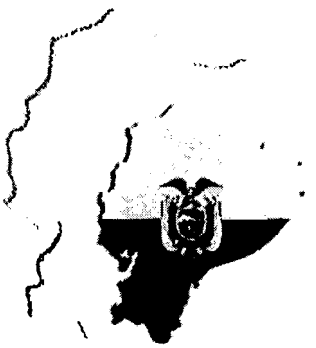
REQUEST

OF THE REPUBLIC OF ECUADOR
TO THE UNITED STATES OF AMERICA

PURSUANT TO ARTICLE VII OF THE TREATY BETWEEN
THE UNITED STATES OF AMERICA AND THE REPUBLIC OF ECUADOR
CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION
OF INVESTMENT



Request of the Republic of Ecuador

INTRODUCTION.

1. Because certain questions concerning the interpretation and application of the Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment (hereinafter the "Treaty")[1] have not been resolved through consultations or other diplomatic channels, the Republic of Ecuador hereby requests that these questions, described below, be submitted to an arbitral tribunal for binding decision in accordance with the applicable rules of international law.

THE AGREEMENT OUT OF WHICH THE DISPUTE ARISES.

2. The issues in dispute arise out of the Treaty, and in particular the interpretation and application of paragraph 7 of Article II of the Treaty, which provides as follows:

> *Article VII*
>
> *7. Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.*

THE ARBITRATION AGREEMENT.

3. The Parties' agreement to arbitrate is set forth in Article VII of the Treaty, as follows:

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

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[1] Treaty Between the Republic of Ecuador and the United States of America Concerning the Encouragement and Reciprocal Protection of Investment, *signed at* Washington, D.C. 27 Aug. 1993, *entered into force* 11 May 1997, attached as Annex A.

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.

4. Expenses incurred by the Chairman, the other arbitrators, and other costs of the proceedings shall be paid for equally by the Parties. The Tribunal may, however, at its discretion, direct that a higher proportion of the costs be paid by one of the Parties.

THE NATURE OF THE REQUEST.

4. This Request for Arbitration constitutes a request pursuant to paragraph 1 of Article VII of the Treaty, set forth above. It also constitutes the Republic of Ecuador's Notice of Arbitration under Article 3 of the arbitration rules of the United Nations Commission on International Trade Law adopted on 28 April 1976 (hereinafter, the "UNCITRAL Rules"), which govern the arbitration pursuant to paragraph 1 of Article VII of the Treaty, there being no agreement to the contrary. It also constitutes the Republic of Ecuador's demand under paragraph (a) of Article 3 of the UNCITRAL Rules that the dispute be referred to arbitration. Finally, it also contains, and thereby constitutes, the Republic of Ecuador's Statement of Claim pursuant to Article 18 of the UNCITRAL Rules.

THE PARTIES AND THEIR ADDRESSES.

5. The parties, and their addresses (for the time being), are as follows:

Claimant:

Republic of Ecuador
c/o Dr. Diego García Carrión
Procurador General del Estado
Robles 731 y Amazonas, 2° Piso
Quito, Ecuador

and

Respondent:

United States of America
c/o The Honorable Hillary Clinton
Secretary of State
Washington, D.C.

STATEMENT OF FACTS SUPPORTING THE CLAIM.

6. On March 30, 2010, an arbitral tribunal, constituted under the UNCITRAL Rules pursuant to paragraph 3(a)(iii) of Article VI of the Treaty, rendered a partial award on claims raised under the Treaty against the Republic of Ecuador by Chevron Corporation and Texaco Petroleum Company.[2]

7. By Note No. 13528-GM/2010 dated June 8, 2010,[3] the Government of the Republic of Ecuador informed the Government of the United States of America that it disagrees with certain aspects of the partial award, expressly specifying its preoccupation and particular concern with what it considered to be the tribunal's erroneous interpretation and application of paragraph 7 of Article II of the Treaty, quoted above. On the basis of that erroneous interpretation and application, the partial award held that the Republic of Ecuador failed to comply with its obligations when its courts did not render judgments in six lawsuits lodged by Texaco Petroleum Company in the years before claimants commenced their arbitration under the Treaty, including a period before the Treaty entered into force.

8. The Note explained that the Government of the Republic of Ecuador considers that the text of paragraph 7 of Article II of the Treaty reflects the Parties' intention to incorporate into the Treaty pre-existing obligations under customary international law relating to the prohibition against denial of justice by providing an effective framework or system under which claims may be asserted and rights enforced; that by agreeing to this text the Parties did not intend to obligate themselves to assure that the framework or system provided is effective in particular cases, which is a matter regulated by other provisions of the Treaty incorporating customary international law principles; and that paragraph 7 of Article II may not properly be applied to the ascertainment of compensation due for losses suffered as a result of a violation of its requirements in a manner that determines rights under the law of the respective Party to be different from what the courts of that Party have determined, or would likely determine, it to be.

9. The Note further explained that the Government of the Republic of Ecuador considers that the partial award:

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[2] *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador*, PCA Case No. AA277 (Partial Award of 30 March, 2010) (Böckstiegel, Van den Berg, Brower) *available at* http://ita.law.uvic.ca/documents/ChevronTexacoEcuadorPartialAward.PDF

[3] Annex B (delivered by Note No. 4-2-87/10 on June 11, 2010).

- erroneously interprets the duties reflected in the terms of paragraph 7 of Article II to be far broader than those reflected in the requirements just mentioned, to exceed those necessary to implement customary international law and to constitute a guarantee of treatment in particular cases; and

- erroneously interprets and applies the provision to allow the compensation due for a violation to be based upon determinations of rights under the respective law of the United States or Ecuador that are at odds with actual or likely determinations of the United States or Ecuadorian courts.

10. The Note gave specific examples of how the partial award incorrectly interpreted and applied paragraph 7 of Article II, pointing out that the partial award:

- states that "Article II(7) of the [Treaty] constitutes a lex specialis with greater specificity than the customary law standard of denial of justice" (¶ 275), that "a distinct and potentially less-demanding test is applicable under this provision as compared to denial of justice under customary international law," which sets "a high threshold" (¶ 244), and thus that "a violation of Article II(7) . . . may not always be sufficient to find a denial of justice under customary international law;"

- rejects the position that paragraph 7 of Article II requires only the existence and availability a framework or system under which claims may effectively be asserted and rights enforced and that, while individual experiences may be evidence of systemic inadequacies, they cannot themselves constitute breaches of the provision, holding that paragraph 7 of Article II allows arbitral "review of investor treatment in individual cases" (¶ 245);

- although acknowledging that "principles of customary international law, such as the principle of 'judicial finality'[, require] complete exhaustion of local remedies in order to establish State Responsibility for the acts of a State's judiciary" (¶ 321), rejects the contention that, in reviewing treatment in individual cases, it must be proven that there has been "a strict exhaustion of local remedies in order for the Tribunal to find a breach of Article II(7)" (¶ 268), holding that claims for violations of paragraph 7 of Article II "are not subject to that same strict requirement of exhaustion" (¶ 321); and

- although acknowledging that "the threshold of 'effectiveness' stipulated by [paragraph 7 of Article II] requires that a measure of deference be afforded to the domestic justice system" (¶ 247), holding that a tribunal "owes . . . no deference" to any judgment issued by national courts after the date by which a violative delay has been determined to have occurred (¶ 377) and, on this basis, disregarding Ecuadorian court decisions dismissing some of the lawsuits for exceeding the period of prescription applicable under Ecuadorian law (because the tribunal "does not agree with the [court's] complex reasoning") (¶ 387) and for lack of merit under applicable Ecuadorian law principles of contract interpretation (¶ 465).

11. Citing the principle of international law reflected in Article 31(3) of the Vienna Convention on the Law of Treaties that treaty parties may agree on interpretations of the terms of their treaty that are highly authoritative,[4] and the principle reflected in Article 26 of the Vienna Convention that "[e]very treaty in force . . . must be performed by [the parties] in good faith,"[5] including preventing any misinterpretation and misapplication of their treaty that results in harm to one of them, the Note expressed the request of the Government of the Republic of Ecuador that the Government of the United States of America confirm by reply note its agreement that:

> "*1. the obligations under Article II(7) of the Treaty are not greater than those required to implement obligations under the standards of customary international law;*
>
> *2. the Article II(7) requirement of effective means refers to the provision of a framework or system under which claims may be asserted and rights enforced, but does not create obligations to the Parties to the Treaty to assure that the framework or system provided is effective in particular cases; and*
>
> *3. the fixing of compensation due for losses suffered as a result of a violation of the requirements of Article II(7) cannot be based upon a determination of rights under the law of the respective Party that is different from what the courts of that Party have determined or would likely determine, and thus do not permit arbitral tribunals under Article VI.3 of the Treaty to substitute their judgment of rights under municipal law for the judgments of municipal courts.*"

12. The Note also gave notice that, if such a confirming note was not forthcoming, or if the Government of the United States did not otherwise agree with the interpretations of paragraph 7 of Article II of the Treaty stated by the Government of the Republic of Ecuador, an unresolved dispute must be considered to exist between the Government of the Republic of Ecuador and the Government of the United States of America concerning the interpretation and application of the Treaty. No such confirming note was received by the Government of the Republic of Ecuador.

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[4] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) 1155 U.N.T.S. 331, *entered into force* 27 Jan. 1980 ("There shall be taken into account [in the interpretation of a treaty], together with the context[,] any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.").

[5] *Id.*, art. 26.

13. Subsequent to the delivery of the Note, the Chief of Mission of the Ecuadorian Embassy in Washington raised its preoccupations with and concerns about these unresolved issues in a meeting with the Legal Adviser of the United States Department of State and inquired about the position of the Government of the United States of America with regard to them. In a subsequent conversation initiated by him, the State Department Legal Adviser informed the Chief of Mission of the Ecuadorian Embassy "that his Government will not rule on this matter," making clear that no further response to, and no consultation or negotiation on, the issues raised could be expected.

THE GENERAL NATURE OF THE DISPUTE.

14. A relevant dispute exists between the Parties concerning the interpretation or application of the Treaty which has not been resolved through consultations or other diplomatic channels because the Republic of Ecuador's express specification of its preoccupations and concerns in the matter, and its positions on the proper interpretation and application of paragraph 7 of Article II of the Treaty, were made and directly communicated to the Government of the United States in circumstances (including Article V of the Treaty[6]) where a response was called for, but were met with a refusal by the Government of the United States to enter into any discussion on the matter. The Republic of Ecuador's efforts to seek a resolution through consultations or other diplomatic channels had therefore proven unsuccessful and the matter remains unresolved. This Request for Arbitration seeks resolution of the dispute, in the interest of both Parties, by means of an authoritative determination on the proper interpretation and application of paragraph 7 of Article II of the Treaty that accords with what the Republic of Ecuador considers to have been the intentions of the Parties at the time when the Treaty was concluded.

POINTS AT ISSUE AND THE RELIEF SOUGHT.

15. The Republic of Ecuador respectfully seeks an award determining the following points at issue:

A. that 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;

B. that the Parties' obligation under paragraph 7 of Article II of the Treaty to provide "effective means" requires only that they Parties provide a framework

[6] "The Parties agree to consult promptly, on the request of either, to resolve any disputes in connection with the Treaty, or to discuss any matter relating to the interpretation or application of the Treaty."

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; and

C. that 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.

REPRESENTATIVES OF THE REPUBLIC OF ECUADOR AND ADDRESS FOR NOTIFICATION.

16. Counsel of the Republic of Ecuador for purposes of representation in this matter are:

Diego García Carrión, Procurador General del Estado
Dr. Francisco Grijalva, Director de Patrocinio Internacional
Procuraduría General del Estado
Robles 731 y Amazonas, 2° Piso
Quito, Ecuador
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APPOINTMENT OF ARBITRATORS.

17. In accordance with paragraph 2 of Article VII of the Treaty, the tribunal shall be comprised of three members, one appointed by each of the parties, respectively, and a third arbitrator, who shall act as chair, appointed by the other two arbitrators. Failing timely appointment by the other two arbitrators, the third arbitrator shall be appointed in accordance with the UNCITRAL Rules applicable, *mutatis mutandis*, to the appointment of three-member tribunals. Also in accordance with this provision, the appointing authority referred to in the UNCITRAL Rules shall be the Secretary General of the International Centre for Settlement of Investment Disputes.

18. The Republic of Ecuador will appoint an arbitrator, and invites the United States also to appoint an arbitrator, within two months of delivery of this Request for Arbitration.

Delivered on June 28, 2011

ANNEX A

Ecuador Bilateral Investment Treaty

Signed August 27, 1993; Entered into Force May 11, 1997

103D CONGRESS *1st Session*

SENATE TREATY Doc. 103-15

INVESTMENT TREATY WITH THE REPUBLIC OF ECUADOR

MESSAGE
FROM
THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

THE TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF ECUADOR CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT, WITH PROTOCOL AND A RELATED EXCHANGE OF LETTERS, SIGNED AT WASHINGTON ON AUGUST 27,1993

September 10, 1993.--Treaty was read the first time and, together with the accompanying papers, referred to the Committee on Foreign Relations and ordered to be printed for the use of the Senate

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1993
69-118

THE WHITE HOUSE, *September 10, 1993.*
To the Senate of the United States:

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith the Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, with Protocol and related exchange of letters, signed at Washington on August 27, 1993. Also transmitted for the information of the Senate is the report of the Department of State with respect to this Treaty.

