

**IN THE MATTER OF AN ARBITRATION BEFORE A TRIBUNAL CONSTITUTED
IN ACCORDANCE WITH THE TREATY BETWEEN THE UNITED STATES OF
AMERICA AND THE REPUBLIC OF ECUADOR CONCERNING THE
ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT
SIGNED ON 27 AUGUST 1993 (THE “BIT”)**

- and -

UNCITRAL ARBITRATION RULES 1976

- between -

ULYSSEAS, INC.

“Claimant”

and

THE REPUBLIC OF ECUADOR

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

I N T E R I M A W A R D

Tribunal:

Prof. Piero Bernardini, Presiding Arbitrator

Prof. Michael Pryles

Prof. Brigitte Stern

Registry:

Permanent Court of Arbitration

REPRESENTATIVES OF THE PARTIES

ULYSSEAS, INC.

- Mr. James L. Loftis
- Mr. Mark Beeley
- Mr. Justin Marlles
Vinson & Elkins LLP

ECUADOR

- Dr. Diego García Carrión
Procurador General del Estado
- Dr. Álvaro Galindo C.
Director de Patrocinio Internacional
- Dra. Christel Gaibor
Directora Adjunta de Patrocinio
Internacional
- Mr. Jay L. Alexander
- Mr. Alejandro A. Escobar
- Ms. Dorine Farah
Baker Botts LLP

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TABLE OF ABBREVIATIONS

Answer	Respondent's Answer, dated 23 November 2009
Counter-Memorial	Claimant's Counter-Memorial on Respondent's Objections to Jurisdiction, dated 19 April 2010
CWS-JURI-	Claimant's Witness Statement
ECT	Energy Charter Treaty, 17 December 1994
Exhibit C-JURI-	Claimant's Exhibit
Exhibit R-	Respondent's Exhibit
Memorial	Respondent's Memorial on Preliminary Objections to Jurisdiction, dated 19 March 2010
Notice of Arbitration	Claimant's Notice of Arbitration, dated 8 May 2009
Rejoinder	Claimant's Rejoinder, dated 31 May 2010
Reply	Respondent's Reply, dated 10 May 2010
VCLT	Vienna Convention on the Law of Treaties, 23 May 1969

CHAPTER I – PROCEDURAL HISTORY

A. COMMENCEMENT OF THE ARBITRATION PROCEEDINGS AND CONSTITUTION OF THE ARBITRAL TRIBUNAL

1. On 8 May 2009, Claimant served a Notice of Arbitration on Respondent alleging breaches of the Treaty between The United States of America and The Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment (the “BIT”).
2. By letter dated 31 July 2009 and pursuant to Article 7 of the UNCITRAL Arbitration Rules (the “UNCITRAL Rules”), Claimant informed Respondent of its appointment of Professor Michael Pryles as the first Arbitrator.
3. By letter dated 1 October 2009 and pursuant to Article 7 of the UNCITRAL Rules, Respondent appointed Professor Brigitte Stern as the second Arbitrator.
4. On 30 October 2009, the Co-arbitrators agreed on the choice of Professor Piero Bernardini as Presiding Arbitrator.
5. By letter dated 3 November 2009, the Presiding Arbitrator informed the Parties that the Tribunal had been duly constituted and invited Respondent to submit its Answer to Claimant’s Notice of Arbitration by 23 November 2009.
6. On 23 November 2009, Respondent submitted its Answer to Claimant’s Notice of Arbitration in accordance with the Tribunal’s direction.
7. By letter dated 25 November 2009, the Tribunal noted the Parties’ agreement to retain the Permanent Court of Arbitration (the “PCA”) as administrator of the proceedings and concurred with this agreement.
8. By letter dated 27 November 2009, the Tribunal sent to the Parties draft Terms of Appointment and Procedural Rules for their review and comment by 18 December 2009, and invited the Parties to agree on a calendar for the proceedings by the same date.
9. By letter dated 9 December 2009, the Tribunal confirmed that the initial hearing would be held at the Peace Palace, in The Hague, on 15 January 2010, as agreed upon by Respondent and Claimant in their letters of 4 and 7 December 2009, respectively. The Tribunal also

informed the Parties that the PCA had appointed Mr. Paul-Jean Le Cannu as the administrative secretary for the case and invited them to confirm that they agreed to the appointment by 18 December 2009.

10. By separate letters dated 18 December 2009, Claimant and Respondent successively informed the Tribunal that the Parties had been unable to agree on a procedural calendar, indicated their respective position on said calendar, and provided their comments on the draft Terms of Appointment and Procedural Rules circulated by the Tribunal. Respondent also confirmed in its letter its acceptance of the terms by which Mr. Paul-Jean Le Cannu would serve as administrative secretary to the Tribunal. Claimant did so in a subsequent letter dated 21 December 2009.
11. By letter dated 23 December 2009, the PCA, under instruction from the Tribunal, circulated updated draft Terms of Appointment and Procedural Rules in anticipation of the initial hearing.
12. By letter dated 12 January 2010, the PCA, under instruction from the Tribunal, informed the Parties that, due to bad weather conditions in Europe and additional professional commitments, Mr. Pryles would be unable to attend the initial hearing in person on 15 January 2010, but would attend by video conference.
13. By letter dated 13 January 2010, the PCA, under instruction from the Tribunal, circulated further updated draft Terms of Appointment and Procedural Rules in anticipation of the initial hearing.

B. INITIAL HEARING

14. On 15 January 2010, an initial hearing was held at the Peace Palace, in The Hague, The Netherlands. Present at the initial hearing were:

Tribunal:

Prof. Piero Bernardini, Presiding Arbitrator

Prof. Michael Pryles (by videoconference)

Prof. Brigitte Stern

For the Claimant:

Mr. James Loftis

Mr. Mark Beeley

Mr. Justin Marlles

For the Respondent:

Dr. Álvaro Galindo

Mr. Alejandro Escobar

Ms. Dorine Farah

Permanent Court of Arbitration:

Mr. Paul-Jean Le Cannu

15. At the initial hearing, the Terms of Appointment were agreed upon and signed by the Parties and the Tribunal, Professor Pryles having authorized the use of its electronic signature. The Presiding Arbitrator signed the Procedural Rules on behalf of the Tribunal. Signed originals of each document were handed out to each Party and member of the Tribunal. Having heard the arguments of the Parties with respect to the case, the Tribunal decided to bifurcate the proceedings and established the procedural calendar.¹

C. WRITTEN PHASE OF THE PROCEEDINGS

16. By letter dated 20 January 2010, the PCA, under instruction from the Tribunal, circulated the summary minutes of the initial hearing that took place on 15 January 2010, along with an audio-CD containing the recording of the initial hearing. The PCA invited the Parties to submit their comments on these summary minutes by 27 January 2010. The PCA also circulated on behalf of the Tribunal Procedural Order No. 1 dated 20 January 2010, which set out the procedural calendar established at the initial hearing.
17. By letter dated 20 January 2010, Claimant noted a disparity between Procedural Order No. 1 and the summary minutes of the initial hearing with respect to the date by which the first round of document productions should be made, and asked the Tribunal for clarification. By letter of the same date, the PCA, under instruction from the Tribunal, informed the

¹ See summary minutes of the initial hearing dated 20 January 2010, p. 10.

Parties that the correct date was 29 January 2010, not 27 January 2010, and circulated a duly amended Procedural Order No. 1.

18. By letter dated 22 January 2010 and in accordance with Procedural Order No. 1, Claimant submitted its First Request for the Production of Documents.
19. By letter dated 22 January 2010 and in accordance with Procedural Order No. 1, Respondent submitted its Request for Production of Documents in the form of a Redfern Schedule.
20. By letter dated 25 January 2010, Claimant submitted a Redfern Schedule relating to Claimant's document requests.
21. By letter dated 29 January 2010, Claimant submitted its responses and objections to Respondent's Request for Production of Documents dated 22 January 2010 in the form of a Redfern Schedule, along with a document entitled Responses and Objections.
22. By letter dated 29 January 2010, Respondent submitted, in the form of a Redfern Schedule, its responses to Claimant's First Request for the Production of Documents dated 22 January 2010, as well as an index of the documents it produced.
23. By letter dated 4 February 2010, Claimant submitted to the Tribunal its Replies to Respondent's Response to Claimant's Request for Document Production.
24. By letter dated 5 February 2010, Respondent submitted its updated Redfern Schedule, and its Responses to Claimant's Objections to Respondent's Request for Production of Documents.
25. By letter dated 5 February 2010, Claimant submitted a confidential structure chart identifying the abbreviated ownership structure of Ulysseas.
26. By letter dated 8 February 2010, Respondent informed the Tribunal that it was unable to limit or abandon its request for production of documents, as Claimant had expected in light of its submission of a structure chart identifying its abbreviated ownership structure.
27. By letter dated 10 February 2010, the PCA, under instruction from the Tribunal and in accordance with the schedule established in Procedural Order No. 1, circulated Procedural

Order No. 2 which recorded the Tribunal's decision on the Parties' Requests for Document Production. Procedural Order No. 2 provided, *inter alia*, that Claimant had to produce certain documents in response to Respondent's Request No. 4, provided that the Parties entered into a confidentiality agreement regarding these documents.

28. By letter dated 19 February 2010, Respondent drew to the Tribunal's attention that Claimant was refusing to accept certain provisions of Respondent's executed agreement on confidentiality, and on that basis was refusing to produce the documents responsive to Respondent's Request No. 4 until a confidentiality agreement has been reached. Respondent requested the Tribunal to direct the Parties as follows:

A. to confirm that the Claimant's refusal to accept the terms of the Respondent's already executed agreement on confidentiality is unreasonable;

B. to confirm that the Respondent has executed and delivered an agreement on confidentiality that is sufficient for the Claimant to produce the documents responsive to the Respondent's request No. 4, as required by Procedural Order No. 2;

C. to instruct the Claimant to produce such documents forthwith and within 24 hours of the Tribunal so directing;

D. to amend the procedural schedule to take account of the Claimant's delay in producing documents in accordance with Procedural Orders No. 1 and No. 2, so that the time period for submitting Respondent's Memorial on Jurisdiction extends to one month from the date on which the Claimant produces the requested documentation; and

E. to draw the appropriate inferences from the Claimant's refusal to accept the Respondent's executed confidentiality agreement.

29. After further correspondence between the Parties on this issue, the PCA, by letter dated 23 February 2010 and under instruction from the Tribunal, informed the Parties that the Tribunal had examined the Parties' exchange of correspondence relating to the Confidentiality Agreement and invited the Parties to reconcile their positions without delay so as not to disrupt the agreed calendar of the proceedings.
30. Following a further exchange of correspondence between the Parties regarding Claimant's document production, and a letter from Claimant dated 24 February 2010 informing the Tribunal that the issue regarding the conclusion of the confidentiality agreement should be

resolved without the need for intervention by the Tribunal, the Parties entered into a Confidentiality Agreement on 26 February 2010.²

31. In subsequent correspondence exchanged by the Parties on 5, 9, and 16 March 2010, the Parties further discussed Claimant's document production and compliance with Procedural Order No. 2.
32. By letter dated 19 March 2010, Respondent submitted its Memorial on Preliminary Objections to Jurisdiction with Fact Exhibits and Legal Authorities in accordance with Procedural Order No. 1.
33. By letter dated 19 April 2010, Claimant submitted its Counter-Memorial on Objections to Jurisdiction, with supporting Witness Statements, Fact Exhibits and Legal Authorities in accordance with Procedural Order No. 1.
34. By letter dated 10 May 2010, Respondent submitted its Reply with Legal Authorities in accordance with Procedural Order No. 1.
35. By letter dated 12 May 2010 and following confirmation by Respondent of its availability, the PCA, under instruction from the Tribunal, confirmed that the hearing on jurisdiction would be held on 17-18 June 2010 in The Hague in the Peace Palace and invited the Parties to agree on a hearing schedule by 7 June 2010.
36. By letter dated 20 May 2010, Claimant informed Respondent that "Elliott Associates, L.P. is willing to provide documents further supporting Mr. Veldwijk's statement regarding Paul Singer's control over the other two general partners in Elliott Associates, L.P." on the condition that "the terms of the Confidentiality Agreement between Ulysseas and the Republic of Ecuador dated February 25, 2010 are extended to include Elliott and any document produced by Elliott, and any such documents are treated as 'Confidential Material' pursuant to the terms of the Confidentiality Agreement." Claimant also enclosed a letter to this effect from Elliott Associates, L.P.

² Letter from Claimant to Respondent dated 9 March 2010, p. 5.

37. By letter dated 25 May 2010, Respondent replied to Claimant's letter dated 20 May 2010 stating that Claimant did not comply with Procedural Order No. 2 in a timely fashion and "may not do so now at this late stage."
38. By letter dated 31 May 2010, Claimant submitted its Rejoinder with Legal Authorities in accordance with Procedural Order No. 1.
39. By letter dated 7 June 2010, the PCA, under instruction from the Tribunal, informed the Parties of the Tribunal's following directions:
 1. *In application of Section 3.3 of the Procedural Rules of January 15, 2010, Claimant shall produce the documents indicated in its letter of May 20, 2010 regarding Paul Singer's control over the other two general partners in Elliott Associates L.P. This evidence, which is directly relevant to the question of jurisdiction to be decided by the Tribunal, is not covered by Procedural Order No. 2.*
 2. *Claimant's request that the terms of the Confidentiality Agreement with Respondent dated February 25, 2010 be extended to cover the documents to be so produced is justified in light of Elliott Associates' counsel's letter of May 20, 2010. Respondent is therefore invited to agree to such extension.*
 3. *These additional documents shall be produced not later than June 14, 2010. Respondent shall have an opportunity to comment on such documents either in writing soon thereafter or in the course of its oral submission at the hearing.*
 4. *On a different matter, Claimant is invited to have available at the hearing the unredacted text of the Joint Venture Agreement (JVA) dated January 18, 2002 (C-JURI-42) and of the Amended JVA dated June 29, 2007 (C-JURI-44), should the Tribunal decide to inspect them.*
40. The Tribunal having granted a one-day extension to the Parties, at their request, for the submission of a hearing schedule, Claimant, on behalf of the Parties, informed the Tribunal of the agreed schedule by letter dated 8 June 2010. The schedule indicated, *inter alia*, that Mr. Zacharia Korn, one of Claimant's witnesses, would testify before the Tribunal.
41. By letter dated 10 June 2010, the PCA, under instruction from the Tribunal, informed the Parties that the proposed hearing schedule was agreeable to the Tribunal.
42. By e-mail dated 15 June 2010, Claimant submitted electronic copies of the documents that it was requested to submit pursuant to paragraph 1 of the PCA's letter dated 7 June 2010,

and informed the PCA that hard copies of the documents had previously been provided to Respondent under cover of the Parties' Confidentiality Agreement. By letter of the same date, the PCA, under instruction from the Tribunal and in accordance with paragraph 3 of the PCA's letter dated 7 June 2010, informed the Parties that Respondent was invited to submit its comments on the above-mentioned documents at the upcoming hearing on jurisdiction.

43. By letter dated 15 June 2010, Respondent submitted English translations of certain Fact Exhibits and Legal Authorities.

D. HEARING ON JURISDICTION

44. On 17 and 18 June 2010, the hearing on jurisdiction was held at the Peace Palace, in The Hague, The Netherlands. Present at the hearing were:

Tribunal:

Prof. Piero Bernardini, Presiding Arbitrator

Prof. Michael Pryles

Prof. Brigitte Stern

For the Claimant:

Mr. James Loftis

Mr. Mark Beeley

Mr. Justin Marlles

Mr. Mario Restrepo

For the Respondent:

Dr. Álvaro Galindo

Mr. Jay Alexander

Mr. Alejandro Escobar

Ms. Dorine Farah

Permanent Court of Arbitration:

Mr. Paul-Jean Le Canu

Court reporter :

Mr. Trevor McGowan

45. At the hearing, Claimant presented an additional confidential structure chart designed to show that Mr. Paul Singer owns and controls Elliott Associates, L.P.,³ which, in turn, indirectly controls Ulysseas.⁴ Claimant also circulated copies of the unredacted version of the Joint Venture Agreement between Elliott Associates, L.P., Elliott International, L.P., and Veredas Power, Inc. dated 18 January 2002 (the “JVA”), and the Amendment to the Joint Venture Agreement between the same parties dated 29 June 2007 (the “Amendment to JVA”).⁵
46. By letter dated 28 June 2010, Claimant submitted copies of the slides used in support of Claimant’s Opening and Reply Statements at the hearing on jurisdiction. By letter dated 1 July 2010, the PCA transmitted copies of these slides to Respondent, at the request of the latter.

CHAPTER II – FACTUAL BACKGROUND

47. What follows is a summary of certain facts, some of which are disputed, relevant to the preliminary objections to jurisdiction. This summary is without prejudice to the full factual record that has been considered by the Arbitral Tribunal.
48. Claimant in this arbitration is Ulysseas (“Ulysseas” or “Claimant”), an energy corporation with its contact address at 2500 CityWest Blvd., Suite 1750, Houston, Texas,⁶ and registered in the State of Delaware, United States of America, since 26 February 2003.⁷
49. Respondent in this arbitration is the Republic of Ecuador (“Ecuador” or “Respondent”).

³ Hearing Transcript, Day 1, p. 112, lines 12-25, p. 113, lines 1-9.

⁴ Hearing Transcript, Day 1, p. 111, lines 10-18.

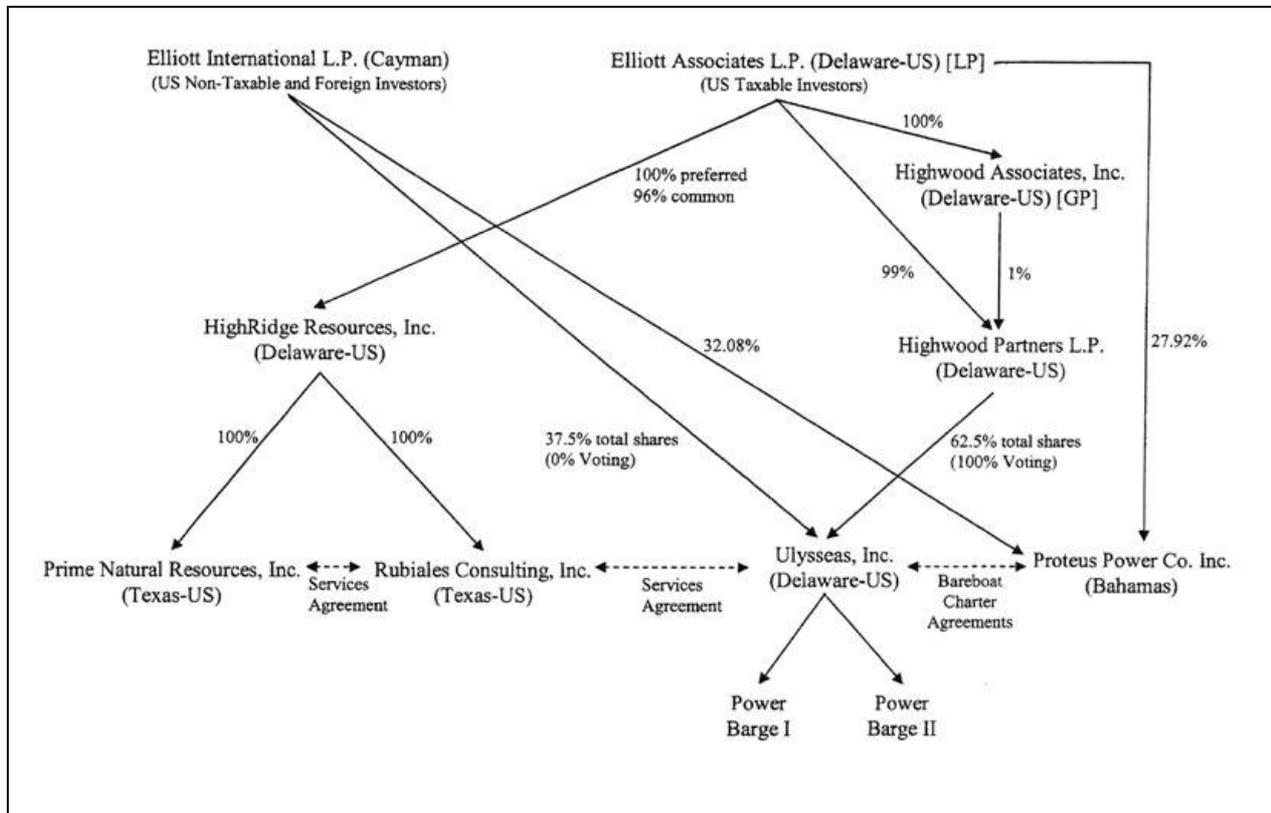
⁵ Hearing Transcript, Day 2, p. 18, lines 10-11. Respondent had been allowed to see an unredacted copy of the JVA and Amendment to JVA on the first hearing day, after the session. (Hearing Transcript, Day 2, p. 19, lines 5-9). The JVA as amended by the Amendment to JVA will be hereinafter referred to as the “Amended JVA.”

