IN THE MATTER OF AN ARBITRATION UNDER THE TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF ECUADOR CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT SIGNED ON 27 AUGUST 1993 (THE "BIT")

- and -

THE UNCITRAL ARBITRATION RULES 1976

- between -

MURPHY EXPLORATION & PRODUCTION COMPANY – INTERNATIONAL

"Claimant"

and

THE REPUBLIC OF ECUADOR

"Respondent," and together with Claimant, the "Parties"

PARTIAL AWARD ON JURISDICTION

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13 November 2013

Tribunal:
Professor Kaj Hobér
Professor Georges Abi-Saab
Professor Bernard Hanotiau, Presiding Arbitrator

Registry:
Permanent Court of Arbitration

Secretary to the Tribunal:
Sarah Grimmer

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I. PARTIES

1. Claimant is Murphy Exploration and Production Company – International, of 16290 Katy Freeway, Suite 600, Houston, Texas 77094, a company duly incorporated and existing under the laws of the State of Delaware, U.S.A. ("**Claimant**" or "**Murphy**"). Claimant is represented by Messrs. Craig Miles, Roberto J. Aguirre Luzi, and Esteban Leccese of King & Spalding LLP in Houston; Mr. Kenneth Fleuriet and Ms. Amy Roebuck of King & Spalding LLP in Paris; and Mr. Francisco Roldán of Pérez Bustamente & Ponce in Quito.

2. Respondent is the Republic of Ecuador ("**Ecuador**" or "**Respondent**") with the address State's Attorney General, Robles 731 and Av. Amazonas, Quito. Respondent is represented by Dr. Diego García Carrión, Dra. Christel Gaibor Flor, Dr. Luis Felipe Aguilar, and Dra. Gianina Osejo at the office of the State's Attorney General; Mr. Mark Clodfelter, Dr. Ronald Goodman, Dr. Alberto Wray, Mr. Ignacio Torterola, Dr. Constantinos Salonidis, and Ms. Diana Tsutieva of Foley Hoag LLP in Washington, D.C.; and Mr. Bruno Leurent, Mr. Thomas Bevilacqua, and Ms. Angelynn Meya of Foley Hoag LLP in Paris.

II. RELEVANT LEGAL PROVISIONS

3. Claimant commenced these proceedings against Ecuador by Notice of Arbitration dated 21 September 2011 pursuant to Article VI of the Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment (the "**US-Ecuador BIT**", "**BIT**", or "**Treaty**").

4. Article VI of the BIT provides:

> 1. For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.
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> 2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute, under one of the following alternatives, for resolution:

(a) to the courts or administrative tribunals of the Party that is a party to the dispute; or

(b) in accordance with any applicable, previously agreed dispute settlement procedures; or

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

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

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

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

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

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

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

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

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

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

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

III. BACKGROUND

Factual background of the dispute

5. This section contextualises the decision of the Tribunal on the Respondent's jurisdictional objection based on Article VI of the BIT, but does not represent findings of fact.

6. Following a bidding process in 1985, Ecuador and a consortium of oil companies led by Conoco Ecuador Limited ("**Conoco**") entered into a Service Contract for the Exploration and Exploitation of Hydrocarbons in Block 16 of the Ecuadorian Amazon Region ("**Service Contract**").[1] The consortium consisted of Conoco, Overseas Petroleum and Investment Corporation, Diamond Shamrock South America Petroleum B.V., and Nomeco Latin American Inc. ("**Consortium**").[2] The Service Contract assigned Respondent ownership of the oil produced and the Consortium a set fee for the oil extraction.[3]

7. Claimant's subsidiaries acquired a 20% aggregate interest in the Service Contract in 1987. Conoco assigned 10% of its rights and obligations under the Service Contract to each of Murphy Ecuador Oil Company Limited ("**Murphy Ecuador**"), a company from Bermuda,[4] and its immediate parent company, Canam Offshore Limited ("**Canam**"), a company from the Bahamas[5] that was wholly owned by Claimant.[6]

8. In December 1996, the Consortium and Ecuador executed the Modification of the Service Contract into a Participation Contract for the Exploration and Exploitation of Hydrocarbons (Crude Oil) in Block 16 of the Amazon Region of Ecuador ("**Participation Contract**").[7] The Participation Contract, which was intended to remain in force until 31 January 2012,[8]

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

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

[3] Notice of Arbitration, para. 3.

[4] Objections to Jurisdiction, para. 16.

[5] Objections to Jurisdiction, para. 16.

[6] Objections to Jurisdiction, paras. 15-16.

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

[8] Notice of Arbitration, para. 3.

allocated a percentage of oil production to the Consortium and authorised it to market its share.[9] Claimant's subsidiaries had a 20% stake in this contract.[10]

9. In the early 2000s, global oil prices rose sharply.

10. On 25 April 2006, Ecuador amended its Hydrocarbons Law and passed Law 42.[11] Law 42 obliged the Consortium to pay an "additional participation" of at least 50% of the difference between the actual monthly average price of oil and the price as of the date of the Participation Contract.[12] Decree No. 1672, a regulatory decree issued in July 2006, set the additional participation at 50%.[13] This percentage was increased to 99% by Decree No. 662, which was issued in October 2007.[14]

11. In December 2007, Ecuador enacted the Tax Equity Law that applied to all new or modified contracts issued on 1 January 2008 and after.[15] This law created a 70% tax on profits from oil sales that would apply only when a reference price, on which each oil company and Ecuador had to agree, was exceeded.[16] Respondent contends that the high reference rates negotiated by the oil companies and the lower assessment rate provided for by the Tax Equity Law effectively tempered the effect of Decree No. 662.[17]

12. Claimant contends that it and the other Consortium members sought to enforce the original terms of the Participation Contract, but made Law 42 payments under protest for a time. It quantifies its share of these payments at USD118 million.[18] Ecuador contends that Claimant became the sole dissenting member of the Consortium with regard to the continuance of operations in Block 16.[19]

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[9] Notice of Arbitration, para. 5; Statement of Claim, para. 2.

[10] Notice of Arbitration, para. 5.

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

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

[13] Notice of Arbitration, paras. 8, 30; Statement of Claim, paras. 10, 145.

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

[15] Objections to Jurisdiction, para. 37.

[16] Objections to Jurisdiction, para. 37.

[17] Objections to Jurisdiction, para. 38.

[18] Notice of Arbitration, para. 9; Statement of Claim, paras. 179-181.

[19] Objections to Jurisdiction, para. 40.

13. On 29 February 2008, Claimant notified Ecuador of its intention to submit the dispute between the Parties on Law 42 to arbitration.[20] It also contended that the six-month notice period required by Article VI(3)(a) of the BIT expired in or around October 2006.[21]

Procedural history of the ICSID proceedings

14. In March 2008, Claimant initiated ICSID proceedings under the Treaty ("**ICSID Arbitration**").[22] Shortly thereafter, Murphy Ecuador, together with the other Consortium members, initiated a separate ICSID arbitration relating to the same facts ("**Murphy Ecuador ICSID Arbitration**").[23]

15. Claimant alleged that, after May 2008, Respondent forced investors to convert their participation contracts to new service contracts or risk the termination of their contracts and the abandonment of their investments.[24] On 12 March 2009, therefore, Claimant sold its interest in the Participation Contract, i.e., its entire equity interest in Murphy Ecuador, to the Consortium's operator, which was Repsol YPF Ecuador S.A. by then.[25] Claimant states that it did so at a substantially diminished value and exclusive of the USD118 million in Law 42 payments it had made under protest.[26] Respondent contends that Claimant suffered no loss.[27]

16. The Parties fully pleaded their cases on both jurisdiction and the merits in the ICSID Arbitration, which lasted approximately three and a half years.

17. On 3 July 2009, Respondent denounced the ICSID Convention.

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[20] Notice of Arbitration, para. 31; Murphy's Letter to Ecuador dated 29 February 2009, **CEX-4**.

[21] Notice of Arbitration, para. 31.

[22] Statement of Claim, para. 31.

[23] Objections to Jurisdiction, paras. 41, 49.

[24] Notice of Arbitration, paras. 10-11; Statement of Claim, paras. 182-201.

[25] Statement of Claim, paras. 202-209; First Witness Statement of Ignacio Herrera, para. 51. By a Public Deed issued on 31 January 1992, Maxus Ecuador Inc. took over the operation of the Consortium from Conoco. Objections to Jurisdiction, para. 18. In 1999, the Spanish group Repsol took on the role of Consortium operator from YPF, which is what Maxus Ecuador was then called. Objections to Jurisdiction, para. 18. In January 2001, a newly created entity named Repsol YPF Ecuador S.A. ("**Repsol**") assumed the role of Consortium operator. Objections to Jurisdiction, para. 18.

[26] Notice of Arbitration, para. 11; Statement of Claim, paras. 12, 202-209.

[27] Objections to Jurisdiction, para. 51.

18. On 15 December 2010, a majority of the tribunal in the ICSID Arbitration found that it did not have jurisdiction over the dispute ("**ICSID Award on Jurisdiction**").[28] Claimant states that:

> [The tribunal] rejected all of Ecuador's remaining objections to jurisdiction by finding that they were not questions of jurisdiction but should only be considered during the merits phase. Thus…the only bar to a new tribunal's having jurisdiction over the present dispute was the majority's finding that Murphy had not consulted and negotiated with Ecuador for a six-month period before filing for arbitration.[29]

19. Ecuador alleges that the Consortium, including Murphy Ecuador, agreed to withdraw its claims in the Murphy Ecuador ICSID Arbitration with prejudice in exchange for a Modification Contract to the Participation Contract that would convert the latter to a service contract.[30] This settlement was reached on 23 November 2010.[31]

20. By letter dated 30 December 2010, Murphy invited Ecuador to participate in consultations and negotiations regarding their dispute under the Treaty,[32] to which Ecuador responded by letter dated 31 January 2011 stating, *inter alia*, that the "six-month period [prescribed by Article VI(3)(a) of the BIT] begins to run only from January 3, 2011."[33]

21. Between February and July 2011, the Parties exchanged correspondence and conducted a meeting, but were unable to resolve their dispute.[34]

22. On 13 July 2011, Murphy filed a second Request for Arbitration with ICSID, to which Ecuador objected on jurisdictional grounds. On 19 August 2011, Murphy withdrew the said request without prejudice.[35]

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

[29] Notice of Arbitration, para. 38.

[30] Objections to Jurisdiction, para. 46.

[31] Objections to Jurisdiction, para. 46.

[32] Notice of Arbitration, para. 38.

[33] Notice of Arbitration, para. 38.

[34] Notice of Arbitration, paras. 39-47; Statement of Claim, paras. 32-42.

[35] Notice of Arbitration, para. 49; Statement of Claim, paras. 43-44.

Procedural history of the present proceedings

23. By a Notice of Arbitration dated 21 September 2011, Claimant commenced these proceedings against Ecuador under the UNCITRAL Arbitration Rules 1976.

24. On 14 March 2012, Claimant appointed Professor Kaj Hobér (of Mannheimer Swartling Advokatbyrå, Norrlandsgaten 21, Stockholm, Sweden) as arbitrator. On 12 April 2012, Ecuador appointed Professor Georges Abi-Saab (of 14 Chemin de St. Georges, Clarens, Switzerland) as arbitrator. On 25 May 2012, Professors Hobér and Abi-Saab jointly appointed Professor Bernard Hanotiau (of Hanotiau & van den Berg, 480 Avenue Louise, B9, Brussels, Belgium) as Presiding Arbitrator.

25. The Parties and the Tribunal signed the Terms of Appointment on 3 September 2012.

26. The Tribunal issued Procedural Order No. 1, which formalised a partial procedural timetable in accordance with a procedural teleconference held on 19 July 2012.

27. On 17 September 2012, Claimant filed a Statement of Claim ("**Statement of Claim**") accompanied by (1) the first witness statement of Mr. Ignacio Herrera; (2) the expert report of Dr. Hernán Pérez Loose with annexes; (3) the expert report of Mr. Brent C. Kaczmarek, CFA with attachments; and (4) exhibits CEX-1 to CEX-167 and legal authorities CLA-001 to CLA-108. Claimant dispatched relevant Spanish translations on 15 October 2012, along with English translations of selected documents and a corrected Statement of Claim, Errata Sheet, and missing exhibits (including CEX-168).

28. On 18 October 2012, Ecuador submitted its Objections to Jurisdiction ("**Objections to Jurisdiction**") accompanied by exhibits REX-1 to REX-33 and legal authorities RLA-1 to RLA-194. On 23 October 2012, Ecuador submitted a revised version of its Objections to Jurisdiction (to correct minor errors) and an errata sheet. Relevant Spanish translations were submitted on 15 November 2012.

29. Accompanying its Objections to Jurisdiction was a request by Respondent that the Tribunal "bifurcate these proceedings and address in a preliminary fashion the serious jurisdictional issues hereto raised so that they can be separately assessed and resolved at the outset of this dispute."[36]

[36] Objections to Jurisdiction, para. 321.

30. On 16 November 2012, Claimant filed its Response to Respondent's Objections to Jurisdiction ("**Claimant's Response**") accompanied by exhibits CEX-169 to CEX-192 and legal authorities CLA-109 to CLA-232, and opposed Respondent's request for bifurcation. It provided a Spanish translation of its submissions on 15 December 2012.

31. On 17 November 2012, the Tribunal proposed that the issue of bifurcation be resolved without Professor Abi-Saab, who would be unable to fulfil his arbitral obligations from the week of 19 November 2012 to March 2013 for medical reasons.

32. On 10 and 13 December 2012, respectively, Respondent and Claimant agreed that the Presiding Arbitrator alone would decide on Respondent's request for bifurcation.

33. On 19 December 2012, the Presiding Arbitrator issued his Decision on Respondent's Request for Bifurcation ("**Bifurcation Decision**"), in which he directed that the Respondent's jurisdictional objection based on Article VI of the Treaty be determined in a preliminary phase. Subject to the outcome of this phase, the remaining jurisdictional objections were to be joined with the merits. The Bifurcation Decision further established a timetable for the preliminary phase and scheduled a jurisdictional hearing for 21 and 22 May 2013. The Permanent Court of Arbitration ("**PCA**") provided the Parties with a Spanish translation of the Bifurcation Decision on 14 January 2013.

34. On 21 January 2013, Ecuador submitted a Reply to Claimant's Response ("**Respondent's Reply**") accompanied by the expert opinion of Professor Kenneth Vandevelde with exhibits 1-15 and the witness statement of Dra. Christel Gaibor Flor, with an English translation.

35. On 20 March 2013, Claimant filed its Rejoinder on Jurisdiction ("**Claimant's Rejoinder**") with exhibits CEX-193 to CEX-198 and legal authorities CLA-233 to CLA-267, accompanied by the second witness statement of Mr. Ignacio Herrera and the expert report of Professor Steven R. Ratner with accompanying exhibits 1 to 27.

