PCA Case No. 2023-35

IN THE MATTER OF AN ARBITRATION PURSUANT TO THE AGREEMENT BETWEEN THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA AND THE GOVERNMENT OF THE REPUBLIC OF ECUADOR CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT, SIGNED ON 21 MARCH 1994, ENTERED INTO FORCE ON 1 JULY 1997, AND TERMINATED ON 19 MAY 2018 (the "Treaty")

- and -

THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (revised in 2010) (the "UNCITRAL Rules")

- between -

JUNEFIELD GOLD INVESTMENTS LIMITED (PEOPLE'S REPUBLIC OF CHINA) (the "Claimant")

- and -

THE REPUBLIC OF ECUADOR

(the "Respondent" or "Ecuador", and together with the Claimant, the "Parties")

PARTIAL AWARD ON JURISDICTION

Tribunal
Ms. Sofia Martins (Presiding Arbitrator)
Mr. Ignacio Suárez Anzorena
Prof. Philippe Sands KC

Registry and Secretary
Mr. Julian Bordaçahar

Permanent Court of Arbitration

2 June 2025

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LIST OF DEFINED TERMS AND ABBREVIATIONS

TERM	DEFINITION
BIT	Bilateral investment treaty
Claimant or Junefield	Junefield Gold Investments Limited
Counter-Memorial on Objections to Jurisdiction	Junefield's Counter-Memorial on Objections to Jurisdiction, dated 2 July 2024
Contracting Parties	The People's Republic of China and the Republic of Ecuador
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States
ICJ	International Court of Justice
Memorial on Objections to Jurisdiction	Ecuador's Memorial on Objections to Jurisdiction, dated 15 April 2024
Parties	The Claimant and the Respondent
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
Rejoinder on Jurisdiction	Junefield's Rejoinder on Objections to Jurisdiction, dated 19 November 2024
Reply on Jurisdiction	Ecuador's Reply on Objections to Jurisdiction, dated 10 September 2024
Reply to Request for Arbitration	Reply to Claimant's Request for Arbitration, dated 9 December 2022
Request for Arbitration	The Claimant's Request for Arbitration, dated 4 October 2022
Respondent or Ecuador	The Republic of Ecuador
Treaty	Agreement between the Government of the People's Republic of China and the Government of the Republic of Ecuador, concerning the Encouragement and Reciprocal Protection of Investment, signed on 21 March 1994, entered into force on 1 July 1997, and terminated on 19 May 2018
Tribunal	The arbitral tribunal in the present proceedings
UNCITRAL Rules	The Arbitration Rules of the United Nations Commission on Trade Law, revised in 2010
VCLT	Vienna Convention on the Law of Treaties, done on 23 May 1969

Hearing	The hearing on jurisdiction, held on 11 and 12 December 2024 at the premises of the Permanent Court of Arbitration in the Peace Palace in The Hague.
PHBs	Post-Hearing Briefs
FET	Fair and Equitable Treatment contained in Article 3.1 of the Treaty
PS	Protection and Security contained in Article 3.1 of the Treaty
FIR	Fork in the road clause contained in Article 9.3 of the Treaty
MFN Clause	Most Favored Nation clause contained in Article 3.2 of the Treaty
5 June Judgment	Judgment rendered by the First Instance Civil Judge of Cuenca, dated 5 June 2018
3 August Judgment	Judgment rendered by the Court of Appeal of the Azuay Province of the Republic of Ecuador, dated 3 August 2018

I. THE PARTIES

1. The Claimant in this arbitration is Junefield Gold Investments Limited (the "**Claimant**"). The Claimant is represented in this arbitration by:

Alejandro López Ortiz
Dany Khayat
José Caicedo
Isabela Lacreta
Emiliano Represa
Mayer Brown LLP
10 Avenue Hoche
Paris 75008
France

Tung Kwong Shien Robert Terence (Terence Tung)
Raymond C.L. Yang
Ka Wai Leung
Johnson Stokes & Master
16th to 18th Floors, Prince's Building
10 Chater Road
Central Hong Kong
People's Republic of China

Javier Robalino
Andrés Donoso
Robalino
Avenida 12 de Octubre N26-48, esq. Lincoln, Edificio Mirage, 16th Floor
Quito
Ecuador

2. The Respondent in this arbitration is the Republic of Ecuador (the "**Respondent**" or "**Ecuador**", together with the Claimant, the "**Parties**"). The Respondent is represented in this arbitration by:

Juan Carlos Larrea
Ana María Larrea
Marco Teran
Lily Díaz Granados
Julia Rovello (until 15 May 2025)
Gary López
Procuraduría General del Estado
Av. Amazonas No. N39-123 y Arízaga
Quito, Ecuador

Raul Mañón
Digna French
Jorge López Fung
Squire Patton Boggs (US) LLP
Suite 3400
200 South Biscayne Boulevard
Miami, FL 33131
United States of America

Rostislav Pekař
José R. Feris
David Seidl
Aline Ramos
Squire Patton Boggs (UK) LLP
7, rue du Général Foy
75008 Paris
France

II. PROCEDURAL HISTORY

A. COMMENCEMENT OF THE ARBITRATION

3. On 4 October 2022, the Claimant filed its Request for Arbitration, together with factual exhibits C-001 to C-049, and legal authorities CL-001 to CL-004. The Claimant commenced these arbitration proceedings against the Respondent pursuant to Article 9 of the Agreement between the Government of the People's Republic of China and the Government of the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, signed on 21 March 1994, entered into force on 1 July 1997 and terminated on 19 May 2018 (the "**Treaty**"[1]).

4. In the Request, the Claimant noted that under Article 9.5 of the Treaty, the Tribunal shall determine its own procedure. In order to "achieve more certainty", the Claimant proposed the adoption of the 2010 version of the Arbitration Rules of the United Nations Commission on International Trade Law (the "**UNCITRAL Rules**"), as the rules applicable to these proceedings.

5. On 9 December 2022, the Respondent submitted its Response to the Notice of Arbitration.

6. On 5 May 2023, the Claimant sent a letter to the Permanent Court of Arbitration (the "**PCA**") requesting it to administer, and consequently to register, the arbitration, following the agreement of the Parties. The Claimant also advised about certain procedural agreements reached by the Parties.

7. On 11 May 2023, the Respondent confirmed that the Parties had reached a number of agreements on certain procedural matters, including on the choice of the PCA to administer the arbitration and on the application of the 2010 UNCITRAL Rules to these proceedings.

8. In accordance with the UNCITRAL Rules, these arbitration proceedings are deemed to have commenced on 4 October 2022, as this was the date when the Respondent received the Request for Arbitration.

B. TRIBUNAL CONSTITUTION

9. On 9 December 2022, the Claimant appointed Mr. Ignacio Suárez Anzorena, a national of the Republic of Argentina, as arbitrator. His contact details are as follows:

Mr. Ignacio Suárez Anzorena
De las Rosas esq. De los Geranios
Chalet La Serena

[1] Agreement between the Government of the People's Republic of China and the Government of the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, dated 21 March 1994, **CL-001**.

20000 Punta del Este
Maldonado
Uruguay
E-mail: isa@suarezanzorena.com

10. On 9 December 2022, the Respondent appointed Prof. Philippe Sands KC, a national of the United Kingdom of Great Britain and Northern Ireland and of the Republic of France, as arbitrator. His contact details are as follows:

Prof. Philippe Sands KC
11 King's Bench Walk
Temple London
EC4Y 7EQ
United Kingdom of Great Britain and Northern Ireland
E-mail: philippe.sands@11kbw.com

11. On 17 April 2023, pursuant to Article 9.4 of the Treaty, the Claimant invited the Secretary General of the International Centre for Settlement of Investment Disputes ("**ICSID**") to appoint the Chairman of the Tribunal.

12. On 2 August 2023, the Secretary General of ICSID presented to the Parties a ballot of six candidates to serve as the presiding arbitrator.

13. On 14 August 2023, both Parties completed and returned the ballot to the Secretary General of ICSID.

14. On 16 August 2023, the Secretary General of ICSID appointed Ms. Sofia Martins, a national of Portugal, as the presiding arbitrator based on the Parties' selections. Her contact details are as follows:

Ms. Sofia Martins
Miranda & Associados
Edifício ALLO
Avenida da Índia, 10 – 5.º piso, fr. 5.1
1300-299 Lisbon Portugal
E-mail: sofia.martins@mirandalawfirm.com

15. On 23 August 2023, the Secretary General of ICSID informed of Ms. Martins' acceptance of her appointment.

C. THE ARBITRATION AGREEMENT

16. Article 9 of the Treaty reads as follows:

> "Article 9
> 1.- Any dispute between an investor fo [sic] one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other

> Contracting Party shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.
>
> 2.- If the dispute cannot be settled through negotiations within six months, either party to the dispute shall be entitled to submit the dispute to the competent court of the Contracting Party accepting the investment.
>
> 3.- If a dispute involving the amount of compensation for expropriation cannot be settled within six months after resort to negotiations as specified in Paragraph 1 of this Article, it may be submitted at the request of either party to an ad-hoc arbitral tribunal. The provisions of this paragraph shall not apply if the investor concerned has resorted to the procedure specified in Paragraph 2 of this Article.
>
> 4.- Such an arbitral tribunal shall be constituted for each individual case as follows: each party to the dispute shall appoint an arbitrator, and these two shall select a national of a third State which has diplomatic relations with the two Contracting Parties as Chairman. The first two arbitrators shall be appointed within two months of the written notice for arbitration by either Party to the dispute to the other, and the Chairman shall be selected within four months. If within the reriod [sic] specified above the tribunal has not been constituted, either party to the dispute may invite the Secretary General of the Intenational [sic] Center for Settlement of Investment Disputes to make the necessary appointments.
>
> 5.- The tribunal shall determine its own procedure. However, the tribunal may, in the course of determination of procedure, take as guidance the Arbitration Rules of the International Center for Settlement of Investment Disputes.
>
> 6.- The tribunal shall reach its decision by a majority of votes. Such decision shall be final and binding on both parties to the dispute. Both Contracting Parties shall commit themselves to the enforcement of the decision in accordance with their respective domestic law.
>
> 7.- The tribunal shall adjudicate in accordance with the law of the Contracting Party to the dispute accepting the investment including its rules on the conflict of laws, the provisions of this Agreement as well as the generally recognized principles of international law.
>
> 8.- Each party to the dispute shall bear the cost of its appointed member of the tribunal and of its representation in the proceedings. The costs of the appointed Chairman and the remaining costs shall be borne in equal parts by the parties to the dispute".

D. LANGUAGE AND SEAT OF THE ARBITRATION

17. Pursuant to Paragraph 8.1 of the Terms of Appointment and Paragraph 2.1 of Procedural Order No. 1, the Parties agreed that the language of the proceedings shall be English, and Spanish shall be the secondary language of the arbitration.

18. Pursuant to Paragraph 7.1 of the Terms of Appointment, by agreement of the Parties, the legal place (or "seat") of this arbitration shall be Amsterdam, The Netherlands.

E. REGISTRY AND ADMINISTRATION OF THE ARBITRATION

19. Pursuant to Paragraph 9.1 of the Terms of Appointment, the Parties agreed that the PCA shall act as registry and shall administer the arbitral proceedings.

F. TRANSPARENCY OF THE PROCEEDINGS

20. Under Section 11 of Procedural Order No. 1:

> 11.1 In accordance with the UNCITRAL Rules, the hearings will be held in camera unless the Parties agree otherwise.
>
> 11.2 The existence of the proceedings (including the names of the Parties, counsel and the Tribunal) and all awards may be disclosed and shall be published in the PCA's Case Repository. After the issuance of each award, and prior to its publication, the Tribunal will consult with the Parties regarding the need to redact any sensitive information contained therein, and shall take a decision thereafter.
>
> 11.3 Unless the Parties expressly agree in writing to the contrary, any other information or materials in the proceedings created for the purpose of the arbitration together with all other documents produced by the other Party in the proceedings not otherwise in the public domain shall remain confidential—save and to the extent that disclosure may be required of a Party (i) by legal duty, (ii) to protect or pursue a legal right, or (iii) to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority, and save to their shareholders and advisers so long as they too keep the information and material confidential.
>
> 11.4 Additional confidentiality protections may be sought by either Party with respect to especially sensitive documents on a case-by-case basis.

G. INITIAL PROCEDURAL STEPS IN THE ARBITRATION

21. On 5 September 2023, the Tribunal circulated a draft of the Terms of Appointment and Procedural Order No. 1 and invited the Parties' comments thereon.

22. On 28 September 2023, the Parties submitted their comments on the draft Terms of Appointment and draft Procedural Order No. 1, noting the points of agreements and those of divergence between them.

23. On 4 October 2023, the Tribunal and the Parties conducted the first procedural meeting by videoconference.

24. On 10 October 2023, the Tribunal and the Parties executed the Terms of Appointment reflecting the agreement on a number of procedural and other matters. By executing this document, the Parties acknowledged, *inter alia*, that the members of the Tribunal had been validly appointed in accordance with the Treaty, and any agreement reached between them, with the assistance of ICSID for the appointment of the Presiding Arbitrator.[2]

25. Also on 10 October 2023, the Tribunal issued Procedural Order No. 1. Among other things, said order established the arbitration's procedural calendar which included a phase to discuss the potential bifurcation of the proceedings.

[2] Terms of Appointment, ¶¶ 6.8-6.10.

H. BIFURCATION OF THE PROCEEDINGS

26. On 20 November 2023, the Respondent filed its Request for Bifurcation, together with legal authorities RL-001 to RL-019.

27. On 20 December 2023, the Claimant filed its Objections to the Request for Bifurcation, together with factual exhibits C-001 to C-049, and legal authorities CL-005 to CL-035.

28. On 25 January 2024, the Tribunal issued Procedural Order No. 2, which contained its Decision on Bifurcation, whereby it granted the Respondent's request to bifurcate the proceedings on the jurisdictional objection with regard to the interpretation of Article 9 of the Treaty. Consequently, the Tribunal instructed the Parties to follow the scenario set forth in the Procedural Calendar attached to Procedural Order No. 1 that assumed bifurcation; said calendar fixed a hearing on jurisdiction, to be held from 11 to 13 December 2024 at the premises of the PCA in the Peace Palace in The Hague (the "**Hearing**").

I. WRITTEN SUBMISSIONS ON JURISDICTION

29. On 21 February 2024, the Tribunal issued Procedural Order No. 3, providing a revised version of the Procedural Calendar. Primarily, the dates of the jurisdictional phase were modified, while the Hearing dates and location remained unchanged. Additionally, the timeline for the notification of witnesses and experts to be examined at the Hearing was included.

30. On 15 April 2024, the Respondent submitted its Memorial on Objections to Jurisdiction, together with factual exhibits R-001 to R-007, and legal authorities RL-020 to RL-053.

31. On 2 July 2024, the Claimant submitted its Counter-Memorial on Objections to Jurisdiction, together with the legal opinions of Prof. Edgar Neira (CER-01) and Prof. Robert Kolb (CER-02), as well as factual exhibits C-050 to C-072, and legal authorities CL-036 to CL-155.

32. On 18 July 2024, the Tribunal issued Procedural Order No. 4, amending several time limits in the Procedural Calendar. Specifically, amendments were made to the deadlines for the submission of the Reply on Jurisdiction and Rejoinder on Jurisdiction, the notification of witnesses and experts to be examined at the Hearing, and the pre-Hearing conference call.

33. On 10 September 2024, the Respondent submitted its Reply on Jurisdiction, together with the legal opinions of Mr. Luis González (RER-001) and Mr. Santiago Velázquez (RER-002), as well as factual exhibits R-008 to R-013, and legal authorities RL-054 to RL-152.

34. On 19 November 2024, the Claimant submitted its Rejoinder on Jurisdiction, together with legal authorities CL-156 to CL-208 and the second legal opinions of Prof. Edgar Neira (CER-003) and Prof. Robert Kolb (CER-004).

J. HEARING

35. On 16 October 2024, the Tribunal informed the Parties that, after reviewing their submissions thus far, it believed that a maximum of two days would suffice for the Hearing. Consequently, the Tribunal proposed scheduling the Hearing for 11-12 December 2024, releasing the third day (13 December 2024) from reserve.

36. By e-mails of 18 and 21 October 2024, the Parties confirmed their agreement with the Tribunal's proposed Hearing schedule.

37. On 15 November 2024, the Tribunal sent the Parties a draft version of Procedural Order No. 5 regulating the conduct of the Hearing, inviting the Parties' comments. Those comments were received on 22 November 2024.

38. On 21 November 2024, the Parties notified the experts to be examined at the Hearing.

39. The Tribunal, the Parties and the PCA had scheduled a Pre-Hearing Conference on 25 November 2024 to discuss matters related to the organization of the Hearing. However, since the Parties reached agreement on all procedural aspects outlined in the draft Procedural Order, the Tribunal consulted the Parties on the need of proceeding with the meeting. Both Parties agreed that that it was unnecessary, and the meeting was subsequently cancelled. Thus, on 25 November 2024, the Tribunal issued Procedural Order No. 5 on Hearing Organization.

40. From 11 to 12 December 2024, the Hearing was held in the Peace Palace. The following individuals attended the Hearing:

Tribunal
Ms. Sofia Martins (Presiding Arbitrator)
Mr. Ignacio Suárez Anzorena
Prof. Philippe Sands KC
Mr. Ricardo Saraiva (Tribunal's Assistant)

Claimant
Ms. Zhou Minhiu, Junefield Gold Investments Limited
Ms. Xiao Juan, Junefield Gold Investments Limited
Prof. Meng Wan, Junefield Gold Investments Limited
Mr. Alejandro López Ortiz, Mayer Brown LLP
Ms. Isabela Lacreta, Mayer Brown LLP
Mr. Emiliano Represa, Mayer Brown LLP
Ms. Elizabeth Herold-Reverdin, Mayer Brown LLP
Mr. Javier Robalino, Robalino
Ms. Cristina Viteri, Robalino
Ms. Michelle Vasco, Robalino
Mr. Terence Tung, Johnson Stokes & Master
Mr. Raymond C. L. Yang, Johnson Stokes & Master
Ms. Ka Wai Leung, Johnson Stokes & Master
Prof. Robert Kolb, Claimants' Expert
Prof. Edgar Neira, Claimant's Expert

Respondent
Mr. Juan Carlos Larrea Valencia, Procuraduría General del Estado
Ms. Ana María Larrea, Procuraduría General del Estado
Ms. Julia Rovello, Procuraduría General del Estado
Ms. Lily Díaz Granados, Procuraduría General del Estado
Ms. Amparo Miranda, Procuraduría General del Estado
Mr. Marco Terán, Procuraduría General del Estado
Mr. Gary López, Procuraduría General del Estado
Mr. Raúl B. Mañón, Squire Patton Boggs
Mr. Rostislav Pekař, Squire Patton Boggs
Mr. David Seidl, Squire Patton Boggs
Ms. Aline Ramos, Squire Patton Boggs
Ms. Digna French, Squire Patton Boggs
Mr. Luis A. González García, Respondent's Expert
Dr. Santiago Velázquez, Respondent's Expert

Registry: Permanent Court of Arbitration
Mr. Julian Bordaçahar, PCA Senior Legal Counsel and Secretary to the Tribunal
Ms. Anabel Blanco, PCA Legal Counsel
Ms. Andrea Martínez Bernáldez, PCA Assistant Legal Counsel

Stenographers
Ms. Dawn K. Larson

K. POST-HEARING DEVELOPMENTS

41. On 12 December 2024, at the conclusion of the Hearing, the Tribunal requested the Parties to confer and revert on the following topics: (i) the timeline for finalizing the agreed version of the transcripts; (ii) the necessity of Post-Hearing Briefs (the "**PHBs**") and their potential timeline; and (iii) the timeline for submitting Statements of Costs (collectively, "**Post-Hearing Matters**").

42. On 17 December 2024, the Respondent submitted its proposal on the Post-Hearing Matters.

43. On 18 December 2024, the Claimant submitted its proposal on the Post-Hearing Matters.

44. The Parties agreed on the timeline for the agreed version of the transcripts. However, they could not reach an agreement on the need for PHBs and the timeline for submitting their Statements of Costs. Thus, on 23 December 2024, the Tribunal issued Procedural Order No. 6 on Post-Hearing Matters, whereby it requested the Parties to submit: (i) their agreed revisions to the Hearing transcript; (ii) their PHBs;[3] and (iii) their respective Statements of Costs.

45. On 6 January 2025, the Parties submitted their agreed revisions to the Hearing transcript.

[3] The Tribunal noted that: "[w]hile the Tribunal is of the view that the Parties have already been afforded ample opportunity to present their cases, it acknowledges the extensive questions raised during the Hearing and, given that there was no opportunity to make closing statements, sees potential benefit in providing the Parties with an opportunity to make concise written submissions. Therefore, pursuant to Articles 17(1) and 24 of the UNCITRAL Rules, the Tribunal requests the Parties to submit PHBs." (Procedural Order No. 6 ¶ 17).

46. On 27 January 2025, the Parties submitted their respective PHBs.

47. On 13 February 2025, the Parties submitted their respective Statements of Costs.

48. On 26 May 2025, the Tribunal updated the Parties on the progress regarding the drafting of the Award, advised that it would first issue its Award electronically and in English, with hard copies and the Spanish translation to follow in due course, and declared the proceedings formally closed pursuant to Article 31(1) of the UNCITRAL Rules.

III. FACTUAL BACKGROUND

49. The facts reproduced in the following section are only those deemed relevant to put into context the legal question on the interpretation of Article 9 of the Treaty, which is the only bifurcated jurisdictional objection pursuant to Procedural Order No. 2. Except for those matters which are finally settled in this Partial Award, nothing asserted herein may or must be understood as a prejudgment by the Tribunal of issues which are left to be decided in other potential stages of the proceedings.

50. According to the Claimant, a series of acts allegedly attributable to instrumentalities and organs of the Republic of Ecuador have caused a substantial deprivation of the economic use and enjoyment of the Claimant's alleged investments in the exploration, construction, and operation of a gold and silver mining project located in the Province of Azuay, in Ecuador.[4]

51. The instant dispute arises with respect to the Claimant's alleged investment in Ecuagoldmining, owner of the following mining concession rights in Ecuador as of 2015:[5]

(i) Concession Canoas, code 3941.1, granted by the Ministry of Energy and Mines on 4 May 1995 and replaced in 2010 by the Ministry of Non Renewable Natural Resources.[6]

(ii) Concession Canoas 1, code 100262, granted by the Ministry of Energy and Mines on 15 March 1996 and replaced in 2010 by the Ministry of Non Renewable Natural Resources.[7]

(iii) Concession San Luis A2, code 100160, granted by the Ministry of Energy and Mines on 16 December 19998 and replaced in 2010 by the Ministry of Non Renewable Natural Resources.[8]

(iv) Concession Miguir, code 100666, granted by the Ministry of Energy and Mines on 9 May 2003 and replaced in 2010 by the Ministry of Non Renewable Natural Resources.[9]

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4 Request for Arbitration, ¶¶ 6-7.

5 Public Deed of Mining Rights Cession and Transference Agreement entered into by SLM and Ecuagoldmining dated 20 July 2015, **C-17**.

6 Concession Title for Canoas dated 4 May 1995, **C-3**; Replacement of Concession Title for Canoas dated 26 March 2010, **C-4**.

7 Concession Title for Canoas 1 dated 15 March 1996, **C-5**; Replacement of Concession Title for Canoas 1 dated 26 March 2010, **C-6**.

8 Concession Title for San Luis A2, dated 16 November 1999, **C-7**; Replacement of Concession Title for San Luis A2 dated 26 March 2010, **C-8**.

9 Concession Title for Miguir dated 9 May 2003 **C-9**; Replacement of Concession Title for Miguir dated 26 March 2010, **C-10**.

52. On 8 April 2016, the Regional Sub-secretary of Mines approved the merger of Canoas and Canoas 1 into one concession named Canoas (Accumulated) (3941.1).18. Thus, at the date of the Request for Arbitration, the Project included three Concessions: Canoas, San Luis A2 and Miguir.[10]

53. Between 2013 and 2017, the Claimant developed a gold and silver mining project in the concession areas, where it performed activities of extraction, transportation, beneficiation and commercialization of the minerals.[11]

54. On 6 November 2016, the Ministry of Mines declared the initiation of the exploitation stage of the Claimant's mining project.[12]

55. According to the Claimant, besides the mine, the mining project includes powder kegs, an administration building and quarters for the workers, facilities for access to the mines (including roads, tunnels and galleries), dumps, fuel tank, a mine-mouth workshop warehouse and mine water reservoir (the "**Project**").[13] Moreover, it also included specialised mining equipment such as air compressors, electric generators, dump trucks, scoops loaders, mine fans, drilling machines, among other equipment needed for the mining activities.[14]

56. On 8 May 2018, according to the Claimant, individuals broke into the facilities of the project where staff and employees resided and worked.[15] The Respondent sent police and military forces on the same day, who occupied the mining project and its facilities.[16]

57. Also according to the Claimant, in the following months the Respondent gradually withdrew the forces it had deployed, allegedly, without making sure that the Claimant could regain possession and control of the mining project.[17]

58. The Claimant considers that this caused the attacks to intensify, and on 4 October 2019, the individuals occupying the mining project allegedly gained full control of its access roads.[18] The

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[10] Resolution No. MM-CZM-CS-2016-0109-RM issued by the Ministry of Mine dated 8 April 2016, **C-22**.

[11] Request for Arbitration, ¶ 17.

[12] Ministry of Mines' Resolution No. MM-DM-2015-001 regarding the Miguir Concession, dated 11 November 2015, **C-24**; Ministry of Mines' Resolution No. MM-DM-2015-002 regarding the San Luis A2 Concession, dated 11 November 2015, **C-25**; Ministry of Mines' Resolution No. MM-DM-2015-003 regarding the Canoas Concession, dated 11 November 2015, **C-26**; Ministry of Mines' Resolution No. MM-DM-2015-004 regarding the Canoas 1 Concession, dated 11 November 2015, **C-27**.

[13] Request for Arbitration, ¶ 23.

[14] Request for Arbitration, ¶ 23.

[15] El Comercio, "Mineros y opositores reclaman por los enfrentamientos en proyecto Rio Blanco", dated 9 May 2018, **C-32**.