⁶ Notice of Arbitration, para. 2.1.

⁷ Notice of Arbitration, para. 2.1; Memorial, para. 16; Certificate of Incorporation of Ulysseas, dated 26 February 2003, Exhibit C-JURI-1, marked as confidential by Claimant.

A. THE OWNERSHIP STRUCTURE OF ULYSSEAS

50. Claimant has submitted the following confidential chart of Ulysseas' Abbreviated Ownership Structure:⁸



1. Ulysseas' relationship with Elliott Associates, L.P.

51. As indicated in the above chart, 62.5% of Ulysseas' shares, including the entirety of its Class A voting shares, are owned by Highwood Partners, L.P., a limited partnership organized under the laws of the State of Delaware, United States of America ("State of

⁸ Counter-Memorial, p. 9. See also the Abbreviated Ownership Structure of Ulysseas v. 2, Exhibit C-JURI-21, marked as confidential by Claimant.

Delaware”).⁹ The remaining 37.5% of Ulysseas’ shares are owned by Elliott International, L.P., a limited partnership organized under the laws of the Cayman Islands.¹⁰

52. Highwood Partners, L.P., is in turn 99% owned by Elliott Associates, L.P., a limited partnership organized under the laws of the State of Delaware, the remaining 1% being held by Highwood Associates, Inc.,¹¹ which is the General Partner of Highwood Partners, L.P.¹² Highwood Associates is wholly owned by Elliott Associates, L.P.¹³

2. Ulysseas’ relationship with Proteus Power Co. Inc.

53. In February 2003, Ulysseas became the successor to two charter party agreements to which Proteus Power Co. Inc. (“Proteus”), a Bahamas company with an office in Houston, Texas,¹⁴ was already a party.¹⁵ According to Claimant, “the charterer (Proteus Power Co. Inc.) contracted to pay a monthly fee to the owner (Ulysseas) in return for use of the vessels PBI and PBII.”¹⁶
54. Proteus was formed pursuant to the JVA between Elliott Associates, L.P., Elliott International, L.P. and Veredas Power, Inc. (“Veredas”), a corporation organized under the

⁹ Written Consent of the Sole Director of Ulysseas dated 26 February 2003, Resolution No. IV; Highwood Partners, L.P. Stockholder Certificate for Shares of Stock in Ulysseas dated 26 February 2003; Elliott International, L.P. Stockholder Certificate for Shares of Stock in Ulysseas dated 26 February 2003, Exhibit C-JURI-16, marked as confidential by Claimant; Veldwijk Witness Statement, para. 22, CWS-JURI-1; Pollock Witness Statement, para. 4, CWS-JURI-2; Counter-Memorial, para. 21.

¹⁰ Written Consent of the Sole Director of Ulysseas dated 26 February 2003, Resolution No. IV; Highwood Partners, L.P. Stockholder Certificate for Shares of Stock in Ulysseas dated 26 February 2003; Elliott International, L.P. Stockholder Certificate for Shares of Stock in Ulysseas dated 26 February 2003, Exhibit C-JURI-16, marked as confidential by Claimant; Veldwijk Witness Statement, para. 22, CWS-JURI-1; Pollock Witness Statement, para. 4, CWS-JURI-2; Counter-Memorial, para. 21.

¹¹ Veldwijk Witness Statement, para. 23, CWS-JURI-1; Counter-Memorial, para. 21.

¹² Highwood Associates, Inc. Incumbency Certificate dated 13 October 2008, Exhibit C-JURI-19, marked as confidential by Claimant; Certificate of Limited Partnership of Highwood Partners, L.P. dated 1 July 1994, Exhibit C-JURI-17, marked as confidential by Claimant; Certificate of Incorporation of Highwood Associates, Inc. dated 1 July 1994, Exhibit C-JURI-18, marked as confidential by Claimant; Veldwijk Witness Statement, para. 23, CWS-JURI-1; Pollock Witness Statement, para. 5, CWS-JURI-2; Counter-Memorial, para. 21.

¹³ Highwood Associates, Inc. Shareholder Register dated 8 March 2010, Exhibit C-JURI-20, marked as confidential by Claimant; Veldwijk Witness Statement, para. 24, CWS-JURI-1; Pollock Witness Statement, para. 5, CWS-JURI-2; Counter-Memorial, para. 22.

¹⁴ Memorial, para. 16; Counter-Memorial, para. 110.

¹⁵ See below, para. 64.

¹⁶ Counter-Memorial, para. 112. “PBI” and “PBII” refer to power Barges that Ulysseas purchased in February 2003 (See *infra*, para. 63).

laws of Bahamas,¹⁷ which Mr. Veldwijk understands “to be part of the Panamanian-based Synergy Group, owned in whole or in part by Germán Efromovich.”¹⁸ Respondent argues in a similar fashion that the “Brazilian Synergy Group [is] controlled by Mr. Germán Efromovich, a Bolivian-born Brazilian national.”¹⁹ According to Mr. Veldwijk, the purpose of Proteus’ formation was to provide services to Ulyseas by operating the power barges that it owned.²⁰

55. Pursuant to Section 2.3(b) of the JVA, Elliott Associates, L.P. and Elliott International, L.P. together held 50% of Proteus’s share capital, with Veredas holding the other 50%.²¹ The board of directors of Proteus comprised four members, two directors nominated by Elliott Associates, L.P. and Elliott International, L.P., and two others nominated by Veredas.²² The joint consent of Elliott Associates, L.P. and Elliott International, L.P., and Veredas was required in order for a number of actions to be taken by Proteus.²³ In the event of a deadlock, the JVA provided for a dissolution procedure.²⁴ In addition, under Section 5.5(a) and (b) of the JVA, Elliott Associates, L.P. and Elliott International, L.P. were conferred the exclusive right to decide whether Proteus could “make any purchase of goods or services in excess of U.S. \$100,000 [...]” or “incur any capital commitment in excess of U.S. \$100,000 [...]”²⁵

¹⁷ Joint Venture Agreement dated 18 January 2002, recitals and Sect. 2.2, Exhibit C-JURI-42, marked as confidential by Claimant; Veldwijk Witness Statement, para. 48, CWS-JURI-1; Memorandum of Association and Articles of Association of Proteus Power Co., Inc., Exhibit C-JURI-43, marked as confidential by Claimant; Korn Witness Statement, para. 5, CWS-JURI-3.

¹⁸ Veldwijk Witness Statement, para. 47, CWS-JURI-1. Mr. Korn indicated at the hearing that the Synergy Group is controlled by two brothers, José and Germán Efromovich (Hearing Transcript, Day 1, p. 138, lines 16-17).

¹⁹ Memorial, para. 132; Press Article “Norse denies Brazilian sale plans,” Upstreamonline, dated 15 September 2008, Exhibit R-6; Reply, para. 72.

²⁰ Veldwijk Witness Statement, para. 48, CWS-JURI-1; Mr. Korn, Hearing Transcript, Day 1, p. 151, line 25, p. 152, lines 1-10.

²¹ Joint Venture Agreement, Sect. 2.3(b), Exhibit C-JURI-42, marked as confidential by Claimant. Claimant circulated the full text of the JVA and Amendment to JVA at the hearing (see above, para. 45).

²² Joint Venture Agreement, Sect. 5.1, Exhibit C-JURI-42, marked as confidential by Claimant.

²³ Joint Venture Agreement, Sect. 5.4, Exhibit C-JURI-42, marked as confidential by Claimant.

²⁴ Joint Venture Agreement, Sect. 14.3 (the text was circulated at the hearing; see *supra*, para. 45).

²⁵ Joint Venture Agreement, Sect. 5.5(a) and (b), Exhibit C-JURI-42, marked as confidential by Claimant.

56. On 29 June 2007, the JVA was amended by the Amendment to JVA.²⁶ Pursuant to the Amendment to JVA, Veredas agreed to transfer 100 shares that it held in Proteus to Elliott Associates, L.P. and Elliott International, L.P.,²⁷ which, as a result, held together 60% of Proteus' share capital (27.92% and 32.08%, respectively).²⁸ Elliott Associates, L.P. and Elliott International, L.P. were also given the right to appoint a further director to the board of Proteus in addition to the two directors they were already entitled to appoint.²⁹

3. Ulysseas' relationship with Rubiales Consulting, Inc. and Prime Natural Resources, Inc.

57. Ulysseas entered into an Administrative and Professional Services Agreement, with Rubiales Consulting, Inc. ("Rubiales"), a corporation organized under the laws of Texas,³⁰ for the provision of certain administrative, accounting, and other related professional services to Ulysseas.³¹ The term of this agreement was deemed to have commenced on 1 October 2007³² and provides, *inter alia*, that Rubiales "is acting as an independent contractor."³³

58. Rubiales had itself entered into an Administrative and Professional Services Agreement with Prime Natural Resources, Inc. ("Prime"), a corporation organized under the laws of Texas.³⁴ The effective date of the agreement was 1 January 2007.³⁵ On 23 November

²⁶ Amendment to Joint Venture Agreement, dated 29 June 2007, Exhibit C-JURI-44, marked as confidential by Claimant.

²⁷ Amendment to Joint Venture Agreement, dated 29 June 2007, Sect. 4.1, Exhibit C-JURI-44, marked as confidential by Claimant.

²⁸ Veldwijk Witness Statement, para. 50, CWS-JURI-1; Pollock Witness Statement, paras. 10 and 11, Exhibit CWS-JURI-2; Korn Witness Statement, para. 6, Exhibit CWS-JURI-3.

²⁹ Amendment to Joint Venture Agreement, dated 29 June 2007, Sect. 4.3, Exhibit C-JURI-44, marked as confidential by Claimant; Counter-Memorial, para. 111.

³⁰ Certificate of Incorporation of Rubiales Consulting, Inc., dated 19 September 2003, Exhibit C-JURI-9, marked as confidential by Claimant.

³¹ Administrative and Professional Services Agreement between Ulysseas and Rubiales, Preamble, Exhibit C-JURI-11, marked as confidential by Claimant.

³² Administrative and Professional Services Agreement between Ulysseas and Rubiales, para. 2, Exhibit C-JURI-11, marked as confidential by Claimant.

³³ Administrative and Professional Services Agreement between Ulysseas and Rubiales, para. 5, Exhibit C-JURI-11, marked as confidential by Claimant.

³⁴ First Amended and Restated Administrative and Professional Services Agreement between Rubiales and Prime, Preamble, Exhibit C-JURI-5, marked as confidential by Claimant; Certificate of Amendment for Prime Natural Resources, Inc., dated 26 May 2000 and Articles of Amendment to the Articles of Incorporation of Prime Natural Resources, Inc., dated 24 May 2000, Exhibit C-JURI-1, marked as confidential by Claimant.

2009, Rubiales and Prime entered into a First Amended and Restated Administrative and Professional Services Agreement,³⁶ effective as of 1 January 2008,³⁷ whereby Prime would provide certain administrative, accounting, and other related professional services to Rubiales.³⁸ The agreement provided, *inter alia*, that Prime “is acting as an independent contractor.”³⁹

59. According to Claimant’s chart, Rubiales and Prime are both wholly owned by Highridge Resources, Inc.,⁴⁰ a corporation organized under the laws of the State of Delaware,⁴¹ whose preferred shares and common shares are 100% and 96% owned by Elliott Associates, L.P., respectively.⁴²

4. The Parties’ disagreement as to who controls Ulysseas

60. The Parties disagree as to who ultimately controls Ulysseas, and in particular as to whether it is controlled by Mr. Paul E. Singer⁴³ or by Mr. Germán Efromovich, through the Synergy Group and Proteus.⁴⁴

³⁵ First Amended and Restated Administrative and Professional Services Agreement between Rubiales and Prime, Preamble, Exhibit C-JURI-5, marked as confidential by Claimant.

³⁶ First Amended and Restated Administrative and Professional Services Agreement between Rubiales and Prime, Preamble, Exhibit C-JURI-5, marked as confidential by Claimant.

³⁷ First Amended and Restated Administrative and Professional Services Agreement between Rubiales and Prime, Preamble and para. 2, Exhibit C-JURI-5, marked as confidential by Claimant.

³⁸ First Amended and Restated Administrative and Professional Services Agreement between Rubiales and Prime, Preamble, Exhibit C-JURI-5, marked as confidential by Claimant.

³⁹ First Amended and Restated Administrative and Professional Services Agreement between Rubiales and Prime, para. 5, Exhibit C-JURI-5, marked as confidential by Claimant.

⁴⁰ Veldwijk Witness Statement, paras. 6, 16, CWS-JURI-1; Share Certificates for Prime Natural Resources held by Prime II, Inc. (now Highridge Resources, Inc.) dated 30 September 2002, 1 October 2002, 31 December 2002, and 27 January 2003, Exhibit C-JURI-2, marked as confidential by Claimant; Share Certificate for Rubiales Consulting, Inc., held by Prime II, Inc. (now Highridge Resources, Inc.) dated 20 September 2003, Exhibit C-JURI-10, marked as confidential by Claimant.

⁴¹ Certificate of Incorporation for Highridge Resources, Inc. and Certificate of Amendment of Certificate of Incorporation, Exhibit C-JURI-3, marked as confidential by Claimant.

⁴² Veldwijk Witness Statement, para. 8, CWS-JURI-1; Share Certificates for Highridge Resources, Inc., held by Elliott Associates, L.P., dated 30 December 2002 and 24 June 2008, Exhibit C-JURI-4, marked as confidential by Claimant.

⁴³ Counter-Memorial, paras. 23-24, 106; Claimant’s letter dated 20 May 2010; Claimant’s Rejoinder, paras. 75, 79-80; Reply, paras. 64.

⁴⁴ Counter-Memorial, paras. 109-111, 117-120, 124-130; Rejoinder, paras. 64-65; Memorial, paras. 91, 115, 117-124, 132-136; Reply, paras. 68-75.

61. On 15 June 2010⁴⁵ and at the hearing on jurisdiction,⁴⁶ Claimant provided evidence which, in its view, showed that Mr. Singer controls Ulysseas. At the hearing, Respondent stated that Claimant's evidence "seems to show that Mr. Singer does control [...] this limited partnership called Elliott Associates LP which sits at the top of the initial corporate chart offered by the claimant."⁴⁷ Respondent further indicated that it would accept that Mr. Singer is an American national.⁴⁸ Respondent, however, argued that "the line of control between Ulysseas and Elliott is broken" by the JVA and "diverted to the Synergy Group and to Mr. Efromovich."⁴⁹
62. The Parties also disagree as to the nature and the necessary scope of disclosure of the relationship that exists between Claimant, on the one hand, and Prime and Rubiales, on the other.⁵⁰

B. THE IMPORTATION AND INSTALLATION OF POWER BARGE I ("PBI") AND POWER BARGE II ("PBII")

63. On 27 February 2003, Claimant purchased two ocean-going power Barges, PBI and PBII (collectively the "Barges"), from Cayman Power Barge I, Ltd. and Odyssea Vessels, Inc., respectively,⁵¹ for the purposes of generating electricity to be used by consumers on land.⁵²
64. The Barges were the subject of individual charter party agreements between Cayman Power Barge I, Ltd. and Proteus and Odyssea Vessels, Inc. and Proteus, respectively.⁵³

⁴⁵ See *supra*, para. 42.

⁴⁶ See *supra*, para. 45.

⁴⁷ Hearing Transcript, Day 1, p. 67, lines 21-25.

⁴⁸ Hearing Transcript, Day 1, p. 68, lines 15-16.

⁴⁹ Hearing Transcript, Day 1, p. 68, lines 4-7.

⁵⁰ Memorial, paras. 137-141; Reply, paras. 76-79; Counter-Memorial, paras. 121-123; Rejoinder, paras. 86-87.

⁵¹ Vessel Purchase Agreement between Cayman Power Barge I, Ltd. and Ulysseas, Inc., dated 27 February 2003, Exhibits C-JURI-29 and R-21, marked as confidential by Claimant; Vessel Purchase Agreement between Odyssea Vessels, Inc. and Ulysseas, Inc., dated 27 February 2003, Exhibits C-JURI-30 and R-22, marked as confidential by Claimant; Memorial, para. 16.

⁵² Notice of Arbitration, para. 3.2.

⁵³ Bareboat Charter Party between Cayman Power Barge I, Ltd. and Proteus Power Co., Inc., dated 18 January 2002, Exhibits C-JURI-33 and R-25, marked as confidential by Claimant; Bareboat Charter Party between Odyssea Vessels, Inc. and Proteus Power Co., Inc., dated 18 January 2002, Exhibits C-JURI-33 and R-26, marked as confidential by Claimant.

Proteus was the charterer under these agreements.⁵⁴ Pursuant to paragraph 3.2 of both agreements, “[a]t all times during the term of the Charter Party, title to the Facility⁵⁵ shall be vested in Owner⁵⁶ to the exclusion of Charterer [...]”⁵⁷ In conjunction with the sale of the Barges, Cayman Power Barge I, Ltd. and Odyssea Vessels, Inc. assigned to Ulysseas their rights and responsibilities under the two charter party agreements.⁵⁸

65. According to Claimant, Ecuador opened up its electricity sector to private investment in 2003 in order to satisfy rapidly growing demand.⁵⁹ Claimant alleges that to take advantage of those liberal market conditions, it imported and installed PBI and PBII in Ecuador in late March/early April 2003 and April 2005,⁶⁰ respectively.⁶¹
66. On 12 and 14 July 2004, Ulysseas applied to the *Consejo Nacional de Electricidad* (“CONELEC”), the Ecuadorian government agency charged, under Ecuadorian law, with regulating investment in the electricity sector,⁶² for a *Permiso de Generación Eléctrica* in relation to PBII⁶³ and PBI,⁶⁴ respectively.

