Neutral Citation Number: [2005] EWCA Civ 1116

Case No: A3/2005/1121

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
Mr Justice Aikens

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/09/2005

Before :

LORD PHILLIPS OF WORTH MATRAVERS, MR
LORD JUSTICE CLARKE
and
LORD JUSTICE MANCE

- -

Between :

Occidental Exploration & Production Company	**Appellant**
- and -	
The Republic of Ecuador	**Respondent**

- -
- -

Mr Christopher Greenwood QC and Mr Toby Landau (instructed by **Messrs Debevoise & Plimption Llp**) for the **Appellant**
Mr David Lloyd Jones QC and Mr Simon Birt (instructed by **Messrs Weil Gotshal & Manges Llp**) for the **Respondent**

Hearing dates : 20, 21, 22 July 2005

- -

Approved Judgment

Lord Justice Mance:

Outline

1. This is the judgment of the Court. The appeal, from a judgment and order of Aikens J dated 29th April 2005, concerns the extent to which the English Courts may under s.67 of the Arbitration Act 1996 consider a challenge to the jurisdiction of an award made by arbitrators appointed under provisions to be found in a Bilateral Investment Treaty. The Treaty was signed on 27th August 1993 between the United States of America ("USA") and the Republic of Ecuador ("Ecuador"). It contained provisions "concerning the encouragement and reciprocal protection of investment" in each country by the nationals and companies of the other. These included a provision (Article VI) whereby, in the event of an "investment dispute", such nationals and companies could enjoy direct dispute resolution rights against the other country. One of the options provided was arbitration subject to the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL"), as here occurred. The arbitration was between Occidental Exploration and Production Company ("Occidental"), a Californian corporation, and Ecuador. There was a distinguished panel of arbitrators consisting of the Honourable Charles N. Brower, Dr Patrick Barrera Sweeney and, as chairman, Professor Francisco Orrego Vicuña. Their final award was dated 1st July 2004.

2. Regarding the place of any arbitration, the Treaty says only that it "shall be held in a state that is a party to the New York Convention". There are over 130 such states. But Article 16(1) of UNCITRAL, to which the Treaty refers, provides that

> "Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration".

Occidental and Ecuador were unable to agree upon a place, and the arbitrators by decision dated 1 August 2003 determined that it should be London. The factor "tipping the balance" in favour of London (over Washington D.C.) was its "perception …. as being neutral". Hearings were actually held in Washington, but the award dated 1st July 2004 records the place of arbitration as London.

3. By their award the arbitrators determined the dispute in favour of Occidental, save on one point relating to whether there had been expropriation, which was not in the event relevant to the result. Ecuador by claim form dated 11 August 2004 seeks to have the award set aside under both ss.67 and 68 of the 1996 Act. Also on 11 August 2004, Occidental issued a claim form seeking, in the event of a challenge to the award by Ecuador and if necessary, to re-visit the point on expropriation. But by application notice dated 24 November 2004 Occidental raised a prior objection, that Ecuador's challenge requires the English court to interpret provisions of the Bilateral Investment Treaty between the USA and Ecuador, in contravention of a rule of English law making such an issue "non-justiciable". Colman J directed the trial of a preliminary

issue relating to that objection. Before Aikens J the objection was abandoned as regards the points raised under s.68. By his judgment and order under appeal, Aikens J also decided it against Occidental as regards the points raised under s.67. Aikens J was not, and we are not, concerned with the merits of Ecuador's challenge under either of ss.67 and 68.

Occidental's investment

4. The investment to which Occidental's claim related arose under a contract dated 21 April 1999 with Petroecuador (a state-owned corporation of Ecuador). Occidental thereby obtained the exclusive right to carry out hydrocarbon exploration and exploitation in Block 15 of the Ecuadorian Amazon basin region. Occidental assumed virtually all the costs, and received in return a percentage of the oil produced and the right to export it. The percentage was determined under an elaborate formula in clause 8.1 of the contract known as "Factor X".

5. The costs incurred by Occidental involved it in paying VAT. As an exporter, it sought reimbursement of this VAT from the Ecuadorian tax authority, the *Servicio de Rentas Internas* ("SRI"). At first, in respect of periods from July 1999 to September 2000, this was afforded by SRI, but thereafter and in respect of subsequent periods it was refused. SRI initially justified its refusal on the ground that Factor X had been calculated on a basis covering Occidental's potential VAT liabilities. Latterly (although Ecuador suggests that the arbitrators failed to appreciate this) the justification advanced by SRI and Ecuador changed and was and is that VAT refunds are only available to exporters of "manufactured" products, within which description it is contended that the crude oil exported did not fall.

The Bilateral Investment Treaty

6. The judge summarised the scheme of the Treaty:

> "14. ….. (1) The Preamble sets out the aim of the Treaty, which is to promote greater economic cooperation and investment between the Parties, but on a defined and agreed basis.
>
> (2) Article I sets out various definitions. "Investment" is defined broadly.
>
> (3) Article II sets out the basis on which each Party will permit and treat investment ….. It also provides that the Parties will ensure that investment will have fair and equitable treatment according to international law standards.
>
> (4) Article III deals with expropriation or nationalisation of investments.
>
> (5) Article IV deals with transfers, particularly of funds.

> (6) By Article V the Parties agree to consult promptly to resolve any disputes in connection with the Treaty.
>
> (7) Article VI deals with the resolution of "*investment disputes"* between a State Party and a national or company of the other State Party. Its terms are central to this application …...
>
> (8) Article VII concerns the resolution of disputes between the two Parties to the treaty, ie. USA and Ecuador. If necessary, disputes are to be submitted to an arbitral tribunal, for binding decision "*in accordance with the applicable rules of international law"*."
>
> (9) Article X deals with the tax policies of each Party and provides that each Party should strive to accord fairness and equity in the treatment of investments of nationals and companies of the other Party. It states that the provisions of the Treaty, in particular Articles VI and VII will nevertheless apply to matters of taxation only to a certain extent, as set out in the Article. This Article gave rise to argument about its scope in the arbitration between Occidental and Ecuador."

7. More specifically, Articles II, V, VI, VII and X of the Treaty provide:

> "II.3(a) Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.
>
> (b) Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal of investments. For purposes of dispute resolution under Articles VI and VII, a measure may be arbitrary or discriminatory notwithstanding the fact that a party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a Party.
>
> …..
>
> V. The Parties agree to consult promptly, on the request of either, to resolve any disputes in connection with the Treaty or to discuss any matter relating to the interpretation or application of the Treaty.
>
> VI.1. For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign

investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.

2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute, under one of the following alternatives, for resolution:

(a) to the courts or administrative tribunals of the Party that is party to the dispute; or

(b) in accordance with any applicable, previously agreed dispute-settlement procedures; or

(c) in accordance with the terms of paragraph 3.

3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:

(i) to the International Centre for the Settlement of Investment Disputes ("Centre") established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington March 18, 1965 ("ICSID Convention"), provided that the Party is a party to such Convention; or

(ii) to the Additional Facility of the Centre, if the Centre is not available; or

(iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or

(iv) to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.

(b) Once the national or company concerned has so consented, either party to the dispute may initiate arbitration in accordance with the choice so specified in the consent.

4. Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph (3). Such consent, together with the written consent of the national or company

when given under paragraph (3) shall satisfy the requirement for:

(a) written consent of the parties to the dispute for purposes of Chapter II of the ICSID Convention (Jurisdiction of the Centre) and for purposes of the Additional Facility Rules; and

(b) an "agreement in writing" for purposes of Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958 ("New York Convention").

5. Any arbitration under paragraph 3(a) (ii), (iii) or (iv), of this Article shall be held in a state that is a party to the New York Convention.

6. Any arbitral award rendered pursuant to this Article shall be final and binding on the parties to the dispute. Each Party undertakes to carry out without delay the provisions of any such award and to provide in its territory for its enforcement.

7. In any proceeding involving an investment dispute, a Party shall not assert, as a defense, counterclaim, right of set-off or otherwise, that the national or company concerned has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages.

8. For purposes of an arbitration held under paragraph 3 of this Article, any company legally constituted under the applicable laws and regulations of a Party or a political subdivision thereof that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of the other Party, shall be treated as a national or company of such other Party in accordance with Article 25 (2) (b) of the ICSID Convention.

