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

BETWEEN

THE REPUBLIC OF ECUADOR

AND

THE UNITED STATES OF AMERICA

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

W. Michael Reisman
127 Wall Street
New Haven, Connecticut
U.S.A.

Date: April 24, 2012
I. INTRODUCTION

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

2. I have been asked by the United States Government to study and comment upon the question of jurisdiction presented by the Republic of Ecuador's ("Ecuador") request for interstate arbitration under Article VII of the Ecuador-U.S. Bilateral Investment Treaty ("BIT").

In the preparation of this opinion, I have studied Ecuador's request and submissions as well as the correspondence between the United States and Ecuador related to Ecuador's initiative. I am generally familiar with the history and decisions in the bilateral investment treaty case between Chevron Corporation ("Chevron") and Ecuador which are of relevance to the questions posed.

---

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

II. SUMMARY OF CONCLUSIONS

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

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

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

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

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

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

4. A decision emanating from a procedure such as that proposed by Ecuador or from the decision of this Tribunal would not be directly binding on tribunals exercising jurisdiction under the Article VI investor-state track. Nor would it be an amendment to the BIT. It could not be registered as a treaty under United Nations Charter Article 101 and would, thus, not be noticed to third-party beneficiaries of the BIT. Thus, it would be a procedure to which Ecuador’s desired relief of “authoritative interpretation” is unavailable.
5. As a general matter, the application by Ecuador, were it accepted, could do significant injury to the international investment regime.

III. THE RELEVANT FACTS

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

---

4 Chevron Partial Award at ¶ 242.
created as an independent treaty standard to address a lack of clarity in the customary international law regarding denial of justice" and its "lex specialis nature . . . [is] confirmed by its origin and purpose."

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

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

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

---

5 Id. at ¶ 243.
6 Letter from Minister Patiño to Secretary Clinton, No. 13528-GM/2010, "Interpretacion Erronea del Articulo (II)7 del Tratado Sobre Promocion y Proteccion Reciprocas de Inversiones por Parte de Tribunal en Caso Chevron" [Misinterpretation of Article II(7) of the Treaty for Encouragement and Reciprocal Protection of Investment, by the Arbitral Tribunal in the Chevron Case] (June 8, 2010).
Ecuador and the Government of the United States of America concerning the interpretation and application of the Treaty.

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

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

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

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

[T]he Arbitration Court had made an erroneous interpretation of the BIT in the Chevron II case. Furthermore, the note requested the United Stated [sic] to confirm that it shared the same interpretation of the Republic of Ecuador. If that was not the case, and the United Stated [sic] manifested to have a different interpretation on the subject, it would be understood that there was a difference on the interpretation of the BIT. Ecuador never received any answer to that diplomatic note.

As this conflict of interpretation was not properly clarified through the proper diplomatic channels, the Republic of Ecuador has decided, under the terms of the BIT itself, to request an Arbitration Court to present a formal and final

---

interpretation of the BIT under the rules of International Law, according to the rules of UNCITRAL.¹

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

The U.S. never offered an opinion or commented on Ecuador’s interpretation, nor did the U.S. ever provide Ecuador with its own interpretation of Article II(7).

This plainly was not an oversight on the part of the U.S. It was the result of a deliberate decision by the U.S. not to provide its interpretation of Article II(7) to Ecuador. In fact, Ecuador was told this by none other than my friend, Assistant Secretary of State and Legal Adviser Harold Koh, whom I am very pleased to see here today. On 7 October 2010, four months after receiving Ecuador’s diplomatic note, Assistant Secretary Koh told the Ambassador of Ecuador in Washington that “The United States will not rule on this matter.” And Assistant Secretary Koh, unsurprisingly, was true to his word. Nearly nine months passed from the time of his message to the Ambassador of Ecuador until the time Ecuador filed its Notice of Arbitration. And, as he had informed Ecuador’s Ambassador, the United States never ruled on this matter. It did not respond further to Ecuador’s request and never advised Ecuador of its interpretation of Article II(7). It was blindingly obvious the U.S. was not going to respond.⁹

IV. PRINCIPLES OF TREATY INTERPRETATION

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

---

¹ Id.
the word "rule" in Article 31, as opposed to the instrumental character of the word "means" in Article 32, that Article 31 was intended to be dominant, while Article 32 was intended to be auxiliary or supplemental to it.