36. On 21 to 22 May 2013, a hearing on jurisdiction was held at the Peace Palace in The Hague, the Netherlands.

37. On 11 July 2013, the Parties submitted their respective Statements of Costs.

38. By e-mail of 20 September 2013, Claimant submitted to the Tribunal the award in *Dede v. Romania* issued on 5 September 2013, accompanied by brief arguments in support of its case on jurisdiction. By e-mail dated 27 September 2013, Respondent submitted comments in response.[37]

IV. SUMMARIES OF THE PARTIES' POSITIONS ON RESPONDENT'S JURISDICTIONAL OBJECTION UNDER ARTICLE VI(3) OF THE US-ECUADOR BIT

39. What follows are summaries of the Parties' positions on the issues raised by Respondent's Jurisdictional Objection under Article VI(3) of the US-Ecuador BIT, without prejudice to the full legal arguments that have been put before—and fully considered by—the Tribunal.

40. Article VI of the BIT is set out in full at paragraph 4 *supra*.

Treaty interpretation

41. The Parties agree that Article 31(1) of the Vienna Convention on the Law of Treaties ("**Convention**"), which states that: "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 light of its object and purpose,"[38] governs the interpretation of Article VI(3) of the BIT.

Ordinary meaning of Article VI(3)

A. Respondent's Position

42. Respondent contends that the choices of arbitral fora listed in Article VI(3)(a) of the US-Ecuador BIT are exclusive and irrevocable.[39] It argues that the "or" in this provision delineates alternatives,[40] and explains that "or" denotes equivalence only when it connects

[37] *Dede v. Romania*, ICSID Case No. ARB/10/22, Award, September 5, 2013 ("*Dede* Award").

[38] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, Art. 31, **CLA-4**; Claimant's Response, para. 40; and Respondent's Reply, para. 30.

[39] Respondent's Reply, para. 31.

[40] Respondent's Reply, para. 60.

synonyms or substitutes,[41] which the arbitral fora enumerated in Article VI(3)(a) are not.[42] The inclusion of "choose" in the provision confirms this interpretation.[43]

43. Article VI(3)(a), therefore, authorises only one choice among ICSID, the ICSID Additional Facility, UNCITRAL, or an agreed arbitration institution.[44] Because Article VI(2) of the BIT offers exclusive and irrevocable choices with regard to the mode of dispute resolution,[45] Respondent characterises Article VI(3)(a) as a "fork-within-a-fork."[46]

44. Respondent contends that assigning a conjunctive meaning to "or" in Article VI(3)(a) would lead to multiple "agreements in writing," in violation of the New York Convention to which Article VI(4)(b) of the BIT refers.[47] It would also allow investors to consent to more than one arbitral forum, which would effectively give the host State—and not the investor, as intended by the Parties—the right to select the forum.[48]

45. Respondent cites the following in support of its position: authority stating that "or" typically conveys an exclusive choice;[49] linguistics scholarship cautioning against presuming the inclusive definition of "or;"[50] and commentary on Article 24(3) of the 2004 US Model BIT that states that the selection of a dispute settlement forum forecloses options initially open to

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[41] Respondent's Reply, paras. 58-60, *citing* P. Gove, ed., Merriam-Webster's Third New International Dictionary of the English Language Unabridged (1993), p. 1585, **CEX-169** and The American Heritage Dictionary of the English Language (3rd Ed.) (1992), p. 1271, **CEX-170**.

[42] Respondent's Reply, para. 60.

[43] Respondent's Reply, para. 61.

[44] Objections to Jurisdiction, paras. 66-67.

[45] Objections to Jurisdiction, para. 65.

[46] Objections to Jurisdiction, para. 65.

[47] Respondent's Reply, para. 62.

[48] Respondent's Reply, para. 62; Hearing Transcript (21 May 2013), 37:12-18.

[49] Respondent's Reply, para. 63, *citing K.* Adams & A. Kaye, *Revisiting the Ambiguity of "And" and "Or" in Legal Drafting*, 80(4) ST. JOHN'S L.R. 1167, 1180-1181 (2006), *referring* to the Cambridge Grammar of English Learning. *See also* Respondent's Reply, para. 63, *citing* Nolan and Nolan-Haley, eds., Black's Law Dictionary (6th ed., 1990), p. 1095, **RLA-207** *stating* that "or" is a "disjunctive particle used to express an alternative or give a choice." *See also* Hearing Transcript (21 May 2013), 23:11-19, *citing* the Cambridge Grammar of English Language.

[50] Respondent's Reply, para. 64, *citing* K. Adams & A. Kaye, *Revisiting the Ambiguity of "And" and "Or" in Legal Drafting*, 80(4) ST. JOHN'S L.R. 1167, 1183 (2006)

the parties.[51] Respondent stresses that Article 24(3) of the 2004 US Model BIT operates as a fork-in-the-road even if it lists arbitral fora.[52]

46. Respondent contends that Claimant interprets "or" as denoting temporal exclusivity, evincing that it in fact accepts the disjunctive definition of the word.[53]

47. Respondent points out that the mutual exclusivity of the options of ICSID and the ICSID Additional Facility that is specified in Article VI(3)(a)(ii) of the BIT is a matter of fact and independent of the Parties' choice on this matter, and cannot therefore support Claimant's argument that any limitations to the operation of Article VI(3)(a)(ii) would have been indicated in that provision.[54]

48. Respondent characterises the phrase "under one of the following alternatives" as superfluous to Article VI(2),[55] whose fork-in-the-road effect, it says, is sufficiently established by "or."[56] Respondent contends that the absence of this phrase from Article VI(2) of the 1992 US Model BIT, from which Article VI(2) of the US-Ecuador BIT was copied verbatim, did not prevent the former from operating as a fork-in-the-road.[57] As acknowledged by both the *Lanco* tribunal and Claimant, this is the case as well for Article VII(2) of the Argentina-US BIT, which was also copied from Article VI(2) of the 1992 US Model BIT.[58]

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[51] Respondent's Reply, para. 65-66, *citing* A. Reinisch & L. Malintoppi, *Methods of Dispute Resolution*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 691 (Muchlinski *et al.*, eds. 2008, pp. 692-693), **RLA-208.**

[52] Hearing Transcript (21 May 2013), 34:19-22.

[53] Respondent's Reply, para. 68, *citing* Vandevelde Opinion, para. 62.

[54] Hearing Transcript (22 May 2013), 145:1 to 146:17.

[55] Respondent's Reply, para. 42-43, *citing* Vandevelde Opinion, para. 63.

[56] Respondent's Reply, paras. 33-34.

[57] Respondent's Reply, para. 35-36, 51-52, *referring to* The 1992 U.S. Model BIT (Art. VI(2)) *reprinted in* U.S. International Investment Agreements 810 (K. Vandevelde, 2009), p. 813, **RLA-205**. To illustrate that Article VI(2) of the 1992 US Model BIT indisputably operated as a fork-in-the-road, Respondent refers to the verbatim incorporation of this provision in seven BITs whose respective Letters of Submittal from the U.S. Department of State to the Committee of Foreign Relations of the U.S. Senate all describe this provision as allowing the investor to make "an exclusive and irrevocable choice" of the options so listed. Respondent's Reply, paras. 37-39. *See also* Hearing Transcript (21 May 2013), 27:14-20.

[58] Hearing Transcript (21 May 2013), 27:21 to 28:2.

49. Turning then to Article VI(3)(a) of the US-Ecuador BIT, Respondent argues that "the absence of ["under one of the following alternatives"] in Article VI(3)(a) is as irrelevant as its presence is in Article VI(2)."[59] It states that the similarity of the language structures of Article VI(2) and Article VI(3)(a) of the US-Ecuador BIT—i.e. "may choose (1) or (2) or (3)"—extends the indisputable fork-in-the-road effect of the former provision to the latter.[60] It highlights the word "choose" in Article VI(3)(a) as denoting disjunction, as is the case for the same word in the preceding Article VI(2).[61] Respondent further points out that this language structure derives from Articles VI(2) and Article VI(3)(a) of the 1992 US Model BIT.[62]

50. Based on the interrelation between Articles VI(2) and VI(3)(a) of the US-Ecuador BIT, Respondent argues that, because the "or" in Article VI(2) operates disjunctively irrespective of whether there is a decision on the merits, the "or" in Article VI(3)(a) must be interpreted as operating in exactly the same way.[63] Respondent also highlights the absence of language in Article VI(3)(a) of the US-Ecuador BIT that refers to or otherwise conditions the provision's effectiveness on a decision on the merits.[64] Respondent stresses that "[a] fork is a fork. It's irrevocable, regardless of what happens once it's exercised."[65]

51. Contrary to Claimant, Respondent contends that the doctrine of intertemporal law is "clearly inapplicable here."[66] It submits that the principle of contemporaneity may apply.[67]

52. Respondent rejects Claimant's argument that forks-in-the-road ordinarily delineate between only domestic remedies and international arbitration, stating that: (1) Claimant's argument is not supported by the treaty language as clarified by the accompanying US Letter of Submittal;[68] (2) Claimant does not explain why a clause that lists choices between arbitral fora rather than between courts and arbitral fora cannot operate as a fork-in-the-road;[69] and

[59] Respondent's Reply, para. 45.

[60] Respondent's Reply, para. 44.

[61] Hearing Transcript (21 May 2013), 37:5-8.

[62] Hearing Transcript (21 May 2013), 23:24 to 24:3.

[63] Hearing Transcript (22 May 2013), 160:8-12.

[64] Hearing Transcript (22 May 2013), 160:18-20.

[65] Hearing Transcript (22 May 2013), 202:11-12.

[66] Hearing Transcript (21 May 2013), 27:8-13.

[67] Hearing Transcript (21 May 2013), 27:8-13.

[68] Hearing Transcript (21 May 2013), 30:6-11.

[69] Hearing Transcript (21 May 2013), 30:12-16.

(3) the clauses cited by Claimant in support of its argument are significantly different from Article VI(3)(a) of the US-Ecuador BIT.[70] Respondent contends that "the true purpose of fork-in-the-road clauses is not to distinguish between domestic and international remedies, but [is] rather the avoidance of the multiplicity of proceedings with respect to the same investment dispute."[71] As "the fork in the road is designed to prevent the investor having several bites at the cherry,"[72] Claimant's interpretation would "subvert the long-standing US policy of avoiding multiple proceedings underlying the election of [the] remedies provisions."[73]

53. Respondent argues that the addition of the phrase "under one of the following alternatives" to Article VI(2) of the 1994 US Model BIT was intended to clarify the already unambiguous exclusivity and irrevocability of the choice of dispute-resolution fora among those listed therein.[74] It points out that the said provision operates as a fork-in-the-road even without this phrase,[75] as do corresponding provisions in seven other US BITs that had incorporated Article VI(2) of the 1992 US Model BIT verbatim.[76] Respondent stresses that "identical language cannot be used to describe two different things, which would have to be the case were Article VI(3)(a) [of the US-Ecuador BIT] to be read as not operating as a fork-in-the-road in the face of the [other US BIT provisions] that do operate as a fork-in-the-road."[77] It also contends that not only was the addition of the phrase "under one of the following alternatives" unnecessary to Article VI(2) but its absence from Article VI(3) of the US-Ecuador BIT should not create any negative implication.[78]

54. As to Claimant's argument that Respondent's interpretation violates the *effet utile* principle, Respondent notes that the "*effet utile* rule of interpretation does not dictate that every single word or phrase employed in a treaty must have a meaning that is unique and different from the meaning of every other word or phrase used in the same treaty."[79] It also notes that treaty

[70] Hearing Transcript (21 May 2013), 30:17-21.

[71] Hearing Transcript (21 May 2013), 34:23 to 35:5.

[72] Hearing Transcript (21 May 2013), 32:15-17.

[73] Respondent's Reply, para. 55, *citing* Professor Vandevelde Opinion, paras. 56-57.

[74] Respondent's Reply, para. 49, *citing* Professor Vandevelde's Opinion, paras. 58-59.

[75] Hearing Transcript (21 May 2013), 39:6-10.

[76] Hearing Transcript (21 May 2013), 39:11-18.

[77] Hearing Transcript (22 May 2013), 200:9-17.

[78] Respondent's Reply, paras. 49, *citing* Professor Vandevelde's Opinion, para. 58; Hearing Transcript (21 May 2013), 42:13-19.

[79] Hearing Transcript (21 May 2013), 43:24-25 to 44:1-2.

language can serve a "confirmatory or clarificatory" purpose,[80] as is the case for the said phrase. Respondent argues that the *effet utile* principle would in fact work against Claimant, whose interpretation would diminish the effect given to the word "or" in the relevant provisions of the 1992 US Model BIT.[81]

B. Claimant's Position

55. Claimant argues that Article VI(3)(a) of the US-Ecuador BIT enumerates available and equivalent arbitral fora but does not operate as a fork-in-the-road.[82]

56. Claimant contends that the analysis for ascertaining the ordinary meaning of Article VI(3)(a) of the US-Ecuador BIT should not extend to the other treaties discussed by Respondent and should be constrained to that BIT alone.[83] For example, Claimant highlights that the 1992 US Model BIT—upon which the US-Ecuador BIT was based— is only a model treaty and not an actual one, and, further, reflects the intention of the United States alone.[84]

57. Claimant attributes the fork-in-the-road effect of Article VI(2) of the US-Ecuador BIT to the phrase "under one of the following alternatives."[85] It points out that this phrase was not present in the 1992 US Model BIT and was specifically inserted in Article VI(2) but not Article VI(3)(a) of the US-Ecuador BIT.[86] This phrase not only signifies the mutual exclusivity of the choices listed in the provision but also requires the selection of a single option among them.[87] That Article VI(3)(a) contains neither this phrase nor language analogous to it[88] proves that the Parties did not intend Article VI(3)(a) to operate as a fork-in-the-road.[89]

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[80] Hearing Transcript (21 May 2013), 44:14-15.

[81] Hearing Transcript (21 May 2013), 44:24-25 to 45:1-5.

[82] Claimant's Response, paras. 48-49; Hearing Transcript (21 May 2013), 107:17-20.

[83] Hearing Transcript (21 May 2013), 104:5-10.

[84] Hearing Transcript (22 May 2013), 211:11-13.

[85] Claimant's Response, para. 43, 45; Hearing Transcript (21 May 2013), 104:15-19.

[86] Hearing Transcript (21 May 2013), 104:20-22.

[87] Claimant's Response, para. 43, 45.

[88] Claimant's Response, para. 47, *referring* to analogous language found in Ecuador's other BITs; Hearing Transcript (21 May 2013), 108:9-11.

[89] Claimant's Rejoinder, para. 41, *stating* that the Tribunal should first look at the words chosen by the parties in order to ascertain their intention with regard to the BIT.

