London Court of International Arbitration LCIA Award

London Court of International Arbitration Administered Case No. UN 3467 (FINAL AWARD IN THE MATTER OF AN UNCITRAL ARBITRATION)

Occidental Exploration and Production Company (Claimant) v The Republic of Ecuador (Respondent)

ARBITRATOR: Francisco Orrego Vicuña (President); Charles N. Brower; Patrick Barrera Sweeney

PLACE: London, United Kingdom

LANGUAGE: English

1 July 2004

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I. INTRODUCTION.

1. In 1999, OCCIDENTAL EXPLORATION AND PRODUCTION COMPANY ("OEPC" or "The Company"), a company registered under the laws of California, United States of America, entered into a participation contract ("the Contract" or "Modified Participation Contract") with Petroecuador, a State-owned corporation of Ecuador, to undertake exploration for and production of oil in Ecuador. This Contract followed earlier agreements for the provision of services to Petroecuador.

2. OEPC applied regularly to the *Servicio de Rentas Internas* (SRI) for the reimbursement of Value-Added Tax ("VAT") paid by the Company on purchases required for its exploration and exploitation activities under the Contract and the ultimate exportation of the oil produced. Such reimbursement was also made on a regular basis.

3. Beginning in 2001, however, SRI, based on the opinion that VAT reimbursement was already accounted for in the participation formula under the Contract, issued "Resolutions" denying all further reimbursement applications by OEPC and other companies in the oil sector and requiring the return of the amounts previously reimbursed ("Denying Resolutions").

4. OEPC filed four lawsuits in the tax courts of Ecuador objecting to the above mentioned resolutions on the ground of inconsistency with Ecuador's legislation in force. Decisions on the matter are still pending before the courts, but parallel lawsuits by other oil companies have been decided in part.

5. OEPC also believes that the measures adopted by the SRI are in breach of the "Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment" ("the Treaty"), signed on August 27, 1993 and in force since April 22, 1997.

2004 WL 3267260 (APPAWD)

6. On November 11, 2002, OEPC commenced arbitration proceedings against the Republic of Ecuador under the Treaty, claiming that Ecuador, through the SRI, had breached the Treaty guarantees protecting the Company's investment.

II. PROCEDURAL HISTORY.

7. On November 11, 2002, OEPC initiated these arbitration proceedings by giving Notice of Arbitration to the Republic of Ecuador. The Notice asserted that the dispute is subject to arbitration under Article VI(1) of the Treaty. Pursuant to Article VI(3)(a) of the Treaty, arbitration can be initiated provided six months have elapsed from the date the dispute arose. As OEPC had served a Notice of Dispute on Ecuador on April 4, 2002, more than six months had elapsed and this requirement of the Treaty was satisfied.

8. Pursuant to Article VI(4) of the Treaty, Ecuador has consented to the submission of any investment dispute to arbitration in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL Arbitration Rules"). In accordance with Article VI (3)(a)(iii) of the Treaty, the Notice of Arbitration and Statement of Claim constituted OEPC's written consent to such arbitration under the UNCITRAL Arbitration Rules.

9. The Claimant seeks from the Tribunal the following relief:

a) To declare that Ecuador has breached its obligations under the Treaty and international law;

b) To direct Ecuador to reimburse immediately to OEPC all amounts corresponding to the VAT reimbursements previously denied as well as any additional amounts of VAT payments made by OEPC before the date of the award and which OEPC, before such date, has requested be reimbursed;

c) To direct Ecuador to cause the SRI to reimburse promptly VAT payments made after the award upon appropriate application by OEPC;

d) To direct Ecuador to recognize that OEPC was entitled to the amounts corresponding to VAT payments already reimbursed;

e) To direct Ecuador not to undertake any action or adopt any measure that denies the economic benefit of the VAT reimbursements to which OEPC is found to be entitled, and to take all actions and adopt any measure necessary to ensure that OEPC effectively enjoys those economic benefits;

f) To direct Ecuador to indemnify OEPC for all damages caused by its Treaty breaches, including the costs and expenses of this proceeding; and

g) To direct Ecuador to pay OEPC interest on all sums awarded, and to order any further relief as may be appropriate in the circumstances.

10. Under Article 5 of the UNCITRAL Arbitration Rules the dispute was heard by a Tribunal of three arbitrators. The Claimant appointed The Honorable Charles N. Brower as co- arbitrator. The Respondent, after having appointed two arbitrators who ultimately resigned on personal grounds, appointed Doctor Patrick Barrera Sweeney as co-arbitrator. Co- arbitrator Brower and the arbitrator appointed by Respondent who immediately preceded co- arbitrator Barrera Sweeney chose Professor Francisco Orrego Vicuña as Presiding Arbitrator.

11. A hearing on procedural matters was held with the parties in London on July 21, 2003. In this hearing, after considering the submissions by the parties, the Tribunal decided that the place of arbitration would be London, United Kingdom. A separate decision explaining the reasons for this choice was issued by the Tribunal on August 1, 2003.

12. At that hearing it was also agreed that submissions to the Tribunal would be made in English, except that accompanying documents could be submitted in either English or Spanish. It was also agreed that the submissions, hearings and deliberations would be kept confidential. Other administrative matters were also decided at the hearing. The minutes of the hearing were approved by the Tribunal and communicated to the parties on Au-

2004 WL 3267260 (APPAWD)

gust 1, 2003.

13. The Tribunal initially appointed the London Court of International Arbitration to handle funds of the arbitration. It was agreed with the parties at the hearing that the LCIA would also provide the administrative services required by the arbitration.

14. Another important matter agreed to at the hearing was the procedural timetable for the conduct of the arbitration. This timetable provided for a Statement of Defense by the Respondent, which was submitted on September l2, 2003; for a Memorial by the Claimant, submitted on October 28, 2003; and for a Memorial by the Respondent, submitted on December 18, 2003.

15. In view of the fact that the Respondent raised on September 12, 2003 objections to jurisdiction and admissibility, the Tribunal decided to receive separate submissions on these issues, adopting to this end a fast-track procedure that did not suspend the proceedings on the merits. In accordance with this decision, an Answer on Jurisdiction and Admissibility was submitted by the Claimant on October 3, 2003; a Reply thereto was submitted by the Respondent on October 27, 2003; and a Rejoinder was submitted by the Claimant on November 13, 2003.

16. Having examined the submissions of the parties on jurisdiction and admissibility, the Tribunal decided on November 26, 2003, to join those issues to the merits of the case.

17. During the development of the proceeding the Tribunal issued other Procedural Orders and Decisions, concerning short extensions of time, appearance of witnesses, confidentiality and other matters.

18. A hearing on jurisdiction, admissibility and the merits was held in Washington, D.C. on January 26-30, 2004, as originally established. At the hearing the parties made their opening and closing statements and their experts and witnesses were examined and cross- examined. Also the Tribunal addressed questions to the parties and their experts and witnesses. The Minutes of the hearing were approved by the Tribunal and communicated to the parties on February 16, 2004.

l9. The parties submitted post-hearing Memorials on April 16, 2004 and their respective statements of costs on May 7, 2004.

20. The Claimant requests from the Tribunal as final relief, as expressed in its post- hearing Memorial:

a) To declare that Ecuador, through the Denying Resolutions and related conduct, has breached its obligations under the Treaty and international law;

b) To declare that OEPC is entitled to VAT refund as a matter of international law, Andean Community and Ecuadorian law, with respect to VAT paid on both goods and services used for the production of oil for export, including pre-production expenses and *de minimis* expenses associated with production activities in areas inhabited by indigenous communities;

c) To order Ecuador to cause the SRI to recognize formally that OEPC was and is entitled to reimbursement of VAT paid since July 1999;

d) To order Ecuador to cause the SRI to annul or rescind all resolutions denying such reimbursement;

e) To order Ecuador to cause the SRI to reimburse in cash to OEPC all VAT paid through December 31, 2003 and not already refunded;

f) To order Ecuador to provide formal guarantees that no action will be taken or measure adopted denying the economic benefit of the VAT refund;

g) To order Ecuador to cause the SRI to grant all refunds requested for VAT paid from January 1, 2004;

h) To determine future damages; and

i) To award OEPC all its costs, including attorney fees.

2004 WL 3267260 (APPAWD)

21. OEPC claims under e) above a reimbursement of US $80,263,930, including interest. It also claims under h) above the amount of US $ 121,300,000.

22. Both in its Statement of Defense and in its Memorial on the Merits the Respondent opposed all such requests for relief, including the claim for future damages. It also requested that the Tribunal allocate all costs and expenses of this arbitration to OEPC.

23. On May 11, 2004 the Tribunal declared that the proceedings were closed.

24. The Tribunal held deliberations immediately following the hearing, then by correspondence and at a meeting convened in London May 3-5, 2004.

III. THE FACTS OF THE DISPUTE.

25. OEPC has a long contractual relationship with Petroecuador, an Ecuadorian State-owned corporation entrusted with the planning, organization and operation of hydrocarbon exploration and exploitation in Ecuador. This corporation was previously known as the *Corporación Estatal Petrolera Ecuatoriana*.

26. A service agreement was first executed between the two companies on January 25, l985, and was amended by another service agreement executed on December 18, 1995. Under these service agreements OEPC provided all the services needed for successful production of oil, in return for which it was reimbursed for its costs and was entitled to certain amounts of interest and a service commission. OEPC was in this context a service provider and not an exporter, all the oil produced belonging to Petroecuador. In making purchases on behalf of Petroecuador for exploration and exploitation activities, OEPC paid VAT on local acquisitions and received reimbursement from Petroecuador along with its other costs.

27. The Company replaced its service agreements by signing the Modified Participation Contract for the exploration and exploitation of hydrocarbons in Block 15 of the Ecuadorian Amazon Region, which was executed on July 1, 1999. Ecuador had made possible this new type of contract by amending the Hydrocarbons Law in 1993 to introduce participation or production-sharing agreements. Joint Operating Agreements were also made in respect of the shared fields of Limoncocha and Edén-Yuturi.

28. Investments were made by OEPC under the Contract in pursuance of its obligation and exclusive right to carry out the exploration and exploitation activities in the assigned area. Under this type of contract, OEPC is entitled to a participation formula expressed in terms of a percentage of the oil production, the details of which are contained in Section 8.1 of the Contract. This participation formula is described as "Factor X". In association with other interested companies, additional investments were made in 2001 to expand pipeline capacity as required to boost production of the fields indicated.

29. The dispute between the parties to this arbitration centers on the question whether Factor X includes in the participation formula a reimbursement of VAT paid by OEPC, as the Respondent contends is the case, and the related question whether, if it is not, OEPC is entitled to VAT refunds under Ecuador's tax laws, as OEPC argues. As will be noted in connection with jurisdiction, the Claimant has not brought to this arbitration claims of a contractual nature, but rather only claims concerning its rights under the Treaty. The Respondent, however, is of the opinion that the claims are contractual in nature.

30. OEPC points put that the Contract does not refer to Factor X in connection with the reimbursement of VAT. The Contract, in any event, is governed by the Internal Tax Regime Law of Ecuador ("Tax Law"). Because OEPC exports the oil it receives under the Contract, it holds the view that it is entitled to a credit for the VAT paid as a result of the importation or local acquisition of goods and services used for the production of such oil.

31. In support of its views, OEPC invokes in particular Article 65 of the Tax Law in so far as it

2004 WL 3267260 (APPAWD)

provides for "a right to a tax credit for all the VAT paid in local acquisitions or the importation of goods" for certain activities in respect of which the Claimant believes it qualifies. Article 69A, added to the Tax Law on April 30, 1999, is also invoked as it provides for an entitlement to a "refund" of VAT paid "in local acquisitions or importation of goods employed in the manufacture of exported products". While prior to this date most services had been zero-rated in connection with VAT, with the new legislative enactments VAT was also extended to most services. Later VAT was also increased from 10% to 12%.

32. OEPC applied to the SRI for refunds of VAT payments made for the period July l999- September 2000, which were granted by the "Granting Resolutions". However, by Resolution 664 of August 2S, 2001, the SRI denied the claims of OEPC for VAT tax credits and reimbursements for the period October 2000-May 2001. By Resolution 234 of April 1, 2002, the SRI annulled the Granting Resolutions that had previously granted credits and reimbursements, arguing that they were based on a mistaken interpretation of the Tax Law and ordered OEPC to return those amounts, with interest. Other resolutions denying VAT refunds to OEPC were issued at later dates, particularly Resolution 406 of January 31, 2003 and Resolution 026 of March 6, 2003.

33. OEPC filed four lawsuits in the Tax District Court No. l of Quito, objecting to each of the above mentioned Denying Resolutions on the ground that they violated Ecuadorian law, in particular Articles 65 and 69A of the Tax Law. Under Ecuadorian Tax Law, an appeal of SRI resolutions must be made by the affected party within twenty days. In December 2002 OEPC decided not to continue submitting VAT refund applications because it believed this would have been futile.

34. In the view of the SRI, and of Ecuador in this arbitration, the new policy was justified on the ground that Factor X was calculated in such a manner as to include the reimbursement of VAT. Ecuador believes further that there is no right to VAT refunds under its legislation. As will be discussed further below, both parties have debated extensively their respective views on this matter, in the light of both the Contract and Ecuador's legislation, in addition to the meaning of Andean Community decisions, World Trade Organization ("WTO") law and international law.

