

**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 “Treaty” or “BIT”)**

**- and -**

**THE UNCITRAL ARBITRATION RULES, 1976 (the “UNCITRAL Rules”)**

**- between -**

**MURPHY EXPLORATION & PRODUCTION COMPANY – INTERNATIONAL**

**“Claimant”**

**- and -**

**THE REPUBLIC OF ECUADOR**

**“Respondent,” and together with Claimant, the “Parties”**

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**FINAL AWARD**

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10 February 2017

**Tribunal:**

Me Yves Derains

Professor Kaj Hobér

Professor Bernard Hanotiau, Presiding Arbitrator

**Registry:**

Permanent Court of Arbitration

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**LIST OF DEFINED TERMS AND ABBREVIATIONS**

<b>Adjusted Sum</b>	The fair market value of Murphy Ecuador of USD 87.8 million adjusted to account for the Claimant’s ongoing obligation to make Law 42 payments at 50%, as called for in paragraph 504 of the Partial Final Award
<b>BIT (or Treaty)</b>	Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, adopted 27 August 1993, entered into force 11 May 1997
<b>Claimant (or Murphy)</b>	Murphy Exploration and Production Company – International
<b>Claimant’s E-mail</b>	Claimant’s e-mail of 16 August 2016
<b>Claimant’s Post-Award Submission</b>	Claimant’s Post-Award Submission, dated 29 July 2016
<b>Consortium</b>	As of 28 July 1987: Overseas Petroleum and Investment Corporation, Diamond Shamrock South America Petroleum B.V., Nomeco Latin America Inc., and Murphy Ecuador
<b>Ecuador (or Respondent)</b>	Republic of Ecuador
<b>Entitlement</b>	The difference between the Adjusted Sum and the Repsol Sale Price, as called for in paragraph 504 of the Tribunal’s Partial Final Award
<b>Extension Contract</b>	Contract modifying the Participation Contract for Exploration and Exploitation of Hydrocarbons for Block 16 of 12 March 2009 between the Consortium and PetroEcuador
<b>FET</b>	Fair and equitable treatment
<b>Law 42</b>	Law passed by Ecuador on 25 April 2006 to amend the Hydrocarbons Law
<b>Murphy (or Claimant)</b>	Murphy Exploration and Production Company – International
<b>Murphy Ecuador</b>	Murphy Ecuador Oil Company Limited, wholly-owned subsidiary of the Claimant (formerly known as Lowland Marine Ltd)
<b>Partial Final Award</b>	Partial Final Award issued by the Tribunal on 6 May 2016
<b>Participation Contract</b>	Modification of the Service Contract into a Participation Contract for the Exploration and Exploitation of Hydrocarbons (Crude Oil) in Block 16 between Empresa Estatal Petroleos del Ecuador (Petroecuador) and the Consortium Comprising YPF Ecuador Inc., Overseas Petroleum and Investment Corporation, Nomeco Ecuador Oil LDC, Murphy Ecuador Oil Company, and Canam Offshore Limited dated 27 December 1996
<b>PCA</b>	Permanent Court of Arbitration
<b>PO No. 4</b>	Procedural Order No. 4 issued by the Tribunal on 1 July 2016
<b>Reply</b>	Claimant’s Reply on the Merits, dated 10 July 2014
<b>Repsol Sale Price</b>	Purchase price in accordance with the Sale and Purchase Agreement for the entire share capital in Murphy Ecuador signed

	between Canam and Repsol on 12 March 2009 (USD 78.9 million)
<b>Repsol Transaction</b>	Sale and Purchase Agreement for the entire share capital in Murphy Ecuador signed between Canam and Repsol on 12 March 2009
<b>Repsol</b>	Repsol YPF Ecuador S.A.
<b>Respondent (or Ecuador)</b>	Republic of Ecuador
<b>Respondent's E-mail</b>	Respondent's e-mail of 5 August 2016
<b>Respondent's Post-Award Submission</b>	Respondent's Post-Award Submission, dated 29 July 2016
<b>Third Fair Links Report</b>	Third Expert Report of Anton Mélard de Feuarent (Fair Links), dated 28 July 2016, submitted by the Respondent with its Post-Award Submission
<b>Treaty (or BIT)</b>	Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, adopted 27 August 1993, entry into force 11 May 1997
<b>Umbrella Clause</b>	Article II(3)(c) of the Treaty
<b>UNCITRAL Rules</b>	Arbitration Rules of the United Nations Commission on International Trade Law, 1976

## I. THE PARTIES AND THEIR REPRESENTATIVES

1. Claimant is Murphy Exploration and Production Company – International, of 16290 Katy Freeway, Suite 600, Houston, Texas 77094, U.S.A., 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 S. Miles, Roberto J. Aguirre Luzi, Esteban Leccese, Santiago Maqueda, and Tim Kistner, and Mmes Anita Alvarez and Carol Tamez of King & Spalding LLP in Houston; Mr. Kenneth Fleuriet and Ms. Sarah Z. Vasani of King & Spalding International LLP in London; and Mr. Francisco Roldán of Pérez Bustamente & Ponce in Quito.
2. Respondent is the Republic of Ecuador (“**Respondent**” or “**Ecuador**”) with the address State’s Attorney General, Robles 731 and Av. Amazonas, Quito, Ecuador. Respondent is represented by Dr. Diego García Carrión, Dra. Blanca Gómez de la Torre, and Dra. Giannina Osejo at the office of the State’s Attorney General; Messrs. Mark A. Clodfelter, Alberto Wray, Constantinos Salonidis, and Diego Cadena, and Mmes. Diana Tsutieva, Alexandra Kerr Meise, Anna D. Avilés-Alfaro, Kathryn Kalinowski, and Kathern Schmidt of Foley Hoag LLP in Washington, D.C.; and Messrs. Bruno Leurent, Thomas Bevilacqua, and Ivan Urzhumov, and Mmes. Angelynn Meya and Hana Doumal of Foley Hoag LLP in Paris.

## II. OVERVIEW OF THE DISPUTE

3. The present dispute arises out of a series of legislative measures taken by Ecuador relating to its hydrocarbons industry, following increases in oil prices beginning in the first half of the 2000s. It relates in particular to the operation of a **Participation Contract** entered into in 1996 by a consortium of foreign investors (the “**Consortium**”) in which Murphy held an indirect interest through its 100-percent-owned subsidiary, Murphy Ecuador Oil Limited (“**Murphy Ecuador**”), and the predecessor of the state-owned entity Petroecuador. According to the Claimant, the Participation Contract operated such that the Consortium would receive a share of the oil production calculated on the basis of volume of production and without regard to oil prices. The Claimant submits that the Respondent breached its obligations 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**” or “**Treaty**”) by enacting legislation entitling the Respondent to participate in the Consortium’s profits where the market value of oil exceeded certain reference prices (“**Law 42**”). That level of participation was first set at a maximum of 50 percent and revised some months later to 99 percent (“**Law 42 at 50%**” or “**Law 42 at 99%**,” respectively).

4. On 6 May 2016, the Tribunal rendered a Partial Final Award (the “**Partial Final Award**”), recognizing a violation of the Treaty by the Respondent through its implementation of Law 42 at 99%.
5. In paragraph 503 of the Partial Final Award, the Tribunal stated the following with respect to the Respondent’s liability under the Treaty:

The Tribunal has found that Law 42 at 50% was lawful, but that Law 42 at 99% was unlawful. Accordingly, the Tribunal determines that Claimant should be compensated for the fair market value of Murphy Ecuador assuming that the wrongful act—*i.e.*, Law 42 at 99%—did not occur, meaning that Law 42 at 50% would still have been in place at the valuation date of March 2009. For Claimant to be restored to a ‘but-for’ scenario, the fair market value figure of USD 87.8 million must be adjusted to account for the fact that Murphy Ecuador would have continued paying participation under Law 42 at 50% if Law 42 at 99% had never been introduced.<sup>1</sup>

The Tribunal noted that it was “not able to calculate that sum on the basis of the information submitted by the Parties” and directed the Parties to attempt to agree, within three months of the date of the award, on “the adjustment that should be made to the fair market value of Murphy Ecuador of USD 87.8 million to account for an ongoing obligation on the part of Claimant to make Law 42 payments at 50% (“**Adjusted Sum**”).”<sup>2</sup> The Tribunal added its finding that “Claimant is entitled to any difference between the Adjusted Sum and the purchase price of USD 78.9 million for Murphy Ecuador (“**Entitlement**”),”<sup>3</sup> and ordered the Parties to attempt to agree, also within three months, on this amount, as well as on the “pre- and post-award interest sums referred to in paragraphs 503-504” of the Partial Final Award.<sup>4</sup>

### III. PROCEDURAL HISTORY

6. The Partial Final Award recounts in detail the procedural history of this arbitration from its commencement—when the Claimant filed its Notice of Arbitration dated 21 September 2011 under the UNCITRAL Rules pursuant to Article VI of the Treaty—until 6 May 2016, when it was issued. The present section summarizes procedural developments since that date.