[16] Request for Arbitration, ¶ 30.

[17] Request for Arbitration, ¶ 32.

[18] Request for Arbitration, ¶ 32.

Claimant submits that since that moment it has been unable to perform any mining activity in the concession areas and cannot even access them.[19]

59. In May 2018, a group of individuals claiming to be affected by the Project, alongside certain indigenous organizations, filed a request for interim measures against the Republic of Ecuador, represented by the Minister of Mines, the Minister of Environment and the Attorney General Office, before the Civil Judge of Cuenca.[20]

60. As a result, Ecuadorian courts have rendered judgments that the Claimant deems to have *de facto* cancelled the Concessions (the "**Court Judgements**").[21]

61. First, on 5 June 2018, a first instance Judge rendered a judgment (the "**5 June Judgment**") finding that an allegedly mandatory prior consultation with the indigenous communities had not been performed by Ecuador before the commencement of the mining activities.[22] As a result, the Judge ordered the suspension of the exploitation activities, the performance of prior consultation, and the demilitarization of the Project.[23]

62. Second, on 3 August 2018, the Court of Appeal of the Azuay Province, following an appeal to the 5 June Judgment filed by Ecuador, rendered another judgment (the "**3 August Judgment**").[24] This decision confirmed the suspension of the exploitation activities, relying on the prohibition against the carrying out of mining activities in protected natural areas.[25]

63. On 14 September 2018, the Ministry of Energy and Mines filed an extraordinary action of protection before the Constitutional Court of Ecuador against the 5 June Judgment and the 3 August Judgment on the basis of irregularities in the process,[26] no decision having been handed down to date.

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19 Request for Arbitration, ¶ 34.

20 Request for interim measures, dated 17 May 2018, **C-36**.

21 Request for Arbitration, ¶ 37.

22 Judgment by the First Instance Civil Judge of Cuenca, dated 5 June 2018, **C-37**.

23 Judgment by the First Instance Civil Judge of Cuenca, dated 5 June 2018, **C-37**.

24 Judgment by the Court of Appeal of the Azuay Province, dated 3 August 2018, **C-38**.

25 Judgment by the Court of Appeal of the Azuay Province, dated 3 August 2018, **C-38**.

26 Request for Arbitration, ¶ 42.

IV. SUMMARY OF THE PARTIES' POSITIONS AND RELIEF SOUGHT

64. In this Section the Tribunal will merely highlight the Parties' main positions. Further detail on the arguments brought forward by each in respect of the jurisdictional objection raised by the Respondent will be addressed in Section V below.

65. On the basis of the factual background indicated in the preceding section, the Claimant essentially argues that the Respondent has acted in breach of the Treaty, in particular Articles 4, regarding Expropriation, and 3.1, regarding Fair and Equitable Treatment ("**FET**") and Protection and Security ("**PS**"), and/or international law, requesting compensation.[27]

66. The Respondent, in turn, essentially argues that such alleged Treaty breaches are unfounded.[28] In any event, the Respondent considers that this Tribunal does not even have jurisdiction to assess those breaches based on its reading of Article 9.3 of the Treaty and requested bifurcation of these proceedings, which was ordered by Procedural Order No. 2, as described in Section II.H above.

67. In this Partial Award, the Tribunal will as such only address the objection raised by the Respondent that Article 9 (in particular, Article 9.3) of the Treaty limits its jurisdiction to the legal question concerning the amount of compensation for expropriation.

68. As noted above, Article 9 of the Treaty reads in the relevant part as follows:

> "Article 9
>
> 1.- Any dispute between an investor fo (sic) one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.
>
> 2.- If the dispute cannot be settled through negotiations within six months, either party to the dispute shall be entitled to submit the dispute to the competent court of the Contracting Party accepting the investment.
>
> 3.- If a dispute involving the amount of compensation for expropriation cannot be settled within six months after resort to negotiations as specified in Paragraph 1 of this Article, it may be submitted at the request of either party to an ad-hoc arbitral tribunal. The provisions of this paragraph shall not apply if the investor concerned has resorted to the procedure specified in Paragraph 2 of this Article.
>
> (…)".

69. At its core, the Respondent argues that the interpretation of Article 9.3, in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties (the "**VCLT**"), confines the Tribunal's jurisdiction to the issue of quantum for expropriation, thereby excluding questions of occurrence of or liability for expropriation, FET and PS breaches.

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[27] Request for Arbitration, ¶¶ 74-85, 101.

[28] Reply to Request for Arbitration, ¶ 9.1.

70. In support of this position, the Respondent refers to the ordinary meaning, context, object and purpose, and good faith interpretation of Article 9.3 of the Treaty. In the Respondent's view, Ecuadorian domestic courts, rather than international arbitral tribunals, are entitled to assess breaches of substantive standards of treatment under the Treaty. The fork in the road ("**FIR**") clause contained in Article 9.3 of the Treaty would only be triggered if an investor were to request a domestic court to determine the quantum of compensation for expropriation. Moreover, the Respondent denies that the Most Favored Nation clause ("**MFN Clause**") in Article 3.2 of the Treaty expands the scope of the Tribunal's jurisdiction to include the abovementioned questions of liability.

71. Against this backdrop, the Respondent requests the Tribunal to: (i) dismiss the entirety of the Claimant's claim for lack of jurisdiction; (ii) order the Claimant to bear all costs of the arbitration, including the Respondent's costs for legal representation and assistance, pursuant to paragraphs 1 and 2 of Article 40 of the UNCITRAL Arbitration Rules; and (iii) grant any other relief that it deems appropriate.[29]

72. The Claimant, in turn, maintains, in short, that the interpretation of Article 9.3 of the Treaty leads to the conclusion that the Tribunal has jurisdiction. Essentially, the Claimant denies that a proper interpretation of Article 9.3, based on Articles 31 and 32 of the VCLT, deprives the Tribunal of its jurisdiction.

73. First, the Claimant argues that, pursuant to a good faith interpretation of the Treaty, the Respondent has consented to international arbitration. In particular, the Claimant asserts that a literal, contextual, and effective interpretation of the Treaty grants the Tribunal jurisdiction over issues of liability for expropriation, as well as breaches of FET and PS, in addition to compensation. As part of the contextual interpretation, the Claimant submits that the existence of the FIR provision in Article 9.3 makes the Respondent's restrictive interpretation unsustainable.

74. Second, the Claimant asserts that there is no available remedy under Ecuadorian law that would allow Ecuadorian domestic courts to adjudicate the legality of expropriation under international law.

75. Finally, the Claimant argues that the MFN Clause in the Treaty, in any event, would extend the Tribunal's jurisdictional scope to include liability for expropriation, as well as breaches of FET and FPS.

76. In light of these contentions, the Claimant requests the Tribunal to: (i) declare that it has jurisdiction to decide the entirety of the dispute submitted by the Claimant, or, at least, the entirety

[29] Memorial on Objections to Jurisdiction, ¶ 129; Reply on Jurisdiction, ¶ 212; Respondent's Post-Hearing Brief, ¶ 92.

of the expropriation claim; (ii) dismiss all of the Respondent's jurisdictional objections; (iii) award Junefield the fees and costs arising from these proceedings, including those arising from Ecuador's jurisdictional objections, and the costs of Junefield's representation, with interest; and (iv) award the Claimant such other reliefs that the Tribunal considers appropriate.[30]

[30] Counter-Memorial on Objections to Jurisdiction, ¶ 225; Rejoinder on Jurisdiction, ¶ 222; Claimant's Post-Hearing Brief, ¶ 117.

V. TRIBUNAL'S ANALYSIS

77. As outlined in the Parties' summary positions above, the present dispute centres on the Respondent's jurisdictional objection under Article 9.3 of the Treaty, regarding whether the Tribunal's jurisdiction is limited to the amount of compensation for expropriation.[31]

78. On the basis of the Parties' pleadings, the first issue to be addressed by the Tribunal relates to the standard of review to be applied by this Tribunal when interpreting the dispute resolution provision contained in the Treaty for the purposes of assessing its jurisdiction – **Section A**.

79. The second and central issue to be analysed by the Tribunal is whether the interpretation of Article 9.3 of the Treaty limits the Tribunal's jurisdiction to determining the amount of compensation for expropriation **– Section B**.

80. If the Tribunal finds that Article 9.3 of the Treaty does limit its jurisdiction, the third issue to be determined by the Tribunal is whether the MFN Clause contained in Article 3.2 of the Treaty could be invoked to expand the scope of the Tribunal's jurisdiction to include questions on liability for expropriation, breach of FET, and breach of FPS – **Section C**.

81. Having concluded its analysis on the Respondent's jurisdictional objection, the Tribunal must then decide on the allocation of costs of these proceedings up until now – **Section D**.

82. The Tribunal notes that in identifying, analysing, and resolving the disputed issues, it has taken into consideration all (written and oral) submissions of the Parties, as well as all arguments and evidence submitted to the record, regardless of whether they are specifically mentioned in this Award.

A. PRELIMINARY ISSUE: STANDARD OF REVIEW TO INTERPRET THE RESPONDENT'S CONSENT TO ARBITRATION

1. The Respondent's position

83. Essentially, the Respondent submits that, consistent with the international law principle of *actori incumbit probation*, the Claimant bears the burden of proving, with "sufficient certainty", that Ecuador has "clearly and unequivocally" consented to arbitrate Junefield's claims.[32]

[31] Memorial on Objections to Jurisdiction, ¶ 5.

[32] Memorial on Objections to Jurisdiction, ¶ 6; Reply on Jurisdiction, ¶ 25; Expert Report of Luis A. González García, ¶ 14, **RER-001**; *Case concerning Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti v. France), Judgment of 4 June 2008, ICJ Reports 177, para. 62, **RL-066**.

84. The Respondent relies on *ICS v. Argentina* to assert that consent to the jurisdiction of an international judicial body cannot be presumed[33] and must be proven by a claimant.[34] Based, *inter alia*, on *AsiaPhos v. China* and *Daimler v. Argentina*, Ecuador further contends that jurisdiction can only be established through an unequivocal expression of consent from a State.[35] Such consent must be established through "affirmative evidence", which sets a high standard of proof.[36] The Respondent relies on additional cases to further support its argument that consent has to be clear, express, unequivocal, specific, and intended.[37] In the Respondent's view, these principles apply "in full force" to the interpretation of the scope of a narrow dispute resolution clause, such as the one in Article 9(3).[38] The Respondent relies, in particular, on the China-Ghana and China-Singapore BITs, as well as the interpretation that arbitral tribunals have made of these treaties in *Beijing Everyway Traffic v. Ghana* and *AsiaPhos v. China*, respectively.[39]

85. In response to the Claimant's arguments, the Respondent contends that Junefield seeks to avoid engaging with these authorities, claiming that "this is not a case where there is no consent, but rather a case where the discussion centres on the extent of consent given by Ecuador."[40] According to Ecuador, this purported distinction makes no sense as the issue here is whether Ecuador consented to arbitrate issues other than the "amount of compensation for expropriation."

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33 Memorial on Objections to Jurisdiction, ¶ 7; *ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina*, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012, ¶ 280, **RL-024**; Ecuador's Reply on Jurisdiction, ¶ 27.

34 Memorial on Objections to Jurisdiction, ¶ 7; *ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina*, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012, ¶ 280, **RL-024**; Ecuador's Reply on Jurisdiction, ¶ 27. *Beijing Everyway Traffic and Lighting Company Limited v. Ghana*, PCA Case No. 2021-15, Final Award on Jurisdiction, 30 January 2023, ¶ 120, **RL-014**; Ecuador's Reply on Jurisdiction, ¶ 30.

35 Memorial on Objections to Jurisdiction, ¶ 10; *AsiaPhos Limited and Norwest Chemicals Pte Limited v. People's Republic of China*, ICSID Case No. ADM/21/1, Award, 16 February 2023, ¶ 59, **RL-013**; Ecuador's Reply on Jurisdiction, ¶ 31.

36 Memorial on Objections to Jurisdiction, ¶ 8; *Daimler Financial Services AG v Argentine Republic*, ICSID Case No ARB/05/1, Award, 22 August 2012, ¶¶ 174-175, **RL-025**; Ecuador's Reply on Jurisdiction, ¶ 28.

37 Memorial on Objections to Jurisdiction, ¶ 11; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, ¶ 198, **RL-021**; *Menzies Middle East and Africa S.A. and Aviation Handling Services International Ltd. v. Republic of Senegal*, ICSID Case No. ARB/15/21, Award, 5 August 2016, ¶ 130, **RL-022**; *Itisaluna Iraq LLC and others v. Republic of Iraq*, ICSID Case No. ARB/17/10, Award, 3 April 2020, ¶ 221, **RL-023**; *Case concerning Certain Questions of Mutua Assistance in Criminal Matters* (Djibouti v. France), Judgement of 4 June 2008, ICJ Reports 77, ¶ 62, **RL-066**.

38 Memorial on Objections to Jurisdiction, ¶ 9.

39 Ecuador's Memorial on Objections to Jurisdiction, ¶¶ 9-10. *Beijing Everyway Traffic and Lighting Company Limited v. Ghana*, PCA 2021-15, Final Award on Jurisdiction, 30 January 2023, ¶ 120, **RL-014**. *AsiaPhos Limited and Norwest Chemicals Pte Limited v. People's Republic of China*, ICSID Case No. ADM/21/1, Award, 16 February 2023, ¶ 59, **RL-013**.

40 Reply on Jurisdiction, ¶ 29, citing Counter-Memorial on Objections to Jurisdiction, ¶ 31.

Thus, the fact that Ecuador's consent is limited to that single issue means that the Tribunal lacks jurisdiction over any other issue.[41]

86. The Respondent challenges the Claimant's expert theory regarding consent by implication, denying that Article 9.3 includes any "implied issues" that can be "imported", and asserting that no legal authority exists to permit such importation.[42]

2. The Claimant's position

87. As a starting point, Junefield does not dispute that consent to arbitration is the foundation of the Tribunal's jurisdiction and that it carries the burden of establishing the Tribunal's jurisdiction over this dispute.[43] The Claimant nevertheless sustains that Ecuador's proposed standard of review is inconsistent with the principles expounded in a number of awards.[44]

88. The Claimant rejects the Respondent's assertion, based on *ICS v. Argentina* and *Daimler v. Argentina*, that a restrictive approach on ascertaining consent is the rule.[45] Particularly, the Claimant challenges the Respondent's framing of the legal question in this case, stating that it is not a matter of whether consent exists: this is clearly established in Article 9.3, as the Parties have consented to arbitrate "dispute[s] involving the amount of compensation for expropriation".[46] Instead, the Claimant reframes the question to focus on the extent of the consent that Ecuador has provided.[47]

89. The Claimant submits that, contrary to Respondent's proposed restrictive approach, which is far from being representative of the general approach and is not even supported by some of the cases it relies on, such as *Mutual Assistance*, *ICS v. Argentina*, and *Plama v. Bulgaria*,[48] arbitration agreements must be interpreted objectively and in good faith and neither restrictively nor liberally.[49] In support of its submission, the Claimant relies on *Amco Asia v. Indonesia*,[50] *Société*

41 Reply on Jurisdiction, ¶ 29.

42 Ecuador's Reply on Jurisdiction, ¶ 33.

43 Counter-Memorial on Objections to Jurisdiction, ¶ 16; Rejoinder on Jurisdiction, ¶¶ 14 and 18.

44 Counter-Memorial on Objections to Jurisdiction, ¶ 28.

45 Counter-Memorial on Objections to Jurisdiction, ¶ 29.

46 Counter-Memorial on Objections to Jurisdiction, ¶ 29; Rejoinder on Jurisdiction, ¶ 18.

47 Counter-Memorial on Objections to Jurisdiction, ¶ 29; Rejoinder on Jurisdiction, ¶ 18.

48 Rejoinder on Jurisdiction, ¶¶ 20-22.

49 Counter-Memorial on Objections to Jurisdiction, ¶¶ 30-34; Rejoinder on Jurisdiction, ¶ 22.

50 Counter-Memorial on Objections to Jurisdiction, ¶ 31; *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983, ¶ 14, **CL-036**.

Ouest-Africaine des Bétons Industriels v. Senegal,[51] *SPP v. Egypt*,[52] and *Mondev v United States*.[53]

90. The Claimant further contends that "jurisdiction should prevail if arguments in favour of it are preponderant to those denying it",[54] as held *inter alia* in *Factory of Chorzów*, *Border and Transborder Armed Actions*, in *SPP v. Egypt*.[55]

91. The Claimant further finds support in two decisions issued in the *Free Zones of Upper Savoy* case and in *Sanum v. Laos* to assert that when there is uncertainty about the interpretation of the instrument conferring jurisdiction, it should be interpreted in a manner that endows it with practical effect, provided "it does not involve doing violence to [its] terms."[56] The Claimant explains that this decision reinforces the proposition that consent to arbitration is determined by the proper interpretation of the Treaty's dispute resolution clause and that, contrary to Ecuador's assertion, there is no general restrictive presumption limiting such consent.[57]

92. Regarding the Respondent's reliance on the China-Ghana and China-Singapore BITs, as well as the interpretation by other arbitral tribunals of these treaties that would support that the standard to prove State consent to arbitration is high, the Claimant counterargues that both BITs are starkly distinguishable from the China-Ecuador BIT.[58] While the Claimant acknowledges that in *Tza Yap Shum v. Peru*, the tribunal indeed interpreted a treaty similar to the China-Ecuador BIT,[59] it

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51 Counter-Memorial on Objections to Jurisdiction, ¶ 32; *Société Ouest-Africaine des Bétons Industriels v. Senegal*, ICSID Case No. ARB/82/1, Award, 25 February 1998, ¶ 4.10, **CL-037**.

52 *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction, 14 April 1998, ¶ 63, **CL-039**.

53 Rejoinder on Jurisdiction, ¶ 32. *Mondev International Ltd. v. United States*, ICSID ARB(AF)/99/2 (NAFTA), Award, 10 November 2002, ¶ 43, **CL-102**.

54 Counter-Memorial on Objections to Jurisdiction, ¶ 33; Rejoinder on Jurisdiction, ¶ 26.

55 Counter-Memorial on Objections to Jurisdiction, ¶ 34; Rejoinder on Jurisdiction, ¶ 26-27; *Case Concerning the Factory at Chorzów* (Germany v. Poland) (Jurisdiction) P.C.I.J. Series A, No. 9, 26 July 1927, p. 32, **CL-038**; *Border and Transborder Armed Actions* (Nicaragua v. Honduras) (Jurisdiction and Admissibility) Judgement, ICJ Reports 1988, 20 December 1988, p. 69, at p. 76 and ¶ 16, **CL-156**; *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction, 14 April 1998, ¶ 63, **CL-039**.

56 Rejoinder on Jurisdiction, ¶¶ 29, 34-35; *Free Zones of Upper Savoy and District of Gex*, Order made on 19 August 1929, PCIJ, ser. A / B, 19 August 1929, p. 13, **CL-157**; *Free Zones of Upper Savoy and District of Gex*, Judgement of 7 June 1932, PCIJ, ser. A / B, no. 46, 7 June 1932, p. 138-139, **CL-158**; *Sanum Investments Limited v. The Government of the Lao People's Democratic Republic*, PCA Case No. 2013-13, Award on Jurisdiction, 13 December 2013, ¶¶ 333-335, **CL-027**.

57 Rejoinder on Jurisdiction, ¶¶ 29-30.

58 Counter-Memorial on Objections to Jurisdiction, ¶¶ 36-39; Rejoinder on Jurisdiction, ¶ 44-48.

59 Counter-Memorial on Objections to Jurisdiction, ¶ 39; *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence (Spanish), 19 June 2009, ¶ 37, **CL-025**.

underscores the tribunal's conclusion that jurisdictional clauses must be interpreted objectively, rather than restrictively or liberally.[60]

93. Thus, the Claimant rejects the Respondent's submission that a "higher standard" must be applied in the interpretation of arbitration agreements.[61] Instead, the Claimant submits that, the Tribunal must interpret the Treaty in good faith and give weight to the "normal expectations and common intention of the Parties".[62]

94. Concretely, the Claimant argues that, unlike the China-Ecuador BIT, the China-Ghana BIT expressly sets out a review procedure for expropriation cases in its Article 10, entitled "Settlement of Dispute [sic] on Quantum of Compensation". Furthermore, the China-Ghana BIT also contains an Article 4.3 establishing that the competent courts in the Contracting State commiting the expropriation are empowered to review it, under the laws of the Contracting State. The Claimant argues that these provisions clearly mark a difference with Articles 4 and 9 of the China-Ecuador BIT.[63]

95. The China-Singapore BIT, for its part, establishes an expropriation review procedure before domestic courts under Article 6.2, within the context of the provision prohibiting expropriation. This, the Claimant argues, marks a contrast with Article 4 on the prohibition on expropriation of the China-Ecuador BIT. The Claimant underscores that there is no provision analogous to Article 6.2 of the China-Singapore BIT in the China-Ecuador BIT.[64] The Claimant similarly refutes the reliance of Mr. Gonzalez's legal opinion on the decision in the *ST-Ad v. Bulgaria* case on the basis that Article 4.3 of the Bulgaria-Germany BIT is different from Articles 4 and 9.3 of the Treaty. Unlike the China-Ecuador BIT, the Bulgaria-Germany BIT allows the investor to request the revision of the lawfulness of expropriation through a properly constituted legal proceeding of the Contracting Party which has carried out the expropriation measure.[65]

3. Tribunal's analysis

96. As is clear from the Parties' positions summarized above, there is no disagreement regarding the allocationof the burden of proof: both Parties accept that the Claimant bears the burden of proving that this Tribunal has jurisdiction under Article 9.3 of the Treaty.

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60 Counter-Memorial on Objections to Jurisdiction, ¶ 39; *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence (Spanish), 19 June 2009, ¶ 37, **CL-025**; Rejoinder on Jurisdiction, ¶ 30.

61 Counter-Memorial on Objections to Jurisdiction, ¶ 35.

62 Counter-Memorial on Objections to Jurisdiction, ¶¶ 35, 40; Rejoinder on Jurisdiction, ¶ 25.

63 Counter-Memorial on Objections to Jurisdiction, ¶ 37; Rejoinder on Jurisdiction, ¶ 46.

64 Counter-Memorial on Objections to Jurisdiction, ¶ 38; Rejoinder on Jurisdiction, ¶ 46.

65 Rejoinder on Jurisdiction, ¶¶ 49-50.

97. The only point of divergence concerns the standard to be applied by this Tribunal in interpreting the Treaty for the purposes of assessing its jurisdiction. The Respondent contends that a restrictive interpretative approach is warranted, on the basis that a higher standard of proof is required in establishing jurisdiction. In contrast, the Claimant argues that no such heightened standard applies, and that the Tribunal must simply interpret the Treaty in accordance with the rules of interpretation of the VCLT, objectively and in good faith—that is, neither restrictively nor liberally.

98. The Tribunal agrees with the Claimant, for the following reasons.

99. *First*, Article 31 of the VCLT clearly states that treaties shall be interpreted "in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[66]

100. *Second*, the authorities relied on by the Respondent do not support the proposition that consent must be interpreted applying a restrictive standard or be subject to a higher standard of proof.

101. In *ICS v. Argentina*, for example, the tribunal noted that consent cannot be presumed and must be proven "according to the general rules of international law governing the interpretation of treaties" and "with sufficient certainty".[67]

102. *Beijing Everway Taffic v. Ghana* merely refers to the issue relating to the burden of proof regarding jurisdiction, which is non-disputed here, adding nothing in respect of any eventual higher standard of proof that should apply. On the contrary, the tribunal simply referred to Articles 31 and 32 of the VCLT, stating that they reflect the basic principles of treaty interpretation in customary international law.[68] The same goes for *AsiaPhos v. China*.[69]

103. Further, in *Daimler v Argentina*, the tribunal—referring to several other decisions—stated that "all international treaty commitments (…) must logically be interpreted according to the same basic interpretive principles without distinction as to the type of treaty or type of commitment", that is, "neither liberally nor restrictively".[70] The tribunal even went on to say that "the impossibility of basing a state's consent on a mere presumption should not be taken as a "strict"

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66 Vienna Convention on the Law of Treaties, Art. 31(1), **CL-022**.

67 *ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina*, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012, ¶ 280, **RL-024**.

68 *Beijing Everyway Traffic and Lighting Company Limited v. Ghana*, PCA 2021-15, Final Award on Jurisdiction, 30 January 2023, ¶ 142, **RL-014**.

69 *AsiaPhos Limited and Norwest Chemicals Pte Limited v. People's Republic of China*, ICSID Case No. ADM/21/1, Award, 16 February 2023, ¶ ¶ 57-59, **RL-013**.

70 *Daimler Financial Services AG v Argentine Republic*, ICSID Case No ARB/05/1, Award, 22 August 2012, ¶ ¶ 169, 172, **RL-025**.

or "restrictive" approach in terms of interpretation (…). It is simply the result of respect for the rule according to which state consent is the incontrovertible requisite for any kind of international settlement procedure".[71]

104. *Third*, the Claimant has relied on several other authorities which confirm its position in that interpretation of treaty provisions regarding consent must be neither restrictive nor liberal, and must be conducted in good faith and objectively, as prescribed by the VCLT.

105. In *Amco Asia v. Indonesia*, one of the decisions cited in *Daimler v Argentina*, the tribunal stated the following: "(…) like any other conventions, a convention to arbitrate is not to be construed *restrictively*, nor, as a matter of fact, *broadly* or *liberally*. It is to be construed in a way which leads to find out and to respect the common will of the parties: such a method of interpretation is but the application of the fundamental principle *pacta sunt servanda*, a principle common, indeed, to all systems of internal law and to international law. Moreover – and this is again a general principle of law – any convention, including conventions to arbitrate, should be construed in good faith, that is to say by taking into account the consequences of their commitments the parties may be considered as having reasonably and legitimately envisaged".[72]

106. The tribunal followed the same line of reasoning in *Tza Yap Shum v Peru*, in a case involving a BIT very similar to the Treaty,[73] in *SPP v Egypt*,[74] and in *Mondev v. United States*.[75]

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[71] *Daimler Financial Services AG v Argentine Republic*, ICSID Case No ARB/05/1, Award, 22 August 2012, ¶ 175, **RL-025**.