This is the first bilateral investment treaty with an Andean Pact country, and the second such Treaty signed with a South American country. The Treaty is designed to protect U.S. investment and en-courage private sector development in Ecuador, and support the economic reforms taking place there. The Treaty's approach to dispute settlement will serve as a model for negotiations with other Andean Pact countries.

The Treaty is fully consistent with U.S. policy toward inter-national and domestic investment. A

specific tenet, reflected in this Treaty, is that U.S. investment abroad and foreign investment in the United States should receive fair, equitable, and nondiscriminatory treatment. Under this Treaty, the Parties also agree to international law standards for expropriation and compensation for expropriation, free transfers of funds associated with investments, freedom of investments from performance requirements, and the investors freedom to choose to resolve disputes with the host government through international arbitration.

I recommend that the Senate consider this Treaty as soon as possible, and give its advice and consent to ratification of the Treaty, with Protocol and related exchange of letters, at an early date.

WILLIAM J. CLINTON.

LETTER OF SUBMITTAL

S/S 9320385
DEPARTMENT OF STATE,
Washington, DC, September 7, 1993.

The PRESIDENT
The White House.

THE PRESIDENT: I have the honor to submit to you the Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of In-vestment, with Protocol and a related exchange of letters, signed at Washington on August 27, 1993. Irecommend this Treaty, with Protocol and exchange of letters, be transmitted to the Senate for its advice and consent to ratification.

The bilateral investment treaty (BIT) with Ecuador represents an important milestone in the BIT program. It is the first bilateral investment treaty signed with a member of the Andean Pact, and the second BIT signed with a South American country. (A BIT was signed with Argentina in 1991.) This Treaty will assist Ecuador in its efforts to develop its economy by creating conditions more favorable for U.S. private investment, helping to attract such investment and, thus, strengthening the development of the private sector. It is U.S. policy, however, to advise potential treaty partners during BIT negotiations that conclusion of a BIT does not necessarily result in immediate increases in private U.S. investment flows.

To date, 13 BITs are in force for the United States--with Bangladesh, Cameroon, the Czech Republic, Egypt, Grenada, Morocco, Panama, Senegal, Slovakia, Sri Lanka, Tunisia, Turkey, and Zaire. In addition to the Ecuador Treaty, the United States has signed, but not yet brought into force, BITs with Argentina, Armenia, Bulgaria, the Congo, Haiti, Kazakhstan, the Kyrgyz Republic, Moldova, Romania, and Russia--and a business and economic relations treaty with Poland, which contains the BIT elements.

The Office of the United States Trade Representative and the Department of State jointly led this BIT negotiation, with assistance from the Department of Commerce, Treasury, and OPIC.

THE U.S.-ECUADOR TREATY

The Treaty with Ecuador satisfies the principal BIT objectives, which are:

-- Investments of nationals and companies of either Party in the territory of the other Party (investments) receive the better of national treatment or most-favored-nation (MFN) treatment both on establishment and thereafter, subject to certain specified exceptions;

-- Investments are guaranteed freedom from performance requirements, including requirements to use local products or to export goods;

-- Expropriation can occur only in accordance with international law standards: for a public purpose; in a nondiscriminatory manner; under due process of law; and upon payment of prompt, adequate, and effective compensation;

-- Investments are guaranteed the unrestricted transfer of funds in a freely usable currency; and

-- Nationals and companies of either Party, in investment disputes with the host government, have access to binding international arbitration, without first resorting to domestic courts.

The U.S.-Ecuador Treaty eliminates Article VIII of the prototype text. This language had excluded from the dispute settlement provisions of the BIT those disputes arising under the export credit, guarantee or insurance programs of the Export-Import Bank of the United States, as well as those arising under any other such official programs pursuant to which the Parties agreed to other means of settling disputes. The Export-Import Bank, the Overseas Private Investment Corporation and other relevant government agencies indicated prior to this negotiation that they saw no need to maintain such a provision.

The U.S.-Ecuador Treaty also differs from the prototype in that it includes provisions at Article 1, paragraph 1 (f) and (g), and Article II, paragraph 2, which clarify and extend the requirements of the Treaty with respect to state enterprises. This new language is discussed in further detail in the, article-by-article analysis of the Treaty below.

In addition, the Treaty also includes minor clarifying changes to the text of Article VI, paragraph 2; a provision to preserve contractual arrangements made as part of any debt-equity conversion program in Ecuador, in the Protocol; Ecuador's exceptions to the obligation to provide national treatment, in the Protocol; and a related exchange of letters. These elements are further described below.

The following is an article-by-article analysis of the provisions of the Treaty:

Preamble
The Preamble states the goals of the Treaty. The Treaty is premised on the view that an open investment policy leads to economic growth. These goals include economic cooperation, increased flow of capital, a stable framework for investment, development of respect for internationally-recognized worker rights, and maximum efficiency in the use of economic resources. While the Preamble does not impose binding obligations, its statement of goals may serve to assist in the interpretation of the Treaty.

Article I (Definitions)
Article I sets out definitions for terms used throughout the Treaty. As a general matter, they are designed to be broad and inclusive in nature.

Investment

The Treaty's definition of investment is broad, recognizing that investment can take a wide variety of forms. It covers investments that are owned or controlled by nationals or companies of one of the Treaty partners in the territory of the other. Investments can be made either directly or indirectly through one or more subsidiaries, including those of third countries. Control is not specifically defined in the Treaty. Ownership of over 50 percent of the voting stock of a company would normally convey control, but in many cases the requirement could be satisfied by less than that proportion.

The definition provides a non-exclusive list of assets, claims and rights that constitute investment. These include both tangible and intangible property, interests in a company or its assets, "a claim to money or performance having economic value, and associated with an investment," intellectual property rights, and any right conferred by law or contract (such as government-issued licenses and permits). The requirement that a "claim to money" be associated with an investment excludes claims arising solely from trade transactions, such as a simple movement of goods across a border, from being considered investments covered by the Treaty.

Under paragraph 2 of Article I, either country may deny the benefits of the Treaty to investments by companies established in the other that are owned or controlled by nationals of a third country if 1) the company is a mere shell, without substantial business activities in the home country, or 2) the third country is one with which the denying Party does not maintain normal economic relations. For example, at this time the United States does not maintain normal economic relations with, inter alia, Cuba or Libya.

Paragraph 3 confirms that any alternation in the form in which as asset is invested or reinvested shall not affect its character as investment. For example, a change in the corporate form of an investment will not deprive it of protection under the Treaty.

Company
The definition of "company" is broad in order to cover virtually any type of legal entity, including any corporation, company, association, or other entity that is organized under the laws and regulations of a Party. The definition also ensures that companies of a Party that establish investments in the territory of the other Party have their investments covered by the Treaty, even if the parent company is ultimately owned by non-Party nationals, although the other Party may deny the benefits of the Treaty in the limited circumstances set forth in Article 1, paragraph 2. Likewise, a company of a third country that is owned or controlled by nationals or companies of a Party. will also be covered. The definition also covers charitable and non-profit entities, as well as entities that are owned or controlled by the state.

National
The Treaty defines "national" as a natural person who is a national of a Party under its own laws. Under U.S. law, the term "national" is broader than the term "citizen;" for example, a native of America Samoa is a national of the United States, but not a citizen.

Return
"Return" is defined as "an amount derived from or associated with an investment," and the Treaty provides a non-exclusive list capital gains; or other fees; provides breadth to the Treaty's transfer provisions in Article IV.

Associated Activities
The Treaty recognizes that the operation of an investment requires protections extending beyond the investment to numerous related activities. This definition provides an illustrative list of such investor activities, including operating a business facility, borrowing money, disposing of property, issuing stock and purchasing . These activities are covered by Article II, paragraph 1, which guarantees the better of national or MFN treatment for investments and associated activities.

State Enterprise
"State enterprise" is defined as an enterprise owned, or controlled through ownership interests, by a Party.

Delegation
"Delegation" is defined to include a legislative grant, government order, directive or other act which transfers governmental authority to a state enterprise or authorizes a state enterprise to exercise such authority.

The definitions of "state enterprise" and "delegation" are included to clarify the scope of the obligations of Article II, paragraph 2, which provides that any governmental authority delegated to a must be exercised in a manner consistent with the Party obligations under the Treaty.

Article II (Treatment)
Article II contains the Treaty's major obligations with respect to the treatment of investment.

Paragraph 1 generally ensures the better of MFN or national treatment in both the entry and post-entry phases of investment. It thus prohibits both the screening of proposed foreign investment on the basis of nationality and non-discriminatory measures once the investment has been made, subject to specific exceptions provided for in a separate Protocol. The United-States and Ecuador have both reserved certain exceptions in the Protocol to the Treaty, the provisions of which are discussed in the section entitled "Protocol."

Paragraph 2 is designed to ensure that a Party cannot utilize state owned or controlled enterprises to circumvent its obligations under the Treaty. To this end, it requires each Party to observe its treaty obligations even when it chooses, for administrative or other reasons, to assign some portion of its authority to a state enterprise, such as the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees or other charges. Paragraph 2 also supports competitive equality for investments by requiring that a Party ensure that state enterprises accord the better of national or MFN treatment in the sale of its goods or services in the Party's territory.

Paragraph 3 guarantees that investment shall be granted "fair and equitable" treatment. It also prohibits Parties from impairing, through arbitrary or discriminatory means, the management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal of investment. This paragraph also sets out a minimum standard of treatment based on customary international law.

In paragraph 3(c), each Party pledges to respect any obligations it may have entered into with respect to investments. Thus, in dispute settlement under Articles VI or VII, a Party would be foreclosed from arguing, on the basis of sovereignty, that it may unilaterally ignore obligations to such investments.

Paragraph 4 allows, subject to each Party's immigration laws and the entry of each Party's nationals into the territory of the other for purposes linked to investment and involving the commitment of a "substantial amount of capital." This paragraph serves to render nationals of a BIT partner eligible for treaty investor visas under U.S. immigration law and guarantees similar treatment for U.S. investors.

Paragraph 5 guarantees companies the right to engage top managerial personnel of their choice, regardless of nationality.

Under paragraph 6, neither Party may impose performance requirements such as those conditioning investment on the export of goods produced or the local purchase of goods or services. Such requirements are major burdens on investors.

Paragraph 7 provides that each Party must provide effective means of asserting rights and claims with respect to investment, investment agreements and any investment authorizations. Under paragraph 8, each Party must make publicly available all laws, administrative practices. and adjudicatory procedures pertaining to or affecting investments.

Paragraph 9 recognizes that under the U.S. federal system, States of the United States may, in some instances, treat out-of-State residents and corporations in a different manner than they treat in-State residents and corporations. The Treaty provides that the national treatment commitment, with respect to the States, means treatment no less favorable than that provided to U.S. out-of-State residents and corporations.

Paragraph 10 limits the Article's MFN obligation by providing that it will not apply to advantages accorded by either Party to third countries by virtue of a Party's membership in a free trade area or customs union or a future multilateral agreement under the auspices of the General Agreement on Tariffs and Trade (GATT). The free trade area exception in this Treaty is analogous to the exception provided for with respect to trade in the GATT.

Article III (Expropriation)
Article III incorporates into the Treaty the international law standards for expropriation and compensation.

Paragraph 1 describes the general rights of investors and nationalization. These rights also apply standards to direct or indirect state measures "tantamount to expropriation or nationalization," and thus apply to "creeping expropriations" that result in a substantial deprivation of the benefit of investment without taking of the title to the investment.

Five requirements are listed. Expropriation must be for a public purpose; be carried out in a non-discriminatory manner; be subject to prompt, adequate, and effective compensation; be subject to due process; and be accorded the treatment provided in the standards of Article 11 (3). (These standards guarantee fair and equitable treatment and prohibit the arbitrary and discriminatory impairment of investment in its broadest sense.)

The second sentence of paragraph 1 clarifies the meaning of "prompt, adequate, and effective compensation." Compensation must be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known (whichever is earlier); be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable; be freely transferable; and be calculated in a freely usable currency on the basis of the prevailing market rate of exchange.

Paragraph 2 entitles an investor claiming that an expropriation has occurred to prompt judicial or administrative review of the claim in the host country, including a determination of whether they conform to international law. to the better of national or MFN losses related to war or civil disturb, does not specify an absolute obligations to pay compensation for such losses.

Article IV (Transfers)
Article IV protects investors from certain government exchange controls limiting current account and capital account transfers.