58. Claimant alleges that Respondent should be prevented from "insert[ing] this language 'under one of the following alternatives' into Article VI(3) where it's not there."[90] It summarises its argument on this point as follows:

> [t]he absence of the phrase, 'one of the following alternatives,' gives Article VI(3) an inclusive character, which means the choice is not exclusive and irrevocable but can result in a second choice in some circumstances like we have here; namely, a jurisdictional decision without a decision on the merits and where the State has withdrawn in the interim from the original forum.[91]

59. Further to this argument, Claimant highlights that the only textual limitation in Article VI(3)(a)—which is that the investor can choose the Additional Facility of ICSID only if ICSID itself is not available, as per Article VI(3)(a)(ii)—is specifically included therein.[92]

60. Claimant argues that the phrase "under one of the following alternatives" has a meaning of its own and does not merely enhance the effect of "or" in Article VI(2). It points out that Professor Vandevelde, Respondent's legal expert who takes a contrary position, did not negotiate the US-Ecuador BIT.[93] Claimant also submits that the opinion of Professor Vandevelde disregards both his contemporaries' work and supporting documentation,[94] and is discredited by his characterisation of the only phrase differentiating Articles VI(2) and VI(3)(a) of the US-Ecuador BIT as "superfluous."[95] Claimant stresses that "treaties cannot be interpreted and should not be interpreted if there is a way to do so, to render the provisions superfluous. They have to be given some meaning."[96] This is especially the case because of the specific insertion of this phrase in the 1994 US Model BIT.[97]

61. Claimant contends that the four choices listed in Article VI(3)(a) would have been incorporated in the three choices found in Article VI(2) if the former was intended to operate as a fork-in-the-road.[98]

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[90] Hearing Transcript (21 May 2013), 108:18 to 109:12, *discussing The Rompetrol Group N.V. v Romania*, ICSID Case No. ARB/06/3, Award (6 May 2013).

[91] Hearing Transcript (22 May 2013), 211:1-8.

[92] Hearing Transcript (21 May 2013), 107:23 to 108:3.

[93] Claimant's Rejoinder, para. 68.

[94] Claimant's Rejoinder, para. 67.

[95] Claimant's Rejoinder, paras. 69-70.

[96] Hearing Transcript (21 May 2013), 105:19-21.

[97] Hearing Transcript (21 May 2013), 105:22-24.

[98] Claimant's Rejoinder, para. 72, *citing* Professor Ratner's Opinion, para. 15.

62. Claimant argues that the Letter of Submittal of the US-Ecuador BIT treats the general choice of arbitration as "exclusive and irrevocable," but does not expound on Article VI(3)(a).[99]

63. According to Claimant, the 2004 US Model BIT does not shed light on the US-Ecuador BIT. First, the US-Ecuador BIT must be interpreted as of the time it was executed, which was more than a decade prior to 2004.[100] Second, the placement of "or" after each arbitral forum in Article VI(3)(a) of the US-Ecuador BIT establishes the equivalence of the enumerated fora, which is not the case for the single "or" located after the penultimate forum in the corresponding Article 24(3) of the 2004 US Model BIT.[101] And third, Article 24(3) operates as a fork-in-the-road because the 2004 US Model BIT imposes arbitration as the sole means to resolve investment disputes, which the US-Ecuador BIT does not.[102]

64. Claimant contends that the "or" in Article VI(3)(a), unlike the phrase "under one of the following alternatives" or similar language,[103] cannot establish the mutual exclusivity of the listed arbitral fora because:

> the word "or" separating the choices of arbitral fora in Article VI(3) should be interpreted as prohibiting a foreign investor from instituting multiple arbitrations in different fora concurrently, but not as making an investor's choice irrevocable in the event its submission to any one such arbitral forum is rejected on jurisdictional grounds. Thus, as long as (i) an investor's submission to a particular arbitral forum is exclusive in time and (ii) the merits of the investment dispute have not been decided by any forum, an investor is permitted to re-file its claims before any of the arbitral tribunals listed in Article VI(3)—particularly when, as here, the original forum is no longer available due to the exclusive conduct of one of the Parties in withdrawing from that forum before the jurisdictional defect could be cured.[104]

65. At the hearing, Claimant agreed that "'or' could be read consistent with the *effet utile* to mean that the choice is exclusive insofar as it results in a decision on the merits."[105]

[99] Claimant's Rejoinder, para. 73, *citing* Professor Ratner's Opinion, para. 34.

[100] Claimant's Rejoinder, para. 74.

[101] Claimant's Rejoinder, para. 75-76.

[102] Claimant's Rejoinder, para. 77.

[103] Claimant's Response, para. 48.

[104] Claimant's Response, para. 44 n. 38.

[105] Hearing Transcript (22 May 2013), 175:18-21.

66. Claimant rejects Respondent's argument that the fork-in-the-road effect of Article VI(2) of the US-Ecuador BIT operates without regard to whether a claimant can achieve a decision on the merits, explaining that the fact that "you have … access to the domestic court system suggests that you will get a decision on the merits."[106] Claimant also stresses that the purpose of the fork is to lead to a decision on the merits.[107]

67. Claimant argues that Article VI(3)(a) uses "or" in its inclusive sense, in order to signify an enumeration or equivalence.[108] This would not cause Article VI(3) to establish "multiple agreements in writing" in violation of Article II of the New York Convention.[109] Article II of the New York Convention ascertains the existence of the arbitration agreement.[110] Claimant maintains that because Articles VI(2) and VI(3)(a) of the US-Ecuador BIT are not agreements to arbitrate but rather offers from the host States to do so,[111] only one arbitration agreement is created each time an investor consents to arbitration under Article VI(3)(a).[112]

68. Relying on the doctrine of inter-temporal law, under which treaty interpretation must use the meaning of words at the time the treaties were drafted,[113] Claimant concludes that "the dominant position at the time of the negotiation and signing of the BIT was that 'or' was to be interpreted in its inclusive sense, unless special care had been taken by the drafter to make it exclusive."[114]

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[106] Hearing Transcript (22 May 2013), 178:12-14.

[107] Hearing Transcript (22 May 2013), 179:18-21.

[108] Claimant's Response, para. 44, *citing* Merriam-Webster Dictionary of the English Language Unabridged 1585 (1993), **CEX-169** and American Heritage Dictionary of the English Language 1271, **CEX-170**.

[109] Claimant's Rejoinder, para. 61.

[110] Claimant's Rejoinder, para. 62.

[111] Claimant's Rejoinder, para. 63; R. Dolzer and C. Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2008), p. 243, **CLA-234**.

[112] Claimant's Rejoinder, para. 64.

[113] Claimant's Rejoinder, para. 51.

[114] Claimant's Rejoinder, paras. 52-53, 55. The US-Ecuador BIT was negotiated and drafted between 1988 and 1993. Claimant's Rejoinder, para. 52. The legal scholarship discussed by Claimant dates from 1965 to 1995. Claimant's Rejoinder, para. 55; Hearing Transcript (21 May 2013), 109:13-17.

69. The inclusion of the phrase "under one of the following alternatives" in Article VI(2) of the BIT illustrates this "special care."[115] This phrase was necessary to negate the preference for the inclusive definition of "or"[116] and to create the fork-in-the-road effect in Article VI(2).[117] Claimant reiterates that the word "'[o]r'" alone is at best ambiguous, and at the time that the Treaty was drafted, the more common meaning was that it was inclusive."[118] Claimant states that while both Articles VI(2) and VI(3) provide methods of dispute settlement and arbitral fora, respectively, only Article VI(2) lists "irrevocable choices."[119] As for the phrase "under one of the following alternatives," Claimant states that "just as an investor … is not necessarily precluded from making a second choice under the limited circumstances … so too the reference to 'one of the several arbitral alternatives' does not mean that the investor may not … choose another 'one' in the same limited circumstances."[120]

70. Claimant submits that fork-in-the-road provisions are included in BITs in order to "prevent an investor from submitting the same claim to both domestic courts of the host State and international arbitration."[121] Such provisions do not force investors to make an irrevocable selection between two international arbitral fora.[122] While States are of course free to draft fork-in-the-road provisions between different arbitral fora, this should be established with clear textual evidence[123] that is not present in this case.

[115] Claimant's Rejoinder, para. 53.

[116] Claimant's Rejoinder, para. 54.

[117] Claimant's Rejoinder, para. 54.

[118] Hearing Transcript (21 May 2013), 109:23-25.

[119] Claimant's Rejoinder, para. 56; Professor Ratner's Opinion, para. 16.

[120] Hearing Transcript (21 May 2013), 176:5-10.

[121] Claimant's Rejoinder, paras. 35-39, *citing* R. Dolzer and C. Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2008), p. 216, **CLA-234**; C. McLachlan, L. Shore and M. Weiniger, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (2007), pp. 55, 95, **CLA 235**; and K. Vandevelde, BILATERAL INVESTMENT TREATIES: HISTORY, POLICY AND INTERPRETATION (2010), pp. 441-42, **CLA-236** and K. Vandevelde, *Chapter 18: Arbitration Provisions in the BITs and the Energy Charter Treaty*, in T. Walde (Ed.), The Energy Charter Treaty: An East-West Gateway for Investment and Trade (1996), p. 416, **CLA-261**; Prof. Ratner's Opinion, para. 27; Hearing Transcript (21 May 2013), 106:9-15.

[122] Claimant's Rejoinder, para. 39.

[123] Claimant's Rejoinder, para. 40; Hearing Transcript (21 May 2013), 106:18 to 107:1.

Context of Article VI(3)

A. Respondent's Position

71. Respondent states that Article VI(3)(b) authorises an investor to initiate arbitration in accordance with its single choice of arbitration procedure.[124]

72. Respondent highlights the phrase "the choice" in Article VI(4), which it states "connotes singularity and finality,"[125] and contends that "[b]oth Article VI(3)(b) and (4) [of the US-Ecuador BIT] contemplate one choice, the creation of one consensual bond between the claimant investor and the host State."[126]

73. Respondent argues that the US Letter of Submittal of the US-Ecuador BIT—which states that "paragraphs 2 and 3 [of Article VI] set forth the investor's range of choices of dispute settlement [and states that the] investor may make an exclusive and irrevocable choice to: (1) employ one of the several arbitration procedures outlined in the Treaty…."[127]— describes the choice of an arbitral forum as "exclusive and irrevocable."[128] It also cites other US BITs that had incorporated Article VI(3)(a) of the 1992 US Model BIT and whose accompanying Letters of Submittal state the same thing.[129] Respondent further highlights the statement in the Letter of Submittal that the phrase "under one of the following alternatives" in Article VI(2) does not alter the operation of the said provision, which it contends Claimant has overlooked.[130]

[124] Respondent's Reply, para. 74.

[125] Hearing Transcript (21 May 2013), 37:22 to 38:4.

[126] Respondent's Reply, para. 75, *citing* Professor Vandevelde's Opinion.

[127] Respondent's Reply, paras. 51-52.

[128] Objections to Jurisdiction, para. 69; Respondent's Reply, para. 78; Hearing Transcript (21 May 2013), 25:11-18.

[129] Hearing Transcript (21 May 2013), 26:10-17.

[130] Respondent's Reply, para. 80; Hearing Transcript (21 May 2013), 41:20-22.

B. Claimant's Position

74. Claimant reiterates that the term "context" is limited to the Treaty itself and the provisions surrounding Article VI.[131] It then argues that both the Message of Submittal and the Letter of Submittal of the US-Ecuador BIT "are unilateral expressions of the United States' position. They tell us nothing about Ecuador's position, and there is no suggestion that Ecuador accepted them as instruments in any formal way."[132]

75. In response to a question at the hearing, Claimant clarified that there is no contradiction in relying on the Message of Submittal and the Letter of Submittal accompanying the US-Ecuador BIT for the "object and purpose" of Article VI(3)(a). But Claimant submits that these documents do not meet the Vienna Convention definition of "context".[133]

76. Claimant contends that the Letter of Submittal of the US-Ecuador BIT[134] establishes the exclusivity and irrevocability of the choices presented in Article VI(2) but does not do so for Article VI(3)(a).[135] Not only does the Letter of Submittal classify the options presented in Article VI(2) as "exclusive and irrevocable"[136] but it also clarifies that Article VI(2) "adds to the prototype BIT language a phrase reiterating that the investor may choose among three alternatives."[137] As to Article VI(3)(a), however, the Letter of Submittal is silent.

77. Claimant clarifies that Article VI(4), which reiterates the State Parties' consent to arbitration, mentions Article VI(3)(a) but does not expound on it or otherwise limit the investor's choice of an arbitral forum.[138]

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[131] Hearing Transcript (21 May 2013), 110:6-9.

[132] Hearing Transcript (21 May 2013), 110:13-16.

[133] Hearing Transcript (22 May 2013), 181:1-12.

[134] BIT Letter of Submittal, **REX-15**.

[135] Claimant's Rejoinder, para. 82. Claimant also points out that an analysis of the context of Article VI(3)(a) of the US-Ecuador BIT, under Article 31(2) of the Vienna Convention, should have been restricted to the neighbouring provisions of Articles VI(2) and VI(3), and that both Parties therefore exceeded this scope erroneously. Claimant's Rejoinder, para. 81, *citing* Professor Ratner's Opinion, para. 33.

[136] Claimant's Response, para. 52.

[137] Claimant's Response, para. 53, *citing* BIT Letter of Submittal, **REX-15**.

[138] Claimant's Rejoinder, para. 86, *citing* Professor Ratner's Opinion, para. 32.

Object and purpose of the BIT

A. Respondent's Position

78. According to Respondent, the BIT does not guarantee access to international arbitration[139] and has objectives beyond the protection of investment.[140] Specifically, Article VI of the US-Ecuador BIT has for its purpose the avoidance of multiple proceedings.[141] Respondent notes that its interpretation of Article VI(3)(a) of the BIT serves the purpose of allowing Claimant recourse to international arbitration because it provides Claimant access to effective arbitration for as long as it meets certain conditions.[142]

79. Respondent stresses the importance of abiding by the actual agreement of the Parties,[143] especially because the fact that Respondent had allowed itself to be compelled to international arbitration is a significant concession of its sovereignty.[144] Respondent notes that the consent of a State to arbitration cannot be presumed,[145] which it contends Claimant has done.[146]

80. Respondent argues that "dispute-settlement clauses must be interpreted neither restrictively nor expansively."[147] It contends that the *effet utile* principle does not require that "maximum effect" be given to a text[148] and therefore does not mandate the assignment of an expansive interpretation to such a clause.[149] Further, Respondent argues that "the principle of *effet utile*

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[139] Respondent's Reply, para. 87, *citing* Claimant's Response, para. 59; Hearing Transcript (21 May 2013), 46:8-12.

[140] Respondent's Reply, para. 84, *citing Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award (17 Mar. 2006), para. 300, **RLA-162** (expounding on the Netherlands-Czech Republic BIT, the preamble of which is allegedly similar to that of US-Ecuador).

[141] Hearing Transcript (21 May 2013), 46:4-6.

[142] Hearing Transcript (21 May 2013), 46:20 to 47:5.

[143] Respondent's Reply, para. 84 (emphasis in the original), *citing American Airlines v. The Slovak Republic*, UNCITRAL, Final Award (9 Oct. 2009), para. 101, **RLA-159** and *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award (22 Aug. 2012), para. 164, **RLA-145** (internal citations omitted) (stating that "It is for States to decide how best to protect and promote investment. The texts of the treaties they conclude are the definitive guide as to how they have chosen to do so.").

