

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,

Claimant/Party,

-and-

THE UNITED STATES OF AMERICA,

Respondent/Party.

**STATEMENT OF DEFENSE OF
RESPONDENT UNITED STATES OF AMERICA**

Pursuant to Article 19 of the UNCITRAL Arbitration Rules (1976), and in accordance with the Tribunal's Final Draft Procedural Order No. 1 dated March 29, 2012, the United States of America respectfully submits this Statement of Defense.

PRELIMINARY STATEMENT

This arbitration does not fall within the scope of Article VII of the U.S.-Ecuador Bilateral Investment Treaty ("Treaty"). Ecuador has initiated this arbitration by asserting that it is necessary to resolve a "dispute" between Ecuador and the United States "concerning the interpretation or application" of Article II(7) of the Treaty. In fact, there is no such dispute. Rather, this arbitration reflects Ecuador's unilateral attempt to secure a new interpretation of that Article in order to counter an interpretation rendered by another arbitral tribunal, which had

issued an award in an investment dispute brought by two U.S. investors against Ecuador. The United States was not a party to the underlying arbitration.

Unhappy with the outcome of that arbitration, Ecuador now seeks to compel the United States to re-arbitrate the meaning of Article II(7) before a different tribunal. After the investor-State tribunal issued its partial award on the merits, Ecuador sent the United States a diplomatic note containing Ecuador's unilateral statement of the meaning of Article II(7) and requesting confirmation of Ecuador's views. The diplomatic note stated that if the United States failed to confirm Ecuador's views, "an unresolved dispute must be considered to exist" between Ecuador and the United States under the Treaty. Without ever formally requesting consultations with the United States, Ecuador then commenced these proceedings, seeking an "authoritative" interpretation of Article II(7).

This Tribunal lacks jurisdiction to grant Ecuador the relief it seeks, for three principal reasons.

First, there is no "dispute concerning the interpretation or application" of Article II(7) of the Treaty, as required by Article VII. The United States has not taken any position on the interpretations of Article II(7) as stated either in the investor-State tribunal's partial award or in Ecuador's diplomatic note. As such, Ecuador and the United States are not in positive opposition concerning a concrete set of facts affecting the parties' legal rights and obligations, as required by international law. Ecuador's request thus presents no interpretive dispute between the Parties, as required by Article VII to establish this Tribunal's jurisdiction.

Second, Ecuador cannot compel the United States to take a position on Ecuador's interpretation of the Treaty by unilaterally declaring that a failure to do so creates a dispute

concerning that interpretation. Each State Party has the right, but not the obligation, to interpret the Treaty and to comment on the other Party's interpretation of the Treaty. Nothing in the Treaty or in international law supports Ecuador's request to convert impermissibly a State prerogative into a State obligation.

Third, contrary to Ecuador's view, the Treaty Parties did not, in Article VII, consent to arbitrate questions that do not relate to actual disputes between them over the performance of their Treaty obligations. Article VII does not create a mechanism by which an interstate tribunal, at the request of one Party, may render "authoritative" decisions on legal questions divorced from concrete factual situations over a Party's failure to perform under the Treaty. Nor does Article VII create a review mechanism by which a Party may appeal unfavorable decisions rendered by investor-State tribunals. In the same way, Article VII does not create advisory jurisdiction that is available to any Party to invoke at its unilateral discretion. Ecuador's Request for Arbitration suggests that the Treaty Parties, *sub silentio*, intended in Article VII to establish a new regime of international adjudication under investment treaties, under which State Parties can judicialize diplomatic discussions by demanding interpretations by ultimatum, thereby generating arbitrable disputes. Because a provision similar to Article VII exists in thousands of investment treaties around the world, Ecuador's novel theory would turn investment treaty practice on its head.

Further, even if Ecuador could have pointed to facts demonstrating an actual dispute with the United States over the interpretation or application of Article II(7), Ecuador failed to invoke the proper mechanism for consultations with the United States under the Treaty before commencing arbitration. Ecuador merely announced its views on the Treaty, demanded that the United States confirm those views, and then pronounced that an "unresolved dispute" would

exist if the United States failed to yield to Ecuador's request. Ecuador's "request" was in fact a decree, not a good-faith invitation to consultations under the Treaty.

