IN THE ARBITRATION UNDER THE TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF ECUADOR CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENTS AND THE UNCITRAL ARBITRATION RULES (1976)

BETWEEN

THE REPUBLIC OF ECUADOR

AND

THE UNITED STATES OF AMERICA

OPINION WITH RESPECT TO JURISDICTION IN THE INTERSTATE ARBITRATION INITIATED BY ECUADOR AGAINST THE UNITED STATES

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I. INTRODUCTION

1. I am the Myres S. McDougal Professor of International Law at Yale Law School, where I have been on the faculty since 1965. I have published twenty-one books in my field, six of which focus specifically on international arbitration and adjudication; a seventh, which I edited, focuses on jurisdiction in international law. I have also published a number of articles on ICSID arbitration. In addition to teaching and scholarship, I have served as Editor in Chief of the *American Journal of International Law* and Vice-President of the American Society of International Law and have been elected to the *Institut de Droit International*. I served two terms as President of the Arbitral Tribunal of the Bank for International Settlements, served as an arbitrator in numerous international commercial and public arbitrations, as counsel in other arbitrations, as well as in cases before the International Court of Justice ("ICJ"), and as an expert witness on diverse matters of international law. With particular reference to investment law, I have served as arbitrator in two NAFTA arbitrations and served or am serving in six ICSID arbitrations and in one non-supervised investment arbitration. A *curriculum vitae* setting forth a complete list of my activities and publications is appended to this opinion in Annex 1.

2. I have been asked by the United States Government to study and comment upon the question of jurisdiction presented by the Republic of Ecuador's ("Ecuador") request for interstate arbitration under Article VII of the Ecuador-U.S. Bilateral Investment Treaty ("BIT").[1] In the preparation of this opinion, I have studied Ecuador's request and submissions as well as the correspondence between the United States and Ecuador related to Ecuador's initiative. I am generally familiar with the history and decisions in the bilateral investment treaty case between Chevron Corporation ("Chevron") and Ecuador which are of relevance to the questions posed. I

[1] Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Ecuador, Aug. 27, 1993, S. Treaty Doc. No. 103-15 (1997).

note that I prepared a legal opinion on the construction of Article 2(3) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards on behalf of Chevron in a related case before the United States District Court for the Southern District of New York which is appended as Annex 2.

II. SUMMARY OF CONCLUSIONS

3. For the reasons set out below, it is my opinion that:

(a) The BIT is part of a species of treaties for the benefit of third parties in which there is special concern that interpretation by one or both of the States-parties not undermine the rights and expectations of the third-party beneficiaries.

(b) The BIT has created two jurisdictional tracks, each of which is assigned a distinct jurisdiction *ratione materiae* and *ratione personae*.

(c) The interpretation of substantive rights and guarantees in the BIT is reserved for the investor-state jurisdictional track under Article VI once that process has been engaged.

(d) The inter-state jurisdictional track under Article VII may not be used as a unilaterally initiated method for forcing amendments to the provisions falling within the investor-state jurisdictional track.

(e) Hence jurisdiction *ratione materiae* is absent in the instant case.

4. A decision emanating from a procedure such as that proposed by Ecuador or from the decision of this Tribunal would not be directly binding on tribunals exercising jurisdiction under the Article VI investor-state track. Nor would it be an amendment to the BIT. It could not be registered as a treaty under United Nations Charter Article 101 and would, thus, not be noticed to third-party beneficiaries of the BIT. Thus, it would be a procedure to which Ecuador's desired relief of "authoritative interpretation" is unavailable.

5. As a general matter, the application by Ecuador, were it accepted, could do significant injury to the international investment regime.

III. THE RELEVANT FACTS

6. I am not a witness of fact but I think it useful to state some of the background to this case. In the early 1990s, TexPet filed seven cases in Ecuadorian courts against the Ecuadorian government for breach of contract. All TexPet's evidence had been submitted by the mid 1990s but Ecuador's courts did not adjudicate the cases. Over a decade later, in 2006, Chevron (which by then had acquired Texaco) and TexPet commenced arbitration against Ecuador, in accordance with the BIT, averring that Ecuador's courts' failure to adjudicate constituted a violation of the BIT. In an Interim Award in 2008, the tribunal confirmed its jurisdiction and, in a Partial Award in 2010,[2] the tribunal found, inter alia, that Ecuador had violated BIT Article II(7) which requires that "[e]ach Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations."[3] The BIT tribunal held that Article II(7) makes no reference to a customary international law standard but the tribunal, while finding that it was obliged to apply Article II(7) of the BIT, also found convergences and divergences between customary international law's denial of justice and the plain language of Article II(7) with respect to the facts in the case before it. Thus while the obligations created by Article II(7) "overlap significantly with the prohibition of denial of justice,"[4] nevertheless "Article II(7) was . . .

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[2] *Chevron Corp. and Texaco Petroleum Co. v. Republic of Ecuador*, PCA/UNCITRAL, Partial Award on the Merits (Mar. 30, 2011) ("*Chevron* Partial Award"), March 30, 2010, *available at* http://italaw.com/documents/ChevronTexacoEcuadorPartialAward.PDF.

[3] Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Ec., art. II, para. 7, August 27, 1993, available at http://www.state.gov/documents/organization/43558.pdf.

[4] *Chevron* Partial Award at ¶ 242.

created as an independent treaty standard to address a lack of clarity in the customary international law regarding denial of justice" and its "*lex specialis* nature . . . [is] confirmed by its origin and purpose."[5]

7. Ecuador has petitioned a Dutch court at the venue of the arbitration to set the award aside and that case is pending. Ecuador's action in The Hague is the proper and exclusive international legal procedure for challenging an award issuing from the Article VI procedure.

8. On June 8, 2010, the Minister of Foreign Affairs of Ecuador, Ricardo Patiño Aroca, wrote to the United States Secretary of State, Hillary Clinton, on the subject of the "Misinterpretation of Article II(7) of the Treaty"[6] in the BIT case. After a detailed recitation of what Minister Patiño deemed to be mistakes as to matters of law in the BIT award with respect to the interpretation of Article II(7), he noted that the BIT does not contain a provision akin to Article 1131 of NAFTA. He proceeded to state that "it is a principle of international law that treaty parties may agree on interpretation of the terms of their treaty that are highly authoritative" and referred to Article 31(3) of the Vienna Convention on the Law of Treaties ("VCLT"). He then stated that the principle of good faith in Article 26 of the VCLT "requires that parties act to prevent any misinterpretation and misapplication of their treaty that results in harm to one of them." Minister Patiño then summarized Ecuador's understanding of Article II(7) with respect to which he requested the United States to confirm by reply note that it agreed. He concluded:

> If such a confirming note is not forthcoming or otherwise the Illustrious Government of the United States does not agree with the interpretation of Article II.7 of the Treaty by the Government of the Republic of Ecuador, an unresolved dispute must be considered to exist between the Government of the Republic of

[5] *Id.* at ¶ 243.

[6] Letter from Minister Patiño to Secretary Clinton, No. 13528-GM/2010, "Interpretacion Erronea del Articulo (II)7 del Tratado Sobre Promocion y Proteccion Reciproca de Inversiones por Parte de Tribunal en Caso Chevron" [Misinterpretation of Article II(7) of the Treaty for Encouragement and Reciprocal Protection of Investment, by the Arbitral Tribunal in the Chevron Case] (June 8, 2010).

> Ecuador and the Government of the United States of America concerning the interpretation and application of the Treaty.

I will return to some of the Minister's legal premises in the analysis below.

9. On August 23, 2010, Assistant Secretary of State Arturo Valenzuela, replied to Minister Patiño that the United States "is currently reviewing the views expressed in your letter and considering the concerns that you have raised."

10. On June 28, 2011, Minister Patiño wrote to the U.S. Secretary of State that, having received "no written reply" to its Note of June 8, 2010 and "having been informed that an agreed resolution could not be expected," Ecuador was initiating an arbitration in accordance with Article VII(1) of the BIT. The Notice of Arbitration was enclosed. I will consider those parts of it that are relevant to this opinion in the legal analysis which follows.

11. The intentions of Ecuador in pursuing the arbitration were set out in a Press Release of July 4, 2011.[7] As they were issued by the Ecuadorian Attorney General's Office, I assume that they are authoritative. According to the release, Ecuador sent a diplomatic note on June 8, 2010 to Secretary of State Clinton noting the following:

> [T]he Arbitration Court had made an erroneous interpretation of the BIT in the Chevron II case. Furthermore, the note requested the United Stated [sic] to confirm that it shared the same interpretation of the Republic of Ecuador. If that was not the case, and the United Stated [sic] manifested to have a different interpretation on the subject, it would be understood that there was a difference on the interpretation of the BIT. Ecuador never received any answer to that diplomatic note.
>
> As this conflict of interpretation was not properly clarified through the proper diplomatic channels, the Republic of Ecuador has decided, under the terms of the BIT itself, to request an Arbitration Court to present a formal and final

[7] *The Republic Of Ecuador Requests To The Arbitration Court An Interpretation Of The Bilateral Investments Treaty In Place With The United States Of America*, Boletín De Prensa CS/030, July 5, 2011. Official English translation available at http://www.pge.gob.ec/es/reglamentos-internos/doc_download/219-boletin-tbi-english-version.html.

> interpretation of the BIT under the rules of International Law, according to the rules of UNCITRAL.[8]

12. On March 12, 2012, the Legal Adviser to the Department of State wrote to the President of the UNCITRAL tribunal, explaining in brief the United States' jurisdictional objections and requesting a bifurcation of the procedure. At the meeting of the Tribunal on March 21, 2012, Counsel for Ecuador elaborated its view of the United States' responses to its diplomatic correspondence:

> The U.S. never offered an opinion or commented on Ecuador's interpretation, nor did the U.S. ever provide Ecuador with its own interpretation of Article II(7).
>
> This plainly was not an oversight on the part of the U.S. It was the result of a deliberate decision by the U.S. not to provide its interpretation of Article II(7) to Ecuador. In fact, Ecuador was told this by none other than my friend, Assistant Secretary of State and Legal Adviser Harold Koh, whom I am very pleased to see here today. On 7 October 2010, four months after receiving Ecuador's diplomatic note, Assistant Secretary Koh told the Ambassador of Ecuador in Washington that "The United States will not rule on this matter." And Assistant Secretary Koh, unsurprisingly, was true to his word. Nearly nine months passed from the time of his message to the Ambassador of Ecuador until the time Ecuador filed its Notice of Arbitration. And, as he had informed Ecuador's Ambassador, the United States never ruled on this matter. It did not respond further to Ecuador's request and never advised Ecuador of its interpretation of Article II(7). It was blindingly obvious the U.S. was not going to respond.[9]

IV. PRINCIPLES OF TREATY INTERPRETATION

13. As the interpretation of the BIT is a central issue here, it may be useful to briefly restate some of the basic principles of treaty interpretation as they relate to the matters under discussion. International law's canon for interpreting international agreements is codified in two articles of the Vienna Convention on the Law of Treaties ("VCLT"). Article 31 bears the title or chapeau "General rule of interpretation"; Article 32 bears the title or chapeau "Supplementary means of interpretation." It is clear from the respective chapeaus and the mandatory character of

[8] *Id.*
[9] Transcript of Preliminary Conference, March 21, 2012, at pp. 10-11.

the word "rule" in Article 31, as opposed to the instrumental character of the word "means" in Article 32, that Article 31 was intended to be dominant, while Article 32 was intended to be auxiliary or supplemental to it.

14. The chapeau of Article 31 uses the singular "rule," rather than the plural "rules," which imports that its contents are both mandatory *and* integrated. The provision provides that a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of [the treaty's] object and purpose."[10]

V. ANALYSIS OF THE BIT

15. The Ecuador-United States BIT was signed in 1993 and entered into force in 1997. In addition to the standard protections found in this genre of treaty, the BIT affords a national or company of one State-party the now-standard right to initiate binding arbitration against the other State-party, with respect to which "[e]ach Party undertakes to carry out without delay the provisions of any such award and to provide in its territory for its enforcement" (Article VI(6)). Beside the possibility of this investor-state arbitration, the BIT also affords the possibility of inter-state arbitration.

16. The BIT thus contains two distinct arbitration tracks. One track is set forth in Article VI and the other in Article VII.

17. Article VI provides, in pertinent part:

> 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.

[10] Vienna Convention, Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, Art. 31(1).

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 a 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 data 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.

18. Article VII provides, in pertinent part:

> 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 the United Nations Commission on International Trade Law (UNCITRAL), except to the extent modified by the Parties or by the arbitrators, shall govern.
>
> 2. Within two months of receipt of a request, each Party shall appoint an arbitrator. The two arbitrators shall select a third arbitrator as Chairman, who is a national of a third State. The UNCITRAL Rules for appointing members of three member panels shall apply mutatis mutandis to the appointment of the arbitral panel except that the appointing authority referenced in those rules shall be the Secretary General of the Centre.
>
> 3. Unless otherwise agreed, all submissions shall be made and all hearings shall be completed within six months of the date of selection of the third arbitrator, and the Tribunal shall render its decisions within two months of the date of the final submissions or the date of the closing of the hearings, whichever is later.

19. Several points are manifest on the face of the provisions. First, while Article VII speaks of "binding decision" which plainly means binding on the Parties (i.e., the States-parties), to the procedure which produces the decision, it says nothing about whether it is binding on subsequent tribunals acting under Article VI. Second, Article XII(4), which will be considered below, confines the components that are considered "an integral part of the Treaty" to "The Protocol and Side Letter". Possible decisions under Article VII are not included. This suggests that if dispute settlement under Article VII had been intended to provide an authoritative *pro futuro* interpretation of a substantive provision of the BIT, then the drafters would have made sure to have included that in Article XII(4) as is found, for example, in NAFTA Article 1131(2). Who can be bound by an Article VII decision and what are its effects may serve as indicators of what disputes fall within the jurisdiction *ratione materiae* of that jurisdictional track.

A. Jurisdiction

20. Jurisdiction is important, as international arbitration between states is based upon the consent of the states concerned. International courts and tribunals are scrupulous in examining and giving effect to what the states concerned have actually committed themselves to. In its Request for Arbitration, Ecuador seems to try to minimize this. It has styled its demand for an extraordinary appellate review as a "process which is recognized in the Convention for the Pacific Settlement of International Disputes of 1899 [and 1907] . . . as a means for 'the friendly settlement of international disputes.'"[11] These phrases from the preambular section of the 1907 Convention give the impression that limits upon jurisdiction included in the treaties that confer jurisdiction upon the Permanent Court (e.g., the Ecuador-United States BIT) are merely artificial. They are not. Though Ecuador suggests this "is a friendly contest" and concedes that the US is not "violating any of its international obligations," there is no unlimited or open-ended provision of jurisdiction in the dual track jurisdictional system of international investment law whenever a state "seeks only an interpretation of the treaty provision." This is especially true for investment law, where tribunals routinely hold that there is no "presumption of jurisdiction" against a sovereign state.[12]

1. Jurisdiction *Ratione Personae* in the Two-Track System

21. The jurisdictional track established by Article VI provides standing only to an investor ("a national or company of the other Party") and the State Party which is host to that investor's investment. It does not afford standing to the State of the investor. By contrast, the North American Free Trade Agreement ("NAFTA") expressly allows a limited standing for the other treaty Parties. NAFTA Article 1128 provides that "[o]n written notice to the disputing

[11] Note No. 12329/GMRECI/CGJ/2011, at para. 2 (June 28, 2011).
[12] *Southern Pacific Properties v. Egypt*, Case No. ARB/84/3, Decision on Jurisdiction at ¶ 63 (April 14, 1998).

parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement." Article VI of the BIT provides no analogous right in every case.

22. The jurisdictional track established by Article VII affords standing to the "Parties", i.e., the States- Parties to the BIT. It does not, however, afford standing to the nationals whose reliance on and investment under the BIT are principal objectives. Thus, one finds in the BIT a clear set of limits *ratione personae* which differ significantly for each of the respective tracks. In the following section, I will examine the *ratione materiae* implications of the *ratione personae* limitations of the BIT in light of the circumstances of this case.

