

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**  
WASHINGTON, D.C.

In the arbitration proceeding between

**PERENCO ECUADOR LIMITED**

Claimant

and

**THE REPUBLIC OF ECUADOR**

Respondent

**ICSID Case No. ARB/08/6**

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**DECISION ON PERENCO'S APPLICATION FOR  
DISMISSAL OF ECUADOR'S COUNTERCLAIMS**

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*Members of the Tribunal*

H.E. Judge Peter Tomka, President  
Mr. Neil Kaplan, C.B.E., Q.C., S.B.S.  
Mr. J. Christopher Thomas, Q.C.

*Secretary of the Tribunal*

Mr. Marco Tulio Montañés-Rumayor

Date: August 18, 2017

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## **I. Introduction**

1. On April 18, 2017, the Claimant filed an Application for Dismissal of Ecuador's Counterclaims (the "Application"), requesting the Tribunal to issue an Order:
  - a) declaring that Ecuador's counterclaims are inadmissible on the grounds of *res judicata*;
  - b) dismissing Ecuador's counterclaims with prejudice; and
  - c) ordering Ecuador to pay all the costs of the arbitration, as well as Perenco's fees and expenses, for the counterclaims phase of these proceedings.<sup>1</sup>
2. On April 20, 2017, the Tribunal invited the Parties to agree, by April 27, 2017, on the briefing schedule for Claimant's Application.
3. The Parties having failed to reach an agreement on such schedule, the Tribunal informed the Parties through a letter from its Secretary of May 3, 2017, that it determined the following calendar for the filing of the respective written pleadings:
  - a) May 23, 2017 for Ecuador's Response to Perenco's Application for Dismissal of Counterclaims (the "Response");
  - b) June 13, 2017 for Perenco's Reply in Support of its Application to Dismiss Ecuador's Counterclaims (the "Reply"); and
  - c) July 4, 2017 for Ecuador's Rejoinder on Perenco's Request for Dismissal of Counterclaims (the "Rejoinder").
4. The Parties filed their written submissions within the above time limits.

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<sup>1</sup> Application, para. 41.

## II. Arguments of the Parties

### 1. Arguments of Perenco

5. In its Application, Perenco submits that “[w]ith the issuance of the Award in the *Burlington* Arbitration on February 7, 2017, the *Burlington* Tribunal has definitively resolved Ecuador’s counterclaims against the Consortium for alleged environmental harm and failure to maintain the Blocks’ infrastructure.”<sup>2</sup> Perenco contends that “Ecuador’s counterclaims are identical as against each of the Consortium partners, the liability at issue in those counterclaims is joint and several as between Perenco and Burlington, and the *Burlington* Award has definitively resolved that joint and several liability.”<sup>3</sup> In Perenco’s view, “[t]he *Burlington* Award therefore has *res judicata* effect in this proceeding, and [this] Tribunal . . . should dispense with any further consideration of and dismiss Ecuador’s counterclaims.”<sup>4</sup>
6. Perenco submits that this Tribunal has authority to apply *res judicata* to preclude re-litigation of a dispute that has already been decided. It argues that the application of the principle of “*res judicata* is fully warranted [in this case] because Ecuador has brought the same dispute against the Consortium members [Perenco and Burlington] in two separate proceedings”<sup>5</sup> and “Ecuador’s counterclaims in both proceedings concern the same subject matter and are premised on the same legal basis.”<sup>6</sup> It points out that “the *Burlington* tribunal itself has recognized [that] ‘the two arbitrations essentially deal with the same alleged damages’ and Ecuador did not dispute the fact that it sought [what *Burlington* calls] ‘identical overlapping compensation with regard to the same alleged damage’ in both proceedings.”<sup>7</sup>
7. In the elaboration of its submission, Perenco refers to the argument put forward by Ecuador in its Reply on the Counterclaims that “pursuant to Ecuadorian law, all the authors of a tort

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<sup>2</sup> Application, para. 1.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*, para. 8.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*, para. 15, quoting from *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Counterclaims, February 7, 2017, paras. 65 and 70 (CA-CC-59) [hereinafter *Burlington* Decision on Counterclaims].

(such as environmental harm) are jointly liable to its victim. Accordingly, Ecuador is entitled to claim for the total amount of damages from Perenco or Burlington or any other author of the environmental harm caused. How the different authors of the environmental harm should ultimately share liability and pay money back to each other is a matter of no concern to Ecuador.”<sup>8</sup>

8. Perenco emphasizes that:

(a) “Ecuador’s counterclaims in both the *Burlington* and *Perenco* arbitrations allege the same environmental and infrastructure damage allegedly caused by the Consortium during its operation of Blocks 7 and 21”;<sup>9</sup>

(b) “Ecuador raised identical arguments to demonstrate that the Consortium violated the same provisions of Ecuadorian law”;<sup>10</sup>

(c) “[T]he factual issues raised in both counterclaims proceedings were the same and Ecuador presented materially identical evidence in both proceedings”;<sup>11</sup>and

(d) “Ecuador has even demanded identical relief from both tribunals.”<sup>12</sup>

9. On the basis of the above arguments, and the characterization of the two proceedings, Perenco concludes that “all the issues – whether factual or legal – forming the basis of Ecuador’s counterclaims in the *Perenco* proceedings have been determined, after extensive briefing and submissions, in the *Burlington* ... Decision [on the counterclaims]”.<sup>13</sup> Therefore, in its view, “[n]ow that the ... Decision [on the counterclaims] has been incorporated into the *Burlington* Award, it fully and finally disposes of Ecuador’s counterclaims on the Consortium’s liability.”<sup>14</sup>

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<sup>8</sup> *Ibid.*, para. 16, quoting from Ecuador’s Reply on Counterclaims, para. 8.

