

**International Centre for Settlement
of Investment Disputes**

BURLINGTON RESOURCES INC.

CLAIMANT

v.

REPUBLIC OF ECUADOR

RESPONDENT

ICSID Case No. ARB/08/5

DECISION ON JURISDICTION

Rendered by an Arbitral Tribunal composed of:

Prof. Gabrielle Kaufmann-Kohler, President

Prof. Brigitte Stern, Arbitrator

Prof. Francisco Orrego Vicuña, Arbitrator

Secretary of the Tribunal:

Marco Tulio Montañés-Rumayor

Date of Dispatch to the Parties: 2 June 2010

TABLE OF CONTENTS

I.	FACTS RELEVANT TO JURISDICTION	5
1.	The Parties.....	5
1.1	The Claimant.....	5
1.2	The Respondent.....	5
2.	The Dispute.....	5
2.1	Background Facts	5
2.2	Burlington's Acquisition of Ownership Interests in Production Sharing Contracts	6
2.3	Origin of the Dispute.....	9
2.3.1	Dispute Concerning the Purported Lack of Security in Blocks 23 and 24.....	9
2.3.2	Dispute Concerning Ecuador's Increased Participation Under the PSCs	11
II.	PROCEDURAL HISTORY	13
1.	Initial Phase	13
2.	Written Phase on Jurisdiction.....	18
3.	Hearing on Jurisdiction	19
III.	POSITION OF THE PARTIES.....	20
1.	Position of Burlington.....	20
2.	Position of Ecuador	21
IV.	ANALYSIS.....	22
1.	Preliminary Matters.....	22
1.1	The Relevance of Previous ICSID Decisions or Awards	22
1.2	Law Applicable to the Jurisdiction of the Tribunal	23
1.3	Undisputed Matters	24
1.4.	Test for Establishing Jurisdiction	24
2.	Ecuador's Objections to Jurisdiction	25
2.1	Objection to Jurisdiction in Respect of the Expropriation Claim	26
2.2	Objections to Jurisdiction in Respect of the Law 42 Non-Expropriation Claims.....	27
2.2.1	Law 42 Non-Expropriation Claims as "Matters of Taxation" Under Article X of the Treaty.....	28

A.	Ecuador's Arguments	28
(i)	Article X of the Treaty is both relevant and applicable to this dispute	29
(ii)	The Tribunal has no jurisdiction even if Burlington is not challenging Law 42	31
B.	Burlington's Arguments	32
(i)	Whether or not Law 42 is a tax, Article X does not apply to this dispute.....	33
(ii)	The nature and legal source of Ecuador's indemnification obligation	34
C.	Analysis of the Tribunal	34
(i)	Is Law 42 a tax for purposes of Article X of the Treaty?	35
(ii)	Do Burlington's Law 42 non-expropriation claims raise "matters of taxation" under Article X of the Treaty?	36
(iii)	What specific claim or claims advanced by Burlington challenge Law 42?.....	38
1)	<i>Claims for breach of the observance of obligations clause</i>	38
2)	<i>The claim for failure to provide fair and equitable treatment</i>	43
3)	<i>The claim for arbitrary impairment</i>	45
4)	<i>The claim for failure to afford full protection and security</i>	45
2.2.2	Observance and Enforcement of Terms of an "Investment Agreement" under Article X(2)(c) of the Treaty	46
A.	Ecuador's Arguments	46
B.	Burlington's Arguments	48
C.	Analysis of the Tribunal	49
2.3	Objection to Jurisdiction in Respect of the Full Protection and Security Claim for Blocks 23 and 24.....	53
2.3.1	Has Burlington Complied with the Requirements of Article VI Prior to Submitting this Dispute to ICSID Arbitration?	53
A.	Ecuador's Arguments	53
B.	Burlington's Arguments	56
C.	Analysis of the Tribunal	59
(i)	Was There a Dispute in Block 24?	60
(ii)	Was There a Dispute in Block 23?	66
(iii)	Was Burlington Under an Obligation to Make Allegations of Treaty Breach?	69
2.3.2.	Has Burlington Perfected Consent to Arbitrate?	71
V.	DECISION ON JURISDICTION.....	72

TABLE OF ABBREVIATIONS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
BIT or the Treaty	Bilateral Investment Treaty; specifically “Treaty between the United States and Ecuador concerning the Encouragement and Reciprocal Protection of Investments” of 11 May 1997
CM	Burlington's Counter-Memorial on Jurisdiction of 20 October 2009
Exh. C-	Claimant [Burlington]'s Exhibits
Exh. CL-	Claimant [Burlington]'s Legal Exhibits
Exh. E-	Respondent [Ecuador]'s Exhibits
Exh. EL-	Respondent [Ecuador]'s Legal Exhibits
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States, Washington DC 1965
Mem.	Initial Claimants' Memorial of 20 April 2009
OJ	Ecuador's Objections to Jurisdiction of 20 July 2009
PSCs	Production Sharing Contracts for Blocks 7, 21, 23 and 24
RFA or Request	Burlington's Request for Arbitration of 21 April 2008
RPM	Burlington's Request for Provisional Measures of 20 February 2009
Tr. [page:line]	Transcript of the hearing on jurisdiction of 22 January 2010

I. FACTS RELEVANT TO JURISDICTION

1. This Section summarizes the facts of this dispute insofar as they bear relevance to rule on Ecuador's objections to jurisdiction.

1. The Parties

1.1 The Claimant

2. The Claimant, Burlington Resources Inc. ("Burlington" or the "Claimant"), is a corporation existing under the laws of the State of Delaware, United States of America, founded in 1988, and focused on the exploitation of natural resources.
3. The Claimant is represented in this arbitration by Alexander Yanos, Nigel Blackaby and Christopher Pugh of FRESHFIELDS BRUCKHAUS DERINGER; and by José M. Pérez and Javier Robalino-Orellana of PÉREZ BUSTAMANTE & PONCE.

1.2 The Respondent

4. The Respondent is the Republic of Ecuador ("Ecuador" or the "Respondent").
5. The Respondent is represented in this arbitration by Dr. Diego García Carrión and Dr. Álvaro Galindo Cardona from the Procuraduría General del Estado; and by Prof. Pierre Mayer, Dr. Eduardo Silva Romero, Mr. Philip Dunham and Mr. George K. Foster of DECHERT LLP.

2. The Dispute

2.1 Background Facts

6. In the early 1980s, Ecuador, wishing to revitalize its hydrocarbons industry, set in motion a series of bidding rounds aimed at stimulating greater involvement from private operators in this sector. As a result, between 1983 and 1993, Ecuador launched six bidding rounds for the granting of service contracts to private contractors (Exh. C-78).
7. Under the service contract model, the Government awards an exploration area (a "Block") to a private contractor, who undertakes to exploit any commercial oil reserves discovered in this area. The Government, in turn, covers the contractor's costs and pays in addition a fixed monthly fee. Most importantly, the Government

remains the sole owner of the oil produced, and thus captures the higher revenues flowing from any increases in the price of oil (Exh. C-82).

8. Over the course of the six bidding rounds, nonetheless, only a few bids were submitted. Private investors evinced little interest in the service contract model upon which these bidding rounds were predicated. Therefore, beginning in 1992, and in order to induce greater private investment, Ecuador set out to adopt a new legal framework for the oil industry based upon a different contract model: the production sharing contract (the "PSC") (Exhs. C-78, C-81).
9. Under the production sharing contract model, the private contractor assumes all the risks and costs of the exploration and exploitation of oil reserves in a designated area and, in exchange, has the right to receive a share of the oil produced (Exh. C-17).
10. Accordingly, Ecuador introduced changes to its Constitution and to relevant legislation. In particular, on 29 November 1993, the Ecuadorian Congress passed an amendment to the country's hydrocarbons law (the "Hydrocarbons Law") which, together with its implementing Decree No. 1417, laid the foundations for a new legal framework based upon the PSC model (the "Hydrocarbons Legal Framework") (Exhs. C-13, C-15, C-78, C-85, C-88, C-89).
11. Once the new Hydrocarbons Legal Framework was in place, Ecuador launched two additional bidding rounds based upon the new PSC model: Round Seven, in January 1994, and Round Eight, in June 1995. Foreign investors were invited to bid at these two rounds (Exh. C-90).
12. During Rounds Seven and Eight, Ecuador awarded to foreign investors PSCs for Blocks 21, 23 and 24. These PSCs were executed on the following dates: i) for Block 21, on 20 March 1995; ii) for Block 23, on 26 July 1996; and iii) for Block 24, on 27 April 1998 (Exhs. C-2, C-3, C-4).
13. In addition, on 23 March 2000, Ecuador agreed to modify the service contract for the exploration and exploitation of Block 7 into a PSC (Exh. C-1).

2.2 Burlington's Acquisition of Ownership Interests in Production Sharing Contracts

14. Beginning in 2000, Burlington started to acquire ownership interests in PSCs for the exploration and exploitation of oil reserves in Ecuador. Burlington acquired

these ownership interests through its wholly-owned subsidiaries, namely: Burlington Resources Oriente Limited ("Burlington Oriente"), Burlington Resources Andean Limited ("Burlington Andean") and Burlington Resources Ecuador Limited ("Burlington Ecuador") (collectively, the "Burlington Subsidiaries") (RFA, ¶ 1; Mem., ¶ 1).

15. In particular, between 2000 and 2006, Burlington acquired, through the Burlington Subsidiaries, ownership interests in PSCs for the exploration and exploitation of oil reserves in four Blocks: 7, 21, 23 and 24. All four Blocks are located in the Ecuadorian Amazon Region, and each Block comprises an area of 200,000 hectares (Exhs. C-1 to C-4, C-21 to C-25).
16. Burlington acquired its ownership interests in the PSCs according to the following sequence: i) for Block 7, 25% on 28 February 2002, 5% on 13 September 2002 and 12.5% on 2 October 2006; ii) for Block 21, 32.5% on 28 February 2002, 5% on 13 September 2002 and 8.75% on 2 October 2006; iii) for Block 23, 50% on 26 February 2003; and iv) for Block 24, 100% on 9 May 2000 (Exhs. C-111, C-114, C-117, C-119, C-122, C-131, C-132, C-134).
17. As a result of these acquisitions, Burlington holds the following ownership interests in Blocks 7, 21, 23 and 24:
 - 1) In Block 7: 42.5% ownership interest in the PSC held through its Burlington Oriente subsidiary; another company, Perenco, owns the remaining interest and is the operator of the Block.
 - 2) In Block 21: 46.25% ownership interest in the PSC held through its Burlington Oriente subsidiary; Perenco, owner of the remaining interest, is the operator of the Block.
 - 3) In Block 23: 50% ownership interest in the PSC held through its Burlington Andean subsidiary; another company, Compañía General de Combustible S.A. ("CGC"), owns the remaining interest and is the operator of the Block.
 - 4) In Block 24: 100% ownership interest held through its Burlington Ecuador subsidiary, operator of the Block (Exhs. C-22 to C-24, C-26, C-27, C-111, C-114, C-116 to C-119, C-120, C-121, C-130 to C-134).
18. Under the terms of the PSCs for Blocks 7, 21, 23 and 24, Burlington enjoys the following rights and guarantees:

- 1) The right to a fixed participation in crude oil production and the right to freely dispose of this participation;
 - 2) A legal stabilization clause;
 - 3) Conditions of reasonable security for the performance of the PSCs;
 - 4) A tax indemnification clause¹.
19. First, Burlington has the right to a fixed participation in crude oil production. Once the crude is produced in each of the fields, it is transported to the so-called Inspection and Delivery Center ("IDC"). At the IDC, the crude production is examined to ascertain its volume and quality, whereupon it is allocated between the State and the contractor in accordance with a formula established in each PSC (Exhs. C-1, C-2 and C-4 at Clause 3.3.5; Exh. C-2 at Clause 3.3.4).
20. Following this allocation, the contractor becomes the owner of its participation in the crude production (the "Contractor Production Participation") and has the right to freely dispose of it (Exhs. C-1 to C-4 at Clause 10.1).
21. Second, the PSCs include legal stabilization clauses, i.e. provisions according to which Ecuadorian law in force at the time the contracts were executed governs the contractual relationship. Thus, Clause 22.1 of the PSCs for Blocks 7 and 24, whose language is very similar to that of analogous clauses in the PSCs for Blocks 21 and 23, sets forth the following:
- "Applicable Legislation: This Contract is governed exclusively by Ecuadorian legislation, and *laws in force at the time of its signature are understood to be incorporated by reference* (emphasis added)" (Exh. C-3 at Clause 22.1).
22. Third, Ecuador committed to provide contractors reasonable security for the performance of the PSCs (Exhs. C-1 at Clause 5.2.5, C-2 at Clause 5.6.1, C-3 and C-4 at Clause 5.2.6). In this vein, Clause 5.2.6 of the PSC for Block 23, for instance, provides that Ecuador shall:

"Provide conditions of reasonable security for the performance of the operations of this Contract." (Exh. C-3).

¹ While Burlington referred to this clause as a "tax stabilization clause" (Mem., ¶¶ 108-113), Ecuador preferred the expression "renegotiation clause" (Tr. 17:21-24). In light of the semantical disagreement, the Tribunal believes that the term "tax indemnification clause" adequately and neutrally reflects the nature of this clause. For this reason, the Tribunal will employ the expression "tax indemnification clause" or simply "indemnification clause" in this Decision.

23. Finally, the PSCs also feature three kinds of tax guarantees. Under the first tax guarantee, each PSC assures a ceiling on applicable taxes. Thus, for instance, the maximum income tax applicable is 25% for Blocks 7, 21 and 23, and 20% for Block 24 (Exhs. C-1 and C-3 at Clauses 11.2.3 and 11.2.4, C-2 at Clauses 11.2.1 and 11.2.2, and C-4 at Clause 11.2.3).
24. The second tax guarantee is the so-called "tax indemnification clause." Under this clause, Ecuador undertakes to absorb the effect of any tax measure enacted after the execution of the PSCs that would have an impact on the economics of the PSCs, such as increases in tax rates or the creation of new taxes (Exhs. C-1 at Clause 11.12, C-2 at Clause 11.7, C-3 and C-4 at Clause 11.10). This protection is exemplified in the PSC for Block 7, which provides as follows:

"Modification to the tax system: In the event of a modification to the tax system or the creation or elimination of new taxes not foreseen in this Contract, which have an impact on the economics of this Contract, *a correction factor will be included in the production sharing percentages to absorb the impact of the increase or decrease in the tax* (emphasis added)" (Exh. C-1, Clause 11.12).

25. Under the third tax guarantee, Ecuador pledged to exempt Burlington from paying any royalties or related fees in each of the PSCs (Exhs. C-1 and C-4 at Clause 11.9, and C-2 at Clause 11.6). By way of illustration, Clause 11.9 of PSC 24 states that:

"The Contractor...is exempt from the payment of entry fees, surface rights, *royalties*, contributions to compensation projects and contributions to technological research" (emphasis added) (Exh. C-4).

2.3 Origin of the Dispute

26. The dispute between the Parties arises out of the following two factual scenarios: 1) Ecuador's purported failure to protect Burlington's exploration and exploitation activities in Blocks 23 and 24 from local indigenous opposition, and 2) Ecuador's enactment of measures which, purportedly in breach of its contractual and Treaty obligations, unilaterally increased its participation under the PSCs on so-called "unforeseen surpluses."

2.3.1 Dispute Concerning the Purported Lack of Security in Blocks 23 and 24

27. Local indigenous communities residing in Blocks 23 and 24 were opposed to any oil exploration and exploitation activities within these Blocks.
28. When the PSC for Block 24 was first awarded on 27 April 1998, the original private contractor, Arco, encountered resistance from local indigenous communities that

opposed any exploration and exploitation activities in this Block. Arco, being unable to perform its obligations under the PSC, requested Ecuador's consent to declare the Block in *force majeure* (Exh. C-32).

29. On 9 April 1999, instead of declaring the Block in *force majeure*, Ecuador granted Arco a one-year suspension of its obligations under the PSC. It extended this suspension for a further six-month period on 6 April 2000. Hence, when Burlington Ecuador's acquisition in Block 24 became effective on 9 May 2000, its obligations under the PSC were suspended (Exh. C-32).
30. Opposition from the indigenous communities, in the form of violent attacks and death threats, intensified following Burlington Ecuador's acquisition. Therefore, on 6 October 2000, and again on 30 October 2000, Burlington Ecuador requested that Block 24 be declared in *force majeure* (Exhs. C-142, C-144).
31. On 15 May 2001, Ecuador finally accepted the request and declared the Block to be in *force majeure*, thereby suspending Burlington Ecuador's performance under the PSC for the duration of this status (Exh. C-36).
32. At the same time, Burlington sought to negotiate and reach a settlement with the local indigenous communities opposing operations in Block 24. In order to break the impasse in the negotiations, Burlington requested on several occasions assistance from the Ecuadorian Government (Exhs. C-145 to C-150).
33. Ecuador, however, allegedly failed to support Burlington's initiative. As a result, the negotiations did not prosper and opposition from local indigenous communities persisted. To date, Block 24 continues to be in *force majeure* status (Exh. C-151).
34. A similar situation obtained in Block 23. When Burlington Andean acquired its interest in the Block 23 PSC, the Block was already in *force majeure* on account of the opposition from local indigenous communities. Consequently, exploration activities, which had begun, were suspended.
35. Following the acquisition, Burlington Andean and its partner in the Block, CGC, sought to negotiate and reach a settlement with the indigenous communities opposing operations in Block 23. Negotiations, however, were encumbered by several attacks from members of indigenous groups, which included the destruction of the contractors' seismic study base, the setting on fire of their camp, and the kidnapping of several employees (Exh. C-156).

36. As a result of these episodes of violence, CGC, as operator of Block 23, requested assistance from Ecuador on several occasions. Ecuador, however, allegedly failed to provide Burlington Andean and CGC security to their installations, personnel and activities (Exhs. C-153 to C-156).
37. In light of the alleged lack of meaningful assistance, CGC and Burlington Andean eventually decided to suspend their activities in Block 23. To date, Block 23 continues to be in *force majeure* status.