VII.1 Any dispute between the Parties concerning the interpretation or application of the Treaty which is not resolved through consultations or other diplomatic channels, shall be submitted, upon the request of either Party, to an arbitral tribunal for binding decision in accordance with the applicable rules of international law. In the absence of an agreement by the Parties to the contrary, the arbitration rules of …. UNCITRAL, except to the extent modified by the Parties or by the arbitrators, shall govern. …..

…..

> X 1. With respect to its tax policies, each Party should strive to accord fairness and equity in the treatment of investment of nationals and companies of the other Party.
>
> 2. Nevertheless, the provisions of this Treaty, and in particular Article VI and VII, shall apply to matters of taxation only with respect to the following:
>
> (a) expropriation, pursuant to Article III;
>
> (b) transfers, pursuant to Article IV; or
>
> (c) the observance and enforcement of terms of an investment agreement or authorization as referred to in Article VI (1) (a) or (b),
>
> to the extent they are not subject to the dispute settlement provisions of a Convention for the avoidance of double taxation between the two Parties, or have been raised under such settlement provisions and are not resolved within a reasonable period of time."

The award

8. On 4 April 2002 Occidental gave notice to Ecuador that a dispute had arisen, and, after allowing six months to lapse, on 11 November 2002 Occidental wrote consenting in writing to the submission of the dispute to arbitration under UNCITRAL rules, as provided in Article VI.3(a)(iii) of the Treaty. Occidental alleged breaches of Articles II.3(a) and (b) and III.1. The arbitrators were appointed. In September 2003, Ecuador raised objections to any consideration by the tribunal of Occidental's claims on three grounds. The first was that, following the refusal of reimbursement of VAT, Occidental had brought proceedings in Ecuador under Ecuadorian law. The tribunal decided that this did not preclude Occidental's separate claim in the arbitration, and this is no longer in issue. The second was that Occidental's claims, relating as they did to matters of taxation, were precluded by Article X. This, in Ecuador's submission, limits the application of Article VI to the three categories of complaint specified in Article X.2(a), (b) and (c) and even then only permits jurisdiction subject to the closing caveat in Article X.2. The third (linked with the second through Article X.2(a)) was that the claim that there had been any expropriation was on any view "inadmissible" (i.e. evidently unfounded).

9. The tribunal agreed with Ecuador in relation to the third objection. But it nevertheless rejected the second objection. It did so, first, on the ground that the claim could, because of the arguments founded on Factor X, be regarded as involving "the observance and enforcement of terms of an investment agreement or authorisation as referred to in Article VI(1)(a) or (b)". Ecuador asserts that no such basis for jurisdiction was ever suggested by Occidental, whose claims were expressly limited to alleged breaches of rights conferred or created by the Treaty under Article VI.1(c). The second ground on which the tribunal rejected the second objection was, it would

seem, that Article X.2 is not an exclusive definition of the circumstances in which matters of taxation can give rise to arbitration under Article VI, and that Article X.1 may be relied on in arbitration in areas outside the three areas covered by Article X.2(a), (b) and (c). Ecuador wishes to challenge this interpretation of Article X.

10. Having held that it had jurisdiction, the tribunal considered the merits of Occidental's claims, apart from that based on expropriation. It found that Occidental was entitled to the refund of all VAT paid as a result of the importation or local acquisition of goods or services used for the production of oil for export, and awarded it compensation of US$71,533,649 together with interest totalling US$3,541,280. It made certain other orders (some of which Ecuador seeks to challenge, under s.68 of the Arbitration Act 1996, as beyond the tribunal's powers under UNCITRAL rules, although that challenge gives rise to no issue before us).

The issues

11. Before us, the issues have mirrored those argued extensively before Aikens J. In bare outline, Mr Greenwood QC for Occidental submits that Ecuador's challenge to the tribunal's jurisdiction under s.67 raises issues upon which English Courts cannot or should not adjudicate. First, it would require the Court to enforce or interpret the terms of the Treaty, contrary to a principle stated in *J H Rayner (Mincing Lane) Ltd. v. DTI* ("the *Tin Council* case") [1990] 2 AC 418. Secondly and in any event, it would require the Court to "adjudicate upon the transactions of foreign sovereign states" contrary to a wider principle of "judicial restraint or abstention" stated by Lord Wilberforce in *Buttes Gas and Oil Co. v. Hammer* [1982] AC 888, 931G. The first principle may be viewed as a particular concretisation of the second wider principle. In support of these submissions, Mr Greenwood suggests (though less emphatically than before the judge) that the rights and duties in issue in the arbitration should be seen as state rights – Occidental was in other words claiming no more than to enforce the rights which the United States of America would have in international law against Ecuador in respect of any breach of the Treaty towards a United States national or company. But, assuming that Occidental was in the arbitration claiming in its own right, Mr Greenwood submits that any adjudication by an English Court upon the question whether the arbitrators acted within their jurisdiction would still depend upon the application or interpretation of an international treaty and be impermissible. The underlying rationale of the House of Lords authorities which, on his case, lead to this conclusion is, he submits, judicial restraint in the national and international interests, reinforced in the specific area of unincorporated treaties by the constitutional consideration that it is for Parliament, and not the United Kingdom Government or the Courts, to introduce new law at a domestic level. As to the need for the judicial restraint, he submits that a decision on the scope of the matters submitted to arbitration could involve a decision upon the scope of the rights enforceable not just by Occidental but necessarily also by the USA, and could have international implications.

12. Mr Lloyd Jones QC for Ecuador submits in response that the Court is concerned with an agreement to arbitrate, arising in a manner contemplated by the Treaty but

nonetheless separate from the Treaty and made between different parties, only one of them party to the Treaty. English law having become the curial law of the arbitration (albeit only as a result of a decision of the arbitrators pursuant to the terms of the agreement to arbitrate), he submits that neither of the principles which Mr Greenwood invokes should be understood as precluding the English Court from considering and determining an objection to the arbitrators' jurisdiction under s.67 of the Arbitration Act 1996, even if this would involve construing those parts of the Treaty (particularly Articles VI and X, and possibly also Article III) at which it is necessary to look in order to determine the scope of the matters falling within the scope of Ecuador's offer to arbitrate which Occidental accepted.

13. With regard to the nature of the rights pursued in the arbitration, the judge concluded that investors like Occidental were not enforcing rights of the USA, but were given "the right to pursue, in their name and for themselves, claims against the other State party" (paragraph 61). He then held, and this was not in issue before us, that Occidental's substantive claims were governed by principles of international law (in the same way that any claims arising between the USA and Ecuador would be). He held that the arbitration agreement coming into existence between Occidental and Ecuador was likewise subject to international law. This is in issue before us, although neither side suggests that the answer is crucial to its own case. Finally, the judge held, and it is common ground before us, that the arbitral procedure was governed by the law of England as the law of the place of arbitration. Hence, the possibility of applications under the Arbitration Act 1996. Turning to the issues of justiciability, the judge did not consider that examination by the Court of Ecuador's challenge under s.67 to the arbitrators' jurisdiction would "infringe any of the "rules" of non-justiciability …. set out by Lord Oliver" in the *Tin Council* case (paragraphs 72 to 81). He accepted the distinction advanced by Mr Lloyd Jones between adjudication upon rights operating purely at the international level and adjudication upon international rights intended to be exercised in a tribunal subject to control under municipal laws; and he considered that s.67 gave a "foothold" in domestic law to challenge the jurisdictional ruling of the tribunal.

The nature of the rights to which Occidental's claim relates

14. In support of the proposition that Occidental was enforcing rights of the USA under the Treaty, Mr Greenwood referred us to the traditional position regarding the protection of nationals under international law. This was summarised by the Permanent International Court of Justice in the *Case of the Mavrommatis Palestine Concessions* (1924) PCIJ Rep Series A, No. 2:

> "It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own

> rights – its right to ensure, in the person of its subjects, respect for the rules of international law.
>
> The question, therefore, whether the present dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint. Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant."

15. One feature of the traditional protection is that it is up to the protecting State of the injured national whether and how far to make it available. This was put starkly in the *Barcelona Traction, Light and Power Co. Case* (Belgium v. Spain) [1970] ICJ Rep 44, paras. 78-79:

> "The Court would here observe that, within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting …..
>
> The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular claim"

See also *Oppenheim's International Law* (9th Ed.) Vol. 1 para. 410.

16. Bilateral investment treaties such as the present introduce a new element, and create a "very different" situation (cf *Zachary Douglas* in *The Hybrid Foundations of Investment Treaty Arbitrations* (2003) BYIL 151, 169). The protection of nationals is crystallised and in the present Treaty expanded to cover every kind of investment "owned or controlled directly or indirectly by nationals or companies of the other Party" (Article 1), but the investor is given direct standing to pursue the State of the investment in respect of any "investment dispute". An investment dispute is defined as

> "a dispute ….. arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorisation granted by that Party's foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment".

