EXPERT OPINION OF PROFESSOR (JUDGE) C. F. AMERASINGHE, PH.D. (INTERNATIONAL LAW), LL.D. (INTERNATIONAL LAW) – CAMBRIDGE, U.K.; LL.M. (INTERNATIONAL LAW) – HARVARD, U.S.A.; MEMBER, INSTITUT DE DROIT INTERNATIONAL

PREAMBLE

1. I have been requested by the Republic of Ecuador to provide an expert opinion. I have been for twenty years and more associated with international judicial activity, first as Registrar of the World Bank Administrative Tribunal (15 years) and then as a judge of the U.N. Administrative Tribunal (3 years) and as a judge of the Commonwealth Secretariat Tribunal (2 ½ years). I have also been a Full Professor of Law in the University of Ceylon and an Adjunct Professor of International Law at the American University Law School in Washington, D.C., U.S.A. I have written several books published in Europe, on the jurisdiction of international tribunals. I have since 1951 been a member of the prestigious Institut de droit international. My detailed *curriculum vitae* is attached to this opinion.

THE FACTS

2. The detailed facts are as stated in the Counter-Memorial of the Republic of Ecuador filed in response to the Respondent's Memorial on Objections to Jurisdiction.
3. Below is a summary of those facts with which the Respondent would agree.
4. On March 30, 2010, an arbitral tribunal, constituted under the UNCITRAL Rules pursuant to paragraph 3(a)(iii) of Article VI of the BIT between the USA and Ecuador, rendered a partial award on claims raised under the Treaty against the Republic of Ecuador by Chevron Corporation and Texaco Petroleum Company.[1]
5. By Note No. 135238-GM/2010 dated *June 8, 2010*,[2] the Government of the Republic of Ecuador informed the Government of the United States of America that it disagrees with certain aspects of the partial award, expressly specifying its preoccupation and particular concern with what it considered to be the tribunal's erroneous interpretation and application of Article II(7) of the BIT. On the basis of that interpretation and application, the partial award held that the Republic of Ecuador failed to comply with its obligations when its courts did not render judgments in six lawsuits lodged by Texaco Petroleum Company in the years

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

[2] Annex B (delivered by Note No. 4-2-87/10 on June 11, 2010) to Ecuador's Request for Arbitration.

before claimants commenced their arbitration under the Treaty, including a period before the Treaty entered into force. The Note gave several other explanations and concluded by transmitting the request of the Government of the Republic of Ecuador that the Government of the United States of America confirm by reply note its agreement that:

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

The Note also gave notice that, if such a confirming note was not forthcoming, or if the Government of the United States did not otherwise agree with the interpretations of Article II(7) of the Treaty stated by the Government of the Republic of Ecuador, an unresolved dispute must be considered to exist between the Government of the Republic of Ecuador and the Government of the United States of America concerning the interpretation and application of the Treaty.

6. Subsequent to the delivery of the Note, the Chief of Mission of the Ecuadorian Embassy in Washington raised its preoccupations with and concerns about these unresolved issues in a meeting with the Legal Adviser of the United States Department of State and inquired about the position of the Government of the United States of America with regard to them.

7. In August 2010, the United States sent a reply diplomatic Note to Ecuador's Foreign Minister, attaching a letter from the U.S. Assistant Secretary of State for Western Hemisphere Affairs. 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.

8. The parties agree that the United States did not express a view on Ecuador's interpretation of Article II(7) in the August 2010 U.S. diplomatic Note, in the accompanying letter, or

thereafter. In a subsequent conversation initiated by him, the State Department Legal Adviser informed the Chief of Mission of the Ecuadorian Embassy "that his Government will not rule on this matter."

THE LAW AND ITS APPLICATION

A. The Existence of a Dispute

9. The first and principal objection raised by the respondent is that there is no dispute upon which the arbitration tribunal may pronounce. The respondent points out that Article VII of the BIT requires that there be a dispute.

10. By way of a brief introduction, it must be pointed out that there has been much discussion by the ICJ (and the PCIJ) of the requirement that there be a dispute in order that the Court may have jurisdiction. As the ICJ has stated: "the existence of a dispute is the primary condition for the Court to exercise its judicial function".[3] The classic definition of "dispute" is that given by the PCIJ in the *Mavrommatis Palestine Concessions Case (Preliminary Objection)*: "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."[4] The Court satisfies itself that a dispute in those terms exists by examining, *inter alia*, the positions of the parties as expressed in the diplomatic history of the matter, including the pleadings, and in general refers to the relevant circumstances.