2.3.2 Dispute Concerning Ecuador's Increased Participation Under the PSCs

38. On 19 April 2006, the Ecuadorian Congress enacted Law No. 2006-42 ("**Law 42**"), which amended the Hydrocarbons Law as follows:

"Participation of the State over non agreed or unforeseen surpluses from oil selling contracts. Contracting companies having Hydrocarbons exploration and exploitation participation agreements in force with the Ecuadorian State pursuant to this Law, without prejudice to the volume of crude oil which may correspond thereto according to their participation, in the event the actual monthly average selling price for the FOB sale of Ecuadorian crude oil exceeds the monthly average selling price in force at the date of subscription of the agreement expressed at constant rates for the month of payment, **shall grant the Ecuadorian State a participation of at least 50% over the extraordinary revenues caused by such price difference [...]**" (Exh. C-7, Article 2; emphasis added).

39. In other words, Law 42 imposed a participation of 50% over so-called "non agreed or unforeseen surpluses from oil selling prices" on private contractors having PSCs in force with Ecuador.
40. In accordance with Law 42 and its ulterior regulations contained in Decree No. 1583², subsequently replaced by Decree No. 1672³, Ecuador's additional participation must be calculated as follows:
1. First, the monthly average selling price of a barrel of oil at the time of its production must be calculated (the "Currently Prevailing Price");
 2. Second, the monthly average selling price of a barrel of oil at the time the relevant PSC was executed must be calculated (the "Reference Price");
 3. Third, if the Currently Prevailing Price exceeds the Reference Price, then the contractor must allocate 50% of that excess to the State for each barrel of oil produced in a given month.

² Issued on 29 June 2006.

³ Issued on 13 July 2006.

41. The Reference Price for Blocks 7 and 21, that is, the price of a barrel of oil at the time the PSCs for those Blocks were executed, was roughly US\$ 25 and US\$ 15, respectively (C-178).
42. Therefore, if the Currently Prevailing Price of a barrel of oil were, for instance, US\$ 45, then the contractor should allocate to the State US\$ 10 for each barrel of oil produced in Block 7 (50% of US\$ 20, the amount by which the Currently Prevailing Price, US\$ 45, exceeds the Reference Price, US\$ 25) and US\$ 15 for each barrel of oil produced in Block 21 (50% of US\$ 30).
43. Burlington Oriente, through a tax consortium created pursuant to Ecuadorian tax law, which mandated that partners in PSCs contracts should pay taxes jointly (the "Block 7 and 21 Tax Consortium"), paid the additional 50% participation for Blocks 7 and 21 under protest (Exhs. C-25, C-42, C-140).
44. In addition, by letters dated 18 December 2006, the Block 7 and 21 Tax Consortium formally protested against the additional participation imposed by Law 42, and requested Ecuador to absorb the effects of this additional participation in accordance with the tax indemnification provisions of the PSCs. Ecuador apparently did not respond to these letters (Exhs. C-11 and C-12).
45. On 18 October 2007, Ecuador published Decree No. 662 ("**Decree 662**"; henceforth, any reference to Law 42 also includes Decree 662, unless otherwise specified), which amended Decree No. 1672 and increased Ecuador's additional participation for "non-agreed or unforeseen surpluses" from 50 percent to 99 percent (Exh. C-10).
46. As a result, if the Currently Prevailing Price of a barrel of oil were as in the previous example US\$ 45, then, under Decree 662, the contractor should allocate to the State US\$ 19.8 for each barrel of oil produced in Block 7 (99% of US\$ 20) and US\$ 29.7 for each barrel of oil produced in Block 21 (99% of US\$ 30).
47. Burlington Oriente, through the Block 7 and 21 Tax Consortium, paid the additional 99% participation under protest (Exh. C-42).
48. In addition, by letters dated 28 November 2007, Burlington requested Ecuador to provide a written statement of its intent to abide by the tax indemnification provisions contained in the PSCs. Ecuador seemingly did not respond to these letters (Exh. C-43).

49. By June 2008, the Block 7 and 21 Tax Consortium had made Law 42 payments in excess of US\$ 396.5 million (Mem., ¶ 229).
50. By letter dated 19 June 2008, the Tax Consortium asked Ecuador whether it would agree that the disputed payments under Law 42 be made into an escrow account pending final adjudication of the dispute. Ecuador does not appear to have responded to this request. Thus, as of June 2008, the Tax Consortium decided to make all payments due under Law 42 into a segregated account (Exh. C-48).
51. On 19 February 2009, Ecuador instituted so-called *coactiva* domestic proceedings against Perenco, as operator of Blocks 7 and 21, to enforce payment of US\$ 327.3 million allegedly owed by Block 7 and 21 operators under Law 42 (Exh. C-55).
52. On 3 March 2009, an Ecuadorian Executory Tribunal ordered the seizure of Block 7 and 21 oil crude production. On the basis of this decision, Ecuador began to seize and auction off oil crude production from Blocks 7 and 21 (Exh. C-58, C-64, C-65).

II. PROCEDURAL HISTORY

1. Initial Phase

53. On 21 April 2008, Burlington, along with the Burlington Subsidiaries (collectively, the "Initial Claimants"), filed a Request for Arbitration (the "Request") with the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre") against Ecuador and PetroEcuador (the "Initial Respondents"), enclosing forty-five exhibits therewith (Exhs. C-1 to C-45). In the Request, the Initial Claimants asked for the following relief:

"(a) DECLARE that Ecuador and PetroEcuador have breached the PSCs;

(b) DECLARE that Ecuador has breached:

(i) Article II of the Treaty by failing to observe its obligations with regard to Burlington's investments, by failing to accord Burlington's investments fair and equitable treatment and full protection and security, and by implementing arbitrary and discriminatory measures against Burlington's investments; as well as

(ii) Article III of the Treaty by unlawfully expropriating and/or taking measures tantamount to expropriation with respect to Burlington's investments in Ecuador;

(c) ORDER Ecuador and PetroEcuador to specifically perform their obligations under the PSCs and pay damages for their breaches of the PSCs, and Ecuador to pay damages for its breaches of the Treaty....including payment of compound

interest at such a rate and for such period as the Tribunal considers just and appropriate until the effective and complete payment of the award of damages;
or

- (d) In the event that Ecuador and PetroEcuador make future collaboration impossible, DECLARE the PSCs terminated and ORDER Ecuador and PetroEcuador to pay damages for their breaches of the PSCs and Ecuador to pay damages to Burlington for its breaches of the Treaty....including payment of compound interest at such a rate and for such period as the Tribunal considers just and appropriate until the effective and complete payment of the award of damages;
- (e) AWARD such other relief as the Tribunal considers appropriate; and
- (f) ORDER Ecuador and PetroEcuador to pay all of the costs and expenses of this arbitration, including Burlington's 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 other costs".

- 54. On 25 April 2008, the Centre, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the "Institution Rules"), transmitted a copy of the Request to Ecuador and PetroEcuador.
- 55. On 2 June 2008, the Acting Secretary-General of the Centre registered the Request pursuant to Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the "ICSID Convention" or the "Convention"). On the same date, the Acting Secretary-General dispatched the Notice of Registration to the Parties and invited them to proceed, as soon as possible, to constitute an arbitral tribunal.
- 56. Pursuant to Rule 2(3) of the ICSID Rules of Procedure for Arbitration Proceedings (the "Arbitration Rules"), the Initial Claimants, in the absence of agreement on another procedure between the Parties, elected the formula established in Article 37(2)(b) of the ICSID Convention for the constitution of the arbitral tribunal.
- 57. Under Article 37(2)(b) of the ICSID Convention, "the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties." The Parties subsequently proceeded to appoint the members of the Arbitral Tribunal in accordance with the terms of this provision.

58. On 4 August 2008, the Initial Claimants appointed Prof. Francisco Orrego Vicuña, a Chilean national. On 22 September 2008, Respondent appointed Prof. Brigitte Stern, a French national. On 27 October 2008, the Parties agreed to appoint Prof. Gabrielle Kaufmann-Kohler, a Swiss national, as President of the Arbitral Tribunal.
59. On 18 November 2008, the Acting Secretary-General of ICSID notified the Parties that all three arbitrators had accepted their appointments. Thus, in accordance with Rule 6(1) of the Arbitration Rules, the Acting Secretary-General further informed the Parties that, as of the same date, the Arbitral Tribunal was deemed to be constituted and the proceedings to have begun.
60. In the same 18 November 2008 letter, the Acting Secretary-General informed the Parties that Mr. Marco Tulio Montañés-Rumayor would serve as Secretary of the Tribunal.
61. On 20 January 2009, the Arbitral Tribunal held the first session at the World Bank's offices in Paris, France.
62. At the first session, the Parties expressed their agreement that the Tribunal had been properly constituted and stated that they had no objections to the appointment of any of the members of the Tribunal. In addition, several procedural issues on the session's agenda were discussed and agreed upon.
63. The first session was audio-recorded, and transcripts, in both English and Spanish, were produced and distributed to the Parties. Minutes were drafted, signed by the President and the Secretary of the Tribunal, and transmitted to the Parties on 18 February 2009.
64. In addition, the Tribunal suggested, at the first session, a procedural timetable. On 19 and 25 February 2009, Ecuador and the Initial Claimants, respectively, expressed their consent to this procedural timetable.
65. On 20 February 2009, Burlington Oriente, the subsidiary holding Claimant's ownership interests in Blocks 7 and 21, filed a Request for Provisional Measures (the "PMs Request" or "RPM"), which also included a request for a temporary restraining order with immediate effect (the "TRO Request"), asking that the Initial Respondents refrain from: 1) enforcing payments allegedly due under Law 42, 2) affecting the legal situation of or terminating the Block 7 and 21 PSCs, and 3) engaging in any conduct that aggravates the dispute between the Parties.

66. The PMs Request was accompanied by twelve exhibits (Exhs. C-46 to C-57), thirteen legal exhibits (Exhs. CL-1 to CL-13), and a witness statement from Mr. Alex Martinez. Following the PMs Request, the Parties engaged in a protracted exchange of correspondence further elaborating their positions in connection with the TRO Request.
67. On 4 March 2009, Ecuador filed a Preliminary Reply to Burlington Oriente's PMs Request, enclosing three exhibits (Exhs. E-3 to E-5) and nineteen legal exhibits (Exhs. EL-1 to EL-19).
68. On 6 March 2009, the Arbitral Tribunal, considering that the TRO Request met the requirements for provisional measures, recommended "*that the [Initial] Respondents refrain from engaging in any conduct that aggravates the dispute between the Parties and/or alters the status quo until it decides on the Claimants' Request for Provisional Measures or it reconsiders the present recommendation, whichever is first*".
69. On 17 March 2009, Ecuador filed a Reply to Burlington Oriente's PMs Request and a Request for Reconsideration of the Arbitral Tribunal's 6 March 2009 Recommendation, accompanied by five exhibits (Exhs. E-6 to E-10) and seven legal exhibits (Exhs. EL-20 to EL-26).
70. By letter dated 25 March 2009, Burlington Oriente expressed its opposition to Ecuador's Request for Reconsideration of the Arbitral Tribunal's 6 March 2009 Recommendation.
71. On 3 April 2009, the Tribunal denied Ecuador's request on the ground that no changed circumstance called for reconsideration and that the hearing on provisional measures would take place shortly thereafter.
72. On 27 March 2009, Burlington Oriente filed its Response to Ecuador's Reply to the PMs Request, accompanied by eleven exhibits (Exhs. C-58 to C-68) and eight legal exhibits (Exhs. CL-14 to CL-21).
73. On 6 April 2006, Ecuador filed its Rejoinder to Burlington Oriente's PMs Request, enclosing six exhibits (Exhs. E-11 to E-16) and fifteen legal exhibits (Exhs. EL-27 to EL-41).
74. On 17 April 2009, the Arbitral Tribunal held the hearing on provisional measures in Washington D.C., at which counsel for both Parties were in attendance.

Transcripts, in both English and Spanish, were produced and distributed to the Parties.

75. On 29 June 2009, the Arbitral Tribunal issued Procedural Order No. 1, dealing with Burlington Oriente's Request for Provisional Measures, in which it recommended that: 1) the Parties *"make their best efforts to agree on the opening of an escrow account"* into which Burlington Oriente shall make *"payments allegedly due under Law 42...including all payments made by the [Initial] Claimants into their segregated account"*; 2) the [Initial] Respondents *"discontinue the [coactiva] proceedings pending"* for the enforcement of payments allegedly due under Law 42; 3) the Parties *"refrain from any conduct that may lead to an aggravation of the dispute"*. The Tribunal also terminated the recommendation it had issued on 6 March 2009.
76. By letter dated 18 September 2009, the Initial Claimants informed the Tribunal that, because Ecuador had completed the expropriation of Blocks 7 and 21, physically occupying them, the Burlington Subsidiaries withdrew their "contractual claims, including those related to Blocks 23 and 24" (the "Contract Claims"), while Burlington "maintain[ed] its claims under the Treaty."
77. By letter of 22 September 2009, the Initial Respondents, while denying that Blocks 7 and 21 had been expropriated, stated that they would agree to the withdrawal of the Contract Claims provided that it was on a "with prejudice" basis. Additionally, they requested the Tribunal to withdraw Procedural Order No. 1 on the ground that Burlington Oriente had purportedly abandoned operations in Blocks 7 and 21.
78. By letter dated 10 October 2009, the Initial Claimants (a) accepted that the withdrawal of the Contract Claims should be "with prejudice" and (b) agreed that Procedural Order No. 1 should be withdrawn. Subsequently, and at the request of Respondent, the Initial Claimants confirmed, by letter dated 20 October 2009, that since the Contract Claims were withdrawn, PetroEcuador was no longer a party to these proceedings.
79. On 29 October 2009, the Arbitral Tribunal issued Procedural Order No. 2, whereby it ordered the following:
 - 1) Provided that the [Initial] Respondents make no objection by 6 November 2009, the **Contract Claims** will be deemed **withdrawn** with prejudice as of that date.

Consequently, as of 6 November 2009, **PetroEcuador** and, subject to the [Initial] Claimants' confirmation by 2 November 2009, [the **Burlington Subsidiaries**] **will**

cease to be parties to this dispute. As a result, this arbitration will deal solely with Burlington's Treaty Claims against Ecuador.

2) Procedural Order No. 1 is hereby revoked [with the caveat that "the Parties remain under a duty not to further aggravate the dispute"] (emphasis added).

80. On 2 November 2009, the Initial Claimants confirmed, in accordance with Procedural Order No. 2, that, as a result of the withdrawal of the Contract Claims, the Burlington Subsidiaries were no longer parties to these proceedings. Moreover, the Initial Respondents did not object to the withdrawal with prejudice of the Contract Claims by 6 November 2009.

81. Accordingly, as of 6 November 2009, Burlington remains the sole claimant in these proceedings, and Ecuador the sole respondent. Additionally, the only outstanding claims are the claims advanced by Burlington under the Treaty (the "Treaty Claims").

2. Written Phase on Jurisdiction

82. In accordance with the procedural timetable agreed upon following the first session, on 20 April 2009, the Initial Claimants submitted their Memorial (Mem.) accompanied by one hundred and twenty exhibits (Exhs. C-69 to C-188), one hundred and six legal exhibits (Exhs. CL-22 to CL-127), the witness statements of Taylor Reid and Herb Vickers, and the first supplemental witness statement of Alex Martinez. In addition, the Initial Claimants submitted revised versions of Exhibits C-1 to C-4, this time including authorizations, annexes and full English translations.

83. By separate letters dated 20 May 2009, Ecuador and PetroEcuador expressed their intention to raise objections to the Arbitral Tribunal's jurisdiction by 20 July 2009.

84. On 20 July 2009, Ecuador and PetroEcuador filed, in separate submissions, Objections to Jurisdiction. Ecuador's Objections to Jurisdiction were accompanied by ninety-nine exhibits (Exhs. E-17 to E-115), fourteen legal exhibits (Exhs. EL-42 to EL-55), the witness statement of Dr. Christian Dávalos, and the expert reports of Prof. Juan Pablo Aguilar and Prof. Luis Parraguez Ruiz.

85. On 20 October 2009, Burlington⁴ filed its Counter-Memorial on Jurisdiction. Along with its submission, Burlington enclosed ten exhibits (Exhs. C-189 to C-198) and

⁴ Since the Initial Claimants withdrew their Contract Claims on 10 October 2009, as a result of which the Burlington Subsidiaries eventually ceased to be parties to these proceedings on 6 November 2009, only Burlington filed a Counter-Memorial on Jurisdiction.

twenty one legal exhibits (Exhs. CL-128 to CL-148). Burlington did not append any witness statement or expert opinion.

86. On 30 October 2009, the Tribunal held a telephone conference with counsel for the Parties for the purpose of organizing the hearing on jurisdiction. In addition, on this date, the Parties sent a joint letter to the Tribunal agreeing on a number of issues with respect to the organization of the hearing on jurisdiction.
87. On 9 November 2009, the Tribunal issued Procedural Order No. 3 dealing with the organization of the forthcoming hearing on jurisdiction.

3. Hearing on Jurisdiction

88. On 22 January 2010, the Arbitral Tribunal held the hearing on jurisdiction in Paris. In attendance at the hearing were, in addition to the Members of the Arbitral Tribunal and the Secretary, the following party representatives:

(i) On behalf of Burlington:

- Mr. Jason Doughty, from ConocoPhillips
- Ms. Aditi Dravid (via video conference), from ConocoPhillips
- Mr. Alexander Yanos, from Freshfields Bruckhaus Deringer US LLP ("Freshfields")
- Ms. Noiana Marigo, from Freshfields
- Ms. Jessica Bannon Vanto (via video conference), from Freshfields
- Ms. Ana María Uribe, from Freshfields

(ii) On behalf of Ecuador:

- Dr. Álvaro Galindo Cardona, from Procuraduría General del Estado
- Dra. Gianina Osejo, from the Office of the Attorney General of Ecuador
- Prof. Pierre Mayer, from Dechert (Paris) LLP ("Dechert")
- Dr. Eduardo Silva Romero, from Dechert

- Mr. Philip Dunham, from Dechert
- Mr. José Manuel García Represa, from Dechert
- Ms. Véronique Camerer, from Dechert
- Ms. Edith Aupetit, from Dechert

89. At the hearing, Mr. Herb Vickers and, via video conference, Mr. Taylor Reid proffered witness evidence.
90. Dr. Galindo Cardona, Prof. Mayer, Dr. Silva Romero, and Mr. Dunham presented oral arguments on behalf of Ecuador. Mr. Yanos presented oral arguments on behalf of Burlington.
91. The jurisdictional hearing was sound recorded and transcribed *verbatim*, and copies of the sound recordings and the transcripts were subsequently delivered to the Parties.

