



School of International Arbitration

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International Arbitration Case Law

School of International Arbitration, Queen Mary, University of London

International Arbitration Case Law

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**Award Name and Date:**

Copper Mesa Mining Corporation v. The Republic of Ecuador (PCA Case No. 2012-2)  
Award - 15 March 2016

**Case Report by:**

Ibrahim Mohamed Amir, \*\* Diana Ruiz Truque\*\*\*

**Summary:**

The Parties' dispute arises from three mining concessions at Junín, Chaucha and Telimbela in Ecuador granted by the Respondent to (as the Claimant claims) its associated Ecuadorian project companies that were subsequently revoked or terminated by the Respondent (¶1.8). The Claimant alleges that the Respondent unlawfully revoked or terminated the concessions, thereby depriving the Claimant of the entire value of its investments in its project companies and causing it to suffer substantial damages (¶1.9). The Claimant contends that the Respondent's actions and omissions violated its obligations to the Claimant and the Claimant's investments under the Treaty and international law, as the applicable law (¶1.9).

As regard the Respondent's objections to jurisdiction and admissibility, the Tribunal decides to reject them and declares that it has jurisdiction (¶10.4). As regards the Claimant's claims that the Respondent breached its international obligations under the Treaty, the Tribunal decides that the Respondent breached such obligations in regard to the Junín and Chaucha concessions (but not in regard to the option for the Telimbela concession) under Articles II(2) and VIII(1) of the Treaty (¶10.5).

**Main issues:**

Violation of international obligations – Fair and Equitable Treatment (FET) – Full Protection and Security (FPS) – National Treatment – Unlawful Expropriation.

**Arbitral Tribunal:**

Dr. Bernardo Cremades (appointed by the Claimant), Judge Bruno Simma (appointed by the Respondent), V.V. Veeder QC (President)

## **Claimant’s Counsel:**

Messrs. Robert Wisner, Markus Koehnen and Andrei Pascu, McMillan LLP, Toronto, Canada.

## **Respondent’s Counsel:**

Mr Diego García Carrión (Procurador General del Estado); Dra. Blanca Gómez de la Torre (Directora de Asuntos Internacionales y Arbitraje); Ms Christel Gaibor, Ms Diana Moya, Ms Cristina Viteri (the Procuraduría General del Estado); Mr Veijo Heiskanen, Ms Domitille Baizeau, Mr Jaime Gallego and Mr David Bonifacio, Lalive, Geneva, Switzerland.

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## **Digest:**

### **1. Facts of the Case:**

The Parties’ dispute arises from three mining concessions at Junín, Chaucha and Telimbela (¶¶1.83-1.94) in Ecuador granted by the Respondent to (as the Claimant claims) its associated Ecuadorian project companies (¶¶1.73-1.82) that were subsequently and unlawfully revoked or terminated by the Respondent, thereby depriving the Claimant of the entire value of its investments in its project companies and causing it to suffer substantial damages (¶1.8). The Claimant advances its claims under the Treaty, alleging violations by the Respondent of its international obligations under Article II (as to fair and equitable treatment [‘FET’] and full protection and security [‘FPS’] standards); Article IV (as to national treatment) and Article VIII (as to expropriation) (¶1.71).

#### **(i) *The Claimant’s Investments:***

The Claimant submits that, in reliance on the rights to the Junín and Chaucha concessions and the Telimbela project, it made substantial investments in Ecuador (¶¶1.95, 1.99, 1.101). The Respondent contends that the land purchase program in the Junín concession areas by Ascendant Ecuador (the Claimant), post-acquisition of the concessions, consisted of illegal “land trafficking”, as reported in July 2007 by the Commission for Civil Control of Corruption (“CCCC”) (¶1.96) while the Claimant denies that said report makes any such finding (¶1.97).

**(ii) The 2008 Nullification Resolutions:**

On 25 January 2008, the Pichincha Regional Mining Director passed resolutions nullifying the Junín concessions (the “Nullification Resolutions”), declaring them to be unconstitutional on the basis of the State’s inalienable ownership of all natural resources granted by the Constitution of Ecuador (¶1.109). The Claimant appealed the Nullification Resolutions to the National Mining Director, who revoked the Nullification Resolutions on 15 September 2008 (¶1.109).

**(iii) The 2008 Mining Mandate:**

On 18 April 2008, the Respondent’s Constituent Assembly (*Asamblea Constituyente*) passed Constituent Mandate No. 6 (*Mandato Constituyente* No. 6, the “Mining Mandate”) declaring that mineral substances were “to be exploited to suit national interests” and provided for the termination (*extinción*) “without economic compensation” of mining concessions falling into a number of categories, including those “without their environmental impact study having been submitted or without a prior referendum process having been conducted, including those pending an administrative resolution” (¶1.110), which was the case of the Claimant’s concessions.