[144] Hearing Transcript (21 May 2013), 13:21 to 14:8.

[145] Respondent's Reply, para. 90, *citing* Article 31(3)(c) of the Vienna Convention and para. 92 citing *ICS v. Argentina*, para. 280, **RLA-2**.

[146] Respondent's Reply, para. 94.

[147] Hearing Transcript (21 May 2013), 47:11-13.

[148] Hearing Transcript (21 May 2013), 48:13-14.

[149] Hearing Transcript (21 May 2013), 48:7-9.

is not useful for the Tribunal in making a choice between [the Parties'] interpretations" because both of these interpretations do afford Murphy a choice of arbitral forum.[150]

81. Respondent contends that Claimant has interpreted Article VI of the US-Ecuador BIT to give itself "another bite at the cherry contrary to the terms of the provision;" this, it says, is manifestly absurd and unreasonable.[151] It maintains that Claimant exercised its right to submit the Parties' dispute to international arbitration in the ICSID Arbitration,[152] but its non-compliance with the negotiation requirement led to the dismissal of its claims.[153]

82. Respondent submits that the present unavailability of ICSID arbitration stems not from its denunciation of the ICSID Convention but from Claimant's consent to ICSID when Respondent's denunciation was obviously forthcoming.[154]

83. Respondent states that the dismissal of Claimant's claim for lack of jurisdiction will not prevent it from being heard on the merits. Other applicable bodies of law or remedial venues, such as diplomatic protection, do remain available to Claimant.[155]

B. Claimant's Position

84. Claimant states that one of the objects of the US-Ecuador BIT is to protect investments and grant investors access to arbitration.[156] The Preamble of the BIT obliges Respondent to provide "fair and equitable treatment of [Murphy's] investment" and to "maintain a stable framework for investment."[157] Similarly, the Letter of Submittal of the US-Ecuador BIT

[150] Hearing Transcript (21 May 2013), 49:6-14.

[151] Respondent's Reply, para. 89.

[152] Respondent's Reply, para. 88.

[153] Respondent's Reply, para. 88.

[154] Respondent's Reply, para. 88, *referring to* Ecuador's Notification to ICSID No. 4-3-74/07 (4 Dec. 2007), **CEX-111**.

[155] Respondent's Reply, para. 23, *citing* C. Schreuer *et al.*, THE ICSID CONVENTION: A COMMENTARY (2009), p. 424, **RLA-197**.

[156] Claimant's Response, paras. 57-58, *citing* BIT Letter of Transmittal, **REX-15** (where the Message from the President of the United States stated that "under this Treaty, the Parties also agree to international law standards for … the investors' freedom to choose to resolve disputes with the host government through international arbitration" and that "the Treaty's approach to dispute settlement will serve as model [sic] for negotiation with other Andean Pact countries").

[157] Claimant's Rejoinder, para. 89, *referring* to US-Ecuador BIT Preamble, para. 4, **CEX-1**.

states that the latter authorises investors to bypass domestic courts and resort to binding international arbitration.[158]

85. Claimant notes that Article 32(b) of the Vienna Convention prohibits a treaty interpretation that would lead to a "manifestly absurd or unreasonable" result.[159]

86. Claimant contends that Respondent's interpretation of Article VI(3)(a) violates Article 32(b) of the Vienna Convention[160] because, under the unique circumstances of this case, it would prevent any tribunal from reaching the merits of Claimant's claim.[161] While Respondent has identified an ICSID arbitration as Claimant's only option, Respondent's denunciation of the ICSID Convention has made it impossible for Claimant to resubmit its claim to this forum.[162] Respondent's interpretation therefore extinguishes Claimant's right to arbitration.[163]

87. Claimant's position, in other words, is that "to interpret a treaty so as to permit a new choice to consent is particularly warranted in a situation where the legal posture of the Respondent has changed significantly due to its withdrawal from the ICSID Convention."[164] Claimant stresses that "it would be manifestly absurd and unreasonable to deny Murphy an alternative [to international arbitration] in light of Ecuador's withdrawal from ICSID."[165]

88. Claimant argues that Respondent's interpretation also violates the principle of *effet utile* because it renders Article VI meaningless[166] and does not facilitate the access of investors to the listed dispute resolution procedures.[167] Claimant contends that the "absolute right to

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[158] Claimant's Rejoinder, para. 87, *citing* Respondent's Reply, para. 84 and Claimant's Response, paras. 56-58. Hearing Transcript (21 May 2013), 112:1-7.

[159] Claimant's Response, para. 60, *citing* Vienna Convention, Art. 32(b) and para. 61, *citing BG Group plc v. Argentina*, UNCITRAL, Final Award, December 24, 2007, para. 147, **CLA-25.** Claimant refers to *BG v. Argentina*, where the tribunal relied on this provision to strike an exhaustion-of-local-remedies clause from the BIT because Argentina conditioned the access of investors to domestic courts on the renunciation of their right to international arbitration. *Id.*, at para. 61.

[160] Claimant's Response, para. 62.

[161] Claimant's Response, para. 60; Claimant's Rejoinder, para. 96.

[162] Claimant's Response, para. 60; Hearing Transcript (21 May 2013), 113:17-22.

[163] Claimant's Rejoinder, para. 91.

[164] Hearing Transcript (21 May 2013), 113:12-17.

[165] Hearing Transcript (22 May 2013), 212:12-14.

[166] Claimant's Rejoinder, para. 96.

[167] Claimant's Rejoinder, para. 93-95, *citing* Professor Ratner's Opinion, para. 9 and *Asian Agricultural Products LTD (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, June 27, 1990, para. 40, **CLA-61** [other citations omitted]; *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, December 8, 2008,, para. 84, quoting the August 27, 1952 judgment in *Case concerning Rights of Nationals of the United States of America in Morocco*, ICJ Reports, 1952 , p. 196, **RLA-158**, and *United Parcel*

binding arbitration of investment disputes, which implies the dispute ought to be settled, resolved in some way" is made relevant because of the *effet utile* principle.[168] Apart from requiring the Tribunal to give effect to the phrase "under one of the following alternatives" that is present in Article VI(2) but not Article VI(3)(a), the *effet utile* principle also "requires the Tribunal, under the circumstances of this case where Ecuador has withdrawn from ICSID, to interpret the dispute-resolution clause to give Murphy an opportunity to have its dispute adjudicated on the merits rather than to foreclose this opportunity."[169]

89. Given that the right to submit disputes to international arbitration is such a central feature of the BIT, Claimant argues that "to interpret access to international arbitration in the narrow manner that Ecuador advocates by which no arbitral decision on the investment dispute would ever be reached would chill foreign investment rather than promote it, and would be inconsistent with the BIT's object and purpose."[170]

90. Claimant stresses that Articles VI(2) and VI(3)(a) of the US-Ecuador BIT contain Respondent's consent to UNCITRAL arbitration.[171] Respondent's position in the ICSID Arbitration was "that there was no consent on [its] part […] to ICSID arbitration for Murphy International's claims."[172] This clearly establishes that Claimant's initiation of the ICSID Arbitration did not trigger Respondent's consent to international arbitration, which means that such consent occurred for the first time in the present proceedings.[173]

91. Claimant differentiates the case at hand from that in *Daimler v. Argentina*, which involved a dispute resolution clause that positioned ICSID arbitration and UNCITRAL arbitration, as mutually exclusive and irrevocable alternatives through the use of "either…or."[174] Notwithstanding this restrictive language, however, the *Daimler v. Argentina* tribunal still referred to the possibility of having a "future arbitration proceeding."[175]

Service of America Inc. v. Government of Canada, NAFTA, Award on the Merits, May 24, 2007, para. 60, **CLA-266**.

[168] Hearing Transcript (21 May 2013), 112:11-17.

[169] Hearing Transcript (21 May 2013), 112:17-24.

[170] Hearing Transcript (22 May 2013), 182:16-20.

[171] Claimant's Response, para. 63; Claimant's Rejoinder, para. 100.

[172] Claimant's Rejoinder, para. 100, *citing* Ecuador's ICSID Objections to Jurisdiction, para. 37, **RLA-11**.

[173] Claimant's Rejoinder, para. 100.

[174] Claimant's Rejoinder, paras. 98-99, *citing Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/01, Award, August 22, 2012 ("*Daimler* Award"), paras. 172, 174-175, **RLA-145**.

[175] Claimant's Rejoinder, para. 99, *citing* the *Daimler* Award, para. 284(4), **RLA-145**.

92. Claimant characterises diplomatic protection as "potentially ineffective for the investor"[176] and a "frequent source of irritation for [developing countries], and dismisses it as an alternative to arbitration."[177]

Resubmission jurisprudence

A. Claimant's Position

93. Claimant contends that the "resubmission jurisprudence conclusively establishes that a claimant whose original claim was dismissed for lack of jurisdiction is not precluded from commencing a new claim once the original jurisdictional flaw has been corrected."[178]

94. Claimant refers to *Waste Management v. Mexico*,[179] where the tribunal accepted a claim that was re-filed by the claimant after its failure to meet a jurisdictional requirement led to the dismissal of its initial claim.[180] It quotes the relevant part of the holding, as follows:

> In international litigation the withdrawal of a claim does not, unless otherwise agreed, amount to a waiver of any underlying rights of the withdrawing party. Neither does a claim which fails for want of jurisdiction prejudice underlying rights: if the jurisdictional flaw can be corrected there is in principle no objection to the claimant State recommencing its action.[181]

95. Claimant contends that this holding is instructive for this case, given the silence or permissiveness of Article VI(3) of the US-Ecuador BIT on the issue of resubmission.[182]

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[176] Claimant's Rejoinder, para. 101, *citing* K. Vandevelde, BILATERAL INVESTMENT TREATIES: HISTORY, POLICY AND INTERPRETATION (2010), pp. 428-30, **CLA-236**.

[177] Claimant's Rejoinder, para. 102, *citing* R. Dolzer and C. Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2008), p. 212, **CLA-234**.

[178] Claimant's Response, para. 65.

[179] Claimant's Response, para. 66, *citing* Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB (AF)/98/2, Arbitral Award, June 2, 2000 ("*Waste Management I* Award"), **CLA-219,** and Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB (AF)/00/3, Decision on Mexico's Preliminary Objections concerning the Previous Proceedings, June 26, 2002 ("*Waste Management II* Decision on Preliminary Objections"), **CLA-190**.

[180] Claimant's Response, para. 66, *citing Waste Management I* Award, **CLA-219,** and *Waste Management II* Decision on Preliminary Objections, **CLA-190**.

[181] Claimant's Response, para. 67, *citing Waste Management II* Decision on Preliminary Objections, para. 36, **CLA-190**. Claimant also points out that the tribunal in *Waste Management II* relied on the *Barcelona Traction* case for its conclusion. Claimant's Response, para. 68

[182] Claimant's Rejoinder, para. 110.

96. Claimant refers to *Daimler v. Argentina*, where the tribunal dismissed the claim filed by Daimler based on its failure to meet a jurisdictional requirement, but then clarified that the claimant could "upon satisfaction of the Treaty's conditions precedent to arbitration … assert any retrospective MFN claims it may have in any future arbitration proceeding …."[183]

97. Claimant refers to the decision in *Tradex Hellas v. Albania*, where the tribunal found that Albania had consented to ICSID jurisdiction partly because "to deny ICSID jurisdiction would force the investor to initiate arbitration under the UNCITRAL rules … and Albania had not indicated whether it would contest jurisdiction of arbitration under the UNCITRAL rules."[184] While *Tradex* did not involve a BIT claim, Claimant asserts its relevance to the case at hand[185] and argues that the Tribunal should allow Claimant to resort to UNCITRAL arbitration given the current unavailability of ICSID arbitration.[186]

98. Claimant refers to *L.E.S.I.—DIPENTA v. Algeria*, where the tribunal dismissed the claim brought by the *de facto* consortium of claimants—on the ground that this consortium was not an authorised investor—but stated that the claimants could file individual claims to meet the jurisdictional requirement.[187]

99. Claimant also refers to the *Dede* Award in which the tribunal found that it did not have jurisdiction because the claimants had failed to litigate their claims for a prescribed period in local courts before instituting arbitration.[188] The tribunal held that its decision was "without prejudice to Claimants' right to file its claims once the jurisdictional preconditions of [the BIT] have been satisfied."[189]

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[183] Claimant's Response, para. 69, *citing Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/01, Award, August 22, 2012, para. 281, **RLA-145**.

[184] Claimant's Rejoinder, para. 112, *citing Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2, Decision on Jurisdiction, December 24, 1996, reported in ICSID Review – Foreign Investment Law Journal, pp. 162-96 ("*Tradex* Decision"), **CLA-255** and Professor Ratner's Opinion, para. 60.

[185] Claimant's Rejoinder, para. 113.

[186] Claimant's Rejoinder, para. 113, *stating* that "if there is only one remaining forum available (UNCITRAL arbitration) to the investor to have its dispute adjudicated (because external circumstances have rendered ICSID arbitration unavailable notwithstanding the cured jurisdictional defect), the investor should be allowed to use it."

[187] Claimant's Response, para. 70, *citing Consorzio Groupement L.E.S.I.—DIPENTA v. République algérienne démocratique et populaire*, ICSID Case No. ARB/03/08. Award, January 10, 2005 ("*L.E.S.I.* Award"), **RLA-25**.

[188] Claimant's e-mail dated 20 September 2013, *citing* the *Dede* Award.

[189] Claimant's e-mail dated 20 September 2013, *citing* the *Dede* Award, para. 275.

100. As for cooling-off periods generally, which was at issue in the ICSID Arbitration, Claimant cites *Ethyl Corporation v. the Government of Canada*, *Ronald S. Lauder v. Czech Republic*, *Wena Hotels*, and *SGS v. Pakistan* to illustrate that the non-observation of cooling-off periods does not lead to the dismissal of claims, as these periods are procedural in nature.[190] Moreover, forcing claimants to re-file their claims when these periods have expired in the meantime would be uneconomical.[191]

101. Claimant states that Article 26 of the ICSID Convention does not prohibit a claimant whose initial claim was dismissed for lack of jurisdiction from bringing a new claim.[192] As this provision "aims at preventing a party to resort to more than one forum simultaneously, or to disrupt an existing choice of forum,"[193] Article 26 prohibits the re-filing of a claim only when there has been a decision on the merits, which is not the case here .[194]

B. Respondent's Position

102. Respondent contends that the cases Claimant cites do not "establish that a claimant whose original claim was dismissed for lack of jurisdiction under one chosen forum may commence a new arbitration before a different arbitral forum absent the consent of the respondent."[195] At most, Respondent argues, they "stand for the proposition that an investor who has consented to an arbitral procedure might be able to resubmit its claims for arbitration, in the case of a curable jurisdictional defect, to the same arbitral forum, provided, of course, that the conditions for accessing that procedure are met."[196]

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[190] Claimant's Response, para. 71, *citing Ethyl Corporation v. the Government of Canada*, NAFTA UNCITRAL Case, Award on Jurisdiction, June 24, 1998 ("*Ethyl Corp.* Award"), paras. 77-84, **CLA-217**; *Ronald S. Lauder v. the Czech Republic*, UNCITRAL Arbitration, Final Award, Sept. 3, 2001 ("*Lauder* Award"), paras. 187-191, **RLA-7**; *Wena Hotels Ltd. v. Egypt*, ICSID Case No. ARB/98/4, Decision on Jurisdiction, June 29, 1999 ("*Wena Hotels* Decision on Jurisdiction"), 41 I.L.M. 881 (2002), para. 891, **CLA-114**; *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, Aug. 6, 2003, para. 184, **RLA-168**.