<sup>9</sup> *Ibid.*, para. 17.

<sup>10</sup> *Ibid.*, para. 18.

<sup>11</sup> *Ibid.*, para. 19.

<sup>12</sup> *Ibid.*, para. 20.

<sup>13</sup> *Ibid.*, para. 21.

<sup>14</sup> *Ibid.*

10. Expecting that Ecuador will oppose the Application on the basis that Perenco and Burlington have different legal personalities, Perenco urges the Tribunal to “reject any such formalistic arguments ... because Burlington and Perenco amply satisfy the identity of parties requirement.”<sup>15</sup>
11. In support of this view, Perenco argues that:
- (a) Perenco and Burlington operated Blocks 7 and 21 together as the members of the Consortium;<sup>16</sup>
  - (b) the liability that Ecuador puts at issue is the Consortium’s;<sup>17</sup>
  - (c) in case that this “Tribunal does not agree that Perenco and Burlington are the same party – *i.e.* Consortium – for the purposes of Ecuador’s counterclaims, they are at the very least privies in interest.”<sup>18</sup> In this context, it refers to the second decision of the tribunal in *Ampal-American Israel Corp. et al v. Arab Republic of Egypt* which took the view that “the doctrine of *res judicata* applies not simply to the parties themselves but also to those who are in privity of interest with them.”<sup>19</sup>
12. In its Reply, Perenco maintains its submissions and elaborates them further in answering Ecuador’s arguments in the latter’s Response. It stresses that it is Ecuador “who formulated *verbatim* identical counterclaims for the exact same harm on the exact same legal basis in two separate proceedings”,<sup>20</sup> claiming “the full amount of alleged damages against each of Burlington and Perenco.”<sup>21</sup> It also points out that it was Ecuador “who rebuffed Perenco’s

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<sup>15</sup> *Ibid.*, para. 22.

<sup>16</sup> *Ibid.*, para. 23.

<sup>17</sup> *Ibid.*, para. 24. Perenco draws the Tribunal’s attention, by way of example, to different parts of Ecuador’s written pleadings in which the latter referred to the Consortium’s environmental liability. In Annex A to its Reply, Perenco provides the full list of references to the “Consortium” being liable in Ecuador’s written submissions, both in the present proceedings as well as in the *Burlington* proceedings.

<sup>18</sup> Application, para. 25. See also Reply, paras. 24 *et seq.*

<sup>19</sup> Application, para. 25. The quote is from *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, February 21, 2017, para. 261 (CA-CC-72).

<sup>20</sup> Reply, para. 1; see also paras. 7 and 8.

<sup>21</sup> *Ibid.*

attempt to have those identical counterclaims determined only in the *Burlington* proceedings.”<sup>22</sup>

13. Perenco also rejects Ecuador’s argument that its Application is premature in view of the fact that the *Burlington* award is subject to annulment proceedings initiated by Ecuador.<sup>23</sup> Nor does Perenco agree with Ecuador’s contention that its Application is precluded by ICSID Arbitration Rule 41(1) and that it waived its right to now invoke *res judicata* as a ground for declaring Ecuador’s counterclaims in these proceedings inadmissible.<sup>24</sup>
14. At the end of its Reply, Perenco revised its request for relief. It requests this Tribunal to issue an Order:

“a. Declaring that Ecuador’s counterclaims are inadmissible on the ground of *res judicata* and dismissing Ecuador’s counterclaims with prejudice;

b. In the alternative:

i. Ordering as part of the award in this case that Perenco is jointly and severally liable with Burlington for US \$ 41,776,492.77 (the ‘Gross Counterclaims Amount’) in respect of Ecuador’s counterclaims against the Perenco-Burlington Consortium;

ii. Declaring that Perenco has no further liability with respect to the counterclaims beyond the Gross Counterclaims Amount, or such portion of this amount that remains net of any satisfaction that

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<sup>22</sup> *Ibid.*, see also para. 21. Perenco submits as Exhibit CE-CC-415 a copy of its letter of June 24, 2011 addressed to Ecuador in which Perenco proposed “that the counterclaims be fully addressed in the Burlington Arbitration as to all parties, including Perenco”. It is to be noted that, at that moment, Ecuador raised counterclaims only against Burlington, but not yet against Perenco. The counterclaims against Perenco were presented by Ecuador on December 5, 2011 as part of its Counter-Memorial on Liability. The Tribunal had been earlier, on July 13, 2011, informed by Ecuador that “it may submit various counterclaims with its counter-memorial [on liability]”. See Interim Decision on the Environmental Counterclaim, August 11, 2015, paras. 5 and 6. Ecuador, through its letter to Perenco of June 29, 2011 declined Perenco’s proposal that the counterclaims be dealt with only by the *Burlington* Tribunal on the grounds that “[t]he current situation results from Burlington’s and Perenco’s decision to bring separate claims against Ecuador” and that “[i]t must have been self-evident to Burlington and Perenco that one consequence of their decision would be that any counterclaims by Ecuador could be brought in the separate proceedings.” (CE-CC-416).