2. Jurisdiction *Ratione Materiae* in the Two-Track System

23. Along with the *ratione personae* differences between Articles VI and VII, the central jurisdictional feature of the BIT's dual-track jurisdictional regime is its assignment of a different range of disputes exclusively to each of the tracks. The core formula in Article VII of the BIT, to the effect that "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 [. . .] for binding decision in accordance with the applicable rules of international law" is found, in varying formulations, as the exclusive form of jurisdiction in a large number of treaties.[13] The vast majority of treaties do not, however, include the two-tracks for distinct types of arbitration. The two-track jurisdictional arrangement, which is found in this BIT and, more generally, in a large number of international

[13] *See, e.g.*, THE TREATY MAKER'S HANDBOOK 117-131 (Hans Blix & Jirina H. Emerson eds., 1973) (collecting examples of clauses regarding "disputes" over "interpretation or application" from, among many others, the Revised General Act for the Pacific Settlement of International Disputes (1963) and the Convention on International Civil Aviation (1944)).

investment treaties, is distinctive in this treaty genre. (An analogue, to which I will return, is found in Article 47 of the European Convention on Human Rights.)

24. The distinction between the respective jurisdictional tracks goes to the essential objects and purposes of this genre of treaty. BITs, in order to facilitate private investment, have replaced the traditional resort to espousal by the investor's home State with the investor-State dispute settlement provisions allowing the investor to bring a claim directly. Likewise, in order to induce foreign investment, host states consented to arbitration directly by investors generally without requiring exhaustion of local remedies. The consequence of this agreement was thus to depoliticize the process of resolving disputes. In the absence of the BIT arrangement, foreign investment disputes would once again be taken up by states.

25. Thus, part of the compact upon which BITs rest is the "legalization" and corresponding "depoliticization" of the standards of dispute resolution for investor-state disputes. By legalization, I mean that investor-state arbitration is aimed at replacing the traditional system of diplomatic espousal, and that the process of interpretation and application of the substantive standards and procedures is assigned to arbitration tribunals, whose members are selected by investors and states. That process is intended to be autonomous, in the sense that it is subject to its own control mechanisms, whether through ad hoc committees operating under Article 52 of the ICSID Convention or through national courts operating under Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[14] The legalization of the standards to be applied for dispute resolution imports that Article VI tribunals must insist

[14] *See* Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature, art. 52, Mar. 18, 1965, 575 U.N.T.S. 159, 17 U.S.T. 1270; Convention on the Recognition and Enforcement of Foreign Arbitral Awards, arts. IV-IV, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.

on their exclusive competence to interpret and apply the law to the specific factual situations of cases before them.

26. In treaties made to provide benefits to third parties and, especially, to induce them to adjust their actions in reliance on the effective provision of those benefits, the stability of those expectations is also critical to the fulfillment of the objects and purposes of the treaties concerned. BITs share this object and purpose with human rights treaties.[15] In this regard, the European Convention on Human Rights ("ECHR"), which also incorporates a dual track jurisdiction, is an instructive analogy. ECHR Article 47, which in a sense parallels BIT Article VII, provides:

> 1. The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto.
>
> 2. Such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the Protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.

27. ECHR Article 48 provides:

> The Court shall decide whether a request for an advisory opinion submitted by the Committee of Ministers is within its competence as defined in Article 47.

28. Unlike the BIT, the European Convention makes the jurisdiction to provide "advisory opinions" explicit and provides guidance for the role of such opinions within the procedural system created by the treaty. But the European Convention's allocation of jurisdiction between two tracks is nevertheless useful for understanding BIT Article VII, given the presence of third-party beneficiaries in both systems. The States-parties to the European Convention on

Human Rights are precluded from using this second track of jurisdiction for the purpose of initiating a change in the substantive rights afforded to the third party beneficiaries of the treaty. That is reserved to the Court operating under its primary jurisdictional track and this primary track can be initiated only by an aggrieved person as part of a case or controversy.[16] Changes in the substantive rights in the Convention are made through multiple treaty protocols to the Convention.

29. In *pacta in favorem tertii,* where the States-parties decide *ex ante* to reserve to themselves the power to change the rights they are creating for the benefit of third parties, they put the universe of potential third party beneficiaries on express notice that the States-parties have retained this power and have not done so as a matter of State-State arbitration and adjudication. For example, Chapter 20 and Article 1131 of NAFTA make such a retention explicit and do not rely on the State-State dispute settlement provisions of NAFTA, but authorize a process for reaching mutually agreed interpretations. That is to say that Article 1131 clearly states that "[a]n interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section." As confirmed by the tribunal in *Methanex,* "[t]he purport of Article 1131(2) is clear beyond peradventure (and any investor contemplating an investment in reliance on NAFTA must be deemed to be aware of it)."[17] If the investor-state track is not deemed to be exclusive with respect to the decisions of arbitral

[16] The American Convention on Human Rights is similarly careful to cabin the jurisdiction of the "interpretation or application" tracks in Articles 64 and 76. Article 64(1) provides, in pertinent part, that "member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states" yet Article 76 specifies the single mechanism for securing an amendment to the treaty. Proposals to amend the treaty are not made through arbitration, but rather upon presentment to the General Assembly. Such proposals "enter into force for the States ratifying them on the date when two-thirds of the States Parties to this Convention have deposited their respective instruments of ratification." I discuss below the BIT's similar commitment regarding "authoritative" changes to the investment treaty.

[17] *Methanex Corp. v. United States of America*, Final Award, Part IV, Chapter C, at ¶ 20 (NAFTA Ch. 11 Arb. Trib. Aug. 3, 2005)).

tribunals, then a state which is unhappy with the award may try to undermine the exclusivity of the investor-state jurisdictional track *at any stage* by invoking the inter-state jurisdictional track. At the same time, investors who are dissatisfied with the awards rendered in their cases—and roughly half of investment cases are decided against investors[18]—*will press their governments* to initiate the inter-state jurisdictional track, *again, at any stage,* to undermine the legitimacy of the awards which they consider adverse. Even the NAFTA model does not permit these questions to be addressed in State-State dispute resolution. Thus the jurisdiction *ratione materiae* of each of the two tracks is different; in particular, where a dispute has already been adjudicated in investor-State arbitration under Article VI, the Article VI jurisdiction over that dispute is exclusive.

30. All of this is not to suggest that "disputes concerning interpretation or application" per Article VII of the BIT is an empty set. In this two-track jurisdictional structure, the jurisdiction *ratione materiae* contemplated for the Article VII inter-state arbitral track is to hear , for example, disputes arising from one state's non-enforcement of a final award; or disputes when one state purports to denounce the treaty.

31. By contrast, Article VI of the BIT establishes a right of nationals of the other State-party to initiate binding arbitration against the host state; it is a dispute resolution modality in which awards are final, subject only to review of the extrinsic features of the arbitral process (and not appeal of the findings of law and/or fact of the award). This limited form of review applies whether it is pursued under the mechanism of Article 52 of the ICSID Convention or the mechanism of the UNCITRAL Rules and Article V of the New York Convention on the

[18] Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 86 N.C. L. Rev. 1, 49 (2007) ("Out of the fifty-two awards finally resolving treaty claims, there were twenty awards (38.5%) where investors one and tribunals awarded damages. By contrast, there were thirty awards (57.7%) were governments paid investors nothing.")

Recognition and Enforcement of Foreign Arbitral Awards. It is worth mentioning that this limited form of review cuts both ways: in the abstract, it is neither "investor-friendly" nor "State-friendly," as a dissatisfied investor, exactly like a dissatisfied respondent State, must content itself with highly circumscribed annulment procedures as the only lawful means to challenge an award it finds "erroneous."

32. To interpret BIT Article VII in any way which might encroach upon the investor-state process as it interprets and applies the host State's obligations would contradict and interfere with the operation of BIT Article VI, for it would frustrate the investor's rights under the substantive provisions of the treaty and replace the investor's right to a finally binding arbitration—and the host state's correlative duty to implement the award—with another inter-state procedure. It would, moreover, undermine the validity of final awards *tout court* by introducing an advisory or appellate procedure in which the investor would have no standing, hence effectively denying the investor's rights under the BIT.

33. The interpretive aporia created by allowing investor-state subject matter to be artfully drawn into the inter-state track is more than theoretical conjecture, both because Ecuador has signaled its intent to use this proceeding to re-litigate the closely defined findings of law in *Chevron v. Ecuador* and also because we have been here before in the international investment case law. A nervous respondent-state has already tried, and failed, to do something similar in *Lucchetti v. Peru.*[19]

34. In *Lucchetti*, Judge Thomas Buergenthal, Dr. Bernardo Cremades, and Mr. Jan Paulsson composed a distinguished panel that heard an investor-state dispute between Peru and

[19] *Empresas Lucchetti, S.A. & Lucchetti Peru, S.A. v. Peru,* ICSID Case No. ARB/03/04, Award (Feb. 7, 2005),

the Chilean owners of a pasta factory in Lima. Shortly after the investors demanded arbitration, Peru requested that the investor-state tribunal suspend the proceeding because "Claimants' Request for Arbitration [was] (...) the subject of a concurrent State-to-State dispute between the Republic of Peru and the Republic of Chile."[20] Peru's request for suspension and its strategic design of using an inter-state proceeding to collaterally challenge the investor's claims test the hypothesis that Ecuador has assumed as truth: that an *investor*-claimant's claims of law and fact can transit the barrier between the two tracks and be "the subject of . . . dispute" between states. If the inter-state track could furnish "authoritative interpretations" that bear upon an investor's precise claims of fact and law, as Ecuador seeks to obtain, then the *Lucchetti* tribunal might have suspended the investor's proceeding on the merits. After permitting separate briefing and oral argument on Peru's request for suspension, the *Lucchetti* Tribunal dealt quickly and accurately with Peru's challenge: it tersely noted that "the conditions for a suspension of the proceedings were not met and confirmed the schedule for the submission of pleadings on the objections to jurisdiction."[21]

35. The *Lucchetti* decision on the request for suspension was what it had to be: in the two-track regime, inter-state disputes should not infringe on investor-state disputes.Conflating the two tracks which the BIT was at pains to separate would disserve those very procedural rights of the investor which are a central object of the BIT. Allowing inter-state arbitration over the exact "questions of interpretation" an investor has just posed (or, as in *Lucchetti*, is in the process of posing) in its own jurisdictional track renders the BIT's procedural system defective because of the open possibility of the respondent State initiating an *ex parte* hearing between the

[20] *Id.* at ¶ 7.
[21] *Id.* at ¶ 9.

States-parties which excludes the claimant investor. One of the States parties to this *ex parte* proceeding will often not be disinterested in interfering with the investor-state track.

36. Similar lessons about the sensitivity that tribunals must show to the two-track regime can be drawn, by way of contrast, from the *Italy v. Cuba* arbitration. In contrast to the vast majority of modern BITs, the Italian-Cuban BIT, which appears to be unique in both Italy's and Cuba's BIT practice, has no analogue to Article VI (i.e., a separate track dedicated to investor-state arbitration). Rather it assigns a single arbitral procedure for inter-state and investor-state disputes in which the States-parties establish and select the panel. Article 9 of the BIT, dealing with investor-state dispute resolution, provides that if the investor elects arbitration, then it is to be conducted in accordance with paragraphs 3 to 5 of Article 10; Article 10 deals with inter-state dispute resolution! Article 10, paragraph 3 has the States-parties form the tribunal. Paragraph 5 specifies that "Cada una de las Parttes Contratantes deberá pagar los gastos de su proprio árbitro y las de su representación en el proceso." So the fact that this was an arbitration between the two states was not a situation in which the States arrogated investor-state arbitration and dragged it into separate inter-state arbitration. It was required by the Italy-Cuba BIT because there was no separate investor-state jurisdictional track. By contrast, the BIT in the instant case, like other BITs, creates two, independent jurisdictional tracks in its Articles VI and VII respectively. The Italy-Cuba BIT thus relied on the traditional regime of diplomatic protection, which requires the political intervention of the state of nationality of the investor, and renders the award of the tribunal of no relevance to the case under discussion.

37. The essential point of emphasis to be drawn from the BIT, as well as the *Lucchetti* and *Italy v. Cuba* examples, is that the central achievement of the modern BIT regime is to provide meaningful and effective procedural rights in place of the customary law and politicized

arrangement that characterized the pre-BIT era of diplomatic protection. This achievement is primarily expressed in the design of a two-track jurisdictional system, which separates, legalizes, and insulates the investors' procedural rights from what seemed before to be the caprice of sovereign-to-sovereign politics.

38. To read BIT Article VII as Ecuador is proposing would disturb the arbitration guarantees in the Ecuador-United States BIT, in the other BITs to which many states are party, and in the international investment regime in general. Obviously any investment arbitration involves interpreting one or more provisions of a BIT in the context of a set of unique facts. Ecuador's initiative, if successful, would change that. Instead of an independent system of investor-initiated investor-state arbitration, which is the essential foundation of contemporary international investment law, any arbitral award adverse to a host-state could henceforth be undermined by the losing state re-raising it at the inter-state level, ostensibly as a request for interpretation of the investor-state tribunal's construction of the BIT, whether under Article VII of the Ecuador BIT, its equivalent under other BITs, or under Article 64 of the ICSID Convention.

3. The ICSID Convention

39. The structure of the ICSID Convention is instructive with respect to the carefully constructed dual-track allocation of jurisdiction *ratione materiae*. It is also especially relevant in this case, since arbitration under the ICSID Convention is one of the options which BIT Article VI(3) originally made available to the investor. Article 27(1) of the ICSID Convention provides

> No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under

> this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

Article 64 of the ICSID Convention, which parallels Article VII of the BIT, provides that

> Any dispute arising between Contracting States concerning the interpretation or application of this Convention which is not settled by negotiation shall be referred to the International Court of Justice by the application of any party to such dispute, unless the States concerned agree to another method of settlement.

40. The Report of the Executive Directors on the Convention is at pains to explain that the contingent inter-state jurisdiction of the International Court under Article 64 does not infringe on the ICSID Convention's investor-state arbitral jurisdiction.

> Article 64 confers on the International Court of Justice jurisdiction over disputes between Contracting States regarding the interpretation or application of the Convention which are not settled by negotiation and which the parties do not agree to settle by other methods. While the provision is couched in general terms, it must be read in the context of the Convention as a whole. Specifically, the provision does not confer jurisdiction on the Court to review the decision of a Conciliation Commission or Arbitral Tribunal as to its competence with respect to any dispute before it. Nor does it empower a State to institute proceedings before the Court in respect of a dispute which one of its nationals and another Contracting State have consented to submit or have submitted to arbitration, since such proceedings would contravene the provisions of Article 27, unless the other Contracting State had failed to abide by and comply with the award rendered in that dispute. (emphasis supplied)

41. The jurisdiction of Article 64 in the context of the ICSID Convention, like the jurisdiction of Article VII in the context of the BIT, is, thus, distinct from and was designed not to infringe the investor-state jurisdiction of each of the respective instruments. ICSID Article 64 and, in parallel, BIT Article VII relate to prospective violations by one of the State-parties of its obligations *to the other State-party* under the respective treaty. Examples of such violations would include, as I noted above, failure to comply with an award rendered in an investor-state dispute or, more generally, matters arising under Part V of the Vienna Convention on the Law of

Treaties, concerning "Invalidity, Termination and Suspension of the Operation of Treaties;" all of the latter are exclusively inter-state issues.

4. The Purported NAFTA analogy

42. In one of the documents which I received, Counsel for Ecuador has suggested that its novel use of the separate track inter-state arbitration is unremarkable and indeed mirrors other treaty regimes such as NAFTA which call upon states to engage in cooperative interpretive proceedings. Ecuador has further described its demand for a declaration as containing "nothing impertinent" because "it is just what the United States itself did when it joined with Mexico and Canada, to sign a binding interpretation of NAFTA's Chapter Eleven . . . ."[22]

43. But the example which Ecuador forwards controverts exactly what its proponent seeks to prove. The United States, Mexico, and Canada established an express procedure for negotiating and *consenting* to a new trilateral interpretation; they did not assign this function to an arbitration tribunal, to be invoked at the behest of one of them and then to require the other two to submit to its jurisdiction. And they put the universe of potential investors on express notice that they had reserved for themselves this power.

44. The notion that Article VII of the BIT is equivalent to Article 1131 of NAFTA encounters further difficulties. Article 2001 requires the States-parties creating the Free Trade Commission to compose it with ministers who resolve interpretive disputes. The NAFTA arrangement provides for negotiation between the parties to the treaty. These interpretations then become, *by operation of the treaty*, authoritative for tribunals called upon to arbitrate investment disputes arising under the treaty. Moreover, all investors are on notice, as the *Methanex* award made clear, that the application of the treaty is subject to negotiated agreed interpretations by the

[22] Transcript of Preliminary Conference, March 12, 2012, at p. 17.

states-parties. As noted earlier, unlike the oblique language of Article VII of the BIT, "the purport of Article 1132(2) is clear beyond peradventure (and any investor contemplating an investment in reliance on NAFTA must be deemed to be aware of it)."[23] It is therefore curious that without the benefit of NAFTA procedures and protections for third parties, "Ecuador has sought no more and no less" from the United States.[24] Nothing approaching NAFTA Articles 1131 or 2001 appears in the Ecuador-US BIT.