* * *

92. The Arbitral Tribunal has deliberated and carefully considered the arguments presented by the Parties in their written submissions and orally during the course of the jurisdictional hearing. The Tribunal shall now proceed to summarize the position of the Parties (Section III), to analyze the arguments underpinning those positions (Section IV) and finally, on the basis of this analysis, to render a decision on jurisdiction (Section V).

III. POSITION OF THE PARTIES

1. Position of Burlington

93. In its written and oral submissions, Burlington alleged the following:
- (i) Burlington made an investment in Ecuador within the meaning of both the ICSID Convention and the Treaty.
 - (ii) Ecuador has breached its Treaty obligations with respect to Burlington's investment in Ecuador.
 - (iii) The breach of these Treaty obligations on the part of Ecuador has brought about a legal dispute between Burlington and Ecuador.

- (iv) The legal dispute between Burlington and Ecuador arises directly out of Burlington's investment in Ecuador.
- (v) Burlington and Ecuador meet the requirements of jurisdiction *ratione personae* under both the ICSID Convention and the Treaty.
- (vi) Burlington and Ecuador have consented in writing to submit Burlington's Treaty Claims to ICSID arbitration.

94. On the basis of these allegations, Burlington requests the Tribunal to

Reject Ecuador's Jurisdictional Objections in their entirety (CM, ¶ 86).

2. Position of Ecuador

95. In its written and oral submissions, Ecuador argued the following:

- (i) Burlington may have waived its Treaty Claim for expropriation;
- (ii) The Parties have not consented in writing to arbitrate Burlington's Treaty Claims under the ICSID Convention, with the exception of Burlington's Treaty Claim for expropriation.
- (iii) More specifically, Burlington's claims relating to Law 42 involve "matters of taxation" and are therefore outside the jurisdiction of the Tribunal, with the exception of its claim for expropriation.
- (iv) Further, Burlington's claim that Ecuador allegedly failed to provide full protection and security for Blocks 23 and 24 is outside the jurisdiction of the Tribunal because:
 - a) Burlington failed to abide by the six-month waiting period, a condition for consent under the Treaty;
 - b) Burlington failed to perfect consent before Ecuador withdrew its offer to arbitrate this class of disputes pursuant to its declaration under Article 25(4) of the ICSID Convention.

96. On the basis of these allegations, Ecuador requests the Tribunal to

- (i) Declare that Burlington's Treaty claims relating to the enactment and enforcement of Law 42, with the exception of its claims for expropriation, are expressly precluded by the U.S.-Ecuador BIT and outside the Tribunal's jurisdiction;

- (ii) Declare that no valid consent exists under the U.S.-Ecuador BIT and the ICSID Convention for the Treaty claims relating to Ecuador's alleged failure to provide full protection and security for Blocks 23 and 24 (other than in addition to Law 42).

(OJ, ¶ 84).

97. The Tribunal will refer to the Parties' positions in more details if and when appropriate in the course of its analysis.

IV. ANALYSIS

1. Preliminary Matters

98. Before examining the arguments presented by the Parties, the Tribunal will address three preliminary matters, i.e. the relevance of previous ICSID decisions or awards (1.1); the law applicable to the jurisdiction of the Tribunal (1.2); and matters that are undisputed by the Parties (1.3).

1.1 The Relevance of Previous ICSID Decisions or Awards

99. In support of their positions, both parties have relied on previous ICSID decisions or awards, either to conclude that the same solution should be adopted in the present case, or in an effort to explain why this Tribunal should depart from that solution.
100. The Tribunal considers that it is not bound by previous decisions⁵. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. The majority believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law, and thereby to meet the legitimate expectations of the community of States and investors towards the certainty of the rule of law. Arbitrator Stern does not analyze the arbitrator's role in the same

⁵ See e.g., *Saipem S.p.A. v. the People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on jurisdiction and recommendation on provisional measures of 21 March 2007, para. 67, available at <http://www.icsid.org>; *AES Corporation v. the Argentine Republic*, ICSID Case No. ARB/02/17, Decision on jurisdiction of 13 July 2005, para. 30-32, available at http://www.investmentclaims.com/decisions/AES-Argentina_Jurisdiction.pdf.

manner, as she considers it her duty to decide each case on its own merits, independently of any apparent jurisprudential trend.

1.2 Law Applicable to the Jurisdiction of the Tribunal

101. Jurisdiction is governed by the relevant provisions of the ICSID Convention and the BIT between the United-States and Ecuador.

102. In particular, Article 25(1) of the ICSID Convention provides as follows:

"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."

103. The relevant provision of the BIT, in turn, is Article VI, pursuant to which ICSID arbitration is available in the following terms:

"1. For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.

2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute, under one of the following alternatives, for resolution: [...]

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

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

104. The interpretation of both the ICSID Convention and the Treaty is governed by customary international law as codified by the Vienna Convention on the Law of Treaties.

1.3 Undisputed Matters

105. The Parties do not dispute that the Tribunal is the "judge of its own competence", as established in Article 41 of the ICSID Convention.

106. Furthermore, the Parties do not dispute that the following four conditions must be met for the Tribunal to uphold jurisdiction under Article 25 of the ICSID Convention:

- (i) The dispute must be between a Contracting State and a national of another Contracting State;
- (ii) The dispute must be a legal dispute;
- (iii) The dispute must arise directly out of an investment; and
- (iv) The parties must have expressed their consent to ICSID arbitration in writing.

107. Burlington alleges, and Ecuador does not dispute, both rightly so, that the following three conditions of jurisdiction are met in this case:

- (i) The dispute is between Ecuador, a Contracting State, and Burlington, a national of another Contracting State, namely, the United States;
- (ii) The dispute is a legal dispute;
- (iii) The dispute arises directly out of Burlington's investment in Ecuador.

108. As a result, the Tribunal deems that the three conditions of jurisdiction enumerated in the preceding paragraph are fulfilled.

109. With respect to the fourth condition, namely, consent, Ecuador argues that it has not consented to arbitrate Burlington's Treaty claims other than the claim for expropriation under the ICSID Convention. It also contends that, even though it did consent to arbitrate the expropriation claim, Burlington may have waived this claim. The Tribunal will examine Ecuador's arguments below.

1.4 Test for Establishing Jurisdiction

110. At the jurisdictional stage, it must be established that the conditions to jurisdiction set in Article 25 of the ICSID Convention and in the BIT are met. In addition, Claimant's allegations of fact are subject to a *prima facie* standard according to which the alleged facts should be susceptible of constituting a breach of the Treaty

if they were ultimately proven⁶. The Tribunal finds that this standard strikes a proper balance between a more exacting standard which would call for examination of the merits at the jurisdictional stage, and a less exacting standard which would confer excessive weight to the Claimant's own characterization of its claims.

2. Ecuador's Objections to Jurisdiction

111. Ecuador has objected to the jurisdiction of the Tribunal on the following three main grounds:

- (i) First, Burlington's expropriation claim is outside the jurisdiction of the Tribunal if the Tribunal finds that Burlington has waived any challenge against Law 42 and the Decrees (Tr. 203:9-21).
- (ii) Second, Burlington's claims relating to Law 42, other than its claim for expropriation (the "Law 42 non-expropriation claims"), are outside the jurisdiction of the Tribunal because:
 - a) They involve "matters of taxation" and therefore, pursuant to the tax carve-out of Article X, are excluded from the scope of the Treaty (OJ, Sections 2, 2.1 and 2.2);
 - b) And Burlington does not seek to enforce the terms of an "investment agreement", one of the categories of arbitration claims that may be asserted in relation to "matters of taxation", as that term is used in Article X (OJ, Sections 2.3 and 2.4).
- (iii) Third, Burlington's claim for Ecuador's alleged failure to provide full protection and security for Blocks 23 and 24 is outside the jurisdiction of the Tribunal because:
 - a) Burlington failed to abide by the six-month waiting period, a condition for consent under the Treaty (OJ, Section 4.1);

⁶ On the *prima facie* test of treaty breach for purposes of jurisdiction, see among others *UPS v. Canada*, Decision on Jurisdiction, 22 November 2002, paras. 33-37; *Siemens v. Argentina*, Decision on Jurisdiction, 3 August 2004, para. 180, available at <http://www.icsid.org>; *Plama v. Bulgaria*, paras. 118-120, 132; *Bayindir v. Pakistan*, paras. 185-200; *El Paso v. Argentina*, Decision on Jurisdiction, 27 April 2006, paras. 40-45, 109, available at <http://www.icsid.org>; *Jan de Nul v. Egypt*, Decision on Jurisdiction, 16 June 2006, paras. 69-71, available at <http://www.icsid.org>; *Telenor v. Hungary*, Award, 13 September 2006, paras. 34, 53, 68, 80, available at <http://www.icsid.org>.

- b) Burlington failed to perfect consent before Ecuador withdrew its offer to arbitrate this class of disputes pursuant to Article 25(4) of the ICSID Convention (OJ, Section 4.2).

2.1 Objection to Jurisdiction in Respect of the Expropriation Claim

- 112. Ecuador raises a conditional objection to Burlington's expropriation claim. During oral argument, Ecuador stated that "if the Tribunal were to find that Burlington, in [its] last Memorial [has] waived any criticism against Law 42 and the Decrees", then the Tribunal has no jurisdiction over Burlington's expropriation claim (Tr. 203:9-21).
- 113. The Tribunal must thus determine (i) whether the condition upon which Respondent's objection depends is present, and (ii) if it is present, whether the objection is well founded.
- 114. Turning to the first issue, in its Memorial on Liability, Burlington brought an expropriation claim against Ecuador. This claim unambiguously challenged the legality of Law 42 and of the Decrees. A few examples will help to illustrate this point. First, Burlington stated that Law 42 and the Decrees constitute a "taking in violation of Article III of the Treaty" (Mem., ¶ 428). Second, Burlington expressed that the "application" of Law 42 to Burlington "is tantamount to an unlawful expropriation" (Mem., § V.C.1). Third, Burlington alleged that Ecuador had confiscated its "revenues through an unlawful tax" (Mem., ¶ 442).
- 115. In its Objections to Jurisdiction, Ecuador originally conceded that the Tribunal had jurisdiction over Burlington's expropriation claim. In its submission, Ecuador concluded that:

"[A]ll of Burlington's Treaty claims relating to Law 42 and its enforcement should be dismissed for lack of jurisdiction, **with the exception of the claim for expropriation under Article III** (emphasis added)" (OJ, ¶¶ 23, 41).

- 116. In its Counter-Memorial on Jurisdiction, Burlington noted that Ecuador "concede[d] that the Tribunal has jurisdiction over Burlington's expropriation claim" (CM, § 2.A). Burlington also submitted that "the Tribunal has jurisdiction over all of Burlington's non-expropriation claims relating to Law 2006-42" (CM, § 2.B). In support of this submission, Burlington made a series of arguments, one of which was that "Burlington does not challenge Ecuador's right to apply Law 2006-42 to the extent that it is a tax" (CM, § 2.B.1.b).

117. To rule on Respondent's conditional objection, the Tribunal must ascertain whether, in its Counter-Memorial on Jurisdiction, Claimant has waived its criticism of "Law 42 and the Decrees" *with respect to its expropriation claim*. In the view of the Tribunal, Claimant has not waived its criticism of Law 42 and the Decrees with respect to its expropriation claim.
118. First, Claimant has never expressed an intention to waive its challenge to Law 42 *with respect to its expropriation claim*. On the contrary, Claimant expressed that it *unconditionally* challenged Law 42 in its Memorial on Liability, where it has most thoroughly articulated its legal arguments. In particular, Claimant stated that "[w]hether Law No. 2006-42 is considered a tax, a royalty or a violation of Burlington's [contractual] right...it is a taking in violation of Ecuador's [obligations]" (Mem., ¶ 436).
119. Second, this categorical position is to be contrasted with the conditional nature of Claimant's arguments *with respect to its non-expropriation claims*. With respect to these claims, Burlington challenges Law 42 only "if it is not a tax"; but, "to the extent that it is a tax", Claimant *does not challenge* Law 42 (CM, § 2.B.1.b; Tr. 102:9-22; 109:16-110:3). No similar argument was made in the section about Claimant's *expropriation claim* (§ 2.A). Therefore, at no point did Claimant waive any challenge to Law 42 *with respect to its expropriation claim*.
120. In light of the foregoing considerations, the Tribunal finds that Burlington has not waived its challenge of Law 42 and the Decrees with respect to its expropriation claims. The condition upon which Respondent's objection was predicated is not met, and its objection to jurisdiction consequently vanishes on its own terms.
121. As a result, the Tribunal has jurisdiction over Burlington's expropriation claim.

2.2 Objections to Jurisdiction in Respect of the Law 42 Non-Expropriation Claims

122. Ecuador's second objection to jurisdiction is rooted in Article X of the Treaty and is directed at Burlington's Law 42 non-expropriation claims. This objection raises the following two issues:
- (i) Do Burlington's Law 42 non-expropriation claims involve "matters of taxation" under Article X of the Treaty?

- (ii) Do Burlington's Law 42 non-expropriation claims involve the observance and enforcement of an "investment agreement" under Article X(2)(c) of the Treaty?

123. Article X of the Treaty provides the following:

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

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

(a) expropriation, pursuant to Article III;

(b) transfers, pursuant to Article IV; or

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

124. In view of the structure of Article X, the Tribunal will first examine whether Claimant's Law 42 non-expropriation claims raise "matters of taxation" within the meaning of Article X of the Treaty. If the Tribunal concludes that these claims involve "matters of taxation", it will proceed to review whether these claims relate to the observance and enforcement of an "investment agreement" within the meaning of Article X(2)(c) to rule on its jurisdiction. By contrast, if the Tribunal considers that these claims do *not* involve "matters of taxation", then Ecuador's objections to jurisdiction in respect of the Law 42 non-expropriation claims will have to be dismissed.

2.2.1 Law 42 Non-Expropriation Claims as "Matters of Taxation" Under Article X of the Treaty

A. Ecuador's Arguments

125. Ecuador alleges that Burlington's non-expropriation claims challenge the enactment and enforcement of Law 42, thus raising "matters of taxation" which are excluded from the scope of the Treaty as per Article X (OJ, ¶ 14).

126. The purpose of the tax carve-out in Article X of the Treaty is to preserve the State's discretion in the exercise of its power to tax. States rely heavily upon this power to tax in order to raise revenue destined to promote social and political objectives, provide for the national security, and generally foster the public welfare (OJ, ¶¶ 18, 23).
127. Since the power to tax serves so vital State interests, the extent to which the United States and Ecuador were willing, under the Treaty, to subject this power to the scrutiny of an unelected and unaccountable international tribunal "was very limited." Therefore, Ecuador concludes, "the limits of that consent should be respected" (OJ, ¶¶ 16-18, 23).

(i) Article X of the Treaty is both relevant and applicable to this dispute

128. Ecuador maintains that Article X is both relevant and applicable to this dispute. It is relevant because Burlington "truly challenges Law 42" (Tr. 25:19-20). Numerous excerpts from the Memorial, the request for provisional measures, and the witness statement of Alex Martinez indicate that Burlington "truly claims that [Law 42] constitute[s] a breach of the treaty" (Tr. 25:20-21).
129. Article X is also applicable to this dispute. Ecuador notes that the term "matters of taxation" is not defined in the Treaty. However, Ecuador argues that arbitral tribunals interpreting Article X or similar provisions have consistently construed this term broadly (OJ, ¶ 24).
130. In *EnCana v. Ecuador* ("*EnCana*")⁷, the arbitral tribunal, construing a tax carve-out similar to Article X contained in the Canada-Ecuador BIT, held that the meaning of "taxation" was not limited to "direct taxation", and that it encompasses "any executive act...implementing that [tax] law." Subsequently, in *Duke Energy v. Ecuador* ("*Duke Energy*")⁸, the arbitral tribunal, applying the exact same Article X here under scrutiny, embraced the *EnCana* tribunal's broad construction of the term "matters of taxation" (OJ, ¶¶ 25-26).
131. The *EnCana* and *Duke Energy* tribunals provided relevant definitions to ascertain the meaning of "matters of taxation" (Tr. 31:18-19). In *EnCana*, the tribunal defined a "taxation law" as "one which imposes a liability on classes of persons to pay

⁷ *EnCana Corporation v. Republic of Ecuador*, (UNCITRAL) Award dated 3 February 2006 (Exh. EL-45).

⁸ *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award dated 18 August 2008. (Exh. CL-41).

money to the State for public purposes" (Tr. 31:19-32:1). In *Duke Energy*, the tribunal held that "the ruling in *EnCana v. Ecuador* appears to be of particular relevance" (Tr. 32:2-8).