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

V. ANALYSIS OF THE BIT

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

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

17. Article VI provides, in pertinent part:

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

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 ("ICSID convention"), provided that the Party is a party to such Convention; or

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

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

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

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

18. Article VII provides, in pertinent part:
1. Any dispute between the Parties concerning the interpretation or application of the Treaty which is not resolved through consultations or other diplomatic channels, shall be submitted, upon the request of either Party, to an arbitral tribunal for binding decision in accordance with the applicable rules of international law. In the absence of an agreement by the Parties to the contrary, the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), except to the extent modified by the Parties or by the arbitrators, shall govern.

2. Within two months of receipt of a request, each Party shall appoint an arbitrator. The two arbitrators shall select a third arbitrator as Chairman, who is a national of a third State. The UNCITRAL Rules for appointing members of three member panels shall apply mutatis mutandis to the appointment of the arbitral panel except that the appointing authority referenced in those rules shall be the Secretary General of the Centre.

3. Unless otherwise agreed, all submissions shall be made and all hearings shall be completed within six months of the date of selection of the third arbitrator, and the Tribunal shall render its decisions within two months of the date of the final submissions or the date of the closing of the hearings, whichever is later.

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

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

1. Jurisdiction Ratione Personae in the Two-Track System

21. The jurisdictional track established by Article VI provides standing only to an investor (“a national or company of the other Party”) and the State Party which is host to that investor’s investment. It does not afford standing to the State of the investor. By contrast, the North American Free Trade Agreement (“NAFTA”) expressly allows a limited standing for the other treaty Parties. NAFTA Article 1128 provides that “[w]ritten notice to the disputing...
parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement." Article VI of the BIT provides no analogous right in every case.

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

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

23. Along with the *ratione personae* differences between Articles VI and VII, the central jurisdictional feature of the BIT's dual-track jurisdictional regime is its assignment of a different range of disputes exclusively to each of the tracks. The core formula in Article VII of the BIT, to the effect that "any dispute between the Parties concerning the interpretation or application of the Treaty which is not resolved through consultations or other diplomatic channels, shall be submitted, upon the request of either Party [..] for binding decision in accordance with the applicable rules of international law" is found, in varying formulations, as the exclusive form of jurisdiction in a large number of treaties.13 The vast majority of treaties do not, however, include the two-tracks for distinct types of arbitration. The two-track jurisdictional arrangement, which is found in this BIT and, more generally, in a large number of international

---

13 See, e.g., THE TREiTAY MAKER'S HANDBOOK 117-131 (Hans Blix & Jirina H. Emerson eds., 1973) (collecting examples of clauses regarding "disputes" over "interpretation or application" from, among many others, the Revised General Act for the Pacific Settlement of International Disputes (1963) and the Convention on International Civil Aviation (1944)).
investment treaties, is distinctive in this treaty genre. (An analogue, to which I will return, is found in Article 47 of the European Convention on Human Rights.)

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

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

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

1. The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto.

2. Such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the Protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.

27. ECHR Article 48 provides:

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

28. Unlike the BIT, the European Convention makes the jurisdiction to provide "advisory opinions" explicit and provides guidance for the role of such opinions within the procedural system created by the treaty. But the European Convention's allocation of jurisdiction between two tracks is nevertheless useful for understanding BIT Article VII, given the presence of third-party beneficiaries in both systems. The States-parties to the European Convention on
Human Rights are precluded from using this second track of jurisdiction for the purpose of initiating a change in the substantive rights afforded to the third party beneficiaries of the treaty. That is reserved to the Court operating under its primary jurisdictional track and this primary track can be initiated only by an aggrieved person as part of a case or controversy. Changes in the substantive rights in the Convention are made through multiple treaty protocols to the Convention.