[191] Claimant's Response, para. 71, *citing* C. Schreuer, *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road,* 5 J. WORLD INV'T & TRADE 231, 239 (2004), **CLA-60**.

[192] Claimant's Response, para. 75.

[193] Claimant's Response, para. 76.

[194] Claimant's Response, para. 75, *citing* C. Schreuer, THE ICSID CONVENTION: A COMMENTARY (2d. Ed., Cambridge 2009), pp. 1105-06, **CLA-191.**

[195] Respondent's Reply, para. 101.

[196] Hearing Transcript (21 May 2013), 49:23 to 50:3.

103. Respondent states that *Waste Management II* was based on language specific to the North American Free Trade Agreement.[197] Moreover, the tribunal in that case stated the default position under international law, which the Parties' specific agreement supersedes.[198] And lastly, *Waste Management II* involved the re-filing of a claim in the original forum,[199] whereas Claimant seeks to re-file its claim in a forum different from its original choice.[200]

104. Respondent points out that *Daimler v. Argentina* did not consider whether Daimler could consent to UNCITRAL arbitration after having consented to ICSID arbitration,[201] and highlights the significant factual difference between *L.E.S.I.—DIPENTA v. Algeria* and the present case.[202] It further stresses that the tribunals in these two cases gave the respective claimants leave to resubmit their claims upon correction of the jurisdictional flaws, which the Murphy I tribunal did not do.[203]

105. Respondent distinguishes *Tradex* from the facts of the case at hand, primarily on the basis that the claimant in *Tradex* was not guaranteed an international forum even if it complied with all preconditions; by contrast, Claimant was guaranteed an international forum if it complied with all requirements.[204]

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[197] Respondent's Reply, para. 97-98, *citing Waste Management II* Decision on Preliminary Objection, para. 35, **CLA-190**. Respondent also points out the curiosity of forgiving a claimant investor for doubting effectiveness of international procedures when that claimant itself has caused the ineffectiveness of such procedures, such as by failing to adhere to the requirements of the BIT or otherwise violating a provision of it. Respondent's Reply, para. 98.

[198] Respondent's Reply, para. 99, *citing Waste Management II*, Decision on Preliminary Objection, para. 36, **CLA-190**.

[199] Respondent's Reply, para. 100.

[200] Respondent's Reply, para. 100.

[201] Respondent's Reply, para. 102.

[202] Respondent's Reply, para. 104.

[203] Respondent's Reply, para. 107, *citing* Muprhy I, para. 157, **CEX-3**; Hearing Transcript (21 May 2013), 50:10-14.

[204] Hearing Transcript (21 May 2013), 50:18 to 51:3.

106. Respondent argues that even if the tribunal's statement in *Dede v. Romania* that its "decision is without prejudice to Claimant's right to file its claims once the jurisdictional preconditions […] have been satisfied" could be considered a determination—which Respondent claims it is not—this does not support Claimant's position that it may chose a *different* forum from the one it originally chose.[205]

107. Respondent distinguishes this case from both *E.T.I. Euro Telecom International N.V. v. Bolivia*, where the parties agreed for the ICSID claim to be withdrawn and resubmitted to UNCITRAL arbitration,[206] and *Nova Scotia Power Incorporated v. Venezuela*, where the respondent stipulated that the case could be submitted to UNCITRAL arbitration.[207]

108. Respondent contends that *Ethyl v. Canada*, *Lauder v. Czech Republic*, *Wena Hotels v. Egypt*, and *SGS v. Pakistan* authorised resubmission to the same forum, but did not consider whether the investor could consent to a forum other than that originally chosen.[208]

109. Respondent refers to *Lauder v. Czech Republic*, where the tribunal characterised the purpose of Article VI(3) of the US-Czech Republic Treaty—which is similar to Article VI(3) of the US-Ecuador Treaty[209]—as preventing a claimant from bringing an investment dispute against the same respondent "before different arbitral tribunals."[210]

110. Respondent argues that Claimant's original selection of ICSID arbitration reinforces Respondent's characterisation of Article VI(3)(a). The ICSID Convention prohibits a party from unilaterally withdrawing its consent when both parties have given their consent[211] and provides that the consent to ICSID arbitration shall be deemed to exclude any other remedy.[212] Respondent also quotes Professor Schreuer's Commentary, as follows: "once consent to ICSID arbitration has been given, the parties have lost their right to seek relief in another forum, national *and* international, and are restricted to pursuing their claim through

[205] Respondent's e-mail dated 27 September 2013.

[206] Respondent's Reply, para. 105, *citing* L. Peterson, "Telecom Italia Subsidiary Agrees to Withdraw ICSID Claim against Bolivia, but Case to Proceed under other Auspices," *Investment Arbitration Reporter* (30 October 2009), **RLA-220** with other citations omitted.

[207] Respondent's Reply, para. 105.

[208] Respondent's Reply, para. 103.

[209] Objections to Jurisdiction, para. 71 n. 62, *citing Lauder* Award.

[210] Objections to Jurisdiction, para. 71, *citing Lauder* Award, para. 161.

[211] Objections to Jurisdiction, para. 70, *citing* Article 25(1) of the ICSID Convention.

[212] Objections to Jurisdiction, para. 70, *citing* Article 26 of the ICSID Convention.

ICSID."[213] It further refers to *Lanco v. Argentina*, where the tribunal stated that "once the investor has expressed its consent in choosing ICSID arbitration, the only means of dispute settlement available is ICSID arbitration."[214]

Validity of Claimant's Consent to Murphy I

A. Claimant's Position

111. Claimant makes the following alternative argument:

> Murphy accepts in the alternative that per the ICSID Tribunal Award of the Murphy First Award and Ecuador['s] position throughout the first and second ICSID proceedings, Murphy's consent to ICSID arbitration was ineffective; and therefore, Murphy has stated and restates that [it] first gave effective consent to international arbitration in its 2011 UNCITRAL Request for Arbitration.[215]

112. Claimant argues that the finding of the Murphy I tribunal confirms the invalidity of Murphy's consent to ICSID arbitration under the BIT.[216] Claimant's legal expert, Professor Ratner, thus submits that "[t]he denial of jurisdiction by one arbitral venue allows the investor to make a claim in another arbitral venue to whose jurisdiction the State has already consented."[217] While it did resubmit its claim to ICSID arbitration (only to withdraw the said claim at a later time), Claimant clarifies that it did not consent anew to ICSID arbitration, but merely used the same consent that the Murphy I tribunal had found to be invalid.[218] Claimant argues that its first valid consent to international arbitration under Article VI(3)(a) of the US-Ecuador BIT was to this UNCITRAL arbitration.[219]

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[213] Objections to Jurisdiction, para. 70, *citing* Schreuer *et al.*, THE ICSID CONVENTION (2nd ed., 2010), p. 351 (para. 2), **RLA-6** [emphasis added by Respondent].

[214] Objections to Jurisdiction, para. 72, *citing Lanco International, Inc. v. Argentine Republic*, ICSID Case No. ARB/97/6, Decision on the Jurisdiction of the Arbitral Tribunal (8 December 1998), para. 31, **RLA-9**. *See also* Objections to Jurisdiction, para. 72, *citing LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Objections to Jurisdiction (30 April 2004), para. 76, **CLA-108**.

[215] Hearing Transcript (21 May 2013), 114:22 to 115:3; Claimant's e-mail dated 20 September 2013.

[216] Hearing Transcript (21 May 2013), 115:4-10.

[217] Hearing Transcript (21 May 2013), 120:11-14.

[218] Hearing Transcript (21 May 2013), 115:16-19.

[219] Hearing Transcript (21 May 2013), 115:20-24.

113. Claimant further argues that the invalidation of its consent to ICSID arbitration is rooted in the text of Article VI(3)(a) of the BIT itself,[220] in that the six-month negotiation period stipulated in that provision is "not just a precondition to Ecuador's consent … [but] is a precondition to Murphy's ability even to choose the perfect [consent] to any of the arbitral forums including ICSID."[221]

114. Turning first to Article VI(2) of the BIT, Claimant identifies three conditions that an investor must meet before submitting a dispute for resolution: (1) that "an investment dispute" had arisen;[222] (2) that the Parties had sought "resolution [of their investment dispute] through consultation and negotiation;"[223] and (3) that the Parties had failed to settle their dispute.[224] According to Claimant, Article VI(4) of the US-Ecuador BIT provides that the consent of the State to arbitrate is subject to the compliance of the investor with the conditions set in Article VI(3).[225] And finally, Article VI(3) provides that the validity of Claimant's consent is subject to the condition "that Murphy had initiated the six months' negotiation, and those six months [had] elapsed from the date on which the dispute arose."[226]

115. Claimant points to the finding of the Murphy I tribunal—whose Award is *res judicata* between the Parties[227]—that the dispute between the Parties had arisen on 29 February 2008, which is when Claimant communicated a treaty breach to Respondent.[228] According to Article VI(3) of the BIT, Claimant could only consent to arbitration six months after this date or on 1 September 2008.[229] Claimant notes that "it is not disputed between the Parties that Murphy only chose to consent in writing to ICSID before September 1st, 2008."[230]

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[220] Hearing Transcript (21 May 2013), 115:11-15.

[221] Hearing Transcript (22 May 2013), 185:19-23.

[222] Hearing Transcript (22 May 2013), 191:15-16.

[223] Hearing Transcript (22 May 2013), 191:20-22.

[224] Hearing Transcript (22 May 2013), 191:23.

[225] Hearing Transcript (22 May 2013), 192:23-25. Claimant also relies on *Dede v Romania* to argue that "an investor's own consent […] can only be effectuated in accordance with the State's standing offer of consent in the BIT", Claimant's e-mail dated 20 September 2013, *citing* the *Dede* Award, para. 190.

[226] Hearing Transcript (22 May 2013), 193:11-14.

[227] Hearing Transcript (22 May 2013), 193:15-16.

[228] Hearing Transcript (22 May 2013), 193:16-20.

[229] Hearing Transcript (22 May 2013), 195:1-3.

[230] Hearing Transcript (22 May 2013), 195:3-5.

B. Respondent's Position

116. Respondent stresses that the Murphy I Award held only that Claimant's failure to comply with the negotiation requirement of Article VI(3) of the BIT resulted in the tribunal not having jurisdiction to decide Claimant's claim.[231]

117. While the failure to comply with a negotiation requirement leads (as in this case) to the dismissal of a BIT claim,[232] Respondent clarifies that "Murphy's failure to satisfy its obligation to negotiate, at least during six months, does not have as a consequence [that] Murphy's choice of ICSID arbitration was null[,] and void or non-existent."[233] Respondent stresses that the consent of the investor to an arbitral forum is separate from the fulfillment of conditions precedent to the State's consent to arbitration.[234] It argues that "the investor can make its election of forum before the condition precedent is satisfied. The limitation is that this election does not perfect the State's consent."[235]

118. In this case, while Claimant's non-compliance with this requirement prevented it from triggering the consent of Respondent to ICSID arbitration,[236] Claimant consented to ICSID arbitration and thereby made an irrevocable choice of arbitral forum.[237] That Claimant recognised the validity and irrevocability of its consent to ICSID arbitration can be discerned from its withdrawal, without prejudice, of its second ICSID claim[238] and by its efforts to seek the agreement of Ecuador on a different arbitral forum.[239]

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[231] Hearing Transcript (21 May 2013), 58:19 to 59:2; Hearing Transcript (22 May 2013), 152:23 to 153:7.

[232] Hearing Transcript (22 May 2013), 206:6-12.

[233] Hearing Transcript (21 May 2013), 68:16-21.

[234] Hearing Transcript (21 May 2013), 61:19-22; Respondent's e-mail dated 27 September 2013.

[235] Hearing Transcript (22 May 2013), 161:12-15; Respondent's e-mail dated 27 September 2013, *citing* the *Dede* Award. Respondent submits that (i) as the Turkey-Romania BIT at issue in *Dede v Romania* does not include any fork-in-the-road provision, the exclusive and irrevocable nature of a choice of arbitral forum was not at issue; (ii) the *Dede* Award was not about conditions to a claimant's consent to arbitrate but rather about conditions to a respondent State's consent to arbitrate and a claimant investor's right to submit a dispute to arbitration; and (iii) the *Dede* Award is not authority for the proposition that an investor's choice to consent to one or the other forum under Article VI(3)(a) of the BIT would be rendered invalid for failure to fulfill a condition precedent to the submission of a claim to arbitration.

[236] Hearing Transcript (21 May 2013), 66:6-9.

[237] Hearing Transcript (22 May 2013), 161:20-25.

[238] Hearing Transcript (21 May 2013), 68:19-21

[239] Hearing Transcript (21 May 2013), 62:8-13.

119. Respondent further argues that the international law principle of *ex injuria non oritur jus*—under which a party cannot create a legal entitlement for itself using its own wrongful conduct[240]—prevents Claimant from using its own non-compliance to the negotiation requirement in Article VI(3) to benefit itself at the expense of Respondent, which is the party protected by this condition precedent.[241]

120. Respondent's position is that Claimant would have been unable, even in the absence of an ICSID denunciation, to commence a second ICSID arbitration on the basis of its original consent to Murphy I, as its original consent was effective."[242] Respondent refrained from stating its position on whether Claimant could have consented anew to ICSID arbitration had Respondent not denounced the ICSID Convention, on the basis that this is not the issue before the Tribunal.[243]

Respondent's alleged breach of good faith, estoppel and preclusion principles

Background

A. Claimant's Position

121. Claimant stresses that it believed it was factually[244] and legally[245] compliant with Article VI of the BIT when it commenced the ICSID Arbitration. It notes that the *jurisprudence constante* and scholarly commentary at that time was that pre-consent waiting periods were not jurisdictional,[246] and highlights the admission of Respondent, made in a different case,

[240] Hearing Transcript (22 May 2013), 161:25 to 162:3.

[241] Hearing Transcript (22 May 2013), 162:8-19.

[242] Hearing Transcript (22 May 2013), 167:14-17.

[243] Hearing Transcript (22 May 2013), 168:2-6.

[244] Claimant's Response, para. 79. Claimant stresses that ample time had passed between its filing of the request for ICSID Arbitration and the time that Ecuador passed Law 42 and received notice from Repsol, the Consortium's operator, for a violation of the Spain-Ecuador BIT based on the same facts. It also points out that it had engaged in negotiations with Respondent before and after the passage of Law 42. Claimant's Response, para. 79, *citing* Murphy's Request for Arbitration, paras. 46-51.