35. In discussions held with Ecuadorian governmental agencies by other companies similarly affected, the issue of an eventual economic adjustment of the respective contracts was also raised, but it was believed by the companies and Petroecuador that to the extent that VAT was reimbursed via a tax credit the economic balance of the contracts would not be affected. VAT thus would have a neutral effect on such agreements as the Contract, Article 8.6(e) of which establishes the conditions for renegotiating the Contract with a view to redress the economic balance. The parties to the arbitration also hold very different views about the meaning of this clause and its origins.

36. Different conclusions as to the implications of the dispute in the light of the Treaty provisions have also been drawn by each party. OEPC is of the view that Ecuador has breached its obligations under the Treaty and international law, particularly the obligations (i) of fair and equitable treatment; (ii) of treatment not less favorable than that accorded to Ecuadorian exporters; (iii) not to impair by arbitrary or discriminatory measures the management, use and enjoyment of OEPC's investment; and (iv) not to expropriate directly or indirectly all or part of that investment in the circumstances of this case. Ecuador opposes these arguments on the merits, in addition to its objections to jurisdiction and admissibility.

IV. RESPONDENT'S OBJECTIONS TO JURISDICTION AND ADMISSIBILITY.

37. The Republic of Ecuador has objected to any consideration of OEPC's claims by this Tribunal on three principal grounds.

a) The first concerns the "fork in the road" provision contained in Article VI (2) and (3) of the Treaty. In Respondent's view, the fact that the

2004 WL 3267260 (APPAWD)

Claimant has submitted four separate lawsuits to Ecuadorian courts constitutes an irrevocable choice to submit the present dispute to the courts or administrative tribunals of the Respondent in accordance with Article VI (2) (a) of the Treaty. This choice precludes, the argument continues, the submission of the dispute to binding arbitration as provided for in Article VI (3) (a) of the Treaty.

b) The second objection to jurisdiction is that OEPC's claims are precluded under Article X of the Treaty, which applies to matters of taxation except with respect to some specific categories of disputes relating to an investment agreement or authorization, transfer of funds and expropriation. To the extent that one of these categories is involved, the Treaty provides for certain obligations of the host State, in particular those contained in Article II regarding the treatment of the investment, including questions relating to discrimination, fair and equitable treatment, full protection and security and other guarantees. None of them, it is contended, however, is applicable to OEPC's claims.

c) The Respondent lastly objects to the admissibility of the Claimant's submission that there has been an expropriation of its investment by means of the taxation measures adopted. Although expropriation is one of the categories of disputes that Article X of the Treaty allows in respect of tax matters, the Respondent contends that there is no direct or indirect expropriation involved in this case, and hence that the claims by OPEC are inadmissible.

A. The Positions Of the Parties On The "Fork In The Road".

38. Following the issuance of Resolution 664 of the SRI on August 28, 2001, which denied the reimbursement of certain amounts of VAT paid by OEPC, and of Resolution 234 of the same entity on April 1, 2002, requiring OEPC to return to the SRI VAT refunds previously made, OEPC filed two lawsuits in the Tax District Court No. l in Quito. Two other lawsuits were filed on March 10, 2003 and April l4, 2003, in connection with the issuance of SRI Resolutions 406 and 026, which again denied other requests by OEPC for VAT reimbursement. These various lawsuits complained that the SRI Denying Resolutions violated provisions of Ecuadorian law, with particular reference to Articles 65 and 69A of the Tax Law of Ecuador.

39. In the view of the Republic of Ecuador, the Claimant is now precluded from submitting the same dispute to arbitration as it involves the same Denying Resolutions and hence the same denial of refunds. In Respondent's opinion, the fact that an alleged breach of Ecuadorian law is invoked in Ecuadorian courts, while to this Tribunal an alleged breach of Treaty provisions is argued, does not alter the triggering of the "fork in the road" requirements as the underlying dispute is the same in both fora. Because of the choice made, Respondent further asserts, OEPC has waived its right to proceed to arbitration.

40. The Claimant argues to the contrary that it has not submitted an investment dispute to the courts of Ecuador and that it has not made any assertion or claim in such courts concerning its rights under the Treaty. OEPC argues that its lawsuits before the courts of Ecuador were brought to safeguard its entitlement to a VAT refund under Ecuadorian law, as under Articles 83 and 243 of the Ecuadorian Tax Law the administrative act concerned becomes binding if not timely contested. The definition of an investment dispute under Article VI (I) of the Treaty, the Claimant further asserts, is related to rights the investor has under the Treaty and has no connection with its claims pending in the courts of Ecuador, which involve exclusively the consistency of the Denying Resolutions with Ecuador's Tax Law.

41. In the Claimant's view, the cause of action submitted to arbitration is thus different from the cause of action asserted in Ecuadorian courts, the first relating to Treaty rights and the second to issues of domestic law. The Claimant contends in this respect that for two disputes to be considered identical, not only is identity of the parties and the object required, but also that of the causes of action. It is further argued that the relief requested in the two

separate disputes is different.

42. Moreover, the Claimant contends, Article II (3) (b) of the Treaty allows in its second sentence submission to arbitration under Article Vl of disputes concerning the arbitrary or discriminatory character of a measure notwithstanding the fact that the Claimant "has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a Party".

B. Tribunal's Findings On The "Fork In The Road" Objection.

43. The Tribunal has examined with great attention the arguments advanced by the parties, the various decisions of arbitral tribunals and international courts invoked in support of the respective positions and the learned legal opinions of distinguished international jurists, including those of Sir Ian Sinclair[FN1] and Professor Andreas Lowenfeld[FN2] submitted by the respective parties.

44. The Tribunal must note in the first place that, as argued by the Respondent, the Modified Participation Contract qualifies as an "investment agreement" under Article Vl (I) (a) of the Treaty and that OEPC's activities in Ecuador constitute beyond doubt an "investment" under the Treaty. On this point the Tribunal believes that Ecuador's argument is consistent with the *Lanco* [FN3] Preliminary Award in so far as this decision identified a concession contract, albeit structured in a more complex manner, with an investment agreement between the State and the foreign investor under the Argentina-United States bilateral investment treaty.

45. However, it does not follow that the dispute is exclusively one over the terms of the Contract as the Respondent suggests. The dispute does touch in part upon the Contract, as argued by the Respondent by way of defense, as the SRI Denying Resolutions were based on the view that VAT was already reimbursed under the provisions of the Contract.

46. In this connection it must also be noted that the Claimant has not submitted any Contract claims to the courts of Ecuador or for that matter to this Tribunal. It has submitted to those courts an issue of interpretation of the legislation in force, arguing that the Denying Resolutions questioned are inconsistent with the Tax Law. And it has submitted to this arbitration the question of its rights under the Treaty.

47. The characterization of the dispute by the Claimant probably would suffice alone for the Tribunal to reach a determination on jurisdiction. As held by the Tribunal in *Azurix* in respect of its determination on jurisdiction, it is necessary to decide "whether the dispute as presented by the Claimant, is *prima facie* a dispute arising under the BIT"[FN4]. The Tribunal in *SGS v. Pakistan* also concluded that "at this jurisdiction phase, it is for the Claimant to characterize the claims as it sees fit".[FN5]

48. But the fact is that this dispute, its contractual aspects aside, involves a number of issues arising from the legislation of Ecuador, the Andean Community legal order and international law, including of course the question of rights under the Treaty. This explains the fact that the Claimant is addressing different questions to different mechanisms of dispute resolution.

49. The Tribunal is persuaded in this context by the Claimant's interpretation of Article II (3) (b) of the Treaty, which in its second sentence allows for submission to arbitration of arbitrary and discriminatory measures even if the claimant has resorted to the courts or administrative tribunals of the Respondent seeking a review of such measures. Whether this provision finds its origin in the background of the *ELSI* case[FN6] and whether it involves in addition to Article VI the inter- state arbitration provided by Article VII, as argued by the Respondent, does not really matter, as none of these situations could derogate from the rights of the investor to submit a claim for violation of its rights under the Treaty. Moreover, inter-state arbitration under bilateral investment treaties relates to matters that are entirely different from those relating to the investor's rights and guarantees and it would be extremely unwise for any arbitral tribunal to allow

inter-state considerations to interfere with the rights of the investor to claim in its own right.

50. This finding of the Tribunal cannot be taken to mean that the death knell has sounded for the "fork in the road" provisions of bilateral investment treaties, as the Respondent has argued, because the functions of domestic mechanisms and international arbitration are different. As noted by the Annulment Committee in *Wena* in respect of the interplay of leases and treaty claims:

The leases deal with questions that are by definition of a commercial nature. The IPPA deals with questions that are essentially of a governmental nature, namely the standards of treatment accorded by the State to foreign investors... It is therefore apparent that Wena and EHC agreed to a particular contract, the applicable law and the dispute settlement arrangement in respect of one kind of subject, that relating to commercial problems under the leases. It is also apparent that Wena as a national of a Contracting State could invoke the IPPA for the purpose of a different kind of dispute, that concerning the treatment of foreign investors by Egypt. This other mechanism has a separate dispute settlement arrangement and might include a different choice of law provision or make no choice at all... The private and public functions of these various instruments are thus kept separate and distinct.[FN7]

51. The difference between contract-based claims and treaty-based claims has also been discussed by various international arbitral tribunals, as evidenced by the decisions in *Lauder*,[FN8]*Genin*,[FN9] *Aguas del Aconquija*,[FN10] *CMS*[FN11] and *Azurix*[FN12] and of the ad hoc Committee in *Vivendi*. [FN13] The Tribunal held in *CMS*, referring to this line of decisions, that "as contractual claims are different from treaty claims, even if there had been or there currently was a recourse to the local courts for breach of contract, this would not have prevented submission of the treaty claim to arbitration". [FN14]

52. In part, the distinction between these different types of claims has relied on the test of triple identity. To the extent that a dispute might involve the same parties, object and cause of action it might be considered as the same dispute and the "fork in the road" mechanism would preclude its submission to concurrent tribunals.[FN15] A purely contractual claim will normally find difficulty in passing the jurisdictional test of treaty-based tribunals, which will of course require allegation of a specific violation of treaty rights as the foundation of their jurisdiction. As the ad hoc Committee held in *Vivendi*, "A treaty cause of action is not the same as a contractual cause of action; it requires a clear showing of conduct which is in the circumstances contrary to the relevant treaty standard".[FN16]

53. The question, however, is not easy to resolve in practice as has been evidenced by the discussions of various tribunals. The *Vivendi* ad hoc Committee explained that "In a case where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract".[FN17] However, to the extent that the fundamental legal basis of a claim is a treaty, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state "cannot operate as a bar to the application of the treaty standard".[FN18] A similar reasoning applies to the operation of the "fork in the road" mechanism, as the choice of one or other forum will depend on the nature of the dispute submitted and these are not necessarily incompatible.

54. In the recent case of *SGS v. Pakistan*, the Tribunal came accordingly to the conclusion that it did not have jurisdiction over contract claims "which do not also constitute or amount to breaches of the substantive standards of the BIT". [FN19] In *SGS v. The Philippines*, where contractual claims were more easily distinguishable from treaty claims, the Tribunal referred certain aspects of contractual claims to local jurisdiction while retaining treaty-based jurisdiction.[FN20]

55. A further difficulty found by the tribunals in these last two cases was that both treaties contained a broadly defined "umbrella clause". This is also

2004 WL 3267260 (APPAWD)

true of the umbrella clause contained in Article II (3) (c) of the present Treaty, which provides that "Each party shall observe any obligations it may have entered into with regard to investments". However, in this case the Claimant is relying not on such general obligation, but is arguing that violations of more specific Treaty provisions have taken place.

56. The parties to the present case have expressed different views and conclusions about these various cases, and also have debated the implications in the NAFTA context of *Waste Management* insofar as a waiver of domestic remedies is required as a condition of resorting to international arbitration.

57. The Tribunal is of the view that what ultimately matters is that every solution must respond to the specific circumstances of the dispute submitted and the nature of such dispute. To the extent that the nature of the dispute submitted to arbitration is principally, albeit not exclusively, treaty-based, the jurisdiction of the arbitral tribunal is correctly invoked.

58. This is the situation that has in fact occurred in the instant case, where treaty- based issues have come to arbitration and non-contractual domestic law questions have been and are being dealt with by local courts in Ecuador. Far from creating a situation of incompatibility, the decisions adopted thus far by Ecuadorian courts on matters of interpretation of the Ecuadorian Tax Law have been of great help to this Tribunal in its own interpretation of both the Treaty and the relevant provisions of Ecuadorian law as will be shown further below. It follows that the causes of action might be separate and the nature of the disputes different, yet they may both have cumulative effects and interact reciprocally.

59. Another intriguing aspect of this case, which the Tribunal will discuss further below, concerns the fact that the dispute encompasses different points in time. Some claims are in respect of VAT amounts already reimbursed, some other relate to VAT refunds that have been denied, and yet others refer to VAT amounts that have not been submitted for reimbursement and even for VAT amounts not yet due.

60. There is one further powerful reason for this Tribunal finding that the "fork in the road" mechanism has not been triggered in this dispute. The "fork in the road" mechanism by its very definition assumes that the investor has made a choice between alternative avenues. This is turn requires that the choice be made entirely free and not under any form of duress. It has been explained above that in the instant case the Ecuadorian Tax Law requires the taxpayer to apply to the courts within the brief period of twenty days following the issuance of any resolution that might affect it. If this is not done, as noted above, the resolution becomes final and binding.

