

International Centre for Settlement of Investment Disputes

Burlington Resources Inc. and others
CLAIMANTS

v.

Republic of Ecuador
and
Empresa Estatal Petróleos del Ecuador (PetroEcuador)
RESPONDENTS

ICSID Case No. ARB/08/5

PROCEDURAL ORDER No. 1
on Burlington Oriente's Request for Provisional Measures

Rendered by an Arbitral Tribunal composed of:

Prof. Gabrielle Kaufmann-Kohler, President

Prof. Brigitte Stern, Arbitrator

Prof. Francisco Orrego Vicuña, Arbitrator

Secretary of the Tribunal

Marco Tulio Montañés-Rumayor

Date: June 29, 2009

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I. FACTUAL AND PROCEDURAL BACKGROUND

A. Subject matter of this Order

1. The present order deals with a request for provisional measures, by which Burlington Resources Oriente Limited (“Burlington Oriente”; to the exclusion of the other Claimants in this arbitration) seeks the following relief from the Arbitral Tribunal:
 - (i) that Ecuador and PetroEcuador and/or their agencies or entities refrain from demanding payment of amounts allegedly due under Law No. 2006-42 and commencing any action or adopting any resolution or decision that may directly or indirectly lead to the forced or coerced payment of any amount relating to Law No. 2006-42;
 - (ii) that Ecuador and PetroEcuador and/or their agencies or entities refrain from making or implementing any measure, decision or resolution which directly or indirectly affects the legal situation of or is intended to terminate the Block 7 and 21 PSCs; and
 - (iii) that Ecuador and PetroEcuador and/or their agencies or entities refrain from engaging in any other conduct that aggravates the dispute between the parties and/or alters the status quo, including commencing any action or adopting any resolution or decision that directly or indirectly affects the legal or physical integrity of Burlington Oriente’s representatives.

B. Origin of the dispute

2. The present dispute originates from two production sharing contracts (“PSCs”) for the exploration and exploitation of oil fields in the Amazon Region. The first contract relates to Block 7. It was concluded on 23 March 2000 between Kerr McGee Ecuador Energy Corporation, Preussag Energie GMBH, Sociedad Internacional Petrolera S.A., Compañía Latinoamericana Petrolera Numero Dos S.A., on the one hand and the Republic of Ecuador (“Ecuador”) by the intermediary of Empresa Estatal Petróleos del Ecuador (“PetroEcuador”), on the other hand (the “Block 7 PSC”). The second contract relates to Block 21. It was concluded on 20 March 1999 between Oryx Ecuador Energy Company, Santa Fe Minerales del Ecuador S.A., Sociedad Internacional Petrolera S.A. and Compañía

Latinoamericana Petrolera S.A., on the one hand, and Ecuador by the intermediary of PetroEcuador, on the other hand (the “Block 21 PSC”). Burlington Resources Oriente Limited (“Burlington Oriente”) alleges that it now holds a 42.5% interest in the Block 7 PSC and a 46.25% interest in the Block 21 PSC, an allegation that remained unchallenged. Perenco Ecuador Limited (“Perenco”) is the operator of Blocks 7 and 21.

3. Both PSCs contain tax stabilization clauses, a choice of Ecuadorian law, and an ICSID arbitration clause.
4. According to its Article 6(2), the Block 7 PSC will expire on 16 August 2010. By contrast, pursuant to Articles 6(2)(5) and 6(3) of the Block 21 PSC, the period of exploitation for such PSC is twenty (20) years from the date of authorization of PetroEcuador, *i.e.* allegedly until 2021, being specified that by letter of 24 December 2008 (Exhibit C49) the Ministry of Energy and Mines invited Perenco to appoint a negotiating team for the early termination of Block 21 PSC (as confirmed by the Ministry’s letter of 26 January 2009 – Exhibit E3).
5. Burlington Oriente and Perenco formed a Consortium, which is responsible for the tax obligations derived from the PSCs.
6. On 19 April 2006, Ecuador enacted Law No. 2006-42 (“Law 42”), which amended the Hydrocarbons Law of Ecuador as follows:

“**[c]ontracting companies** having Hydrocarbons exploration and exploitation participation agreements in force with the Ecuadorian State pursuant to this Law, without prejudice to the volume of crude oil which may correspond thereto according to their participation, in the event the actual monthly average selling price for the FOB sale of Ecuadorian crude oil exceeds the monthly average selling price in force at the date of subscription of the agreement expressed at constant rates for the month of payment, **shall grant the Ecuadorian State a participation of at least 50% over the extraordinary revenues caused by such price difference [...].**” (Exhibit C7, Article 2; emphasis added)
7. Decrees Nos. 1583 (29 June 2006) and 1672 (13 July 2006) spelled out the method of calculation of such 50% participation. From the record, it appears that the “*reference price*” (that is “*the monthly average selling*

price in force at the date of subscription of the agreement expressed at constant rates for the month of payment") is USD 25 per barrel for Block 7 (Transcript, p.163) and USD 15 per barrel for Block 21 (Exhibit C41). In other words, if "*the actual monthly average selling price for the FOB sale of Ecuadorian crude oil*" amounted for instance to USD 40, Ecuador's participation would be 50% of USD 15, *i.e.* USD 7.5, for Block 7 and 50% of USD 25, *i.e.* USD 12.5, for Block 21.