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<sup>1</sup> Partial Final Award, para. 503.

<sup>2</sup> Partial Final Award, para. 504.

<sup>3</sup> Partial Final Award, para. 504.

<sup>4</sup> Partial Final Award, paras. 504 and 548(v). The Tribunal specified that, failing an agreement of the Parties on these outstanding calculations (Adjusted Sum, Entitlement and pre- and post-award interest sums), it would invite each of them to submit “simultaneously and within a further month” a submission setting out its position.

7. By letter dated 6 June 2016, the Claimant requested that the Tribunal “make an additional award deciding Claimant’s claim for post-award interest on the costs of arbitration” pursuant to Article 37 of the Arbitration Rules of the United Nations Commission on International Trade Law, 1976 (the “**UNCITRAL Rules**”). In the alternative, and “in case the Tribunal decided this issue but failed to expressly reflect it” due to a clerical, typographic, or similar error, the Claimant sought a correction to the Partial Final Award pursuant to Article 36 of the **UNCITRAL Rules**.
8. By letter dated 8 June 2016, the Tribunal acknowledged receipt of the Claimant’s request and invited the Respondent to submit its comments by 17 June 2016.
9. By e-mail dated 10 June 2016, the Respondent advised that the Parties were “in the process of conferring on the questions put by the Tribunal in the partial award, as well as on the possibility of a truncated process for addressing them” and requested that the Tribunal “hold off for the time being on depositing the partial award with the Netherlands courts and until one or both of the parties requests otherwise.”
10. By letter dated 17 June 2016, the Respondent objected to the Claimant’s request of 6 June 2016, arguing that “there is no ground for relief under either Article 36 or 37 of the **UNCITRAL Arbitration Rules**.”
11. By e-mails dated 29 June 2016, the Parties, *inter alia*, indicated that they were “unable to agree upon the calculation of the sums referred to in paragraphs 503-504 of the Partial Final Award” and requested that, “with the Tribunal’s concurrence,” they file post-award submissions in connection thereof by 29 July 2016—*i.e.*, before the expiration of the three-months period provided in the Partial Final Award for them to reach agreement. The Parties reiterated their agreement that the Partial Final Award “not be deposited with the Netherlands courts until the Tribunal decides the remaining issues.”
12. By letter dated 1 July 2016, the Tribunal accepted the Parties’ request to file post-award submissions. On the same date, the Tribunal issued its Procedural Order No. 4 (“**PO No. 4**”), in which it denied the Claimant’s request of 6 June 2016 on the basis of Articles 36 and 37 of the **UNCITRAL Rules**. On the same date, the Tribunal requested a supplementary deposit from the Parties to cover the fees and expenses of the Tribunal and the Permanent Court of Arbitration (“**PCA**”) in this additional phase of the proceedings.

13. On 29 July 2016, the Parties submitted their post-award submissions (the “**Respondent’s Post-Award Submission**” and the “**Claimant’s Post-Award Submission**,” respectively), which the PCA circulated for simultaneous transmission to the Tribunal and the other Party.
14. By e-mail dated 5 August 2016, the Respondent wrote in connection with the Claimant’s Post-Award Submission, notably to request that the Tribunal reject the Claimant’s “entirely unrelated request for the reconsideration of the Tribunal’s Procedural Order No. 4 regarding post-award interest on costs,” and to submit that it “considers that no further submission on the issues defined in paragraphs 503-504 is necessary” (the “**Respondent’s E-mail**”).
15. By e-mail dated 16 August 2016, after having been invited to do so by the Tribunal, the Claimant provided its comments on the Respondent’s E-mail, and agreed that “absent a request from the Tribunal ... no further briefing on paragraphs 503-504 of the Partial Final Award [was] necessary” (the “**Claimant’s E-mail**”).
16. By e-mail dated 17 August 2016, the Presiding Arbitrator informed that the Tribunal “considers that no further exchange is necessary” and that it “will deliberate on the outstanding issues after the holiday period and will issue its award as soon as possible.”

#### IV. REQUESTS FOR RELIEF

17. The Parties’ original requests for relief are detailed at paragraphs 121 to 122 of the Partial Final Award. In their Post-Award Submissions, the Parties additionally request the following:

##### Claimant

1. A final determination of the Adjusted Sum, the Entitlement, and pre- and post-award interest that Ecuador owes Murphy;
2. A reasoned determination of Murphy’s non-FET claims regarding Law 42 at 50%, including a declaration that Ecuador breached the Treaty, and the award of all additional damages that flow from such breach(es);
3. Rejection of Ecuador’s set-off claim;
4. Reconsideration of the Tribunal’s decision in Procedural Order No. 4 and a concomitant award of post-award interest on costs; and
5. Any other relief that the Tribunal may deem appropriate or necessary.<sup>5</sup>

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<sup>5</sup> Claimant’s Post-Award Submission, para. 35.



Respondent

1. A declaration that Ecuador does not owe any compensation to Murphy Ecuador for violation of the Treaty as determined in the Partial Final Award, including any pre- or post-award interest or costs of arbitration, and that, in particular, as a result of the Tribunal’s finding on total damages, Ecuador’s liability under paragraph 548(iii) of the Partial Final Award ordering it to pay compensation to Claimant for damages incurred for historical Law 42 payments in the amount of USD 19,971[,1309.00 and related pre- and post-award interest in paragraphs 548(vi) and 548(viii) is fully discharged; and
2. An award [of] costs of the proceeding, including Ecuador’s attorney’s fees and expenses, in the amount that will fully reflect the relative success of the Parties in the final analysis.<sup>6</sup>

**V. SUMMARIES OF ARGUMENT AND ANALYSIS OF THE TRIBUNAL**

18. In their Post-Award Submissions, the Claimant and the Respondent present their respective proposals for the outstanding calculation of the Adjusted Sum, the Entitlement and pre- and post-award interest referred to in paragraphs 503-504 of the Partial Final Award.
19. The Claimant provides four alternative scenarios for the calculation, which it summarizes as follows<sup>7</sup>:

<b>Damages Component</b>	<b>Scenario 1 Law 42 at 99% a Breach (no Extension Value)</b>	<b>Scenario 2 Law 42 at 99% a Breach (with Extension Value)</b>	<b>Scenario 3 Law 42 at 50% a Breach (no Extension Value)</b>	<b>Scenario 4 Law 42 at 50% a Breach (with Extension Value)</b>
Historical Law 42 Payments	19,971,309	19,971,309	90,118,095	90,118,095
Interest on Historical Law 42 Payments	7,317,721	7,317,721	33,020,323	33,020,323
<b>Historical Law 42 Payments with Interest</b>	<b>27,289,031</b>	<b>27,289,031</b>	<b>123,138,418</b>	<b>123,138,418</b>
Entitlement	-	16,319,600	8,898,694	47,017,517
Interest on Entitlement	-	5,979,692	3,260,585	17,227,768
<b>Entitlement with Interest</b>	<b>-</b>	<b>22,299,292</b>	<b>12,159,279</b>	<b>64,245,285</b>
<b>Scenario Total</b>	<b>27,289,031</b>	<b>49,588,323</b>	<b>135,297,697</b>	<b>187,383,703</b>

<sup>6</sup> Respondent’s Post-Award Submission, para. 105.

<sup>7</sup> Claimant’s Post-Award Submission, para. 23.

20. The Respondent summarizes its proposed calculation as follows<sup>8</sup>:

Adjusted Sum Law 42 at 50% (a)	Purchase price USD 78.9 million (b)	Entitlement as of 12 March 2009 (c) = (a) - (b)	Pre-Award Interest as of 6 May 2016 (d)	Total Entitlement value (including Pre-Award Interest) (e) = (c) + (d)
57,580,092	78,908,000	(21,327,908)	(7,627,705)	(28,955,613)

21. Differences in the Parties’ respective calculations stem from their disagreement on a number of issues, as discussed more fully in sub-sections 1-3 below. Sub-section 4 addresses the separate issue of post-award interest on costs.