45. As I discuss below, the only procedure contemplated by the BIT that is in any way evocative, if at all, of the NAFTA regime is the provision for consultation in Article V. But here again, the analogy to Ecuador's initiative is inapt. Such consultations might result in an agreement between the States parties about one or another interpretive proposition, but is not directly binding on an Article VI tribunal. Here investor-state case law is instructive. In *CME v. Czech Republic*, the State-party reacted to an adverse Partial Award not by improperly invoking the inter-state track of arbitration, but rather by inviting the Netherlands to bilateral consultations on the meaning of the treaty.[25] These consultations between the Czech Republic and the Netherlands resulted in a meeting of the minds which the Parties memorialized in "Agreed Minutes," to which agents of each government affixed their signatures. The tribunal, when presented with the document, took note of the agreed minute but noted that it only confirmed its own, independently reached conclusion. Thus, it treated the parties' agreement as "context" for purposes of the interpretation of the terms of the treaty pursuant to Article 31(3)(a) of the Vienna Convention, although in this case considered the parties' views consonant with its own.

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[23] *Methanex Corp. v. United States of America*, Final Award, Part IV, Chapter C, at ¶ 20 (NAFTA Ch. 11 Arb. Trib. Aug. 3, 2005)).
[24] Transcript of Preliminary Conference, March 21, 2012, at pp. 17-18.
[25] *See generally CME v. Czech Republic*, Final Award at ¶¶ 87-90 (UNCITRAL, March 14 2003).

46. A more unorthodox example of state-initiated attempts to either declare or draw out a non-respondent state's interpretation of a BIT can be found in *Aguas del Tunari v. Bolivia*[26]. In *Aguas del Tunari*, the tribunal was confronted by Bolivia's assertion that both Bolivia and The Netherlands, the other Party to the BIT but not obviously a party in the investor-state arbitration, were allegedly on record that their BIT did not apply to the case at bar. But the documents which Bolivia adduced—a series of parliamentary questions between Dutch MPs and the Dutch government *about the pending case* some of which suggested that the government might consider the BIT to be "inapplicable" to that case—included contradictory Dutch Government statements. Faced with such materials and Bolivia's assertion that this was the joint view of both Contracting Parties, the tribunal wrote to the Legal Advisor to the Netherlands Foreign Ministry to inquire about these statements which purported to reflect the Dutch interpretation.[27] The tribunal framed its enquiry as asking whether the government's statements, when paired with Bolivia's, could be considered a "subsequent agreement" under VCLT Article 31. The Dutch Government replied to the Tribunal with an "Interpretation of the Agreement on encouragement and reciprocal protection of investments." The tribunal found that this document "contained only comments of a general nature that possibly may be relevant to the task of confirming an interpretation under Article 32 . . . of the [VCLT]. It does not provide the tribunal, however, with any information of the type suggested by Article 31 . . . ." Ultimately, the tribunal demurred on its curious reading of VCLT Article 31 and disregarded the letter from the Dutch government: "The Tribunal," it said, "has made no use of this document in arriving at its decision."[28] The tribunal rejection of the letter was consistent with the dual track operation of

[26] ICSID Case No. ARB/02/3 (October 21, 2005).
[27] One may note, in passing, that the tribunal's reliance on ICSID Rule 34 was misplaced; it actually had no authority for its initiative.
[28] *Aguas del Tunari* at ¶ 260.

BITs and is evident in its explanation of why the enquiry was irrelevant: "in any event, the Tribunal emphasizes . . . its firm view that it is the Tribunal, and not the Contracting Parties, that is the arbiter of its jurisdiction."[29]

B. Collateral Review to Circumvent Principles of Res Judicata and Ripeness

47. As far as I can see, Ecuador, in its Request for Arbitration, has styled its "Relief Sought" so that it may subject the *Chevron & Texaco v. Ecuador* Award to quasi-CME review before the appropriate and exclusive control mechanism for that review has even run its course. It has done so by exchanging the name of the nationals for the name "United States" and by rendering the conclusions of law of the Article VII tribunal into what appear to be general 'questions presented' for appellate review. This litigation strategy controverts the general principle of *res judicata* in international law as it operates under the dual-track jurisdictional system of the BIT.

48. Ecuador's intention to create appellate review of a final award is illustrated by compiling a table of Ecuador's "Relief Sought" *against the United States* with the operative parts of the award adverse to Ecuador in *Chevron v. Ecuador*:

"Relief Sought" in *Ecuador v. United States*	Related Holding of the Arbitral Tribunal in *Chevron* Partial Award
"the obligations of the Parties under paragraph 7 of Article II of the Treaty are not greater than their obligations under pre-existing customary international law"	"In view of the above considerations and the language of Article II(7), the Tribunal agrees with the Claimants that a distinct and potentially less-demanding test is applicable under this provision as compared to denial of justice under customary international law." (¶244)
"the Parties' obligation under paragraph 7 of Article II of the Treaty to provide 'effective means' requires only that they [*sic*] Parties provide a framework or system under which claims may be asserted and rights enforced, but do not obligate the Parties to assure that the framework or system provided is effective in particular cases"	"the Tribunal does not share the Respondent's view. While Article II(7) clearly requires that a proper system of laws and institutions be put in place, the system's effects on individual cases may also be reviewed. This idea is reflected in the language of the provision. The article specifies "asserting claims," so some system must be

[29] *Id.* at ¶ 263.

	provided to the investor for bringing claims, as well as "enforcing rights," so the BIT also focuses on the effective enforcement of the rights that are at issue in particular cases. The Tribunal thus finds that it may directly examine individual cases under Article II(7), while keeping in mind that the threshold of 'effectiveness' stipulated by the provision requires that a measure of deference be afforded to the domestic justice system; the Tribunal is not empowered by this provision to act as a court of appeal reviewing every individual alleged failure of the local judicial system *de novo*." (¶247)
"paragraph 7 of Article II may not be properly applied in a manner under which the fixing of compensation due for a violation of the provision is based upon determinations of rights under the respective law of the United States or Ecuador that are contrary to actual or likely determinations of the United States or Ecuadorian courts, as the case may be."	"The Respondent further asserts that the Tribunal's task in this regard is to determine what an Ecuadorian court, applying Ecuadorian law, would have done in these cases. . . . [375:] [T]he Tribunal must ask itself how a competent, fair, and impartial Ecuadorian court would have resolved TexPet's claims. The Tribunal must step into the shoes and mindset of an Ecuadorian judge and come to a conclusion about what the proper outcome of the cases should have been; that is, the Tribunal must determine what an Ecuadorian court, applying Ecuadorian law, would have done in these cases, rather than directly apply its own interpretation of the agreements." [¶366]

49. *Res judicata* is a settled doctrine of public international law generally and international investment law. Setting to one side the identity-of-parties requirement, given the table I have produced above comparing Ecuador's requested relief with the Partial Award's holdings of law, it is clear that the "rights, questions or facts" that constitute Ecuador's "claim for relief" have all been put at issue and resolved. While Ecuador is dissatisfied with the outcome of that proceeding, it cannot claim that it has not had its day in court to litigate precisely the legal situation that gives rise to this attempt to initiate an Article VII arbitration. Indeed, the precise overlap between the *Ecuador v. United States* and *Chevron v. Ecuador* issues of law and fact can hardly be ignored. As the International Court recently affirmed, "[t]wo purposes, one general, the other specific, underlie the principle of res judicata, internationally as nationally. First, the

stability of legal relations requires that litigation come to an end . . . . Secondly, it is in the interest of each party that an issue which has already been adjudicated in favour of that party be not argued again."[30]

50. I have already made reference to the fact that each and every one of Ecuador's claims for relief against the United States are conclusions of law that are still *sub judice* in Dutch courts. Indeed, the court in The Hague is deciding, *inter alia,* whether the *Chevron v. Ecuador* tribunal's holding with respect to Article II(7) was erroneous and an *excès de pouvoir*. Unlike this Article VII proceeding whose jurisdiction is being considered, that legal contest benefits from the proper adversarial parties. Also unlike this Article VII proceeding, the Dutch court is not called upon to issue an advisory opinion. Its deliberations benefit from a bona fide opposition of interests and views, rather than abstract questions posed by one party and unanswered by the other. Assigning what would amount to a concurrent jurisdiction *ratione materiae* under Article VII to Ecuador's challenge to the award in the Article VI proceeding would arrogate a dispute plainly within the control mechanisms of Article VI into the quite different procedures of Article VII. Were Ecuador to fail to comply with the award after the Dutch court proceedings were completed, the Article VI award might become a proper subject for Article VII jurisdiction; it could not, however, be framed, as a "dispute" as Ecuador is presently using the term to draw the U.S. into arbitration.

51. Using the inter-state track in order to invent a procedure for appellate review or compelling renegotiation runs at cross purposes with the two-track jurisdictional regime of the BIT; with respect to its dispute with certain American investors, Ecuador has already had its day in court and benefited from the prerogative of writing its own pleadings. Its exclusive procedure for review is already in progress in The Hague.

[30] *Application of the Genocide Convention* (Bos. v. Serb.), 2007 I.C.J. 43, 90.

C. The Impossibility of an "Authoritative Interpretation"

52. The *ratione materiae* allocation in the two-track jurisdictional regime of the BIT means that even if one were to assume that the Tribunal in this case were to find jurisdiction and were to opine that the interpretation of Article II(7) of the BIT was, as Ecuador claims, erroneous, that finding would have no effect. It would not affect the Chevron-TexPet award or the annulment procedure which Ecuador has initiated and is pending in The Netherlands, or any potential future enforcement action in national courts. Nor would it have any effect on other tribunals convened under Article VI. As noted earlier, a decision in the inter-state jurisdictional track binds the States-parties to it, but it does not become an integral part of the treaty, as Article XII(4) only integrates the Protocol and Side Letter.

VI. CONSEQUENCES BEYOND THIS CASE

53. Ecuador's approach if adopted would introduce into international law a regime that would enable it to do something that it could not do in the course of negotiating the treaty. Ecuador could write the treaty anew through unilateral initiation of inter-state litigation which the BIT reserves for other disputes, in order to secure terms that it considers more beneficial. If this is permitted, Ecuador and any other Party to a BIT could renegotiate the entire treaty through arbitration. If this were permitted, other States could follow suit, rending the fabric of stability of treaty making procedures and undoing the VCLT achievement of transparency in treaty modification and amendment.

54. Ecuador's submission in this case, if accepted, would not only undermine the validity and credibility of the award which the investor has won based upon the rights vouchsafed it under the treaty. It would have the effect of drawing the United States government

into each investment dispute in which the American investor had gained or lost an award. It would create a model for other states-parties to BITs with the United States and other states *inter se* with respect to their own BITs to request "interpretation" in cases which they or their investors have lost a case against the host state or against their national investor. It would equally put the United States government and other governments under pressure from national claimants who had *lost* their BIT arbitrations to initiate inter-state arbitrations in order to reverse the effect of the adverse awards and their holdings. The net effect of this innovation would be to erode the effectiveness of BITs' investor-state arbitration. It would, moreover, consume, once again, precisely those administrative and international and domestic political resources which the privatization of international investment arbitration has permitted the governments who have elected to use BITs to husband.

55. In an investment dispute there is always a State party to a BIT that appears either as a respondent or a counter-claimant who will be proposing to the tribunal its interpretation of one or more provisions of the BIT. If Ecuador's definition of "dispute" in this proceeding is accepted, then each time a State party in an investment dispute finds that its interpretation of a BIT provision fails to persuade the investment tribunal, it will ipso facto be able to claim an "erroneous interpretation" of the BIT which will be an inter-state arbitrable "dispute" with the State of the nationality of the investor unless that other State party consents to the interpretation. This is elevating a State's unilateral unhappiness and its disappointment in bilateral investment arbitration to an inter-state "dispute" and allowing it to circumvent the treaty by compelling renegotiation of specific provisions. The respondent State may do more: as in *Lucchetti*, it will then be able to initiate an Article VII procedure *during* the Article VI arbitration, move for the latter's suspension and essentially arrogate the investor's procedural rights. (The respondent

State may also raise it during the pendency of an annulment procedure which it itself has initiated, as Ecuador has done in this case, or as a defense in a future enforcement action brought by the investor.) The point is there is nothing in the BIT which specifies *when* Article VII jurisdiction can be invoked. If Ecuador's application is allowed in this case, there is nothing to prevent it—and similarly situated states—from raising such an application at any time during the investor-state arbitration, in effect paralyzing those arbitrations. Even if a tribunal resists it, as did *Lucchetti*, its refusal may then be used as a means for challenging the award. This is, in my view, not the purpose for which the inter-State dispute provision of the BIT was designed.

56. I cannot conclude this opinion without commenting on the effect that Ecuador's initiative will have on the third party beneficiaries of this BIT and, more generally, of BITs. Ecuador explained, with unembarrassed candor, that the interpretation it is seeking to compel the United States to consent to or litigate benefits both States.

> To the extent that the interpretation might be said to benefit Ecuador in comparison with the interpretation given by the Chevron Tribunal, it would in equal measure benefit the United States. To the extent that the burden of Article II(7) on Ecuador would be reduced, it would likewise be reduced for the United States. In that regard, it is worth noting that in its own Model BIT promulgated in 2004 and included by the U.S. in its subsequent bilateral investment treaties with other States, the United States completely unburdened itself of Article II(7) by eliminating it from these treaties.
>
> What Ecuador seeks from this Tribunal indisputably imposes no burden on the United States. This is, as I said, a friendly arbitration . . . .[31]

The States Parties' interest in the reliance by the investors – the intended beneficiaries of the treaty – on the stability of the Treaty simply does not figure in this remarkable confession.

VII. CONCLUSIONS

57. For the reasons set out above, it is my opinion that:

[31] Transcript of Preliminary Procedural Conference, March 21, 2012, at pp. 18-19.

(a) The BIT is part of a species of treaties for the benefit of third parties in which there is special concern that interpretation by one or both of the States-parties not undermine the rights and expectations of the third-party beneficiaries.

(b) The BIT has created two jurisdictional tracks, each of which is assigned a distinct jurisdiction *ratione materiae* and *ratione personae*.

(c) The interpretation of substantive rights and guarantees in the BIT is reserved for the investor-state jurisdictional track under Article VI once that process has been engaged.

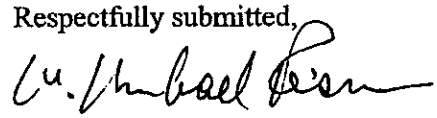
(d) The inter-state jurisdictional track under Article VII may not be used as a unilaterally initiated method for forcing amendments to the provisions falling within the investor-state jurisdictional track.

(e) Hence jurisdiction *ratione materiae* is absent in the instant case.

58. A decision emanating from a procedure such as that proposed by Ecuador or from the decision of this Tribunal would not be binding on tribunals exercising jurisdiction under the Article VI investor-state track. Nor would it be an amendment to the BIT. It could not be registered as a treaty under United Nations Charter Article 101 and would, thus, not be noticed to third-party beneficiaries of the BIT. Thus, it would be a procedure to which Ecuador's desired relief of "authoritative interpretation" is unavailable.

59. As a general matter, the application by Ecuador, were it accepted, could do significant injury to the international investment regime.

Respectfully submitted,



W. Michael Reisman

Annex 1

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W. Michael Reisman is Myres S. McDougal Professor of International Law at the Yale Law School where he has been on the Faculty since 1965. He has been a visiting professor in Tokyo, Hong Kong, Berlin, Basel, Paris and Geneva. He is a Fellow of the World Academy of Art and Science and a former member of its Executive Council. He is President of the Arbitration Tribunal of the Bank for International Settlements, a member of the Advisory Committee on International Law of the Department of State, Vice-Chairman of the Policy Sciences Center, Inc., a member of the Board of the Foreign Policy Association, and has been elected to the *Institut de Droit International*. He was a member of the Eritrea-Ethiopia Boundary Commission (2001-2007); a member of the Sudan Boundary Tribunal (2008-2009); served as arbitrator and counsel in many international cases and was President of the Inter-American Commission on Human Rights of the Organization of American States, Vice-President and Honorary Vice-President of the American Society of International Law and Editor-in-Chief of the American Journal of International Law.

