REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRAL

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PARTIE I

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L'absence de réponse de la partie défenderesse ne permet pas de tirer la conclusion que celle-ci est en désaccord avec la partie demanderesse—Une telle conclusion qu'il existe une opposition n'est justifiée que lorsque toutes les autres interprétations raisonnables ont été écartées—Existence d'une autre explication plausible au silence de la partie défenderesse—Absence de différend à l'égard duquel le Tribunal serait compétent.

Opinion dissidente du professeur Raúl Emilio Vinuesa

Jurisprudence internationale constante concernant l'exercice de la juridiction sur les différends ayant pour objet l'interprétation d'un traité en l'absence d'allégations de violation du traité—Le paragraphe 2 de l'Article 36 du Statut de la Cour internationale de Justice reconnaît l'exercice d'une juridiction sur les différends ayant pour objet l'interprétation d'un traité—La décision du Tribunal aurait des conséquences concrètes pour les deux parties puisqu'une interprétation faisant autorité clarifierait leurs droits et obligations—Il n'est pas nécessaire, pour qu'un différend existe, que l'une ou l'autre des parties allègue une violation d'une règle de droit internationale attribuable à l'autre—La présence d'une opposition n'implique pas forcément l'expression d'une opposition—Le défaut d'une partie de répondre à la demande de l'autre peut être interprété comme la présence d'une opposition—Le silence d'un État ne peut être interprété qu'au regard de l'acte ou de l'allégation émanant d'un autre État—Les circonstances dans lesquelles le silence doit être interprété est une question de fond et non de forme—Les effets juridiques du silence ne dépendent pas de l'intention ou de la volonté de l'État qui s'est tu, mais plutôt de l'évaluation objective des circonstances entourant ce silence—Le silence ne peut profiter à l'État qui s'est abstenu de répondre à la demande ou à l'allégation de son cocontractant.

La notification par la partie défenderesse de son intention de ne pas répondre constituait un acte unilatéral duquel on pouvait déduire l'existence d'une opposition—Aucun précédent ne vient étayer l'affirmation du Tribunal selon laquelle la conclusion qu'il existe une opposition n'est justifiée que lorsque toutes les autres interprétations raisonnables ont été écartées—La partie demanderesse était en droit de se prévaloir de l'article VII en vertu duquel les deux États ont convenu de recourir à un arbitrage entre États contraignant pour le règlement de leurs différends ayant pour objet l'interprétation ou l'application du traité.

* * * * *

In the matter of an Arbitration

-before-

an Arbitral Tribunal Constituted in Accordance with Article VII of the Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, 27 August 1993, and the UNCITRAL Arbitration Rules 1976

-between-

The Republic of Ecuador

-and-

The United States of America

Award

Arbitral Tribunal:

Professor Luiz Olavo Baptista (Chair)
Professor Raúl Emilio Vinuesa
Professor Donald M. McRae

Registrar:
Mr. Martin Doe Rodríguez

Registry:
Permanent Court of Arbitration

29 September 2012

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List of Defined Terms

August 23 Note	Diplomatic Note No. Prot 181/2010 dated 23 August 2010
BIT	Bilateral Investment Treaty
DSU	Dispute Settlement Understanding
FCN Treaty	Friendship, Commerce and Navigation Treaty
FTA	Free Trade Agreement
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IUSCT	Iran–United States Claims Tribunal
June 8 Note	Diplomatic Note No. 1352-GM/2010 dated 8 June 2010
MFN	Most-Favored Nation
NAFTA	North American Free Trade Agreement
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Rules	Arbitration Rules of the United Nations Commission on International Trade Law, 15 December 1976
UNCLOS	United Nations Convention on the Law of the Sea, 10 December 1982
VCLT	Vienna Convention on the Law of Treaties, 23 May 1969
WTO	World Trade Organization

Introduction

A. The Parties

1. The Clamant in this arbitration is the Republic of Ecuador (hereinafter the "Claimant" or "Ecuador"). The Claimant is represented in these proceedings by:

— Dr. Diego García Carrión, Procurador General del Estado

— Ms. Christel Gaibor, Directora de Asuntos Internacionales y Arbitraje (Encargada), Procuraduría General del Estado

— Ms. Cristina Viteri, Abogada, Procuraduría General del Estado

— Mr. Paul Reichler, Foley Hoag LLP

— Mr. Mark Clodfelter, Foley Hoag LLP

— Mr. Andrew Loewenstein, Foley Hoag LLP

— Mr. Bruno Leurent, Foley Hoag AARPI

2. The Respondent in this arbitration is the United States of America (hereinafter the "Respondent" or "U.S." or "United States"). The Respondent is represented in these proceedings by:

— Mr. Harold Hongju Koh, Legal Adviser, U.S. Department of State

— Mr. Jeffrey D. Kovar, Assistant Legal Adviser, U.S. Department of State

— Ms. Lisa J. Grosh, Deputy Assistant Legal Adviser, U.S. Department of State

— Mr. Jeremy K. Sharpe, Chief, Investment Arbitration, Office of the Legal Adviser, U.S. Department of State

— Mr. Lee M. Caplan, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State

— Ms. Karin Kizer, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State

— Ms. Neha Sheth, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State

B. Background to the arbitration

3. The Claimant filed a Notice of Arbitration on 28 June 2011 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 dated 27 August 1993* (hereinafter the "Treaty").

4. The Claimant contends that since certain questions concerning the interpretation of Article II(7) of the Treaty have not been resolved through consultation or diplomatic channels, that a dispute exists regarding the interpretation and application of the Treaty and therefore submits these questions to an arbitral tribunal for binding decision in accordance with the applicable rules of international law.[1]

II. Procedural history

5. By a Request and Statement of Claim dated 28 June 2011, Ecuador commenced arbitration proceedings against the United States of America, pursuant to Article VII of the Treaty and Article 3 of the UNCITRAL Rules.

6. By letter dated 29 August 2011, Ecuador advised the United States that it had appointed Professor Raúl Emilio Vinuesa as arbitrator. By letter of

[1] Claimant's Request, para. 1.

the same date, the United States advised Ecuador that it had appointed Donald M. McRae as arbitrator.

7. By letter dated 8 February 2012, the Secretary-General of ICSID, acting as the appointing authority pursuant to Article VII(2) of the Treaty, appointed Dr. Luiz Olavo Baptista as President of the Arbitral Tribunal.

8. By letters dated 12 March 2012, the Parties agreed for the PCA to act as registry in these proceedings.

9. On 21 March 2012, the Tribunal held a Preparatory Hearing at the Peace Palace, The Hague, the Netherlands. Present at this meeting were:

The Tribunal:

— Professor Luiz Olavo Baptista
— Professor Raúl Emilio Vinuesa
— Professor Donald M. McRae

For the Claimant:

— Ms. Cristina Viteri
— Mr. Paul Reichler
— Mr. Mark Clodfelter
— Mr. Bruno Leurent

For the Respondent:

— Mr. Harold Hongju Koh
— Mr. Jeffrey Kovar
— Mr. Jeremy Sharpe
— Mr. Lee Caplan
— Mr. John Kim
— Ms. Karen Johnson

For the Permanent Court of Arbitration:

— Mr. Martin Doe Rodríguez
— Ms. Jara Mínguez Almeida
— Ms. Hinda Rabkin

10. On 9 April 2012, taking into account the agreements reached between the Parties and the Tribunal on procedural issues during the 21 March 2012 hear-

ing, the Tribunal issued Procedural Order No. 1 providing, *inter alia*, that the languages of the arbitration would be English and Spanish, and setting out the terms regarding the written submissions, communications, witnesses, experts, and hearings. Procedural Order No. 1 set forth the following schedule of the proceedings:

> **XIV. Procedural Calendar**
>
> 60. In accordance with Article VII(3) of the Treaty, the Tribunal establishes the following schedule of proceedings, without prejudice to the Tribunal's decision on jurisdiction.
>
> 61. By 29 March 2012, the United States shall submit its Statement of Defence.
>
> 62. By 25 April 2012, the United States shall submit its Memorial on Jurisdiction.
>
> 63. By 23 May 2012, Ecuador shall submit its Counter-Memorial on Jurisdiction and Memorial on the Merits.
>
> 64. By 20 June 2012, the United States shall submit its Counter-Memorial on the Merits.
>
> 65. On 25–26 June 2012, a hearing on jurisdiction shall be held at the seat of the PCA in the Peace Palace at The Hague.
>
> 66. By 13 July 2012, Ecuador shall submit its Reply Memorial on the Merits.
>
> 67. By 30 July 2012, the United States shall submit its Rejoinder Memorial on the Merits.
>
> 68. On 6–9 August 2012, a hearing on the merits shall be held at the seat of the PCA in the Peace Palace at The Hague.

11. Procedural Order No. 1 also set forth the following terms regarding confidentiality:

> **XII. Confidentiality**
>
> 49. The award may be made public only with the consent of both parties.
>
> 50. Hearings shall be held in camera and the transcripts shall remain confidential unless the parties agree otherwise.
>
> 51. The pleadings and submissions of the Parties shall remain confidential, except that, on the date of the opening of the hearing on jurisdiction, or as soon thereafter as any redactions may be agreed by the Parties, the Statements of Claim and Defense, as well as Respondent's Memorial on Jurisdiction and Claimant's Counter-Memorial on Jurisdiction, will be made publicly available on the PCA website, and the Parties are free to disclose them, subject to the redaction of any confidential information. On the date of the opening of the hearing on the merits, if any, or as soon thereafter as any redactions may be agreed by the Parties, the Parties' memorials on the merits will be made publicly available on

the PCA website, and the Parties are free to disclose them, subject to the redaction of any confidential information. Failing agreement between the Parties on the appropriateness of any redactions, the matter shall be decided by the Tribunal. Any information provided by a Party which has been designated as confidential by that Party shall be kept confidential and treated as confidential, unless the Tribunal determines that it shall not be redacted.

12. On 29 March 2012, the Respondent submitted its Statement of Defence.

13. On 13 April 2012, the Respondent submitted the Spanish translation of its Statement of Defence.

14. On 25 April 2012, the Respondent submitted its Memorial on Jurisdiction.

15. On 11 May 2012, the Respondent submitted the Spanish translation of its Memorial on Jurisdiction.

16. On 11 May 2012, the Claimant submitted the Spanish translation of its Request for Arbitration and Statement of Claim.

17. On 23 May 2012, the Claimant submitted its Counter-Memorial on Jurisdiction and Memorial on the Merits.

18. By letter dated 1 June 2012, the Respondent applied to have the hearing on jurisdiction extended by one day to present an expert witness. By letter dated 5 June 2012, the Claimant opposed the Respondent's application.

19. On 8 June 2012, the Claimant submitted the Spanish translation of its Memorial on the Merits.

20. On 12 June 2012, the Claimant submitted the Spanish translation of its Counter-Memorial on Jurisdiction.

21. By letter dated 11 June 2012, the Respondent responded to the Claimant's letter dated 5 June 2012 and notified the Claimant and the Tribunal that it intended to present Professor Christian Tomuschat as an expert witness at the hearing on jurisdiction. By letter dated 14 June 2012, the Claimant objected to the presentation of Professor Christian Tomuschat at the hearing on jurisdiction on the basis that the notification provided by the Respondent was untimely according to Article 25(2) of the UNCITRAL Rules. By letter dated 15 June 2012, the Respondent responded to the Claimant's objection.

22. On 20 June 2012, the Tribunal decided that the Respondent's notification of its intent to present Professor Tomuschat as an expert witness was untimely and, consequently, that the hearing on jurisdiction would not be extended by an additional day. The Tribunal indicated, however, that it was prepared to hold a supplementary hearing for the examination of expert witnesses, if it was deemed necessary after the hearing on jurisdiction. The Parties were also invited to consult and attempt to agree on the order of proceedings for the hearing on jurisdiction.

23. On 20 June 2012, the Respondent submitted its Counter-Memorial on the Merits and accompanying documents.

24. By letter dated 21 June 2012, the Claimant requested that the Respondent's Counter-Memorial on the Merits be disregarded in the Tribunal's consideration of the jurisdictional issues since the Memorial allegedly dealt with jurisdictional rather than merits issues.