132. Law 42 is a tax within the meaning of *EnCana* and *Duke Energy*. This is because Law 42 imposes a tax on extraordinary profits for increases in the price of oil which "goes directly into the account of the State not of the -- in the account of Petroecuador, as all taxes do in the Cuenta Unica of the State at the Central Bank." (Tr. 31:4-8). As such, Burlington's challenges to Law 42 raise "matters of taxation" within the meaning of Article X of the Treaty.
133. However, Law 42 is not a tax under Ecuadorian law because it reformed the Hydrocarbons Law, which is not itself a tax law. It follows that Law 42 is not a tax under Ecuadorian law only "in a very narrow...technical sense" (Tr. 33:14-34:11). In any event, for purposes of Article X of the Treaty, it is irrelevant that Law 42 is not a tax under Ecuadorian law. Under Article X, all that matters is that Law 42 "imposes a liability on classes of persons to pay money to the State for public purposes" (OJ, ¶¶ 27-28).
134. Ecuador asserts that Burlington contradicts itself in characterizing Law 42. On the one hand, Burlington states that "measures deemed to be taxes within the internal law of the state issuing the tax" are "matters of taxation" under Article X (Tr. 29:20-23). On the other hand, Burlington points that "Law 42 is a tax as a matter of Ecuadorian law" (Tr. 30:2-3). If the latter is true, then Burlington's objection, in the sense that Law 42 does not raise "matters of taxation", "disappears" (Tr. 30:9-11).
135. In addition, the decision in *Occidental Exploration and Production Co. v. The Republic of Ecuador* ("*Occidental*")⁹, on which Burlington heavily relies, is distinguishable from this case. In *Occidental*, the claimant did not challenge the tax law, whereas here Burlington "is challenging" the tax law (Tr. 28:17). Further, the dispute in *Occidental* was triggered by a "new interpretation of a contractual clause by Ecuador" and not, as here, by the enactment of Law 42, a "fiscal measure" (Tr. 28:20-29:3).
136. In sum, under Article X of the Treaty, the extent to which Ecuador consented to arbitrate disputes related to "matters of taxation" is "very limited." It follows that investors have limited Treaty protection with respect to taxation matters. In

⁹ *Occidental Exploration and Production Company v. The Republic of Ecuador*, London Court of International Arbitration Case No. UN3467, Final Award dated July 1, 2004. (Exh. CL-41).

particular, investors may not invoke Treaty provisions such as "fair and equitable treatment, full protection and security, most-favoured-nation, and national treatment" when taxation is involved (OJ, ¶ 19).

137. Thus, Burlington's non-expropriation claims relating to the enactment and enforcement of Law 42 raise "matters of taxation" under Article X of the Treaty. As a result, Ecuador concludes that they "should be dismissed for lack of jurisdiction" (OJ, ¶ 41).

(ii) The Tribunal has no jurisdiction even if Burlington is not challenging Law 42

138. Ecuador argues that even if Burlington were not challenging Law 42, but merely seeking to enforce the contractual tax indemnification clauses purportedly violated by Ecuador, Burlington's Law 42 non-expropriation Treaty claims would still lie outside the Tribunal's jurisdiction for the following three reasons (Tr. 38:22-39-21).

139. First, "Burlington simply withdrew its contract claims" (Tr. 43:3-4). Hence, enforcement of contract provisions is not within the scope of this Tribunal's jurisdiction.

140. Second, "the purported breach of the [tax readjustment] clauses could not amount to a Treaty breach" (Tr. 43:21-23). In support of this proposition, Ecuador relies upon the ICSID awards in *Pantechniki v. Albania* ("*Pantechniki*"), *EDF v. Romania*, *CMS v. Argentina* ("*CMS*"), and *Duke Energy v. Ecuador* (Tr. 44:3-48:2).¹⁰

141. Pursuant to *Pantechniki*, the claims of the investor must be characterized by reference to the "normative source" from which these claims derive (Tr. 44:15-19). Here, the PSCs are the normative source on which Burlington's Treaty claims are based, from which it follows that "Burlington is not making any treaty claim" (Tr. 45:9-10). According to *EDF v. Romania*, "it is not enough that the State itself be a party to the relevant contract for the breach of contract to become a treaty breach" (Tr. 45:21-24). Finally, under *CMS* and *Duke Energy*, "there can only be a treaty claim [for breach of a contract] if there is exercise of sovereign power" (Tr. 46:11-17; 47:21-23).

¹⁰ *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award dated 30 July 2009 (Exh. CL-41); *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13), Award dated 8 October 2009; *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award dated 12 May 2005.

142. Third, "the umbrella clause of the treaty is of no assistance to Burlington" (Tr. 48:7-8). This is because the umbrella clause is inoperative without privity of contract. "[I]f there is no privity in a contract between Claimant and Respondent in an investment case, the umbrella clause simply does not work" (Tr. 50:7-10). According to Ecuador, the annulment decision in *CMS v. Argentina*, as well as the awards in *Impregilo v. Pakistan* and *EDF v. Romania* lend support to this conclusion (Tr. 49:6-50:24).
143. As a result, Ecuador submits that Burlington's non-expropriation Treaty claims relating to the enactment and enforcement of Law 42 should be dismissed for lack of jurisdiction (OJ, ¶ 84(a)). Specifically, Ecuador concludes that the following claims are subject to dismissal:
- (i) Failure to afford fair and equitable treatment (Article II(3)(a));
 - (ii) Failure to afford full protection and security (Article II(3)(a));
 - (iii) Arbitrary and discriminatory impairment (Article II(3)(b));
 - (iv) Violation of the observance of obligations clause (the "umbrella clause") (Article II(3)(c) (OJ, ¶ 41).

B. Burlington's Arguments

144. Burlington claims that its Law 42 non-expropriation claims do not raise "matters of taxation" excluded under Article X, and that these claims are therefore covered by the Treaty (CM, ¶ 7).
145. Burlington disagrees with Ecuador about the purpose of Article X. According to Burlington, the purpose of Article X is to exclude tax matters from the BIT "on the assumption that tax matters are properly covered in bilateral tax treaties" (Tr. 105:14-18). For this reason, this dispute, not being subject to a bilateral tax treaty, falls within the scope of the BIT (Tr. 106:12-25).
146. The purpose of Article X is not, as Ecuador alleges, "to respect some amorphous concept of sovereignty" (Tr. 105:21-25). In any case, Burlington notes that it is not asking this Tribunal to scrutinize or curtail Ecuador's taxing power (CM, ¶ 38).
147. According to Burlington, Ecuador's position regarding the characterization of Law 42 is contradictory. According to Ecuador's own admission, Law 42 is not a tax under Ecuadorian Law. Yet, if Law 42 is not a tax under Ecuadorian law, it cannot

be a tax under Article X of the Treaty, nor raise "matters of taxation" (CM, ¶¶ 12-14).

(i) Whether or not Law 42 is a tax, Article X does not apply to this dispute

148. Burlington's primary contention is that Law 42 is a tax under Ecuadorian law. "If the Tribunal wants to reach a conclusion, a definitive conclusion on its own as to whether Law 42 is a tax or not....the proper answer [is that] it is a tax under Ecuadorian law" (Tr. 98:10-16). However, Burlington makes also an alternative argument should the Tribunal find that Law 42 is not a tax (CM, ¶ 15; Tr. 99:12-19).
149. Burlington advances, in short, the following two arguments. First and foremost, if Law 42 *is a tax*, Article X does not apply because Burlington is not challenging "the imposition of a tax, or a failure to exempt from a tax" (Tr. 109:16-23). Second and in the alternative, if Law 42 *is not a tax*, Burlington does challenge Law 42; yet, Article X still does not apply because Article X applies only to "matters of taxation", and if Law 42 is not a tax, it cannot give rise to "matters of taxation" (Tr. 109:24-110:2).
150. Burlington argues that Law 42 can be a tax for purposes of Article X of the Treaty only if it is a tax under Ecuadorian law (CM, ¶ 14; Tr. 225:1-6). In the alternative, since the Parties disagree on the "basic question" of whether Law 42 is a tax, Burlington invites the Tribunal to join this issue to the merits (CM, ¶ 15; Tr. 96:1-97:1).
151. Burlington's Law 42 non-expropriation claims are not "matters of taxation" because Burlington is not challenging the enactment and enforcement, nor the validity of Law 42. Rather, Burlington is challenging Ecuador's failure to comply with its obligation to indemnify Burlington for the imposition of Law 42 in accordance with the PSCs and with the overall legal framework (CM, ¶ 18; Tr. 100:3-8)
152. The most relevant decision to this dispute is *Occidental*. In that case, Occidental brought claims against Ecuador for the denial of valued-added tax ("VAT") reimbursements. The tribunal held that Occidental's claims did not raise a matter of tax law, but rather a matter of contract interpretation (CM, ¶¶ 22-24).
153. Indeed, Occidental did not dispute the "existence of the tax or its percentage"; instead, it claimed that a refund was due under the terms of the contract. Likewise, Burlington here is not challenging the tax created by Law 42, but claiming an adjustment due under the terms of the PSCs (CM, ¶ 25).

154. *EnCana* and *Duke Energy*, on which Ecuador relies, are distinguishable. Both of these cases, in fact, “involved direct challenges to taxation measures” (CM, ¶ 26). In *EnCana*, the claimant challenged the amount of VAT liability assessed against its subsidiaries, whereas in *Duke Energy* the claimant disputed the denial of a customs duty exemption (CM, ¶¶ 27, 30). However, neither *EnCana* nor *Duke Energy* bears relevance here, for Burlington is not challenging the validity of Law 42 (CM, ¶¶ 29, 32).

(ii) The nature and legal source of Ecuador's indemnification obligation

155. Ecuador was under a Treaty obligation to indemnify Burlington for the effects of Law 42 by adjusting the parties' respective production sharing percentages. This Treaty-based obligation is rooted in the PSCs and the Hydrocarbons Legal Framework (CM, ¶¶ 19-21, 32; Tr. 100:8-10). Ecuador's failure to indemnify Burlington for the effects of the Law 42 tax breached Burlington's Treaty right (i) to fair and equitable treatment, (ii) to full protection and security, (iii) to umbrella clause protection and (iv) to not be subject to arbitrary and discriminatory impairment (CM, ¶ 21; Tr. 100:11-101:13).

156. Ecuador breached Burlington's Treaty right to fair and equitable treatment because Ecuador's indemnification obligation, rooted in both the PSCs and the Hydrocarbons Legal Framework, “became part of Burlington's legitimate expectations...the frustration of [which] constitutes a violation of the Treaty's fair and equitable treatment clause” (Tr. 100:11-101:5). Similarly, Ecuador's failure to indemnify breached Burlington's right to “full protection and security clause” and to umbrella clause protection (Tr. 101:5-8).

157. Burlington notes that the *Pantehniki* decision, invoked by Ecuador to argue that Burlington's claims are rooted in the PSCs and not in the Treaty, is distinguishable from this dispute because in that case there was no umbrella clause (Tr. 114:3-19).

158. In sum, Article X of the Treaty does not apply to this dispute, and thus Ecuador's objection to the Tribunal's jurisdiction over Burlington's Law 42 non-expropriation claims should be dismissed (CM, ¶ 32).

C. Analysis of the Tribunal

159. The Tribunal must determine whether Burlington's Law 42 non-expropriation claims raise “matters of taxation” within the meaning of Article X of the Treaty. The Tribunal is of the view that there can be “matters of taxation” under Article X only if

there is a tax within the meaning of that provision. The arguments of the Parties also presupposed this view. However, the Parties disagree on what constitutes a tax under Article X.

160. As a result, the Tribunal must determine (i) whether Law 42 is a tax for purposes of Article X of the Treaty and, if so, (ii) whether Burlington's Law 42 non-expropriation claims raise "matters of taxation" within the meaning of that provision. If the Tribunal were to find that Law 42 is not a tax, then Article X would not be applicable to this dispute and the Tribunal would dispense with the second determination.

(i) Is Law 42 a tax for purposes of Article X of the Treaty?

161. The Tribunal's first task is to ascertain whether Law 42 is a tax *for purposes of Article X of the Treaty*. Claimant states that Law 42 can be a tax for purposes of Article X "only if" it is a tax under Ecuadorian law (CM, ¶ 14; Tr. 225:1-6). The Tribunal does not agree.

162. Article X forms part of an international treaty between the United States and Ecuador. An international treaty is governed by international law, not by the domestic law of either the United States or Ecuador. Accordingly, the question whether Law 42 is a tax for purposes of Article X is governed by international law, not by Ecuadorian law.

163. Therefore, for purposes of jurisdiction, the Tribunal needs only to decide whether Law 42 is a tax for purposes of Article X of the Treaty under international law. In other words, there is no point in the Tribunal determining at this stage whether Law 42 is a tax under Ecuadorian law. In this fashion, the question of whether Law 42 is a tax under Ecuadorian law will be decided, if it needs to be decided, at the merits phase.

164. To answer the question whether Law 42 is a tax for purposes of Article X of the Treaty under international law, the Tribunal finds that the *EnCana* and *Duke Energy* decisions are indeed apposite. In *EnCana*, the tribunal held that a "tax" is "imposed by law" and that this "taxation law is one which imposes a liability on classes of persons to pay money to the State for public purposes." In *Duke Energy*, the tribunal, dealing with the Treaty applicable to this dispute, held that "the ruling in *EnCana v. Ecuador* appears to be of particular relevance" to elucidate the meaning of "matters of taxation" under Article X of the Treaty.

165. Building on *EnCana's* ruling, *Duke Energy* stands for the proposition that there is "tax" under Article X of the Treaty if the following four requirements are met: (i) there is a law (ii) that imposes a liability on classes of persons (iii) to pay money to the State (iv) for public purposes. Under this definition, the Tribunal is of the view that Law 42 is a tax.
166. First, Law 42 is, as its very name indicates, a law. Second, that law imposes a liability on "classes of persons", namely, on contracting companies having PSCs in force with Ecuador whenever the currently prevailing price of oil exceeds a preset reference price. Third, in accordance with this liability, these "classes of persons" must pay money to the State on a monthly basis. Fourth and finally, the monies so collected are available for the State to use for public purposes. As Ecuador indicated, the money collected under Law 42 "goes directly into the account of the State...as all taxes do, in the *Cuenta Unica* of the State at the Central Bank" (Tr. 31:7-11). The Tribunal also notes that Burlington paid the monies due under Law 42 through the same Tax Consortium which is liable for income taxes in Blocks 7 and 21.
167. For these reasons, the Tribunal concludes that Law 42 is a tax for purposes of Article X of the Treaty. In light of this conclusion, the Tribunal must now determine whether Burlington's Law 42 non-expropriation claims raise "matters of taxation" within the meaning of Article X.
- (ii) Do Burlington's Law 42 non-expropriation claims raise "matters of taxation" under Article X of the Treaty?
168. Under Article X of the Treaty, "matters of taxation" are as a rule excluded from the scope of the Treaty. The Parties agree that a dispute raises "matters of taxation" whenever an investor challenges the validity or enforcement of a tax. However, the Parties disagree on whether Claimant is challenging Law 42 or not.
169. Claimant states that it is not challenging Law 42, but merely Respondent's failure to comply with its obligation to indemnify Claimant for the effects of Law 42 on the economics of the PSCs. Respondent in turn maintains that Claimant is challenging Law 42. According to Respondent, "although Burlington says it does not challenge [Law 42], in fact it does....Burlington well and truly challenges Law 42 and the Decrees" (Tr. 18:7-8; 25:18:20).
170. To determine whether Claimant challenges Law 42 or not, the Tribunal will take into account Claimant's position throughout these proceedings, including in (i) its

Request for Arbitration, (ii) its Request for Provisional Measures, (iii) its Memorial on Liability, (iv) and, finally, in its Counter-Memorial on Jurisdiction and at the hearing on jurisdiction.

171. First, in its Request for Arbitration of 21 April 2008, Burlington stated the following in the section dealing with Ecuador's purported "Treaty Violations":

"Ecuador's imposition of a host of measures, including Law 2006-42, its implementing regulations, and principally Decree 662, and outright refusal to honor its contractual obligation to provide Burlington its participation in the crude or *alternatively* absorb the effects of such measures, abrogated Ecuador's Treaty obligations towards Burlington [...] (emphasis added) (RFA, ¶ 95)."

172. In the Request for Arbitration, Burlington included Law 42 as part of a "host of measures" which "abrogated Ecuador's Treaty obligations towards Burlington." Burlington argued only "alternatively" that Ecuador's failure to "absorb the effects of [Law 42 and the Decrees]" also formed part of that "host of measures." Therefore, the Tribunal concludes that Burlington's primary contention in the Request – *i.e.* that Law 42 was part of a "host of measures" which violated Ecuador's Treaty obligations towards Burlington – posed a challenge to Law 42.

173. Second, in its Request for Provisional Measures of 20 February 2009, Burlington requested an order from the Tribunal recommending that:

Ecuador...refrain from demanding payment of amounts allegedly due under Law No. 2006-42 and commencing any action or adopting any resolution or decision that may directly or indirectly lead to the forced or coerced payment of any amount relating to Law No. 2006-42 (RPM, ¶ 84(i)).

174. The Request for Provisional Measures evinces that Claimant was challenging both (i) the validity of Law 42 ("amounts *allegedly* due") and (ii) the enforcement of Law 42 ("refrain from demanding payment...under Law 42" and "from commencing any action...that may lead...to the forced or coerced payment of any amount [due under Law 42]"). Therefore, the Tribunal concludes that Burlington also challenged Law 42 in its Request for Provisional Measures.

175. Third, in its Memorial on Liability of 20 April 2009, Claimant has argued that Ecuador breached the Treaty because it failed "to honor its obligation to absorb the effects of [Law 42]" (Mem., ¶ 370). For reasons that will be explained below, the Tribunal considers that this claim does not pose a challenge to Law 42 itself. Yet, Claimant has also argued, for instance, that Ecuador has used "its sovereign taxing power in bad faith to force Burlington to accept a new service contract" (Mem., ¶

406). Thus, the Tribunal finds that, in its Memorial on Liability, Claimant has challenged Law 42, but only in part.

176. Fourth, in its Counter-Memorial on Jurisdiction of 20 October 2009, Claimant stated that its "non-expropriation claims arise out of Ecuador's failure to indemnify it for the effects of Law 2006-42." In its Counter-Memorial, Claimant invoked no other obligation as the basis of its Law 42 non-expropriation claims. At the hearing on jurisdiction of 22 January 2010, Claimant confirmed this view by stating that "what was unlawful about that tax [Law 42] is not the tax itself, but the failure to indemnify for the imposition of that tax" (Tr. 100:5-8). As the Tribunal noted in the previous paragraph, this claim does not pose a challenge to Law 42 itself.

