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Partial Dissenting Opinion

In the

Arbitration proceeding between

Murphy Exploration and Production Company International

“Murphy” or “Claimant”

v.

The Republic of Ecuador

“Ecuador” or “Defendant”

(hereinafter, both parties shall be collectively called the “Parties”)

ICSID Case No. ARB/08/4

A. Introduction

1. I shall depart from the reasoning and the conclusions of the award issued on these proceedings (the “Award”) only and exclusively since the Arbitral Tribunal’s jurisdiction is denied therein due to the fact that the prior negotiation period or “cooling period” as provided in the Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, dated April 22, 1997 (the “BIT”) has not been completed.

2. It is undisputed that as from September 2005¹ and with the consent of the then President of Ecuador some negotiations were entered into between oil companies transacting business in said country and the state oil company Petroecuador, acting on behalf of Ecuador, due to Ecuador’s intention to improve, given the increase in the oil price, its economic participation in the existing oil contracts with Petroecuador, structured as product sharing agreements (the “Oil Contracts”), that is to say, according to the modality assigning to each of the parties to such contracts a certain participation in the extraction of crude.

3. It is also undisputed that Repsol S.A. (“Repsol”) participated in such negotiations concerning Block 16 and the contract signed on September 27, 1996 between Petroecuador, on behalf of Ecuador, and the undersigning contractors (the “Contract”),² that Murphy Ecuador Oil Company Ltd. (“Murphy Ecuador”)

¹ *Ecuador Inmediato*, September 21, 2005, CEX-48.

² *El Comercio*, November 22, 2005, Annex A-1 referred to in the Hearing held on April 6, 2010.

was included among the non-operating parties of the contractor, and that Repsol acted in its capacity as operator of the area covered by the Contract.³

4. It is likewise undisputed that Ecuador, unsatisfied with what it considered the oil companies' resistance to negotiate given their adherence to existing Oil Contracts to which they were parties, put an end to said negotiations and enacted Law No. 42 ("Law No. 42"), published on April 25, 2006, which amended the Hydrocarbons Law, which unilaterally introduced Ecuador's 50% participation in the surplus between the monthly average FOB sale price of Ecuadorian crude oil and the monthly average sale price of such crude upon the celebration of the Oil Contracts.⁴

B. The Dispute under the BIT and its Manifestation

5. Murphy claims that the dispute between Ecuador and Murphy under the BIT arises in the moment mentioned in the previous paragraph 4, moment as from which the period regarding negotiations between the Parties provided for in the BIT starts running. Upon expiration thereof, the dispute may be submitted for settlement by binding arbitration, pursuant to Article VI(3) of the BIT, that is to say, much earlier than the commencement date of these arbitration proceedings instituted by Murphy on March 3, 2008 and the letter dated February 29, 2008 whereby Murphy communicates Ecuador its consent to submit the existing dispute between Murphy and Ecuador to ICSID jurisdiction as established in the BIT, pursuant to said letter (the "Letter".) Respondent claims that it was aware of the existence of Murphy's claims when it received the Letter and that the dispute between Murphy and Ecuador under the BIT could not have originated before March 3, 2008; that is to say, before the commencement of these arbitration proceedings instituted by Murphy.⁵ The fact that the dispute between Murphy and Ecuador has arisen only on the last date is implicit in Ecuador's claim.

6. It is generally admitted that the mere presence of a legal conflict of interests is sufficient to originate a difference or a dispute. Therefore, the International Court of Justice, in line with its decisions on prior cases, has decided that:

*"According to the consistent jurisdiction of the Court and the Permanent Court of International Justice, a dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between parties [several phrases omitted.] Moreover, for the purposes of verifying the existence of a legal dispute it falls to the Court to determine whether 'the claim of one party is positively opposed by the other.'"*⁶

³ The evidence, not contrasted by Ecuador, reveals that even before the passing of Law No. 42, there have been negotiations with the other oil companies, including Repsol, in which it acted in its own and in the non-operating parties' best interest, and that upon the failure of such negotiations, Ecuador enacted such Law (journalistic articles dated September 21, 2005 (*Ecuador Inmediato*); November 21 and 22, 2005 (*El Comercio*), after Ecuador's Minister of Economy, Mr. Diego Borja, put an end to the negotiations (*El Comercio* journalistic article, dated August 2, 2006) and announced that Ecuador was going to exercise its sovereign will to that respect.