[72] Counter-Memorial on Objections to Jurisdiction, ¶ 31; *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983, ¶ 14, **CL-036**.

[73] *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence (Spanish), 19 June 2009, ¶ 37, **CL-025**: "El Tribunal considera que el único modo apropiado de respetar adecuadamente dichas expresiones consiste en analizar la formulación de las palabras acordadas objetivamente y en su totalidad. En este proceso, la postura adoptada por la jurisprudencia nos lleva a concluir que el estándar apropiado para interpretar las normas sobre resolución de diferencias y demás disposiciones de un tratado sobre temas jurisdiccionales es idéntico al que se aplica a otras disposiciones del APPRI, ni más restrictivo ni más liberal".

[74] *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction, 14 April 1998, ¶ 63, **CL-039**: "(…) there is no presumption of jurisdiction -- particularly where a sovereign State is involved -- and the Tribunal must examine Egypt's objections to the jurisdiction of the Centre with meticulous care, bearing in mind that jurisdiction in the present case exists only insofar as consent thereto has been given by the Parties. This is not to say, however, that there is a presumption against the conferment of jurisdiction with respect to a sovereign State or that instruments purporting to confer jurisdiction should be interpreted restrictively. (…) jurisdictional instruments are to be interpreted neither restrictively nor expansively, but rather objectively and in good faith, and jurisdiction will be found to exist if -- but only if -- the force of the arguments militating in favor of it is preponderant".

[75] *Mondev International Ltd. v. United States*, ICSID ARB(AF)/99/2 (NAFTA), Award, 10 November 2002, ¶ 43, **CL-102**: "there is no principle either of extensive or restrictive interpretation of jurisdictional provisions in treaties. In the end the question is what the relevant provisions means, interpreted in accordance with the applicable rules of interpretation of treaties".

107. It follows that what this Tribunal is required to do is to interpret and apply the Treaty in accordance with the rules of interpretation set out in the VCLT. This is not disputed by the Parties.[76] This approach governs both Article 9.3 and the MFN Clause.

B. WHETHER THE INTERPRETATION OF ARTICLE 9(3) LIMITS THE TRIBUNAL'S JURISDICTION TO THE AMOUNT OF COMPENSATION FOR EXPROPRIATION

1. The Respondent's position

108. The Respondent submits that the Tribunal does not have jurisdiction to determine whether there was a breach of any of the substantive standards of treatment contained in the Treaty.[77] Rather, the Respondent avers that "any dispute" pertaining to any substantive standard must be submitted to Ecuadorian or Chinese domestic courts, as an arbitral tribunal merely has jurisdiction to determine the amount of compensation for an expropriation that has already been proclaimed by Ecuador or China, as the case may be, whether by its legislative, executive or judicial branch, and not over the existence or legality of an expropriation.[78]

109. The Respondent argues that the interpretation of Article 9 of the Treaty must go beyond mere dictionary definitions and linguistics, and adopt a comprehensive approach that considers all elements contained in Article 31 of the VCLT, namely the context and the Treaty's object and purpose.[79]

110. The Respondent rejects the Claimant's "broad interpretation" of Article 9.3,[80] arguing that the Claimant's approach (whereby Article 9.3 of the Treaty would suffice to grant the Tribunal jurisdiction on the question of liability for expropriation, FET, and PS) disregards the ordinary meaning, the "unequivocal language", and the context of Article 9 as a whole.[81]

111. The Respondent submits that Article 9.1 calls for the amicable settlement of "any" dispute between an investor and the host State in connection with the investment. Article 9.2, then, would enable "the" dispute referred to in Article 9.1 to be brought by the investor to a competent court of the host State, after exhausting the six-month negotiation "cool-off period".[82] The first two paragraphs of Article 9 would as such require "any dispute" by an investor concerning the breach of any substantive standard to be solved through negotiations first, and only then go to the

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76 Memorial on Objections to Jurisdiction, ¶ 18; Reply on Jurisdiction, ¶ 38; Rejoinder on Jurisdiction, ¶ 52.

77 Memorial on Objections to Jurisdiction, ¶ 12.

78 Memorial on Objections to Jurisdiction, ¶¶ 13, 20, 33. Reply on Jurisdiction, ¶¶ 40, 42.

79 Memorial on Objections to Jurisdiction, ¶ 19; *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, ¶ 91, **RL-028**.

80 Memorial on Objections to Jurisdiction, ¶ 15.

81 Memorial on Objections to Jurisdiction, ¶¶ 15-16.

82 Memorial on Objections to Jurisdiction, ¶ 21.

domestic courts of the host State.[83] In other words, a reading of these two paragraphs would not provide the investor the possibility of resorting to international arbitration.[84]

112. Turning to Article 9.3, the Respondent avers that disputes "involving the amount of compensation for expropriation" constitute a "narrow and specific subset of disputes covered by the prior two paragraphs".[85] Hence, "only a subset of disputes", contemplated in the preceding 9.1 and 9.2, specifically those concerning the amount of compensation for expropriation, can be submitted to arbitration.[86] Domestic courts, the Respondent argues, "retain exclusive jurisdiction" over disputes concerning liability for a breach of any of the six substantive standards contemplated in the Treaty.[87]

(a) The ordinary meaning and context of Article 9.3 of the Treaty

113. First, the Respondent argues that the choice of the indefinite article "a" in the phrase "a dispute involving the amount of compensation for expropriation" in Article 9.3—compared to "any dispute" in Article 9.1 and "the dispute" in Article 9.2—indicates that not all investment disputes under the Treaty are arbitrable.[88] The Respondent emphasizes the significance of the difference between the definite article "the" in Article 9.1 and the indefinite article "a" in Article 9.3. It contends that the article "a" in Article 9.3 introduces a "fresh" definition of "a dispute", which specifically pertains to disputes involving the amount of compensation for expropriation.[89] Furthermore, the Respondent asserts that the choice of the article "a" at the beginning of Article 9.3, as opposed to "any", is significant considering that the former implies a more limited scope than the latter.[90]

114. The Respondent's interpretation yields as a result that any treaty violation, including the breach of any substantive standard, should be submitted to negotiation.[91] Thereafter, upon failure of such negotiation, those disputes would be dealt with by local Ecuadorian courts, and only those disputes related to the amount of compensation for expropriation could then be submitted to arbitration.[92]

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83 Memorial on Objections to Jurisdiction, ¶ 22.
84 Memorial on Objections to Jurisdiction, ¶ 23.
85 Memorial on Objections to Jurisdiction, ¶ 24; Reply on Jurisdiction, ¶ 44.
86 Memorial on Objections to Jurisdiction, ¶ 25; Reply on Jurisdiction, ¶ 44.
87 Memorial on Objections to Jurisdiction, ¶ 25.
88 Memorial on Objections to Jurisdiction, ¶ 37; Reply on Jurisdiction, ¶ 45.
89 Reply on Jurisdiction, ¶ 48.
90 Reply on Jurisdiction, ¶¶ 49-50.
91 Memorial on Objections to Jurisdiction, ¶ 38.
92 Memorial on Objections to Jurisdiction, ¶ 38.

115. Second, the Respondent contends that the meaning of "dispute" under the Treaty must be understood in line with the well-established definition of the term as once espoused by the Permanent Court of International Justice ("**PCIJ**") in the *Mavrommatis* case: "a disagreement on a point of law or fact, a conflict of legal views or interests between two persons".[93] The Respondent submits that, consistent with this definition, Article 9.3 is circumscribed to a disagreement between Junefield and Ecuador involving the amount of compensation for expropriation, and cannot include "a collective of claims brought by an investor against a Contracting State", like the Claimant argues. The Respondent dismisses, as a result, the Claimant's argument that arbitration would be available for disputes regarding any of the six Treaty standards "so long as they formed part of a larger dispute that would involve the amount of compensation for expropriation".[94]

116. Third, the Respondent avers that the meaning of "amount of compensation for expropriation", while clear, is also informed by Article 4 of the Treaty.[95] The last paragraph of Article 4 defines what "fair compensation" is.[96] In this context, the disputes regarding the amount of compensation for expropriation referenced in Article 9.3 would necessarily involve the question of whether the compensation was fair, as defined under Article 4.[97] Consequently, the Tribunal would lack jurisdiction to determine whether Ecuador's impugned conduct qualifies as expropriation and, if so, whether any of the conditions for the expropriation outlined in subparagraphs a) through c) of Article 4 were met.[98]

117. The Respondent argues that the occurrence and legality of expropriation (regulated in Articles 4.1 (a-c) of the Treaty) are distinct from disputes regarding the amount of compensation, which are (regulated in Article 4.1(d) and 9.3). It explains that the subsequent quantification of compensation is a process that follows and is "entirely separable" from the fact that an expropriation has been previously proclaimed. Accordingly, the Tribunal's jurisdiction arises solely from Article 9.3 for the purpose of reviewing quantum.[99]

118. The Respondent cites *Beijing Shougang v. Mongolia*, where the tribunal interpreted similarly-worded provisions under the China-Mongolia BIT. In performing the interpretation exercise, the tribunal concluded that "a dispute involving the amount of compensation for expropriation" under

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93 Memorial on Objections to Jurisdiction, ¶ 39; *Mavrommatis Palestine Concessions*, P.C.I.J., Series A, No. 2, Objection to the Jurisdiction of the Court, 30 August 1924, p. 11, **RL-002**; Reply on Jurisdiction, ¶ 53.

94 Memorial on Objections to Jurisdiction, ¶¶ 39-40; Reply on Jurisdiction, ¶ 54.

95 Memorial on Objections to Jurisdiction, ¶ 41; Reply on Jurisdiction, ¶ 55.

96 Memorial on Objections to Jurisdiction, ¶ 41.

97 Memorial on Objections to Jurisdiction, ¶ 42; Reply on Jurisdiction, ¶ 57.

98 Memorial on Objections to Jurisdiction, ¶ 42; Reply on Jurisdiction, ¶ 58.

99 Memorial on Objections to Jurisdiction, ¶ 44; Reply on Jurisdiction, ¶ 59.

Article 8.3 would deal with the question whether "the sum to be paid by the State as a compensation is equivalent to the value of the expropriated investments at the time when the expropriation is proclaimed", under Articles 4.1 and 4.2.[100]

119. In that case, the tribunal understood that Article 4.1 of the relevant treaty contemplated the payment of compensation as a primary obligation, by providing that "the expropriation shall be carried out on a non-discriminatory basis in accordance with legal procedures and against compensation". The tribunal then defined the disputes referred to in Article 8.3, namely those "involving the amount of compensation for expropriation", as a subcategory of disputes dealing with the question whether the compensation owed under Article 4.1 is "equivalent to the value of the expropriated investments at the time when expropriation is proclaimed", as established under Article 4.2.[101]

120. The Respondent argues that its position is confirmed by the interpretative principle of "expression unius exclusion alterius", which may be invoked if a treaty provision employs an expression that refers to a subset of a broader category. Provided this is shown, then the expression should be interpreted to apply only to that subset, excluding the remaining parts of the category. In this context, the express referral in Article 9.3 to "amount of compensation for expropriation" would entail that all other elements related to expropriation would be excluded from the provision's scope.[102]

121. Fourth, as regards the use by Article 9.3 of the word "involving" as a connector between "dispute" and the phrase "the amount of compensation for expropriation", the Respondent relies again on *Beijing Shougang v. Mongolia* to affirm that the "critical terms" in this grammatical structure are in the phrase "amount of compensation for expropriation," whereas "nothing turns on" the "neutral" word "involving."[103] It likewise relies on *AsiaPhos v. China,* where it was held that while the term "involving" was not tantamount to the term "including", which would mean that "as long as one element of the dispute concerns the question of compensation, it would be within the scope of the arbitration clause", the term "involving" was also broader than "over" or "limited to", thus reaching a conclusion consistent with the reasoning of the Court of Appeal of Singapore

[100] Memorial on Objections to Jurisdiction, ¶ 45; Reply on Jurisdiction, ¶¶ 60-62; *China Heilongjiang International Economic & Technical Cooperative Corp, and others v. Mongolia*, PCA Case No. 2010-20, Award, 30 June 2017, ¶ 442, **RL-012**.

[101] Ecuador's Memorial on Objections to Jurisdiction, ¶ 46; *China Heilongjiang International Economic & Technical Cooperative Corp, and others v. Mongolia*, PCA Case No. 2010-20, Award, 30 June 2017, ¶¶ 443–445, **RL-012**.

[102] Reply on Jurisdiction, ¶ 63.

[103] Memorial on Objections to Jurisdiction, ¶¶ 49-51; Ecuador's Reply on Jurisdiction, ¶ 64-65.

in *Sanum Investments v. Laos*, in that the meaning of the term "involving" would not be decisive for the interpretation of the treaty, as its nature remained neutral.[104]

122. The Respondent also rejects the Claimant's assertion that if the Contracting Parties of the Treaty had intended to limit jurisdiction, they would have used phrases such as "involving only" or "involving exclusively". The Respondent argues that, by the same logic, if the Contracting Parties had not intended for jurisdiction to be limited, they would have included language to reflect that intent. To reinforce this point, the Respondent maintains that if the Contracting Parties had intended to extend the Tribunal's jurisdiction to encompass any breach of the Treaty, they would not have employed such specific wording referring to the amount of compensation for expropriation.[105]

123. Moreover, the Respondent argues that the non-inclusive nature of the term "involving" is confirmed by the Spanish ("relacionado con") and Chinese versions ("**涉及**"[shèjí]) of the Treaty. In support of this contention, the Respondent first submits that even though English is the prevailing version of the Treaty, the Spanish and Chinese versions must be considered in the interpretative process, unless there is a conflict between the prevailing and non-prevailing versions, which is not the case, as neither of these terms would have an inclusive meaning.[106]

124. Specifically, the wording "relacionado con" can be interpreted as "in correspondence to" (en correspondencia con), "in accordance with" (conforme a) or "with regard to" (a propósito de). The Respondent posits that the phrase "relacionado con" indicates a connection but it is not necessarily inclusive, and its meaning may even be exclusive depending on the context.[107]

125. As to the Chinese characters "**涉及**"(shèjí), the Respondent contends they translate into "cover", "concern", "involve", "implicate", "relate to", "deal with", or "touch upon", and therefore do not inherently possess an exclusive or inclusive nature.[108]

126. The Respondent further rejects the Claimant's argument that the term "involving" translates into the Chinese characters "涉及" (shèjí). It dismisses the Claimant's reasoning that "the meaning of 涉及 (shèjí) is broader and more inclusive" than more restrictive terms such as "有关" (youguan) and "关于" (guanyu), which would translate into "concerning".[109] The Respondent provides

[104] Memorial on Objections to Jurisdiction, ¶ 50; Reply on Jurisdiction, ¶ 68; *AsiaPhos Limited and Norwest Chemicals Pte Ltd v. People's Republic of China*, ICSID Case No. ADM/21/1, Award, 16 February 2023, ¶¶ 65-66, 82, **RL-013**.

[105] Memorial on Objections to Jurisdiction, ¶ 54.

[106] Memorial on Objections to Jurisdiction, ¶¶ 55-56; Reply on Jurisdiction, ¶¶ 72-74.

[107] Memorial on Objections to Jurisdiction, ¶ ¶ 57-58; Reply on Jurisdiction, ¶¶ 74-75.

[108] Memorial on Objections to Jurisdiction, ¶ 59; Reply on Jurisdiction, ¶ 76.

[109] Reply on Jurisdiction, ¶ 77.

examples from China's treaty practice to refute the Claimant's theory that China employed "涉及" (shèjí) (translated as "involving") to expand its consent to arbitrate any dispute, while "有关" (youguan) and "关于" (guanyu) (translated as "concerning", "about", "on", "for") to define a narrower scope.[110] Amongst its examples, it addresses the Singapore-China BIT, which contains language similar to Article 9.3, but uses the character "关于" (guanyu).[111]

127. The Respondent concludes that the Claimant's interpretation of the term "involving" in Article 9.3 is misplaced in light of examples found in China's BITs with Singapore, Denmark, Sri-Lanka, Greece, Argentina, Bahrain and Qatar.[112] In those instruments, the term "involving" is not consistently translated as "涉及" (shèjí), nor are the remaining characters "有关" (youguan) and "关于" (guanyu) translated in all instances as "concerning".[113] Instead, the Respondent insists that "involving" is not to be classified as broad, nor as inclusive, but that it is a neutral term that can be compared to other connectors.[114] The Respondent finally notes that as far as the Argentina-China BIT, with its "asymmetrical ISDS clause", is concerned, the employment of the term "involving" does not necessarily give rise to the creation of a "broad dispute resolution framework."[115]

128. Particularly referring to the so-called First-Generation BITs, the Respondent provides a list of 53 treaties reflecting China's restrictive approach to the jurisdiction of arbitral tribunals, through the use of terms such as "involving" and "concerning".[116] The Respondent emphasizes that the flexibility displayed by China in the choice of terms to denote a narrow consent to arbitration demonstrates that these terms are indeed neutral; instead of reflecting an intent to modify the jurisdictional scope, these are rather linguistic variations.[117] Even more, for the Respondent, this shows that the entire case cannot be reduced to a question of the meaning of a connector like "involving".[118]

(b) Interpreting Article 9(3) in light of the object and purpose of the Treaty

129. Turning to the next element, the Respondent submits that the object and purpose of the Treaty confirms that Article 9.3 limits the jurisdiction of the Tribunal to determine the "amount of

[110] Reply on Jurisdiction, ¶¶ 78-82.
[111] Reply on Jurisdiction, ¶¶ 80-81.
[112] Reply on Jurisdiction, ¶¶ 80-82.
[113] Reply on Jurisdiction, ¶¶ 80-82.
[114] Reply on Jurisdiction, ¶ 84.
[115] Reply on Jurisdiction, ¶ 86.
[116] Reply on Jurisdiction, ¶¶ 119-120.
[117] Reply on Jurisdiction, ¶ 120.
[118] Ecuador's Reply on Jurisdiction, ¶ 124.

compensation for expropriation". It invokes Article 32 of the VCLT, which allows the interpreter to resort to supplementary means of interpretation, including the preparatory work of the Treaty and the circumstances of its conclusion, in order to confirm the meaning that results from applying Article 31.[119]

130. On this basis, the Respondent argues that China's long-standing policy of limiting jurisdiction of investment-treaty tribunals to the determination of the amount of compensation for expropriation would be important because the Treaty is based on China's 1993 Model BIT, from which Article 9 was taken *verbatim*.[120]

131. According to the Respondent, the BITs concluded by China from 1986 to 1997 (corresponding to the second wave of BITs concluded by China, as opposed to the first, signed between 1982 and 1985, which contained no ISDS provisions) all restrict the jurisdiction of international tribunals to issues of compensation for expropriation.[121] The Respondent illustrates this assertion with the 1985 China-Singapore BIT, the 1989 China-Ghana BIT, the 1988 China-Japan BIT, and the 1991 China-Mongolia BIT, which would be included in the so-called First Generation BITs.[122]

132. The Respondent argues that these examples show China's deliberate policy of protecting national sovereignty when dealing with investor State arbitration and expropriation measures.[123] This policy would be reflected, the Respondent observes, in the principle of the States' permanent sovereignty over their natural resources, as crystalized in the Charter of Economic Rights and Duties, adopted in 1974.[124] The Respondent adds that this policy was also reflected in China's narrow consent to the ICSID Convention, which occurred just one year before Ecuador and China concluded the Treaty and was limited in the same way as these BITs.[125] The Respondent further argues that this was China's position in the *AsiaPhos v. China* case.[126]

133. Accordingly, the Respondent maintains that China's investment policy and the fact that "Ecuador accepted the text of the Treaty as proposed by China", must be considered when interpreting the Treaty.[127] It is in particular against the backdrop of China's sovereignty-centered policy in

[119] Memorial on Objections to Jurisdiction, ¶ 63.

[120] Memorial on Objections to Jurisdiction, ¶¶ 26, 64; Reply on Jurisdiction, ¶¶ 88, 91, 97, 98.

[121] Memorial on Objections to Jurisdiction, ¶ 66; Reply on Jurisdiction, ¶¶ 89, 107, 119.

[122] Memorial on Objections to Jurisdiction, ¶ ¶ 66-67; Ecuador's Reply on Jurisdiction, ¶ 90.

[123] Memorial on Objections to Jurisdiction, ¶ 67; Reply on Jurisdiction, ¶ 88; 105.

[124] Reply on Jurisdiction, ¶102.

[125] Memorial on Objections to Jurisdiction, ¶¶ 29, 71-73; Reply on Jurisdiction, ¶ 89; 109-110, 112.

[126] Memorial on Objections to Jurisdiction, ¶¶ 74-75; *AsiaPhos Limited and Norwest Chemicals Pte Ltd v. People's Republic of China*, ICSID Case No. ADM/21/1, Award, 16 February 2023, ¶ 43, 179, **RL-013**.

[127] Reply on Jurisdiction, ¶ 92.

investment arbitration that the Respondent highlights that, *a fortiori*, the Claimant's broad interpretation of the term "involving" in the Treaty is not tenable.[128]

134. Additionally, the Respondent avers that the inclusion of the element "amount of compensation for expropriation" is found in more than 50 BITs signed by China, while it is non-existent in Ecuador's remaining 30 BITs, which would evidence China's negotiating leverage.[129]

135. Moreover, the Respondent explains which factors motivated China's policy of narrow consent towards investment arbitration (until the adoption of China's 1998 "Going Global" strategy).[130] First, China considered that investment arbitration would not be coherent with the notion of sovereignty.[131] Second, being a capital-importing country with no significant amount of overseas investment at the time, there was a preference by the Chinese government to solve disputes with foreign investors before domestic courts.[132]

(c) An effective interpretation of the Treaty

136. The Respondent refutes the Claimant's contention that the interpretation proposed by Ecuador of Article 9.3 would deprive the Treaty of its *effet utile*.[133]

137. The Respondent contends that the Claimant's argument rests on the incorrect premise that protections afforded to investors are only meaningful and useful if they can be enforced in arbitration, which is contradicted, first and foremost, by the option to resort to local courts allowed by Article 9.2 of the Treaty.[134]

138. To further support this argument, the Respondent submits that there are several BITs (some even concluded by China), in which standards of protection do not contain provisions for investment-treaty arbitration at all.[135]

139. Even more, the Respondent emphasizes that, in the Treaty, insofar as Article 9.3 only refers to expropriation, the Contracting Parties intentionally excluded the five remaining standards of protection from the scope of investment arbitration, precisely reflecting their belief that arbitration was not the only way to enforce these standards.[136] The Respondent addresses, in this regard, the Claimant's assertion that the Respondent's interpretation is "untenable" in light of the FIR

[128] Ecuador's Reply on Jurisdiction, ¶¶ 111; 113.
[129] Reply on Jurisdiction, ¶¶ 94-96.
[130] Memorial on Objections to Jurisdiction, ¶ 76, 81.
[131] Memorial on Objections to Jurisdiction, ¶ 77.
[132] Memorial on Objections to Jurisdiction, ¶ 78.
[133] Memorial on Objections to Jurisdiction, ¶ 82; Reply on Jurisdiction, ¶ 138.
[134] Memorial on Objections to Jurisdiction, ¶ 83; Reply on Jurisdiction, ¶ 149.
[135] Memorial on Objections to Jurisdiction, ¶ 84.
[136] Reply on Jurisdiction, ¶ 148.

provision contained in the second sentence of Article 9.3.[137] The Respondent submits that the FIR provision is not triggered when the investor only requests domestic courts to decide on the State's liability for expropriation or to declare if certain measures qualify as expropriation.[138] It would also not be triggered, as per the Respondent, when the investor requests a domestic court to decide on the State's alleged violation of other Treaty standards.[139] In accordance with the Respondent's view, such clause would only be activated if the request to domestic courts pertains to the amount of compensation for expropriation.[140]

140. Elaborating on the above, the Respondent submits that a FIR clause is only triggered whenever there is an overlap between two claims.[141] Accordingly, pursuing a domestic remedy for expropriation cannot possibly trigger the applicability of the FIR clause because such venue deals with the legality of the expropriation under domestic law, whereas the arbitral path would focus on the question of legality under international law.[142]

141. The Respondent also contests the Claimant's reliance on the preamble of the Treaty to support a broad interpretation of Ecuador's consent.[143] The Respondent argues that the preamble "is not an independent source of the intention of the drafters" or a "carte blanche for investors to rewrite the treaty",[144] but, critically, it highlights the Claimant's alleged mischaracterization that the preamble referred to a "meaningful" protection, or even made any reference at all to the dispute settlement method of the Treaty,[145] and even more so, that any "meaningful" protection would necessarily imply recourse to ISDS.[146]

142. Finally, the Respondent also argues that it is the Claimant's interpretation of Article 9.3 that deprives the phrase "amount of compensation for expropriation" of any *effet utile*, opposing the Claimant's argument that if issues of quantum are inextricably linked to questions of liability for expropriation or, for example, breaches of FET obligations, they would be covered by Article 9.3.[147] The assessment of an FET claim, the Respondent contends, is a stand-alone evaluation

[137] Memorial on Objections to Jurisdiction, ¶ 89; Reply on Jurisdiction, ¶ 150.

[138] Memorial on Objections to Jurisdiction, ¶¶ 91-92; Reply on Jurisdiction, ¶ 152.

[139] Memorial on Objections to Jurisdiction, ¶ 91.

[140] Memorial on Objections to Jurisdiction, ¶ 91; *AsiaPhos Limited and Norwest Chemicals Pte Ltd v. People's Republic of China*, ICSID Case No. ADM/21/1, Award, 16 February 2023, ¶ 176, **RL-013**.

[141] Reply on Jurisdiction, ¶ 154.

[142] Reply on Jurisdiction, ¶ 154.

[143] Ecuador's Reply on Jurisdiction, ¶¶ 144-149.

[144] Reply on Jurisdiction, ¶ 145.

[145] Reply on Jurisdiction, ¶ 146.

[146] Reply on Jurisdiction, ¶ 148.

