

DISSENTING OPINION

I. GENERAL COMMENTS

1. The present case is a very complex case to which the three members of the Tribunal have been extremely devoted during many years. Although I greatly respect and esteem my distinguished colleagues, I could not concur with them on several important legal findings. While I subscribe to the analysis of the facts and the law concluding that the Respondent acted in a disproportionate manner in its reaction to the serious violation of its laws by the Claimants, I am in complete disagreement with the way damages have been calculated, which I consider to be resting on grossly incorrect legal bases. To be accurate, I don't have a problem with figures, I have a problem with principles that were applied (or not) to reach these figures.

2. As a matter of fact, I disagree with all the answers given to what the Tribunal has called the "four 'core' threshold quantum issues" described in the following manner (§ 457 of the Award):

These issues concern the impact (if any) on the Tribunal's determination of quantum of:

- 1) The Ecuadorian Law 42;
- 2) The Ecuadorian VAT Interpretative Law;
- 3) The Farmout Agreement; and
- 4) The fault of the Claimants prior to the *Caducidad* Decree.

3. To give a general overview of my main points of disagreement, I can state that they are of two different types.

4. Firstly, there are – as is often encountered in a complex case as the one at stake – disagreements that would not, by themselves, have prompted me to write a dissent. On one hand, I consider that the consequence of the fault committed by the Claimants, when they violated the Ecuadorian law, is overly underestimated and insufficiently taking into account the importance that each and every State assigns to the respect of its legal order by foreign companies. On the other hand, I have a different analysis of the laws applicable in the determination of damages. These disagreements concern respectively the issues 4, 1 and 2 above.

5. Secondly, there is the fundamental impossibility for me to follow the different statements in the Award relating to the effect this Tribunal should give to the Farmout Agreement. The majority's position on the effect of the Farmout Agreement is, in my view, so egregious in legal terms and so full of contradictions, that I could not but express my dissent. In my view, there are two major questionable aspects in the majority's approach to the question of the effectiveness of the Farmout Agreement: the first is the analysis of the question of the effectiveness of a legal act under Ecuadorian law, which is based on a total lack of reasons, with the consequence that I was not able to follow the "reasoning" from point A to point B, as well as gross errors of law in the purported interpretation of the content of Ecuadorian law; the second, which in my view is even a more serious matter, is the manifest excess of power of the Award nullifying a contract concerning a company which not only was not a party to the arbitration, but moreover – even if it had been a party – could not be considered, being a Chinese company, as an investor over which the Tribunal had jurisdiction under the US/Ecuador BIT.
6. I will therefore concentrate my remarks on the way the majority dealt with the consequences of the Farmout Agreement on the calculation of damages and only briefly state my position beforehand on the other topics.
- 6 (bis) As a last general note, I indicate that I wrote my dissent based on a version sent to me that my two co-arbitrators indicated they were ready to sign. After I send them my dissent, I was informed that some clarifications needed to be made to parts of the Award. As I did not want to enter into an endless process, I did not myself change my dissent, which could explain some discrepancies, if any, between the wording of the Dissenting opinion and the wording of the Award.

1. The consequence of the fault of the Claimants

7. I consider that the contribution of the Claimants to the damage has been overly underestimated, as the Claimants deliberately took the risk of *caducidad* by their behaviour – meaning that *caducidad* could happen or not happen, and there were indeed more chances that it could happen than not, considering the text of the law and the reference to *caducidad* in the contract. It is interesting to note that in the *MTD* case both

the tribunal and the ad hoc committee¹ have endorsed a 50/50 split on the sole ground that the claimant had acted imprudently from a business point of view though not illegally. Here the split 50/50 would have been even more justified, as the Claimants have acted both very imprudently and illegally. This critique of the majority's position, however, is not based on an error of law or an excess of power, but on a different appreciation of the factual situation, which is at the discretion of the Tribunal.

8. As a result of the foregoing, I consider that a fair and reasonable apportionment of responsibility between the Claimants and the Respondent should more appropriately have been a 50/50 split.

2. The analysis of Law 42

9. As a background remark, I note that it is generally admitted that sovereign States have a broad discretion when they exercise their fiscal powers. Let me only cite here a case rendered under another BIT entered into by Ecuador, where this was underscored in the following terms:

“... foreign investments like other activities are subject to the taxes and charges imposed by the host State. In the absence of a specific commitment from the State, the foreign investor has neither the right nor any legitimate expectation that the tax regime will not change, perhaps to its disadvantage, during the period of the investment.”
(Emphasis added)²

It is indeed uncontroversial that, absent a fiscal stabilization clause in a contract, nothing prevents a State to participate in the benefits of a changed economic situation, stemming out of its inalienable natural resources. Windfall profit taxes are commonly-used measures to adjust the division of revenues from natural resources between States and private companies.

10. But, for the majority, Law 42 is not a tax or a levy. This seems however in contradiction with the qualification given by the majority to Law 42 as “a unilateral

¹ *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7) (Malaysia/Chile BIT), Award, 25 May 2004, §§ 242-243 and *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7) (Malaysia/Chile BIT), Decision on Annulment, 21 March 2007, § 101. It can also be mentioned here, that the same 50/50 split was made in *Bogdanov*, where the Claimant claimed 62102 lei and the tribunal awarded 31000 lei, just because the investor was not cautious enough. *Iurii Bogdanov, Agurdino-Invest Ltd. and Agurdino-Chimia JSC v. Republic of Moldova*, SCC (Russia/Moldova BIT), Arbitral Award, 22 September 2005, p. 19.

² *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, UNCITRAL (Canada/Ecuador BIT), Award, 3 February 2006, § 173.

decision of the Ecuadorian Congress to allocate to the Ecuadorian State a defined percentage of the revenues earned by contractor companies” (§ 510 of the Award), which, in my modest understanding, describes exactly what a tax or a levy does. Moreover, in order to reach the conclusion that Law 42 violated the Participation Contract, the majority based such finding on a confusion between participation in volumes and participation in revenues and concluded therefore that Law 42 was in violation of Clause 8.1 providing for the participation of the contractor in the volume of oil extracted, as well as in violation of Clause 5.3.2, which grants to the contractor a right of free disposal of the volumes of oil attributed under Clause 8.1.

11. I would have reasoned completely differently on both counts. Firstly, I cannot admit that Law 42 is a violation of Clauses 8.1 and 5.3.2, as Law 42 is dealing with a different issue than the ones regulated by the Participation Contract. It is not because the word “participation” is used in both expressions that participation in volumes means the same as participation in revenues! Lawyers ought to be rigorous and not to use one term for the other and one concept for another. Law 42 itself in its Article 2, makes the distinction:

... Contractor companies ... without prejudice to the volume of crude oil subject to participation that correspond to them ... will recognize in favor of the Ecuadorian state a participation of at least 50% of the extraordinary income generated by the difference in price.

12. Moreover, considering that Law 42 is evidently a tax³, I would have analyzed whether such modification in the general taxation violated Clauses 8.6 and 11.11, which are definitely not stabilization clauses but renegotiation clauses.⁴ And I would have concluded that there is no violation, as a law permitting the contractor to benefit from

³ This can indeed be supported by analyses of what is a tax made by other international arbitration tribunals, especially in three cases against Ecuador. Suffice it to cite the case of *Burlington*, in which the tribunal, dealing with the same BIT and the same Law 42, declared: “The Tribunal concludes that Law 42 is a tax ...”, *Burlington Resources Inc. and others v. Republic of Ecuador* (ICSID Case No. ARB/08/5) (US/Ecuador BIT), Decision on Jurisdiction, 2 June 2010, § 167. See also, *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, UNCITRAL (Canada/Ecuador BIT), Award, 3 February 2006, § 173 and *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador* (ICSID Case No. ARB/04/19) (US/Ecuador BIT), Award, 18 August 2008, § 174.

⁴ See Clause 8.6. **Economic stability.** In the event that, due to actions taken by the State of Ecuador or PETROECUADOR, any of the events described below occur **and** have an impact on the economy of this Participation Contract: a. Modification of the tax regime as described in clause 11.11. [...] e. Collection of the Value Added Tax, VAT, as set forth in Official Letter No. 01044 of October 5, 1998, which appears as annex number XVI, pursuant to which the Directorate of Internal Revenue Service states that the imports made by the contractor for the operations of Block 15 under the structure of the participation contract, are subject to said tax. In the cases indicated in letters a) and b), the Parties shall enter into amending contracts as indicated in clause 15.2, in order to re-establish the economy of this Participation Contract. When the events indicated in letters c), d), and e) occur, a correction factor shall be included in the participation percentages, to absorb the increase or decrease of the economic burden, in accordance with Annex No. XIV. (Emphasis added)

50% of unexpected profits does not impact on “the economy of the contract”, which was based on a long-term projection at the time of the signature of the contract of an expected 15 dollar price, according to the Claimants’ expert, Mr. Albuja himself.⁵

13. As a result of the foregoing, I consider that Law 42 should have been taken into account in the calculation of damages.

3. The analysis of the VAT Interpretative Law

14. Analyzing the consequences of the VAT Interpretative Law on the Participation Contract, the Award again establishes a confusion between two different things – an increase of the VAT and an impact on the economy of the contract – when stating (§ 568 of the Award) that “(t)here is no doubt, in the view of the Tribunal, that the VAT Interpretative Law has thereby increased the economic burden of the Claimants and thus impacted the economy of the Participation Contract.” (Emphasis added). I consider that it follows from a reading of Clauses 8.6⁶ that, contrary to what is implied by the majority’s position, not every collection of VAT has *ipso facto* an impact on the economy of the contract. Such impact had to be analyzed, which the majority did not do. Without entering in a lengthy discussion, it appears to me⁷ that the fact that the law did not refund VAT and that this was not compensated by a modification in the percentages of participation in the volumes does not appear to be a violation of the Participation Contract.

15. As a result of the foregoing, I consider that the VAT Interpretative Law should have been taken into account in the calculation of damages.

4. The different issues raised by the Farmout Agreement

⁵ To be noted the testimony of Mr. Albuja, on which the majority relies for other conclusions, to the effect that “... at the time of the negotiations the market price was well below the constant price that we were instructed to assume for the purpose of the negotiations. Specifically, Petroecuador had required that the parties project future cash flows on the assumption of a constant price of \$15 per barrel for Block 15 crude oil.” (Emphasis added)

⁶ See note 4 above.

⁷ I am comforted in this analysis of the limited impact of the VAT issues by the holdings of the tribunal concerning the same VAT in *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, UNCITRAL (Canada/Ecuador BIT), Award, 3 February 2006, § 174: “There is nothing in the record which suggest that the change in VAT laws or their interpretation brought the companies to a standstill or rendered the value to be derived from their activities so marginal or unprofitable as effectively to deprive them of their character as investments.”

16. I will now turn to my main concern, which indeed prompted me to write this dissenting opinion, which is related to the way the majority dealt with the consequences of the Farmout Agreement.
17. To deal exhaustively with this extremely complex and crucial issue, I will follow a four step analysis. In order to fully understand what was the essence and effect of the Farmout Agreement, there are two key issues, raised at two different moments in time, one issue at the time of the performance of the Farmout Agreement, one issue at the moment of *caducidad*.
18. To start with, it is indeed of crucial importance to fully understand what were the respective entitlements of OEPC and AEC under the Farmout Agreement, when it was entered into by the two parties. I will therefore start with a first question in order to understand “what was the effect of the signature of the Farmout Agreement on OEPC’s rights?”(1) and summarize under this heading the main findings of the Award with which I agree, to the effect that the essence of the Farmout Agreement was to transfer rights and not only to establish contractual liabilities. The whole structure of the Award, especially the finding that the Claimants committed a violation of Ecuadorian law, is based on this crucial analysis.
19. The next issue that had to be decided by the Tribunal was whether these entitlements have been modified on the occurrence of *caducidad*. This question in fact has to be further divided.
20. A first step is to determine what are the conditions – under the appropriate law – for an act to be considered inexistent or null and void and what are the legal modalities of such a finding. I will therefore examine whether or not under New York law and/or Ecuadorian law the concepts of inexistence or absolute nullity are applicable and in which cases the intervention of a judge to make such a finding is required. In doing so, I will answer the following question: “Can the Farmout Agreement be considered inexistent or automatically null and void on the occurrence of *caducidad*?” (2)
21. A second step, as it is not contested that no New York or Ecuadorian judge has declared the Farmout Agreement to be null and void, is of course to determine whether this ICSID Tribunal could – as has been done in the Award – annul the assignment of rights effectuated through the Farmout Agreement. In other words, it is imperative to deal

with the following crucial interrogation: “Could the Farmout Agreement be considered inexistent or null and void on the occurrence of *caducidad* by this ICSID Tribunal?” (3)

22. This could be the end of the analysis, but I consider it important to state in this dissenting opinion what should have been, in my view, the right way to deal with the matter in view of the applicable principles of public international law, had the majority not decided as it has in violation of these principles. The answer to this last inquiry will be the following: “Had the majority not exceeded its powers in annulling Andes’ rights, the Tribunal could only have granted 60% of the damages to the Claimants, in conformity with the principles of international law.”