In Paragraph 1, the Parties agree to permit "transfers related to an investment to be made freely and without delay into and out of its territory." Paragraph 1 also provides a non-exclusive, list of transfers that must be allowed, including returns (as defined in Article 1); payments made in compensation for expropriation (as defined in Article III); payments arising out of an investment dispute; payments made under a contract, "including the amortization of principle and interest payments on a loan; proceeds from the liquidation of all or part of an investment; and additional

contributions to capital for the maintenance or development of an investment.

Paragraph 2 provides that transfers are to be made in a "freely usable currency" at the prevailing market rate of exchange on the date of transfer with respect to spot transactions in the currency to be transferred. "Freely usable" is a standard of the International Monetary Fund; at present there are five such "freely usable" currencies: the U.S. dollar, Japanese yen, German mark, French franc and British pound sterling.

Paragraph 3 recognizes that notwithstanding these guarantees, Parties may maintain certain laws or obligations that could affect transfers with respect to investments. It provides that the Parties may require reports of currency transfers and impose income taxes by such means as a withholding tax on dividends. It also recognizes that Parties may protect the rights of creditors and ensure the satisfaction of judgments in adjudicatory proceedings through their laws, even if such measures interfere with transfers. Such laws must be applied in an equitable, nondiscriminatory and good faith manner.

Article V (State-State, Consultations)
Article V provides for prompt consultation between the Parties, at either Party's request, on any matter relating to the interpretation or application of the Treaty.

Article VI (State-Investor Dispute Resolution)
Article VI sets forth several means by which disputes between an investor and the host country may be settled.

Article VI procedures apply to an "investment dispute," a term which covers any dispute arising out of or relating to an investment authorization, or an agreement between the investor and the host government or to rights granted by the Treaty with respect to an investment.

When a dispute arises, Article VI provides that the disputants should initially seek to resolve the dispute by consultation and negotiation, which may include non-binding third party procedures. Should such consultations fail, paragraphs 2 and 3 set forth the investor's range of choices of dispute settlement. The investor may make an exclusive and irrevocable choice to: (1) employ one of the several arbitration procedures outlined in the Treaty; (2) submit the dispute to procedures previously agreed upon by the investment and the host country government in an investment agreement or otherwise; or (3) submits the dispute to the local courts or administrative tribunals of the host country. Paragraph 2 of Article VI of the Ecuador BIT adds to the prototype BIT language a phrase reiterating that the investor may choose among these three alternatives. This addition does not alter the operation of this provision. Under the Treaty, the investor can take an investment dispute to binding arbitration after six months from the date that the dispute arises. The investor may choose between the International Center for the Settlement of Investment Disputes (ICSID) (if the host country has joined the Centre--otherwise the ICSID Additional Facility is available) and ad hoc arbitration using the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). The Treaty also recognizes that, by mutual agreement, the parties to the dispute may choose another arbitral institution or set of arbitral rules.

Paragraph 4 contains the consent of the United States and Ecuador to the submission of investment disputes to binding arbitration in accordance with the choice of investor.

Paragraph 5 provides that a non-ICSID arbitration shall take place in a country that is a party to the United Nations Convention the Recognition and Enforcement of Arbitral Awards. This requirement enhances the ability of investors to enforce their arbitral awards. In addition, paragraph 6 includes a separate commitment by each Party to enforce arbitral awards rendered pursuant to Article VI procedures.

Paragraph 7 provides that in any dispute settlement procedure, a Party may not invoke as a defense, counterclaim, set-off or in any other manner the fact that the company or national has received or will be reimbursed for the same damages under an insurance or guarantee contract.

Paragraph 8 is included in the Treaty to ensure that ICSID arbitration will be available for investors making investments in the form of companies created under the laws of the Party with which in there is a dispute.

Article VII (State-State Arbitration)
Article VII provides for binding arbitration of disputes between the United States and Ecuador that are not resolved through consultations or other diplomatic channels. The article constitutes each Party's prior consent to arbitration.

Article VIII (Preservation of Rights)
Article VIII clarifies that the Treaty is meant only to establish a floor for the treatment of foreign investment. An investor may be entitled to more favorable treatment through domestic legislation, other international legal obligations, or a specific obligation assumed by a Party with respect to that investor. this provision ensures that the Treaty will not be interpreted to derogate from any entitlement to such more favorable treatment.

Article IX (Measures Not Precluded)
The first paragraph of Article IX reserves the right of a Party to take measures for the maintenance of public order and the fulfillment of its international obligations with respect to international peace and security, as well as those measures it regards as necessary for the protection of its own essential security interests. These provisions are common in international investment agreements.

The maintenance of public order would include measures taken pursuant to a Party's policy powers to ensure public health and safety. International obligations with respect to peace and security would include, for example, obligations for rising out of Chapter VII of the United National Charter. Measures permitted by the provision on the protection of a Party's essential security interests would include security-related actions taken in time of war or national emergency; actions not an arising from a state of war or national emergency must have a clear and direct relationship to the essential security interest of the Party involved.

The second paragraph allows a Party to promulgate special formalities in connection with the establishment of investment, provided that the formalities do not impair the substance of any Treaty rights. Such formalities would include, for example, U.S. reporting requirements for certain inward investment.

Article X (Tax Policies)
The Treaty exhorts both countries to provide fair and equitable treatment to investors with respect to tax policies. However, tax matters are generally excluded from the coverage of the prototype BIT, based on the assumption that tax matter are properly covered in bilateral tax treaties.

The Treaty, and particularly the dispute settlement provisions, do apply to tax matters in three areas, to the extent they are not subject to the dispute settlement provisions of a tax treaty, or, if so subject, have been raised under a tax treaty's dispute settlement procedures and are not resolved in a reasonable period of time.

The three areas where the Treaty could apply to tax matters are expropriation (Article III), transfers (Article IV) and the observance and enforcement of terms of an investment agreement or authorization (Article VI (1) (a) or (b)). These three areas are important for investors, and two of the three expropriatory taxation and tax provisions contained in an investment agreement or authorization are not typically addressed in tax treaties.

Article XI (Application to Political Subdivisions)
Article XI makes clear that the obligations of the Treaty are applicable to all political subdivisions of the Parties, such as provincial, state and local governments.

Article XII (Entry into Force, Duration and Termination)
The Treaty enters into force thirty days after exchange of instruments of ratification and continues in force for a period of ten years. From the date of its entry into force, the Treaty applies to existing and future investments. After the ten-year term, the Treaty will continue in force unless terminated by either Party upon one year's notice. If terminated, all existing investments would continue to be protected under the Treaty for ten years thereafter.

Protocol
The Treaty addresses debt-equity programs, under which an investor purchases debt of a country at a discount and receives local currency in an amount equivalent to the debt's face value. These programs normally require that the investor postpone repatriating the investment made with the local currency obtained in the conversion. Investors may choose to enter into such programs because they obtain more local currency than they otherwise would receive for a given amount of foreign exchange. The treaty's Protocol provides that any deferral of transfers agreed to under debt-equity conversion programs would not be superseded by the treaty's guarantee of transfers without delay. This provision in the Protocol was added at the suggestion of the United States. The United States has been generally supportive of debt-equity conversion programs as part of the overall solution to the debt problem and has considered them to be an important element in commercial bank financing programs which reduce debt and debt service.

U.S. bilateral investment treaties allow for sectoral exceptions to national and MFN treatment. The U.S. exceptions are designed to protect governmental regulatory interests and to accommodate the derogations from national treatment and, in some cases, MFN treatment in existing federal law.

The U.S. portion of the Protocol contains a list of sectors and matters in which, for various legal and historical reasons, the federal government or the states may not necessarily treat investments of nationals or companies of the other Party as they do U.S. investments or investments from a third country. The U.S. exceptions from national treatment are: air transportation; ocean and coastal shipping; banking; insurance; government grants; government insurance and loan programs; energy and power production; local customhouse brokers; owners of real property; ownership and operation of broadcast stations; ownership of shares in the Communications Satellite Corporation; the provision of common carrier telephone and telegraph services; the provision of submarine cable services; use of land and natural resources; mining on the public domain; maritime and maritime-related services; and, primary dealership in U.S. government securities.

Ownership of real property, mining on the public domain, maritime and maritime-related services, and primary dealership in U.S. government securities are excluded from MFN as well as national treatment commitments. The last three sectors are exempted by the United States from MFN treatment obligations because of U.S. laws that require reciprocity. Enforcement of reciprocity provisions would deny both national and MFN treatment.

The listing of a sector does not necessarily signify that domestic laws have entirely reserved it for nationals. Future restrictions or limitations on foreign investment are only permitted in the sectors listed; must be made on an MFN basis,, unless otherwise specified in the Protocol; and must be appropriately notified. Any additional restrictions or limitations which a Party may adopt with respect to listed sectors may not affect existing investments. The Ecuador Treaty adds language to the prototype BIT reiterating that listing an exception to national treatment does not relieve the

Parties from their obligations to accord national and most-favored-nation treatment.

Because the U.S. exceptions to national treatment and MFN treatment are based on existing U.S. law, they are not altered during negotiations.

Ecuador's exceptions to national treatment are: traditional fishing (which does not include fish processing or aquaculture); and broadcast radio and television stations. These exceptions were based on provisions of investment measures consideration by the Government of Ecuador. Ecuador has not received any sectoral exceptions to MFN treatment in the Protocol.

Exchange of Letters
In an exchange of letters at the time the Treaty was signed, Ecuador explicitly confirmed that the Treaty shall serve to satisfy a variety of substantive and procedural requirements imposed on U.S. investors and investments by Ecuadorian law. This understanding reflects the desire of the Government of Ecuador that the Treaty should operate in and of itself to reduce or eliminate certain bureaucratic practices identified as impediments to investment.

The exchange of letters clarifies, for example, that certain local training nationality requirements for employment will be waived for U.S. investors. The letters confirm that the Treaty shall satisfy any and all authorizations necessary for issuing Ecuadorian visas for certain executives and key personnel. Except where itemized in paragraph four of the Protocol, investment is permitted in areas and enterprises that would otherwise require special administrative or other foreign investment authorizations. The Government of Ecuador state that this would make automatic its discretion to permit foreign investment, inter alia, along the border, on the coast, and in "non-traditional" fisheries. The letters constitute an understanding between the governments and are an integral part of the Treaty.

The other U.S. Government agencies which negotiated the Treaty join me in recommending that it be transmitted to the Senate at an early date.
Respectfully submitted,

Warren Christopher

TREATY BETWEEN
THE UNITED STATES OF AMERICA AND
THE REPUBLIC OF ECUADOR
CONCERNING THE ENCOURAGEMENT
AND RECIPROCAL PROTECTION OF INVESTMENT

The United States of America and the Republic of Ecuador hereinafter the "Parties");

Desiring to promote greater economic cooperation between them, with respect reinvestment by nationals and companies of one Party in the territory of the other Party;

Recognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties;

Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maxim effective utilization of economic resources;

Recognizing that the development of economic and business ties can contribute to the well-being

of workers in both Parties and promote respect for internationally recognized worker rights; and

Having resolved to conclude a Treaty concerning the encouragement and reciprocal protection of investment;

Have agreed as follows:

ARTICLE I

1. For the purposes of this Treaty,

(a) "investment" means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes:

(i) tangible and intangible property, including rights, such as mortgages, liens and pledges;

(ii) a company or shares of stock or other interests in a company or interests in the assets thereof;

(iii) a claim to money or a claim to performance having economic value, and associated with an investment;

(iv) intellectual property which includes, inter alia, rights relating to:
literary and artistic works, including sound recordings;
inventions in all fields of human endeavor;
industrial designs;
semiconductor mask works;
trade secrets, know-how, and confidential business information; and
trademarks, service marks, and trade names; and

(v) any right conferred by law or contract, and any license and permits pursuant to law;

(b) "company" of a Party means any kind of corporation, company, association, partnership, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned or controlled;

(c) "national" of a Party means a natural person who is a national of a Party under its applicable law;

(d) "return" means an amount derived from or associated with an investment, including profit; dividend; interest; capital gain; royalty payment; management, technical assistance or other fee; or returns in kind;

(e) "associated activities" include the organization, control, operation, maintenance and disposition of companies, branches, agencies, offices, factories or other facilities for the conduct of business; the making, performance and enforcement of contracts; the acquisition, use, protection and disposition of property of all kinds including intellectual property rights; the borrowing of funds; the purchase, issuance, and sale of equity shares and other securities; and the purchase of foreign exchange for imports.

(f) "state enterprise" means an enterprise owned, or controlled through ownership interests, by a Party.

(g) "delegation" includes a legislative grant, and a government order, directive or other act transferring to a state enterprise or monopoly, or authorizing the exercise by a state enterprise or monopoly, of governmental authority.

2. Each Party reserves the right to deny to any company the advantages of this Treaty if nationals of any third country control such company and, in the case of a company of the other Party, that company has no substantial business activities in the territory of the other Party or is controlled by nationals of a third country with which the denying Party does not maintain normal economic relations.