**(iv) The 2008 Termination Resolutions:**

On 7 October 2008, the Under-Secretary of Mines ordered the termination of the Junín concessions on the basis of the Mining Mandate stating that “no prior referendum process” had been conducted (¶1.111). The Respondent contends that the extinction of the Junín concessions was a matter of legitimate public policy where the concession holder had failed to secure the approval of local communities in the years it held the concession (¶1.111). The Claimant appealed the Termination Resolutions but the appeal was ruled inadmissible (¶1.112). Subsequently, the Claimant applied for an extraordinary measure of protection to the Transitional Constitutional Court, but it was dismissed on the basis of failure to state any cause of action (¶1.112).

**(v) The 2009 Mining Law:**

On 29 January 2009, a new mining law (the “2009 Mining Law”) was enacted by the Respondent (¶1.114). Article 24 established that the mining areas and mining projects where the State of Ecuador conducted geological research, exploration or prefeasibility or feasibility studies shall be returned to the State (¶1.114). On 19 June 2009, all three of the Claimant’s projects identified as ones in which the State had conducted geological investigations (¶1.115).

**(vi) Attempted Sales:**

The Claimant contends that the combined effect of these measures taken by the Respondent deprived it of the ability to seek any further public financing in Canadian capital markets, and therefore, that it was forced to search for a buyer of its remaining interests in Ecuador as its cash reserves were being depleted (¶1.116). From the autumn of 2008, the Claimant claims that it pursued such a sale, but each attempt failed due to uncertainties surrounding its rights to develop its projects (¶1.116).

## 2. Procedural Background:

On 20 July 2010, invoking Article XIII(2) of the Treaty, the Claimant sent a written Notice of Dispute to Ecuador as the named Respondent which alleged that measures taken or not taken by Ecuador were in breach of the Treaty; that the Claimant had incurred loss or damage by reason of those breaches; and that the Claimant was therefore requesting monetary compensation from Ecuador (¶5.3). Six months later, by Notice of Arbitration dated 21 January 2011, the Claimant commenced arbitral proceedings against the Respondent under the UNCITRAL Arbitration Rules 1976 (the “UNCITRAL Rules”) pursuant to Article XIII(4)(c) of the Treaty. (¶1.11). On 17 January 2012, the first procedural meeting was held, where the Terms of Appointment were agreed and adopted by the Tribunal and the Parties (¶1.20). According to these Terms of Appointment, the Parties agreed that the PCA act as registry in these proceedings. The Terms of Appointment also established English as the sole language of the arbitration; The Hague, The Netherlands, as the legal place (or “arbitral seat”) of the arbitration; and Washington DC, USA, or such other geographical venue as the Tribunal may determine in consultation with the Parties as the physical venue for oral hearings (¶1.21).

On 25 January 2012, the Tribunal issued Procedural Order No. 1, ordering the submission of Statements of Claim and Defence by the Claimant and Respondent, respectively and fixing the time-table for these written submissions (¶1.22). Six days later, the Claimant submitted its Statement of Claim and accompanying documents (¶1.23). On 8 March 2012, the Respondent submitted its Statement of Defence and accompanying documents, raising several objections to the Tribunal’s jurisdiction (¶1.25). On 21 March 2012, a second procedural meeting was held by telephone conference call between the Tribunal and the Parties, where a further schedule for the proceedings was discussed (¶1.26).

On 26 April 2012, the Tribunal issued Amended Procedural Order No. 2, setting out a procedural time-table allowing for the possibility that the Respondent might submit a request for bifurcation (as between jurisdiction and the merits) and also setting out an alternative time-table in the event of no such bifurcation (¶¶1.28–1.31). On 3 August 2012, a third procedural meeting was held by telephone conference-call between the Tribunal and the Parties on the disputed issue of bifurcation (¶1.37). On 9 August 2012, the Tribunal issued Procedural Order No. 3, whereby the Tribunal decided to reject the Respondent’s request for bifurcation and set a procedural calendar for the period up to the oral hearing to take place in Washington, DC, USA from 14 to 25 September 2013 (¶1.38).

On 5 February 2013, the Tribunal issued Procedural Order No. 5 deciding on the Parties’ disputed document production requests and ordering the production of such documentation by no later than 19 February 2013 for the Respondent and 1 April 2013 for the Claimant (¶1.45).