II. THE ANALYSIS OF THE FARMOUT AGREEMENT

23. As an introductory remark, I want to indicate that the two first questions I will be dealing with here – *i.e.* “What was the effect of the signature of the Farmout Agreement on OEPC’s rights?” and “Can the Farmout Agreement be considered inexistent or automatically null and void on the occurrence of *caducidad*?” – are independent the one from the other. One thing is to know whether or not the legal situation created by the Farmout Agreement transferred rights or created only liabilities. This question is decisive in order to determine whether the Claimants have violated the Ecuadorian law. The Tribunal has unambiguously and unanimously stated that the effect of the Farmout Agreement was indeed to transfer rights and therefore that the Claimants had violated the law, as this operation was done without the required ministerial authorization. I stress here that the Tribunal has clearly stated that the transfer of rights was the essence of the Farmout Agreement. The second thing was to decide whether such transfer of rights was inexistent or automatically null, in other words whether the situation created by the Farmout Agreement – the transfer of rights – continued or not after *caducidad*. The majority has given a strange answer to that question: it stated that the initial situation of a transfer of rights has automatically ceased to exist by application of Article 79 of the HLC, but has at the same time stated that a liability of the Claimants towards Andes remains. As there was no such liability in the first place, these two aspects of the majority position are, in my view, contradictory.

1. What was the effect of the signature of the Farmout Agreement on OEPC’s rights?

24. This question has been abundantly discussed in the Award, which has come to the conclusion that rights under the Participation Agreement have indeed been transferred. As the Claimants have insisted, in their last submissions, that the Farmout Agreement only created a “Farmout liability” – a term that was not used in their first submissions and can be found nowhere in the Farmout Agreement – I will revisit briefly the main conclusions of the Tribunal on this issue, with which I agree and elaborate on their consequences.
25. While the Claimants indeed consider that the only thing that AEC acquired is a “Farmout liability” *i.e.* “a contractual right to claim a certain share of production from OEPC”, the Respondent contends that the Claimants only invented this term in order to take advantage of the *Chorzów Factory* dictum, but that in reality there exists no such thing as a “Farmout liability” and consequently that the Claimants are only entitled to claim for an interference with 60% of their remaining rights, the other 40% having been transferred to AEC through the Farmout Agreement.
26. The Claimants’ position is based on the analysis of the entitlements of AEC as a *claim* toward OEPC or a *credit* toward OEPC, the latter being considered as having a *liability* towards AEC⁸, and on the analysis according to which the Farmout Agreement did not give AEC any rights under the Participation Contract or ownership rights in the oil. The Respondent’s position is the reverse. This was clearly expressed by Professor Pierre Mayer in the February 2010 hearing: “AEC/Andes is not a mere creditor. It is the owner of an economic interest in the Farmout Property. Farmout Property means the Participation Contract.”⁹
27. The Tribunal has not accepted the Claimants’ contention that what AEC acquired was a mere contractual right implying a liability of OEPC towards them. It is not because the rights have been transferred by contract that they amount only to a contractual liability. A liability implies that you have to transfer something at some point in time, and here the Tribunal has come to the clear conclusion that the transfer of 40% of the economic rights in the Participation Contract has been fully executed. In fact, the rights were transferred immediately – on Closing – and during a certain time, AEC – and not OEPC – had a liability towards OEPC relating to the scheduled payments. These obligations of AEC

⁸ It should be noted that in French the word “*liability*” in the ICJ decision is translated by “*passif*.” There is no way to consider that the rights acquired by AEC in full payment of its 40% share of the expenses on Block 15 could be considered as a “*passif*” of OEPC.

⁹ Hearing Transcript (4 February 2010), p. 199, lines 20-21 and p. 200, line 1.

towards OEPC were fulfilled at the beginning of the year 2004, before the event of *caducidad*.

28. The Tribunal indeed has considered that rights in the Participation Contract have been transferred. In other words, as the situation stood at the moment of the *Caducidad* Decree, the rights under the Participation Contract were owned for 60% by OEPC and for 40% by AEC/Andes, *i.e.* at the time of *caducidad*, OEPC had only a right of ownership of 60% of the production of oil, having sold to AEC/Andes a right of ownership of 40% of the production of oil.
29. These conclusions of the Tribunal are rooted in a series of simple findings, based on the texts of the different agreements entered into (i), as well as on the economic factors of the deal between OEPC and AEC (ii).

(i) First finding: The Farmout Agreement and the JOA clearly state that part of the rights belongs to OEPC and part to AEC

30. It suffices here to quote Article 2.02 of the Farmout Agreement:

As between OEPC and AECI, AECI upon Closing, ... shall be entitled to the rights and benefits attributable to such Farmout Interest ... in the same manner and to the same extent as if AECI held legal title to a 40% economic interest as a participant in the Farmout property ... Likewise, as between OEPC and AECI, ... upon Closing, OEPC ... shall be entitled to the rights and benefits attributable to the remaining 60% interest in the Farmout Property ...

31. And at the end of this Article, OEPC is described as “the owner of such remaining 60% interest” (Emphasis added), which necessarily implies that it is not the owner of the other 40%. Here it is clearly stated that OEPC, for its own account, is only entitled to “the rights and benefits attributable to such remaining 60% interest.” This has been clearly explained by the Tribunal in §§ 301-303 and 330-331 of the Award.
32. The same conclusion has to be drawn from the terms of Clause 3.3.1 of the Joint Operating Agreement which states that “all the rights and interests in and under the Participating Agreements, all Joint Property and any Petroleum and any Petroleum produced from the Agreement Area shall, subject to the terms of the Participating Agreements, be owned by the Parties in accordance with their respective Participating Interests” (Emphasis added). It results from this clear wording that AEC owns rights, more precisely rights to 40 % of the Block 15 property and rights to 40 % of the past extracted oil – which it had indeed received, and rights to 40% of the future extracted oil

or the compensation of this future oil in case it cannot receive it, and that OEPC has no liabilities towards AEC, the relevant rights having been transferred.

(ii) Second finding: the economic aspects demonstrate that OEPC has already been fully paid for the transfer of the right to 40% of the economic interest

33. It is common ground that AEC agreed to pay 40% of all the CAPEX and OPEX in developing Block 15¹⁰, in exchange of its acquisition of 40% of the economic rights in the Participation Contract. In other words, AEC did acquire by paying for it, 40% of the economic interest in the Farmout Property. The Claimants have never denied having received large sums of money in order to convey to AEC this economic interest, which means that they no longer own this part of the rights under the Participation Contract.

34. The fact that OEPC has definitely lost the economic benefits of 40% of the Participation Contract's rights is also apparent in the fact that it had no means to recover 40% of the value of its economic interest that was definitely given to AEC. It should be remembered that nothing was provided for in the Farmout Agreement, in case there would be no transfer of legal title, for any reason. This state of fact, giving a definitive right to the oil, a definitive ownership of a percentage of the oil produced to AEC, has been confirmed by M. Derman, a witness for the Claimants in the December 2008 hearing:¹¹

Q. Now, Mr. Derman, I understand that – I believe you said earlier, and you confirm now, that it's your understanding that if the government had not approved the transfer of legal title after Oxy had repaid its earning obligations – excuse me, after AEC had paid its earning obligations, AEC would simply remain indefinitely as the holder of an economic interest with an entitlement to oil going forward.

B. That's right. (Emphasis added)

35. In other words, in the absence of *caducidad*, OEPC could not have claimed the rights to 40% of the oil back. Why could it claim these 40% with *caducidad*?

36. As a consequence, a major portion of the amounts invested in Block 15 was contributed by another entity than the Claimants (AEC, now Andes). It is uncontested that the Tribunal has recognized that rights have been transferred to AEC, these having been later transferred to Andes. I do not see how it would be possible to grant damages

¹⁰ For the exact figures, see §§ 132-133 of the Award.

¹¹ Hearing Transcript (19 December 2008), Day 7, pp. 1687, lines 20-22 and 1688, lines 1-6.

pertaining to rights that no longer belong to the Claimants, without disregarding the basic rules of international law.

37. For all these reasons explained in the Award, but which have been reiterated in this opinion, in order to dispel any confusion introduced by the late reference by the Claimants to a “Farmout liability”, the Tribunal has concluded that, through the Farmout Agreement, the Claimants actually transferred 40% of their rights under the Participation Contract to AEC, conclusion with which I concur.
38. It is undisputed that Andes, following the implementation of the Farmout Agreement and the subsequent sale of AEC’s 40% economic interest in the Participation Contract, has become – and still is¹² – the owner of 40% of the rights and obligations in and under the Participation Contract.
39. The question remains whether this situation has changed on the occurrence of *caducidad*.

2. Can the Farmout Agreement be considered inexistent or automatically null and void on the occurrence of *caducidad*? Substantive aspects

40. In other words, the issue that must be discussed is whether this transfer could be considered as inexistent or null and void by this Tribunal on the occurrence of *caducidad*, by application of New York and/or Ecuadorian laws. The majority has given a positive answer to this question. It has therefore granted damages to the Claimants as if they had never entered into the Farmout Agreement and as if this Agreement had not been fully executed, as far as the payments from AEC to the Claimants for the acquisition of their proprietary rights are concerned.
41. A first question is whether, under the application of the relevant law, inexistence or nullity resulting from an absence of authorization is automatic or has to be decided by a national court. This question will be dealt with in this section. A second and fundamental issue is whether, in the absence either of an automatic inexistence or nullity or of a declaration by a national court, this Tribunal was empowered to declare such inexistence or nullity, an issue that will be examined in the next section.

¹² At least, was until the rendering of this Award.

42. The most significant issue to emerge from the parties' submissions of November 2011 in answer to the Tribunal's questions of October 2011 is whether the assignment of rights under the Farmout Agreement would be automatically inexistent or null and void or whether a judicial declaration is required. The central question is thus: is the inexistence or nullity automatic under the applicable law or does it have to be decided by a national court?

43. In order to answer this question, there must first be a determination of the applicable law. I quote here again, for the ease of reference, the governing law clause, which is to be found in the Farmout Agreement:

This Agreement shall be governed by and construed, interpreted and applied in accordance with the laws of the State of New York, United States of America, excluding any choice of law rules or conflict of law principles which would refer the matter to the laws of another jurisdiction, except to the extent that the laws of Ecuador require application of the laws of Ecuador to the Participating Agreements and Block 15 or other property situated in or operations or activities conducted in Ecuador.

44. Although I have some doubts on the applicability of Ecuadorian law under this clause,¹³ I will accept, for the sake of an exhaustive analysis, the Award's approach – following the apparently common understanding of the parties – to the effect that “the application of New York and Ecuadorian law is relevant to whether the assignment was valid” (§ 616 of the Award) and examine the situation under both legal orders, as has been done by the majority. In fact, in my view, the controversy on the applicable law is of limited interest as the solution is the same whether New York law or Ecuadorian law is applied. What differs is the answer given by the majority and my own answer. The majority considers that under both legal orders there is an automatic cancellation of the assignment performed through the Farmout Agreement, because such contract has to be considered inexistent or at least automatically null and void. To the contrary, I consider that under both legal orders, inexistence is not relevant in the circumstances and that a nullity resulting from an absence of authorization has to be declared by a judge. In presenting my own analysis of the relevant legal documents, I will demonstrate that the majority, in order to arrive at an opposite conclusion, used not the real Ecuadorian law but an inexistent and inchoate body of law. Before analyzing these two bodies of law, it is apposite to briefly summarize the positions of the two parties.

¹³ But will not expand on the reasoning that raised such doubts in order to keep an acceptable length to this opinion.

45. The Claimants in fact provide two arguments, one under Ecuadorian law – their main position being that Ecuadorian law is applicable – the other under New York law, if it were to apply, both argumentation reaching the same conclusion that the Farmout Agreement has to be considered null and void by this Tribunal. The Claimants contend the following as concerns the nullity of the Farmout Agreement:

1. Under Ecuadorian law, it is automatically and mandatorily null and void by operation of Article 79(1) HCL.
2. Under New York law, it would be unenforceable and without effect.