3. Any alteration of the form in which assets are invested or reinvested shall not affect their character as investment.

ARTICLE II

1. Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the most favorable, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Protocol to this Treaty. Each Party agrees to notify the other Party before or on the date of entry into force of this Treaty of all such laws and regulations of which it is aware concerning the sectors or matters listed in the Protocol. Moreover, each Party agrees to notify the other of any future exception with respect to the sectors or matters listed in the Protocol, and to limit such exceptions to a minimum. Any future exception by either Party shall not apply to investment existing in that sector or matter at the time the exception becomes effective. The treatment accorded pursuant to any exceptions shall, unless specified otherwise in the Protocol, be not less favorable than that accorded in like situations to investments and associated activities of nationals or companies of any third country.

2. (a) Nothing in this Treaty shall be construed to prevent a Party from maintaining or establishing a state enterprise.

(b) Each Party shall ensure that any state enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Party's obligations under this Treaty wherever such enterprise exercises any regulatory, administrative or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees or other charges.

(c) Each Party shall ensure that any state enterprise that it maintains or establishes accords the better of national or most favored nation treatment in the sale of its goods or services in the Party's territory.

3. (a) Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.

(b) Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. For purposes of dispute resolution under Articles VI and VII, a measure may be arbitrary or discriminatory notwithstanding the fact that a party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a Party.

(c) Each Party shall observe any obligation it may have entered into with regard to investments.

4. Subject to the laws relating to the entry and sojourn of aliens, nationals of either Party shall be

permitted to enter and to remain in the territory of the other Party for the purpose of establishing, developing, administering or advising on the operation of an investment to which they, or a company of the first Party that employs them, have committed or are in the process of committing a substantial amount of capital or other resources.

5. Companies which are legally constituted under the applicable laws or regulations of one Party, and which are investments, shall be permitted to engage top managerial personnel of their choice, regardless of nationality.

6. Neither Party shall impose performance requirements as a condition of establishment, expansion or maintenance of investments, which require or enforce commitments to export goods produced, or which specify that goods or services must be purchased locally, or which impose any other similar requirements.

7. Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.

8. Each Party shall make public all laws, regulations, administrative practices and procedures, and adjudicatory decisions that pertain to or affect investments.

9. The treatment accorded by the United States of America to investments and associated activities of nationals and companies of the Republic of Ecuador under the provisions of this Article shall in any State, Territory or possession of the United States of America be no less favorable than the treatment accorded therein to investments and associated activities of nationals of the United States of America resident in, and companies legally constituted under the laws and regulations of other States, Territories or possessions of the United States of America.

10. The most favored nation provisions of this Treaty shall not apply to advantages accorded by either Party to nationals or companies of any third country by virtue of:

(a) that Party's binding obligations that derive from full membership in a free trade area or customs union; or

(b) that Party's binding obligations under any multilateral international agreement under the framework of the General Agreement on Tariffs and Trade that enters into force subsequent to the signature of this Treaty.

ARTICLE III

1. Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ("expropriation") except: for a public purpose; in a nondiscriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(3). Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be calculated in a freely usable currency an the basis of the prevailing market rate of exchange at that time; be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable; and be fully transferable.

2. A national or company of either Party that asserts that all or part of its investment has been expropriated shall have a right to prompt review by the appropriate judicial or administrative authorities of the other Party to determine whether any such expropriation has occurred and, if so, whether such expropriation, and any associated compensation, conforms to the principles of

international law.

3. Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favorable than that accorded tb its own nationals or companies or to nationals or companies of any third country, whichever is the most favorable treatment, as regards any measures it adopts in rotation to such losses.

ARTICLE IV

1. Each Party shall permit all transfers related to an investment, to be made freely and without delay into and out of its territory. Such transfers include: (a) returns; (b) compensation pursuant to Article III; (c) payments arising out of an investment dispute; (d) payments made under a contract, including amortization of principal and accrued interest payments made pursuant to a loan agreement; (e) proceeds from the sale or liquidation of all or any part of an investment; and (f) additional contributions to capital for the maintenance or development of an investment.

2. Transfers shall be made in a freely usable currency at the prevailing market rate of exchange on the date of transfer with respect to spot transactions in the currency to be transferred.

3. Notwithstanding the provisions of paragraphs 1 and 2, either Party may maintain laws and regulations (a) requiring reports of currency transfer; and (b) imposing income taxes by such means as a withholding tax applicable to dividends or other transfers. Furthermore, either Party may protect the rights of creditors, or ensure the satisfaction of judgments in adjudicatory proceedings, throuqh the equitable, nondiscriminatory and good faith application of its law.

ARTICLE V

The Parties agree to consult promptly, on the request of either, to resolve any disputes in connection with the Treaty, or to discuss any matter relating to the interpretation or application of the Treaty.

ARTICLE VI

1. For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign investment authority to such national or company; or (c) an alleged broach of any right conferred or created by this Treaty with respect to an investment.

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

(a) to the courts or administrative tribunals of the Party that is 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 date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:

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

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

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

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

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

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

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

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

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

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

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

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

ARTICLE VII

1. Any dispute between the Parties concerning the interpretation or application of the Treaty

which is not resolved through consultations or other diplomatic channels, shall be submitted, upon the request of either Party, to an arbitral tribunal for binding decision in accordance with the applicable rules of international law. In the absence of an agreement by the Parties to the contrary, the arbitration rules of 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.

4. Expenses incurred by the Chairman, the other arbitrators, and other costs of the proceedings shall be paid for equally by the Parties. The Tribunal may, however, at its discretion, direct that a higher proportion of the costs be paid by one of the Parties.

ARTICLE VIII

This Treaty shall not derogate from:

(a) laws and regulations, administrative practices or procedures, or administrative or adjudicatory decisions of either Party;

(b) international legal obligations; or

(c) obligations assumed by either Party, including those contained in an investment agreement or an investment authorization,

that entitle investments or associated activities to treatment more favorable than that accorded by this Treaty in like situations.

ARTICLE IX

1. This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

2. This Treaty shall not preclude either Party from prescribing special formalities in connection with the establishment of investments, but such formalities shall not impair the substance of any of the rights set forth in this Treaty.

ARTICLE X

1. With respect to its tax policies, each Party should strive to accord fairness and equity in the treatment of investment of nationals and companies of the other Party.

2. Nevertheless, the provisions of this Treaty, and in particular Article VI and VII, shall apply to matters of taxation only with respect to the following:

(a) expropriation, pursuant to Article III;

(b) transfers, pursuant to Article IV; or

(c) the observance and enforcement of terms of an investment agreement or authorization as referred to in Article VI (1) (a) or (b), to the extent they are not subject to the dispute settlement provisions of a Convention for the avoidance of double taxation between the two Parties, or have been raised under such settlement provisions and are not resolved within a reasonable period of time.

ARTICLE XI

This Treaty shall apply to the political subdivisions of the Parties.

ARTICLE XII

1. This Treaty shall enter into force thirty days after the data of exchange of instruments of ratification. It shall remain in force for a period of ten years and shall continue in force unless terminated in accordance with paragraph 2 of this Article. It shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter.

2. Either Party may, by giving one year's written notice to the other Party, terminate this Treaty at the end of the initial ten year period or at any time thereafter.

3. With respect to investments made or acquired prior to the date of termination of this Treaty and to which this Treaty otherwise applies, the provisions of all of the other Articles of this Treaty shall thereafter continue to be effective for a further period of ten years from such date of termination.

4. The Protocol and Side Letter shall form an integral part of the Treaty.

IN WITNESS WHEREOF, the respective plenipotentiaries have signed this Treaty.
DONE in duplicate at Washington on the twenty-seventh day of August, 1993, in the English and Spanish languages, both texts being equally authentic.

FOR THE UNITED STATES OF AMERICA:

FOR THE REPUBLIC OF ECUADOR:

PROTOCOL

I. The Parties note that the Republic of Ecuador may establish a debt-equity conversion program under which nationals or companies of the United States may choose to invest in the Republic of Ecuador through the purchase of debt at a discount.

The Parties agree that the rights provided in Article IV, paragraph 1, with respect to the transfer of returns and of proceeds from the sale or liquidation of all or any part of an investment, may, as such rights would apply to that part of an investment financed through a debt-equity conversion, be modified by the terms of a debt-equity conversion agreement between a national or company of the United States and the Government of the Republic of Ecuador or any agency or instrumentality thereof.

The transfer of returns and/or proceeds from the sale or liquidation of all or any part of an investment shall in no case be on terms less favorable than those accorded, in like circumstances, to nationals or companies of the Republic of Ecuador or any third country,

whichever is more favorable.

2. The United States reserves the right to make or maintain limited exceptions to national treatment, as provided in Article 11, paragraph 1, in the sectors or matters it has indicated below:

air transportation; ocean and coastal shipping; banking; insurance; government grants; government insurance and loan programs; energy and power production; customhouse brokers; ownership of real property; ownership and operation of broadcast or common carrier radio and television stations; ownership of shares in the Communications Satellite Corporation; the provision of common carrier telephone and telegraph services; the provision of submarine cable services; use of land and natural resources; mining on the public domain; maritime services and maritime-related services; and primary dealership in United States government securities.

The treatment accorded pursuant to these exceptions shall, unless specified in paragraph 3 of this Protocol, be not less favorable than that accorded in like situations to investments and associated activities of nationals or companies of any third country.

3. The United States reserves the right to make or maintain limited exceptions to most favored nation treatment, as provided in Article II, paragraph 1, in the sectors or matters it has indicated below:

ownership of real property; mining on the public domain; maritime services and maritime-related services; and primary dealership in United States government securities.

4. The Republic of Ecuador reserves the right to make or maintain limited exceptions to national treatment, as provided in Article II, paragraph 1, in the sectors or matters it has indicated below:

traditional fishing (which does not include fish processing or aquaculture); ownership and operation of broadcast radio and television stations.

The treatment accorded pursuant to these exceptions shall be not less favorable than that accorded in like situations to investment and associated activities of nationals or companies of any third country.

THE UNITED STATES TRADE REPRESENTATIVE
Executive Office of the President
Washington, D.C. 20506

27 August 1993

Dear Mr. Minister:

I have the honor to confirm receipt of your letter which reads as follows:

"I have the honor to confirm the following understanding which was reached between the Government of the Republic of Ecuador and the Government of the United States of America in the course of negotiations of the Treaty Concerning the Encouragement and Reciprocal Protection of Investment (the "Treaty"):

With respect to Article 11, paragraph 4, the Government of the Republic of Ecuador confirms that the Treaty shall serve to satisfy the requirements for any and all authorizations necessary under its laws for nationals of the United States to enter and to remain in the territory of the Republic of Ecuador or the purpose of establishing, developing, administering or advising on the operation of

an investment to which they, or a company of the United States that employs them, have committed or are in the process of committing a substantial amount of capital or other resources. Such authorizations include those granted by the Labor Ministry, such as to waive local training requirements established as a condition to the entry of highly trained and specially qualified employees that are essential to the company's operations. Nationals of the United States, however, can be required to fulfill limited formalities in connection with entry and sojourn in the Republic of Ecuador, including the presentation of a visa application and relevant documentation.

With respect to Article II, paragraph 5, the Government of the Republic of Ecuador confirms that the Treaty shall serve to satisfy the requirements for any and all authorizations necessary under its laws for the engagement of foreign nationals as top managers.

In addition, the Government of the Republic of Ecuador indicates that under the Ecuadorian Constitution, including Article 18, and the laws of the Republic of Ecuador, foreign nationals and companies may need special administrative or other authorizations that are specific to the investments of foreign persons. The Government of the Republic of Ecuador confirms that the Treaty shall serve to satisfy the requirements for any and all such authorizations, except for those sectors or matters in which the Republic of Ecuador may make or maintain limited exceptions to national treatment, as provided in Article II, paragraph 1 and listed in paragraph 4 of the Protocol.

I have the honor to propose that this understanding be treated as an integral part of the Treaty.

I would be grateful if you would confirm that this understanding is shared by your government.

His Excellency
Diego Paredes,
Minister of Foreign Relations of the
Republic of Ecuador,
Quito."

I have the further honor to confirm that this understanding is shared by my Government and constitutes an integral part of the Treaty.

Sincerely,

Rufus H. Yerxa
Acting United States Trade Representative

[TRANSLATION]

Washington, D.C., August 27, 1993

His Excellency
Ambassador Rufus Yerxa
Acting United States Trade Representative
Washington, D.C.

Mr. Ambassador:

I have the honor to confirm the following Understanding, which was reached between the Government of Ecuador and the Government of the United States of America in the course of negotiations of the Treaty Concerning the Encouragement and Reciprocal Protection of Investment (the "Treaty)":

[For the text of the understanding, see Ambassador Yerxa's letter immediately preceding.]

I have the honor to propose that this understanding by treated as an integral part of the Treaty.

I would be grateful if you would confirm that this understanding is shared by your Government.

Accept, Excellency, the assurances of highest consideration.

[s] Diego Paredes

REGISTRO OFICIAL
ORGANO DEL GOBIERNO DEL ECUADOR

Administración del Sr. Dr. Alfredo Palacio González
Presidente Constitucional de la República

TRIBUNAL CONSTITUCIONAL

Año I -- Quito, Viernes 25 de Noviembre del 2005 -- N° 153

DR. RUBEN DARLO ESPINOZA DIAZ
DIRECTOR

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SUPLEMENTO

TOMO II

FUNCION LEGISLATIVA

COMISION DE LEGISLACION Y CODIFICACION

CODIFICACION:

2005-012 Codificación y recopilación del Régimen de Derecho Internacional Privado.