Curriculum Vitae

Born April 23, 1939, Philadelphia, PA; educated, Philadelphia public schools; Central High School, 1956; B.A. Johns Hopkins University, 1960; LL.B. summa cum laude, Faculty of Law, Hebrew University, Jerusalem, Israel, 1963; Diplôme en Droit Comparé (Premier Cycle), Faculté Internationale pour l'enseignement de droit comparé (Strasbourg), 1963; LL.M. Yale Law School, 1964; Admitted, Connecticut Bar, 1964; J.S.D. Yale Law School, 1965; Research Associate, Yale Law School, 1965; Fulbright Scholar, The Hague, The Netherlands, 1966-67; Associate Professor, Yale Law School, 1969; Professor, Yale Law School, 1972-82; Wesley Newcomb Hohfeld Professor of Jurisprudence, Yale Law School, 1982-98; Myres S. McDougal Professor of International Law, 1998-; Board of Editors, American Journal of International Law, 1971-1983; Board of Editors, American Journal of Comparative Law, 1971-1977; Vice-President, American Society of International Law, 1984-86; Honorary Vice-President, American Society of International Law, 1996; Board of Editors, Journal of Conflict Resolution, 1972-1987; Board of Editors, Policy Sciences, 1984-88; Board of Review and Development, American Society of International Law (ASIL), 1972-1975; Executive Council, ASIL, 1972-1974, 1983-1984, 1996-; Committee for Student and Professional Development, ASIL, 1971-1974; Panel of Humanitarian Law, ASIL, 1971-1974; Advisory Board, Aviation Consumer Action Project, 1971-1974; Member, Consortium for Inter-University World Order Studies, Fund for Peace, 1970-1975; Board of Directors, Policy Sciences, Inc., 1979-; Board of Directors, U.S. Committee for Somali Refugee Relief, 1980-86; Advisory Board, Urban Morgan Institute for Human Rights, 1984-; Council on Foreign Relations, 1975-; International Law Association, 1975-; Executive Committee, American Branch, International Law Association, 1981-1995; Fellow, World Academy of Art and Science, 1981-; Executive Council, World Academy of Art and Science, 1983-93; Advisory Committee on International Law, U.S. Department of State 1987-; Fellow, Institute for Advanced Studies, Berlin, 1990; Member, Inter-American Commission of Human Rights, Organization of American States, 1990-95; Second Vice-President, Inter-American Commission on Human Rights, Organization of American States, 1992-93; First Vice-President, Inter-American Commission on Human Rights, Organization of American States 1993-94; President, Inter-American Commission on Human Rights, Organization of American States 1994-95; Honorary Vice-President, American Society of International Law, 1997; Member of the Board, Foreign Policy Association, 1997- ; member of the Institute of World Business Law of the International Chamber of Commerce, 1998-2001; *associé* of the *Institut de Droit International*, 1999; Academic Advisory Board for Transnational Books; Chairman, International Advisory Panel, National University of Singapore, 2002; member of panel of overseas referees of *Singapore Academy of Law Journal*, 2002-; member of the Advisory Board of *Journal of International Criminal Justice*, 2002-; member, International Bar Association Task Force on Legal Responses to International Terrorism, 2002-2004; Editor-in-Chief, American Journal of International Law, 1998-2003; member of the Advisory Board of *African Human Rights Law Journal*, 2003-; Board of Editors, Encyclopedia of Public International Law (Heidelberg), 2003-; member of the Panel of International Consultants for the Gujarat National University, Ahmedabad, Gujarat State, India, 2004-2006; member of the Editorial Board of *Indian Journal of International Law*, 2004-; member of the European Society

of International Law, 2004-; Honorary Editor, *American Journal of International Law*, 2004-; member of the Advisory Editorial Board of the *University of Botswana Law Journal*, 2004-; member of the Editorial Board of the *Stockholm International Arbitration Review*, 2005-; member of the ASIL Advisory Committee for ICJ Nominations and Other International Appointments, 2005-; ICSID Arbitrators List (for Colombia) for the period effective February 15, 2006-2012; member of the Advisory Board of the Columbia Program on International Investment, 2006-; member of the International Editorial Board of the *Cambridge Review of International Affairs*, 2006-; Honorary Professor, Gujarat National Law University, 2007-; member of the International Advisory Board of the School of Law of City University of Hong Kong, 2007-; member, World Bank Administrative Tribunal Nominating Committee, 2007-2008; Honorary Professor in City University of Hong Kong, May 1, 2008 to April 30, 2014; member of the Advisory Board of the Latin American Society of International Law (LASIL), 2007-; member of the Advisory Board of *Journal of International Dispute Settlement*, 2009-; member of the Advisory Board of *Yearbook on International Investment Law and Policy*, 2009-; Member of The American Law Institute, 2009-; Board of Directors of The Plainsight Group, 2009-; Board of Directors of Water Intelligence PLC (UK) 2010-; Adjunct Professor in City University of Hong Kong from March 1, 2008 to February 28, 2014.

Prizes and Awards: Gherini Prize, Yale Law School, 1964; International Organization Prize (Ginn Foundation), 1965; Fulbright Scholar, 1966-1967; O'Connell Chairholder, University of Florida, Law Center, Spring, 1980; World Academy of Art and Science, Harold Dwight Lasswell Award for Communication in a Divided World, April, 1981; Certificate of Merit, American Society of International Law, 1994; Order of Bahrain, First Class, 2001; Manley O. Hudson Medal, American Society of International Law, 2004; Human Rights Award, International Human Rights Law Review, St. Thomas University School of Law, 2008.

Endowed Lectureships

Myres S. McDougal Distinguished Lecture in International Law and Policy, University of Denver, 1982.

Distinguished Visiting Lecture, Cumberland Law School of Samford University, 1986.

Beam Distinguished Lecture, University of Iowa, College of Law, 1986.

Dunbar Lecture, University of Mississippi, College of Law, 1988.

Brainerd Currie Lecture, Duke University, School of Law, 1989.

Freiwillige Akademische Gesellschaft Lecture, University of Basel, 1991.

Sloan Lecture, Pace University Law School, 1992.

Siebenthaler Lecture, Salmon P. Chase College of Law, Northern Kentucky University, 1995.

Hague Academy of International Law, 1996.

Lauterpacht Lecture, Cambridge University, 1996.

Eberhardt Deutsch Lecture, Tulane University, 1997.

Order of the Coif Lecture, 1999.

Hugo L. Black Lecture, University of Alabama School of Law, Spring 2001.

The Johnson Lecture, Vanderbilt Law School, January 2002.

Adda B. Bozeman Lecture, Sarah Lawrence College, April 2002.

The Manley O. Hudson Lecture, American Society of International Law, April 2004.

The Klatsky Lecture in Human Rights, Case Western Reserve University School of Law, January 2008.

The Goff Arbitration Lecture, Freshfields Bruckhaus Deringer/City University of Hong Kong, Hong Kong, December 2008.

Human Rights Missions

1. Member, Independent Counsel on International Human Rights, Peshawar, Pakistan, 1987.

2. Member, OAS Observation Team for the Elections in Suriname, November, 1987.

3. Member, International Commission of Jurists Group, Budapest, Hungary, February, 1990.

4. Observer, Taiwan elections, International League for Human Rights, December, 1991.

5. On-site visit to Haiti, Inter-American Commission on Human Rights, 1990, 1994.

6. On-site visit to Peru, Inter-American Commission on Human Rights, 1990, 1992, 1994.

7. On-site visit to Colombia, Inter-American Commission on Human Rights, 1991, 1993.

8. On-site visit to Guatemala, Inter-American Commission on Human Rights, 1994.

9. On-site visit to Bahamas, Inter-American Commission on Human Rights, 1994.

10. On-site visit to Ecuador, Inter-American Commission on Human Rights, 1994.

11. On-site visit to Jamaica, Inter-American Commission on Human Rights, 1995.

12. Report to the Constitutional Review Commission, Fiji, 1997.

13. Report to the Greenland Commission on Self-Government (with Chimène Keitner), December, 2001.

Publications

Books

1. Nullity and Revision: The Review and Enforcement of International Judgments and Awards (Yale University Press, 1971).

2. The Art of the Possible: Diplomatic Alternatives in the Middle East (Princeton University Press, 1970).

3. Puerto Rico and the International Process: New Roles in Association (American Society of International Law, West Publishing Company, 1973). Reprinted in 11 Revista Juridica de la Universidad Interamericana de Puerto Rico (1977).

4. Toward World Order and Human Dignity: Essays in Honor of Myres S. McDougal (co-edited with Burns Weston, Free Press, 1976).

5. Folded Lies: Bribery, Crusades, and Reforms (Free Press, 1979).

   A. Spanish Translation, Remedios Contra la Corrupcion? (Cohecho, cruzadas y reformas), Fondo de Cultura Economica", Mexico, 1981; republished in its Series "Biblioteca Joven", 1984.

B. Japanese Translation, Iwanami Shoten, Tokyo, 1983.

C. Russian Translation, Moscow, 1988.

6. International Law in Contemporary Perspective: The Public Order of the World Community (co-edited with Myres S. McDougal, Foundation Press, 1981).

7. International Law Essays (co-edited with Myres S. McDougal, Foundation Press, 1981).

8. Power and Policy in Quest of Law: Essays in Honor of Eugene Victor Rostow (with Myres S. McDougal, Martinus Nijhoff, 1985).

9. Jurisprudence: Understanding and Shaping Law (with Aaron M. Schreiber, New Haven Press, 1987).

10. International Incidents: The Law that Counts in World Politics (co-edited with Andrew R. Willard, Princeton University Press, 1988).

11. Regulating Covert Action: Practices, Contexts and Policies of Covert Coercion Abroad in International and American Law (with James E. Baker, Yale University Press, 1992) (Japanese Translation, 2000).

12. Systems of Control in International Adjudication and Arbitration: Breakdown and Repair (Duke University Press, 1992).

13. Straight Baselines in International Maritime Boundary Delimitation (with Gayl Westerman, St. Martin's Press, 1992).

14. The Laws of War: A Comprehensive Collection of Primary Documents on International Laws Governing Armed Conflict (with Chris T. Antoniou, Vintage Press, 1994).

15. International Commercial Arbitration: Cases, Materials and Notes on the Resolution of International Business Disputes (with W. Laurence Craig, William Park and Jan Paulsson, Foundation Press, 1997).

16. The Supervisory Jurisdiction of the International Court of Justice: International Arbitration and International Adjudication (Hague Academy, 1997).

17. Law in Brief Encounters (Yale University Press, 1999). Chinese Translation, Shenghuozhongde Weiguan Falu [Microscopic Laws in Life] (Shangzhou Chubanshe, Taipei, 2001).

18. Jurisdiction in International Law (Ashgate, 1999).

19. International Law in Contemporary Perspective (2d ed.) (with Mahnoush H. Arsanjani, Siegfried Wiessner and Gayl S. Westerman) (Foundation Press, 2004).

20. Foreign Investment Disputes: Cases Materials and Commentary (with Doak Bishop and James Crawford) (Kluwer Law International) (2005).

21. Understanding and Shaping International Law: Essays of W. Michael Reisman (Guojifa: Lingwu Yu Goujian) (Law Press - China, 2007).

22. The Reasons Requirement in International Investment Arbitration: Critical Case Studies (with Guillermo Aguilar Alvarez, eds.) (Martinus Nijhoff Publishers, 2008).

23. Stopping Wars and Making Peace: Studies in International Intervention (with Kristen Eichensehr, eds.) (Martinus Nijhoff Publishers, 2009).

24. L'Ecole de New Haven de Droit International (A. Pedone), 2010.

In Progress

1. Fraudulent Evidence in International Litigation (Lauterpacht Lecture) (with Christina Parajon Skinner) (Cambridge University Press, 2012).

2. International Commercial Arbitration (with Laurence Craig, William Park and Jan Paulsson, Foundation Press, 2013) (second edition).

3. International Law in the 21st Century: The Quest for World Order and Human Dignity. General Course in July 2007 at The Hague Academy of International Law. Projected 2012.

4. Foreign Investment Disputes: Cases Materials and Commentary (with Doak Bishop and James Crawford) (Kluwer Law International) (second edition). Projected 2013.

Articles

1. "The Changing Structure of International Law: Unchanging Structure for Inquiry," 65

Columbia Law Review 810 (with Myres S. McDougal, 1965).

2. "The Role of the Economic Agencies in the Enforcement of International Judgments and Awards: A Functional Approach," 19 International Organization 929 (1965).

3. Address in De Zaak Zuid-West Afrika: Het Vonnis Van Het Internationaal Gerechtshof Critisch Bezein (1966) pp. 52-59, 61.

4. "Revision of the South West Africa Cases," 7 Virginia Journal of International Law 1 (1966).

5. "The World Constitutive Process of Authoritative Decision," 19:3 Journal of Legal Education 253 (with Myres S. McDougal and Harold D. Lasswell, 1967); reprinted in 1 Black & Falk, The Future of the International Legal Order (1968); reprinted in McDougal & Reisman, International Law Essays (1981).

6. "Rhodesia and the United Nations: The Lawfulness of International Concern", 62 American Journal of International Law 1 (with Myres S. McDougal, 1968); reprinted in 2 International Lawyer 721 (1968).

7. "Theories about International Law: Prologue to a Configurative Jurisprudence," 8 Virginia Journal of International Law 188 (with Myres S. McDougal and Harold D. Lasswell, 1968); reprinted in McDougal & Reisman, International Law Essays (1981).

8. "Judgment Enforcement," Proceedings of the American Society of International Law 13 (1968).

9. "The Enforcement of International Judgments and Awards," 63 American Journal of International Law 1 (1969).

10. "The Collection and Distribution of Current Materials for Teaching International Law," 21 Journal of Legal Education 80 (1968).

11. "Facets of International Arbitration," 20 Syracuse Law Review 166 (1968); reprinted as "The Multifaceted Phenomenon of International Arbitration" 24 Arbitration Journal 69 (1969).

12. Memorandum upon Humanitarian Intervention (with Myres S. McDougal, 1968) circulated privately and as a United Nations Petition Document; republished in Lillich, Humanitarian Intervention (1973).

13. "The Continuing Validity of Humanitarian Intervention," 3 International Lawyer 435

(with Myres S. McDougal, 1969).

14. "Ratification of the Genocide Convention," Proceedings of the Association of American Law Schools (1969).

15. "Sanctions and Enforcement," Volume 3, Black & Falk, The Future of the International Legal Order (1970); reprinted in McDougal & Reisman, International Law Essays (1981).

16. "International Non-Liquet: Recrudescence and Transformation," 3 International Lawyer 770 (1969).

17. "Procedures for Controlling Unilateral Treaty Termination," 63 American Journal of International Law 544 (1969).

18. "Responses to Genocide and Discrimination," East African Journal of Law and Development 1971; republished in 1 Denver Journal of International Law 29 (1971).

19. Rapporteur's Report, Working Group on Scientific Knowledge, Education and Communication, Environment and Society, International Joint Conference of the American Geographical Society and the American Division of the World Academy of Art and Science, 1970, published in 184 Annals of the New York Academy of Sciences 595 (1971).

20. "Polaroid Power: Taxing Business for Human Rights," Foreign Policy, Summer, 1971.

21. "Diplomatic Alternatives in the Middle East: From Obsolescent Goals to a New Program," Testimony in Hearings Before the Subcommittee on the Near East of the Committee on Foreign Affairs, House of Representatives, 92nd Cong., 2nd Session, February 22, 1972, p. 8.

22. "Who Owns Taiwan," 166 New Republic 21 (April 2, 1972).

23. "Who Owns Taiwan: A Search for International Title," 81 Yale Law Journal 599 (with Lung-chu Chen, 1972); reprinted in Yung-Hwah Jo, Taiwan's Future (1974).

24. "Theory of Federal Preemption -- Legal Grounding and Application," Anti-Boycott Bulletin (July, 1977).

25. "The Status of Taiwan: International Law and International Implications," Testimony in Hearings Before the Subcommittee on Asian and Pacific Affairs of the Sub-committee on Foreign Affairs, House of Representatives, 92nd Congress, 2nd Session, May 3, 1972 on "The New China Policy: Its Impact on the United States and Asia."

26. "The Intelligence Function and World Public Order," 46 Temple Law Quarterly 365

(with Myres S. McDougal and Harold D. Lasswell, 1973); reprinted in McDougal & Reisman, International Law Essays (1981).

27. "Private Armies in a Global War System: Prologue for Decision," 14 Virginia Journal of International Law 1 (1973); reprinted in J.N. Moore, International Law and Civil War (Johns Hopkins Press, 1973); reprinted in McDougal & Reisman, International Law Essays (1981).