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

---

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

17 Methanex Corp. v. United States of America, Final Award, Part IV, Chapter C, at ¶ 20 (NAFTA Ch. 11 Arb. Trib. Aug. 3, 2005)).
tribunals, then a state which is unhappy with the award may try to undermine the exclusivity of the investor-state jurisdictional track at any stage by invoking the inter-state jurisdictional track. At the same time, investors who are dissatisfied with the awards rendered in their cases—and roughly half of investment cases are decided against investors—will press their governments to initiate the inter-state jurisdictional track, again, at any stage, to undermine the legitimacy of the awards which they consider adverse. Even the NAFTA model does not permit these questions to be addressed in State-State dispute resolution. Thus the jurisdiction *ratione materiae* of each of the two tracks is different; in particular, where a dispute has already been adjudicated in investor-State arbitration under Article VI, the Article VI jurisdiction over that dispute is exclusive.

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

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

---

18 Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 86 N.C. L. Rev. 1, 49 (2007) (“Out of the fifty-two awards finally resolving treaty claims, there were twenty awards (38.5%) where investors one and tribunals awarded damages. By contrast, there were thirty awards (57.7%) were governments paid investors nothing.”)
Recognition and Enforcement of Foreign Arbitral Awards. It is worth mentioning that this limited form of review cuts both ways: in the abstract, it is neither “investor-friendly” nor “State-friendly,” as a dissatisfied investor, exactly like a dissatisfied respondent State, must content itself with highly circumscribed annulment procedures as the only lawful means to challenge an award it finds “erroneous.”

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

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

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

---

19 *Empresas Lucchetti, S.A. & Lucchetti Peru, S.A. v. Peru*, ICSID Case No. ARB/03/04, Award (Feb. 7, 2005),
the Chilean owners of a pasta factory in Lima. Shortly after the investors demanded arbitration, Peru requested that the investor-state tribunal suspend the proceeding because “Claimants’ Request for Arbitration [was] (...) the subject of a concurrent State-to-State dispute between the Republic of Peru and the Republic of Chile.”\textsuperscript{20} Peru’s request for suspension and its strategic design of using an inter-state proceeding to collaterally challenge the investor’s claims test the hypothesis that Ecuador has assumed as truth: that an investor-claimant’s claims of law and fact can transit the barrier between the two tracks and be “the subject of . . . dispute” between states. If the inter-state track could furnish “authoritative interpretations” that bear upon an investor’s precise claims of fact and law, as Ecuador seeks to obtain, then the Lucchetti tribunal might have suspended the investor’s proceeding on the merits. After permitting separate briefing and oral argument on Peru’s request for suspension, the Lucchetti Tribunal dealt quickly and accurately with Peru’s challenge: it tersely noted that “the conditions for a suspension of the proceedings were not met and confirmed the schedule for the submission of pleadings on the objections to jurisdiction.”\textsuperscript{21}

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

\textsuperscript{20} Id. at \textsuperscript{17}.
\textsuperscript{21} Id. at \textsuperscript{19}.
States-parties which excludes the claimant investor. One of the States parties to this *ex parte* proceeding will often not be disinterested in interfering with the investor-state track.

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

37. The essential point of emphasis to be drawn from the BIT, as well as the *Lucchetti* and *Italy v. Cuba* examples, is that the central achievement of the modern BIT regime is to provide meaningful and effective procedural rights in place of the customary law and politicized
arrangement that characterized the pre-BIT era of diplomatic protection. This achievement is primarily expressed in the design of a two-track jurisdictional system, which separates, legalizes, and insulates the investors’ procedural rights from what seemed before to be the caprice of sovereign-to-sovereign politics.

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

3. The ICSID Convention

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

No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under
this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