[147] Reply on Jurisdiction, ¶ 140.

under the FET legal umbrella.[148] The Respondent also casts doubt on the feasibility of the Claimant's inextricable link theory.[149] In the Respondent's view, requiring a tribunal to conclude that there was an expropriation in order to be able to assess an FET claim is unworkable in a practical scenario.[150]

(d) Arbitral awards interpreting similarly worded treaties

143. The Respondent submits that other arbitral tribunals have recognized to have jurisdiction only over the amount of compensation for expropriation (excluding occurrence and legality).[151]

144. As regards cases involving BITs not concluded by China, the Respondent argues, for instance, that in *Berschader v. Russia*, the tribunal reached such conclusion, noting that the Soviet Union generally entered into BITs containing limited consent to investment arbitration.[152] The Respondent also highlights that in *RosInvest v. Russia* and *Austrian Airlines v. Slovakia*, both tribunals were inclined to a narrow interpretation of the arbitration agreement and held that the ordinary meaning of the jurisdictional clause excluded the occurrence and legality of the expropriation questions.[153]

145. As regards BITs concluded by China, the Respondent observes that arbitral tribunals have expressed two sets of opinions when dealing with the legal question on whether a similarly worded clause limits jurisdiction to the amount of compensation for expropriation.[154] The tribunals that agree with Ecuador's position regarding the jurisdictional limitation are those from *Beijing Everyway v. Ghana*, *Beijing Shougang v. Mongolia*, and *Asiaphos v. China*.[155] The three tribunals that would side with the Claimant's position, and thus, assumed jurisdiction over both occurrence, liability and quantum are those from *Tza Yap Shum v. Peru*, *Sanum v. Laos*, and

[148] Reply on Jurisdiction, ¶ 141.

[149] Reply on Jurisdiction, ¶ 142.

[150] Reply on Jurisdiction, ¶ 142.

[151] Memorial on Objections to Jurisdiction, ¶ 95. Reply on Jurisdiction, ¶ 184.

[152] Memorial on Objections to Jurisdiction, ¶ 97; *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, SCC Case No. 080/2004, Award, 21 April 2006, ¶ 155, **RL-015**.

[153] Memorial on Objections to Jurisdiction, ¶¶ 99-100; *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction, 1 October 2007, ¶ 112, 114, **RL-039**; *Austrian Airlines v. The Slovak Republic*, UNCITRAL, Final Award, 9 October 2009, ¶ 96, **RL-010**.

[154] Memorial on Objections to Jurisdiction, ¶ 101.

[155] Memorial on Objections to Jurisdiction, ¶ 101; Reply on Jurisdiction, ¶¶ 189-190; *Beijing Everyway Traffic and Lighting Company Limited v. Ghana*, PCA Case No. 2021-15, Final Award on Jurisdiction, 30 January 2023,¶¶ 166-171, **RL-014**; *China Heilongjiang International Economic & Technical Cooperative Corp, and others v. Mongolia*, PCA Case No. 2010-20, Award, 30 June 2017, ¶¶ 442-445, **RL-012**; A*siaPhos Limited and Norwest Chemicals Pte Ltd v. People's Republic of China*, ICSID Case No. ADM/21/1, Award, 16 February 2023, ¶ 78, **RL-013**.

BUCG v. Yemen.[156] The Respondent further observes that none of these tribunals accepted jurisdiction over violations of other BIT standards besides expropriation.[157]

146. Regarding *Beijing Everyway v. Ghana*, the Respondent refutes the Claimant's argument that said tribunal performed a narrow reading of the provision because the arbitration clause was titled "Settlement of Dispute [sic] on Quantum of Compensation". The Respondent submits that the title of the clause had no bearing on the tribunal's reasoning. Rather, the Respondent underscores that the tribunal focused on the ordinary meaning of the term "the amount of" preceding the terms "compensation for expropriation", to conclude that there was a clear limitation intended by the treaty parties.[158]

147. Furthermore, the Respondent rejects the Claimant's proposition that the existence of the FIR provision in the China-Ghana BIT influenced the tribunal's decision. The Respondent categorizes this argument as "irrelevant", because the existence of such provision would, in any case, not render the Respondent's interpretation "untenable", for the reasons summarized above. To further defend this point, the Respondent notes that both in *Beijing Shougang v. Mongolia* and *AsiaPhos v. China*, the tribunals upheld a narrow interpretation of the arbitration clause even considering that the treaties had FIR provisions.[159] The Respondent showcases that what prevailed for both tribunals was the ordinary meaning of the relevant clause.[160] Moreover, the Respondent notes that a reading of these awards confirms that the tribunals' positions were mainly motivated by their intention to give due effect to the limitations on jurisdiction imposed by the contracting parties of the treaty.[161]

148. The Respondent submits that the Tribunal should not follow the decisions in *Tza Yap Shum v. Peru*, *Sanum v. Laos*, and *BUCG v. Yemen*.[162] First, the Respondent contests the central premise the tribunal stood on in *Tza Yap Shum v. Peru*, reiterating that the FIR clause is not left without effect if the jurisdictional clause is limited to the amount of compensation for expropriation,

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[156] Memorial on Objections to Jurisdiction, ¶ 101; *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction, 19 June 2006, **CL-025**; *Sanum Investments Limited v. Lao People's Democratic Republic*, UNCITRAL, PCA Case No. 2013-13, Award on Jurisdiction, 13 December 2013, **CL-027**; *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017, **CL-023**.

[157] Memorial on Objections to Jurisdiction, ¶ 102.

[158] Memorial on Objections to Jurisdiction, ¶ 104; *Beijing Everyway Traffic and Lighting Company Limited v. Ghana*, PCA Case No. 2021-15, Final Award on Jurisdiction, 30 January 2023, ¶¶ 118–120, **RL-014**.

[159] Memorial on Objections to Jurisdiction, ¶ 105.

[160] Memorial on Objections to Jurisdiction, ¶¶ 105-107; *China Heilongjiang International Economic & Technical Cooperative Corp, and others v. Mongolia*, PCA Case No. 2010-20, Award, 30 July 2017, ¶ 451, **RL-012**; *AsiaPhos Limited and Norwest Chemicals Pte Ltd v. People's Republic of China*, ICSID Case No. ADM/21/1, Award, 16 February 2023, ¶ 84, **RL-013**.

[161] Reply on Jurisdiction, ¶ 191.

[162] Memorial on Objections to Jurisdiction, ¶ 109.

because when an investor initiates proceedings before local courts to seek a declaration of expropriation, the investor is not barred from resorting to international arbitration to settle the quantum question.[163] The Respondent also emphasizes that it was not China's intent for a FIR provision to be used to expand the scope of consent to arbitration.[164] The Respondent relies on Chinese scholarship criticizing the award for reaching a "manifestly absurd" interpretation, and for showing bias.[165] The Respondent submits that the same criticism applies to *Sanum v. Laos* and *BUCG v. Yemen*, because the FIR clause in both applicable treaties influenced the tribunal's decision to expand consent to arbitration.[166]

(e) Broad interpretation is not supported by principles of international law

149. The Respondent further challenges the Claimant's expert's theory regarding consent by implication, denying both that Article 9.3 includes any "implied issues" that can be "imported", *i.e*. the power to rule on occurrence of expropriation, as well as asserting that no legal authority exists to permit such importation. In short, the Respondent sustains that the ICJ jurisprudence relied upon by the Claimant is inapposite because Article 9.3 only grants jurisdiction on the remedy (compensation) and not on the breach, and not the other way around.[167]

(f) Good faith interpretation

150. In light of all the foregoing, according to Respondent, the only plausible and good faith interpretation of Article 9.3, consistent with the VCLT, would be the one that results in the Tribunal having jurisdiction to determine only the amount of compensation for an expropriation previously proclaimed by Ecuador. In such an eventual scenario, an investor could then resort to ISDS arbitration to discuss one issue alone: the amount of compensation for expropriation.[168]

151. The Respondent further rejects, in this regard, the Claimant's theory that jurisdiction would extend to any claimed breaches "so long as they formed part of a larger dispute that would involve the amount of compensation for expropriation" because this would allow an investor to overcome the limitations imposed by the phrase "amount of compensation for expropriation", extending

[163] Memorial on Objections to Jurisdiction, ¶ 111.

[164] Memorial on Objections to Jurisdiction, ¶ 112.

[165] Memorial on Objections to Jurisdiction, ¶ 113; A. Chen, "Queries to the Recent ICSID Decision on Jurisdiction upon the Case of Tza Yap Shum v. Republic of Peru: Should China-Peru BIT 1994 Be Applied to Hong Kong SAR under the One Country Two Systems Policy", 10 J. World Investment & Trade 829 (2009), pp. 861–862, **RL-033**; G. "Wang, Consent in Investor–State Arbitration: A Critical Analysis", Chinese Journal of International Law, 2014, pp. 350-352, **RL-040**.

[166] Memorial on Objections to Jurisdiction, ¶ 115.

[167] Reply on Jurisdiction, ¶¶ 33-36.

[168] Reply on Jurisdiction, ¶ 40.

jurisdiction to other breaches of the Treaty, by simply bringing forward a frivolous claim for determination of an amount of compensation for expropriation.[169]

(g) Considerations based on Ecuadorian Law

152. The Respondent argues that while the domestic laws of the Contracting Parties are not relevant towards interpreting Article 9.3 of the Treaty, Ecuadorian law allows an investor to bring a claim before Ecuadorian courts for a breach of the Treaty, notably a "juicio de conocimiento", in which the applicant can seek a declaration regarding its rights under the Treaty, notably a declaration that expropriation has occurred. Once such a declaration is obtained, the investor can then submit its dispute over quantum to an arbitral tribunal.[170]

153. The Respondent asserts that the Claimant's argument that obtaining such a declaration of expropriation is not possible under Ecuadorian law is wrong.[171] First, the Respondent posits that whenever a treaty, like this BIT, is ratified, it becomes part of Ecuadorian law and thus the rights contained therein become actionable. Therefore, investors can seek remedy before Ecuadorian courts for breaches of Treaty obligations.[172] Moreover, the Respondent submits that investors do not require "enabling legislation", contrary to what the Claimant sustains, to seek enforcement of rights under the Treaty,[173] simply because Article 75 of the Ecuadorian Constitution bestows upon every affected individual the right to access to justice (*derecho a la tutela efectiva de los derechos*).[174]

154. The absence of a specialized legal framework or a statute granting Ecuadorian judges specific jurisdiction poses no hindrance, according to the Respondent. The Ecuadorian legal system vests an inherent authority upon judges to hear disputes even in the absence of a clear legal framework. Furthermore, judges have a duty to adjudge in cases where there is unclear law, since they are statutorily prohibited from denying the administration of justice.[175]

155. In light of the above, the Respondent presents three procedural avenues that the Claimant could pursue to enforce its rights under Ecuadorian law: (i) an action before a civil court using the ordinary procedure seeking a declaration that certain government conduct is similar to an expropriation; (ii) an action before a civil court using the ordinary procedure seeking a declaration that certain government conduct amounts to confiscation; (iii) a constitutional action before any

[169] Reply on Jurisdiction, ¶ 139.
[170] Memorial on Objections to Jurisdiction, ¶¶ 93-94.
[171] Reply on Jurisdiction, ¶ 161.
[172] Reply on Jurisdiction, ¶ 164.
[173] Reply on Jurisdiction, ¶¶ 165-166.
[174] Reply on Jurisdiction, ¶ 167.
[175] Reply on Jurisdiction, ¶ 169.

court of first instance seeking remedy for an alleged violation of constitutional property rights.[176] Moreover, the Respondent submits that the Claimant can also seek a judicial declaration of an alleged violation of its rights against expropriation or similar measures under Article 4 of the Treaty.[177] The Respondent also notes that the Claimant could have initiated an *Acción Extraordinaria de Protección* to challenge the Court Judgments, or could have intervened in the one filed by the *Procuraduría General del Estado*.[178]

156. Finally, while noting that the nature of the Court Judgements falls outside the Tribunal's jurisdiction at the present phase of the arbitration, the Respondent submits that the Court Judgments themselves do not constitute a declaration of expropriation. A "suspension" of exploitation activities would not be tantamount to an expropriation, as it does not bear the inherent permanence and irreversible nature of an expropriation.[179] The Respondent rejects, in this regard, the Claimant's proposition that the passage of time has turned the temporary measure into a permanent one, because the passage of time cannot generate a legal situation that is only for an Ecuadorian state organ to create.[180]

2. The Claimant's position

157. The Claimant submits that an interpretation of Article 9.3 under Article 31 of the VCLT can only lead to the conclusion that a dispute "involving the amount of compensation for expropriation" encompasses both the legal question on liability for expropriation, as well as the question related to quantum.[181] In its view, findings regarding the occurrence and modality of the expropriation (direct or measures similar to expropriation, lawful or unlawful, etc.) are elements that are highly relevant to the determination of the amount of compensation. The award to be made by the Tribunal is, therefore, one that involves the amount of compensation for the expropriation; such integrated award is indivisible.[182]

158. The Claimant objects to the Respondent's application of Articles 31 and 32 of the VCLT,[183] particularly in relation to the use of China's contemporaneous investment treaty policy and the Respondent's interpretation of the term "involving the amount of compensation for expropriation." It argues that these do not assist in interpreting the ordinary meaning, context or

[176] Reply on Jurisdiction, ¶ 171.
[177] Reply on Jurisdiction, ¶ 172.
[178] Reply on Jurisdiction, ¶¶ 181-183.
[179] Reply on Jurisdiction, ¶ 177.
[180] Reply on Jurisdiction, ¶ 178.
[181] Counter-Memorial on Objections to Jurisdiction, ¶ 43.
[182] Counter-Memorial on Objections to Jurisdiction, ¶ 42.
[183] Rejoinder on Jurisdiction, ¶ 52.

object and purpose of Article 9.3.[184] The Claimant further disagrees with substituting the prior analysis under Article 31 with Article 32, [185] particularly when the interpretation of Article 9.3 in accordance with Articles 31 does not lead to an ambiguous or unclear understanding, nor does it produce a manifestly absurd or unreasonable outcome.[186]

(a) The ordinary meaning and context of Article 9.3 of the Treaty

159. As a prelude to delving into the scope of the disputes covered by Article 9.3, the Claimant agrees with the Respondent that not all disputes under the Treaty are arbitrable.[187]

160. The Claimant submits, however, first and foremost, that arbitrability lies in the difference between the phrasings "any dispute in connection with an investment" in Article 9.1 and "a dispute involving the amount of compensation for expropriation" in Article 9.3, rather than in the differences in the use of "a", "any" or "the".[188] Relying on Prof. Kolb's legal opinion, the Claimant asserts that even though the use of "a" in Article 9.3 does indeed demonstrate that it has a narrower scope than Article 9.1, this is unrelated to the "material reach" of Article 9.3.[189]

161. Second, the Claimant avers that the literal interpretation of Article 9.3 means that "a collective of claims brought by the Investor against a Contracting State" (a dispute), "that includes" (involves) the amount of compensation for expropriation can be brought to arbitration.[190]

162. Relying on the definition of "dispute" provided by the Respondent, found in the *Mavrommatis* case, the Claimant argues that a dispute is not limited to just one disagreement on a point of law or fact, as the Respondent suggests. Based on the opinions of scholars Palchetti and Schreuer, the Claimant emphasizes that the term "dispute" is broad and can encompass multiple claims.[191] Pursuant to Prof. Kolb's legal opinion, the Claimant underscores the alleged absurdity of the Respondent's argument that the word "dispute" in singular automatically overrides the possibility of bringing multiple claims.[192]

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184 Rejoinder on Jurisdiction, ¶¶ 53-54.

185 Rejoinder on Jurisdiction, ¶¶ 55-56.

186 Rejoinder on Jurisdiction, ¶ 60.

187 Counter-Memorial on Objections to Jurisdiction, ¶ 47; Rejoinder on Jurisdiction, ¶¶ 67, 70-74.

188 Counter-Memorial on Objections to Jurisdiction, ¶ 47.

189 Counter-Memorial on Objections to Jurisdiction, ¶ 46; Rejoinder on Jurisdiction, ¶ 74.

190 Counter-Memorial on Objections to Jurisdiction, ¶ 47.

191 Counter-Memorial on Objections to Jurisdiction, ¶ 48; C. Schreuer, "What is a Legal Dispute?" in I. Buffard, J. Crawford, A. Pellet, and S. Wittich (eds), *International. Law between Universalism and Fragmentation*. Festschrift in Honour of Gerhard Hafner, Martinus Nijhoff Leiden, 2008, p. 960, **CL-046**; P. Palchetti, "Dispute", Max Planck Encyclopedia of International Law, Oxford Public International Law, 2018, ¶ 10, **CL-045**.

192 Counter-Memorial on Objections to Jurisdiction, ¶ ¶49-50; **CER-002**, Prof. Kolb, ¶ 33.

163. Third, the Claimant maintains that the ordinary meaning of the term "involving" in Article 9.3 confirms that consent to arbitrate covers at least disputes dealing with compensation for expropriation as well as liability.[193] The Claimant relies on the dictionary definition of "involving", which is "including, entangling or enveloping".[194] This would mean that the minimum requirement is that the dispute "includes" the determination on the amount of compensation, which does not entail a restriction.[195] Following *Tza Yap Shum v. Peru* and *Sanum Investments v. Laos*, where the tribunals interpreted similarly-worded treaty clauses, the Claimant submits that the term "involving" has an inclusive meaning that indicates that the jurisdictional scope is not necessarily restricted to the amount of compensation over expropriation.[196] To reinforce this argument, the Claimant relies on the dissenting opinion of arbitrator Stanimir Alexandrov in *AsiaPhos v. China*, where he advocated for the inclusive nature of the term, and opposed the majority's opinion that it was neutral.[197]

164. As for the Spanish version of the Treaty, the Claimant rejects the Respondent's submission that the expression "relacionado con" might carry an exclusive meaning considering the wording of the Treaty, sustaining that there is no indication in the Treaty that the Parties intended for that phrase to be exclusive.[198] The Claimant explains that the Spanish term's meaning entails that, provided the two elements in question are connected (in this case, the dispute and the amount of compensation for expropriation), they would both be included within the scope of the arbitration agreement.[199]

165. In the same vein, the Claimant contends that the Respondent's proposition around the term "relacionado con" found in Article 8.1 is irrelevant. While it is true that the term "relacionado con" is used in Articles 8.1 and 9.3 of the Spanish version, the Claimant considers that the repetition of this phrase does not really speak to the true meaning of the term. Rather, the Claimant avers that the English and Chinese versions show that the drafters intended for both provisions to

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[193] Counter-Memorial on Objections to Jurisdiction, ¶ 52.

[194] Counter-Memorial on Objections to Jurisdiction, ¶ 52: *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017, ¶ 76, **CL-023**; Rejoinder on Jurisdiction, ¶ 77.

[195] Counter-Memorial on Objections to Jurisdiction, ¶ 53; *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence (Spanish), 19 June 2009, ¶ 150, **CL-025**.

[196] Counter-Memorial on Objections to Jurisdiction, ¶ 54; *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence (Spanish), 19 June 2009, ¶ 150, **CL-025**; *Sanum Investments Limited v. The Government of the Lao People's Democratic Republic*, PCA Case No. 2013-13, Award on Jurisdiction, 13 December 2013, ¶ 329, **CL-027**; Rejoinder on Jurisdiction, ¶ 77.

[197] Counter-Memorial on Objections to Jurisdiction, ¶ 55; *AsiaPhos Limited and Norwest Chemicals Pte Ltd v. People's Republic of China*, ICSID Case No. ADM/21/1, Dissenting Opinion of Stanimir A. Alexandrov, 16 February 2023, ¶ 13, **CL-050**; Rejoinder on Jurisdiction, ¶ 78.

[198] Counter-Memorial on Objections to Jurisdiction, ¶ 56; Rejoinder on Jurisdiction, ¶ 91.

[199] Rejoinder on Jurisdiction, ¶ 91.

carry different meanings. Notably, and unlike the Spanish version, the English and Chinese versions use different terms for Articles 8.1 and 9.3. For instance, in Article 8.1, the English version uses the word "concerning" and the Chinese version uses the character "对" (dui) (meaning "to", "for", "about"), both having restrictive meanings. However, in Article 9.3, the English version uses the term "involving" and the Chinese version uses the characters "**涉及**" (shèjí), both terms carrying, according to the Claimant, an inclusive meaning.[200]

166. The Claimant further underscores that the Chinese characters "**涉及**" (shèjí) are used to translate the term "involving" in "most dispute resolution clauses" with the same formulation as Article 9.3 of the Treaty.[201]

167. Focusing on the Chinese version of the Treaty, the Claimant submits that the ordinary meaning of the characters "**涉及**" (shèjí), found in the dictionary "新华词典" (Xinhua Cidian), is either of the following: (i) "牵涉到" (qianshedao); or (ii) "**关**联到" (guanliandao)[202].

168. Regarding the characters "牵涉" (qianshe), the Claimant notes that the translation found in Cambridge Dictionary is: (i) "involve" which in turn means "to include someone in something, or to make them take part in or feel part of it"; or (ii) "entail" which in turn means "to make something necessary, or to involve something."[203] The Claimant further notes that the Respondent relied on the Collins Dictionary, which translates the Chinese characters "**涉及**" (shèjí) to "involve" and defines such term as "[i]f an activity involves something, that thing is a necessary part of it." The Claimant submits that this confirms that the characters "**涉及**" (shèjí) have an inclusive meaning, contrary to the Respondent's assertions.[204]

169. Regarding the characters "**关**联" (guanlian), the Claimant notes that the Cambridge Dictionary provides the following meanings: (1) relation, relationship; (2) connection; (3) link, linkage; (4)

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[200] Counter-Memorial on Objections to Jurisdiction, ¶ 57.

[201] Counter-Memorial on Objections to Jurisdiction, ¶ 58; Agreement between the People's Republic of China and the Government of the Republic of Estonia concerning the encouragement and reciprocal protection of Investments (official Chinese version), dated 9 February 1993, Article 8.3, **CL-051**; Agreement between the Government of the People's Republic of China and the Government of the Republic of Iceland concerning the promotion and reciprocal protection of investments (official Chinese version), dated 31 March 1994, Article 9.3, **CL-052**; Agreement between the Government of the Arab Republic of Egypt and the Government of the People's Republic of China concerning the encouragement and reciprocal protection of investments (official Chinese version), dated 21 April 1994, Article 9.3, **CL-053**.

[202] Counter-Memorial on Objections to Jurisdiction, ¶ 59; Extract of Xinhua Cidian (4th Edition, August 2013, The Commercial Press), **C-064**.

[203] Counter-Memorial on Objections to Jurisdiction, ¶ 60; "牵涉" (qianshe), Cambridge Chinese (Simplified)-English Dictionary, **C-065**.

[204] Counter-Memorial on Objections to Jurisdiction, ¶ 62"**涉**及", Collins Dictionary, **R-005**.

association; and (5) correspondence.[205] The Claimant submits that this term carries a connotation of relationship, not of limitation.[206]

170. Moreover, the Claimant sustains that if the Parties had intended to narrow the scope of the consent to arbitrate, they would have used terms like "concerning", "provided that", "on the matter of", "limited to" or "over", providing examples emanating from China's treaty practice. For instance, Article 7.1 of the China-United Kingdom BIT reads "concerning an amount of compensation", Article 8.1 of the China-Israel BIT reads "with respect to the amount of compensation", and Article 10.2(a) of the China-Philippines BIT reads "on the matter of compensation".[207]

171. The Claimant submits that, unlike the translation of the word "involving" which is "**涉及**" (shèjí), the word "concerning" is usually translated to (i) "有**关**" (youguan) or (ii) "**关于**" (guanyu).[208] The Claimant explains that both of these terms generally mean "about", "on", "regarding", "over", "for", which are all of a restrictive nature and entirely different from "**涉及**" (shèjí).[209]

172. The Claimant provides a detailed presentation of China's BITs which refer to "the amount of compensation for expropriation" and that use: (i) the word "involving" and its corresponding Chinese characters "涉及" (shèjí); (ii) the word "concerning" and its corresponding Chinese characters " 有关" (youguan), "关于" (guanyu) and "就" (jiu); and (iii) other connectors "on the matter of", "over", "with respect to", "about" and "relate to" and their corresponding Chinese characters "有关" (youguan). The Claimant showcases these examples to dispel the Respondent's argument that the word "involving" and its Chinese characters "涉及" (shèjí) do not bear an inclusive meaning.[210] It explains that the first group is consistently employed in 36 China BITs out of the 47 China BITs summarised; the second group in 18 China BITs; and the third in 10.[211] It then concludes that the Chinese characters "涉及" (shèjí), consistently correspond to the word

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[205] Counter-Memorial on Objections to Jurisdiction, ¶ 63; "**关**联" (guanlian), Cambridge Chinese (Simplified)-English Dictionary, **C-067**.

[206] Counter-Memorial on Objections to Jurisdiction, ¶¶ 63-64.

[207] Counter-Memorial on Objections to Jurisdiction, ¶ 65; Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China concerning the Promotion and Protection of Investments with Exchange of Notes, available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/793/download, dated 15 May 1968, **CL-054**; Agreement between the Government of the People's Republic of China and the Government of the State of Israel for the Promotion and Reciprocal Protection of Investments, dated 10 April 1995, **CL-055**; Agreement between the Government of the People's Republic of China and the Government of the Republic of the Philippines concerning Encouragement and Reciprocal Protection of Investments, dated 20 July 1992, **CL-056**.

[208] Counter-Memorial on Objections to Jurisdiction, ¶ 66.

[209] Counter-Memorial on Objections to Jurisdiction, ¶ 67; Rejoinder on Jurisdiction, ¶ 82.

[210] Rejoinder on Jurisdiction, ¶ 83-89, Appendices A-C.

[211] Rejoinder on Jurisdiction, ¶ 86.