[245] Claimant's Response, para. 79. Claimant states that when it filed its request for ICSID Arbitration, it did so on the basis of unanimous ICSID decisions holding that waiting periods were not jurisdictional requirements but procedural matters. Claimant's Response, para. 79, *citing* Murphy's Request for Arbitration, para. 50.

[246] Claimant's Rejoinder, para. 16.

that its jurisdictional objection was unlikely to succeed.[247] It further points out that non-compliance with waiting periods have been excused based on the futility of negotiations,[248] which Respondent's ultimatum to investors to either comply with Law 42 or abandon their investments guaranteed in this case.[249]

122. Claimant states that it resubmitted its claim to ICSID when Respondent failed to indicate its preferred arbitral forum.[250] It points out that international law imposes consequences on a State's failure to object when faced with an unequivocal proposal to resolve a dispute.[251] Claimant moreover alleges that the combination of Respondent's silence on this matter and its denunciation of the ICSID Convention "have a direct relevance for understanding the good faith of Ecuador's conduct and the consequence of such conduct."[252]

123. Claimant contends that, while Respondent objected to the resubmission of Claimant's ICSID claim, Respondent also posited that Claimant would be allowed to pursue its claims in another forum. Claimant explains that it was on the basis of these representations—as well as on its own desire to "avoid a long and costly jurisdictional procedure"—that it decided to withdraw its resubmitted claim and commence UNCITRAL arbitration instead.[253] In doing so, Claimant contends that it accepted Respondent's position that Claimant did not validly consent to ICSID Arbitration.[254]

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[247] Claimant's Rejoinder, para. 17, *citing Occidental Petroleum Corporation, Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Jurisdiction, 9 September 2008, ("*Occidental* Decision on Jurisdiction"), para. 91, **CLA-267**.

[248] Claimant's Rejoinder, para. 20, *citing Occidental Petroleum Corporation, Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Jurisdiction, 9 September 2008, ("*Occidental* Decision on Jurisdiction"), para. 94, **CLA-267**.

[249] Claimant's Rejoinder, para. 21.

[250] Claimant's Response, para. 86, *citing* Murphy's Letter to Ecuador dated 30 December 2010, **CEX-5**; and Murphy's Letter to Ecuador dated 8 June 2011, **CEX-14**.

[251] Hearing Transcript (22 May 2013), 195:21 to 196:8.

[252] Hearing Transcript (21 May 2013), 123:20 to 124:3

[253] Claimant's Response, para. 93; Hearing Transcript (21 May 2013), 117:8-11.

[254] Claimant's Response, para. 93.

B. Respondent's Position

124. Respondent considers it "irrelevant that Claimant's choice has not played out well for it and that it has been unable to secure a decision on the merits of its claims under its chosen arbitral mechanism due, as it happens, to its own reckless procedural attitude."[255]

125. Respondent rejects Claimant's contention that it filed its ICSID Arbitration claim in good faith. It points out that the Murphy I tribunal correctly relied on the characterisation of the *Enron v. Argentina* tribunal of the negotiation period as jurisdictional, and dismisses Claimant's contention that the relevant passage in that case was dicta.[256] It notes that the United States considers conditions attached to arbitration to be mandatory and jurisdictional.[257]

126. Respondent rejects the contention of Claimant that it had negotiated with Respondent prior to bringing its claim in the ICSID Arbitration, and points out that it was precisely the failure of Claimant to negotiate with Respondent prior to bringing its claim in the ICSID Arbitration that the Murphy I tribunal considered a breach of Article VI of the BIT.[258]

127. Clarifying that it represented to the Murphy I tribunal that it would negotiate with Claimant in good faith but not that such negotiations would be successful,[259] Respondent contends that it did negotiate with Claimant in good faith.[260] But, it says, Claimant treated the negotiation as a technicality to the re-filing of its ICSID claim.[261] Respondent highlights the position of Claimant that it would not settle for less than the amount claimed in Murphy I.[262]

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[255] Respondent's Reply, para. 4.

[256] Respondent's Reply, para. 7, *citing Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction (15 December 2010), para. 153, **CEX-3**.

[257] Respondent's Reply, para. 8, *citing* K. Vandevelde, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009), p. 600 (citing to the U.S. Submission in *Pope & Talbot v. Canada*), **RLA-196**.

[258] Respondent's Reply, paras. 10-11.

[259] Respondent's Reply, para. 11.

[260] Respondent's Reply, paras. 15-16, *citing* Ecuador's Officio No. 2644 (30 June 2011), **CEX-15** and Letter from Murphy International to Ecuador (7 July 2011), **CEX-16**.

[261] Respondent's Reply, paras. 15-16, *citing* Ecuador's Officio No. 2644 (30 June 2011), **CEX-15** and Letter from Murphy International to Ecuador (7 July 2011), **CEX-16**.

[262] Respondent's Reply, paras. 13-14, *citing* Gaibor Statement (18 January 2013), paras. 7-8.

128. Stressing that it was under no obligation to confirm its agreement to a non-ICSID alternative if the negotiations between it and Claimant failed,[263] Respondent notes that "it was silence from Ecuador [that met] this wish of Murphy to go or to obtain freedom to go to UNCITRAL. And Murphy could not be misled by Ecuador's silence."[264] It further portrays Claimant's efforts to secure the agreement of Respondent to UNCITRAL arbitration as proof that Claimant itself considered its consent to ICSID arbitration to be valid and irrevocable.[265]

129. Respondent argues that its renunciation of the ICSID Convention was a "lawful exercise of a right afforded to Ecuador by international law"[266] and not an attempt to deprive Claimant of its chosen forum.[267] It states that Claimant could have availed of arbitration under the ICSID rules had it complied with the jurisdictional requirement in filing its claim.[268]

130. Respondent contends that Claimant chose to withdraw its refiled ICSID claim for its own reasons and not because it relied on alleged representations by Respondent.[269] If it had truly relied on Respondent's alleged representations, then Claimant would not have withdrawn its claim "without prejudice."[270]

131. Respondent argues that the principle of good faith and the doctrines of estoppel and preclusion cannot oblige Respondent to submit to UNCITRAL arbitration without its consent.[271]

Estoppel

A. Claimant's Position

132. Claimant contends that judicial estoppel prevents Respondent from abandoning its previous position that Claimant did not validly consent to ICSID arbitration and now arguing that the validity of Claimant's consent causes this Tribunal to have no jurisdiction over the matter.[272]

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[263] Respondent's Reply, para. 17.

[264] Hearing Transcript (21 May 2013), 64:5-7.

[265] Hearing Transcript (21 May 2013), 65:1-9.

[266] Respondent's Reply, para. 19, *citing* ICSID Convention, Art. 71.

[267] Respondent's Reply, para. 19.

[268] Respondent's Reply, para. 19.

[269] Respondent's Reply, para. 20, *citing* Notice of Arbitration, para. 49 and Statement of Claim, para. 44.

[270] Respondent's Reply, para. 20.

[271] Respondent's Reply, para. 135.

[272] Claimant's Response, para. 105.

In other words, the doctrine of estoppel holds Respondent to its previous position, under which consent to UNCITRAL arbitration is Claimant's first valid consent under the BIT.[273] To hold otherwise would allow Respondent to secure an unfair advantage over Claimant, who would then be denied the opportunity to have its claim heard on the merits.[274]

133. Claimant also argues that estoppel prevents Respondent from withdrawing its previous position that Claimant could resubmit its dispute to an arbitral forum other than ICSID.[275] According to Claimant, while Respondent objected to the resubmission of Claimant's ICSID claim, it also argued that Claimant would be allowed to pursue its claims in another forum. Claimant specifically points to Respondent's 28 July 2011 letter to ICSID, which states: "If no operative consent exists, Article 26 [of the ICSID Convention] does not operate and the foreign national is free to pursue other remedies. This is exactly the situation of a claimant whose claim has been dismissed by an ICSID award for lack of jurisdiction."[276] The letter further states that "in case the ICSID tribunal has given an award in which it finds that the dispute is not within the jurisdiction of the Centre, a party may take that dispute to another forum for a decision on the merits.[277]

134. Claimant contends that this case meets the "more traditional notion of estoppel involving detrimental reliance."[278] It identifies its "detrimental reliance" as the withdrawal of its refiled ICSID claim and the re-filing of its claim under the UNCITRAL Rules.[279] Such reliance has been prejudicial, in that Claimant has had to incur legal costs to defend against Respondent's jurisdictional objections.[280] Were this Tribunal to uphold Respondent's objections, Claimant notes that its reliance would be more prejudicial still.[281]

[273] Claimant's Response, para. 105.

[274] Claimant's Rejoinder, paras. 147-148.

[275] Claimant's Rejoinder, paras. 138-139.

[276] Claimant's Response, para. 91, *citing* Ecuador's Letter to ICSID dated 28 July 2011, pp. 6-7, **CEX-18**; Hearing Transcript (21 May 2013), 117:20 to 118:8.

[277] Claimant's Response, para. 92, *citing* Ecuador's Letter to ICSID dated 28 July 2011, p. 7, **CEX-18**.

[278] Claimant's Response, para. 106, *citing Pan American* Decision on Jurisdiction, para. 159, **RLA-20**.

[279] Claimant's Response, para. 107.

[280] Claimant's Rejoinder, para. 140.

[281] Claimant's Rejoinder, para. 140.

135. Claimant contends that the principle of estoppel applies even if the representation involved concerns "the conduct of the parties in construing their respective rights and duties," and is therefore not of fact but of law.[282] It stresses that legal representations, and not just factual ones, can give Respondent an unfair advantage.[283]

B. Respondent's Position

136. Respondent clarifies that it has always argued that the failure of Claimant to comply with the six-month negotiation period in the BIT was ineffective in the sense that it could not perfect the consent of Respondent to ICSID arbitration.[284]

137. Respondent stresses that it did not induce Claimant to withdraw its refiled ICSID claim and submit its dispute to UNCITRAL arbitration.[285] Referring specifically to its 28 July 2011 letter, Respondent states that "it was arguing [there] that Murphy could not rely on its original consent in order to resubmit claims to ICSID in light of the denunciation because Murphy's instrument of consent simply could not sustain more than one proceeding under the ICSID Convention."[286] And even if there was a representation, Respondent classifies this representation as being one of law, which cannot support a claim for estoppel.[287]

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[282] Claimant's Rejoinder, para. 141, *citing* Respondent's Reply on Jurisdiction, para. 127.

[283] Claimant's Rejoinder, paras. 149. In a case involving Respondent and Chevron, the US Court of Appeals for the Fifth Circuit stressed that "judicial estoppel is an equitable doctrine" that is not limited to "contrary 'factual positions'" because "a change of legal position can be just as abusive of court processes and an opposing party as deliberate factual flip-flopping." Claimant's Rejoinder, paras. 142, 145-146, *citing Republic of Ecuador v. Connor*, Nos. 12-20123, February 13, 2013, US App LEXIS 3087, at 4, 12-13, **CLA-258**. *See also* Hearing Transcript (21 May 2013), 125:8 to 126:10.

[284] Hearing Transcript (21 May 2013), 70:12-16.

[285] Respondent's Reply, para. 127.

[286] Hearing Transcript (21 May 2013), 72:1-5, *citing* Letter to ICSID dated 28 July 2011, p. 5, **CEX-18**.

[287] Respondent's Reply, para. 127, *citing* D.W. Bowett, *Estoppel before International Tribunals and its Relation to Acquiescence*, 33 BRIT. Y.B. INT'L. L. 176 (1957), p. 189, **CLA-164**.

138. Respondent highlights the absence of detrimental reliance on the part of Claimant,[288] which it characterises as "indispensable for the existence of a situation of estoppel."[289] It reiterates that Claimant withdrew its second ICSID claim "without prejudice" in its own self-interest and to avoid a lengthy jurisdictional challenge.[290]

139. Even if Claimant did rely on Respondent's position during Murphy I, Respondent contends that Claimant suffered no prejudice as a result.[291] Had Claimant not withdrawn its second request for ICSID arbitration and instead proceeded with that case, it still would have faced jurisdictional objections from Respondent.[292] Because there is no substantial difference between Claimant's position in the scenarios presented above, Respondent contends that no detriment followed from Claimant's alleged reliance.[293]

Preclusion

A. Claimant's Position

140. Claimant asserts that preclusion is broader than estoppel because detrimental reliance is not an element of the former.[294] Instead "a party is precluded from taking an inconsistent position by virtue of the principle of good faith alone."[295]

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[288] Respondent's Reply, para. 128; Hearing Transcript (21 May 2013), 74:19-21.

[289] Hearing Transcript (21 May 2013), 74:11-12.

[290] Respondent's Reply, para. 128, *citing* Letter from Murphy International to Ecuador (18 August 2011), **CEX-19**; Hearing Transcript (21 May 2013), 74:24-25 to 75:1-2.

[291] Respondent's Reply, para. 129; Hearing Transcript (21 May 2013), 75:6-10.

[292] Respondent's Reply, para. 129; 129 n. 165; Hearing Transcript (21 May 2013), 75:11-17.

[293] Respondent's Reply, para. 129, *citing Case Concerning the Barcelona Traction, Light and Power Company, Limited* (New Application: 1962) (Belgium v. Spain), Judgment (Preliminary Objections), 24 July 1964, ICJ Rep. 1964, p. 24, **RLA-223**.

[294] Claimant's Response, para. 97-99, *citing Argentine-Chile Frontier Case (Argentina v. Chile)*, Award, 9 December 1996, 16 R.I.A.A. 109, 164 (1969), **CLA-118** for the definition of the doctrine of preclusion; B. Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 142 *et seq.* (1987) (internal citations omitted), **CLA-121**; Claimant's Response, para. 100 *citing* the Concurring Opinion of Richard M. Mosk with respect to Interlocutory Award, *Oil Field of Texas, Inc. v. The Government of the Islamic Republic of Iran, National Iranian Oil Company, Oil Service Company of Iran*, No. ITL 10-43-FT, 1982 WL 229382, at 23-24, **CLA-122**. Claimant's Response, para. 101, *citing Legal Status of Eastern Greenland (Den. V. Nor.)*, Judgment, 5 April 1933, P.C.I.J., Ser. A/B, No. 53, at 68-69, **CLA-123**; Hearing Transcript (21 May 2013), 126:24-25.

[295] Claimant's Response, para. 102.

