F. The Finding Of The Tribunal Concerning Expropriation

80."A claim of expropriation should normally be considered in the context of the merits of a case. However, it is so evident that there is no expropriation in this case that the Tribunal will deal with this claim as a question of admissibility.

81."The Claimant asserts that by "unlawfully, arbitrarily, discriminatorily, and retroactively taking OEPC's right to VAT refunds, Ecuador has expropriated all or part of an investment by OEPC". It is further argued by the Claimant that the right to a refund is either an investment or part of one, failing within the definition of investment under Article I (1) (i), (iii) and (v) of the Treaty, which includes intangible property, including rights, a claim to money associated with an investment and any right conferred by law.

82."The Respondent argues that direct expropriation has not occurred as there has been no seizure of title to property and that in any event taxation cannot be considered by its very nature as a kind of property subject to expropriation. Neither has there been any indirect expropriation as the criteria of substantial or significant deprivation required by international law has not been met and OEPC continues to receive substantial benefits from its investment.

83."Article III (1) of the Treaty provides:

Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ("expropriation") except: for a public purpose; in a nondiscriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article I (2) (3)....

84."The Tribunal in Lauder rightly explained that

...In general, expropriation means the coercive appropriation by the State of private property, usually by means of individual administrative measures. Nationalization involves large-scale takings on the basis of an executive or legislative act for the purpose of transferring property or interests into the public domain. The concept of indirect (or "de facto", or "creeping") expropriation is not clearly defined. Indirect expropriation or nationalization is a measure that does not involve an overt taking, but that effectively neutralized the enjoyment of the property.

85."The Tribunal agrees with the Claimant in that expropriation need not involve the transfer of title to a given property, which was the distinctive feature of traditional expropriation under international law. It may of course affect the economic value of an investment. Taxes can result in expropriation as can other types of regulatory measures. Indirect expropriation has significantly increased the number of cases before international arbitral tribunals. It is also noticeable that bilateral investment
treaties contain broad definitions of investments that can encompass many kinds of assets.

86."The Tribunal, however, is not persuaded by the Claimant's arguments that in this case there has been an expropriation. It is not tenable to argue that there can be "no doubt that under the Treaty the Refund Claim is an investment per se". However broad the definition of investment might be under the Treaty it would be quite extraordinary for a company to invest in a refund claim. But even if a refund claim is considered to be included in the claims to money, and other rights mentioned in the definition, still the expropriation has to meet the standards required by international law.

87."The Tribunal in Metalclad endorsed what has been considered a rather broad definition of expropriation. The Tribunal held that expropriation includes:
[C]overt or incidental intereference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonable-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.30

88."Even in the context of such a broad definition, the Metalclad Tribunal identified standards to the effect that there must be a deprivation, that this deprivation must affect at least a significant part of the investment and that all of it relates to the use of the property or a reasonably expected economic benefit. Similarly, the Iran-United States Claims Tribunal has held that deprivation must affect "fundamental rights of ownership" 31, a criteria reaffirmed in CME. 32.

89."The Tribunal holds that the Respondent in this case did not adopt measures that could be considered as amounting to direct or indirect expropriation. In fact, there has been no deprivation of the use or reasonably expected economic benefit of the investment, let alone measures affecting a significant part of the investment. The criterion of "substantial deprivation" under international law identified in Pope & Talbot is not present in the instant case. 33If narrower definitions of expropriation under international law are examined, the finding of expropriation would lie still farther away.

90."This is not to say that the investor has not been affected by the decisions taken by the Respondent, for indeed it has been, as will be discussed in connection with the Contract, Andean Community law and Ecuadorian legislation.

91."As will be discussed further below, liability ensues for a breach of rights under the Treaty, but not as a consequence of expropriation.

92."The Tribunal accordingly holds that the claim concerning expropriation is inadmissible.

26Lauder, par. 200.
28Marvin Feldman v. Mexico, (ICSID Case No ARB (AF)/99/1), Award, December 16, 2002, paras. 103-106.
31Tippetts, Abett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran, 6 CTR 219 (1984-II); Phelps Dodge Corp. v. Islamic Republic of Iran, 10 CTR 121 (1986-1).
33Pope & Talbot Inc. v. Canada, interim Award, June 26, 2000, paras. 96, 102, as published in www.appletonlaw.com/cases/P&T/InterimAward.pdf

Referring Principles:

XI.1 - Compensation for expropriation