⁴ Official Registry, dated April 25, 2006, CEX-49.

⁵ Ecuador's jurisdictional objections, dated August 15, 2009, No. 104, pages 47-48.

⁶ ICJ, "*Case concerning certain property (Liechtenstein v. Germany)*", judgment of February 10, 2005, No. 24, page 16, (Preliminary Objections Judgment, ICJ Reports 2005, p. 6).

7. Undoubtedly, on the one hand, the resistance of the oil companies to accept changes regarding what they understand as their rights under the Oil Contracts in force and, on the other hand, Ecuador's decision to exercise its sovereign power to impose, through the enactment of Law No. 42, an economic participation regime of the Ecuadorian Government in such companies which, according to the oil companies, implies a violation of such rights, constitutes a conflict of interests with strong legal connotations, in relation to which the involved parties maintain radically opposed views; and that, therefore, from then on, on April 25, 2006, a dispute that may be characterized as a dispute under international law arises or originates.

8. In its relevant parts, Article VI(2) and VI(3)(a) of the BIT recites as follows:

(...)

"2. Cuando surja una diferencia en materia de inversión, las partes en la diferencia procurarán primero resolverla mediante consultas y negociaciones. Si la diferencia no se soluciona amigablemente, la sociedad o el nacional interesado, para resolverla, podrá optar por someterla a una de las siguientes vías, para su resolución:

c) Conforme a lo dispuesto en el párrafo 3 de este artículo.

3. a) Siempre y cuando la sociedad o el nacional interesado no haya sometido la diferencia, para su solución, según lo previsto por el inciso a) o el inciso b) del párrafo 2, y hayan transcurrido seis meses desde la fecha en que surgió la diferencia, la sociedad o el nacional interesado podrá optar por consentir por escrito a someter la diferencia, para su solución, al arbitraje obligatorio:"

(...)

9. Article VI(2) and VI(3)(a) of the BIT, as opposed to other similar Treaties, such as the Treaty between the Republic of Ecuador and the Kingdom of Spain concerning the Encouragement and Reciprocal Protection of Investment, dated June 26, 1996, does not define when a dispute regarding investments arises nor does it require or demand it to be alleged, raised in a written or any other way or claimed under a specific modality to constitute it, become aware of it, formulate it, manifest it or to initiate or continue the prior negotiations process; and it establishes, on the other hand, that the six-month period shall start running as from the moment when the dispute arises.

10. Article VI of the BIT makes reference to "investment disputes" exclusively. Clearly, contractual disputes may simultaneously constitute disputes under investment protection agreements which are relevant for the case;⁷ and according to the claims in these arbitration proceedings, Murphy alleges that Law No. 42 constitutes a violation to the Contract and the BIT.⁸ To jurisdictional effects (which are the

⁷ Principle recently ratified by the decision of the *Ad hoc Committee* on annulment in ICSID case No. ARB/01/3 "*Enron Creditors Recovery Corp. Ponderosa Assets, L.P. and The Argentine Republic*" no. 134, page 54 (Parties' dispatch date: July 30, 2010.)

⁸ Memorial on the Merits, dated April 30, 2009, No. 298.

only ones which shall be considered at this stage of the proceedings), as acknowledged by continuous case law, it is only important to evaluate such *prima facie* allegations and to take them as true upon presentation, as long as there is no reason, upon evaluation, to understand that such allegations are improbable, frivolous or reckless.⁹ It shall be concluded that, to such effects, the dispute under the Contract and the BIT "arose" or "erupted" at the same time – that is to say April 25, 2006.