25. By letter dated 23 June 2012, the Respondent requested that the Claimant's letter of 21 June 2012 be disregarded since, according to Procedural Order No. 1, the Claimant should file its Reply Memorial on 13 July 2012 and only then respond to the Respondent's Counter-Memorial on the Merits.

26. On 22 June 2012, a pre-hearing telephone conference call was held between the Tribunal and the Parties to discuss the order of proceedings for the hearing on jurisdiction.

27. On 25 and 26 June 2012, a Hearing on Jurisdiction was held at the Peace Palace, The Hague, the Netherlands. Present at the meeting were:

The Tribunal:

— Professor Luiz Olavo Baptista
— Professor Raúl Emilio Vinuesa
— Professor Donald M. McRae

For the Claimant:

— Dr. Diego García Carrión
— Ms. Christel Gaibor
— Ms. Cristina Viteri
— Ms. Ana Maria Gutierrez
— Mr. Paul Reichler
— Mr. Mark Clodfelter
— Mr. Andrew Loewenstein
— Mr. Bruno Leurent
— Mr. Yuri Parkhomenko
— Dr. Constantinos Salonidis
— Ms. Christina Beharry

For the Respondent:

— Mr. Harold Hongju Koh
— Mr. Jeffrey Kovar

— Mr. Jeremy Sharpe
— Mr. Lee Caplan
— Ms. Karin Kizer
— Ms. Neha Sheth
— Mr. John Kim
— Ms. Karen Johnson
— Mr. Frank Schweitzer
— Mr. William Echols
— Ms. Maarja Boulos
— Ms. Abby Lounsberry

For the Permanent Court of Arbitration:

— Mr. Martin Doe Rodríguez
— Ms. Hinda Rabkin
— Ms. Melanie Riofrio

28. By letter dated 3 July 2012, the Respondent requested a brief extension to file the Spanish translations of the Counter-Memorial on the Merits and accompanying witness statements.

29. By letter dated 5 July 2012, the Claimant stated that it had no objection to the Respondent's request for a brief extension.

30. On 12 July 2012, the Respondent submitted the Spanish translation of its Counter-Memorial on the Merits.

31. On 13 July 2012, the Respondent submitted revised Spanish translations of its Statement of Defense and Memorial on Jurisdiction.

32. On 13 July 2012, the Claimant submitted its Reply Memorial on the Merits.

33. On 20 July 2012, the Claimant submitted the Spanish translation of its Reply Memorial on the Merits.

34. On 30 July 2012, the Respondent submitted its Rejoinder on the Merits.

35. By letter dated 2 August 2012, the Tribunal informed the Parties that "[t]he Tribunal has reached a decision on the question of its jurisdiction: by a majority consisting of Prof. McRae and Prof. Baptista (with Prof. Vinuesa dissenting), the Tribunal has concluded that it has no jurisdiction, and the case must consequently be dismissed in its entirety, due to the absence of the existence of a dispute falling within the ambit of Article VII of the Treaty. Under the circumstances, and in particular in view of the imminent Hearing on the Merits scheduled to commence next week, the Tribunal has also, by majority, decided to

inform the Parties of the above decision, with full reasons to follow in due course in its award." The Tribunal consequently cancelled the Hearing on the Merits.

36. By letter dated 2 August 2012, Professor Vinuesa informed the Parties that his decision to dissent from the Tribunal's decision was "under reservation of the right to manifest in due time [his] dissidence over the [Tribunal's] conclusion and the said reasons as well as under reservation of [his] right to agree or disagree over any other reasoning not [expressed by the majority] at the time [he] manifested [his] dissidence."

III. Statement of Facts

37. The following section sets out the facts regarding the background to this arbitration relevant to the present decision.

38. The Parties signed the Treaty on 27 August 1993. The Treaty entered into force on 11 May 1997.

39. By a notice of arbitration dated 21 December 2006, Chevron and TexPet commenced an arbitration against Ecuador under paragraph 3(*a*)(iii) of Article VI of the Treaty and the UNCITRAL Rules claiming *inter alia* a denial of justice under Article II(7) for the manner in which seven commercial cases that were filed by TexPet against Ecuador in Ecuadorian courts were treated by these courts between 1991 and 1994.[2] In 2007, the Ecuadorian government established a Special Commission to review each of its 23 BITs and publicly stated its intention not to renew its BIT with the United States.[3] On 6 July 2009, Ecuador denounced the ICSID Convention.[4]

40. On 30 March 2010, the arbitral tribunal rendered a partial award on claims raised under the Treaty in PCA Case No. 2007–2: *Chevron Corporation and Texaco Petroleum Company* v. *The Republic of Ecuador* (hereinafter "Chevron Partial Award").[5] In that award, the tribunal found Ecuador in violation of *inter alia* Article II(7) of the Treaty because of undue delay by the Ecuadorian courts in adjudicating Chevron and Texaco's claims.[6] The *Chevron* tribunal found that Article II(7) set out an "effective means" standard and therefore "constituted *lex specialis* and not a mere restatement of the law on denial of justice."[7]

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[2] *Chevron Corp. and Texaco Petroleum Co.* v. *Republic of Ecuador* PCA Case No. 2007–2, UNCITRAL Rules 1976, Partial Award on the Merits (30 March 2010), para. 36 [R-1] (hereinafter "*Chevron* Partial Award").

[3] Respondent's Memorial on Jurisdiction, p. 12.

[4] Respondent's Memorial on Jurisdiction, p. 12, citing ICSID News Release, "Ecuador Submits a Notice under Article 71 of the ICSID Convention" (7 July 2009).

[5] Claimant's Request, para. 6; Respondent's Statement of Defense, pp. 4–5; Respondent's Memorial on Jurisdiction, pp. 7–10, citing *Chevron* Partial Award, *supra* note 2.

[6] *Chevron* Partial Award, supra note 2, para. 262.

[7] *Chevron* Partial Award, supra note 2, para. 242.

41. By Diplomatic Note No.4–2–87/10 dated 11 June 2010, transmitting a copy of Diplomatic Note No. 1352-GM/2010 dated 8 June 2010 (hereinafter the "June 8 Note"), the Government of Ecuador informed the Government of the United States that it disagreed with certain aspects of the Partial Award, expressly pointing to the interpretation and application of Article II(7) of the Treaty which the Claimant considered erroneous and overbroad.[8] The Note detailed the Claimant's concern that the *Chevron* Partial Award's interpretation of Article II(7) had "put into question the common intent of the Parties with respect to the nature of their mutual obligations regarding investment of nationals or companies of the other Party."[9] The Note raised three matters of interpretation which the Claimant sought to clarify with the Respondent:

i. The obligations of the Parties under Article II(7) are not greater than those required to implement obligations under the standards of customary international law;
ii. 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;
iii. 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.[10]

The Note then provided specific examples of where, according to the Claimant, the *Chevron* Partial Award incorrectly interpreted and applied Article II(7) of the Treaty.[11]

42. The Note requested that the Government of the United States confirm by diplomatic note its agreement with the Claimant's interpretation and application of Article II(7) of the Treaty.[12] The Note also gave notice that if such a confirming note was not forthcoming, "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."[13]

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[8] June 8 Note, p. 1 [R-2]; Respondent's Memorial on Jurisdiction, p. 10; Claimant's Counter-Memorial on Jurisdiction, paras. 13–14.

[9] June 8 Note, p. 1.

[10] June 8 Note, p. 3.

[11] June 8 Note, p. 2.

[12] June 8 Note, p. 3.

[13] June 8 Note, p. 4.

43. On 17 June 2010, following Ecuador's request, Ecuador's ambassador to the United States, Mr. Luis Benigno Gallegos, met with the US Legal Advisor, Mr. Harold Hongju Koh, to discuss the interpretation of Article II(7). According to the Claimant, Ecuador "explained its views on the three matters of interpretation raised therein and sought the United States' views."[14] The US Legal Advisor informed Ecuador that the United States would study Ecuador's views and initiate its inter-agency process for determining the United States' position on this issue.[15]

44. On 7 July 2010, the Claimant brought a claim before the District Court of The Hague to set aside the interim and partial awards, contending among other things that the tribunal committed legal error in its finding of a breach of Article II(7) of the Treaty and that the error justified setting aside the *Chevron* Partial Award.[16]

45. On 23 August 2010, the Respondent sent a reply by Diplomatic Note No. Prot 181/2010 to Ecuador's Minister of Foreign Affairs (hereinafter the "August 23 Note"), attaching a letter from the Assistant Secretary of State for Western Hemisphere Affairs which 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 the United States "look[s] forward to remaining in contact about this".[17] According to the Claimant, due to the lack of response from the Respondent, the Ecuadorian Embassy in Washington "made multiple attempts to call Mr. Koh [the U.S. Legal Adviser] in order to follow up on its request for the United States to provide its interpretation of Article II(7)."[18]

46. On 4 October 2010, Mr. Koh placed a telephone call to Ambassador Gallegos at the Ecuadorian Embassy in Washington.[19] According to the Respondent, "the Legal Adviser informed Ambassador Gallegos, in an informal conversation, that it would be difficult to consider a request for interpretation of the Treaty while Ecuador was in the process of terminating that agreement."[20] In the Claimant's view, Mr. Koh "stated that the United States would give *no response at all*,"[21] saying that "his Government will not rule on this

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[14] Claimant's Counter-Memorial on Jurisdiction, para. 15.

[15] Claimant's Counter-Memorial on Jurisdiction, para. 16.

[16] Plaintiff's Writ of Summons, *Ecuador* v. *Chevron*, Cause-List No. 2011/402 (7 July 2011), District Court of The Hague, paras. 111, 113 [R-31].

[17] 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 (23 August 2010) [R-3] (hereinafter "Valenzuela Letter").

[18] Claimant's Counter-Memorial on Jurisdiction, para. 18, citing Witness Statement of Luis Benigno Gallegos (23 May 2012) (hereinafter "Gallegos Witness Statement"), para. 7 (emphasis in original).

[19] Claimant's Counter-Memorial on Jurisdiction, para. 19.

[20] Respondent's Statement of Defense, p. 7.

[21] Claimant's Counter-Memorial on Jurisdiction, para. 19, citing Gallegos Witness Statement, para. 8 (emphasis in original).

matter," but did not provide any explanation for the United States' refusal.[22] Ambassador Gallegos reported on this conversation to Ecuador's Minister of Foreign Affairs, Trade and Integration, describing in Spanish what, according to the Ambassador, Mr. Koh had told him in English.[23]

47. On 25 November 2010, Ecuador's Constitutional Court ruled that the Treaty's investor-State and State-State provisions were unconstitutional due to the binding nature of arbitral decisions rendered under the Treaty.[24]

48. In November 2010, Ecuador announced its intention to terminate all of Ecuador's BITs.[25] The Parties' diplomatic relationship underwent difficulty in April 2011 when the Claimant declared the U.S. ambassador to Ecuador *persona non grata* and ordered her immediate departure from Ecuador, which prompted a reciprocal response from the United States.[26]

49. In April 2011, Ecuador requested its parliament to terminate 13 BITs, including its BIT with the United States, formally denounced its BITs with France, Sweden, Germany, and the United Kingdom, and terminated its BIT with Finland.[27]

IV. Key applicable legal provisions

A. The Treaty

Preamble

> The United States of America and the Republic of Ecuador (hereinafter the "Parties");
>
> Desiring to promote greater economic cooperation between them, with respect to investment by nationals and companies of one Party in the territory of the other Party;
>
> Recognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties;
>
> […]

Article II

> […]

[22] Claimant's Counter-Memorial on Jurisdiction, para. 19.

[23] Claimant's Counter-Memorial on Jurisdiction, para. 21, citing Gallegos Witness Statement, para. 9.

[24] Respondent's Memorial on Jurisdiction, p. 13, citing Opinion No. 043–10-DTC-CC, Case No. 0013–10-TI, Opinion of the Constitutional Court (25 November 2010), pp. 11, 13 [R-14].

[25] Respondent's Memorial on Jurisdiction, p. 13.

[26] Respondent's Memorial on Jurisdiction, p. 14.

[27] Respondent's Memorial on Jurisdiction, p. 14.