**1. Whether the Tribunal should reconsider its position with respect to the Claimant’s non-FET Treaty claims in relation to Law 42 at 50%**

22. In its Partial Final Award, the Tribunal concluded that, as it had found that Ecuador breached the fair and equitable treatment (“FET”) clause of the Treaty, it was “not necessary to determine Murphy’s claims that Ecuador breached other provisions,” including (i) Article II(3)(c) (the “Umbrella Clause”); (ii) Article II(3)(a) (full protection and security); (iii) Article II(3)(b) (non-impairment through arbitrary measures); and (iv) Article III(1) (expropriation).<sup>9</sup> This notwithstanding, the Claimant now requests the Tribunal to reconsider its position and to determine its non-FET Treaty claims in relation to Law 42 at 50%—especially its claim under the Umbrella Clause—and to declare that Ecuador violated the Treaty by enacting and enforcing Law 42 at both 99% and 50%.<sup>10</sup> The Respondent opposes this request on the basis that it “proposes that the Tribunal consider factors outside of the principles set forth in paragraphs 503-504”<sup>11</sup> of its Partial Final Award.

**A. Claimant’s Position**

23. The Claimant submits that the Tribunal’s conclusion that a finding to the effect that Ecuador breached one of the non-FET Treaty provisions would have no impact on damages remains valid in relation to its claims regarding Law 42 at 99%; however, that conclusion does not hold with respect to Law 42 at 50%. The Claimant argues instead that any finding of a breach of a non-FET provision with respect to Law 42 at 50% would have a “substantial impact” on damages, including

<sup>8</sup> Respondent’s Post-Award Submission, para. 18.

<sup>9</sup> Partial Final Award, para. 294.

<sup>10</sup> Claimant’s Post-Award Submission, paras. 11, 18.

<sup>11</sup> Respondent’s E-mail; Respondent’s Post-Award Submission, para. 6.

“on the calculation of the Adjusted Sum and Entitlement.”<sup>12</sup> According to the Claimant, the Tribunal retains jurisdiction to decide its non-FET claims until a full final award is rendered, because it “chose not to decide those claims in the First Partial Award.”<sup>13</sup>

24. The Claimant further submits that the Partial Final Award is “consistent with Murphy’s position that Law 42 (at both 50% and 99%) violated the Treaty’s Umbrella Clause.”<sup>14</sup> It cites excerpts from the award recognizing Murphy’s “right[s]” and “guarantee[s]” under the Participation Contract—rights that “could not be modified unilaterally,” the Respondent’s attempt to introduce “a unilateral change” by virtue of its Law 42 notwithstanding.<sup>15</sup> It follows that, although the Tribunal’s findings occurred in the context of its analysis of Murphy’s FET claim, such reasoning would be consistent with additional findings that the Respondent independently breached the Treaty’s Umbrella Clause. Accordingly, the Claimant submits, “Murphy deems it critical that the Tribunal provide a reasoned decision on Murphy’s non-FET claims.”<sup>16</sup>
25. The Claimant notes that if the Tribunal were to uphold one of the non-FET claims in this way, there would be “no need to adjust downward the fair market value of Murphy Ecuador” as of 12 March 2009 (*i.e.*, USD 87.8 million), to account for the impact of Law 42 at 50% as called for in the Partial Final Award (*i.e.*, no Adjusted Sum).<sup>17</sup> Such a finding would also entitle the Claimant to “additional damages” to compensate Murphy for payments it made under Law 42 at 50%.<sup>18</sup>

### ***B. Respondent’s Position***

26. The Respondent opposes the Claimant’s request that the Tribunal examine its non-FET Treaty claims in relation to Law 42 at 50%. In its view, any damages calculation incorporating an assumption that Law 42 at 50% was wrongful in light of Ecuador’s obligations under the Treaty would be “impermissible” in light of the Tribunal’s findings on liability in its Partial Final Award.<sup>19</sup> It argues that the Claimant’s pleadings in this regard amount to an “attempt[] to divert

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<sup>12</sup> Claimant’s Post-Award Submission, para. 9.

<sup>13</sup> Claimant’s Post-Award Submission, para. 10.

<sup>14</sup> Claimant’s Post-Award Submission, para. 12.

<sup>15</sup> Claimant’s Post-Award Submission, para. 12, *referring to* Partial Final Award, paras. 190, 270-271, 273.

<sup>16</sup> Claimant’s Post-Award Submission, para. 12.

<sup>17</sup> Claimant’s Post-Award Submission, para. 19.

<sup>18</sup> Claimant’s Post-Award Submission, para. 19. The Claimant submits that such damages would be easily calculable following the same methodology the Tribunal employed in setting damages for Law 42 at 99%.” *Id.*

<sup>19</sup> Respondent’s Post-Award Submission, paras. 81, 98. The Respondent addressed the question of examining the Claimant’s non-FET Treaty claims, in relation to Law 42 at 50%, in response to two of three sets of computations that the Claimant presented to the Respondent during the Parties’ post-award consultations. According to the

the Tribunal’s attention” from the principles already set forth in the Partial Final Award with regard to the calculation of damages.<sup>20</sup>

27. In response to the Claimant’s suggestion that the Tribunal has not yet decided the Claimant’s non-FET Treaty claims in relation to Law 42 at 50%, the Respondent submits that the Tribunal clearly decided that:

*the damages alleged by Claimant under the other heads of claim are the same as those alleged under its claim for breach of the FET standard; thus finding a breach under Article II(3)(a) of the Treaty as opposed to under any other provision invoked by Claimant has no impact on the calculation of damages.*<sup>21</sup>

The Respondent further recalls the Tribunal’s finding to the effect that, because the Claimant invoked the violation of multiple Treaty provisions as alternative grounds for finding the Respondent liable under the BIT, “once the Tribunal has found that one of those alternatives is well-founded, *deciding on the other grounds is no longer part of the Tribunal’s mission.*”<sup>22</sup> In this case, the Respondent notes, the Tribunal has already determined that Law 42 at 50% “was a reasonable measure” in light of the circumstances,<sup>23</sup> making it unnecessary to explicitly address the Claimant’s non-FET claims in respect to the legislation.<sup>24</sup> In any event, the Respondent notes, the Tribunal did expressly reject some of the Claimant’s arguments relating to the Umbrella Clause.<sup>25</sup>

28. Finally, the Respondent submits that the Claimant could have pursued a request for an additional award under the UNCITRAL Rules if it seriously believed that the Tribunal failed to decide any of its claims.<sup>26</sup>

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Respondent, those two sets of calculations rest on the assumption that Law 42 at 99% and at 50% are both wrongful. *See* Respondent’s Post-Award Submission, paras. 78-79.

<sup>20</sup> Respondent’s Post-Award Submission, para. 6; Respondent’s E-mail.

<sup>21</sup> Respondent’s Post-Award Submission, para. 83 *referring to* Partial Final Award, para. 294 (emphasis added by the Respondent).

<sup>22</sup> Respondent’s Post-Award Submission, para. 84 *referring to* Partial Final Award, para. 294 (emphasis added by the Respondent).

<sup>23</sup> Respondent’s Post-Award Submission, para 6.

<sup>24</sup> Respondent’s Post-Award Submission, para. 85.

<sup>25</sup> Respondent’s Post-Award Submission, para. 86.

<sup>26</sup> Respondent’s Post-Award Submission, para. 87.

*C. Analysis of the Tribunal*

29. The Tribunal decided in the Partial Final Award that Ecuador breached the FET standard contained in Article II(3)(a) of the Treaty and that this was sufficient to dispose of all of the Claimant's claims under the Treaty:

As the Tribunal has found that Ecuador breached Article II(3)(a) of the Treaty, it is not necessary to determine Claimant's claims that Ecuador breached other provisions of the Treaty such as Article II(3)(c) (the "umbrella" clause); (2) Article II(3)(a) (full protection and security); (3) Article II(3)(b) (non-impairment through arbitrary measures); and (4) Article III(1) (expropriation). The Tribunal is satisfied that *the damages alleged by Claimant under the other heads of claim are the same as those alleged under its claim for breach of the FET standard; thus finding a breach under Article II(3)(a) of the Treaty as opposed to under any other provision invoked by Claimant has no impact on the calculation of damages.*<sup>27</sup>

30. The Claimant disagrees with the above, arguing instead that "a finding that Law 42 at 50% violated any provision of the BIT (other than FET) would indeed have a substantial impact on damages, including on the calculation of the Adjusted Sum and the Entitlement."<sup>28</sup>
31. The Respondent, however, rightly points out that the damages alleged by the Claimant under its claim for breach of the FET standard and under the other heads of claim are the same. As such, in finding a breach of the FET standard under Article II(3)(a), the Tribunal effectively addressed all of the Claimant's claims under the Treaty. The Claimant's damages did not consist of "separate and distinct question[s]" of liability as the Claimant now suggests. Further, the Respondent correctly recalls the Tribunal's observation in the Partial Final Award that "since Claimant has relied on the violation of several of the Treaty's provisions as *alternative grounds* for its claim for compensation, once the Tribunal has found that one of those alternative grounds is well-founded, *deciding on the other grounds is no longer part of the Tribunal's mission.*"<sup>29</sup>
32. The Tribunal therefore rejects the Claimant's claim because it calls for the Tribunal to reconsider what it already decided in the Partial Final Award. Contrary to the Claimant's suggestion that the Tribunal "chose not to decide" its non-FET claims,<sup>30</sup> the Tribunal considers that it already has determined the extent of the Respondent's liability in the Partial Final Award, under the aegis of the Treaty's FET standard. It would be an unnecessary and duplicative reexamination of the merits

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<sup>27</sup> Partial Final Award, para. 294 (emphasis added).