"involving",[212] and are utilized in most dispute resolution clauses qualified by "the amount of compensation for expropriation".[213]

173. As per the Claimant, the Tribunal should give weight to this choice of wording because it reflects the common intention of the Contracting Parties and created legitimate expectations for the investors.[214]

174. The Claimant then highlights that in the event there is a conflict between the meaning of "involving" in the Spanish and Chinese versions, then the English version would prevail.[215]

175. Fourth, the Claimant argues that Ecuador's interpretation of Article 9.3 constitutes a rewrite, as it would add the word "only" before "the amount of compensation for expropriation" and the expression "that has already been proclaimed" after that same expression.[216] Consequently, this interpretation narrows the meaning of the word "expropriation" to the exclusion of indirect expropriation, contradicting the express wording of Article 4.1 and the "well-established principle of international law that expropriation provisions of investment protection treaties cover indirect expropriation as well."[217]

176. Fifth, the Claimant avers that, in applying Article 31 of the VCLT, Article 9.3 must be read in context with the other fragments of Article 9, as well as the rest of the provisions that make up the entire Treaty.[218]

177. In this respect, the Claimant submits that paragraphs 1 and 2 of Article 9 contain no indication that the investor's possibilities should be limited to settlement through negotiations and litigation before domestic courts. Rather, the correct way of reading Article 9 would be as a "gradual build-up" of the right of the Parties to submit "a dispute involving the amount of compensation for expropriation" to arbitration.[219]

178. While the Claimant agrees with the Respondent's proposition that Article 9.3 encompasses a subset of the disputes referred to in Article 9.1, the Claimant rejects that it is a subset with respect to those submitted to domestic courts in Article 9.2 and can only deal with the amount of compensation. Rather, the Claimant submits that the subset is derived from the qualifier "involving the amount of compensation for expropriation", meaning that a dispute that does not

[212] Rejoinder on Jurisdiction, ¶ 88.
[213] Rejoinder on Jurisdiction, ¶ 87.
[214] Counter-Memorial on Objections to Jurisdiction, ¶ 68.
[215] Counter-Memorial on Objections to Jurisdiction, ¶ 69.
[216] Rejoinder on Jurisdiction, ¶ 92-94.
[217] Rejoinder on Jurisdiction, ¶ 97.
[218] Counter-Memorial on Objections to Jurisdiction, ¶ 72.
[219] Counter-Memorial on Objections to Jurisdiction, ¶ 78; Rejoinder on Jurisdiction, ¶ 114.

involve the amount of compensation for expropriation cannot be submitted to arbitration, and by no means requires prior domestic litigation under Article 9.2.[220]

179. In that vein, the Claimant's reading of Article 9.3 requires three conditions to be met for the Parties to have a right to submit the dispute to international arbitration: (i) that the dispute cannot be settled through negotiations within the six-month period referred to in Article 9.3; (ii) that it involves the amount of compensation for expropriation; and (iii) that the dispute has not been submitted to an Ecuadorian court.[221]

180. Regarding this last condition, the Claimant considers that the last sentence of Article 9.3 ("the provisions of this paragraph shall not apply if the investor concerned has resorted to the procedure specified in Paragraph 2 of this Article") is a FIR provision, which Ecuador fails to take into consideration.[222] Relying on Prof. Kolb's legal opinion,[223] the Claimant contends that this is meant to give the investor a choice between submitting a dispute involving the amount of compensation for expropriation to either of two options: (i) a domestic court in Ecuador (pursuant to Article 9.2), or (ii) international arbitration (pursuant to Article 9.3).[224] According to the Claimant, the fact that the investor is barred from resorting to international arbitration if they pursue "the procedure" mentioned in Article 9.2, *i.e*. local litigation, indicates that the disputes under Article 9.2 are also arbitrable.[225] In other words, if "a dispute involving the amount of compensation for expropriation" has been submitted to local courts, the investor will no longer be able to resort to arbitration.[226]

181. To further support this interpretation, the Claimant turns to cases where tribunals have interpreted similar jurisdictional clauses against the backdrop of a FIR clause.[227] Namely, in *Tza Yap Shum v. Peru*, the tribunal held that an approach where only disputes concerning compensation for expropriation could be submitted to arbitration would defeat the whole purpose of the arbitration clause.[228] Moreover, the Court of Appeal of Singapore in *Sanum v. Laos* held that, in the context of the FIR clause, the legal issues of liability for expropriation and quantum are inseparable.[229]

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[220] Counter-Memorial on Objections to Jurisdiction, ¶¶ 79 and 82; Rejoinder on Jurisdiction, ¶¶ 115-116.

[221] Counter-Memorial on Objections to Jurisdiction, ¶ 80.

[222] Counter-Memorial on Objections to Jurisdiction, ¶¶ 82-83.

[223] Rejoinder on Jurisdiction, ¶ 118.

[224] Counter-Memorial on Objections to Jurisdiction, ¶ 83.

[225] Counter-Memorial on Objections to Jurisdiction, ¶ 84.

[226] Rejoinder on Jurisdiction, ¶ 116.

[227] Counter-Memorial on Objections to Jurisdiction, ¶ 86.

[228] Counter-Memorial on Objections to Jurisdiction, ¶ 86; *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence (Spanish), 19 June 2009, ¶¶ 154, 157, **CL-025**.

[229] Counter-Memorial on Objections to Jurisdiction, ¶ 87; *Sanum Investments Limited v. The Government of the Lao People's Democratic Republic*, [2016] SGCA 57, 29 September 2016, ¶ 130, **CL-028**.

Both tribunals concurred that a narrow interpretation of the arbitration clause, completely isolated from the FIR clause, would lead to an "untenable conclusion": the investor would not have access to arbitration.[230]

182. According to the Claimant, an examination of Article 4 is indispensable to understand the scope, reach, and meaning of Article 9.3.[231] This because if an investor were to submit a dispute relating to the existence and legality of an expropriation to a local court, by reason of Article 4 of the Treaty such local court would necessarily have to decide on the issue of fair compensation, which is one of the four requirements set out in Article 4.1 to decide on a lawful expropriation, thus triggering the FIR provision and preventing recourse to arbitration.[232]

183. The Claimant rejects the Respondent's standpoint that the FIR provision is not triggered if the investor limits its claim in domestic litigation to the liability for expropriation and leaves the compensation issue aside. The Claimant views this interpretation as unsustainable, precisely because one of the four elements of a lawful expropriation established in Article 4.1 of the Treaty is a fair compensation. The Claimant underlines the term "fair" and submits that it inevitably delves into the amount of compensation.[233] The Claimant goes on to rely on the analysis of the court in *Sanum v. Laos*, which held that, applying the FIR provision, and in light of the expropriation clause, if an investor submits the question on liability for expropriation to a domestic court, it would immediately be barred from submitting it to international arbitration on the amount of compensation because this issue would have already been analysed by the domestic court.[234]

184. According to the Claimant, Ecuador's case on Article 4 is marred by one serious contradiction, as it artificially separates the wording of Article 4 and asserts that the determination of "fair compensation" falls within the jurisdiction of the Tribunal, by reason of Article 4.2. However, pursuant to Article 4.1(d), for an expropriation to be lawful it must fulfill four requirements, including fair compensation.[235]

185. Consequently, the determination of the legality of an expropriation by domestic courts will always result in a declaration of unlawfulness, considering that the Respondent argues that courts must

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[230] Counter-Memorial on Objections to Jurisdiction, ¶ 88; *Sanum Investments Limited v. The Government of the Lao People's Democratic Republic*, [2016] SGCA 57, 29 September 2016, ¶ 133, **CL-028**; *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence (Spanish), 19 June 2009, ¶¶ 154-157, **CL-025**.

[231] Rejoinder on Jurisdiction, ¶ 101.

[232] Rejoinder on Jurisdiction, ¶ 117.

[233] Counter-Memorial on Objections to Jurisdiction, ¶¶ 92-93, Rejoinder on Jurisdiction, ¶ 107.

[234] Counter-Memorial on Objections to Jurisdiction, ¶ 94, Rejoinder on Jurisdiction, ¶ 110.

[235] Rejoinder on Jurisdiction, ¶¶ 103-104.

refrain from examining the fulfilment of fair compensation, or an arbitral tribunal would also be barred from determining the amount of compensation for expropriation, resulting in the triggering of the FIR provision.[236] The Claimant states that if the intention of the Contracting Parties had been to separate the proceedings into legality and quantum, they would not have added the "fair" qualifier to Article 4.1(d), and they would have expressly allowed local courts to determine the question of legality.[237]

186. The Claimant concludes that the Respondent's take on the FIR provision would render the arbitration clause meaningless.[238]

(b) Interpreting Article 9(3) in light of the object and purpose of the Treaty

187. Junefield refutes the Respondent's argument that the interpretation of the Treaty is informed by the Chinese foreign policy of limiting the jurisdiction of international arbitration tribunals to issues of quantum. It is the common intention of both Contracting Parties, the Claimant asserts, that should be given weight in the interpretation of the Treaty and not just the unilateral intention of one of them.[239]

188. In this connection, the Claimant denies that Ecuador had negligible incidence in the Treaty's text during negotiations, as evidenced by the material differences between the Treaty and the Chinese Model BIT.[240] To the contrary, in the Claimant's view, it is "inconceivable" that Ecuador "blindly accepted" the conditions allegedly imposed by China – there had to be an assessment on the wording of the Treaty on Ecuador's side, pursuant to their understanding of international law and views on foreign investment protection.[241]

189. Furthermore, the Claimant submits that, contrary to the Respondent's argument, the Chinese foreign policy falls outside the scope of Article 31(3) of the VCLT in that treaties concluded by China with third parties are clearly not "relevant rules of international law applicable in the relations between the parties".[242] The Claimant sustains that the Respondent's reference to such treaties demonstrates that "[i]f anything, […] negotiators of this Treaty [China-Ecuador BIT] knew how to draft a restrictive dispute resolution clause and yet chose not to include such restrictive wording in the Treaty".[243]

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[236] Rejoinder on Jurisdiction, ¶ 105.
[237] Rejoinder on Jurisdiction, ¶ 108.
[238] Counter-Memorial on Objections to Jurisdiction, ¶ 96.
[239] Counter-Memorial on Objections to Jurisdiction, ¶ 120.
[240] Rejoinder on Jurisdiction, ¶¶ 128, 133-137.
[241] Rejoinder on Jurisdiction, ¶ 129.
[242] Rejoinder on Jurisdiction, ¶ 124.
[243] Rejoinder on Jurisdiction, ¶ 125.

190. In any case, even acknowledging the similarity between the Treaty and the Chinese Model BIT, the Claimant holds that the differences are "fundamental and material". In particular, the addition of the word "fair" to qualify "compensation" in Article 4 of the Treaty marks a stark distinction.[244] The Claimant submits that the incorporation of such adjective "creates a heightened obligation" to warrant that the harmed investor is restored to a position as close as possible as it had before the alleged expropriation occurred and includes the debate regarding lawfulness in any issues relating to the amount of compensation.[245]

191. The Claimant also rebuts the Respondent's argument that China's accession instrument to ICSID, showing a narrow consent to investment arbitration limited to compensation for expropriation, is relevant to interpret the Treaty. The Claimant considers that China's acceptance to ICSID arbitration is unrelated to its position towards arbitration generally. In any case, the Claimant notes that after its accession to ICSID, China adopted a more liberal approach towards arbitration.[246] This would be reflected, according to the Claimant, in the adoption of a new model BIT in 1997, which includes a dispute resolution clause giving the investor a choice between domestic courts and international arbitration with no limitation.[247]

192. Moreover, the Claimant denies that the treaties entered into by China in that period of time demonstrated a uniform practice of limiting arbitral jurisdiction to quantum.[248] The Claimant highlights the differences between the China-Singapore and China-Ghana BITs *vis-à-vis* the China-Ecuador BIT.[249] For instance, in the China-Singapore BIT, Article 6, referring to expropriation, contains a rule that compensation should be subject to the laws of the Contracting Party, as well as a provision stating that the legality of expropriation may be reviewed by a competent domestic court.[250] These provisions are absent in Article 4 of the China-Ecuador BIT.[251] For its part, the China-Ghana BIT contains no FIR provision, and the wording of its Article 10, entitled "Settlement of Dispute [sic] on Quantum of Compensation" is entirely different from Article 9 of the China-Ecuador BIT, to a point where no comparison is possible.[252]

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244 Rejoinder on Jurisdiction, ¶ 133-136.

245 Rejoinder on Jurisdiction, ¶ 136.

246 Rejoinder on Jurisdiction, ¶ 142.

247 Rejoinder on Jurisdiction, ¶ 146.

248 Counter-Memorial on Objections to Jurisdiction, ¶ 121.

249 Counter-Memorial on Objections to Jurisdiction, ¶ 123-125.

250 Counter-Memorial on Objections to Jurisdiction, ¶ 123; Agreement between the Government of the People's Republic of China and the Government of the Republic of Singapore on the Promotion and Protection of Investments, dated 21 November 1985, Article 6, **CL-033**.

251 Counter-Memorial on Objections to Jurisdiction, ¶ 123.

252 Counter-Memorial on Objections to Jurisdiction, ¶ 125.

(c) An effective interpretation of the treaty

193. The Claimant submits that an interpretation of Article 9.3 in light of the Treaty's object would support its interpretation of Article 9.3, not restricting the Tribunal's jurisdiction to quantum. The Claimant considers that the object and purpose of the Treaty, derived from its preamble, is "to promote foreign investments by providing meaningful protection to foreign investors".[253] In the Claimant's view, the "meaningful protection of investors" would depend on the "meaningful scope of the jurisdiction of the arbitral tribunal".[254] Thus, for the Claimant, relying on *Sanum v. Laos* and *Beijing Urban Construction v. Yemen*, the only reading of Article 9.3 that would give effect to the Treaty's object and purpose is that which gives the Tribunal the broadest jurisdictional scope possible, that is, including the ability for this Tribunal to decide also on existence and legality of an expropriation.[255]

194. The Claimant further submits, referring to its analysis of the ordinary meaning of Article 9.3 summarized at subsection (a) above, that the Respondent's position deprives the second sentence of Article 9.3 – the FIR provision –, if not the entire Article 9.3 and Article 4, of any effect, insofar as such position implies re-writing the Treaty, whereas the Claimant's interpretation does not, which is why it is the only interpretation that gives the Treaty *effet utile*.[256]

195. Moreover, the Claimant avers that the principle of evolutive interpretation provides further support to the weight that the Claimant is giving to the object and purpose of the Treaty.[257] The Claimant submits that said principle has been endorsed by international courts and arbitral tribunals, *i.e.*, the Inter-American Court of Human Rights, the International Court of Justice, and the arbitral tribunal in *Al-Warraq v. Indonesia*.[258]

(d) Arbitral awards interpreting similarly-worded treaties

196. The Claimant rejects the Respondent's reliance on (i) *AsiaPhos v. China*, (ii) *Beijing Everyway Traffic v. Ghana* and (iii) *Beijing Shougang v. Mongolia*.[259]

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253 Counter-Memorial on Objections to Jurisdiction, ¶ 97.

254 Counter-Memorial on Objections to Jurisdiction, ¶ 98; **CER-002**, Prof. Kolb, ¶ 90.

255 Counter-Memorial on Objections to Jurisdiction, ¶ 99; *Sanum Investments Limited v. The Government of the Lao People's Democratic Republic*, [2016] SGCA 57, 29 September 2016, ¶¶ 149-150, **CL-028**; *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017, ¶ 92, **CL-023**.

256 Rejoinder on Jurisdiction, ¶ 121.

257 Rejoinder on Jurisdiction, ¶ 152.

258 Rejoinder on Jurisdiction, ¶¶ 152-154.

259 Counter-Memorial on Objections to Jurisdiction, ¶ 133.

197. First, as already mentioned, *AsiaPhos v. China* is based on the China-Singapore BIT which, according to the Claimant, contains a wording that is not comparable to the one in the Treaty.[260] Concretely, the crux of the tribunal's reasoning in that case was Article 6.2, which contained a local jurisdictional clause for the legal question on expropriation. This clause, which has no equivalent in the China-Ecuador BIT, was read by the tribunal in conjunction with the arbitration clause. Consequently, the tribunal decided that the arbitration clause would be limited to the amount of compensation.[261]

198. The Claimant dismisses the Respondent's reliance on *Austrian Airlines v. Slovakia* and *RosInvest v. Russia* with the same argument.[262] In both cases, the Claimant submits, the relevant BITs contained separate local jurisdictional clauses that guided the tribunals to a narrow interpretation of the arbitration clauses. Because the local jurisdictional clause is absent in the China-Ecuador BIT, the Claimant submits, these cases are clearly distinguishable.[263]

199. Second, the Claimant sustains that *Beijing Everyway Traffic v. Ghana* is also not analogous to the instant case because (i) the local jurisdictional clause in Article 4.3 (which the Respondent fails to consider), (ii) the absence of a FIR clause, and (iii) the heading of Article 10 in the China-Ghana BIT all guided the tribunal to a narrow interpretation of the arbitration clause.[264]

200. Finally, while the Claimant concedes that the applicable treaty in *Beijing Shougang v. Mongolia* is indeed similarly worded to the China-Ecuador BIT, the Claimant holds that the conclusion reached by the tribunal in that case is an outlier considering the better reasoned decisions in *Tza Yap Shum* v. *China* and *Sanum v. Laos*, which gave effect to the FIR provision.[265]

(e) Broad interpretation is supported by principles of international law

201. The Claimant avers that its proposed broad interpretation of the arbitration clause is supported by two principles: (i) implied powers, and (ii) jurisdiction to determine liability necessarily entails jurisdiction to determine compensation.[266]

[260] Counter-Memorial on Objections to Jurisdiction, ¶ 134.

[261] Counter-Memorial on Objections to Jurisdiction, ¶ 135.

[262] Counter-Memorial on Objections to Jurisdiction, ¶ 136.

[263] Counter-Memorial on Objections to Jurisdiction, ¶¶ 137-139; *Austrian Airlines v The Slovak Republic, UNCITRAL Ad Hoc Arbitration*, Award, 9 October 2009, ¶ 93, **RL-010;** *RosInvestCo UK Ltd. v. The Russian Federation*, Award on Jurisdiction, 1 October 2007, ¶¶ 108, 114, 118, **RL-039**.

[264] Counter-Memorial on Objections to Jurisdiction, ¶¶ 140-143.

[265] Counter-Memorial on Objections to Jurisdiction, ¶¶ 145-147.

[266] Counter-Memorial on Objections to Jurisdiction, ¶ ¶107, 113.

202. Regarding the principle of implied powers, the Claimant provides the definition in the context of international organizations.[267] At its core, under this principle, an international organization has additional powers from those established in its constitutive treaty, if necessary and essential for the fulfilment of its tasks, functions, and the mission of the organization.[268] Analogously, the Claimant argues, arbitral tribunals may act in exercise of their implied powers in fulfilment of the mission entrusted by the Parties.[269] In the instant case, the Claimant says, it is necessary for the Tribunal to rule on the substance of the expropriation claim and not limit itself to quantum, in order to properly achieve the mission entrusted to it by the Parties.[270]

203. Turning to the principle that jurisdiction over liability entails jurisdiction over quantum, the Claimant relies on the *Corfu Channel* and *LaGrand* cases.[271] In both, the ICJ ruled that where jurisdiction existed to decide on a matter, there was no need to have an additional jurisdictional basis to assess the remedies.[272] Adjudication over liability is inseparable from adjudication over quantum for the sake of completeness of the judicial decision.[273] Against this backdrop, the Claimant submits that this principle supports a broad interpretation of Article 9, because it ensures that the Parties have a real choice between domestic litigation and international arbitration for disputes involving the amount of compensation for expropriation.[274] If this principle is applied to the Respondent's interpretation, domestic courts in Ecuador would have jurisdiction over both liability and compensation and it would effectively deprive Article 9.3, referring to the jurisdiction of international arbitral tribunals, of its meaning.[275]

(f) Good faith interpretation

204. In light of all the foregoing, the Claimant posits that a good faith interpretation of the Treaty must lead the Tribunal to have jurisdiction over the entirety of the dispute, including not only liability

[267] Counter-Memorial on Objections to Jurisdiction, ¶ 108; A. Gadkowski, "The doctrine of implied powers of international organizations in the case law of international tribunals", Przegląd Prawniczy Uniwersytetu Im. Adam Mickiewicza University Law Review, Vol. 6 (2016), p. 46, **CL-061**.

[268] Counter-Memorial on Objections to Jurisdiction, ¶ 108; A. Gadkowski, "The doctrine of implied powers of international organizations in the case law of international tribunals", Przegląd Prawniczy Uniwersytetu Im. Adam Mickiewicza University Law Review, Vol. 6 (2016), p. 46, **CL-061**.

[269] Counter-Memorial on Objections to Jurisdiction, ¶ 109.

[270] Counter-Memorial on Objections to Jurisdiction, ¶ 110.

[271] Counter-Memorial on Objections to Jurisdiction, ¶¶ 114,116.

[272] Counter-Memorial on Objections to Jurisdiction, ¶¶ 114,116; *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, I.C.J. Reports 1949, 9 April 1949, p. 26; **CL-064**; *LaGrand (Germany v. United States of America)*, Judgment, I.C.J. Reports 2001, 27 June 2001, p. 485, ¶ 48; **CL-066**.

[273] Counter-Memorial on Objections to Jurisdiction, ¶ ¶ 114,116; *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, I.C.J. Reports 1949, 9 April 1949, p. 26, **CL-064**.

[274] Counter-Memorial on Objections to Jurisdiction, ¶ 118.

[275] Counter-Memorial on Objections to Jurisdiction, ¶ 117.

and quantum for expropriation, but also the assessment of FET and PS.[276] The Claimant maintains that the FET and PS claims are intrinsically connected to the expropriation claim, and thus, jurisdiction over all claims would be warranted.[277]

(g) Considerations based on Ecuadorian law

205. The Claimant contends that, contrary to the Respondent's assertions, Ecuadorian law is relevant to the interpretation of Article 9.3 of the Treaty because (i) the interpretation requires an application of the law to the facts of the case, which must as such be taken into account; and (ii) Ecuador cannot, as a matter of international law, rely on its own law to justify its breaches of international obligations. Further, the Claimant argues, the Respondent's position relies on a critical–yet incorrect–premise of Ecuadorian law, *i.e*. that local courts could declare a breach of the Treaty and occurrence of expropriation, because there are no available remedies to that effect under Ecuadorian law.[278]

206. The Claimant denies the Respondent's proposition that the Claimant could initiate a *juicio de conocimiento* before an Ecuadorian court seeking to obtain a declaration that the Respondent breached the Treaty. This because even though a *juicio de conocimiento* could be a hypothetically plausible venue, no Ecuadorian court has been conferred jurisdiction under the Ecuadorian Constitution to declare an expropriation or a treaty breach.[279] Further elaborating on this point, the Claimant submits that only when there are mechanisms in place to allow for adjudication of a given right may such right be declared, and this requires jurisdiction of local courts, granted by Ecuadorian law, which simply does not exist, noting this had nothing to do with the existence of a specific procedure for expropriation.[280] The Claimant also rejects the argument that an investor in Ecuador could pursue a civil action to obtain a declaration that the State has breached international law. In the Claimant's view, this would escape the competences of Ecuadorian civil judges, who are circumscribed to the adjudication of disputes between private parties.[281] Disputes involving State entities, would rather fall under the auspices of *contencioso-administrativo* judges.[282]

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[276] Counter-Memorial on Objections to Jurisdiction, ¶ 149.

[277] Counter-Memorial on Objections to Jurisdiction, ¶ 150.

[278] Counter-Memorial on Objections to Jurisdiction, ¶¶ 152-155.

[279] Counter-Memorial on Objections to Jurisdiction, ¶¶ 158-159; 170; Rejoinder on Jurisdiction, ¶ 172; **CER-001**,Prof. Neira, ¶ 103 ("no [Ecuadorian] law […] has conferred jurisdiction in favour of any Ecuadorian court to hear claims brought by foreign investors under a BIT." Unofficial translation).

[280] Rejoinder on Jurisdiction, ¶ 173.

[281] Rejoinder on Jurisdiction, ¶ 180.

[282] Rejoinder on Jurisdiction, ¶¶180,186.

207. Furthermore, the Claimant explains that, in the instant case, expropriation under the Treaty occurred as a product of two judicial decisions by Ecuadorian courts, which *de facto* cancelled the Claimant's concessions: the 5 June Judgment, which ordered the immediate suspension of the exploitation activities, and the 3 August Judgement, by the Court of Appeal of the Azuay Province, which confirmed the first judgment.[283] The Claimant submits that the judgments themselves do not "constitute a declaration of expropriation", but that they are "expropriatory acts".[284]

208. Relying on the expert opinion of Prof. Neira, the Claimant points to three issues raised by the expropriatory nature of these judicial decisions.