11. As already decided by the *Ad-Hoc Committee* in the case *Vivendi* when deciding a jurisdictional question, "*Read literally, the requirements for arbitral jurisdiction in [Article 8] do not necessitate that the Claimant allege a breach of the BIT itself: it is sufficient that the dispute relate to an investment made under the BIT.*"¹⁰ The first and second paragraphs of Article 8 of the Argentina-France BIT referred to in the *Ad-Hoc Committee* decision relate to the dispute as from which the six-month term shall start running for the negotiated resolution thereof. This same construction corresponds to Article VI(2) and VI(3) of the BIT, the text of which is clear, unambiguous and unequivocal as its literal meaning.

12. Undoubtedly, Law No. 42 and the subsequent decrees are related to Murphy's investments and its investor's rights with reference to the Contract and its investments in Ecuador in Block 16 within the scope of the BIT. The fact that, for example, the written complaints issued by Repsol, in its capacity as operator, related to the enactment or the application of such law¹¹ do not make specific reference to the BIT does not prevent such complaints from reflecting and manifesting the existence of a pending dispute previously raised under the BIT as from the enactment of Law No. 42, which had already triggered the six-month term of prior negotiations.

13. Therefore: (a) on April 25, 2006, the dispute raised in relation to the enactment of Law No. 42 was configured and established, at the same time, as a dispute under the Contract and as an international law dispute covered by the provisions of international investment protection treaties eventually applicable to investment cases such as , in the case of Murphy, the BIT, because it is, at the same time, a foreign investment dispute; and (b) it is not necessary to notify that a dispute has been raised or to configure it as a BIT violation or to allege it or to raise it as a claim under it, or, otherwise, for the period established in its Article VI(3)(a) to start running.

14. Such conclusion is not shaken by the fact that Repsol has sent a note to Ecuador on November 12, 2007, (the "Note") with the consent and in the interest of the then members of the contractor, with the aim to list the violations under the aforementioned Agreement between the Kingdom of Spain and the Republic of Ecuador for the Promotion and Reciprocal Protection of Investments (the "Agreement") for which, according to Repsol, Ecuador is responsible, and to open the negotiation period as a step prior to Repsol's instituting international arbitration proceedings under the ICSID system, pursuant to said Agreement. Sending the Note or its content has nothing to do with Murphy's satisfaction of BIT

⁹ Award on jurisdiction on "*Amco Asia Corp. and others v. Indonesia*", dated September 25, 1983, 1 ICSID Reports no. 38, pages 405 (1993). "*Methanex Corp vs United States*" (TLCAN), First Partial Award on Jurisdiction and Admissibility, August 7, 2002, no. 121, pages 54-55, CLA-160.

¹⁰ ICSID Case ARB/97/3, no. 55, pages 115 (*Annulment Decision*).

¹¹ For example, Repsol's note to the Chief of the Oil Contracts Administration Unit of Petroecuador, dated October 18, 2007, where it states for the record that Repsol made the payments in protest on behalf of the contracting consortium as from April, 2006 of such sums of money claimed under the Law No. 42 and the regulatory decrees, CEX-057.

requirements in respect of its claims as individually falling under any of its Articles, including, without limitation, Article VI(2) and VI(3)(a), nor with its rights under the BIT.

15. The reference to the Note in Murphy's request for arbitration, dated March 3, 2008, was solely aimed at illustrating Murphy's complaints through the operator, Repsol, in respect of the governmental measures which are subject to the request and Ecuador's actions that, according to Murphy, would violate the BIT – that is to say, as an illustration of the dispute on the basis of which Murphy raises its claims under this treaty –¹² as confirmed in the Hearing by its legal representative.¹³ It is worth mentioning that the Note also identifies the enactment of Law No. 42 as the source of and the moment when the controversies or differences invoked under the Agreement arose, as Murphy does in this arbitration in relation to the dispute it raised under the BIT.¹⁴ In a way, Murphy states or suggests that the Note – issued with respect to a different treaty – constitutes or intends to constitute the moment as from which the six-month term under Article VI(3)(a) of the BIT has to start running or a manifestation of the existence of the dispute under said treaty. This is perfectly detailed in the Letter whereby Murphy submits to the jurisdiction of ICSID all its claims against Ecuador under the BIT, where no reference to the Note is made, and where it is stated, on the contrary, that six months have elapsed since the dispute arose upon the enactment of Law No. 42 without having been resolved by negotiation (hence, said six-month period expired well before the date of the Note.)¹⁵ For that reason and due to the fact that the dispute, as already indicated, also arose in relation to Murphy upon the enactment of Law No. 42, it is incorrect to state that the negotiation and consultation conducted by Repsol as an operator occurred before the outbreak of the dispute.