61. The Tribunal is of the view that in this case the investor did not have a real choice. Even if it took the matter instantly to arbitration, which is not that easy to do, the protection of its right to object to the adverse decision of the SRI would have been considered forfeited if the application before the local courts were not made within the period mandated by the Tax Code.

62. The Tribunal is also mindful that the *Aguas del Aconquija* award on the merits deferred to the obligation to resort to local courts in view of the provisions of a private concession contract between the Claimants and the Province of Tucumán, and "the impossibility, on the facts on the instant case, of separating potential breaches of contract claims from BIT violations without interpreting and applying the Concession Contract, a task that the contract assigns expressly to the local courts".[FN21] But the Tribunal is also mindful that this Award was annulled on this very point by the *Vivendi* ad hoc Committee, explaining:

In the Committee's view, it is not open to an ICSID tribunal having jurisdiction under a BIT in respect of a claim based upon a substantive provision of that BIT, to dismiss the claim on the ground that it could or should have been dealt with by a national

court. In such a case, the inquiry which the ICSID tribunal is required to undertake is one governed by the ICSID Convention, by the BIT and by applicable international law. Such an inquiry is neither in principle determined, nor precluded, by any issues of municipal law, including any municipal law agreement of the parties."[FN22]

63. This reasoning is applicable *mutatis mutandis* to the case of the present Treaty. The Tribunal accordingly holds that it has jurisdiction to consider the dispute and the "fork in the road" objection is dismissed.

C. The Position Of The Parties In Respect Of The Exclusion Of Matters Of Taxation.

64, The second jurisdictional objection introduced by the Respondent concerns the exclusion of matters of taxation from dispute resolution under Article X of the Treaty. This Article provides as follows:

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 Articles 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.

65. In the Respondent's view, questions of VAT and the non-reimbursement thereof are clearly "matters of taxation" excluded from dispute settlement under the Treaty by Article X. Moreover, it is argued, while OEPC's claims invoke Ecuador's obligations under Article II of the Treaty, referring in particular to no less favorable treatment, fair and equitable treatment and arbitrary and discriminatory measures, none of these obligations applies to taxation matters.

66. The Claimant has opposed Ecuador's interpretation of Article X, arguing in particular that the meaning of the exclusion and the negotiating history of the Article indicate that such exclusion applies only to matters of direct taxation as these are the matters addressed by conventions for the avoidance of double taxation. It notes, too, that at no relevant time has any double taxation treaty ever existed between the United States and Ecuador. Indirect taxation would be thus subject to the dispute settlement provisions of the Treaty without exclusion. This is in the Claimant's view the ordinary meaning of Article X in accordance with the rules of interpretation of Articles 31 and 32 of the Vienna Convention on the Law of Treaties.[FN23] It is further contended that exceptions ought to be interpreted in a restrictive manner.

67. The Claimant invokes in support of its interpretation the fact that this Article is modeled on the United States Model Bilateral Investment Treaty and that the interpretation given by officials of that country as well as their statements ought to be controlling. In this context, it is argued, the only meaning of the Article is to avoid conflicts with the dispute settlement arrangements under conventions on the avoidance of double taxation; if all kinds of taxation were included in the exception of the Article it would become meaningless. It is further believed that any measure adopted by the Respondent in violation of Article II of the Treaty would become exempted from dispute settlement if disguised as a taxation measure, a result that is inconsistent with the very purpose of the Treaty. The law of the WTO and the Andean Community are also invoked in support of Claimant's interpretation.

D. The Tribunal's Findings In Respect Of The Meaning Of Article X.

2004 WL 3267260 (APPAWD)

68. The Tribunal agrees with both parties in that the proper interpretation of Article X must not result in rendering it meaningless. This is the conclusion that arises evidently from the Vienna Convention on the Law of Treaties in respect of interpretation. To this extent, Respondent's view that all matters of taxation are exempted from dispute settlement under the Treaty, with the exception of the specific categories mentioned in Article X, is not persuasive. Even if certain matters could still be covered by this Article and thus not make it meaningless, as argued by the Respondent, that interpretation would nonetheless constrain it to a quite marginal application. This is evidently not what the parties intended in placing an Article of such importance in a Treaty which is brief indeed.

69. The Claimant might be right in believing that the exception refers only to a certain category of taxes typically dealt with under conventions for the avoidance of double taxation. The negotiating history of the Article in fact evidences a connection to this interpretation. The law of the WTO and of the Andean Community might also provide aspects in support of such views. But this is not the approach the Tribunal believes appropriate to follow for the proper interpretation of Article X. Among other reasons for not pursuing the discussion between direct and indirect taxes under Article X is that the evidence is not conclusive on this point. There are, however, other elements that are persuasive in attending to the interpretation of the Article.

70. The first is that concerning fair and equitable treatment in tax matters. The Tribunal notes that the reference in paragraph 1 of Article X to "strive to accord fairness and equity" in respect of tax policies concerning the treatment of the investment by the host country is not devoid of legal significance. It imposes an obligation on the host State that is not different from the obligation of fair and equitable treatment embodied in Article II, even though admittedly the language of Article X is less mandatory. This legal effect is not derogated from by the "nevertheless" proviso with which paragraph 2 opens, as this expression cannot be read to mean that in respect of tax policies the host State could pursue an unfair or inequitable treatment. It only means that such obligation is concerned with the three categories of tax matters therein listed, that is, expropriation, transfers and the observance and enforcement of an investment agreement or authorization.

71. A second consideration is that the Tribunal must also examine whether the dispute involves any of the three matters specifically listed in Article X in respect of which the dispute settlement provisions of Article Vl positively do apply. If it does involve any of these elements, the dispute will in any event fall within the Treaty provisions and the settlement of disputes. The question of transfers does not arise in this case. The question of expropriation will be examined separately as being an admissibility objection introduced by the Respondent. The question then is whether the observance and enforcement of the terms of an investment agreement concerning matters of taxation is at issue in this dispute.

72. It was concluded above that the Modified Participation Contract between OEPC and Ecuador indeed qualifies as an investment agreement. Although, as also explained, the Claimant has not invoked here contract-based rights, but rather has pursued the interpretation of domestic law in the courts of Ecuador and treaty rights before this Tribunal, the fact is that in part the dispute finds its origins in that Contract insofar as it is disputed whether VAT reimbursement is included in Factor X. This view has been brought up by the Respondent itself as one of its defenses and has been invoked by the SRI as the specific reason for denying the reimbursement of VAT. To this extent, the Respondent itself appears to accept that there is a dispute concerning the observance and enforcement of the Contract, which brings the tax dispute squarely within the exceptions of Article X and hence within the jurisdiction of the Tribunal. There is here a typical situation of *forum prorogatum*.

73, That being so, and as the Tribunal has a duty to examine the submissions by both parties, it can only come to the conclusion that a tax matter asso-

2004 WL 3267260 (APPAWD)

ciated with an investment agreement has been submitted to it for its consideration. Even if the Claimant has not characterized the dispute as one concerning the Contract, the objective fact is that the Contract is central to the dispute. Together with the question of the observance of the Contract, however, there is one other issue that the Tribunal needs to keep in mind. This is the Claimant's alleged right to reimbursement under Ecuadorian law, Andean Community law and international law, an issue which is broader than that concerning the observance of the Contract.

74. This dispute has also a very particular meaning for the parties. In spite of it having been extensively discussed as a tax matter, a closer look might lead to the conclusion that what is really disputed is whether there is a right to refund of taxes unchallengedly due and owing and in fact paid, and, if so, how to achieve such reimbursement. In fact, the parties do not dispute the existence of the tax or its percentage. What the parties really discuss is whether its refund has been secured under Factor X of the Contract, as claimed by the Respondent, or if that is not the case, whether, as argued by the Claimant, it should be recognized as a right under Ecuadorian Tax Law.

75. The dispute, one way or the other, thus is clearly subject to the dispute settlement provisions of the Treaty. This automatically brings in the standards of treatment of Article II, including fair and equitable treatment. Paragraph I of Article X thus acquires in this context its full meaning. This does not prevent of course other aspects of the dispute concerning Treaty rights from being also considered in this arbitration, independent of the meaning of the Contract, nor does it prevent this Tribunal from interpreting the Contract to the extent relevant to decide on the alleged Treaty violations.

76. A modest amount of ink has been spilt by the parties in referring to, and arguing on the basis of, Article 2103 of the North American Free Trade Agreement ("Taxation"), in respect of both jurisdiction and the merits of this matter. This Article provides in its Paragraph I that "Except as set out in this Article, nothing in this Agreement shall apply to taxation measures." That Article, however, contains five further paragraphs containing also ten separate sub-paragraphs covering well over a full further page (when using quite small print). Ecuador's expert Professor David Gantz percipiently has described Article 2103 as constituting "much more detailed tax exclusion (and reinclusion) provisions" than Article X of the instant Treaty.[FN24] That being the case, the Tribunal has found little merit in reviewing its provisions here, having concluded that they are of marginal value to the present analysis, if any.

77. The Tribunal accordingly finds that, because of the relationship of the dispute with the observance and enforcement of the investment Contract involved in this case, it has jurisdiction to consider the dispute in connection with the merits insofar as a tax matter covered by Article X may be concerned, without prejudice to the fact that jurisdiction can also be affirmed on other grounds as respects Article X as explained above.

E. The Position Of The Parties Concerning Expropriation.

78. The Respondent raises as a third bar to consideration of OEPC's claims the argument that, there being no expropriation involved in this case, as asserted by the Claimant, this specific ground for submitting a matter of taxation to dispute resolution under the Treaty's Article X is not available.

79, The Claimant is of the view that there has been an expropriation of its investment by Ecuador's refusal to refund the VAT to which it is entitled under Ecuadorian law, thus placing the Respondent in breach of Article III of the Treaty. This in itself, the Claimant argues, renders the claim admissible. In any event, the Claimant submits that the question of whether there has been an expropriation or not pertains to the merits, and that it has met the test applied by the Tribunal in *CMS* to find jurisdiction in that it has demonstrated *prima facie* that it has been affected by the measures adopted by the Respond-

ent.[FN25]

F. The Finding Of The Tribunal Concerning Expropriation.

80. A claim of expropriation should normally be considered in the context of the merits of a case. However, it is so evident that there is no expropriation in this case that the Tribunal will deal with this claim as a question of admissibility.

81. The Claimant asserts that by "unlawfully, arbitrarily, discriminatorily, and retroactively taking OEPC's right to VAT refunds, Ecuador has expropriated all or part of an investment by OEPC". It is further argued by the Claimant that the right to a refund is either an investment or part of one, falling within the definition of investment under Article I(1)(i),(iii) and (v) of the Treaty, which includes intangible property, including rights, a claim to money associated with an investment and any right conferred by law.

82. The Respondent argues that direct expropriation has not occurred as there has been no seizure of title to property and that in any event taxation cannot be considered by its very nature as a kind of property subject to expropriation. Neither has there been any indirect expropriation as the criteria of substantial or significant deprivation required by international law has not been met and OEPC continues to receive substantial benefits from its investments

83. Article III (1) of the Treaty provides;

Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ("expropriation") except: for a public purpose; in a nondiscriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article (Il) (3)....

84. The Tribunal in *Lauder* rightly explained that

...In general, expropriation means the coercive appropriation by the State of private property, usually by means of individual administrative measures. Nationalization involves large-scale takings on the basis of an executive or legislative act for the purpose of transferring property or interests into the public domain. The concept of indirect (or "*de facto*", or "*creeping*") expropriation is not clearly defined. Indirect expropriation or nationalization is a measure that does not involve an overt taking, but that effectively neutralized the enjoyment of the property.[FN26]

85. The Tribunal agrees with the Claimant in that expropriation need not involve the transfer of title to a given property, which was the distinctive feature of traditional expropriation under international law.[FN27] It may of course affect the economic value of an investment. Taxes can result in expropriation[FN28] as can other types of regulatory measures.[FN29] Indirect expropriation has significantly increased the number of cases before international arbitral tribunals. 1t is also noticeable that bilateral investment treaties contain broad definitions of investments that can encompass many kinds of assets.

86. The Tribunal, however, is not persuaded by the Claimant's arguments that in this case there has been an expropriation. It is not tenable to argue that there can be "no doubt that under the Treaty the Refund Claim is an investment *per se*". However broad the definition of investment might be under the Treaty it would be quite extraordinary for a company to invest in a refund claim. But even if a refund claim is considered to be included in the claims to money and other rights mentioned in the definition, still the expropriation has to meet the standards required by international law.

87. The Tribunal in *Metalclad* endorsed what has been considered a rather broad definition of expropriation. The Tribunal held that expropriation includes:

... [C)overt or incidental interference with the use of property which has the effect of depriving the

owner, in whole or in significant part, of the use or reasonable-to-be- expected economic benefit of property even if not necessarily to the obvious benefit of the host State.[FN30]

88. Even in the context of such a broad definition, the *Metalclad* Tribunal identified standards to the effect that there must be a deprivation, that this deprivation must affect at least a significant part of the investment and that all of it relates to the use of the property or a reasonably expected economic benefit. Similarly, the Iran-United States Claims Tribunal has held that deprivation must affect "fundamental rights of ownership"[FN31], a criteria reaffirmed in *CME*.[FN32]

89. The Tribunal holds that the Respondent in this case did not adopt measures that could be considered as amounting to direct or indirect expropriation. In fact, there has been no deprivation of the use or reasonably expected economic benefit of the investment, let alone measures affecting a significant part of the investment. The criterion of "substantial deprivation" under international law identified in *Pope & Talbot* is not present in the instant case.[FN33] If narrower definitions of expropriation under international law are examined, the finding of expropriation would lie still farther away.