⁵⁴ Bareboat Charter Party between Cayman Power Barge I, Ltd. and Proteus Power Co., Inc., dated 18 January 2002, Preamble, Exhibits C-JURI-33 and R-25, marked as confidential by Claimant; Bareboat Charter Party between Odyssea Vessels, Inc. and Proteus Power Co., Inc., dated 18 January 2002, Preamble, Exhibits C-JURI-33 and R-26, marked as confidential by Claimant; Memorial, para. 16; Counter-Memorial, para. 112.

⁵⁵ The Facility refers to PBI and PBII (see the Bareboat Charter Party between Cayman Power Barge I, Ltd. and Proteus Power Co., Inc., dated 18 January 2002, para. 1.6, Exhibits C-JURI-33 and R-25, marked as confidential by Claimant, and the Bareboat Charter Party between Odyssea Vessels, Inc. and Proteus Power Co., Inc., dated 18 January 2002, para. 1.7, Exhibits C-JURI-33 and R-26, marked as confidential by Claimant, respectively).

⁵⁶ The Owner refers to Cayman Power Barge I, Ltd. and Odyssea Vessels, Inc. (see Bareboat Charter Party between Cayman Power Barge I, Ltd. and Proteus Power Co., Inc., dated 18 January 2002, Preamble, Exhibits C-JURI-33 and R-25, marked as confidential by Claimant, and Bareboat Charter Party between Odyssea Vessels, Inc. and Proteus Power Co., Inc., dated 18 January 2002, Preamble, Exhibits C-JURI-33 and R-26, respectively).

⁵⁷ Bareboat Charter Party between Cayman Power Barge I, Ltd. and Proteus Power Co., Inc., dated 18 January 2002, para. 3.1, Exhibits C-JURI-33 and R-25, marked as confidential by Claimant; Bareboat Charter Party between Odyssea Vessels, Inc. and Proteus Power Co., Inc., dated 18 January 2002, para. 3.1, Exhibits C-JURI-33 and R-26, marked as confidential by Claimant; Counter-Memorial, para. 112.

⁵⁸ Counter-Memorial, para. 112 and footnote 235; Assignment and Assumption Agreement regarding PBI, dated 27 February 2003, Exhibits C-JURI-34 and R-23, marked as confidential by Claimant; Assignment and Assumption Agreement regarding PBII, dated 27 February 2003, Exhibits C-JURI-34 and R-24, marked as confidential by Claimant.

⁵⁹ Notice of Arbitration, para. 3.1.

⁶⁰ According to Mr. Veldwijk, PBI and PBII arrived in Ecuador on 31 March 2003 and 16 April 2005, respectively.

⁶¹ Notice of Arbitration, para. 3.3. Respondent alleges that it is Proteus that took these actions (see Memorial, para. 17).

⁶² Notice of Arbitration, para. 3.5; Memorial, para. 20.

⁶³ *Contrato de Permiso Para Generación de Energía* regarding PBII, dated 12 September 2006, Art. 2.1, Exhibits C-JURI-40 and R-5.

67. On 21 September 2004, CONELEC issued *Certificados de Permiso* (“Licence Certificates”) to Ulysseas for PBI and PBII.⁶⁵ The Licence Certificates themselves were conditioned on Claimant signing Licence Contracts for each of the Barges with CONELEC within three months.⁶⁶
68. On 12 April 2005, CONELEC issued a certificate whereby it certified that in a meeting held on 13 September 2004, its board of directors decided to grant a Licence Certificate to Ulysseas for the operation of PBI and established a three-month deadline within which a Licence Contract was to be signed.⁶⁷
69. On 1 June 2005, CONELEC authorized Claimant to continue operating PBI on a temporary basis until the conclusion of a Licence Contract in accordance with the requirements of the *Centro Nacional de Control de la Energía* (“CENACE”) and Memorandum No. DE-05 313 dated 23 May 2005.⁶⁸
70. On 23 February 2006, CONELEC granted to Claimant an extension of the three-month time period that started to run from 6 February 2006 for the conclusion of a Licence Contract for the operation of PBII.⁶⁹
71. On 11 September 2006, CONELEC issued a certificate whereby it certified that in a meeting held on 13 September 2004, its board of directors decided to grant a Licence

⁶⁴ *Contrato de Permiso Para Generación de Energía* regarding PBI, dated 15 August 2005, Art. 2.1, Exhibits C-JURI-38 and R-9.

⁶⁵ *Certificado de Permiso No.67* regarding PBI, dated 21 September 2004, Exhibit R-28; *Certificado de Permiso No. 68* regarding PBII, dated 21 September 2004, Exhibit R-29.

⁶⁶ *Certificado de Permiso No.67* regarding PBI, dated 21 September 2004, article 1, Exhibit R-28; *Certificado de Permiso No. 68* regarding PBII, dated 21 September 2004, article 1, Exhibit R-29. See also Certificate issued by CONELEC on 12 April 2005 certifying that CONELEC’s board of directors resolved to grant a Licence Certificate in relation to PBI to Ulysseas on 13 September 2004 (Exhibit C-JURI-37) and Certificate issued by CONELEC on 11 September 2006 certifying that CONELEC’s board of directors resolved to grant a Licence Certificate in relation to PBII to Ulysseas on 13 September 2004 (Exhibit C-JURI-39).

⁶⁷ CONELEC Certificate dated 12 April 2005, Exhibit C-JURI-37.

⁶⁸ *Contrato de Permiso Para Generación de Energía* regarding PBI, dated 15 August 2005, Art. 2.2, Exhibits C-JURI-38 and R-9.

⁶⁹ *Contrato de Permiso Para Generación de Energía* regarding PBII, dated 12 September 2006, Art. 2.2, Exhibits C-JURI-40 and R-5.

Certificate to Ulysseas for the operation of PBII and established a three-month deadline for the signature of a Licence Contract.⁷⁰

72. Ulysseas and CONELEC, the latter acting on behalf of Ecuador,⁷¹ signed two *Contratos de Permiso para Generación de Energía Eléctrica* (“Licence Contracts”), one on 15 August 2005 for PBI, for a term of ten years,⁷² and another on 12 September 2006 for PBII, for a term of fifteen years.⁷³ Among other things, the Licence Contracts authorize Claimant to generate electric power with PBI and PBII and to commercialize it.⁷⁴ They also contain identical dispute resolution provisions, which read as follows:

*DISPUTE RESOLUTION. – In the event of controversies or differences that arise between the parties and that cannot be resolved between them, they shall be subject to Ecuadorian law and be resolved through alternative arbitration and mediation procedures, in accordance with law, and administered in accordance with the Mediation and Arbitration Law of Ecuador, its implementing Regulation and the Regulations of the Arbitration Tribunals of the Quito Chamber of Commerce, with the express waiver of any other national or international jurisdiction or diplomatic channels, public or private. In addition, the contracting parties agree that the appointing Authority of the Tribunal, comprising three arbitrators, shall be the Quito Chamber of Commerce and that the language used in the conciliation and arbitration proceeding shall be Spanish.*⁷⁵

C. EVENTS LEADING TO THESE PROCEEDINGS

73. The views of the Parties concerning how the present dispute developed diverge considerably. For purposes of the present decision, suffice it to note that, in Claimant’s view, Respondent took several measures which altered the legal and regulatory framework

⁷⁰ CONELEC Certificate dated 11 September 2006, Exhibit C-JURI-39.

⁷¹ Notice of Arbitration, para. 3.6.; The recitals of the Licence Contracts use the following wording: “[...] en representación del Estado Ecuatoriano [...]” (see *Contrato de Permiso Para Generación de Energía* regarding PBI, dated 15 August 2005, recitals and Art. 1, Exhibits C-JURI-38 and R-9; *Contrato de Permiso Para Generación de Energía* regarding PBII, dated 12 September 2006, recitals and Art. 1, Exhibits C-JURI-40 and R-5).

⁷² *Contrato de Permiso Para Generación de Energía* regarding PBI, dated 15 August 2005, Art. 7, Exhibits C-JURI-38 and R-9.

⁷³ *Contrato de Permiso Para Generación de Energía* regarding PBII, dated 12 September 2006, Art. 7, Exhibits C-JURI-40 and Exhibit R-5.

⁷⁴ *Contrato de Permiso Para Generación de Energía* regarding PBI, dated 15 August 2005, Art. 6, Exhibits C-JURI-38 and R-9; *Contrato de Permiso Para Generación de Energía* regarding PBII, dated 12 September 2006, Art. 6.1, Exhibits C-JURI-40 and R-5.

⁷⁵ Respondent’s translation of *Contrato de Permiso Para Generación de Energía* regarding PBI, dated 15 August 2005, Art. 30, Exhibit R-9; *Contrato de Permiso Para Generación de Energía* regarding PBII, dated 12 September 2006, Art. 30, Exhibit R-5 as provided in Memorial, para. 36.

governing the power sector in Ecuador, including the payment system applicable to private thermoelectric generators like Ulysseas,⁷⁶ and ultimately left Claimant's investment devoid of value.⁷⁷ According to Claimant, Ecuador's actions amount to a violation of its right under the BIT to fair and equitable treatment, full protection and security, and protection against unlawful expropriation.⁷⁸

74. In Respondent's view, PBI, which only operated from April to October 2006, was unfit for its purpose due to technical defects.⁷⁹ On 18 February 2008, Claimant requested that the PBI Licence Contract be terminated by mutual agreement of the Parties⁸⁰ and subsequently informed CONELEC that PBI would be recycled.⁸¹ Respondent also argues that Claimant failed to fulfill its obligations under the PBII Licence Contract,⁸² and eventually left no choice to CONELEC but to assume temporary operation of PBII.⁸³ Respondent believes that Ulysseas' claims fall outside the jurisdiction of this Tribunal.⁸⁴

CHAPTER III - CONTENTIONS OF THE PARTIES

75. Respondent alleges that Claimant has waived its right to bring claims against Respondent under the BIT with respect to its investment in Ecuador, and even if Claimant is held not to have waived arbitration against Respondent under the BIT, Respondent has denied Claimant the advantages of the BIT in accordance with its Article I(2).⁸⁵
76. According to Claimant, Respondent's objections to the Tribunal's jurisdiction are groundless.⁸⁶ Respondent's argument based on waiver "fail[s] to overcome the strong presumption against a claimant's contractual waiver of treaty rights granted under the BIT"

⁷⁶ Notice of Arbitration, paras. 3.20 *et seq.*

⁷⁷ Notice of Arbitration, para. 3.38.

⁷⁸ Notice of Arbitration, para. 4.2.

⁷⁹ Memorial, paras. 22-23.

⁸⁰ Memorial, para. 23; Letter from Ulysseas to CONELEC, dated 18 January 2008, Exhibit R-11.

⁸¹ Memorial, para. 23; Letter from Ulysseas to CONELEC, dated 19 May 2008, Exhibit R-12.

⁸² Memorial, para. 25; Letter from Ulysseas to CONELEC, dated 21 December 2007, section A.1., Exhibit R-35.

⁸³ Memorial, para. 27; CONELEC Resolution No. 089/09, dated 24 September 2009, Exhibit R-20.

⁸⁴ Answer, para. 57; Memorial, para. 165; Reply, para. 89.

⁸⁵ Memorial, paras. 4, 5, 10.

⁸⁶ Counter-Memorial, paras. 5-20.

and the alleged waiver does not apply to Ulyseas' treaty claims.⁸⁷ In addition, the provisions of Article I(2) of the BIT, which Respondent incorrectly interprets, do not apply in this case.⁸⁸

A. THE ALLEGED WAIVER BY CLAIMANT OF ITS RIGHT TO BRING CLAIMS UNDER THE BIT

1. The possibility for an investor to waive by contract its right to arbitration under a BIT

(a) Respondent's contentions

77. Respondent is of the view that an investor can contractually and in advance waive its right to bring claims before an arbitral tribunal under a BIT.⁸⁹

78. Respondent contends that Claimant's waiver is consistent with general rules of international law as evidenced in arbitral practice and scholarly writings.⁹⁰ Many investment treaties give the choice to investors to waive their procedural right to have their treaty claim heard by an international arbitral tribunal by instead prosecuting these claims before the municipal courts of the host State.⁹¹ Respondent gives the example of "fork-in-the-road" provisions.⁹²

79. Referring to *Aguas del Tunari v. Bolivia*,⁹³ *Vivendi v. Argentina*⁹⁴ and commentary,⁹⁵ Respondent insists that "in the presence of a clear waiver of international remedies by the

⁸⁷ Counter-Memorial, para. 16.

⁸⁸ Counter-Memorial, paras. 17, 74.

⁸⁹ Reply, para. 8, section A, para. 13; Hearing Transcript, Day 2, pp. 2-4.

⁹⁰ Memorial, paras. 78-87.

⁹¹ Memorial, para. 79.

⁹² Memorial, para. 79.

⁹³ Memorial, para. 81. Respondent refers to *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Jurisdiction, 21 October 2005, para. 118, Exhibit R-AA.

⁹⁴ Memorial, para. 84. Respondent refers to *Compañía de Aguas del Aconquija, S.A. & Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, paras. 76 and 98, Exhibit R-X, and argues that the relevant clause in that case was not considered an effective waiver because it "did not demonstrate a clear intention by the Parties to exclude international arbitration."

⁹⁵ Memorial, para. 82. Respondent refers to Paulsson, J, *Denial of Justice in International Law* (2005) p. 32, Exhibit R-BB. See also Memorial, para. 83. Respondent refers, *inter alia*, to Spiermann, O, "Individual Rights, State Interests and the Power to Waive ICSID Jurisdiction under Bilateral Investment Treaties" (2004) 20(2) *Arbitration International* 179, p. 205, Exhibit R-C.

investor, effect should be given to that waiver,”⁹⁶ including when the waiver is contained in a contractual clause.⁹⁷ In Respondent’s view, “[t]he basic principle in each case is that a binding exclusive jurisdiction clause in a contract should be respected, unless overridden by another valid provision.”⁹⁸

80. Respondent alleges that its proposition finds further support in cases regarding the interpretation of the so-called Calvo clause,⁹⁹ in particular *North American Dredging Company of Texas (United States) v. United Mexican States*.¹⁰⁰ Taking the example of *Deweere v. Belgium*,¹⁰¹ Respondent further considers that its position is consonant with “the general position that individuals have the *prima facie* power to waive their rights if they so choose.”¹⁰² Arbitration being consensual, there is no rule of international law preventing an investor to validly waive arbitration under the BIT.¹⁰³ In addition, there is no such prohibition in the text of the applicable BIT.¹⁰⁴

81. Respondent therefore disagrees with Claimant’s proposition that there is a “strong presumption” against a claimant’s contractual waiver of the right to BIT-based arbitral jurisdiction.¹⁰⁵ The authorities relied upon by Claimant in fact support Respondent’s position and confirm that an investor may waive contractually its right to resort to international treaty arbitration in advance.¹⁰⁶

⁹⁶ Memorial, para. 81.

⁹⁷ Memorial, para. 83. Respondent refers to, *inter alia*, Spiermann, O, “Individual Rights, State Interests and the Power to Waive ICSID Jurisdiction under Bilateral Investment Treaties” (2004) 20(2) *Arbitration International* 179, p. 205, Exhibit R-C.

⁹⁸ *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004, para. 138, Exhibit R-I, quoted in Memorial, para. 85.

⁹⁹ Memorial, para. 86.

¹⁰⁰ *North American Dredging Company of Texas (United States) v. United Mexican States*, (1926) 4 UN Rep. 26, Exhibit R-CC.

¹⁰¹ *Deweere v. Belgium*, Judgment, 27 February 1980, ECHR Series A No. 35, para. 49, Exhibit R-DD.

¹⁰² Memorial, para. 88.

¹⁰³ Hearing Transcript, Day 1, p. 32, lines 19-25, p. 33, lines 1-12.

¹⁰⁴ Hearing Transcript, Day 2, p. 3, lines 12-13.

¹⁰⁵ Reply, para. 14. Respondent refers to Counter-Memorial, paras. 16, 47. See also Hearing Transcript, Day 1, p. 33, lines 24-25, p. 34, lines 1-16.

¹⁰⁶ Reply, para. 14. Respondent refers to *IBM World Trade Corporation v. The Republic of Ecuador*, ICSID Case No. ARB/02/10, Decision on Jurisdiction and Competence, 22 December 2003, Exhibit C-JURI-B; *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2001, Exhibit R-W; *Compañía de Aguas del Aconquija, S.A. & Vivendi Universal v. Argentine Republic*, ICSID Case

(b) Claimant's contentions

82. According to Claimant, contractual waiver of treaty-based arbitral jurisdiction is “disallowed” or “disfavored.”¹⁰⁷ There exists, in Claimant’s view, a presumption against such contractual waiver.¹⁰⁸ Contrary to Respondent’s position, a private party cannot abrogate in advance by contract the agreement that Ecuador has made with the United States.¹⁰⁹
83. Claimant refers to *IBM v. Ecuador*,¹¹⁰ *SGS v. Pakistan*,¹¹¹ *SGS v. Philippines*,¹¹² and *Vivendi v. Argentina*,¹¹³ and submits that these cases either reject or undermine the premise of Respondent’s waiver arguments, namely that “a prior contractual choice of forum can oust a BIT tribunal’s jurisdiction by implication.”¹¹⁴ Indeed, these cases confirm that contractual waiver of the right to treaty protection is prohibited.¹¹⁵
84. More generally, with respect to the cases of *SGS v. Pakistan*, *IBM v. Ecuador*, *Vivendi v. Argentina* and *Azurix v. Argentina*, Claimant is of the view that Respondent, in its interpretation of the cases, relies upon a false dichotomy between contractual renunciation

No. ARB/97/3, Decision on Annulment, 3 July 2002, Exhibit R-X; *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003, Exhibit C-JURI-I. See also Reply, paras. 15, 16; Hearing Transcript, Day 2, p. 4, lines 13-19. Respondent refers to *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004, Exhibit R-I.

¹⁰⁷ Counter-Memorial, section A, p. 12; see also Counter-Memorial, paras. 27-42; Rejoinder, paras. 6-19.

¹⁰⁸ Counter-Memorial, para. 46; Rejoinder, paras. 7, 17, 18.

¹⁰⁹ Hearing Transcript, Day 1, p. 85, lines 6-9.

¹¹⁰ Counter-Memorial, para. 36. Claimant refers to *IBM World Trade Corporation v. The Republic of Ecuador*, ICSID Case No. ARB/02/10, Decision on Jurisdiction and Competence, 22 December 2003, Exhibit C-JURI-B.

¹¹¹ Counter-Memorial, para. 39. Claimant refers to *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2001, para. 32, Exhibit R-W.

¹¹² Counter-Memorial, para. 40. Claimant refers to *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004, para. 154, Exhibit R-I. See also Hearing Transcript, Day 2, p. 41, lines 15-25, p. 42, lines 1-6.

¹¹³ Counter-Memorial, para. 41. Claimant refers to *Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para. 102, Exhibit R-X.

¹¹⁴ Hearing Transcript, Day 2, p. 40, lines 13-15.