28. "Making International Humanitarian Law Effective: The Case for Civic Initiatives," (Paxman & Boggs, eds.) The United Nations: A Reassessment, p. 31 (University of Virginia Press, 1973).

29. "Miselection: Responses to an Insider Coup," The Nation, August 13, 1973.

30. "Middle East Disengagement: More Substitutes for Peace," The Nation, March 9, 1974.

31. "Compacts: A Study of Interstate Agreements in the American Federal System," 27 Rutgers Law Review 70 (with Gary Simson, 1973); reprinted in Hazard & Wagner, Law in the United States of America in Social and Technological Revolution 459 (1974).

32. "Accelerating Advisory Opinions: Critique and Proposal," 68 American Journal of International Law 648 (1974).

33. "Living with the Majority," The Nation, February 1, 1975.

34. "Trade Helps the Traders," The Nation, June 12, 1976.

35. "A Theory about Law from the Policy Perspective," in Weisstub (ed.), Law and Policy (1976).

36. "Recognition and Social Change" in Toward World Order and Human Dignity: Essays in Honor of Myres S. McDougal (with Eisuke Suzuki, co-edited with Burns Weston, 1976).

37. "Big Sticks and Big Mouths," The Nation, June 19, 1976, p. 472.

38. "The Danger of Abandoning Taiwan," New York Times, August 28, 1976.

39. "Why We Can't Cry Foul," The Nation, January 8, 1977.

40. "African Imperialism," Editorial, 70 American Journal of International Law 801 (1976).

41. "Myth System and Operational Code," 3 Yale Studies in World Public Order 230 (1977).

42. "Foreign Affairs and the Several States," Speech delivered at the Annual Meeting of the American Society of International Law, April 22, 1977. Published in the Proceedings of the 71st Annual Meeting, p. 182.

43. "The Pragmatism of Human Rights," The Nation, May 7, 1977, p. 554, reprinted in Yale Law Reports (Fall, 1977).

44. "Theory of Federal Preemption--Legal Grounding and Application," Anti-Boycott Bulletin, July, 1977, p. 121.

45. "On Playing Chinacard," Wall Street Journal, August 25, 1978.

46. "The Case of Western Somaliland," 1 Horn of Africa 13 (1978).

47. "Playing Chinacard," 13 Yale Law Report (Winter, 1978-79).

48. "Campaigns Against Bribery," Yale Alumni Magazine, p. 17 (February, 1979).

49. "Views on Recognizing the Peoples Republic of China," Yale Alumni Magazine and Journal, p. 16 (March, 1979).

50. "Treaty Termination in American Constitutional Law," Testimony to the Senate Committee on Foreign Relations, in Treaty Termination, Hearings Before the Committee on Foreign Relations, United States Senate, 96th Congress, 1st Session, April 11, 1979, p. 387.

51. "Who Can Terminate Mutual Defense Treaties" (with Myres S. McDougal), Part I, National Law Journal, Vol. I, No. 36, May 21, 1979; Part II, idem., Vol. I, No. 37, May 28, 1979.

52. In Memoriam: "Harold D. Lasswell" 4 Yale Studies in World Public Order 154 (1978).

53. "Harold D. Lasswell," 73 American Journal of International Law 55 (with Myres S. McDougal, 1979).

54. Motion and Brief Amici Curiae in support of petition for certiorari in Goldwater v. Carter, December 6, 1979 (with Myres S. McDougal).

55. "The Regime of Straits and National Security," 74 American Journal of International Law 48 (1980).

56. "Termination of the U.S.S.R.'s Treaty Right of Intervention in Iran," 74 American Journal

of International Law 144 (1980).

57. "Myres S. McDougal," Biographical Essay in 18 International Encyclopedia of the Social Sciences 479 (1980).

58. "The Legal Effect of Vetoed Resolutions," 74 American Journal of International Law 904 (1980).

59. "The Case of the Non-Permanent Vacancy, 74 American Journal of International Law 907 (1980).

60. "Humanitarian Intervention," The Nation, May 24, 1980, p. 612.

61. "National Development as International Development," Forward to Lateef, Crisis in the Sahel: A Case Study in Development Cooperation (1980).

62. "The Prescribing Function in World Constitutive Process: How International Law is Made," (with Myres S. McDougal), 6 Yale Studies in World Public Order 249 (1981).

63. "International Law-making: A Process of Communication," Lasswell Memorial Lecture, American Society of International Law, April 24, 1981. 75 American Society of International Law Proceedings 101 (1981).

64. "Inadequacies of the Straits' Passage Regime in the LOS Draft," Marine Policy, p. 276 (July, 1981).

65. "Key International Legal Issues with Regard to Ocean Thermal Energy Conversion Systems," 11 California Western International Law Journal 425 (1981).

66. "West Bank: Belligerent Occupation or Incremental Annexation," The Nation, December, 1981.

67. General Report, International Law and Organization for a New World Order: The Uppsala Model, Grahl-Madsen & Toman, The Spirit of Uppsala (1984).

68. "The Golan Gambit," The Miami Herald, December 20, 1981.

69. "Critical Defense Zones and International Law: The Reagan Codicil," 76 American Journal of International Law 589 (1982).

70. "The Plaintiff's Dilemma: Illegally Obtained Evidence and Admissibility in International Adjudication" (with Eric Freedman), 76 American Journal of International Law 739 (1982).

71. "The First Casualty," The Nation, May 15, 1982.

72. "Somali Self-Determination in the Horn: Legal Perspectives and Implications for Social and Political Engineering," in (I.M. Lewis, ed.) Nationalism and Self-Determination on the Horn of Africa 151 (1983).

73. "Jeffrey Edwin Rockwell," 9 Brooklyn Journal of International Law 1 (1983).

74. "The Individual Under African Law in Comprehensive Context" in The Individual Under African Law 9 (Takirambudde, ed. 1983).

75. "Toward a General Theory About African Law, Social Change and Development" in The Individual Under African Law, 83 (Takirambudde, ed. 1983).

76. "Looking, Staring and Glaring: Microlegal Systems and World Public Order" (The McDougal Lecture, University of Denver, 1982), 12 Denver Journal of International Law and Policy 165 (1983).

77. "The Tormented Conscience: Applying and Appraising Unauthorized Coercion," 32 Emory Law Journal 499 (1983).

78. "The Struggle for The Falklands," 93 Yale Law Journal 287 (1983).

79. "Intervention Treaties in International Law" in Adeniran & Alexander, International Violence (1983).

80. "The World Power Process of Effective Power: The Global War System" (with Myres S. McDougal and Andrew R. Willard), (McDougal & Reisman, eds.) Power and Policy in Quest of Law (Martinus Nijhoff, 1985).

81. "International Law in Policy-Oriented Perspective" (with Myres S. McDougal) in Macdonald & Johnston, The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory 103 (Martinus Nijhoff, 1983).

82. "Coercion and Self-Determination: Construing Article 2(4)," 78 American Journal of International Law 642 (1984).

83. "Reporting the Facts As They Are Not Known: Media Responsibility in Concealed Human Rights Violations," 78 American Journal of International Law 650 (1984).

84. "The United Nations Charter and The Use of Force: Is Article 2(4) Still Workable?" Proceedings of the American Society of International Law 68 (1984).

85. "Nuclear Weapons in International Law," 4 New York Law School Journal of International and Comparative Law 339 (1973); reprinted, in slightly amended form, under title of "Deterrence and International Law" in Nuclear Weapons and Law 129 (Miller & Feinrider, eds. 1984).

86. "Bad Politics Makes Bad Law: Reflections on the Politicization of the International Court," forthcoming in John Bassett Moore Society, The Nicaraguan Case (1985).

87. "Teaching International Law in The '80s," 31 Yale Law Report 29 (Spring, 1985); reprinted in 20 International Lawyer 987-95 (Summer, 1986).

88. "International Incidents: Introduction to a New Genre in the Study of International Law," 10 Yale Journal of International Law 1 (1984).

89. "Criteria for the Lawful Use of Force in International Law," 10 Yale Journal of International Law 279 (1985).

90. "Jurisdiction in Human Rights Cases: Is the Tel-Oren Case a Step Backward?" Proceedings of the American Society of International Law 361 (1985).

91. "The Utility of McDougal's Jurisprudence," Proceedings of the American Society of International Law 273 (1985).

92. Comments on "Problems of the Law of Armed Conflict in Lebanon," Proceedings of the American Society of International Law, Panel on Humanitarian Law 236-39 (1983).

93. "Has the International Court Exceeded Its Jurisdiction?" 80 American Journal of International Law 128 (1986).

94. "Termination of the United States Declaration Under Article 36(2) of the Statute of the International Court," published by the University of Virginia Press in a collection entitled The United States and the Compulsory Jurisdiction of the International Court of Justice 71-106 (ed. A.C. Arend, 1986).

95. "Lining Up: The Microlegal System of Queues," 54 University of Cincinnati Law Review 417 (1985).

96. "Should We Just Write Off Hostages?," New York Times, December 3, 1986, p. 31, op. ed.

97. "The Other Shoe Falls: The Future of Article 36(1) Jurisdiction in the Light of Nicaragua." 81 American Journal of International Law 168 (1987).

98. "U.S. Gain From an Iranian Victory," Wall Street Journal, February 19, 1987, p. 26, op. ed.

99. "Jurisdiction in Human Rights Cases," 79 Proceedings of the American Society of International Law 368 (1985).

100. Foreword to Khosla: "Myth and Reality of the Protection of Civil Rights Law: A Case Study of Untouchability in Rural India" (with Myres S. McDougal, 1987).

101. "Through or Despite Governments: Differentiated Responsibilities in Human Rights Programs," 72 Iowa Law Review 391 (1987).

102. "The Cult of Custom in the Late 20th Century," 17 California Western International Law Journal 133 (1987).

103. "Designing Curricula: Making Legal Education Continuously Effective and Relevant for the 21st Century," 17Cumberland Law Review 831 (1986-1987); Reprinted as "El Diseño del Plan de Estudios: Para que la Enseñanza del Derecho Continúe Siendo Efectiva y Relevante en el Siglo XXI" in La Enseñanza del Derecho y el Ejercicio de la Abogacia (Martin F. Böhmer, Ed.) Biblioteca Yale de Estudios Jurídicos, pp. 105-128 (1999).

104. "America Sails Into Difficult Gulf Straits While Losing Track of Its Own Interests," Los Angeles Times, August 2, 1987, op. ed.

105. "Kuwait Takes Advantage of U.S. Paranoia About Soviet Expansion," Hartford Courant, August 4, 1987. op. ed.

106. Editorial Comment: "The Resistance in Afghanistan is Engaged in a War of National Liberation," 81 American Journal of International Law 906 (1987).

107. "The Formulation of General International Law: How is it Generated? How is the Existence of its Norms Ascertained?" 2 American University Journal of International Law and Policy 448-54, 455, 457-58, 460 (1987).

108. "Old Wine in New Bottles: The Reagan and Brezhnev Doctrines in Contemporary International Law and Practice," 13 Yale Journal of International Law 171 (1988).

109. "Closing P.L.O. Office Strikes at Free Speech," New York Times, March 16, 1988, op. ed.

110. "Even Though Defeated, Soviets Emerged Victor of Afghanistan War," Hartford Courant, April 24, 1988, op. ed.

111. "Genocide and the Soviet Occupation of Afghanistan," 1 The ISG Newsletter (with Charles H. Norchi, (Spring, 1988).

112. "Flashy, Shoddy Journalism Undermines Democracy," Hartford Courant, June 8, 1988, op. ed.

113. "Preliminary Notes for Discussion on the Establishment of a World-Museum," World Academy of Art and Sciences News June, 1988.

114. "Silent World Fuels Growth of Chemical Arsenals," Los Angeles Times, August 24, 1988, op. ed.

115. "The World Community: A Planetary Social Process," 21 University of California at Davis Law Review 807 (with Myres S. McDougal and Andrew R. Willard, Spring, 1988).

116. "Accord on Embassy Espionage Would Ease U.S.-Soviet Tensions," New Haven Register, September 11, 1988, op. ed.

117. "Which Law Applies to the Afghan Conflict?" 82 American Journal of International Law 459 (with James Silk, 1988).

118. "American Human Rights Diplomacy: The Next Phase," 28 Virginia Journal of International Law (Summer, 1988).

119. "Preliminary Notes for Discussion on the Establishment of a World-Museum," Part II World Academy of Art and Sciences News November, 1988.

120. "Rapping and Talking to the Boss: The Microlegal System of Two People Talking," Conflict and Integration: Comparative Law in the World Today Chuo University, 1988.

121. "A Hard Look at Soft Law," Proceedings of the 82nd Annual Meeting of the American Society of International Law 373 (1988).

122. "Straight Baselines in International Law: A Call for Reconsideration," Proceedings of the 82nd Annual Meeting of the American Society of International Law 260 (1988).

123. "Harnessing International Law to Restrain and Recapture Indigenous Spoliations, 83:1 American Journal of International Law 56 (January, 1989).

124. "Respecting One's Own Jurisprudence: A Plea to the International Court of Justice," 83:2

American Journal of International Law 312 (April, 1989).

125. "Reflections on State Responsibility for Violations of Explicit Protectorate, Mandate, and Trusteeship Obligations," 10:1 Michigan Journal of International Law 231 (Winter, 1989).

126. "Holy Alliance Would Censor Civilization's Symbols -- and its Dynamism," The Hartford Courant, Sunday, April 23, 1989.

127. "No Man's Land: International Legal Regulation of Coercive Responses to Protracted and Low Level Conflict," 11:2 Houston Journal of International Law 317 (Spring, 1989).

128. "The Arafat Visa Affair: Exceeding the Bounds of Host-State Discretion," 83:5 American Journal of International Law 519 (July, 1989).

129. "An International Farce: The Sad Case of the PLO Mission," 14:2 Yale Journal of International Law 412 (1989).

130. "Apartheid's Death: Reports are Greatly Exaggerated," The Los Angeles Times, Wednesday, September 6, 1989.

131. "War Powers: The Operational Code of Competence," 83:4 American Journal of International Law 777 (October, 1989);
reprinted in Foreign Affairs and the U.S. Constitution (L. Henkin, M. Glennon & W. Rogers, eds.) 68 (1990).

132. "The New International Holy Alliance and the Struggle to Appropriate and Censor General Cultural Symbols," Proceedings of the 83rd Annual Meeting of the American Society of International Law, 260 (1989); reprinted as "Who Controls Our Symbols?" in Yale Law Report (Spring, 1990).

133. Panel on "Chemical Warfare," Proceedings of the 83rd Annual Meeting of the American Society of International Law, 455 (1989).

134. "The Breakdown of the Control Mechanism in ICSID Arbitration," 1989:4 Duke Law Journal 739 (1989).

135. "International Law after the Cold War," 84:4 American Journal of International Law 859 (1990).

136. "Sovereignty and Human Rights in Contemporary International Law," 84:4 American Journal of International Law 866 (1990).

137. "Necessary and Proper: Executive Competence to Interpret Treaties," 15:2 Yale Journal of International Law 316 (1990).

138. "Governments-in-Exile: Notes Toward a Theory of Formation and Operation," in Governments-in-Exile in Contemporary World Politics (Shain ed.) (1990).

139. "Some Lessons From Iraq: International Law and Democratic Politics," 16:1 Yale Journal of International Law 203 (1991).

140. "Theory About Law: The New Haven School of Jurisprudence," Institute for Advanced Study, Berlin, Yearbook 1989/90 (1991).

141. "Allocating Competences to Use Coercion in the Post-Cold War World: Practices, Conditions, and Prospects," in Law and Force in the New International Order (Damrosch & Scheffer eds.) (1991).

142. Panel on Application of Humanitarian Law in Non-International Armed Conflicts, 85 ASIL Proceedings 83, 85 (1991).

143. "Double Standards 'Guide' the Vote," Los Angeles Times (Jan. 17, 1992); reprinted as "Human Rights in Taiwan," in The 1991 National Assembly Election in Taiwan: Reports by Observers from the United States of America (1992).

144. "National Reports: United States of America," (with William Araiza) in International Law of Export Control, Jurisdictional Issues (Karl M. Meessen, ed.) 163 (1992).

145. "Systemic Costs of Non-Compliance with International Law -- Effects on the System and on Interstate Relations," ASIL/NVIR Proceedings, 1991 (The Hague).

146. "Repairing ICSID's Control System: Some Comments on Aron Broches' 'Observations on the Finality of ICSID Awards,'" 7:1 ICSID Review, Foreign Investment Law Journal 196 (Spring, 1992).

147. "Some Reflections on International Law and Assassination Under the Schmitt Formula," 17:2 Yale Journal of Int'l Law 687 (Summer, 1992).