Under the present Treaty, a dispute may thus arise out of or relate to (a) a commercial agreement, (b) an executive authorisation or (c) an alleged breach of a Treaty right.

Article VI(3)(a) of the present Treaty provides the investor with various ways in which to pursue an investment dispute – (i) by use of International Centre for the Settlement of Investment Disputes ("ICSID"), provided the State is a party to the relevant Convention, (ii) by use of the Centre's Additional Facility, if the Centre is not itself available, (iii) by UNCITRAL arbitration, as here occurred, or (iv) by using any other arbitration institution or rules agreed between the parties to the dispute.

17. Where a dispute arises out of or relates to a commercial agreement made with the investor, it would seem to us both artificial and wrong in principle to suggest that the investor is in reality pursuing a claim vested in his or its home State, and that the only improvement by comparison with the traditional State protection for investors is procedural. It would potentially undermine the efficacy of the protection held out to individual investors, if such protection was subject to the continuing benevolence and support of their national State. *Douglas*, at p.170 in the article already cited, draws attention to arbitrations where the national State by intervention or in submissions opposed its investor's claims or the tribunal's jurisdiction to hear them; but, if the claims were the State's, such opposition should have been of itself fatal.

18. In the case of a claim of type (c) - and probably also (b) – any substantive right would have to be found in the Treaty. The Treaty would have to be regarded as conferring or creating direct rights in international law in favour of investors either from the outset, or at least (and in this event retrospectively) as and when they pursue claims in one of the ways provided. These alternative analyses are advanced by *Douglas* at pp.182-4. The former analysis is in our view natural and preferable, but it does not matter which applies.

19. That treaties may in modern international law give rise to direct rights in favour of individuals is well established, particularly where the treaty provides a dispute resolution mechanism capable of being operated by such individuals acting on their own behalf and without their national state's involvement or even consent. *Oppenheim's International Law* (9th Ed.), para. 375 put the matter in this way in 1992:

> "States can, …. and occasionally do, confer upon individuals, whether their own subjects or aliens, international rights *strictu sensu*, ie rights which they can acquire without the intervention of municipal legislation and which they can enforce in their own name before international tribunals",

See also *Oppenheim*, para. 7, as well as *McCorquodale, The Individual and the International Legal System* in *Evans' International Law* (OUP) (2003), pp. 304-6. Most frequently cited in this connection is the Permanent Court of International Justice's Advisory Opinion in the *Jurisdiction of the Courts of Danzig Case* (1928) PCIJ Rep Series B No. 15, p.1, considering the effect of a treaty (the *Beamtenabkommen*) made on 22 October 1921 between Poland and Danzig. The *Beamtenabkommen* regulated the employment conditions of Danzig railway employees who had, after the First World War, passed into the service of the Polish

Railways Administration. Poland's contention that this treaty only created inter-State rights was rejected. The Court said that:

> "It may be readily admitted that, according to a well established principle of international law, the *Beamtenabkommen*, being an international agreement, cannot, as such, create direct rights and obligations for private individuals. But it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and enforceable by the national courts. That there is such an intention in the present case can be established by reference to the terms of the *Beamtenabkommen*. (pp.17-18)"

The Court thus looked at the intention of the States making the treaty and held, in that light, that the *Beamtenabkommen* "constitutes part of the provisions of the "contract of service", that is "the series of provisions which constitute the legal relationship between the Railways Administration and its employees"; and that the relevant officials could sue the Administration direct in the Danzig courts. In the more recent *LaGrand Case* (2001) 40 ILM 1069, the International Court of Justice held that article 36(1)(b) of the Vienna Convention on Consular Relations, requiring prison authorities to "inform the person concerned without delay of his rights under this subparagraph" creates "individual rights". By this we read the Court as meaning rights of the person concerned operating independently of and not derivative from any rights of such person's national state (even though that state, Germany, was invoking such rights under the compulsory jurisdiction article of the relevant Optional Protocol). In the area of human rights a number of treaties provide individuals with rights of access to vindicate the protection afforded by the treaty. The European Convention on Human Rights is thus enforceable by victims of the breach of such rights, and "any person, non-governmental organisation or group of individuals" may seek to establish that he is a victim by bringing a direct claim before the European Court of Human Rights in Strasbourg (cf article 34 of the Convention).

20. Turning therefore to the present Treaty, its language makes clear that injured nationals or companies are to have a direct claim for their own benefit in respect of all three types of claim specified in (a), (b) and (c). The natural conclusion is that all three types of claim are capable of pursuit by investors in their own right. As *Douglas* puts it in his article at p.182:

> "The fundamental assumption underlying the investment treaty regime is clearly that the investor is bringing a cause of action based upon the vindication of its own rights rather than those of its national State."

We note that this is how the matter is also seen by the authors of a number of recent international arbitration awards, faced with arguments relying on the *Barcelona Traction* case to limit or control the protection available to investors under bilateral

investment treaties. We will not cite all of them. But in *Enron Corporation v. The Argentine Republic* (ICSID Case No. ARB/01/3; January 14. 2004) the tribunal said that the *Barcelona Traction* case "has been held not to be controlling in investment claims such as the present, as it deals with the separate question of diplomatic protection in a particular setting" (para. 38) and that:

> ….what the State of nationality of the investor might argue in a given case to which it is a party cannot be held against the rights of the investor in a separate case to which the investor is party. This is precisely the merit of the ICSID Convention in that it overcame the deficiencies of diplomatic protection where the investor was subject to whatever political or legal determination the State of nationality would make in respect of its claim" (para. 48).

Similar statements appear in *LG&E Energy Corporation v. Argentine Republic* ICSID Case No. ARB/02/1; April 30, 2004, para. 52, in *GAMI Investments Inc. v. United Mexican States* NAFTA Final Award 15 November 2004, para. 30, in *Camuzzi International S.A. v. The Argentine Republic* ICSID Case No. ARB/03/2; May 11, 2005, paras. 138-145, where the tribunal observed that diplomatic protection "cannot be considered the general rule in the system of international law presently governing the matter, but as a residual mechanism available when the affected individual has no direct channel in its own right", and in *Camuzzi International S.A. v. The Republic of Argentina* ICSID Case No. ARB/03/7, para. 44, where the tribunal said of the *Barcelona Traction* case that:

> "…. this decision of the International Court of Justice referred particularly to the protection that could be expected by the shareholders in this case, but specifying that they can enjoy other protection, if there is a specific agreement in this regard. In this case, this is precisely the situation. There is an applicable international juridical agreement. This agreement is the Treaty and according to it, Camuzzi has the right to request, directly and immediately, the protection of its rights by accessing the Tribunal."

Finally, we mention *Gas Natural SDG S.A. v. The Argentine Republic* ICSID Case No. ARB/03/10, where the tribunal stated:

> "The scheme of both the ICSID Convention and the bilateral investment treaties is that in this circumstance, the foreign investor acquires rights under the Convention and Treaty, including in particular the standing to initiate international arbitration." (para. 34)

21. Mr Greenwood relied on the decision and reasoning of another distinguished arbitration panel (Sir Anthony Mason, Judge Abner J. Mikva and Lord Mustill) in *The Loewen Group, Inc. v. USA* (2003) 42 ILM 811. Claims were made by a Canadian company ("TLGI") for discrimination by the USA contrary to article 1102 of the North American Free Trade Agreement ("NAFTA"). Subsequent to the arbitration hearing on their merits, TLGI filed for relief under Chapter 11 of the United States

Bankruptcy Code, and a reorganisation plan was approved, whereby (a) immediately before TLGI went out of business, it assigned the claims to a new Canadian corporation ("Nafcanco"), (b) the rest of its business operations were then reorganised as a new United States corporation, which owned and controlled Nafcanco. The claims were Nafcanco's only asset and their pursuit its only business. All of the benefits of any award in favour of Nafcanco would have enured to the new United States corporation (i.e. as Nafcanco's parent and controller). The arbitrators held that their jurisdiction to determine the claims before them had ceased, since the real claimant was now a United States corporation. They applied the general principle of international law, whereby there must be "continuous national identity from the date of the events giving rise to the claim … through the date of the resolution of the claim …..". They recognised that NAFTA allowed an individual investor to "make a claim on its own behalf and submit the claim to international arbitration" (paragraph 223) and that "As claimants have been allowed to prosecute claims in their own right more often, provision has been made for amelioration of the strict requirement of continuous nationality" (paragraph 229). But they found no such ameliorating provision in NAFTA, and they rejected any resemblance between, on the one hand,

> "rights of action under private law aris[ing] from personal obligations (albeit they may be owed by or to a State) brought into existence by domestic law and enforceable through domestic tribunals and courts"

and, on the other hand,

> "NAFTA claims [which] have a quite different character, stemming from a corner of public international law in which, by treaty, the power of States under that law to take international measures for the correction of wrongs done to its nationals has been replaced by an ad hoc definition of certain kinds of wrong, coupled with specialist means of compensation" (paragraph 233).