<sup>28</sup> Claimant's Post-Award Submission, para. 9.

<sup>29</sup> Partial Final Award, para. 294 (emphasis added).

<sup>30</sup> Claimant's Post-Award Submission, para. 10.

if the Tribunal were to consider anew whether the Respondent breached the Treaty’s non-FET provisions.

## **2. Whether the value of the Adjusted Sum and the Entitlement should account for the Extension Contract**

33. In its Partial Final Award, the Tribunal adopted Ecuador’s “future free cash flows of Murphy Ecuador between March 2009 and January 2012” for the purpose of calculating the fair market value of Murphy Ecuador as of 12 March 2009, discounting the effect of Law 42.<sup>31</sup> According to the Claimant, this calculation should be revised to take into account not only free cash flows through the end of the original term of the Participation Contract, *i.e.*, 2012, but also the extended term to 2018 of the new contractual framework negotiated with Repsol YPF Ecuador S.A. (“**Repsol**”) as part of the Claimant’s sale of Murphy Ecuador (the “**Extension Contract**”). The Respondent, for its part, disagrees with any such revision (*i.e.*, the incorporation of the Extension Contract into the Tribunal’s calculation of its “but-for” scenario as described in paragraphs 501 and 502 of the Partial Final Award).

### ***A. Claimant’s Position***

34. The Claimant submits that a fair calculation of the Entitlement, as called for by the Tribunal in its Partial Final Award,<sup>32</sup> must consider the value of the contractual extension from 2012 to 2018.<sup>33</sup> The Claimant notes in this regard that the Tribunal’s assessment of Murphy Ecuador’s fair market value—at USD 87.8 million—currently excludes the Extension Contract’s value; in its view, however, the Extension Contract conferred “valuable extension rights on the Consortium, which Repsol realized at the time of the sale and undoubtedly factored into” the sale price it paid for its rights under the Extension Contract (the “**Repsol Sale Price**”).<sup>34</sup> Accordingly, the Claimant submits, “the Adjusted Sum must also reflect the value of the contract extension that is included in the Repsol Sale Price but not included in the fair market value of Murphy Ecuador as calculated by Ecuador’s *quantum* experts and adopted by the Tribunal.”<sup>35</sup> The Claimant considers that the

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<sup>31</sup> Partial Final Award, paras. 501-502.

<sup>32</sup> Partial Final Award, para. 504.

<sup>33</sup> Claimant’s Post-Award Submission, para. 21

<sup>34</sup> Claimant’s Post-Award Submission, paras. 20, 21.

<sup>35</sup> Claimant’s Post-Award Submission, para. 21 (emphasis in original).

hearing testimony of the Respondent’s quantum expert also supports the inclusion of the Extension Contract in the calculation of Murphy’s Entitlement.<sup>36</sup>

35. The Claimant contends that the implicit value of the Extension Contract as factored into the Repsol Sale Price amounts to approximately USD 38.1 million. Accordingly, it requests that this amount be “added to Murphy Ecuador’s fair market value in all scenarios before the Repsol Sale Price is deducted from the Adjusted Sum, with concomitant impact on the Entitlement.”<sup>37</sup> Failure to make such an adjustment would result in the Respondent receiving “credit for a Repsol Sale Price that includes value based on an extension to 2018 as against an Adjusted Sum that only values cash flows under the Participation Contract’s original term to January 2012” and “unfair undercompensation” for the Claimant.<sup>38</sup>

***B. Respondent’s Position***

36. The Respondent rejects the Claimant’s assumption that the Extension Contract’s value is “severable from the [Repsol Sale Price] and needs to be added to the Adjusted Sum before calculating the Entitlement value.”<sup>39</sup> It argues that such an assumption (i) exceeds the parameters set out in paragraphs 503 and 504 of the Partial Final Award, (ii) lacks any economic justification, and (iii) contradicts Navigant’s first computation as well as the Claimant’s previously stated position.
37. The Respondent describes Navigant’s—and, by extension, the Claimant’s—approach in the following terms:

The Third Navigant Assumption calls, in effect, for the deduction of the “Extension Value” from the [Repsol Sale Price] and its concomitant discarding from the calculation of the Entitlement. The manner in which Navigant seeks to effectuate that is by adding the so-called Extension Value to the Adjusted Sum before deducting the full [Repsol Sale Price]. In that way, the impact of the “Extension Value” in the calculation of the Entitlement is neutralized.<sup>40</sup>

38. It attacks this approach on the above-stated three grounds. First, with respect to the parameters set out in paragraphs 503 and 504 of the Partial Final Award, the Respondent observes that “[t]he

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<sup>36</sup> Claimant’s Post-Award Submission, para. 21 *referring to* Hearing Tr. (Day 3), pp. 640:4-641:9; *see also* Claimant’s First Post-Hearing Brief, fn. 23.

<sup>37</sup> Claimant’s Post-Award Submission, para. 22.

<sup>38</sup> Claimant’s Post-Award Submission, para. 22.

<sup>39</sup> Respondent’s Post-Award Submission, para 79.

<sup>40</sup> Respondent’s Post-Award Submission, para. 89.

only adjustment to Murphy Ecuador’s FMV called for by the Tribunal was to account for ‘an ongoing obligation on the part of Claimant to make Law 42 payments at 50%.’”<sup>41</sup> The Respondent adds that the Tribunal envisaged deducting “the *full* amount of the SPA sale price in order to calculate the Entitlement.”<sup>42</sup> The Respondent therefore argues that the Claimant’s suggestion that only part of the Repsol Sale Price should be credited against Murphy Ecuador’s fair market value (under Law 42 at 50%) is inconsistent with the Partial Final Award.<sup>43</sup>

39. Second, and in any event, the Respondent submits that the Claimant’s approach to calculating its Entitlement “lacks any economic justification.”<sup>44</sup> As noted in the Third Fair Links Report, Navigant has provided no explanation as to why “the compensatory benefits from the Extension Contract” received by the Claimant, by virtue of the USD 78.9 million it received as payment for Murphy Ecuador, “should be eliminated from the actual compensation.”<sup>45</sup>
40. Finally, the Respondent contends that Navigant’s approach, as described above, is in “complete contradiction” of its “consistent position in favor of the deduction of the full amount of the SPA sale price from the overall damages claimed.”<sup>46</sup> In this connection, the Respondent notes that “neither the Claimant nor Navigant ever made such a claim either in the ICSID arbitration or in the previous phase” of these proceedings.<sup>47</sup> This, according to the Respondent, demonstrates the Claimant’s adherence to “the principle of *full* deduction of the SPA sale price from Claimant’s overall damages,” its present submission to the contrary notwithstanding.<sup>48</sup>
41. In any event, and out of an “abundance of caution,” the Respondent adds that Navigant’s computation of the value of the Extension Contract benefit, considered on the merits and independent of Navigant’s previous position, “appears to be seriously flawed.”<sup>49</sup> In this regard,

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<sup>41</sup> Respondent’s Post-Award Submission, para. 90, *referring to* Partial Final Award, para 504.

<sup>42</sup> Respondent’s Post-Award Submission, para. 90 (emphasis in original).

<sup>43</sup> Respondent’s Post-Award Submission, para. 90; Respondent’s E-mail.

<sup>44</sup> Respondent’s Post-Award Submission, para. 91.

<sup>45</sup> Respondent’s Post-Award Submission, para. 91, *referring to* Third Fair Links Expert Report, para. 100.

<sup>46</sup> Respondent’s Post-Award Submission, para. 92.

<sup>47</sup> Respondent’s Post-Award Submission, para. 92. *See also* Respondent’s Post-Award Submission, paras. 93-96.