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

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

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

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

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

4. The Purported NAFTA analogy

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

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

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

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

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

25 See generally CME v. Czech Republic, Final Award at ¶¶ 87-90 (UNCITRAL, March 14 2003).
46. A more unorthodox example of state-initiated attempts to either declare or draw out a non-respondent state’s interpretation of a BIT can be found in *Aguas del Tunari v. Bolivia*.\(^{26}\) In *Aguas del Tunari*, the tribunal was confronted by Bolivia’s assertion that both Bolivia and The Netherlands, the other Party to the BIT but not obviously a party in the investor-state arbitration, were allegedly on record that their BIT did not apply to the case at bar. But the documents which Bolivia adduced—a series of parliamentary questions between Dutch MPs and the Dutch government about the pending case some of which suggested that the government might consider the BIT to be “inapplicable” to that case—included contradictory Dutch Government statements. Faced with such materials and Bolivia’s assertion that this was the joint view of both Contracting Parties, the tribunal wrote to the Legal Advisor to the Netherlands Foreign Ministry to inquire about these statements which purported to reflect the Dutch interpretation.\(^{27}\) The tribunal framed its enquiry as asking whether the government’s statements, when paired with Bolivia’s, could be considered a “subsequent agreement” under VCLT Article 31. The Dutch Government replied to the Tribunal with an “Interpretation of the Agreement on encouragement and reciprocal protection of investments.” The tribunal found that this document “contained only comments of a general nature that possibly may be relevant to the task of confirming an interpretation under Article 32 . . . of the [VCLT]. It does not provide the tribunal, however, with any information of the type suggested by Article 31 . . . .” Ultimately, the tribunal demurred on its curious reading of VCLT Article 31 and disregarded the letter from the Dutch government: “The Tribunal,” it said, “has made no use of this document in arriving at its decision.”\(^{28}\) The tribunal rejection of the letter was consistent with the dual track operation of

---

\(^{26}\) ICSID Case No. ARB/02/3 (October 21, 2005).

\(^{27}\) One may note, in passing, that the tribunal’s reliance on ICSID Rule 34 was misplaced; it actually had no authority for its initiative.

\(^{28}\) *Aguas del Tunari* at ¶ 260.
BITs and is evident in its explanation of why the enquiry was irrelevant: "in any event, the Tribunal emphasizes . . . its firm view that it is the Tribunal, and not the Contracting Parties, that is the arbiter of its jurisdiction." 29

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

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

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

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

29 *Id.* at ¶263.
provided to the investor for bringing claims, as well as “enforcing rights,” so the BIT also focuses on the effective enforcement of the rights that are at issue in particular cases. The Tribunal thus finds that it may directly examine individual cases under Article II(7), while keeping in mind that the threshold of ‘effectiveness’ stipulated by the provision requires that a measure of deference be afforded to the domestic justice system; the Tribunal is not empowered by this provision to act as a court of appeal reviewing every individual alleged failure of the local judicial system de novo.” (¶247)

49. *Res judicata* is a settled doctrine of public international law generally and international investment law. Setting to one side the identity-of-parties requirement, given the table I have produced above comparing Ecuador’s requested relief with the Partial Award’s holdings of law, it is clear that the “rights, questions or facts” that constitute Ecuador’s “claim for relief” have all been put at issue and resolved. While Ecuador is dissatisfied with the outcome of that proceeding, it cannot claim that it has not had its day in court to litigate precisely the legal situation that gives rise to this attempt to initiate an Article VII arbitration. Indeed, the precise overlap between the *Ecuador v. United States* and *Chevron v. Ecuador* issues of law and fact can hardly be ignored. As the International Court recently affirmed, “[t]wo purposes, one general, the other specific, underlie the principle of *res judicata*, internationally as nationally. First, the
stability of legal relations requires that litigation come to an end . . . Secondly, it is in the interest of each party that an issue which has already been adjudicated in favour of that party be not argued again.\textsuperscript{30} 

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

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

\textsuperscript{30} \textit{Application of the Genocide Convention} (Bos. v. Serb.), 2007 I.C.J. 43, 90.
C. The Impossibility of an “Authoritative Interpretation”

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

VI. CONSEQUENCES BEYOND THIS CASE

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

54. Ecuador’s submission in this case, if accepted, would not only undermine the validity and credibility of the award which the investor has won based upon the rights vouchsafed it under the treaty. It would have the effect of drawing the United States government
into each investment dispute in which the American investor had gained or lost an award. It would create a model for other states-parties to BITs with the United States and other states inter se with respect to their own BITs to request "interpretation" in cases which they or their investors have lost a case against the host state or against their national investor. It would equally put the United States government and other governments under pressure from national claimants who had lost their BIT arbitrations to initiate inter-state arbitrations in order to reverse the effect of the adverse awards and their holdings. The net effect of this innovation would be to erode the effectiveness of BITs’ investor-state arbitration. It would, moreover, consume, once again, precisely those administrative and international and domestic political resources which the privatization of international investment arbitration has permitted the governments who have elected to use BITs to husband.