<sup>23</sup> Reply, paras. 45 *et seq.*

<sup>24</sup> *Ibid.*, paras. 49 *et seq.*

Ecuador has obtained from Burlington (the ‘Net Counterclaims Amount’);

iii. Further ordering that Perenco may satisfy the Net Counterclaims Amount by deducting it from the amount that Ecuador owes to Perenco under this Tribunal’s final award; and

iv. Otherwise conditioning the above order on obtaining satisfactory guarantees from Ecuador that it will not enforce the Tribunal’s Award and the *Burlington* Award cumulatively, whether by offset or otherwise, such that the Gross Counterclaims Amount is the full amount that Ecuador can recover against both Perenco and Burlington; and

c. Ordering that Ecuador hold Perenco harmless against any future claims based on alleged environmental and infrastructure liability arising out of Blocks 7 and 21, before any jurisdiction whatsoever whether arbitral or judicial, national or international; and

d. Ordering Ecuador to pay all the costs of the arbitration, as well as Perenco’s fees and expenses, for the counterclaims phase of these proceedings.”<sup>25</sup>

## 2. *Arguments of Ecuador*

15. Ecuador requests the Tribunal to dismiss Perenco’s Application for several reasons.

16. It considers it late since the Parties have been arbitrating “the still-pending counterclaims” for more than five years. Ecuador characterizes Perenco’s approach as an “opportunistic and eleventh-hour desperate attempt to avoid this Tribunal’s decision which is expected in the coming months.”<sup>26</sup> It argues that if Perenco wished to prevent parallel litigation of the counterclaims, it “should have filed a *lis pendens* application many years ago”,<sup>27</sup> as early

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<sup>25</sup> *Ibid.*, para. 65.

<sup>26</sup> *Response*, para. 1.

<sup>27</sup> *Ibid.*, paras. 4 and 10. See also Rejoinder, paras. 24-26.

as in December 2011. In Ecuador’s view, Perenco “waited until it knew what the result of the *Burlington* arbitration was”<sup>28</sup> and now hopes to “take advantage of the known result in the *Burlington* arbitration, to limit its liability towards Ecuador.”<sup>29</sup> Ecuador contends that “Perenco’s environmental experts have no doubt anticipated [that] this Tribunal’s independent environmental expert is likely to find significantly more environmental damage than the *Burlington* tribunal in its recent Award.”<sup>30</sup> Ecuador alleges that “Perenco has most likely realized that, as the operator of Blocks 7 and 21, it could be solely responsible for the infrastructure and environmental harm caused to these Blocks.”<sup>31</sup> Ecuador is convinced that “this Tribunal, with the assistance of its own independent expert, will find far more pollution in Blocks 7 and 21 than the *Burlington* tribunal did”<sup>32</sup> and thus alleges that “Perenco simply concluded that its situation could only worsen.”<sup>33</sup>

17. Ecuador submits that Perenco’s Application is inadmissible on the basis of ICSID Arbitration Rules 41(1), 26(3) and 27 because Perenco did not raise its objection promptly,<sup>34</sup> and “accordingly waived its right to object.”<sup>35</sup>
18. Ecuador also points out that this Tribunal was the first one to issue its Interim Decision on the Environmental Counterclaim in August 2015 while the *Burlington* tribunal rendered its Decision on Counterclaims only in February 2017. In Ecuador’s view, the Interim Decision resolved “at least twelve different legal and factual issues with finality.”<sup>36</sup> Perenco’s Application is thus precluded by this Tribunal’s Interim Decision and it should be declared inadmissible.<sup>37</sup>
19. It also denies that the *Burlington* tribunal has definitively resolved the counterclaims. It draws this Tribunal’s attention to the fact that the *Burlington* Award is the subject of

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<sup>28</sup> Response, para. 11.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> Rejoinder, para. 8.

<sup>32</sup> *Ibid.*, para. 9.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*, paras. 27 and 31.

<sup>35</sup> *Ibid.*, para. 31.

<sup>36</sup> Response, para. 31.