Because the Tribunal has no jurisdiction to hear Ecuador's request, it should reject the request in its entirety and award the United States the full costs of these proceedings.

I. STATEMENT OF FACTS

This case relates to an investment arbitration that two U.S. investors, Chevron and Texaco, brought in 2004 against Ecuador.¹ Between 1991 and 1993, a Texaco subsidiary, TexPet, filed seven breach-of-contract claims against the Ecuadorian government in Ecuadorian courts. TexPet alleged that Ecuador had improperly diverted oil priced under the contract for domestic consumption and sold it for a profit on the international market. TexPet claimed \$553 million in damages for Ecuador's alleged misappropriation of TexPet's oil.

TexPet's seven breach-of-contract claims languished in Ecuador's courts for more than a decade. In December 2006, Texaco and Chevron (which had by then acquired Texaco) brought a claim against Ecuador under Article VI of the Treaty, alleging that the courts' failure to hear the contract claims constituted a denial of justice under customary international law and a violation of Ecuador's obligations under the Treaty, including Article II(7).

The investor-State case was heard by a distinguished tribunal comprising Karl-Heinz Böckstiegel, as presiding arbitrator, Charles N. Brower, and Albert Jan van den Berg. The tribunal found that the Ecuadorian courts' failure to hear the breach-of-contract claims violated

¹ *Chevron Corp. and Texaco Petroleum Co. v. Republic of Ecuador*, PCA/UNCITRAL, Partial Award on the Merits (Mar. 30, 2011) [R-1].

Chevron and Texaco's rights under Article II(7) of the Treaty to "provide effective means of asserting claims and enforcing rights" with respect to their investment. The tribunal stated:

[I]t is the nature of the delay, and the apparent unwillingness of the Ecuadorian courts to allow the cases to proceed that makes the delay in the seven cases undue and amounts to a breach of the BIT by [Ecuador] for failure to provide "effective means" in the sense of Article II(7). In particular, the Tribunal finds the existence of long delays, even after official acknowledgements by the courts that they were ready to decide the cases, to be a decisive factor demonstrating that the delays experienced by TexPet are sufficient to breach the BIT. The Tribunal ultimately concludes that the Ecuadorian courts have had ample time to render a judgment in each of the seven cases and have failed to do so.²

Ecuador has brought a claim to set aside the partial award before the Dutch courts.

Those proceedings are ongoing.

On June 8, 2010, Ecuador sent a diplomatic note to U.S. Secretary of State Hillary Clinton, noting Ecuador's disagreement with the *Chevron* tribunal's decision. The diplomatic note stated, in Ecuador's English translation:

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.³

Ecuador then offered an interpretation of Article II(7) of the Treaty, and it demanded that the United States confirm that interpretation by return diplomatic note. Ecuador stated that there would be consequences if the United States failed to accede to Ecuador's demand:

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

² *Chevron Corp. and Texaco Petroleum Co. v. Republic of Ecuador* at ¶ 262 [R-1].

³ Letter from Ecuadorian Minister of Foreign Affairs, Trade and Integration Ricardo Patiño Arcoa to U.S. Secretary of State Hillary Clinton (June 8, 2010) ("Patiño Letter") at 1 [R-2].

Ecuador and the Government of the United States of America concerning the interpretation or application of the Treaty.⁴

Ecuador's note reads less like a request than an ultimatum – effectively threatening to take the United States to arbitration if the United States declined to confirm Ecuador's interpretation of the Treaty. Nothing in Article VII of the Treaty or in international law supports the practice of generating arbitrations by ultimatum.

Days after Ecuador sent its diplomatic note, Mr. Luiz Gallegos, Ecuador's then-ambassador to the United States, requested a meeting with the State Department's Legal Adviser to reiterate Ecuador's demand. During that meeting, Ecuador's counsel emphasized Ecuador's intention to bring the United States to arbitration if the United States failed to confirm the contents of Ecuador's unilateral interpretive statement concerning Article II(7).