46. The Respondent considers that whether under New York law – its main position being that New York law is applicable – or under Ecuadorian law, if it were to apply, the Farmout Agreement has to be considered as valid and binding, as inexistence is not relevant and nullity is not automatic and no jurisdiction, neither a New York court, nor an Ecuadorian court has declared such nullity.

47. The majority has concluded that the Farmout Agreement has to be construed and interpreted by application of Ecuadorian law and that under this law it is either inexistent or automatically null, but has also stated that the same result follows from the application of New York law.

48. I will here accept the two hypotheses of the application of New York law and Ecuadorian law. And I will demonstrate – both under New York and Ecuadorian law – that on the one hand, inexistence is a concept of restrictive use¹⁴ and could not apply to a case of absence of authorization and that on the other hand, absolute nullity has always to be declared by a court. I will examine successively what is the solution if New York law is applied (i) and what is the solution if Ecuadorian law is applied (ii), which will lead to the general conclusion relating to the question raised in this point (iii).

(i) Under New York law

49. It should be recalled that the Farmout Agreement is in any case primarily subject to New York law and that Ecuadorian law, if applicable, could only be so by reference.

¹⁴ Certainly a concept of restrictive use under Ecuadorian law, if it exists at all under New York law, a question to which a negative answer seems to have to be given, at least on the basis of the submissions of the parties and the documentation provided.

Looking first at New York law, it is worth noting that the Claimants themselves do not argue that the assignment would be null and void, but rather that it would be “unenforceable and without effect.” It appears to me that, by definition, enforcement needs the intervention of a judge.

50. Respondent considers that “New York law contains no requirement that would oblige its courts to render Claimants’ illegal assignment of rights under the Participation Contract to AEC void.”¹⁵ But, the most useful part of the Respondent’s presentation is the statement that under New York law a contract has to be declared null and that such nullity cannot be automatic:

Furthermore, under New York law, a private contract (such as the Farmout Agreement and the Joint Operating Agreement) is not invalidated unless one of the parties initiates legal proceedings to invalidate the contract. Contract invalidation is not a self-executing procedure under New York law. Here, it is undisputed that neither party to the Farmout Agreement or the Joint Operating Agreement has sought such relief. Therefore, the Farmout Transaction must be considered valid under New York law.¹⁶

51. This has not been refuted by the Claimants, as their main contention is to explain what the New York courts would do, which imply that they accept the necessary intervention of the courts in order to declare the nullity or inexistence of a contract or a legal act. A few examples of this approach can be given here, but there are others:

Because the assignment never happened under Ecuadorian law, a New York court applying the parties’ choice of law clause would hold that the Farmout Agreement and the Operating Agreement, which was subject to the Farmout Agreement, did not in fact make any assignment.¹⁷...

... a New York court would not give effect to an assignment of rights in the Participation Contract done without Ministerial authorization if such authorization were required.¹⁸

Under [Article 7.02 of the Farmout Agreement], a New York court would recognize that under Ecuadorian law, the assignment “does not exist.”¹⁹

Ecuador completely ignores the reference in Article 7.02 of the Farmout Agreement to Ecuadorian law determining rights under the Participation Contract. Under this provision, a New York court would give effect to Article 79 HCL by declaring any attempted assignment in

¹⁵ Respondent’s Brief of 3 November 2011, § 58.

¹⁶ Respondent’s Brief of 3 November 2011, § 62.

¹⁷ Claimants’ Brief of 3 November 2011, § 17.

¹⁸ Claimants’ Brief of 3 November 2011, § 22

¹⁹ Claimants’ Reply Brief of 22 November 2011, § 3.

the Farmout or Operating Agreements to be null and void.²⁰ (Emphasis added in all the paragraphs)

52. The majority's position is to the same effect, as it considers that "New York courts would give effect to such laws, including the HCL, when considering the validity of the assignment." (§ 646 of the Award. (Emphasis added)) and concludes the examination of New York law in the following manner:

New York courts commonly apply foreign laws where the relevant contractual provision so provides, and there is no reason to suggest that they would fail to do so in relation to the Farmout Agreement which requires the application of Article 79 of the HCL. (§ 646 of the Award. Emphasis added)

53. I have seen nowhere in the record that contract invalidation is a self-executing procedure under New York law. Looking then at the conditions of "absolute nullity", under which a contract could be considered to be "null and void" under New York, I consider that, should the matter come before a New York court, it might be that a judge might declare the assignment void, by application of Article 79 of the HCL. But this is an entirely different story than an automatic nullity. What is incontrovertible is that no New York judge has declared the Farmout Agreement to be null and void.

54. To sum up, the majority has not argued that there is a concept of inexistence in New York law, nor that there is an automatic nullity, such nullity having to be declared by a court. I do not disagree with such findings, although I did not quite see what conclusion the majority reached from these statements as far as the continuing validity of the Farmout Agreement was concerned.

55. As a result of the foregoing, I conclude that, under New York law which is the law of the contract, the Farmout Agreement having not been invalidated by a New York court, should have been considered as still in force and binding.

(ii) Under Ecuadorian law

56. In a nutshell, the Claimants have mainly argued that this is a case of absolute nullity, and subsidiarily that it is a case of inexistence, but that none of these two categories require the intervention of a judge. The Respondent, on its part, has argued that the category of inexistence does not exist in the Ecuadorian legal system and that this is a case of absolute nullity requiring the intervention of a judge. The majority appears to have

²⁰ Claimants' Reply Brief of 22 November 2011, § 22.

followed a third road, arguing principally that this is a case of inexistence and adding very shortly, in two paragraphs (§ 629 and § 634 of the Award), that it could also be a case of absolute nullity, but that this is equivalent to inexistence, as, according to my colleagues, absolute nullity does not need a declaration by a judge under Ecuadorian law.

57. Referring principally to Ecuadorian law, which the Claimants considers applicable under the choice of law clause of the Farmout Agreement, the Claimants in their Brief of 3 November 2011 have argued that the nullity provided for in Article 79(1) of the HCL is automatic and mandatory, without even mentioning in this first submission the legal category of “inexistence.” The Respondent, to the contrary, in its Brief of 3 November 2011, stated that under Articles 1698 and 1699 of the Ecuadorian Civil Code, the lack of ministerial authorization for the assignment creates an “absolute nullity” which is not automatic (*de pleno derecho*) and requires a judicial declaration in order to have effect. This statement is mainly based on the reiterated fact that absolute nullity has to be declared by a judge. The Respondent invokes, as just mentioned, Articles 1698 and 1699 of the Ecuadorian Civil Code which provide:

Article 1698

The nullity produced by illicit object or illicit cause, and the nullity produced by the omission of any requirement or formality which the law demands for certain acts and contracts to be valid, in consideration to their nature, and not to the quality or status of the persons who execute or agree to them, are absolute nullities.

Article 1699

The absolute nullity can and shall be declared by the judge, even if no party so requests, when it manifestly arises from the act or contract; it may be claimed by anyone having an interest to do so, excepting those who have performed the act or contract knowing or under the duty to know the vice invalidating it; it may also be claimed by the Public Ministry, for the benefit of morals or of the law; and it cannot be cured by ratification of the parties, nor by the passing of a period of time of less than fifteen years. (Emphasis added in the two articles)

58. These articles seem to be crystal clear as regards two important points: the absence of a requirement or formality required for validity entails absolute nullity; absolute nullity has to be declared by a judge.
59. It might be apposite to quote here Article 79 of the HCL used as the basis for the declaration of the inexistence of the Farmout Agreement by the majority (§ 626 of the Award). This article reads:

Article 79.

The transfer of a contract or the assignment to third parties of rights derived from a contract shall be null and void and shall have no validity whatsoever if there is no prior authorization from the Ministry of Energy and Mines, without prejudice to the declaration of caducidad as provided for in this Law. (Emphasis added)

60. According to this Article, the authorisation is required for the validity of the act. Considering the two articles 1698 and 1699 just quoted, it appears with the utmost clarity, that the absence of a requirement necessary for the validity of the transfer entails absolute nullity and that such absolute nullity has to be declared by a judge.

61. While stating that the assignment is not null and void until an Ecuadorian judge has declared it so, the Respondent however added in its Brief of 3 November 2011 that Ecuadorian law does not include the concept of inexistence:

Ecuadorian law has not adopted the notion of “inexistence” of acts or contracts. What is called “inexistence of acts or contracts” in some jurisdictions is, under Ecuadorian law, encompassed within the notion of “nullity”, and shall always be declared by a judge.²¹

62. The Claimants, in their 22 November 2012 Submission, apparently discovering the possible existence of the concept of inexistence in Ecuadorian law from the Respondent’s brief, answered by stating that the Respondent was wrong on this account and that the present situation indeed does not fall within the category of absolute nullity, but within a separate category termed “inexistence.” The legal concept of “inexistence” of a contract means that such contract must be considered by everyone as automatically null and void, with no judicial declaration required. According to the Claimants, the Farmout Agreement lacked an essential element required for “life” and was therefore “inexistent” under Article 1745 of the Ecuadorian Civil Code. As such, no judicial declaration was required.

63. In order to bring some clarity to this question, I will first attempt to follow the different statements made by the majority on the issue (§§ 617-635 of the Award).

64. To begin with, it should be noted that the majority seems to have made up its mind before any serious analysis of the Ecuadorian texts and decisions involved. Already in the third paragraph of the developments devoted to Ecuadorian law, after citing Article 79 of the HCL, the majority prematurely concludes:

On its face, therefore, the assignment that purportedly occurred under the Farmout Agreement was invalid. The assignment therefore had no

²¹ Respondent Brief of 3 November 2011, § 79.

legal effect and OEPC retained 100% of both the legal and beneficial ownership of all rights in the Participation Contract. (§ 619 of the Award. Emphasis added)

65. To conclude before analysis just “on the face” of an article could be acceptable if a subsequently presented analysis were to confirm such conclusion. But I will show that this is not the case, trying to follow step by step the different statements made by the majority, which I will treat separately as I was not able to follow the path from one statement to the other and could not understand the logic behind them.
66. Following their initial statement, the majority purported to analyze four decisions of the Ecuadorian Supreme Court provided to the Tribunal by the parties in order to ascertain the applicable rule, stating:
- It is common ground between the parties that when the Ecuadorian Supreme Court has issued three consistent decisions on a precise point, the law on that point is considered settled and becomes binding on lower courts. It becomes what, in some jurisdictions, is referred to as a “*jurisprudence constante*.” (§ 622 of the Award)
67. After several readings, I could not trace what “precise point” came out of this purported *jurisprudence constante*. As a matter of fact, I will demonstrate that, in my view, a fair and thorough reading of the decisions of the Supreme Court, in their original language, belies completely the findings of the majority.
68. First, I want to point to the selective use of citations from the decisions of the Supreme Court made by the majority, as well as serious problems of translation, although those have not been acknowledged by the majority in the Award. I will complete the analysis on both counts.
69. It should be recalled, for the sake of clarity, that the Tribunal was provided with four decisions of the Supreme Court:
- C-662: a decision of 16 May 2001
 - C-659: a decision of 7 June 2001
 - C-660: a decision of 29 August 2001
 - C-658: a decision of 20 February 2002
70. In fact, reading further into the paragraphs of the Award devoted to the question of the efficiency of the Farmout Agreement, I have been unable to understand what is the law that the majority has applied: it cited those four cases dealing with contracts, and

relied on them, while at the same time warning that “applying a contractual analysis is inappropriate.” (§ 627 of the Award) But then what rules of law were applied? The answer of the majority is simply the following: “Instead, [instead of applying a contractual analysis as was supposedly done in the analyzed decisions] this Tribunal must consider the essential elements for the assignment to have life.” This looks like a rule whose content was invented by the majority, which is certainly not part of the Ecuadorian legal order, apparently in order to avoid taking into account what the cited decisions referring to “the essential elements for the assignment to have life” precisely meant by these “essentials elements.” The majority’s approach can be described as a *proprio motu* determination of what the majority considered to be an essential element, a determination completely disconnected from the legal order in which these essential elements have been precisely and restrictively defined.

71. Strangely too, the majority has focused on the first and third decision. In doing so, it selected some extracts but did not quote the remainder of the decisions which explains and clarifies what is stated in the extracts in a different way than the interpretation given by the majority. I will revert to a complete analysis of these two cases.