<sup>37</sup> Rejoinder, paras. 3-4 and 11 *et seq.*

annulment proceedings.<sup>38</sup> In Ecuador’s view, “an ICSID award that is the object of a pending application for annulment ... cannot be invoked as having *res judicata* effect.”<sup>39</sup>

20. Ecuador, in its Annulment Application, challenges the *Burlington* Award also as far as the Decision on Counterclaims, which has been made an integral part of the Award,<sup>40</sup> is concerned. It argues that the *Burlington* tribunal manifestly exceeded its powers and failed to state its reasons when dealing with the counterclaims, pointing to some twelve “serious flaws”.<sup>41</sup>
21. Ecuador submits that if the annulment application is successful and if this Tribunal were now to dismiss, with prejudice, its counterclaims as inadmissible, as requested by Perenco, Ecuador would be deprived of a decision on its counterclaims,<sup>42</sup> leaving it “without any decision whatsoever on the environmental harm caused to Blocks 7 and 21, despite having been engaged in six years of costly proceedings, during which the existence of such harm was confirmed by both tribunals.”<sup>43</sup>
22. Ecuador submits that in any event Perenco’s position on *res judicata* “is manifestly contrary to ... international law”,<sup>44</sup> and therefore the Application has to be dismissed. It elaborates that in international law *res judicata* applies between two disputes only when the triple identity test is satisfied: there shall be the same parties, the same subject matter and the same cause of action.<sup>45</sup>
23. Ecuador argues that Perenco and Burlington are legally and economically independent entities, that they are not the same party, either formally or in effect.<sup>46</sup> It points out that the counterclaims it brought up in the *Burlington* arbitration were against Burlington, and

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<sup>38</sup> Response, paras. 4 and 37; Rejoinder, paras. 6 and 40.

<sup>39</sup> Rejoinder, para. 40.

<sup>40</sup> See *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, February 7, 2017, para. 9 (CL-CC-60) [hereinafter *Burlington* Award].

<sup>41</sup> Response, para. 38. In a letter to the Tribunal (copied to Perenco) of June 12, 2017, Ecuador informed the Tribunal that on June 7, 2017, it filed a supplemental annulment application setting out, “in addition to the five grounds for annulment” stated in its Application of February 14, 2017, seven further grounds.

<sup>42</sup> Response, para. 4.

<sup>43</sup> *Ibid.*, para. 43 (emphasis in the original).

<sup>44</sup> *Ibid.*, para. 47.

<sup>45</sup> *Ibid.*, paras. 48 and 49.

<sup>46</sup> *Ibid.*, para. 53; Rejoinder, para. 78.

not against Perenco or the Consortium. It further emphasises that the jurisdiction of the *Burlington* tribunal to hear and determine the counterclaims derived from an agreement entered into by Burlington and Ecuador on May 26, 2011, to which Perenco was not a party.<sup>47</sup> And it adds that “the *Burlington* tribunal did not overstep the limits of its jurisdiction”,<sup>48</sup> and pronounced itself only on the liability of Burlington in respect of the counterclaims, not on Perenco’s, nor on the Consortium’s liability, which would not even be possible since the Consortium has no legal personality under Ecuadorian law.<sup>49</sup>

24. Ecuador thus contends that “Burlington and Perenco are not functionally the same party for counterclaims purposes” but “[t]hey have independent liability, separately put at issue in distinct proceedings”.<sup>50</sup>
25. Ecuador also rejects Perenco’s argument that *res judicata* applies, despite the lack of formal identity between Perenco and Burlington, because the two companies were privies-in-interest. It maintains that “[*r*]es judicata applies only when there is strict identity of the parties to the first and second arbitrations.”<sup>51</sup> According to Ecuador, privity, in its natural definition, “exists specifically between an owner and property.”<sup>52</sup> It explains that “[w]hen the property is party to an arbitration, the owner equally stands to benefit or suffer economically as a direct consequence of its outcome [a]nd, thus, the results of that arbitration should be applicable against the owner in future arbitrations, just as they would be against the property.”<sup>53</sup> Consequently, Ecuador denies that there can be privity between Perenco and Burlington, which are legally and economically distinct entities; one does not own the other.<sup>54</sup>

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<sup>47</sup> Response, paras. 55, 57-59. Ecuador refers to para. 60 of the *Burlington* Award, although the reference should rather be to para. 60 of the *Burlington* Decision on Counterclaims of the same date, which was subsequently made an integral part of the Award.

<sup>48</sup> *Ibid.*, para. 60.

<sup>49</sup> Rejoinder, para. 55.

<sup>50</sup> Response, para. 64.

<sup>51</sup> *Ibid.*, para. 66. In support of its view, Ecuador refers to the final award of March 14, 2003 in *CME Czech Republic B.V. v. The Czech Republic*, para. 432 (CA-508), and to *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, June 11, 2012, paras. 1132-1133 (EL-353). See also Rejoinder, paras. 60 and 62.

<sup>52</sup> Response, para. 68.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*, para. 70.