90. This is not to say that the investor has not been affected by the decisions taken by the Respondent, for indeed it has been, as will be discussed in connection with the Contract, Andean Community law and Ecuadorian legislation.

91. As will be discussed further below, liability ensues for a breach of rights under the Treaty, but not as a consequence of expropriation.

92. The Tribunal accordingly holds that the claim concerning expropriation is inadmissible.

V. DISCUSSION OF THE LAW APPLICABLE TO THE MERITS.

A. Introduction.

93. It has been concluded above that the dispute in the present case is related to various sources of applicable law. It is first related to the Contract in so far as it is necessary to establish whether VAT has been included in Factor X and the ensuing question of the economic balance between the parties' interests; it is next related to Ecuadorian tax legislation; this is followed by specific Decisions adopted by the Andean Community and issues that arise under the law of the WTO. In particular the dispute is related to the rights and obligations of the parties under the Treaty and international law.

94. These various aspects will be examined next as to their meaning and interpretation.

B. The Meaning And Extent of The Contract.

95. The difference between the Contract and its predecessor service agreement of January 25, 1985 (as amended December 18, 1995) ("Service Agreement") is analogous to the distinction between "debt" and "equity." Under the Service Agreement OEPC simply received payments from Petroecuador reimbursing it for all expenditures related to both the exploration and oil subsequent production, including any VAT paid, as well as interest on unamortized investments and a commission varying in accordance with a formula. Petroecuador was the sole owner of all oil production, was its exclusive exporter, and hence bore the entire market risk. Since VAT paid by OEPC was an acknowledged expense incurred in performing the Service Agreement, the same simply was reimbursed to it by Petroecuador. Occidental effectively was a "hired hand" working for "wages" consisting of its expenses plus a formulaic supplement. Hence, like a creditor of a debt obligation, it received income calculated to cover its expenses plus a fixed return on its debt investment.

96. The Contract changed all of that by eliminating all reimbursement of expenses to OEPC by Ecuador while at the same time granting OEPC a "participation," or share, in the oil produced, and thus an "equity" in such oil, which was calculated to cover all expenses of exploration and production and also

2004 WL 3267260 (APPAWD)

provide a profit. The value of this participation would depend on the status of the market from time to time. This arrangement had certain attractions for both sides, but also brought new factors into play for OEPC. One such factor was the payment of taxes, specifically VAT, which previously had been "passed through" to Petroecuador under the Service Agreement. Thus OEPC, in considering what from its perspective would be the appropriate participation percentage in light of its projected costs, necessarily had to calculate what its probable VAT tax liability would be. To the extent there would be none, save for the financing cost of paying VAT and then awaiting reimbursement, the percentage arguably could be less. To the extent, however, that OEPC would be out of pocket as regards VAT, were that to be the case, its costs would increase and hence the required participation would need to be correspondingly higher. Thus a clear understanding regarding the refundability (or not) of VAT was an essential element undergirding OEPC's negotiating position.

97. It has been the position of Ecuador from the outset of the present dispute that OEPC in fact has received, and continues to receive, full reimbursement of all VAT it has paid in that the participation percentage OEPC receives under the Contract has been calculated at a level which includes such reimbursement. This assertion focuses attention on what is known as Factor X, the Contract formula setting the respective participation percentages. Thus one is driven in the first instance to examine the Contract in order to determine whether Factor X does so include VAT refunds.

98. Factor X itself is found in the Contract at "EIGHT: PARTICIPATION AND DELIVERY PROCEDURES," specifically at 8.1 ("Calculating Contractor Participation") and its sub- headings. The formula there set forth refers exclusively to production volumes and reserves and contains no discussion of or reference to any element of cost. The corresponding formula of 8.5 for "State Participation in Production" simply calculates the difference between OEPC's participation factor and 100. There are no references in "EIGHT" to taxes in relation to Factor X (or Ecuador's participation percentage); rather it simply states at 8.5.2, under "Other income," that "The Ecuadorian State shall receive income tax and other taxes in accordance with pertinent laws," and, in respect of 8.6 ("Economic Stability"), that certain changes may be made in the Contract, as will be discussed below, "in order to reestablish the economy of" the Contract in the event described changes in the tax situation are experienced. Thus the most pertinent provision of the Contract does not on its face indicate that Factor X in fact included any refund of VAT.

99. Reference to certain other provisions of the Contract goes no further towards substantiating Ecuador's contention. Under "FIVE: OBLIGATIONS AND RIGHTS OF THE PARTIES" it is provided, at 5.1 and 5.1.17, in pertinent part, that "[i]n addition to the obligations set forth in this Participation Contract, Contractor shall:... Pay the taxes, contributions and customs duties as may be required by the laws and regulations of Ecuador." Similarly, "ELEVEN: TAXES, LABOR PARTICIPATION AND CONTRIBUTIONS" expressly requires OEPC to pay various named taxes, particularly income taxes and a tax on total assets. Finally, under "TWENTY TWO: APPLICABLE LAW, DOMICILE, JURISDICTION AND PROCEDURE" 22.1.4 sets forth a "Legal Framework" of 22 separate "[n]orms applicable to this Participation Contract, at the time of its execution," which expressly are not exhaustive. Item 10 in that listing is the "Internal Tax Regime Law, published in Official Gazette No. Three hundred and forty one (341) of December twenty two (22), Nineteen hundred and eighty nine (1989) and its amendments," precisely the VAT law here in issue. Clearly none of those references sheds any light on whether the VAT paid by OEPC, the refund of which it has claimed, is, as contended by Ecuador, automatically refunded via Factor X.

l00. It is noteworthy that, doubtless out of an abundance of caution, certain documents were annexed to the Contract and referred to under "TWENTY FOUR: DOCUMENTS TO THIS PARTICIPATION CONTRACT," in particular under

2004 WL 3267260 (APPAWD)

24.2 ("Annexed Documents"), which provides that "[f]orming an integral part of this Participation Contract, as annexes are the following documents." Those Annexes include four of potential relevance to this case, namely Annexes III, V, XIV and XVI.

101. Annex III consists of "SUMMARY MINUTES OF THE NEGOTIATION MEETINGS BETWEEN PETROECUADOR AND BLOCK 15 CONTRACTOR" signed by both sides April 29, 1999, just few weeks prior to the effective date of the Contract. In a discussion of "participation parameters" at 5.13 it records only that they "were agreed to by the negotiating teams on the basis of the legal framework in effect when these Minutes were signed," which, it must be noted, necessarily included Article 65 of the Tax Law (on which OEPC relies). It nowhere mentions VAT specifically and it sheds no light whatsoever on whether Factor X did or did not include a refund of VAT. Annex V is the unilateral Petroecuador "REPORT FROM THE NEGOTIATING COMMISSION [ETC.]" that negotiated the Contract with OEPC, which likewise is unilluminating as regards whether or not Factor X encompassed VAT reimbursement.

102. Annexes XIV and XVI, however, are of assistance. Both relate to 8.6, the "Economic Stability" provision of the Contract introduced above. It is clear from the testimony before the Tribunal that in the runup to conclusion of the Contract OEPC was concerned to have clarity regarding its responsibility for VAT, as a matter of both initial payment and ultimate liability. Previously VAT had been irrelevant to its concerns, as under the Service Contract it always recovered any VAT paid as an expense reimbursed by Petroecuador. Since under the new Contract, however, OEPC itself ultimately would be liable for any taxes collected and not refunded, it was compelled to be certain of its ultimate costs. The first point therefore was to ascertain whether indeed its purchases in support of the Contract would be subject to VAT at all. Therefore on 26 August 1998 it inquired of the SRI "whether the imports of equipment, machinery, materials and other consumable supplies that Occidental will have to make pursuant to the Participation Contract... will be taxed at the 10% VAT rate or at the zero rate for this tax." This "consulta," as it is known in Ecuador, did not inquire regarding the refundability of any VAT that would need to be paid inasmuch as, according to OEPC, that company had the clear understanding that under Article 65 as it then stood it would be entitled to such refund. It is to be noted that the same understanding necessarily underpins Ecuador's position that Factor X in the Contract provided such reimbursement. In response to that "consulta" Ms. Elsa de Mena, the SRI's Director General then and now, advised by letter of 5 October 1998, which is Annex XVI to the Contract, that "the goods brought in by your client in order to fulfill its contractual obligations are subject to the said [VAT] at the 10% rate." It is pertinent, too, that although OEPC's "consulta," and hence also SRI's response, did not deal with VAT levied on services, the undisputed evidence before us establishes that services also became subject to this tax as of April 30, 1999. Having established that it would be required to lay out such sums, and being sure in the circumstances that it would be entitled to a refund of the same, OEPC then understandably set about protecting itself in the Contract against the possibility that such refund might, for whatever reason, not be forthcoming.

103. OEPC's (and equally Ecuador's) protection against certain possible changes in expectations, due to changes of circumstances (including changes in the law attributable to Ecuador), was established in 8.6 of the Contract ("Economic Stability"). It begins with the following condition:

In the event that, due to actions taken by the State of Ecuador or PETROECUADOR, any of the events described below occur and have an impact on the economy of this Participation Contract:

l04. It then lists, at a.-e., five such "events." The first (a.) is "Modification of the tax regime as described in clause 11.11," which is included in "ELEVEN," to which reference has been made above. The second and third (b. and c.) relate to "[m]odification of the regime for remittances abroad or exchange rates" and "[r]eduction of the

2004 WL 3267260 (APPAWD)

production rate." The fourth (d.), relating to "[m]odification of the value of the transport rate described in clause 7.3.1," is noteworthy insofar as such modification expressly must be "in accordance with the procedure established in Annex XIV," which Annex, as will be seen below, also plays a role with the fifth and final item listed (e.), which is key to this case:

e. Collection ("Cobro" in the original Spanish, which pursuant to 3.2 of the Contract is "the only valid [version]" and "shall prevail" in case of any conflict with the English text) of the Value Added Tax, VAT, as set forth in Official Letter No. 01044 of October 5, 1998, which appears as annex number XVI, pursuant to which the Directorate of Internal Revenue Service states that the imports made by the contractor for the operations of block 15 under the structure of the participation contract, are subject to said tax.

105. It is significant that this provision refers to "[c]ollection," as opposed to "payment," and thus indicates, in the view of the Tribunal, as OEPC contends, that it was indeed intended to cover the situation resulting in this arbitration, namely the non-refund of VAT paid. The conclusion that this provision is directed to actual "collection," in the sense of retention or failure to refund, rather than to an increase in tax rates or legislation of new taxes, as Ecuador contends, is strengthened by the existence alongside item e. of item a. of 8.6, "[m]odification of the tax regime as described in clause 11.11," which in turn refers to "a modification of the tax ... regime []...;and/or...of [its] legal interpretation; and/or the creation of new taxes or levies not foreseen in this Participation Contract." It stands to reason that such references in a. would not have been necessary if Ecuador's broad interpretation of e. were correct, as under Ecuador's theory those eventualities would be embraced by e. Applying the basic rule of construction of any instrument that each word and phrase is to be given meaning, if at all possible, the conclusion is inescapable that e. must be understood as contended by OEPC. In turn, such a mechanism to effect a restoration of the economic balance in case of non-refund of VAT obviously would not have been agreed between the parties to the Contract had they mutually contemplated that such refunds were already provided automatically by Factor X.

106. The Tribunal's conclusion in this regard is further bolstered by the testimony offered by the parties at the Hearing. Reference was made previously to Annex III to the Contract ("SUMMARY MINUTES OF THE NEGOTIATION MEETINGS BETWEEN PETROECUADOR AND BLOCK l5 CONTRACTOR"). That Annex listed a "Negotiating Team" consisting of six representatives each from OEPC and Petroecuador. One would assume that these twelve would be the most knowledgeable persons on the point of whether or not VAT refunds were included in Factor X. It is striking that of these twelve representatives three were put forward as witnesses in this case, all three of whom were from the Petroecuador side, but two of whom testified, not on behalf of Petroecuador, but rather in support of OEPC.

107. Indeed, the "Chair of the Negotiating Group of Petroecuador" at the time, Mr, Patricio Larrea Cabrera (who prior to his testimony had left its employ), testified quite unequivocally on behalf of OEPC, as regards Factor X, that "we at Petroecuador did not even have the authority to offer contractually any refund of a tax provided by the Internal Tax Regime Law." He testified further specifically that:

VAT was not included in the X factors as a cost borne by the Contractor because we at Petroecuador assumed that the Contractor was entitled to a tax credit under Article 65 of the Internal Tax Regime Law. Since the Contractor has a legally recognized right to a refund of the VAT, the legislative changes to the VAT rate applicable to the imported goods cannot affect the Contractor, provided that this right to a tax credit remains in force so that the Contractor can obtain a refund of the VAT.