72. Moreover, the majority has not discussed the second and fourth cases, just mentioning their existence and merely stating, and I quote:

The parties also provided the Tribunal with the Supreme Court decisions of 7 June 2001 and 20 February 2002, both of which reaffirm the categories of “inexistence” and “absolute nullity,” but doubtless because the Court had firmly established the principles relating to inexistence in the two other cases (that is, the 16 May 2001 and 29 August 2001 cases) they discuss only briefly the definitions of these categories. (§ 635 of the Award)

73. It is quite surprising for me to read that a decision of June 2001 can “reaffirm” a decision of August 2001. This is indeed quite a strange chronology. Contrary to the majority’s statement that the cases C-658 and C-699 discuss “only briefly these categories” (§ 635 of the Award), I consider that they are more enlightening than the two other cases to understand the difference between inexistence and absolute nullity and the criteria for these respective concepts as well as their respective consequences; in fact, these two cases are extremely useful for what they say both on the difference between inexistence and validity and on the criteria for inexistence, especially if one considers the Spanish version and not the misleading English version. I will revert to this.

74. Second, the Award suffers from several approximations as far as the core concepts dealt with are concerned. At the beginning, there is a confusion between absolute nullity and inexistence, which can first be seen in §§ 622 and 623 of the Award, where the two legal categories are treated either as equivalent or as a unique concept: "... Ecuadorian law recognizes automatic nullity or 'inexistence.'"; "... the concept of automatic nullity or inexistence was judicially recognized." But, in the next paragraph (§ 624 of the Award), the majority asserts that there is a difference between the categories of inexistence, absolute nullity and relative nullity. At first sight, this does not really appear coherent.

75. But the confusion between absolute nullity and inexistence appears again when the majority considers that Article 79 of the HCL is similar to Article 1745 (§ 628 of the Award). I quote these two articles and a mere look at them shows that they do not use at all the same legal vocabulary:

Article 79 of the HCL

La transferencia de un contrato o la cesión a terceros de derechos provenientes de un contrato, *serán nulas y no tendrán valor alguno si no precede autorización* del Ministerio del Ramo ...

The transfer of a contract or the assignment to third parties of rights derived from a contract *shall be null and void and shall have no validity whatsoever if there is no prior authorization* from the Ministry of Energy and Mines ...

Article 1745 of the Ecuadorian Civil Code

La falta de instrumento publico no puede suplirse por otra prueba en los actos y contratos en que la ley requiere esa solemnidad; y se mirarán *como no ejecutados o celebrados* ...

The lack of a public deed cannot be replaced by other evidence in the acts and contracts for which the law requires this solemnity; and they will be *deemed as non executed and signed* ... (Emphasis added)

76. Article 79 which deals with the absence of an authorization, by its own terms, refers to invalidity ("no validity whatsoever") while Article 1745, which deals with the absence of a public deed refers to inexistence ("deemed as non executed"). It seems quite difficult to establish a confusion between these two provisions as does the majority.

77. It should be added that the majority indicates that it took comfort in some declarations made by counsel and experts of both the Claimants and the Respondent before the question of the effect of Article 79 of the HCL was raised by the Tribunal in its Letter of 6 October

2011, declarations which are extensively quoted (§§ 636-644 of the Award). I am not impressed by these citations, expressed prior to the Additional Submissions. These are all citations taken out of context and proffered in relation with other topics than the distinction between absolute nullity and inexistence, on which, to the contrary, the submissions of 3 and 22 November 2011 concentrated. If such an approach should be favoured, one could also say for example that the Claimants having not even mentioned inexistence in their 3 November 2011 submission and the Respondent arguing that it does not exist in the Ecuadorian legal system, such position can comfort the Tribunal that inexistence does not exist! Moreover, I consider that experienced arbitrators are capable to read decisions of the Supreme Court and understand their true meaning, notwithstanding whatever counsel or experts elaborate on them.

78. Contrary to the majority taking just one citation out of C-662 (§ 624 of the Award) and one citation out of C-660 (§ 630 of the Award) and not discussing the two other cases C-658 and C-659 (§ 635 of the Award), I will now proceed to a thorough analysis, in the chronological order, of the four cases mentioned by the majority on which their findings purportedly rest, and put these isolated citations back in their context. This might look like legal technicalities, but being rigorous is required on such an important issue as the one dealt with here. I will also show that had the translations concerning the criteria of inexistence been correct and the original Spanish texts been really taken into account, the conclusions arrived at by the majority would have been impossible to sustain. The issue of the application of the proper law is at stake here.

The decision of 16 May 2001 (C-662)²²

79. This is the decision on which the majority most heavily relies (§§ 624-629 of the Award). The starting point is the quotation of a unique citation, as just mentioned, which I will copy here, for the ease of reference:

This Chamber has examined on several occasions the question relating to the ineffectiveness of a juridical act. The doctrine distinguishes three types of ineffectiveness: 1. Maximum ineffectiveness or inexistence, when the act does not have the essential requirements for it to have a life. The inexistent act cannot be cured and does not need to be invalidated; 2. absolute nullity, when the act is capable of producing some effects in certain special conditions. There is an appearance of act until its nullity is declared. *Absolute nullity* cannot be cured but *must be invalidated, i.e., declared*; 3. relative nullity, which implies that the act

²² To give the general context, in this case, the issue was whether a promise to sell/purchase a real property (an office in Guayaquil), that had to be made through a public deed, could be considered effective without the public deed.

is said to be valid and is only invalidated as of the day on which it is voided. The relatively void act can be validated.²³ (Emphasis added)

80. The majority then quite correctly frames the core issue that has to be discussed: what is the consequence of the absence of authorization, is it inexistence or absolute nullity? (§ 625 of the Award). The answer is immediate: “It is the Tribunal’s view that the assignment that occurred under the Farmout Agreement undoubtedly meets the criteria expressed in the above quotations for “inexistence.” (§ 626 of the Award. Emphasis added)). The problem is that these criteria were indeed enumerated not in this citation but later in the decision, which clarified what has to be considered an essential requirement, as will be explained in more detail below, and that the majority just decided for itself that an authorization was such an essential requirement, a statement which can be found nowhere in the decision. The majority thus concludes that the absence of authorization entails inexistence because “both elements of ‘ineffectiveness’ identified by the Supreme Court have been satisfied: the attempted assignment (1) lacked an essential element required to give it life; and (2) as noted above, this defect cannot be cured.”(*Ibid.*)

81. The next step is the astounding statement, already mentioned in paragraph 70 of this dissenting opinion, that the analysis of the case deals with contracts and is therefore not relevant:

In supporting its decision the Court quoted Columbian scholars who have stated that required elements for life in the context of contracts are “expressed will, the consent, an object, and the solemn form.”²⁴ Although the Respondent attempted to argue that the Farmout Agreement did not fall within any of these criteria, it failed to appreciate that it is not the contract – the Farmout Agreement – that is at issue here. The issue is the validity of the assignment effected by the Farmout Agreement. Therefore applying a contractual analysis is inappropriate. (§ 627 of the Award)

82. In other words, the majority refuses to apply the criteria for inexistence put forward by the Supreme Court, pretending that these are criteria developed only for contracts and that it is not dealing with a contractual situation here. There are again here, according to me, a contradiction, an absurdity and an error of law: first, a contradiction, if the case is not relevant why study it; second, an absurdity, how can an assignment made through a contract be deemed not to be a contractual matter; third, a gross error of law, *i.e.* the statement that the criteria apply only for contract is blatantly wrong, as the decision does not deal only with contracts but with legal acts in general. As a matter of fact, a mere reading of the Supreme Court decision shows that contrary to what is stated by the

²³ Supreme Court of Ecuador, 16 May 2001 at page 1528. CA-662 (Claimants’ Translation of RLA-348).

²⁴ *Ibid.*

majority to the effect that the “required elements for life in the context of contracts are ‘expressed will, the consent, an object, and the solemn form.’ (Emphasis added, *ibid.*), these elements are precisely the only criteria whose absence causes a legal act to be inexistent, and do not only apply for contracts. It deserves the full citation both in Spanish and English:

Los citados autores colombianos escriben: “Ciertas condiciones generales son indispensables para la formación de los actos jurídicos, sin ellas, éstos no pueden nacer, no existen, son nada frente al derecho. Tales condiciones son: la voluntad manifestada, el consentimiento, el objeto y la forma solemne.

The cited Colombian authors write: “Certain general conditions are essential for the formation of legal acts; without them, the acts cannot be born, do not exist, are nothing under the law. Said conditions are: the expressed will, the consent, an object, and the solemn form.

83. Stating therefore without the slightest support in Ecuadorian law that an authorization is among the essential elements whose absence leads to inexistence, the majority concludes from the use of the term validity in Article 79, that “no validity” is equivalent with “no life” or “no existence” and concludes: “The logical consequence of this provision is that no further action is required to invalidate an unauthorised assignment.” (§ 628 of the Award)

84. Last, but not least, in the final paragraph devoted to the decision of 16 May 2001, the majority seems to deduct an automaticity for absolute nullity – although I am not certain of this interpretation of the quite obscure statements of this paragraph which seems to deal suddenly with absolute nullity, when the majority has already concluded that the absence of an authorization entails inexistence – from the fact that a judge “shall” declare absolute nullity when the conditions for such are present. Deducting an automatic nullity from a statement that a judge shall declare the nullity is at best puzzling. In fact, in doing so, the majority has endorsed a line of argumentation of the Claimants to the effect that the nullity is automatic, basing themselves on an unjustified assimilation between “mandatory” and “automatic” when they refer to the *Caducidad* Decree in order to defend the idea that “(t)he nullity of the unauthorized assignment of rights pursuant to Article 79(1) HCL is automatic and mandatory”²⁵, in citing the following excerpt of the Decree:

... the acts that the Law prohibits are null and of no value, save when another effect is expressly designated for the case of violation; in no case may the judge declare an act valid that the law establishes is null. (Emphasis in the original)

²⁵ Claimants’ Brief of 3 November 2011, § 11.

The Claimants have concluded from this citation that the nullity is automatic and does not need the intervention of a judge to be acknowledged. This interpretation has been endorsed by the majority.

85. To the contrary, in my understanding, this simply indicates that a judge has to intervene to declare absolute nullity and means that it is mandatory for a judge to declare the nullity of an act considered to be null by law if he/she is requested to judge the validity of the act or on its own motion, not that an act can be considered as null automatically without the intervention of a judge. It appears quite plain that precisely in this extract a reference is made to a judge whose intervention is necessary. The rule according to which a judge cannot “declare” valid an act which is null by law rather demonstrates precisely that any nullity shall be “declared” by a judge under Ecuadorian law.
86. Some other gaps in the majority’s presentation will now be presented. First, as appears in the citation presented by the majority, it is indeed “the doctrine” that distinguishes three types of ineffectiveness. What is interesting is that if one does not stop there and goes on reading the decision of 16 May 2001, the Supreme Court immediately explains that there is another doctrinal position:

“It has been argued that our legislation does not distinguish inexistence from nullity, and that, therefore acts considered non existent by the doctrine should be included among those absolutely null.” (Emphasis added)

87. The Supreme Court then continues its doctrinal review and refers to Chilean and Colombian scholars to state that they “accept that in certain cases there are inexistent acts that are an appearance, a miscarriage, an attempt of an act rather than an act itself.” One remark here: the description of what can be considered as an inexistent act has nothing to do with our situation, as the Farmout Agreement can be no means be described as “an appearance, a miscarriage, an attempt of an act rather than an act itself.” To the contrary, the situation of the Farmout Agreement can be described as a situation where “there is an appearance of act until its nullity is declared”, which is the situation that leads to a declaration of absolute nullity. The Supreme Court then endorses the “essential conditions” and the consequence of the lack thereof, as described:

Certain general conditions are essential for the formation of legal acts; without them, the acts cannot be born, do not exist, are nothing under the law. Said conditions are: the expressed will, the consent, an object

and the solemn form. ... The lack of such formalities is an obstacle to the formation or perfecting of such juridical acts and leads to such acts as being considered inexistent. (Emphasis added)

88. No trace of an authorization, as an essential condition for the formation of a legal act. Considering the structure of the reasoning, these essential elements – whose absence leads to inexistence – can only refer to the ones cited in the decision and it is indeed striking that in explaining what these essential requirements are, the Supreme Court refers exclusively to solemnities. For example, the Supreme Court quotes Article 1745 of the Civil Code mentions “the lack of a public deed.” The Supreme Court, then, summarizes its position in the following way:

“When the law requires the solemn formality of a public deed and it has not been granted, the act or contract will be regarded as though it has not been executed and signed, that is, legally, his act does not exist.” (Emphasis added)²⁶

And the rest of the decision of 16 May 2001 only mentions this hypothesis: “acts that are lacking the formalities required by law ...” due to an absolute lack of the proper form ...”