¹¹⁵ Rejoinder, para. 14. Claimant refers to Thomas W. Wälde, *The “Umbrella” Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases*, 6 THE JOURNAL OF WORLD INVESTMENT & TRADE 183, 211 (April 2005), Exhibit C-JURI-DD. See also Rejoinder, para. 8.

of other available jurisdictions, and a contractual exclusive forum selection clause, a dichotomy which the tribunals in those cases was not faced with.¹¹⁶

85. Claimant further asserts that treaty-based fork-in-the-road clauses and Calvo clause awards cannot be relied upon to buttress the applicability of contractual waiver on the following grounds: first, fork-in-the-road provisions are set out in the applicable BIT and do not depend on contractual provisions;¹¹⁷ they are also different from an advance waiver in so far as they offer a choice to the investor at the time the dispute is submitted for resolution;¹¹⁸ second, the *North American Dredging Company of Texas* and *Woodruff* cases deal with the ability of a party to waive an international tribunal's jurisdiction over contract claims and therefore are not relevant to the present claim for breach of the BIT.¹¹⁹
86. Finally, Claimant submits that to deprive investors of the neutral international forum provided for under BITs would ultimately discourage foreign investment and contradict the public interest.¹²⁰ Indeed, Respondent cannot ignore that “[...] contractual waiver of BIT rights is prohibited because it would allow State parties to give lip service to their international commitments, while undermining those commitments by a contract.”¹²¹

2. The alleged waiver in Article 30 of the Licence Contracts of Claimant's right to resort to arbitration under the BIT

(a) The express and clear waiver allegedly contained in Article 30 of the Licence Contracts

(i) *Respondent's contentions*

87. Respondent contends that Article 30 of the Licence Contracts contains a clear and unambiguous waiver of recourse to international arbitration under the BIT.¹²² First, the negotiating history of the Licence Contracts demonstrates that while Claimant was not required to waive this right under Ecuadorian law, Claimant nonetheless agreed to do so

¹¹⁶ Rejoinder, paras. 13, 15, 16.

¹¹⁷ Counter-Memorial, para. 43.

¹¹⁸ Hearing Transcript, Day 1, p. 86, lines 21-25, p. 87, line 1.

¹¹⁹ Counter-Memorial, para. 45.

¹²⁰ Counter-Memorial, para. 42.

¹²¹ Rejoinder, para. 6.

¹²² Memorial, paras. 35, 36; Hearing Transcript, Day 1, p. 14; lines 24-25.

freely.¹²³ Second, Respondent is of the view that the use of the phrase “the express waiver of any other national or international jurisdiction [...], public or private” in Article 30 clearly encompasses all dispute resolution procedures available to the Parties.¹²⁴ Contrary to Claimant’s argument, the reference to “international jurisdiction” can only mean that the Parties intended to waive recourse to international BIT arbitration, given it is the only obvious instance of international jurisdiction available to Claimant in this case.¹²⁵

88. Furthermore, Respondent contends that Claimant’s reliance on *Occidental v. Ecuador* to argue that Article 30 does not contain a clear waiver, is misplaced.¹²⁶ First, the contract in that case provided expressly for ICSID jurisdiction.¹²⁷ Second, the issue was not whether waiver language generally excludes resort to arbitration under an investment treaty.¹²⁸ Third, the scope of the contractual waiver in question was significantly narrower than that of Article 30.¹²⁹

89. Finally, while Claimant wrongly argues that Respondent bases its jurisdictional objection on a mere arbitration or forum selection clause,¹³⁰ Respondent emphasizes that it instead relies “on the express waiver” contained in Article 30.¹³¹ Instead of focusing on the

¹²³ Memorial, paras. 37-42. Respondent refers to *Reglamento de Concesiones, Permisos y Licencias para la Prestación del Servicio de Energía Eléctrica*, dated 31 March 2008, Exhibit R-B; Letter from Ulysseas to CONELEC, dated 11 March 2005, Exhibit R-41; Letter from Ulysseas to CONELEC, dated 22 June 2005, Exhibit R-42; Letter from Ulysseas to CONELEC, dated 31 October 2005, Exhibit R-43; Letter from CONELEC to Ulysseas, dated 31 May 2006, Exhibit R-44; Letter from Ulysseas to CONELEC, dated 16 June 2006, Exhibit R-47; Letter from Ulysseas to CONELEC, dated 12 July 2006, Exhibit R-48; Letter from Ulysseas to CONELEC, dated 6 September 2006, Exhibit R-49; Letters from Ulysseas to CONELEC, dated 28 November 2006, Exhibit R-50. See also Hearing Transcript, Day 1, p. 19, lines 20-25, p. 20, lines 1-17.

¹²⁴ Memorial, para. 44.

¹²⁵ Memorial, para. 44; Reply, para. 19; Hearing Transcript, Day 1, p. 16, lines 9-18, p. 31, lines 2-4. Respondent adds that, contrary to Claimant’s contention, Ecuador’s foreign investment law does not confer jurisdiction to international bodies and thus does not offer any alternative forum (Hearing Transcript, Day 2, p. 6, lines 19-25, p. 7, lines 1-6).

¹²⁶ Reply, para. 20. Respondent refers to Counter-Memorial, paras. 52, 53.

¹²⁷ Reply, para. 20.

¹²⁸ Reply, para. 20.

¹²⁹ Reply, para. 20. Respondent refers to *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Jurisdiction, 9 September 2008, para. 63, Exhibit R-QQ. See also Hearing Transcript, Day 2, p. 10, lines 5-14.

¹³⁰ Reply, para. 12. Respondent refers to Counter-Memorial, para. 15.

¹³¹ Reply, para. 12.

selection of forum made in Article 30, Claimant should address the effect of the express waiver contained in that provision, which it does not.¹³²

(ii) *Claimant's contentions*

90. In Claimant's view, Article 30 is insufficiently specific for it is not an exclusive forum selection clause that explicitly and clearly renounces the jurisdiction of tribunals constituted under the BIT.¹³³ Rather, it refers only to "any other public or private [...] international jurisdiction" without mentioning the BIT or tribunals constituted under the BIT.¹³⁴ While Respondent incorrectly argues that "public [...] international jurisdiction" can only refer in this case to arbitration under the BIT,¹³⁵ Claimant contends that there are at least three counterexamples of public international fora for disproving Respondent's point.¹³⁶
91. Claimant also relies, *inter alia*, on *Occidental v. Ecuador*,¹³⁷ concerning a clause in the parties' Participation Contract that is similar to, and even broader than,¹³⁸ Article 30, which the tribunal held to be insufficiently clear and unequivocal to amount to a waiver.¹³⁹
92. Finally, Claimant submits that Article 30 consists of a *positive* agreement to arbitrate in Quito, which must be balanced by a *negative* renunciation of jurisdiction.¹⁴⁰ Whereas

¹³² Reply, para. 13.

¹³³ Counter-Memorial, section 1, p. 26; Hearing Transcript, Day 1, pp. 89-93. (As a basis for the requirement of clarity and specificity, Claimant relies on *Aguas del Tunari v. Bolivia*, para. 119, *TSA v. Argentina*, para. 62, and *Occidental v. Ecuador*, para. 73.) See also Hearing Transcript, Day 2, pp. 45-47.

¹³⁴ Counter-Memorial, paras. 49-51; Hearing Transcript, Day 1, p. 82, lines 12-13.

¹³⁵ Hearing Transcript, Day 1, p. 95, lines 13-17.

¹³⁶ Rejoinder, paras. 47, 48. Claimant argues that (1) in the absence of Article 30, Ulysseas, CONELEC and Ecuador could have agreed to have this Tribunal hear both Ulysseas' BIT claims and contractual claims arising out of CONELEC's breach of the Licence Agreements; (2) if there were an umbrella clause, such as at Article II(3)(C) of the BIT, the Tribunal could deal with contract claims; and (3) at the time the Licence Agreements were signed, Ecuador's Investment Promotion and Guarantee Law of 1997 offered various international fora to foreign investors.

¹³⁷ Counter-Memorial, paras. 52, 53. Claimant refers to *Occidental v. Ecuador*, Decision on Jurisdiction, paras. 63, 71, 73, 74 Exhibit C-JURI-H. The Tribunal notes that Claimant submitted as Exhibit C-JURI-H the Final Award rendered on 1 July 2004 under the auspices of the LCIA but refers in reality to the Decision on Jurisdiction rendered on 9 September 2008 in ICSID proceedings.

¹³⁸ Hearing Transcript, Day 1, p. 92, lines 16-20.

¹³⁹ Counter-Memorial, para. 53. Claimant refers to *Occidental v. Ecuador*, Decision on Jurisdiction, paras. 71, 73, 74, Exhibit C-JURI-H. See also Rejoinder, para. 44.

¹⁴⁰ Rejoinder, para. 13.

Respondent seeks to separate the negative renunciation of jurisdiction from Article 30, Claimant submits that they go hand in hand.¹⁴¹

(b) The alleged identity of the Parties to the Licence Contracts and to this arbitration

(i) *Respondent's contentions*

93. Respondent asserts that CONELEC acted “in representation of the Ecuadorian State” – as explicitly stated in the Licence Contracts – thereby making Respondent a party to the Licence Contracts.¹⁴² While Claimant relies on Article 2 of the *Ley de Régimen del Sector Eléctrico* (“LRSE”) for the proposition that CONELEC is a separate entity independent of the Ecuadorian State, Respondent asserts that the wording of Article 2 “does not render the State (*i.e.*, the Respondent) a third party to the Licence Contracts.”¹⁴³ Other provisions of the Licence Contracts, in Respondent’s view, indicate that Claimant contracted with Respondent.¹⁴⁴ In particular, Respondent refers to Article 23, which concerns changes in legislation affecting the autonomy of the Grantor that Respondent only could introduce,¹⁴⁵ and to Article 24, a stabilization clause providing that “the State” shall acknowledge damage to “the investor” if laws or regulations cause injury or amend contractual provisions.¹⁴⁶ Moreover, “[i]f the parties truly intended for CONELEC to act as a separate and independent entity from the Respondent, any change in legislation would have constituted a *force majeure* event and not a breach of the Grantor’s obligations.”¹⁴⁷ That is not the purpose of Article 25 of the Licence Contracts and its reference to “authorities exercising public office” does not relate to Ecuadorian public authorities.¹⁴⁸

¹⁴¹ Rejoinder, paras. 13, 15; Hearing Transcript, Day 1, p. 94, lines 10-21.

¹⁴² Reply, paras. 9, 21-31. Respondent refers to *Contrato de Permiso Para Generación de Energía* regarding PBI, dated 15 August 2005, recitals and Art. 1, Exhibit R-9; *Contrato de Permiso Para Generación de Energía* regarding PBII, dated 12 September 2006, recitals and Art. 1, Exhibit R-5. See also Hearing Transcript, Day 1, p. 22, lines 18-25, p. 23, lines 1-15.

¹⁴³ Reply, para. 23. Respondent refers to the *Ley de Régimen del Sector Eléctrico* of 10 October 1996, Art. 2, Exhibit C-JURI-K. See also Hearing Transcript, Day 1, p. 23, lines 9-15.

¹⁴⁴ Reply, para. 24.

¹⁴⁵ Reply, para. 24.

¹⁴⁶ Reply, para. 24.

¹⁴⁷ Reply, para. 25.

¹⁴⁸ Reply, para. 25.

94. In addition, Respondent argues that Articles 3(c) and 5(a) of the *Ley Orgánica de la Procuraduría General del Estado* “expressly allow [it] [...] to initiate and defend arbitral proceedings, involving public entities such as CONELEC.”¹⁴⁹ The State Attorney General could thus initiate arbitration against Ulysseas under the Licence Contracts in representation of the Ecuadorian State.¹⁵⁰ Further, while Claimant wrongly asserts that the State can only bind itself to arbitration with the express consent of the Attorney General, Respondent contends that in 2005 and 2006, “there was no need for the Attorney General to approve arbitration clauses in contracts with the state or with a public entity.”¹⁵¹ Additionally and contrary to Claimant’s allegations, “there is clear practice in Ecuador which allows a party which has entered into a concession contract with a public entity that has separate legal personality to sue the state as a whole directly.”¹⁵² Respondent adds that, even if the State were to argue that it cannot be sued, Ulysseas would have a claim for denial of justice.¹⁵³ Lastly, because CONELEC’s actions are attributable at public international law to the State,¹⁵⁴ Claimant’s argument that its waiver is not subject to the international rules on attribution of conduct to the State cannot stand.¹⁵⁵
95. Respondent finally argues that Claimant’s reliance on *Azurix v. Argentina*, *Aguas del Tunari v. Bolivia* and *Impregilo v. Pakistan*,¹⁵⁶ where the respondent State argued that it was not a party to the relevant contract, is misconceived.¹⁵⁷

¹⁴⁹ Reply, para. 26. Respondent refers to *Ley Orgánica de la Procuraduría General del Estado, Codificación*, published 13 April 2004, Articles 3(c) and 6(a), Exhibit R-RR. See also Hearing Transcript, Day 1, p. 24, lines 16-25, p. 25, lines 1-5.

¹⁵⁰ Hearing Transcript, Day 1, p. 25, lines 3-5.

¹⁵¹ Hearing Transcript, Day 1, p. 72, lines 23-25.

¹⁵² Hearing Transcript, Day 1, p. 26, lines 1-5.

¹⁵³ Hearing Transcript, Day 2, p. 5, lines 10-20.

¹⁵⁴ Reply, paras. 19, 27.

¹⁵⁵ Reply, para. 27; Hearing Transcript, Day 1, p. 23, lines 16-25, p. 24, lines 1-10.

¹⁵⁶ Reply, para. 28. Respondent refers to Counter-Memorial, paras. 57, 58, 62 and *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003, Exhibit C-JURI-I, *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Jurisdiction, 21 October 2005, Exhibit R-AA, and *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/322, Decision on Jurisdiction, April 2005, Exhibit R-G, respectively.

¹⁵⁷ Reply, paras. 29-31.

(ii) *Claimant's contentions*

96. Claimant asserts that Respondent is not a party to the Licence Contracts; rather, CONELEC is, and Claimant “never agreed to waive its right to arbitrate BIT claims before an UNCITRAL tribunal against Respondent.”¹⁵⁸ Claimant is of the view that CONELEC is a separate and independent entity under Ecuadorian law on the basis of Articles 2 and 12 of the LRSE.¹⁵⁹ Claimant argues that Respondent’s relevant concession law itself “distinguishes between CONELEC, a party to the Licence Agreement, and the State.”¹⁶⁰ In Claimant’s view, Article 24 of the Licence Contracts has the same effect.¹⁶¹ In addition, the *force majeure* provision in Article 25 would be rendered useless if Respondent were bound to the Licence Contracts.¹⁶² Claimant refers to *Azurix v. Argentina*, *Agua del Tunari v. Bolivia*, and *Impregilo v. Pakistan* to support its arguments that tribunals have held that arbitration clauses in concession contracts signed with government agencies or entities, as is CONELEC, do not waive treaty-based claims against the Government.¹⁶³
97. Claimant also argues that Respondent’s reliance on Articles 3(c) and 5(a) of Ecuador’s *Ley Orgánica de la Procuraduría del Estado*¹⁶⁴ is insufficient to support Respondent’s position.¹⁶⁵ In Claimant’s view, the fact that CONELEC is State-owned and may “represent” Respondent, or even make certain guarantees that bind Respondent, or that Respondent may from time to time intervene in CONELEC’s legal proceedings does not mean that Respondent and CONELEC “are one in the same, or that Ulysseas or the non

¹⁵⁸ Counter-Memorial, para. 28. See also Counter-Memorial, paras. 54, 55.

¹⁵⁹ Counter-Memorial, paras. 60, 61; Article 2 LRSE, Exhibit C-JURI-K; Article 12 LRSE, Exhibit C-JURI-K.

¹⁶⁰ Rejoinder, para. 25. Claimant refers to *Reglamento de Concesiones, Permisos y Licencias para la Prestación del Servicio de Energía Eléctrica* Article 115, Exhibit C-JURI-II.

¹⁶¹ Rejoinder, para. 26. Claimant stresses that, pursuant to Ecuador’s Constitution as referred to in Article 24, “the State, through the GRANTOR, may establish special guarantees and security assurances to the investor [...]”

¹⁶² Counter-Memorial, para. 56. In Claimant’s view, if Respondent were bound, acts by Respondent would not be “unforeseeable events,” including “acts of the authority exercised by a public official,” which do include acts of Ecuadorian public authorities (Rejoinder, para. 28). Claimant refers to *Contrato de Permiso Para Generación de Energía* regarding PBI, dated 15 August 2005, Art. 25, Exhibit C-JURI-38; *Contrato de Permiso Para Generación de Energía* regarding PBII, dated 12 September 2006, Art. 25, Exhibit C-JURI-40.

¹⁶³ Counter-Memorial, para. 57, 58, 62. Claimant refers to *Azurix v. Argentina*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003, para. 19, Exhibit C-JURI-I; *Agua del Tunari v. Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent’s Objection to Jurisdiction, 21 October 2005, paras. 2, 57, Exhibit R-AA; *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, para. 210, Exhibit R-G. See also Hearing Transcript, Day 1, p. 96, lines 21-25, p. 97, lines 1-13.

¹⁶⁴ Reply, para. 26.

¹⁶⁵ Rejoinder, paras. 21, 22.

signatory Respondent intended Article 30 to apply to any other entity.”¹⁶⁶ Claimant further emphasizes that, under Ecuadorian law, the State Attorney-General must approve the participation of Ecuador itself in any agreement subjecting the State to arbitration.¹⁶⁷ CONELEC cannot agree to an arbitration agreement that binds the State without the Attorney-General’s approval.¹⁶⁸ Article 30 of the Licence Contracts, however, was approved and the Licence Contracts themselves were signed by the Executive Director of CONELEC, *not* the State Attorney-General.¹⁶⁹ In addition, there is no evidence of a “practice” of allowing Ecuador to be sued where a party has entered into a contract with a separate public entity.¹⁷⁰

98. Finally, Claimant points out that “Respondent has never claimed [...] that it will answer a Quito arbitration or pay an award emanating from that arbitration.”¹⁷¹ Rather, it merely argued that if it did not, Claimant could bring a claim for denial of justice.¹⁷² According to Claimant, “[t]he routes by which Respondent would seek to evade an obligation to arbitrate [...] are well worn.”¹⁷³

(c) The alleged coverage of BIT claims under Article 30 of the Licence Contracts

(i) *Respondent’s contentions*

99. Respondent asserts that the scope of Article 30 extends beyond disputes arising under the Licence Contracts to all “controversies or disputes” arising between the Parties.¹⁷⁴ Similarly-worded clauses have been considered broad enough to include non-contractual

¹⁶⁶ Rejoinder, para. 22. See also Rejoinder, para. 27.

¹⁶⁷ Rejoinder, para. 23. Claimant refers to Ecuador’s *Ley de Arbitraje y Mediación*, Articles 4, 42, Exhibit C-JURI-EE.

¹⁶⁸ Hearing Transcript, Day 1, p. 99, lines 4-12; Hearing Transcript, Day 2, p. 48, lines 23-25, p. 49, lines 1-14. Claimant again refers to Ecuador’s *Ley de Arbitraje y Mediación*, Article 42.