209. First, the second-instance nature of the 3 August Judgment bars the Claimant from submitting a claim before a first-instance judge that said judgment constitutes an unlawful expropriation under the Treaty.[285] The Claimant emphasizes that it would be "unconceivable" under Ecuadorian law for a first-instance judge to declare that a final and binding decision issued by an appellate court breaches Ecuadorian law or an international treaty.[286] The Claimant highlights that this same rationale applies to a scenario in which the Claimant seeks a declaration of confiscation under Ecuadorian law.[287]

210. The second issue raised by the judgments is that, even though these would constitute an expropriation under the Treaty, they would not be declaratory of expropriation under Ecuadorian law.[288] The Claimant observes that expropriation under Ecuadorian law is the product of an administrative procedure, not of judicial proceedings, where several conditions are assessed: *i.e.*, public interest, valuation of the property. Thus, it follows that no Ecuadorian court can declare in a judicial, nor administrative proceeding that a judicial decision issued by another court constitutes an expropriation under Ecuadorian law or a treaty.[289]

211. The third issue touched upon by the Claimant is that, in the event of expropriation proceedings before domestic courts, these would inevitably usurp the jurisdiction of the arbitral tribunal in matters of compensation for expropriation, and by virtue of the FIR clause, Article 9.3 would be rendered meaningless because no resort to international arbitration would be possible.[290] Furthermore, the Claimant observes that the Respondent's standpoint on domestic courts

[283] Counter-Memorial on Objections to Jurisdiction, ¶ 162.
[284] Counter-Memorial on Objections to Jurisdiction, ¶ 165; Rejoinder on Jurisdiction, ¶ 200.
[285] Counter-Memorial on Objections to Jurisdiction, ¶ 161.
[286] Counter-Memorial on Objections to Jurisdiction, ¶ 161; Rejoinder on Jurisdiction, ¶ 181.
[287] Counter-Memorial on Objections to Jurisdiction, ¶ 168.
[288] Counter-Memorial on Objections to Jurisdiction, ¶ 164.
[289] Counter-Memorial on Objections to Jurisdiction, ¶ 165.
[290] Counter-Memorial on Objections to Jurisdiction, ¶ 166; Rejoinder on Jurisdiction, ¶ 184.

reviewing the issue on quantum has the consequence of turning the arbitral tribunal into a *de facto* appellate organ to review compensation disputes.[291]

212. The Claimant underscores how the Respondent's interpretation, if accepted (*quod non*), would place a heavy burden on the Claimant, that would require it to initiate "an ill-fated judicial pilgrimage" before Ecuadorian domestic courts.[292] The Claimant submits that it is in a situation similar to that of the *ELSI* case, where Italy could not provide remedies for the investor to pursue.[293] In the Claimant's view, the Respondent is proposing for Junefield to follow this path, which would encounter serious difficulties in each step:

> (1) bringing a claim before a civil judge in Ecuador, (2) relying on his or her residual competence, (3) under an ordinary civil proceeding, (4) against the Republic of Ecuador, represented by either the Attorney General's Office or the Director General of the Judicial Council, (5) to obtain a declaration that the acts committed by the Ecuadorian courts, the Ecuadorian Police Department, the Ecuadorian Military, municipal and state authorities all constitute expropriation, (6) on the basis of the Treaty and international law, (7) but without considering whether such expropriation was made against fair compensation as required by Article 4.[294]

213. To illustrate some of the complexities, the Claimant explains that, for instance, a civil judge would decline to hear the dispute because it does not deal with two private entities, and a *contencioso-administrativo* judge would likewise refuse to adjudicate the case because it is against the State and not specific administrative entities. This would place the Claimant in a difficult and tiring position of knocking the door of different judges.[295] Moreover, the Claimant considers that, even if this obstacle is overcome, it is doubtful whether the Supreme Court, the Constitutional Court, or any second-instance judge would validate the decision in light of the magnitude of interests at stake.[296]

214. Additionally, the Claimant refutes the Respondent's argument that the extraordinary action of protection, pending before the Constitutional Court of Ecuador has any effect on the case at bench.[297] First, the Claimant considers that, because the action has been pending for more than five years, the effects of the Judgments are already crystallized.[298] A potential reversal of the Judgments would therefore have no major consequence.[299] Second, the Claimant underlines that

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[291] Counter-Memorial on Objections to Jurisdiction, ¶ 167.

[292] Counter-Memorial on Objections to Jurisdiction, ¶ 171.

[293] Counter-Memorial on Objections to Jurisdiction, ¶ 172; *Elettronica Sicula S.pA. (ELSI) (United States of America v. Italy)*, I.C.J. 15, Judgment, 20 July 1989, ¶¶ 62-63, **CL-069**.

[294] Rejoinder on Jurisdiction, ¶ 185.

[295] Rejoinder on Jurisdiction, ¶ 186.

[296] Rejoinder on Jurisdiction, ¶ 187.

[297] Counter-Memorial on Objections to Jurisdiction, ¶¶173-180.

[298] Counter-Memorial on Objections to Jurisdiction, ¶ ¶177-178; Rejoinder on Jurisdiction, ¶ 192.

[299] Counter-Memorial on Objections to Jurisdiction, ¶ 177.

the extraordinary action was not initiated by Junefield or Ecuagoldmining, and thus, deems these proceedings as irrelevant for analysing the jurisdictional objection.[300] Third, given the final and binding nature of the 3 August Judgment, the Claimant opines that the potential overturn of the decision is unlikely.[301]

215. In any case, the Claimant considers that an extraordinary action could never lead to a declaration of expropriation under the Treaty because the Constitutional Court is concerned with constitutional rights and not with treaty breaches.[302] Such an action, the Claimant adds, would not even pass the admissibility test to be considered by the Constitutional Court.[303]

216. Finally, the Claimant submits that the Respondent has failed to make its domestic courts competent to declare an expropriation under the Treaty.[304] In this connection, the Claimant contends that the Respondent cannot rely on having a "deviant legal situation" to circumvent its international obligations under the Treaty.[305] This is the well-established international legal principle that domestic law is not an excuse to breach international law.[306] Additionally, the Claimant avers that the Respondent cannot deny a right conferred to investors under the Treaty on the basis that they did not fulfil a condition that, at the outset, was impossible to attain.[307] In other words, the Respondent cannot excuse its non-compliance arguing that the Claimant did not resort to domestic litigation, if the Respondent itself, by not making its courts competent to provide remedies, made it impossible for the Claimant to seek relief locally.[308]

217. The Claimant emphasizes that it was incumbent upon the Respondent to make its system readily available to grant the Claimant proper justice.[309] In this vein, the Claimant notes that the existence of a substantive right under the Treaty (remedies under domestic courts) does not entail that the judicial system of the relevant party that recognized such right "put mechanisms in place to allow

[300] Counter-Memorial on Objections to Jurisdiction, ¶ 175.

[301] Counter-Memorial on Objections to Jurisdiction, ¶ 176.

[302] Rejoinder on Jurisdiction, ¶ 191.

[303] Rejoinder on Jurisdiction, ¶ 193.

[304] Counter-Memorial on Objections to Jurisdiction, ¶ 183.

[305] Counter-Memorial on Objections to Jurisdiction, ¶ 184; Rejoinder on Jurisdiction, ¶ 162-164; International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts ("ILC Articles"), with commentaries, 2001, Article 32 (commentary), p. 94, **CL-071**.

[306] Rejoinder on Jurisdiction, ¶¶ 162-164, 195-197; ILC Articles with commentaries, 2001, Article 32 (commentary), p. 94, **CL-071**.

[307] Counter-Memorial on Objections to Jurisdiction, ¶ 185; *Case Concerning the Factory at Chorzów* (Germany v. Poland) (Jurisdiction) P.C.I.J. Series A, No. 9, 26 July 1927, p. 31, **CL-038**.

[308] Counter-Memorial on Objections to Jurisdiction, ¶¶ 186-187; N.*V. Philips Gloeilampenfabrieken v. German Federal Republic*, Arbitral Commission on Property, Rights and Interests in Germany, First Chamber, dated 30 October 1958, p. 505, **CL-072**.

[309] Counter-Memorial on Objections to Jurisdiction, ¶¶ 188-189.

for adjudication of matters related to that substantive right".[310] The Claimant highlights that, contrary to the rights of investors, Ecuador has made sure that rights contained in human rights treaties are enforceable before domestic courts "irrespective of attribution of competence".[311] Specifically, the Claimant rebuts the Respondent's partial reference to Article 11.3 of the Ecuadorian Constitution.[312] While it recognizes that the provision indeed establishes that "judges are statutorily prohibited from abstaining or refusing to rule on any dispute brought before them", the Claimant points out that this is true "only in respect of constitutional rights and those arising from international instruments for the protection of human rights".[313]

3. Tribunal's analysis

218. As flows from the preceding sections, it is common ground between the Parties that Article 9.3 of the Treaty bestows some form of jurisdiction on an arbitral tribunal. The Parties further agree that not all the disputes under the Treaty are arbitrable under Article 9.3 or, in other words, that only a subset of the disputes covered by Article 9.1 may be submitted to arbitration.[314] The disagreement lies in how to define this subset. Ecuador sustains that only disputes strictly limited to determining the amount of compensation—where expropriation has already been declared by state authorities or a local court—may be decided by an arbitral tribunal. In contrast, Junefield argues that no such prior recourse to local courts is required by the Treaty. In its view, as long as the dispute includes ("involves") determining the amount of compensation due for expropriation, such a dispute is arbitrable. In other words, in the Claimant's view, only disputes seeking merely declaratory relief or restitution of an expropriated asset would not be arbitrable.[315]

219. The Tribunal has thoroughly analysed and discussed at length the Parties' respective positions and arguments. The members of the Tribunal agree that, as evidenced by the split case law considering similarly worded BITs, the text of the Treaty is open to different interpretations. The Tribunal's decision on the scope of its jurisdiction, therefore, turns on what it considers to be the interpretation of the Treaty required by the VCLT.

220. Unfortunately, it has not been possible to reach a unanimous decision on such an interpretation. The following paragraphs consequently reflect what the majority has concluded to be the interpretation as required by the VCLT.

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[310] Rejoinder on Jurisdiction, ¶ 172.

[311] Rejoinder on Jurisdiction, ¶ 177.

[312] Rejoinder on Jurisdiction, ¶ 177.

[313] Rejoinder on Jurisdiction, ¶ 177.

[314] See ¶ 159 above.

[315] See ¶ 178 above. See also Tr. Day 1, 109:22-110:23

221. In summary, the majority of the Tribunal has concluded that neither Party is entirely right. The Tribunal does have jurisdiction under Article 9.3 of the Treaty to adjudicate disputes related to expropriation, and—contrary to the Respondent's position— such jurisdiction does not require a prior declaration of expropriation by local courts or authorities. However, as opposed to the broader reading proposed by the Claimant, this jurisdiction is limited to expropriation claims and does not extend to any of the other standards of protection foreseen in the Treaty. In other words, this Tribunal holds jurisdiction to determine if the Court Judgements amount to an expropriation or similar measure, and, in the affirmative, to determine the amount of compensation due. This Tribunal does not, however, under Article 9.3 of the Treaty, hold jurisdiction to entertain any claims relating to FET or PS, as argued by the Claimant.

222. The majority's reasoning is naturally based on the principles of interpretation contained in the VCLT.

223. The relevant provisions of the VCLT read as follows:

> "Article 31
>
> General rule of interpretation
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.
>
> Article 32
>
> Supplementary means of interpretation
>
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or

> (b) leads to a result which is manifestly absurd or unreasonable.
>
> Article 33
>
> Interpretation of treaties authenticated in two or more languages
>
> 1. When a treaty has been authenticated in two or more languages, the text is equally authoritative
>
> in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
>
> […]."

224. As will be evidenced, the basis of the majority's analysis is the ordinary meaning of the text of the Treaty. Applying Article 33.1 of the VCLT, the majority has focused primarily on the English version because the Treaty prescribes that, in case of divergence of interpretation, the English text shall prevail over the Chinese and Spanish versions. The majority has, in its analysis, considered not only the wording of Article 9.3 but also other relevant provisions, noting that the other elements referred to in Article 31.2 of the VLCT are simply not present in the case at hand.

225. To recall, Article 9 (1 to 3) of the Treaty reads as follows (emphasis added):

> "Article 9
> 1.- **Any dispute** between an investor fo [sic] one Contracting Party and the other Contracting Party **in connection with an investment** in the territory of the other Contracting Party shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.
>
> 2.- **If the dispute cannot be settled** through negotiations within six months, **either party** to the dispute **shall be entitled to submit the dispute to the competent court** of the Contracting Party accepting the investment.
>
> 3.- If **a dispute involving the amount of compensation for expropriation** cannot be settled **within six months after resort to negotiations** as specified in Paragraph 1 of this Article, it **may be submitted at the request of either party to an ad-hoc arbitral tribunal**. **The provisions of this paragraph shall not apply if the investor concerned has resorted to the procedure specified in Paragraph 2 of this Article**."

226. The plain reading of these provisions leads to the conclusion that, according to Article 9.1, *any dispute in connection with an investment* must necessarily be subject to a period of amicable settlement prior to recourse to any adjudicatory means of solution of such dispute.

227. A further conclusion is that any such dispute (*i.e. any dispute in connection with an investment*) may, failing amicable settlement, be submitted to local courts for adjudication, as per Article 9.2.

228. However, according to Article 9.3, in the same scenario, that is, failing amicable settlement within six months, either party may choose to submit *disputes involving the amount of compensation for expropriation* (and not *any dispute in connection with an investment*) to an arbitral tribunal rather than to a local court of the host State.

229. The plain reading of these provisions entails, as a result, that either party may, after six months have elapsed without the settlement of a given dispute:

a. Submit *any dispute in connection with an investment* to local courts; this naturally includes the possibility to submit disputes *involving the amount of compensation for expropriation*, which are a subset of the former, to local courts;

b. Alternatively, if a dispute only *involves the amount of compensation for expropriation*, to submit such dispute—and such dispute alone—to an arbitral tribunal rather than to a local court; however, recourse to an arbitral tribunal will no longer be available if *the investor* has *resorted to the procedure specified in Paragraph 2*.

230. There is no question that Article 9.3 encompasses a FIR provision. This is evident from the fact that both local proceedings and arbitration may be commenced at exactly the same time (six months after commencement of negotiations towards amicable settlement). In other words, once six months have elapsed, either party may choose between local courts or arbitration, said choice being final.

231. This, in and of itself, strongly suggests that the type of disputes contemplated by Article 9.3 are to be considered as self-sufficient; if they were not, the option to resort to arbitration or local courts would not be available concurrently.

232. This further appears to be at odds with Ecuador's contention that recourse to arbitration would only be available *after* the "proclamation" of expropriation (either by an administrative decision or by a local court). While such a construction could theoretically work for direct expropriations, it does not work for indirect expropriations, which are also covered by the definition of the term "expropriation" contained in Article 4 of the Treaty.[316]

233. Indeed, in a scenario of direct expropriation, a decision (in the case of Ecuador, an administrative decision[317]) would already exist. In that case, there would be no need to discuss whether an expropriation had occured. The investor could simply choose to accept the legality of the expropriation and opt to have an arbitral tribunal, rather than a local court, decide on the amount of compensation alone.

234. In a scenario of indirect expropriation, however, there would be no such decision (assuming that no such acknowledgment was made during the negotiation phase). The investor would, therefore, necessarily have to seek a declaration that a given act or omission is tantamount to an

[316] Agreement between the Government of the People's Republic of China and the Government of the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, dated 21 March 1994, Article 4, **CL-001**.

[317] Constitution of the Republic of Ecuador, Article 323, **CL-070**; Ecuador's Organic Law on the National Public Procurement System, Article 58, **CL-086**.

expropriation, and that it is accordingly entitled to compensation, the amount of which should also be determined.

235. The wording of Article 9.3, however, does not distinguish between direct and indirect expropriations:[318] it simply says the investor may choose arbitration over local courts and can do so at the same moment. In no way whatsoever does Article 9.3 suggest that if the investor believes it is faced with an indirect expropriation it must first resort to local courts to have them decide on the occurrence of an expropriation before being able to ask an arbitral tribunal to decide on the amount of compensation due. Reading such a requirement into Article 9.3 would equate to introducing a requirement that is simply nowhere to be found in such provision.

236. Nor, for that matter, can such a requirement be found in any other part of the Treaty, notably in Article 4, as even the Respondent's legal expert acknowledged at the Hearing.[319] To recall, Article 4 reads as follows:

> "Neither Contracting Party shall expropriate, nationalize or take similar measures (hereinafter referred to as "expropriation") against investments of investors of the other Contracting Party in its territory, unless the following conditions are met:
>
> a) for the public interests;
>
> b) under domestic legal procedure;
>
> c) without discrimination;
>
> d) against fair compensation,
>
> The compensation mentioned in letter d) of this Article shall be equivalent to the value of the expropriated investments at the time when expropriation is proclaimed, be convertible and freely transferable. The compensation shall be paid without unreasonable delay".

237. Contrary to provisions in other BITs, such as the Singapore-China or the Ghana-China BITs,[320] Article 4 of the Treaty makes no mention of the possibility—let alone the need—for local courts to determine the occurrence and/or legality of an expropriation. Reading such a requirement into

[318] Neither does the definition of Article 4, for that matter. Moreover, it is not contested that the term "expropriation" covers both direct and indirect expropriation. Tr. Day 1, 50: 19-51: 7.

[319] Tr. Day 2, 234:15:24 ("Now, let's put ourselves in a regulatory measure that takes the assets of the investor. This is a regulatory measure. The question then is how do we establish whether we have an expropriation? So how do we get the proclamation of expropriation in our regulatory taking? This is the existence of an indirect expropriation. **How do we get a declaration of an indirect expropriation? The BIT doesn't help us; right, it doesn't say how**) (emphasis added); Transcript, Day 2, 275:2-275:9 (PRESIDENT MARTINS: And where do you retrieve that from Article 4 that you must go to the courts, the local courts? That's what I'm having trouble understanding. THE WITNESS: **It doesn't say. Article 4 doesn't say.** But what is implied is you need to establish the existence of expropriation and that can only be by Ecuadorian or Chinese courts or authorities). (Emphasis added).

[320] Agreement between the Government of the People's Republic of China and the Government of the Republic of Singapore on the Promotion and Protection of Investments, dated 21 November 1985, Article 6.2, **CL-033**; Agreement between the Government of the People's Republic of China and the Government of the Republic of Ghana Concerning The Encouragement and Reciprocal Protection of Investments, dated 12 October 1989, Article 4.3, **CL-034**.

the Treaty would equate to importing an implied term, a possibility that the Respondent has vehemently rejected.[321]

238. This conclusion——*i.e*. that the text of the Treaty does not require a prior decision by local courts on the occurrence of expropriation—renders it unnecessary to consider the issue further. As a result, there is no need to entertain the Parties' extensive arguments on whether the assessment of occurrence of an expropriation, the liability arising therefrom, and the *quantum* of compensation due are separable issues.

239. Be that as it may, the majority of the Tribunal cannot help noting that Ecuador's position has not remained consistent throughout the proceedings. Initially, based on Article 4, Ecuador argued that *quantum* was separable from the matters of occurrence and legality, both of which should first be addressed by local courts as conditions precedent to the determination of quantum.[322] At the Hearing, however, Ecuador revised its position, arguing that only occurrence, and not legality, would have to be determined by local courts,[323] suggesting that legality was not even relevant and could be left undetermined.[324]

240. In short, this division between occurrence, legality and *quantum* is simply absent from the wording of the Treaty.

241. A *bona fide* interpretation of the first sentence of Article 9.3 leads, consequentely, to the conclusion that the ordinary meaning of the expression *involving the amount of compensation for expropriation* (without even having to delve into the meaning of each single word) must include the ability of an arbitral tribunal (specifically, in situations of indirect expropriations) to determine not only the amount of compensation due but, necessarily, the antecedent issue of occurrence of an expropriation.

242. Further, such an interpretation gives meaning to ***all*** the words in the phrase "*involving the amount of compensation for expropriation*", rather than just some of them. In particular, it provides a meaning to the word *involving*, whereas the Respondent's proposed interpretation does not: arguing that *involving* is neutral is effectively the same as saying that the word need not be there at all, or that it should be read as meaning something entirely different, such as *limited to*.

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321 "Thus, no issue can be implied or imported into Article 9(3) of the Treaty." Reply on Jurisdiction, ¶ 37.

322 Memorial on Objections to Jurisdiction, ¶ 44. Reply on Jurisdiction, ¶ 59.

323 Tr. Day 1, 158:12-16.

324 Tr. Day 2, 232:10-233:3. Ecuador's expert, however, maintained, consistent with the original position of Ecuador, that a three step approach should be applied as per Article 4: the first step would be to establish occurrence and would result from the general prohibition enshrined in the body of the first paragraph of Article 4 (up to "unless"); the second step would involve establishing legality and would result from paragraphs a) to d); finally, *quantum* could be determined, and only this third issue would be available to an arbitral tribunal. Tr. Day 2, 202:16-206:25.

According to dictionary definitions, the word *involving* has an inclusive meaning.[325] At the same time, this interpretation gives proper weight and meaning to the word *expropriation*, as it limits arbitrable disputes to those related to this particular standard of protection, and not others, as further detailed below at ¶¶ 263 *et seq*.

243. This conclusion naturally dispenses with the need to further analyse the scope of the FIR provision contained in the last sentence of Article 9.3, in particular the meaning of the phrase "*the provisions of this paragraph shall not apply if the investor concerned has resorted to the procedure specified in Paragraph 2 of this Article"*. Even considering, as the Respondent does, that this phrase refers to the expression "*dispute involving the amount of compensation for expropriation"* that is found at the beginning of Article 9.3, the broader interpretation of the majority of this expression would still be compatible with the narrower scope of the FIR proposed by the Respondent. In contrast, a broader interpretation of the FIR –*i.e.*that it would apply to "any" dispute, as per the reference to paragraphs 2 and 1–, would be manifestly incompatible with the narrow reading for the expression under consideration advanced by the Respondent.

244. The conclusion of the majority is not affected by the Parties' arguments based on the other language versions of the Treaty, even though those versions are not, as mentioned above, prevalent.

245. As to the Chinese version, despite the Parties' extensive arguments, it would appear that it is not possible to reach a firm conclusion on the meaning of "**涉及**" (shèjí), as the meaning appears to vary depending on the context. As per the Respondents own contentions, this expression can mean "cover", "concern", "involve", "implicate", "relate to", "deal with", or "touch upon", and therefore does not inherently possess an exclusive or inclusive nature.[326] In any event, any of those meanings would be in line with the interpretation of the majority as stated above: Article 9.3 allows for arbitration of any dispute that covers, concerns, involves, implicates, relates to or deals with compensation for expropriation. None of the above meanings appear to translate into "disputes related *only* to compensation for expropriation".

246. The same applies to the Spanish version which uses the expression "relacionado con". As stated by the Respondent, this expression indicates a connection,[327] which has a broader meaning than *involving*. As a consequence, even if one were to follow the Spanish version of Article 9.3, this Tribunal would retain jurisidction. If this provision were to mean that *only* disputes connected to the amount of compensation are arbitrable, a different wording in Spanish would be required,

[325] Oxford English Dictionary, "Involving", **CL-024**: "To roll or enwrap in anything that is wound round, or surrounds as a case or covering; to enfold, to envelop. Const. in, "with."

[326] See ¶ 125125 above.

[327] See ¶ 124 above.

such as, for example, inserting the word *exclusivamente* or *solamente* between "conflicto relacionado" and "con el monto de compensación por expropriación".

247. In other words, as with the English version, the equivalent expressions of *disputes involving the amount of compensation for expropriation* in Chinese and Spanish cannot be interpreted either too restrictively or too broadly, that is, to mean *only* disputes related to compensation for expropriaton or disputes related to any standard of protection whatsoever under the Treaty, as long as compensation for expropriation is included in the claims.

248. The majority of the Arbitral Tribunal considers that its conclusions based on the text of Article 9.3 of the Treaty, when read in the context of other relevant provisions (Article 9.1 and 9.2 and Article 4), do not leave the meaning of Article 9.3 ambiguous or obscure or lead to a result which is manifestly absurd or unreasonable. The majority thus sees no reason to resort to any supplementary means of interpretation under Article 32 of the VCLT.

249. Be that as it may, and given the Parties' extensive pleadings on other BITs entered into by China and prior case law, the majority will briefly address these aspects.

250. The Respondent relied on other so-called First Generation BITs, notably the 1985 China-Singapore BIT, the 1989 China-Ghana BIT, the 1988 China-Japan BIT, and the 1991 China-Mongolia BIT.[328] The majority finds that the wording of all of these treaties (except the 1991 China-Mongolia BIT)[329] is different and, as a result, of limited value to assist in the interpretation of the Treaty.

251. Article 6.2 of the 1985 China-Singapore BIT states the following:

> The legality of any measure of expropriation, nationalization or other measures having effect equivalent to nationalization or expropriation may at the request of the national or company affected, be reviewed by the competent court of the Contracting Party taking the measures in the manner prescribed by its laws.[330]

252. No such similar language may, however, be found in the Treaty. In other words, there is an express distinction between legality and *quantum*, which is absent in the Treaty.

253. Article 4.3 of the China-Ghana BIT,[331] in turn, states the following:

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[328] See ¶¶ 131-133 above.

[329] Agreement between the Government of the People's Republic of China and the Government of the Mongolian People's Republic concerning the Encouragement and Reciprocal Protection of Investments, dated 26 August 1991, **RL-041**.

[330] Agreement between the Government of the People's Republic of China and the Government of the Republic of Singapore on the Promotion and Protection of Investments, dated 21 November 1985, **CL-033**.

[331] Agreement between the Government of the People's Republic of China and the Government of the Republic of Ghana Concerning the Encouragement and Reciprocal Protection of Investments, dated 12 October 1989, **CL-034**. See also wording of the English version of Article 4(3) of the China-Ghana BIT as interpreted by the tribunal in *Beijing Everyway Traffic v. Ghana*, on the basis of the Chinese version of the China-Ghana BIT,

> If an investor considers the expropriation mentioned in Paragraph 1 of this Article incompatible with the laws of the Contracting State taking such expropriation, [the competent courts in the Contracting State taking such expropriation] shall, upon the request of the investor, review the said expropriation.

254. Further, Article 10 (corresponding to Article 9 of the Treaty) has no FIR provision and is titled "Settlement of Disputes on Quantum of Compensation". Again, no such similar language may be found in the Treaty.

255. Finally, Article 11.2 of the China-Japan BIT[332] states the following:

> "If a dispute concerning the amount of compensation referred to in the provisions of paragraph 3 of Article 5 between a national or company of either Contracting Party and the other Contracting Party or other entity, charged with the obligation for making compensation under its laws and regulations, cannot be settled within six months from the date either party requested consultation for the settlement, such dispute shall, at the request of such national or company, be submitted to a conciliation board or an arbitration board, to be established with reference to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States done at Washington on March 18, 1965 (hereinafter referred to as Washington Convention"). Any dispute concerning other matters between a national or company of either Contracting Party and the other Contracting Party may be submitted by mutual agreement, to a conciliation board or an arbitration board as stated above. In the event that such national or company has resorted to administrative or judicial settlement within the territory of the latter Contracting Party, such dispute shall not be submitted to arbitration."

256. The wording and the structure of this BIT is also different from the Treaty. Article 5.4 of this BIT, for instance, also refers specifically to local courts, as follows: "[n]ationals and companies of either Contracting Party whose investments and returns are subjected to expropriation, nationalization or any other measures the effects of which would be similar to expropriation ir nationalization, shall have the right of access to the competent courts of justice and administrative tribunals and agencies of the other Contracting Party taking the measures and the amount of compensation in accordance with the applicable laws and regulations of such other Contracting Party".

257. Prior case law involving BITs concluded by China is again of limited value. As noted by both Parties, case law is essentially split[333] and, in any event, only in two of the six cases was the wording of the BIT identical to that of the Treaty, with opposite results.

Beijing Everyway Traffic and Lighting Company Limited v. Ghana, PCA 2021-15, Final Award on Jurisdiction, 30 January 2023, ¶ 178, **RL-014**.