148. "My Self-Determination, Your Extinction," Los Angeles Times (Aug. 12, 1992); also appeared as "Too Bad If My Self-Determination Destroys You," International Herald Tribune (Aug. 14, 1992); also appeared as "Wenn aus Freiheit Vertreibung folgt" in Die Zeit (Nov. 6, 1992).

149. "With Help, U.S. Can Avoid New Quagmires," The Atlanta Journal, The Atlanta Constitution (Dec. 27, 1992).

150. "International Election Observation," 4 Pace University Yearbook of International Law 1 (1992).

151. "The Concept and Functions of Soft Law in International Politics," in Essays in honour of Judge Taslim Olawale Elias (Volume I Contemporary International Law and Human Rights), edited by Professor Emmanuel G. Bello and Prince Bola A. Ajibola, SAN, 135 (1992).

152. "New Scenarios of Threats to International Peace and Security: Developing Legal Capacities for Adequate Responses," Proceedings of an International Symposium of the Kiel Institute of International Law 13 (1993).

153. "The View from the New Haven School of International Law," 86 American Society of International Law Proceedings 118-125 (1992).

154. Sovereignty Panel, Remarks on Symposium on Low-Intensity Conflict, Naval War College (forthcoming).

155. "Humanitarian Intervention and the Protection of New Democracies," American Bar Association Standing Committee on Law and National Security and the Center for National Security Law at the University of Virginia (Oct. 1992, forthcoming).

156. "Hachlata Mishpatit Ki-hachra-ah Chevratit" ("Legal Decision as Social Choice,") University of Tel-Aviv, 18:3 Eyunei Ha-Mishpat 611 (1994).

157. "Obviating Affirmative Action," 39:2 Yale Law Report (Spring 1993) reprinted in 1 Discrimination and The Law in South Africa, 256 (C. Heyns ed., 1994).

158. "The Constitutional Crisis in the United Nations," 87:1 AJIL 83 (1993), reprinted in "The Development of the Role of the Security Council, Workshop 1992" Hague Academy of International Law (Nijhoff, 1993).

159. "The Constitutional Court and the Independence of the Judiciary," in Hungarian Constitutional Reform and the Rule of Law (D.T. Fox & A. Bonime-Blanc, eds. 1993).

160. "Peacemaking," 18:1 Yale Journal of International Law 415 (Winter 1993).

161. "Preparing to Wage Peace: Toward the Creation of an International Peacemaking Command and Staff College," 88:1 American Journal of International Law 76 (January, 1994).

162. "Autonomy, Interdependence and Responsibility," Comments on Weyrauch & Bell,

"Autonomous Lawmaking: The Case of the "Gypsies," 103:2 Yale Law Journal 401 (1993).

163. "Control Mechanisms in International Dispute Resolution," 2 United States-Mexico Law Journal 129 (1994).

164. "Moving International Law From Theory to Practice: The Role of Military Manuals in Effectuating the Law of Armed Conflict (with W. Lietzau) vol. 64 International Law Studies 1991, The Law of Naval Operations (H.B. Robertson, Jr. ed.).

165. "Critical Choices," paper prepared for "The Push of Science and Technology, The Pull of Cultural Diversity and Human Values," conference co-sponsored by The World Academy of Art and Science, Georgetown University, April 4, 1993.

166. "The Raid on Baghdad: Some Reflections on its Lawfulness and Implications," 5:1 European Journal of International Law 120 (1994).

167. "Fact-Finding Initiatives for the Inter-American Court of Human Rights," Commemorative Edition of the 15th Anniversary of the Inter-American Court of Human Rights, San José, Costa Rica (Nov. 1994).

168. Introductory Remarks, Symposium: Constitutionalism in the Post-Cold War World, 19 Yale J. Int'l L. 189, 191 (1994).

169. "A Place For 'All the Rest of Us': Reinventing the General Assembly," Proceedings XXIII Annual Conference, Canadian Council on Int'l Law, 33 (October, 1994).

170. "The Structural Imperatives of DRMs: Some Hypotheses and Their Applications," ABA Committee on Int'l Trade Law and Canadian Law "Int'l Dispute Resolution After NAFTA," April, 1994, reprinted as "Contextual Imperatives of Dispute Resolution Mechanisms — Some Hypotheses and Their Applications in the Uruguay Round and NAFTA," 29:3 Journal of World Trade 5 (June, 1995) (with Mark Wiedman).

171. "The Inter-American Commission on Human Rights," Conference on the Inter-American Human Rights System: Defending Human Rights, 1959-1994, Regional Meeting of the Am. Soc'y of Int'l Law, Am. Univ. (April, 1994).

172. "Amending the Charter: The Art of the Feasible," Annual Meeting of the Am. Soc'y of Int'l Law

173. "Reflections on the Problem of Individual Responsibility for Violations of Human Rights,"

174. "Protecting Indigenous Rights in International Adjudication," 89:2 American Journal of Int'l Law 350 (1995).

175. "Haiti and the Validity of International Action," 89:1 AJIL 82 (1995).

176. "Humanitarian Intervention and Fledgling Democracies," 18:3 Fordham International Law Jnl. 794 (1995).

177. "Covert Action," 20:2 Yale Journal of International Law 419 (Summer, 1995) (remarks at the International Studies Association Annual Meeting, Intelligence Section, Washington, D.C. March 29, 1994).

178. "A Jurisprudence from the Perspective of the "Political Superior", Harold J. Siebenthaler Lecture, 23:3 Northern Kentucky Law Review 605 (1996).

179. "Creating, Adapting and Designing Dispute Resolution Mechanisms for the International Protection of Human Rights," Conference on the Implications of the Proliferation of International Adjudicatory Bodies for Dispute Resolution, Proceedings of a Forum Co-Sponsored by the American Soc'y of Int'l Law and the Graduate Institute of Int'l Studies, Geneva, Switzerland, May 13, 1995, ASIL Bulletin No. 9.

180. "Practical Matters for Consideration in the Establishment of a Regional Human Rights Mechanism: Lessons from the Inter-American Experience," 1 Saint Louis-Warsaw Transatlantic Law Journal 89 (1995).

181. "Institutions and Practices for Restoring and Maintaining Public Order," 6:1 Duke J. of Comparative & Int'l Law 175 (1995).

182. "Designing Law Curricula for a Transnational Industrial and Science Based Civilization," ABA Section on Legal Education, Aug. 5, 1995, 46:3 Journal of Legal Education 1 (1996).

183. "Assessing the Lawfulness of Non-military Enforcement: The Case of Economic Sanctions," Proceedings of the 89th Annual Mtg. of ASIL 350 (1996).

184. "Tilting at Reality," 74:6 Texas Law Review 1261 (May 1996).

185. "Human Rights Workers as Internationally Protected Persons," in The Living Law of Nations: Essays on Refugees, Minorities, Indigenous Peoples and the Human Rights of Other Vulnerable Groups in Memory of Atle-Grahl Madsen (Alfredsson & MacAlister-Smith, eds.) 391 (1996).

186. "On Africa, No Attractive Options for the World," The International Herald Tribune,

Nov. 23-24, 1996, p. 8.

187. "International Law and the Inner Worlds of Others," 9:1 St. Thomas Law Review 25 (1996).

188. "When Are Economic Sanctions Effective? Selected Theorems and Corollaries," 2:3 ILSA Journal of International & Comparative Law 587 (Summer 1996).

189. "El Control y Vigilancia de Guardianes Corruptos: ¿Reformas Eficaces o Simples 'Cruzadas' de Distracción?," Universidad de Los Andes Facultad de Derecho, 7 Revista de Derecho Público (Febrero de 1997).

190. "Redesigning the United Nations," 1 Singapore Jnl. of Int'l & Comp. Law 1 (1997).

191. "The Political Consequences of the *Nuclear Weapons* Opinion," Symposium on Changing Structure of International Law Revisited (Paris), forthcoming in European Journal of International Law.

192. "Toward a Normative Theory of Differential Responsibility for International Security Functions: Responsibilities of Major Powers," in Japan and International Law Past, Present and Future: International Symposium to Mark the Centenary of the Japanese Association of International Law (Nisuke Ando, ed.,), Kluwer Law International, page 43 (1999).

193. "Legal Responses to Genocide and Other Massive Violations of Human Rights," prepared for delivery at the Meeting of Experts on "Reining in Impunity for International Crimes and Serious Violations of Human Rights," U.S. Holocaust Memorial Museum, April 13, 1997.

194. "Myres S. McDougal: Architect of a Jurisprudence for a Free Society," 66 Mississippi Law Journal 15 (1997).

195. "The Lessons of Qana," 22:2 Yale Jnl of Int'l Law 381 (Summer 1997).

196. "Legal Responses to Genocide and Other Massive Violations of Human Rights," 59:4 Law and Contemporary Problems, Duke University 75 (Autumn, 1996).

197. "The Sea Change from Caution to Openness," in The Enduring Importance for a Free Press of Article 19, Universal Declaration of Human Rights 35 (w/ Ralph Wilde, 1998).

198. "Designing and Managing the Future of the State," 8:3 European Journal of International Law 409 (1997).

199. "International Human Rights Law Bearing on Individual and Group Rights," Fiji

Constitution Review Commission Research Papers, vol. 2 181 (1997).

200. "Hollow Victory: Humanitarian Intervention and Protection of Minorities," Proceedings of the American Soc'y of Int'l Law 431 (April, 1997).

201. "The Quest for an International Liability Regime for the Protection of the Global Commons," in International Law: Theory and Practice: Essays in Honour of Eric Suy (with M.H. Arsanjani) 469 (1998).

202. "The Applicability of International Law Standards to United Nations Economic Sanctions Programmes," (with Douglas Stevick) 9 European Journal of Int'l Law 86-141 (1998).

203. "Stopping Wars and Making Peace: Reflections on the Ideology and Practice of Conflict Termination in Contemporary World Politics," 6 Tulane J. of Int'l & Comp. Law 5 (1998).

204. "Freedom of Speech as a Matter Fundamental to All Human Rights. Why and What For?," Friedrich-Naumann-Stiftung 79 (Aug. 1998).

205. "A Policy Science Approach for Designing the Future of Taiwan," 1 New Century Think Tank Forum, 80-85 (1998) (in Taiwanese).

206. "Myres Smith McDougal (1906-1998)," 92:4 American Journal of International Law 729 (1998) (with R. Falk, R. Higgins and B. Weston).

207. "The Facts," (*Breard* case) 92:4 American Journal of International Law 666 (1998) (with J. Charney).

208. "A World Contest for Teaching Phonetic Universality," in Toward Comparative Law in the 21st Century, Institute of Comparative Law in Japan, Chuo University (1998).

209. "Private International Declaration Initiatives," in La Déclaration Universelle des droits de l'homme 1948-98 Avenir d'un idéal commun Actes du colloque des 14, 15 et 16 septembre 1998 à la Sorbonne, 79 La Documentation Française, Paris (1999)

210. "Developments in International Criminal Law," (Forward) 93:1 American Journal of International Law 1 (1999) (with J. Charney).

211. "Tributes: Myres S. McDougal, Theory About Law: Jurisprudence for a Free Society," 108:5 The Yale Law Journal 935 (1999).

212. "Compensation for Human Rights Violations: The Practice of the Past Decade in the Americas," State Responsibility and the Individual - Reparation in Instances of Grave

Violations of Human Rights, 63 Kluwer Law International (1999).

213. "The Political Consequences of the General Assembly Advisory Opinion," International Law, the International Court of Justice and Nuclear Weapons, 473 Cambridge University Press (1999).

214. "The Government of the State of Eritrea and the Government of the Republic of Yemen Award of the Arbitral Tribunal in the First Stage of the Proceedings," 93:3 American Journal of International Law, p. 668 (July 1999).

215. "Towards a Normative Theory of Differential Responsibility for International Security Functions: Responsibilities of Major Powers," Japan and International Law Past, Present and Future, (International Symposium to Mark the Centennial of the Japanese Association of International Law) 43 Kluwer Law International (1999).

216. "The United States and International Institutions," 41:4 Survival, The IISS Quarterly, 62 (November 1999).

217. "Kosovo's Antinomies" 93:4 American Journal of International Law 860 (1999).

218. "International Legal Responses to Terrorism" 22:1 Houston Journal of International Law 3 (1999).

219. "Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention" in 11:1 European Journal of International Law 3 (March 2000).

220. "Sovereignty and Human Rights in Contemporary International Law" in Democratic Governance and International Law 239, (Gregory H. Fox and Brad R. Roth, eds.) Cambridge University Press (2000).

221. "The Incident at Cavalese and Strategic Compensation" with Robert D. Sloane in 94:3 American Journal of International Law 505 (July 2000).

222. "Procedures for Resolving the Kosovo Problem" with Monica Hakimi and Robert Sloane, in <http://www.unausa.org/issues/kosovo/rome/reisman.htm>.

223. "Designing Curricula: Making Legal Education Effective in the 21st Century", in The Singapore Conference: Leading the Law and Lawyers into the New Millennium @ 2020, 271 Butterworths (2000).

224. "The Vision and Mission of *The Yale Journal of International Law*", in 25:2 Yale J. Int'l L. 263 (Summer 2000).

225. "How to Make Pirates into Law-abiding Citizens: Free and Fair Radio and Free and Fair Elections in Taiwan", in Freedom of the Press and The Mass Media, 87 (2000).

226. "Eritrea-Yemen Arbitration (Award, Phase II: Maritime Delimitation)" in 94:4 American Journal of International Law 721 (October 2000).

227. "The Regime for *Lacunae* in the ICSID Choice of Law Provision and the Question of Its Threshold" in Essays in Honor of Ibrahim F.I. Shihata,15:2 ICSID Review Foreign Investment Law Journal 362 (Fall 2000); also printed in Liber Amicorum Ibrahim F.I.Shihata, Kluwer Law International (2001).

228. "Scenarios of Implementation of the Statute of the International Criminal Court" in "The Rome Statute of the International Criminal Court: A Challenge to Impunity," edited by Mauro Politi and Giuseppe Nesi 281 (2001).

229. "A New Haven School Look at Sanctions" in "Does Method Matter?" ASIL Proceedings (2001).

230. "In Defense of World Public Order" in 95:4 American Journal of International Law 833 (2001).

231. "Congratulation Letter" in Volume 1: Peking University International and Comparative Law Review, January 8, 2002.

232. "Judge Shigeru Oda: Reflections on the Formation of a Judge" in a Festschrift in Honor of Judge Shigeru Oda, Liber Amicorum Judge Shigeru Oda, 57-73, N. Ando et al (eds.) (2002).

233. "Unratified Treaties and Other Unperfected Acts in International Law: Constitutional Functions," 35 Vanderbilt Journal of Transnational Law 729 (2002).

234. "International Arbitration and Sovereignty," 18:3 Arbitration International 231 (2002).

235. "Introduction to Proceedings" in "The Definition of Aggression and the ICC" ASIL Proceedings 181 (2002).

236. "2001 Hugo Black Lecture: Illusion and Reality in the Compensation of Victims of International Terrorism," (with Monica Hakimi) 54:2 Alabama Law Review (2003).

237. "Jonathan I. Charney: An Appreciation," 36:1 Vanderbilt Journal of Transnational Law (January 2003).

238. "Assessing Claims to Revise the Laws of War," 97:1 American Journal of International Law, 82 (January 2003).

239. "Preemptive Force: When Can It Be Used? Implications for Iraq and North Korea," Volumes XI and XII, Foreign Policy Forum, 195 (2002).

240. "Aftershocks: Reflections on the Implications of September 11," Vol. 6 Yale Human Rights & Development Law Journal 81 (2003).

241. "The Use of Friendly Settlements in the Inter-American Human Rights System"(with Susan Benesch) in a Festschrift in Honor of Antonio Cassese, "Man's Inhumanity to Man," L.C. Vohrah et al (eds.), 741-770 (2003).

242. "Judge Shigeru Oda: A Tribute to an International Treasure," Leiden Journal of International Law, 16 (2003), pp.57-65.

243. "Self Defense in an Age of Terrorism," ASIL Proceedings, 142 (2003).

244. "Free Association: The United States Experience" (with Chimène I. Keitner), 39:1 Texas International Law Journal 1 (Fall 2003).

245. "Learning to Deal with Rejection: The International Criminal Court and the United States," 2 Journal of International Criminal Justice, 17-18 (2004).

246. "Comments on the Presentations by Nico Krisch and Carsten Stahn" in "Terrorism as a Challenge for National and International Law: Security Versus Liberty?" Walter, Vöneky, Röben, Schorkopf (eds.) P.909 (2004) Max Planck Institute.