55. In an investment dispute there is always a State party to a BIT that appears either as a respondent or a counter-claimant who will be proposing to the tribunal its interpretation of one or more provisions of the BIT. If Ecuador’s definition of “dispute” in this proceeding is accepted, then each time a State party in an investment dispute finds that its interpretation of a BIT provision fails to persuade the investment tribunal, it will ipso facto be able to claim an "erroneous interpretation" of the BIT which will be an inter-state arbitrable "dispute" with the State of the nationality of the investor unless that other State party consents to the interpretation. This is elevating a State’s unilateral unhappiness and its disappointment in bilateral investment arbitration to an inter-state “dispute” and allowing it to circumvent the treaty by compelling renegotiation of specific provisions. The respondent State may do more: as in Lucchetti, it will then be able to initiate an Article VII procedure during the Article VI arbitration, move for the latter’s suspension and essentially arrogate the investor’s procedural rights. (The respondent
State may also raise it during the pendency of an annulment procedure which it itself has initiated, as Ecuador has done in this case, or as a defense in a future enforcement action brought by the investor.) The point is there is nothing in the BIT which specifies when Article VII jurisdiction can be invoked. If Ecuador’s application is allowed in this case, there is nothing to prevent it—and similarly situated states—from raising such an application at any time during the investor-state arbitration, in effect paralyzing those arbitrations. Even if a tribunal resists it, as did Lucchetti, its refusal may then be used as a means for challenging the award. This is, in my view, not the purpose for which the inter-State dispute provision of the BIT was designed.

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

To the extent that the interpretation might be said to benefit Ecuador in comparison with the interpretation given by the Chevron Tribunal, it would in equal measure benefit the United States. To the extent that the burden of Article II(7) on Ecuador would be reduced, it would likewise be reduced for the United States. In that regard, it is worth noting that in its own Model BIT promulgated in 2004 and included by the U.S. in its subsequent bilateral investment treaties with other States, the United States completely unburdened itself of Article II(7) by eliminating it from these treaties.

What Ecuador seeks from this Tribunal indisputably imposes no burden on the United States. This is, as I said, a friendly arbitration . . . .

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

VII. CONCLUSIONS

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

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

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

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

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

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

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

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

Respectfully submitted,

W. Michael Reisman
Annex 1
W. Michael Reisman

P.O. Box 208215
New Haven, CT 06520-8215
Tel.: (203) 432-4962
Fax.: (203) 432-7247

Summary Resume

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

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


**Endowed Lectureships**

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

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

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

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

Brainerd Currie Lecture, Duke University, School of Law, 1989.
Sloan Lecture, Pace University Law School, 1992.
Siebenthaler Lecture, Salmon P. Chase College of Law, Northern Kentucky University, 1995.
Hague Academy of International Law, 1996.
Lauterpacht Lecture, Cambridge University, 1996.
Eberhardt Deutsch Lecture, Tulane University, 1997.
Hugo L. Black Lecture, University of Alabama School of Law, Spring 2001.
Adda B. Bozeman Lecture, Sarah Lawrence College, April 2002.
The Manley O. Hudson Lecture, American Society of International Law, April 2004.
The Klatsky Lecture in Human Rights, Case Western Reserve University School of Law, January 2008.
The Goff Arbitration Lecture, Freshfields Bruckhaus Deringer/City University of Hong Kong, Hong Kong, December 2008.

Human Rights Missions


Publications

Books


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


In Progress


Articles


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


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


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


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


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


162. "Autonomy, Interdependence and Responsibility," Comments on Weyrauch & Bell,
"Autonomous Lawmaking: The Case of the "Gypsies," 103:2 Yale Law Journal 401
(1993).

163. "Control Mechanisms in International Dispute Resolution," 2 United States-Mexico Law

164. "Moving International Law From Theory to Practice: The Role of Military Manuals in
Effectuating the Law of Armed Conflict (with W. Lietzau) vol. 64 International Law

Cultural Diversity and Human Values," conference co-sponsored by The World Academy
of Art and Science, Georgetown University, April 4, 1993.