16. The Note seems to find its explanation in the text of Article XI(1) and (2) of the Agreement, which, unlike Article VI(2) of the BIT, requires express notice of the dispute to declare and deem the period for prior negotiation started, as provided for in the Agreement, to enable Repsol to resort to arbitration under the Agreement.¹⁶ Murphy Ecuador's consent to the Note does not preclude Murphy's right to

¹² Request for arbitration, dated March 3, 2008, No. 37, page 9: *"Since the enactment of the Government's measures adversely affecting its investment, Claimant, through its subsidiary and the Operator, has protested its application while working with the Government to negotiate an amicable resolution. This and the details of the Government's other actions in violation of the Treaty are outlined in two letters, both dated November 12, 2007, sent to the Government by the Block 16 Operator on behalf of the Claimant."*

¹³ Hearing, transcription of April 5, 2010, pages 259-261.

¹⁴ Note, No.13, page.5: *"Estas medidas normativas, entre otras, constituyen una violación de las obligaciones de Ecuador bajo el Tratado..."*.

¹⁵ Note dated February 29, 2008 addressed to the President of Ecuador, among others, page 4: *"Estas y otras medidas crean una "disputa en materia de inversión" entre Murphy y el Gobierno según el Artículo VI del TBI. El Artículo VI(3) prevé que una sociedad afectada puede someter la disputa ante el CIADI si han transcurrido seis meses desde la fecha en que la misma surgió. Considerando que las objeciones y protestas a los actos y omisiones del Gobierno relacionados a las inversiones fueron hechas tanto por la subsidiaria de Murphy en el Ecuador como por los socios desde 2001, y el fracaso en la resolución de esas diferencias, no obstante los continuos intentos para negociarlas desde entonces, no queda duda que más de seis meses han transcurrido desde que la disputa surgió"*.

¹⁶ Official Gazette of Ecuador No. 8 dated April 10, 1998: *"Artículo XI 1. Toda controversia relativa a las inversiones que surja entre una de las Partes Contratantes y un inversionista (Sic) de la otra Parte Contratante respect a cuestiones reguladas por el presente Acuerdo será notificada por escrito, incluyendo una información detallada, por el inversionista a la Parte Contratante receptora de la inversión. En la medida de lo posible las partes tratarán de*

enforce its investor rights separately under a treaty other than the Agreement -the BIT- nor, in doing so, to invoke a different moment triggering the cooling-off period set forth in the BIT. Whether Murphy's BIT claim in this arbitration is part of Repsol's claim under the Agreement or not is a question regarding the merits of this case which cannot be determined now, hence, such question cannot be the subject of conjectures at this stage at which, as mentioned before, Claimant's allegations as regards jurisdiction are established *prima facie*.