[332] Agreement between Japan and the People's Republic of China concerning the Encouragement and Reciprocal Protection of Investment (official Chinese version), dated 27 August 1988, **RL-049**.

[333] See ¶¶ 145 and 200 above.

258. Indeed, *AsiaPhos v. China*[334] is based on the China-Singapore BIT which, as noted in ¶ 251 above, contains an express indication that the legality of an expropriation is to be reviewed by local courts. *Beijing Everyway Traffic v. Ghana*,[335] in turn, is based on the China-Ghana BIT which, as also noted (in ¶ 253 above), again contains an express indication that the legality of an expropriation is to be reviewed by local courts. Additionally, such BIT contains no FIR provision. Out of the three awards that concluded against jurisdiction only *Beijing Shougang v. Mongolia*[336] was based on a quasi-identical wording. While this award was most certainly adopted by a highly respected tribunal, the majority notes that it does not seem to give any weight to the fact that both local proceedings and arbitration may be commenced at exactly the same time (six months after commencement of negotiations towards amicable settlement), which the majority considers most relevant, as noted above.[337]

259. As to the three awards that concluded for jurisdiction, *Tza Yap Shum* v. *China*[338] was based on the China-Peru BIT, whose Article 8.3 differs somewhat from Article 9.3 of the Treaty.[339] If anything, the FIR provision contained in its last sentence—which is identical to that of the Treaty—along with the absence of any reference to review by local courts in Article 4, supports the conclusion that the scope of the FIR covers any dispute. *Beijing Urban Construction v. Yemen*,[340] in turn, was based on the China-Yemen BIT, which again makes no reference to review by local courts; its Article 10 likewise differs in certain respects from the Treaty.[341] Only *Sanum*

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334 *AsiaPhos Limited and Norwest Chemicals Pte Ltd v. People's Republic of China*, ICSID Case No. ADM/21/1, Award, 16 February 2023, ¶ 104, **RL-013.**

335 *Beijing Everyway Traffic and Lighting Company Limited v. Ghana*, Final Award on Jurisdiction, PCA Case No. 2021-15, 30 January 2023, ¶ 180, **RL-014**.

336 *China Heilongjiang International Economic & Technical Cooperative Corp, and others v. Mongolia*, ICSID Case No. 2010-20, Award, 30 July 2017, **RL-012.**

337 See ¶¶ 230-231 above.

338 *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence (Spanish), 19 June 2009, ¶ 37, **CL-025**.

339 Agreement between the Government of the Republic of Peru and the Government of the People's Republic of China concerning encouragement and reciprocal protection of investments, dated 9 June 1994, **CL-049**. "Article 8.3 – If a dispute involving the amount of compensation for expropriation cannot be settled within six months after resort to negotiations as specified in Paragraph 1 of this Article, it may be submitted at the request of either party to the international arbitration of the International Center for Settlement of Investment Disputes (ICSID), established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, signed in Washington. D.C,, on March 18, 1965. Any disputes concerning other matters between an investor of either Contracting Party and the other Contracting Party may be submitted to the Center if the parties to the disputes so agree. The provisions of this Paragraph shall not apply if the investor concerned has resorted to the procedure specified in Paragraph 2 of this Article."

340 *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017, ¶ 92, **CL-023**.

341 China - Yemen BIT (1998) - Electronic Database of Investment Treaties (EDIT), **CL-141**. "Article 10.2 - 2. If the dispute cannot be settled amicably by the parties to the dispute within six months from the date of the written resolution, the dispute shall be submitted at the investor's option: (1) The court in which the contracting party of the investment has jurisdiction, or (2) Arbitration of the International Center for Settlement of

v. Laos [342] was based on a provision identical to Article 9.3 of the Treaty. In that case, the tribunal concluded—as the majority does here—that Article 8.3 of the China-Laos BIT[343] *"does not provide that access to arbitration by either party to the dispute on the amount of compensation is subject to prior recourse to the Laotian courts".*[344]

260. In short, even if prior case law were to be determinative (or, at least, instructive), the scale would tip towards the Claimant's and not the Respondent's position.

261. Finally, as to the arguments concerning China's restrictive policy with respect to arbitration in this type of treaties at the time in which the Treaty entered into force, the majority highlights that the task of this Tribunal is to determine which is the most harmonious interpretation of the Treaty relying on the VCLT, as indicated above, and not to reformulate its terms to make them compatible with the alleged policy of one of the contracting parties. Even more so when the Respondent has entered into multiples treaties with broad arbitration provisions, before and after entering into the Treaty, and no evidence concerning the *travaux preparatoires* for the Treaty were included as evidence in this arbitration.

262. In conclusion, the reference to *disputes involving the amount of compensation for expropriation* must be understood to mean disputes that include—but are not limited to—the discussion of an amount of compensation for expropriation. In pratice, this means that, for the purposes of considering the amount of compensation, an arbitral tribunal will have the power to assess whether expropriation occurred and gives rise to liability.

263. That is not to say, however, as the Claimant would have it, that this phrase encompasses any dispute, even relating to other standards of protection, so long as a claim for compensation for expropriation is included in the set of claims presented to an arbitral tribunal. This essentially for two reasons, on which the Tribunal's decision is unanimous.

264. First, as noted above, both Parties acknowledge that Article 9.3 envisages a limited set of disputes *vis-à-vis* those foreseen in Article 9.1 (*i.e.*, *any disputes in connection with an investment*). Such limited set of disputes only includes *disputes involving the amount of compensation for*

Investment Disputes under the Convention on Settlement of Investment Disputes between States and Other Nationals, which was opened for signature on March 18, 1965 in Washington. For this purpose, either Contracting Party shall grant irrevocable consent to the arbitration proceedings referred to in these terms for the dispute concerning the amount of compensation. Other dispute submission procedures shall be subject to the consent of the parties."

[342] *Sanum Investments Limited v. The Government of the Lao People's Democratic Republic*, PCA Case No. 2013-13, Award on Jurisdiction, 13 December 2013, **CL-027**.

[343] Agreement between The Government of the People's Republic of China and the Government of the Lao People's Democratic Republic Concerning the Encouragement and Reciprocal Protection of Investments, dated 31 January 1993, **CL-026**.

[344] *Sanum Investments Limited v. The Government of the Lao People's Democratic Republic*, PCA Case No. 2013-13, Award on Jurisdiction, 13 December 2013, ¶¶ 326; 330-333, **CL-027**.

expropriation. An arbitral tribunal only holds jurisdiction regarding the latter. If one were to follow the Claimant's excessively extensive interpretation, then an investor could overcome this limitation by simply raising a claim for compensation for expropriation even if completely frivolous just to secure jurisdiction of an arbitral tribunal, as correctly noted by the Respondent.[345] As noted above, it is not only the word *involving* that must have a meaning; the reference to *expropriation* must naturally also carry some meaning and cannot be ignored.

265. Second, as noted in ¶ 218 above, Claimant itself acknowledges that certain types of disputes are not arbitrable under the Treaty, notably those aimed at obtaining merely declaratory relief.[346] Article 9.3 refers only to expropriation and makes no mention of the other standards of protection foreseen in the Treaty. There is therefore no reason, based on the ordinary meaning of the text of the Treaty, to extend jurisdiction to the declaration of breach of any other standard of protection, let alone to award compensation for any such alleged breaches. This would simply imply ignoring the phrase *amount of compensation for expropriation*.

266. A final note, in this respect, to highlight that even the case law relied upon by the Claimant to support upholding this Tribunal's jurisdiction under Article 9.3 of the Treaty does not support its contention that said jurisdiction can extend to other standards of protection. The issue was not even raised in either *Beijing Urban Construction v. Yemen*,[347] *Tza Yap Shum v. Peru*,[348] or *Sanum v. Laos*[349]. Nor did the Claimant even attempt to argue that this was the case. Moreover, the Claimant's legal expert on international law also acknowledged, at the Hearing, that at most there can be an overlap between fair compensation for expropriation and fair treatment, but that that the two issues are not inextricably linked.[350]

267. In light of the foregoing, the majority of the Tribunal decides that its jurisdiction under Article 9.3 of the Treaty is not merely restricted to determining the amount of compensation due for

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345 Reply on Jurisdiction, ¶ 139.

346 Tr. Day 1, 79:2–11 (PRESIDENT MARTINS: Sorry for the interruption, but did you mean with that statement that the meaning of this provision would be that merely declaratory relief, for instance, in arbitration would be prevented? Is that what you mean? MS. LACRETA: That is exactly what I mean, and just to confirm that, my next phrase was: "What the Contracting Parties wanted to avoid is that an investor would seek the Tribunal to obtain declaratory reliefs on the breach of the Treaty or even that the Parties would ask that an investor would request the restitution of an expropriated asset." This was what the Contracting Parties wanted to avoid. They wanted to ensure that the compensatory relief for expropriation would always be present in a dispute taken to arbitration.)

347 *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017, ¶ 92, **CL-023**.

348 *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence (Spanish), 19 June 2009, ¶ 37, **CL-025**.

349 *Sanum Investments Limited v. The Government of the Lao People's Democratic Republic*, PCA Case No. 2013-13, Award on Jurisdiction, 13 December 2013, **CL-027**.

350 Tr. Day 2, 303:7–304:6 (Kolb).

expropriation. Rather, it also includes the possibility to assess if such an expropriation did indeed occur and if this translates into a Treaty breach. The Tribunal further decides (unanimously) that its jurisdiction is not as broad as to include the possibility to assess any other potential Treaty breaches, being limited to expropriation.

C. WHETHER THE TRIBUNAL WOULD HAVE JURISDICTION BY VIRTUE OF THE MOST-FAVOURED NATION CLAUSE CONTAINED IN ARTICLE 3(2) OF THE TREATY

1. The Respondent's position

268. The Respondent denies that the Claimant can invoke the MFN Clause found in Article 3.2 of the Treaty to widen the scope of the arbitration agreement or to expand the State's consent to arbitration.[351]

269. First, the Respondent submits that the MFN Clause is limited to the substantive standards set forth in Article 3.1, and therefore, it cannot be used to extend the scope of the Respondent's consent to arbitration.[352] To further reinforce this point, the Respondent refers to *Beijing Everyway v. Ghana*, where the tribunal interpreted an MFN clause similar to Article 3.2, and held that the terms "treatment and protection" should be interpreted narrowly, restricting the applicability of the MFN clause to substantive standards of treatment.[353] The Respondent underlines that this arbitration clause is unique because it limits arbitration to a very specific category of disputes.[354] As a corollary, to extend its scope via MFN would require clarity over the parties' intention to do so.[355] Even more, in *Sanum v. Laos*, the Respondent notes, the tribunal interpreted similar MFN and arbitration clauses, and declined to expand its jurisdiction as that would amount to "a substantial rewrite of the Treaty".[356]

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[351] Memorial on Objections to Jurisdiction, ¶¶ 116-121; Reply on Jurisdiction, ¶ 200.

[352] Memorial on Objections to Jurisdiction, ¶ 118; Reply on Jurisdiction, ¶¶ 203-204.

[353] Memorial on Objections to Jurisdiction, ¶ 119; Reply on Jurisdiction, ¶ 208; *Beijing Everyway Traffic & Lighting Tech. Co., Ltd v. The Government of the Republic of Ghana*, PCA Case No. 2021-15, Final Award on Jurisdiction (Save as to Costs), 30 January 2023, ¶¶ 280–281, **RL-014**.

[354] Memorial on Objections to Jurisdiction, ¶ 122; Reply on Jurisdiction, ¶ 210.

[355] Ecuador's Memorial on Objections to Jurisdiction, ¶ 122; *Beijing Everyway Traffic & Lighting Tech. Co., Ltd v. The Government of the Republic of Ghana*, PCA Case No. 2021-15, Final Award on Jurisdiction (Save as to Costs), 30 January 2023, ¶ 285, **RL-014**.

[356] Memorial on Objections to Jurisdiction, ¶ 123; Reply on Jurisdiction, ¶ 210; *Sanum Investments Ltd. v. Government of the Lao People's Democratic Republic*, PCA Case No. 2013-13, Award on Jurisdiction, 13 December 2013, ¶ 358, **CL-027**.

270. Second, the Respondent alleges that the protection provided by Article 3.1 is territorially limited to Ecuador, relying on *ICS Inspection v. Argentina* to argue that extra-territorial treatment, like international arbitration, is excluded from the scope of the MFN Clause.[357]

271. Third, the Respondent submits that for "treatment" to constitute a breach of the MFN Clause, it must clearly have an impact in the economic activities of the investor. In this vein, dispute resolution clauses cannot be deemed as such.[358]

2. The Claimant's position

272. The Claimant submits, *quod non*, that the Tribunal has jurisdiction over expropriation, FET and PS claims by operation of the MFN Clause contained in Article 3.2 of the Treaty.[359] The Claimant asserts that the legal effect of an MFN clause is that the investor covered by the protections of a treaty can access the benefits granted to third-party nationals under another treaty with the same host State.[360] Thus, the Claimant invokes the MFN Clause to broaden the scope of the arbitration agreement to include all the substantive protections under the Treaty.[361]

273. As to the Respondent's first argument, the Claimant contends that the right to an effective arbitration agreement, or the "right to resolve its disputes and obtain redress (…) through arbitration", is a substantive protection, relying on *Up and CD Holding v. Hungary*.[362] First, because the "treatment" accorded to an investor would include the right to resort to arbitration. Second, because the standard of "protection" would also include access to arbitration.[363] Moreover, the Claimant submits that the MFN Clause should be interpreted in a manner which affords meaningful protection to investors.[364] The Claimant also relies on *Tza Yap Shum v. Peru*, in which the tribunal asserted that "treatment" within the context of an MFN clause entails a wider protection spectrum, which would include procedural aspects.[365]

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[357] Ecuador's Memorial on Objections to Jurisdiction, ¶¶ 119-120; Reply on Jurisdiction, ¶¶ 206-207; *ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina*, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012, ¶¶ 308–309, **RL-024**.

[358] Reply on Jurisdiction, ¶ 205.

[359] Counter-Memorial on Objections to Jurisdiction, ¶¶ 199-200.

[360] Counter-Memorial on Objections to Jurisdiction, ¶ 202.

[361] Counter-Memorial on Objections to Jurisdiction, ¶ 203.

[362] Counter-Memorial on Objections to Jurisdiction, ¶¶206-207; Rejoinder on Jurisdiction, ¶ 209-210; *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Decision on Preliminary Issues of Jurisdiction, 3 March 2016, ¶ 193, **CL-076**.

[363] Counter-Memorial on Objections to Jurisdiction, ¶ 208; Rejoinder on Jurisdiction, ¶ 207.

[364] Counter-Memorial on Objections to Jurisdiction, ¶ 212.

[365] Rejoinder on Jurisdiction, ¶¶ 211-212.

274. As to the Respondent's second argument, the Claimant denies that the reference to the territory of the host State in Article 3.1 of the Treaty limits the applicability of the MFN Clause,[366] arguing that, despite the extra-territorial nature of investor-State arbitration, the arbitration agreement has effects that are territorially circumscribed to Ecuador.[367]

275. Finally, the Claimant rebuts the Respondent's argument that for "treatment" to be considered an MFN breach, it must cause a practical impact on the economic activities of the investor. The Claimant submits that this requirement is not found in the Treaty and is thus nonexistent.[368]

276. The Claimant thus suggests invoking the MFN Clause to import a most favorable arbitration clause found in the Ecuador-Peru BIT, which has a wider scope of protection that includes liability for expropriation, FET and PS, relying in particular on *RosInvest v. Russia*.[369]

3. Tribunal's Analysis

277. The issue to be decided by this Tribunal was framed as whether the MFN Clause would allow this Tribunal to determine whether an expropriation occurred, and whether the FET and PS principles set forth in the Treaty have been breached. Having regard to the majority's conclusion that the Tribunal has jurisdiction to determine if an expropriation has occurred, the issue arises as to whether, by virtue of the MFN Clause, this Tribunal also has jurisdiction over claims relating to violations of the FET and PS standards, going beyond the obligations set forth in Article 9 of the Treaty.

278. To analyse this last issue, the starting point must naturally be the wording of the MFN Clause contained in the Treaty, which reads as follows:

> "Article 3
>
> 1.- […] Investments and activities associated with investments of investors of either Contracting Party shall be accorded fair and equitable treatment and shall enjoy protection in the territory of the other Contracting Party.
>
> 2.- The treatment and protection referred to in Paragraph 1 of this Article shall not be less favorable than that accorded to investments and activities associated with such investments of investors of a third State.
>
> […]"

[366] Counter-Memorial on Objections to Jurisdiction, ¶ 213.

[367] Counter-Memorial on Objections to Jurisdiction, ¶¶ 215-216; Rejoinder on Jurisdiction, ¶¶ 216-217; *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Decision on Preliminary Issues of Jurisdiction, 3 March 2016, ¶ 191, **CL-076**.

[368] Rejoinder on Jurisdiction, ¶¶ 213-214.

[369] Counter-Memorial on Objections to Jurisdiction, ¶¶ 220-222. *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction, 1 October 2007, **RL-039.**

279. As summarized above, the Claimant's position is that the right of recourse to arbitration is a substantive protection, and that both the standards of "treatment" and "protection" provided for in the Treaty would include such a right of recourse to arbitration.

280. The Tribunal disagrees with the Claimant's position, for the reasons indicated below.

281. *First,* the Tribunal endorses the observation made by the tribunal in *Daimler v. Argentina* regarding the split between authors and case law on *"whether dispute resolution provisions in treaties should be viewed as substantive protections in and of themselves, or whether they are merely procedural mechanisms for enforcing the treaty's other (presumably substantive) obligations"*, namely that this debate is not at the crux of the matter. Rather, the focus should be on *"what meaning the Contracting State Parties to the specific Treaty in question have attached to the term*[s]*"*.[370]

282. This requires the Tribunal to look at the ordinary meaning of these terms, in their context, in accordance with Article 31 of the VCLT. It further means resorting, if necessary, to supplementary means of interpretation, as foreseen in Article 32 of the VCLT.

283. Starting with the wording, Article 3.2 of the Treaty—where the MFN Clause is located—refers to *the treatment and protection referred to in Paragraph 1*. Article 3.1, in turn, refers to *fair and equitable treatment* and to *protection*.

284. This reference is aimed at restricting the scope of the MFN Clause to *fair and equitable treatment* and to *protection* and not to all other matters dealt with in the Treaty.

285. Given that neither *fair and equitable treatment* nor *protection* are defined terms in the Treaty, further analysis is required. In particular, it must be assessed whether these two expressions, notably in the context of the Treaty, may be understood to include an absolute right of recourse to arbitration.

286. The Tribunal's conclusion is that they cannot.

287. As to FET, no precise definition of this standard may be found either in the Treaty or, for that matter, in relevant literature.[371] The Claimant has not conducted any meaningful exercise to explain the proper interpretation of the expression, merely relying instead on just two authorities.

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[370] *Daimler Financial Services AG v Argentine Republic*, ICSID Case No ARB/05/1, Award, 22 August 2012, ¶ 219, **RL-025**.

[371] "Chapter 6: Standards of Protection", in Josefa Sicard-Mirabal and Yves Derains, Introduction to Investor-State Arbitration, (© Kluwer Law International; Kluwer Law International 2018), pp. 133 – 160: *"There is no precise definition of FET. If the words composing the standard have to be defined, it would be suggested that 'fair' brings to mind words such as 'just', 'unbiased', and, 'in accordance with rules or laws'. If the word 'equitable' is considered, it evokes terms such 'balanced', 'impartial', 'egalitarian'. Accordingly, anything*

288. This first authority, however, simply states that *"**arguably** as a minimum requirement the FET standard of treatment covers dispute resolution"*.[372] That same authority says, in any event, that *"[i]t cannot easily be inferred from China's treaty practice that it intended for all disputes to be resolved through international arbitration. Reliance on the MFN in respect of more favourable dispute-resolution provisions may therefore prove difficult"*.[373]

289. The second authority is *UP and CD Holding v. Hungary*, in which the tribunal said that *"an investor's entitlement to resort to arbitration under a BIT must be construed as an integral part of the treatment accorded to him/her/it"*.[374] The Tribunal finds no basis or support for this conclusion. States are free to agree on what dispute resolution mechanisms investors may resort to. Indeed, some States, like Brazil, have rejected investor-State arbitration across the board.[375] For such States, disputes related to investments can only be resolved by—for example—negotiation, State-to-State dispute resolution or national courts. This does not imply, however, that investors do not enjoy fair treatment in local courts.

290. It follows that, even under the Claimant's own analysis, it cannot be concluded that FET includes an absolute right of recourse to arbitration.

291. As to the standard of *protection*, assuming *arguendo* that the Treaty is referring to the traditional standard of Full Protection and Security, the same has essentially been found to seek *"to ensure that host States take 'active and reasonable measures to protect a foreign investment from adverse effects or actions (of a physical or legal nature) of the host State, its organs, or third parties'"*.[376]

292. The only authority relied upon by the Claimant is Prof. Kolb's first expert report.[377] However, in the Tribunal's view, the Claimant misinterprets what Prof. Kolb actually meant.

293. The relevant paragraph reads as follows (emphasis added):

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that is not fair and equitable violates the FET standard accorded to a foreign investor. Not surprisingly, the violation of the FET standard is centered on the facts of the pertinent case".

[372] N. Gallagher and S. Wenhua, "Chapter 8: Settlement of Investor-State Disputes", in *Chinese Investment Treaties, Policies and Practice*, Oxford International Arbitration Series, 2009, ¶ 8.97, **CL-154**.

[373] N. Gallagher and S. Wenhua, "Chapter 8: Settlement of Investor-State Disputes", in *Chinese Investment Treaties, Policies and Practice*, Oxford International Arbitration Series, 2009, ¶ 8.112, **CL-154**.

[374] *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Decision on Preliminary Issues of Jurisdiction, 3 March 2016, ¶ 193, **CL-076**.

[375] A. Berger, "China's new bilateral investment treaty programme: Substance rational and implications for international investment law making" in the *American Society of International Law International Economic Law Interest Group (ASIL IELIG) 2008 biennial conference "The Politics of International Economic Law: The Next Four Years"*, 2008, p. 4, **RL-063**.

[376] "Chapter 6: Standards of Protection", in Josefa Sicard-Mirabal and Yves Derains, Introduction to Investor-State Arbitration, (© Kluwer Law International; Kluwer Law International 2018), pp. 133 – 160 (p. 146), quoting Girsberger, Daniel & Nathalie Voser, International Arbitration: Comparative and Swiss Perspectives, 475 (3rd ed., Schulthess Juristiche Medien AG 2016), **CL-154**.

[377] **CER-002**, Prof. Kolb, ¶ 157.

> While the generic term *protection* is open to several interpretations, the interpretation best aligned with the purpose and object of the treaty must be preferred. The Treaty imposes upon the parties the obligation to protect the respective investors. Such protection has a double dimension. **The Host State must ensure** at once that foreign investors are treated by its organs in accordance with the substantive rules contained in the Treaty – and **that their rights are legally protected, through access to domestic litigation or investment arbitration, as provided for in the Treaty**. **From this perspective, access to investment arbitration in accordance with the Treaty must be understood as part and parcel of the obligation** incumbent upon the Host State to ensure *protection* to the eligible investors.[378]

294. In other words, what Prof. Kolb is saying is that the host State must, as the Treaty says, provide access to local courts *or* to arbitration, in the terms provided for in the Treaty. Put differently, access to arbitration is only part and parcel of the standard of *protection* in respect to *disputes involving the amount of compensation.* Regarding other standards, as discussed in Section B above, the Treaty only ensures protection by allowing investors to resort to State courts.

295. *Second*, one must look at the context of the Treaty. Just like the Tribunal found that, in the analysis of Article 9.3 it was essential to look at other provisions of the Treaty, here the same principle applies. And if we look at Article 9.3, there is no doubt that the Parties agreed that arbitration would be available only for a certain set of disputes: *disputes involving the amount of compensation for expropriation.* Applying the MFN Clause would, as a result, not merely involve an expansion of Junefield's rights but rather frontally contradict the Contacting Parties' agreement regarding the type of disputes which are arbitrable. In the Tribunal's view, for an interpretation to support the incorporation, through an MFN clause, of an arbitration clause into a treaty which provides only for a very limited category of arbitrable disputes, as is the situation in this case, the parties' intention to extend the scope of an MFN clause to include a right to have recourse to arbitration must result from the ordinary meaning of the Treaty. In the present case, the wording of the Treaty provides no such indication. The specific language in Article 9.3 limiting recourse to arbitration must in this case prevail over the wording used in the MFN Clause (which, as noted above, only refers to FET and protection and does not indicate any inclusion of a right of recourse to arbitration). This conclusion is similar to that reached by the tribunal in *Tza Yap Sum c. Peru*,[379] one of the authorities on which Claimant has heavily relied.

296. *Finally*, the Tribunal refers to the analysis made by the tribunal in *Daimler v. Argentina*[380] on the contemporaneous meaning attached to the terms *treatment* and *protection* by the broader international community of States, as reflected in the World's Bank Guidelines of 1992. Even

[378] **CER-002**, Prof. Kolb, ¶ 157.

[379] *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence (Spanish), 19 June 2009, ¶ 216, **CL-025**.

[380] *Daimler Financial Services AG v Argentine Republic*, ICSID Case No ARB/05/1, Award, 22 August 2012, ¶¶ 220-224, **RL-025**.

though these are a soft law instrument, they nevertheless assist the Tribunal in shedding some light on the issue, in the absence of other specific evidence, such as the preparatory works of the Treaty. As noted in that decision:

> "[…] at that time, as reflected one year later by the World Bank Guidelines on the Treatment of Foreign Direct Investment, and in particular its Part III devoted to "treatment", the prevailing view among the Development Committee of the World Bank (an essentially universal international organization and the host body of ICSID) was that treatment was meant to cover discrete principles of conduct applicable to the State hosting the foreign investment, with a view to safeguarding the investment from any discriminatory or unfair and inequitable practices within the Host State's territory. That is, the treatment of investments was perceived as dealing with the legal regime of the investment to be respected by the Host States in conformity with its international obligations, whatever the national organs (whether legislative, executive, or judicial) concerned with the actual application of this regime."[381]

297. In other words, the word "treatment" was contemporaneously considered to refer only to the nature of the direct treatment by a State of an investor, and not to extend to the right to have recourse to dispute resolution.