108. The second Petroecuador representative who offered testimony on behalf of OEPC was Mr. Celio Vega Ortega, currently in the employ of Pet-

2004 WL 3267260 (APPAWD)

roecuador's wholly owned subsidiary Petroproduccion as "Financial Specialist in the Special Projects" department, who handled the economic side of Petroecuador's negotiations with OEPC. (Mr. Vega, having submitted written testimony, failed to appear to be cross-examined at the Hearing, despite the best efforts of the Tribunal, which had summoned him to attend, reportedly out of concern that he had not received assurances satisfactory to him that by appearing as summoned his employment would not be jeopardized, an assertion strongly disputed by Petroecuador. The Tribunal has received his written testimony in evidence and, considering all of the circumstances, is inclined to give it a measure of credence, particularly considering its consistency with both that of Mr. Larrea Cabrera and with the Tribunal's own analysis of the Contract as set forth above.) While cast in a somewhat more sterile tone than Mr. Larrea's testimony, the evidence given by Mr. Vega is convincing to the effect that the economic analysis and model on the basis of which the negotiations took place utterly excluded VAT as a factor. Thus it is confirmatory of the position taken by OEPC in this arbitration to the effect that those negotiations proceeded on the common understanding that VAT paid by OEPC would be refunded as required by the Tax Law.

109. The lone Petroecuador Negotiating Group member whose testimony was offered by Petroecuador, Mr, Luis A. Berrazueta Subia, currently serves as Legal Assistant to the Executive Presidency of Petroecuador. His role in the Negotiating Group was to attend to the legal aspects. His testimony largely was argumentative and conclusory, and in no event included specific testimony to the effect that Factor X in fact was understood by the negotiators to include reimbursement of VAT.

110. Given the strength of the testimony put before the Tribunal by OEPC, coming from the leader and the economist of the Petroecuador team that negotiated the Contract, the comparative lack of persuasive force of the less detailed testimony of Mr. Barrazueta, and the fact that Ecuador has not produced as supportive witnesses anyone else directly involved in those negotiations, the Tribunal is constrained to conclude that its reading of the Contract as not including refunds of VAT in Factor X is indeed correct.

111. At this point it is appropriate to return to item e. of 8.6, which has until now been reviewed summarily. The treatment of it to this point has been limited to analyzing the five items that trigger it. It is now pertinent to note, in continuation, that 8.6 provides differing methods of dealing with those items when they are present. Thus, following the listing of the five items, it continues:

In the cases indicated in letters a) [modification of the tax regime] and b) [modification of the regime for remittances abroad or exchange rates], the Parties shall enter into amending contracts as indicated in clause 15.2, in order to reestablish the economy of this Participation Contract. When the events indicated in letters c) [reduction of the production rate], d) [modification of the value of the transport rate] and e) ["collection" of VAT] occur, a correction factor shall be included in the participation percentages, to absorb the increase or decrease of the economic burden, in accordance with Annex No. XIV.

112. It could be argued on behalf of Ecuador, in theory, that since "collection" of VAT, as argued by OEPC, would always result in an increase but never a decrease of the "economic burden" on it, e. must be interpreted as argued by Ecuador, namely to mean any change in the VAT regime (e.g., higher rates, lower rates, broader scope, lesser scope), since the adjustment provision quoted above speaks of both increases and decreases. Apart from the points made further above, however, the reference in the adjustment provision to either "increase or decrease" is perfectly consistent with OEPC's view in that that provision applies to all of a., b., c., d. and e., one of which addresses only a decrease (c.), one of which deals only with an increase (e., in OEPC's, and the Tribunal's, view), and the others of which could involve either an increase or a decrease. Again, all roads lead to the conclusion that Factor X did not include refunding of VAT.

2004 WL 3267260 (APPAWD)

113. One final reference should be made here to Annex XIV. Ecuador has argued from the reference in that Annex to "ADJUSTMENT FOR PAYMENT OF VALUE-ADDED TAX (VAT) ON IMPORTS," and a reference in the "DEFINITIONS" therein to "Variation in the amount of VAT paid on imports," that e. must be construed as Ecuador has contended, i.e., to address broad changes in legislation rather than "collection" (retention or non-refund) of VAT. While this is to an extent a point for Ecuador, the fact that Annex XIV is subordinate to 8.6 gives the former a lesser value in construing e., and in any event the point is of little value when ranged against the wealth of other interpretive material both in the Contract itself and in the evidentiary record that strongly supports the view of OEPC. Finally, and to the Tribunal conclusively, Annex XIV's closing "Explanatory note" confirming that "the law for the Reform of Public Finances" effective May 1, 1999, which is in fact the tax reform legislation of April 30, 1999 (which, for example, extended services), "was not taken into consideration in the negotiations for establishing the economics of the Participation Contract for Block 15" is proof positive that Factor X did not include the VAT the non-refund of which is at the root of the instant dispute. Indeed, that "Explanatory note" expressly foresees that as a result Occidental "shall be entitled to request a revision of the X factors, in accordance with the provisions of Section 11.11 of the Participation Contract."

114. Before leaving this discussion of 8.6 the Tribunal finds it appropriate to deal with the role of that clause in the continuing relationship of the parties. As will be seen in the later portion of this Award dealing with the relief to be granted, there is an issue as to how to provide for the future. It will be seen that the powers of the Tribunal are, in practical terms, somewhat limited in this regard. It is clear from the Tribunal's analysis of e. of 8.6, however, that the conditions for application of "a correction factor" to be "included in the participation percentages, to absorb the increase... of the economic burden" would be present if Ecuador, notwithstanding the instant Award, were to persist in refusing to refund VAT to OEPC. In that case, application of 8.6 e. would be a matter of right available to OEPC to invoke. Strictly speaking, those conditions are also met by the fact that, as recorded in Annex XIV to the Contract, the changes in law of 30 April 1999, effective 1 May 1999, subjected services to VAT (due to a. of 8.6), at least insofar as Ecuador should continue to refuse to refund any VAT paid. Therefore, while the Tribunal, in the circumstances of this arbitration and given the overall terms of this Award, does not regard it as appropriate to order the parties to apply 8.6, it clearly is open to them to resolve such issues as may arise in light of this Award regarding its future implementation, should they mutually wish to do so, via application of this provision. To be quite specific, it would in the view of the Tribunal do no violence to the Contract if following issuance of this Award the parties were to choose to agree to a modification of Factor X that would provide to OEPC the same value it would receive via actual refunds of VAT not yet quantified and mandated to be paid by Ecuador to OEPC in the dispositif of this Award, both for periods past and in the future. The Tribunal notes that it was contended at the Hearing that this could not in fact be done because the resulting adjustment would place Ecuador's participation percentage below the minimum mandated by the applicable legislation, a point on which the Tribunal is not in a position to express any opinion. The Tribunal simply points out a potential route for the future that, based on the record before it, would under the described circumstances be a correct application of the Contract. By the same token, 8.2 of the Contract permits the parties, should they mutually so choose, to agree that OEPC receive "its participation in cash for a period of not less than one year". Since the relevance of 8.6 has been disputed before the Tribunal it has felt it appropriate to make this clarification.

115. The Tribunal must also point out for the sake of clarification that the conclusion it has reached to the effect that the Contract does not include VAT refunds in Factor X is case specific. This is what the Contract between Ecuador and OEPC is taken to mean, and has no necessary implication for other contracts where the provisions and hence their in-

2004 WL 3267260 (APPAWD)

terpretation might be different.

116. It will now be discussed whether OEPC has as a consequence a right to reimbursement under the law.

C. The Meaning And Extent Of Ecuador's Tax Legislation.

117. The SRI was established in December 1997 as an independent, technical entity with national jurisdiction over the administration of taxes, to replace the *Dirección General de Rentas*, which had been part of the Ministry of Finance.

118. The creation of the SRI, which was granted broader authority and extended powers, was part and parcel of the modernization of the Ecuadorian tax administration. Thus, the SRI has been an active participant in the formulation of Ecuadorian tax policy, both from a technical standpoint and through direct involvement in the elaboration of draft laws, by- laws and regulations. The SRI was provided with new legal control mechanisms which constituted a major improvement in the provision of information to the SRI and the collection of taxes.

119. Prior to April 30, 1999, under Article 65 of the Tax Law, exporting producers of goods and services were entitled to tax credit for the whole of the amount of VAT paid on local purchases or on imported goods that would become part of their fixed assets, raw materials, inputs and services. In addition, the law envisaged a right to a refund of such tax credit (without interest).

120. On April 30, 1999 a substantial change was introduced to VAT itself. It evolved from covering only a small range of transactions and services on which a 10% VAT was assessed into a broad based tax with but a few specific transactions being zero-rated. Almost all transactions in goods and services were subjected to the imposition of VAT under the revised law. Hence as negotiations on the Contract between OEPC and Petroecuador reached their conclusion, and the Contract was to be executed, this VAT reform took effect.

121. As just indicated, Article 65, as it was in effect up until April 30, 1999, provided for a tax credit of VAT and the right to a refund of VAT for exporters. Tax credits were granted to all producers of goods (whether produced for the domestic market or for export) on VAT paid on the purchase of goods and services; the right to compensation of such amounts was granted to those who sold goods VAT-taxed at l 0% (domestic market) and the right to a tax refund was accorded to exporters of the VAT not compensated by the tax credit.

122. According to Article 68 of the Tax Law in effect from December 1989 through May 14, 2001, a tax credit of VAT could be offset against other taxes to be paid by the same taxpayer. If exporters could not thus obtain compensation for the entire VAT entitled to a tax credit, the exporter had the right to an actual refund of the amount not set off. On April 30, 1999, a new Article 69A took effect, as part of the tax reform discussed just above, which included in the Tax Law an express provision regarding VAT refunds for exporters that established special concepts and conditions applicable to those particular cases. Therewith Article 65 was also revised in that it had dealt exclusively with tax credits of VAT and not VAT refunds. Such revision distinguishes the right to a tax credit from that to a tax refund as respects exports.

123. Consequently as of April 30, 1999, the Ecuadorian tax system clarified and distinguished the two concepts, *i.e.*, tax credit and tax refund, in regard to exporters. Hence a tax refund to exporters is the right to the actual reimbursement of a tax credit,

124. Article 69A of the Tax Law reads:

Art. 69A. VAT paid in export activities.- Natural persons and companies that have paid the value added tax in local purchases or importation of goods used in the manufacture of goods that are exported, have the right to have that tax refunded to them without interest within a period no to exceed ninety (90) days, through the issue of the respective credit note, check or other means of payment. Interest

shall be paid if the above-mentioned period elapses without the claimed VAT having been refunded.

The Internal Revenue Service must return what has been paid upon the format submission of the tax return by the legal representative of the obligor, which must be accompanied by certified copies of the invoices showing the VAT paid. If misrepresentation is found in the information, the person responsible shall be fined the equivalent of double the amount that was attempted to be defrauded from the public treasury."[FN34]

125. According to Article 69A, refunds are limited to export-oriented manufacturers and solely to VAT paid on local purchases or importation of goods used in the manufacturing of export goods. Ecuadorian law granted the right to VAT refunds exclusively to the cases listed above; therefore, in strict application of the law, the VAT paid on other bases is to be maintained as a tax credit.

126. It must also be noted that under Article 69A the SRI is empowered to issue credit notes to refund taxpayers. This is how the SRI will normally refund tax payments to all exporters. The credit notes are freely sold on the Ecuadorian stock exchange.

127. Nevertheless, Article 169 of the Tax Law Regulations in effect as of the date on which the Contract was executed states as follows:

Art. 169. Tax Credit on Export of Goods: Individuals and legal entities that are exporters and that have paid VAT in purchasing the goods that they export are entitled to a tax credit for said payments; they shall be likewise entitled to credit for tax paid in purchasing raw materials, inputs and services used in products made and exported by the manufacturer. Once the goods have been exported, the taxpayer shall submit an application for the corresponding refund, accompanied by a copy of the respective export documents, to the Revenue Department...

Manufacturers are also entitled to the tax credit for VAT paid in the local purchase of raw materials, inputs and services used in producing goods for exportation and that are added to raw materials admitted into the country under special customs regimes, even if said taxpayers do not export the finished product directly, as long as said goods are actually purchased by the exporters and the transfer to the exporter of the goods produced by these taxpayers, which have not been cleared in through customs, is taxed rate zero."[FN35]

l28. Article 169 of the Tax Law Regulations complements the pre-existing legal regime for taxes by including both manufacturing and production in referring to export activities. Moreover, it authorizes tax refunds not only as to purchases of goods, but also as to the acquisition of services. At the same time the differing concepts of tax credits and tax refunds to exporters remain as explained above: a tax refund is the right to the actual reimbursement to exporters of a tax credit.

129. Article 169 of the Tax Law Regulations, as quoted above, was amended on June 29, 1999 as follows:

Value Added Tax Refund to Government Institutions, Exporters of Goods and the Disabled.- In order for exporters of goods to obtain a refund of value added tax paid in importing or locally purchasing inputs, raw materials and services used in products made and exported by the manufacturer or producer, as applicable, once the goods have been exported, said parties must apply to the Internal Revenue Department, submitting certified copies of sales receipts, import or export documents and the following, supplementary information: [FN36]

130. This amendment to Article 169 mostly included the requirements for filing for a tax refund, but it also ratified the general purport of the Tax Law in respect of the rights of exporters, manufacturers and producers to a refund of VAT paid on the purchase of goods and services.