17. Be that as it may, what happens is that this case features, specifically, the issue that the same set of facts is the basis for two different claims under two different treaties. However, this does not exclude the existence of conducts related to such facts which are common to both treaties; that is to say, not susceptible of being viewed from the perspective of one treaty only. This common feature does not either authorize to label such conducts as relating to one treaty only with the sole purpose of depriving them of their effects or autonomous meaning under the terms of another treaty. For example, it is incorrect to label the Note as having the sole effect of subsuming the negotiation, consultation, notes and payments under protest of amounts required by Ecuador under Law No. 42 and later decrees effected by Repsol -as Contractor's operator- as conduct exclusively related to the Agreement or exclusively relevant to such Agreement, and not also related to Murphy's rights under the BIT and its provisions. Moreover, it is not proper to assign to the Note the retroactive or future effect of neutralizing the meaning under the BIT and from the perspective of Murphy's rights thereunder to the conduct of Repsol as operator, to determine Murphy's position with regard to Law No. 42 and later decrees or such consultations or negotiations and the futility or not of the negotiating efforts before or after the Note during the cooling-off period under the BIT in the relation between Murphy and Ecuador. It is important to highlight that the Parties do not distinguish between the period of negotiations before and after the Note. Ecuador only marks a difference between the negotiations stage which led to the execution of the contract modifying the Contract dated March 12, 2009 and the negotiations after such date¹⁷ and does not distinguish between negotiations before and after the Note.

C. The Parties to the Dispute under the BIT

18. The fact that Repsol was the operator under the Contract acting in representation of the remaining parties of the contractor (which is not disputed) and, besides, that Murphy Ecuador, controlled by Murphy, is a party to such Contract, allows to conclude that said difference, which has arisen as from the enactment of Law No. 42, emerged simultaneously with relation to Murphy Ecuador and Murphy itself. However, the Award suggests that in the communications exchanged with Petroecuador or with the Ecuadorian authorities, the scope of Repsol's conduct did not cover the rights and interests of the persons who have invested indirectly in Block 16 as per the Contract and, therefore, that the difference did not arise as well in respect of Murphy, since Murphy Ecuador, a company incorporated under the laws of Bermuda and indirectly controlled by Murphy by way of the company of the Bahamas Canaam Offshore Ltd., is not a party to the Contract. I do not agree with this position.

arreglar esas diferencias mediante un acuerdo amistoso. 2. Si la controversia no pudiera ser resuelta de estas forma en un plazo de seis meses a contar de la fecha de notificación escrita mencionada en el párrafo 1, sera sometida a elección del inversionista.... [there follows a list of arbitral instances to which the investor may resort].

¹⁷ Declaration of the representative of Ecuador in the Hearing of April 5, 2010, p. 273.

19. Murphy Ecuador –it is undisputed that during the stage relevant to the analysis, it was wholly and indirectly controlled by Murphy¹⁸ – was also ran by Murphy and subject to the directions of said company as regards the positions to be adopted vis-à-vis the requirements of Ecuador and Law No. 42, the negotiations of the consortium with Ecuador in connection with the adoption of such Law, and payment, or lack of payment, of the amounts required under Law No. 42 , which, actually, has been acknowledged by Ecuador 's representative.¹⁹ Therefore, the conduct of the operator Repsol before Ecuador both during the course of negotiations and when stating its position (such as payments under protest) regarding the legitimacy of Law No. 42 reflects – while Murphy Ecuador remained under the control of Murphy –Murphy's position, although neither Murphy Ecuador nor Murphy have participated directly in such negotiations or signed the letters evidencing payment under protest. In consequence, the dispute, which arose upon the adoption of Law No. 42 in relation to the Contract and its parties, was also automatically established in relation to Murphy, and not only Murphy Ecuador.

20. As pointed out in an ICSID case:²⁰

[11] *"...in general, ICSID tribunals do not accept the view that their competence is limited by formalities, and rather they rule on their competence based on a review of the circumstances surrounding the case, and, in particular, the actual relationship among the companies involved. This jurisprudence reveals the willingness of ICSID tribunals to refrain from making decisions on their competence based on formal appearances, and to base their decisions on a realistic assessment of the situation before them.*

[12] *It is for this reason that ICSID tribunals are more willing to work their way from subsidiary to the parent company rather than the other way round...."*

21. This reasoning, relevant to determine who are the parties involved or affected in the stage of negotiations preceding the arbitration claim, has received recent confirmation in the *Burlington* case, which also partially referred to similar differences as those of these arbitration proceedings, although concerning different Blocks located in Ecuador. In such case, under similar circumstances, it was recognized that, given that the conduct of the operator *Perenco* was attributable to a subsidiary of the foreign investor, such conduct was not only attributable to such subsidiary but it must be deemed carried out on behalf of the claimant investor, even when the subsidiary forming part of the contractor party was controlled only by 50% by said investor.²¹