177. In sum, throughout these proceedings, Claimant has submitted various claims and arguments, some of which challenge and some of which do not challenge Law 42. The question thus is not so much whether Claimant has challenged Law 42 on the whole, but rather what specific claims pose a challenge to Law 42. In light thereof, the Tribunal will examine the claims advanced by Claimant individually in order to ascertain whether Law 42 is challenged or not with respect to each claim.

(iii) What specific claim or claims advanced by Burlington challenge Law 42?

178. In its Memorial on Liability, Claimant has advanced Law 42 non-expropriation claims for breach of the following Treaty provisions: (i) observance of obligations clause; (ii) fair and equitable treatment; (iii) arbitrary and discriminatory impairment; and (iv) full protection and security.

1) Claims for breach of the observance of obligations clause

179. Claimant has advanced claims for Respondent's purported breach of obligations covered by the observance of obligations clause of the Treaty (the "umbrella clause"). This clause is enshrined in Article II(3)(c) of the Treaty, which provides as follows:

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

180. Claimant brings three umbrella clause claims for the breach of obligations that would arise from the PSCs as well as from the Hydrocarbons Legal Framework. First, Respondent failed to indemnify Claimant for the imposition of the Law 42 tax. Second, provided that Law 42 is not a tax, Respondent failed to exempt Claimant

from Law 42. Third, Respondent failed to guarantee Claimant the agreed-upon share of crude production.

181. The first umbrella clause claim is predicated on Respondent's alleged failure to indemnify Burlington for the imposition of the Law 42 tax. Claimant does not bring this claim on the ground that Law 42 is unlawful or that Law 42 should not be enforced against Claimant. Claimant rather seeks to enforce contractual indemnification obligations by virtue of which Respondent assumed the obligation to absorb the effects of new taxes or the increase of existing taxes. In the view of the Tribunal, this claim does not raise "matters of taxation." Just like in *Occidental*, on which Claimant properly relies, this claim revolves around a contract matter, not a "matter of taxation" (*Occidental*, ¶ 74).
182. Indeed, Respondent's indemnification obligation under the PSCs is unrelated to its taxing power as a sovereign state. The contract indemnification clauses bind the investor just as much as they bind Respondent. As Respondent noted, the indemnification clauses are clauses "which either party can invoke. If there is a decrease in taxation, then it is Ecuador who can claim re-establishment of the economics [of the contract]. If there is an increase, it is the other party, but it works perfectly symmetrically" (Tr. 26:12-18). The Tribunal agrees.
183. Thus, two private parties who have no power whatsoever over taxes could enter into an indemnification clause identical to those contained in the PSCs, *i.e.* if there is a tax increase, the contract price is reduced, and vice versa. And if one of the parties were to seek enforcement of the indemnification clause, it would not mean that that party is challenging the tax that prompted the application of the clause; rather, it would simply *invoke* the tax to substantiate its claim for indemnification. This logic does not change when the State is one of the parties subject to the clause. Hence, the Tribunal is of the view that this claim does not raise "matters of taxation."
184. The second umbrella clause claim is based on Respondent's failure to exempt Claimant from Law 42 *to the extent that Law 42 is not a tax* (Mem., ¶ 370). However, as the Tribunal previously concluded, Law 42 *is* a tax for purposes of Article X, and therefore this claim lapses on its own terms.
185. The third umbrella clause claim rests on Respondent's obligation to guarantee Claimant a fixed participation in crude oil production in accordance with the formulas set out in the PSCs. Burlington's third umbrella clause claim is conditional

on the Tribunal finding a violation with respect to either the first or the second umbrella clause claims previously analyzed. In particular, Claimant advances this claim "only to the extent" that Respondent has failed to either "absorb the effects of [Law 42]" (first umbrella clause claim) or to exempt Claimant from "the application of [Law 42]" if Law 42 is not a tax or a royalty (second umbrella clause claim) (Mem., ¶ 370).

186. Because Claimant's third umbrella clause depends upon the first and the second umbrella clause claims, the third umbrella clause claim must share the fate of those claims. In particular, the Tribunal has already found that the first umbrella clause claim does not raise "matters of taxation", and that the second umbrella clause claim lapses on its own terms. In light thereof, the Tribunal considers that, to the extent that this third claim is contingent upon the first umbrella clause claim, it does not raise "matters of taxation." On the other hand, to the extent that this third claim is contingent upon the second umbrella clause claim, it lapses on its own terms just as the second claim did.

187. In sum, the Tribunal finds that: (i) the first umbrella clause claim does not raise "matters of taxation" under Article X of the Treaty; (ii) the second umbrella clause claim lapses on its own terms; (iii) the third umbrella clause claim does not raise "matters of taxation" to the extent that it is dependent upon the first umbrella clause claim (the "first limb" of the third umbrella clause claim), and lapses on its own terms to the extent that it is dependent upon the second umbrella clause claim (the "second limb" of the third umbrella clause claim).

188. Ecuador has raised additional objections in case the Tribunal were to find that Burlington's umbrella clause claims do not raise "matters of taxation" under Article X of the Treaty. Since the Tribunal found that the second umbrella clause claim and the second limb of the third umbrella clause claim have lapsed on their own terms, it must be understood that these additional objections are directed only against the first umbrella clause claim and against the first limb of the third umbrella clause claim.

189. As a first additional objection, Ecuador stresses that Burlington has withdrawn its contract claims. While that is true, the Tribunal notes that Burlington's umbrella clause claim is a Treaty claim, not a contract claim. As the tribunal in *Bayindir v. Republic of Pakistan* ("*Bayindir*") held, the distinction between treaty and contract claims, tracing back to the *ad hoc committee's* decision in *Vivendi v. Argentina*, "is

now well-established" (*Bayindir*, Decision on Jurisdiction, ¶ 148) Thus, Ecuador's objection cannot stand.

190. Second, Ecuador alleges that Burlington's claims do not involve the exercise of sovereign power. This requirement, however, has no support in the text of the umbrella clause of the Treaty. Moreover, while different views have been expressed on this matter, in line with other decisions such as for instance *Duke Energy*, the Tribunal considers that umbrella clauses may apply even if no exercise of sovereign power is involved (*Duke Energy*, ¶ 320). Consequently, Claimant may rely upon the treaty's umbrella clause even if no exercise of Respondent's sovereign power is involved. Hence, Ecuador's objection cannot stand.
191. Third, Ecuador alleges that the umbrella clause is of no avail to Burlington because there is no privity of contract between Ecuador and Burlington (the "privity objection"). In support of its position, Ecuador relies upon *Impregilo v. Pakistan* ("*Impregilo*"), *EDF v. Romania*, and the *ad hoc committee's* decision in *CMS v. Argentina*. The Tribunal will examine the relevance to this dispute of each of these decisions.
192. In *Impregilo*, the issue was whether the dispute resolution clause of the Italy-Pakistan BIT applied to a state entity other than Pakistan. The tribunal held that it did not (Exh. EL-60, ¶¶ 214, 216). Significantly, there was no umbrella clause in the BIT applicable to that case. As a result, the tribunal in that case dealt with a very different issue from the one raised here. In *Impregilo*, the issue was whether the dispute resolution clause was binding upon state entities other than Pakistan; here, by contrast, the issue is whether Burlington may rely upon the Treaty's umbrella clause to enforce obligations that Ecuador indisputably assumed in the PSCs.
193. In *EDF v. Romania*, the issue was whether claimant could invoke the umbrella clause of the UK-Romania BIT, the wording of which is similar to the BIT in this case, to enforce obligations assumed by Romanian state entities other than the Romanian state. The tribunal held that claimant could not so invoke the umbrella clause, because the umbrella clause only applied "to obligations assumed by the Romanian state" (Exh. EL-59, ¶ 317). However, this is not the issue here, for it is undisputed that Ecuador assumed the obligations contained in the PSCs. Rather, the issue here is whether Burlington, as the investor, may invoke the obligations contained in those PSCs.

194. Ecuador also relies upon the annulment decision in *CMS v. Argentina* ("*CMS*"), where the *ad hoc Committee* held that "[t]he effect of the umbrella clause is not to transform the obligation which is relied on into something else....[i]f this is so, it would appear that the parties to the obligation...are likewise not changed by reason of the umbrella clause" (Exh. CL-72, ¶ 95). It should be noted that the wording of the umbrella clause in the US-Argentina BIT applicable in *CMS* is identical to that of the US-Ecuador BIT.
195. According to Respondent, *CMS* stated "that *only if* there is privity [of contract] between claimant and respondent...[may] those contractual obligations be elevated to the level of a treaty breach through the umbrella clause" (emphasis added) (Tr. 49:6-14). The Tribunal disagrees with Respondent's reading of *CMS*. It considers that, while the *ad hoc Committee* in *CMS* certainly raised concerns with respect to the scope of application of umbrella clauses, no general rule on that question may be extrapolated from that decision.
196. Indeed, the *ad hoc Committee* annulled the *CMS* award for "failure to state [the] reasons" why *CMS* could invoke the umbrella clause against Argentina to enforce obligations of Argentina to TGN, a company of which *CMS* was a minority shareholder (*CMS Annulment*, ¶¶ 96-97). Because the award was annulled on this ground, the *ad hoc Committee* did not address the argument that the application of the umbrella clause by the *CMS* tribunal would have constituted manifest excess of power because of the lack of privity between *CMS* and Argentina. Accordingly, the reasons why the *CMS* award was ultimately annulled were *particular to that decision*. Arbitrator Stern takes exception to the analysis of *CMS* presented in ¶¶ 195-196.
197. Nonetheless, the Tribunal notes that the Parties have not sufficiently discussed the issue of the scope of the umbrella clause. Since Respondent raised the objection of lack of privity for the first time at the hearing on jurisdiction, the Parties have not presented their views in writing on this issue.
198. As a result, the Tribunal decides to join to the merits its final determination on whether it has jurisdiction over Burlington's outstanding umbrella clause claims pending resolution of the question whether these claims require privity between Burlington and Ecuador (the "*privity objection*").
199. In sum, the Tribunal declares that: (i) Burlington's second umbrella claim and the second limb of the third claim lapse on their own terms; (ii) Burlington's first

umbrella claim and the first limb of the third umbrella claim do not raise "matters of taxation" under Article X of the Treaty; (iii) Ecuador's additional objections, directed at Burlington's first umbrella clause claim and the first limb of the third umbrella clause claim, are rejected with the exception of its privity objection; (iv) the privity objection is joined to the merits; (v) the Parties may not re-argue or present new arguments on any jurisdictional issue other than the privity objection with respect to Burlington's outstanding umbrella clause claims.

2) The claim for failure to provide fair and equitable treatment

200. Claimant alleges that Respondent has breached its obligation to provide Claimant fair and equitable treatment. This obligation is embodied in Article II(3)(a) of the Treaty, which provides as follows:

"Investment shall at all times *be accorded fair and equitable treatment*, shall enjoy full protection and security and shall in no case be accorded treatment less than that required under international law" (emphasis added).

201. Claimant supports its fair and equitable treatment claim on two main grounds. First, Respondent frustrated Claimant's legitimate expectations by repudiating its obligations to (i) absorb the effects of Law 42, (ii) exempt Claimant from Law 42, and (iii) guarantee Claimant a fixed share of crude oil production. These obligations arise from both the PSCs and the Hydrocarbons Legal Framework. Second, Respondent has used its tax power in bad faith to force Claimant to give up its rights in the PSCs.

202. Claimant's first fair and equitable treatment claim is based on the frustration of its legitimate expectations in relation to three distinct legal obligations. The Tribunal must therefore examine whether each of these legitimate expectations pose a challenge to Law 42 and thus raise "matters of taxation" within the meaning of Article X of the Treaty.

203. First, Claimant's legitimate expectations were frustrated because Respondent failed to absorb the effects of Law 42 pursuant to the Hydrocarbons Legal Framework and the PSCs. With regard to the Hydrocarbons Legal Framework, the Tribunal considers that Claimant had no right, in the absence of a contract, to be indemnified for the effects of new taxes or tax increases. With regard to the PSCs, the Tribunal has already concluded that the obligation to absorb the effects of new or increased taxes does not challenge Law 42 and, consequently, does not raise "matters of taxation" under Article X.

204. Yet, outside the umbrella clause context, a breach of contract by the State can amount to a Treaty breach only if the State's sovereign power is involved (*Duke Energy*, ¶ 345). Otherwise stated, Respondent's purported repudiation of the tax indemnification clauses could result in a breach of fair and equitable treatment under the Treaty *only if Respondent's sovereign power were involved*. The Tribunal, however, has already determined that the contractual indemnification clauses do not involve the exercise of sovereign power¹¹. Thus, this claim does not meet the relevant *prima facie* standard (¶ 110 above) because the facts alleged, even if proven, could not constitute a breach by Respondent of its Treaty obligation to accord Claimant fair and equitable treatment. Consequently, the Tribunal has no jurisdiction over this claim.
205. Second, Claimant alleges that its legitimate expectations were disappointed because Respondent failed to exempt it from Law 42. The notion that the very application of Law 42 to Claimant results in a violation of the Treaty is inherent in this claim. In the view of the Tribunal, this claim thus poses a challenge to Law 42 and therefore raises "matters of taxation" within the meaning of Article X of the Treaty. This conclusion remains unaltered regardless of whether Respondent's obligation stems from the PSC or from the Hydrocarbons Legal Framework.
206. Third, Claimant alleges that Respondent frustrated its legitimate expectation, independent of the other expectations, to have a fixed share of crude production. In the Tribunal's opinion, this claim challenges Law 42, for it is premised on the notion that Law 42 *itself* frustrated Claimant's expectation to have a fixed share of crude production¹². This notion implies that Law 42 itself is unlawful because it breaches an obligation. Therefore, this claim also raises "matters of taxation" within the meaning of Article X.
207. Claimant's second fair and equitable treatment claim is that Respondent used its tax power in bad faith in order to force Claimant to surrender its rights under the PSCs. In the view of the Tribunal, this claim ostensibly challenges Law 42, as well as Respondent's tax power, and therefore raises "matters of taxation". Arbitrator Orrego Vicuña has taken exception to this finding.

¹¹ While usually this would be an issue for the merits, the Tribunal was required to address this issue at this stage in order to determine whether Claimant's umbrella clause claims raised "matters of taxation" under Article X of the Treaty.

¹² It should be noted that, on this occasion, Claimant did not advance this claim to the extent that there was a violation of one of the previous two claims, as it did with respect to the umbrella clause claims. Rather, this claim was independent of the previous two claims.

208. In sum, the Tribunal finds that Burlington's fair and equitable treatment claim based on the alleged frustration of its legitimate expectation that the effects of any new taxes be absorbed by Ecuador does not meet the *prima facie* standard of jurisdiction pursuant to which, if later proven, the facts alleged must be susceptible of constituting a Treaty breach. The Tribunal further finds that Burlington's remaining fair and equitable treatment claims raise "matters of taxation" under Article X. Therefore, it will probe whether these latter claims relate to the observance and enforcement of the terms of an "investment agreement" in order to finally determine whether it can assert jurisdiction over them.

3) The claim for arbitrary impairment

209. Claimant maintains that Respondent has breached its obligation to refrain from enacting arbitrary measures that impair Claimant's investment. This obligation is incorporated in Article II(3)(b) of the Treaty, which sets forth that:

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

210. Claimant supports this Treaty claim on the basis of a series of allegations. First, Respondent imposed an "unlawful tax" that targeted "Burlington's profits during a period of increasing oil prices" (Mem., ¶ 421). Second, Respondent enacted tax measures that "suffocated" Claimant's investment (*id.*). Third, Respondent "aggressively pursued collection of Burlington's disputed debt by commencing the *coactiva* process" (Mem., ¶ 423). Finally, "[f]rom the enactment of [Law 42]...Ecuador has created...an arbitrary framework for Burlington's investment" (Mem., ¶ 427).

211. The Tribunal deems that Claimant's allegations regarding arbitrary impairment challenge Law 42, and thus raise "matters of taxation" excluded from the scope of the Treaty in accordance with Article X. Arbitrator Orrego Vicuña has taken exception to this finding. Hence, the Tribunal will later examine whether this claim relates to the observance and enforcement of the terms of an "investment agreement" in order to determine its jurisdiction over this claim.

4) The claim for failure to afford full protection and security

212. Claimant asserts that Respondent has breached its obligation to afford Claimant full protection and security in any of the Blocks. This obligation is articulated in Article II(3)(a) of the Treaty, which provides as follows:

Investment shall at all times...enjoy full protection and security.

213. Claimant asserts that "by discarding the legal framework governing" Burlington's investment, Respondent "has failed to provide legal and commercial security to Burlington's investments in Blocks 7, 21, 23, and 24." In particular, this failure materializes in "the newly created legal regime [which] destroys the legal and commercial security of [Burlington's] investment" (Mem., ¶ 470).
214. The "newly created legal regime" to which Claimant refers is Law 42. Indeed, in the same paragraph, Claimant states that, if Blocks 23 and 24 were to reach "the exploration and exploitation phases of the PSCs", the "eventual application of Law No. 2006-42 [Law 42]...would further contribute to the complete erosion of the legal and commercial value of [these Blocks]" (Mem., ¶ 470). In short, Claimant alleges that the application of Law 42 to Blocks 7 and 21 "destroys" the legal security of its investment, and that the eventual application of Law 42 to Blocks 23 and 24 would do as much (*id.*).
215. On the basis of these allegations, the Tribunal deems that Claimant's full protection and security claim, rooted in Ecuador's purported failure to provide *legal and commercial security* in Blocks 7, 21, 23 and 24, challenges Law 42 and thus raises "matters of taxation" under Article X. Accordingly, as is the case with the fair and equitable treatment claims and the arbitrary impairment claim, which also involve taxation matters, the Tribunal must ascertain whether this claim relates to the observance and enforcement of the terms of an "investment agreement" in order to determine its jurisdiction over this claim.
216. This claim, however, should be distinguished from Burlington's independent full protection and security claim for Ecuador's purported failure to provide *physical security* in Blocks 23 and 24 *due to the opposition of indigenous communities*. The Tribunal shall address Ecuador's objections with regard to this other claim in Section 3.3 below.