11. Whether a dispute exists is for the Court or tribunal to determine.[5] That is to say, it is dependent neither upon the subjective assertion by one party that a dispute exists,[6] nor upon an equally subjective denial by another party that a dispute exists.[7] For the purpose of this

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[3] The *Nuclear Tests Cases*, 1974 ICJ Reports at pp. 271 and 476.

[4] (1924), PCIJ Series A2 at p. 11. There are several other ICJ cases in which this view was adopted: see, e.g., the *Right of Passage Case (Merits)*, 1960 ICJ Reports at p. 34, *South-West Africa Cases (Preliminary Objections)*, 1962 ICJ Reports at pp. 328, 343, *East Timor Case*, 1955 ICJ Reports at p. 99.

[5] *Case concerning Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russia)*, ICJ Judgment, 2011, para. 30.

[6] *South-West Africa Cases (Preliminary Objections)*, 1962 ICJ Reports at p. 328, *East Timor Case*, 1995 ICJ Reports at p. 100.

[7] *Land, Island and Maritime Frontier Dispute Case*, 1992 ICJ Reports at p. 555, *Peace Treaties Opinion*, 1950 ICJ Reports at p. 74, *UN Headquarters Agreement Opinion*, 1988 ICJ Reports at p. 27.

enquiry the court must make an objective determination.[8] Such determination can be made by enquiring whether the claim of one party is expressly opposed by the other.[9] Equally important is the fact that the ICJ has emphasized in the *Georgia v. Russia* case that "the existence of a dispute may be inferred from the failure of a state to respond to a claim in circumstances that a response is called for."[10]

12. That the existence of a dispute can be inferred is further demonstrated in *Cameroon v. Nigeria.*[11] Nigeria claimed that there was no dispute concerning boundary delimitation as such throughout the whole length of the boundary from the tri-point in Lake Chad to the sea, subject, within Lake Chad to the question of the title over Darak and adjacent islands, and without prejudice to the title over the Bakassi Peninsula. For Cameroon its existing boundary with Nigeria was precisely delimited by the former colonial powers and by decision of the League of Nations and acts of the United Nations. These delimitations were confirmed or completed by agreements made directly between Cameroon and Nigeria after their independence. Cameroon requested that the court "specify definitively the frontier between Cameroon and Nigeria from Lake Chad to the sea" along a line the coordinates of which were given in Cameroon's Memorial. The fact that Nigeria claimed title to the Bakassi Peninsula and Darak and adjacent islands, meant, in the view of Cameroon that Nigeria contested the validity of these legal instruments and thus called into question the entire boundary which was based on them. That, in the view of Cameroon, was confirmed by the occurrence, around the boundary, of numerous incidents and incursions. Nigeria's claims to Bakassi as well as its position regarding the Maroua Declaration also threw into doubt the basis of the maritime boundary between the two countries. In Cameroon's view, and contrary to what Nigeria asserted, a dispute had arisen between the two States concerning the whole of the boundary.

13. The ICJ stated further

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[8] *Peace Treaties Opinion*, 1950 ICJ Reports at p. 74.

[9] *South-West Africa Cases (Second Phase)*, 1966 ICJ Reports at p. 33. See also the *East Timor Case*, 1955 ICJ Reports at p. 100.

[10] *Case concerning Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russia)*, ICJ Judgment, 2011, para. 30.

[11] 1998 ICJ Report, p. 275.