8. On 18 October 2007, Ecuador published Decree No. 662 ("Decree 662"; from here, any reference to Law 42 includes Decree 662 unless otherwise specified), which amended Decree No. 1672 and increased the participation on "*extraordinary revenues*" pursuant to Law 42 from 50 percent to 99 percent. Using the same example as in the preceding paragraph, Ecuador's participation would be 99% of USD 15, *i.e.* USD 14.85, for Block 7 and 99% of USD 25, *i.e.* 24.75, for Block 21 crude.
9. From the enactment of Law 42 until June 2008, *i.e.* during eighteen months after the adoption of Law 42 and eight months after Decree 662, the Consortium made the payments due under these texts to the State (hereinbelow, the expression "Law 42 payments" will include payments under Decree 662, unless otherwise specified). Specifically, by June 2008, the Consortium alleges that it "*had made Law No. 2006-42 payments for Block 7 and 21 to Ecuador in excess of US\$396.5 million*" (Request for provisional measures, para.25).
10. Thereafter, the Consortium ceased to make such payments to the Respondent. Instead, it deposited the monies owed under Law 42 (and Decree 662) in an alleged total amount of USD 327.4 million (USD 171.7 million for Block 7 and USD 155.7 million for Block 21) into two segregated accounts, over which it keeps control.
11. Following the decision of Burlington Oriente to reject Ecuador's proposal to amend the Block 7 and 21 PSCs, Ecuador allegedly threatened to seize assets of the Consortium in order to collect unpaid amounts relating to Law 42 and to terminate the Block 7 and Block 21 PSCs. Notices were

served by PetroEcuador on Perenco (Exhibit C55), in order to collect monies in the amount of USD 327,467,447.00 million (for the entire Consortium).

12. On 19 February 2009, Ecuador and PetroEcuador (through the Executory Tribunal of PetroEcuador) instituted so-called *coactiva* proceedings to enforce the payment of USD 327,467,447.00, corresponding to the Consortium's allegedly unpaid amounts under Law 42.
13. On 25 February 2009, PetroEcuador proceeded to serve its third notice of the *coactiva* process on Perenco, which filed an action before the Civil Judge of Pichincha against any further actions that could be taken within the *coactiva* process¹.
14. On 3 March 2009, the *coactiva* administrative tribunal ordered the immediate seizure of all Block 7 and 21 crude production and cargos produced by Perenco, which decision was confirmed by the Civil Judge of Pichincha on 9 March 2009 (Exhibit C60).
15. At the hearing, Burlington Oriente asserted that the “[coactiva judge] *elected to treat it [the debt for payments under Law 42] as if it was res judicata, and then went ahead, seized the assets, and auctioned off – and auctioned them off for payment.*” (Transcript, pp.27-8). The Respondents did not rebut such statement. They had actually stated in a letter of 3 March 2009 that “*steps have been, or will imminently be, taken by the ‘coactivas judge’ to seize certain assets in satisfaction of the debts claimed in C-55 to Burlington Oriente’s Request for Provisional Measures*”. Although no amounts were specified, there is no dispute that Ecuador has seized certain quantities of oil produced by Burlington. By contrast, it has not been shown that other assets such as production equipment have been seized.

¹ It is unclear whether Perenco alone, or the whole Consortium (as stated by the Respondent, see para.40 of the Rejoinder) filed an action before the Ecuadorian courts.

C. Request for arbitration

16. On 21 April 2008, Burlington Resources Inc., Burlington Oriente, Burlington Resources Andean Limited and Burlington Resources Ecuador Limited filed a Request for arbitration with ICSID. They asked for the following relief:

“(a) DECLARE that Ecuador has breached:

- (i) Article III of the Treaty [between the United States and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment] by unlawfully expropriating and/or taking measures tantamount to expropriation with respect to Burlington’s investments in Ecuador;
 - (ii) Article II of the Treaty by failing to treat Burlington’s investments in Ecuador on a basis no less favorable than that accorded nationals; by failing to accord Burlington’s investments fair and equitable treatment, full protection and security and treatment no less than that required by international law; by implementing arbitrary and discriminatory measures against Burlington’s investments; and
 - (iii) Each of the PSCs;
- (b) ORDER Ecuador: (i) to pay damages to Burlington for its breaches of the Treaty in an amount to be determined at a later stage in these proceedings, including payment of compound interest at such a rate and for such period as the Tribunal considers just and appropriate until the effective and complete payment of the award of damages for the breach of the Treaty; and/or (ii) to specific performance of its obligations under the PSCs and pay damages for its breaches of the PSCs in an amount to be determined at a later stage in the proceedings, including interest at such a rate as the Tribunal considers just and appropriate until the complete payment of all damages for breach of the PSCs.
- (c) AWARD such other relief as the Tribunal considers appropriate; and
- (d) ORDER Ecuador to pay all of the costs and expenses of this arbitration, including Burlington’s legal and expert fees, the fees and expenses of any experts appointed by the Tribunal, the fees and expenses of the Tribunal and ICSID’s other costs”.

D. Procedural history

17. On 20 February 2009, Burlington Oriente filed a Request for provisional measures (the “Request”).

18. The Request was accompanied by a number of exhibits, including a witness statement from Mr. Alex Martinez. It included a request for a temporary restraining order with immediate effect.
19. On 23 February 2009, the First Respondent (Ecuador) filed a response to the Claimant's request for a temporary restraining order. It in particular undertook "*to serve prior notice on the Tribunal, granting enough time for the Tribunal to act as necessary, before it takes any measure that seeks to enforce the debts claimed in exhibit C-55 to the request for Provisional Measures*". On the basis of this undertaking, the Tribunal considered that it could dispense with reviewing whether a temporary order with immediate effect was justified pending determination of the application for provisional measures.
20. Burlington Oriente renewed its request for a temporary restraining order on 25 February 2009 alleging that the third *coactiva* notice had been given and that three days thereafter the Respondents could start seizing assets. The First Respondent replied on 26 February 2009 and reiterated its undertaking.
21. On 27 February 2009, the Arbitral Tribunal again resolved that there was no need to rule on Burlington Oriente's request in view of Ecuador's repeated assurances.
22. On 3 March 2009, Burlington Oriente again repeated its request for a temporary restraining order, owing to the alleged imminence of the seizures of Burlington Oriente's assets pursuant to two orders issued by the *coactiva* tribunal on 3 March 2009.
23. On 4 March 2009, the First Respondent filed a preliminary reply to Burlington Oriente's Request for provisional measures (the "Preliminary Reply").
24. On 6 March 2009, in light of the information received three days earlier, the Arbitral Tribunal recommended "*that the Respondents refrain from engaging in any conduct that aggravates the dispute between the Parties*".

and/or alters the status quo until it decides on the Claimants' Request for Provisional Measures or it reconsiders the present recommendation, whichever is first." In issuing such recommendation, the Arbitral Tribunal considered that the requirements of urgency and of necessity were met. It in particular considered that Burlington Oriente's right to have its interests effectively protected by way of provisional measures was sufficient to demonstrate necessity in the circumstances.