26. Ecuador further argues that the evidence presented in the two proceedings is not identical and it has been presented in different ways to this Tribunal and to the *Burlington* tribunal.<sup>55</sup> It also points to the fact that while “the *Burlington* tribunal relied on the testimony of party-appointed experts and, in addition, sought and obtained detailed explanations and clarifications ... in the course of [its] site visit”, “this Tribunal has refused to place any reliance on the testimony of the Party-appointed experts and has instead resorted to appointing its own independent environmental expert.”<sup>56</sup> Ecuador concludes that accepting the *Burlington* Decision on Counterclaims as *res judicata* for the purpose of these proceedings “would ... entail transplanting a decision reached by another tribunal on the basis of a different evidentiary record to proceedings which did not follow the same course or pattern.”<sup>57</sup> Ecuador concludes that “these are adequate reasons to reject the application of *res judicata*.”<sup>58</sup>
27. Ecuador disagrees with Perenco’s alternative request for relief which the latter formulated in its Reply.<sup>59</sup> In Ecuador’s view, “an offset against Perenco for the same counterclaims damages awarded in the *Burlington* Decision is ... precluded by the 2015 Interim Decision on Counterclaims rendered by this Tribunal.”<sup>60</sup> It also considers such offset premature in light of the pending annulment proceedings in the *Burlington* case.<sup>61</sup>
28. It is of the view that it is inappropriate for the Tribunal to obtain satisfactory guarantees from Ecuador to prevent double recovery. It submits that “[a]ny specific measures aimed at preventing double recovery ... are a matter of the enforcement of the decisions against Perenco and Burlington.”<sup>62</sup>
29. Ecuador considers as inadmissible Perenco’s request that the Tribunal order that Ecuador hold Perenco harmless against any future claims based on alleged environmental and

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<sup>55</sup> *Ibid.*, paras. 82, 84 *et seq.* See also Rejoinder, para. 53, in which it states that “the tribunals received starkly different evidence and argument.”

<sup>56</sup> *Ibid.*, para. 88.

<sup>57</sup> *Ibid.*, para. 94.

<sup>58</sup> *Ibid.*

<sup>59</sup> See para. 14 above.

<sup>60</sup> Ecuador’s Rejoinder, para. 93.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*, para. 94.

infrastructure liability arising out of Blocks 7 and 21. It points out that such a claim has never been presented by Perenco in the course of more than five years of proceedings relating to Ecuador's counterclaims. It considers this claim as an entirely new claim, which has been presented too late, contrary to Arbitration Rule 40(2).<sup>63</sup>

30. Ecuador requests that the Tribunal to:

- “Dismiss Perenco’s Application for Dismissal of Ecuador’s Counterclaims dated 18 April 2017;
- Dismiss Perenco’s alternative requests for relief;
- Dismiss Perenco’s request that Ecuador hold Perenco harmless against any future claims based on alleged environmental and infrastructure liability arising out of Blocks 7 and 21, before any jurisdiction whatsoever whether arbitral or judicial, national or international; and
- Order Perenco to reimburse Ecuador all the costs and expenses incurred in responding to Perenco’s Application, with interest.”<sup>64</sup>

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<sup>63</sup> *Ibid.*, paras. 95-97.

<sup>64</sup> *Ibid.*, para. 100.

### III. Analysis by the Tribunal

31. The Tribunal starts its analysis with providing a short chronology of events in these proceedings and in the *Burlington* proceedings as they are relevant to considering the Application:

- January 17, 2011: Ecuador presented, pursuant to Article 40(2) of the ICSID Arbitration Rules, environmental and infrastructure counterclaims against Burlington, when it filed its Counter-Memorial on Liability in the *Burlington* proceedings;<sup>65</sup>
- May 26, 2011: although Burlington initially stated that it would challenge the *Burlington* tribunal's jurisdiction, Burlington and Ecuador concluded an agreement by which Burlington accepted the jurisdiction of the tribunal over the counterclaims;<sup>66</sup>
- June 24, 2011: Perenco's letter to Ecuador proposing "that the counterclaims be fully addressed in the *Burlington* Arbitration as to all parties, including Perenco";<sup>67</sup>
- June 29, 2011: Ecuador's letter to Perenco declined this proposal on the grounds that "[t]he current situation results from Burlington's and Perenco's decision to bring separate claims against Ecuador" while "[i]t must have been self-evident to Burlington and Perenco that one consequence of their decision would be that any counterclaims by Ecuador could be brought in the separate proceedings";<sup>68</sup>

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<sup>65</sup> *Burlington* Decision on Counterclaims, para. 6 (CL-CC-59).

<sup>66</sup> *Ibid.*, and E-428.

<sup>67</sup> Exhibit CE-CC-415.

<sup>68</sup> Exhibit CE-CC-416.

- July 13, 2011: Ecuador informed the Tribunal that “it may submit various counterclaims with its counter-memorial [on liability]”;<sup>69</sup>
- July 28, 2011: this Tribunal, in consultation with the Parties, fixed the procedural calendar for counterclaims;
- September 30, 2011: Ecuador filed a Supplemental Memorial on Counterclaims in the *Burlington* proceedings;
- December 5, 2011: Ecuador filed a Counter-Memorial on Liability and Counterclaims in these proceedings;
- February 13, 2012: following the Parties’ agreement, this Tribunal fixed a new procedural calendar;
- April 24, 2012: Ecuador filed a Second Supplemental Memorial on Counterclaims in the *Burlington* proceedings;
- April 27, 2012: Ecuador filed a Supplemental Memorial on Counterclaims in these proceedings;
- 28 September 28, 2012: Perenco filed a Counter-Memorial on Counterclaims;
- 29 September 29, 2012: Burlington filed a Counter-Memorial on Counterclaims;
- February 22, 2013: Ecuador filed its Reply on Counterclaims in these proceedings;

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<sup>69</sup> Interim Decision on the Environmental Counterclaim, August 11, 2015, para. 6.