¹⁶⁹ Rejoinder, para. 23. Claimant refers to *Contrato de Permiso Para Generación de Energía* regarding PBI, dated 15 August 2005, Exhibit C-JURI-38; *Contrato de Permiso Para Generación de Energía* regarding PBII, dated 12 September 2006, Exhibit C-JURI-40. See also Counter-Memorial, para. 55.

¹⁷⁰ Hearing Transcript, Day 1, p. 100, lines 2-6.

¹⁷¹ Rejoinder, paras. 31-33. Claimant refers to *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICC Arbitration No. YD/AS No. 3493, Award, 11 March 1983, Exhibit C-JURI-JJ by way of precedent for its proposition.

¹⁷² Hearing Transcript, Day 2, p. 48, lines 15-22.

¹⁷³ Rejoinder, para. 31. See also Rejoinder, paras. 32-33. Claimant refers to *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICC Arbitration No. YD/AS No. 3493, Award, 11 March 1983, Exhibit C-JURI-JJ by way of precedent for its proposition. See also Hearing Transcript, Day 1, p. 88, lines 8-23.

¹⁷⁴ Memorial, para. 45; Hearing Transcript, Day 1, p. 15, lines 12-15.

claims, such as tortious claims or treaty claims.¹⁷⁵ The terms of the Parties' waiver under Article 30 are therefore sufficiently wide to encompass Claimant's BIT-based claims.¹⁷⁶

100. According to Respondent, "the mere fact that the waiver is contained in a contract does not mean that it is limited in scope to only contractual claims."¹⁷⁷ In fact, Claimant implicitly accepts Respondent's position when it recognizes that BIT-based arbitration may be waived provided that the waiver is sufficiently specific. Referring to *Eureko v. Poland*, Respondent takes the example of a settlement agreement between the State and the investor which had the effect of waiving both the contractual and treaty claims of the investor.¹⁷⁸ Seen in its proper context, Article 30 is specific enough to encompass "the entire relationship between Ulysseas and the Republic of Ecuador as the state granting the concession for the operation of the power barges."¹⁷⁹

101. Respondent also argues that Claimant would not have an investment under the BIT without the Licence Contracts.¹⁸⁰ Claimant's rights under the Licence Contracts amount to Claimant's "investment" under Article 1(a)(v) of the BIT.¹⁸¹ While Claimant's Barges are also investments under the BIT, Claimant's operation of those Barges in Ecuador would not have been possible without the Licence Contracts.¹⁸² Relying on *Mihaly v. Sri Lanka*,¹⁸³ Respondent contends that the admission of Claimant's investment was subject to the Licence Contracts, which consequently represent all of the agreed terms, including the waiver, upon which Claimant made its investment.¹⁸⁴

¹⁷⁵ Memorial, para. 46.

¹⁷⁶ Memorial, para. 47. On the basis that Respondent is a party to the Licence Contracts, Respondent also contends that the words "controversies or differences" in Article 30 must have been intended to include all claims that could arise against a State, e.g. treaty claims (Reply, para. 34).

¹⁷⁷ Reply, para. 33; Hearing Transcript, Day 1, p. 16, lines 22-23. In Respondent's view, both *Aguas del Tunari v. Bolivia* and *Occidental v. Ecuador* support this proposition (Hearing Transcript, Day 2, p. 9, lines 15-25, p. 10, lines 1-14).

¹⁷⁸ Reply, para. 33. Respondent refers to *Eureko B.V. v. Republic of Poland*, *Ad hoc* Arbitration, Partial Award, 19 August 2005, paras. 173-175, Exhibit R-SS. See also Hearing Transcript, Day 2, p. 3, lines 24-25, p. 4, lines 1-3.

¹⁷⁹ Hearing Transcript, Day 1, p. 18, lines 13-16.

¹⁸⁰ Memorial, section 3, p. 15; para. 48.

¹⁸¹ Memorial, para. 52.

¹⁸² Memorial, para. 53.

¹⁸³ Memorial, para. 54. Respondent refers to *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002, paras. 59-60, Exhibit R-K.

¹⁸⁴ Memorial, para. 54; Reply, para. 35.

102. Respondent also emphasizes that the Licence Contracts contain substantive protections that are similar,¹⁸⁵ and not parallel,¹⁸⁶ to those provided in the BIT, “confirm[ing] that the parties must have had the BIT in mind when they included the waiver language in Article 30 [...]”¹⁸⁷ Respondent adds that, because the BIT is part of Ecuadorian law,¹⁸⁸ Claimant could, in a dispute under Article 30, “request the Tribunal established under the Ecuadorian Arbitration Act to apply international law, and specifically the treaty between the United States and Ecuador.”¹⁸⁹ Respondent concludes that the expression of the Parties’ common intention to waive arbitration under the BIT in Article 30 “deprives the Tribunal of jurisdiction over the entirety of the Claimant’s claims.”¹⁹⁰

(ii) *Claimant’s contentions*

103. Claimant argues that the scope of Article 30 is much more limited than Respondent alleges it is: (1) the use of the terms “disputes or differences of opinion [...] between the parties” to the Licence Contracts and the absence of broadening language (such as “all disputes” or “any differences of opinion”) show that the parties intended for Article 30 to apply only to contractual disputes under Ecuador law between CONELEC and Ulysseas;¹⁹¹ (2) the phrase “between these parties” refers to CONELEC and Ulysseas and does not even purport to refer to Respondent;¹⁹² (3) Article 30 contains the agreement of the “parties [...] to be subject to Ecuadorian law,” not BITs or international law;¹⁹³ and (4) disputes “will be resolved by alternative mediation and arbitration proceedings, based on the law, conducted in accordance with the Mediation and Arbitration Law of Ecuador, its Regulations and the

¹⁸⁵ Memorial, paras. 55-63. Respondent refers to Articles II(3)(a), II(3)(b) and III(1) of the BIT relating to fair and equitable treatment, full protection and security, and protection against expropriation respectively, Exhibit R-A; *Contrato de Permiso Para Generación de Energía* regarding PBI, dated 15 August 2005, Articles 6.4, 12.1(a),(d), and (h), 12.2(h), 13(2)(c), 21(b) and (c), 23, 24, and 26 Exhibit R-9; *Contrato de Permiso Para Generación de Energía* regarding PBII, dated 12 September 2006, Articles 6.4, 12.1.1, 12.1.4, 12.1.8, 12.2.8, 13.2.3, 21.2, 21.3, 23, 24, and 26, Exhibit R-5.

¹⁸⁶ Reply, para. 38.

¹⁸⁷ Reply, para. 38.

¹⁸⁸ Hearing Transcript, Day 1, p. 20, lines 23-25, p. 21, lines 1-10; Hearing Transcript, Day 2, p. 11, lines 12-17.

¹⁸⁹ Hearing Transcript, Day 2, p. 13, lines 23-25, p. 14, line 1.

¹⁹⁰ Memorial, paras. 65, 90.

¹⁹¹ Rejoinder, para. 37; Counter-Memorial, paras. 28-29.

¹⁹² Rejoinder, para. 38.

¹⁹³ Rejoinder, para. 39.

Regulations of the Arbitration Tribunals of the Chamber of Commerce of the city of Quito,” which Claimant submits is illustrative of the fact that renunciation of other jurisdictions was driven by a desire “to protect the integrity of any such commercial arbitration.”¹⁹⁴

104. While Respondent asserts that “the mere fact that the waiver is contained in a contract does not mean that it is limited in scope to only contractual claims,”¹⁹⁵ Claimant submits that this conclusion is in fact “entirely reasonable” in this case.¹⁹⁶ Further, Claimant is of the view that Respondent’s reliance on *Eureko B.V. v. Poland* is misplaced, given that it dealt with the post-dispute settlement of claims that were already known to the parties to the settlement agreement, whereas Respondent argues that Claimant waived treaty claims *before* any claims arose.¹⁹⁷
105. Claimant further submits that its investments in Ecuador, for the purposes of the BIT, are not limited to the Licence Contracts.¹⁹⁸ On the basis of the BIT’s definition of investment, Claimant contends that its investments in Ecuador include its Barges and the shore facilities and transmission lines it constructed for the Barges.¹⁹⁹ Claimant thus rejects the ‘but for’ test that Respondent purports to base upon *Mihaly v. Sri Lanka*,²⁰⁰ which concerned “pre-investment and development expenditures.”²⁰¹ According to *Mihaly*, “only the final investment is protected”²⁰² and PBI, PBII, the transmission lines and docking facilities are

¹⁹⁴ Rejoinder, para. 40.

¹⁹⁵ Rejoinder, para. 49. Claimant quotes Reply, para. 33.

¹⁹⁶ Rejoinder, para. 49.

¹⁹⁷ Rejoinder, para. 49. Claimant refers to *Eureko B.V. v. Republic of Poland*, *Ad hoc* Arbitration, Partial Award, 19 August 2005, paras. 173-175, Exhibit R-SS. See also Hearing Transcript, Day 2, p. 42, lines 18-25.

¹⁹⁸ Counter-Memorial, para. 30.

¹⁹⁹ Counter-Memorial, para. 30. Claimant refers to Article I(1)(a) of the BIT, Exhibit C-JURI-A and to the broad interpretation given Article I(1)(a) by Tribunals in *Chevron Corp. v. Republic of Ecuador*, Interim Award, 1 December 2008, paras. 181-184, Exhibit C-JURI-E; *M.C.I. Power Group L.C. v. Republic of Ecuador*, Award, 31 July 2008, para. 164, Exhibit R-Y.

²⁰⁰ Counter-Memorial, para. 31. Claimant refers to *Mihaly International Corp. v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002, Exhibit R-K

²⁰¹ Counter-Memorial, para. 32.

²⁰² Counter-Memorial, para. 34.

not “pre-investment and development expenditures” as described in *Mihaly*; rather, they are the investments.²⁰³

106. Claimant further submits that the guarantees contained in the Licence Contracts find no parallels in the BIT, and are “subject to Ecuadorian law” as set out in Article 30.²⁰⁴ Therefore the waiver can apply only to matters of Ecuadorian law. Claimant has not, however, made Ecuadorian contract law claims for breach of the Licence Contracts; its claims are based on the BIT.²⁰⁵

B. RESPONDENT’S ALLEGED DENIAL TO CLAIMANT OF THE ADVANTAGES OF THE BIT IN ACCORDANCE WITH ITS ARTICLE I(2)

1. Interpretation of the terms of Article I(2) of the BIT

(a) Respondent’s contentions

107. Respondent contends that it was clearly entitled to, and did apply, the plain terms of the BIT to deny its advantages to Claimant.²⁰⁶ Indeed, under Article I(2) of the BIT, each Party to the Treaty reserves the right to deny the advantages (a) to “any company,” in which case the only applicable condition is that “nationals of a third country control such company,” and (b) to “a company of the other Party,” in which case one of two additional conditions must be met:

- (i) either that company of the other Party “has no substantial business activities in the territory of the other Party”; or
- (ii) that company “is controlled by nationals of a third country with which the denying Party does not maintain normal economic relations.”²⁰⁷

²⁰³ Counter-Memorial, para. 32. Claimant argues that permission to operate the Barges in Ecuador was granted by CONELEC through Certificates issued on 12 April 2005 and 11 September 2006 separately from the Licence Contracts and neither contained an arbitration clause; in any case, the Barges arrived in Ecuador before these Certificates were issued on 31 March 2003 and 16 April 2005 respectively.

²⁰⁴ Counter-Memorial, para. 66. See also Hearing Transcript, Day 1, p. 103, lines 6-12.

²⁰⁵ Counter-Memorial, paras. 66, 71, 72.

²⁰⁶ Memorial, paras. 93, 95.

²⁰⁷ Memorial, para. 97.

108. Respondent contends that the meaning of “control” in a legal context “includes the legal capacity or entitlement to control another entity.”²⁰⁸ Respondent further argues that “control” for the purposes of Article I(2) of the BIT should be distinguished from ownership or an ownership interest²⁰⁹ and may be based on a “contractual relationship,”²¹⁰ including the fact of being a general partner.²¹¹ Respondent asserts that United States investment treaty practice confirms this position.²¹² Further, in Respondent’s view, “control may be held or exercised directly or indirectly” such as through intermediary entities;²¹³ “control may be either *de jure* or *de facto*,” *i.e.* amounting to “the legal potential or ability to exercise substantial influence over the management and operations of the Claimant”;²¹⁴ “control may be held or exercised exclusively or jointly with others,”²¹⁵ including through a joint venture agreement,²¹⁶ and control must be established “immediately before the occurrence of the event or events giving rise to the dispute”²¹⁷ as is the case for Article VI(8) of the BIT, for Claimant to qualify as a company of the United States. By restricting the meaning of control to “direct ownership,” Claimant fails to interpret the terms of the BIT in accordance with the VCLT.²¹⁸

²⁰⁸ Memorial, para. 99. Respondent refers to *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Jurisdiction, 21 October 2005, para. 233, Exhibit R-AA.

²⁰⁹ Memorial, paras. 100, 101. Respondent refers to Articles I(1)(a), (b), (f), VI(8) of the BIT, Exhibit R-A and points out that all other relevant provisions of the BIT, except Article I(1)(e), use the phrase “owned and controlled,” and not merely “control” as is the case in Article I(2). Respondent also refers to *Aguas del Tunari* for the proposition that control is not limited to ownership (See Hearing Transcript, Day 1, p. 49, lines 21-25, p. 50, lines 1-6; *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Jurisdiction, 21 October 2005, Exhibit R-AA)

²¹⁰ Memorial, para. 102; Hearing Transcript, Day 1, p. 51, lines 7-19.

²¹¹ Hearing Transcript, Day 1, p. 51, lines 20-22, p. 69, lines 1-5.

²¹² Memorial, para. 102. Respondent refers to the United States-Poland BIT, in which the United States narrowed the meaning of “control” by excluding specific types of contractual relationships (Treaty Between the United States of America and the Republic of Poland Concerning Business and Economic Relations, 1990, Article I(1)(j), Legal Exhibit R-GG).

²¹³ Memorial, para. 103. Respondent refers to *Ronald S. Lauder v. The Czech Republic*, Award, 3 September 2001, Exhibit R-HH.

²¹⁴ Memorial, para. 104. Respondent refers to the definition of *de jure* or *de facto* control by the Tribunal in Procedural Order No. 2. See also Hearing Transcript, Day 1, p. 54, lines 19-25, p. 55, lines 1-10.

²¹⁵ Memorial, para. 106; Hearing Transcript, Day 1, p. 70, lines 15-24; Hearing Transcript, Day 2, p. 27, lines 24-25, p. 28, lines 1-2.

²¹⁶ Hearing Transcript, Day 1, p. 52, lines 4-11.

²¹⁷ Memorial, para. 107.

²¹⁸ Reply, para. 56. Respondent refers to the VCLT, Exhibit R-P.

109. Respondent further argues that the reference to “nationals of a third country” in Article I(2) of the BIT is concerned only with natural persons and not companies.²¹⁹ Respondent notes, in support of its position, that Article I(1)(c) of the BIT defines a “national” as “a natural person,” that Article I(2) must be contrasted with provisions that refer to both “nationals *and* companies,”²²⁰ and that this interpretation is the only way of reconciling Article I(2) with Article VI(8), which refers to “nationals *or* companies.”²²¹ In addition, Respondent refers to the Letter of Submittal of the BIT, asserting that denial of the benefits of the BIT was reserved for parent companies “*ultimately* owned by non-Party nationals.”²²²

(b) Claimant’s contentions

110. In Claimant’s view, Article I(2) of the BIT must be construed such that Respondent is able to deny Claimant the advantages of the BIT only if Claimant is controlled by nationals of a third country *and* (not *or*) either Claimant has no substantial business activities in the United States, or Claimant is controlled by a national of a third country with which Respondent has no normal economic relations.²²³ Claimant submits that this view is supported by commentary to Article I(2) in the Letter of Submittal from the United States Department of State to the President,²²⁴ and the cases of *Generation Ukraine v. Ukraine*,²²⁵ *Pan American v. Argentina*²²⁶ and *Plama v. Bulgaria*.²²⁷

²¹⁹ Memorial, para. 109; Hearing Transcript, Day 1, pp. 56-58.

²²⁰ Memorial, para. 110. Respondent refers to the Preamble, Articles I(1)(a), II(1) and (9), III(2) and (3), VI(1), (2), (3), (4), (7), X(1) of the BIT, Exhibit R-A.

²²¹ Memorial, paras. 111, 112 (emphasis added).

²²² Reply, para. 56. Respondent refers to Letter of Submittal S/S 9320385 of the United States Department of State, dated 7 September 1993, p. 5, Exhibit C-JURI-A (emphasis added).

²²³ Counter-Memorial, paras. 90-92, 96; Hearing Transcript, Day 1, p. 106, lines 1-11.

²²⁴ Counter-Memorial, para. 93. Claimant refers to Letter of Submittal S/S 9320385 of the United States Department of State, dated 7 September 1993, Exhibit C-JURI-A.

²²⁵ Counter-Memorial, para. 94. Claimant refers to *Generation Ukraine v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, para. 15.6, Exhibit C-JURI-P.

²²⁶ Counter-Memorial, para. 95. Claimant refers to *Pan American v. Argentina*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July 2006, para. 122, Exhibit C-JURI-O.

²²⁷ Counter-Memorial, para. 95. Claimant refers to *Plama v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, para. 143, Exhibit C-JURI-L.

111. With respect to “control,” Claimant agrees that “control” means the “legal capacity to control.”²²⁸ However, Claimant does not agree with Respondent’s view that “control” should be defined according to the definition set forth in Article I(1)(j) of the United States-Poland BIT.²²⁹ This would lead to the “absurd” result that the tribunal “should scale an endless ladder of corporate entities in order to reach an undefined third-country national that directly or indirectly ‘controls’ Ulysseas.”²³⁰
112. Furthermore, because Article I(2) is only one of two instances where “control” is referred to without reference to “ownership,”²³¹ and is the only instance where the BIT limits the investor’s protections, “control” should be interpreted to mean only direct control,²³² “consistent with the BIT’s object and purpose.”²³³ Claimant alleges that Respondent’s quotation of the definition of “Company” in the Letter of Submittal of the BIT is incomplete.²³⁴ Rather, the full definition shows it is meant to broaden the class of protected investors.²³⁵
113. Finally, having initially asserted that that the term “national” includes companies,²³⁶ Claimant now argues that “national” means a natural person and is “a narrowing function” requiring that the host State prove control of the company by a third-country national.²³⁷

²²⁸ Counter-Memorial, para. 98. Claimant refers to *Aguas del Tunari v. Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent’s Objection to Jurisdiction, 21 October 2005, para. 264, Exhibit R-AA. See also Hearing Transcript, Day 1, p. 107, lines 1-5.

²²⁹ Counter-Memorial, para. 98.

²³⁰ Counter-Memorial, para. 100.

²³¹ Counter-Memorial, para. 102.

²³² Counter-Memorial, para. 102.

²³³ Counter-Memorial, para. 105.

²³⁴ Rejoinder, para. 70.

²³⁵ Rejoinder, para. 70. Claimant refers to Letter of Submittal S/S 9320385 of the United States Department of State, dated 7 September 1993, Exhibit C-JURI-A.