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

[…]

Article V

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

Article VI

1. For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (*a*) an investment agreement between that Party and such national or company; (*b*) an investment authorization granted by that Party's foreign investment authority to such national or company; or (*c*) an alleged 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 data on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:

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

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

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

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

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

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

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

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

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

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

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

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

Article VII

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

Commission on International Trade Law (UNCITRAL), except to the extent modified by the Parties or by the arbitrators, shall govern.

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

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

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

B. The Vienna Convention on the Law of Treaties ("VCLT")

Article 26

"Pacta sunt servanda"

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

[…]

Article 31

General rule of interpretation

1. 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 its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(*a*) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(*b*) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(*c*) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(*a*) leaves the meaning ambiguous or obscure; or

(*b*) leads to a result which is manifestly absurd or unreasonable.

V. Relief Requested

50. The Respondent requests that the Tribunal render an award:

i. dismissing the Claimant's request in its entirety and with prejudice;
ii. ordering such further and additional relief as the Respondent may request and the Tribunal may deem appropriate;
iii. ordering that the Claimant bear the costs of this arbitration, including the Respondent's costs for legal representation and assistance, pursuant to Article VII(4) of the Treaty and Article 40 of the UNCITRAL Rules.[28]

51. The Claimant requests that the Tribunal render an award:

i. dismissing the Respondent's objections to jurisdiction in their entirety.[29]

VI. Summary of the Parties' Arguments

52. The Respondent objects to the jurisdiction of the Tribunal, alleging the absence of a "dispute" under Article VII of the Treaty. The Respondent argues that the Claimant has failed to satisfy the two essential elements necessary to establish the existence of a dispute under international law: concreteness and positive opposition. The Respondent also submits that the Claimant was obliged to and did not engage in meaningful consultations in good faith with the Respondent prior to resorting to arbitration. The Respondent further

[28] Respondent's Memorial on Jurisdiction, p. 67.

[29] Claimant's Counter-Memorial on Jurisdiction, para. 138.

contends that it is under no obligation to respond to the Claimant's assertions regarding the proper interpretation of the Treaty. In addition, the Respondent maintains that Article VII does not create advisory, appellate, or referral jurisdiction and argues that exercising jurisdiction would be contrary to the Treaty's object and purpose and would have far-reaching and destabilizing consequences for investment treaty arbitration.

53. The Claimant contends that Article VII of the Treaty authorizes the Tribunal to make a binding decision in a dispute concerning the interpretation and application of Article II(7) and that international law imposes no requirement of allegation of treaty breach or any other measure of concreteness beyond what the Claimant articulated in its Request. Furthermore, the Claimant maintains that a dispute does exist since the Respondent has expressly stated its positive opposition to the Claimant's interpretation of Article II(7) and that its positive opposition can also be inferred. The Claimant further argues that upholding its Request would not create appellate, advisory, or referral jurisdiction and that extra-legal concerns should not prevent the Tribunal from exercising jurisdiction over a legal dispute regarding the interpretation and application of the Treaty.

1. The Respondent's Position

54. The Respondent objects to the jurisdiction of the Tribunal due to the absence of any "dispute" between Ecuador and the United States under Article VII of the Treaty. The Respondent argues that "the United States never consented to submit to purely advisory matters of this kind to arbitration under Article VII."[30] According to the Respondent, Ecuador's "'dispute' is not with the United States, but with the award rendered by the *Chevron* tribunal, an investor-state arbitration constituted under Article VI."[31] The Respondent argues that "Ecuador fails to cite even one case where an international tribunal has taken jurisdiction under a State-to-State compromissory clause like Article VII when the disputed interpretation or application involved third persons and not the other Treaty Party."[32]

a) The ordinary meaning of the terms of Article VII

55. The Respondent maintains that the use of the term "dispute" in Article VII, together with the fact that the Tribunal is to render a "binding decision" demonstrates the Parties' intention to create contentious jurisdiction, rather than advisory, appellate, or referral jurisdiction.[33] The Respondent contests the Claimant's emphasis on the word "any" preceding the word "dispute", submit-

[30] Respondent's Memorial on Jurisdiction, p. 15.

[31] Respondent's Memorial on Jurisdiction, p. 15.

[32] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 110.

[33] Respondent's Memorial on Jurisdiction, p. 16.

ting that "[w]hether it is 'any' or even 'all', the Article makes clear that there must be a dispute. The limitation in the provision is the word 'dispute'".[34]

56. Relying on the expert opinion of Professor Tomuschat, the Respondent contends that the word "dispute" has "obtained a specific meaning in international practice" which requires that the parties to a treaty put themselves "in positive opposition with one another over a concrete case involving a claim of breach under the treaty."[35]

57. The Respondent charts the development of the definition of "dispute" in the jurisprudence of the ICJ, citing *Mavrommatis*, *Southwest Africa*, and *Northern Cameroons*. The Respondent highlights the ICJ's pronouncement in *Southwest Africa* that "it must be shown that the claim of one party is positively opposed by the other…a mere assertion is not sufficient to prove the existence of a dispute" and its statement in *Northern Cameroons* that the Court may "pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication, an actual controversy."[36]

58. The Respondent avers that a dispute concerning the interpretation or application of the Treaty cannot arise in the abstract and that the Claimant's claim fails because "it presents nothing more than abstract legal questions about the general meaning of Article II(7)."[37] The Respondent argues that the Claimant mischaracterizes the phrase "interpretation or application" in Article VII by attempting to "disconnect it from the requirement of a 'dispute'" and thus distorts the plain meaning of the text.[38] According to the Respondent, the plain meaning of the phrase "dispute concerning the interpretation or application" is that a "claim concerning the interpretation of the Treaty must also be concrete, involving allegations of non-compliance with the Treaty and positive opposition between the Parties."[39] Furthermore, the Respondent argues that "the distinction between interpretation or application is not relevant to the question of the Tribunal's jurisdiction here" since the inclusion of "interpretation" in Article VII was meant to ensure that disputes over the interpretation of the Treaty in the context of an allegation of Treaty non-compliance would be justiciable.[40]

59. The Respondent alleges that disputes under Article VII of the Treaty must be "between the Parties" and cannot arise out of a separate controversy

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[34] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 104.

[35] Respondent's Memorial on Jurisdiction, p. 17, citing Expert Opinion of Professor Christian Tomuschat (24 April 2012), paras. 5–7 (hereinafter "Tomuschat Opinion"); Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 103–106. Respondent's hearing slides, "The Vienna Convention on the Law of Treaties", no. 5–7.

[36] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 105–106. Respondent's hearing slides "The Vienna Convention on the Law of Treaties", no. 8–9.

[37] Respondent's Memorial on Jurisdiction, p. 17.

[38] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 102, 122.

[39] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 102.

[40] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 119–120.

or a dispute with a third party.[41] The Respondent submits that the Claimant takes issue with the *Chevron* tribunal's interpretation of Article II(7) and not with the Respondent, who the Claimant has not accused of failing to perform its obligations under the Treaty.[42]

60. According to the Respondent, the phrase "for binding decision in accordance with the applicable rules of international law" in Article VII confirms that Article VII covers legal and not political disputes, which requires a conflict of claims or rights between the Parties, based on the Treaty, that is capable of binding resolution by the application of legal rules and principles.[43] The Respondent argues that the Claimant has "no legal dispute with the United States to resolve under international law" since there are no facts at issue or concrete disagreement between the Parties concerning the interpretation of Article II(7).[44]

61. The Respondent further argues that the term "binding" in Article VII "reflects traditional notions of res judicata" and that "in the absence of a concrete case, there would be no future set of facts to which the decision could apply".[45] The Respondent submits that any award issued by the Tribunal could not apply to the *Chevron* case because the decision of the Article VI tribunal is, by its own terms, "final and binding on the Parties to the dispute."[46]

b) Article VII read in context

62. The Respondent contrasts Article V and Article VI of the Treaty with Article VII, noting that they provide the essential context for interpreting Article VII in accordance with Article 31(1) of the VCLT. With respect to Article V, the Respondent asserts that it provides a forum for discussion of a wide range of subjects including "any *matter* relating to the interpretation or application of the Treaty" and that, unlike a dispute, a "matter" does not need to arise out of assertions by Parties of contrary rights or claims and thus establishes a much broader scope for discussions between the Parties.[47] The Respondent contends that "to the extent Ecuador's claim is that the United States refused to enter into negotiations with it to agree on the meaning of Article II(7), it is Article V and not Article VII that provides the mechanism for raising that complaint."[48]

63. The Respondent also contrasts Article VII with the investor-State dispute resolution mechanism in Article VI, which contemplates annulment

[41] Respondent's Memorial on Jurisdiction, p. 17.

[42] Respondent's Memorial on Jurisdiction, pp. 17–18.

[43] Respondent's Memorial on Jurisdiction, p. 18.

[44] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 112–113.

[45] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 112–113.

[46] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 113–114.

[47] Respondent's Memorial on Jurisdiction, p. 18; Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 114–115.

[48] Respondent's Memorial on Jurisdiction, p. 19.

and set-aside proceedings under the applicable arbitration rules and law as the exclusive means for challenging awards rendered by investor-State tribunals. According to the Respondent, "[Article VI] serves as the principal mechanism for binding dispute settlement" and an award rendered by an Article VII tribunal could not prevent a future Article VI tribunal from finding a different interpretation of Article II(7) which the Claimant would be obliged to comply with.[49] The Respondent argues that "this confirms that a State-to-State tribunal constituted under Article VII has no appellate jurisdiction over such awards."[50] Relying on Professor Reisman's expert opinion, the Respondent asserts that Articles VI and VII create "two distinct tracks of arbitration" that assign different disputes to each track.[51] However, the Respondent rejects Claimant's characterization that "the U.S. has put forward a theory of exclusive jurisdiction whereby Article VI and Article VII are in conflict somehow," contending that they are two different articles with different grants of jurisdiction.[52] The Respondent submits that "there may be cases of alleged breach which could be brought directly by an investor under Article VI or by a State under Article VII, but that question is not presented by this case."[53]

64. Article VII is, according to the Respondent, a "residual procedural mechanism for ensuring Party compliance with the Treaty in limited circumstances," for example to resolve a dispute over a Party's failure to pay an award rendered under Article VI of the Treaty. [54]

c) Article VII read in light of the Treaty's object and purpose

65. The Respondent alleges that, when read in light of the Treaty's object and purpose as required by Article 31(1) of the VCLT, Article VII provides a tribunal "jurisdiction only to adjudicate a (1) concrete case alleging a violation of the Treaty by one Party that is (2) positively opposed by the other Party" and that the Claimant has failed to satisfy either requirement.[55] The Treaty's object and purpose is the "encouragement and reciprocal protection of investment" and, while Article VI serves as the principal avenue for dispute resolution involving investors, "Article VII is meant to address real controversies regarding a Party's failure to live up to its Treaty obligations."[56] The Respondent fur-

[49] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 116.

[50] Respondent's Memorial on Jurisdiction, p. 20.

[51] Respondent's Memorial on Jurisdiction, p. 20, citing Expert Opinion of Professor W. Michael Reisman dated 24 April 2012, para. 23 (hereinafter "Reisman Opinion").

[52] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 328:21–25.

[53] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, pp. 328:25–329:3.

[54] Respondent's Memorial on Jurisdiction, p. 20.

[55] Respondent's Memorial on Jurisdiction, pp. 20–21.