- March 18, 2013: Ecuador filed its Reply on Counterclaims in the *Burlington* proceedings;
- July 8, 2013: Burlington filed its Rejoinder on Counterclaims;
- July 12, 2013: Perenco filed its Rejoinder on Counterclaims;
- September 9 to 17, 2013: the hearing on the counterclaims in this proceeding was held in The Hague;
- November 6, 2013: Perenco and Ecuador filed their Post-Hearing Briefs;
- November 22, 2013: Perenco and Ecuador filed their Reply Post-Hearing Briefs;
- June 1 to 7, 2014: the *Burlington* tribunal held hearings on the counterclaims in Paris, originally scheduled for August 26 to 31, 2013 but rescheduled due to the suspension of the proceedings for more than five months following the disqualification of an arbitrator;
- October 3, 2014: Burlington and Ecuador filed their Post-Hearing Briefs;
- March 29 to April 1, 2015: the *Burlington* tribunal, accompanied by the parties' representatives and counsel, conducted a site visit;
- July 15, 2015: Burlington and Ecuador filed Post-Site Visit Briefs;
- August 11, 2015: this Tribunal issued its Interim Decision on the Environmental Counterclaim (reserving its decision on the infrastructure counterclaim with which it will deal either in its quantum decision or thereafter). In

that Decision, the Tribunal made certain findings of fact and Ecuadorian law and recommended that the Parties consider their respective positions and seek to negotiate a settlement in light of what the Tribunal had found. It added that if the Parties did not arrive at a settlement, in light of its doubts about the expert evidence tendered by both Parties, it would proceed to appoint an independent expert who would conduct sampling in accordance with the Tribunal's findings and instructions. The Tribunal was later informed that the Parties were unable to settle their dispute and therefore on July 6, 2016 it proceeded to appoint the expert jointly recommended to it by the Parties

- September 18, 2015: upon the *Burlington* tribunal's invitation, Burlington and Ecuador filed their comments on this Tribunal's Interim Decision on Ecuador's Environmental Counterclaim;
- July 6, 2016: as noted above, on this date, the Tribunal appointed an independent environmental expert based on the joint proposal by Perenco and Ecuador. The expert then familiarised himself with the working papers of the Parties' experts in preparation for an initial survey of the sites in Ecuador that are at issue in the environmental counterclaim dispute;
- November 1 to 5, 2016: the Tribunal's expert and the Parties' representatives and counsel visited the place connected with the dispute;
- February 7, 2017: the *Burlington* tribunal issued its Decision on Counterclaims and its Decision on Reconsideration and Award;
- April 18, 2017: upon the Tribunal's invitation, Perenco and Ecuador filed their comments on the *Burlington* tribunal's Decision on Counterclaims and on the Decision on Reconsideration and Award;

- April 18, 2017: Perenco filed its Application for Dismissal of Ecuador’s Counterclaims;
  - From August 2, 2017 until the time of this writing: the Tribunal’s expert, with his support team, accompanied by Perenco’s and Ecuador’s representatives and counsel, have visited Blocks 7 and 21 for the purpose of conducting sampling work.<sup>70</sup>
32. This chronology shows that the proceedings on Ecuador’s counterclaims in the two proceedings progressed in parallel, although in the *Burlington v. Ecuador* case, the counterclaims were presented more than 10 months earlier. The Parties were fully aware of this fact.
  33. Parallel proceedings are, to the extent possible, to be avoided. However, neither this Tribunal nor the *Burlington* tribunal had the power to order the consolidation of the parts of the proceedings relating to counterclaims *proprio motu*.
  34. The Tribunal notes that Perenco suggested to Ecuador “that the counterclaims be fully addressed in the *Burlington* Arbitration”;<sup>71</sup> the Tribunal equally notes the reasons provided by Ecuador for declining that suggestion.<sup>72</sup>
  35. The Tribunal further observes that Perenco never in the past challenged its jurisdiction to hear Ecuador’s counterclaims nor their admissibility.
  36. It should be recalled that the fact that this Tribunal was the first one to hold a hearing on the counterclaims in 2013 and to issue its Interim Decision on Environmental Counterclaims in 2015, the decision in which a number of legal issues under Ecuadorian law were determined with finality, but this did not prevent the *Burlington* tribunal from

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<sup>70</sup> Being interested in the timely completion of these arbitral proceedings, Perenco suggested that “[i]n any event, briefing on [its] Application should proceed in parallel to [Tribunal’s expert] Mr. MacDonald’s work” (Application, para. 6).