²³⁶ Rejoinder, paras. 66-68.

²³⁷ Hearing Transcript, Day 1, p. 108, lines 15-25, p. 109, lines 1-8.

2. The alleged “control” of Claimant by a national of a third country, Mr. Efromovich

(a) Respondent’s contentions

114. Respondent submits that Claimant was at all relevant times controlled by Mr. Germán Efromovich, a Brazilian national,²³⁸ through Proteus, Veredas, and the Synergy Group.²³⁹
115. Respondent relies on a number of press reports to argue that Claimant was perceived as a Brazilian company, belonging to Mr. Efromovich.²⁴⁰ Respondent further contends that Mr. Efromovich did have an interest in Ulysseas which derived from Proteus, the Joint Venture between the Elliott Group and Veredas, the latter being a Bahamas company of the non-United States Synergy Group controlled by Mr. Efromovich.²⁴¹ Respondent also contends that Proteus, also a Bahamas company, presented Claimant’s power generation project in Ecuador in 2002²⁴² and had a central role in the operation of the Barges;²⁴³ Claimant “has represented itself to be an ‘affiliate’ of Proteus.”²⁴⁴
116. Respondent further emphasizes that in the relevant provisions of the JVA, “the only matters that are exclusively within the Elliott Group’s discretion are the approval of capital commitments and of expenditure on goods and services”;²⁴⁵ the express and positive

²³⁸ Memorial, para. 115.

²³⁹ Memorial, para. 132.

²⁴⁰ Memorial, para. 122. Respondent refers to Press Article entitled ‘*Barcaza eléctrica preocupa a Atunec*’, *El Comercio*, dated 2 December 2004, Exhibit R-62; Press Article entitled ‘*Una generadora llega al Puerto Principal*’, *El Comercio*, dated 15 April 2005, Exhibit R-63; Press Article entitled ‘*Barcaza no entregará sus 50 megavatios desde Puerto Hondo*’, *El Telégrafo* (Guayaquil), dated 11 October 2005, Exhibit R-64. See also Memorial, para. 124. Respondent refers to Press Article entitled ‘*La barcaza de Ulysseas espera un visto bueno*’, *Diario Hoy*, dated 16 September 2005, Exhibit R-65; *Cámara de Comercio Ecuatoriano Brasileña*, ‘*Optimismo Empresarial la Región*’, Quito, 16 March 2010 (Promotional Statement), Exhibit R-66. See also Hearing Transcript, Day 1, p. 59, lines 1-24.

²⁴¹ Reply, para. 72; Hearing Transcript, Day 1, p. 60, lines 3-6. The Tribunal notes that Respondent used the term “Elliott Group” in its Memorial without specifically defining this term (see Memorial, paras. 117, 133, 135, 136, 138). By contrast, Respondent defined the term “Elliott Group” at para. 41 of its Reply, as comprising Elliott International, L.P. and Elliott Associates L.P. The Tribunal uses an identical definition *infra* at para. 182.

²⁴² Memorial, para. 117.

²⁴³ Hearing Transcript, Day 1, p. 60, lines 14-15.

²⁴⁴ Memorial, para. 120; Reply, para. 71. Respondent refers to Letter from Ulysseas, dated 25 February 2008, Exhibit C-JURI-15, marked as confidential by Claimant.

²⁴⁵ Reply, para. 73. Respondent refers to Joint Venture Agreement, dated effective 1 September 2001, Sect. 5.5, Exhibit R-58, originally produced and marked as confidential by Claimant.

consent of Veredas is required, however, for essentially all key decisions of Proteus.²⁴⁶ The Amendment to JVA did not change this.²⁴⁷

117. According to Respondent, the JVA “limited and limits what Ulysseas may do.”²⁴⁸ Indeed, other provisions of the JVA indicate that Ulysseas is considered an “affiliate” of Elliott Group as defined in the JVA, capable of incurring the default of the Elliott Group under the agreement.²⁴⁹ Similarly, the grants of powers of attorney to Messrs Korn and Abad Guerra (representatives of Veredas), were made subject to the limits set forth in the JVA,²⁵⁰ suggesting that control of Ulysseas “lies with the entities behind the JVA, and in particular with Veredas and the Synergy Group.”²⁵¹ Respondent thus considers that “the Joint Venture Agreement [...] in fact was a shareholding agreement for the control and for the conduct of Proteus which tied in the affiliates of each of the parties,” including Ulysseas,²⁵² and broke the line of control between Ulysseas and the Elliott Group.²⁵³

118. Finally, Respondent contends that it was entitled to presume that nationals of a third country control Claimant on two grounds: (i) Claimant waived recourse to arbitration under Article 30 of the Licence Contracts;²⁵⁴ and (ii) Claimant did not comply with Procedural Order No. 2 which required Claimant to produce documents relevant to the question of its control.²⁵⁵

²⁴⁶ Reply, para. 73; Hearing Transcript, Day 1, p. 62, lines 23-25, p. 63, lines 1-5; Hearing Transcript, Day 2, p. 28, lines 3-25, p. 29, lines 1-25.

²⁴⁷ Reply, para. 74.

²⁴⁸ Hearing Transcript, Day 1, p. 61, lines 21-22.

²⁴⁹ Hearing Transcript, Day 2, p. 22, lines 9-25, p. 23, lines 1-18. Respondent refers to Article I and XIII of the unredacted JVA circulated at the hearing.

²⁵⁰ Reply, para. 69. Respondent refers to the Supplemental Agreement, dated 30 September 2003, recitals and article 1, Exhibit C-JURI-23, marked as confidential by Claimant.

²⁵¹ Reply, para. 70. See also Hearing Transcript, Day 1, p. 61, lines 24-25, p. 62, lines 1-12.

²⁵² Hearing Transcript, Day 2, p. 25, lines 5-9; see also Hearing Transcript, Day 2, p. 36, lines 13-19.

²⁵³ Hearing Transcript, Day 1, p. 68, lines 3-7.

²⁵⁴ Memorial, paras. 125-127.

²⁵⁵ Memorial, paras. 128-156.

(b) Claimant's contentions

119. Claimant argues that it is wholly controlled by a national of the United States, Mr. Paul Singer, through Elliott Associates, L.P.²⁵⁶ Claimant further argues that it was not an “affiliate” of Proteus but rather a “partner,” which is a more accurate translation of “asociada”,²⁵⁷ Claimant was not controlled by Proteus and Proteus itself was not controlled by the Brazilian Mr. Germán Efromovich.²⁵⁸ Claimant submits instead that Proteus was controlled almost completely by Elliott Associates, L.P. and Elliott International, L.P., by virtue of the JVA and the Amendment to JVA.²⁵⁹ In particular, under the Amendment to JVA, Veredas transferred “a significant amount of its [...] shares [in Proteus]” to Elliott Associates and Elliott International, leaving the latter two entities with a combined 60% shareholding interest in Proteus.²⁶⁰ Furthermore, Elliott Associates and Elliott International acquired the right to appoint an additional director to the board of Proteus, which Claimant contends gave Elliott Associates and Elliott International “virtually total” control over Proteus.²⁶¹ Control by Mr. Efromovich would have been impossible because the Synergy Group subsidiaries have never owned more than 50% of Proteus and “neither Mr. Efromovich, the Synergy Group, nor any of the subsidiaries or affiliates of the Synergy Group have ever had any shareholder interest, direct or indirect in Ulysseas or its parent companies.”²⁶²
120. Claimant also submits that its granting of powers-of-attorney to individuals including Zacharia Korn, Boris Patricio Abad and Cristina Cajiao Luna gave them authority to act on behalf of Ulysseas but not to *control* the company.²⁶³ Similarly, the Administrative and

²⁵⁶ Hearing Transcript, Day 1, p. 112, lines 12-15, p. 129, lines 18-21. See also Counter-Memorial, paras. 106-108.

²⁵⁷ Counter-Memorial, para. 128.

²⁵⁸ Counter-Memorial, para. 109.

²⁵⁹ Counter-Memorial, paras. 110, 111.

²⁶⁰ Counter-Memorial, para. 111. Claimant refers to Veldwijk Witness Statement, para. 50, Exhibit CWS-JURI-1; Korn Witness Statement, para. 6; CWS-JURI-3; Pollock Witness Statement, paras. 10-11, Exhibit CWS-JURI-2; Amendment to Joint Venture Agreement, Sect. 4.1, Exhibit C-JURI-44, marked as confidential by Claimant. See also Hearing Transcript, Day 1, p. 114, lines 15-20.

²⁶¹ Counter-Memorial, para. 111. Claimant refers to Amendment to Joint Venture Agreement, Sect. 4.3, Exhibit C-JURI-44, marked as confidential by Claimant. See also Hearing Transcript, Day 1, p. 114, lines 15-21, pp. 123-124.

²⁶² Counter-Memorial, para. 118.

²⁶³ Counter-Memorial, paras. 114-116.

Professional Services Agreements with Rubiales and Prime do not give either Rubiales or Prime control over Claimant.²⁶⁴

121. In any event, Claimant insists that all the JVA does is establishing control of Proteus.²⁶⁵ While Proteus' role was to find business opportunities for Ulysseas, the JVA does not force Ulysseas to take up those opportunities.²⁶⁶ The JVA is not an exclusive arrangement and is not binding on Ulysseas.²⁶⁷

3. The alleged lack of substantiality of Claimant's business activities in the United States

(a) Respondent's contentions

122. Respondent argues that Claimant has no substantial business activities in the United States for the purposes of Article I(2) of the BIT on the following grounds:²⁶⁸ first, "substantial business activities" is undefined in the BIT and should be understood to mean "important" business activities;²⁶⁹ second, Claimant's "only productive assets" are the Barges, which are located outside of the United States in Ecuador and are managed by Proteus, in turn managed through individuals of Brazil and Ecuador;²⁷⁰ third, "Claimant does not conduct regular trading activities in the United States";²⁷¹ and fourth, "Claimant has no known premises or employees of its own, but instead contracts other entities such as Prime to oversee its affairs in Ecuador."²⁷² The only evidence Claimant has adduced is that it filed tax returns in the United States, that its sole corporate officer, Mr. Pollock, works from New York City, and that it purchased PBII in Texas, United States.²⁷³ According to

²⁶⁴ Counter-Memorial, paras. 121-124. Claimant refers to the Administrative and Professional Services Agreement between Ulysseas and Rubiales, paras. 5, 8, Exhibit C-JURI-11, marked as confidential by Claimant; First Amended and Restated Administrative and Professional Services Agreement between Rubiales and Prime, para. 8, Exhibit C-JURI-5, marked as confidential by Claimant.

²⁶⁵ Hearing Transcript, Day 2, p. 53, lines 5-7.

²⁶⁶ Hearing Transcript, Day 2, p. 54, lines 1-9.

²⁶⁷ Hearing Transcript, Day 2, p. 54, lines 9-17.

²⁶⁸ Memorial, para. 159; Hearing Transcript, Day 1, p. 63, lines 9-25, p. 64, lines 1-9.

²⁶⁹ Memorial, para. 158.

²⁷⁰ Memorial, para. 159.

²⁷¹ Memorial, para. 159.

²⁷² Memorial, para. 159.

²⁷³ Reply, para. 83. Respondent refers to Counter-Memorial, para. 132.

Respondent, this “confirms that Ulysseas is in fact merely a ‘*shell*’ company with minimum presence in the United States.”²⁷⁴

(b) Claimant’s contentions

123. In Claimant’s view, since the BIT does not define “substantial business activities,” a good faith interpretation of the BIT reveals that it is the “*materiality* not the *magnitude* of the business activity [that] is the decisive question.”²⁷⁵ The question is therefore one of “economic benefit.”²⁷⁶ On that basis, Claimant submits that it conducts “substantial business activities” in the United States: first, Claimant’s corporate officers have worked primarily from the United States; second, PBII was purchased from a Houston-based, Delaware-organized company; third, Claimant’s Assignment and Assumption Agreements²⁷⁷ are governed by Texan law; fourth, Claimant is managed by a United States company with corporate offices in the United States; and fifth, Claimant has consistently filed tax returns in the United States.²⁷⁸

4. The question of the timeliness of Respondent’s denial of the advantages of the BIT

(a) Respondent’s contentions

124. Respondent submits that it denied to Claimant the advantages of the BIT in a timely fashion on two grounds:²⁷⁹ first, Article I(2) of the BIT reserves a right for each party to deny the advantages of the BIT, which is not qualified by any time limit, and the existence of which should be determined on a case-by-case basis;²⁸⁰ second, Claimant knew of Respondent’s expectation to deny the advantages of the BIT from the outset, Claimant having waived recourse to arbitration under Article 30 of the Licence Contracts.²⁸¹

²⁷⁴ Reply, para. 83.

²⁷⁵ Counter-Memorial, para. 131 (emphasis in the original).

²⁷⁶ Counter-Memorial, paras. 146-148; Rejoinder, para. 89.

²⁷⁷ See *supra* footnote 58.

²⁷⁸ Counter-Memorial, para. 132; Hearing Transcript, Day 1, p. 114, lines 24-25, p. 115, lines 1-12. While Respondent argues that Claimant has not provided sufficient evidence of substantial business activities, Claimant points out that Respondent has chosen not to cross-examine Messrs Veldwijk and Pollock on this issue (Hearing Transcript, Day 2, p. 61, lines 2-14).

²⁷⁹ Memorial, para. 163.

²⁸⁰ Memorial, para. 161.

²⁸¹ Memorial, para. 162.

125. Further, contrary to Claimant’s argument that this right must have been exercised before commencement of these proceedings,²⁸² Respondent argues that that position “is not supported by either the text of the BIT or notions of ‘legal certainty’.”²⁸³ Claimant’s reliance on authorities interpreting Article 17(1) of the ECT is inappropriate: (1) neither Respondent nor the United States are parties to the ECT; (2) unlike Article I(2) of the BIT, Article 17(1) of the ECT concerns the denial of the substantive benefits of the ECT only, as opposed to the advantages of the entire treaty.²⁸⁴
126. Respondent instead relies on *Empresa Electrica v. Ecuador* where the State exercised its right to deny advantages at the first session of the tribunal which then held that Ecuador had exercised its right in a timely fashion.²⁸⁵ While general principles of international law may well impose a time limit on the exercise of the right to deny the advantages of the BIT, Respondent has acted reasonably by invoking the denial of advantages as a preliminary objection to jurisdiction.²⁸⁶ Finally, according to Respondent, it would not be feasible in practice to ask host States to monitor all investors to check whether they are controlled by third party nationals at the time they invest, as suggested by Claimant.²⁸⁷

(b) Claimant’s contentions

127. Claimant is of the view that Respondent must have positively exercised the right to deny benefits before violating its international law obligations in order to effect denial.²⁸⁸ According to Claimant, positive State action requires prospective “reasonable notice,” in light of the fact that the BIT aims to promote foreign investment in Ecuador,²⁸⁹

²⁸² Counter-Memorial, para. 87.

²⁸³ Reply, paras. 40, 44-46; Hearing Transcript, Day 1, p. 45, lines 16-17.

²⁸⁴ Reply, para. 44; Hearing Transcript, Day 1, pp. 41-43. According to Respondent, Claimant’s other authorities are not on point (see Hearing Transcript, Day 1, p. 44, lines 9-18).

²⁸⁵ Memorial, para. 121; Hearing Transcript, Day 1, p. 45, lines 2-9. Respondent refers to *Empresa Electrica Del Ecuador, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/05/9, Award, 2 June 2009, para. 71, Exhibit R-JJ.

²⁸⁶ Hearing Transcript, Day 1, pp. 39-41.

²⁸⁷ Hearing Transcript, Day 2, p. 32, lines 2-25.

²⁸⁸ Rejoinder, para. 59. Claimant refers to *Plama v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, paras. 159-165; *Yukos Universal Ltd. v. The Russian Federation*, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, 30 November 2009, paras. 456-459, Exhibit C-JURI-T. See also Counter-Memorial, paras. 75, 76. Claimant refers to the VCLT, Exhibit C-JURI-R.

²⁸⁹ Counter-Memorial, para. 77.

“retrospective application would undercut an investor’s legitimate expectations of legal certainty.”²⁹⁰

128. Claimant relies upon several decisions, including *Plama v. Bulgaria* and *Yukos v. Russia*, where the tribunal concluded that a denial of the ECT protections required not merely the invocation of a right but positive action on the part of the State, such as notice, and rejected retrospective application of the denial of benefits clause which would offend an investor’s legitimate expectations²⁹¹ or the objective of the ECT.²⁹² *Empresa Electrica v. Ecuador*, by contrast, cannot be relied upon in this proceeding²⁹³ as “the tribunal did not reach the question of whether Respondent’s ‘invocation’ of the denial was a proper exercise of the denial-of-benefits provision.”²⁹⁴
129. Claimant finally suggests that the host State could simply, as a condition of investment, require investors to disclose whether they are controlled by third-country nationals.²⁹⁵

5. Compliance with Procedural Order No. 2

(a) Respondent’s contentions

130. According to Respondent, Claimant bears the burden of disproving the *prima facie* case that Respondent has made in this proceeding, namely that Mr. Efromovich, a third-country national, controls Claimant.²⁹⁶ Claimant has failed to discharge this burden.²⁹⁷ Indeed,

²⁹⁰ Counter-Memorial, paras. 77, 87; Rejoinder, paras. 54, 61-62; Hearing Transcript, Day 1, p. 116, lines 6-14.

²⁹¹ Counter-Memorial, paras. 79-81. Claimant refers to *Plama v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, paras. 155, 157, 162, 164, Exhibit C-JURI-L. See also Hearing Transcript, Day 1, p. 118, lines 3-8.

²⁹² Counter-Memorial, para. 83. Claimant refers to *Yukos Universal Ltd. v. The Russian Federation*, PCA Case No. AA227, Interim Award on Jurisdiction and Admissibility, 30 November 2009, Exhibit C-JURI-T. See also Hearing Transcript, Day 1, p. 120, lines 10-24.

²⁹³ Counter-Memorial, para. 84. Claimant refers to *Empresa Eléctrica del Ecuador, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/05/9, Award, 2 June 2009, Exhibit R-JJ.

²⁹⁴ Counter-Memorial, para. 84. Claimant refers to *Empresa Eléctrica del Ecuador, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/05/9, Award, 2 June 2009, Exhibit R-JJ. See also Hearing Transcript, Day 1, p. 121, lines 3-10.

²⁹⁵ Hearing Transcript, Day 1, p. 117, lines 2-4; Hearing Transcript, Day 2, p. 62, lines 14-25, p. 63, lines 1-20.

²⁹⁶ Memorial, paras. 128-129.

²⁹⁷ Memorial, para. 130.