[56] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 117–118.

ther contends that, "in case of doubt, [these provisions] are to be interpreted in favor of the natural liberty and independence of the party concerned."[57]

66. The Respondent argues that, under the ordinary meaning of Article VII, read in context and in light of its object and purpose, decisions of tribunals constituted under Article VII are binding only between the Parties to the case and regarding the subject matter in dispute.[58] The Respondent alleges that the Claimant is attempting to bind other tribunals and third parties through this Tribunal's award.[59]

d) The requirement of a "concrete case" alleging a treaty violation

67. In the Respondent's view, Article VII applies only to a "dispute" between the Parties concerning the interpretation or application of the Treaty. The Respondent argues that a "dispute" must entail an "*actual controversy* before the Tribunal concerning a Party's alleged breach of the Treaty" and that it "must be *concrete* in the sense that one Party claims that the other Party's act or omission has violated its legal rights, thereby warranting judicial relief capable of affecting the Parties' rights and obligations."[60] The Respondent alleges that "at the core of the concreteness requirement is a Party's complaint about the other Party's act, omission, or course of conduct."[61]

68. According to the Respondent, the requirement of a "concrete case" regarding an alleged treaty violation has "been recognized by nearly every form of international dispute-settlement tribunal, from investor-State to State-to-State tribunal."[62] The Respondent rejects the Claimant's attempt to cite cases which refute the existence of the concreteness requirement, arguing that all these cases "arose out of clear allegations of treaty violation or are otherwise manifestly distinguishable because the Parties consented to broader jurisdiction."[63] Furthermore, the Respondent argues that "the stark separation between interpretation and application that Ecuador proposes is artificial" since in all cases, even those cited by the Claimant, "there may be elements of both interpretation and application."[64] The Respondent notes that the compromissory clauses of some of the cases cited by the Claimant are broader than

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[57] Respondent's Memorial on Jurisdiction, p. 21, citing *Arbitral Decision Rendered in Conformity with the Special Agreement Concluded on December 17, 1939, Between the Kingdom of Sweden and the United States of America Relating to the Arbitration of a Difference Concerning the Swedish Motor Ships Kronprins Gustaf Adolf and Pacific*, reprinted in 26 Am. J. Int'l L. 834, p. 846 [R-41].

[58] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 341:4–20.

[59] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 342:4–25.

[60] Respondent's Memorial on Jurisdiction, p. 21.

[61] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 127.

[62] Respondent's Memorial on Jurisdiction, pp. 21–22.

[63] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 128, 136–137.

[64] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 137.

Article VII of the Treaty. In any event, the Respondent argues that these cases would also meet the concreteness requirement.[65]

69. The Respondent cites the Anglo-Italian Conciliation Commission decision in the *Cases of Dual Nationality*, which explicitly addressed the issue of the "concrete case" requirement and determined that it lacked jurisdiction to entertain abstract claims.[66] The Respondent contends that the Anglo-Italian Commission, looking at a compromissory clause with virtually identical operative language as the one at issue in the case at hand, found that it could not entertain the United Kingdom's request to interpret the meaning of a provision outside of a concrete case, lest it improperly engage in judicial lawmaking.[67]

70. The Respondent takes issue with the Claimant's attempts to distinguish the *Cases of Dual Nationality*. First, while the Anglo-Italian Commission expresses concern over making abstract pronouncements when not all the parties to a multilateral agreement are party to the proceeding, the Respondent argues that there is no difference between the non-party States and Italy, who also did not consent to the exercise of such competence by the Anglo-Italian Commission.[68] Second, the Respondent disputes that the compromissory clause in *Cases of Dual Nationality* was somehow inherently limited to concrete cases. According to the Respondent, nowhere in the Anglo-Italian Commission's decision is there support for this theory. The Anglo-Italian Commission "interpreted the scope of its jurisdiction only by reference to Article 83(2) of the Treaty".[69]

71. The Respondent further points to pronouncements by the ICJ on the importance of a "concrete case" to establish its contentious jurisdiction.[70] The Respondent in particular relies on the *Northern Cameroons* case where the ICJ stated that its contentious jurisdiction allows it to "pronounce judgment *only* in connection with *concrete cases* where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties."[71] The Respondent argues that the same "concreteness" concept is found in the dispute settlement mechanism of the WTO. Under that mechanism, a dispute only arises in "situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member."[72] The Respondent cites *United States Measures Affecting Imports of Woven Wool Shirts and*

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[65] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 138–139.

[66] Respondent's Memorial on Jurisdiction, p. 21, citing *Cases of Dual Nationality*, XIV UN Reports of International Arbitral Awards 27 [R-30].

[67] Respondent's Memorial on Jurisdiction, p. 21, citing *Cases of Dual Nationality*, *supra* note 66.

[68] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 131.

[69] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 132.

[70] Respondent's Memorial on Jurisdiction, p. 23.

[71] Respondent's Memorial on Jurisdiction, p. 23, citing *Case Concerning the Northern Cameroons* (Cameroon v. United Kingdom), Judgment on Preliminary Objections of 2 December 1963, 1963 I.C.J. Reports 13, p. 34 [R-10][C-129] (hereinafter "*Northern Cameroons*").

[72] Respondent's Memorial on Jurisdiction, p. 24, citing WTO Dispute Settlement Understanding, Article 3.9 [R-17] (hereinafter "DSU").

Blouses, where the WTO Appellate Body ruled that "we do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to make law by clarifying existing provisions of the WTO agreement outside the context of resolving a particular dispute."[73]

72. The Respondent asserts that investor-State tribunals similarly require an actual controversy in a concrete case to take jurisdiction. The Respondent cites *Maffezini* v. *Spain*, where the tribunal concluded that a "dispute must relate to clearly identified issues between the parties and must not be merely academic."[74] Professor Schreuer has observed that "[t]he disagreement between the parties must also have some practical relevance to their relationship and must not be purely theoretical. It is not the task of [investor-State tribunals] to clarify legal questions *in abstracto*."[75] The Respondent further points to *ad hoc* tribunals that had come to similar conclusions, such as the *Aminoil* arbitration where the tribunal found that despite years of negotiations and the expression of divergent legal positions over the rights and obligations under various concession agreements, a concrete step such as nationalization had to be taken for there to be a dispute which would found arbitral jurisdiction.[76]

73. The Respondent distinguishes several of the cases relied upon by the Claimant, arguing that none of these cases were abstract or involved requests for interpretation outside the context of an actual controversy.[77] The Respondent divides the cases cited by the Claimant into "breach cases," where the claim involved an allegation of breach, and "consent cases," where the parties agreed to a broader jurisdictional grant. The Respondent contends that these cases "demonstrate precisely how the United States understands Article VII to operate in practice."[78] In the "consent cases," *Case A/2* and *Case A/17* before the Iran–U.S. Claims Tribunal, the Respondent submits that the U.S. and Iran consented that the Iran–U.S. Claims Tribunal address various issues concerning the interpretation of the Algiers Accords outside of the context of a concrete case.[79] However, even then the Respondent alleges that "[t]here often was a conflict of rights at issue. There may not have been allegations of breach as such, but there was a real conflict of issues."[80]

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[73] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 132.

[74] Respondent's Memorial on Jurisdiction, pp. 24–25, citing *Emilio Agustin Maffezini* v. *Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction (25 January 2000), para. 94 [R-45] (hereinafter "*Maffezini*").

[75] Respondent's Memorial on Jurisdiction, p. 25, citing C. Schreuer, The ICSID Convention: A Commentary (2d ed. 2009), p. 94 [R-82].

[76] Respondent's Memorial on Jurisdiction, pp. 25–26, citing *In the Matter of an Arbitration Between Kuwait and the American Independent Oil Company (AMINOIL)*, Award (24 March 1982), 21 I.L.M. 976 [R-53] (hereinafter "*Aminoil*").

[77] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 140.

[78] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 137.

[79] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 140, 158–159.

[80] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 333:6–10.

74. The Respondent also distinguishes the "breach" cases. In *Revaluation of the German Mark*, the premise of the claimant's case was that Germany had violated the terms of the London Debt Agreement by revaluing its mark and refusing to make payments on the basis of new par values as allegedly required by the guarantee clause. The Respondent therefore argues that the tribunal did not abstractly interpret the guarantee clause in the treaty but did so in the context of a concrete allegation of breach.[81] In *Rights of U.S. Nationals in Morocco*, while France brought the case before the ICJ and raised interpretive questions about its obligations, the U.S. had alleged multiple treaty violations, notably that France had breached the MFN clause in a commercial treaty by depriving U.S. nationals of economic and consular rights.[82]

75. In the case of *Certain German Interests in Polish Upper Silesia*, the Respondent first notes that the compromissory clause covered the broader category of "differences of opinion".[83] The Respondent also addresses the statement in that case that a court could provide an abstract interpretation of a treaty since it had already done so in Judgment Number 3. The Respondent submits that Judgment Number 3 was the *Treaty of Neuilly* case in which Bulgaria and Greece submitted a question of treaty interpretation to the PCIJ's summary chamber by special agreement. Judgment Number 3 therefore falls squarely into the category of "consent cases" according to the Respondent.[84] The Respondent further distinguishes *Upper Silesia* by arguing that the case arose out of clear allegations by Germany that Poland had breached the underlying peace treaty by expropriating the property of German nationals. The second question posed by Germany to the PCIJ, concerning what attitude should have been adopted by Poland so as not to breach the treaty, was in fact not decided by the PCIJ, since Germany did not convert this abstract question into a justiciable one.[85]

76. In the case of the *Statute of the Memel Territory*, the Respondent first notes that the compromissory clause also covered "differences of opinion" and takes issue with the Claimant's attempts to assimilate "disputes" with "differences of opinion". The fact that this particular treaty provided that "differences of opinion" would be treated as disputes of an international character does not alter the definition of a "dispute" in international practice.[86] The Respondent asserts in any event that the concreteness requirement is satisfied since the Allied Powers accused Lithuania of wrongly dismissing the president of the Memel Territory directorate.[87] Furthermore, the Respondent notes that the court refused to rule on the more abstract question of whether "the right to

[81] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 140–143.

[82] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 145–146.

[83] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 147–148.

[84] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 148:13–20.

[85] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 148:21–150:25.

[86] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 151:8–150:7.

[87] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 153:4–9.

dismiss the President exists only under certain conditions or in certain circumstances and what those conditions or circumstances are."[88]

77. In the *Pensions of Officials of the Saar Territory*, the Respondent notes once again that the clause in question is broader, covering "serious differences of views." The Respondent also contends that, although the parties did not plead their cases in terms of treaty breaches, the arbitration nonetheless arose out of Germany's allegations that the Commission had breached the Baden–Baden Agreement by drawing on the pension reserve fund to pay pensions.[89]

78. The Respondent also argues that the *Amabile* case is inapposite, since in that case the U.S.–Italian Conciliation Commission merely established a general rule of procedure regarding the admission of written testimony, which it was competent to do pursuant to the terms of the Peace Treaty. In any event, the Commission did not do so in the abstract but in order to assess evidence proffered by Ms. Amabile in support of her claim.[90]

79. Finally, the Respondent alleges that the *U.S. Air Services Agreement* case clearly falls within the category of breach cases, since the question at issue concerned the conflicting rights claimed by the United States and France under the Services Agreement with real consequences flowing from the determination of those rights to various airlines.[91]

80. The Respondent maintains that it has long taken the position that State-to-State dispute settlement clauses that it included in FCN treaties and BITs permit only the resolution of "disputes between the Parties concerning the interpretation and application of the Treaty" and that the U.S. government has pronounced that "it is in the interest of the United States to be able to have recourse to [State-to-State dispute settlement] in case of treaty violation."[92]

81. Furthermore, the Respondent notes that the Claimant has also recognized the requirement of an actual controversy. The Claimant argued before the *Chevron* tribunal that "simply making an arbitration demand stating that a dispute exists is insufficient to invoke the BIT."[93]

82. The Respondent contends that in the case at hand the Claimant "presents no coherent theory for determining when a controversy has sufficient concreteness to constitute a dispute" and denies the existence of such a

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[88] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 154:5–13.

[89] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 155:12–156–13.

[90] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 157:6–158:7.

[91] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 331:5–13.

[92] Respondent's Memorial on Jurisdiction, pp. 26–27, citing U.S. Senate Report on Commercial Treaties with Belgium and Vietnam (28 August 1961), Appendix, Department of State Memorandum on Provisions in Commercial Treaties Relating to the International Court of Justice, p. 7 [R-110].