The arbitrators concluded that:

> "There is no warrant for transferring rules derived from private law into a field of international law where claimants are permitted for convenience to enforce what are in origin the rights of Party states" (paragraph 233).

22. The award on this point in *Loewen* is controversial (cf *The Hybrid Foundations of Investment Treaty Arbitrations* (2003) BYIL 151, especially 175-6). But we do not, in any event, consider that its reasoning or decision affects the proper conclusion regarding the nature of the rights capable of pursuit by investors under the present Bilateral Investment Treaty. The provisions of NAFTA, although it is a trilateral investment treaty, appear for present purposes to be materially the same as those of the present Treaty, but even the tribunal in *Loewen* accepted that the claimant was pursuing claims "in its own right" and "on its own behalf". The statement that NAFTA "claimants are permitted for convenience to enforce what are in origin the rights of Party states" was said in a context where the tribunal was concerned to

emphasise that the rights (to whomsoever they belonged) remained subject to international law principles governing continuity of nationality. It is reading too much into this compressed language to conclude that the tribunal meant that the rights enforced remained simply and solely the rights of the States, which claimants were being given some form of power to enforce, as third parties or attorneys. But, if the tribunal in *Loewen* meant to suggest that the rights conferred under a bilateral (or multilateral) investment treaty such as the present remain of the same character as the rights identified by the Permanent Court of International Justice in *Case of the Mavrommatis Palestine Concessions* or by the International Court of Justice in the *Barcelona Traction* case, we would respectfully disagree with its analysis.

Non-justiciability

23. We turn to the core aspect of Mr Greenwood's case, non-justiciability. The wider basis on which this is asserted was identified by Lord Wilberforce in *Buttes Gas*. The civil claims pursued between private individuals or concerns in that case were not founded on any investment treaty, or even on any private law contract referring to the provisions of any treaty. But the defence of justification raised by Mr Hammer and Occidental as defendants (in response to Buttes Gas's libel claim) and Occidental's counterclaim for conspiracy to defraud could, on the unusual facts of that case, only have been decided by considering a range of extremely contentious international matters: an allegation that the Ruler of Sharjah had back-dated a decree extending his territorial waters; a claim to sovereignty by the Government of Iran made subsequent to such decree; instructions to the ruler of Umm al Qaiwain by the United Kingdom political agent; intervention by Her Majesty's naval, air and military forces then operating in the relevant area under treaty arrangements; and further intervention by the Iranian Government. In the single full speech given by Lord Wilberforce, these issues were held to be non-justiciable, on the basis of a general principle of English law that "the courts will not adjudicate upon the transactions of foreign sovereign states" (p.931G and 932A). This was explained as a matter of "judicial restraint or abstention" and to be "inherent in the very nature of the judicial process" (p.931G and 932A). In applying this principle to the facts of the case, Lord Wilberforce said "the important inter-state issues and/or issues of international law which would face the court":

> "…..have only to be stated to compel the conclusion that these are not issues upon which a municipal court can pass. …… [T]here are ….. no judicial or manageable standards by which to judge these issues, or to adopt another phrase ….., the court would be in a judicial no-man's land: the court would be asked to review transactions in which four sovereign states were involved, which they had brought to a precarious settlement, after diplomacy and the use of force, and to say that at least part of these were "unlawful" under international law. I would just add ….. that it is not to be assumed that these matters have now passed into history, so that they now can be examined with safe detachment."

We note in parenthesis that the House did not have to address what would have happened to the libel claim, if Buttes Gas had insisted on pursuing it, after it was held that the defence of justification was non-justiciable – though Lord Wilberforce commented that "this would seem unjust". The injustice was avoided since Buttes was held to its offer to abandon the libel claim in this event.

24. In *British Airways Board v. Laker Airways Ltd.* [1985] AC 58, Lord Diplock, with whose speech all other members of the House agreed, said that:

> "The interpretation of treaties to which the United Kingdom is a party but the terms of which have not either expressly or by reference been incorporated in English domestic law by legislation is not a matter that falls within the interpretative jurisdiction of an English court of law."

This was however in the context of a claim that the US Government had been in breach of treaty obligations (so that the considerations later identified in *Buttes Gas* were potentially in play). The case was not concerned with a situation where the interpretation of treaty wording may be relevant to the construction of an agreement with a private party, or with any investment treaty. In *Westland Helicopters Ltd. v. Arab Organisation for Industrialisation* [1995] QB 282, international arbitration proceedings under a joint venture agreement had led to an award in Westland's favour against the Organisation. The award was converted into a judgment and Westland obtained garnishee orders nisi against six London banks. Colman J was faced with a claim by an Egyptian intervener to be the same as (or a successor to) the Organisation by virtue of domestic Egyptian laws. The justification for such laws was in issue but was said by the intervener to lie in an international law principle of necessity which was in turn said to be invoked by breach by the other member states setting up the Organisation of the treaty by which it was set up. Colman J held such issues to be non-justiciable.

25. On the other hand, in *Kuwait Airways Corporation v. Iraqi Airways Company (Nos. 4 and 5)* [2002] 2 AC 883, the House of Lords held that the principle in *Buttes Gas* did not prevent the English courts from identifying the plain breach of the United Nations Charter involved in Iraq's invasion of Kuwait and subsequent expropriation of the Kuwait civil aviation fleet. The problems of adjudication confronting the court in *Buttes Gas* were absent, the standard to be applied was clear and manageable and the outcome not in doubt: see at paras 25, 113, 125 and 146 per Lords Nicholls, Steyn, Hoffmann and Hope. Lord Steyn regarded the proposition that *Buttes Gas* established "an absolute rule ….. that courts in England will not adjudicate upon acts done abroad by virtue of sovereign authority" as "too austere and unworkable an interpretation of the *Buttes* case" (p.1101E).

26. The narrower and more clear-cut basis on which Mr Greenwood advances his case was stated in the *Tin Council* case. The International Tin Council ("ITC") was a body constituted by an international treaty not incorporated into law in the United Kingdom. The ITC was also created a legal person in the United Kingdom by article 5

of the International Tin Council (Immunities and Privileges) Order 1972 made under the International Organisations Act 1968. The ITC in its form as a legal person in the United Kingdom - rather than the states who were its members and the parties to the international treaty - was held accordingly to be the contracting party in the contracts it had entered into with the appellant companies. There was no basis in English law for holding the member states liable for its debts, and, even if in international law any such basis had existed, there would have been no basis for enforcing such a liability in a United Kingdom court. If under international law the (unincorporated) treaty made the ITC the agent of its members when contracting, this too was a liability which a United Kingdom court could not enforce, if it could not be found in the 1972 Order. A claim for the appointment of a receiver over ITC's assets, including any claims it might have under the treaty to be indemnified by its members in respect of its liabilities to the appellants, failed for similar reasons.

27. The two main speeches, with which the three other members of the House of Lords agreed, were delivered by Lords Templeman and Oliver. Lord Templeman's speech stresses the inability of United Kingdom courts to enforce unincorporated "treaty rights and obligations conferred or imposed by agreement or by international law" (see e.g. pp.476H-477A and 480D-E), although it suggests that such courts might look at an unincorporated treaty "for the purpose of resolving any ambiguity in the meaning and effect of the Order of 1972" (p.481G). Lord Oliver expressed himself more widely at pp.499F-500D:

> "It is axiomatic that municipal courts have not and cannot have the competence to adjudicate upon or to enforce the rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law. That was firmly established by this House in *Cook v Sprigg* [1899] A.C. 572, 578, and was succinctly and convincingly expressed in the opinion of the Privy Council delivered by Lord Kingsdown in *Secretary of State in Council of India v Kamachee Boye Sahaba* (1859) 13 Moo. P.C.C. 22, 75:
>
> > 'The transactions of independent states between each other are governed by other laws than those which municipal courts administer: such courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make.'
>
> On the domestic plane, the power of the Crown to conclude treaties with other sovereign states is an exercise of the Royal Prerogative, the validity of which cannot be challenged in municipal law: see: *Blackburn v Attorney-General* [1971] 1 W.L.R. 1037. The Sovereign acts
>
> > 'throughout the making of the treaty and in relation to each and every of its stipulations in her sovereign character, and by her own inherent authority; and, as in making the treaty, so in performing the treaty, she is beyond the control of

> municipal law, and her acts are not to be examined in her own courts:' *Rustomjee v The Queen* (1876) 2 Q.B.D. 69, 74, *per* Lord Coleridge C.J.
>
> That is the first of the underlying principles. The second is that, as a matter of the constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is res inter alios acta from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant."