25. The First Respondent filed its Reply to Burlington Oriente's Request for provisional measures (the "Reply"), together with a Request for reconsideration of the Tribunal's recommendation of 6 March 2009, on 17 March 2009. On 25 March 2009, the Claimant filed a Reply to the First Respondent's request for reconsideration of the Tribunal's recommendation on 25 March 2009. The Arbitral Tribunal denied the First Respondent's request for reconsideration on 3 April 2009 on the ground that no changed circumstances called for reconsideration and that the hearing on provisional measures was to take place shortly thereafter.
26. The Claimants filed their Response to Ecuador's Replies to the Request for provisional measures on 27 March 2009 (the "Response") and the Respondent filed their Rejoinder to Burlington Oriente's Request for provisional measures on 6 April 2009 (the "Rejoinder").
27. The hearing on provisional measures took place on 17 April 2009 in Washington, D.C. It was attended by the following persons:

Members of the Tribunal

Professor Gabrielle Kaufmann-Kohler, President of the Tribunal

Professor Brigitte Stern, Arbitrator

Professor Francisco Orrego Vicuña, Arbitrator

ICSID Secretariat

Mr. Marco T. Montañés-Rumayor, Secretary of the Tribunal

Representing the Claimants

Ms. Aditi Dravid, ConocoPhillips Company
Mr. Alex Martínez, Burlington Resources Oriente Limited
Mr. Alexander Yanos, Freshfields Bruckhaus Deringer US LLP
Ms. Noiana Marigo, Freshfields Bruckhaus Deringer US LLP
Mr. Viren Mascarenhas, Freshfields Bruckhaus Deringer US LLP
Mr. Javier Robalino-Orellana, Pérez Bustamante & Ponce Abogados
Cía Ltda.

Representing First Respondent Republic of Ecuador

Mr. Alvaro Galindo Cardona, Director de Patrocinio Internacional
Procuraduría General del Estado
Mr. Juan Francisco Martínez, Procuraduría General del Estado
Mr. Felipe Aguilar, Procuraduría General del Estado
Mr. Eduardo Silva Romero, Dechert LLP
Mr. George K. Foster, Dechert LLP
Mr. José Manuel García Represa, Dechert LLP

Representing Second Respondent PetroEcuador

Dr. José Murillo Venegas, Empresa Estatal Petróleos del Ecuador
Dr. Wilson Narváez, Empresa Estatal Petróleos del Ecuador

At the hearing, the Tribunal heard the Parties' oral arguments as well as the testimony of Mr. Martinez. A transcript was made in English and Spanish and distributed to the Parties.

II. PARTIES' POSITIONS

A. Claimant's position

28. The Claimant argues that the test to be applied to provisional measures is twofold: urgency and necessity to spare significant harm to a Party's rights.
29. It understands the first requirement of urgency in a broad fashion that includes situations in which protection cannot wait until the award. In the

present case, it submits that urgency arises out of the Respondents' plan to enforce all amounts due under Law 42.

30. With respect to necessity, the Claimant stresses that the distinction between "significant" and "irreparable" harm does not entail consequences in the present case. According to the Claimant, irreparable harm is not required under the ICSID Convention or international law, and a broad meaning has been given to the phrase by a number of international tribunals (*Paushok v. Mongolia*, *City Oriente v. Ecuador*, *Saipem v. Bangladesh*). It further submits that ICSID arbitral tribunals have interpreted "*necessity*" for provisional measures not so much as a need to prevent "*irreparable*" harm but as a need to spare "*significant harm*". According to the Claimant, ICSID tribunals have also given careful consideration to the proportionality of the measures when considering if they are necessary.
31. The Claimant argues that necessity exists here in three respects:
- (i) Provisional measures are necessary to preserve the Claimant's rights under Article 26 of the ICSID Convention and Rule 39(6) of the ICSID Arbitration Rules pursuant to which "[...] *once the parties have consented to ICSID arbitration, they cannot resort to other forums in respect to the subject matter of the dispute before the ICSID Tribunal.*" (Response, para.32). The Claimant contends that through the *coactiva* proceedings, the Respondents seek provisional relief against it in contravention to the said rights.
 - (ii) Provisional measures are necessary to protect Burlington Oriente's independent right to specific performance of the Block 7 and 21 PSCs. The right to specific performance exists under Ecuadorian law, as provided by Article 1505 of the Ecuadorian Civil Code and confirmed by the Supreme Court of Ecuador in the case of *Tecco v. IEOS*. The Claimant also argues that Burlington Oriente's right to specific performance would not survive termination of the PSCs and that it is a property right that deserves protection to prevent its dissipation or destruction. The Claimant substantially argues that the Respondents' measures will irreversibly end Burlington Oriente's actual right to seek specific performance of the PSCs by effectively terminating them.
 - (iii) Provisional measures are necessary to protect Burlington Oriente's self-standing rights to the preservation of the *status quo*, non-

aggravation of the dispute, and preservation of the award. These rights are in danger of being irreparably harmed by the actions of the Respondents. In particular, according to the Claimant, the enforcement of Law 42 would alter the *status quo* and aggravate the dispute, as well as frustrate the effectiveness of the award, particularly of an award of specific performance.

32. The Claimant adds that its request for provisional measures not only responds to the necessity criterion, but also fulfills the proportionality requirement. They point out that “[s]ince Ecuador has not enforced Law No. 2006-42 since June 2008, when the Consortium began depositing it into a segregated account, no additional burden would be imposed upon Ecuador if the Tribunal authorized the Consortium or Burlington Oriente to continue paying such amounts into a segregated account or into an official escrow account.” (Request, para.74).
33. The Arbitral Tribunal further notes the statement made by Mr. Alex Martinez, a member of the Board of Directors for Burlington Oriente and Latin America Partnership Operations and Peru Opportunity Manager for ConocoPhillips Corporation, according to whom “[i]f Ecuador indeed seizes the production assets of the Perenco-Burlington Oriente Consortium and/or the oil produced by the consortium, Burlington Oriente will be forced to exit Blocks 7 and 21 as it will be forced in this context to spend money to produce oil for the sole benefit of PetroEcuador” (Witness Statement of Alex Martinez, para.10).