89. Two important lessons can be drawn from this decision: first, it only refers to the lack of a solemn form not the lack of an authorization, as the basis for inexistence. Second, at the end of the day, it cannot be denied that it is the Supreme Court that has declared the inexistence, and I do not see how it could be otherwise, for two reasons: first because, when some solemn formality is lacking, there will always be a party saying that the contract is inexistent and the other that it is not, and a recourse to a court is therefore always needed; second, because, especially when an act has been performed, as was the situation in the case C-662 or in relation with the Farmout Agreement, there must be a judicial pronouncement to undo what has been done under the inexistent act. When there is a legal inexistence of an act that has a factual existence, a court has to explicit the legal consequences of this situation. This is precisely what the Supreme Court has done in the case C-662, concluding:

It is decreed that [the property that was transferred under an inexistent act] be restored to its owners within the term of thirty days as of the date this judgment is enforceable. (Emphasis added)

90. In other words, what can be derived from this case is that indeed the concept of inexistence appears to be accepted by the Supreme Court. Certainly, the citation quoted in

²⁶ *Id.*, p. 1529.

§ 79 of this opinion seems to belie the Respondent's assertion that "inexistence" does not exist in the Ecuadorian legal order, and I take note of the correctness of Claimants' position on this point. However, the same citation also clearly indicates that absolute nullity has to be declared by a judge, which this time belies the contention of the Claimants to the effect that absolute nullity is automatic. This citation presented by the Claimants is of crucial importance and, in my view, confirms that absolute nullity – as well as relative nullity – has to be declared by a judge.²⁷ The Supreme Court even insists on that point, on saying it two times with a different word: "Absolute nullity ... must be invalidated, *i.e.*, declared." In other words, the unavoidable interpretation of the just mentioned citation is that, while inexistence might not always need the intervention of a judge, "absolute nullity" does.

91. The Supreme Court's decision examined here also indicates that inexistence can only be found in very limited circumstances dealing with a solemn formality which is lacking. There is not the slightest reference to the lack of a substantial requirement or an authorization or anything of that type. Moreover, the Supreme Court did not say "the Buyer can consider the contract automatically inexistent", leaving him to draw the consequences. It is the Supreme Court that declared that the contract "will be regarded ... legally inexistent" and therefore the Supreme Court ordered that the situation, that prevailed before the contract has been executed, be restored.

The decision of 7 June 2001 (C-659)²⁸

92. This case confirms the difference between inexistence and absolute nullity, as already stated in the previous decision. Again, a promise to sell a real estate was done without the legal requirement of a public deed and, according to the Supreme Court, has therefore to be considered as inexistent under Article 1745 of the Civil Code. This means that when a contract is inexistent, no claim can be raised on its basis:

... a private promissory contract to sell real estate property shall be deemed not executed or signed, or as having no effect whatsoever; or, in other terms, it is an apparent contract, it does not legally exist, it lacks all effectiveness. Therefore, a claim cannot be filed pursuant to it ..., as the contested judgment requests on the basis of section 1532 of

²⁷ The distinction between absolute and relative nullity is merely a question of timing, one being *ex tunc*, the other *ex nunc*.

²⁸ To give the general context, this case dealt with a promise to sell real estate, for which a public deed was lacking. The Buyer had paid the money, but did not receive the property. It then requested that its money should be returned, arguing the inexistence of the contract and therefore the inexistence of a cause to its undue payment.

the Civil Code; one cannot enforce compliance or request termination of an inexistent contract. (Emphasis added)

93. It should be underscored that the Supreme Court used the expression “no effect whatsoever” which should be distinguished from the expression “no validity whatsoever”, the first expression referring to inexistence, the second to absolute nullity.
94. This case confirms that only the lack of a public deed and not of any other essential legal requirement can be a cause of inexistence. It must however be noted that the majority might have implicitly relied on a misleading English translation of the relevant part of the Supreme Court’s decision, for its general interpretation of the conditions for inexistence – as capable of encompassing a legal requirement different from a public deed, like an authorization. This misleading English translation is indeed the only clear reference which I encountered to the idea that a legal requirement which is not the requirement of a public deed could constitute a condition for the coming into existence of an act.
95. The original Spanish text reads as follows:

.... Se trata de aquellas cláusulas que ordinariamente forman parte de un contrato de promesa, pero que al haberse celebrado sin **las solemnidades** exigidas por la ley, escritura pública, por tratarse de la compraventa de un inmueble, no produce entre las partes obligación alguna, conforme lo establece en forma terminante el Artículo 1597 del Código Civil. Esta Sala en fallo expedido 16 de mayo de 2001, mediante Resolución 188-2001, al analizar este tipo de “convenios” privados de venta de inmuebles, ha considerado que debe aplicarse a tales casos la disposición del artículo 1745 del Código Civil: “La falta de instrumento público no puede suplirse por otra prueba en los actos y contratos en que la Ley requiere **esa solemnidad**; y se miraran como no ejecutados o celebrados, aun cuando en ellos se prometa reducirlos a instrumento público dentro de un cierto plazo, bajo una cláusula penal. Esta cláusula no tendrá efecto alguno.” Por esta razón, un contrato privado de promesa de venta de inmuebles se mirará como no ejecutado ni celebrado ni tendrá eficacia alguna o dicho de otro modo es un contrato aparente, jurídicamente no existe, carece de toda eficacia ... (Emphasis added)

96. It confirms therefore the fact that only the absence of a public deed, to the exclusion of any other formal requirement, can be a cause of inexistence.
97. The English translation of the decision of the Supreme Court reads however as follows:

These are clauses which ordinarily are part of a promissory contract, but that, because they did take [sic] place without **the legal requirements**, a public deed, because it is pertaining to the purchase of a real estate property, no obligation between the parties was produced, as established in a clear manner in section 1597 of the Civil Code. This Court, in a ruling issued May 16, 2001, by way of Resolution 188-2001, upon analyzing this type of private promissory "contracts" for the sale of a real estate property, has considered that the provision of section 1745 of the Civil Code must apply to such cases; "The lack of a public instrument cannot be replaced by other evidence in the acts and contracts in which the Law requires **this legal requirement**; and they will be deemed as non-executed or signed, even if it is promised therein that they will be committed to a public instrument within a certain period of time, under a penalty clause. This clause shall not have any effect whatsoever." For this reason, a private promissory contract to sell real estate property shall be deemed not executed or signed, or as having no effect whatsoever; or, in other terms, it is an apparent contract, it does not legally exist, it lacks all effectiveness ... (Emphasis added)

98. Highlighted in bold, it is noticeable that the word "solemnidad" and the phrase "solemnidades exigidas por la ley" are translated as "legal requirement", which of course is not the same thing. Suffice it to say here that the original and authentic Spanish version completely disproves the majority's analysis of the conditions for inexistence.

The decision of 29 August 2001 (C-660)²⁹

99. Again, in this case, the Supreme Court declared that the relevant "promise of purchase agreement" needed a public deed to exist, and that without this deed the contract was inexistent. The Supreme Court gave some indications on the consequences of an inexistent contract:

... an act that the doctrine considers has maximum ineffectiveness or inexistence cannot be validated, nor does it need to be invalidated."

100. The Supreme Court recopied then exactly what it said in C-662, a few months before, citing first the two different doctrinal positions, and then citing again what it considered to be the essential requirements, whose absence entails inexistence:

Certain general conditions are essential for the formation of legal acts; without them, the acts cannot be borne, do not exist, are nothing under

²⁹ To give the general context, this case concerns a "promise of purchase agreement", but that was only qualified as such after some reasoning by the Supreme Court, as it was the buying of a vacation time-share property. Some money was handed over by the Buyer, but then another contract was entered into by the parties, called a "deed of settlement" which was a termination act terminating the promise of purchase agreement, with the consequence that the money should be restituted to the Buyer by the Seller.

the law. Said conditions are: the expressed will, the consent, an object and the solemn form.

101. Also in this case, as in the former ones, the Supreme Court referred repeatedly to the absence of solemn form or certain solemnities, and to no other cause of inexistence, such as an absence of authorization.

The decision of 20 February 2002 (C-658)³⁰

102. This case is quite important, as it expresses very clearly that a distinction has to be made between existence and validity.
103. Moreover, this case, once again disproves the majority's finding that anything else than "solemnidas/public deed" can constitute a formal requirement for existence. Here again, the record shows a problem of translation: in this case, the word "solemnidad" had not been translated by legal requirement, but the words legal requirements have been purely and simply added to the original Spanish text. I quote here both texts:

The misleading English translation:

...The nullity is the legal consequence, generated because in the granting, subscription or manner in which a contract or legal act was celebrated, certain requirements or formalities expressly stated or regulated by law were omitted, the breach of which causes the penalty, one must differentiate between the conditions of existence and the conditions of validity, the first being the will, object, cause and **solemnities or legal requirements** prescribed by law, those without which the act is not binding for legal purposes and lacks any legal existence..

The original Spanish version:

...la nulidad es una consecuencia jurídica que se genera porque en el otorgamiento, suscripción o forma de celebrar un acto o negocio jurídico se ha omitido ciertos requisitos y/o formalidades que expresamente la ley señala o regula y cuyo incumplimiento origina la sanción, debiendo diferenciarse las condiciones de existencia de las condiciones de validez, siendo las primeras las [sic] voluntad, el objeto, la causa y las **solemnidades** prescritas por la ley, aquellas sin las cuales el acto no nace a la vida del derecho, careciendo de existencia jurídica ... (Emphasis added)

104. A mere reading of these texts shows first that there can be non confusion between existence and validity and second that there can be non confusion between the conditions

³⁰ To give the general context, this case dealt again with the purchase of real property.

of existence and the conditions of validity. It has already been underscored that precisely the majority did not distinguish the concepts of existence/inexistence on the one hand and the concepts of validity/invalidity on the other hand.³¹ This case expressly states that there can be no confusion between inexistence and invalidity, distinction which the majority completely ignored. In the same manner, it has already been underscored that the majority assimilated solemnities with legal requirements, a conclusion that can in no way be based on the original Spanish text.

The *jurisprudence constante* stemming out of these decisions

105. It seems that a certain number of conclusions can be drawn from the analysis of these four decisions of the Ecuadorian Supreme Court. If one looks at the formal conditions that must be present for inexistence to arise, these cases – far from setting a judicial precedent that, according to the majority, would indicate that a legal act which lacks a required authorization or any other formal requirement is inexistent – show to the contrary that inexistence results only from the lack of a public deed. The cases stand for the principle that inexistence does not result from the absence of other formalities than the solemnity of a legal deed. The absence of other formalities, like the absence of an authorization, entails an absolute nullity.

106. In other words, the presentation of the conditions of inexistence in Ecuadorian law by the Respondent has to be considered as corresponding to the true content of that law. The majority however has disregarded it in a summary fashion, stating: “Although the Respondent averred that the “inexistence” category applied only to a limited body of real estate transactions requiring the execution of a public deed, as discussed below, there is nothing in the general definitions set out in the case law to support such a narrow application of “inexistence.” (§ 623 of the Award). The majority states categorically that there is “nothing” to support the fact that inexistence is only a consequence of a lack of a public deed. Let me just point to a few elements that disprove such a blatant and unfounded statement. First, ALL the cases mentioned deal only with real estate transactions, which should at least render cautious with too quick generalizations; second, ALL the cases cited deal exclusively with solemnities and public deeds; not a single case deals with the lack of an authorization! In other words, a fair reading of the cases of the Supreme Court cited by the majority to support their finding that inexistence can be declared when an authorization is not given, shows that this does not have the slightest

³¹ See, for example, § 626 of the Award.

support, as inexistence is linked exclusively with the absence of the formality of a public deed, and not with the absence of any other condition of validity of the act. I repeat that NONE of the cited cases dealt with the absence of an authorization.

107. Although the majority has not expressly referred to the misleading translations mentioned above, the idea that the absence of any essential legal requirement – including the legal requirement of an authorization – is a cause of inexistence, pervades the majority’s findings. The references to an essential aspect rather to the more restricted requirement of a public deed are numerous: “an essential element” (3 times in § 626 of the Award), “an essential requirement” (*Ibid.*), “the essential elements” (§ 627 of the Award), “essential requirements” (§ 630 of the Award). Whether or not the majority has relied on the English translations to reach its decision, it was at least imperative to take into account the authentic Spanish texts, with regard to which the majority’s approach to the content of Ecuadorian law is blatantly not sustainable.