<sup>48</sup> *See* Respondent’s Post-Award Submission, paras. 92-95.

<sup>49</sup> Respondent’s Post-Award Submission, fn. 159.



the Respondent points to a series of what it considers to be methodological flaws with the computations presented by the Claimant during the Parties' post-award consultations.<sup>50</sup>

*C. Analysis of the Tribunal*

42. In the Partial Final Award, the Tribunal determined that “the fair market value of Murphy Ecuador as of 12 March 2009 in the absence of Law 42 was USD 87.8 million.”<sup>51</sup> Further, the Tribunal considered that only *one* adjustment should be made to Murphy Ecuador's fair market value. This was the adjustment to account for the Claimant's ongoing obligation to make Law 42 at 50% payments. Applying the adjustment produces the Adjusted Sum, which in turn, allows for the calculation of the Claimant's Entitlement. This is fully described by the Tribunal at paragraphs 503 and 504 of the Partial Final Award.
43. The Claimant now seeks to include the Extension Contract's value as an additional adjustment. The Tribunal considers that any further adjustment to the fair market value of Murphy Ecuador of USD 87.8 million (*i.e.*, an adjustment other than to take into account the Claimant's ongoing obligation to make Law 42 at 50% payments), would be inconsistent with—and amount to a reconsideration of—the Partial Final Award. It, therefore, agrees with the Respondent that the argument raised by the Claimant exceeds the parameters set out in paragraphs 503 and 504 of the Partial Final Award, and rejects the Claimant's claim.

**3. Whether the sale of Murphy Ecuador has a negative or a positive effect on damages**

44. The Parties disagree on how to account for the difference between the Adjusted Sum and the Repsol Sale Price paid by Repsol for Murphy Ecuador on 12 March 2009 (the “**Repsol Transaction**”), as called for by the Tribunal in its Partial Final Award. The Respondent argues that the difference is negative; it therefore submits that the Claimant's damages should be decreased, or “offset,” in order to avoid over-compensation. The Claimant, in turn, submits that the Respondent's economic analysis lacks merit and maintains that the Tribunal contemplated the Entitlement as an “additional sum” to Murphy, rather than a credit favoring Ecuador.

*A. Respondent's Position*

45. The Respondent submits that the difference between the Adjusted Sum and the Repsol Sale Price is negative. Further, it considers that the Tribunal has both the power and the duty, as specified in

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<sup>50</sup> See Respondent's Post-Award Submission, fn. 159 & paras. 99-103.

<sup>51</sup> Partial Final Award, para. 502.

paragraphs 503 and 504 of its Partial Final Award and guided by general principles of compensation under international law, to “offset” this sum from the amount owed to Murphy.

i. The Repsol Transaction fully mitigated the Claimant’s damages

46. As a preliminary matter, the Respondent considers that the Parties have agreed that the Adjusted Sum amounts to USD 57.6 million.<sup>52</sup> In support of its claim, the Respondent refers to its Third Fair Links Report and Navigant’s first computation presented by the Claimant during the Parties’ post-award consultations which, it says, present this amount.<sup>53</sup>
47. The Respondent therefore submits that the difference between the Adjusted Sum—*i.e.*, USD 57.6 million—and the Repsol Sale Price—*i.e.*, USD 78.9 million—has a negative value of approximately USD 21.3 million.<sup>54</sup> In other words, the “Claimant was paid USD 21.3 million more for Murphy Ecuador than its FMV under Law 42 at 50%.”<sup>55</sup>
48. The Respondent notes that the Tribunal “has not decided” the effect on the Claimant’s overall damages of its sale of Murphy Ecuador arising from the Treaty breach,<sup>56</sup> and submits that the Repsol Transaction effectively and “fully mitigated” the Claimant’s damages under Law 42 above 50%, *i.e.*, under Law 42 at 99%. It argues that this point is not in dispute. The Claimant’s expert, for example, “consistently conceptualized Claimant’s total loss” as resulting from the breach taking into account the Repsol Sale Price;<sup>57</sup> the Tribunal similarly recognized that the Repsol Transaction had been undertaken by the Claimant to mitigate its losses in response to Law 42 at 99%.<sup>58</sup> In light of what the Respondent considers, therefore, to be uniform agreement among the Parties, their experts and the Tribunal, it contends that the transaction’s value should be deducted from the damages owed to Murphy.

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<sup>52</sup> Respondent’s Post-Award Submission, paras. 14-15.

<sup>53</sup> The Respondent addresses the other two computations that the Claimant presented, both of which, in its words, “radically depart” from the Tribunal’s ruling at Respondent’s Post-Award Submission, sec. V. The Respondent’s arguments regarding the assumptions underlying these other two computations are summarized in paras. 26-28 and 37-41 above.

<sup>54</sup> Respondent’s Post-Award Submission, para. 16.

<sup>55</sup> Respondent’s Post-Award Submission, para. 16.

<sup>56</sup> Respondent’s Post-Award Submission, para. 20.

<sup>57</sup> Respondent’s Post-Award Submission, paras. 22-25, *referring to* Second Navigant Report, para. 133; *see also* Respondent’s Post-Award Submission, para. 29.

<sup>58</sup> Respondent’s Post-Award Submission, paras. 27-28, *referring to* Partial Final Award, para. 446.

49. The Respondent further contends that the fact that the Tribunal did not precisely anticipate the mitigating value of the Repsol Transaction cannot prevent it from recognizing it as negative. Indeed, the Tribunal stated that “any difference” must be taken into account, including, by implication, a negative one.<sup>59</sup> The Respondent therefore rejects the Claimant’s assertion that the fact that it already received payment in excess of Murphy Ecuador’s fair market value under Law 42 at 50% “can have no other effect than reducing the Entitlement amount to zero.”<sup>60</sup> In the Respondent’s view, such a “simplistic” reading would be “contrary to international law.”<sup>61</sup> In any event, this constitutes an admission from the Claimant that it has “already been fully compensated” for its losses.<sup>62</sup> The Respondent additionally notes that Navigant itself previously “acknowledged that the difference between the fair market value of Murphy Ecuador and the USD 78.9 million purchase price paid by Repsol-YPF could yield a negative amount.”<sup>63</sup>
50. According to the Respondent’s Third Fair Links Report, the “overall impact” of the Repsol Transaction on the Claimant’s damages yields a negative value of USD 1.8 million as of 6 May 2017, or USD 1.3 million, excluding pre-award interest.<sup>64</sup> It follows, in the Respondent’s view, that the sale “more than compensated” the Claimant for its losses relating to Law 42 at 99%, something which the Respondent suggests the Claimant itself recognized in an internal memorandum.<sup>65</sup> Accordingly, the Respondent submits that the Claimant had “no unsatisfied losses” as of 12 March 2009 (the date of the Repsol Transaction).<sup>66</sup>
51. Finally, the Respondent argues that, as a further result of the full mitigation, no pre- or post-award interest is owed to the Claimant. The Third Fair Links Report states that both “pre-award and post-award interest rate should apply to a zero value and lead to no overall pre-award and post-award interest.”<sup>67</sup> Applying these rates to a value of zero is appropriate in light of the fact that the

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<sup>59</sup> Respondent’s Post-Award Submission, para. 11.

<sup>60</sup> Respondent’s Post-Award Submission, para. 5.

<sup>61</sup> Respondent’s Post-Award Submission, para. 5.

<sup>62</sup> Respondent’s Post-Award Submission, para. 5.

<sup>63</sup> Respondent’s Post-Award Submission, para. 30.

<sup>64</sup> Respondent’s Post-Award Submission, para. 32, *referring to* Third Fair Links Report, para. 67 & p. 16, fig. 3.

<sup>65</sup> Respondent’s Post-Award Submission, para. 33, *referring to* Third Fair Links Report, para. 70.

<sup>66</sup> Respondent’s Post-Award Submission, para. 34.

<sup>67</sup> Third Fair Links Report, para. 72.