Two months later, in August 2010, the United States sent a reply diplomatic note to Ecuador's Minister of Foreign Affairs, attaching a letter from Assistant Secretary of State for Western Hemisphere Affairs Valenzuela to Ecuadorian Foreign Minister Patiño.⁵ That letter stated that “the U.S. government is currently reviewing the views expressed in your letter and considering the concerns that you have raised,” and that it “look[ed] forward to remaining in contact” on the matter.⁶ Ecuador never responded to the United States' August 2010 diplomatic note. Subsequently, Ambassador Gallegos met with the Legal Adviser and informally discussed with him a variety of issues, including Ecuador's diplomatic note.

⁴ Patiño Letter at 4 [R-2].

⁵ Letter from U.S. Assistant Secretary of State for Western Hemisphere Affairs Arturo A. Valenzuela to Ecuadorian Minister for Foreign Affairs, Trade and Integration Ricardo Patiño Arcoa (Aug. 24, 2010) (“Valenzuela Letter”) [R-3].

⁶ Valenzuela Letter at 1 [R-3].

At that time, political opposition to bilateral investment treaties had reached new heights in Ecuador. Ecuador already had given notice that it no longer consented to ICSID arbitration of disputes concerning natural resources, such as gas, oil, and minerals. In July 2009, Ecuador had taken the more drastic step of denouncing the ICSID Convention altogether. Two months later, in September 2009, the Ecuadorian government requested approval from its parliament to terminate 13 bilateral investment treaties, including its BIT with the United States, arguing that they were unconstitutional. Ecuador's Constitutional Court subsequently ruled that provisions of the U.S.-Ecuador BIT were unconstitutional.

Against this factual background, the Legal Adviser informed Ambassador Gallegos, in an informal conversation, that it would be difficult to consider a request for an interpretation of the Treaty while Ecuador was in the process of terminating that agreement. Contrary to Ecuador's statement, at no time did the Legal Adviser say that "his Government will not rule on this matter."⁷

There were no further formal communications between the Parties on this matter before Ecuador commenced arbitration against the United States. Ecuador never responded in writing to the United States' diplomatic note. Nor did Ecuador ever request consultations with the United States under the Treaty. The United States has not expressed a view regarding Ecuador's interpretation of Article II(7), either in the August 2010 U.S. diplomatic note, the accompanying letter, or thereafter.

⁷ 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 (June 28, 2011) ¶ 13.

II. Points at Issue

This arbitration presents the question whether one State can issue a unilateral statement concerning the meaning of a treaty and, if the other State remains silent or fails to negotiate over that declaration, convoke an international arbitral tribunal to render an "authoritative" interpretation of the treaty. The answer, we submit, is no.

Ecuador's Request for Arbitration is jurisdictionally defective in at least three respects.

First, there is no "dispute between the Parties concerning the interpretation or application" of Article II(7) of the Treaty. In the absence of such a dispute, this Tribunal lacks jurisdiction.

Article VII of the Treaty states:

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.

Article VII authorizes the Tribunal to adjudicate disputes "between the Parties concerning the interpretation or application of the Treaty" for the purpose of rendering a "binding decision in accordance with the applicable rules of international law." Article VII thus provides for a mechanism by which, in the context of an actual dispute, one Party may resort to arbitration to redress an act or omission taken by another Party that it believes is inconsistent with the Treaty.

This Tribunal cannot take jurisdiction over this matter unless Ecuador can demonstrate a genuine "dispute" with the United States over the "interpretation or application" of Article II(7). The issue of what constitutes a dispute is a fundamental question of international law and

adjudication. The World Court has developed an extensive jurisprudence on this question over nearly a century. In 1924, the Permanent Court of International Justice established the basic rule that, as a threshold question of jurisdiction, a claim must present “a disagreement on a point of law or fact, a conflict of legal views or of interests” between two parties regarding their performance under the Treaty.⁸

The International Court of Justice has elaborated on this requirement in the decades since. To find jurisdiction, the claimant must demonstrate that the disputing parties put themselves in positive opposition to one another arising from a concrete situation regarding the performance of their treaty obligations. Thus, “it is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. . . . It must be shown that the claim of one party is positively opposed by the other.”⁹ The International Court of Justice has confirmed that the existence of positive opposition is a matter of objective determination that a tribunal must make in order to find that it has jurisdiction.¹⁰

A party can put itself in positive opposition by taking an action that directly opposes the actions or position of another treaty party.¹¹ Ecuador does not allege, however, that the United States took any action that directly opposes Ecuador’s interpretation of Article II(7). While a party may put itself in positive opposition by expressing an interpretation of the other Party’s

⁸ *The Mavrommatis Palestine Concessions (Greece v. United Kingdom)*, 1924 P.C.I.J. (ser. A) No. 2, p. 11 (Aug. 30, 1924) [R-4].