[93] Respondent's Memorial on Jurisdiction, p. 27, citing *Chevron Corp. and Texaco Petroleum Co.* v. *Republic of Ecuador*, PCA Case No. 2007–2, Interim Award (1 December 2008), para. 94 [R-32] (hereinafter "*Chevron* Interim Award").

requirement, relying solely on positive opposition to found the dispute.[94] The Respondent notes that this leaves undetermined "what theoretical framework could possibly guide this Tribunal's analysis to Ecuador's conclusion?"[95]

83. The Respondent points to the report by the Claimant's expert, Professor Pellet, where he recognizes a concreteness requirement, at least for purposes of Article V and submits that the U.S.' failure to respond to Ecuador's demand breached the U.S.' obligation to consult under Article V. The Respondent disagrees with Professor Pellet's conclusion that the U.S. has breached its Article V obligations and notes that the Claimant has never claimed this breach, but it does "agree with Professor Pellet's basic approach to Article V" where a dispute is based on an act, omission, or a course of conduct that is alleged to violate the BIT.[96] The Respondent submits that Professor Pellet's analysis is strained when he examines whether there is a dispute concerning the interpretation of Article II(7) of the BIT, and that even Professor Pellet concedes that "the problem is that this dispute concerns the implementation of Article V and not, primarily, the interpretation of Article II(7)." The Respondent, however, rejects Professor Pellet's reasoning that, since the Parties would probably not agree on the meaning of Article II(7) when consulting under Article V, it would be more efficient for the Tribunal to directly decide the issue.[97]

84. The Respondent asserts that the Claimant has manifestly failed to establish the existence of a concrete case as required under Article VII. The Respondent contends that "by its own admission, Ecuador makes no allegation that the United States has failed to comply with the Treaty," citing the Claimant's pronouncements that:

> Ecuador has not accused the United States of any wrongdoing. It does not accuse the United States of violating any of its international obligations. It does not seek compensation from the United States. It does not seek an order against the United States.[98]

The Respondent avers that the Claimant is asking the Tribunal to rule on "open-ended questions, not connected to any concrete facts" pointing to the fact that the Claimant asked the Tribunal at the First Preparatory Meeting to rule on the Claimant's precise obligations under Article II(7), such as how to organize its court system to comply with the Treaty and how aggressively it must act to speed up cases and by which methods.[99]

85. The Respondent stresses that the questions the Claimant put to the Tribunal "provide the strongest justification for why the 'concrete case'

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[94] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 134.

[95] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 134.

[96] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 134–135.

[97] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 135–136.

[98] Respondent's Memorial on Jurisdiction, pp. 27–28, citing Transcript (Preparatory Meeting), 21 March 2010, p. 18.

[99] Respondent's Memorial on Jurisdiction, p. 28.

requirement is essential."[100] The Respondent contends that these questions lead to an advisory opinion and that the Tribunal is not "a general advisor" of the Claimant regarding how it is to implement changes to its judiciary.[101] Furthermore, the concreteness requirement "prevents Article VII from being construed so broadly as to deprive a Party of its discretion to interpret the BIT or to undermine the bilateral economic dialogue under a BIT."[102]

e) Lack of positive opposition by the Parties

86. The Respondent argues that to establish the existence of a "dispute", the Claimant must prove that the Parties are in "positive opposition" to one another in a concrete case involving a breach of the Treaty.[103] Despite certain statements to the contrary in its Counter-Memorial, the Respondent submits that, at the hearing on jurisdiction, the Claimant accepted the requirement of positive opposition to found a dispute.[104]

87. To establish the lack of positive opposition in this case, the Respondent notes the Claimant's acknowledgment that the Respondent "did not affirmatively oppose Ecuador's unilateral interpretation of Article II(7) of the Treaty."[105] The Respondent stresses that "it has never taken a position on the substance of Ecuador's interpretation of Article II(7)…either before or after Ecuador presented its Diplomatic Note."[106] The Respondent objects to the Claimant's reference to the Respondent's pleadings to found positive opposition. The Respondent relies on *Georgia* v. *Russia* to argue that "jurisdiction must be established at the time of an application" and that therefore the positive opposition must have materialized as of 28 June 2011.[107]

88. In any event, the Respondent denies that its pleadings put it in positive opposition, rejecting the argument that the characterization of the Claimant's interpretation as unilateral means that the Respondent necessarily disagrees with it.[108] The Respondent submits that its calling the Claimant's interpretation unilateral is a fact, and is without prejudice as to whether the Respondent agrees with the Claimant's interpretation.[109] Furthermore, the Respondent rejects the Claimant's view that because the Respondent's expert, Professor Reisman, characterized the *Chevron* award as *res judicata*, then this

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[100] Respondent's Memorial on Jurisdiction, p. 28.

[101] Respondent's Memorial on Jurisdiction, pp. 28–29.

[102] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 130.

[103] Respondent's Memorial on Jurisdiction, p. 29.

[104] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 164.

[105] Respondent's Memorial on Jurisdiction, p. 29.

[106] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 167; Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 334:19–22.

[107] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 167–169.

[108] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 169.

[109] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 170, 190.

necessarily means that the U.S. agrees with the *Chevron* award as binding for Ecuador's obligations *vis-à-vis* the United States as well.[110] The Respondent stresses that Professor Reisman's opinion only described the *Chevron* award as *res judicata* in the context of explaining the relationship between Article VI and Article VII of the Treaty and in no way implied that the award was *res judicata* for future tribunals.[111]

89. The Respondent contests the Claimant's argument that the Respondent put itself in positive opposition through its silence: "[s]ilence alone cannot establish positive opposition. It is only when a party's actions make it clear that its views are positively opposed to the other party, that silence can serve as an objective determination of positive opposition."[112] The Respondent points to the ILC guidelines on unilateral interpretive declarations which states that silence is a common and indeterminate response and can express either agreement or disagreement with the proposed interpretation.[113] The Respondent also relies on Professor Tomuschat's view that "in the absence of an obligation to provide an answer, silence alone cannot be deemed to constitute rejection."[114] The Respondent notes that the Claimant has conceded that the Respondent "has taken no action whatsoever," meaning that it cannot have created positive opposition.[115]

90. The Respondent defines positive opposition, with reference to international jurisprudence, as "a conflict of legal views or interests between two parties."[116] To establish positive opposition, the Respondent argues that a "tribunal must make an 'objective determination' that 'the claim of one party is positively opposed by the other.'"[117] The Respondent notes that positive opposition is often established by diplomatic exchanges or is manifested in public statements.[118] The Respondent sets out the two factors required to establish positive opposition:

> one party must allege that the party's acts, omissions, or course of conduct amount to international wrongdoing, or otherwise conflict with or offend the first party's rights under the treaty. Second, the accused Party must deny the allegation of wrongdoing, either expressly or implicitly.[119]

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[110] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 190–191.

[111] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 191.

[112] Respondent's Memorial on Jurisdiction, p. 29.

[113] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 192–193.

[114] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 193.

[115] Respondent's Memorial on Jurisdiction, pp. 29–30.

[116] Respondent's Memorial on Jurisdiction, p. 30, citing *Mavrommatis Palestine Concessions* (Greece v. U.K.), Judgment of 30 August 1924, 1924 P.C.I.J., Series A, No. 2 [R-4] (hereinafter "*Mavrommatis*"); *East Timor (Portugal* v. *Australia*), Judgment (30 June 1995), 1995 I.C.J. Reports 90, pp. 99–100 [R-55].

[117] Respondent's Memorial on Jurisdiction, p. 30, citing *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (First Phase), Advisory Opinion (30 March 1950), 1950 I.C.J. Reports 65, p. 74 [R-6][C-137] (hereinafter "*Interpretation of Peace Treaties*").

[118] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 165–166.

[119] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 107.

The Respondent submits that taking a position on the underlying matter may be done explicitly or implicitly through action. However, one party cannot force the other into positive opposition nor can one party unilaterally create a dispute.[120]

91. The Respondent argues that the cases cited by the Claimant in claiming that the existence of a dispute can be established by a party's conduct, including silence, actually contradict the Claimant's assertion. The Respondent analyses *Georgia* v. *Russia*, *Cameroon* v. *Nigeria*, and *UN Headquarters* and contends that in those cases, one party had claimed that the other had breached international obligations owed to that party, which demanded a response. The Respondent alleges that in the case at hand, no allegation of a breach of the Treaty has been put forward, and there is therefore no obligation to respond to the Claimant's request for interpretation.[121]

92. As regards *Georgia* v. *Russia*, the Respondent maintains that Georgia had claimed that Russia had violated a human rights treaty and that Russia had expressly and publicly denied those claims, which is why the ICJ determined that the parties were in positive opposition. *Georgia* v. *Russia* is thus inapposite to the matter at hand since the Claimant has never alleged any breach of the Treaty, nor has the Respondent publicly or privately affirmed or denied the Claimant's interpretation of Article II(7).[122] With respect to *UN Headquarters* and *Cameroon* v. *Nigeria*, the Respondent contends that the actions of the accused parties, allegedly contrary to their treaty obligations, provided clear evidence that they opposed the claim of breach, thus giving rise to a dispute. In *UN Headquarters*, the United States passed a law in direct violation of its alleged international obligations.[123] Meanwhile, in *Cameroon* v. *Nigeria*, the ICJ found that Nigerian troops had engaged in "incidents and incursions" into the territory claimed by Cameroon.[124] Furthermore, in that case, the parties had agreed that there was a dispute over part of the border but not over the entirety of the border and therefore the question was one of the scope of the dispute, not its existence.[125] The Respondent submits that *Cameroon* v. *Nigeria* is inapposite to the case at hand: "there have been no troop invasions, no border skirmishes, and no admission of even the smallest

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[120] Respondent's Memorial on Jurisdiction, p. 30.

[121] Respondent's Memorial on Jurisdiction, pp. 30–31.

[122] Respondent's Memorial on Jurisdiction, p. 31, citing *Case Concerning the Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russia), Judgment on Preliminary Objections (1 April 2011), ICJ, para. 112 [R-9][C-122] (hereinafter "*Georgia* v. *Russia*"); Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 172–173.

[123] Respondent's Memorial on Jurisdiction, p. 32, citing *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion (26 April 1988), 1988 I.C.J. Reports 12, p. 28 [R-57] (hereinafter "*UN Headquarters Agreement*").

[124] Respondent's Memorial on Jurisdiction, p. 33.

[125] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 177.

of disputes."[126] In this case, the Claimant does not allege that the Respondent has taken any action whatsoever contrary to its obligations under the Treaty.[127]

93. The Respondent asserts that the Claimant cannot "unilaterally create 'positive opposition'" since positive opposition requires an objective determination by the Tribunal that one party's claims of a treaty breach are refuted by the other party.[128] Even if the US Legal Adviser had stated that the United States "will not rule" on the Claimant's request that it agree to the Claimant's interpretation—a fact the Respondent denies—this would not create positive opposition over the interpretation of Article II(7).[129] The Claimant cannot show that the Respondent contradicted a claim of treaty violation by Ecuador in diplomatic or public statements, and thus no objective assessment of this alleged statement could lead to the conclusion that the Parties were in positive opposition.[130] The Respondent maintains that the ICJ has concluded similarly, finding in *Certain Property* that diplomatic exchanges between Liechtenstein and Germany demonstrating a clear difference of views manifested positive opposition over whether there was a breach of an international obligation.[131] Unlike the German Foreign Minister's statement to the Foreign Minister of Liechtenstein that it was "known that the German Government [did] not share the legal opinion" of Liechtenstein on this matter, which the ICJ took to establish the requisite positive opposition, the US Legal Adviser allegedly stated that the Respondent "would not rule" on the Claimant's request—not that it disagreed with the Claimant's interpretation of Article II(7) of the Treaty.[132]

94. The Respondent contends that the Claimant cannot force the Parties into positive opposition by ultimatum. It cannot unilaterally put the Respondent in the "untenable position" of having no choice but to agree with the Claimant's interpretation or be deemed to be in positive opposition by remaining silent.[133] Furthermore, the Respondent alleges that "the most Ecuador can do is to say that the failure of the United States to answer Ecuador's either/or demand […] created the dispute […] But that alleged dispute is over whether Ecuador had a right to issue such an ultimatum or demand and whether the Respondent had an obligation to answer. It's not over the interpretation or application of Article II(7)."[134]

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[126] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 178.

[127] Respondent's Memorial on Jurisdiction, pp. 31–32.

[128] Respondent's Memorial on Jurisdiction, p. 34.

[129] Respondent's Memorial on Jurisdiction, p. 34.