60. CONVENIO INTERNACIONAL DE LAS MADERAS TROPICALES.

Datos Generales.-

Lugar: Ginebra Suiza.
Tipo: Multilateral.
Fecha de suscripción: 26/01/1994.
Fecha de publicación: Registro Oficial No. 779, de fecha 12 de septiembre de 1995.

Texto.-

PREÁMBULO:

Las Partes en el presente Convenio,

Recordando la Declaración y el Programa de Acción sobre el Establecimiento de un Nuevo Orden Económico Internacional, el Programa Integrado para los Productos Básicos, una Nueva Asociación para el Desarrollo: El Compromiso de Cartagena y los objetivos pertinentes contenidos en el Espíritu de Cartagena,

Recordando el Convenio Internacional de las Maderas Tropicales, 1983, y reconociendo la labor realizada por la Organización Internacional de las Maderas Tropicales y los logros alcanzados desde sus comienzos, incluida una estrategia para lograr que el comercio internacional de maderas tropicales provenga de recursos forestales ordenados de forma sostenible,

Recordando además la Declaración de Río sobre el Medio Ambiente y el Desarrollo, la Declaración autorizada, sin fuerza jurídica obligatoria, de principios para un consenso mundial respecto de la ordenación, la conservación y el desarrollo sostenible de los bosques de todo tipo y los capítulos pertinentes del Programa 21, aprobados por la Conferencia de las Naciones Unidas sobre el Medio Ambiente y el Desarrollo en junio de 1992, en Río de

Artículo X. Solución de controversias entre un inversionista y la Parte Contratante receptora de la inversión.-

(1) Toda controversia relativa a las disposiciones del presente Convenio entre un inversionista de una Parte Contratante y la otra Parte será, en la medida de lo posible, solucionada mediante consultas amistosas

(2) Si la controversia no hubiere podido ser solucionada en el término de seis meses, a partir del momento en que fue planteada por una u otra de las Partes, podrá ser sometida, a pedido del inversionista:

- O bien a los Tribunales competentes de la Parte Contratante en cuyo territorio se realizó la inversión,

- O bien el arbitraje internacionel en las condiciones descritas en el inciso (3).

Una vez que un inversionista haya sometido la controversia a las jurisdicciones de la Parte Contratante implicada o el arbitraje internacional, la elección de uno u otro de esos procedimientos será definitiva.

(3) En caso de recurso de arbitraje internacional, la controversia deberá ser sometida al Centro Internacional de Arreglo de Diferencias Relativas a Inversiones (C.I.A.D.I.), creado por el "Convenio sobre Arreglo de Diferencias Relativas a las Inversiones entre Estados y Nacionales de otros Estados", abierto a la firma en Washington el 18 de marzo de 1965.

(4) El órgano arbitral decidirá en base a las disposiciones del presente Convenio, al derecho de la Parte Contratante involucrada en la controversia, incluidas las normas relativas a conflictos de leyes, a los términos de eventuales acuerdos particulares concluidos con relación a la inversión y a los principios del Derecho Internacional aplicables en la materia.

(5) Las sentencias arbitrales serán definitivas y obligatorias para las partes en la controversia. Cada Parte Contratante las ejecutará de conformidad con su legislación.

Artículo XI. Entrada en vigor, duración y terminación:

(1) El presente Convenio entrará en vigor a los cuarenta y cinco días de la fecha del canje de los respectivos instrumentos de Ratificación y su vigencia será de diez años. Después permanecerá en vigor hasta la expiración de un plazo de doce meses a partir de la fecha en que alguna de las Partes Contratantes notifique por escrito a la otra Parte Contratante, su decisión de dar por terminado este Convenio.

(2) Con relación a aquellas inversiones efectuadas con anterioridad a la fecha en que la notificación de terminación de este Convenio se haga efectiva, las disposiciones de los Artículos 1 a X continuarán en vigencia por un período de diez años a partir de la fecha.

Hecho en la ciudad de Quito, República del Ecuador, a los dieciséis días del mes de mayo de mil novecientos noventa y cuatro, en dos ejemplares originales, en idioma español, siendo los dos textos igualmente auténticos

10. TRATADO ENTRE LA **REPUBLICA** DEL ECUADOR Y LOS ESTADOS UNIDOS DE AMERICA **SOBRE PROMOCION** Y **PROTECCION** RECIPROCA DE **INVERSIONES**, DE SU **PROTOCOLO** Y DE LAS NOTAS **REVERSALES** ANEXAS AL MISMO

Datos Generales.-

Lugar: Washington.
Tipo: Bilateral.
Fecha de suscripción: 27/08/1993.
Fecha de publicación: Registro Oficial No. 49, de fecha 22 de abril de 1997.

Texto.-

La República del Ecuador y los Estados Unidos de América, en adelante, "las Partes";

Deseando promover una mayor cooperación económica entre ellas, con respecto a las inversiones hechas por nacionales y sociedades de una Parte en el territorio de la otra Parte;

Reconociendo que el acuerdo sobre el tratamiento a ser otorgado a esas inversiones estimulará el flujo de capital privado y el desarrollo económico de las Partes;

Conviniendo en que, a los fines de mantener un marco estable para las inversiones y la utilización más eficaz de los recursos económicos, es deseable otorgar un trato justo y equitativo a las inversiones;

Reconociendo que el desarrollo de los vínculos económicos y comerciales puede contribuir al bienestar de los trabajadores en las dos Partes y promover el respeto por los derechos laborales reconocidos internacionalmente; y,

Habiendo resuelto concertar un tratado sobre la promoción y la protección recíproca de las inversiones,

Han acordado lo siguiente:

Artículo I. 1. A efectos del presente Tratado:

a) "Inversión" significa todo tipo de inversión tales como el capital social, las deudas y los contratos de servicio y de inversión, que se haga en el territorio de una Parte y que directa o indirectamente sea propiedad de nacionales o sociedades de la otra Parte o esté controlada por dichos nacionales o sociedades, y comprende:

i) Los bienes corporales e incorporales, incluso derechos tales como los de retención, las hipotecas y las prendas;

ii) Las sociedades o las acciones de capital u otras participaciones en sociedades o en sus activos;

iii) El derecho al dinero o alguna operación que tenga valor económico y que esté relacionada con una inversión;

iv) La propiedad intelectual que, entre otros, comprende los derechos relativos a:

Las obras artísticas y literarias, incluidas las grabaciones sonoras;

Los inventos en todos los ámbitos del esfuerzo humano;

Los diseños industriales;

Las obras de estampado de semiconductores;

- Los secretos comerciales, los conocimientos técnicos y la información comercial confidencial, y las marcas registradas, las marcas de servicio y los nombres comerciales; y,

v) Todo derecho conferido por ley o por contrato y cualesquiera licencias y permisos conferidos conforme a la Ley.

b) "Sociedad" de una Parte significa cualquier clase de sociedad anónima, compañía, asociación, sociedad comanditaria u otra entidad legalmente constituida conforme al ordenamiento interno de una Parte o de una subdivisión política de la misma, tenga o no fines de lucro y sea de propiedad privada o pública;

e) "Nacional" de una Parte significa la persona natural que sea nacional de una Parte de conformidad con su legislación;

d) "Rendimiento" significa la cantidad derivada de una inversión o vinculada a ella, incluidos los beneficios, los dividendos, los intereses, las plusvalías, los pagos de regalías, los honorarios de gestión, asistencia técnica u otra índole, y las rentas en especie;

e) "Actividades afines" significa la organización, el control, la explotación, el mantenimiento y la enajenación de sociedades, sucursales, agencias, oficinas, fábricas u otras instalaciones destinadas a la realización de negocios; la celebración, el cumplimiento y la ejecución de contratos; la adquisición, el uso la protección y la enajenación de todo género de bienes, incluidos los derechos de propiedad intelectual; el empréstito de fondos; la compra, emisión y venta de acciones de capital y de otros valores, y la compra de divisas para las importaciones;

0 "Empresa estatal" significa la empresa que sea propiedad de una de las Partes o que esté controlada por esa Parte mediante derecho de propiedad;

g) "Delegación" significa la concesión legislativa y la orden, norma u otra disposición oficial que transfieran autoridad gubernamental a una empresa o monopolio estatal, o le autoricen el ejercicio de dicha autoridad;

2. Cada Parte se reserva el derecho a denegar a cualquier sociedad los beneficios del presente Tratado si dicha sociedad está controlada por nacionales de un tercer país y, en el caso de una sociedad de la otra Parte, si dicha sociedad no tiene actividades comerciales importantes en el territorio de la otra Parte o está controlada por nacionales de un tercer país con el cual la Parte denegante no mantiene relaciones económicas normales.

3. Ninguna modificación en la forma en que se invierten o reinvierten los activos alterará el carácter de los mismos en cuanto a inversión.

Artículo II. 1. Cada Parte permitirá y tratará las inversiones y sus actividades afines de manera no menos favorable que la que otorga en situaciones similares a las inversiones o actividades afines de sus propios nacionales o sociedades, o las de los nacionales o sociedades de cualquier tercer país, cualquiera que sea la más favorable, sin perjuicio del derecho de cada Parte a hacer o mantener excepciones que correspondan a alguno de los sectores o asuntos que figuran en el Anexo del presente Tratado. Cada Parte se compromete a notificar a la otra Parte, con anterioridad a la fecha de entrada en vigor del presente Tratado o en dicha fecha, todo ordenamiento interno del cual tenga conocimiento referente a los sectores o asuntos que figuran en el Anexo. Cada Parte se compromete igualmente a notificar a la otra Parte toda futura excepción con respecto a los sectores o asuntos que figuran en el Anexo y a limitar dichas excepciones al mínimo Las excepciones futuras de cualquiera de las Partes no se aplicarán a las inversiones existentes en los sectores o asuntos correspondientes en el momento en que dichas excepciones entren en vigor. El trato que se otorgue conforme a los términos de una excepción será, salvo que se especifique lo contrario en el Anexo, no menos favorable que el que se otorgue en situaciones similares a las inversiones y actividades afines de los nacionales o sociedades de cualquier tercer país.

2. a) Lo dispuesto en el presente Tratado no impedirá que las Partes mantengan o establezcan empresas estatales.

b) Cada Parte se asegurará de que las empresas estatales que mantenga o establezca actúen de manera compatible con las obligaciones de esa Parte en virtud del presente Tratado, cuando ejerzan cualquier facultad reguladora, administrativa o pública que le haya sido delegada por esa Parte como, por ejemplo, la facultad de expropiar, otorgar licencias, aprobar operaciones comerciales o imponer cuotas, derechos u otros gravámenes.

c) Cada Parte se asegurará de que las empresas estatales que mantenga o establezca concedan el mejor trato, ya sea el nacional o el de la nación mas favorecida, a la venta de sus bienes o servicios en el territorio de la Parte.

3. a) Las inversiones, a las que se concederá siempre un trato justo y equitativo, gozarán de protección y seguridad plenas y, en ningún caso, se les concederán un trato menos favorable que el que exige el derecho internacional.

b) Ninguna de las Partes menoscabará, en modo alguno, mediante la adopción de medidas arbitrarias o discriminatorias, la dirección, la explotación, el mantenimiento, la utilización, el usufructo, la adquisición, la expansión o la enajenación de las inversiones. Para los fines de la solución de diferencias, de conformidad con los artículos VI y VII, una medida podrá tenerse por arbitraria o discriminatoria aun cuando una parte haya tenido o ejercido la oportunidad de que dicha medida se examine en los tribunales o en los tribunales administrativos de una de las Partes.

c) Cada Parte cumplirá los compromisos que haya contraído con respecto a las inversiones.

4. Sin perjuicio de las leyes relativas a la entrada y permanencia de extranjeros, se permitirá a los nacionales de cada Parte la entrada y permanencia en el territorio de la otra Parte a fines de establecer, fomentar o administrar una inversión, o de asesorar en la explotación de la misma, en la cual ellos, o una sociedad de la primera Parte que los

emplee, hayan comprometido, o estén en curso de comprometer, una cantidad importante de capital u otros recursos.

5. A las sociedades que estén legalmente constituidas conforme al ordenamiento interno de una Parte, y que constituyan inversiones, se les permitirá emplear al personal administrativo superior que deseen, sea cual fuere la nacionalidad de dicho personal.

6. Como condición para el establecimiento, la expansión o el mantenimiento de las inversiones, ninguna de las Partes establecerá requisitos de cumplimiento que exijan o que hagan cumplir compromisos de exportación con respecto a los bienes producidos, o que especifiquen que ciertos bienes o servicios se adquieran en el país, o que impongan cualesquiera otros requisitos parecidos

7 Cada Parte establecerá medios eficaces para hacer valer las reclamaciones y respetar los derechos relativos a las inversiones, los acuerdos de inversión y las autorizaciones de inversión.

