017, **Exhibit RLA-99**, ¶¶ 1253-1254 (explaining that "*another criterion commonly adopted* [by arbitral tribunals] *is the general conduct of a party and the more or less serious nature of the case it has defended*" and giving relevance to the fact that "*there were numerous procedural issues and difficult substantive legal questions involved at the various phases of the Arbitration*").

[signed]

Mr. Jose A. Martinez de Hoz
Arbitrator

Date: February 22, 2023

Professor Brigitte Stern
Arbitrator

Date:

Professor Luca G. Radicati di Brozolo
President of the Tribunal

Date:

[signed]

Mr. Jose A. Martinez de Hoz
Arbitrator

Date:

Professor Brigitte Stern
Arbitrator

Date: February 22, 2023

Professor Luca G. Radicati di Brozolo
President of the Tribunal

Date:

Mr. Jose A. Martinez de Hoz
Arbitrator

Date:

Professor Brigitte Stern
Arbitrator

Date:

[signed]

Professor Luca G. Radicati di Brozolo
President of the Tribunal

Date: February 23, 2023

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

SEPARATE CONCURRING OPINION

José A. Martínez de Hoz (Co-arbitrator)

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.[1]

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**").[2]

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).[3]

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**").[4]

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"*.[5] 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*

---

[1] Concession Contract, Article 3, **Exhibit C-3.**

[2] Letter from the MEM to ION dated October 22, 2013, **Exhibit C-25**.

[3] MEM letter to ION dated November 20, 2014, **Exhibit C 131**.

[4] Letter from the MEM to ION dated December 19, 2013, **Exhibit C-26**.

[5] *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".[6]

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".*[7]

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.[8] Nicaragua's legal expert Ms. Rizo and Respondent's witness Ms. Artiles that monitored the Contract, stated that, under normal circumstances, the Evaluation Program should have been completed during the exploration phase.[9] Moreover, Ms. Artiles 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.[10]

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 significante que puede convertirse en comercial"*[11] at the end of the exploration phase (the six-year duration of which had been extended several times to approximately ten years),[12] ION could without more enter the

---

[6] *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. Artiles (RWS-Artiles I ¶ 46 and RWS- Artiles II, ¶ 26).

[7] Counter-Memorial, ¶ 160.

[8] 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. Artiles´ cross examination, Tr. ENG, Day 3, p. 687: 12-19.

[9] Ms. Rizo cross examination, Tr. SPA, Day 3, p. 785: 10-21; and p. 786: 1-2; and Ms. Artiles´ cross examination, Tr. ENG, Day 3, p. 690: 2-9.

[10] Nicaragua's witness Ms. Artiles 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.

[11] ION Declaration of Discovery, November 6, 2012, **Exhibit C-16.** See ¶ 160 *supra*.

[12] 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.[13] 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,[14] the absence in ION's Block of recoverable, let alone commercial reserves,[15] 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,[16] all this compounded by the drop of the crude oil prices commencing in mid-2014 after the

---

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

[13] Termination letter of MEM dated December 3, 2014, **Exhibit C-34.**

[14] Examination of Dr. Flores, Tr. Day 5, p. 1147: 1-7.

[15] 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.

[16] 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.[17] Ryder Scott's[18] and Quadrant's[19] 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.[20] Since it is undisputed that ION never performed the evaluation required by said provision nor established the existence of commercial reserves,[21] 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.[22] 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

---

[17] Examination of Dr. Flores, Tr. Day 5, p. 1151: 18-22; and p. 1152: 1-21.

[18] Examination of Ryder Scott, Tr. Day 4, p. 909: 2-21; p. 910: 4-9; p. 914: 11-22.

[19] 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.

[20] See Articles 44 and 45 of Law 286 and Article 5 of the Contract.

[21] 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).

[22] 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.[23] There is no evidence of any preceding administrative termination proceeding. Nicaragua did not produce during the document production phase any evidence in this regard[24] 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.***"[25] 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.[26] 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.[27] 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.[28] ION wrote

---

[23] Termination Letter of MEM dated December 3, 2014, **Exhibit C-34**.

[24] Reply, ¶ 186 and footnote 420.

[25] MEM letter dated March 25, 2015, **Exhibit C-40.** Emphasis added.

[26] Letter from the Attorney General to Mr. Oquist dated October 27, 2015, **Exhibit C-243.**

[27] 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".*

[28] 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.[29] 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.[30] 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

[29] Letter from ION to MEM dated September 30, 2014, **Exhibit C-29**.
[30] Letter from MEM to ION dated October 7, 2014, **Exhibit C-30**.