Following the Parties’ failure to agree on a mutual undertaking regarding the confidentiality of raw footage from the documentary film “*Under Rich Earth*” the Respondent requested an urgent confidentiality order from the Tribunal in respect of these materials and the Claimant opposed this application (¶1.48). On 14 August 2013, the Tribunal issued an Urgent Procedural Order granting the Respondent’s application in part (¶1.48).

On 19 August 2013, the Respondent submitted its Rejoinder and accompanying documents (¶1.50). Five days later, the Tribunal issued Procedural Order No. 6, confirming its Urgent

Procedural Order of 14 August 2013 and addressing certain other procedural matters relating to the oral hearing (¶1.51). From 16-21 September 2013, an oral hearing (the “Hearing”) was held at the World Bank in Washington, DC, USA, where the Parties agreed to make simultaneous submissions of post hearing briefs by 29 November 2013, rebuttal post-hearing briefs (including costs submissions) by 24 January 2014, and responses on the reasonableness of the other side’s costs submissions by 31 January 2014 (¶¶1.53-1.54).

On 12 March 2014, the Tribunal declared the proceedings closed in accordance with Article 29 of the UNCITRAL Rules.

### **3. Jurisdiction and Admissibility:**

#### ***(i) Article XIII(12) of the Treaty:***

According to the Respondent, the Claimant is bringing a claim under Article XIII(12)(a) concerning damage to the (alleged) local subsidiaries of the Claimant in Ecuador (i.e. the three project companies), and not a claim under Article XIII(3) (¶5.9). Therefore, according to the Respondent, the Claimant must comply with the requirements of Article XIII(12) and the local subsidiaries must separately consent to arbitration and waive any rights each may have under the local law (here Ecuadorian law) against the measures taken by the host State (here the Respondent) of which the investor (here the Claimant) complains (¶5.9).

The Respondent further submits that Article XIII(12) is an “improved version of a fork-in-the-road clause”, establishing a unity of interest between the foreign investor and its local subsidiary (¶5.10). If the latter chooses to initiate or continue local or other proceedings, no claim under the Treaty may be brought by the foreign investor; but if the foreign investor chooses to initiate an arbitration under the Treaty for damages caused to the subsidiary, these proceedings are considered to have been brought on behalf of the local subsidiary (¶5.10). Pursuant to Article XIII(12)(b) of the Treaty, the only exception to these conditions would be when the host State has unlawfully deprived the foreign investor of the control of its local subsidiary, such is not this case (¶5.10).

The Respondent further contends that where a foreign investor has made and operates its investment through a local subsidiary, it may not claim for direct damage to itself under Article XIII(3) of the Treaty; and, in that sense, that Article XIII(12) is intended to be an exclusive (or exhaustive) remedy (¶5.12).

The Tribunal considers that the Claimant is entitled, as a matter of jurisdiction and admissibility, to advance its own claims against the Respondent, in respect of its own investments in Ecuador pursuant to Article XIII(1) and (2) of the Treaty (¶5.50). The Tribunal also considers that is what the Claimant has done in this arbitration for its primary claims: it has not there sought to advance or espouse any claim in the name of any its subsidiaries; and it is only claiming compensation for harm which it has itself suffered and not any harm suffered by its subsidiaries (¶5.50). Although, in case its primary claim failed, the Claimant also advanced an alternative claim under Article XIII(12) of the Treaty, that alternative subsidiary claim was made only in response to the Respondent’s jurisdictional objection to its primary claims (¶5.50).

In the Tribunal’s view, these are all claims pleaded against the Respondent by the Claimant alone, in its own right and on its own behalf for its own harm to its own investment (¶5.51).

For that purpose, as a matter of jurisdiction, the Claimant does not advance any claim on behalf of any of the project companies; and it does not need to place any reliance upon Article XIII(12) of the Treaty (¶5.51).

Further, the requirements of Article XIII(12)(a) of the Treaty are simply not applicable to the Claimant's case under Articles XIII(1) and (2) (¶5.53). It is therefore unnecessary to consider further the Respondent's submission that Article XIII(12) operates as an improved or exclusive 'fork-in-the-road' provision (¶5.53).

**(ii) Continued Ownership:**

According to the Respondent, the Claimant has not proven ownership of any of the assets alleged by the Claimant as constituting its investments in Ecuador on the relevant dates, including the shares indirectly owned by the Claimant (¶5.24). The Respondent submits that the Claimant sold its subsidiaries to Biotreat in January 2010, and accordingly, that only Biotreat may claim thereafter on behalf of these three companies and not the Claimant (¶5.24). Further, the Respondent challenged the acquisition of Ascendant Barbados by the Claimant (which owned the project companies) (¶5.24). However, the Tribunal concludes such ownership continued, *de jure*, up to the date of this arbitration's commencement (¶5.47).