131. The failure by OEPC to report the VAT it had paid in its VAT returns for eighteen months under the Contract, *i.e.*, until January 2002, led the SRI erroneously to conclude that the VAT paid for pur-

2004 WL 3267260 (APPAWD)

chases had not been registered as a tax credit, and consequently it was considered as being within costs and expenses of the Contract. Substitute VAT declarations filed later by OEPC did include such registrations.

132. On November 18, 1999, when the VAT rate of 10% was increased to 12%, a new provision relevant to refunds also was added to the Tax Law. That unnumbered Article, after Article 55 of the Tax Law, states as follows:

Tax Credit for the exportation of goods. Natural and juridical persons who export and have paid VAT in the acquisition of the goods they export, have a right to a tax credit for said payments. They shall have this same right for the tax paid in the acquisition of raw materials, supplies and services used in the products produced and exported by the manufacturer. Once the exportation is made, the taxpayer shall request from the Internal Revenue Service the corresponding refund, attaching a copy of the appropriate exportation documents.

This right may be transferred only to the direct suppliers of exporters. Manufacturers also have a right to a tax credit for the VAT paid in the local acquisition of raw materials, supplies and services destined to the production of goods for exportation, which are added to raw materials that have entered the country under special customs systems, even though such taxpayers do not directly export the finished product, so long as these goods are actually acquired by the exporters and the transfer to the exporter of the goods produced by these taxpayers, which have not been the object of nationalization, are taxed at the zero rate.

The oil business shall be governed by specific laws."[FN37]

133. This provision confirms exporters' right to a tax refund, since - as has been pointed out - this right had been already provided for under Article 65 of the Tax Law. During the course of this arbitration no specific laws or provisions pertaining to tax credit for oil activities have come to this Tribunal's attention.

134. The SRI through several "Granting Resolutions" granted tax credits and refunds of VAT payments to exporting oil exploration and exploitation companies. This policy lasted up until mid-2001. On August 28, 2001, however, the SRI issued Resolution No. 664, which denied OEPC's refund request for the periods October- December 2000 and January May 2001. The expressed basis upon which Resolution No. 664 denied VAT refund is that the value-added tax had already been incorporated within investment costs and expenses, and therefore was automatically reimbursed through Factor X of the Contract.

135. Based on the argument that Article 69A does not grant the right to a tax refund on production exports, but rather only on manufactured exports, and that oil does not constitute a manufactured good, on April 1, 2002 the SRI further annulled Granting Resolutions No. 28, 47, 50, 200, 592, 784, 118, 929, 61, 965 and 326 issued between February l0, 2000 and April 30, 2001. The SRI stated, however, that in case Article 69A would be applicable, VAT had already been refunded to OEPC through the Contract.

136. The Tribunal agrees with the SRI that Article 69A grants the right to a tax refund to exporters of goods involved in activities such as mining, fishing, lumber, bananas and African palm oil. The Tribunal does not, however, agree that the oil industry is excluded from the application of Article 69A, especially considering that Article 169 of the Tax Law Regulations establishes the right to a tax refund of VAT paid on purchases of goods and services for exporters irrespective of whether they be manufacturers or producers.

137. This Tribunal considers that although Ecuadorian Supreme Court decisions do not constitute precedent having either binding or mandatory force as regards the instant case, the discussions contained in the decisions of the Ecuadorian tax courts and of the Supreme Court give useful guidance in understanding Ecuadorian legislation and important related concepts. The complexity of the issues being discussed, as well as the individuality

2004 WL 3267260 (APPAWD)

and special features of each particular case submitted to such courts, have generated contradictions in some of the decisions.

138. In the *City Oriente Limited* case No. 19607, submitted by that company to an Ecuadorian Tax Court seeking to obtain VAT refund on exports, the Court partially accepted the Claimant's petition and ruled that City Oriente Limited was entitled to a refund of 2% VAT rate since the contract was executed under a 10% VAT rate, and that the increment of the VAT rate to 12% affected the economic conditions of the contract. The Court, however, denied that the Claimant was entitled to a VAT refund pursuant to Article 69A.

139. In December 2002 City Oriente Limited appealed the Tax Court's ruling to the Supreme Court. Three months later it withdrew the appeal. Nonetheless, in January 2003 the SRI appealed that same ruling. The Supreme Court denied the appeal based on the argument that the SRI had not expressly objected to the Tax Court ruling entitling City Oriente Limited to a 2% VAT refund. Moreover, the Supreme Court stated that Article 55 of the Tax Law was applicable as long as a different VAT regime was not established in special laws. That same ruling also stated that tax obligations imposed by the law may not be altered or modified contractually.

140. The Tax Courts also have held that Article 69A does not grant the right to a VAT refund to exploration and exploitation companies for their exports of oil, since the law grants such right only to manufacturing exporters and oil is not "manufactured." As a consequence of this reasoning, the Tax Courts have denied oil companies the right to a refund of VAT. A Tax Court has also ruled in *Repsol YPF Ecuador S.A. vs. SRI*, however, that since the participation contract of that particular oil company was executed when the applicable VAT rate was 10%, whereas by November 1999 such rate had been increased to 12%, this oil exploration and exploitation company was entitled to a refund of the 2% difference.

141. The Ecuadorian Supreme Court, Special Taxation Chamber, has provided in a final ruling on the same case that Article 69A does in fact grant the right to a VAT refund to all exporters, hence oil exploration and exploitation companies are entitled to such refund. It is the Supreme Court's view that "manufacturing" encompasses every type of productive activity, and that the imposition of VAT depends not on the source of the good, but rather on its final destination.

142. In a, similar case, the *Bellwether case*, the Ecuadorian Supreme Court has acknowledged a company's right to VAT refunds for its oil exports. That case was remanded to the Tax Court for a ruling on the SRI's argument that the VAT had already been refunded to the Company through Factor X of the participation contract. The final ruling then issued by the Tax Court is to the effect that VAT was refunded to the oil company in that it was included in its costs and expenses throughout the negotiation of the participation contract, which took place after the tax law as explicated herein was fully in effect.

143. It is not for this Tribunal to decide whether contracts made by other companies have included or not the VAT refund in their respective arrangements. It need only decide whether this was or was not the case in respect of OEPC. As has been explained above, the Tribunal has concluded that VAT reimbursement was not included in OEPC's Contract. If follows that under Ecuadorian tax legislation the Claimant is entitled to such a refund, particularly as it has been held by the Ecuadorian courts that such a right pertains to exporters generally, whether involved in manufactures or in production.

144. The Tribunal has now to examine the specific legal situation arising under Andean Community law and international law.

D. The Meaning And Extent Of Andean Community Decisions.

145. The Claimant has argued convincingly that in addition to the right to VAT refund that flows from Ecuador's legislation, there are specific and binding

obligations to this effect under Andean Community law.

146. Under the Agreement of Subregional Integration adopted in 1969 and its amendments, an elaborate legal framework has been established and developed. Two decisions relevant for VAT policy have been adopted within his framework. Commission Decision No. 330 of 1992 directed member countries to eliminate subsidies and undertake the harmonization of intra- regional export incentives, including certain indirect export-related taxes. More specifically, Commission Decision No. 388 of 1996 instructed member countries that indirect taxes paid "in the acquisition of raw materials, intermediate inputs, services, and capital goods, national or imported, consumed or utilized in the process of production, manufacture, transport or marketing of goods for export, will be reimbursed to the exporter".

147. Although the Respondent expressed the view at the hearing held in this case that in any event this regime applies only to intra-regional exports and not to those to world markets,[FN38] the Tribunal concludes otherwise. In fact, not only is the economic rationale underlying VAT reimbursement the same for all exports, but also the Report of the Andean Council on Harmonization, on which Decision 388 is based, expressly explained that the harmonization concerned indirect taxes both "internally and with respect to third parties". [FN39] Decision No. 370 had also mandated during the preparatory work that the scope of the regime should include extra- subregional exports.

148. At the hearing, the Tribunal addressed questions to the parties regarding the effectiveness of Andean Community Law. Experts for each party gave different answers. While for Claimant's expert this was an effective and binding legal order,[FN40] for Respondent's expert this was not quite so since often the decisions are ignored by member countries.[FN41] The fact that stands out, however, is that Andean Community decisions are binding under the Ecuadorian legal system.

149. The Tribunal has examined the instruments governing the Andean Community and concludes that without any doubt it is a binding legal order that the member countries are under an obligation to respect and implement. Under Article 2 of the Codified Treaty establishing the Andean Community Court of Justice of 1999, such decisions bind member countries as from the date of their adoption and, moreover, member countries are required under Article 4 to adopt the necessary enforcement measures, as well as not to adopt any measure contrary to the Andean Community provisions.

150. The binding nature of decisions has been confirmed by numerous decisions of the Andean Community Court of Justice and national courts. If such obligations are not carried out by a member country, aside from incurring international responsibility, it will not be able to invoke this omission to the disadvantage of a citizen or investor that has relied on the rules.

151. The Andean Community legal order was aptly described by a distinguished jurist as follows:

...[T]he most interesting features and characteristics of the Andean legal order are those that result from the study of the nature and validity of subregional acts... member countries are bound to observe these rules as a matter of obligation...the law enacted by subregional bodies unequivocally prevails over different or incompatible domestic law.[FN42]

152. In the light of these considerations the Tribunal concludes that the Claimant has a right to VAT refund under Andean Community law. The Tribunal also notes, however, that under Article 5 of Andean Community Decision 388 compensation other than refund may be used to the end of reimbursing the exporter.

E. The Nature And Extent Of WTO Law.

153. The parties have also discussed in connection with both jurisdiction and the merits the relevance of WTO law in this case. The Claimant has relied importantly on Professor Schenk's opinion to argue

2004 WL 3267260 (APPAWD)

that there is a universal practice for countries to adopt a destination-principle VAT allowing for the reimbursement of VAT attributable to export goods paid in the country of origin. Both the WTO Agreement and the General Agreement on Trade in Services (GATS), in the Claimant's view, commit Ecuador and the United States not to discriminate and to grant national treatment in various sectors, including the improved recovery of hydrocarbons.

154. Ecuador has asserted on the basis of Professor Cooper's opinion that the fact that there might be a common international best practice in the matter does not imply the existence of an obligation under international law; departures from such practice do not amount to violations of agreements or customary international law.

155. The Tribunal has examined with attention the agreements discussed as well as the interpretations offered by the parties and their respective experts. The Tribunal is persuaded on this point that Ecuador's viewpoint is right in so far as the existence of an international practice, which both parties accept, does not mean that there is a treaty or customary law obligation making such practice binding on the parties.

VI. THE MEANING AND EXTENT OF THE TREATY AND INTERNATIONAL LAW.

156. Following the examination of the Contract, Ecuador's tax laws, Andean Community law and WTO law, the Tribunal reaches now the stage of examining the specific claims made by OEPC under the Treaty and international law, as well as Ecuador's defenses and viewpoints on these claims.

157. The Claimant has alleged the existence of four breaches of the Treaty and international law:

l. Ecuador has failed to accord the investment fair and equitable treatment and treatment no less favorable than that required by international law, in breach of Article II(3)(a) of the Treaty.

2. Ecuador has failed to treat the investment on a basis no less favorable than that accorded to investments of its own nationals or of nationals of third countries, in breach of Article II(1) of the Treaty.

3. Ecuador has impaired by arbitrary and discriminatory measures the management, operation, maintenance, use or enjoyment of the investment, in breach of Article II(3)(b) of the Treaty.

4. Ecuador has expropriated, directly or indirectly, all or part of Claimant's investment without a public purpose; in a discriminatory manner; without payment of prompt, adequate and effective compensation; and in disregard of due process of law and general principles of treatment provided for in Article II(3) of the Treaty, all in breach of Article III(1) of the Treaty.

158. The Tribunal will examine each of these claims separately, following the reverse order. The claim on expropriation, however, has already been held to be inadmissible and, therefore, will not be discussed again here.

A. The Claim of Impairment.

159. The Claimant has argued that Ecuador has impaired the management and other rights of OEPC in connection with its investment, in breach of Article II (3) (b) of the Treaty. In particular, it is claimed that a legitimate economic expectation on which the investment was based has been undermined by the measures taken. This Article provides as follows:

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

l60. The Respondent is of the view that this claim duplicates other claims by OEPC in respect of discrimination and questions of fair and equitable treatment in connection with Article II(1) and Article II(3)(a), and denies in any event that any such expectation was frustrated by the measures adopted.

161. The Tribunal is not persuaded by the Claimant's argument that the management, operation, maintenance, use, enjoyment, acquisition, ex-

pansion or disposal of the investment has been in any way impaired by the measures adopted. In fact, it is quite evident from the record that the Claimant continues to exercise all these rights in a manner which is fully compatible with the rights to property.

162. The Tribunal is persuaded, however, by the argument of arbitrariness, at least to an extent. The Tribunal in *Lauder*, interpreting an equivalent but differently drafted provision of the pertinent investment treaty, resorted to the definition of "arbitrary" in Black's Law Dictionary, where it is held to mean "depending on individual discretion;...founded on prejudice or preference rather than on reason or fact".[FN43]

163. In the context of the present dispute, the decisions taken by SRI do not appear to have been founded on prejudice or preference rather than on reason or fact. As was convincingly explained in the hearing by the Director of the SRI, Mrs. De Mena, the SRI was confronted with a variety of practices, regulations and rules dealing with the question of VAT. It has been explained above that this resulted in a confusing situation into which the SRI had the task of bringing some resemblance of order. However, it is that very confusion and lack of clarity that resulted in some form of arbitrariness, even if not intended by the SRI.