⁹ *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 319, 328 [R-5].

¹⁰ *Interpretation of Peace Treaties*, Advisory Opinion, I.C.J. Reports 1950, p. 65, 74 [R-6].

¹¹ See, e.g., *Certain Property (Liechtenstein v. Germany)*, Preliminary Objections, Judgment, I.C.J. Reports 2005, p. 6, 18-19 (concluding that German courts’ treatment of Liechtenstein property as German assets, which directly contradicted Liechtenstein’s position on the property, evidenced that the parties were in positive opposition) [R-7]; *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 275, 315-17 (concluding that Nigeria’s deployment of troops into disputed territory evidenced, with other factors, a dispute over the Cameroon-Nigeria border) [R-8].

performance or nonperformance under a treaty that conflicts with the other treaty party's interpretation,¹² Ecuador does not allege conflicting interpretations of Article II(7), because it has not alleged that the United States offered *any* interpretation of the provision. As such, Ecuador and the United States are not in positive opposition over the interpretation of Article II(7), and thus there is no dispute within the meaning of Article VII of the Treaty.

In addition to finding that two States are in positive opposition over a relevant point of law or fact, a "dispute" also must concern a "concrete case[] where there exists at the time of the adjudication an actual controversy" between the parties.¹³ As Ecuador's Request makes clear, the only relevant controversy is one between Chevron/Texaco and Ecuador, which was the subject of extensive arbitral proceedings and a final and binding award. As Ecuador itself must concede, the United States was not a party to that arbitration, has taken no position on it, and has otherwise not acted inconsistently with Article II(7) in any way. There can be no dispute, therefore, under Article VII of the Treaty.

Second, Ecuador cannot compel the United States to take a position on Ecuador's unilateral interpretation of the Treaty simply by declaring that a failure to confirm Ecuador's interpretation would create an arbitrable dispute concerning that interpretation. No Party to the Treaty is required to accept, or even respond to, the other Party's unilateral statement concerning the meaning of a treaty provision, on pain of being hauled before an arbitral tribunal. Indeed,

¹² See, e.g., *Interpretation of Peace Treaties* at 74-75 (concluding that the parties had created a dispute by taking opposing views in diplomatic exchanges on the performance of treaty obligations) [R-6]; *Case Concerning the Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russia)*, Preliminary Objections, Judgment, I.C.J. Reports 2011, p. 1, 47 (concluding that parties' opposing statements to the Security Council and to news media concerning Russia's alleged treaty breaches put the parties in positive opposition) [R-9].

¹³ *Case Concerning the Northern Cameroons (Cameroon v. United Kingdom)*, Preliminary Objections, Judgment, I.C.J. Reports 1963, p. 15, 33-34 [R-10].

Ecuador's June 2010 diplomatic note acknowledged the basic principle that treaty parties *may*, but are not required to, agree on subsequent interpretations. In that diplomatic note, Ecuador observed that some treaties, such as the NAFTA, expressly provide for the treaty parties, through *mutual agreement*, to issue binding interpretations of the treaty.¹⁴ But Ecuador has cited no authority for the principle that a State is *required* to offer its interpretation of a treaty when requested by another treaty party.¹⁵ Ecuador's request in this case effectively seeks to transform a State *prerogative* into a State *obligation*.

Third, nothing in the plain language or object and purpose of the Treaty suggests that the Tribunal has the authority to render, as Ecuador has requested, an "authoritative" interpretation of treaty provisions that are not the subject of an actual dispute between the Parties. The Treaty does not create advisory jurisdiction, by which investors or States may put to third parties legal questions for "authoritative" interpretations. In this regard, the Treaty, like other bilateral investment treaties, differs from the statutes of the ICJ or the Inter-American Court of Human Rights, which expressly allow designated entities or States to seek advisory opinions of certain legal issues.