247. The Manley O. Hudson Lecture "Why Regime Change is (Almost Always) a Bad Idea," 98 American Journal of International Law 516 (2004) and also in ASIL Proceedings 290 (2004).

248. Memorial Remarks in "Eugene V. Rostow 1913-2002" in Memorial Volume published at Yale Law School at page 34 (2004).

249. "Indirect Expropriation and its Valuation in the BIT Generation," (with Robert D. Sloane), 74 The British Year Book of International Law 2003 115 (2004).

250. "Rasul v. Bush: A Failure to Apply International Law," 2 Journal of International Criminal Justice 973 (2004).

251. "The Democratization of Contemporary International Law-Making Processes and the Differentiation of Their Application," in Developments of International Law in Treaty

Making (R. Wolfrum & V. Röben (eds.) Max-Planck-Institut für ausländisches öffentliches Recht and Vöolkerrecht, page 15 (2005); reprinted in 2:3 Transnational Dispute Management ( ) (June 2005).

252. "Unilateral Action in an Imperfect World Order," in 8 Austrian Review of International and European Law 163 (2003) and in Multilateralism v. Unilateralism: Policy Choices in a Global Society (J.B. Attanasio and J.J. Norton eds., 2004).

253. "The Law-in-Action of the International Criminal Court," in 99:2 American Journal of International Law 385 (April, 2005) (with Mahnoush H. Arsanjani).

254. "On Paying the Piper: Financial Responsibility for Security Council Referrals to the International Criminal Court," in 99:3 American Journal of International Law 615 (July, 2005).

255. "The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes," in 19:2 ICSID Review 328 (Fall 2004) (with Mahnoush H. Arsanjani).

256. "Expanding the Security Council: Much Ado," in JURIST on (August 7, 2005) http://jurist.law.pitt.edu/forumy/2005/08/expanding-un-security-council-much-ado.php (last checked October 7, 2005) and in 36:3 Security Dialogue 373-374 (September 2005).

257. "A Judge's Judge: Justice Florentino P. Feliciano's Philosophy of the Judicial Function," in Law in the Service of Human Dignity: Essays in Honour of Florentino Feliciano (Charnovitz, Steger and Van den Bossche, editors) at page 3 (2005).

258. "The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes," (with Mahnoush H. Arsanjani) in Common Values in International Law: Essays in Honour of Christian Tomuschat (Pierre-Marie Dupuy, Bardo Fassbender, Malcolm N. Shaw, Karl-Peter Sommermann, editors) at page 409 (2006).

259. Foreword in Tai-Heng Cheng's "State Succession and Commercial Obligations," page ix (2006).

260. Foreword in Elli Louka's "International Environmental Law: Fairness, Effectiveness, and World Order," page xi (2006).

261. "The Past and Future of the Claim of Preemptive Self-Defense," (with Andrea Armstrong) in 100:3 American Journal of International Law 525 (July 2006); also in ASIL A Century of International Law: American Journal of International Law Centennial Essays 1906-2006, p. 189 (2007).

262. "Holding the Center of the Law of Armed Conflict," in 100:4 American Journal of

International Law 852 (October 2006).

263. "The Shadows Looming over International Law," in 6 Baltic Yearbook of International Law 7-25 (2006).

264. "No Exit? A Preliminary Examination of the Legal Consequences of United States' Notification of Withdrawal From the Optional Protocol to the Vienna Convention on Consular Relations," (with Mahnoush H. Arsanjani) in Promoting Justice, Human Rights and Conflict Resolution Through International Law / La promotion de la justice, des droits de l'homme et du règlement des conflits par le droit international (Liber Amicorum Lucius Caflisch), Marcelo G. Kohen (ed.), 897-926 (2007).

265. "What is the Current Value of Signing a Treaty?" (with Mahnoush H. Arsanjani) in Human Rights, Democracy and the Rule of Law: Liber Amicorum Luzius Wildhaber, (S. Breitenmoser, B. Ehrenzeller, M. Sassòli, W. Stoffel, and B. Wagner Pfeifer (eds.)), 1491 (2007).

266. "The New Haven School: A Brief Introduction" (with Siegfried Wiessner and Andrew R. Willard) in 32:2 Yale Journal of International Law 575 (2007).

267. "Reflections on Economic Development, National Sovereignty and International Arbitration,"in xvii Arbitraje Internacional: Tensiones Actuales (Fernando Mantilla-Serrano, Coordinator for Comité Colombiano de Arbitraje) (2007).

268. "Claims to Pre-emptive Uses of Force: Some Trends and Projections and Their Implications for World Order," (with Andrea Armstrong) in International Law and Armed Conflict: Exploring the Faultlines: Essays in Honour of Yoram Dinstein (M.N. Schmitt and J. Pejic (eds.)), 79 (2007).

269. "Some Reflections on the Effect of Artisanal Fishing on Maritime Boundary Delimitation," (with Mahnoush H. Arsanjani) in Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah (Ndiaye and Wolfrum (eds.)), 629-665 (2007).

270. "Law, International Public Policy (So-called) and Arbitral Choice in International Commercial Arbitration," in International Arbitration 2006: Back to Basics?" (ICCA Congress Series No. 13), (van den Berg (gen. ed.)), p. 849 (2007).

271. "The Evolving International Standard and Sovereignty" in 101 ASIL Proceedings, p. 462-465 (2007).

272. Preface in "The Historical Foundations of World Order: The Tower and The Arena" by Douglas M. Johnston, page vii (2008).

273. "The International Criminal Court and the Congo: From Theory to Reality," in The Theory and Practice of International Criminal Law: Essays in Honor of M. Cherif Bassiouni (with Mahnoush H. Arsanjani) (Sadat and Scharf (eds.)), page 325 (2008).

274. "On the Causes of Uncertainty and Volatility in International Law" in The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity: Essays in Honour of Professor Ruth Lapidoth, (Broude and Shany (eds.)), page 33 (2008).

275. "Development and Nation-Building: A Framework for Policy-Oriented Inquiry" 60:2 Maine Law Review 309 (2008).

276. "Acting *Before* Victims Become Victims: Preventing and Arresting Mass Murder" 40:1&2 Case Western Reserve Journal of International Law 57 (2008).

277. Preface in "Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice," by Emmanuel Gaillard and Domenico Di Pietro (eds.) 2008).

278. "The Provisional Application of the Energy Charter Treaty," in Investment Protection and the Energy Charter Treaty, (Coop and Ribeiro (eds.)), page 47 (2008).

279. "Nullity in International Law," (with Dirk Pulkowski) in Max Planck Encyclopedia of Public International Law (www.mpepil.com) (2009).

280. "McDougal, Myres Smith," in The Biographical Dictionary of American Law, (Roger K. Newman, ed.), page 371 (2009).

281. "Eclipse of Expropriation?," (with Rocío Digón) in Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2008, (Arthur W. Rovine (ed.)), page 27 (2009).

282. "Sanctions and International Law," in Vol. 4 of Intercultural Human Rights Law Review, page 9 (2009).

283. "International Legal Dynamics and the Design of Feasible Missions: The Case of Afghanistan," in Vol. 85 of International Law Studies: The War in Afghanistan: A Legal Analysis, page 59 (Michael N. Schmitt, ed.) (2009).

284. "Inversión Extranjera, Desarrollo Económico y Arbitraje Internacional," in Diálogos Sobre la Justicia Internacional, page 26 (Bernardo Sepúlveda, Coordinator) (2009).

285. "Combating Piracy in East Africa," 35 Yale Journal of International Law Online 14 (2009), http://www.yjil.org/ (with Bradley T. Tennis).

286. "Overview," in Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2009, (Arthur W. Rovine (ed.)), page 291 (2010).

287. "Reflections on the Control Mechanism of the ICSID System," *in* THE REVIEW OF INTERNATIONAL ARBITRAL AWARDS, IAI SERIES ON INTERNATIONAL ARBITRATION NO. 6, at 197 (E. Gaillard (ed.), (2010).

288. Foreword (with Lea Brilmayer) in "A Principled Approach to State Failure: International Community Actions in Emergency Situations," by Chiara Giorgetti (2010).

289. "International Investment Arbitration and ADR: Married but Best Living Apart," in Vol. 24, No. 1, Spring 2009 ICSID Review, p. 185 (2010); and reprinted in UNCTAD Investor-State Disputes: Prevention and Alternatives to Arbitration II, United Nations Publication (2010) (forthcoming).

290. Foreword in "Yearbook on International Investment Law & Policy 2009-2010", Karl P. Sauvant (ed.), p. xix, (2010).

291. "Interpreting Treaties for the Benefit of Third Parties: The "*Salvors*' Doctrine" and the Use of Legislative History in Investment Treaties," with Mahnoush H. Arsanjani, 104:4 American Journal of International Law, p. 597 (2010).

292. "East African Piracy and the Defense of World Public Order," with Mahnoush H. Arsanjani, in Law of the Sea in Dialogue, Holger Hestermeyer/Nele Matz-Lück/Anja Seibert-Fohr/Silja Vöneky (eds.), p. 137 (2010).

293. "Thomas Franck and the Use of Force," in Proceedings of the Annual Meeting (American Society of International Law), Vol. 104 (March 24-27, 2010), pp. 403-408.

294. Remarks in Proceedings of the Annual Meeting (American Society of International Law), Vol. 104 (March 24-27, 2010), pp. 503-504.

295. "Soft Law and Law Jobs," 2:1 Journal of International Dispute Settlement 25 (2011).

296. "The Changing Relation of National Courts and International Commercial Arbitration," with Heide Iravani, in The American Review of International Arbitration, 2010/Vol. 21, Nos. 1-4, p. 5 (2011).

297. "Provisional Application of Treaties in International Law: The Energy Charter Treaty

Awards," with Mahnoush H. Arsanjani, in The Law of Treaties Beyond the Vienna Convention (E. Cannizzaro, ed.) p. 86 (2011).

298. "Investment and Human Rights Tribunals as Courts of Last Appeal in International Commercial Arbitration," in Liber Amicorum en l'honneur de Serge Lazareff, pages 521-530 (A. Pedone) (2011).

299. Foreword: *Veritas vos liberabit* in Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law, p. xxxv (J. d'Aspremont, ed.) (2011).

300. "In Personal Performance Codes, One Size Doesn't Fit All: Clarifying the Professional and Ethical Responsibilities of Decision Makers," with Andrew R. Willard, in Asia Pacific Law Review, p. 1, Vol. 19:1 (2011).

301. "What Constitutes an Investment and Who Decides?" with Anna Vinnik in Contemporary Issues in International Arbitration and Mediation. The Fordham Papers 2010, (Rovine (ed.)), pages 50-70 (2011).

302. Foreword in Nuclear Weapons, Justice and the Law by Elli Louka, p. vii (2011).

303. "Reflections on the Cogency of Fragmentation: Statutes of Limitation and "Continuing Violations" in Investment and Human Rights Law," with Mahnoush H. Arsanjani, in Coexistence, Cooperation and Solidarity: Liber Amicorum of Rüdiger Wolfrum, pages 265-280 (2012).

304. Foreword in Treaty Interpretation in Investment Arbitration by J. Romesh Weeramantry, p. vii (2012).

305. "The Future of International Investment Law and Arbitration," in Realizing Utopia: The Future of International Law (Cassese (ed.)), page 275-286 (2012).

Forthcoming Articles

1. "Preparing for Investment Disputes: The Respondent Government's Perspective," with Heide Iravani.

2. "Sovereign Wealth Funds and National Security," with Patrick DeSouza in *Sovereign Investment: Concerns and Policy Reactions* (K. Sauvant, L. Sachs, W. Schmit Jongbloed eds.).

3. "The Weston Phenomenon," a brief appreciation forthcoming in University of Iowa College of Law for Journal of Transnational Law & Contemporary Problems.

4. Book Review "Selecting International Judges: Principle, Process and Politics," forthcoming in American Journal of International Law.

Book Reviews

1. Review of Schelling, Arms and Influence, 61 American Journal of International Law 625 (1967).

2. Book Review: Fact-finding in the Maintenance of International Peace, by William I. Shore (Dobbs Ferry, New York, 1970). 65 American Political Science Review 1256-57 December 7, 1971.

3. Book Review: East Pakistan--A Post-Mortem, 64 American Journal of International Law (1974).

4. Book Review: Hungdah Chu (ed.), China and the Question of Taiwan, (1973), 69 American Journal of International Law 207-209, 1975.

5. Book Review: Pierre-Marie Martin, Le Conflit Israelo-Arabe. Recherches sur l'Emploi de la Force en Droit International Public Positif" (1973), 70 American Journal of International Law 197 (1976).

6. Book Review: Smith (ed.), From War to Peace: Essays in Peacemaking and War Termination (1974), 70 American Journal of International Law 196 (1976).

7. Book Review: Hull, The Irish Triangle: Conflict in Northern Ireland (1976) and Rose, Northern Ireland: Time of Choice (1976), 71 American Journal of International Law 375 (1977).

8. Review of Yearbook of World Problems and Human Potential (1976) in 71 American Journal of International Law 832 (1977).

9. Book Review: Preservacion del Medio Ambiente Marino, edited by Francisco Orrego-Vicuña, 72 American Journal of International Law 447 (1978).

10. Book Review: P.J. Kuyper, The Implementation of International Sanctions: The Netherlands and Rhodesia (1978), 73 American Journal of International Law 720 (1979).

11. "Bosses and the Law: Caudillism and Formalism," Review of Rogelio Perez Perdomo, El formalismo juridico y sus funciones sociales en el siglo XIX Venezolano (1978) in 29 American Journal of Comparative Law 727 (1981).

12. Review of Cabranes, Citizenship and The American Empire (1979), 28 American Journal of Comparative Law 358 (1980).

13. Book Review: Young, Compliance and Public Authority, 76 American Journal of International Law 868 (1982).

14. Book Review: Morrison. The Dynamics of Development on the European Human Rights Convention, 77 American Journal of International Law 345 (1983).

15. Book Review: Steinberg. Satellite Reconnaisance. 78 American Journal of International Law 516 (1984).

16. Book Review: (Bernhardt, ed.) Encyclopedia of Public International Law. 78 American Journal of International Law 503 (1984).

17. Book Review: Willis, Prologue to Nuremberg, 79 American Journal of International Law 200 (1985).

18. Book Review: Zoller, Peacetime Unilateral Remedies, 79 American Journal of International Law 1083 (1985).

19. Book Review: Craig, Park & Paulsson, International Chamber of Commerce Arbitration, 80 American Journal of International Law 268 (1986).

20. Book Review: Kratochwil, Rohrlich and Mahajan, Peace and Disputed Sovereignty: Reflections of Conflict Over Territory, 81 American Journal of International Law, 306 (1987).

21. Book Review: Encyclopedia of Public International Law, Instalment 7. 81 American Journal of International Law, 263 (1987).

22. Book Review: Encyclopedia of Public International Law, Instalment 9, International Relations and Legal Cooperation in General: Diplomacy and Consular Relations, 85:1 American Journal of International Law 205 (1991).

23. Book Review: Encyclopedia of Public International Law, Instalment 10, International Relations and Legal Cooperation in General: Diplomacy and Consular Relations, 85:1 American Journal of International Law 207 (1991).

24. Book Review: Lassa Oppenheim's Nine Lives: Oppenheim's International Law (edited by Sir Robert Jennings and Sir Arthur Watts) Volume I, PEACE, Introduction and Parts 1-4, Ninth Edition, 1992, 19:1 Yale Journal of International Law 255 (1994).

25. Book Review: Metamorphoses: Judge Shigeru Oda and the International Court of Justice in Canadian Yearbook of International Law, 185 (1995).