166. "The Raid on Baghdad: Some Reflections on its Lawfulness and Implications," 5:1

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

168. Introductory Remarks, Symposium: Constitutionalism in the Post-Cold War World, 19

169. "A Place For 'All the Rest of Us': Reinventing the General Assembly," Proceedings XXIII

170. "The Structural Imperatives of DRMs: Some Hypotheses and Their Applications," ABA
Committee on Int'l Trade Law and Canadian Law "Int'l Dispute Resolution After
NAFTA," April, 1994, reprinted as "Contextual Imperatives of Dispute Resolution
Mechanisms — Some Hypotheses and Their Applications in the Uruguay Round and

Human Rights System: Defending Human Rights, 1959-1994, Regional Meeting of the
Am. Soc'y of Int'l Law, Am. Univ. (April, 1994).

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

Rights,"


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


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


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


Forthcoming Articles


**Book Reviews**


32


Annex 2
DECLARATION OF PROFESSOR W. MICHAEL REISMAN

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

1. I am the Myres S. McDougal Professor of International Law at Yale Law School, where I have been on the faculty since 1965. I have published twenty-one books in my field, six of which focus specifically on international arbitration and adjudication; a seventh, which I edited, focuses on jurisdiction in international law. I am the lead editor of a casebook entitled "International Commercial Arbitration" (with Craig, Park and Paulsson). My book, "Systems of Control in International Adjudication and Arbitration," considers the role of national courts in the context of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. My book, "Foreign Investment Disputes" (2005, with Bishop and Crawford) focuses on the many problems encountered in international investment law. In addition to my teaching and scholarship, I have served as Editor-in-Chief of the American Journal of International Law and Vice-President of the American Society of International Law. I have also been elected to the Institut de Droit International and the American Law Institute. I serve as President of the Arbitral Tribunal of the Bank for International Settlements, have served as an arbitrator in numerous international commercial and public international arbitrations, as counsel in other arbitrations, as well as in cases before the International Court of Justice ("ICJ"), and as an expert witness on diverse matters of international law. With
particular reference to investment law, I have served as arbitrator in two NAFTA arbitrations and have served or am serving in five ICSID arbitrations and in one non-supervised investment arbitration. Most of the disputes on which I have arbitrated or testified have concerned bilateral investment treaties and I have considered their impact on international law in an article (with Professor Robert Sloane) in the British Yearbook of International Law.¹ A *curriculum vitae* setting forth a complete list of my activities and publications is appended to this declaration.

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

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


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

³ *See* Chevron’s Notice of Arbitration at paras. 70 – 73. *See also* Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment ("U.S.-Ecuador BIT"), 1997.
contract claim; it does not reinstitute other legal actions which may have arisen out of a commercial agreement. Moreover, by terms incorporated by reference in the BIT and by the international law which it applies, questions as to the arbitrability of Chevron and TexPet's complaints must be taken up first by the arbitral tribunal itself, subject only to such post-award review as may be warranted under Article V of the New York Convention. There is not a single instance where a US court has sought to intervene in and to halt a BIT case before an award has been issued.

The FAA and the New York Convention

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

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

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

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

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

2. The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

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

7. In Article VI(4) of the U.S.-Ecuador BIT, the United States and Ecuador explicitly agreed that the Treaty's arbitration clause would constitute an “agreement in writing” for purposes of Article II of the New York Convention, thereby making the Convention directly applicable to BIT arbitration proceedings.

In the instant case, a federal court cannot find the BIT’s arbitration clause “null and void, inoperative or incapable of being performed,” and these are the only grounds available to it in dealing with Ecuador’s Petition. Indeed, other arbitrations have already been brought under the U.S.-Ecuador BIT without the validity of its arbitration agreement ever having been challenged by Ecuador, and the validity of the agreement to arbitrate is not even in dispute in this case.

The Unique International Legal Dimension of the Dispute

8. The arbitration clause in the instant case is contained in a bilateral investment treaty or BIT. BITs have become important instruments of U.S. policy for encouraging investment in foreign states to the benefit of the economic development of those states as well as to the profit of American investors; both of these objectives are American national interests. BITs oblige foreign governments to provide indispensable protections to United States investors and investments.