The Claimant owned, indirectly, the three project companies from July 2004 onwards, up to and including the Termination Resolutions (12 November 2008) in regard to the Junín concessions and also the events of June 2009 regarding "a cloud on title" in regard to the Chaucha concession (with the Telimbela concession) (¶5.43). Accordingly, the Claimant made its alleged investments in Ecuador in July 2004 onwards, through its intermediary subsidiary (Ascendant Barbados), a legal person formed under Bajun law (¶5.43).

The Claimant's investments took place before the alleged measures taken by the Respondent in 2008 and 2009 allegedly in breach of the Treaty, allegedly causing legal harm to the Claimant (¶¶5.44-5.47). They also took place long before the Claimant's Notice of Dispute of 20 July 2010 and the commencement of this arbitration on 21 January 2011 (¶¶5.44-5.47). The Tribunal accepts the Claimant's case that, *de jure*, the Claimant's transactions with Biotreat in 2009 did not deprive the Claimant of its investments before this arbitration's commencement (¶¶5.44-5.47). Hence, the Tribunal finds there was continuous legal ownership by the Claimant of its investments from 2004 up to 21 January 2011 (¶¶5.44-5.47).

Accordingly, the Tribunal decides that the Claimant has met the jurisdictional requirements of the Treaty, as regards *ratione temporis*, *ratione personae* and *ratione materiae* (¶5.48).

**(iii) Legality of Ownership:**

The Respondent submits that the conduct of the Claimant's alleged subsidiaries, as well as that of its agents and employees, amounts to severe breaches of legal principles governing corporate social responsibility and is contrary to international public policy, including the UN Global Compact, the OECD Guidelines and the Voluntary Principles and therefore only lawful investments are protected under the Treaty (¶5.29).

Moreover, the Respondent contends that the Claimant's investment relating to the Junín concessions were made in a manner not in accordance with the laws of Ecuador, as the Claimant was fully aware that these concessions were obtained under a "rigged" tender

process and were also not operated in accordance with Ecuadorian law as the Claimant engaged in a series of unlawful activities violating Ecuadorian law and international law, as well as international public policy (¶5.30).

The Claimant however contends that the Treaty does not require compliance with local laws during the “management, conduct or operation” of that investment, which is the language is used in Article IV(1) of the Treaty (¶¶5.31-1.32). Had the Contracting Parties to the Treaty intended the broader meaning alleged by the Respondent, they would have specifically used the word “operated”, at least, rather than the word “controlled” (¶5.31).

In the Tribunal’s view, the wording of the Treaty is confined, at most, to a jurisdictional bar applying to the time when the Claimant first made its investment (¶5.54), and the Respondent’s case is limited to the time of the Claimant’s original investment in acquiring the Junín concessions (¶5.57). The wording of Article 1(g) of the Treaty is clear: the phrase “in accordance with the latter’s laws” qualifies the earlier concept of the investment’s ownership and control when made; and it does not extend to the subsequent operation, management or conduct of an investment (¶5.54). Not only is any such wording significantly absent from Article 1(g), but it would take clear wording to produce such an important jurisdictional bar (¶5.54, 5.56). It would effectively deprive an investor from exercising any arbitral remedy under the Treaty if the investor (or its agents or employees) ever committed a breach of the host State’s laws during the life of its investment (¶5.55). That would be a stark and potentially harsh result, severely limiting the legal autonomy of the arbitration agreement between an investor and a host State resulting from Article XIII(4) of the Treaty (¶5.55).

**(iv) *Unclean Hands:***

As regards the Junín concessions, the Respondent submits that the Claimant’s claims are inadmissible *ratione materiae* as the Claimant approaches the Tribunal with “unclean hands” having failed to comply with applicable Ecuadorian and international laws (¶5.36).

In the Tribunal’s view, the Claimant was not guilty of any wrongdoing, whether it amounted to “unclean hands” or any other like impropriety, at the time when it acquired the Junín concessions in 2004 (¶5.60). Further, the Tribunal considers that the Respondent’s case on unclean hands is not a jurisdictional objection, but rather an objection to the admissibility of the Claimant’s claims based upon its alleged post-acquisition misconduct, and an objection as to admissibility necessarily assumes that a tribunal has jurisdiction (¶5.62). Given the Respondent’s obligation of good faith under the Treaty in regard to arbitration, the Tribunal decides that the Respondent is precluded from raising this objection as to admissibility (¶5.64). However, this decision does not apply to other wrongdoings under Ecuadorian law by the Claimant and its agents (¶5.64).