2.2.2 Observance and Enforcement of Terms of an "Investment Agreement" under Article X(2)(c) of the Treaty

A. Ecuador's Arguments

217. Ecuador contends that Burlington's Law 42 non-expropriation claims do not relate to the enforcement of an "investment agreement" as that term is used in Article X (OJ, ¶ 34). It essentially supports this position with two arguments.

218. First, Burlington itself is not a party to the PSCs and, therefore, the PSCs cannot be characterized as "investment agreements" for purposes of Article X(2)(c). Under Article VI(1)(a), to which Article X(2)(c) refers, an "investment agreement" is an agreement between a Party and "a national or company of the other Party." Here, Ecuador is the Party and Burlington the "national or company of the other Party", namely, the United States. Yet, no investment agreement has been concluded between Ecuador and Burlington (OJ, ¶¶ 35, 40).
219. Ecuador claims that this conclusion is consonant with the decisions in *Duke Energy* and *EnCana*. In *Duke*, the tribunal, construing the Treaty applicable to this case, rejected claimant's attempt to characterize certain contracts as "investment agreement[s]" within the meaning of Article X of the Treaty on the ground that "an investment agreement has to be one that 'is between a State Party and a national or company of the other State Party'" (emphasis in original) (OJ, ¶ 36; Tr. 36:16-37:7).
220. In *EnCana*, the claimant, relying on a tax carve-out similar to that of Article X, sought to enforce PSCs entered into between subsidiaries incorporated in a third state and Ecuador. The tribunal held, however, that the contracts did not qualify as "agreements" under the tax carve-out on the ground that the claimant was not itself a party to the PSCs. As a result, claimant's treaty claims were dismissed for lack of jurisdiction (OJ, ¶ 40).
221. Ecuador maintains that Burlington's arguments to the effect that Burlington is the "real investor", and that an investment is "an indivisible whole", bear no relevance. The question is not who the real investor is, but what the parties to the investment agreements are. Here, Burlington "is not a signatory" to the investment agreements, and therefore the "third exception to Article X" does not apply (Tr. 37:17-38:16).
222. Second, Ecuador argues that Article VI(8) of the Treaty "has no bearing in the instant case" (OJ, ¶ 37). Under this provision, a "company legally constituted under the [laws] of a Party", which is controlled at the relevant time by a national or company of the other Party, shall be treated as a national of such other Party. Article VI(8) only applies when a company has been "legally constituted under the [laws] of a Party", that is, either in the United States or Ecuador. Yet, the Burlington Subsidiaries, parties to the PSCs, are incorporated in neither of these countries; rather, they are incorporated in Bermuda, and thus Burlington cannot rely upon this provision (OJ, ¶¶ 38-39).

223. As a result, Ecuador concludes that Burlington's Law 42 claims other than expropriation should be dismissed for lack of jurisdiction (¶¶ 40-41).

B. Burlington's Arguments

224. Burlington maintains that its claims relate to the enforcement of an "investment agreement" pursuant to Article X(2)(c) of the Treaty (CM, ¶ 39).

225. The proper approach to construe the term "investment agreement", Burlington argues, is one that focuses upon the economic substance of the investment, as opposed to its form. In accordance with this substantive approach, Burlington is the real party to the investment agreement, viewed as a whole, underlying this dispute. The fact that it has invested through special purpose vehicles incorporated in Bermuda does not alter this conclusion (CM, ¶¶ 40, 45, 50).

226. Burlington points to four facts in support of its proposition that, as opposed to its Subsidiaries, it is the real party to the investment agreement. First, Ecuador approached and targeted Burlington, knowing all along that Burlington, and not its Subsidiaries, was the real investor (CM, ¶ 41). Second, Burlington's claims are broader than the PSCs because they are also based on the legal guarantees set out in the Hydrocarbons Legal Framework (CM, ¶ 42).

227. Third, although Burlington is not a signatory to the PSCs, it did provide, through its wholly-owned U.S. subsidiary, Burlington Resources International Inc., performance guarantees "covering all of its Bermudian subsidiaries' obligations under the PSCs." As a result, "Ecuador has the right to enforce the PSC obligations against Burlington" (CM, ¶ 43). Finally, when Law 42 and Decree 662 were passed, it was Burlington, "as the real party in interest", that requested compliance with the tax indemnification provisions of the PSCs (CM, ¶ 44).

228. Burlington notes that there is a consistent body of ICSID jurisprudence focusing on the economic reality of investments, as opposed to their formal set-up. In *Enron Corp. v. The Argentine Republic* ("*Enron*"), for instance, the tribunal, echoing the notion that an investment is an "indivisible whole", rejected the argument that a transfer agreement was not an investment agreement because the agreement was entered into by a local gas company but not by the claimant. The reasoning behind *Enron* is consistent with that of *Holiday Inns v. Morocco* ("*Holiday Inns*") and with numerous other ICSID decisions that followed suit (CM, ¶¶ 45-49).

229. Burlington asserts that Ecuador cannot benefit from Burlington's investment and attendant guarantees and at the same time seek to avoid Burlington's exercise of its rights with respect to those investments (CM, ¶ 50).
230. Finally, Burlington submits that its interpretation of the term "investment agreement" is the only one that comports with both the object and purpose of the Treaty, namely, to promote foreign investment, and with the broad definition of "investment" under Article I(a), which encompasses both direct and indirect investments (CM, ¶ 51-52).

C. Analysis of the Tribunal

231. The Tribunal must determine whether Burlington's Law 42 non-expropriation claims which raise "matters of taxation", namely, the fair and equitable treatment, the arbitrary impairment, and the full protection and security claims, relate to the observance and enforcement of an investment agreement within the meaning of Article X(2)(c). Article X, in its relevant portions, refers to Article VI(1):

"Article X.

[T]he provisions of this Treaty...shall apply to matters of taxation only with respect to the following:

....

(c) the observance and enforcement of terms of an *investment agreement* or authorization as referred to in Article VI (1) (a)....[...]" (emphasis added).

232. Article VI(1) in turn provides as follows:

"Article VI.

1. For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an *investment agreement* between that Party and such national or company..." (emphasis added).

233. Under these provisions, there is jurisdiction over Burlington's Law 42 non-expropriation claims insofar as these claims relate to the observance and enforcement of the terms of an investment agreement. Conversely, there is no jurisdiction over these claims if they do *not* relate to such an observance and enforcement.
234. The Parties disagree on whether there is an investment agreement between them within the meaning of Article VI(1)(a), to which Article X(2)(c) refers. Claimant

argues that Burlington is the "real investor" and that, based on this economic reality, there is an investment agreement between Burlington and Ecuador. Respondent objects that there is no investment agreement because (i) the PSCs were not entered into between Claimant and Respondent and (ii) the economic reality of the investment is irrelevant for purposes of defining an investment agreement.

235. The Treaty contains no definition of the term investment agreement. However, under Article VI(1), the Treaty provides that the "investment agreement" must be entered into "between [a] Party and [a] national or company of the other Party." In accordance with this requirement, the PSCs are not investment agreements. Indeed, while Ecuador qualifies as a Party to the Treaty, the Burlington Subsidiaries which entered into the PSCs are incorporated in Bermuda and thus are not nationals or companies "of the other Party" to the Treaty, that is, the United States. Arbitrator Orrego Vicuña has taken exception to this finding.
236. Claimant proposes an "economic approach" to the concept of "investment agreement", and argues that a number of ICSID decisions adopted such approach. However, the "economic approach" endorsed by those ICSID tribunals refers to the avowedly capacious concept of "investment", not to the more restrictive concept of "investment agreement."
237. In particular, the decisions upon which Claimant expressly relies, to wit, *Enron* and *Holiday Inns*, including the quotations that Claimant brings to the attention of the Tribunal, refer to the concept of "investment", not to the concept of "investment agreement." In consequence, these decisions are inapposite to ascertain the meaning of "investment agreement" here in question.
238. In any event, the Tribunal considers that, while it makes sense to adopt an economic approach in relation to the concept of "investment", the concept of "agreement" is one that more naturally lends itself to a legal approach. This does not mean that economic considerations should be wholly alien to the concept of "investment agreement". It simply means that it is the law and not economics that generally sets the contours of what qualifies as an "agreement."
239. The Tribunal finds support for a legal approach to the notion of "investment agreement" in the *Duke Energy* and *EnCana* decisions. In *Duke Energy*, the tribunal found that the investor and Ecuador had not entered into an "investment agreement" because claimant had not "signed" the contracts in question, nor had it

assumed any "obligations" under those contracts. In *EnCana*, the tribunal similarly held that there was no agreement preventing the application of the tax carve-out of the Canada-Ecuador BIT because the PSCs in question in that case had not been "concluded by the investor in these proceedings...but by its third-State-incorporated subsidiaries" (emphasis added) (EL-45, ¶ 167).

240. In sum, the *Duke Energy* and *EnCana* tribunals' focus on the signature or conclusion of the contract, and on the obligations assumed thereunder, shows that they adopted a legal rather than an economic approach to the meaning of "investment agreement." This Tribunal will also adopt that approach.
241. Claimant argues that four facts indicate that there was an investment agreement between Claimant and Respondent. First, Respondent targeted Claimant. Second, Claimant's claims are broader than the PSCs as it includes rights stemming from the Hydrocarbons Legal Framework. Third, Claimant has given parent company guarantees in connection with the PSCs. Fourth, when the Law 42 dispute arose, Claimant, acting as the "real party in interest", requested Respondent to comply with its tax indemnification obligations under the PSCs.
242. First, the fact that Claimant was "targeted" by Respondent corroborates Burlington's economic interest in the investment and, ultimately, Burlington's status as the real investor behind the investment. Yet, this does not establish the existence of an investment agreement between Claimant and Respondent.
243. Second, while Claimant's rights could arguably derive from Ecuadorian law in addition to the PSCs, the Tribunal does not consider that this possibility lends support to Claimant's argument that there is an investment agreement between Claimant and Respondent. In the view of the Tribunal, the Hydrocarbons Legal Framework did not create an investment agreement between Claimant and Respondent within the meaning of Article VI(1)(a) of the Treaty.
244. Indeed, the Hydrocarbons Legal Framework was unilaterally enacted by Ecuador in the exercise of its sovereign power – as is generally the case with any piece of legislation. By contrast, an investment agreement must be entered into between two specific parties, *i.e.* "a Party [to the Treaty] and a national or company of the other Party", and does not necessarily involve the State's exercise of its sovereign power.
245. Third, Claimant argues that there was an investment agreement because it undertook to guarantee the obligations of its Subsidiaries under the PSCs. In the

view of the Tribunal, these guarantees do not give rise to an investment agreement between Claimant and Respondent. Claimant did not assume these guarantees directly, but through a third wholly-owned U.S. subsidiary which was otherwise wholly alien to Burlington's investment in Ecuador. Thus, Burlington was only a second-degree guarantor.

246. Moreover, Burlington's second-degree guarantees are unilateral undertakings assumed exclusively for Ecuador's benefit. The Tribunal therefore cannot see how Burlington could rely upon these unilateral undertakings as evidence in support of an agreement which is by definition bilateral. Finally, even if these unilateral undertakings could somehow be considered an "investment agreements" under the Treaty, Burlington could still not avail itself of the Article X(2)(c) exception because this dispute does not relate to "the observance and enforcement" of Burlington's obligations under the guarantees, but rather to "the observance and enforcement" of *Ecuador's obligations* under the Treaty and possibly, via the Treaty, under the PSCs.
247. Fourth, the fact that Claimant, as "the real party in interest", requested Respondent to comply with the tax indemnification provisions contained in the PSCs shows, once again, Claimant's economic stake in the investment. Yet, as was the case with the first fact invoked by Claimant, this does not establish the existence of an investment agreement between Claimant and Respondent. Even if considered cumulatively, the four facts enumerated by Claimant fail to establish the existence of a bilateral investment agreement between Claimant and Respondent.
248. In light of these circumstances, the Tribunal concludes that Claimant and Respondent have not entered into an investment agreement under Article VI(1)(a) of the Treaty, and therefore Burlington's Law 42 non-expropriation claims do not relate to the observance and enforcement of the terms of an investment agreement within the meaning of Article X(2)(c).
249. Since Burlington's Law 42 non-expropriation claims do not relate to the observance and enforcement of the terms of an investment agreement, the Tribunal cannot but conclude that it has no jurisdiction over those Law 42 non-expropriation claims which raise "matters of taxation" within the meaning of Article X, *i.e.*, (i) the fair and equitable treatment claim (at ¶ 208), (ii) the arbitrary impairment claim (at ¶ 211); and (iii) the full protection and security claim (at ¶ 215).

2.3 Objection to Jurisdiction in Respect of the Full Protection and Security Claim for Blocks 23 and 24

250. Ecuador's third objection to jurisdiction is directed at Burlington's full protection and security claim for lack of *physical security* in Blocks 23 and 24 due to the opposition of local indigenous communities. It raises the following two issues:

- (i) Has Burlington complied with the requirements of Article VI of the Treaty prior to submitting this dispute to ICSID arbitration?
- (ii) Has Burlington perfected consent to arbitrate these claims before Ecuador withdrew its offer to arbitrate this class of disputes pursuant to Article 25(4) of the ICSID Convention?

2.3.1 Has Burlington Complied with the Requirements of Article VI Prior to Submitting this Dispute to ICSID Arbitration?

A. Ecuador's Arguments

251. Ecuador argues that Burlington failed to comply with the requirements of Article VI of the Treaty in connection with its full protection and security claim for Blocks 23 and 24. The requirements of Article VI are prerequisites for "the validity of the investor's "consent" to ICSID arbitration". As a result, Burlington's full protection and security claim for Blocks 23 and 24 should be barred for lack of jurisdiction (OJ, ¶¶ 64, 67, 69, 75).

252. Pursuant to Article VI of the BIT, an investor may submit a dispute to ICSID arbitration only if *inter alia*, the following three cumulative conditions are met: (i) there is a dispute, (ii) the investor provides notice of the dispute containing one or more allegations of Treaty breach, and (ii) six months have elapsed from the date on which the dispute arose, that is, from the date of the alleged Treaty breach (OJ, ¶¶ 65-66)¹³.

253. Ecuador founds its objection on the following:

- 1) There was never a dispute in relation to Blocks 23 and 24;

¹³ An additional requirement under the Treaty is that the investor must not have submitted the dispute either to the courts of the Contracting Parties or to any other form of dispute settlement mechanism. Burlington's compliance with this requirement is not disputed by Ecuador (OJ, ¶ 66).

- 2) Even if there was a dispute, Burlington did not provide proper notice of it to Ecuador; and
- 3) Thus, Burlington did not comply with the six-month waiting period requirement in Article VI of the Treaty.

i) There was never a dispute in relation to Blocks 23 and 24

254. Ecuador alleges that "there was no dispute in relation to Blocks 23 and 24" for the following three reasons (Tr. 56:14-16).
255. First, there was never "a disagreement between the parties" in relation to the indigenous opposition in Blocks 23 and 24 (Tr. 59:10-16).
256. Second, the Blocks were under *force majeure* status. A declaration of *force majeure* amounts precisely to a recognition that the events in question are beyond the control of the Parties. In particular, under the PSCs, both parties were exempt from liability for the situation obtaining in the Blocks. Therefore, "if there is no potential liability arising from [the PSCs], there cannot be any real dispute" (OJ, ¶¶ 71-72; Tr. 60:8-17).
257. Third, as an additional token that there was no dispute, Ecuador points out that "there was clear collaboration between the parties to solve the issue" in the Blocks concerning the indigenous opposition (Tr. 61:5-12).

ii) Burlington did not provide proper notice of the dispute to Ecuador

258. In the alternative, if there was a dispute, Burlington did not provide Ecuador with proper notice of the dispute. In particular, Burlington did not properly advise Ecuador of an alleged breach of the full protection and security provision of the Treaty in relation to Blocks 23 and 24 until the filing of its Request for Arbitration, in disregard of the notice requirements contained in Article VI of the BIT. (OJ, ¶ 64; Tr. 53:21-24).
259. In *Lauder v. Czech Republic*, the tribunal, faced with a provision with wording similar to that of Article VI, clearly stated "the need for a notice of the dispute." As a result, Burlington's failure to comply with this requirement should foreclose jurisdiction over these claims, in consonance with the ICSID decision in *Enron v. Argentine Republic*. (OJ, ¶ 67; Tr. 56:2-5; 69:17-70:12).

260. The letters on which Burlington relies to claim that Ecuador was apprised of the dispute actually failed to give proper notice of the dispute in accordance with Article VI of the Treaty (OJ, ¶ 69; Tr. 56:18-21). First, the 4 December 2002 letter, through which Burlington claims to have advised Ecuador of a dispute in relation to Block 23, "was sent by CGC, not Burlington", "only refers to the question of *force majeure*", and contains no allegation of "any treaty breach" (Tr. 62:17-63:15).
261. Second, the 6 December 2000 letter, through which Burlington claims to have advised Ecuador of a dispute in relation to Block 24, again "is only referring to the *force majeure* question" and contains no allegation of any "breach of treaty" (Tr. 63:16-64:2)
262. Third, while Burlington refers to "repeated communications advising [Ecuador] of the dispute", these communications "do not refer to any disagreement [nor] to any treaty breach" (Tr. 64:3-16).
263. Fourth, Burlington sent to Ecuador four identical notices on 11 October 2007 (the so-called "Trigger Letters") alleging various BIT breaches in connection with its interests in Blocks 7, 21, 23 and 24. However, the Trigger Letters referred only to Law 42 breaches, and omitted any reference to Ecuador's purported failure to provide full protection and security against opposition from local indigenous groups in Blocks 23 and 24 (OJ, ¶¶ 68-69). While Burlington employed the expression "among other Government measures" in the Trigger Letters, this expression is insufficient to give notice of a specific and different dispute in Blocks 23 and 24 due to the opposition local indigenous communities. Most importantly, Ecuador argues, the Trigger Letters constitute Burlington's express recognition that it was bound to comply with the requirements of Article VI prior to submitting the dispute to ICSID arbitration (OJ, ¶ 68; Tr. 64:17-65-17).
264. Ecuador also contends that the onus is on the "Claimant to demonstrate with clear evidence that any further negotiations with the Respondent host State would be futile...[and yet Burlington presented] no evidence whatsoever on record of this point" (Tr. 69:5-16).
265. Finally, in omitting to put Ecuador on notice of its failure to provide full protection and security in connection with Blocks 23 and 24, Burlington in effect prevented Ecuador from taking steps to address the situation and from engaging in meaningful negotiations (OJ, ¶ 70; Tr. 67:3-68:13).