USD 7.14 million pre-award interest as described in the Partial Final Award “is fully mitigated by the USD (7.63) million negative Interest related to the Entitlement.”<sup>68</sup>

ii. The Tribunal has the power and duty to “offset” negative amounts

52. The Respondent submits that the Tribunal has the power, and indeed the duty, to take the negative Entitlement amount into account in its calculations of the Claimant’s losses, and, therefore, of the damages owed to it by Ecuador. It argues that the Tribunal “expressly reserved the power to ‘make the necessary findings’ in view of the calculation of the Adjusted Sum, the Entitlement and pre- and post-award interest” in the Partial Final Award.<sup>69</sup> Even without this “reservation of power,” the Tribunal could, in any event, apply “those of its inherent powers ‘instrumental in the adjudication of the main claim,’ which include the power to provide redress for the injury actually suffered.”<sup>70</sup>
53. In the Respondent’s view, the “necessary findings” the Tribunal reserved for this phase of the case include an “offset” of the amounts partially awarded in the Partial Final Award:

A finding of such an adjustment is necessary in order to assure that these proceedings, and the Tribunal’s legal and factual determinations, do not lead to overcompensation. Otherwise, the outcome of these proceedings, which is still very much within the Tribunal’s power to determine, will be contrary to all principles of compensation under International Law as universally recognized, including by Murphy itself.<sup>71</sup>

54. The Respondent submits that the applicable “principle[] of compensation” under international law is “full reparation of any loss.”<sup>72</sup> Any such loss, however, must be defined by reference to “concrete and actual damage incurred.”<sup>73</sup> Accordingly, full reparation requires the avoidance of overcompensation and double recovery,<sup>74</sup> as demonstrated by the practice of investment

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<sup>68</sup> Respondent’s Post-Award Submission, para. 35, *referring to* Third Fair Links Report, para. 73 & tbl. 1.

<sup>69</sup> Respondent’s Post-Award Submission, paras. 62, 69.

<sup>70</sup> Respondent’s Post-Award Submission, para. 67.

<sup>71</sup> Respondent’s Post-Award Submission, para. 4.

<sup>72</sup> Respondent’s Post-Award Submission, para. 36.

<sup>73</sup> Respondent’s Post-Award Submission, para. 36, *referring to* Partial Final Award, para. 425.

<sup>74</sup> Respondent’s Post-Award Submission, para. 36.

tribunals,<sup>75</sup> the Permanent Court of International Justice,<sup>76</sup> and the ILC Articles on State Responsibility.<sup>77</sup> A corollary to the avoidance of double recovery, the Respondent advances, is the subtraction—or “offsetting”—of benefits against losses, at least where these derive from or share a common factual nucleus.<sup>78</sup> It contends that “any difference” between the Adjusted Sum and the Repsol Sale Price must be accounted for in order to accurately “restore[]” the Claimant to the position in which it would have been but for the Treaty breach,<sup>79</sup> including “all compensatory benefits” it received from the sale of Murphy Ecuador. The Respondent therefore argues that “to properly assess Claimant’s total loss,” the negative Entitlement must offset the positive damages value related to historical Law 42 payments.<sup>80</sup>

55. The Respondent further notes that both elements of the Claimant’s damages result “from the same breach of the Treaty” (*i.e.*, the imposition of Law 42 at 99%); therefore the benefit which the Claimant derived from the Repsol Transaction “is derived from the ‘same cause as the harm,’” as recognized in paragraphs 466 to 467 of the Partial Final Award.<sup>81</sup> Both elements—damages flowing from the imposition of Law 42, and the benefit incurred through a sale of Murphy Ecuador that was motivated by the same law—should be “assessed in totality.”<sup>82</sup> In this regard, the Respondent notes that

it is irrelevant that the Law 42 payments and Entitlement constitute two [separate] elements of damages. Other tribunals have deducted from one head of damages the gains that resulted from awarding compensation for another head of damages to avoid double recovery.<sup>83</sup>

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<sup>75</sup> Respondent’s Post-Award Submission, paras. 36-40, *referring to*, among others, *Victor Pey Casado & Foundation “Presidente Allende” v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile (18 December 2012); *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award (13 September 2001), para. 582 (CLA-32); *Railroad Development Corp. v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award (29 June 2012), para. 265 (RLA-436).

<sup>76</sup> Respondent’s Post-Award Submission, para. 49, *referring to* *Factory at Chorzow (Claim for Indemnity) (Merits)*, Judgement, p. 47 (RLA-252).

<sup>77</sup> Respondent’s Post-Award Submission, para. 38, *referring to* ILC Draft Articles on State Responsibility, Art. 36, Commentary (RLA-284).

<sup>78</sup> Respondent’s Post-Award Submission, paras. 41-43 (citing the UNIDROIT Principles of International Commercial Contracts and other sources of international law), 44-48 (citing various instances of the principle in municipal law).

<sup>79</sup> Respondent’s Post-Award Submission, paras. 19-20; *see also* Partial Final Award, para. 503.

<sup>80</sup> Respondent’s Post-Award Submission, para. 21.

<sup>81</sup> Respondent’s Post-Award Submission, para. 51, *referring to* Partial Final Award, paras. 466-467.

<sup>82</sup> The Respondent considers the Claimant to share this view, at least in principle (if not in application). *See* Respondent’s Post-Award Submission, para. 52.

<sup>83</sup> Respondent’s Post-Award Submission, paras. 53-54, *referring to* *Total S.A. v. Argentine Republic*, ICSID Case No. ARB 04/1, Award (27 November 2013), para. 94 (RLA-480); *Suez, Sociedad General de Aguas de Barcelona*

56. Further, the Respondent argues that the “Compensatory Benefit” embedded in the Repsol Sale Price—*i.e.*, the reason that the purchase price is higher than the Adjusted Sum—is attributable to Ecuador. Citing the Third Fair Links Report, the Respondent notes that “[t]he reason for this higher value” derives from “benefits extended by Ecuador to the Consortium members” under the Extension Contract—providing, *inter alia*, a seven-year extension for the concession, a higher reference price of USD 42.5 per barrel, and division of profits calculated from a more favourable base price.<sup>84</sup> The Respondent notes that this—the fact that the sale price incorporated the “benefits of the Extension Contract granted by Ecuador”—is not being disputed by the Claimant.<sup>85</sup>
57. Finally, the Respondent submits that the “offsetting” it seeks will not result in its unjust enrichment. It notes that the Claimant “effectively admits that the deduction” would not lead to such a result, and that, in any event, Ecuador would not “actually receiv[e] any sums” as a result of a negative offset. Rather, any such offset would merely counterbalance the “significant benefits” offered by Ecuador through the Extension Contract.<sup>86</sup>

iii. The Tribunal should make a further finding on costs as a result of the full mitigation of the Claimant’s damages

58. The Respondent requests that the Tribunal order the Claimant to pay the Respondent a portion of the Respondent’s costs of arbitration and costs of legal representation and assistance, or order that each Party shall bear its own costs.<sup>87</sup> In the Respondent’s view, such an order would be consistent with the Tribunal’s guiding criterion for the allocation of costs, *i.e.*, the Parties’ rate of success in the arbitration.<sup>88</sup> The Respondent states that, in this case, the “full mitigation” of the Claimant’s losses by virtue of the Repsol Transaction (on the understanding that Law 42 at 50% was lawful) necessarily “entails that Claimant did not prevail on its damages claim;” this, in turn, necessitates “a further finding by the Tribunal in its final fixing of the costs of arbitration.”<sup>89</sup> The Respondent argues that both paragraph 504 of the Partial Final Award and the Tribunal’s “inherent power over

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S.A. & Vivendi Universal S.A. v. The Argentine Republic, ICSID Case No. ARB/03/19 (9 April 2015), para. 104 (RLA-487).

<sup>84</sup> Respondent’s Post-Award Submission, paras. 55-56.

<sup>85</sup> Respondent’s Post-Award Submission, para. 57.

<sup>86</sup> Respondent’s Post-Award Submission, para. 60.

<sup>87</sup> Respondent’s Post-Award Submission, para. 72.

<sup>88</sup> Respondent’s Post-Award Submission, para. 72 referring to Partial Final Award, para. 546.

<sup>89</sup> Respondent’s Post-Award Submission, para. 72.

procedure,” as codified in Article 15 of the UNCITRAL Rules, empower it to make such a finding.<sup>90</sup>

***B. Claimant’s Position***

59. The Claimant submits four alternative damage scenarios for the Tribunal’s consideration and rejects the Respondent’s proposal that the Entitlement be “offset” as untimely and without merit.

i. The Claimant’s damage scenarios

60. The Claimant provides four alternative scenarios for the calculation of the Adjusted Sum, the Entitlement, and pre- and post-award interest, ranging from approximately USD 27.3 million to USD 187.3 million.<sup>91</sup> Those scenarios, as recited in the Claimant’s Post-Award Submission, are as follows:

- Scenario 1: Law 42 at 99% a breach with no consideration of extension value. Assumes that only Law 42 at 99% is a breach and provides no value adjustment for contract extension. Adjusted Sum is USD 57.1 million. Entitlement is USD 0. Historical payments under Law 42 at 99% are USD 19.9 million (as found in the Partial Final Award). Total damages, including pre-award interest to 6 May 2016, are USD 27.3 million.
- Scenario 2: Law 42 at 99% a breach with consideration of extension value. Assumes that only Law 42 at 99% is a breach and provides value adjustment for contract extension. Adjusted Sum is USD 95.2 million. Entitlement is USD 16.3 million. Historical payments under Law 42 at 99% are USD 27.2 million (as found in the Partial Final Award). Total damages, including pre-award interest to 6 May 2016, are USD 49.5 million.
- Scenario 3: Law 42 at 50% a breach without consideration of extension value. Assumes that Law 42 at 50% is also a breach but provides no value adjustment for contract extension. Adjusted Sum is USD 87.8 million. Entitlement is USD 8.9 million. Historical payments under Law 42 at both 50% and 99% are USD 123.1 million. Total damages, including pre-award interest to 6 May 2016, are USD 135.2 million.
- Scenario 4: Law 42 at 50% a breach with consideration of extension value. Assumes that Law 42 at 50% is also a breach and provides value adjustment for contract extension.