The Tribunal has decided to join what remains of the Respondent’s case on admissibility to the merits of the Claimant’s claims in regard to the Junín concessions (¶5.65). The Tribunal there prefers to take into account the Claimant’s case not in the form of the doctrine of unclean hands as such, but rather under analogous doctrines of causation and contributory fault applying to the merits of the Claimant’s claims arising from events subsequent to the acquisition of its investment (¶5.65).

For these several reasons, the Tribunal dismisses the Respondent's objections to the Tribunal's jurisdiction and (as regards the Junín concessions) the admissibility of the Claimant's claims (¶5.67).

#### **4. Liability and Causation:**

##### **(a) The parties' Position:**

##### **(i) *Unlawful Expropriation:***

*The Claimant contends that* the Respondent: (i) directly expropriated the Junín concessions by formally extinguishing title to the Golden 1 and Golden 2 concessions (with Magdalena) via the Nullification Resolutions and the Termination Resolutions applying the Mining Mandate in an arbitrary and unjustifiable manner, (ii) indirectly expropriated the Claimant's interest in Ascendant Ecuador ("AE") by taking all its material assets, thereby destroying the entire value of its shares and (iii) indirectly expropriated the Chaucha and Telimbela concessions by disclosing their inclusion on the list of projects to be directly expropriated by the Respondent (without compensation) under Article 24 of the 2009 Mining Law, thereby also creating a "serious title defect" to the Chaucha concession (¶¶6.6, 6.17, 6.20, 6.23). These, so the claimant submits, were unlawful expropriations under the Treaty as no compensation was paid, they were not taken for a public purpose, they were not carried out according to due process of law, and they singled out the Claimant's investments in a discriminatory manner (¶6.7). The Claimant further contends that the Respondent violated Article VIII of the Treaty, which required prompt, adequate and effective compensation to be paid by the Respondent to the Claimant for both direct and indirect expropriation (¶6.7).

*The Respondent contends that* it is well established under international law that a non-discriminatory regulation, adopted for a public purpose and enacted in accordance with due process, does not amount to expropriation, and even less, to unfair and inequitable treatment (¶6.9). The 2008 Mining Mandate, the 2009 Mining Law and the Termination Resolutions are measures issued by the State in accordance with due process and in the exercise of its legitimate regulatory authority and police powers, responding to a compelling public policy consideration, seeking to address the many social, economic and environmental issues that remained unsolved and to establish a more stable and efficient regulatory regime (¶¶6.9, 6.12, 6.18). The Respondent records that, apart from the Junín concessions, 1,334 other concessions were terminated by the Mining Mandate and a total of over 1,026 concessions were terminated under Article 1 of the Mining Mandate (¶¶ 6.11). The Nullification Resolutions are not amounted to expropriation as they were overturned upon appeal and never took effect (¶¶6.12, 6.18). These measures, so the Respondent contends, do not qualify as breaches of the Treaty because they fall under the general exception provided by Article XVII(3) of the Treaty and therefore do not amount to expropriation under the Treaty (¶¶6.12, 6.14, 6.15, 6.16).

##### **(ii) *The Fair and Equitable Treatment "FET" Standard:***

*The Claimant contends that* the Respondent failed to give to the Claimant's investments in Ecuador fair and equitable treatment in accordance with principles of international law, thereby violating Article II of the Treaty and breaching the FET standard in regard to all its concessions, by the following acts:



(a) revoking the legal framework that applied to the mining concessions that were the fundamental basis of the Claimant's investments by adopting the Nullification Resolutions, the Termination Resolutions and Article 24 of the 2009 Mining Law;

(b) through these same measures, acting contrary to specific representations contained in the concessions (confirmed on numerous occasions) to the effect that the Claimant's subsidiaries had a right of exploration and development within the concession areas;

(c) acting on the basis of a "mandate" from the Constituent Assembly rather than on the basis of a valid law passed by Congress and signed by the President;

(d) citing a purported failure to conduct a referendum process when there were no legitimate grounds to do so and where the Respondent itself was responsible for any such failure;

(e) denying the concessionaire at Junín (Ascendant Ecuador) any right to independent review of the Termination Resolutions; and

(f) denying the concessionaires at Chaucha and Telimbela (DosRios and Telimbela) the right to review the designation of their projects for reversion to the Respondent under Article 24 of the Mining Law (¶¶6.25-6.26).