164. The situation was further complicated by the fact that the SRl applied the rules that had been enacted in the understanding that the VAT refund had taken place under the Contract. This assumption turned out to be wrong.

165. The claim that these measures are also discriminatory has a meaning under this Article only to the extent that impairment has occurred. Otherwise the claim, as the Respondent has argued, is the same as that concerning other articles of the Treaty that will be examined below.

166. The Claimant's rights under the Contract and the Treaty have not been fully safeguarded as a consequence of the difficulties to which the investor was exposed. As will be noted further below, there are other serious questions in respect of the treatment of the investor that are separate and distinct from impairment and arbitrariness.

B. The Claim To No Less Favorable Treatment.

167. Article II(1) of the Treaty establishes the obligation to treat investments and associated activities "on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the most favorable..." Exceptions to national treatment and most favored nation treatment can be included in a separate Protocol. Ecuador's exceptions under the Protocol to the Treaty are limited to traditional fishing and the ownership and operation of radio and television stations.

168. The Claimant is of the view that Ecuador has breached this obligation because a number of companies involved in the export of other goods, particularly flowers, mining and seafood products are entitled to receive VAT refund and continuously enjoy this benefit. Lumber, bananas and African palm oil have also been referred to in this context. There is in this situation, the Claimant argues, a violation of the national treatment obligation. The Claimant also asserts that the meaning of "in like situations" does not refer to those industries or companies involved in the same sector of activity, such as oil producers, but to companies that are engaged in exports even if encompassing different sectors.

169. Moreover, in the Claimant's opinion, there can be no differentiation between producers and manufacturers as this is not allowed for under the legislation of Ecuador, Andean Community law or international standards.

170. The Claimant also has argued that there is a failure of most-favored-nation treatment because under bilateral investment treaties made by Ecuador with Spain and Argentina, respectively, the standard of national treatment is not qualified by the reference to "in like situations". OEPC would thus be entitled to this less restrictive treatment under the most-favored-nation clause.

2004 WL 3267260 (APPAWD)

171. The Respondent opposes all such arguments on the basis that "in like situations" can only mean that all companies in the same sector are to be treated alike and this happens in respect of all oil producers. The comparison, it is argued, cannot be extended to other sectors because the whole purpose of the VAT refund policy is to ensure that the conditions of competition are not changed, a scrutiny that is relevant only in the same sector.

172. The Respondent also explains that the treatment of foreign-owned companies and national companies is not different as Petroecuador is also denied VAT refunds, and that there is nothing in the policy that is intended to discriminate against foreign companies. It is also explained that other foreign producers, such as flower exporters, are granted the VAT refund because the law and the policy so allow. Ecuador also opposes the arguments concerning the most-favored-nation clause as no example is given of a Spanish or Argentine company in the oil sector, or any other sector, receiving a more favorable treatment to which the clause could apply.

173. The Tribunal is of the view that in the context of this particular claim the Claimant is right and its arguments are convincing. In fact, "in like situations" cannot be interpreted in the narrow sense advanced by Ecuador as the purpose of national treatment is to protect investors as compared to local producers, and this cannot be done by addressing exclusively the sector in which that particular activity is undertaken.

174. The Tribunal is mindful of the discussion of the meaning of "like products" in respect of national treatment under the GATT/WTO. In that context it has been held that the concept has to be interpreted narrowly and that like products are related to the concept of directly competitive or substitutable products.[FN44]

l75. However, those views are not specifically pertinent to the issue discussed in this case. In fact, the purpose of national treatment in this dispute is the opposite of that under the GATT/WTO, namely it is to avoid exporters being placed at a disadvantage in foreign markets because of the indirect taxes paid in the country of origin, while in GATT/WTO the purpose is to avoid imported products being affected by a distortion of competition with similar domestic products because of taxes and other regulations in the country of destination.

176. In the first situation, no exporter ought to be put in a disadvantageous position as compared to other exporters, while in the second situation the comparison needs to be made with the treatment of the "like" product and not generally. In any event, the reference to "in like situations" used in the Treaty seems to be different from that to "like products" in the GATT/WTO. The "situation" can relate to all exporters that share such condition, while the "product" necessarily relates to competitive and substitutable products.

177. In the present dispute the fact is that OEPC has received treatment less favorable than that accorded to national companies. The Tribunal is convinced that this has not been done with the intent of discriminating against foreign-owned companies. The statement of Mrs. De Mena at the hearing evidences that the SRI is a very professional service that did what it thought was its obligation to do under the law. However, the result of the policy enacted and the interpretation followed by the SRI in fact has been a less favorable treatment of OEPC.

178. This finding makes it unnecessary for the Tribunal to examine whether there were in addition most-favored-nation-treatment obligations involved. In view of the fact that the parties have discussed in detail the meaning of *Maffezini* in this context, the Tribunal believes it appropriate to clarify that that case is not really pertinent to the present dispute as it dealt with the most-favored-nation-treatment only insofar as procedural rights of the claimant there were involved, not substantive treatment as is the case here.

179. The Tribunal accordingly holds that the Respondent has breached its obligations under Article II(1) of the Treaty.

C. The Claim In Respect Of Fair And Equitable Treatment And Full Protection And Security.

180. The Claimant has argued that the Respondent's measures are also in breach of Article II(3)(a) of the Treaty. This Article provides:

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 favorable than that required by international law.

181. OEPC is of the view that by revoking preexisting decisions that were legitimately relied upon by the investor to assume its commitments and plan its commercial and business activities, Ecuador has frustrated OEPC's legitimate expectations on the basis of which the investment was made and has thus breached the obligation to accord it fair and equitable treatment.

182. The Respondent believes to the contrary that there was no expectation of a VAT refund at the time the investment was made and there is no violation of any international standard to this effect. Moreover, Ecuador argues that no investor can expect that all of its expectations will be met.

183. Although fair and equitable treatment is not defined in the Treaty, the Preamble clearly records the agreement of the parties that such treatment "is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources". The stability of the legal and business framework is thus an essential element of fair and equitable treatment.

184. The Tribunal must note in this context that the framework under which the investment was made and operates has been changed in an important manner by the actions adopted by the SRl. It was explained above that the Contract has been interpreted by the SRI in a manner that ended up being manifestly wrong as there is no evidence that VAT reimbursement was ever built into Factor X. The clarifications that OEPC sought on the applicability of VAT by means of a "consulta" made to the SRI received a wholly unsatisfactory and thoroughly vague answer. The tax law was changed without providing any clarity about its meaning and extent and the practice and regulations were also inconsistent with such changes.

185. Various arbitral tribunals have recently insisted on the need for this stability. The Tribunal in *Metalclad* held that the Respondent "failed to ensure a transparent and predictable framework for Metalclad's business planning and investment. The totality of these circumstances demonstrate a lack of orderly process and timely disposition in relation to an investor of a Party acting in the expectation that it would be treated fairly and justly...".[FN45] Also the Tribunal in *Técnicas Medioambientales*, as recalled by the Claimant, has held:

The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations....[FN46]

186. It is quite clear from the record of this case and from the events discussed in this Final Award that such requirements were not met by Ecuador. Moreover, this is an objective requirement that does not depend on whether the Respondent has proceeded in good faith or not.

187. The Tribunal accordingly holds that the Respondent has breached its obligations to accord fair and equitable treatment under Article II(3)(a) of the Treaty. In the context of this finding the question of whether in addition there has been a breach of full protection and security under this Article becomes moot as a treatment that is not fair and equitable automatically entails an absence of full protection and security of the investment.

158. There is still one aspect that the Tribunal needs to address in respect of this Article and the arguments of the parties related thereto. The Article

provides that in no case shall the investment be accorded treatment less favorable than that required by international law. This means that at a minimum fair and equitable treatment must be equated with the treatment required under international law.

189. The issue that arises is whether the fair and equitable treatment mandated by the Treaty is a more demanding standard than that prescribed by customary international law.

190. The Tribunal is of the opinion that in the instant case the Treaty standard is not different from that required under international law concerning both the stability and predictability of the legal and business framework of the investment. To this extent the Treaty standard can be equated with that under international law as evidenced by the opinions of the various tribunals cited above. It is also quite evident that the Respondent's treatment of the investment falls below such standards.

191. The relevant question for international law in this discussion is not whether there is an obligation to refund VAT, which is the point on which the parties have argued most intensely, but rather whether the legal and business framework meets the requirements of stability and predictability under international law. It was earlier concluded that there is not a VAT refund obligation under international law, except in the specific case of the Andean Community law, which provides for the option of either compensation or refund, but there is certainly an obligation not to alter the legal and business environment in which the investment has been made. In this case it is the latter question that triggers a treatment that is not fair and equitable.

192. The question whether there could be a Treaty standard more demanding than a customary international law standard that has been painfully discussed in the context of NAFTA and other free trade agreements does not therefore arise in this case. The case here is rather to ensure both the stability and predictability of the governing legal framework.

D. Other Claims And Defenses.

l93. The parties have introduced in their submissions and pleadings other claims and defenses which the Tribunal will briefly address.

l94. The Claimant has argued that the SRI Granting Resolutions that refunded VAT for a period of time particularly created a legitimate expectation on the basis of which additional investments were made in connection with the pipelines and which generally served as the basis of a business prospect. This, according to the Claimant, creates an estoppel under international law that prevents Ecuador from arguing now that alleged domestic irregularities or mistaken policies of its own doing can be invoked to the detriment of the legitimate expectation of the investor.

195. The Respondent is of the view that international law does not prevent Ecuador from correcting mistaken or erroneous interpretations of the law that led during fourteen months to the reimbursement of VAT to OEPC and that, in any event, that is not a long enough time to trigger the operation of estoppel. It is also argued that OEPC did not rely on the Granting Resolutions as the business arrangements had been made or advanced before any such Resolution was issued.

196. The Tribunal concludes on this matter that, as stated above, OEPC undertook its investments, including its participation in the pipeline arrangements, in a legal and business environment that was certain and predictable. This environment was changed as a matter of policy and legal interpretation, thus resulting in the breach of fair and equitable treatment. This breach relates to the effects of both revoking the Granting Resolutions and denying further VAT refunds. The rights of the Claimant are therefore protected under the fair and equitable treatment standard required by the Treaty and enforced by the Tribunal, independently of any estoppel. This last issue therefore becomes moot.

197. The Respondent also has raised in connection with the merits the defense that matters of taxation are excluded under Article X of the Treaty. In so far as jurisdiction and admissibility are concerned

2004 WL 3267260 (APPAWD)

the question was already decided by the Tribunal in the terms set out above. These terms, in so far as the observance and enforcement of the investment agreement is concerned, also govern the discussion on the merits.

VII. REMEDIES.

A. Compensation due.

198. The Tribunal turns now to the consideration of remedies. The relief requested by the Claimant and the position of Ecuador in this respect have been explained above.

199. The remedies discussed next are a consequence of the Tribunal's finding that the VAT refund is not included within the Contract terms as alleged by the Respondent. In such a case, the Claimant is entitled to have the VAT refunded under both Ecuadorian law and the Andean Community law.

200. In the light of the discussion held, the Tribunal finds that the Respondent has breached its obligation to accord OEPC a treatment no less favorable than that accorded to nationals or other companies in accordance with the standard of national treatment (Article II(I) of the Treaty) and has also breached its obligation concerning fair and equitable treatment (Article II(3)(a) of the Treaty). The claim about arbitrariness is only partially upheld as this does not appear to have resulted from a deliberate action by the SRI but from an overall rather incoherent tax legal structure (Article II(3)(b) of the Treaty). As noted, the claims to expropriation and other kinds of impairment have been dismissed.

201. The Tribunal finds that these breaches have a causal link to four separate but related situations in which the rights of the Claimant have been affected and damage has ensued.

202. The first situation concerns the amounts refunded under the Granting Resolutions. The Respondent cannot order the Claimant to return the amounts of VAT refunded by the Granting Resolutions as OEPC had a right to such refunds because no alternative mechanism was included in the Contract as the SRI believed. The Tribunal accordingly holds that the Claimant is entitled to retain the amounts so refunded and that the SRI Denying Resolutions requiring the return of those amounts are without legal effect.

203. The second situation concerns the amounts of VAT whose refund has been requested and denied by the SRI. The amount claimed by OEPC in this connection is US $ 12,643,146. The third situation is that relating to the amounts of VAT that have been paid by OEPC through December 31, 2003 even if no refund has been requested because in the Claimant's view the request would have been futile, This claim is for US $60,538,223. The total amount for VAT not refunded claimed by OEPC through December 31, 2003 thus comes to US$73,181,369.

204. The Respondent argues that this figure should first be reduced by $6S, 001,019.89 because the refund for these payments was never requested. Other reductions should be made, the Respondent also argues, in view of the fact that some requests do not meet the requirements of the tax law.

205. The Tribunal holds in this respect that the Claimant is entitled to the refund of VAT requested, again because no alternative mechanism was included in the Contract. In so far as VAT was paid and its refund not requested, the Tribunal holds that the Claimant is also entitled to this amount as the argument that any application for refund would have been futile is convincing. This entitlement to VAT includes the amounts paid on goods, services and reasonable pre-production costs, particularly in connection with assistance to indigenous communities living within the Contract area.