108. I repeat that the absence of an authorization is distinct from the absence of a public deed and entails absolute nullity. This is indeed confirmed by section 1698 of the Civil Code:

... the nullity produced by the omission of any requirement or formality which the law demands for certain acts and contract to be valid, in consideration to their nature, and not to the quality or status of the persons who execute or agree to them, are absolute nullities.
(Emphasis added)

109. According to Article 1698, “the nullity produced by the omission of any requirement or formality which the law demands for certain acts and contracts to be valid” (Emphasis added) is an absolute nullity. This is exactly the situation of Article 79 of the HCL, which refers indeed to the absence of validity.

110. The absence of the requirements and formalities requested by law clearly results not in inexistence but in absolute nullity. And absolute nullity – just like relative nullity for that matter –has to be declared by a judge, the difference being that the first declaration is *ex tunc* and the second *ex nunc*. The fact that absolute nullity has to be declared by a judge is stated without any possible ambiguity in section 1699 of the Civil Code:

The absolute nullity can and shall be declared by the judge, even if no party so requests, when it manifestly arises from the act or contract.

111. To conclude the question of the effectiveness of the Farmout Agreement under Ecuadorian law, it must be insisted upon, as any interpretation has to start with a good faith interpretation of the words used in a legal text, that Article 79 of the HCL uses the expression “null and void” and not “inexistent.” Legal words have each their own meaning and I do not see that the reference to “null and void” used in the HLC could be deemed equivalent to “inexistent.”³² This element is already conclusive, but we have seen that other arguments point to the same direction.
112. Looking then at the conditions of “absolute nullity”, under which a contract can be considered to be “null and void” under Ecuadorian law, I consider that, should the matter come before an Ecuadorian court, a judge would have no choice but to declare the assignment void. But this is an entirely different story than an automatic nullity. What is incontrovertible is that no Ecuadorian judge has indeed declared the Farmout Agreement to be null and void and that this Agreement was in full effect for many years.
113. As a result of the foregoing, I conclude that, if the applicable law is Ecuadorian law, the Farmout Agreement, having not been invalidated by an Ecuadorian court, should have been considered as still in force and binding.

(iii) General conclusion on the effectiveness of the Farmout Agreement

114. In sum, I have come to the conclusion that, whether one applies Ecuadorian Law or New York law, in isolation or in combination, the Farmout Agreement cannot just be taken out of the picture for determining the amount of damages granted to the Claimants. I have been convinced first, that the conditions for inexistence are not present and second, that absolute nullity provided for in Article 79 of the HCL has to be declared by a competent court.
115. It must be mentioned that Ecuador or PetroEcuador have not requested a declaration of nullity. Claimants are not entitled to do so. No New York judge or Ecuadorian judge has declared it. And, in my view, the majority could not declare it *sua sponte*, as it has no jurisdiction to do so, as will be discussed now.

³² This has also been noted by the Respondent: “Article 79 of the HCL does in any event not refer to “inexistence” of the unauthorized transfer of rights but to the fact that it is “null and void” under Ecuadorian law. Respondent’s Brief of 3 November 2011, § 79.

116. As a result of the foregoing, I conclude that – whether by application of New York law or Ecuadorian law – the Farmout Agreement, having not been invalidated either by a New York court or an Ecuadorian court, should have been considered as still in force and binding.

3. Could the Farmout Agreement be considered inexistent or null and void on the occurrence of *caducidad* by this ICSID Tribunal? Jurisdictional issues.

117. A last question is indeed whether, in the absence of inexistence or automatic nullity or of a declaration of nullity by a national court, this Tribunal is empowered to declare a contract between a party to the arbitration and a non party null and void.

118. In other words, the question is whether the Tribunal should have declared that this transaction, entirely fulfilled during 6 years, is inexistent or null and void from the beginning – with the consequence that AEC/Andes is then, by virtue of this Award rendered in a proceeding to which it is not a party, deprived of any rights in the Participation Contract.

119. I consider that in deciding as it did, the majority has both exercised a jurisdiction that it manifestly did not possess, and in exercising such jurisdiction has not applied the basic principles of international law relating to international responsibility.

120. The majority has however attempted to justify its findings both with regard to its jurisdiction and to the way it used this jurisdictional power to deal with the merits *i.e.* the determination of the amount of damages granted to the Claimants.

121. As far as the basis of its jurisdictional power to annul the assignment of rights effectuated through the Farmout Agreement is concerned, the majority seems to find it in an Ecuadorian rule. The Award indeed contains the following statement, which will be discussed below:

Article 10 of the Civil Code quoted in the above passage from the 29 August 2001 case is notable: “In no case may the Judge declare valid an act that the law decrees to be null and void.” If this Tribunal were to award only 60% compensation as requested by the Respondent, it would be acting in direct contravention of this Article by treating as valid an act that the law decrees to be null and void. The very wording

of Article 10 demonstrates that the Ecuadorian authorities specifically contemplated situations like the present case – where the law itself (not a judge) decrees something to be null and void.” (§ 633 of the Award).

122. As far as its decision on the merits is concerned, the majority declared: “The conclusions of the Tribunal in this section are sound under the principles of public international law to be applied when determining damages. Both parties referred, in particular, to unjust enrichment and to those principles contained in the *Chorzow Factory* case.” (§ 653 of the Award). I will show that it is the exact contrary, later in this opinion.

123. It is my contention that the majority manifestly exceeded its jurisdiction in annulling rights belonging to Andes.

124. In view of the quotation cited in paragraph 121 of this opinion, it appears that the majority considers that it is empowered by Article 10 of the Ecuadorian Civil Code to judge the validity of a contract between a party and a non-party to this ICSID arbitration. I did not know that our ICSID Tribunal was empowered to act as an Ecuadorian judge and declare null and void a contract to which the applicable law is the law of New York. In fact, whatever the applicable legal order, no such power exists for our Tribunal. In declaring that the Farmout Agreement between a party to this arbitration and a non-party to this arbitration is inexistent/null and void, the majority has exercised, in my view, a power that it does not have. The Tribunal was not seized of a contractual dispute involving the Farmout Agreement, nor has any argument been presented that the existence of the Farmout Agreement is a violation of the Ecuador/United States BIT.

125. Realizing probably that it was exercising jurisdiction towards a party over which it did not have jurisdiction, the majority – possibly in an attempt to alleviate its own concerns about depriving Andes of the rights it acquired under the Farmout Agreement – has followed the Claimants argument that the assignment is severable from the contract through which the assignment was performed. The Claimants indeed have argued that “(a)ny portion of the Farmout or Operating Agreements that purported to assign rights under the Participation Contract without a required authorization is, under New York law, severable from the Agreements.”³³ Thus, in the same line, according to the majority:

For the avoidance of doubt, as noted above, the Tribunal reiterates that in the present case it is the validity of the assignment that is under scrutiny, and not the validity of the Farmout Agreement itself. The Tribunal’s findings on the validity of the assignment do not affect other obligations that might arise between the parties to the

³³ Claimants’ Brief of 3 November 2011, § 3.

Farmout Agreement (such parties being different to those in the present arbitration), nor does it render the Farmout Agreement itself invalid as between OEPC and AEC. (§ 635 of the Award)

126. If I understand correctly what the majority wants to convey here, it seems that it is saying that it cannot judge the validity of the Farmout Agreement, because it is between parties that are different than the ones before the ICSID Tribunal, but that it can rule on the validity of the assignment. This line of reasoning is quite difficult to follow, as it seems to me first that the parties to the assignment are exactly the same as the parties to the Farmout Agreement and second that the assignment and the Farmout Agreement are one and the same thing intrinsically linked together.
127. I am really at loss to understand the reasoning:
- it is not contested that the sole purpose of the Farmout Agreement was to transfer rights;
 - this transfer of rights is inexistent/invalid;
 - but the Farmout Agreement is existent/valid.
128. I consider that the “farming out”, the transfer of rights was at the core of the Farmout Agreement and that the idea that the “assignment of rights” which is the only purpose of the Farmout Agreement is “severable” does not make sense. This appears totally artificial as the sole and unique object of the Farmout agreement was precisely to transfer rights in and under the Participation Contract to AEC, and to express all the conditions for exercising such rights, as clearly stated in Article 1.02 which indicates that “AECI and OEPC have agreed that AECI will acquire from OEPC a 40% economic interest in the Farmout property, subject to the terms and conditions of this Agreement ...” (Emphasis added). I could not see exactly what would remain “existent/valid” as being not intermingled with the transfer and its conditions and independent of it.
129. *De facto*, the majority’s decision amounts to “expropriate” a Chinese company over which it has manifestly no jurisdiction under the rules of international law. It is indeed clearly stated by the majority: “... AEC ... holds no rights – beneficial or otherwise – in the Participation Contract.” (§ 658 of the Award. Emphasis added)
130. The application of international law to the question of damages should have prevented the majority to assert jurisdiction in order to take drastic decisions in relation with an investment belonging to a Chinese company under the Ecuador/US BIT.

131. I consider that in declaring the rights of Andes to be inexistent, the majority has deprived an entity over which it had no jurisdiction of its rights and therefore that it has not applied the proper law, which is international law, to the assessment of damages.

132. It has also to be emphasized that the majority has disregarded the existence of the Farmout Agreement for the purpose of evaluating the damages – without at a minimum reinstating the situation that would have existed in the absence of the Farmout, as for example asking OEPC to reimburse to Andes all the money that was invested in Block 15 by AEC.³⁴ It should not have taken a half decision, but in order to be fair, restore the situation that would have existed without the performance of the Farmout Agreement considered inexistent or declared null and void, before drawing conclusions based on its inexistence, when everyone knows that it exist and has been fully performed. With such a decision, the majority is in violation with fundamental principles of international law. Either OEPC indeed hands over 40% of the awarded damages to Andes – as the Claimants have asserted they will do – which means that the majority has in fact indirectly granted damages for the benefit of AEC/Andes – which would be a manifest excess of power, as will be explained below. Compensating a party which does not have the required nationality under a BIT is clearly not something that is encompassed in the Tribunal’s jurisdiction. I consider that the majority has therefore not applied the applicable law, which is international law, to the assessment of damages. Or OEPC will not hand over 40% of the awarded damages to Andes, precisely relying on this Award which declares that Andes has no rights, but then the decision of the majority will have condoned the violation of the international principle against unjust enrichment.

4. Had the majority not manifestly exceeded its powers in annulling Andes’ rights, the Tribunal, could only have granted 60% of the damages to the Claimants in conformity with the principles of international law

133. The question discussed here is: what should the solution have been, had the majority not manifestly exceeded its power?

134. In order to be exhaustive in the discussion of the public international law aspects of this case, I will indeed now present the international law principles that should have been applied, had not the majority annulled all the rights in the Participation Contract

³⁴ Such restoration of the situation that would have existed without the performance of an act considered inexistent or declared null and void has been performed for example by the Supreme Court in case C-662. See paragraph 89 of this opinion.

belonging to Andes. In other words, I will from now on base my reasoning on the hypothesis that the majority would not have exceeded its jurisdiction and as a consequence that the Farmout Agreement is considered in force between OEPC and Andes, as it is indeed in the real world.

135. I will explain why I disagree with the statement of the majority to the effect that its decision is in conformity with international law and especially with the principle of unjust enrichment and the *Chorzów* principles (§ 653 of the Award, cited in § 122 of this opinion). And I will show to the contrary that the majority's decision is in contradiction with these two bodies of principles, as well as with the basic principles of international law granting a limited jurisdiction to this Tribunal, as already mentioned.
136. In other words, I will demonstrate, in this final part of my dissenting opinion, that, had the Farmout Agreement been taken into account as it should have been, the Tribunal could not have granted 100% of the damages to the Claimants. The question raised here is whether, according to the rules and principles of international law, the fact that 40% of the rights have been transferred to AEC/Andes is a bar to a 100% compensation of OEPC, or whether a mere 60% compensation of OEPC would go against these rules and principles? I consider that all principles of international law point to the same result, *i.e.* that OEPC could not be compensated for 100% of the value of Block 15, and hence was only entitled to 60% of the damages.
137. I reiterate that, according to me, had the Farmout Agreement been taken into account, a 100% compensation instead of a 60% compensation, in this particular case, would have violated basic principles of international law, both concerning the fundamental principles related to this Tribunal's jurisdiction, as well as the substantial principles established in the *Chorzów* case and the principle of unjust enrichment. Firstly, I will reiterate that granting 100% of the damages to the Claimants is in violation of the basic rules relating to this Tribunal's jurisdiction *ratione personae*, as far as nationality is concerned (i); secondly, I will explain that the same conclusion has to be adopted, if one considers that OEPC has kept the legal title to the 40% interest of AEC/Andes, under the Farmout Agreement's dispositions, which implies that granting 100% of the damages to the Claimants also violates the basic rules of international law relating to its jurisdiction over beneficial owners (ii); thirdly, I will then recall what are the consequences of the application of the *Chorzów* principles to the kind of relation between the Claimants and Andes as established by the essence of the Farmout Agreement and show that the decision of the Tribunal violates these principles (iii); fourthly, I will note that, in my view, the

fact of compensating OEPC for 100% of the rights of the Participation Agreement – as the majority has decided – goes, in any event, against the general international principle against unjust enrichment (iv); and I will close on a concluding remark (v).