141. Claimant argues that Respondent first violated the doctrine of preclusion when it represented that it would in good faith negotiate with Claimant in order to fulfill the six-month negotiation period of Article VI(3)(a) of the BIT[296] but then allegedly attempted to disassociate the negotiations from the BIT requirement, withdrew from the ICSID Convention, and then objected to Claimant's resubmission of its ICSID claim.[297]

142. Claimant contends that Respondent again ran afoul of the doctrine of preclusion when it represented that Claimant could have a non-ICSID arbitral forum resolve its dispute and then raised jurisdictional objections to prevent precisely this from happening.[298]

143. Claimant points out that Respondent has benefitted from its change in position, in that: "Ecuador is better off facing the possible enforcement of a New York Convention award rendered by an UNCITRAL Tribunal, rather than that of an ICSID award, which cannot be challenged in domestic courts and for which no exequatur is required for enforcement."[299]

B. Respondent's Position

144. Respondent rejects Claimant's definition of preclusion, which it states contains two criteria: a "clear and unequivocal representation" and "detrimental reliance."[300] It is Respondent's position that there is no substantive difference between preclusion and estoppel.[301]

145. Respondent further argues that the doctrine of preclusion cannot apply if the party making the representation derives no benefit from it.[302] This was allegedly the case here, as Claimant withdrew its request for arbitration "without prejudice."[303] Respondent further dismisses Claimant's argument on Respondent being advantaged by having potentially an Award under

[296] Claimant's Response, para. 103.

[297] Claimant's Response, para. 103.

[298] Claimant's Response, para. 103.

[299] Claimant's Rejoinder, para. 150.

[300] Respondent's Reply, paras. 130, *citing* T. Cottier & J.P. Müller, *Estoppel*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2012), **RLA-224**; 134 *citing Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Partial Award on the Merits (30 March 2010), paras. 351-352, **RLA-226**; Hearing Transcript (21 May 2013), 75:24 to 76:2.

[301] Hearing Transcript (21 May 2013), 164::3-4.

[302] Respondent's Reply, para. 134, *citing* D.W. Bowett, *Estoppel before International Tribunals and its Relation to Acquiescence*, 33 BRIT. Y.B. INT'L. L. 176 (1957), pp. 183-184. Hearing Transcript (21 May 2013), 78:11-15.

[303] Respondent's Reply, para. 134; Hearing Transcript (21 May 2013), 78:20-22.

the New York Convention regime rather than the ICSID Convention as "entirely hypothetical at most and in fact not even sustained by actual practice."[304]

Claimant's alleged contradictory position under the ICSID Arbitration

A. Respondent's Position

146. Respondent argues that the principles of estoppel, preclusion, and good faith prevent Claimant from reversing its position that it had validly consented to ICSID Arbitration.[305] It reiterates that Claimant took this position in Murphy I and based its refiled ICSID claim on it.[306] It further states that Claimant defended this position when it withdrew its refiled ICSID claim "without prejudice,"[307] and has maintained it throughout this UNCITRAL arbitration including up to the Rejoinder.[308]

147. Respondent characterises Claimant's withdrawal of its second request for ICSID arbitration as "a tactical, entirely voluntary decision" to avoid lengthy jurisdictional proceedings.[309] This withdrawal was not because Claimant conceded to or relied on Respondent's jurisdictional objections.[310] First, Claimant did not explicitly refer to its reliance on Respondent's representations, although it could have.[311] And second, Claimant reserved the option of ICSID arbitration by withdrawing its claim "without prejudice."[312]

[304] Hearing Transcript (21 May 2013), 78:22 to 79:1.

[305] Respondent's Reply, para. 112.

[306] Respondent's Reply, para. 113, *citing* Notice of Arbitration, para. 79; Hearing Transcript (21 May 2013), 54:4 to 55:12.

[307] Respondent's Reply, para. 114, *citing* Letter from Murphy International to Ecuador (18 August 2011), pp. 2-4, **CEX-19**. Hearing Transcript (21 May 2013), 55:13-17.

[308] Hearing Transcript (21 May 2013), 55:18 to 56:4

[309] Respondent's Reply, para. 115-116, *citing* Letter from Murphy International to Ecuador (18 August 2011), p. 4, **CEX-19**.

[310] Respondent's Reply, para. 115, *citing* Letter from Murphy International to Ecuador (18 August 2011), p. 4, **CEX-19**.

[311] Respondent's Reply, para. 117.

[312] Respondent's Reply, para. 117.

148. Respondent stresses that Claimant maintained its position on the validity of its consent to ICSID arbitration during its initiation of the present proceedings[313] and up to the filing of its Statement of Claim.[314] It further points out that Claimant still maintains this position[315] and only accepts Respondent's position "for the purposes of this pleading."[316]

149. Respondent accuses Claimant of hedging its risk in view of its withdrawal of its second request for ICSID arbitration "without prejudice."[317]

150. Respondent dismisses the inference allegedly drawn by Claimant (that it can pursue its claim before a different arbitral forum) from Respondent's comment on Article 26 of the ICSID Convention (that the issuance of an ICSID jurisdictional award leads to the expiration of the Parties' consent to ICSID arbitration).[318] Respondent's comment allegedly covers only the legal effect of Article 26 of the ICSID Convention on Claimant's refiled ICSID claim,[319] and does not indicate Claimant's rights under the BIT.[320] Respondent further argues that Claimant's description of this argument in its 18 August 2011 letter confirms that Claimant had this understanding of the issue.[321]

151. Respondent states that the Murphy I tribunal did not address the validity of Claimant's consent and was merely concerned with Claimant's compliance with a jurisdictional requirement.[322] It clarifies that in "[that] arbitration before the ICSID Tribunal, there was never any claim made that the consent of Murphy to ICSID arbitration was invalid."[323] Respondent further states that if consent was an issue in Murphy I, then the consent concerned was that of Respondent itself. Specifically, the issue was whether the six-month negotiation period was a condition of Respondent's consent to international arbitration, and

[313] Respondent's Reply, para. 118, *citing* Notice of Arbitration, para. 49.

[314] Respondent's Reply, para. 119, *citing* Statement of Claim, para. 44.

[315] Respondent's Reply, para. 120, *citing* Claimant's Response, para. 91.

[316] Respondent's Reply, para. 120, *citing* Claimant's Response, paras. 3, 8, 35, 77, and 93.

[317] Respondent's Reply, para. 121.

[318] Respondent's Reply, para. 122.

[319] Respondent's Reply, para. 122; Hearing Transcript (21 May 2013), 72:24 to 75:3

[320] Respondent's Reply, para. 122; Hearing Transcript (21 May 2013), 73:3-5.

[321] Hearing Transcript (21 May 2013), 73:5-13.

[322] Respondent's Reply, para. 123.

[323] Hearing Transcript (21 May 2013), 56:16-20.

Respondent did succeed in this defense because the Murphy I tribunal held that the six-month negotiation period was an essential requirement of the BIT and dismissed Claimant's claim for failure to meet it.[324]

152. Respondent further contends that Respondent abandoned its position on the validity of the consent of Claimant after that proceeding.[325]

B. Claimant's Position

153. Claimant stresses that the ruling of the Murphy I tribunal was not supported by either the *jurisprudence constante* of that time or investment arbitration scholars.[326]

154. Claimant explains that it chose not to seek an annulment of the Murphy I award and to submit its claim to arbitration under the UNCITRAL rules instead because it accepted Respondent's position that ICSID was no longer available to Claimant.[327] Claimant argues that "an investor's compliance with the state of the law as argued successfully by its opponent may not be held against it."[328] Because Claimant has abided by Respondent's interpretation of the Murphy I award; Respondent cannot now hold Claimant's previous position against it.[329]

155. Claimant points out that Respondent could have but did not seek an annulment of the Murphy I award either. It is Respondent, therefore, that is contradicting the position it took in relation to Murphy I.[330]

156. Claimant stresses that it chose to withdraw its second request for ICSID arbitration because of Respondent's representation that Claimant could submit its claim to another forum and Claimant's belief that incurring the costs of a jurisdictional proceeding in view of this representation would be unnecessarily detrimental to both Parties.[331]

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[324] Hearing Transcript (21 May 2013), 57:6-13.

[325] Respondent's Reply, para. 123.

[326] Claimant's Rejoinder, paras. 120-124.

[327] Claimant's Rejoinder, para. 126.

[328] Claimant's Rejoinder, para. 131, *citing Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Award, February 6, 2007, para. 209 ("*Siemens* Award"), **CLA-12**.

[329] Claimant's Rejoinder, para. 128; Hearing Transcript (22 May 2013), 196:10-22.

[330] Claimant's Rejoinder, para. 127.

[331] Claimant's Rejoinder, para. 129.

157. Claimant explains that it withdrew its refiled ICSID claim "without prejudice" to ensure that it would be able to resubmit its claim to arbitration, which it did.[332] It further clarifies that "in U.S. jurisprudence … the question of withdrawal of a claim with or without prejudice has nothing to do with the forum that the claim is brought in but with the claim itself."[333]

158. Claimant states that Professor Ratner, Claimant's legal expert, supports Respondent's position in Murphy I.[334] Professor Ratner posits that an investor can resubmit its claim to a new arbitral forum following an award dismissing jurisdiction, provided that the jurisdictional requirements in the BIT are complied with.[335]

V. TRIBUNAL'S ANALYSIS

Introduction

159. Article VI(2) of the US-Ecuador BIT provides that:

> In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute, under one of the following alternatives, for resolution:
>
> (a) to the courts or administrative tribunals of the Party that is a party to the dispute; or
>
> (b) in accordance with any applicable, previously agreed dispute settlement procedures; or
>
> (c) in accordance with the terms of paragraph 3.

160. For this provision to apply there must exist an "investment dispute" that "cannot be settled amicably." In such circumstances, the investor may choose to submit the dispute under one of the three alternatives listed.

161. It is uncontested that this provision contains a classic fork-in-the-road provision and that the three alternatives are mutually exclusive.

162. In the present case, Murphy chose to submit the dispute in accordance with the terms of paragraph 3, which provide as follows:

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[332] Claimant's Rejoinder, para. 130.

[333] Hearing Transcript (22 May 2013), 176:20-23.

[334] Claimant's Rejoinder, para. 133, *citing* Professor Ratner's Opinion, para. 57.

[335] Claimant's Rejoinder, para. 134, *citing* Professor Ratner's Opinion, para. 59.

> 3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:
>
> (i) to the International Centre for the Settlement of Investment Disputes ("Centre") established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 ("ICSID Convention"), provided that the Party is a party to such Convention; or
>
> (ii) to the Additional Facility of the Centre, if the Centre is not available; or
>
> (iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or
>
> (iv) to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.
>
> (b) once the national or company concerned has so consented, either party to the dispute may initiate arbitration in accordance with the choice so specified in the consent.

163. More precisely, in March 2008, Murphy commenced the ICSID Arbitration. On 15 December 2010, a majority of the tribunal in that arbitration declined jurisdiction on the ground that Claimant had failed to comply with the six-month negotiation period stipulated in Article VI(3)(a). The Murphy I Award was limited to this finding; the tribunal made no pronouncement, for instance, on the validity of Murphy's or Ecuador's consent to the ICSID Arbitration.

164. On 30 December 2010, in order to cure the defect identified in the Murphy I Award, Claimant initiated negotiations with Ecuador. In the meantime, on 6 July 2009, Ecuador had denounced the ICSID Convention with effect as of 7 January 2010. This notwithstanding, and given that Ecuador had declined to state whether it would agree to UNCITRAL arbitration in light of its withdrawal from the ICSID Convention, on 13 July 2010, Claimant recommenced arbitration against Ecuador under the ICSID Convention, relying on Ecuador's consent of 2008. Ecuador again raised objections to jurisdiction. As a result, Claimant withdrew its ICSID request on 19 August 2011 and on 21 September 2011, commenced arbitration in accordance with the UNCITRAL Arbitration Rules under Article VI(3)(a)(iii) of the BIT.

165. In these proceedings, Respondent objects to the jurisdiction of the Tribunal, alleging *inter alia* that the word "or" between the arbitral options set out in Article VI(3)(a) is disjunctive and thus renders the choice between those fora mutually exclusive.

166. The Tribunal recognises and the Parties have acknowledged that this is a case of first impression with an unprecedented factual matrix. The unique issue before the Tribunal can be stated as follows: can Claimant submit its claim to UNCITRAL arbitration under Article VI(3)(a) given that, first, its prior submission of the claim to ICSID arbitration in Murphy I was dismissed by the ICSID tribunal for lack of jurisdiction; that, second, Claimant recommenced arbitration against Ecuador under the ICSID Convention and later withdrew its request; and that, finally, ICSID arbitration is no longer available.

167. In reaching its decision, the Tribunal has carefully considered the pleadings and supporting materials of the Parties, both written and oral. The Tribunal shall rule on only those issues that are relevant for it to reach its decision.

Treaty Interpretation

168. The analysis of Respondent's jurisdictional objection necessarily begins with the specific language of Article VI(3)(a) of the BIT, as interpreted in accordance with Article 31(1) of the Vienna Convention.

169. Article 31(1) of the Vienna Convention provides, in relevant part:

> 1. 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.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

170. The Tribunal shall thus examine the "ordinary meaning" of the terms of Article VI(3)(a) "in their context and in light of [the BIT's] object and purpose."

171. The Tribunal shall also be guided by the principle of *effet utile*, which requires tribunals to interpret treaty provisions "so as to give them their fullest weight and effect consistent with the normal sense of the words and with other parts of the text, and in such a way that a reason

and a meaning can be attributed to every part of the text."[336] The Tribunal notes that the Parties do not dispute the application of this principle but instead disagree as to *how* the principle should be applied.

A. Ordinary meaning of Article VI(3)

172. It is Respondent's case that Article VI(3)(a) lists mutually exclusive and irrevocable choices between arbitral fora. The Tribunal notes, however, that there is no explicit limitation to this effect in the text of the provision and that it is plausible that the word "or" in Article VI(3)(a) conveys inclusiveness as Claimant submits. Absent text explicitly signifying a limitation, it is Respondent's burden to establish that such a limitation exists and that Claimant's interpretation is implausible. The Tribunal considers that Respondent has not met its burden in this case.

173. The Tribunal finds that Article VI(3)(a)—interpreted in accordance with the ordinary meaning to be given to its terms—lists arbitral fora that are available to the investor, but does not signify the mutual exclusivity of the arbitral fora or otherwise require the selection of a single choice among them. Unlike Article VI(2) of the BIT, Article VI(3)(a) does not, therefore, operate as a fork-in-the-road.

174. In this regard, the Tribunal notes, first, that in support of its position on the ordinary meaning of the BIT, Respondent has referred to treaties that it alleges are similar to the US-Ecuador BIT. The Tribunal considers those treaties to be informative to the present exercise only to the extent that its interpretation of the US-Ecuador BIT needs to be supplemented.

175. Second, the Tribunal rejects Respondent's argument based on Article II of the New York Convention; namely, that an inclusive meaning of "or" would allow the investor to consent to more than one arbitral forum, thereby leading to the creation of multiple agreements in writing in violation of Article II of the New York Convention. As Claimant points out, Article II of the New York Convention concerns the existence of an arbitration agreement. When an investor selects an arbitral forum by commencing an arbitration, the standing offer of the State is met by the acceptance of the investor which thus completes the arbitration agreement. While there may be several options of arbitral fora making up the State's standing offer to arbitrate, only one arbitration agreement is created whenever an investor selects an arbitral forum.