Nor does the Treaty establish through Article VII an appellate mechanism, to which either Party could challenge the correctness or validity of an unfavorable award rendered by an investment tribunal constituted under Article VI. In that regard, investment arbitration under the Treaty and similar BITs differs from WTO adjudication, which clearly establishes an appellate mechanism.

¹⁴ Ecuador also acknowledged in its note that the U.S.-Ecuador BIT "does not contain a provision like Article 1131 of NAFTA." Patiño Letter at 3 [R-2].

¹⁵ Patiño Letter at 3 (noting that "treaty parties may agree on interpretations of the terms of their treaty") [R-2].

Nor does Article VII of the Treaty establish a referral mechanism, by which investors or States engaged in arbitration under Article VI may refer legal questions to an interstate tribunal to determine the scope of the rights and obligations at issue. In that regard, there is nothing in the Treaty comparable to the treaty establishing the European Community, which allows for national courts to refer questions of European law to the European Court of Justice.

Reading Article VII to serve these unintended purposes would have negative and destabilizing consequences for investment treaties, including for investor-State arbitration, contrary to the Treaty's object and purpose. In any investor-State case, the respondent State could demand at any time that the investor's State of nationality confirm the respondent's interpretation of the contested BIT provision or face parallel interstate arbitration, whereas the investor would have no such right. Similarly, if the investor's State disagreed with the respondent State's treaty interpretation in any investor-State case, it too could force the respondent State into parallel interstate arbitration. Compelling States to reach an agreed interpretation in the context of an investor-State dispute whenever demanded by another State, at pain of arbitration if they fail, would eviscerate a principal rationale for investor-State dispute mechanisms, which is to depoliticize investment disputes and permit neutral and binding arbitration between the State and the investor.¹⁶ Ecuador's reading of the Treaty also would undermine the finality of investor-State awards by allowing States to re-litigate the meaning and effect of treaty provisions at issue in the underlying dispute. States could then seek to use the "authoritative interpretation" as a collateral attack on a final investor-State award in annulment,

¹⁶ See, e.g., KENNETH J. VANDEVELDE, U.S. INTERNATIONAL INVESTMENT AGREEMENTS 30 (2009) ("The investor-state disputes mechanism thus served two political goals: it removed the United States government from involvement in private investment disputes that might disrupt foreign policy while reaffirming U.S. support for the protection of foreign investment.") [R-11].

set-aside, or enforcement proceedings. Parallel proceedings, moreover, could effectively double the already significant costs to States of investment arbitration.

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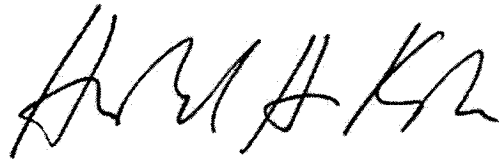
Ecuador's Request for Arbitration is not just baseless in itself, but unprecedented and broadly destabilizing to international law and adjudication, especially in the context of international investment agreements. The danger is compounded by the fact that countless other treaties, including thousands of international investment agreements, contain compromissory clauses similar to Article VII. It thus is imperative that this Tribunal reject Ecuador's attempt to create a new rule of international law, by which States would be legally compelled to respond to unilateral statements of treaty interpretation or face binding dispute resolution. Permitting this arbitration to go forward would destabilize the systems of both investor-State arbitration and State-to-State arbitration by giving States parties incentives to force their treaty partners into arbitration to review, collaterally, investor-State awards granted in arbitrations in which those partners never participated.

III. RELIEF SOUGHT

For the foregoing reasons, the United States respectfully requests that this Tribunal render an award: (1) dismissing Ecuador's request in its entirety and with prejudice; and (2) ordering that Ecuador bear the costs of this arbitration, including the United States' costs for legal representation and assistance, pursuant to Article VII(4) of the Treaty and Article 40 of the UNCITRAL Arbitration Rules.

Dated: March 29, 2012

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'H. Koh', written in a cursive style.

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