28. However, he continued at pp.500D-501B by recognising some exceptions:

> "These propositions do not, however, involve as a corollary that the court must never look at or construe a treaty. Where, for instance, a treaty is directly incorporated into English law by Act of the legislature, its terms become subject to the interpretative jurisdiction of the court in the same way as any other Act of the legislature. *Fothergill v Monarch Airlines Ltd* [1981] A.C. 251 is a recent example. Again, it is well established that where a statute is enacted in order to give effect to the United Kingdom's obligations under a treaty, the terms of the treaty may have to be considered and, if necessary, construed in order to resolve any ambiguity or obscurity as to the meaning or scope of the statue. Clearly, also, where parties have entered into a domestic contract in which they have chosen to incorporate the terms of the treaty, the court may be called upon to interpret the treaty for the purposes of ascertaining the rights and obligations of the parties under their contract: see, for instance, *Philippson v Imperial Airways Ltd.* [1939] A.C. 332.
>
> Further cases in which the court may not only be empowered but required to adjudicate upon the meaning or scope of the terms of an international treaty arise where domestic legislation, although not incorporating the treaty, nevertheless requires, either expressly or by necessary implication, resort to be had to its terms for the purpose of construing the legislation (as in *Zoernsch v Waldock* [1964] 1 W.L.R. 675) or the very rare case in which the exercise of the Royal Prerogative directly

> effects an extension or contraction of the jurisdiction without the constitutional need for internal legislation, as in *Post Office v Estuary Radio Ltd* [1968] 2 Q.B. 740.
>
> It must be borne in mind, furthermore, that the conclusion of an international treaty and its terms are as much matters of fact as any other fact. That a treaty may be referred to where it is necessary to do so as part of the factual background against which a particular issue arises may seem a statement of the obvious. But it is, I think, necessary to stress that the purpose for which such reference can legitimately be made is purely an evidential one. Which states have become parties to a treaty and when and what the terms of the treaty are are questions of fact. The legal results which flow from it in international law, whether between the parties inter se or between the parties or any of them and outsiders, are not and they are not justiciable by municipal courts."

29. The unenforceability in the United Kingdom of unincorporated treaties under the reasoning in the *Tin Council* case was at the heart of the further decisions of the House of Lords in *R .v Home Secretary, ex p. Brind* [1991] 1 AC 696, especially at pp.748B and 762C-D per Lords Bridge and Ackner and *R v. Lyons* [2003] 1 AC 976, especially paras. 27, 79 and 104 per Lords Hoffmann, Hobhouse and Millett. Lord Hoffmann referred to the *Tin Council* case as establishing that the English courts "have no jurisdiction to interpret or apply" unincorporated international treaties. Mr Lloyd Jones referred us to Lord Steyn's suggestion in *In re McKerr* [2004] 1 WLR 807 that the reasoning, though not the actual decision, in the *Tin Council* case would one day receive "comprehensive re-examination". But, like Aikens J, we would regard any root and branch re-examination of its reasoning as a matter for a higher Court.

30. In *ex p. Brind*, the House again acknowledged that reference might be made to an unincorporated treaty (in that case the European Convention on Human Rights) to resolve an ambiguity in English primary or secondary legislation (pp.748B-C, 760G-761E and 763C, per Lords Bridge, Ackner and Lowry); and there are a number of modern authorities where English Courts have been assisted in one context or another in deciding upon the proper approach under English law by having regard to treaties or principles in international law: see e.g. *A v. Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 WLR 87, per Lord Bingham at paras. 19 and 68; *R (European Roma Rights Centre) v. Immigration Officer at Prague Airport* [2004] UKHL 55; [2005] 2 WLR 1, per Lord Steyn at paras. 44-45 and Baroness Hale at paras. 98-100. In the *Kuwait Airways* case, a critical feature of the House of Lords decision was the provisions of the United Nations Charter and Security Council Resolutions; and Lord Steyn at para. 114 rejected as "marching logic to its ultimate unreality" Iraqi Airways's submission that, because these were unincorporated, they must be disregarded.

31. English courts are not therefore wholly precluded from interpreting or having regard to the provisions of unincorporated treaties. Context is always important. *Philipson v. Imperial Airways*, to which Lord Oliver referred in the *Tin Council* case, was itself a case where the English courts interpreted such provisions in an international convention in order to arrive at the meaning of a domestic law contract for carriage by air: see per Lord Atkin at pp.346-9, Lord Russell at p.353 (though he found the meaning of the relevant convention unclear, and ended up applying the domestic principle of *contra proferentem*) and Lord Wright at pp.364-9. In *Arab Monetary Fund v. Hashim* ("*AMF v. Hashim*") [1991] 1 AC 114, 166B, Lord Templeman himself pointed out that "passages extracted and amassed from a lengthy speech" - that of Lord Oliver in the *Tin Council* case – "deal with different issues and different facts". The present case concerns very different issues from those in play in either the *Tin Council* case or *AMF v. Hashim*. Mr Greenwood in argument described the principles in both *Buttes Gas* and the *Tin Council* case as "carving out a small and carefully circumscribed sphere". We need therefore to consider with care the proper scope and application in the present context of general statements expressed in different contexts. In *The Campaign for Nuclear Disarmament v. The Prime Minister* ("the *CND* case") [2002] EWHC 2759 QB a Divisional Court presided over by Simon Brown LJ (as he was), identified the principle under discussion as a principle:

> "whereby the court has no jurisdiction to declare the true interpretation of an international instrument which has not been incorporated into English domestic law and which it is unnecessary to interpret for the purposes of determining a person's rights and duties under domestic law".

The question arises whether in the present case there is a sufficient foothold of the nature contemplated by these last words.

32. The answer to this question can in our view only be found by taking into account, first, the special character of a bilateral investment treaty such as the present and, second, the agreement to arbitrate which it is intended to facilitate and which is both recognised under English private international law rules and (since England is the place of arbitration) subject to the Arbitration Act 1996. The Treaty involves, on any view, a deliberate attempt to ensure for private investors the benefits and protection of consensual arbitration; and this is an aim to which national courts should, in an internationalist spirit and *because* it has been agreed between States at an international level, aspire to give effect - compare the reasoning of the Permanent Court of International Justice in the *Jurisdiction of the Courts of Danzig* case, cited in paragraph 19 above. The present Treaty holds out to investors on a standing basis the right "to choose to consent in writing to the submission of the dispute for settlement by binding arbitration" in any one of four specified ways (although the fourth, as pointed out, involves further agreement); and, once such consent is given, "either party to the dispute may initiate arbitration in accordance with the choice so specified in the consent". The Treaty expressly goes on to provide that the consent of the relevant State "hereby" to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the relevant investor's written consent, together with the investor's written consent when choosing such arbitration, shall satisfy the requirement for written consent under the ICSID

Convention and for "an 'agreement in writing' for purposes of Article II of the [New York] Convention ….."; and that any arbitration shall be held in a State party to that Convention. This purpose can only be fulfilled, in a legal system with a dualist approach to international law like the English, if the operation of the mechanism for consensual arbitration in the Treaty does in fact generate an "agreement in writing". The application of the New York Convention depends on such an agreement, and the provisions of the Arbitration Act 1996 (ss.100-104) relating to the enforcement of foreign arbitral awards give effect to this requirement in English law. We would not in the circumstances accept Mr Greenwood's submission that the consensual aspect of the arbitration contemplated in Article VI of the Treaty is a matter of mere form. It must, as it seems to us, have been intended to give rise to a real consensual agreement to arbitrate, even though by a route prescribed in the Treaty.