Claimant did not comply with the requirements of Procedural Order No. 2 in at least four respects.²⁹⁸

131. First, Respondent alleges that Claimant unilaterally redacted the JVA and the Amendment to JVA contrary to Procedural Order No. 2,²⁹⁹ and belatedly raised grounds of confidentiality for such redaction.³⁰⁰ This and the fact that Claimant obtained the JVA from Proteus³⁰¹ suggest that “Claimant is an instrument of the joint venture between the Elliott Group and Synergy Group.”³⁰² Respondent finally objected to Claimant’s proposed *in camera* and *ex parte* inspection of the JVA by the Tribunal.³⁰³
132. Second, Claimant unjustifiably withheld its management contract with Prime existing at the time Claimant commenced these proceedings,³⁰⁴ where that management contract would reflect the relationships between Mr. Efromovich, the Synergy Group, the Elliott Group, Prime and Claimant.³⁰⁵
133. Third, Respondent argues that Claimant deliberately avoided its obligation pursuant to Procedural Order No. 2 to produce documents evidencing authorization of specific proposals for electricity sales agreements that Claimant purports to have made in Ecuador.³⁰⁶ Respondent thus invited the Tribunal to infer that the authorization must have originated from Proteus.³⁰⁷
134. Fourth, Respondent initially submitted that Claimant failed to produce documents showing the identity and nationality of the individual(s) who control(s) relevant entities, in particular

²⁹⁸ Memorial, para. 130; Reply, para. 85.

²⁹⁹ Memorial, para. 134.

³⁰⁰ Memorial, para. 134; Reply, para. 86.

³⁰¹ Memorial, para. 136.

³⁰² Memorial, para. 133.

³⁰³ Reply, para. 86. The full text of the JVA and Amendment to JVA was circulated at the hearing (see above, para. 45).

³⁰⁴ Memorial, para. 139; Reply, para. 76. Respondent refers to First Amended and Restated Administrative and Professional Services Agreement between Rubiales and Prime, dated effective 1 January 2008, Exhibit R-73, originally produced and marked as confidential by Claimant; Exhibit R-73 (see also Exhibit C-JURI-5).

³⁰⁵ Memorial, para. 138.

³⁰⁶ Memorial, para. 142.

³⁰⁷ Memorial, paras. 143, 144.

Elliott Associates, L.P.³⁰⁸ Having reviewed the evidence submitted by Claimant on 15 June 2010, Respondent stated that Mr. Singer did seem to control Elliott Associates L.P. but maintains that Ulysseas is controlled by Mr. Efromovich through the JVA.³⁰⁹

135. Respondent also replies to other issues raised by Claimant in its letter of 9 March 2010,³¹⁰ stating that (a) Claimant's insistence that the documents requested contain confidential information is unwarranted,³¹¹ and (b) Claimant implausibly accused Respondent of failing to comply with its own obligations to produce documents.³¹² Respondent argues, *inter alia*, that it never claimed that it only discovered Ulysseas was American on April 23, 2009.³¹³ Respondent also asks the Tribunal to find that Claimant's request – that Respondent not be permitted in the future to rely on undisclosed documents responsive to Claimant's Requests for Document Production of 22 January 2010³¹⁴ – is unfounded and procedurally unfair.³¹⁵

(b) Claimant's contentions

136. Claimant rebuts Respondent's argument that Claimant bears the burden to disprove that Proteus is controlled by the Synergy Group and Mr. Germán Efromovich.³¹⁶ Claimant instead states that Respondent bears the burden to prove that Mr. Efromovich controls Ulysseas³¹⁷ and has not provided any persuasive evidence.³¹⁸

137. Claimant also insists that it fully complied with Procedural Order No. 2.³¹⁹

138. First, while Respondent was never entitled to the full text of the JVA and Amendment to JVA,³²⁰ Claimant nonetheless provided the relevant portions of the JVA and Amendment to

³⁰⁸ Memorial, para. 148.

³⁰⁹ See *supra*, para. 61.

³¹⁰ Letter from Claimant to Respondent, dated 9 March 2010, Exhibit R-68.

³¹¹ Memorial, paras. 154, 155.

³¹² Memorial, paras. 151, 152.

³¹³ Reply, para. 88(c). Counter-Memorial, para. 125.

³¹⁴ Counter-Memorial, paras. 155 and 158(c).

³¹⁵ Reply, para. 88(d).

³¹⁶ Reply, paras. 72-75.

³¹⁷ Rejoinder, para. 75; Hearing Transcript, Day 1, p. 106, lines 15-21; Hearing Transcript, Day 2, p. 51, lines 12-22.

³¹⁸ Hearing Transcript, Day 1, p. 113, lines 10-17; Hearing Transcript, Day 2, p. 51, lines 23-25, p. 52, lines 1-9.

³¹⁹ Counter-Memorial, Section IV, p. 69.

JVA in support of its representations regarding Proteus,³²¹ an Abbreviated Ownership Structure of Ulysseas, and volunteered to make available documents to support the components of this Abbreviated Ownership Structure.³²² Claimant further contends that “Respondent’s refusal to consent to an *in camera* inspection [of the JVA and Amendment to JVA] reveals the weakness in its case.”³²³

139. Second, Claimant argues that it has not “withheld” an engagement contract with Prime *per se* as there is “no direct agreement between Ulysseas and Prime.”³²⁴ Notwithstanding, Claimant furnished Respondent with agreements linking Prime to Ulysseas through Rubiales.³²⁵

140. Third, Claimant asserts that it satisfied Respondent’s request for “documents made by any person to authorize the proposals made by Ulysseas for entering into power purchase agreements” by adducing documents showing that the authorizations were effected through a chain of powers-of-attorney.³²⁶

141. Fourth, Claimant states that Procedural Order No. 2 required it to produce documents “relevant to establish which *entity* controls it for purposes of Article I(2) of the BIT,”³²⁷ which it did.³²⁸ In any event, Claimant contends that Paul Singer’s control over Elliott Associates, L.P. and Ulysseas is unquestionably established by the documents it produced on 15 June 2010.³²⁹

142. Finally, Claimant requests the Tribunal to order that Respondent may not rely upon any undisclosed documents that ought to have been adduced in response to Claimant’s Requests for Document Production, given Respondent’s own refusal to meet those document

³²⁰ Counter-Memorial, para. 139. The full text of the JVA and Amendment to JVA was circulated at the hearing (see *supra*, para. 45).

³²¹ Counter-Memorial, para. 141.

³²² Counter-Memorial, paras. 140, 141.

³²³ Rejoinder, para. 78.

³²⁴ Counter-Memorial, para. 144; Rejoinder, para. 87.

³²⁵ Counter-Memorial, para. 144.

³²⁶ Counter-Memorial, paras. 146, 147; Rejoinder, para. 88.

³²⁷ Rejoinder, para. 84. Claimant refers to Procedural Order No. 2, para 10.

³²⁸ Counter-Memorial, paras. 140, 141.

³²⁹ Hearing Transcript, Day 1, p. 112, lines 1-25, p. 113, lines 1-9.

production obligations.³³⁰ In particular, Claimant asserts that Respondent deliberately misrepresented to Ulysseas and the Tribunal that it became aware of Claimant's nationality on 23 April 2009.³³¹

C. THE PARTIES' REQUESTS FOR RELIEF

1. Respondent's requests for relief

143. In its Reply, Respondent requested that the Tribunal enter a decision:

(a) That all of the Claimant's claims in these proceedings are outside the jurisdiction of this Tribunal or, in the alternative, inadmissible;

(b) Ordering the Claimant to pay all of the Respondent's costs associated with these proceedings, including the arbitrators' fees and administrative costs, and the legal costs (including attorneys' fees) incurred by the Respondent, in an amount to be quantified; and

(c) Ordering any other relief that the Tribunal sees fit.³³²

2. Claimant's requests for relief

144. In its Rejoinder, Claimant requested that the Tribunal enter a decision :

1. Denying all of the relief sought by Respondent;

2. Ordering that Claimant's claims shall proceed to a hearing on the merits;

3. Declaring that Ulysseas has complied with its obligations under Procedural Order No. 2 and rejecting Respondent's requests for adverse inferences against Ulysseas' jurisdictional arguments or in favor of Respondent's own jurisdictional arguments;

4. Declaring that Respondent may not in the future rely upon any undisclosed documents responsive to Ulysseas' Requests for Document Production of January 22, 2010 for any purpose whatsoever;

5. Ordering Respondent to pay all of Ulysseas' costs and the costs of arbitration associated with the jurisdictional phase of these proceedings set out in Procedural order No. 1, as well as the legal fees and costs incurred by Ulysseas (including attorneys' fees) in an amount to be quantified; and

6. Ordering any other relief that this Tribunal sees fit.³³³

³³⁰ Counter-Memorial, para. 155; Hearing Transcript, Day 1, p. 124, lines 8-10.

³³¹ Counter-Memorial, paras. 151, 152; Hearing Transcript, Day 1, p. 124, lines 23-25, p. 125, lines 1-6.

³³² Reply, para. 89. See also Memorial, para. 165; Answer, para. 57.

CHAPTER IV – THE TRIBUNAL’S FINDINGS

A. INTRODUCTION

145. As reflected by the Parties’ contentions described in Chapter III, two are Respondent’s jurisdictional objections. On one side, Respondent contends that in Article 30 of the Licence Contracts Claimant has waived its right to bring claims under the BIT (hereinafter, “the alleged waiver of treaty claims”). On the other, by exercising the right reserved to it by Article I(2) of the BIT, Respondent has deprived Claimant of the advantages of the BIT, including its dispute settlement provision (hereinafter, “the alleged denial of BIT’s benefits”).
146. The Parties have argued extensively regarding both jurisdictional objections, as reflected by the summary of their respective contentions under Chapter III. Claimant requests the Tribunal to confirm that its claims are within the Tribunal’s jurisdiction and are admissible. Respondent requests a decision that all of Claimant’s claims are beyond the Tribunal’s jurisdiction or, in the alternative, are not admissible. Each Party requests that the other pay all costs associated with these proceedings.
147. The Tribunal will separately consider the alleged waiver of treaty claims and the alleged denial of BIT’s benefits based on the Parties’ arguments and the evidence filed by each of them in support of their respective contentions. The Tribunal’s finding regarding the two jurisdictional objections concludes that Claimant’s claims are within its jurisdiction for the reasons developed below in this Chapter.

³³³ Rejoinder, p. 47. See also Counter-Memorial, pp. 81-82. In its Notice of Arbitration, Ulysseas claimed:

- (1) *Damages, in such amounts as to be assessed, but in any event expected to exceed US\$35 million, and to include compensation for Ulysseas’ full dollar value of its investment in Ecuador, including but not limited to: the value of the Facilities; the value of all electricity for which Ulysseas remains uncompensated by Ecuador; and the value of all financial assets belonging to Ulysseas frozen by Ecuador;*
- (2) *Pre and post judgment interest on such damages at such a rate as the Tribunal may think fit;*
- (3) *Declarations that:*
- (a) *no outstanding amounts are owed to Petrocomercial by Ulysseas; and*
- (b) *all CONELEC fines levied against Ulysseas are invalid;*
- (4) *Its legal and other costs of bringing these proceedings; and*
- (5) *Such other relief that the Tribunal believes to be just and proper.*

B. THE ALLEGED WAIVER OF TREATY CLAIMS

148. The Parties have discussed, among other questions, whether an investor may waive by contract its right to arbitration under a BIT.³³⁴ As made manifest by their opposing arguments, the heart of the Parties' debate lies in establishing whether an investor may choose to waive, in advance of any dispute which might arise in the future between that investor and the host State under the treaty, the treaty protection agreed between the contracting States. Obviously, an investor may freely waive to bring a treaty claim after a dispute has arisen, when all factual and legal aspects of the case are available permitting a considered choice whether or not to assert a claim in arbitration under the treaty.
149. The Tribunal is aware of the negative conclusion reached by other investment treaty tribunals regarding the investor's choice under a contract with the State of a dispute settlement method other than the one available to it under a given treaty, before any dispute has arisen. In view of its decision in the present case, the Tribunal does not need to express an opinion on the subject. It believes that in any case the investor's waiver of the treaty arbitration is subject to the essential condition that the waiver be freely agreed by the investor. Any pressure or compulsion by the host State to obtain by contract the investor's waiver of the treaty protection may well constitute a breach by the State of the obligation it has assumed vis-à-vis the other contracting State regarding the protection of that State's investor. There is no evidence in the file of these proceedings that Claimant's acceptance of Article 30 of the Licence Contracts, assuming it is a waiver of the BIT arbitration, was due to Respondent's compulsion or other form of pressure.
150. The question whether Claimant has waived its right to resort to arbitration under the BIT in Article 30 of the Licence Contracts deserves an in-depth analysis due to its multifaceted aspects.

Article 30 of the two Licence Contracts reads as follows in the original Spanish text:

SOLUCIÓN DE CONTROVERSIAS - En caso de controversias o diferencias que surjan entre las partes y que no pudieran ser solucionadas entre las mismas, se sujetarán a las leyes ecuatorianas y serán resueltas mediante el procedimiento alternativo de conciliación y arbitraje, en derecho, y administrado con sujeción a la Ley de Mediación y Arbitraje del Ecuador, de su Reglamento de Aplicación y

³³⁴ *Supra*, paras. 77-86.

*del Reglamento de los Tribunales de Arbitraje de la Cámara de Comercio de la ciudad de Quito, con expresa renuncia a cualquier otra jurisdicción nacional o internacional o la vía diplomática, pública o privada. Adicionalmente las partes contratantes convienen en que: La Autoridad nominadora del Tribunal conformado por tres árbitros será la Cámara de Comercio de Quito y, que el idioma a utilizarse en el procedimiento de conciliación y arbitraje será el castellano.*³³⁵

151. In order for the alleged contractual waiver by Claimant to be effective, the parties involved must be identical. The parties to the contracts which, according to Respondent, would have given effect to the waiver by Claimant of the BIT arbitration, *i.e.* the two Licence Contracts, should be Ulysseas, on one side, and the State of Ecuador, on the other. Only these two parties could have in fact waived a dispute settlement method available to them under the BIT by adopting the one regulated by Article 30 of the Licence Contracts. The Parties, fully aware of this indispensable condition, have strenuously argued this aspect, Claimant by denying that the State is a party to the Licence Contracts, and Respondent by contending that the State is a party to the Licence Contracts since CONELEC signed them “*en representación del Estado Ecuatoriano.*”³³⁶
152. It is the Tribunal’s view that the State of Ecuador is not party to the Licence Contracts, for the reasons that are given below.
153. CONELEC, the National Electricity Council, was created by the LRSE “as a legal entity subject to public law, with its own resources and administrative, economic, financial and operational autonomy.”³³⁷ It is part of CONELEC’s functions and powers, among others, “to grant permits and licences for the installation of new power generation units and to give authority for the signature of concession contracts for the generation, transmission and distribution to the Executive Director of CONELEC in conformity with the applicable Regulation.”³³⁸

³³⁵ Respondent’s English translation of Article 30 of the Licence Contracts is reproduced *supra*, para. 72.

³³⁶ This formulation is in Article 1 of both Licence Contracts where the signatory parties are described as appearing (“*Comparecientes*”) before the notary public in Quito on 15 August 2005 for PBI (Exhibits C-JURI-38 and R-9) and 12 September 2006 for PBII (Exhibits C-JURI-40 and R-5).

³³⁷ *Ley de Régimen del Sector Eléctrico*, Art. 12: “*Constitución. - Créase el Consejo Nacional de la Electricidad CONELEC, como persona jurídica de derecho público con patrimonio propio, autonomía administrativa, económica, financiera y operativa*” (Exhibit C-JURI-K).

³³⁸ *Ley de Régimen del Sector Eléctrico*, Art. 13 (n): “*Otorgar permisos y licencias para la instalación de nuevas unidades de generación de energía y autorizar la firma de contratos de concesión para generación, transmisión o*

154. The State of Ecuador has therefore created a special entity with separate legal personality, having its own assets and resources, capable of suing and being sued and entrusted with functions and powers to regulate the electricity sector on behalf of the State. The effect of creating a public entity to regulate a specific sector of State activity, with the power to sign contracts with third parties in that sector, is to avoid the direct responsibility of the State for that sector's activity. It would be contrary to this purpose to make the State party to contracts signed by the public entity with third parties, thereby assuming a direct responsibility towards those parties for the contract performance.
155. Truly, Article 1 of the Licence Contracts, when describing the parties appearing before the notary public in Quito refers to CONELEC as being there “*en representación del Estado Ecuatoriano como así lo determina el artículo dos de la Ley de Régimen del Sector Eléctrico.*”³³⁹ Respondent relies on this qualification of CONELEC to conclude that the State is the party to the Licence Contracts with Claimant. Article 2 of the Law in question, referred to in Article 1 of the Licence Contracts, states as follows:

Concesiones y Permisos. – El Estado es el titular de la propiedad inalienable e imprescriptible de los recursos naturales que permiten la generación de energía eléctrica. Por tanto, sólo él, por intermedio del Consejo Nacional de Electricidad como ente público competente, puede concesionar o delegar a otros sectores de la economía la generación, transmisión, distribución y comercialización de la energía eléctrica.

Referring to this provision of the law in the context of the description of CONELEC as signatory to the Licence Contracts simply highlights that CONELEC is acting in the capacity and within the powers granted to it by the law in question “*como ente público competente.*”

156. For the sake of completeness, the Tribunal adds that although CONELEC is an entity separate from the State, its conduct in performing the powers and duties assigned to it by the law may be attributed under public international law to the State in specific

distribución al Director Ejecutivo del CONELEC de conformidad a lo que señale el Reglamento respectivo” (Exhibit C-JURI-K) (the translation in the text is of the Tribunal). In conformity with Article 13 (n) of the LRSE, both Licence Contracts were signed by CONELEC's Executive Director.

³³⁹ *Contrato de Permiso Para Generación de Energía* regarding PBI, dated 15 August 2005, Art. 1, Exhibits C-JURI-38 and R-9 ; *Contrato de Permiso Para Generación de Energía* regarding PBII, dated 12 September 2006, Art. 1, Exhibits C-JURI-40 and R-5.

circumstances. Reference is made to Article 5 of the ILC Articles on the Responsibility of States for International Wrongful Acts, providing as follows:

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

The fact that the conduct of a person or entity may be attributed to the State in given circumstances confirms that the conduct is that of the person or entity, and not of the State. Were it the conduct of the State it would not need to be attributed to the State. This Article clearly states that only acts performed by a separate entity with the use of elements of governmental authority (“*puissance publique*”) are attributed to the State, not acts performed in a commercial capacity, as are contracts.

157. The Tribunal’s conclusion that CONELEC, not the State of Ecuador, is party to the Licence Contracts is confirmed by various contractual provisions to which the Parties have made reference. When properly analysed, all these provisions make manifest that a clear distinction is made between CONELEC as party to the Licence Contracts and the State as the sovereign power whose actions, external to the contract, may have effects on the Parties’ respective rights and obligations. Three provisions of the Licence Contracts will be considered in that regard.
158. Article 23 provides for CONELEC’s responsibility, as Grantor (“*OTORGANTE*”), to compensate the Licensee (in our case, Claimant) for any changes in legislation, regulation decision or other rule (“*ley, regulación, resolución u otra norma*”) to the Licensee’s prejudice. It is evident that any such changes may only be the result of State’s acts.
159. Article 24 refers to Article 271 of the Constitution according to which the State, “*a través del OTORGANTE*” (i.e. CONELEC), may establish special guarantees and assurances in the investor’s favour so that no modifications shall be made to the contracts (“*los convenios*”) by laws or other provisions “*de cualquier clase.*” Should any law provisions result in prejudice to the investor or in the modification of the contractual provisions, compensation shall be paid to the investor for the resulting damage or prejudice, so as to re-establish the financial and economic stability that would have prevailed in the absence of

such acts or decisions. Since compensation will be paid “*a través del OTORGANTE,*” it is clear that the distinction between the State and CONELEC is again confirmed by this provision of the Licence Contracts.