B. Respondents’ position

34. In its Preliminary Reply, Reply and Rejoinder, the First Respondent (Ecuador) set out its arguments against the Claimant’s Request. The Second Respondent (PetroEcuador) stated in its letters of 31 March, 2 and 6 April 2009 that it opposed the Claimant’s Request and agreed with the position of the Republic of Ecuador, as expressed in the submissions just referred to. Therefore, the Arbitral Tribunal will thereafter refer to the position expressed in the First Respondent’s submissions as that of both Respondents (on the admissibility of PetroEcuador’s opposition to the Request, see para.43).

35. The Respondents state at the outset of their submissions that the Claimant's acts against the enforcement of a valid Ecuadorian law constitute an interference with the sovereignty of Ecuador. They further contend that a presumption of validity exist in favor of legislative measures adopted by a State, that any loss might be compensated by an award of damages and interest, and that the Claimant admits that it could meet its obligations to pay the disputed amounts, since it stated to have set aside the relevant amounts in U.S. accounts. The Respondents also state that the Claimant's Request is neither urgent nor necessary.
36. The Respondents stress that the applicable test for granting provisional measures is the existence of an urgent need to avoid irreparable prejudice, in accordance with ICJ practice. In particular, they stress that no ICSID tribunal has ever rejected the criterion of "*irreparable*" harm to the benefit of "*significant*" harm. They further state that Burlington Oriente's reliance on *Paushok v. Mongolia* and *City Oriente v. Ecuador* is misplaced, as in the latter case, irreparable harm was met on the facts and, in the former, the arbitral tribunal recognized that it went against the weight of authorities.
37. Furthermore, the Respondents understand urgency as follows: "[...] *action prejudicial to the rights of Burlington Oriente is likely to be taken before the Tribunal can finally decide on the merits of the dispute submitted to it.*" (Preliminary Reply, para. 8). The Respondents also state that "*Burlington Oriente's reliance on a so-called 'proportionality test' confuses the issue*" (Preliminary Reply, para.52).
38. The Respondents do not see the need for protection against the termination of the PSCs as urgent, since Ecuador confirmed on 23 February 2009 to the Arbitral Tribunal that none of the Respondents had taken steps to this effect.
39. The Respondents further opposed the Claimant's arguments asserting that Burlington Oriente has not identified any substantive right requiring preservation through provisional measures:

- (i) The *coactiva* process does not threaten the Claimants' rights under Article 26 of the ICSID Convention and Rule 39(6) of the ICSID Arbitration Rules. Such process is an administrative not a judicial proceeding. Consequently, it does not involve the determination of any of the matters at issue in this arbitration. The only judicial proceedings before the Ecuadorian courts (namely the proceedings in front of the Civil Court of Pichincha) were initiated by the Claimants, and not by any of the Respondents.
- (ii) Burlington Oriente has no right to specific performance of the PSCs, let alone one that would be irreparably harmed absent provisional relief. It has not established that Ecuador actually intended to terminate the PSCs. To the contrary, the government "***expressly disavowed any such intention.***" (Rejoinder, para.21, with emphasis). Even if Ecuador had such intent, Burlington Oriente would still have no right to specific performance under international law. As for Ecuadorian law, it does not recognize a right to specific performance when the subject matter of the obligation is contrary to the law, which would be the case here because the enforcement of the PSCs would breach Law 42. Moreover, there is no more basis for a tribunal to restrain a sovereign State from terminating a contract than to order a State to reinstate a contract after termination.
- (iii) The preservation of the *status quo*, the non-aggravation of the dispute, and the preservation of the effectiveness of the award are not free standing rights in international law, independent from contractual or treaty rights. The preservation of the *status quo* is one of the purposes to be served by preserving rights under Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules by way of provisional measures. Even if it had a right to the preservation of the *status quo*, Burlington Oriente is the one who altered this *status quo* by ceasing to pay the amounts due to Ecuador. Finally, there is no risk that the enforcement of Law 42 aggravates the dispute or renders any future award ineffective, since the dispute can easily be resolved through a monetary award.

40. The Respondents further argue that the Claimant's allegations about a threat to the physical and legal integrity of Burlington's representatives is unparticularised and should therefore be rejected.

III. DISCUSSION

41. The Tribunal will first deal with some preliminary matters (A). Thereafter, it will address the standards applicable to provisional measures in general (B), before reviewing each such standards, *i.e.* the existence of right (C),

urgency (D), and necessity or the need to avoid harm (E). It will finally deal with the issue of the escrow account (F) before setting forth its decision (IV).

A. PRELIMINARY MATTERS

42. The Arbitral Tribunal will first deal with a few procedural issues which arose during the hearing of 17 April and in the course of previous written exchanges, namely the timeliness of PetroEcuador's opposition to the Request; Burlington Oriente's use of an alleged statement by President Correa; and the request for relief regarding the alleged threat to the legal and physical integrity of the Claimant's representatives.
43. Burlington Oriente argues that PetroEcuador's endorsement of Ecuador's position on 31 March 2009 (confirmed on 1 and 6 April 2009 and repeated at the hearing, Transcript, p.9) was untimely and should thus not be considered. PetroEcuador attended the hearing without presenting oral argument of its own in accordance with the Tribunal's understanding set out in the latter's letter of 8 April 2009. Since PetroEcuador made no written or oral submissions of its own, but for its adhesion to Ecuador's case, the fact that such adhesion did not respect the briefing schedule did not affect the Claimant's due process rights. The Tribunal would thus find it excessively formalistic to disregard PetroEcuador's endorsement of the First Respondent's position.
44. As a second preliminary matter, the Respondents object to Burlington Oriente's reliance at the hearing on a statement by President Correa in 2008 (Transcript, p.21). Since evidence of such a statement was not in the record then, the Arbitral Tribunal will not consider it for purpose of this decision.
45. As a third preliminary matter, the Respondents submit that Burlington Oriente's request for relief based on the threat to the legal and physical integrity of its representatives has been abandoned (Transcript, pp.90-91). The Arbitral Tribunal indeed notes that Burlington Oriente has not opposed such submission at the hearing. Be this as it may, the allegation of threats

is in any event unsubstantiated Hence, the Tribunal will not further entertain it.²

46. As a final observation within these preliminary matters, the Tribunal notes that this order is made on the basis of its understanding of the record as it stands now. Nothing herein shall preempt any later finding of fact or conclusion of law.