[336] R. Gardiner, Treaty Interpretation (2008), p. 64.

176. Third, the Tribunal finds that the structural difference between Article 24(3) of the 2004 US Model BIT and Article VI(3)(a) of the US-Ecuador BIT prevents the former provision from being helpful in the Tribunal's interpretation of the latter. As pointed out by Claimant, Article 24(3) imposes international arbitration as the sole mechanism for dispute resolution, while Article VI(2)(c) of the US-Ecuador BIT presents international arbitration "in accordance with the terms of [Article VI(3)]" as just one option for dispute resolution among two other options, as listed in Articles VI(2)(a) and VI(2)(b), respectively.

177. The disagreement between the Parties on the meaning of "under one of the following alternatives" in Article VI(2) can be characterised as an extension of their dispute over the effect of "or" in Article VI(3)(a). Both Parties agree that Article VI(2) operates as a fork-in-the-road. But the question is whether this operation is triggered by the word "or" (as Respondent argues) or by the phrase "under one of the following alternatives" (as Claimant argues).

178. The Tribunal considers that the presence of the phrase "under one of the following alternatives" in Article VI(2) and its corresponding absence in Article VI(3)(a) are meaningful. The inclusion of this language in Article VI(2) puts its operation as a fork-in-the-road provision beyond doubt. The fact that this language is absent from Article VI(3)(a) satisfies the Tribunal that this provision does not operate as a fork-in-the-road. The Tribunal cannot read a limitation into a provision that does not have a limitation. Moreover, the absence of the phrase "under one of the following alternatives" enhances the plausibility of assigning a meaning to Article VI(3)(a) under which the "or" is inclusive only.

179. From a literal standpoint alone, the *effet utile* principle dictates a textual interpretation of the BIT under which the word "or" in both Articles VI(2) and VI(3)(a) denotes inclusiveness, and the phrase "under one of the following alternatives" in Article VI(2) is not superfluous to the text. Rather, the phrase is necessary to establish a restrictive definition.

180. The Tribunal does not disagree with Respondent's argument that treaty language can have a confirmatory or clarificatory purpose and that even such language must be given weight and effect. The principle of *effet utile* mandates not just that treaty terms be given weight and effect, but also that they be accorded "their fullest weight and effect consistent with the normal sense of the words and with other parts of the text, and in such a way that a reason

and a meaning can be attributed to every part of the text."[337] The Tribunal therefore disagrees with Respondent's statement that the *effet utile* principle "does not require a maximum effect be given to a text."[338]

181. That the *effet utile* principle mandates the selection of a better meaning among other plausible meanings for the treaty terms must be correct. Were the Tribunal not to seek the better meaning for the treaty terms, then all plausible definitions of such terms would stand on equal footing and lead to an impasse due to the impossibility of either ascertaining a single meaning for the text or reconciling several equally valid but conflicting meanings.

182. A broader application of the *effet utile* principle in conjunction with an analysis of the object and purpose of the BIT leads to the same result. Claimant argued that "'or' could be read consistent with the *effet utile* principle to mean that the choice is exclusive insofar as it results in a decision on the merits…."[339] In answer to this, Respondent stressed that the fork-in-the-road effect of Article VI(2) of the BIT is replicated exactly in Article VI(3)(a) of the BIT, stating that the choice of one arbitral forum is exclusive, irrevocable, and irreversible: "You [cannot] make another choice of forum, whether or not there is a resolution on the merits of the claim."[340] Specifically, Respondent argued that the disjunctive function of the word "or" in Article VI(2) could not be conditioned on Claimant receiving a decision on the merits and, therefore, neither should this be the case for Article VI(3)(a).[341] Respondent also highlighted the absence of language in Article VI(3)(a) that referred to the possibility of obtaining a decision on the merits as a condition for its effectiveness.[342]

183. While the Tribunal acknowledges that Article VI(3)(a) of the BIT—as well as Article VI(2)—does not explicitly refer to a decision on the merits, it nevertheless finds that an interpretation of both provisions in accordance with the *effet utile* principle mandates that such a result be obtained. The basis for this is the object and purpose of the BIT, which will be discussed in Section C.

[337] R. Gardiner, Treaty Interpretation (2008), p. 64.

[338] Hearing Transcript (21 May 2013), 48:13-14.

[339] Hearing (22 May 2013), 175:18-23.

[340] Hearing (22 May 2013), 159:13-15.

[341] Hearing (22 May 2013), 160:8-12.

[342] Hearing (22 May 2013), 160:18-20.

B. Context of Article VI(3)

184. As previously indicated, Article 31(2) of the Vienna Convention defines context as follows:

> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

185. The Tribunal is cognisant of the Parties' dispute as to whether the Message of Submittal and the Letter of Submittal constitute part of the context for the purpose of an analysis under Article 31 of the Vienna Convention. The Tribunal finds it unnecessary to resolve this dispute. It remains the case that both Parties have relied on these materials in support of their respective positions.

186. The Tribunal finds nothing in the context of Article VI(3) that would discredit the results of the previous analysis of the ordinary meaning of that treaty provision. While the contextual indications highlighted by Respondent may indicate disjunction between arbitral fora, these indications are consistent with the Tribunal's interpretation that the disjunctive meaning of the word "or" in Article VI(3)(a) of the BIT is only triggered once there is a decision on the merits.

C. Object and Purpose of the BIT

187. The Tribunal notes that its dismissal of the Respondent's interpretation of Article VI(3)(a) sufficiently disposes of the jurisdictional objection of the Respondent, but further observes that the interpretation advocated by Claimant most accords to the object and purpose of the BIT.

188. One of the objectives of the Treaty is to give the investor access to a meaningful arbitration. This is evidenced by both Article VI(2), which prioritises the amicable settlement of disputes but offers alternatives for dispute resolution in the event that such settlement is impossible, and Article VI(3)(a), which gives the investor the option of submitting "the dispute for

settlement by binding arbitration." It is particularly noteworthy that Black's Law Dictionary defines "settlement" as "an agreement ending a dispute or lawsuit."[343]

189. This objective is further evidenced in the US Letter of Submittal for the US-Ecuador BIT, which lists as one of the principal BIT objectives to ascertain that "[n]ationals and companies of either Party, in investment disputes with the host government, have access to binding international arbitration, without first resorting to domestic courts."[344]

190. The Tribunal notes that if it were to dismiss Claimant's claim on the basis of Respondent's jurisdictional objection, the dispute would not be settled and Claimant would not have access to a binding resolution of the merits of its case through international arbitration.

191. The Tribunal also notes Respondent's argument that one of the objectives of a fork-in-the-road provision is to prevent a multiplicity of proceedings with respect to the same investment dispute.[345] Because this case involves the replacement of an unavailable forum with an available one, and because the one arbitral forum to which Claimant could have theoretically resubmitted its dismissed claim is now unavailable, there can be no concern here about a duplication of proceedings. Furthermore, and by way of a more general observation, fork-in-the-road provisions typically distinguish between contract claims and treaty claims. They are not designed to prevent the kind situation that arises here.

192. The Tribunal further notes Respondent's argument that "there is no extrinsic object and purpose of the Treaty of guaranteeing an adjudication on the merits of an investor's claim whether in the courts, whether in a previously agreed procedure, or in treaty arbitration."[346] The Tribunal is not persuaded by this argument. As Claimant has pointed out, access to dispute resolution is in fact structured so as to lead to a decision on the merits.

193. Furthermore, that a claimant in an international arbitration is not always entitled to a decision on the merits of its claims does not mean that the said claimant could not be entitled to such a decision in some cases or, more particularly, under the unique facts of this case. And with regard to this specific case, the Tribunal finds that the object and purpose of the US-Ecuador BIT—as manifested in the references to the "settlement" of disputes and "binding international arbitration"—operate in conjunction with the circumstances of this case to

[343] Black's Law Dictionary (9th ed. 2009).

[344] 7 September 1993, Letter of Submittal of the US-Ecuador Treaty, at **REX-15**.

[345] Hearing Transcript (21 May 2013), 34:23– 35:5.

[346] Hearing Transcript (21 May 2013), 46:8-11.

mandate that Claimant be allowed to obtain a decision on the merits of its claim, subject to the Tribunal's determination of Respondent's other jurisdictional objections.

194. It is noteworthy that (1) Claimant has cured the procedural defect that led to the dismissal of the first ICSID arbitration; (2) the resubmission jurisprudence suggests that ICSID arbitration would still have been available to Claimant were it not for Respondent's withdrawal from the ICSID Convention; and (3) Claimant may have been led to believe that UNCITRAL arbitration was acceptable to Respondent, and may have withdrawn its refiled ICSID claim on that basis.

195. The Tribunal is convinced that the resubmission jurisprudence presented by Claimant establishes that the failure of a party to abide by the so-called "cooling-off period" is a curable procedural defect and not an absolute jurisdictional hurdle. In *Waste Management v. Mexico*, for example, the tribunal delineated between the underlying rights of a claim and the jurisdictional requirements that attach to the filing of a claim, which explains why the tribunal in that case accepted a claim that was refiled by the claimant after that claim was initially dismissed for the claimant's failure to meet a jurisdictional requirement.[347] In *Daimler v. Argentina*, the tribunal dismissed a claim for the claimant's failure to meet a jurisdictional requirement but at the same time noted that the claimant could bring its claims once it fulfilled the so-called conditions precedent to arbitration.[348]

196. Respondent itself characterises the relevant resubmission jurisprudence as "[at most] stand[ing] for the proposition that an investor who has consented to an arbitral procedure might be able to resubmit its claims for arbitration, in the case of a curable jurisdictional defect, to the same arbitral forum, provided, of course, that the conditions for accessing that procedure are met."[349] From this characterisation, the Tribunal notes that Respondent itself seems to take issue not with the right of Claimant to resubmit its dispute *per se* but, rather, with Claimant's resubmission of its dispute to an arbitral forum other than ICSID.

197. Under the circumstances of this case, Respondent's interpretation of Article VI(3)(a) entirely forecloses Claimant's access to international arbitration. The Tribunal considers such a result to run counter to the object and purpose of the BIT and to be "manifestly absurd and unreasonable" under the meaning of Article 32 of the Vienna Convention.

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[347] *Waste Management II* Decision on Preliminary Objections, para. 36, **CLA-190**.

[348] *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/01, Award, August 22, 2012, para. 281, **RLA-145**.

[349] Hearing Transcript (21 May 2013), 49:23 to 50:3.

198. The Tribunal acknowledges that Respondent was fully within its right to withdraw from the ICSID Convention. The Tribunal recognises, however, that Respondent's denunciation of the ICSID Convention forms part of the factual matrix that must be considered in its evaluation of the results to which the Parties' respective interpretations of Articles VI(2) and VI(3)(a) of the BIT would lead.

199. At the hearing, the Tribunal asked the Parties whether, under the circumstances of this case and assuming that Respondent had not withdrawn from the ICSID Convention, Claimant could have validly refiled its claim with ICSID, as it had since complied with the six-month negotiation period indicated in Article VI(3)(a) of the BIT.[350] As previously stated, Claimant answered this question in the affirmative. Respondent answered that Claimant would not have been able to commence a second ICSID arbitration based on its original consent in Murphy I,[351] but refrained from expressing a position on whether Claimant could have consented anew to ICSID arbitration were it not for Respondent's withdrawal from the ICSID Convention.[352]

200. The Tribunal finds that this question must be answered in the affirmative. Specifically, because Claimant has since cured the procedural defect that led to the dismissal of its claim in Murphy I, it could have refiled its claim for resolution via ICSID arbitration had Respondent not renounced the ICSID Convention. On both its own analysis of the resubmission jurisprudence and Respondent's characterisation of it, the Tribunal is satisfied that a claimant that has since cured the procedural defect that had led to the dismissal of its initial claim can refile its claim in the same forum. Since this same forum is unavailable in this case, in keeping with the object and purpose of the Treaty, Claimant shall have recourse to UNCITRAL arbitration.

Validity of Claimant's Consent to Murphy I

201. Even were the Tribunal to accept Respondent's position that Article VI(3)(a) operates as a fork-in-the-road, it finds that the consent of Claimant to the present UNCITRAL arbitration constitutes its first valid consent to international arbitration under Article VI(3)(a) of the BIT.

[350] Hearing Transcript (21 May 2013), 132:20-133:7.

[351] Hearing Transcript (22 May 2013), 167:14-17.

[352] Hearing Transcript (22 May 2013), 168:2-6.

202. On this issue, Respondent argues that an investor can select an arbitral forum that then triggers the fork-in-the-road effect of Article VI(3)(a) of the BIT even before the fulfilment of the condition precedent; the effect of the non-fulfilment of the condition precedent is that the selection would not then trigger the consent of the State to arbitration.[353] Respondent also submits that when a party has itself prevented a condition precedent from being fulfilled, that party may not seek to derive benefit from its own breach of the condition; in other words, in this case, Murphy cannot seek to have its own election of ICSID rendered invalid by invoking its own failure to respect the negotiating period requirement.[354]

203. The Tribunal considers it clear from the text of Article VI(3)(a) that Claimant—or the "company concerned" in this case—could only "choose to consent in writing to the submission of the dispute for settlement by binding arbitration" after meeting two conditions. First, that Claimant had not submitted the dispute for settlement under Articles VI(2)(a) and VI(2)(b). That Claimant satisfies this condition is not disputed. Second, that "six months have elapsed from the date on which the dispute arose." The Murphy I tribunal dismissed Claimant's ICSID case precisely because Claimant had not met this requirement—which the Murphy I tribunal had found to be jurisdictional. The Murphy I tribunal defined the date on which the dispute arose as 29 February 2008, which is when Murphy wrote to Ecuador alleging a breach of the Treaty. The Murphy I tribunal simply held that it had no jurisdiction over Claimant's claim and did not address the issue of the validity of either Claimant's or Respondent's consent in respect of the ICSID Arbitration. The Tribunal finds that the invalidity of Claimant's choice of ICSID arbitration is a necessary consequence and corollary of the decision of the Murphy I tribunal.

204. Article VI(3)(a) explicitly provides a condition precedent to Claimant's valid selection of an arbitral forum and its acceptance of the host State's offer of consent of international arbitration. Because Claimant did not make a valid choice of forum and therefore did not properly accept the State's offer of consent, the consent that it gave in the present proceedings to UNCITRAL arbitration is the first instance of proper consent under Article VI(3)(a).

[353] Hearing Transcript (22 May 2013), 161:12-16.

[354] Hearing Transcript (22 May 2013), 162:8-19.

VI. DISPOSITIF

1. Respondent's jurisdictional objection based on Article VI of the Treaty is dismissed.

2. The Tribunal's decision on costs related to the jurisdictional phase of these proceedings is deferred until a later award.

Done at The Hague, the Netherlands, on 13 November 2013

Professor Kaj Hobér
Arbitrator

Professor Georges Abi-Saab
Arbitrator
(Professor Abi-Saab appends a Separate Opinion)

Professor Bernard Hanotiau
Presiding Arbitrator