D. The Futility of Negotiations

22. Evidence also reveals the futility of the negotiations with chances of success between the Parties due to their strongly antagonistic positions after the enactment of Law No. 42, which were repeatedly manifested through the request for payment of amounts calculated in accordance with Law No. 42 as

¹⁸ Hearing, transcription of April 5, 2010, p. 261.

¹⁹ Murphy International *"...puso reparos [objections to the negotiations with the Ecuadorian authorities] e impidió un pronto acuerdo con el objetivo de apalancar su capacidad de negociación con Repsol..."*, transcription, April 5, 2010, p. 61.

²⁰ *"Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema S.A.R.L v. Democratic Republic of the Congo"*, (ICSID Case No. ARB/98/7, Award, September 1, 2000), 17 FILJ 382 (2002).

²¹ ICSID Case No. ARB/08/5, *"Burlington Resources Inc. vs. Republic of Ecuador"*, Award, June 2, 2010, p. 68, nos. 326-329.

from July 6, 2006 and Repsol's payments under protest with monies of the parties to the Contract. In the letters where Repsol states such protests, it also notes that they are based on the fact that the requests for payment as per Law No. 42 constitute a unilateral modification of the Oil Contracts, thus violating Contractor's rights. This last concept includes Murphy Ecuador. As already shown, in formulating such protests, Repsol was also representing the interests and position of Murphy, controlling company of Murphy Ecuador at that time.

23. Law No. 42 was followed by regulatory decree No. 662 passed on October 18, 2000, which by increasing Ecuador's participation under Law No. 42 from 50% to 99% stressed the already clear differences between Ecuador's and Murphy's positions, since this measure caused a substantial increase in the economic contribution in favor of Ecuador that originated the dispute.

24. Under the BIT (Article VI(2)), both parties to the dispute – not only the investor - should initially seek a resolution through consultation and negotiation. The BIT does not state who must initiate or promote the negotiation, it is rather a requirement directed to both parties equally.

25. The only negotiating possibility offered by Ecuador after the adoption of said regulatory decree, according to the declarations of its new President Rafael Correa,²² was the transformation of the Oil Contracts in contracts for services, *i.e.*, in agreements inspired, as deduced from the allegations in this case, in a legal and economic concept different from the regime evidenced by the Oil Contracts. Moreover, President Correa has declared that the only possible alternative for negotiation was that of this type of contract, and that, if not accepted, the participation of 99 % set forth in regulatory decree No. 662 for the Ecuadorian State will be increased to 100 %.²³

26. The evidence in these proceedings shows that, before and after the issuance of the Note, and even after the sale by Murphy of its participation in Murphy Ecuador, Ecuador, by way of declarations of President Correa, kept its strong position that the only option for negotiation was the transformation of the Oil Contracts into contracts for services.²⁴ It is pertinent to point out that nothing in these proceedings shows that such President Correa's declarations or those cited above have been officially denied. Neither has the Defendant questioned the truthfulness or authenticity of the evidence provided by Murphy reflecting such declarations.

27. Murphy did not accept – and had no obligation to accept – said option, presented by Ecuador in such unconditional and categorical terms, as the only option Ecuador was willing to consider as a negotiated solution between the Parties, which eventually led to the fact that Murphy Ecuador did not sign the contract modifying the already mentioned Contract (entered into by Repsol on March 12, 2009), by means of which a transition regime is established while the negotiations carried on during a calendar year (later extended under information provided by Ecuador during the Hearing²⁵) in order to transform the Contract into a contract for services.

²² Declarations which appeared in El Universo newspaper, dated October 23, 2007, CEX-108.

²³ Declarations which appeared in El Comercio newspaper, October 6, 2007, CEX-133.