298. In light of the foregoing, the Tribunal upholds the Respondent's jurisdictional objection in respect of the possibility of extending jurisdiction to FET and PS through the MFN Clause.

D. ALLOCATION OF COSTS

299. The Tribunal notes that both Parties requested that each Party bear its own as well as its counterpart's cost on the basis of Article 42(1) of the UNCITRAL Rules and the "costs follow the event" principle.[382]

1. The Parties' Costs

300. Junefield has declared that its total costs and expenses incurred in the Jurisdictional Phase amount to **USD 1,636,114.54**. This amount includes legal fees, expert fees, arbitration costs and other actual expenses.[383] The break-donw of these amounts is, according to the Claimant, as follows:[384]

[381] *Daimler Financial Services AG v Argentine Republic*, ICSID Case No ARB/05/1, Award, 22 August 2012, ¶ 222, **RL-025**.

[382] Respondent's Statement of Costs, ¶¶ 3, 23; Claimant's Statement of Costs, ¶¶ 8, 11.

[383] Claimant's Statement of Costs, ¶ 3.

[384] See chart included in Claimant's Statement of Costs, ¶¶ 5, 7.

	Description	Total amount [USD]
1.	Legal fees of Mayer Brown	**USD 1,132,000**
2.	Legal fees of Johnson Stokes & Master (from 2 December 2024)	**USD 80,000**
3.	Legal fees of Robalino	**USD 100,000.00**
	Description	**Total amount [USD]**
4.	Costs and expenses of Counsel team including those associated with the Hearing	**USD 20,404.89**
5.	Expert fees of Prof. Edgar Neira	**USD 28,000.00**
6.	Expert fees of Prof. Robert Kolb	**USD 120,000.00**
7.	Travel and accommodation costs of Experts and Client representatives associated with the Hearing	**USD 5,709.65**
8.	Advance on costs (paid to the PCA)	**USD 150,000.00**
	Total	**USD 1,636,114.54**

301. The Claimant additionally requests that the Respondent be ordered to pay the compound interest on the total costs and expenses awarded in favour of Junefield at the rate of 1% above the Hong Kong Dollar Best Lending Rate quoted by the Hongkong and Shanghai Banking Corporation Limited from time to time.[385]

302. For its part, the Respondent has declared that its total costs and expenses incurred in the Jurisdictional Phase amount to **USD 1,240,052.20**.[386] This amount includes legal fees, expert fees, internal fees of the State officials, arbitration costs and other actual expenses.[387] The break-donw of these amounts is, according to the Respondent, as follows:[388]

[385] Claimant's Statement of Costs, ¶ 15.

[386] Respondent's Statement of Costs, ¶ 25.

[387] Respondent's Statement of Costs, Schedule A.

[388] See chart included in Respondent's Statement of Costs, Schedule A.

Description		Total amount [USD]
1.	Counsel legal fees	**USD 869,947.50**
2.	Cost of the time devoted by representatives of the PGE of Ecuador assigned to this case	**USD 67,881.27**
Description		**Total amount [USD]**
3.	Counsel expenses	**USD 15,815.74**
4.	Travel expenses and costs of representatives of the PGE of Ecuador	**USD 11,370.52**
5.	Expert fees of Mr. Luís González García	**USD 90,000.00**
6.	Costs (including travel expenses) of Mr. Luís González García	**USD 563.12**
7.	Expert fees of Dr. Santiago Velázquez Velázquez	**USD 32,000.00**
8.	Costs (including travel expenses) of Dr. Santiago Velázquez Velázquez	**USD 2,474.05**
9.	Advance on costs (paid to the PCA)	**USD 150,000.00**
Total		**USD 1,240,052.20**

2. Tribunal's Analysis

303. The Tribunal begins by observing that, in the Terms of Appointment, the Parties agreed that all Tribunal's fees and expenses should be paid in accordance with the ICSID Schedule of Fees.[389] Additionally, they agreed that any work carried out by the PCA should also be paid in accordance to the ICSID's Schedule of Fees.[390] They further agreed that while the Tribunal Assistant would be remunerated directly by the Presiding Arbitrator, he would be entitled to the reimbursement of justified personal disbursements for attending hearings and meeting.[391] Finally, the Parties agreed that all payments to the Tribunal shall be made from the deposit administered by the PCA.[392]

304. Regarding arbitration deposits, the Parties agreed to apply the relevant provisions of the UNCITRAL Rules.[393] In particular, it was agreed that, in accordance with the ICSID Schedule of Fees and the UNCITRAL Rules, the Parties would make an initial deposit of USD 300,000 (USD 150,000 each Party) to be deposited with the PCA. During the Hearing, the Parties expressly

[389] Terms of Appointment, ¶ 13.1.
[390] Terms of Appointment, ¶ 9.1.5.
[391] Terms of Appointment, ¶ 13.4.
[392] Terms of Appointment, ¶ 13.3.
[393] Terms of Appointment, ¶¶ 12.1-12.5.

confirmed their intention to depart from Article 9.8 of the Treaty,[394] and instead ratified their agreement that the Parties would advance, in equal parts, the fees of the entire Tribunal, as well as all other arbitration expenses (as they had previously done throughout the proceedings), in accordance with the relevant provisions of the UNCITRAL Rules.[395]

305. Accordingly, the Tribunal shall allocate costs pursuant to Articles 40 and 42 of the UNCITRAL Rules. As per Article 40(2) of the UNCITRAL Rules, the term "costs" includes only:

> (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 41;
>
> (b) The reasonable travel and other expenses incurred by the arbitrators;
>
> (c) The reasonable costs of expert advice and of other assistance required by the arbitral tribunal;
>
> (d) The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
>
> (e) The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
>
> (f) Any fees and expenses of the appointing authority as well as the fees and expenses of the Secretary-General of the PCA.

306. In turn, Article 42(1) of the UNCITRAL Rules provides that:

> The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

307. Considering that both Parties presented valid arguments and each prevailed in part; that the conduct of counsel throughout the proceedings was appropriate; and that the fees incurred by both Parties are reasonable, the Tribunal determines that each Party shall bear its own costs for legal representation and assistance, and share in equal parts all other arbitration costs of this phase of the proceedings.

308. Pursuant to Article 40(2)(a), the Tribunal advised that the fees and expenses incurred by each member of the Tribunal (determined pursuant to section 13 of the Terms of Appointment), and

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[394] Agreement between the Government of the People's Republic of China and the Government of the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, dated 21 March 1994, Article 9(8) ("Each party to the dispute shall bear the cost of it appointed member of the tribunal and of its representation in the proceedings. The costs of the appointed Chairman and the remaining costs shall be borne in equal parts by the parties to the dispute."), **CL-001**.

[395] Transcript, Day 1, 7:19–8:5; Respondent's Statement of Costs, ¶ 2; the Claimant further submitted that: "[e]ven if the Tribunal considers that there is an inconsistency between Article 9(8) of the Treaty and Article 42 of the UNCITRAL Rules, Article 42 should prevail since the Parties agreed to the application of the UNCITRAL Rules subsequent to the Treaty", Claimant's Statement of Costs, ¶ 11.

the PCA, acting as registry and administering the arbitral proceedings (as per paragraph 9.1 of the Terms of Appointment), are the following:

CONCEPT	**FEES**	**EXPENSES**
Ms. Sofia Martins	**USD 83,400**	**USD 1,999.98**
Mr. Ignacio Suárez Anzorena	**USD 72,500**	**USD 6,455.57**
Prof. Philippe Sands KC	**USD 65,750**	**USD 446.84**
Permanent Court of Arbitration	**USD 107,200**[396]	**N/A**
Mr. Ricardo Saraiva	**N/A**	**USD 373.59**

309. Regarding all other arbitration costs, including the costs incurred organizing the Hearing, for court reporting and simultaneous interpretation services, as well as all other expenses (telecommunication, bank charges, printing and courier, etc.), they amount to **USD 44,000.57**. Thus, the Tribunal fixes the total costs of this phase of the arbitration in the amount of **USD 382,126.55**.

310. Accordingly, each Party shall share said amount in equal parts, which shall be covered by their corresponding initial deposits, as well as by their forthcoming supplementary deposits, which will be used to cover unpaid fees and expenses as well as the future costs of the arbitration.

[396] As explained, the Parties agreed in the Terms of Appointment that work carried out by the PCA should be paid in accordance to the ICSID's Schedule of Fees. Pursuant to that schedule, the administering authority charges an hourly fee for the Tribunal Secretary's attendance at hearings, as well as an administrative fee of USD 52,000 upon the registration of a case and annually thereafter. Accordingly, the PCA has charged this annual fee for the periods of 2023 and 2024 to date.

VI. DISPOSITIVE SECTION

311. In light of the foregoing, the Tribunal partially rejects Ecuador's objection on jurisdiction, concluding that:

a. It has jurisdiction, under Article 9.3 of the Treaty, with respect to all aspects of Junefield's expropriation claim

b. It does not have jurisdiction, under Article 9.3 of the Treaty, with respect to Junefield's claims relating to FET and PS; and

c. It does not have jurisdiction, under the MFN Clause of the Treaty, with respect to Junefield's claims relating to FET and PS.

312. The Tribunal further decides that each Party shall bear its own costs for legal representation and assistance and share in equal parts all other arbitration costs.

THE TRIBUNAL

Mr. Ignacio Suárez Anzorena

Date: 2-6-25

Prof. Philippe Sands KC

Date:

Ms. Sofia Martins
(Presiding Arbitrator)

Date:

THE TRIBUNAL

Mr. Ignacio Suárez Anzorena

Date:

Prof. Philippe Sands KC
- in dissent -

Date: 19.5.25

Ms. Sofia Martins
(Presiding Arbitrator)

Date:

THE TRIBUNAL

Mr. Ignacio Suárez Anzorena

Date:

Prof. Philippe Sands KC

Date:

Sofia Martins

Ms. Sofia Martins
(Presiding Arbitrator)

Date: 2-6-25

DISSENTING OPINION OF PROFESSOR PHILIPPE SANDS KC

1. I regret that I have considered it necessary to dissent from the decision of my co-arbitrators (the "Majority") on the question of whether the Tribunal has jurisdiction to determine the merits of the particular claim advanced by the Claimant. This is on the basis of my own approach to the correct interpretation of Article 9 of the Treaty.

2. Article 9 provides as follows:

> 1.- Any dispute between an investor fo [sic] one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.
>
> 2.- If the dispute cannot be settled through negotiations within six months, either party to the dispute shall be entitled to submit the dispute to the competent court of the Contracting Party accepting the investment.
>
> 3.- If a dispute involving the amount of compensation for expropriation cannot be settled within six months after resort to negotiations as specified in Paragraph 1 of this Article, it may be submitted at the request of either party to an ad-hoc tribunal. The provisions of this paragraph shall not apply if the investor concerned has resorted to the procedure specified in Paragraph 2 of this Article.

3. As with any treaty provisions, Article 9 falls to be interpreted in accordance with the rules set forth in Articles 31 to 33 of the Vienna Convention on the Law of Treaties (the "VCLT"). The Tribunal may also have regard to previous decisions of investor-state tribunals which have considered similar or identical treaty language. Such decisions are, of course, not binding on this Tribunal, but their reasoning may be informative or offer useful guidance.

4. My difference with the conclusions adopted by the Majority concerns the meaning of the phrase "involving the amount of compensation for expropriation" in Article 9(3) of the BIT. In my view, the proper interpretation of those words is that the Tribunal only has jurisdiction to determine disputes concerning the amount of compensation for an expropriation, and not any dispute concerning expropriation. In particular, this Tribunal does not have jurisdiction over any other element of expropriation (or, as the Tribunal has determined, any other claim relating to expropriation that goes beyond the issue of the amount of compensation to be paid).

5. My starting point is the "ordinary meaning" of the words in light of the Treaty's object and purpose. I note in passing that the basis of the Majority's analysis is said to be "the ordinary

meaning of the text of the Treaty",[1] yet that is not really what follows in the reasoning. Article 9(3) demonstrates a clear and specific concern on the part of the Treaty parties with "the amount of compensation for expropriation", and not with expropriation more broadly. If the parties had been concerned with giving the Tribunal jurisdiction over expropriation claims in general, they could have done so. This could have been achieved simply by referring to "expropriation" in Article 9(3), a simple matter of drafting, and one which is adopted in many other treaties. This they did not do. Their approach reflects a clear choice on the part of the drafters of the Treaty, and it is one that must form the starting point of the interpretative exercise. The vast majority of, if not all, unlawful expropriation claims concern situations in which a claimant has received no compensation and so will "involve" the issue of the adequacy of compensation. The practical effect of the Majority's interpretation is that in all such cases a tribunal will have jurisdiction to determine all parts of the expropriation claim, thus rendering meaningless the particular choice of words adopted by the drafters of Article 9(3). This point is not considered by the Majority.

6. Unsurprisingly, there have been significant arguments concerning the meaning of the word "involving". In isolation, there are two ways in which the word could be interpreted: (i) simply as a neutral connecting word; or (ii) as an inclusive word, implying that what follows is merely one example or part of a broader whole. I am firmly of the view that the first interpretation is more appropriate in the context of the Treaty. There are four reasons for this.

7. The first concerns the other language versions of the Treaty. The Majority is correct that Article 33(1) VCLT provides that, in the event of a divergence between different language versions, the language provided for by party agreement or the text of the treaty shall prevail. But attention should also be paid to Article 33(3) VCLT, which provides that "[t]he terms of the treaty are presumed to have the same meaning in each authentic text". The Tribunal is required to consider whether the different language versions are capable of reconciliation, and it is only in the context of a clear conflict that the Tribunal should reach an interpretation based on the English text alone.

8. In this regard, the Spanish version of the Treaty uses the phrase "relacionado con". Contrary to the Claimant's argument, I do not understand that this phrase necessarily implies any connotation of inclusivity. Rather, I understand the phrase to describe a connection between two objects without implying anything as to the nature or extent of the connection. The Majority's position, as I understand it, is that clearer language could have been used if the Treaty drafters intended the jurisdiction of *ad hoc* tribunals to be limited to disputes

[1] Majority's Award, para.219.

concerning the quantum of expropriation.[2] No doubt clearer language could have been used, but the language chosen does not, in my view, give the Tribunal any broader jurisdiction. As noted above, the text could have referred to "a dispute involving expropriation", which plainly would allow for a broader approach, but the drafters elected not to adopt this approach. By using the words "the amount of compensation for expropriation" they plainly, in my view, intended to act to limit the scope of the clause, and the category of disputes over which a Tribunal would have jurisdiction.

9. The Chinese version of the Treaty uses the characters "**涉及**" (sheji). There has been extensive argument from the Parties as to the proper translation of these characters into English, and the meaning of other characters which are used in a similar context in other investment treaties to which China is a party. It is not possible for me to reach a firm conclusion as to the proper meaning of "**涉及**" (sheji); as is often the case, the proper meaning will likely vary depending on the context. I am satisfied, however, that the characters are not–and are not intended to be–inherently inclusive.

10. Taking the three authentic versions of the Treaty into account, I believe that they carry no necessary implication of inclusivity, as argued by the Claimant. I consider that it is appropriate to interpret the words "involving", "relacionado con" and "**涉及**" (sheji) as words or phrases which state, or are capable of stating, a connection in a neutral manner. The Majority's conclusion that the word "involving" necessarily has an inclusive and expansive effect as to jurisdiction creates a conflict between the different language versions of the text in circumstances where a reconciliation of the texts is possible.

11. The second reason for my view is the object and purpose of the Treaty. It is well-established that a treaty's preamble can provide some guidance as to its object and purpose. In the current case, however, I do not consider that the preamble offers any meaningful assistance on the interpretation of Article 9(3). The preamble refers in general terms to the benefits of investment and an intention to create favourable conditions for investment. However, these aims may be achieved by the creation of substantive investment obligations on each party and giving investors the right to enforce those standards in national courts. There is nothing in the preamble which offers any guidance or direction as to the scope of the jurisdiction which the Treaty parties intended to give to the Tribunal. As recognised by the tribunal in *Beijing*

[2] Majority's Award, para. 241.

Shougang v Mongolia, such general remarks in a preamble are plainly insufficient to affect the ordinary meaning of the text of Article 9(3).[3]

12. More relevant, in my view, is the clear policy of China in its practise in first generation BITs to avoid broadly worded dispute resolution provisions in order to limit the possibilities of international litigation. The Majority has not really engaged with this aspect. Although there are inevitably variations between the Chinese BITs in this period, these variations are minor and in no way undermine the existence of a clear policy.[4] That policy has been recognised in academic work cited by the Respondent[5] and is reflected in the significant number of Chinese BITs which contain similarly worded dispute resolution agreements.

13. Although the policy is that of China, it can nevertheless be taken into account in interpreting the Treaty. Ecuador acquiesced to this policy when it entered into the Treaty, without seeking to renegotiate any of its terms. I am strengthened in this view by the work of the International Law Commission,[6] as well as the existence of several international arbitral awards which take account of a policy and practise which is predominantly that of one treaty party.[7] The analysis of the Majority takes no account of this policy or practise.

14. The third reason for my view is the wider context of the Treaty. For the reasons discussed above, I do not consider that the preamble to the Treaty can provide any assistance. There are, however, two elements of greater significance. The first is the fork-in-the-road (the "FIR") provision contained in Article 9(3). I do not agree with the approach of the Majority that this FIR provision tends to support the view that Article 9(3) gives the Tribunal jurisdiction to determine all aspects of an expropriation claim.[8] I fully share the view of the tribunal in *Beijing Shougang v Mongolia*, to the effect that the provision would not deprive an *ad hoc* tribunal of jurisdiction to determine the issue of compensation if the claimant had expressly reserved the issue of compensation for a decision in arbitration.[9] It is by now well-established

[3] *Beijing Shougang and others v Mongolia*, PCA Case No. 2010-20, Award, 30 June 2017 (Arbs. Peter Tomka, Yas Banifatemi, Mark Clodfelter), para. 451, **RL-012**.
[4] In its Reply on Jurisdiction, at para. 119, the Respondent provided a table with 49 of China's first generation BITs concluded between 1985 and 1999, each of which connects a tribunal's jurisdiction to "the amount of compensation" payable following an expropriation, using substantively similar connecting words.
[5] See e.g. Geiguo Wang, 'Consent in Investor-State Arbitration: A Critical Analysis' (2014) 13(2) Chinese Journal of International Law 335, **RL-040**; Jane Y. Willems, 'The Settlement of Investor State Disputes and China New Developments on ICSID Jurisdiction' (2011) 8(1) South Carolina Journal of International Law and Business 1, **RL-065.**
[6] ILC Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries (2018), paras. 12, 17 and 27.
[7] See e.g. *Wirtgen v Czech Republic*, PCA Case No. 2014-03, Award, 11 October 2017, para. 234; European Communities – Customs Classification of Certain Computer Equipment, WTO Report of the Appellate Body, 5 June 1998, AB-1998-2, para. 93.
[8] Majority's Award, paras. 221-232, 244, 260.
[9] *Beijing Shougang and others v Mongolia*, PCA Case No. 2010-20, Award, 30 June 2017 (Arbs. Peter Tomka, Yas Banifatemi, Mark Clodfelter), para. 449, **RL-012**.

that a FIR provision only excludes a tribunal's jurisdiction if the "triple identity test" is satisfied, namely that there have been domestic proceedings involving the same cause of action, the same object and the same parties.[10] This test would plainly not be satisfied where domestic proceedings concerned the existence of an expropriation, and the proceedings before an *ad hoc* tribunal concerned the quantum of compensation.

15. The Majority expresses some concern with the prospect that, on the more restrictive interpretation that I favour, a claimant bringing a claim for an indirect expropriation would have to seek a declaration from the local courts–unless the State had explicitly determined that it had engaged in an act of expropriation–before it could turn to an *ad hoc* tribunal.[11] Although it is fair to say that the Treaty does not explicitly contain such a requirement, it is the natural implication of the ordinary meaning of the words of the Treaty, which reserves to national jurisdictions the great majority of disputes that could, in theory, arise in relation to an investment governed by this Treaty. That is what the parties plainly envisaged and provided for in the Treaty. That was the stated and policy intention of China, and it was accepted without demurral by Ecuador.

16. Contrary to the view expressed by the Majority, I consider this to be no cause for concern: recourse to the jurisdiction of an international arbitration tribunal is exceptional, a matter that must be strictly limited to the intentions of the drafters, and is not a matter to be presumed. In this Treaty, the national courts of the Contracting States, and not *ad hoc* tribunals, are plainly considered by the parties to be the primary forum for settling most types of disputes that could arise. In my view, the drafters of the Treaty rather obviously decided to allocate certain jurisdiction to national courts, and other (but only very limited) jurisdiction to arbitral tribunals. There is nothing in the Treaty to indicate that the parties considered that arbitration is a preferable means of settling disputes, or that they wished future arbitrators to circumvent the explicit choice of the Treaty parties and the plain meaning of Article 9(3). There has been extensive discussion between the Parties as to whether the Ecuadorian courts have the power to declare or proclaim the existence of an expropriation, but that is beside the point. As the Majority Award appears to recognise, any such inability may be grounds for an inter-state claim or complaint, but it cannot as such affect interpretation of the Treaty or the meaning and effect of this Tribunal's jurisdiction.

[10] See e.g. *Yukos Universal Limited (Isle of Man) v The Russian Federation*, Interim Award on Jurisdiction and Admissibility, 30 November 2009 (Arbs. L. Yves Fortier, Charles Poncet, Stephen Schwebel), para. 598, **CL-152**.
[11] See Majority's Award, para. 235; and *Beijing Shougang and others v Mongolia*, PCA Case No. 2010-20, Award, 30 June 2017 (Arbs. Peter Tomka, Yas Banifatemi, Mark Clodfelter), para. 449, **RL-012**.

17. A second contextual factor is the structure of Article 4. Article 4 defines "fair compensation" as "equivalent to the value of the expropriated investment as the time when expropriation is proclaimed […]". There is consequently a clear link between Article 9(3) and this aspect of Article 4. In my view, the text of Article 9(3) shows a clear intention to give an *ad hoc* tribunal jurisdiction over the question of whether any compensation was "equivalent to the value of the expropriated investment" but not any other element of an expropriation claim. Moreover, when determining the lawfulness of an expropriation, it is perfectly possible for a tribunal to consider the adequacy of any compensation paid without having first to consider one or more other elements of an expropriation claim which are contained in Article 4. The "value of the expropriated investment" is not affected by whether the expropriation took place for a public purpose or without discrimination. Whilst the amount payable by compensation after a finding of a breach may differ, that is a fundamentally different issue to the criteria for legality in Article 4.

18. Fourthly, I do not consider that the interpretation which I (and more recent tribunals in cases with similar treaty language) have adopted should give rise to any concern about depriving Article 9(3) of any effect. Although the Majority does not explicitly mention this principle, it seems to inform their view in paragraph 243 that "arguing that *involving* is neutral is effectively the same as saying that that the word need not be there at all, or that it should be read as meaning something entirely different, such as *limited to.*"[12]

19. The principle of *effet utile*–or an approach to interpretation which relies on an intention to give meaningful effect to a form of words–does not mean that any given treaty provision should be given its maximum or most extensive possible effect. Rather, the *effet utile* principle is concerned with avoiding a result in which a treaty provision is given no effect at all. As explained by Sir Gerald Fitzmaurice:

> "[…] where a text is ambiguous or defective, but a possible, though uncertain, interpretation of it would give the agreement some effect, whereas otherwise it would have none, a court is entitled to adopt that interpretation, on the legitimate assumption that the parties must have intended their agreement to have some effect, not none.
>
> […]
>
> Significantly, however, [the principle] is all too often misunderstood as denoting that agreements should always be given their maximum possible effect, whereas its real object is merely […] to prevent them from failing altogether. This affords a very good pointer to the limits of a doctrine which, it allowed free play, would

[12] Majority's Award, para. 243.

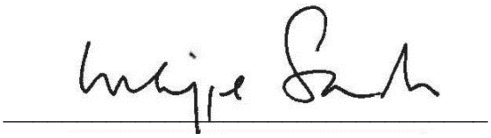
> result in parties finding themselves saddled with obligations they never intended to enter into, in relation to situations they never contemplated, and which often they could not even have anticipated."[13]

20. The interpretation which I favour does not leave the word "involving" without any meaning. Rather, the inclusion of the word operates to limit the jurisdiction of the Tribunal to a particular and narrowly confined type of dispute. Nor does my interpretation render Article 9(3) inoperative or without any effect. There is therefore no need to adopt the broader interpretation favoured by the Majority in order to ensure that Article 9(3) is given a meaningful effect.

21. Finally, it is worth reflecting on the broader consequences of the Majority's reasoning. The Majority has concluded that the Tribunal does not have jurisdiction over claims for breaches of other treaty standards. I agree with this conclusion, yet it is difficult to see how it can be reasonably sustained on the Majority's reasoning. If the word "involving" is indeed to have a more broadly inclusive meaning, as the Majority argues, then why not also extend it to include any FET or FPS claim within the scope of the Tribunal's jurisdiction, in circumstances in which the claimant has also raised an issue of compensation for expropriation? The Majority rightly rejects such an outcome, yet it offers no real explanation as to why it would be avoided on its approach to the interpretation of Article 9(3).

22. In conclusion, the interpretation adopted by the Majority departs from the language and plain meaning of the text of the Treaty, as well as the context of the practise of the Parties, in particular that of the People's Republic of China. For this reason, I believe that the Majority has fallen into error. It has significantly expanded the scope of the Tribunal's jurisdiction beyond that which the drafters of the Treaty intended. This is an approach which, with the greatest respect, goes beyond the limited powers of an Arbitral Tribunal established and operating under the rules of public international law.

[13] Sir Gerald Fizmaurice, "*Vae Victis* or Woe to the Negotiators! Your Treaty or Our "Interpretation of It?" (1971) 65 AJIL 358, p. 373, **CL-148**. See also *Cemex v Venezuela*, ICSID Case No. ARB/08/15, 30 December 2010 (Arbs. Gilbert Guillaume, Georges Abi-Saab, Robert B. von Mehren), para. 114, **CL-126**.



Prof. Philippe Sands

Date: 2 June 2025