33. Further, as Mr Greenwood accepts, the agreement to arbitrate which results by following the Treaty route is not itself a treaty. It is an agreement between a private investor on the one side and the relevant State on the other. The question may then arise: under what law is that agreement to arbitrate to be regarded as subject, applying the principles of private international law of the English forum? Mr Lloyd Jones argues that the arbitration agreement coming into existence between Occidental and Ecuador is subject to Ecuadorian law (with matters of procedure being subject to the law of England as the place of arbitration). His proposition is that Ecuadorian law has the closest and most real connection with any agreement to arbitrate between a US investor and Ecuador, while United States law would have the closest and most real connection with any agreement to arbitrate between an Ecuadorian investor and the USA. He points out that UNCITRAL article 1(2) contemplates that there may be "provisions of the law applicable to the arbitration from which the parties cannot derogate", and that the normal position with arbitration agreements is that they are subject to some national law. But, dramatic though the expansion has been in recent years in the number of bilateral investment treaties, there is very limited authority anywhere on the nature or effect of arbitrations under such treaties. It is common ground that English private international law recognises an agreement to arbitrate substantive issues such as the present according to international law (cf *Orion v. Belfort* [1962] 2 Ll.R. 257, 264, per Megaw J, *Dicey & Morris, The Conflict of Laws* Vol. 1, para. 16-031 and *Mustill & Boyd's Commercial Arbitration (2nd Ed.) pp.80-81*), and it is also clear that the present is such. (The words "in accordance with the law" in s.46(1)(a) and "the law determined by the conflict of laws rules which it considers applicable" in s.46(3) of the Arbitration Act 1996 are capable of having this broad meaning, and s.46(1)(b) now adds further to the flexibility of arbitration, by permitting an agreement to arbitrate issues in accordance with other, non-legal considerations.) All this being so, we would be minded to accept that, under English private international law principles, the agreement to arbitrate may itself be subject to international law, as it may be subject to foreign law. That possibility also appears to us to have been embraced as long ago as 1962 by Megaw J in *Orion v. Belfort* (above). And, if one assumes that this is possible, then that is the view that we would, like the judge, take of this particular arbitration agreement. Although it is a consensual agreement, it is closely connected with the international Treaty which contemplated its making, and which contains the provisions defining the scope of the arbitrators' jurisdiction. Further, the protection of investors at which the whole scheme is aimed is likely to be better served if the agreement to arbitrate is subject to

international law, rather than to the law of the State against which an investor is arbitrating.

34. In the light of the preceding paragraph we have some reservations about one aspect of the judgment of Hobhouse J (as he then was) in *Dallal v. Bank Mellat* [1986] 1 QB 441. At pp.456B-D, in relation to the principles applicable to consensual arbitration, he may be read as having insisted that any agreement to arbitrate must be subject to the proper law of a municipal legal system, rather than international law. We note that *Mustill & Boyd* does not read Hobhouse J as requiring more than that any choice of international law to govern an agreement to arbitrate should be express. We are however unclear why even this should be necessary. We add that the issue in *Dallal* was whether an adjudication of the Iran-US Claims Tribunal should be recognised as a decision by "a court of competent jurisdiction" for the purposes of the principle in *Henderson v. Henderson* (1843) 3 Hare 100. Hobhouse J in the event recognised it for such purposes on an alternative basis, drawing on the analogy of a "statutory" arbitration. At pp.458A-D, he may on one reading still have thought it necessary to identify some validating municipal law. But he went on to refer to authorities recognising the competence of international tribunals established by treaty or by State acquiescence to adjudicate in other countries upon issues affecting the nationals of, and choses in action sited within, such States (see pp.458A-462E); and to say that "…. competence can be derived from international law and international comity requires that the courts of England should recognise the validity of the decisions of foreign tribunals whose competence is so derived" (p. 461H). We note that in *R v. Lyons*, *Dallal v. Bank Mellat* was considered and was treated, at least by Lord Hoffmann, as if concerned simply with a decision of a tribunal set up under an international treaty without any municipal legal authority (cf p.996D-F). *Dallal v. Bank Mellat* was distinguished not on the ground that decisions of the European Court of Human Rights could not bind because, in English eyes, the Court was no more than a body set up under an international treaty, but because (a) the issues were different and in any event (b) such decisions could not override an Act of Parliament. If English law recognises the binding force of a "quasi-statutory" adjudication at the international level, it is, in our view, hard to see why it should not be possible for a State and an investor to enter into an agreement to arbitrate of the type contemplated by the present Bilateral Investment Treaty subject to international law.

35. However, if this is not possible and any such agreement must, under English private international law, be subject to a municipal law, then, since the present agreement was clearly intended to be binding, it must be subject to Ecuadorian or United States law. There is no reason to doubt that it would be valid and enforceable as intended under either or both of these laws. But, bearing in mind that it would be an agreement by a United States investor relating to an investment in Ecuador and to an alleged breach of duty by Ecuador towards the investor in Ecuador, we would (on the present hypothesis) accept Mr Lloyd Jones's submission that the governing law would be that of Ecuador.

36. Ultimately, however, we do not consider that it matters what law governs the agreement to arbitrate. The strength or otherwise of Mr Greenwood's submissions that the English court cannot or should not entertain a challenge to the arbitrators'

jurisdiction under s.67, because this would involve considering, construing and applying the Treaty provisions regarding jurisdiction, cannot depend critically upon whether or not the agreement to arbitrate is subject to international or Ecuadorian law. Even if it were generally subject to Ecuadorian law, it would not be possible to consider, construe or apply the Treaty provisions regarding jurisdiction without taking into account its international legal meaning as between Ecuador and the USA.

37. The question thus squarely arises whether the principles in either *Buttes Gas* or the *Tin Council* case preclude the English Court from considering a challenge to the jurisdiction of the arbitrators, when the determination of this challenge would involve construing the Treaty provisions by reference to which their consensual jurisdiction is defined. Mr Greenwood submits that nothing in the Treaty itself can affect the application of such principles. They are domestic legal principles, not dependent upon or capable of being altered by treaty, still less by a Treaty to which the United Kingdom is not party. He submits that, since the jurisdiction of the arbitrators is to be ascertained by examination of the Treaty, any determination of the extent of their jurisdiction will also reflect or bear on the proper scope of the issues which the two States have agreed to discuss or resolve between themselves under Article V of the Treaty and which, if no such resolution is achieved, either State is able to refer to inter-State arbitration under Article VII. But that does not, we think, make the subject-matter of the dispute between an investor and a State the same as any dispute (if any) that may exist between the two States. And, even if it does, we consider that Mr Greenwood's submissions fail to recognise the combined force of the two factors mentioned in the first two sentences of paragraph 32 above. The case is not concerned with an attempt to invoke at a national legal level a Treaty which operates only at the international level. It concerns a Treaty intended by its signatories to give rise to rights in favour of private investors capable of enforcement, to an extent specified by the Treaty wording, in consensual arbitration against one or other of its signatory States. For the English Court to treat the extent of such rights as non-justiciable would appear to us to involve an extension, rather than an application, of existing doctrines developed in different contexts. Mr Greenwood highlights the possibility that a State might be upset by a decision interpreting a bilateral investment treaty, and drew our attention to a letter of protest dated 1 October 2003 by the Swiss Government following *SGS Société Générale de Surveillance SA v. Pakistan* ICSID Case ARB/01/13. But the Treaty itself provides for separate dispute resolution between a private investor and either of the States party to it, both of whom must be taken to have been content to accept any such risk. And the argument anyway carries him too far. *Société Générale de Surveillance SA v. Pakistan* was a decision not of a court, but of an ICSID arbitration tribunal to which the State had on any view agreed. Further, recourse to a court, when and if permissible, would (one hopes) be likely to correct any error in interpretation, rather than to perpetuate or introduce one. It is not without irony that Ecuador is here seeking (without any protest by the United States) to invoke the Court's jurisdiction, while Occidental is resisting it.

38. In the case of an ICSID arbitration, no recourse to the English court is currently possible under the Arbitration Act 1996: see the Arbitration (International Investment Disputes) Act 1966 s.3(2). The ICSID scheme also differs in having its own enforcement mechanism, so that the New York Convention is inapplicable. Neither of these factors suggests to us that the English Court should refrain from exercising

jurisdiction under s.67 in respect of an arbitration conducted under Article VI.3(a)(iii) and UNICITRAL rules.