26. Book Review: The Inter-American Human Rights System in 92 American Journal of Int'l Law 784 (1998).

Annex 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

REPUBLIC OF ECUADOR,	:	
	:	
Petitioner,	:	
	:	09 Civ. 9958
v.	:	
	:	
CHEVRON CORPORATION and TEXACO PETROLEUM COMPANY,	:	
	:	
Respondents.	:	

DECLARATION OF PROFESSOR W. MICHAEL REISMAN

I, W. MICHAEL REISMAN, residing at New Haven, Connecticut, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746 and the laws of the United States of America, that the following is true and correct:

1. I am the Myres S. McDougal Professor of International Law at Yale Law School, where I have been on the faculty since 1965. I have published twenty-one books in my field, six of which focus specifically on international arbitration and adjudication; a seventh, which I edited, focuses on jurisdiction in international law. I am the lead editor of a casebook entitled "International Commercial Arbitration" (with Craig, Park and Paulsson). My book, "Systems of Control in International Adjudication and Arbitration," considers the role of national courts in the context of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. My book, "Foreign Investment Disputes" (2005, with Bishop and Crawford) focuses on the many problems encountered in international investment law. In addition to my teaching and scholarship, I have served as Editor-in-Chief of the *American Journal of International Law* and Vice-President of the American Society of International Law. I have also been elected to the *Institut de Droit International* and the American Law Institute. I serve as President of the Arbitral Tribunal of the Bank for International Settlements, have served as an arbitrator in numerous international commercial and public international arbitrations, as counsel in other arbitrations, as well as in cases before the International Court of Justice ("ICJ"), and as an expert witness on diverse matters of international law. With

particular reference to investment law, I have served as arbitrator in two NAFTA arbitrations and have served or am serving in five ICSID arbitrations and in one non-supervised investment arbitration. Most of the disputes on which I have arbitrated or testified have concerned bilateral investment treaties and I have considered their impact on international law in an article (with Professor Robert Sloane) in the British Yearbook of International Law.[1] A *curriculum vitae* setting forth a complete list of my activities and publications is appended to this declaration.

2. I have been asked by Chevron Corporation ("Chevron") and Texaco Petroleum Company ("TexPet") for my opinion with respect to certain international legal issues raised by the Republic of Ecuador's Petition to Stay Arbitration. In that complaint, Ecuador prays the Court to "preliminarily and permanently enjoin[] Chevron Corp. and TexPet from prosecuting or continuing to prosecute the UNCITRAL Arbitration set forth in the Notice... ."[2] The arbitration to which Ecuador refers was initiated by Chevron and TexPet on September 23, 2009 on the basis of an arbitration agreement in Article VI (1) of the United States-Ecuador Bilateral Investment Treaty ("U.S.-Ecuador BIT").[3] Specifically I have been asked to opine, as a matter of public international law, on the proper role of a national court with respect to the BIT arbitration brought by Chevron and TexPet against Ecuador.

3. For the reasons set out below, it is my opinion that a United States federal court in the present case is obliged by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "New York Convention"), to dismiss Ecuador's complaint and to order it to proceed to arbitration. (The New York Convention is incorporated in United States law in Chapter 2 of the Federal Arbitration Act ("FAA"), as discussed below.) Such a conclusion is required because: (1) the BIT's arbitration clause is valid and operable and has, moreover, been accepted as such by Ecuador; and (2) a BIT claim rests on alleged violations of obligations in a treaty and is distinct from a

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[1] Robert D. Sloane and W. Michael Reisman, *Indirect Expropriation and its Valuation in the BIT Generation*, 74 BRITISH YEARBOOK OF INTERNATIONAL LAW 115 (2004).

[2] Petition to Stay Arbitration at para. 44. UNCITRAL refers to the United Nations Commission on International Trade Law. As provided for in the U.S.-Ecuador BIT, the arbitration brought against Ecuador is proceeding in accordance with the UNCITRAL Arbitration Rules. *See infra* at para. 13.

[3] *See* Chevron's Notice of Arbitration at paras. 70 – 73. *See also* Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment ("U.S.-Ecuador BIT"), 1997.

contract claim; it does not reinstitute other legal actions which may have arisen out of a commercial agreement. Moreover, by terms incorporated by reference in the BIT and by the international law which it applies, questions as to the arbitrability of Chevron and TexPet's complaints must be taken up first by the arbitral tribunal itself, subject only to such post-award review as may be warranted under Article V of the New York Convention. There is not a single instance where a US court has sought to intervene in and to halt a BIT case before an award has been issued.

The FAA and the New York Convention

4. It is well-established that the provisions of Chapter 2 of the Federal Arbitration Act ("FAA") apply to arbitration agreements found in U.S. treaties concerning international investment, such as the U.S.-Ecuador BIT.

5. Of note where my expertise is concerned is the FAA's enforcement of the New York Convention, an international treaty to which the U.S. is a party, which provides for the enforcement of international arbitration agreements and the recognition and enforcement of foreign arbitral awards. The New York Convention was statutorily incorporated into U.S. law in 1970. Chapter 2 of the FAA provides:

> The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.[4]

6. One of the foundation principles of the New York Convention is that contracting states commit their courts to refrain from exercising their own jurisdiction when it is sought to be invoked by a party to a valid arbitration clause, instead referring the matter to the arbitral tribunal designated by the agreement to arbitrate. Article II of the New York Convention provides:

> 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

[4] 9 U.S.C. § 201.

> 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
>
> 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Thus, unless an agreement to arbitrate is "null and void, inoperative or incapable of being performed," the Convention requires the court of a state-party, such as the United States, to refer the parties to arbitration.

7. In Article VI(4) of the U.S.-Ecuador BIT, the United States and Ecuador explicitly agreed that the Treaty's arbitration clause would constitute an "agreement in writing" for purposes of Article II of the New York Convention, thereby making the Convention directly applicable to BIT arbitration proceedings. In the instant case, a federal court cannot find the BIT's arbitration clause "null and void, inoperative or incapable of being performed," and these are the only grounds available to it in dealing with Ecuador's Petition. Indeed, other arbitrations have already been brought under the U.S.-Ecuador BIT without the validity of its arbitration agreement ever having been challenged by Ecuador,[5] and the validity of the agreement to arbitrate is not even in dispute in this case.

The Unique International Legal Dimension of the Dispute

8. The arbitration clause in the instant case is contained in a bilateral investment treaty or BIT. BITs have become important instruments of U.S. policy for encouraging investment in foreign states to the benefit of the economic development of those states as well as to the profit of American investors; both of these objectives are American national interests. BITs oblige foreign governments to provide indispensable protections to United States investors and investments. Most important, they enable those investors, on their own initiative, to arbitrate any disputes with those foreign governments (1) before neutral international arbitral

[5] *See, e.g., Empresa Eléctrica del Ecuador, Inc. v. Republic of Ecuador*, Award, ICSID Case No. ARB/05/9 (2009); *Duke Energy Electroquil Partners and Electroquil SA v. Ecuador*, Award, ICSID Case No ARB/04/19; IIC 333 (2008); and *MCI Power Group LC and New Turbine Inc v. Ecuador*, Award, ICSID Case No ARB/03/6; IIC 296 (2007).

tribunals and not before the national courts of the foreign government; and (2) on the basis of the international law rules incorporated in the BIT and not the law of the host state. In this treaty scheme, BIT arbitration is a critical component, for without it U.S. investors would be subject to the domestic courts of the host state and hence would be less likely to make major investments in countries such as Ecuador. Thus the general national policy of support for arbitration is reinforced with respect to arbitral commitments in BITs. An arbitration agreement contained in a bilateral *treaty,* while subject to Chapter 2 of the FAA, like all other arbitration clauses, is part of a political program in the effectiveness of which the United States government has indicated that it has a manifest interest.

9. The AAA arbitration which Ecuador mentions in its Petition has no bearing on Chevron and TexPet's initiation of BIT arbitration with respect to the violation of the rights assured to investors in the U.S.-Ecuador BIT. That AAA arbitration arose out of a private contractual dispute, whereas the UNCITRAL arbitration arises from an alleged violation of treaty rights which the Republic of Ecuador had assured the United States it would afford to U.S. nationals. The issues raised by Chevron and TexPet's BIT action are not the same as those which were at dispute in the other arbitration to which Ecuador has pointed in support of its estoppel argument. Chevron and TexPet's AAA arbitration sought to enforce a contractual right of indemnification against Ecuador's state-owned oil company, Petrocuador. Furthermore, the Court's order staying that arbitration was made on the basis that Ecuador was not contractually bound by the terms of a 1965 Joint Operating Agreement. Chevron and TexPet, in their UNCITRAL action, take up a different issue, seeking, *inter alia*, the enforcement of Ecuador's commitment to provide fair and equitable treatment to Chevron and TexPet, to uphold investment agreements protected by the BIT, and to refrain from discriminatory measures that have deprived Chevron of its right to due process in Ecuador.[6] The material distinctiveness of the BIT arbitration seems clear to me but the important point is that Ecuador is bound by the U.S.-Ecuador BIT, so even were this Court to find the issues raised in the two arbitrations somehow similar, Ecuador's claim that Chevron and TexPet are collaterally estopped from bringing an investment claim against Ecuador under the U.S.-Ecuador BIT would still be an issue that had to be taken up by the UNCITRAL Tribunal, in the first instance, rather than by a federal court.

[6] *Chevron Corp. and Texaco Petroleum Co. v. Ecuador*, UNCITRAL, Notice of Arbitration (Sept. 23, 2009).

Competence-Competence and the Ecuador-U.S. Arbitration Agreement

10. Of particular relevance to this case is the principle of "competence-competence," or the competence of a tribunal to determine its competence. According to this principle, it is the arbitral tribunal which has the jurisdiction to determine, in the first instance, challenges to its own jurisdiction. The legal doctrine of competence-competence authorizes arbitrators to commence an arbitration and determine all disputes about its jurisdiction as long there is a valid and operable arbitration clause.[7] The principle of competence-competence is maintained in international arbitration because: (1) there is a presumption that the parties have conferred such jurisdictional power upon an arbitral tribunal when they entered into an arbitration agreement; and (2) competence to decide jurisdiction is an inherent faculty of all judicial bodies and essential to their ability to function. This fundamental tenet of international commercial and investment arbitration[8] serves to prevent untimely judicial intervention by national courts from obstructing the arbitration process in cases such as this one. If international law did not incorporate the competence-competence principle, preliminary disagreements about the jurisdiction of a tribunal would simply terminate the arbitration or send it to one or the other of the national courts of the parties, a consequence which the election of arbitration by the parties (and, in the case of BITs, its endorsement by two states) to a BIT had specifically sought to avoid.

11. It is clear from the language of the BIT that Ecuador and the United States had agreed that whichever tribunal a prospective claimant selected would have the competence to determine, in the first instance, questions of arbitrability. Article VI (4) of the Treaty is explicit that nationals and companies of either party, in investment disputes with the host government, are entitled, at their election, to direct access to binding international arbitration without first resorting to domestic courts, and that the ensuing arbitration will be conducted by application of international legal standards.

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[7] *See* Rene David, Arbitration in International Trade 10 (1985) (Trans. of Arbitrage dans le commerce international).

[8] The doctrine of competence-competence is well established in international investment law. It is explicitly mandated under the rules of the Court of Arbitration of the International Chamber of Commerce ("ICC"), the United Nations Commission on International Trade Law ("UNCITRAL"), and the International Centre for the Settlement of Investment Disputes ("ICSID"). Each of these organizations was established for the purpose of facilitating international trade and investment.

12. Article VI(3) allows for a United States investor to submit a dispute for settlement by binding arbitration to UNCITRAL, to the International Centre for the Settlement of Investment Disputes ("ICSID"), to ICSID's Additional Facility, or "to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute." The first three options are entirely a matter of choice by the United States investor.

13. Article VII of the BIT states, in pertinent part:

> 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 the United Nations Commission on International Trade Law (UNCITRAL), except to the extent modified by the Parties or by the arbitrators, shall govern.[9]

14. Article VIII of the BIT dictates that "[t]his Treaty shall not derogate from ... international legal obligations." In his statement addressed to the Senate upon its advice and consent to ratification of the Ecuador-U.S. BIT, President Clinton emphasized that the parties agree to "*international law standards* for ... the investors freedom to choose to resolve disputes with the host government through international arbitration."[10]

15. "International law standards," "applicable rules of international law" and "international legal obligations," as employed in the Treaty, all recognize an arbitral tribunal's competence to decide matters regarding its own jurisdiction. Even if one were to try to contest that, Article VIII itself indicates that Ecuador and the United States intended the forums available to the claimant to have competence-competence. This is because each forum for arbitration named in the U.S.-Ecuador BIT which Ecuador had agreed the United States investor has the option to invoke, incorporates the doctrine of competence-competence.

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[9] Emphasis added.

[10] Ecuador Bilateral Investment Treaty, SENATE TREATY Doc. 103-15, 1997, Message from the President of the United States. Emphasis added.

16. Article 41 of the ICSID Convention, to which Ecuador was a party at the time of the BIT's ratification, states:

> (1) The Tribunal shall be the judge of its own competence.
>
> (2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

17. Article 21 of the UNCITRAL Rules uses comparable language:

> 1. The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.
>
> 2. The arbitral tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of article 21, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

18. Thus, Ecuador consented to submit potential questions of arbitrability to an arbitral tribunal under the BIT, as the treaty expressly adopted international law standards where arbitration was concerned, and each of the arbitral institutions listed in the BIT has explicit rules incorporating the doctrine of competence-competence in their tribunals' jurisdictions.

19. Moreover, none of Ecuador's allegations go to the validity or operability of the arbitration clause itself and, hence, none even engage any of a United States' court's treaty and statutory powers not to order arbitration. To the contrary, Ecuador's allegations all implicate either procedural issues, with no relation to Article II(3) of the New York Convention, or constitute challenges to the primary investment agreements rather than to the validity of the arbitration agreement

itself. To be specific, Ecuador prays that the Court should stay the Arbitration initiated by Chevron and TexPet because the Arbitration is allegedly precluded by principles of waiver and estoppel.[11] These are precisely the kinds of issues to be taken up, at this stage, by the arbitral tribunal itself and not to be preempted by a domestic court.

20. Ecuador does not allege that the claims that Chevron and TexPet have brought against Ecuador in the UNCITRAL Arbitration are beyond the proper definition of an "investment dispute" under Article VI(I) of the BIT—therefore falling outside the ambit of the agreement to arbitrate. But the point of emphasis is that, even if an "investment dispute" did not exist, it is the arbitral tribunal itself, and not a national court such as this Court, which has the competence to decline jurisdiction. Similarly, if it proves to be beyond the arbitral Tribunal's power to grant a form of relief to Chevron and TexPet which would affect the rights of persons not party to the BIT's arbitration clause, as Petitioner argues,[12] it is within the arbitral Tribunal's competence to decline jurisdiction over such matters.

21. In the event that the Tribunal were to manifestly exceed its jurisdiction, the international arbitral system which Ecuador accepted with respect to U.S. investors provides ample and effective checks on an arbitral tribunal's excesses. Petitioner would then have the opportunity to contest the enforcement of the award in the proper jurisdiction. The point of emphasis is that a domestic court is not the appropriate venue, at this phase of the arbitral process, in which to try to contest arbitrability of the questions raised. Indeed, a finding in a U.S. judicial venue at this phase of the dispute that certain of Chevron and TexPet's claims are not arbitrable would deprive Chevron and TexPet of their right to arbitrate as set forth in the BIT and could, ironically, constitute a treaty violation on the part of the United States. It is likely for that reason that, to date, no U.S. federal court has ever sought to enjoin a party from pursuing a BIT arbitration.

Conclusions

22. In my opinion, the Court should decline to enjoin Chevron and TexPet from pursuing their right to arbitration under the BIT for the following reasons:

a. The New York Convention, as incorporated in United States law, dictates that federal courts "shall recognize an agreement in

[11] *Id.* at para. 36.
[12] *See* Petition to Stay Arbitration at para. 37.

writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship ...." Ecuador has a defined legal relationship with Chevron and TexPet under the various investment agreements and an obligation to arbitrate under the U.S.-Ecuador BIT, which guarantees investors the right to submit a dispute to arbitration.

b. The only grounds for a federal court to intervene and to prevent an arbitration are if the agreement to arbitrate is "null and void, inoperative or incapable of being performed." None of those contingencies applies in the instant case. Chevron and TexPet's claims arise from a BIT, negotiated and executed by the federal government. Moreover, for the Court to look to domestic jurisprudence to attempt to circumvent the validity of the BIT's agreement to arbitrate would constitute a violation of international law.

c. Under the doctrine of competence-competence, which is incorporated in the Ecuador-U.S. BIT by means of its designation of international legal standards and the rules of the arbitral institutions which it makes available for the investor's choice, an arbitral tribunal has the right to determine its own jurisdiction in the first instance. Thus it is the tribunal selected by the claimant which must decide whether the complaints brought by Chevron and TexPet are properly within the scope of the BIT.

23. Other possible reasons for dismissing Ecuador's petition are beyond the scope of my assignment to report on international law.

24. In closing, I affirm that the above represents my independent opinion on the matters in the instant case which implicate international law.

I declare under penalty of perjury that the foregoing is true and correct. Executed January 19, 2010 at New Haven, Connecticut.

W. Michael Reisman

BETH BARNES
NOTARY PUBLIC
MY COMMISSION EXPIRES OCT. 31, 2011

Beth A. Barnes, Notary Public
January 19, 2010