Most important, they enable those investors, on their own initiative, to arbitrate any disputes with those foreign governments (1) before neutral international arbitral

---

5 See, e.g., Empresa Eléctrica del Ecuador, Inc. v. Republic of Ecuador, Award, ICSID Case No. ARB/05/9 (2009); Duke Energy Electroquil Partners and Electroquil SA v. Ecuador, Award, ICSID Case No ARB/04/19; IIC 333 (2008); and MCI Power Group LC and New Turbine Inc v. Ecuador, Award, ICSID Case No ARB/03/6; IIC 296 (2007).
tribunals and not before the national courts of the foreign government; and (2) on
the basis of the international law rules incorporated in the BIT and not the law of
the host state. In this treaty scheme, BIT arbitration is a critical component, for
without it U.S. investors would be subject to the domestic courts of the host state
and hence would be less likely to make major investments in countries such as
Ecuador. Thus the general national policy of support for arbitration is reinforced
with respect to arbitral commitments in BITs. An arbitration agreement contained
in a bilateral treaty, while subject to Chapter 2 of the FAA, like all other arbitration
clauses, is part of a political program in the effectiveness of which the United
States government has indicated that it has a manifest interest.

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

6 Chevron Corp. and Texaco Petroleum Co. v. Ecuador, UNCITRAL, Notice of Arbitration
(Sept. 23, 2009).
Competence-Competence and the Ecuador-U.S. Arbitration Agreement

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

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

---

7 See Rene David, Arbitration in International Trade 10 (1985) (Trans. of Arbitrage dans le commerce international).
8 The doctrine of competence-competence is well established in international investment law. It is explicitly mandated under the rules of the Court of Arbitration of the International Chamber of Commerce ("ICC"), the United Nations Commission on International Trade Law ("UNCITRAL"), and the International Centre for the Settlement of Investment Disputes ("ICSID"). Each of these organizations was established for the purpose of facilitating international trade and investment.
12. Article VI(3) allows for a United States investor to submit a dispute for settlement by binding arbitration to UNCITRAL, to the International Centre for the Settlement of Investment Disputes (“ICSID”), to ICSID’s Additional Facility, or “to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.” The first three options are entirely a matter of choice by the United States investor.

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

1. Any dispute between the Parties concerning the interpretation or application of the Treaty which is not resolved through consultations or other diplomatic channels, shall be submitted, upon the request of either Party, to an arbitral tribunal for binding decision in accordance with the applicable rules of international law. In the absence of an agreement by the Parties to the contrary, the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), except to the extent modified by the Parties or by the arbitrators, shall govern.\(^9\)

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

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

---

\(^9\) Emphasis added.

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

(1) The Tribunal shall be the judge of its own competence.

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

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

1. The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.

2. The arbitral tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of article 21, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

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

19. Moreover, none of Ecuador’s allegations go to the validity or operability of the arbitration clause itself and, hence, none even engage any of a United States’ court’s treaty and statutory powers not to order arbitration. To the contrary, Ecuador’s allegations all implicate either procedural issues, with no relation to Article II(3) of the New York Convention, or constitute challenges to the primary investment agreements rather than to the validity of the arbitration agreement.
itself. To be specific, Ecuador prays that the Court should stay the Arbitration initiated by Chevron and TexPet because the Arbitration is allegedly precluded by principles of waiver and estoppel. These are precisely the kinds of issues to be taken up, at this stage, by the arbitral tribunal itself and not to be preempted by a domestic court.

20. Ecuador does not allege that the claims that Chevron and TexPet have brought against Ecuador in the UNCITRAL Arbitration are beyond the proper definition of an "investment dispute" under Article VI(1) of the BIT—therefore falling outside the ambit of the agreement to arbitrate. But the point of emphasis is that, even if an "investment dispute" did not exist, it is the arbitral tribunal itself, and not a national court such as this Court, which has the competence to decline jurisdiction. Similarly, if it proves to be beyond the arbitral Tribunal's power to grant a form of relief to Chevron and TexPet which would affect the rights of persons not party to the BIT's arbitration clause, as Petitioner argues, it is within the arbitral Tribunal's competence to decline jurisdiction over such matters.

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

Conclusions

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

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

---

11 Id. at para. 36.
12 See Petition to Stay Arbitration at para. 37.
writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship ....” Ecuador has a defined legal relationship with Chevron and TexPet under the various investment agreements and an obligation to arbitrate under the U.S.-Ecuador BIT, which guarantees investors the right to submit a dispute to arbitration.

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

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

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

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

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

W. Michael Reisman

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

10