39. Mr Greenwood also referred us to the provisions in the Treaty for inter-State arbitration. We would agree that it is highly probable that courts could not exercise jurisdiction over an inter-state arbitration under Article VII (because it would not be based on an agreement to arbitrate within the meaning of the Arbitration Act 1996 or of the New York Convention and/or because of s.9(2) of the State Immunity Act 1978). But again this has in our view no bearing on the question whether the English Court can and should exercise jurisdiction over an investor-State arbitration under Article VI.

40. Nonetheless, we shall consider further whether there is any basis for the principles in *Buttes Gas* and the *Tin Council* case to apply having regard to the terms and effect of the Treaty and to what has taken place consequent upon it. Here, the provisions of the present Treaty between the two States contemplate and have led, as between one of the States and an investor, to an agreement - recognised under English private international law principles - to arbitrate a dispute which may cover the interpretation of any aspect of the Treaty, including aspects going to the arbitrators' jurisdiction. That agreement to arbitrate, recognised under English private international law, gives rise to rights between the parties to it, including the right to have disputes arbitrated within its terms and not to have disputes arbitrated which fall outside its terms.

41. We see no good reason why any arbitration held pursuant to such an agreement, or any supervisory role which the court of the place of arbitration may have in relation to any such arbitration, should be categorised as being concerned with "transactions between States" so as to invoke the principle of non-justiciability in *Buttes Gas*. No-one suggests that any of such issues was non-justiciable before the arbitrators, whether they were issues going (a) to their jurisdiction or (b) to the substance of the investor's claims. It is apparent that such arbitrations have become frequent, and that the majority have led to published awards, of which we have been shown a considerable number. Appeals on the substance of such awards could not come before an English court under s.69(1) of the Arbitration Act 1996 except in so far as they were regarded as raising a question of law within the meaning of that section. But it is not suggested that there is any equivalent limitation of the issues of jurisdiction which may normally be raised in court under s.67. If issues regarding jurisdiction are justiciable before the arbitrators, we do not find it easy to see why they should be regarded as non-justiciable before the English Court. It is true that, on our preferred view, the present agreement to arbitrate was subject to international law, and that any doctrine of non-justiciability operates, of its nature, in domestic rather than international law (cf *Bank Nacional de Cuba v. Sabbatino* 376 U.S. 398). But the issues of jurisdiction, with which the arbitrators were entrusted, were from a technical viewpoint issues which a court of law would also appear qualified and able to determine. Differing views may, perhaps, be held by some as to whether the carefully thought out scheme of the Arbitration Act 1996 now fulfils all the (it may well be, differing) needs or desires of all who resort to English arbitration subject potentially to the English Courts' jurisdiction under the Act. But this case is not a forum for arguing about such matters, and it has not been argued as if it were. This case

concerns not the scheme of the Arbitration Act 1996, but whether there is a general principle of non-justiciability in English law which precludes the conventional operation of the Act, for reasons of constitutional propriety or because of wider considerations of judicial restraint, having regard to inherent limitations in the judicial role and/or to this country's national and international interests.

42. As to judicial restraint, we accept that the resolution of the present issues of jurisdiction is not likely to be as clear-cut as was the case with the different issues of international law in the *Kuwait Airways* case. But nothing appears to have been or to be likely to be involved in the resolution of the present issues which could make them remotely comparable in difficulty of manageability or resolution or in sensitivity to the issues in *Buttes Gas*. It is also inherent in the Treaty itself that issues of jurisdiction involving one State will be determined in the absence of the other, by an independent arbitration tribunal. We cannot see how the objection to their being raised in court under s.67 can in these circumstances be said to depend on any limitation "inherent in the very nature of the judicial process". We find it equally impossible to see how the objection could be said to raise any considerations relating to this country's national and international interests remotely equating to those found in *Buttes Gas*.

43. Mr Greenwood sought to support his submissions on non-justiciability by reference to the decision of the International Court of Justice in *East Timor (Portugal v. Australia)* (1995) ICJ 90. The Court there refused, in the absence of Indonesia as a party, to entertain a claim brought by Portugal challenging Australia's right to conclude a treaty with Indonesia to delimit the continental shelf in the area of the Timor Gap. Portugal's claim was based on the proposition that it alone remained in law the administering power in respect of East Timor, despite the Portuguese authorities' withdrawal from East Timor in 1975 followed by Indonesia's intervention in and control of East Timor since 1975. Portugal's claim against Australia necessarily depended upon showing that Indonesia had acquired no legal status in respect of East Timor and that Australia and Indonesia therefore had no right to enter into the Treaty. The very subject-matter of Portugal's claim was the lawfulness of Indonesia's conduct. But the Court also made clear that it was "not necessarily prevented from adjudicating when the judgment it is asked to give might affect the legal interests of a State which is not party to the case" (para.34). Further, the position is clearly quite different where, as here, a Treaty between two States makes clear that an investor national of one of the States may pursue direct rights against the other, without the involvement, presence or even consent of his own national State. Where the Treaty contemplates and provides for dispute resolution means of this nature, the principle of international law to be found in the *East Timor Case* cannot help in either international or national law to identify whether or when a national court may appropriately exercise a supervisory jurisdiction provided by the relevant procedural law.

44. Mr Greenwood also held out to us, briefly, the spectre of an English Court having to reconsider the correctness of an arbitration panel's ruling on the validity of the Treaty. Although there is no such issue in this case, in another case an issue might, he observes, arise about, say, duress or the completion and validity of the Treaty. We

leave aside the improbable nature of such an issue. Even so, we question the example of duress, because that would appear likely only to make the Treaty voidable, and so not to affect the jurisdiction of an arbitration agreement arising from the operation of its terms. It is, we suspect, even conceivable that a valid agreement to arbitrate could result from the operation in good faith of the terms of a Treaty which for some reason subsequently proved not to have been validly executed. However that may be, (a) we are not persuaded that it would necessarily be incongruous for an English Court to reconsider even an issue of validity, if the arbitrators had done so, and (b) if it would be incongruous, the reason could well be that, in this particular context as opposed to the present, the principle in *Buttes Gas* did apply.

45. As to the narrower principle of jurisdiction stated in the *Tin Council* case, Mr Lloyd Jones submits that the present situation is on all fours with *Philipson v. Imperial Airways*. The judge did not go so far, pointing out that in *Philipson* there was "a Municipal law contract". But, as we have observed, under English private international law, an agreement to arbitrate may be subject not merely to English, but also to any foreign law or to public international law. The mere fact that the agreement was here subject to international law does not seem to us to differentiate the present case from *Philipson*.

46. A more compelling distinction between this case and *Philipson* is perhaps that the contract in *Philipson* was entirely independent of the Treaty, and, since it simply incorporated Treaty concepts or terms, independent of the Treaty's validity in international law. That brings one back to the position, already discussed, of a challenge to jurisdiction based on a contention that the Treaty was for some reason invalid. The spectre briefly conjured up and argued by Mr Greenwood in this regard relates to a different kind of jurisdictional issue from the present. The present jurisdictional issues arise under an agreement to arbitrate which both parties to the arbitration accept to have been validly made and implemented. The English Courts, which under the relevant English law principles of private international law recognise the agreement, are being asked to interpret its scope in order to give effect to the rights and duties contained in the agreement to arbitrate. That in our view satisfies both the essential elements of the *Philipson* case, and the criterion for jurisdiction identified in the *CND* case.

47. On no view do we regard it as a critical distinction that one party to the present arbitration was a State, Ecuador. Indeed, one may argue that the presence as party to the arbitration of the State arguing (and indeed raising) the relevant jurisdictional issues makes it easier, rather than more difficult, to contemplate an English Court ruling on the interpretation of the scope of the arbitration provisions in the Treaty. And we consider that the fact that the States party to the Treaty deliberately chose to provide for a mechanism for dispute resolution which invokes consensual arbitration, with its domestic legal connotations, is a factor which should make the English Court hesitate long about subjecting such arbitration proceedings to special principles of judicial restraint developed in relation to international transactions or treaties lacking any foundation or incorporation in domestic law.

48. These considerations are by themselves in our view sufficient to decide this appeal in Ecuador's favour. But Mr Lloyd Jones also advances two fall-back arguments. The first is based on evidence that, under Ecuadorian law, the Treaty is self-executing, and becomes part of Ecuadorian law – indeed at a level superior to that of any ordinary domestic law. On that basis, he submits that, even if the agreement to arbitrate was not itself a sufficient justification for an English Court to consider the scope of the arbitration contemplated by the Treaty, the incorporation into Ecuadorian law removed any objection. He referred to *AMF v Hashim*, where the English Court was able to recognise the existence of the AMF, because it had been incorporated in the United Arab Emirates. But matters of status and contract are subject to different principles in private international law. If the agreement to arbitrate had been subject to Ecuadorian law, Mr Lloyd Jones's argument could have had force. As it is, it seems to us of no assistance to Ecuador.