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<sup>90</sup> Respondent’s Post-Award Submission, para. 73 referring to Partial Final Award, para. 504; UNCITRAL Rules, Art. 15.

<sup>91</sup> Claimant’s Post-Award Submission, para. 23.

Adjusted Sum is USD 125.9 million. Entitlement is USD 47 million. Historical payments under Law 42 at both 50% and 99% are USD 123.1 million. Total damages, including pre-award interest to 6 May 2016, are USD 187.3 million.<sup>92</sup>

ii. The Respondent’s proposed “offset” is irrelevant, untimely, and invalid

61. The Claimant objects to the Respondent’s proposed “offset” of the benefits it alleges the Claimant accrued in respect of the Repsol Transaction as against the amount of the Entitlement, as “untenable and untimely.”<sup>93</sup>
62. The Claimant describes the Respondent’s “eleventh-hour attempt to convert the [E]ntitlement into a credit” to be applied against damages as misguided for four reasons.<sup>94</sup> First, the Claimant objects to the Respondent’s proposition that the Claimant is “liable to Ecuador” for having sold its stake in Murphy Ecuador for a price higher than the Respondent’s estimation of the company’s fair market value at the time of the sale. The Claimant suggests that there is “no link” between the historical Law 42 payments and the Entitlement that might otherwise justify an “offset” from one category to the other; rather, the two categories of damages are “separate and distinct.”<sup>95</sup>
63. Second, and to similar effect, the Claimant reiterates that the Respondent’s “set-off” theory wrongly compares “‘apples to oranges’ by seeking to offset a Repsol Sale Price that includes substantial value for the extension against an Adjusted Sum that includes none.”<sup>96</sup> In this regard, the Claimant notes its “disappoint[ment]” by what it considers to be the Respondent’s attempt to “mislead” the Tribunal by suggesting that Murphy itself has consistently “deducted the Repsol Sale Price from its full damages claim, including its claim for historical Law 42 payments.”<sup>97</sup> The Claimant submits that this is “demonstrably false,” and refers the Tribunal to the following passage from its Reply on the Merits (the “**Reply**”):

Ecuador alleges that Murphy’s sale of its interest in Block 16 to Repsol resulted in an accounting gain, such that Murphy suffered no damages as a result of Law 42. This is a non-sequitur for two reasons. First, the Repsol sale did not mitigate in any way the US\$118 million in additional participation that Murphy paid prior to the sale.<sup>98</sup>

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<sup>92</sup> Claimant’s Post-Award Submission, para. 23.

<sup>93</sup> Claimant’s Post-Award Submission, para. 24.

<sup>94</sup> Claimant’s Post-Award Submission, paras. 24-29 (emphasis omitted).

<sup>95</sup> Claimant’s Post-Award Submission, para. 26.

<sup>96</sup> Claimant’s Post-Award Submission, para. 29.

<sup>97</sup> Claimant’s E-mail.

<sup>98</sup> Claimant’s E-mail (emphasis omitted), *referring to Reply*, para. 26.



The Claimant also recalls that the table of contents to its Reply describes its two pre-interest damages heads as (i) “Historical Law 42 Payments Should Be Awarded Pre-Tax,” and (ii) “Damages Post-March 2009 Should Be Measured as ‘But For’ Cash Flows to January 2012 Less the Actual Proceeds of the Repsol Sale.”<sup>99</sup> This, according to the Claimant, clearly establishes that “the Repsol Sale Price acted as a mitigation of post-sale forward-looking damages but not of pre-sale historical Law 42 payments.”<sup>100</sup>

64. The third ground on which the Claimant objects to an “offset” from the Entitlement is derived from the Partial Final Award itself, which, in the Claimant’s view, does not contemplate that the Entitlement “could work to the detriment of the award of historical Law 42 payments to Murphy.”<sup>101</sup> In this regard, the Claimant rejects the Respondent’s suggestion that the Tribunal meant, knowingly or otherwise, to calculate the Entitlement as a credit “for any negative difference between the adjusted fair market value of Murphy Ecuador and the Repsol Sale Price.”<sup>102</sup> Similarly, it rejects the argument that the Tribunal only referred to the Entitlement as a “positive potential outcome” in the Partial Final Award on the theory that it did not foresee that “application of the 50% rate to Murphy Ecuador’s 2009-2012 cash flows might result in a reduction of the Fair Links-calculated FMV of Murphy Ecuador by the only \$9 million or so needed to bring the Adjusted Value to less than the Repsol Sale Price.”<sup>103</sup>
65. The Claimant suggests that the Tribunal’s formulation “meant exactly what it said,” namely (in its reading) that the Entitlement could “only lead to further damages to Murphy” and not to a credit in Ecuador’s favour.<sup>104</sup> According to the Claimant, the “very definition” of the Entitlement connotes “something to be awarded as an additional sum,” rather than a credit to be subtracted from the Claimant’s damages.<sup>105</sup> Had the Tribunal foreseen the possibility that the Adjusted Sum could be less than the Repsol Sale Price—*i.e.*, yielding a negative number—the Claimant considers that it would have suggested as much in the Partial Final Award.<sup>106</sup>

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<sup>99</sup> Claimant’s E-mail.

<sup>100</sup> Claimant’s E-mail.

<sup>101</sup> Claimant’s Post-Award Submission, para. 27.

<sup>102</sup> Claimant’s E-mail.

<sup>103</sup> Claimant’s E-mail.

<sup>104</sup> Claimant’s E-mail.

<sup>105</sup> Claimant’s Post-Award Submission, para. 27.

<sup>106</sup> Claimant’s Post-Award Submission, para. 27.

66. Finally and in any event, the Claimant submits that, as Ecuador never raised the possibility of an “offset” at an earlier stage of the proceedings, the Respondent can no longer “raise it now.”<sup>107</sup> Accordingly, it submits that the Respondent’s set-off claim is without merit and procedurally inadmissible.

*C. Analysis of the Tribunal*

67. As a preliminary matter, the Claimant admits that, if it is assumed that only Law 42 at 99% is a breach of the Treaty and no adjustment is to be made to the fair market value of Murphy Ecuador for the Extension Contract, the Adjusted Sum—taking into account the Claimant’s ongoing obligation to make Law 42 at 50% payments—is USD 57.1 million,<sup>108</sup> which is less than the USD 87.8 million value the Tribunal found at paragraph 502 of the Partial Final Award.
68. The difference between the Adjusted Sum (USD 57.1 million) and the Repsol Sale Price (USD 78.9 million) is negative. According to the Claimant, its Entitlement is therefore zero.<sup>109</sup> The Respondent, on the other hand, considers that the negative difference between the two amounts should be taken into consideration by the Tribunal in its calculation of the Claimant’s losses, arguing that, in selling Murphy Ecuador for USD 78.9 million, the Claimant fully mitigated its damages under Law 42 above 50%.<sup>110</sup> The Respondent, therefore, introduces a new offset claim and also requests that the Tribunal make a new finding on costs as the result of what they refer to as the “full mitigation of the Claimant’s damages.”<sup>111</sup> The Claimant disputes this on the basis that the Repsol Sale Price acts to mitigate post-sale forward-looking damages, but not pre-sale historical Law 42 payments.<sup>112</sup>
69. The Tribunal agrees with the Claimant’s analysis. More precisely, as summarized above, the Claimant invokes four grounds to object to the Respondent’s position.<sup>113</sup> The Tribunal finds that the first three grounds are well-founded. In particular, it agrees with the Claimant that the Respondent’s set-off theory wrongly seeks to establish a “link between the historical Law 42 payments and the Entitlement” in order to justify an offset. As stated by the Claimant, the Repsol

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<sup>107</sup> Claimant’s Post-Award Submission, para. 28.