B. APPLICABLE STANDARDS

1. Legal framework

47. The relevant rules are found in Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules, which are generally considered to grant wide discretion to the Arbitral Tribunal.

48. Article 47 of the ICSID Convention provides that

“[e]xcept as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the specific rights of either party.”

49. Rule 39 of the ICSID Arbitration Rules reads as follows:

- (1) “At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.
- (2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).
- (3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.

² See, for a similar approach, *Occidental Petroleum Corporation, Occidental Exploration and Production Company v. Republic of Ecuador* (ICSID Case No. ARB/06/11), Decision on provisional measures of 17 August 2007, para. 89: “In other words, Claimants are asking a provisional measure in order to avoid a behaviour, which they are not even sure to be intended. This is not the purpose of a provisional measure. Provisional measures are not deemed to protect against any potential and hypothetical harm susceptible to result from uncertain measures, they are deemed to protect the requesting party from an imminent harm.”

- (4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.

[...]"

It is undisputed by the Parties that the Arbitral Tribunal has the power to order provisional measures prior to ruling on its jurisdiction. The Tribunal will not exercise such power, however, unless there is *prima facie* basis for jurisdiction.

50. The provisional measures were requested by Burlington Oriente, *i.e.* one of the so-called "*Burlington subsidiaries*" (Request for Arbitration, para.1). The "*Burlington subsidiaries*" (that is Burlington Oriente, Burlington Resources Ecuador Limited and Burlington Resources Andean Limited) seek compensation for the Respondents' breach of the PSCs (Request for Arbitration, para.3). As far as Burlington's subsidiaries are concerned, the Claimants assert that ICSID has jurisdiction on the basis of the arbitration clauses embodied in Section 20.3 of the Block 7 PSC and Section 20.2.19 of the Block 21 PSC:

"By the express language of the PSCs for Blocks 7, 21 and 23, the parties consented to ICSID jurisdiction from the moment the ICSID Convention was ratified by Ecuador. Ecuador ratified the ICSID Convention on February 7, 2001. Thus, since February 7, 2001, all parties to the PSCs for Blocks 7, 21 and 23 have consented to ICSID arbitration to resolve the dispute set forth herein." (Request for Arbitration, para.131).

Hence, the Tribunal considers that it has *prima facie* jurisdiction for purposes of rendering this order.

2. Requirements for provisional measures

51. There is no disagreement between the Parties, and rightly so, that provisional measures can only be granted under the relevant rules and standard if rights to be protected do exist (C below), and the measures are urgent (D below) and necessary (E below), this last requirement implying an assessment of the risk of harm to be avoided by the measures. By contrast, the Parties differ on the nature of such harm. The Claimant argues that significant harm is sufficient, while the Respondents insist on

irreparable harm. The Parties further disagree on the type and existence of the rights to be protected. The Tribunal will now review the different requirements for provisional measures just set out and the Parties' divergent positions in this respect.

C. EXISTENCE OF RIGHTS

52. Burlington Oriente asserts that three types of rights need protection by way of provisional measures, namely the right to exclusive recourse to ICSID under Article 26 of the ICSID Convention (1); the rights to the preservation of the *status quo*, the non-aggravation of the dispute and the effectivity of the arbitral award (2); and the right to specific performance of the PSCs (3).

53. At the outset, one notes the Parties' concurrent view that the Tribunal must examine the existence of rights under a *prima facie* standard (Transcript, p.169, 179-80, 199). It cannot require actual proof, but must be satisfied that the rights exist *prima facie*.

1. Right to exclusivity under Article 26 ICSID Convention

54. In the first place, Burlington Oriente substantially argues that provisional measures are necessary to preserve the exclusivity of ICSID proceedings under Article 26 of the ICSID Convention, which in essential part provides that “[c]onsent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.”

55. The Claimant submits that matters at issue in the present case are being adjudicated in the *coactiva* process. The Respondents reply that the *coactiva* proceeding is an administrative not a judicial process, that it carries no *res judicata*, and does not preempt the determination of the dispute by this Tribunal.

56. In the Tribunal's view, two questions arise here. First, does a right to the exclusive jurisdiction of ICSID exist as a right that can be protected through provisional measures? If the answer is positive, the second question that arises is whether that right is at risk under the circumstances if no provisional measures are granted.

57. The Tribunal has no doubt about the existence of a right to exclusivity susceptible of protection by way of provisional measures, or in the words of the *Tokios Tokelés v. Ukraine* tribunal:

“Among the rights that may be protected by provisional measures is the right guaranteed by Article 26 to have the ICSID arbitration be the exclusive remedy for the dispute to the exclusion of any other remedy, whether domestic or international, judicial or administrative.”³

58. The existence of such a right being accepted, is the continuation of the *coactiva* process susceptible of putting this right at risk? There is conflicting argumentation on record about the true legal nature and the subject matter of the *coactiva* process (Transcript, pp. 26-7, 49-63, 116-30). The Tribunal is thus unable to come to a conclusion on this issue in the context of this Order. Hence, for purposes of the present limited review, it cannot but hold that Burlington Oriente has not established a *prima facie* case of breach of Article 26 of the ICSID Convention.

2. Right to the preservation of the *status quo* and non-aggravation of the dispute

59. Second, Burlington Oriente asserts rights to the preservation of the *status quo*, the non-aggravation of the dispute, and the preservation of the award. The Respondents object that these are neither rights under Article 47 of the ICSID Convention nor free standing rights under international law and that the Claimant can only seek measures that protect the substantive rights in dispute.

60. In the Tribunal's view, the rights to be preserved by provisional measures are not limited to those which form the subject-matter of the dispute or

³ *Tokios Tokelés v. Ukraine* (ICSID Case No. ARB/02/18), Order No. 3 of 18 January 2005, para. 7, citation omitted.

substantive rights as referred to by the Respondents, but may extend to procedural rights, including the general right to the *status quo* and to the non-aggravation of the dispute. These latter rights are thus self-standing rights.