[130] Respondent's Memorial on Jurisdiction, p. 34.

[131] Respondent's Memorial on Jurisdiction, p. 34, citing *Case Concerning Certain Property* (Liechtenstein v. Germany), Judgment (10 February 2005), 2005 I.C.J. Reports 6, para. 25 [R-7] (hereinafter "*Certain Property*").

[132] Respondent's Memorial on Jurisdiction, p. 35, citing *Certain Property*, *supra* note 131, para. 23.

[133] Respondent's Memorial on Jurisdiction, pp. 35–36.

[134] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 108–109.

95. Finally, the Respondent argues that it cannot see how its silence prejudices the Claimant or requires the Claimant to give U.S. investors greater advantages than Ecuador agreed to provide, since Ecuador's interpretation was successful in one investor-State arbitration. The Respondent alleges that the Claimant seems to be treating the *Chevron* award as binding precedent in the future, rather than providing it with its proper force as final and binding only as between Chevron and Ecuador.[135]

f) The Respondent does not owe the Claimant an obligation to respond to or confirm the Claimant's unilateral interpretation of the Treaty

96. The Respondent disputes the Claimant's theory that the principle of good faith obligates the Respondent to respond to or confirm the Claimant's unilateral interpretation of Article II(7).[136] The Respondent asserts that the Claimant has no right under the Treaty or general international law to demand that the Respondent confirm its own interpretation of Article II(7) or be thereby forced to submit to arbitration. For the Claimant to be able to unilaterally create a dispute about the substance of its claim would "turn international treaty practice on its head."[137] The Respondent contends that States retain the discretion to mutually agree to a joint interpretation but are under no obligation to reach such agreement.[138]

97. According to the Respondent, a State may bind itself under international by a unilateral act but cannot bind another State by that act.[139] Allowing the Claimant to bring into being a mechanism not provided by the Treaty which would force the Respondent to pronounce itself on the interpretation of provisions of the Treaty whenever the Claimant found it necessary, is inconsistent with the notion of mutuality which underlies the obligations on State parties to a treaty.[140]

98. The Respondent maintains that nothing in the Treaty contains any provision obligating the Respondent to interpret the Treaty "beyond the four corners of the text itself."[141] The Respondent notes that the only provision in the Treaty under which the Respondent is committed to engage in consultations regarding the meaning of the Treaty provisions is Article V which, as the Respondent's expert Professor Tomuschat opines, "would have been the proper avenue to see if the Parties could agree to a mutually acceptable interpretive statement."[142] The Respondent also cites *Oppenheim's International Law* for

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[135] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 194–195.

[136] Respondent's Memorial on Jurisdiction, p. 36.

[137] Respondent's Memorial on Jurisdiction, p. 36.

[138] Respondent's Memorial on Jurisdiction, p. 37.

[139] Respondent's Memorial on Jurisdiction, p. 37.

[140] Respondent's Memorial on Jurisdiction, pp. 37–38.

[141] Respondent's Memorial on Jurisdiction, p. 38.

[142] Respondent's Memorial on Jurisdiction, pp. 38–39, citing Tomuschat Opinion, para. 14.

the proposition that "[w]hile consultations must be undertaken in good faith, they do not give to any of the states involved a right to have its views accepted by the others or to stop them acting in whatever way they propose."[143] The Respondent contends that it did in fact respond to the Claimant by stating that "it would remain silent on Ecuador's interpretation." While this may not have been the desired response, the Respondent argues that it was made in good faith and is fully consistent with the Treaty.[144]

99. The Respondent counters the Claimant's assertion that the principles of good faith and *pacta sunt servanda* obligate the Respondent to respond to its demand for interpretation.[145] The Respondent alleges that the principle of good faith is one of the basic principles governing the creation and performance of legal obligations but "is not itself a source of obligations where none would otherwise exist."[146] Any legal obligation to respond to the Claimant's demand must therefore have a basis in the Treaty.[147] The Respondent adds that in *Cameroon* v. *Nigeria*, the ICJ rejected Nigeria's argument that Cameroon's failure to give Nigeria prior notice of its intent to bring a claim before the ICJ was a breach of good faith.[148] The Respondent submits that the Claimant's efforts to argue here that the Respondent did not fulfill its obligations under the Treaty in good faith are similarly unavailing. According to the Respondent, given that the Claimant never invoked Article V, it cannot now argue that the United States did not consult in good faith.[149]

100. Furthermore, the Respondent contends that the principle of good faith is incumbent on both Parties and that it is difficult to find good faith in the Claimant's decision to invoke Article VII of the Treaty only a few months after having successfully petitioned its courts to declare that provision unconstitutional.[150]

101. The Respondent also disputes the Claimant's reliance on the principle of *pacta sunt servanda* as a means to require the Respondent to express a view on the proper interpretation of the Treaty. While the Respondent concedes that every treaty in force is binding upon the parties and must be performed in good faith, the Claimant can point to no obligation that the Respondent has failed to perform under the Treaty, or that it has acted in bad

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[143] Respondent's Memorial on Jurisdiction, p. 39, citing Robert Jennings & Arthur Watts, *Oppenheim's International Law* (9th ed. 1992) at s. 537 [R-83].

[144] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 186.

[145] Respondent's Memorial on Jurisdiction, p. 39.

[146] Respondent's Memorial on Jurisdiction, p. 39, citing *Case Concerning Border and Transborder Armed Actions Case* (Nicaragua v. Honduras), Judgment on Jurisdiction and Admissibility (20 December 1988), 1988 I.C.J. Reports 69, p.105 [R-62] (hereinafter "*Border and Transborder Armed Actions*").

[147] Respondent's Memorial on Jurisdiction, p. 39.

[148] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 187.

[149] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 187–188.

[150] Respondent's Memorial on Jurisdiction, p. 40.

faith, or that the lack of response by the Respondent somehow prevents the Claimant from performing its obligations under the Treaty.[151]

102. The Respondent argues that international law does not compel States to respond to unilateral interpretive declarations, nor does it prohibit them from remaining silent when confronted with such declarations.[152] The Respondent notes that, when confirmed by the other State party, interpretations contained in such declarations may become part of the context in which the terms of a treaty are to be read.[153] The Respondent however, avers that it is aware of no instance where a party unilaterally imposed its view on another party through arbitration and that such an attempt was firmly rejected in *Cases of Dual Nationality*.[154]

103. Furthermore, the Respondent cites State and treaty practice in support of its position.[155] The Respondent contends that it can find no treaty imposing the obligation of responding to a demand for interpretation, nor an example of a State party responding to such a demand under the belief that it was obliged to do so.[156] The Respondent maintains that, where it and its treaty partners have made express provisions for States to offer their unilateral views on the meaning of a provision of an investment treaty, "they have created a discretionary rather than a mandatory right," such as under the North American Free Trade Agreement (hereinafter "NAFTA") where a non-disputing party to the NAFTA may make a submission to an investor-State tribunal on a question of interpretation of the treaty, as well as under the United States' more recent BITs and FTAs.[157] The Respondent agrees with Professor Pellet's opinion, relying on the *S.S. Wimbledon* case, that limits on sovereign discretion must be express. The Respondent argues that no such express limitation can be found in Article V or any other provision of the Treaty.[158]

104. Where State practice exists, the Respondent claims that this practice confirms that States have the discretion—rather than the obligation—to agree to a joint interpretation.[159] The Respondent points to the examples of the Netherlands consenting to offer its interpretation of the Czech–Netherlands BIT under the consultations provision of that treaty, and that of Argentina and Panama issuing an exchange of notes to reach a joint interpretation on the meaning of the MFN clause in the Argentina–Panama BIT.[160] In neither case did the States in question act as if under an obligation to offer an interpretation.[161]

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[151] Respondent's Memorial on Jurisdiction, pp. 40–41.
[152] Respondent's Memorial on Jurisdiction, pp. 41–42.
[153] Respondent's Memorial on Jurisdiction, pp. 42–43.
[154] Respondent's Memorial on Jurisdiction, p. 43.
[155] Respondent's Memorial on Jurisdiction, p. 43.
[156] Respondent's Memorial on Jurisdiction, p. 43.
[157] Respondent's Memorial on Jurisdiction, pp. 43–44.
[158] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 185.
[159] Respondent's Memorial on Jurisdiction, p. 44.
[160] Respondent's Memorial on Jurisdiction, p. 45.
[161] Respondent's Memorial on Jurisdiction, p. 45.

105. The Respondent contends that investment treaties which provide for the issuance of joint interpretations to clarify the meaning of a treaty, expressly require the parties' mutual agreement, such as is found in Article 1131 of NAFTA.[162] Similar provisions to Article 1131 of NAFTA have been included in the 2012 U.S. Model BIT and recent U.S. FTAs, but remain the exception rather than the rule in international practice.[163] The Respondent points to Professor Reisman's opinion that Article VII of the Treaty is not equivalent to Article 1131 of NAFTA, and that in any event "even NAFTA Article 1131 does not compel joint interpretations."[164]

106. The Respondent submits that issuing an interpretation of a treaty obligation requires a complicated inter-agency process and is only done in a contentious case with a genuine dispute.[165]

g) The Claimant has not fulfilled its obligation to consult

107. The Respondent argues that, as the ICJ held in *Georgia* v. *Russia*, a tribunal cannot exercise jurisdiction until all preconditions are fulfilled under the relevant compromissory clause. According to the Respondent, under Article VII of the treaty, this would require the Claimant to seek to resolve the dispute through consultations or other diplomatic channels after the dispute had arisen.[166] The Respondent contends that, even accepting the Claimant's theory that a dispute arose in October 2010 when Mr. Koh told Ambassador Gallegos that the U.S. would not provide a response to Ecuador's Diplomatic Note, the Claimant failed to meaningfully pursue consultations, under Article V or otherwise, prior to commencing arbitration under Article VII.[167] The Respondent alleges that all the actions relied upon by the Claimant to satisfy its obligations to consult took place prior to the date on which the Claimant itself alleges that the dispute crystallized.[168]

h) Article VII does not create advisory, appellate or referral jurisdiction

108. The Respondent claims that had the Parties to the Treaty intended to provide the Tribunal with broader powers to address abstract legal questions, they would have had to do so expressly.[169] The Respondent alleges that

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[162] Respondent's Memorial on Jurisdiction, p. 46.

[163] Respondent's Memorial on Jurisdiction, p. 46.

[164] Respondent's Memorial on Jurisdiction, pp. 46–47, citing Reisman Opinion para. 44.

[165] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, pp. 317:20–319:19.

[166] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 110.

[167] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 311:7–16.

[168] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 110–111.

[169] Respondent's Memorial on Jurisdiction, pp. 47–48.

"[a]bsent the expressed consent of both Parties, the Tribunal has no authority to act as an advisory, appellate or referral body."[170]

109. The Respondent notes that the question the Claimant has asked the Tribunal is similar to those posed to the ICJ in its capacity as an advisory body competent to offer non-binding opinions under the ICJ Statute. The Treaty is, however, devoid of any equivalent enabling provisions.[171]

110. The Respondent asserts that Article VII also does not provide for appellate jurisdiction, unlike the Dispute Settlement Understanding which grants the Appellate Body of the WTO the power to decide "issues of law covered in the [underlying] panel report and legal interpretations developed by the panel."[172] The Respondent notes that, when in the past it has considered the creation of appellate jurisdiction, it has done so expressly, as in recent BITs and investment chapters of FTAs.[173] The Respondent argues that the inclusion of express provisions regarding the potential creation of appellate jurisdiction in its BIT practice shows that Article VII of the Treaty is not and was never intended to function as an appellate mechanism.[174]

111. The Respondent contends that, although the Claimant claims that it does not intend to ask the Tribunal to overturn the *Chevron* case, a press statement issued by the Claimant "implied that its goal in this arbitration is to undo the award."[175] The Respondent notes that the Claimant's request for an interpretation was prompted by the *Chevron* award and that its letter to the Tribunal of 21 June 2012 states that "Ecuador's Memorial on the Merits and attachments set forth Ecuador's interpretation of Article II(7) and explain why the interpretation given by the Arbitral Tribunal in Chevron Corp and Texaco Petroleum Company versus the Republic of Ecuador was incorrect."[176] The Respondent argues that this indicates that Ecuador is seeking to relitigate the *Chevron* award and is thus equivalent to a request for appeal, over which the Tribunal does not have jurisdiction.[177] The Respondent alleges that the Claimant is at least seeking to attack the *Chevron* award collaterally in violation of Article VI of the treaty, pursuant to which that award is to be treated as final and binding.[178]

112. The Respondent points to the case of *X* v. *Y*[179] and *Lucchetti* v. *Peru*[180] as examples of cases where disguised appeals were not granted. In *X*

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[170] Respondent's Memorial on Jurisdiction, p. 48.