8. Cada Parte hará públicos las leyes, los reglamentos, las prácticas y los procedimientos administrativos y los fallos judiciales relativos a las inversiones o que las atañan.

9. El trato otorgado por los Estados Unidos de América a las inversiones y actividades afines de los nacionales y de las sociedades de la República del Ecuador, conforme a las disposiciones del presente artículo será, en cualquiera de los estados, territorios o posesiones de los Estados Unidos de América, no menos favorable que el trato que se otorgue a las inversiones y actividades afines de los nacionales de los Estados Unidos de América que residan en los demás estados, territorios o posesiones de los Estados Unidos de América, y a las sociedades constituidas legalmente, conforme al ordenamiento interno de dichos otros estados, territorios o posesiones.

10. Las disposiciones del presente Tratado relativas al trato de nación más favorecida no se aplicarán a las ventajas concedidas por cualquiera de las Partes a los nacionales o las sociedades de ningún tercer país de conformidad con:

a) Los compromisos vinculantes de esa Parte que emanen de su plena participación en uniones aduaneras o en zonas de libre comercio, o

b) Los compromisos vinculantes de esa Parte adquiridos en virtud de cualquier convenio internacional multilateral amparado por el Acuerdo General sobre Aranceles Aduaneros y Comercio que entre en vigencia tras la firma del presente Tratado.

Artículo III. 1. Las inversiones no se expropiarán ni nacionalizarán directamente, ni indirectamente mediante la aplicación de medidas equivalentes a la expropiación o nacionalización ("expropiación"), salvo que ello se efectúe con fines de interés público, de manera equitativa y mediante pago de una indemnización pronta, adecuada y efectiva, y de conformidad con el debido procedimiento legal y los principios generales de trato dispuestos en el párrafo 3 del artículo II. La indemnización equivaldrá al valor justo en el mercado que tenga la inversión expropiada inmediatamente antes de que se tome la acción expropiatoria o de que ésta se llegue a conocer, si ello ocurre con anterioridad; se calculará en una moneda utilizable libremente, al tipo de cambio vigente en el mercado en ese momento; se pagará sin dilación; incluirá los intereses devengados a un tipo de interés comercialmente razonable desde la fecha de la expropiación; será enteramente realizable, y será transferible libremente.

2 El nacional o sociedad de una Parte que sostenga que su inversión le ha sido expropiada total o parcialmente tendrá derecho a que las autoridades judiciales o administrativas competentes de la otra Parte examinen su caso con prontitud para determinar si la expropiación ha ocurrido y, en caso afirmativo, si dicha expropiación y la indemnización correspondiente se ajustan a los principios del derecho internacional.

3 A los nacionales o las sociedades de una Parte cuyas inversiones sufran pérdidas en el territorio de la otra Parte con motivo de guerra o de otro conflicto armado, revolución, estado nacional de excepción, insurrección, disturbios entre la población u otros acontecimientos similares, la otra Parte les otorgará, con respecto a las medidas que adopte en lo referente a dichas pérdidas, un trato no menos favorable que el trato más favorable que otorgue a sus propios nacionales o sociedades o a los nacionales o a las sociedades de cualquier tercer país

Artículo IV. 1. Cada Parte permitirá que todas las transferencias relativas a una inversión que se envíen a su territorio o se saquen del mismo se realicen libremente y sin demora Dichas transferencias comprenden: a) los rendimientos; b) las indemnizaciones en virtud del artículo III; c) los pagos que resulten de diferencias en materia de inversión; d) los pagos que se hagan conforme a los términos de un contrato, entre ellos, las amortizaciones de capital y los pagos de los intereses devengados en virtud de un convenio de préstamo; e) el producto de la venta o liquidación parcial o total de una inversión, y f) los aportes adicionales al capital hechos para el mantenimiento o el fomento de una inversión.

2. Las transferencias se harán en una moneda libremente utilizable, al tipo de cambio vigente en el mercado en la fecha de la transferencia con respecto a las operaciones al contado realizadas en la moneda que se ha de transferir.

3. No obstante lo dispuesto en los párrafos 1 y 2 del presente artículo, cada Parte podrá conservar las leyes y los reglamentos que: a) requieran la presentación de informes acerca de las transferencias monetarias y b) graven impuestos sobre la renta por medios tales como la retención de impuestos aplicable a los dividendos u otras transferencias Además, cada Parte podrá proteger los derechos de los acreedores o asegurar el cumplimiento de los fallos dictados en procedimientos judiciales, mediante la aplicación equitativa, imparcial y de buena fe de sus leyes

Artículo V. Las Partes convienen en consultarse con prontitud, a solicitud de cualquiera de ellas, para resolver las diferencias que surjan en relación con el presente Tratado o para considerar cuestiones referentes a su interpretación o aplicación.

Artículo VI. 1. A efectos del presente artículo una diferencia en materia de inversión es una diferencia entre una Parte y un nacional o una sociedad de la otra Parte, que

se deba o sea pertinente a: a) un acuerdo de inversión concertado entre esa Parte y dicho nacional o sociedad; b) una autorización para realizar una inversión otorgada por la autoridad en materia de inversiones extranjeras de una Parte a dicho nacional o sociedad, o c) una supuesta infracción de cualquier derecho conferido o establecido por el presente Tratado con respecto a una inversión.

2. Cuando surja una diferencia en materia de inversión, las partes en la diferencia procurarán primero resolverla mediante consultas y negociaciones. Si la diferencia no se soluciona amigablemente, la sociedad o el nacional interesado, para resolverla, podrá optar por someterla a una de las siguientes vías, para su resolución:

a) A los tribunales judiciales o administrativos de la Parte que sea parte en la diferencia, o

b) A cualquier procedimiento de solución de diferencias aplicable y previamente convenido, o

c) Conforme a lo dispuesto en el párrafo 3 de este artículo.

3. a) Siempre y cuando la sociedad o el nacional interesado no haya sometido la diferencia, para su solución, según lo previsto por el inciso a) o el inciso b) del párrafo 2, y hayan transcurrido seis meses desde la fecha en que surgió la diferencia, la sociedad o el nacional interesado podrá optar por consentir por escrito a someter la diferencia, para su solución, al arbitraje obligatorio:

i) Del Centro Internacional de Arreglo de Diferencias Relativas a Inversiones ("el Centro") establecido por el Convenio sobre el Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de otros Estados, hecho en Washington el 18 de marzo de 1965 ("Convenio del CIADI"), siempre que la Parte sea parte en dicho Convenio; o

ii) Del Mecanismo Complementario del Centro, de no ser posible recurrir a éste; o

iii) Según las Reglas de Arbitraje de la Comisión de las Naciones Unidas sobre el Derecho Mercantil Internacional (CNUDMI), o

iv) De cualquier otra institución arbitral o conforme a otra norma de arbitraje, según convengan las partes en la diferencia.

b) Una vez que la sociedad o el nacional interesado dé su consentimiento, cualquiera de las partes en la diferencia podrá iniciar el arbitraje según la opción especificada en el consentimiento.

4. Cada una de las Partes consiente en someter cualquier diferencia en materia de inversión al arbitraje obligatorio para su solución, de conformidad con la opción especificada en el consentimiento por escrito del nacional o la sociedad, según el párrafo 3. Ese consentimiento, junto con el consentimiento por escrito del nacional o la sociedad, cuando se da conforme al párrafo 3, cumplirá el requisito de:

a) Un "consentimiento por escrito" de las partes en la diferencia a efectos del Capítulo II de la Convención del CIADI (Jurisdicción del Centro) y a efectos de las normas del Mecanismo Complementario, y,

b) Un "acuerdo por escrito" a efectos del artículo II de la Convención de las Naciones Unidas sobre el Reconocimiento y la Ejecución de las Sentencias Arbitrales Extranjeras, hecha en Nueva York el 10 de junio de 1958 ("Convención de Nueva York").

5. Todo arbitraje efectuado de conformidad con la cláusula ó iv del inciso a), párrafo 3 del presente artículo, tendrá lugar en un Estado que sea Parte en la Convención de Nueva York.

6. Todo laudo arbitral dictado en virtud de este artículo será definitivo y obligatorio para las partes en la diferencia. Cada Parte se compromete a aplicar sin demora las disposiciones de dicho laudo y a garantizar su ejecución en su territorio.

7. En todo procedimiento relativo a una diferencia en materia de inversión, las Partes no emplearán como defensa, reconvención, derecho de contrarreclamación o de otro modo, el hecho de que la sociedad o el nacional interesado ha recibido o recibirá, según los términos de un contrato de seguro o de garantía, alguna indemnización u otra compensación por todos sus supuestos daños o por parte de ellos.

8. A efectos de un arbitraje efectuado según lo previsto en el párrafo 3 del presente artículo, toda sociedad legalmente constituida conforme al ordenamiento interno de una Parte o subdivisión política de la misma que, inmediatamente antes de ocurrir el suceso o los sucesos que dieron lugar a la diferencia, constituyera una inversión de nacionales o de sociedades de la otra Parte, deberá ser tratada como nacional o sociedad de esa otra Parte, conforme al inciso b), párrafo 2, del artículo 25 de la Convención del CIADI

Artículo VII. 1 Toda diferencia entre las Partes concerniente a la interpretación o aplicación del presente Tratado que no se resuelva mediante consultas u otras vías diplomáticas, se presentará, a solicitud de cualquiera de las Partes, a un tribunal de arbitraje para que llegue a una decisión vinculante conforme a las normas de arbitraje de la Comisión de las Naciones Unidas para el Derecho Mercantil Internacional (CNUDMI), excepto en cuanto dichas normas hayan sido modificadas por las Partes o por los árbitros.

2. En el plazo de dos meses a partir de la recepción de la solicitud, cada Parte nombrará a un árbitro. Los dos árbitros nombrarán como presidente a un tercer árbitro que sea nacional de un tercer Estado. Las Normas de la CNUDMI relativas al nombramiento de vocales para las juntas de tres miembros se aplicarán, mutatis mutendis, al nombramiento de la junta arbitral, salvo que la autoridad denominativa a la que hacen referencia esas reglas será el Secretario General del Centro.

3. Salvo acuerdo en contrario, todos los casos se presentarán y todas las audiencias concluirán en un plazo de seis meses a partir del nombramiento del tercer árbitro; y el Tribunal dictará su laudo en un plazo de dos meses a partir de la fecha de las últimas presentaciones o de la fecha de clausura de las audiencias, si esta última fuese posterior.

4. Los gastos incurridos por el Presidente y los otros árbitros, así como las demás costas del procedimiento, serán sufragados en partes iguales por las Partes. Sin embargo, el Tribunal podrá, a su discreción, ordenar que una de las Partes pague una proporción mayor de las costas.

Artículo VIII. El presente Tratado no menoscabará:

a) Las leyes, los reglamentos, las prácticas y los procedimientos administrativos y los fallos administrativos y judiciales de cualquiera de las Partes;

b) Los compromisos jurídicos internacionales, ni

c) Los compromisos asumidos por cualquiera de las Partes, incluidos los que estén incorporados a los acuerdos o las autorizaciones de inversión, que otorguen a las inversiones o a las actividades afines un trato más favorable que el que les otorga el presente Tratado en situaciones parecidas.

Artículo IX. 1. El presente Tratado no impedirá la aplicación por cualquiera de las Partes de las medidas necesarias para el mantenimiento del orden público, el cumplimiento de sus compromisos respecto del mantenimiento o la restauración de la paz o seguridad internacionales, o la protección de los intereses esenciales de su seguridad.

2. El presente Tratado no impedirá que cualquiera de las Partes prescriba trámites especiales con respecto al establecimiento de inversiones, pero dichos trámites no menoscabarán la esencia de cualquiera de los derechos que se enuncian en el presente Tratado.

Artículo X. 1. En lo relativo a sus normas tributarias, cada Parte deberá esforzarse por actuar justa y equitativamente en el trato de las inversiones de los nacionales y las sociedades de la otra Parte.

2. No obstante, las disposiciones del presente Tratado, especialmente los artículos VI y VII del mismo, se aplicarán a cuestiones tributarias solamente con respecto a:

a) La expropiación, de conformidad con el artículo III;

b) Las transferencias, de conformidad con el artículo IV, o

c) La observancia y el cumplimiento de los términos de un acuerdo o autorización en materia de inversión, tal como se menciona en el inciso a) o el inciso b),

En la medida en que no estén sujetas a las disposiciones sobre la solución de diferencias de un Convenio para evitar la doble imposición tributaria concertado entre las dos Partes, o que se hayan suscitado de conformidad con dichas disposiciones y no se hayan resuelto en un plazo razonable.

Artículo XI. El presente Tratado se aplicará a las subdivisiones políticas de las Partes.

Artículo XII. 1. El presente Tratado entrará en vigor treinta días después de la fecha de canje de los instrumentos de ratificación y permanecerá en vigor por un período de 10 años y continuará en vigor a menos que se denuncie de conformidad con las disposiciones del párrafo 2 del presente artículo. El presente Tratado se aplicará a las inversiones existentes en el momento de su entrada en vigor y a las inversiones que se efectúen o adquieran posteriormente.