*The Respondent* denies any breach of the FET Standard (¶6.27). The Termination Resolutions with respect to the Junín concessions, so the Respondent contends, were taken following the failure of Ascendant Ecuador to respect and comply with a legal framework in place since 2000 (¶¶6.30, 6.33), and in particular, the local consultation and Environmental Impact Studies ("EIS") requirements which existed before the 2008 Mining Mandate (¶6.32). Further, The Respondent submits such legal reform is fully consistent with international standards, and, contrary to the Claimant's arguments, was passed by a Constitutional Assembly in accordance with its mandate (¶6.34).

The Respondent insists that they were legitimate measures taken to implement the Mining Mandate, which served legitimate public policy purposes and addressed issues of serious public concern (¶6.36). The Respondent also denies that the Mining Mandate or the Termination Resolutions violated due process and that Ascendant Ecuador did not have any right to independent review of the Termination Resolutions since there were multiple forms of recourse available to Ascendant Ecuador to challenge the Termination Resolutions; namely: *recurso de reposición, recurso de apelación, recurso extraordinario de revisión, recurso subjetivo o de plena jurisdicción, recurso de casación, acción extraordinaria de protección and acción de protección* (¶6.38). With respect to the Chaucha and Telimbela concessions, the Respondent contends that there is no evidence that the Claimant has been treated in any way in an unfair or unjust manner (¶6.43).

**(iii) *The Full Protection and Security "FPS" Standard:***

*The Claimant contends that* the Respondent failed to provide the Claimant's investments with both the physical and the legal security required by Article II(b) of the Treaty (¶6.44). That failure, so the Claimant alleges, was solely attributable to the Respondent's failure to act with due diligence to guarantee the physical security of Ascendant Ecuador's employees and its subsequent suspension of any further activity by Ascendant Ecuador in the Junín area (¶6.44).

*The Respondent contends that the Claimant has not established that the Respondent failed to ensure the physical security of the Claimant's investments, and that the Claimant's own paramilitary forces provoked the violent confrontations with the local communities (¶6.45). The Respondent submits that pursuant to the tripartite agreements, its police forces were effectively deployed; but that it was Ascendant Ecuador that failed to implement the tripartite agreements (¶6.45).*

**(iv) National Treatment:**

*The Claimant contends that the Respondent violated Article IV of the Treaty granting more favourable treatment to the investments of one of its own investors, ENAMI, with respect to the expansion, management, conduct and operation of the Junín, Chaucha and Telimbela concessions, than it granted to the Claimant (¶6.47). It submits that ENAMI was granted *de jure* more favourable treatment by being granted a preferential right of first refusal on the mining projects by virtue of Article 20 of the General Regulations to the 2009 Mining Law, which, according to the Claimant, was not justified and existed only to unjustly enrich the Respondent (¶6.48).*

*The Respondent submits that this claim fails because: (i) the General Regulations to the 2009 Mining Law establishing ENAMI's preferential rights were only issued on 4 November 2009, (ii) the Claimant's theory would imply that the Respondent could have breached the Treaty after the Claimant had already lost or disposed of its investments, and (iii) the concessions have not been granted to ENAMI (nor has ENAMI applied for them), although the Respondent agrees that ENAMI has been granted a concession that partially overlaps with the area of the Junín concessions (i.e. the Llurimagua concession). Furthermore, as ENAMI's preferential rights are based on its status as a State-owned national mining company and not its Ecuadorian nationality (¶6.49).*

**(b) The Tribunal's Analysis and Decision:**

**(i) The Junín concessions:**

*The Termination Resolutions:* In October 2008, the Under-Secretary of Mines ordered the Regional Mining Director of Pichincha to terminate the Junín concessions without any compensation on the grounds that consultations had not been carried out by the concessionaire (¶6.54). Subsequently, on 12 November 2008, pursuant to such order and Article 1 of the Mining Mandate, the regional mining director terminated the Junín concessions without any economic compensation, with no prior notice to the concessionaire and no prior opportunity for the concessionaire to make any representations in its defence before any administrative or judicial organ competent to hear and decide such an appeal on its merits within the Ecuadorian legal system. (¶¶6.55-6.56).

As to deprivation, the Tribunal decides that the effect of the Termination Resolutions was effectively to neutralize the Claimant's investment in the Junín concession amounting to substantial deprivation (¶6.59). As to justification, in the Tribunal's view, as a general matter, the Claimant took the risk of changes in the legal and regulatory regime upon making its long-term investments in Ecuador (¶6.61). The Tribunal decides that the Claimant has not established, on the evidence, any legitimate expectation to prevent the application of such general changes adversely affecting its investments (¶6.61).