[171] Respondent's Memorial on Jurisdiction, p. 49.

[172] Respondent's Memorial on Jurisdiction, p. 50, citing DSU, *supra* note 72, Article 17.6.

[173] Respondent's Memorial on Jurisdiction, p. 50.

[174] Respondent's Memorial on Jurisdiction, p. 50.

[175] Respondent's Memorial on Jurisdiction, p. 51.

[176] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 200.

[177] Respondent's Memorial on Jurisdiction, p. 51.

[178] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 203–204.

[179] *X S.A.* v. *Y Ltd.*, Case 4A_210/2008/ech, Oct. 29, 2008 (Swiss Federal Court, 1st Civ. Law Division), 27 ASA Bull., No. 2, 309, p. 323 [R-12].

[180] *Empresas Lucchetti S.A. and Lucchetti Peru S.A.* v. *Republic of Peru*, ICSID Case No. ARB/03/04, Award (7 February 2005) [R-50] (hereinafter "*Lucchetti*").

v. *Y*, company X, after a partial award was rendered against it by the tribunal, commenced a new arbitration under the same contract seeking a declaration on the validity of the parties' underlying agreement, as well as setting aside proceedings in Swiss courts. It then asked the initial tribunal to stay its proceedings. The Swiss Federal Court rejected company X's impermissible attempt to defeat the tribunal's partial award and the initial tribunal declined to stay its proceedings.[181] In *Lucchetti* v. *Peru*, after the claimant had brought a case against Peru under the Chile–Peru BIT, Peru began arbitration under the State–State arbitration clause and asked the *Lucchetti* tribunal to suspend its proceedings in light of the concurrent State-to-State dispute, which the tribunal refused to do.[182] The Respondent also relies on Professor Orrego Vicuña's view that resorting to State-to-State arbitration to avoid the obligation the State has accepted with respect to an investor "constitutes an '*abus de droit*' sufficient for the inter-State tribunal to decline its jurisdiction."[183]

113. The Respondent highlights its expert Professor Reisman's opinion that the Claimant's attempt to use the State-to-State track to invent a procedure for appellate review is at odds with the two-track jurisdictional regime of the Treaty.[184] The Respondent argues that taking jurisdiction and ruling on the questions presented in this case would force the Respondent into a proceeding to relitigate a final award in which it had not participated.[185]

114. Finally, the Respondent submits that Article VII does not allow for referral jurisdiction which would permit the consideration of preliminary legal questions by a third party.[186] The Respondent contends that when States establish referral jurisdiction, they do so expressly by two methods: the "case-stated" method where a national court *sua sponte* refers a question to an international court for binding decision, such as under Article 9F of the Treaty of Lisbon, or by "evocation" procedures where a disputing party may request the removal of a legal issue from one court to another for decision, such as is found in the 1922 Treaty of Upper Silesia.[187] The Respondent avers that States know how to establish referral mechanisms and the absence of these mechanisms in the Treaty indicates that the Parties intended to confer no such power on the Tribunal.

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[181] Respondent's Memorial on Jurisdiction, pp. 51–52.

[182] Respondent's Memorial on Jurisdiction, p. 52, citing *Lucchetti*, *supra* note 180.

[183] Respondent's Memorial on Jurisdiction, pp. 52–53, citing Francisco Orrego Vicuña, *Lis Pendens Arbitralis,* Parallel State and Arbitral Procedures in International Arbitration: Dossiers—ICC Institute of World Business Law, p. 207, 214 [R-92].

[184] Respondent's Memorial on Jurisdiction, p. 53, citing Reisman Opinion para. 51.

[185] Respondent's Memorial on Jurisdiction, p. 53.

[186] Respondent's Memorial on Jurisdiction, p. 53.

[187] Respondent's Memorial on Jurisdiction, pp. 53–54.

i) A finding of jurisdiction would exceed the tribunal's judicial function and would constitute judicial law-making

115. The Respondent alleges that because the Tribunal is empowered to take only original and contentious jurisdiction, it cannot rule on Ecuador's request for an abstract interpretation of Article II(7) as this would exceed its judicial function.[188] The Respondent submits that the Claimant's request for an interpretation that would bind future tribunals is outside the scope of Article VII, since it would "deprive them of the right to be the masters of the meaning of their treaties."[189] The Respondent points to the *Nuclear Tests* case, where Judge Gros stated that the tendency to submit political disputes to adjudication would result in the "institution, on the international plane, of government by judges."[190] The Respondent also highlights the warning of the *Aminoil* tribunal against arbitral tribunals stepping into the shoes of the parties to regulate their affairs without their express consent.[191]

116. The Respondent argues that the Claimant is asking the Tribunal to act as an international legislator, not arbitrator, and to substitute its own interpretation of a provision of the Treaty for that of sovereign consent.[192] The Respondent points again to the reasoning in the *Cases of Dual Nationality* where the Anglo-Italian Conciliation Commission ruled that a dispute settlement provision providing for jurisdiction over "disputes concerning the application or interpretation" of the treaty in question did not grant it jurisdiction to decide abstract and general questions, stating that "the arbitrator cannot substitute the legislator".[193] The Respondent contends that the Claimant is making the same request of this Tribunal that the United Kingdom made to the *Cases of Dual Nationality* tribunal, since it asks the Tribunal to issue an interpretation of a provision of the Treaty absent party consent and outside the context of a concrete case.[194]

j) Exercising jurisdiction would be contrary to the Treaty's object and purpose and would destabilize international adjudication

117. The Respondent argues that granting the Claimant's request would "jeopardize the system of investment treaties, particularly investor-State dispute settlement provisions" and would have the effect of "judicializing diplomacy",

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[188] Respondent's Memorial on Jurisdiction, p. 55.

[189] Respondent's Memorial on Jurisdiction, pp. 55–56.

[190] Respondent's Memorial on Jurisdiction, p. 56, citing Separate Opinion of Judge Gros, *Nuclear Tests Case* (Australia v. France), 1974 I.C.J. Reports 253, p. 297 [R-77] (hereinafter "*Nuclear Tests*").

[191] Respondent's Memorial on Jurisdiction, p. 56, citing *Aminoil*, *supra* note 76, pp. 1015–16.

[192] Respondent's Memorial on Jurisdiction, p. 57.

[193] Respondent's Memorial on Jurisdiction, pp. 57–58, citing *Cases of Dual Nationality*, *supra* note 66, pp. 29, 35.

[194] Respondent's Memorial on Jurisdiction, pp. 58–59.

chilling the free exchange of views essential to foreign relations.[195] The equivalent to Article VII is found in a countless number of investment treaties and, should the Claimant's request be granted, this would open the door to State-to-State arbitrations for matters that the parties never consented to litigating.[196]

118. The Respondent submits that taking jurisdiction would undermine stability, predictability and neutrality, which it argues are "key principles built into Article VI".[197] The Treaty does not provide for further review or appeal other than the permissible annulment or set-aside proceedings.[198] The Respondent argues that an "authoritative interpretation" rendered by an Article VII tribunal could be used to collaterally attack an award rendered pursuant to Article VI of the Treaty, such as the *Chevron* award, and the Claimant could seek to use an award rendered by the Tribunal to deny enforcement of the *Chevron* award.[199]

119. Second, the Respondent asserts that granting the Claimant's request would undermine the depoliticization of investment disputes, a principal rationale for investor-State arbitration. In any actual or impending investor-State arbitration, the State of the investor would then face the threat of arbitration.[200] The Respondent points to the opinion of its expert, Professor Reisman, who contends that allowing the Claimant's request to proceed would encourage respondent States and States of investors to initiate State-to-State arbitrations to reverse the effect of awards.[201] The Respondent argues that this would "erode the effectiveness of BITs' investor-State arbitration."[202] The Respondent rejects Professor Amerasinghe's opinion and deems his conclusion—that the Parties "intended to deviate from their BIT practice and establish a novel control mechanism by which one *ad hoc* tribunal is authorized, sub silentio, to render an authoritative and definitive interpretation that bind other *ad hoc* tribunals"—to be not only improbable but wholly unsupported by law."[203]

120. Third, the Respondent submits that if the Claimant's request is granted, it would create a "new and unprecedented referral mechanism for investment arbitration" which is not under the purview of Article VII.[204] A respondent State could seek fast-track State-to-State arbitration to obtain an interpretation of a treaty provision to influence ongoing investor-State arbitrations.[205] The Respondent disputes the Claimant's argument that exercising

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[195] Respondent's Memorial on Jurisdiction, p. 59.

[196] Respondent's Memorial on Jurisdiction, p. 59.

[197] Respondent's Memorial on Jurisdiction, p. 59.

[198] Respondent's Memorial on Jurisdiction, p. 60.

[199] Respondent's Memorial on Jurisdiction, p. 60.

[200] Respondent's Memorial on Jurisdiction, pp. 60–61.

[201] Respondent's Memorial on Jurisdiction, p. 61, citing Reisman Opinion para. 54.

[202] Respondent's Memorial on Jurisdiction, p. 61.

[203] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 208.

[204] Respondent's Memorial on Jurisdiction, p. 62.

[205] Respondent's Memorial on Jurisdiction, p. 62.

jurisdiction would lead to less politicization by clarifying the Parties' rights and obligations under the Treaty.[206] The Respondent avers that "by dragging the investor's home State into the dispute, Ecuador is ensuring that the potential friction becomes actual diplomatic tension."[207]

121. Finally, the Claimant's broad interpretation of Article VII would judicialize significant aspects of the Parties' bilateral relationships and could limit potentially useful lines of communication and agreement between the Parties.[208] The Respondent avers that the Tribunal's assumption of jurisdiction in this case would "drastically change this dynamic" and both Parties would have to exercise extreme caution with every request for discussion of the Treaty, since even silence could land the Parties in State-to-State arbitration.[209] The Respondent contends that if the Claimant's broad interpretation of "disputes" were adopted, consultations under Article V—which allows discussions on "any matters" and which is meant to foster discussion—would always proceed under the threat of arbitration.[210] According to the Respondent, the structure of Article V which foresees consultations on disputes as well as other matters indicates that these are two separate categories. Furthermore, the Respondent maintains that the Claimant's position would permit a Party to bypass consultations under Article V altogether and turn immediately to arbitration, as the Claimant has attempted to do in the case at hand.[211]

122. The Respondent submits that finding jurisdiction would establish a dangerous general precedent for the interpretation of other treaties, and that discussions among treaty partners about the meaning of treaties would be chilled, as they would proceed under the constant threat of State-to-State arbitration.[212] The Respondent notes that similar State-to-State dispute resolution clauses appear in many bilateral and multilateral treaties beyond the investment protection area, such as the UN Convention Law of the Sea (hereinafter "UNCLOS"), and asserts that the Tribunal's acceptance of the Claimant's proposal could have far-reaching destabilizing consequences that could "unravel the longstanding system of international treaties."[213]

123. The Respondent concludes that the Claimant "invites the Tribunal not just to exceed its authority in this case, but more fundamentally, to displace the role of bilateral diplomatic discussion and to destabilize the entire system of inter-State arbitration."[214]

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[206] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 211.

[207] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 211.

[208] Respondent's Memorial on Jurisdiction, p. 62.

[209] Respondent's Memorial on Jurisdiction, p. 63.

[210] Respondent's Memorial on Jurisdiction, p. 64.

[211] Respondent's Memorial on Jurisdiction, p. 64–65.

[212] Respondent's Memorial on Jurisdiction, p. 66.

[213] Respondent's Memorial on Jurisdiction, p. 66.