61. The Tribunal will now review the right to the preservation of the *status quo* and the non-aggravation of the dispute. Such right focuses on the situation at the time of the measures. By contrast, the right to the protection of the effectivity of the award looks into the future. As such, under the circumstances of this case, it is closely linked with the right to specific performance. The discussion on such latter right, to which the Tribunal refers later in this Order, thus equally disposes of the issue of the protection of the award.
62. The existence of the right to the preservation of the *status quo* and the non-aggravation of the dispute is well-established since the case of the *Electricity Company of Sofia and Bulgaria*⁴. In the same vein, the *travaux préparatoires* of the ICSID Convention referred to the need “to preserve the *status quo* between the parties pending [the] final decision on the merits” and the commentary to the 1968 edition of the ICSID Arbitration Rules explained that Article 47 of the Convention “is based on the principle that once a dispute is submitted to arbitration the parties should not take steps that might aggravate or extend their dispute or prejudice the execution of the award”⁵.
63. In ICSID jurisprudence, this principle was first affirmed in *Holiday Inns v. Morocco*⁶ and then reiterated in *Amco v. Indonesia*. In the latter case, the tribunal acknowledged “the good and fair practical rule, according to which both Parties to a legal dispute should refrain, in their own interest, to do

⁴ *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, Judgment of 5 December 1939, PCIJ series A/B, No 79, p.199. See also the *LaGrand case (Germany v. United States)*, Judgment of 27 June 2001, para. 103, ICJ Reports 2001, p.466.

⁵ 1 ICSID Reports 99.

⁶ *Holiday Inns S.A. and others v. Kingdom of Morocco* (ICSID Case No. ARB/72/1), Order of 2 July 1972, not public but commented in Pierre Lalive, “The First ‘World Bank’ Arbitration (Holiday Inns v. Morocco) – Some Legal Problems”, BYIL, 1980.

*anything that could aggravate or exacerbate the same, thus rendering its solution possibly more difficult*⁷.

64. The principle was re-affirmed in *Plama v. Bulgaria*⁸ (although with a somewhat more limited approach), *Occidental v. Ecuador*⁹, and *City Oriente v. Ecuador*¹⁰.
65. There is no doubt in the Tribunal's mind that the seizures of the oil production decided in the *coactiva* proceedings are bound to aggravate the present dispute. At present, both PSCs are in force and, subject to the controversy about the Law 42 payments, appear to be performed in accordance with their terms. If the seizures continue, it is most likely that the conflict will escalate and there is a risk that the relationship between the foreign investor and Ecuador may come to an end.
66. In making this finding, the Tribunal understands Ecuador's arguments about its duties to enforce its municipal law and in particular Law 42. Yet, the ICSID Convention allows an ICSID tribunal to issue provisional measures under the conditions of Article 47. Hence, by ratifying the ICSID Convention, Ecuador has accepted that an ICSID tribunal may order measures on a provisional basis, even in a situation which may entail some interference with sovereign powers and enforcement duties.
67. The Tribunal is also mindful of the Respondents' argument that Burlington Oriente is the one who altered the *status quo* by ceasing to pay the amounts due to Ecuador. It cannot, however, follow this argument. Indeed, the *status quo* at issue, the one that needs protection – provided the other requirements are met – consists in the continuation of the cooperation between the Parties in the framework of the PSCs.

⁷ *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Decision on request for provisional measures of 9 December 1983, ICSID Reports, 1993, p.412.

⁸ *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/04), Order of 6 September 2005, para.40.

⁹ *Occidental Petroleum Corporation, Occidental Exploration and Production Company v. Republic of Ecuador* (ICSID Case No. ARB/06/11), Decision on provisional measures of 17 August 2007, para.96.

¹⁰ *City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (ICSID Case No. ARB/06/21), Decision on provisional measures of 19 November 2007, para.55.

68. In conclusion, the Tribunal holds that Burlington Oriente has shown the existence of a right to preservation of the *status quo* and the non-aggravation of the dispute.

3. Right to specific performance (and to the preservation of the effectivity of the award)

69. Third, the Claimant asserts a right to specific performance of the PSCs and to the protection of the effectivity of an award that may sanction such right. It is disputed whether specific performance is admissible under Ecuadorian and international law.

70. With respect to international law, Article 35 of the ILC Articles on State responsibility provide for restitution which includes specific performance unless it is materially impossible or wholly disproportionate¹¹. Whether specific performance is impossible or disproportionate is a question to be dealt with at the merits stage. It is true that the view has been expressed that the right to specific performance is not available under international law where a concession agreement for natural resources has been terminated or cancelled by a sovereign State. In the instant case, the PSCs are in force which makes it unnecessary to consider that view. As far as Ecuadorian law is concerned, it appears to provide for the remedy of specific performance pursuant to Article 1505 of the Civil Code.

71. Accordingly, at first sight at least, a right to specific performance appears to exist. Some other factual and legal elements seem to support the possibility of specific performance: (i) Burlington Oriente's claim for specific performance is a contract, not a treaty claim; (ii) the PSCs are still being performed, and (iii) they contain a choice of Ecuadorian law and a tax stabilization clause. Thus, at least *prima facie*, a right to specific performance could exist in the present situation. Under the circumstances, the same can be said of the right to the protection of the effectivity of a possible future award.

¹¹ See also e.g. *CMS Gas Transmission Company v. The Argentine Republic* (ICSID Case No. ARB/01/8), Award of 12 May 2005, para.400: "Restitution is the standard used to re-establish the situation which existed before the wrongful act was committed, provided this is not materially impossible and does not result in a burden out of proportion as compared to compensation."

D. URGENCY

72. The Parties agree that there is urgency when it is impossible to wait until the award because actions prejudicial to the rights of the petitioner are likely to be taken before the Arbitral Tribunal decides on the merits of the dispute. They disagree, however, on whether the present facts meet the urgency requirement. The Respondents in particular submit that the threat of termination of the PSCs does not create an urgent situation as Ecuador has confirmed to the Tribunal on 23 February 2009 that the Respondents had taken no steps to this effect.