266. In sum, Ecuador concludes, Burlington has made "an opportunistic use of [its] Request for Arbitration to advance frivolous Treaty claims in relation to Blocks 23 and 24" (OJ, ¶ 74).

B. Burlington's Arguments

267. Burlington contends that it complied with the requirements of Article VI of the Treaty in connection with its full protection and security claim for Blocks 23 and 24 prior to submitting this dispute to ICSID arbitration. Burlington notes that, in accordance with Article VI, it only submitted this claim to ICSID arbitration six months after the date on which the dispute arose (CM, ¶¶ 55-57, 62).

268. Contrary to what Ecuador alleges, Burlington claims that (i) there was a dispute in relation to Blocks 23 and 24; (ii) the BIT has no formal notice requirement; and (iii) Ecuador learned of the existence of the dispute on numerous occasions. Therefore, Burlington complied with the requirements of Article VI.

(i) *The disputes in Blocks 23 and 24 arose soon after Burlington's investment*

269. Burlington maintains that a dispute arose in Blocks 23 and 24 shortly after Burlington acquired ownership interests in the PSCs for the exploration and exploitation of those Blocks. The dispute was brought about by the opposition of local indigenous communities to hydrocarbon operations in those Blocks (CM, ¶ 58).

270. Specifically, a dispute arose when Burlington made its "initial requests for protection and security from the indigenous opposition in Blocks 23 and 24." The first request for protection was made as early as 6 October 2000 for Block 24 and 4 December 2002 for Block 23. These initial requests were followed by "repeated communications" to the same effect (CM, ¶¶ 58, 61).

271. Burlington points that Ecuador's argument that the *force majeure* status of the Blocks signified that no party was responsible for the situation obtaining in the Blocks "is a question for the merits" (CM, ¶ 61 n.76).

(ii) *The BIT has no formal notice requirement*

272. Burlington argues that, contrary to Ecuador's allegation, there is no notice requirement under Article VI of the Treaty. There is no need for Claimant to "advise[] formally of the existence of a dispute....All that needs to be established is

that a dispute existed within the meaning of the treaty for more than six months, and then that consent was validly provided" (Tr. 116:19-117:5). In addition, for a dispute to exist no "specific allegation of a Treaty breach" is required, but merely "evidence that a dispute has arisen." Once a dispute "arises", the purpose of the six-month waiting period is to give the State an opportunity to redress the problem (CM, ¶¶ 59-60).

273. In spite of such purpose, when Burlington informed Ecuador of the violation of its Treaty right in the dispute resulting from the enactment of Law 42, "no machinery of the Government was made known to Burlington such that negotiations went forward with respect to [those] treaty claims" (Tr. 84:19-22).

274. According to Burlington, tribunals do not require claimants to articulate all of their claims during the period of amicable settlement, recognizing that this approach would be overly formalistic and could hinder the negotiation process. In its letters to Ecuador, Burlington did not need to spell out its legal claims in detail, but merely to make reference to its rights "in general terms" (CM, ¶ 67; Tr. 125:5-15). In *Generation Ukraine v. Ukraine*, for instance, the tribunal held that "[t]he requirement to consult and negotiate...does not serve to compel the investor to plead its legal case on multiple occasions. To insist upon [specific articulation of the investor's legal claims] would only have a chilling effect on consultation and negotiation" (CM, ¶ 67; Tr. 125:16-126:2).

(iii) *Ecuador learned of the existence of the dispute on numerous occasions*

275. Burlington alleges that Ecuador knew of the existence of a dispute in Blocks 23 and 24 more than six months before Burlington filed its Request for Arbitration on 21 April 2008 (CM, § C.1). In particular, Ecuador learned about the existence of this dispute at the following three different points in time:

- (i) First, shortly after Burlington made its investment in these Blocks, that is, in 2000 for Block 24 and in 2002 for Block 23;
- (ii) Second, when Ecuador received Burlington's 11 October 2007 notices, i.e., the "Trigger Letters";
- (iii) Third, when Burlington filed its Request for Arbitration in April 2008 (CM, ¶¶ 62, 68-69, 70-71).

276. First, soon after it invested in Blocks 23 and 24, Burlington informed Ecuador of the difficulties it was facing in these Blocks due to opposition from local communities. As mentioned before, Burlington made initial requests for protection and security on 6 October 2000 for Block 24 and on 4 December 2002 for Block 23. Burlington repeatedly reiterated these requests by addressing letters to PetroEcuador, to Governors and to the Ministry of Energy and Mines (CM, ¶¶ 58, 61).
277. According to Burlington, there are two letters which are "emblematic of the broader tenor of [the] discussions" taking place between Burlington and Ecuador. This tenor is one which sufficiently apprised Ecuador of the disputes in the Blocks due to the indigenous opposition. The first letter refers to Block 24 and is date-marked 31 January 2005; the second letter refers to Block 23 and is date-marked 21 December 2005 (Tr. 124:4-25; 129:18-25).
278. Moreover, as Ministerial Decree No. 197 of 23 April 1999 demonstrates, Ecuador knew that indigenous groups opposed the exploitation of Blocks 23 and 24 and that it was under an obligation to address those issues (CM, ¶ 60).
279. Second, even if these letters did not sufficiently inform Ecuador of the dispute with Burlington in connection with Blocks 23 and 24, the Trigger Letters did. The Trigger Letters explicitly stated that Ecuador's inaction resulted in a violation of its obligations to provide full protection and security for these Blocks (CM, ¶¶ 63-65).
280. Burlington's allegations in the Trigger Letters were not limited to Law 42 measures. Indeed, the Trigger Letters stated that Law 42 measures, "*among other Government's measures*", constituted a breach of Ecuador's obligation to accord full protection and security to Burlington's investment in the Blocks (emphasis added by Claimant) (CM, ¶ 64). In the context of Burlington's previous letters of protest and request for assistance, reference to these "other" measures necessarily included Ecuador's inaction in connection with Blocks 23 and 24 (CM, ¶ 65).
281. Therefore, the Trigger Letters apprised with sufficient detail the existence of a dispute in connection with Blocks 23 and 24, placing Ecuador in a position to take steps to resolve the dispute amicably. This is all that is required under the Treaty, which imposes no formal notice obligation (CM, ¶¶ 66, 68-69).
282. Third and finally, Ecuador was once again made aware of the existence of the dispute when Burlington filed its Request for Arbitration on 21 April 2008. In its Request for Arbitration, Burlington detailed all the facts and the law of the dispute

concerning Ecuador's alleged failure to accord full protection and security to Burlington's investment in Blocks 23 and 24 (CM, ¶¶ 70-71).

283. In sum, Burlington complied with Article VI of the Treaty because it submitted the dispute in connection with Blocks 23 and 24 to ICSID arbitration more than six months after the date on which the dispute arose (CM, ¶¶ 61-62).

C. Analysis of the Tribunal

284. The Tribunal must determine whether Claimant complied with the requirements of Article VI of the Treaty in relation to its full protection and security claims for Blocks 23 and 24. In its relevant part, Article VI of the Treaty provides the following:

"1. For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.

[...]

3. (a) Provided that...six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration [to the ICSID]."

285. The Parties disagree on two main issues. First, while it is common ground that Article VI requires the existence of a dispute, the Parties disagree on whether there actually was a dispute in this case with respect to Blocks 23 and 24. Second, the Parties disagree on whether Article VI requires the would-be claimant to provide notice of the dispute containing allegations of the Treaty rights that were purportedly breached and, if so, whether Burlington met this requirement.

286. Accordingly, the Tribunal must analyze (i) whether there was a dispute in connection with Blocks 23 and 24 and (ii) whether Burlington was under an obligation to provide notice of the dispute to Ecuador containing allegations of Treaty breach and, if so, (iii) whether Burlington complied with this obligation.

(i) *Was There a Dispute in connection with Blocks 23 and 24?*

287. It is common ground between the Parties that Article VI of the Treaty requires the existence of a dispute. The Parties also agree on the meaning of the term "dispute" under Article VI(3) of the Treaty.

288. Claimant has stated that a "dispute" is a "disagreement" between the parties "as to what their obligations or rights are"; in addition, both parties need to be aware of this "disagreement" (Tr. 232:22-233:11). Similarly, Respondent has stated that there is a dispute when there is a "disagreement between the parties....an opposition of interests and views", and "for a disagreement to exist, someone has to say to the other side, "We disagree on something. You are not doing something"" (Tr. 58:10:13; 216:21-24).
289. In sum, both Parties agree that a "dispute" under Article VI entails (i) a disagreement between the parties on their rights and obligations, an opposition of interests and views, and (ii) an expression of this disagreement, so that both parties are aware of the disagreement. The Tribunal agrees with this definition, and will now apply it to the facts of this case.
290. Claimant stated that it made initial requests for protection and security on 6 October 2000 for Block 24, and on 4 December 2003 for Block 23. For chronological reasons, therefore, the Tribunal will focus first on Block 24.

(i) Was There a Dispute in Block 24?

291. Claimant alleges that it first required protection for Block 24 by letter of 6 October 2000 addressed to the Ministry of Energy and Mines and to PetroEcuador. In the letter, Claimant stated that it was writing:
- "[T]o notify that there is a *Force Majeure* scenario in accordance with [the PSC for Block 24[...]. Burlington continues to face active opposition from the indigenous communities residing in Block 24[...]. Burlington declares that the conditions described....constitute *Force Majeure*" (Tribunal's translation)(Exh. C-142).
292. While the 6 October 2000 letter refers to the fact that "Burlington continues to face active opposition from the indigenous communities residing in Block 24", this is only mentioned as the reason why the Block should be declared in *force majeure*. However, the 6 October 2000 letter contains no request for protection and security, nor does it evidence any disagreement concerning the level of security that Ecuador was providing in the Block.
293. The purpose of the 6 October 2000 letter, as Claimant itself acknowledged in its Memorial, was to "avoid a breach of its obligation to timely perform....under the PSC" (Mem., ¶ 184). The Tribunal agrees with Respondent's view that this letter "is only referring to the *force majeure* question" (Tr. 63:16-64:2). Thus, this letter fails to raise a "dispute" within the meaning of Article VI of the Treaty.

294. However, Claimant argues that it sent other repeated communications to Respondent requesting protection and security for Block 24. Claimant refers in particular to its letter dated 31 January 2005 as "emblematic" of the tenor of the discussions taking place between Claimant and Respondent (Tr. 128:19-25). In light of Claimant's own characterization, this letter warrants special attention.

295. Claimant's letter of 31 January 2005 comprises three pages addressed by Mr. Vickers, of Burlington Ecuador, to the Ministry of Energy and Mines and to Ecuador. In its relevant portions, it states:

"During 2004, Block 24 continued to be under *force majeure* status due to the difficulties in reaching agreements with the local and indigenous communities that would allow [Burlington Resources] to access and begin with the exploration activities.

Most of Burlington's efforts during 2004 were directed at establishing a clear and open dialogue with the different communities and indigenous groups in the Block that would allow to reach agreements and to begin operations. *Likewise, Burlington worked jointly with agencies of the Ministry of Energy and Mines in order to seek to reach a solution and to settle once and for all the present situation.*

Burlington Resources *has worked jointly with the Government* and the indigenous people in order to develop a program that would benefit the indigenous people residing in the Block....[program description follows].

.....

Through this proposal, the indigenous people residing in this area will be able to participate directly in the economic benefits deriving from oil activities in the Block. Regrettably, *although the Government as well as the indigenous people seem to be open to and supportive of this proposal*, there is thus far no definitive solution to the *Force Majeure* situation.

Towards the end of 2004, there seemed to be some progress in the negotiations as a result of the community help offer previously indicated as well as *the support of the Government* to assemble the indigenous people around a negotiation table in order to secure access to Block 24. This apparent progress encountered once again the pressures of indigenous groups commanded by external groups....

.....

Unfortunately....Burlington fears that no agreement will be reached within a short time....

We hope that within the coming weeks the Government take action, that it proceed emphatically and that it solve these matters, in such a way that Burlington Resources will not be compelled to opt for [] the Deep Freeze *Force Majeure* alternative.

As it was previously mentioned, Burlington Resources remains optimistic that the efforts made will allow to reach the necessary agreements in order to begin with the exploration program in Block 24 (Tribunal's translation) (emphases added)(Exh. C-147).

296. From the letter, three observations may be drawn. First, Claimant indicates, on four occasions, that Respondent has assisted Claimant in some form or another in dealing with the indigenous opposition in the Block. Second, towards the end of the letter, Claimant states "its hope that within the next few weeks the Government take action and that it proceed emphatically and that it solve these matters." Finally, the letter ends on an optimistic note, with Claimant expressing confidence that a final agreement with the indigenous communities could be reached.
297. Claimant's expectation that Respondent "take action and that it proceed emphatically and that it solve these matters" is the only portion of the letter that could plausibly bear any relevance to the existence of a "dispute." However, in the view of the Tribunal, this expectation is insufficient to rise to the requisite level of "dispute" within the meaning of Article VI(3) of the Treaty.
298. While Claimant's expectation is conceivably a diplomatic request for further assistance in connection with the indigenous opposition in the Block, this request for assistance does not express disagreement with the manner in which the Respondent has fulfilled its obligation to provide protection and security in the Block. In and of itself, a request for assistance does not express disagreement on the parties' rights and obligations are, unless the surrounding context suggests otherwise, *i.e.* that the party whose assistance is requested has thus far failed to abide by its duty to assist.
299. However, the context of the request for assistance, far from suggesting that Respondent has not done enough or has failed to abide by its duty, focuses on the progress made in part *thanks to* the assistance of Respondent. The letter also ends on an optimistic note, indicative of auspicious circumstances. At no point in the letter does Claimant express disagreement with the way Respondent has discharged its obligation to provide full protection and security in the Block.
300. The Tribunal has also reviewed the remaining correspondence for Block 24 sent by Claimant before the Trigger Letter, and concludes that they also fail to manifest disagreement in relation to Respondent's obligation to provide full protection and security in the Block (Exhs. C-144, C-145, C-146, C-148 and C-150).
301. The Tribunal understands that it can be difficult to find an adequate balance between diplomacy and assertiveness. Mr. Vickers, who signed many of the letters sent by Claimant to Respondent, stated at the hearing: "*When you are seeking assistance from a Government, you are not going to tell them, "You are not doing*

anything." You are going to say..."I appreciate what you have been doing"....."but I need you to do a lot more." (Tr. 155:20-156:3). Nonetheless, this difficulty cannot dispense Claimant from voicing a disagreement as required by Article VI of the Treaty.

302. Similarly, the Tribunal finds that Ministerial Decree No. 197 of 23 April 1999 does not show that Respondent knew that there was a dispute with Claimant in relation to the purported lack of protection and security in Block 24. In its relevant part, Ministerial Decree No. 197 states that:

"[T]he Government of Ecuador....shall coordinate and carry out the necessary policies and actions in order that the petroleum industry, declared to be necessary to the public interest, may perform its activities normally (CM, ¶ 60)."

303. The Tribunal notes that Claimant only acquired its interest in Block 24 on 9 May 2000. For that reason, the Tribunal fails to see how the Ministerial Decree, dated 23 April 1999, could show any disagreement *with Claimant*, who at the time of the Decree held no interest in this Block.

304. In any event, the Decree expresses no *disagreement* in relation to Respondent's purported failure to comply with its obligation to provide protection and security in the Block due to the indigenous opposition. The Decree simply articulates Respondent's general policy in relation to the petroleum industry, and could at best be construed as an acknowledgement that such industry was facing problems.

305. In light of these conclusions, the Tribunal must now examine whether the so-called Trigger Letter for Block 24 apprised Respondent of a dispute in relation to its obligation to provide protection and security in the Block.

306. The Trigger Letter for Block 24 is dated 11 October 2007 and reads as follows:

On March 29, 2006, the Government passed Law No. 2006-42, which together with Decree No. 1672 of July 11, 2006, imposed a new, unilateral 50% participation of the Government in the so-called excessive prices ("excedentes de precio") of crude oil, among other measures. On October 4, 2007, the Government issued Decree No. 662, which unilaterally increased this 50% unilateral participation in the excessive prices to 99%. Law No. 2006-42, Decree No. 1672, and Decree No. 662, *among other Government's measures*, manifestly alter the conditions upon which the Companies invested in Ecuador, severely impair the viability of Burlington Resources' investment in Ecuador, and have substantially damaged Burlington Resources' investment and its value.

These measures, *among others*, constitute a breach of Ecuador's obligations under the BIT toward Burlington Resources' investment in Ecuador, *including but not limited to* the obligations to (i) accord fair and

equitable treatment to investments, (ii) *accord full protection and security to investments*, (iii) not to impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal of investments, (iv) observe any obligation it may have entered into with regard to investments, and (v) not to expropriate or nationalize investments, either directly or indirectly through measures tantamount to expropriation or nationalization, except for a public purpose, in a non-discriminatory manner, upon payment of prompt, adequate and effective compensation, and in accordance with the due process of law and the general principles of treatment established in Article II(3) of the BIT (emphases added by Claimant) (Exh. C-45).