(i) According to the international law principles relating to the jurisdiction of the Tribunal, no damages ultimately benefiting to AEC/Andes could have been awarded by the Tribunal, because of the limited jurisdiction *ratione personae*

138. It is common ground that neither AEC, nor Andes are parties to this arbitration, nor are they American companies susceptible to benefit from the Ecuador/US BIT, AEC being a Canadian company and Andes a Chinese company. It is also common ground that AEC and Andes have been heavily investing in Block 15, but this means thus that a major portion of the amounts invested in Block 15 was contributed by entities over which the Tribunal has no jurisdiction under the Ecuador/US BIT (AEC, now Andes). An investment, as is well know, requires a contribution: it is uncontested that OEPC has contributed only for 60% of the value of the investment, 40% of that value, including both initial capital expenditures and operational expenditures during the life of the project, having been paid by AEC/Andes. How would it be possible to grant damages pertaining to rights that no longer belong to OEPC, without disregarding the basic rules that confer jurisdiction on ICSID tribunals? In case two different investors are claiming an interference with their rights, they must both present a claim and one investor cannot bring a claim for the other, especially when they do not have the same nationality and cannot invoke the same BIT, as is the case here.

139. The important point I want to convey here is that, just as the majority has exceeded its powers in annulling a transfer of rights to an investor that was not a party to the arbitration and could not be such a party under the Ecuador/US BIT, it could neither have granted 100% of the damages to the Claimants, had the Farmout been considered in existence.

140. Such a position – to refuse to compensate indirectly non parties which cannot benefit from the BIT under which the case proceeds – has already been adopted by several tribunals, among them the tribunal in the *Impregilo* case. To underscore the striking similarities with our situation, I quote some articles of the Impregilo Joint Venture Agreement and of the OEPC/AEC Operating Agreement.

Impregilo: Clause 32.1 under the heading entitled “Legal Relationship Amongst the Parties” provides that:

“This Agreement does not constitute a partnership or other form of permanent company or organization between the Parties under any applicable law.”

OEPC/AEC: Article 14.1 of the Joint Operating Agreement “Relationship of Parties” provides that:

“... It is not the intention of the Parties to create, nor shall this Agreement be deemed or construed to create a mining or other partnership, joint venture or association or (except as explicitly provided in this Agreement) a trust.

Impregilo: By Clause 5.2 of the JVA, each of the partners shares the “rights and obligations, costs and expenses, losses and benefits arising out of or in any way connected with the Contract(s) and the performance of the Works” in proportion to its respective participation.

OEPC/AEC: Clause 3.3.1 of the Joint Operating Agreement states that “all the rights and interests in and under the Participating Agreements, all Joint Property and any Petroleum and any Petroleum produced from the Agreement Area shall, subject to the terms of the Participating Agreements, be owned by the Parties in accordance with their respective Participating Interests”

Impregilo: Impregilo was the only signatory to the Contract on behalf of the joint-venture and was the guarantor of the performance of the other members of the consortium.

OEPC/AEC: It is well known that OEPC was the only signatory of the Participation Contract with Ecuador and therefore the only guarantor of its performance, as it has confirmed it to the authorities.

Impregilo: Impregilo argued that it is under a contractual obligation to distribute any monetary Award. Thus, the only way for Impregilo to obtain its 57.8% stake is for the Tribunal to permit Impregilo to proceed on behalf of all participants. The claimant reasoned that it could not be made whole for its own personal losses from the treaty breaches unless it collected all damages suffered by the joint venture, because, if it collected only its proportionate share, it would have to distribute a portion of such share to its joint venture partners.

OEPC/AEC: In the same way, the Claimants argue, that because they have to give 40% of any award to AEC, under the Farmout Agreement, if the Tribunal gives them only 60% they could not be made whole for their own personal losses, as they will be left with only 36 % of the whole value.

141. This situation, as can be seen, presents striking similarities with the present case. The tribunal rejected without ambiguity the attempt by Impregilo to claim amounts that would be turned over to nationals from third countries, stating:

The question is raised whether a party who does fall within the ambit of a BIT and the Convention may act in arbitration proceedings in a representative capacity, in order to advance claims on behalf of other entities who do not so qualify.

...

... There is nothing in the BIT to extend this to claims of nationals of any other state, even if advanced on their behalf by Italian nationals.

...

The fact that Impregilo may be empowered to advance claims on behalf of its partners is an internal contractual matter between the participants of the Joint Venture. It cannot, of itself, impact upon the scope of Pakistan’s consent as expressed in the BIT. Equally, the fact that Impregilo may be obliged to account to its partners in respect of

any damages obtained in these proceedings is also an internal GBC matter, which has no bearing on Pakistan's agreed exposure under the BIT. If this were not so, any party would be at liberty to conclude a variety of private contracts with third parties, and thereby unilaterally expand the ambit of a BIT.³⁵ (Emphasis added)

142. I think that our Tribunal should have adopted the same reasoning. When taking into account the existence of the Farmout Agreement, it is not possible to grant 100% of the damages to the Claimants, as it is in fact granting 40% to someone else.

143. The same position was adopted in *PSEG v. Turkey*, where the tribunal explained that it could not award compensation “in respect of investments or expenses incurred by entities over which there is no jurisdiction, even if this was done on behalf of one of the Claimants.”³⁶

144. To summarize, I conclude that the Tribunal could only have granted to the Claimants damages corresponding to 60% of their rights and that it could not – as did *de facto* the majority – grant damages for 100% of the losses incurred in Block 15 resulting from *caducidad*, because such a solution would be unacceptable, under the only two possible scenarios, as suggested earlier: either OEPC will not transmit 40% of the amount received in damages to Andes, and it will then be unjustly enriched, in violation of the international principle of unjust enrichment; or OEPC will indeed transmit 40% of the amount received in damages to Andes, and the Tribunal would therefore have compensated Andes through OEPC, in violation of the principles of its limited jurisdiction *ratione personae*. This would be an improper recovery on behalf of an entity not protected by the U.S.-Ecuador BIT, when Andes is not a claimant in this procedure and could only claim and receive damages from Ecuador under the China/Ecuador BIT. Such investment is not protected by the Treaty because it does not belong to United States companies or nationals. It is certainly not possible for the Claimants to claim under the US/Ecuador BIT for an economic value belonging to a Chinese company. As to OEPC, it can only claim, on its own behalf, the value of its reduced investment, and not of the investments made by another, non-American company.

(i) According to the international law principles relating to the jurisdiction of the Tribunal and international law principles applicable to compensation for international illicit acts, no damages ultimately benefiting to AEC/Andes could have been awarded by the Tribunal, because, in case of split between a legal

³⁵ *Impregilo S.p.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/3), Decision on Jurisdiction, 22 April, 2005, § 146, § 148 and § 151.

³⁶ *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Elektrik Uretim ve Ticaret Limited Sirketi v. Turkey* (ICSID Case No. ARB/02/5), Award, 19 January 2007, § 325.

owner and a beneficial owner, it is only the beneficial owner which can be compensated

145. Although the Tribunal has concluded that the *de facto* legal title was transferred (§ 331 of the Award), it is also beyond doubt that the *de jure* legal title remained with OEPC. The question which the Tribunal had to solve then was whether OEPC as the *de jure* owner of the legal title to the 40% interest of AEC could claim for damages caused to AEC, in the name of which it was holding this legal title until the required governmental approvals were obtained.
146. It is uncontested that *caducidad* has caused damages to two different investors: OEPC and AEC/Andes. OEPC, as an investor having paid only for 60% of all the money invested in Block 15 cannot include the value of the damages incurred by AEC/Andes, as an investor having paid 40% of all the money invested in Block 15, to augment its own damages. It cannot be contested that OEPC is not the sole investor in Block 15, as it has indeed, by transferring to AEC/Andes 40% of its economic interest through the Farmout Agreement, effectively disinvested from Block 15 to that extent. AEC/Andes is an investor having equivalent rights in the benefits of Block 15 to those of OEPC, but in a different proportion.³⁷
147. As far as the 40% interest belonging to AEC are concerned, the relation between AEC and OEPC is not a relation between a creditor and a debtor, it is rather a situation of a splitting of title, between the legal title and the economic interest, between a nominee and a beneficial owner.
148. As far as the position of international law towards beneficial owners, in cases where the legal title and the beneficial ownership are split, is concerned, it is quite uncontroversial, after a thorough review of the existing doctrine and case-law, that international law grants relief to the owner of the economic interest.

³⁷ I note that this would even be true, if the analysis concerning the substance of its interest in Block 15 presented by the Claimants would have prevailed, as has been well explained by the Respondent, in Respondent's Rejoinder PHB on Quantum and Counterclaim on damages, § 125: "AEC/Andes' rights can be characterized as an "investment" under the relevant provisions of the Ecuador-China BIT. Indeed, even following Claimants' argument that "AEC acquired no more than a contractual right against OEPC to receive from OEPC 40% of Block 15 production," such a credit would be an investment since, under Article 1c) of the Ecuador-China BIT money claims and any entitlement of economic value are "investments." ... As a result, AEC/Andes' 40% economic interest is an investment different from Claimants' investment."

149. The fact that international law favours the beneficial owner has been recognized by the doctrine³⁸; the case-law of the Iran-US Claims Tribunal³⁹ which has always considered the beneficial owner of the legal interest rather than the legal owner when there was a split of title, as well as ICSID tribunals' decisions.⁴⁰

150. It is worth mentioning that in relation to 40% of the interest in Block 15, OEPC did keep only "the nominal legal title", the beneficial owner of the interest being AEC. This results from many articles in the Farmout Agreement or the Joint Operating Agreement, which have been cited in the Award. I will only cite here again two of those. Article 2.01 of the Farmout Agreement explains that the economic interest "does not include nominal legal title to an interest in Block 15 or an interest as a party to the Participating Agreements." The Joint Operating Agreement refers to the Farmout at Article 3.2.1 as follows:

Pursuant to the provisions of the Farmout Agreement, AECI has on the Effective Date a forty percent (40%) interest in the Participating Agreements that until the Transfer Date shall be equivalent economically to, but shall not include, nominal legal title.

151. This means that, for 40% of the rights and interests in Block 15, there is a split of title, the nominal legal title belonging to OEPC, the beneficial interest belonging to AEC. According to the principles of international law dealing with this type of situation where there is a split of title, only the beneficial owner, AEC/Andes, can claim for interference with his interests, OEPC having no standing to claim in the name of the beneficial owner.

(iii) According to the international law principles governing State responsibility, OEPC should only have received 60% of the total damages, in line with the Chorzów Factory principle of full recovery

152. It should be reminded that, in assessing damages for breaches of international law, it is the duty of a tribunal to ascertain the amount of damages directly and proximately caused by the wrongdoer, and to restore the claimant, as far as possible, to the position it

³⁸ See for example, Margaret Whiteman's *Digest of International Law*, vol. 8 pp. 1261-1262, in particular: "Where the beneficial owner of property, with respect to which claim was made before ... the Commission ... was a *national* of the United States, and where the legal owner or nominee was a non-national of the United States, the Commission allowed claims, if otherwise eligible. But where the legal owner or trustee was a national of the United States, and beneficiary or *cestui que trust* was a non-national, in claims before that Commission, the claims were denied."

³⁹ *James M. Saggi, Michael R. Saggi and Allan J. Saggi, Claimants, v. The Islamic Republic of Iran*, Case No. 298, 29-Iran.U.S.C.T.R. p. 20, with references to many other cases.