73. The Arbitral Tribunal agrees that the criterion of urgency is satisfied when, as Schreuer puts it, “*a question cannot await the outcome of the award on the merits*”¹². This is in line with ICJ practice¹³. The same definition has also been given in *Biwater Gauff v. Tanzania*:

“In the Arbitral Tribunal’s view, the degree of ‘urgency’ which is required depends on the circumstances, including the requested provisional measures, and may be satisfied where a party can prove that there is a need to obtain the requested measures at a certain point in the procedure before the issuance of an award.”¹⁴

74. The Tribunal shares the Respondents' opinion that no urgency arises from the alleged threat of termination of the PSCs. The urgency lies elsewhere and is closely linked to the non-aggravation of the dispute discussed in the preceding section, to which the Tribunal refers. Indeed, when the

¹² Christoph SCHREUER, *The ICSID Convention: A Commentary*, Cambridge University Press, 2001, p. 751 (para.17).

¹³ In the words of the ICJ, “[w]hereas the power of the Court to indicate provisional measures will be exercised only if there is urgency in the sense that there is a real risk that action prejudicial to the rights of either party might be taken before the Court has given its final decision (see, for example, *Passage through the Great Belt (Finland v. Denmark)*, Provisional Measures, Order of 29 July 1991, ICJ Reports 1991, p. 17, para.23; *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Provisional Measures, Order of 17 June 2003, ICJ Reports 2003, p. 107, para.22 ; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Preliminary Objections, Order of 23 January 2007, p. 11, para.32), and whereas the Court thus has to consider whether in the current proceedings such urgency exists”, Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia v. Russian Federation*), Order of 15 October 2008, para.129.

¹⁴ *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), Procedural Order No. 1 of 31 March 2006, para.76.

measures are intended to protect against the aggravation of the dispute during the proceedings, the urgency requirement is fulfilled by definition¹⁵.

E. NECESSITY OR NEED TO AVOID HARM

75. The Parties concur that the measures must be necessary or in other words that they must be required to avoid harm or prejudice being inflicted upon the applicant. They differ, however, on the required intensity of the harm: “*irreparable*”, *i.e.* not compensable by money, for the Respondents, as opposed to “*significant*” for the Claimant.
76. The Respondents substantially argue that the harm invoked by Burlington Oriente cannot be deemed “*irreparable*” because (i) no production assets were seized and (ii) such harm can easily be made good by a monetary award. They rely in particular on *Occidental Petroleum and other v. Ecuador* to argue that “*a mere increase in damages is not a justification for provisional measures*” (Rejoinder, para.55).
77. The Claimant does not dispute that no production assets were seized, but insists that its operational capacity is severely threatened by the seizures, that the imposition of the Law 42 payments led to a loss on investment in 2008 and prevented a sale of the latter (Testimony of Mr. Martinez, Transcript, pp.117-118 and 114). It also argues that it may have no other choice than to “walk away” from its investment.
78. The words “necessity” or “harm” do not appear in the relevant ICSID provisions. Necessity is nonetheless an indispensable requirement for provisional measures. It is generally assessed by balancing the degree of harm the applicant would suffer but for the measure.
79. The Respondents are right in pointing out that a number of investment tribunals have required irreparable harm in the sense of harm not compensable by monetary damages. The *Occidental* tribunal found that there was no irreparable harm since the Claimants’ harm, if any, could be

¹⁵ Of the same opinion, in particular, *City Oriente*, Decision on Provisional Measures, para.69.

compensated by a monetary award¹⁶. In the same vein, the *Plama* tribunal mentioned that it accepted the respondent's argument that the harm was not irreparable if it could be compensated by damages¹⁷, but did not discuss the matter further. Similarly, the tribunal in *Metaclad v. Mexico* denied the request and underlined that the measures must be required to protect the applicant's rights from “*an injury that cannot be made good by subsequent payment of damages*”¹⁸.

80. By contrast, the *City Oriente* tribunal distinguished its case from investment cases where the sole relief sought was damages, while *City Oriente* was seeking contract performance¹⁹. In its decision not to revoke the measures, the tribunal stressed that neither Article 47 of the ICSID Convention nor Arbitration Rule 39 “*require that provisional measures be ordered only as means to prevent irreparable harm*”²⁰. In the UNCITRAL investment case of *Paushok v. Mongolia*, the tribunal distinguished *Plama*, *Occidental* and *City Oriente* and concluded that “*irreparable harm*” in international law has a “*flexible meaning*”. It also referred to Article 17A of the UNCITRAL Model Law which only requires that “*harm not adequately reparable by an award of damages is likely to result if the measures are not ordered*”²¹.

81. However defined, the harm to be considered does not only concern the applicant. The *Occidental* tribunal recalled that the risk of harm must be assessed with respect to the rights of both parties. Specifically, it stated that “*provisional measures may not be awarded for the protection of the rights of one party where such provisional measures would cause irreparable harm to the rights of the other party, in this case, the rights of a sovereign State*”.²² In the same spirit, the *City Oriente* tribunal stressed the need to weigh the interests at stake against each other. Referring to

¹⁶ *Occidental*, para.92.

¹⁷ *Plama*, para.46.

¹⁸ *Metalclad Corporation v. United Mexican States* (ICSID Case No. ARB(AF)/97/1), Decision on a request by the Respondent for an order prohibiting the Claimant from revealing information regarding ICSID Case ARB(AF)/97/1, para.8.

¹⁹ *City Oriente*, Decision on Revocation, para.86.

²⁰ *Ibid.*, para.70.

²¹ *Paushok*, paras.62, 68-69.

²² *Occidental*, para.93.