49. Mr Lloyd Jones also suggests, with reference to *Jones v. The Ministry of the Interior (the Kingdom of Saudi Arabia)* [2004] EWCA Civ 1394; [2005] 2 WLR 808, that it would be an infringement of the right of access to the courts under article 6 of the European Convention on Human Rights, if the issue of the arbitrators' jurisdiction could not be raised under s.67 of the Arbitration Act 1996. We find it unnecessary to go into this very briefly argued suggestion, which has on its face some implausibility in the case of a State claiming to be protected in respect of its supposed human rights.

The judge's approach and further considerations

50. The judge took a different route to the same conclusion. He considered, firstly, that s.67 by itself confers on Ecuador a right to challenge the jurisdiction of the arbitrators, and, secondly, that the exercise of considering the arbitrators' jurisdiction is no different in kind from that undertaken by Hobhouse J in *Dallal v. Bank Mellat*.

51. As to the first point, we would agree with Mr Greenwood that there is a potential problem about treating s.67 as by itself conferring a right for the purposes of satisfying the test suggested by Simon Brown LJ in the *CND* case. It is not so much that s.67 is procedural, although Simon Brown LJ was probably focusing on substantive rights. It is rather that the prior question arises whether s.67 is itself to be read as subject to any principle of non-justiciability, and this question has, we think, to be answered by looking more widely than at s.67 alone. Mr Lloyd Jones does not suggest that s.67 is in mandatory terms, capable by themselves of overriding any principle of non-justiciability. Bearing in mind its use of the word "may", its language could be read as subject to such principle, particularly when s.81(1) provides that "Nothing in this Part shall be construed as excluding the operation of any rule of law consistent with the provisions of this Part ….". So it is necessary to look beyond s.67 in order to determine whether the principle of non-justiciability extends to prevent an English Court considering arbitrators' jurisdiction in circumstances such as the present.

52. Turning to the judge's second point, in our view *Dallal* and later authority considering it do offer some further support to Ecuador's case on this appeal. It is true that Hobhouse J was not concerned with any challenge to the jurisdiction of the Iran-United States Claims Tribunal over the issues which it determined; and it is also true, as already observed, that on one reading of his judgment he was concerned to find a basis in municipal law for any recognition of that Tribunal's adjudication (cf pp.456B-C and 458A-D). On the other hand, he was on any view prepared to look at unincorporated international treaties and at State conduct or acquiescence in order to determine whether to recognise the Tribunal's competence and decision; and *R v. Lyons* throws no doubt on the legitimacy of this (cf paragraphs 30-32 above). At p.462D Hobhouse J pointed out that, in determining whether the Tribunal's adjudication was a decision by a "court of competent jurisdiction" for the purposes of the principle in *Henderson v. Henderson*, all he was doing was "giving effect to an English procedural remedy in respect of a procedural complaint that is recognised by English law". Neither judicial restraint nor the unincorporated nature of the relevant treaty or international law prevented him doing this. Once again, this demonstrates that, given the right context, the English Court can and will have regard to an international treaty and general international law. As in *Dallal*, so here Ecuador is seeking a procedural remedy which is on its face available in respect of proceedings over which the English Courts have been given, under the Arbitration Act 1996, a certain (albeit limited) supervisory jurisdiction. In our view, although *Dallal* is not direct authority on the present point, it shows that the principle of non-justiciability is not, in any of its aspects, absolute, and need not and should not be applied over-rigidly. We add that the more stress is laid, as Mr Greenwood sought to do, on the relatively formal way in which consensus to arbitrate was achieved under the present Treaty, the closer the analogy between the present arbitration and the "statutory" arbitration which Hobhouse J identified in *Dallal*.

53. The fact that the Treaty is at pains to bring about an award capable of enforcement under the New York Convention is in our view a still more significant factor. The Convention provides both for recognition and enforcement and, under Article V, for limited circumstances in which recognition and enforcement "may be refused, at the request of the party against whom it is invoked" if that party provides appropriate proof of such circumstances. These include that:

> "(a) ….. the said agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the law of the country where the award was made; or ……
>
> (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or

> (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; ….".

54. These provisions, relating to recognition and enforcement and to the circumstances in which the same may be refused, are reflected in English law in s.103(1) and (2)(b), (c) and (d) and (4) of the Arbitration Act 1996. In a judgment in *Dardana Ltd. v. Yukos Oil Co.* [2002] 2 Ll.R. 326, with which the other members of the Court agreed, Mance LJ rejected (at p.333) an argument that the word "may" in s.103(2) had a "permissive, purely discretionary, or [as he saw it] arbitrary, force". The word "may" in that subsection must also have been intended to reflect the corresponding word in the New York Convention.

55. The present Treaty expressly contemplated the application of the New York Convention. It seems to us that all concerned must be taken to have understood that the usual grounds for opposing recognition and enforcement would apply, including any grounds based on want or excess of jurisdiction by the arbitrators, to which s.103 of the 1996 Act gives effect. The wider doctrine of non-justiciability, inspired by the United States "political question" doctrine and introduced into English law in *Buttes Gas*, cannot be regarded as directed to or as undermining this point. The narrower doctrine, based on the principle that international agreements do not create direct rights and obligations in favour of private persons and recognised in English law in the *Tin Council* case, is well established in international law – see the *Jurisdiction of the Courts of Danzig* case. But that case also shows that the position is quite different in international law where two States have deliberately agreed to confer rights intended to be enforceable domestically on private persons. Viewed in that context, we see no incongruity in a conclusion that the consensual arbitration intended under the Treaty carries with it the usual procedural and supervisory remedies provided under English law as the relevant procedural law. That being so, we do not see any sensible basis for suggesting that there is or should be any difficulty about an English Court, in the context of an English award, determining the scope of arbitrators' jurisdiction under s.67 or (in the case of an application to enforce) under s.66. It is also to be noted that, under s.66, the English Court is given no option at all but to refuse enforcement, if "the person against whom it is sought to be enforced shows that the tribunal lacked jurisdiction to make the award". Mr Greenwood suggests valiantly that a sensible distinction might, if necessary, be drawn between the "proactive" intervention involved under s.67 and the "reactive" involvement of a court under ss.66 and 103. That would be a quite inadequate basis for the application of what is said to be a fundamental, or even constitutional, principle regarding non-justiciability in the one context but not in the other. We do not consider that anything in English law compels so unsatisfactory a conclusion. We also note that we were shown cases in which courts in other countries have exercised or assumed that it was open to them to exercise equivalent supervisory power to review the jurisdiction of arbitrators appointed under investment treaties – see e.g. *Czech Republic v. CME Czech Republic B.V.* (Svea Court of Appeal, Sweden; 15 May 2003), especially at pp.69-71 and *Canada v. S.G. Myers, Inc.* (Kelen J, Canadian Federal Court; 13 January 2004), especially paras. 33-35. We were not shown any authorities to contrary effect.

56. For completeness, we mention one further minor point. The Treaty provides, as one of the available dispute resolution methods, recourse to the courts or administrative tribunals of the State party to the dispute. In a country like Ecuador with a monist system, under which the Treaty was self-executing at a high constitutional level, it would not even require legislation to enable investors, if they wished, to pursue the State in its own courts on any of the Treaty grounds. The scope of the concept of "investment dispute" in Article VI and of the protection afforded by Article X would then be determined by a domestic State court. This possibility is at least to be borne in mind when considering whether the English Court should regard as non-justiciable a similar issue, when sought to be raised (here by the State itself) on a challenge to the jurisdiction of an arbitration panel appointed under an agreement reached as contemplated by the third of the available dispute resolution means.

Conclusions

57. We accept that the English principle of non-justiciability cannot, if it applies, be ousted by consent. We are however concerned with issues regarding its proper scope and interpretation in a novel context. The considerations which we have identified in paragraphs 51-56 above all militate against an understanding of that principle, in either of its aspects, which would tend, if anything, to undermine the chosen scheme of those involved. They reinforce the conclusion that we would, for reasons summarised in paragraphs 31-47 above, anyway reach.

58. For these reasons, we would conclude that the judge reached the correct conclusion and would dismiss Occidental's appeal in respect of Aikens J's determination of the preliminary point in favour of Ecuador.