92. The court notes that in this reply Nigeria does not indicate whether or not it agrees with Cameroon on the course of the boundary or on its legal basis, though clearly it does differ with Cameroon on Darak and adjacent islands, Tipsan and Bakassi. Nigeria states that the existing land boundary is not described by reference to geographical coordinates but by reference to physical features. As to the legal basis on which the boundary rests, Nigeria refers to relevant instruments without specifying which these instruments are apart from saying that they predate independence and that, since independence, no bilateral agreements "expressly confirming or otherwise describing the pre-independence boundary by reference to geographical coordinates" have been concluded between the parties. That wording seems to suggest that the existing instruments may require confirmation. Moreover, Nigeria refers to "well-established practice both before and after independence" as one of the legal bases of the boundary whose course, it states "has continued to be accepted in practice"; however it does not indicate what that practice is."[12]

14. The Court referred to its precedents[13] and concluded:

> 93. The Court is seized with the submission of Cameroon which aims at the definitive determination of its boundary with Nigeria from Lake Chad to the sea.... Nigeria maintains that there is no dispute concerning the delimitation of that boundary as such throughout its whole length from the tripoint in Lake Chad to the sea.... and that Cameroon's request definitively to determine that boundary is not admissible in the absence of such a dispute. However, Nigeria has not indicated its agreement with Cameroon on the course of that boundary or on its legal basis....and it has not informed the Court of the position which it will take in the future on Cameroon's claims. Nigeria is entitled not to advance arguments that it considers are for the merits at the present stage of the proceedings; in the circumstances however, the Court finds itself in a situation in which it cannot decline to examine the submission of Cameroon on the ground that there is no dispute between the two states. Because of Nigeria's position the exact scope of this dispute cannot be determined at present; a dispute nevertheless exists between the two Parties, at least as regards the legal bases of the boundary. It is for the Court to pass upon this dispute."[14]

15. The case demonstrates that a dispute relating to the whole course of the boundary was established by inference, even though Nigeria did not expressly challenge it. The dispositive factor for the Court's inference of that dispute was Nigeria's silence in the face of

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[12] *Ibid.* at p. 316.

[13] *Ibid.* at p. 314.

[14] *Ibid.* at pp. 316-17.

Cameroon's express concerns and preoccupation to finally determine the boundary between the two States.

16. The ICJ precedents may be analyzed as follows:

(1) A dispute exists when one party *expressly* opposes the point of view of the other party.

(2) A dispute exists when one party remains silent where a response is required. There is then a dispute by *implication.*

17. In the present case the Respondent showed by its conduct and *expressis verbis,* as demonstrated by the facts, that it did not view with favor the interpretation of Article II(7), permitting the invocation of arbitration in order to settle a dispute on the interpretation of this provision. Thus, under (1) above, there is an existence of a dispute.

18. In addition, it is clear that the existence of a dispute may be *inferred* under (2) above. In regard to the inference of the existence of a dispute the following observations may be made.

19. The ICJ decisions in *Georgia v. Russia* and *Cameroon v. Nigeria* reflects the law applicable in the current case which involves a situation in which the U.S. refused to respond to Ecuador's concerns about the correct interpretation of Article II(7). The requests of Cameroon and Ecuador are comparable as is the conduct of Nigeria and the U.S. Cameroon's request reflected a doubt that the whole boundary was defined. Ecuador contends that there has not been a conclusive interpretation of Article II(7). Both Nigeria and the U.S. in the two cases were aware of the other parties' concerns and preoccupations. Cameroon felt that it was necessary to define its boundary, Ecuador wishes to have the interpretation of Article II(7) clarified in order to avoid future unnecessary disputes. The U.S. conduct is not explicitly challenging Ecuador's interpretation of Article II(7) and denying the existence of a dispute is comparable to Nigeria's conduct in its approach to the issue of the boundary between it and Cameroon. The law as applied in *Cameroon v. Nigeria* requires that the U.S.'s failure to respond to Ecuador's concerns about the interpretation of Article II(7) while maintaining that there is no dispute, creates a sound basis for inferring that there exists a dispute concerning the interpretation of Article II(7). In *Georgia v. Russia*

the ICJ made it quite clear that substance is more important than form in establishing a dispute.[15] In the current case, there is in substance a dispute.

20. In the light of this discussion and taking into account all circumstances of this case, it follows that Ecuador's request from its treaty partner for its interpretation clearly created the situation calling for a response. Under international law, failure to respond in such circumstances creates a legitimate basis for the inference that a dispute has arisen between the two States.