2. Cualquiera de las Partes podrá denunciar el presente Tratado al concluir el período inicial de diez años, o en cualquier momento posterior, mediante notificación por escrito a la otra Parte con un año de antelación

3. Con respecto a las inversiones efectuadas o adquiridas antes de la fecha de terminación del presente Tratado, y a las cuales el presente Tratado sea por lo demás aplicable, las disposiciones de todos los demás artículos del presente Tratado continuarán en vigor durante un período adicional de diez años después de la fecha de terminación.

4. El protocolo y la Carta Anexa formarán parte integral del presente Tratado.

En fe de lo cual, los respectivos plenipotenciarios han firmado el presente Tratado.

Hecho en Washington, a los veinte y siete días del mes de agosto de mil novecientos noventa y tres, en dos textos en los idiomas español e inglés, ambos igualmente auténticos.

PROTOCOLO

1. Las Partes toman nota de que el Ecuador puede establecer un programa de conversión de deuda por inversión según el cual nacionales o sociedades de los Estados Unidos podrían invertir en el Ecuador a través de la compra de deuda con descuento.

Las Partes convienen en que los derechos previstos en el artículo IV, párrafo 1, respecto a la transferencia de utilidades y del producto de la venta o liquidación de todo o parte de una inversión, pueden, en tanto tales derechos se apliquen a esa parte de la inversión financiada a través de una conversión de deuda, ser modificados por los términos de un convenio de conversión de deuda entre un nacional o sociedad de los Estados Unidos y el Gobierno del Ecuador o cualquiera de sus organismos o representantes, de ahí en adelante.

La transferencia de utilidades y/o producto de la venta o liquidación total o parcial de una inversión, en ningún caso se hará en términos menos favorables que aquellos otorgados, en circunstancias semejantes, a nacionales o sociedades del Ecuador o de un tercer país, cualesquiera que sean las más favorables.

2. Los Estados Unidos se reservan el derecho a establecer o mantener excepciones restringidas al trato nacional, previsto en el artículo II, párrafo 1, en los sectores o materias que se indican a continuación:

Transporte aéreo; transporte marítimo y de cabotaje; banca; seguros; asignaciones oficiales; programas gubernamentales de seguros y préstamos; producción de energía y electricidad; agencias de aduanas; propiedad de bienes inmobiliarios; propiedad y operación de estaciones emisoras de radio y televisión comercial; propiedad de acciones en la "Communications Satellite Corporation"; provisión de servicios públicos de telefonía y telegrafía; prestación de servicios de cable submarino; aprovechamiento de la tierra y los recursos naturales; explotaciones de minas en propiedades públicas; servicios marítimos y servicios afines; y corretaje a título primario de valores del Gobierno de los Estados Unidos.

El trato otorgado respecto a estas excepciones será no menos favorable que el otorgado en situaciones semejantes a las inversiones y actividades afines pertenecientes a nacionales o sociedades de terceros países, salvo lo especificado en el párrafo 3 de este Protocolo.

3. Los Estados Unidos se reservan el derecho a hacer o mantener excepciones restringidas al trato de nación mas favorecida, prevista en el artículo II, párrafo 1, en los sectores o materias que se indican a continuación:

Propiedad de bienes inmobiliarios, explotación de minas en propiedades públicas; servicios marítimos y afines; y corretaje primario de valores del Gobierno de los Estados Unidos.

Ecuador se reserva el derecho a hacer o mantener excepciones restringidas al trato nacional, previsto en el artículo II, párrafo 1, en los sectores o materias que se indican a continuación:

Pesca tradicional (que no incluye procesamiento de la pesca ni la acuicultura); propiedad y operación de estaciones emisoras de radio y televisión comercial.

El trato otorgado respecto a estas excepciones no será menos favorable que el otorgado en situaciones semejantes a inversiones o actividades afines pertenecientes a nacionales o sociedades de terceros países.

NOTAS REVERSALES

EMBAJADA DEL ECUADOR WASHINGTON, D.C.

Washington D.C., a 27 de agosto de 1993.

Excelentísimo Señor
Embajador Rufus Yerxa
Representante Comercial de los Estados Unidos, Encargado
Washington, D.C.

Señor Embajador:

Tengo el honor de confirmarle el entendimiento que ha sido alcanzado entre el Gobierno del Ecuador y de los Estados Unidos de América en el curso de las negociaciones del Tratado sobre Promoción y Protección Recíproca de Inversiones ("el Tratado").

Con respecto al artículo II, párrafo 4 el Gobierno del Ecuador confirma que el Tratado servirá para satisfacer los requerimientos de todas y cualesquiera autorizaciones necesarias, según Ley ecuatoriana, para que los nacionales de los Estados Unidos entren y permanezcan en la República del Ecuador con propósito de establecer, desarrollar, administrar o asesorar en la operación de una inversión para la cual ellos, o una sociedad de los Estados Unidos que los emplee, hayan comprometido o estén en curso de comprometer una cantidad importante de capital o de otros recursos. Dichas autorizaciones incluyen las proporcionadas por el Ministerio del Trabajo, tales como la exoneración de los requerimientos de capacitar al personal nacional establecidos como una condición para el ingreso de empleados alto y especialmente calificados, que sean esenciales para las operaciones de una sociedad. A los Nacionales de Estados Unidos, sin embargo, puede exigírseles que cumplan ciertos trámites relativos a su ingreso y permanencia en el Ecuador, incluida la presentación de una solicitud de visa y de la documentación pertinente.

Con respecto al artículo II, párrafo 5, el Gobierno del Ecuador confirma que el Tratado servirá para satisfacer los requerimientos de todas las autorizaciones necesarias, según la Ley ecuatoriana, para la contratación de extranjeros en calidad de alto personal directivo.

Además el Gobierno del Ecuador indica que, según la Constitución Política, incluido el artículo 18 y la Ley ecuatoriana, los ciudadanos y sociedades extranjeros pueden necesitar autorizaciones especiales administrativas o de otro orden, específicas para las inversiones extranjeras.

El Gobierno del Ecuador confirma que el Tratado servirá para satisfacer los requerimientos de dichas autorizaciones, excepto para los sectores o materias en los cuales el Ecuador pueda hacer o mantener excepciones restringidas respecto al trato nacional, previsto en el artículo II, párrafo 1, y enumerados en el párrafo 4 del Protocolo.

Tengo el honor de proponer que este entendimiento sea considerado como parte integrante del Tratado.

Mucho agradeceré a V.E., que me confirme que este entendimiento lo comparte su Gobierno.

Reciba, Excelencia, las expresiones de mi consideración.

11. TRATADO ENTRE LA REPUBLICA DEL ECUADOR Y LA REPUBLICA FEDERAL DE ALEMANIA SOBRE FOMENTO Y RECIPROCA PROTECCION DE INVERSIONES DE CAPITAL Y DE SU PROTOCOLO.

Datos Generales.-

Lugar: Quito, Ecuador.
Tipo: Bilateral.
Fecha de suscripción: 21/03/1996.
Fecha de publicación: Registro Oficial No. 84, de fecha 11 de junio de 1997

Texto.-

La República del Ecuador y la República Federal de Alemania;

Animadas del deseo de intensificar la colaboración económica entre ambos Estados;

Con el propósito de crear condiciones favorables para las inversiones de capital de los nacionales o sociedades de uno de los dos Estados en el territorio del otro Estado;

Reconociendo que el fomento y la protección de esas inversiones de capital mediante un tratado pueden servir para estimular la iniciativa económica privada e incrementar el bienestar de ambos pueblos;

Han convenido en lo siguiente:

Artículo 1. Definiciones.-

Para los fines del presente Tratado:

1.- El concepto de "inversiones de capital" comprende toda clase de bienes, en especial:

ANNEX B

EMBASSY OF ECUADOR

No. 4-2-87/10

The Embassy of Ecuador presents its compliments to the U.S. Department of State - Office of Andean Affairs, and has the honor to attach a letter from the Minister of Foreign Affairs, Trade and Integration, Mr. Ricardo Patiño, to the Secretary of State, Mrs. Hillary Clinton, regarding the interpretation of Article II (7) of the 1993 Bilateral Investment Treaty in the context of Chevron's claim against Ecuador related to past oil operations by Chevron's subsidiary, Texaco Petroleum Company.

Accordingly, the Embassy of Ecuador would appreciate if this letter can be conveyed to the Secretary of State.

The Embassy of Ecuador avails itself of this opportunity to renew to the U.S. Department of State - Office of Andean Affairs, the assurances of its highest consideration.

June 11th, 2010

EMBAJADA DEL ECUADOR WASHINGTON

U.S. Department of State - Office of Andean Affairs
2201 C Street NW
Washington, DC 20520

REPÚBLICA DEL ECUADOR

Ministerio de Relaciones Exteriores, Comercio e Integración

No. 13528 -GM/2010

Quito, a 8 de junio de 2010.

ASUNTO: INTERPRETACION ERRONEA DEL ARTICULO (II)7 DEL TRATADO SOBRE PROMOCION Y PROTECCION RECIPROCA DE INVERSIONES POR PARTE DE TRIBUNAL ARBITRAL EN CASO CHEVRON.

Señora Secretaria de Estado:

En nombre del Gobierno de la República del Ecuador, me cumple presentar ante el Ilustrado Gobierno de los Estados Unidos de América, por intermedio de Vuestra Excelencia, algunos asuntos muy delicados que han surgido en torno a la correcta interpretación y aplicación que debe darse a los términos del Tratado entre la República del Ecuador y los Estados Unidos de América, concerniente a la Promoción y Protección Recíproca de Inversiones, firmado el 27 de agosto de 1993, el cual entró en vigor el 11 de mayo de 1997 (en adelante "el Tratado"). Estos asuntos cuestionan la intención común de las Partes con respecto a la naturaleza de sus obligaciones mutuas en relación a las inversiones de nacionales o sociedades de la otra Parte. También amenazan con socavar la buena administración de los procedimientos de solución de controversias entre los inversionistas de un Estado y otro Estado.

Recientemente un tribunal arbitral constituido bajo las Reglas de Arbitraje de la Comisión de las Naciones Unidas para el Derecho Mercantil Internacional, con arreglo al artículo VI.3.a.iii del Tratado dictó un laudo parcial sobre reclamos presentados en el marco del Tratado contra la República del Ecuador por parte de Chevron Corporation y Texaco Petroleum Company. El laudo parcial aborda las cuestiones de responsabilidad y compensación bajo el Tratado. Una copia del laudo parcial se acompaña a esta nota.

El Gobierno de la República del Ecuador no está de acuerdo con muchos aspectos del laudo parcial, pero está particularmente preocupado por la interpretación y aplicación errónea del Tribunal del Artículo II (7) del Tratado. Sobre la base de esta errónea interpretación y aplicación, el laudo parcial sostiene que la República del Ecuador no cumplió con sus obligaciones cuando las cortes ecuatorianas no dictaron sentencia en siete demandas presentadas por una filial de las demandantes en los años anteriores a que las demandantes inicien el arbitraje en virtud del Tratado y antes de que el Tratado entre en vigor.

.../...

A Su Excelencia
Hillary Clinton,
Secretaria de Estado,
W a s h i n g t o n, DC.

El Artículo II (7) dispone que "Cada parte establecerá medios eficaces para hacer valer las reclamaciones y respetar los derechos relativos a las inversiones, los acuerdos de inversión y las autorizaciones de inversión." El Gobierno de la República del Ecuador considera que esta disposición tuvo la intención de obligar a las Partes a implementar obligaciones ya existentes en virtud del derecho internacional consuetudinario, relativas a la prohibición de la denegación de justicia al proporcionar un marco o sistema efectivo, en virtud del cual puedan hacerse valer los reclamos y cumplirse los derechos. No fue la intención obligar a las Partes a asegurar que el marco o sistema provisto sea efectivo en casos particulares, asunto que está cubierto bajo otras disposiciones del Tratado que incorporan los principios del derecho internacional consuetudinario. Finalmente, el Gobierno de la República del Ecuador considera que, en virtud de la intención de las partes, la determinación de la compensación por las pérdidas sufridas como resultado de una violación de estos requisitos no puede basarse en una determinación de los derechos bajo la legislación de la Parte respectiva que es diferente a lo que las cortes de esa Parte han determinado o que podrían determinar.

El laudo parcial del tribunal arbitral, sin embargo, interpreta los deberes expresados en los términos del Artículo II (7) de manera mucho más amplia que los reflejados en los requisitos ya mencionados, excediéndose a aquellos necesarios para implementar el derecho consuetudinario internacional y constituir una garantía de trato en casos particulares. El laudo parcial también interpreta y aplica la disposición que permite la debida compensación por una violación que se base en determinaciones de los derechos según el derecho local, sin consideración a las determinaciones reales o probables de las cortes locales.