206. The Respondent asserts that "the Tribunal should deny any and all refunds that were not even requested," citing *Feldman* as authority,[FN47] Nothing in the Feldman case, however, militates against this conclusion. In that case the issue of futility never arose. There the Tribunal was faced with actual refund applications for the period in issue that were in significantly lesser amounts than

2004 WL 3267260 (APPAWD)

were recorded in customs documents that "reasonably reflect[ed] the relevant exportations during that period" and on which basis the claimant, for purposes of the arbitration, calculated his damages. Given this disparity in the evidence, the Feldman Tribunal elected to rely on the evidence of what the claimant actually had sought by way of refunds. That is a far cry from the present case. In addition, as OEPC has hastened to point out, it has produced a wealth of documentation from which to judge the accuracy of the amounts claimed. The Tribunal has no trouble awarding the amounts such documentation supports.

207. The Tribunal realizes that some of the VAT whose refund was requested needs to be adjusted in the light of the fact that there were objections raised by the Respondent as to the propriety of the invoices and other aspects. The objected amount was US $ 94,972.41 in connection with the VAT effectively submitted for reimbursement. This gives a correction factor of 0.0075, which if applied to the total claim for VAT is equivalent to US $ 550,000. As a conservative measure better to ensure that the compensation awarded to OEPC in respect of Ecuador's Treaty breaches does not exceed the amount of VAT which OEPC in fact should have been refunded, the Tribunal reduces the claimed compensation by a further 1.5 percent, or US $ 1,097,720. Accordingly, the total amount of VAT to which OEPC is entitled as at December 31, 2003 is US $71,533,649.

208. As the Tribunal has also found that the responsibility for complying with its Treaty obligations, and particularly that of maintaining a stable legal and business environment, is attributable to the State as a whole, it is held that the amount established above shall be paid by the Government of Ecuador as compensation due to the investor because of the breach of its rights under the Treaty. This compensation is determined by the amount of VAT the refund of which has been denied by the Government of Ecuador as at December 31, 2003.

209. The Tribunal is also aware of the fact that requests for VAT refunds have been made by OEPC in Ecuador's courts as a matter of entitlement under Ecuadorian law and separate from the claims brought to this Tribunal for breaches of Treaty rights. These local claims, however, entail the possibility of a double recovery as the Respondent has rightly argued. Accordingly, in order clearly to forestall any possible double recovery of VAT by OEPC, the Tribunal: (i) holds that OEPC shall not benefit from any additional recovery; (ii) directs the Claimant to cease and desist from any local court actions, administrative proceedings or other actions seeking refund of any VAT paid through December 31, 2003; and (iii) holds that any and all such actions and proceedings shall have no legal effect.

210. There is still a fourth situation that the Tribunal must examine concerning the claim for VAT not yet due or paid. The Tribunal will not order the payment of compensation or a refund of amounts that are not due or paid. The Respondent has rightly cited to this effect the decision in *SPP*[FN48] relying on the *Chorzow Factory*[FN49] and *Amoco*[FN50] to the extent that contingent and undeterminate damage cannot be awarded. OEPC's claim for US $ l21,300,000 on this count is therefore dismissed.

B. Interest.

211. The tribunal also holds that interest shall be paid in connection with the amount of compensation indicated through December 3l, 2003. OEPC believes this interest to be that which the SRI applies for delay or late payment of tax obligations, in accordance with Articles 20 and 21 of the Tax Law, which results in the amount of US $7,082,561. In this regard, the Tribunal notes that inasmuch as it is granting compensation for Treaty breaches, those provisions are not directly applicable. The Tribunal believes considering all of the circumstances of this case, that appropriate interest through December 31, 2003 would be one half of the sum requested, or US $ 3,541,280.

212. The total amount of VAT refunds and interest due to OEPC through December 31, 2003 accordingly is US $75,074,929.

2004 WL 3267260 (APPAWD)

C. Rebalancing the Contract and other forms of compensation.

213. The Tribunal also wishes to offer the parties some guidance as how to best conduct their future relations, in the understanding that both parties are willing to work together for the future in a mutually beneficial relationship, as became evident in this arbitration. To this end, as noted in connection with the Contract, if the parties so wish they may explore the possibility of rebalancing the economic benefits of the Contract under Clause 8.6.e, so as to specifically include VAT refund in Factor X.

2l4. In accordance with the Andean Group Resolution 388, the parties can also explore, in addition to refund, other forms of compensation if this allows them to reach a mutually satisfactory outcome. In fact, Article 5 of this Resolution provides for the reimbursement of indirect taxes by means of either compensation or refund. Payment in kind, a solution partially explored by the parties at one stage of their dispute, might be one form of compensation to be borne in mind if the parties so wish in connection with both the compensation granted in this Award and future claims to VAT refund. The parties may of course agree also on other forms of compensation if appropriate.

215. In any event, to the extent that there are requests to the SRI for VAT reimbursement in the future this shall of necessity follow the procedures and scrutiny provided under the Ecuadorian Tax Law.

D. Costs and expenses.

216. Taking into consideration the circumstances of the case and the fact that the parties have both won and lost in respect of important issues of the dispute, the Tribunal decides that the Respondent shall bear 55% of the costs of arbitration and the Claimant 45% of such costs. Each party shall bear its own legal expenses.

DECISION.

NOW THEREFORE THE ARBITRAL TRIBUNAL

DECIDES AND AWARDS AS FOLLOWS:

1. It has jurisdiction to hear and decide this case.

2. The Claimant is entitled to the refund of all VAT paid as a result of the importation or local acquisition of goods and services used for the production of oil for export, as well as reasonable pre-production costs and *de minimis* expenses associated with production activities, particularly relating to indigenous communities. Such refund is not included in Factor X in the Contract.

3. Except for the amount of compensation and interest determined in this Award, all requests for refund to the SRI shall follow in the future the normal administrative procedures of the Ecuadorian tax law.

4. The Respondent breached its obligations to accord the investor treatment no less favorable than that accorded to nationals and other companies under the standard of national treatment guaranteed in Article II(1) of the Treaty.

5. The Respondent breached its obligations to accord the investor the fair and equitable treatment guaranteed in Article II(3)(a) of the Treaty and to an extent the guarantee against arbitrariness of Article II(3)(b).

6. The Claimant is entitled to retain all amounts of VAT reimbursed by the SRI and the Resolutions ordering the return of such monies are without legal effect.

7. The Respondent shall pay the Claimant compensation in the amount of US $ 71,533,649.

8. The Respondent shall pay the Claimant simple interest on the amount in 7. above in the amount of US $3,541,280.

9. The Respondent shall pay the Claimant simple interest at the rate of 2.75% per annum on the sums in 7. and 8. above from January 1, 2004 to the date of this Final Award.

10. In order clearly to forestall any possible double recovery of VAT by OEPC, the Tribunal: (i) holds that OEPC shall not benefit from any additional recovery; (ii) directs the Claimant to cease and desist from any local court actions, administrative proceedings or other actions seeking refund of any VAT paid through December 31, 2003; and (iii) holds that any and all such actions and proceedings shall have no legal effect.

11. Pursuant to Article 38 and 39 of the UNCITRAL Arbitration Rules, the Tribunal fixes the costs of the arbitration at US $594,044.38 made up as follows:

a) Fees and Expenses of the Presiding Arbitrator US $239,841.37

b) Fees and Expenses of Arbitrator Barrera Sweeney US $181,220.50

c) Fees and Expenses of Arbitrator Brower US $140,371.51

d) Costs of Administration US $32,6ll.

12. The Respondent shall pay 55% of the costs of the arbitration (US $326,724.40), of which it has already advanced US $300,000. The Claimant shall pay 45% of such costs (US $267,319.98) out of the US $300,000 which it has advanced. Therefore, the Respondent shall pay to Claimant US $26,724.40 in respect of such costs.

l3. To the extent, if any, that this Final Award has not been paid by the Respondent to the Claimant within 30 days following the date of this Final Award, the Respondent shall pay the Claimant simple interest at the rate of 4% per annum on the sums in 7.,8. and 12. above, to the extent and so long as they shall not have been paid, from the date 30 days following the date of this Final Award until the date of effective payment of said sums.

14. Each Party shall pay its own costs for legal representation and assistance.

15. All other claims are herewith dismissed.

Place of Arbitration: London, United Kingdom.

Date of this Arbitral Award; 1st JULY 2004.

The Arbitral Tribunal

Charles N. Brower

Arbitrator

Francisco Orrego Vicuña

President

Patrick Barrera Sweeney

Arbitrator

FN1.1. Expert Opinion of Sir Ian Sinclair, October 27, 2003.

FN2.2. Expert Opinion of Professor Andreas Lowenfeld, October 27, 2003.

FN3.3. Lanco International, Inc. v. Argentine Republic (ICSID Case No. ARB/97/6), Decision of the Tribunal of December 8, 1998 (English text), 40 ILM 457 (2001), paras, 15-16.

FN4.4. Azurix Corp. v. Argentine Republic (ICSID Case No. ARB/01/12), Decision on Jurisdiction of December 8, 2003, International Law in *Brief available at*: http://www.asil.org/jlib/azurix.pdf, par. 145.

FN5.5. SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan (ICSID Case No. ARB/01/l3), Decision on Objections to Jurisdiction of August 6, 2003; 18 ICSID Rev.- FILJ 301 (2003), par. 145.

FN6.6. Case Concerning the *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment of July 20, 1989, ICJ Reports 1989, 15.

FN7.7. Wena Hotels Ltd. v. Egypt (ICSID Case No. ARB/98/4), Decision on Application for Annulment rendered on February 5, 2002, 41 ILR 933 (2002), paras. 31, 35.

FN8.8. Ronald S. Lauder v. Czech Republic, UNCITRAL Final Award (Sept. 3, 2001), as published in www.mfcr.cz/static/Arbitraz/en/FinalAward.pdf

FN9.9. Alex Genin and others v. Republic of Estonia (ICSID Case No. ARB/99/2), Award of the Tribunal (June 25, 2001); Decision on Claimants' Request for Supplementary Decisions and Rectification (April 4, 2002), *available at*: http://www.worldbank.org/icsid/cases/conclude.htm

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FN11.11. CMS Gas Transmission Company v. Argentine Republic (ICSID Case No. ARB/01/8), Decision on Jurisdiction of July 17, 2003, 42 ILM 788 (2003).

FN12.12. AZURIX.

FN13.13. Compañia de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic (Case No. ARB/97/3), Decision on Application for Annulment of July 3, 2002, 41 ILM 1135 (2002) (Vivendi Annulment).

FN14.14. CMS par. 80; Azurix, par. 89.

FN15.15. Lauder, paras. 161, 163.

FN16.16. Vivendi Annulment, par. 113.

FN17.17. Vivendi Annulment, par. 98.

FN18.18. Vivendi Annulment, par. 101.

FN19.19. SGS v. Pakistan, par. 162.

FN20.20. SGS v. Philippines, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction, 29 January 2004, par. 163.

FN21.21. Aguas cit., par. 81.

FN22.22. Vivendi Annulment, par. 102.

FN23.23. Vienna Convention on the Law of Treaties, May 23, 1969, 8ILM 679 (1969). Article 31.1 reads: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". Article 32 reads as pertinent: "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion..."

FN24.24. Expert Opinion of Professor David Gantz, October 27, 2003, par. 56.

FN25.25. CMS, par. 35.

FN26.26. Lauder, par, 200.

FN27.27. Rosalyn Higgins: "The Taking of Property by the State: Recent Developments in International Law", Recueil des Cours, Hague Academy of International Law, Vol. 176, 1982-III, 263.

FN28.28. Marvin Feldman v. Mexico, (ICSID Case No. ARB (AF)/99/1), Award, December 16, 2002, paras. 103- 106.

FN29.29. Thomas Wälde and Abba Kolo: "Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law", International and Comparative Law Quarterly, Vol. 50, 2001, 811-848.

FN30.30. Metalclad v. Mexico, 40 International Legal Materials 55 (2001) par. 103.

FN31.31. Tippetts, Abett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran, 6 CTR 219 (1984-II); Phelps Dodge Corp. v. Islamic Republic of Iran, l0 CTR 121 (1986-I).

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FN34.34. English translation as provided in Mr. Mario Alberto Prado Mora's expert opinion.

FN35.35. English translation as provided in Claimant's Exhibits submitted to the Tribunal on February 9, 2004.

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FN38.38. Prado Hearing Statement, January 27, 2004, at 503-505.

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FN46.46. Técnicas Medioambientales Tecmed S. A. v. Mexico, Award of May 29, 2003, 43 ILM 133 (2004), par. 154.

FN47.47. Feldman, pars. 202-203.

FN48.48. SPP v. Egypt, Award of May 20, 1992, 32 ILM 933, 973 (1993).

FN49.49. Chorzow Factory (Merits), PCIJ, Ser. A. No, l7, p. 29.

FN50.50. Amoco International Finance Corp. v. Iran, 12 Iran-U.S. CTR 170 (1986), at 238.

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- Permanent Court of International Justice, "Factory at Chorzów"

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2004 WL 3267260 (APPAWD)

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2004 WL 3267260 (APPAWD)

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