⁴⁰ See, for example, *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt* (ICSID Case No. ARB/05/15), Award, 1 June 2009, §§ 87-90.

would have occupied but for the wrongful act, as has been clearly stated by the PCIJ in the *Chorzów Factory* case, which I quote for the ease of reference:

On approaching this question, it should first be observed that, in estimating the damage caused by an unlawful act, only the value of property, rights and interests which have been affected and the owner of which is the person on whose behalf compensation is claimed, or the damage done to whom is to serve as a means of gauging the reparation claimed, must be taken into account. This principle, which is accepted in the jurisprudence of arbitral tribunals, has the effect, on the one hand, of excluding from the damage to be estimated, injury resulting for third parties from the unlawful act and, on the other hand, of not excluding from the damage the amount of debts and other obligations for which the injured party is responsible.⁴¹

153. The plain text of the *Chorzów Factory* dictum indicates that a distinction has to be made, between *rights* belonging to a third party for which a claimant cannot assert any claim and *liabilities* towards a third party which are a constitutive part of a claimant's entitlements. In order to distinguish the two, a good point of departure is to state that a liability means that A (OEPC) is under an *obligation to transfer* something to B (AEC), a transfer means that A (OEPC) *has transferred* something to B (AEC). In other words, it is clear that the *Chorzów Factory* dictum means that, on the one hand compensation can only be granted to the *owner* of a right that has been interfered with, and that on the other hand, if a right belonging to an owner is burdened with a *liability* this does not prevent its owner to receive full compensation for its right.

154. In fact, no party disagrees with this theoretical analysis of the *Chorzów Factory* dictum, as it has just been presented, based on a distinction between a right of ownership and a liability, and on the fact that a claimant can only claim for a loss it has sustained personally. This analysis has been reiterated by the Respondent in its Rejoinder Post-Hearing Brief, where it stated that "(t)he general principle set forth in the *Chorzów* decision to determine the damage caused by an unlawful act is the following: only the value of property, rights and interests which have been affected and the owner of which is the person on whose behalf compensation is claimed, or the damage done to whom is to serve as a means of gauging the reparation claimed, must be taken into account."⁴² The Claimants do not disagree with this presentation either, admitting that same distinction in the following terms: "It is settled international law that contractual obligations and liabilities for which the injured party remains responsible must not be excluded from its compensable damages. Only when a third party has a right of ownership in the investment, the compensable damage must be reduced to the extent of that third party's

⁴¹ *Case concerning the Factory at Chorzów* (Claim for Indemnity) (Merits), P.C.I.J. Series A, No. 17, Judgement of 13 September 1928, at page 31.

⁴² Respondent's Rejoinder PHB on Quantum and Counterclaim on Damages, § 119.

ownership right.”⁴³ Commenting the *Chorzów Factory* case, the Claimants were unambiguous on its meaning and its consequences: “The Court’s statement makes it clear that the injured party cannot claim damages for injury caused to property of which he is not the owner.”⁴⁴

155. Having these general principles in mind, I start by stating that the fact of compensating OEPC for 60% of its own remaining rights would have been perfectly in line with the *Chorzów* principle of full reparation, as will be explained now.

156. It is not contested that restitution is the priority reparation, and that when it is not available, the amount of damages should be equivalent to the value that restitution would have afforded to the Claimants. I therefore disagree with the Respondent, when it relies on the Tribunal’s Decision on Provisional Measures to say that the Tribunal should no longer be concerned with restitution, as it was stated in that decision, that in the circumstances of the case, restitution was to be considered as impossible and therefore non available. I agree therefore with the Claimants analysis, to the effect that: “... the fact that restitution in kind is no longer available to Claimants does not relieve Ecuador of its obligation to pay Claimants compensation corresponding to ‘the value which restitution in kind would bear’.”⁴⁵ That obligation to grant damages equivalent to restitution arises precisely because restitution itself is no longer possible.

157. Granting 60% of the value of Block 15 to the Claimants would have been perfectly in line with the *Chorzów* principle of full recovery. The full value of the investment of OEPC was only 60% of the full value of the Participation Contract. The situation was aptly described by Professor Mayer in the February 2010 hearing:

Now, in that situation, what happens when *caducidad* occurs? Who suffers the damage? The answer is obvious: It’s both Oxy up to 60 percent of the value of the Farmout property as defined, and Andes, successor to AEC, up to 40 percent of the value.⁴⁶

158. I consider that the Tribunal should have concluded that OEPC is entitled to 60% of the value of Block 15, which is in line with the *Chorzów Factory* principle of full recovery. Ecuador would have indeed compensated the Claimants for the full value of their investment, which for the reasons explained does not include the portion of the rights financed by AEC/Andes and belonging to them. Restitution – if it could have been

⁴³ Claimants PHB on Damages, § 223.

⁴⁴ Claimants PHB on Damages, § 233.

⁴⁵ Claimants’ Skeleton Submission, 29 October 2009 (Section IX, §8)

⁴⁶ Hearing Transcript (4 February 2010), p. 191, lines 13-18.

granted⁴⁷ – would not have given to OEPC more than it had before. Restitution of Block 15 would have amounted for OEPC that it could recuperate a right to 60% of the oil produced, and could not, by miracle, have been offered back a right to 100% of the oil produced to OEPC, when it did no longer possess such a right at the moment when *caducidad* was declared.

159. In paying 60% of the value of the rights under the Participation Contract, Ecuador would indeed have compensated the Claimants for the full value of their investment, which does not include the portion of the rights financed by AEC/Andes and owned by them, which is now Andes' investment.

(iv) According to the international principle based on unjust enrichment, the Claimants are unjustly enriched, if after having been fully paid by AEC for the acquisition of 40% of the economic rights under the Participation Contract, they receive the equivalent of 40% of these rights back

160. The Respondent argues that, because pursuant to the Farmout Agreement, AEC paid due consideration to OEPC for the its acquisition of a 40% economic interest in Block 15, OEPC would be unjustly enriched if OEPC now received, in addition, damages representing 100% the fair market value of the Participation Contract.

161. It is incontrovertible that he Claimants cannot evade the fact that, with or without *caducidad*, with or without a declaration of nullity of the assignment of right by the majority, they were only entitled to receive 60% of the benefits of the Participation Contract, because AEC had a right to 40% of the total benefit. It is clear that 40% of all expenses incurred for Block 15 have been paid by AEC, and there is therefore no justification to grant damages for the losses incurred by AEC as a result of its investment in Block 15 to OEPC. Claimants have not been damaged with respect to AEC/Andes's 40%, since Claimants have no right to the economic benefits of that 40% in the first place.

162. This means that, in a DCF method of calculation of the Claimants' damages, based on an evaluation of their future profits, any damages granted to the Claimants cannot exceed their part of the profits. For the application of the DCF method, the future net cash flows are appropriately determined by calculating the flow of benefits that the Claimants would

⁴⁷ Which is not the case, as has been explained in the Decision on Provisional Measures, 17 August 2009, §§ 75-86.

have been reasonably expected to earn in, in the state of the world in which the termination of the contract hypothetically did not occur (the “but for” scenario). In this perspective, it appears uncontested that the Claimants could only expect to receive 60% of the benefits: as expressed by the Respondent, “[t]heir losses cannot be higher than their expected profits. Thus, awarding Claimants 100% of the purported economic losses would overcompensate and unjustly enrich them.”⁴⁸ (Emphasis added)

163. OEPC answers to this in saying that – according to the Farmout Agreement – it is bound to retrofit 40% to Andes. The Claimants argue that, because they have to give 40% of any award to AEC, if the Tribunal gives them only 60% they could not be made whole for their own personal losses, as they will be left with only 36 % of the whole value.⁴⁹

164. Firstly, the Tribunal should not have granted 100% of the damages to the Claimants as it had no guarantee that the 40% will be transferred to Andes, as guaranteeing rights to AEC cannot be part of the Award of a Tribunal respecting the limits of its jurisdiction, as this would concern rights of a party which is not in the case. The same analysis has been made by the tribunal in the case of *Impregilo v. Pakistan*.⁵⁰ In that case, already mentioned, Impregilo reasoned that it could not be made whole for its own personal losses from the treaty breaches unless it collected all damages suffered by the joint venture, because, if it collected only its proportionate share, it would have to distribute a portion of such share to its joint venture partners. The tribunal rejected such attempt of a full recovery by Impregilo on several bases, among which the possible contradiction with the principle of unjust enrichment, in the following terms:

Indeed, there is a further counter to Impregilo’s argument that it requires recovery in respect of GBC’s total losses in order to be left with compensation in respect of its own 57.8% stake (because its own contractual arrangements with its partners oblige it to share out any proceeds in any event). As pointed out in the decision of the Iran-U.S. Claims Tribunal in *Blount Brothers Corporation v. Iran*, a tribunal has no means of compelling a successful Claimant to pass on the appropriate share of damages to other shareholders or participants.⁵¹

⁴⁸ Respondent’s Rejoinder on Quantum, § 77.

⁴⁹ Claimants’ PHB on Damages, § 259. See also, Claimants’ Opening Presentation, Slide 214.

⁵⁰ *Impregilo supra note 35*.

⁵¹ *Impregilo supra note 35* at § 152. When citing the Award No.215-52-1, 28 February 1986 *Blount Brothers Corporation v. The Government of the Islamic Republic of Iran* case, the tribunal referred to many other cases from the same tribunal, *i.e.* Award No. 232-97-2, 2 May 1986 *Richard D. Harza, et al v. The Islamic Republic of Iran, et al*, 11 Iran-U.S. C.T.R., p. 86; Award No 244-68-2, 8 August 1986, *Howard, Needles, Tammen & Bergendorff v. The Government of the Islamic Republic of Iran*, 11 Iran-U.S. C.T.R., p. 314; Award No. 282-10853 to 6-1, 17 December 1986, *Ian L. McHarg v. The Islamic Republic of Iran*, 13 Iran-U.S. C.T.R., p. 302.

165. Secondly, I note that, if OEPC indeed will fulfil the obligation to give 40% of the granted damages to Andes, this precisely indicates that it is not claiming 100% for itself, but is claiming only 60% for itself and claiming 40% for Andes.

(v) A concluding note

166. It could appear, at first sight, that it would not be fair that the execution by OEPC of the Farmout Agreement with AEC on 1 October 2000 would allow Ecuador, following *caducidad*, to be legally obliged to compensate OEPC for 60% only of its interest in Block 15, when it concretely had acquired 100% of Block 15 upon the issuance of the *Caducidad* Decree. The Claimants have indeed insisted on the fact that the State – if it is obliged to pay only 60% of the total damages – would be unjustly enriched. This is also the approach of my two colleagues forming the majority, as it is stated in the Award: “In this respect, by far the greater risk of unjust enrichment lies at the door of Ecuador. Ecuador would be unjustly enriched if only obliged to compensate for 60% of a 100% unlawful taking.” (§ 655 of the Award)

167. I wish to mention that there is no unfairness here, as this is purely a result of the limited jurisdiction of ICSID tribunals. International investment tribunals are not here to redress any torts worldwide. Under a BIT, they are meant to solve disputes between investors of a certain nationality and States, but do not concern investors that have neither one nor the other nationality of the two States parties to the BIT. It happens more often than not that there is no jurisdiction for all or a portion of a loss caused by a State’s action. For example, in *Mihaly v. Sri Lanka*⁵², an ICSID case in which the tribunal’s jurisdiction was based on the United States/Sri Lanka BIT, involving a partnership without legal personality between Mihaly (USA) and Mihaly (Canada), the tribunal decided that only Mihaly (USA) could claim for its own rights and not Mihaly (Canada), although there was an alleged deprivation of the whole economic operation:

... neither Canada nor Mihaly (Canada) could bring any claim under the ICSID Convention, whatever rights Mihaly (Canada) had or did not have against Sri Lanka.

...
The Tribunal finds, nonetheless, that Mihaly International Corporation (USA) is entitled to file a claim in its own name against Sri Lanka in respect of the rights and interests it may be able subsequently to establish in the proposed power project. (Emphasis added)

⁵² *Mihaly International Corporation v. Sri Lanka* (ICSID Case No. ARB/00/2), Award, 15 March 2002, § 24 and § 26.

168. As a matter of fact, each time an international tribunal does not have jurisdiction over a case that has some merits, it could be theoretically said that the State has been unjustly enriched. But this is nothing extraordinary, it is simply the result of the limited access to international arbitration, which the majority has blatantly disregarded.

[signed]

Professor Brigitte Stern

Date: 20 September 2012