307. Claimant argues that the Trigger Letter explicitly states that Respondent has violated its obligation to provide full protection and security against the indigenous opposition in the Block because the letter refers to Law 42 and "other" measures; and the reference to "other" measures, construed in the context of Claimant's previous letters of protest, necessarily includes such violation by Respondent. The Tribunal cannot follow this line of argument.
308. As the Tribunal just concluded, Claimant's letters prior to the Trigger Letter failed to apprise Respondent of a dispute in relation to its obligation to provide protection and security in the Block. If these letters failed to apprise Respondent of such a dispute, the Tribunal does not see how they could provide the relevant context to construe the reference to "other" measures in the Trigger Letter as apprising Respondent of such dispute.
309. Further, in the absence of relevant context from previous letters, the reference to "other" measures is insufficient to apprise Respondent of a dispute in relation to its obligation to provide protection and security in the Block *due to the opposition of the indigenous communities*. In short, the Trigger Letter does not articulate Claimant's disagreement with a reasonable degree of specificity.
310. The Tribunal must next examine whether Claimant sufficiently apprised Respondent of the dispute when it filed its Request for Arbitration on 21 April 2008.
311. The Tribunal agrees that the Request for Arbitration adequately apprises Respondent of a dispute in relation to its protection and security obligation in Block 24 due to the opposition of the indigenous communities. In the Request, after briefly describing the problem of the opposition of the local indigenous communities in the Block, Claimant concludes that "Ecuador has failed to provide [to Burlington] any real support in resolving the problems, and has failed to provide security to Burlington's installations, personnel and hydrocarbons activities" (RFA, ¶ 79).

312. However, the Request for Arbitration is too late a time to apprise Respondent of a dispute. The six-month waiting period requirement of Article VI is designed precisely to provide the State with an opportunity to redress the dispute before the investor decides to submit the dispute to arbitration. Claimant has only informed Respondent of this dispute *with the submission* of the dispute to ICSID arbitration, thereby depriving Respondent of the opportunity, accorded by the Treaty, to redress the dispute *before* it is submitted to arbitration.
313. In connection with the dispute arising from the enactment of Law 42, Claimant has stated that "no machinery of the Government [of Ecuador] was made known to Burlington such that negotiations went forward with respect to [that dispute]" (Tr. 84:19-22). This comment would suggest that negotiations between Claimant and Respondent would have proven futile in connection with the problem of the indigenous opposition in Block 24. Two observations are warranted in this regard.
314. First, according to Claimant's own account of events, the facts underlying the dispute in Block 24 due to the indigenous opposition chronologically preceded the Law 42 dispute by over five years. In the view of the Tribunal, the fact that negotiations proved futile in this second dispute does not mean that negotiations over a prior, unrelated dispute would have similarly proven futile. In any event, Claimant has not stated, nor has it advanced any evidence, suggesting that negotiations would have proven futile.
315. Second, by imposing upon investors an obligation to voice their disagreement at least six months prior to the submission of an investment dispute to arbitration, the Treaty effectively accords host States the right to be informed about the dispute at least six months before it is submitted to arbitration. The purpose of this right is to grant the host State an *opportunity* to redress the problem before the investor submits the dispute to arbitration. In this case, Claimant has deprived the host State of that opportunity. That suffices to defeat jurisdiction.
316. In light of the preceding considerations, the Tribunal finds that, prior to the filing of the Request for Arbitration, there was no dispute, sufficiently expressed in legal terms, between Claimant and Respondent in relation to the latter's obligation to provide full protection and security in Block 24 due to the opposition of indigenous communities. And while there was a dispute once the Request for Arbitration was filed, this was too late a time for Claimant to comply with the six-month waiting period requirement contained in Article VI with respect to that dispute.

317. As a result, Claimant failed to abide by the conditions for acceptance of the offer of ICSID arbitration contained in Article VI(3)(a) of the Treaty with respect to its full protection and security claim for Block 24, and this claim is therefore inadmissible.
318. As a result, the Tribunal upholds Respondent's objection and declares that it lacks jurisdiction over Claimant's Treaty claim for Respondent's alleged failure to provide full protection and security in Block 24 due to the opposition of local indigenous communities.

(ii) Was There a Dispute in Block 23?

319. Claimant assessed that it first requested protection for Block 23 by letter of 4 December 2002 addressed to the Executive President of PetroEcuador. In the letter, CGC, the operator of the Block, wrote:

"We seek your attention to notify you of the new violent acts that occurred today in Block 23 of the Ecuadorian Amazon region that have hampered the development of the activities of the operator Compañía General de Combustibles S.A., CGC. In this regard, we manifest the following:

[Description of events, where it is mentioned that the seismic base was destroyed and eight employees were kidnapped].

.....

In light of these events, *we insist*, in the most self-restrained fashion, that you intercede with your good offices, and take the measures you deem necessary, with the purpose of ensuring that the Armed Forces and the National Police will act resolutely to procure the liberation of the hostages, as well as to facilitate the execution of the ongoing seismic project.....

It will not go unnoticed by you the constant willingness of my client, the Company CGC, to engage in dialogue and openness in order to achieve agreements and solutions beneficial for the aforementioned communities, moreover, *it is the duty of the Ecuadorian state*, and PetroEcuador in particular, *to guarantee the safety of the operations*, as stated in our contractual agreement and under appropriate constitutional norms" (Tribunal's translation for the portions where translation was not provided by Claimant) (emphases added) (CM, ¶ 58, Exh. C-153)."

320. In the view of the Tribunal, the 4 December 2002 letter is sufficient to raise a "dispute" within the meaning of Article VI(3) of the Treaty. While the main purpose of the letter is to request assistance from PetroEcuador with the episodes of violence and the opposition met in the Block, the tone and the context of the letter do manifest a disagreement over rights and obligations.
321. Following the description of the facts giving rise to the request for assistance, CGC, the operator of the Block, "insist[s]" that the Armed Forces and the National Police act to ensure that the hostages be liberated and that operations in the Block can

continue. The very use of the word "insist" suggests that the request was previously made without success.

322. Moreover, towards the end of the letter, Respondent is reminded that it is its "duty" to "guarantee the safety of the operations." This reminder, in a context which suggests that previous security requests remained unheard, is indicative of a disagreement concerning rights and obligations.

323. In addition, the Tribunal must review the significance of Claimant's "emblematic" letter for Block 23. This letter is dated 21 December 2005 and is also addressed to the Executive President of PetroEcuador. It states:

"The Association composed of my client [CGC] and [Burlington] has a PSC with the Ecuadorian State, represented by PetroEcuador, for the Exploration and Exploitation of Hydrocarbons in Block 23, located in the Ecuadorian Amazon Region.

PETROECUADOR is aware that [Block 23 is in *force majeure*].

In light of the *force majeure* scenario, we have on innumerable occasions requested PETROECUADOR to comply with its obligation, set forth in Clause 5.2.6 of the Contract, to "**provide reasonable conditions of security to perform operations**" [...].

Despite the contractor's repeated requests and demands that the State adopt the necessary measures that will enable to perform the activities agreed upon in the contract, which no doubt are oriented to favour the prospects of reserves for the Ecuadorian State, we have not managed to secure PETROECUADOR and the energy authorities' effective intervention in order to overcome the obstacles underlying the *force majeure* situation.

On the other hand, it is the duty of the Ecuadorian State, through its police power, to adopt the necessary measures to guarantee the security of its citizens in the national territory [...].

[CGC has worked]...with each and every one of the communities residing in said Block, for the purpose of being able to perform the activities agreed upon in the contract, without obtaining, regrettably, the indispensable collaboration and commitment of its counterpart, PETROECUADOR and the Ecuadorian State.

... We accompany a binder containing documentary and incontrovertible evidence of [the damages suffered as a result of the insecurity in the Block].

In this context, it is imperative that PETROECUADOR, on behalf of the Ecuadorian State, comply with its obligation and adopt compensatory measures for the damages caused to my client, while at the same time, with its intervention, the problems that brought about a stoppage of the exploration activities, and qualified as Force Majeure, may be resolved (Tribunal's translation) (emphasis in the original) (Exh. C-176)."

324. With this letter, Claimant unambiguously apprised Respondent of a dispute in relation to its obligation to provide protection and security in Block 23 due to the opposition of the indigenous communities. The letter articulates a clear

disagreement with the way Respondent had discharged its security obligations in the Block up to that point. The reference to requests for protection made on "repeated" and "innumerable" occasions, the emphasis on Ecuador's security obligations, and the demand for compensatory measures plainly indicate the existence of a dispute.

325. Respondent alleges that there is no dispute in any event because the Block was in *force majeure* and because the Parties collaborated at different points to solve the problems in the Block. In the view of the Tribunal, these are matters for the merits. For purposes of jurisdiction, Claimant has expressed a disagreement over legal rights and obligations with respect to the lack of security in Block 23, and this is all that the term "dispute" requires within the meaning of Article VI(3) of the Treaty.
326. Finally, Respondent states that these letters cannot raise a dispute between Claimant and Respondent because it was CGC, the operator of the Block, who signed the letters. According to Respondent, these letters could at best raise a dispute between CGC and Respondent, not between Claimant and Respondent. The Tribunal disagrees.
327. During the jurisdictional hearing, Mr. Vickers testified that "it is certainly the industry practice in Ecuador at the behest of the Government that the operator is the representative [of the Block]" (Tr. 173:20-22). The Tribunal finds confirmation of this "industry practice" in the *coactiva* proceedings which prompted Claimant's request for provisional measures in connection with the Law 42 dispute in Blocks 7 and 21 (see *supra* at ¶ 65).
328. In the *coactiva* proceedings, the Executory Tribunal of PetroEcuador initiated proceedings to enforce the payment of US\$ 327.3 million due in accordance with Law 42 for oil produced in Blocks 7 and 21. As initially mentioned, Burlington holds significant ownership interests in these two Blocks: 42.5% in Block 7 and 46.25% in Block 21. Revealingly, however, the *coactiva* proceedings were instituted *only* against Perenco, the operator, for the *entire* debt allegedly accrued in Blocks 7 and 21 and not just for Perenco's share of the debt (Exhs. C-55, C-58 and C-65).
329. In the view of the Tribunal, this sufficiently substantiates Mr. Vickers' statement to the effect that, for Block 23, "CGC was the face before the Government" (Tr. 178:11-12). Since CGC was the face of Block 23 before the Government, its letters were also sent on behalf of Burlington, which held a 50% interest in the Block through its Burlington Andean subsidiary.

330. The Tribunal concludes that CGC's letters of 4 December 2002 and 21 December 2005 to PetroEcuador were also sent on behalf of Claimant. The Tribunal is aware that these letters were addressed to PetroEcuador rather than to Ecuador. However, as Ecuador has argued from the outset of this dispute, PetroEcuador was its legal representative for purposes of the PSCs (OJ, ¶¶ 10, 12; PetroEcuador's OJ, § 2.1). It follows that any communications addressed to PetroEcuador in connection with the PSCs must be deemed to have been addressed to Ecuador as well. Thus, CGC's letters of 4 December 2002 and 21 December 2005 properly raised a dispute between Claimant and Respondent within the meaning of Article VI(3) of the Treaty.

331. In sum, the Tribunal concludes that there was a dispute between Claimant and Respondent in connection with the latter's security obligations in Block 23, and that Respondent's objection must thus be rejected. The Tribunal must now focus on Respondent's next objection.

(iii) Was Burlington Under an Obligation to Make Allegations of Treaty Breach?

332. Respondent argues that, in any event, the Tribunal has no jurisdiction over this claim because Claimant failed to provide proper notice of the dispute. According to Respondent, pursuant to Article VI of the Treaty, there is "proper notice" of the dispute only when there is an allegation of treaty breach. Claimant asserts that there is no formal notice requirement under Article VI of the Treaty, let alone a requirement that such notice must contain an allegation of treaty breach.

333. In its parts relevant to this issue, Article VI provides the following:

1. For purposes of this Article, an investment dispute is a **dispute** between a Party and a national or company of the other Party arising out of or **relating to... (c) an alleged breach of any right conferred** or created **by this Treaty** with respect to an investment.

2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute, under one of the following alternatives, for resolution:

[....]

(c) in accordance with the terms of paragraph 3.

3. (a) Provided that...six months have elapsed **from the date on which the dispute arose**, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding [ICSID] arbitration. (Emphasis added).

334. Article VI(1)(c) defines an "investment dispute" as one relating to "an alleged breach of any right conferred or created by this Treaty with respect to an investment."¹⁴ Article VI(3)(a), in turn, provides that a dispute may be submitted to ICSID arbitration provided that six months have elapsed "from the date on which the *dispute* arose" (emphasis added). The Tribunal considers that the meaning of "dispute" in Article VI(3)(a) refers back to the definition of "investment dispute" in Article VI(1)(c). Indeed, Article VI(1) defines investment dispute "for purposes of this Article [VI]", of which paragraph 3 is no doubt a part. The use of the words "investment dispute" and then only "dispute" in paragraph 2 shows that these two terms designate one and the same thing. The Tribunal agrees on this point with the *Lauder* decision, upon which Respondent relies. That decision reached the same conclusion with respect to a similarly worded dispute resolution clause in the US-Czech BIT¹⁵ (see *Lauder*, ¶ 184).
335. In short, the "dispute" to which Article VI(3)(a) refers is one that relates to "an alleged breach of any right conferred or created by this Treaty with respect to an investment." Stated otherwise, as long as no allegation of Treaty breach is made, no dispute will have arisen giving access to arbitration under Article VI. This requirement makes sense as it gives the state an opportunity to remedy a possible Treaty breach and thereby avoid arbitration proceedings under BIT, which would not be possible without knowledge of an allegation of Treaty breach.
336. Because a dispute under Article VI(3)(a) only arises once an allegation of Treaty breach is made, the six-month waiting period only begins to run at that point in time. In this case, Burlington made no allegations of Treaty breach in connection with the indigenous opposition in Blocks 23 and 24 prior to filing its Request for Arbitration. As a result, the waiting period of Article VI(3)(a) did not begin to run. And while Burlington did make allegations of Treaty breach once it filed its Request for Arbitration, at which point the dispute arose, it failed to comply with the six-month waiting period, as it should have, before filing the Request. Therefore, the

¹⁴ Since Burlington's full protection and security claims due to the local indigenous opposition in Blocks 23 and 24 raises purely Treaty claims, Article VI(1)(a) and Article VI(1)(b) are inapplicable to this specific dispute.

¹⁵ Article VI(1) of the US-Czech BIT sets forth as follows: "For the purposes of this Article, an investment dispute is defined as a dispute involving...(c) an alleged breach of any right conferred or created by this Treaty with respect to an investment." Article VI(3)(a) in turn provides the following: "At any time after six months from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by conciliation or binding arbitration." As may be appreciated, both the language and the structure of Article VI of the US-Czech BIT bear a high level of resemblance with Article VI of the US-Ecuador BIT.

Tribunal cannot but conclude that Burlington's claim for Block 23 is also inadmissible.

337. While the Tribunal agrees with Claimant that Article VI does not impose a formal notice requirement, it considers that Article VI requires evidence of some form or another that allegations of Treaty breach have been made. By way of example, meeting minutes containing evidence that such allegations were made could suffice. However, Claimant has presented no such evidence.
338. The Tribunal considers that the requirement that allegations of Treaty breach must be made would not hinder the negotiation process, as Claimant's reliance upon *Generation Ukraine* suggests. Article VI does not require the investor to spell out its legal case in detail during the initial negotiation process; Article VI does not even require the investor to invoke specific Treaty provisions at that stage. Rather, Article VI simply requires the investor to inform the host State that it faces allegations of Treaty breach which could eventually engage the host State's international responsibility before an international tribunal. In other words, it requires the investor to apprise the host State of the likely consequences that would follow should the negotiation process break down.
339. Finally, Claimant contends that Respondent did not set in motion any government machinery with respect to the allegations of Treaty breach Claimant did make in connection with the Law 42 dispute. In the view of the Tribunal, however, this cannot dispense Claimant from complying with the Treaty requirements with respect to a different dispute.
340. Therefore, the Tribunal concludes that Burlington's full protection and security claim for Block 23 is inadmissible in accordance with Article VI of the Treaty. It adds that in ICSID arbitration the inadmissibility of claims has the same consequence as the failure to meet the requirements for jurisdiction under Article 25 of the ICSID Convention or the BIT, such consequence being that the Tribunal cannot exercise jurisdiction over the dispute.

2.3.2. Has Burlington Perfected Consent to Arbitrate?

341. In light of the Tribunal's conclusions that Burlington's full protection and security claims for lack of physical security in Blocks 23 and 24 are inadmissible, it is unnecessary to address Ecuador's remaining objection, namely, that it withdrew its offer of ICSID arbitration pursuant to an Article 25(4) ICSID Convention declaration before Burlington actually accepted this offer.

V. DECISION ON JURISDICTION

342. For the reasons set forth above, the Arbitral Tribunal declares that:

- A. It has jurisdiction over the following claim: Burlington's expropriation claim under Article III of the Treaty;
- B. It joins to the merits the determination of whether it has jurisdiction over Burlington's Law 42 first umbrella clause claim and over the first limb of its third umbrella clause claim under Article II(3)(c) of the Treaty;
- C. Burlington's Law 42 second umbrella clause claim and the second limb of its third umbrella clause claim under Article II(3)(c) of the Treaty lapsed on their own terms;
- D. It lacks jurisdiction over the following claims:
 - 1. Burlington's Law 42 fair and equitable treatment claim under Article II(3)(a) of the Treaty;
 - 2. Burlington's Law 42 arbitrary impairment claim under Article II(3)(b) of the Treaty;
 - 3. Burlington's Law 42 full protection and security claim under Article II(3)(a) of the Treaty;
- E. The following claims are inadmissible pursuant to Article VI(3) of the Treaty:
 - 1. Burlington's full protection and security claim for Block 24 under Article II(3)(a) of the Treaty;
 - 2. Burlington's full protection and security claim for Block 23 under Article II(3)(a) of the Treaty.
- F. In accordance with Rule 41(4) of the Rules, it will take the necessary steps for the continuation of the proceedings toward the merits phase;
- G. It reserves the decision on costs for subsequent adjudication.

[signed]

Professor Gabrielle Kaufmann-Kohler
President of the Tribunal

[signed]

Professor Francisco Orrego Vicuña
Arbitrator

[signed]

Professor Brigitte Stern
Arbitrator