<sup>71</sup> Exhibit CE-CC-415 (Perenco’s letter was made available to the Tribunal only on April 18, 2017).

<sup>72</sup> Exhibit CE-CC-416 (Ecuador’s letter was made available to the Tribunal only on April 18, 2017).

holding hearings on the counterclaims in 2014 and issuing its own Decision on Counterclaims in 2017.

37. The *Burlington* tribunal noted that “[o]n 11 August 2015, the *Perenco* tribunal issued an Interim Decision on the Environmental Counterclaim ... in which it ruled on certain issues of fact and law.”<sup>73</sup> The tribunal further observed that it “is mindful of the separate nature of the two arbitrations and of its duty to resolve the dispute before it solely on its own record and merits.”<sup>74</sup> It continued that it “is also mindful of the risk of double recovery ..., and of the potential risk of contradictory decisions.”<sup>75</sup> And then it added: “the Tribunal will refer to the *Perenco* Decision in those instances where, in spite of the desire to avoid contradictions, it reaches a conclusion different from that of the *Perenco* tribunal”.<sup>76</sup>
38. The *Burlington* tribunal’s being aware of the risk of double recovery, which the Parties before it acknowledged, stated that it “lack[ed] the necessary information or basis to adopt any specific measures ... to prevent double recovery.”<sup>77</sup> It therefore noted that it must leave the task of preventing double recovery “to the *Perenco* tribunal as the one deciding in second place”,<sup>78</sup> adding that, “as a matter of principle, [its] Decision cannot serve and may not be used to compensate Ecuador twice for the same damage.”<sup>79</sup>
39. It seems therefore that the *Burlington* tribunal expected this Tribunal’s final decision on counterclaims to be issued subsequently, in which this Tribunal will have to take care of preventing double recovery, taking into account the Decision on Counterclaims in the *Burlington* proceedings.
40. This Tribunal, in its Interim Decision, resolved all legal issues which divided the Parties and made a number of legal and factual determinations as far as Ecuador’s environmental counterclaim was concerned.

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<sup>73</sup> *Burlington* Decision on Counterclaims, para. 64.

<sup>74</sup> *Ibid.*, para. 69.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*, para. 1086.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*

41. These issues have been determined by the Tribunal with finality. The Tribunal earlier concluded, when it dealt with Ecuador’s Motion for Reconsideration of the Tribunal’s Decision on Remaining Issues of Jurisdiction and Liability that “it does not have the power to reopen and reconsider its findings”.<sup>80</sup> The Tribunal has taken the view that “[t]here is ample prior authority in support of the view [that] once the tribunal decides with finality any of the factual or legal questions put to it by the parties ... such a decision becomes *res judicata*”.<sup>81</sup>
42. The Tribunal, being consistent, cannot now take a different view as far as the nature of its Interim Decision on the Environmental Counterclaims is concerned.
43. Since the Tribunal ruled in the Interim Decision on various legal and factual issues relating to Ecuador’s environmental counterclaim, this necessarily implies that it considered this counterclaim admissible. The Tribunal could not have ruled on these various legal and factual issues if it had not been convinced that it had jurisdiction over Ecuador’s counterclaim and that it was admissible.
44. At no previous stage of the proceedings relating to Ecuador’s counterclaims has Perenco raised objections, either to the Tribunal’s jurisdiction or to the admissibility of the counterclaims. Perenco was of course aware of the counterclaims raised by Ecuador in the *Burlington* proceedings, admitting that it “and Burlington ... presented a joint defense throughout the counterclaims phase”.<sup>82</sup> It has raised its objection to the admissibility of Ecuador’s counterclaims only now, after more than five years of arbitrating before this Tribunal, and after the Tribunal had issued its Interim Decision and appointed its Expert to assist it with “ascertaining the environmental condition of the Blocks [7 and 21] in

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<sup>80</sup> Decision on Ecuador’s Reconsideration Motion, April 10, 2015, para. 97.

<sup>81</sup> *Ibid.*, para. 43. The cases (*CMS Gas Transmission v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005; *Waste Management Inc. v. United Mexican States (Waste Management II)*, ICSID Case No. ARB(AF)/00/3, Decision on Mexico’s Preliminary Objection, June 26, 2002; *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, November 30, 2012; and *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Respondent’s Request for Reconsideration, March 10, 2014; are quoted in paras. 44 to 47 of the Decision on Ecuador’s Reconsideration Motion.