Específicamente, el laudo parcial establece que "el Artículo II (7) del [Tratado] constituye lex specialis con mayor especificidad que el estándar del derecho consuetudinario de denegación de justicia" (¶ 275). También afirma que "un distinto y potencialmente menos exigente examen es aplicable en virtud de esta disposición en relación a la denegación de justicia conforme al derecho internacional consuetudinario", el que establece "un umbral más alto" (¶ 244). Así, de acuerdo al laudo parcial, "una violación del Artículo II (7). . . no siempre es suficiente para encontrar denegación de justicia conforme al derecho internacional consuetudinario". Aunque el laudo parcial reconoce que "los principios del derecho internacional consuetudinario, como el principio de la 'finalidad judicial' [requieren el] agotamiento total de los recursos locales con el fin de establecer la responsabilidad del Estado por los actos del poder judicial del Estado" (¶ 321), rechaza el argumento de que las demandantes deben demostrar "un estricto agotamiento de los recursos internos para que el Tribunal encuentre una violación del Artículo II (7)" (¶ 268). En cambio, el laudo parcial sostiene que las reclamaciones por violaciones del Artículo II (7) "no están sujetas a la misma estricta exigencia de agotamiento" (¶ 321).

El laudo parcial también rechaza la posición de que el Artículo II (7) tan solo requiere medios eficaces para hacer valer las reclamaciones y respetar los derechos y que, si bien las experiencias puntuales pueden ser evidencia de deficiencias sistemáticas, no pueden, por sí solas, constituir incumplimientos de la disposición. Contrariamente, el laudo parcial sostiene que el Artículo II (7) permite "revisar el trato al inversionista en casos individuales" (¶ 245).

Finalmente, mientras que reconoce que "el umbral de la "eficacia" previsto por el [Artículo II (7)] exige que un grado de deferencia sea otorgado al sistema de justicia doméstico " (¶ 247), el laudo parcial afirma de manera inequívoca que el tribunal "debe...ninguna deferencia" a cualquier sentencia dictada por las cortes nacionales después de haberse determinado un retraso violatorio (¶ 377). Sobre esta base, el laudo parcial deshecha las decisiones de las cortes ecuatorianas, por medio de las cuales se desestimaron algunas de las demandas por exceder los plazos de prescripción aplicables en la legislación ecuatoriana (porque el tribunal "no está de acuerdo con el razonamiento complejo de la [Corte]) (¶ 387) y por falta de mérito bajo los principios aplicables del derecho ecuatoriano de interpretación de los contratos (¶ 465). El laudo parcial de este modo sustituye la decisión de los funcionarios judiciales ecuatorianos debidamente autorizados y que fueron constitucionalmente facultados para adoptar tales decisiones, por aquella del tribunal arbitral en las cuestiones referentes a la ley ecuatoriana.

Como resultado de la errónea interpretación y aplicación del Artículo II (7) en el laudo parcial, el Gobierno de la República del Ecuador se encuentra en una posición similar a la de las Partes en el Tratado de Libre Comercio de América del Norte que consideraron que los tribunales arbitrales en virtud del Capítulo 11 de dicho acuerdo habían llegado a interpretaciones erróneas de su Artículo 1105, y por lo tanto, utilizaron los medios específicos disponibles en virtud del artículo 1131 de dicho acuerdo para dictaminar conjuntamente una interpretación vinculante del artículo 1105.

Aunque el Tratado no contiene una disposición como la del artículo 1131 del TLCAN, es un principio de derecho internacional que las partes de un tratado podrán acordar la interpretación de los términos de su tratado, siendo altamente autoritativas. *Véase* el artículo 31 (3), de la Convención de Viena sobre el Derecho de los Tratados, ("habrá de tenerse en cuenta [en la interpretación de un tratado], junto con el contexto [,] todo práctica ulteriormente seguida en la aplicación del tratado o de la aplicación de sus disposiciones").

Aun más, el principio de que "[t]odo tratado en vigor. . . debe ser cumplido por [las partes] de buena fe ", *véase* el artículo 26 de la Convención de Viena sobre el Derecho de los Tratados, exige que las partes actúen para prevenir cualquier mala interpretación y aplicación indebida de su tratado que resulte en detrimento de uno de ellos.

Por lo tanto, el Gobierno de la República del Ecuador solicita respetuosamente al Ilustrado Gobierno de los Estados Unidos de América que se sirva confirmar, mediante una nota de respuesta, su acuerdo con que:

1. las obligaciones en virtud del Artículo II (7) del Tratado no son mayores que las requeridas para implementar las obligaciones bajo los estándares del derecho internacional consuetudinario;
2. el requerimiento del Artículo II (7) de medios efectivos se refiere a la provisión de un marco o sistema en virtud del cual puedan efectuarse reclamos y hacerse cumplir los derechos, pero no obliga a las Partes en el Tratado a asegurar que el marco o el sistema provisto sea siempre efectivo en casos particulares; y,
3. la fijación de la debida compensación por las pérdidas sufridas como resultado de una violación de los requisitos del Artículo II (7) no puede basarse en una

determinación de los derechos bajo la legislación de la Parte respectiva que sea distinta a lo que las cortes de esa Parte han determinado o podrían determinar, por lo que no se permite a los tribunales arbitrales con arreglo al Artículo VI (3) del Tratado, sustituir con sus decisiones aquellas sentencias en las que se aplica el derecho bajo las normas municipales en las sentencias expedidas por las cortes locales.

Si dicha nota de confirmación no es presentada, o, en su defecto, el Ilustrado Gobierno de los Estados Unidos de América no coincide con el Gobierno de la República del Ecuador en la interpretación del Artículo II (7) del Tratado, se entenderá que existe una diferencia no resuelta entre el Gobierno de la República del Ecuador y el Gobierno de los Estados Unidos de América relativa a la interpretación del Tratado.

Me valgo de la oportunidad para renovar Vuestra Excelencia el testimonio de mi más alta y distinguida consideración.

Ricardo Patiño Aroca,
Ministro de Relaciones Exteriores, Comercio e Integración

DESPACHO DEL CANCILLER
ECUADOR

Con Anexos.

Non Official Translation

No. 13528-GM/2010

Quito, June 8th, 2010

SUBJECT: MISINTEPRETATION OF ARTICLE II (7) OF THE TREATY FOR ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT, BY THE ARBITRAL TRIBUNAL IN THE CASE CHEVRON

Madam Secretary of State:

On behalf of the Government of the Republic of Ecuador, I meet to submit to the Illustrious Government of the United States, through your Excellency, various delicate matters that have arisen around the proper interpretation and application to be given to terms of the Treaty between the Republic of Ecuador and the United States of America, serious issues that have arisen concerning the proper interpretation and application to be accorded to terms of the Treaty between the Republic of Ecuador and the United States of America concerning the Encouragement and Reciprocal Protection of Investment which was signed on August 27, 1993 and which entered into force on May 11, 1997 (hereinafter "Treaty"). These issues put into question the common intent of the Parties with respect to the nature of their mutual obligations regarding investments of nationals or companies of the other Party. They also threaten to undermine the proper administration of the procedures for resolving disputes between investors of one State and the other State.

Recently an arbitral tribunal constituted under the Arbitration Rules of the United Nations Commission on International Trade Law pursuant to Article VI.3.a.iii of the Treaty rendered a partial award on claims raised under the Treaty against the Republic of Ecuador by Chevron Corporation and Texaco Petroleum Company. The partial award addresses the questions of liability and compensation under the Treaty. A copy of the partial award accompanies this note.

The Government of the Republic of Ecuador disagrees with many aspects of the partial award but is particularly concerned with the tribunal's erroneous interpretation and application of Article II.7 of the Treaty. On the basis of that erroneous interpretation and application, the partial award holds that the Republic of Ecuador failed to comply with its obligations when its domestic courts did not render judgments in seven lawsuits lodged by a subsidiary of the claimants in the years before claimants commenced their arbitration under the Treaty, and before the Treaty entered into force.

../...

To the Honorable
Hillary Clinton,
Secretary of State
Washington DC

Article II.7 provides that "[e]ach Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations." The Government of the Republic of Ecuador considers that this provision was intended to obligate the Parties to implement pre-existing obligations under customary international law relating to the prohibition against denial of justice by providing an effective framework or system under which claims may be asserted and rights enforced. It was not intended to obligate the Parties to assure that the framework or system provided is effective in particular cases, which is a matter left to other provisions of the Treaty incorporating customary international law principles. Finally, the Government of the Republic of Ecuador believes that, under the Parties intended meaning, the determination of compensation due for losses suffered as a result of a violation of these requirements cannot be based upon a determination of rights under the law of the respective Party that is different from what the courts of that Party have determined or would likely determine.

The arbitral tribunal's partial award, however, interprets the duties manifested in the terms of Article II.7 to be far broader than those reflected in the requirements just mentioned, to exceed those necessary to implement customary international law and to constitute a guarantee of treatment in particular cases. The partial award also interprets and applies the provision to allow the compensation due for a violation to be based upon determinations of rights under local laws at odds with the actual or likely determinations of the local courts.

Specifically, the partial award states that "Article II(7) of the [Treaty] constitutes a lex specialis with greater specificity than the customary law standard of denial of justice" (¶ 275). It also states that "a distinct and potentially less-demanding test is applicable under this provision as compared to denial of justice under customary international law," which sets "a high threshold"(¶ 244). Thus, according to the partial award, "a violation of Article II(7) . . . may not always be sufficient to find a denial of justice under customary international law." Although the partial award recognizes that "principles of customary international law, such as the principle of 'judicial finality'[, require] complete exhaustion of local remedies in order to establish State Responsibility for the acts of a State's judiciary" (¶ 321), it rejects the contention that claimants must prove "a strict exhaustion of local remedies in order for the Tribunal to find a breach of Article II(7)" (¶ 268). Instead, the partial award holds that claims for violations of Article II(7) "are not subject to that same strict requirement of exhaustion" (¶ 321).

The partial award also rejects the position that Article II(7) requires only a framework or system under which claims may effectively be asserted and rights enforced and that, while individual experiences may be evidence of systematic inadequacies, they cannot themselves constitute breaches of the provision. Instead, the partial award holds that Article II(7) allows arbitral "review of investor treatment in individual cases" (¶ 245).

Finally, while acknowledging that "the threshold of 'effectiveness' stipulated by [Article II(7)] requires that a measure of deference be afforded to the domestic justice system" (¶ 247), the partial award states unequivocally that a tribunal "owes . . .no deference" to any judgment issued by national courts after a violative delay has been determined (¶ 377). On this basis, the partial award disregards Ecuadorian court decisions dismissing some of the lawsuits for exceeding the period of prescription applicable under Ecuadorian law (because the tribunal "does not agree with the [court's] complex reasoning") (¶ 387) and for lack of merit under applicable Ecuadorian

law principles of contract interpretation (¶ 465). The partial award thereby substitutes the judgment of the arbitral tribunal on issues of Ecuadorian law for that of the duly authorized Ecuadorian judicial officers constitutionally empowered to make such decisions.

As a result of the partial award's erroneous interpretation and application of Article II(7), the Ecuador finds itself in a position similar to that of the Parties to the North American Free Trade Agreement who considered that arbitral tribunals under Chapter 11 of that agreement had arrived at erroneous interpretations of its Article 1105 and therefore exercised the specific means available to them under Article 1131 of that agreement to jointly render a binding interpretation of Article 1105.

Although the Treaty does not contain a provision like Article 1131 of NAFTA, it is a principle of international law that treaty parties may agree on interpretations of the terms of their treaty that are highly authoritative. *See* Article 31(3),Vienna Convention on the Law of Treaties, ("There shall be taken into account [in the interpretation of a treaty], together with the context[,] any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.").

Moreover, the principle that "[e]very treaty in force . . . must be performed by [the parties] in good faith," *see* Article 26,Vienna Convention on the Law of Treaties, requires that parties act to prevent any misinterpretation and misapplication of their treaty that results in harm to one of them.

Therefore, the Government of the Republic of Ecuador respectfully requests the Illustrious Government of the United States of America to confirm, by a note of reply, the agreed upon by:

1. the obligations under Article II(7) of the Treaty are not greater than those required to implement obligations under the standards of customary international law;

2. the Article II(7) requirement of effective means refers to the provision of a framework or system under which claims may be asserted and rights enforced, but does not create obligations to the Parties to the Treaty to assure that the framework or system provided is effective in particular cases; and

3. the fixing of compensation due for losses suffered as a result of a violation of the requirements of Article II(7) cannot be based upon a determination of rights under the law of the respective Party that is different from what the courts of that Party have determined or would likely determine, and thus do not permit arbitral tribunals under Article VI.3 of the Treaty to substitute their judgment of rights under municipal law for the judgments of municipal courts.

If such a confirming note is not forthcoming or otherwise the Illustrious Government of the United States does not agree with the interpretation of Art. 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 Ecuador and the Government of the United States of America concerning the interpretation and application of the Treaty.

I take this opportunity to renew to Your Excellency the assurances of my highest consideration.

(SIGNED)
Ricardo Patiño Aroca,
Minister of Foreogn Affairs, Trade and Integration