²⁴ Declarations which appeared in La Hora newspaper, April 23, 2009, CEX-77.

²⁵ Transcription of the Hearing of April 6, 2010, p. 370.

28. Clearly, positions so radically different conspire in a decisive manner against reaching a possible agreement between Murphy and Ecuador leading to a useful negotiation. Such positions evidence the futility of any negotiating effort during the six-month period provided for in Article VI(3)(a) of the BIT and even after such period, without the need of determining, for reaching such conclusion, whether such period is of procedural or jurisdictional nature. Given the circumstances, only if it were taken for granted that Murphy had the obligation to accept the only negotiating option formulated by Ecuador consisting of the transformation of the Contract into a contract for services, it may be concluded that following the negotiating process would not be futile. In fact, such hypothesis must be ruled out, since it is not compatible with the idea of a free negotiation without conditions set forth beforehand.

29. Article VI(2) of the BIT does not set forth any obligation to negotiate, it only requires the parties “to commit efforts” (“*procurar*”) to reach a negotiated solution. The BIT does not demand the parties to reach a positive solution, nor does it set forth a minimum level of attempts or efforts to be applied to such end or to reach a solution, nor prescribes any intensity in their application, nor imposes a minimum period in which the will or effort to negotiate is to be maintained.

30. It is worth contrasting the soft character of the provisions of Article VI(2) of the BIT with the categorical and peremptory character of the language of Article VI(3)(a), which automatically triggers the right to resort to arbitration upon the expiration of a period of six months after the date on which the dispute arose, without making any reference as to whether the negotiation efforts were appropriately undertaken or fulfilled. In accordance to adequate criteria for drafting clauses for the solution of disputes providing for, in a combined manner, a period of negotiation prior to an arbitral instance, Article VI(3)(a) of the BIT sets a clear and precise dividing line between the negotiation stage and the arbitral stage by fixing a time limit between both stages, surely with the purpose of avoiding delays which may arise due to debates or opposing views about whether such negotiations were duly attempted or effectively carried out, avoiding undue delays because of disputes over whether the negotiation stage was fulfilled and minimize the possibility of interposing jurisdictional objections to the detriment of the legitimate right of access to justice of the party seeking to resort to an arbitral proceeding to enforce its rights. Even in case of doubt as to the futility of the negotiations between Murphy and Ecuador, the presumption is that, in absence of a negotiated solution reached by the Parties within the time limit set forth in Article VI(3)(a) of the BIT, the arbitral stage provided therein becomes automatically available.

E. Conclusions

31. From the above it is to be understood that a clear difference between Murphy and the Ecuadorian State under Article VI of the BIT arose as from the adoption of Law 42 by Ecuador, and that all the conditions for triggering the six-month previous negotiations period in respect of Murphy’s claims in accordance with said Article were fulfilled as from then. Taking into account the date of enactment of Law No. 42 (April 25, 2006) and the submission of the Request for Arbitration by Murphy before ICSID on March 3, 2008, this is, long after such date, the negotiations period under Article VI of the BIT has already expired and, anyway, due to the circumstances of the case, such negotiations, negotiating efforts or their permanence had already been proven futile by then.

32. In any case, it seems difficult not to notice, having regard to the framework of the particular circumstances of this case, that forcing Murphy, after more than two years and a half in arbitration, to envisage now a negotiating stage of uncertain future given the history of the relationship between the Parties depicted here, but with the plausible ending of Murphy having to reinstate later the claim filed

herein in a new proceeding should Murphy desire to enforce what it considers to be its rights, does not marry well with the concept of a reasonably fast and efficient access to the arbitral instances provided for in the BIT and seriously impairs Murphy's right to access arbitral justice under its Article VI(3).

33. Therefore, I reject the jurisdictional objection of Ecuador based upon the fact that the negotiation period provided for in Article VI of the BIT has not elapsed, with costs and fees to be borne by Defendant.

[Signed]

Dr. Horacio A. Grigera Naón

Arbitrator

Date: November 19, 2010

[The text above is a translation of the original text in Spanish]