<sup>82</sup> Application, para. 34.

accordance with the legal and factual findings made by the Tribunal in [its Interim] Decision.”<sup>83</sup>

45. The Tribunal understands Perenco’s position that it could not have earlier raised its objection to the admissibility of Ecuador’s counterclaims based on the *res judicata* effect of the Decision on the Counterclaims rendered by the *Burlington* tribunal on February 7, 2017 and incorporated into the Award.
46. This Tribunal is not, however, convinced that the *Burlington* tribunal’s Decision renders Ecuador’s counterclaims, the admissibility of which had not been previously challenged and on which the Tribunal ruled in its Interim Decision of August 11, 2015, now inadmissible. At best, the Tribunal could consider that they may have become moot and the Tribunal need not rule on them because its decision/award would be “devoid of any purpose”.<sup>84</sup> But this is not the situation here, for the following reasons.
47. Ecuador filed, on February 14, 2017,<sup>85</sup> its Application under Article 52(1) of the ICSID Convention requesting the annulment of the *Burlington* Award, including the Decision on Counterclaims, and requested a stay of enforcement of the Award. Under Article 52(5) of the Convention, in such a case “enforcement shall be stayed provisionally while the [*ad hoc*] Committee rules on such request.” According to the publicly available information from the ICSID website, the *ad hoc* Annulment Committee held a hearing on the request for the stay of enforcement of the award on July 18, 2017 and is currently deliberating. If the stay is not lifted but continues, the Award, including the Decision on the Counterclaims, is unenforceable. As the Convention’s architect, A. Broches, observed “[a]lthough the Convention does not explicitly so provide, a *stay of enforcement* necessarily carries with it a *suspension of recognition* of the award which means that to the extent of such a stay the

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<sup>83</sup> Interim Decision on the Environmental Counterclaim, para. 611(8).

<sup>84</sup> *Northern Cameroons, Judgment of 2 December 1963, I.C.J. Reports 1963*, p. 38; *Nuclear Tests (Australia v. France), Judgment of December 20, 1974, I.C.J. Reports 1974*, p. 271, para. 271.

<sup>85</sup> The Application for annulment was filed just 7 days after the Award had been dispatched to the Parties, perhaps the ‘fastest’ annulment application in the history of ICSID. Article 52(2) of the ICSID Convention provides that “[t]he application shall be made within 120 days after the date on which the award was rendered”. In practice, applications are made rather shortly before the expiry of this period.

*award may not be relied on as a final decision.*<sup>86</sup> Other authors familiar with the ICSID system have expressed the view that “a stay [of enforcement] effectively freezes all binding aspects of the award, including its *res judicata* effect.”<sup>87</sup>

48. One may consider that at least one characteristic feature of the award, even if still formally considered *res judicata*, is suspended. As the *ad hoc* Annulment Committee in *MINE v. Guinea* observed “if an *ad hoc* Committee grants a stay of enforcement, the obligation of the party against whom the Award was rendered to abide and comply with the terms of the Award is *pro tanto* suspended.”<sup>88</sup>
49. The *res judicata* attached to an ICSID award is, however, of a rather particular nature. It is true that Article 53(1) of the Convention provides that “[t]he award shall be binding on the parties and shall not be subject to any appeal or any other remedy except those provided for in this Convention”. This provision is usually perceived as expressing the binding nature of the award in terms of *res judicata*.<sup>89</sup> The only remedies provided for are revision (Article 51) and annulment (Article 52).<sup>90</sup>
50. Ecuador has availed itself of one of these remedies and requested annulment. Under Article 52(4) of the Convention, the *ad hoc* Annulment Committee “shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1)”. If the Award is annulled in full then the *res judicata* nature of that Award is “destroyed”<sup>91</sup>, if it is annulled in part (in the instant case, for example, in respect of the Decision on Counterclaims), that annulled part is deprived of a *res judicata* quality.
51. In view of this uncertainty of the future status of the *Burlington* Award, in particular the Decision on Counterclaims incorporated into it, the Tribunal considers that it should not declare Ecuador’s [environmental] counterclaim as inadmissible in these proceedings,

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<sup>86</sup> A. Broches, ‘Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution’ in 2 *ICSID Review-Foreign Investment Law Journal*, 1987, p. 294 (emphasis added).

<sup>87</sup> L. Reed, J. Paulsson and N. Blackaby, *Guide to ICSID Arbitration* (Kluwer Law International, 2004), p. 104.

<sup>88</sup> *Maritime International Nominees Establishment (MINE) v. Republic of Guinea*, ICSID Case No. ARB/84/4, Interim Decision No. 1 of the *ad hoc* Committee, August 12, 1988, para. 9.

<sup>89</sup> C. Schreuer *et al*, *The ICSID Convention: A Commentary* (2nd ed., Cambridge University Press, 2009), p. 1099.

<sup>90</sup> Report of the Executive Directors on the Convention, para. 41.

<sup>91</sup> C. Schreuer *et al*, *supra* note 89, p. 901.

moreover with prejudice, as requested by Perenco. The Tribunal is certainly under no obligation to do so.

52. The Tribunal will thus continue in its work, with the assistance of its Expert, and issue in due course its final Decision on Counterclaims, being aware of its duty to eliminate the risk of double recovery.

#### **IV. Decision**

53. For the above reasons, the Tribunal decides that:

- (a) Perenco's Application for Dismissal of Ecuador's Counterclaims is rejected; and
- (b) Costs are reserved for future determination.

[signed]  
Judge Peter Tomka  
President of the Tribunal

[signed]  
Mr. Neil Kaplan, C.B.E., Q.C., S.B.S.  
Arbitrator

[signed]  
Mr. J. Christopher Thomas, Q.C.  
Arbitrator