Article 17A(1) of the UNCITRAL Model Law, it emphasized the balance of interests that needs to be struck as follows:

“It is not so essential that provisional measures be necessary to prevent irreparable harm, but that the harm spared the petitioner by such measures must be significant and that it exceeds greatly the damage caused to the party affected thereby.”²³

82. In the circumstances of the present case, this Tribunal finds it appropriate to follow those cases that adopt the standard of “*harm not adequately reparable by an award of damages*” to use the words of the UNCITRAL Model Law. It will also weigh the interests of both sides in assessing necessity.
83. Unlike *Occidental*, this case is not one of only “*more damages*” caused by the passage of time²⁴. It is a case of avoidance of a different damage. The risk here is the destruction of an ongoing investment and of its revenue-producing potential which benefits both the investor and the State. Indeed, if the investor must continue to finance operation expenses while making losses, from a business point of view it is likely that it will reduce its investment and maintenance costs to a minimum and thus its output and the shared revenues. There is also an obvious economic risk that it will cease operating altogether. While profit sharing may be legitimate, expecting that a foreign investor will continue to operate a loss making investment over years is unreasonable as a matter of practice. Contrary to the Respondents' assertion pursuant to which the protection would be granted against the investor's own act of “walking away”, the Tribunal considers that the project and its economic standing is at risk regardless of the conduct of the investor.
84. In reaching this conclusion, the Tribunal has paid due attention to the Respondents' argument that the effect of the seizures was economically neutral for the Claimant. Every time oil is seized for a given amount, past due Law 42 debts are extinguished, which would allow the Claimant to withdraw the equivalent amount from the segregated account. Although

²³ City Oriente, Decision on Revocation, para.72.

²⁴ Occidental, para.99.

the Claimant replies that it will not touch the monies on the segregated account, the objection is mathematically speaking correct. Yet, it misses the point. Indeed, the risk of further deterioration of the relationship possibly ending with the destruction of the investment would still exist. This is especially, but not exclusively so if the investor is liable to settle both the alleged past due Law 42 payments and the newly accruing ones (Transcript, p.195). The consequences of the end of the investment relationship would affect the investor as well as the State. The latter would then in effect lose future Law 42 payments if they are ultimately held to be due.

85. This last observation shows that provisional measures are in the interest of both sides if they are adequately structured, a matter discussed in the next section.

F. ESCROW ACCOUNT

86. As an alternative to its main request for relief, Burlington Oriente confirmed at the hearing that it could envisage an escrow account “*where all the funds that are the subject of this dispute could be held pending its resolution*” (Transcript, pp.23-24, esp. lines 16-18). The Arbitral Tribunal notes the Respondents’ argument that such account would be “*unmanageable and inadequate*” (Transcript, p.211, line 12), since it would exclusively cover the Parties in this arbitration, notwithstanding the joint liability of the Consortium and also because an offshore escrow account would be “*inimical to Ecuador’s sovereignty*” (Transcript, p.212, lines 4-5).
87. The Arbitral Tribunal is of the view that the establishment of an escrow account would provide a balanced solution likely to preserve each Party’s rights. The Republic of Ecuador would have the certainty that the amounts allegedly owing would be paid and could later be collected if held to be due. The investor would benefit from the cessation of the *coactiva* process, and although paying significant amounts into the escrow account, would have the assurance that such amounts could later be recovered if held not to be due. Moreover, in reliance on such assurances, one would

reasonably expect both Parties to continue the performance of the PSCs under their terms.

88. The terms and conditions of the escrow account, and other practicalities call for a number of specifications:

- (i) The escrow account shall contain all future and past payments due under Law 42 and Decree 662. Past payments shall include all payments owed by the Claimant and payed into their segregated account. It appears that past payments (in the amount of USD 327.4 million) were made by the Consortium into two segregated U.S. accounts (one for each of the members of the Consortium, see Request, para.25). Therefore, even if the Consortium were jointly liable for its debts as the Respondents allege, the Claimant will be able to separate the payments owed by it from the payments owed by Perenco.
- (ii) The amounts deposited on the escrow account shall only be released in accordance with a final award, or a settlement agreement duly entered into by the Parties, or with other specific instructions issued by this Tribunal.
- (iii) The escrow agent shall be an internationally recognized financial institution. For reasons of neutrality, it shall not be an Ecuadorian, North American or Bermuda institution.
- (iv) Interest earned on the escrow account should be credited to such account and released in accordance with a final award, or a settlement agreement, or other instructions from this Tribunal.
- (v) The costs incurred by the escrow account shall be borne equally by both Parties but can be made part of the claim for compensation by each Party.

IV. ORDER

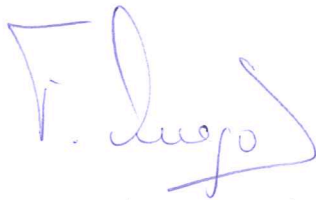
On this basis, the Arbitral Tribunal makes the following order:

1. The Parties shall confer and make their best efforts to agree on the opening of an escrow account at an internationally recognized financial institution incorporated outside of Ecuador, the United States of America and Bermuda;

2. Burlington Oriente shall pay into the escrow account all future and past payments allegedly due under Law 42 and Decree 662, including all payments made by the Claimants into their segregated account;
3. The funds in the escrow account shall only be released in accordance with a final award or a settlement agreement duly entered into by the Parties or with other specific instructions from this Tribunal;
4. The costs of the escrow account shall be borne equally by both Parties and can be made part of the claim for compensation by each Party;
5. The interest accrued on the escrow account shall be credited to such account and released in accordance with a final award, or a settlement agreement, or other instructions from this Tribunal;
6. If the Parties cannot agree on the opening of an escrow account within 60 days from notification of this Order, they shall report to the Arbitral Tribunal setting forth the status of their negotiations and the content of and reasons for their disagreements after which the Arbitral Tribunal will rule on the outstanding issues;
7. The Respondents shall discontinue the proceedings pending against the Claimant under the *coactiva* process and shall not initiate new *coactiva* actions;
8. The Parties shall refrain from any conduct that may lead to an aggravation of the dispute until the Award or the reconsideration of this order. In particular, Burlington Oriente shall refrain from making good on its threat to abandon the project and Ecuador shall refrain from any action that may induce Burlington Oriente to do so;
9. The Order issued by this Tribunal on 6 March 2009 is terminated;
10. Costs are reserved for a later decision or award.



Professor Gabrielle Kaufmann-Kohler
President of the Tribunal



Professor Francisco Orrego Vicuña
Arbitrator



Professor Brigitte Stern
Arbitrator