The Tribunal decides that the Termination Resolutions, as implemented, are attributable to the Respondent under international law, they were no mere regulatory measures, because, in the circumstances, these Resolutions were made in an arbitrary manner and without due process (¶6.66). Accordingly, Article XV(II)(3) of the Treaty is inapplicable; and the permanent taking of the Claimant's Junín concessions, was an expropriation under Article VIII of the Treaty (¶6.67). Further, given the absence of any compensation and due process upon such expropriation, the Tribunal decides that it was an unlawful expropriation in breach of Article VII of the Treaty, as well a breach of the FET standard in Article II(2)(a) of the Treaty (¶¶6.67, 6.70).

As regards unlawful expropriation, it is indisputable that the Termination Resolutions were not made or implemented "against prompt, adequate and effective compensation" as required by Article VIII(1) of the Treaty (¶6.68). Further, they were made and implemented without any "prompt review by a judicial or other independent authority" of the Respondent within the meaning of Articles VIII(1) and (2) of the Treaty (¶¶6.68-6.69).

Regarding the National Treatment Standard, the Tribunal does not consider, on the evidence, that a separate breach has been established by the Claimant under Article IV of the Treaty, and hence rejected the claim (¶6.71).

*The Nullification Resolutions:* The Tribunal does not consider, on the evidence, that the Respondent violated Articles II(2)(a), IV or VIII of the Treaty in regard to the Nullification Resolutions of 25 January 2008 and, as a result of the Claimant's successful appeal, they were revoked by order of the Ministry of Mining's National Director on 15 September 2008 (¶¶6.72-6.73). Accordingly, the Tribunal decides that no liability arises from the Nullification Resolutions under the Treaty, as alleged by the Claimant (¶6.74).

*The Ministry's Earlier Interventions:* Under the Treaty, the Tribunal cannot fault the Respondent, for the Claimant's increasing difficulties up to March 2007, including the Claimant's physical access to the Junín concessions (¶6.76). These difficulties did not constitute by themselves violations of the Treaty (¶6.74). Moreover, they were caused by third persons (whose conduct is not attributable to the Respondent) and, particularly from the summer of 2006 onwards, many were materially self-inflicted by the Claimant itself (¶6.74). The Tribunal therefore rejects the Claimant's allegations of any breach of the Treaty by the Respondent before 24 September 2007 (¶6.80).

However, the Tribunal decides that there was a breach by the Respondent of the FET and FPS standards by September 2007 (¶6.83). At that point, rather than giving legal force to the factual effect of the anti-miners' physical blockade of the Junín concessions, the Respondent should have attempted something to assist the Claimant in completing its consultations and other requirements for the EIS (¶6.83). Accordingly, the Tribunal concludes that Respondent's unlawful conduct under the FET and FPS standards, from September 2007 to November 2008, materially contributed to the characterization of the Termination Resolutions of 13 November 2008 as an unlawful expropriation and a further breach of the FET standard (¶6.85).

*Causation:* The Tribunal next addresses all issues however broadly related to causation under this single heading, although the Parties have addressed them under several different headings, including causation itself, contributory fault and unclean hands, materially affecting issues of both causation and compensation (¶6.86).

The Tribunal decides that the Claimant's injury was caused both by the Respondent's unlawful expropriation and also by the Claimant's own contributory negligent acts and omissions and unclean hands (¶6.97). Given that the Tribunal draws no distinction between these different concepts (causation, contributory fault and unclean hands) for this case, it prefers to refer only to Article 39 of the ILC Articles (¶6.97).

In the Tribunal's view, the evidence establishes that several of the Claimant's senior personnel in Quito were guilty of directing violent acts committed on its behalf, in violation of Ecuadorian criminal law (¶6.100). Their resort to subterfuge and mendacity aggravated those acts (¶6.100). Taking all these factors into account, including the provocations by certain anti-miners, the Tribunal assesses the Claimant's contribution to its own injury as at November 2008, for the purpose of applying Article 39 of the ILC Articles, at 30 per cent (¶6.102).

**(ii) *The Chaucha concession:***

In the Tribunal's view, by July 2009, there was a substantial deprivation amounting to an indirect expropriation in breach of Article VIII(1) of the Treaty by July 2009 (¶6.123). The Tribunal notes that the Ministry of Energy and Mines ("MEM") Under-Secretary's announcement on 31 January 2008 of the pending reversion of the Chaucha concession immediately followed the Nullification Resolutions of 25 January 2008 in regard to the Junín concessions (¶6.123). Although these Nullification Resolutions made no reference to the Chaucha concession, the policy behind these resolutions (pre-dating the Mining Mandate and the Mining Law's Article 24) could equally have been applied to the Chaucha concession (¶6.123). The same applies to the Termination Resolutions of 12 November 2008 (¶6.123).