160. The same distinction is also confirmed by Article 25, dealing with *force majeure* or fortuitous case (“*Fuerza Mayor o Caso Fortuito*”). The list of events exempting either party from responsibility includes “the acts of authority exercised by a public officer” (“*los actos de autoridad ejercidos por un funcionario público*”). There is no reason to restrict “acts of authority” to acts of non-Ecuadorian authorities, as suggested by Respondent.³⁴⁰ Therefore, since also the State of Ecuador’s acts (through a public officer) may exempt CONELEC from responsibility for the duration of the *force majeure*, the State and CONELEC are clearly different entities, CONELEC being the party to the Licence Contracts which may experience a *force majeure* situation due to the State of Ecuador’s acts.
161. Respondent relies on Articles 3(c) and 5(a) of the “*Ley Organica de la Procuración General del Estado*” of 13 April 2004,³⁴¹ allowing the State, through the same authority by which it is represented in this arbitration, to initiate and defend arbitral proceedings involving public entities such as CONELEC.³⁴² It appears from the analysis of these provisions of the *Ley Organica* that the functions of the *Procurador General del Estado* include supervising proceedings involving “*entidades del sector público que tengan personería jurídica*” (Article 3(c): this is the case of CONELEC) and the filing of legal actions involving “*las entidades u organismos del sector público*” (Article 5(a): this, again, is the case of CONELEC). Under the same law, the *Procurador General del Estado* also has the function to “[*e*]jercer el patrocinio del Estado” (Article 3(a)), which confirms the distinction between the State and a public entity (such as CONELEC). The intervention in these proceedings of the *Procurador General del Estado* on Respondent’s side is part of that authority’s functions.
162. For the reasons given above, this Tribunal concludes that there has been no waiver by Claimant of this Tribunal’s jurisdiction over its BIT claims against the State as a result of its acceptance of Article 30 of the Licence Contracts. CONELEC, not the State of Ecuador,

³⁴⁰ Reply, para. 25. See also *supra*, para. 93.

³⁴¹ *Ley Orgánica de la Procuraduría General del Estado, Codificación*, published 13 April 2004, Exhibit R-RR.

³⁴² Reply, para. 26. See also *supra*, para. 94.

is in fact party to such contracts. The agreement in Article 30 of the forum for disputes is an agreement between the Claimant and CONELEC, not between the Claimant and the Respondent State of Ecuador, and can only concern the contract claims of the Claimant against CONELEC. Accordingly, Claimant's BIT claims in these proceedings are within the jurisdiction of the Tribunal.³⁴³

163. In view of this conclusion, there is no need to analyse the content of Article 30 of the Licence Contracts, specifically whether, as discussed between the Parties, it covers the disputes and claims in this BIT arbitration.

C. THE ALLEGED DENIAL OF BIT'S BENEFITS

164. In its first written submission, Respondent has denied Claimant, under Article I(2) of the BIT, the advantages of the BIT, both substantive and procedural, including the right to have recourse to arbitration before this Tribunal.³⁴⁴ Article I(2) of the BIT provides as follows:

*Each Party reserves the right to deny to any company the advantages of this Treaty if nationals of any third country control such company and, in the case of a company of the other Party, that company has no substantial business activities in the territory of the other Party or is controlled by nationals of a third country with which the denying Party does not maintain normal economic relations.*³⁴⁵

165. Respondent's denial of the advantages of the BIT was based on the circumstance that, in its view, available documentation indicates that Claimant is controlled by a national of a third country, namely Brazil or Bolivia,³⁴⁶ and that it has no business activities in the territory of the United States.³⁴⁷ As reflected by the part of Chapter III dealing with the Parties' contentions on this subject,³⁴⁸ the Parties disagree whether the conditions for the applicability of Article I(2) of the BIT are satisfied in the instant case. Respondent contends that Claimant has not been able to rebut its objection to the Tribunal's jurisdiction on the

³⁴³ It is the Tribunal's view that this is an objection to jurisdiction and not an objection to admissibility, as sometimes referred to by the Parties.

³⁴⁴ Answer, para. 16.

³⁴⁵ BIT, Article I(2), Claimant's Legal Authority 1 attached to the Notice of Arbitration.

³⁴⁶ Answer, para. 14. In subsequent submissions Respondent has made reference to Brazil only.

³⁴⁷ Answer, para. 11.

³⁴⁸ See *supra*, Chapter III, Section B.

basis of Respondent's denial of the BIT's advantages to the Claimant.³⁴⁹ Claimant replies that Respondent has not discharged its burden of proving that such conditions have been met.³⁵⁰

166. The Tribunal agrees with Claimant that the burden of proving that the conditions for the exercise of the right to deny the BIT advantages is to be borne by Respondent as the party advancing this specific defence to the Tribunal's jurisdiction.³⁵¹ This is the rule dictated by the UNCITRAL Rules governing these proceedings.³⁵² To establish which conditions are to be proven for a denial of BIT advantages to be valid and effective requires interpreting Article I(2) of the BIT in the light of the VCLT. Article 31(1) of the VCLT provides that

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

167. Applying this rule of interpretation to the instant case, two cumulative conditions must be met for Respondent to deny Claimant the BIT advantages:

- a) Claimant must be controlled by third party nationals, and
- b) either Claimant does not conduct substantial business activities in the United States or Claimant is controlled by nationals of a third country with which Respondent does not maintain normal economic relations.

168. The Parties agree that these are the relevant conditions under Article I(2) of the BIT and that they must be met cumulatively.³⁵³ The Tribunal notes that if it is proven that Claimant is controlled by a United States national there will be no need to prove the other condition, the right to deny the BIT benefits being in such a case excluded. The Parties agree also that the term "control" means the "legal capacity to control."³⁵⁴ However, they disagree

³⁴⁹ Reply, para. 7.

³⁵⁰ Rejoinder, para. 53. See also *supra*, para. 136.

³⁵¹ Memorial, para. 116; Rejoinder, para. 56.

³⁵² UNCITRAL Rules, Article 24(1): "Each Party shall have the burden of proving the facts relied on to support his claim or defence."

³⁵³ Counter-Memorial, para. 92; Reply, para. 42.

³⁵⁴ Counter-Memorial, para. 98; Reply, para. 56.

regarding whether control must be exercised “directly,” as argued by Claimant,³⁵⁵ or may be exercised “indirectly,” as asserted by Respondent.³⁵⁶

169. It is therefore necessary to determine whether the terms of Article I(2) of the BIT, when read in their context and in the light of the object and purpose of the treaty, are meant to limit “control” to direct control or also embrace indirect control. The Tribunal notes in that regard that Article I(1) of the BIT defines a certain number of terms “(f)or the purposes of this Treaty,” *i.e.* with regard to any and all of the treaty provisions. Letter (c) of this Article defines “national” of a Party (*i.e.*, either the United States of America or the Republic of Ecuador) to mean “a natural person who is a national of a Party under its applicable law.”³⁵⁷
170. Only natural persons may be at the upper end of the chain of control of a company, the last company in the chain having natural persons as shareholders or general partners. This means that in order to satisfy the control test under Article I(2) of the BIT the natural person who is the ultimate controller of Ulysseas and its nationality must be identified.
171. Prior to establishing whether the evidence in the file permits identification of the natural person ultimately controlling Claimant, the Tribunal will answer certain questions that have been raised by the Parties and which may bear on the validity and effect of Respondent’s notice of denial of the BIT’s advantages to Claimant.
172. The first question concerns whether there is a time-limit for the exercise by the State of the right to deny the BIT’s advantages. In the Tribunal’s view, since such advantages include BIT arbitration, a valid exercise of the right would have the effect of depriving the Tribunal of jurisdiction under the BIT. According to the UNCITRAL Rules, a jurisdictional objection must be raised not later than in the statement of defence (Article 21(3)). By exercising the right to deny Claimant the BIT’s advantages in the Answer,³⁵⁸ Respondent has complied with the time limit prescribed by the UNCITRAL Rules. Nothing in Article I(2) of the BIT excludes that the right to deny the BIT’s advantages be exercised by the

³⁵⁵ Counter-Memorial, para. 102.

³⁵⁶ Reply, para. 56.

³⁵⁷ BIT, Article I(1), Claimant’s Legal Authority 1 attached to the Notice of Arbitration.

³⁵⁸ *Supra*, para. 164.

State at the time when such advantages are sought by the investor through a request for arbitration.

173. A further question is whether the denial of advantages should apply only prospectively, as argued by Claimant, or may also have retrospective effects, as contended by Respondent. The Tribunal sees no valid reasons to exclude retrospective effects. In reply to Claimant's argument that this would cause uncertainties as to the legal relations under the BIT, it may be noted that since the possibility for the host State to exercise the right in question is known to the investor from the time when it made its the investment, it may be concluded that the protection afforded by the BIT is subject during the life of the investment to the possibility of a denial of the BIT's advantages by the host State.
174. As provided by Procedural Order No. 2 of 10 February 2010 (point 10), the date on which the conditions for a valid and effective denial of advantages are to be met in the instant case is the date of the Notice of Arbitration, *i.e.* 8 May 2009, this being the date on which Claimant has claimed the BIT's advantages that Respondent intends to deny.
175. Having thus established the time under Article I(2) of the BIT when the natural person who ultimately controls Ulysseas must be identified, the Tribunal will proceed to determine whether the evidence provided by the Parties permits such identification. Based on the established terms of reference and the available evidence, it is the Tribunal's conclusion that Claimant has conclusively proven that Mr. Paul E. Singer, a national of the United States of America, controls Ulysseas. The analysis that follows supports this conclusion.
176. The Abbreviated Ownership Structure Chart (the "Chart") filed by Claimant³⁵⁹ shows that Claimant is 100% owned by Highwood Partners L.P., which is in turn owned by Highwood Associates, Inc. (as to 1%) and Elliott Associates L.P. (as to 99%), the latter owning 100% of Highwood Associates. This has been accepted by Respondent,³⁶⁰ subject to an objection that shall be considered below.³⁶¹ The Chart does not show, however, who controls Elliott Associates.

³⁵⁹ Abbreviated Ownership Structure of Ulysseas v. 2, Exhibits C-JURI-21 and R-51, marked as confidential by Claimant,.

³⁶⁰ Reply, para. 64.

³⁶¹ *Infra*, paras. 181-189.

177. The Thirteenth Amended and Restated Limited Partnership Agreement of Elliott Associates L.P. dated 1 July 2009, between Paul E. Singer, Elliott Capital Advisors, L.P. and Elliott Special GP, LLC, filed by Claimant,³⁶² shows that Elliott Associates has three general partners.
178. However, this document does not permit the identification with certainty of the natural persons controlling the latter two entities. Specifically, it does not permit to conclude that Mr. Singer is the only general partner of those entities.
179. Pursuant to the Tribunal's direction of 7 June 2010, Claimant has filed on 15 June 2010 a certain number of documents proving conclusively that Mr. Paul E. Singer is the natural person ultimately controlling Ulysseas. The documents in question have been produced under cover of the Confidentiality Agreement between the Parties.
180. At the hearing, Claimant requested that the "Singer structure above the Claimant [...] not be detailed by name, so that the confidential information is not..." [Counsel's intervention incomplete].³⁶³ It is the Tribunal's understanding that this request refers to the documents filed under cover of Claimant's e-mail of 15 June 2010. There is no need to describe in detail the ownership structure above Elliott Associates L.P. considering that Respondent has accepted at the hearing both this structure³⁶⁴ and the fact that Mr. Paul E. Singer is a national of the United States.³⁶⁵
181. The Tribunal will now consider Respondent's objection to the ownership structure above Ulysseas, as described in the Chart produced by Claimant,³⁶⁶ namely that "the line of control between Ulysseas and Elliott Associates L.P. is broken: it is broken by virtue of the joint venture agreement and it is diverted to the Synergy Group and Mr. Efromovich."³⁶⁷ The basic premise of this objection is that "control" as legal capacity to direct the actions of

³⁶² Thirteenth Amended and Restated Limited Partnership Agreement of Elliott Associates L.P. dated 1 July 2009, Exhibit C-JURI-6.

³⁶³ Hearing Transcript, Day 2, p. 80, lines 2-6.

³⁶⁴ Hearing Transcript, Day 1, p. 67, lines 21-25.

³⁶⁵ Hearing Transcript, Day 1, p. 68, lines 15-16.

³⁶⁶ Abbreviated Ownership Structure of Ulysseas v. 2, Exhibits C-JURI-21 and R-51, marked as confidential by Claimant.

³⁶⁷ Hearing Transcript, Day 1, p. 68, lines 4-7.

a company is not limited to ownership. It may be exercised through contractual rights when there are contractual rights which are not revocable.³⁶⁸

182. This concerns the JVA between Elliott Associates, L.P. and Elliott International, L.P., on one side (the “Elliott Group”), and Veredas, on the other, dated 18 January 2002³⁶⁹. Pursuant to the JVA, Proteus was established, Elliott Group and Veredas each owning 50% of the company. Proteus is party as Charterer to two Bareboat Charter Party agreements with Claimant, as Owner (as successor to the previous owners of the two Barges), regarding the one PBI and the other PBII.³⁷⁰ By the Amendment to JVA dated 29 June 2007,³⁷¹ the participations to Proteus were modified, Elliott Group now owning 60% and Veredas 40%. Also under the Amended JVA, however, fundamental decisions regarding Proteus continue to require the consent of both joint venture parties.³⁷²

183. According to Respondent, Veredas is a Bahamian company of the non-United States Synergy Group controlled by Mr. Germán Efromovich.³⁷³ It is Respondent’s submission that as a result of the Amended JVA, the conduct of Ulysseas, as an affiliate of Elliott Group, is beholden as to vital aspects of its decisions over the Barges,³⁷⁴ including budget for expenditures of the Barges and signature of power purchase agreements, to the written consent of Veredas, a company controlled by a Brazilian national, Mr. Efromovich.³⁷⁵

184. The consequence, according to Respondent, is that Claimant is subject to legal control of the Synergy Group, and of its ultimate controller Mr. Efromovich, since its conduct with regard to the Barges remains subject to the JVA.³⁷⁶ It is Respondent’s submission that this

³⁶⁸ Hearing Transcript, Day 1, p. 51, lines 7-14.

³⁶⁹ Joint Venture Agreement dated 18 January 2002, Exhibit C-JURI-42, marked as confidential by Claimant. See *supra*, para. 45.

³⁷⁰ Bareboat Charter Party between Cayman Power Barge I, Ltd. and Proteus Power Co., Inc., dated 18 January 2002, Exhibits C-JURI-33 and R-25, marked as confidential by Claimant; Bareboat Charter Party between Odyssea Vessels, Inc. and Proteus Power Co., Inc., dated 18 January 2002, Exhibits C-JURI-33 and R-26, marked as confidential by Claimant.

³⁷¹ Amendment to Joint Venture Agreement, dated 29 June 2007, Exhibit C-JURI-44, marked as confidential by Claimant. See *supra*, paras. 45, 56.

³⁷² Amended JVA, Sect. 5.4.

³⁷³ Reply, para. 72; *supra*, para. 115.

³⁷⁴ Hearing Transcript, Day 2, p. 23, lines 15-18.

³⁷⁵ Hearing Transcript, Day 2, p. 25, lines 10-20.

³⁷⁶ Hearing Transcript, Day 2, pp. 23-25.

is an instance of control for the purpose of Article I(2) of the BIT.³⁷⁷ The control in this case is obtained “through a contractual mechanism.”³⁷⁸ Also the powers of attorney granted by Ulysseas were made expressly subject to the limits of the JVA.³⁷⁹

185. Respondent’s position is therefore that Claimant is controlled through the Amended JVA by the joint-venture party, Veredas, the latter having a veto power over vital decisions regarding the business that is the subject of the joint venture. Since Veredas is ultimately controlled by a Brazilian national, Mr. Efromovich, Claimant is controlled by a national of a third country.
186. The Tribunal does not accept Respondent’s reasoning for a number of reasons. Firstly, the veto power enjoyed by Veredas under the Amended JVA does not give that party a control over the affairs of Proteus. The latter’s inability to conduct its business by reason of deadlocks in the decision-making process would bring about the dissolution of the company,³⁸⁰ each joint venture party regaining in that case full and independent freedom of action.
187. Further, even admitting that Veredas exercises a measure of control over Proteus, this would only mean that Veredas, and through it the ultimate controller of the Synergy Group, Mr. Efromovich, controls Proteus as Charterer of PBI and PBII.
188. However, controlling the Charterer of PBI and PBII, the two Barges owned by Claimant, does not mean controlling the Claimant but only controlling a line of Proteus’ business. As suggested by a question put to Respondent’s counsel during the hearing by one Arbitrator,³⁸¹ control over a company’s business does not give control over the company. The latter may always change its line of business should its shareholders or partners so decide by providing the necessary financial resources, abandoning the line of business that has proved to be inoperable or uneconomical.

³⁷⁷ Hearing Transcript, Day 2, p. 25, lines 21-23.

³⁷⁸ Hearing Transcript, Day 2, p. 26, lines 11-12.

³⁷⁹ Reply, para. 69.

³⁸⁰ This is regulated by Sect. 14.3 of the Amended JVA. See also *supra*, para. 55.

³⁸¹ Hearing Transcript, Day 1, p. 53, lines 23-25; p. 54, lines 1-11.

189. For all the reasons stated above, Respondent's objection that the line of control between Claimant and Elliott Associates is broken by reason of the JVA in favour of the Synergy Group and Mr. Efromovich cannot be accepted. While this suffices to dispose of the Respondent's defence, it should also be pointed out that the Respondent has not established the nationality of Mr. Efromovich.
190. Claimant has produced conclusive evidence that Ulysseas is controlled by a U.S. national, Mr. Paul E. Singer. Accordingly, Claimant's claims in these proceedings are within the Tribunal's jurisdiction and are admissible.
191. This decision is also in reply to Claimant's request for a declaration that it has complied with its obligations under Procedural Order No. 2.³⁸²
192. With regard to Claimant's further prayer for relief concerning future reliance by Respondent, if any, on undisclosed documents,³⁸³ the Tribunal reserves any decision in that respect if and when that situation shall occur.

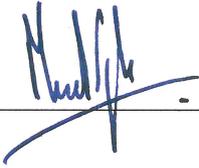
CHAPTER V – DISPOSITIVE PART OF THE DECISION

193. For all the foregoing reasons, the Tribunal unanimously decides:
- a) that the two objections presented by Respondent do not deprive the Tribunal of its jurisdiction over all treaty claims presented by Claimant in these proceedings;
 - b) to make the necessary order for the continuation of the procedure;
 - c) to reserve all questions concerning the costs of arbitration, as defined by Article 38 of UNCITRAL Rules, for subsequent determination;
 - d) to dismiss any other relief requested by either Party, concerning the jurisdictional phase of the arbitration.

³⁸² Rejoinder, para. 94, n. 3.

³⁸³ Rejoinder, para. 94, n. 4.

Date: 28 September 2010



Michael Pryles
(Arbitrator)



Brigitte Stern
(Arbitrator)



Piero Bernardini
(Presiding Arbitrator)