<sup>108</sup> Claimant’s Post-Award Submission, para. 23.

<sup>109</sup> Claimant’s Post-Award Submission, para. 23.

<sup>110</sup> Respondent’s Post-Award Submission, paras. 22-25, *referring to* Second Navigant Report, para. 133; *see also* Respondent’s Post-Award Submission, para. 29.

<sup>111</sup> Respondent’s Post-Award Submission, para. 72.

<sup>112</sup> Claimant’s Post-Award Submission, para. 26.

<sup>113</sup> Paras. 62-66 above.

Sale Price acts to mitigate post-sale forward-looking damages, and not pre-sale historical Law 42 payments. The two categories of damages are “separate and distinct.”

70. The Tribunal therefore rejects the Respondent’s submission that the negative difference between the Adjusted Sum and the Repsol Sale Price can be “offset” from the Claimant’s damages for historical Law 42 payments. Instead, it agrees with the Claimant that the Entitlement referred to at paragraph 504 of the Partial Final Award is zero. As there is no “mitigation” of the Claimant’s losses, the Respondent’s request for a “further finding by the Tribunal in its final fixing of the costs of arbitration” ordering the Claimant to pay the Respondent a portion of the Respondent’s costs of arbitration and costs of legal representation and assistance, or ordering that each Party shall bear its own costs for the entirety of the proceedings, is also rejected.

**4. Whether the Tribunal should reconsider its decision in PO No. 4 regarding post-award interest on costs**

71. The Parties continue to dispute whether the Tribunal should award post-award interest on costs. The Claimant maintains that such interest should be awarded and accordingly requests a “reconsideration of the Tribunal’s decision in Procedural Order No. 4 and a concomitant award of post-award interest on costs.”<sup>114</sup> The Respondent contends that the Claimant’s application is procedurally improper.

***A. Claimant’s Position***

72. The Claimant submits that the Tribunal should revisit its decision in PO No. 4 in order to award post-award interest on costs.<sup>115</sup>
73. It suggests that, contrary to the finding in PO No. 4 that no post-award interest had been specifically requested in its prior pleadings, the Claimant had in fact raised the issue at an earlier stage of the proceedings.<sup>116</sup> In particular, the Claimant notes that in its prayer for relief in its Reply, it requested that the Tribunal award it “all of its costs of this proceeding, including its attorney’s fees and expenses; and on the foregoing amounts compound interest, including... post-Award interest until the date of Ecuador’s final satisfaction of the Award.”<sup>117</sup> It adds that “[t]here is simply

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<sup>114</sup> Claimant’s Post-Award Submission, paras. 34-35.

<sup>115</sup> Claimant’s Post-Award Submission, para. 34.

<sup>116</sup> Claimant’s Post-Award Submission, paras. 32-34, *referring to* Reply, para. 782; Claimant’s First Post-Hearing Brief, para. 149; Claimant’s Second Post-Hearing Brief, para. 61.

<sup>117</sup> Claimant’s Post-Award Submission, para. 32, *referring to* Reply, para. 782.

no reason to penalize Murphy based on a mistaken belief that no specific request for post-award interest on costs was made, when plainly one was.”<sup>118</sup>

74. Further, the Claimant rejects the Respondent’s assertion that the Claimant’s request is beyond the scope of the Tribunal’s inquiry.<sup>119</sup> Rather, the Claimant submits, it is the Respondent who has gone beyond the scope of the Tribunal’s instructions by—in addition to seeking reconsideration of the Tribunal’s award of historical Law 42 payment damages—requesting the Tribunal to reconsider its award of pre-award interest on those damages, as well as its costs award.<sup>120</sup>

### ***B. Respondent’s Position***

75. The Respondent considers the Claimant’s request for reconsideration of the Tribunal’s decision in its PO No. 4 to be “extraneous,” “unrelated,” and “merely another effort to create an artificial situation to counterbalance the implications of paragraph 503-504.”<sup>121</sup> In any event, it notes, the Claimant has “offered no argument or legal authority to justify why reconsideration is available or appropriate in these circumstances.”<sup>122</sup> Instead, the Claimant’s request is based on the same “prayer for relief language” already considered and decided upon previously.<sup>123</sup>

### ***C. Analysis of the Tribunal***

76. The Tribunal agrees with the Respondent that allowing the Claimant’s claim would amount to a reconsideration of the Partial Final Award and of the Tribunal’s order in PO No. 4. It therefore rejects the Claimant’s claim and reiterates its position that “[t]he reason why the Tribunal has not granted post-award interest on costs is that no specific claim in this respect was before the Tribunal at the time of rendering its award.”<sup>124</sup>

## **5. Costs of arbitration**

77. The Tribunal notes that it already awarded costs for these proceedings in the Partial Final Award for costs incurred up to the date of its issuance. This decision concerns costs that have been

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<sup>118</sup> Claimant’s Post-Award Submission, para. 34.

<sup>119</sup> Claimant’s E-mail.

<sup>120</sup> Claimant’s E-mail.

<sup>121</sup> Respondent’s E-mail.

<sup>122</sup> Respondent’s E-mail.

<sup>123</sup> Respondent’s E-mail, *referring to* Claimant’s Letter dated 6 June 2016, fn. 1; Respondent’s Letter dated 17 June 2016, fn. 12; Claimant’s Post-Award Submission, para. 32.

<sup>124</sup> PO No. 4, Section IV.

incurred since that time and calls for an evaluation under Article 40(1) of the UNCITRAL Rules of who the successful Party is in respect of this additional phase of the proceedings.

78. While the Claimant has prevailed overall in securing an additional significant award of damages in this new phase, this was the consequence of the Partial Final Award in its favour and the Claimant prevailing against one of the Respondent's arguments. However, the Tribunal has not accepted the Claimant's various other arguments that would have increased its overall damages.
79. The Tribunal therefore finds that there is no clearly successful Party in respect of this phase of the proceedings and determines that the costs of arbitration shall be borne equally by the Parties.
80. Similarly, the Tribunal finds no reason to apportion the costs of legal representation and assistance between the Parties, and decides that each Party shall bear its own legal costs in respect of this phase of the proceedings.
81. The Parties deposited an additional EUR 150,000 (EUR 75,000 each) to cover the fees and expenses of the Tribunal and the PCA in this phase of the proceedings.
82. The Tribunal has fixed the costs of the arbitration for this phase of the proceedings in the amount of EUR 56,804.87, broken down as follows:

Arbitrator Fees

Professor Kaj Hobér	EUR 15,000.00
Me Yves Derains	EUR 2,850.00
Professor Bernard Hanotiau	EUR 20,180.00

Expenses

(bank charges, office supplies, courier, translation, etc.)	EUR 4,607.36
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Registry Fees

PCA	EUR 14,167.51
<b>TOTAL</b>	<b>EUR 56,804.87</b>

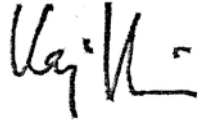
83. The remaining balance on deposit shall be reimbursed in equal shares to the Parties.

**VI. DECISION OF THE TRIBUNAL**

84. The Tribunal hereby:

- (i) DISMISSES the Claimant’s request for the Tribunal to provide a reasoned decision on its non-FET Treaty claims.
- (ii) DISMISSES the Claimant’s claim that the value of the Adjusted Sum and Entitlement should account for the Extension Contract.
- (iii) DISMISSES the Respondent’s proposition that the negative difference between the Adjusted Sum and the Repsol Sale Price should be “offset” from the Claimant’s damages for historical Law 42 payments.
- (iv) DECLARES that the Adjusted Sum and the Entitlement referred at paragraph 504 of the Partial Final Award amount to USD 57.1 million and zero, respectively.
- (v) DECLARES that, as a result of the Entitlement amounting to zero, there shall be no pre-award or post-award interest on it and the Sum of Figure A and Figure B referred to at paragraphs 522 and 548(viii) of the Partial Final Award shall amount to USD 7,136,121.
- (vi) DISMISSES the Claimant’s request that the Tribunal revisit its decision in PO No. 4 and award post-award interest on costs.
- (vii) ORDERS each Party to bear 50% of the costs of arbitration and each Party to bear the costs of its own legal representation and assistance for this additional phase of the proceedings.
- (viii) DISMISSES all other claims.

Done at The Hague, the Netherlands, on 10 February 2017:



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Professor Kaj Hobér  
Arbitrator



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Me Yves Derains  
Arbitrator



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Professor Bernard Hanotiau  
Presiding Arbitrator