With the enactment of Article 24 of the Mining Law on 29 January 2009, the result was inevitable and imminent. In all but form, it came by July 2009 (¶6.125). By then, the Claimant's subsidiary was the concessionaire of the Chaucha concession in name only (¶6.125). The Claimant could not use, enjoy or dispose of the economic benefit if its interest in the Chaucha concession, as was confirmed by its failed sale to Nortec in June 2009 (¶6.125). The fact that a different beneficial owner (other than the Claimant) was requested by the Respondent in 2010 to renew and did renew the Chaucha concession proves nothing, other than the fact the Respondent viewed that third party (Biotreat) very differently from the Claimant (¶6.125).

Further, the Tribunal does not identify the Claimant as a wrongdoer in receiving and acting upon the information procured by Nortec for its own purposes, namely the exercise of due diligence before closing a significant closing transaction. Moreover, the Tribunal does not accept as proven that Nortec itself committed any legal wrong in procuring the list or draft list of affected concessions originating within the MEM (¶6.126).

The Tribunal does not accept that the Claimant (or DosRios) had any effective remedy, legal or administrative, to mitigate or extinguish the effect of the Respondent's conduct towards the Chaucha concession. Any formal or informal inquiry to MEM could not have resulted in any satisfactory solution for the Claimant by July 2009 or, indeed, at any later time (¶6.127).

In the circumstances, the Tribunal thinks it unnecessary to address the Claimant's further claim under the FET standard in Article II(2) of the Treaty (¶6.128). That claim can add nothing to its claim for indirect expropriation under Article VIII(1) of the Treaty (¶6.128).

**(iii) *The Telimbela Concession:***

The Claimant never held any interest in a concession over Telimbela: the concession was held by Ecuadorgold as the concessionaire, with the Claimant having only an option to acquire the concession for the Telimbela concession (¶6.129). Further, there is no cogent evidence that any measure taken by the Respondent caused the Claimant (by itself or others) to allow the lapse of the option to acquire the Telimbela concession (¶6.130). Although inconclusive, the evidence suggests that the decision to allow the option to lapse was caused by the lack of sufficient funds to do otherwise, both by the Claimant and Biotreat (¶6.130). Accordingly, the Tribunal dismisses this claim (¶6.131).

**5. Compensation:**

The Tribunal makes no distinction between direct and indirect expropriation as regards the Claimant's concessions and intends to restore the Claimant to the *status quo ante*, where it would have never been an investor in the Junín and Chaucha concessions (¶7.29). The starting-point is the Claimant's figure, accepted as proven by the Tribunal for lost expenditure actually incurred for the Junín and Chaucha concessions (¶7.32). As regards the Junín concessions, the Claimant's figure falls to be reduced for the Claimant's contributory negligence under Article 39 of the ILC Articles on State Responsibility (contribution to the injury) by 30 per cent (a reduction of US\$ 4,793,398.20), producing the final amount of US\$ 11,184,595.80 (¶7.30, 7.32). As regards the Chaucha concession, it produces the final amount of US\$ 8,262,899. The total principal amount of compensation amounts to US\$ 19,447,494.80 (¶7.32).

**6. Interests:**

The Tribunal decides that full reparation in this case is not limited to simple interest under Article VIII(1) of the Treaty (¶8.11). Applying the *Chorzów* principle (recognized by the Permanent Court of International Justice in the *Chorzów Factory* case in 1927), with Article VIII(1), the Tribunal considers it appropriate in this case to award compound interest and not simple interest (¶8.11). As to the rate of compound interest, the Tribunal decides upon the rate for 26-weeks US Treasury bills, plus three per cent as a normal commercial premium (¶8.12). As for the starting date, the Tribunal fixes, as regards the Junín concessions, 3 November 2008 and, as regards the Chaucha concession, 30 June 2009, as the respective dates of their direct and indirect expropriations, until payment (¶8.12).

**7. Legal and Arbitration Costs:**

The Tribunal decides that the fairest decision on legal costs would be to let them lie where they fell: i.e. to make no order regarding legal costs, thereby rejecting both Parties' claims for legal costs (¶9.10). As regards arbitration costs, applying the same approach, the Tribunal decides that the Parties, as between themselves, shall bear the costs of the arbitration equally (¶9.10).