21. Moreover, because of the concrete nature of this dispute and its ongoing character, the Tribunal's exercise of its jurisdiction in this case will be consistent with the essentials of the judicial function which the ICJ referred to in *Northern Cameroons*.[16]

B. Abstract Nature of the Dispute

22. The Respondent also objects that the dispute is abstract. The dispute according to the Respondent does not involve a "concrete" case. Reliance is placed by the Respondent on the *Dual Nationality Case*.[17]

23. The above case is to be distinguished. The decision was based on the particular clauses of the Treaty of Peace of 1947 which expressly limited the jurisdiction of a Conciliation Commission to provide interpretation of treaty provisions only in the context of disputes arising from concrete claims of non-performance of obligations. But no such limitation is imposed on this Tribunal by Article VII(1) of the Treaty. Moreover, The Treaty of Peace being multilateral, any ruling by the Commission established by Italy and the U.K. would have had an impact on the commissions established by Italy and other members of the United Nations without their being represented in the *Dual Nationality Case*. This feature was critical in the case and caused the Commission not to decide the dispute. The Commission's refusal to adjudicate rested on the unfairness towards other U.N. members if it did pronounce on the dispute.

24. In the *Amabile Case*[18] brought before the U.S.-Italian Conciliation Commission, on the other hand, the Commission did lay down a general rule relating to evidence which would be

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[15] *Georgia v. Russia,* para.30.

[16] *Northern Cameroons,* p. 34.

[17] (1954), 14 UNRIAA, p. 27.

applied in other cases before the same commission. The *Amabile Case* can be said to confirm that there is nothing inherently wrong in giving a general interpretation of a treaty provision of future application, if doing so, is consistent with the express terms of a compromissory clause. Article VII(1) of this Treaty permits this Tribunal to do this. The Permanent Court of International Justice expressly recognized that "there seems to be no reason why States should not be able to ask the Court to give an abstract interpretation of a treaty; *rather would it appear that this is one of the most important functions which it can fulfill.*"[19] And such interpretations were given both by the Court and arbitral tribunals.[20]

25. The plain language of Article VII(1) of the BIT is clear on its face in that it confers jurisdiction over disputes on "interpretation *or* application" of the BIT between the Parties. Particularly, because the provision refers to "application" in addition to "interpretation" it leaves room for disputes on interpretation of the kind in this dispute to be adjudicated upon, without the resolution of the dispute being applicable to a particular case of a U.S. national. In view of this the request for interpretation of Article II(7) is concrete enough.

26. It may also be mentioned that the request for interpretation does not invite the arbitral tribunal to legislate rather than adjudicate. What is requested is clearly a judicial interpretation of Article II(7) of the BIT. The dispute, as pointed out earlier, is an existing legal one which requires resolution by the judicial application of legal concepts and standards.

C. The Two-Track Argument

27. The Respondent argues that there is a "two-track" system of settling disputes under the BIT, which is reflected in Article VI and VII of the treaty and that, if the tribunal adjudicates on the present dispute under Article VII, the tribunal would be acting outside its competence, because it would be interfering with the operation of arbitral tribunals established under Article VI.

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[18] (1962), 14 UNRAA p. 115.

[19] *Certain German interests in Polish Upper Silesia (Germany v. Poland),* Merits, P.C.I.J. Judgment (1926), Series A, N° 7, p. 18.

[20] *Treaty of Neuilly, Article 179, Annex, Paragraph 4 (Interpretation)*, P.C.I.J. Judgment (1924), Series A, No. 3, pp. 5-9; *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, ICJ Judgment, 27 August 1952, *I.C.J. Reports 1952*, p. 179.

28. It cannot be denied that there is a "two-track" system under the BIT. However, this does not mean that the system established under Article VII cannot overlap with, influence and take precedence over the system established under Article VI. Indeed, it seems highly probable and logical that Article VII was included so that any interpretation under Article VII would have to be respected by investor-State arbitral tribunals, especially, *but not only* when a conflict has arisen among arbitral awards under Article VI. It is perfectly compatible that this could be the case. It is noted that Article VII covers interpretation of an agreement between sovereign States which should take precedence over investor-State relations.

29. The short point is that not only would recognizing the preeminence of arbitration procedures under Article VII over procedures under Article VI resolve conflicts between decisions of tribunals under Article VI, but doing so would promote consistency, predictability and stability in the legal relations of the parties to the BIT.

CONCLUSION

30. My conclusion is that this Tribunal enjoys full jurisdiction to rule on the matters raised by Ecuador in its Request for Arbitration.

Professor (Judge) C. F. Amerasinghe

Washington, D.C.

May 23, 2012