[214] Respondent's Memorial on Jurisdiction, p. 67.

2. The Claimant's Position

a) The factual background

124. As a preliminary matter, the Claimant notes that it accepts that the *Chevron* Partial Award is final and binding and does not seek in these proceedings to "affect, let alone appeal, set aside or nullify that award."[215] However, the Claimant submits that the *Chevron* Partial Award gave rise to "considerable uncertainty regarding the meaning of Article II(7) and the scope of Ecuador's obligations thereunder, in particular whether Ecuador is now obliged to take additional steps (and if so, what they might be) in order to satisfy the requirements of that Article."[216]

125. According to the Claimant, it waited more than eight months before proceeding to arbitration despite what it characterizes as "Mr. Koh's categorical refusal to respond to Ecuador's request for the U.S. interpretation of Article II(7)." The Claimant submits that it elected arbitration as a last resort after "having its efforts to engage in discussion firmly and definitively rebuffed."[217]

b) The ordinary meaning of Article VII

126. Article VII of the Treaty confers jurisdiction over "any dispute… concerning the interpretation or application of the Treaty."[218] In the Claimant's view, the ordinary meaning of the provision as well as the jurisprudence and practice of international courts and tribunals confirm that the Tribunal has jurisdiction over abstract disputes as long as the dispute in question concerns the "interpretation or application" of the Treaty.[219] The Claimant disputes the Respondent's submission that there is an *a priori* requirement that the dispute concern a breach of treaty obligations or that international law imposes a greater requirement of concreteness than what is contained in the clause.[220]

127. The Claimant submits that the plain meaning of Article VII, when interpreted in accordance with Article 31 of the VCLT establishes that the "Parties have conferred this Tribunal with the widest possible grant of jurisdiction: the competence to arbitrate 'any dispute…concerning the interpretation and application of the Treaty.'" The Claimant contends that the PCIJ interpreted a similar compromissory clause to confer jurisdiction over a "dispute…of any nature" because the clause's jurisdictional reach was "as comprehensive as

[215] Claimant's Counter-Memorial on Jurisdiction, para. 11.

[216] Claimant's Counter-Memorial on Jurisdiction, para. 12.

[217] Claimant's Counter-Memorial on Jurisdiction, para. 22.

[218] Claimant's Counter-Memorial on Jurisdiction, para. 25.

[219] Claimant's Counter-Memorial on Jurisdiction, para. 25. *See also* Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 223:14–224:14.

[220] Claimant's Counter-Memorial on Jurisdiction, para. 25.

possible."[221] It also notes that the wording of Article VII includes the adjective qualifier *any*, "which entails that the covered disputes may be of any nature."[222]

128. The Claimant stresses the disjunctive nature of the phrase in Article VII "interpretation *or* application," arguing that "it signifies the Parties' intention to confer upon the tribunal jurisdiction over disputes concerning both the interpretation of the Treaty, and separately, disputes concerning its application," which are two distinct separate legal grounds for the submission of disputes to arbitration.[223] The Claimant avers that "interpretation" and "application" are two separate concepts, referring to the Harvard Law School Draft Convention on the Law of Treaties, which defines "interpretation as 'the process of determining the meaning of a text'" and application as "the process of determining the consequences which, according to the text, should follow in a given situation."[224] The Claimant also refers in this regard to the Dissenting Opinion of Judge Ehrlich in the *Chorzów Factory Case* and to the Indus Waters Tribunal's Order on Interim Measures.[225]

129. Therefore, according to the Claimant, disputes over interpretation and application can be arbitrated independently of one another. The Claimant refers to the *Oil Platforms* case where Judge Higgins wrote that the phrase "'application or interpretation' contains 'two distinct elements which may form the subject-matter of a reference to the Court.'"[226] The Claimant also

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[221] Claimant's Counter-Memorial on Jurisdiction, para. 27, citing *Mavrommatis*, *supra* note 116, p. 11.

[222] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, pp. 225:20–23. *See also* Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 64:22–65:1 ("the use of the adjective qualifier 'any' denotes that disputes covered by Article VII may be of any nature. This follows from the construction of the Permanent Court of International Justice of a similarly worded compromissory clause in the Mavrommatis Case.").

[223] Claimant's Counter-Memorial on Jurisdiction, para. 28. *See also* Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 65:8–17 ("The use of the disjunctive 'or' establishes beyond any doubt the Parties' intention to confer upon tribunals operating under Article VII jurisdiction over disputes concerning solely the interpretation of the provisions of the Treaty; in other words, disputes that arise irrespective of the application of such provisions and specific factual situations.").

[224] Claimant's Counter-Memorial on Jurisdiction, para. 29, citing Harvard Law School's Draft Convention on the Law of Treaties [C-134].

[225] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 226:11–22, citing *Case Concerning the Factory at Chorzów*, Dissenting Opinion of Judge Ehrlich (Judgment-Jurisdiction), 1927, P.C.I.J. Series A, No. 9, p. 39 [C-127] ("Interpretation constitutes the process of 'determining the meaning of a rule' while application is the process of 'determining the consequences which the rules attaches to the occurrence of a given fact.'"); Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 227:23–228:4 ("The term 'or' introduces alternative elements which can each satisfy a given solution. In the words of the distinguished Indus Waters Tribunal, [i]f a purely interpretive dispute were not arbitrable under Article VII, the word 'or' inserted between interpretation and application would be meaningless, and this would be at odds with the cardinal rule of treaty interpretation that '[e]ach and every clause of a treaty is to be interpreted as meaningful rather than meaningless.'").

[226] Claimant's Counter-Memorial on Jurisdiction, para. 30, citing *Case Concerning Oil* Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Separate Opinion of Judge Higgins (12 December, 1996), 1996 I.C.J. Reports 803, para. 3 [C-144].

points to the Separate Opinion of Judge Schwebel in the *UN Headquarters Agreement* case, who in the context of discussing breach, wrote that while every allegation of breach entails elements of interpretation, "even in the absence of allegations of treaty breaches a lack of 'concordance of views of the parties concerning [the treaty] interpretation' can independently give rise to a dispute over interpretation."[227]

130. The Claimant argues that the United States itself acknowledged the distinction between disputes regarding the interpretation of treaties and those regarding their application, in the *United States Diplomatic and Consular Staff in Tehran* case, where the United States asserted claims under the Iran–US FCN's compromissory clause that conferred jurisdiction over "any dispute…as to the interpretation or application" of the treaty.[228] The United States accepted that under that provision, disputes regarding interpretation are separately justiciable from disputes over application and argued that "if the Government of Iran had made some contention in this Court that the United States interpretation of the Treaty is incorrect or that the Treaty did not apply to Iran's conduct in the manner suggested by the United States, the Court could clearly be confronted with a dispute relating to the 'interpretation or application of the Treaty'."[229] The Claimant also notes that in the negotiating history of the FCN treaty, the United States sought to reinstate the reference to "application" since as it explained that the "United States wanted to avoid any narrowing of the jurisdictional provision."[230] The Claimant submits that "[h]ad interpretive disputes been predicated on allegations of treaty breaches…the compromissory clause's grant of jurisdiction could not have been 'narrowed' by deleting the reference to 'application'."[231]

131. The Claimant also notes that the enumeration of various categories of legal disputes that a State may subject to compulsory jurisdiction under Article 36(2) of ICJ Statute makes the distinction between interpretation and application.[232] In its view, the same distinction is implicitly acknowledged by the Respond-

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[227] Claimant's Counter-Memorial on Jurisdiction, para. 31, citing *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Separate Opinion of Judge Schwebel (26 April 1988), 1988 I.C.J. Reports 12, p. 51 [C-118].

[228] Claimant's Counter-Memorial on Jurisdiction, para. 32, citing *United States Diplomatic and Consular Staff in Tehran* (United States of America v. Iran), Memorial of the Government of the United States of America (12 January 1980), p. 153 [C-151] (hereinafter "*Consular Staff*").

[229] Claimant's Counter-Memorial on Jurisdiction, para. 32, citing *Consular Staff*, *supra* note 228, p. 153.

[230] Claimant's Counter-Memorial on Jurisdiction, paras. 32–33, citing *Consular Staff*, *supra* note 228.

[231] Claimant's Counter-Memorial on Jurisdiction, para. 34. *See also* Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, pp. 226:23–227:14.

[232] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 229:11–23 ("Indeed, the enumeration of various categories of legal disputes the State may subject to the compulsory jurisdiction of the ICJ under Article 36(2) of the statute of the Court makes this very distinction. It distinguishes between disputes concerning, 'the interpretation of a treaty,' and, 'the existence of any fact, if established, would constitute a breach of an international obligation.' According to

ent's expert, Prof. Tomuschat, who allegedly "does not exclude the possibility that disputes may arise in the absence of […] allegations" by one of the parties.[233]

132. The Claimant emphasizes that this is a dispute about interpretation and not a dispute about the failure to give an interpretation.[234] It is not suggesting that the Respondent breached any obligation in failing to respond to its Diplomatic Note and it expressly acknowledges that it disagrees with its own expert Professor Pellet in this regard.[235] Nonetheless, it contends that such a failure "can give rise to an inference, and that's the relevance of their failure to respond in this case."[236]

133. Finally, the Claimant argues that the Treaty does not provide that investor-State tribunals have exclusive jurisdiction over disputes concerning the protection of investment.[237] It notes that Article VII does not contain the subject matter limitations found in Article VI. Moreover, it avers that the Respondent's own Treaty practice demonstrates that Article VII was not intended to exclude investment protection disputes from the jurisdictional reach of State-to-State Tribunals. In this regard, the Claimant points to the Cameroon–US BIT and to the US 2004 and 2012 Model BITs and concludes that "there are thus no grounds for accepting the [Respondent's] thesis that Article VII was intended sub silentio to exclude all but a few narrow categories of disputes from the jurisdiction of inter-State tribunals."[238]

134. The Claimant thus concludes that the Parties are entitled under Article VII "to convene an international tribunal with authority to render a legally binding decision when there is a dispute between them regarding the meaning of a provision of a treaty, and nothing more. […] This is a clear consequence of the text of Article VII, and none of the limiting factors the United States is invoking can detract from this conclusion."[239]

c) The interpretation by international courts and tribunals of compromissory clauses similar to Article VII of the Treaty

135. The Claimant counters the Respondent's argument that no international court or tribunal has taken jurisdiction over an interpretive dispute in the abstract, referring to several international judgments by the PCIJ, ICJ, and Iran–U.S. Claims Tribunal that exercised jurisdiction over an abstract inter-

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Manley Hudson's 1943 seminal treatise on the jurisprudence of the Permanent Court of International Justice, this distinction in Article 36(2) reflects an understanding that, 'Application will usually involve interpretation, but interpretation will not always include application.'").

[233] *Id.*, pp. 229:23–230:8.

[234] *Id.*, pp. 357:17–358:358:3.

[235] *Id.*, p. 345:6–17.

[236] *Id.*, p. 358:1–3.

[237] *Id.*, p. 291:19–293:25.

[238] *Id.*, p. 294:1–296:3.

[239] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 66:9–24.

pretive dispute. In its view, "other international courts and tribunals have routinely interpreted compromissory clauses similar to Article VII as conferring contentious jurisdiction over disputes concerning issues of treaty interpretation disconnected to any allegation or backdrop involving Treaty breach."[240]

136. First, the Claimant argues that the PCIJ in *Certain German Interests in Polish Upper Silesia* explicitly accepted that a tribunal could exercise jurisdiction to adjudicate an abstract dispute over treaty interpretation.[241] In particular, the Claimant submits that the PCIJ observed that Article 14 of the Covenant provided the PCIJ with the power to hear any international dispute which the Parties submit to it and that there were numerous clauses providing for the PCIJ's compulsory jurisdiction over questions of the interpretation and application of a treaty, including Article 23 of the Geneva Convention which "appear also to cover interpretations unconnected with concrete cases of application."[242] The Claimant submits that the PCIJ further noted that "there is no lack of clauses which refer solely to the interpretation of a treaty" including provisions of the PCIJ's Statute, and that therefore the PCIJ held that it could exercise jurisdiction over abstract issues of treaty interpretation:

> [t]here 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*. It has, in fact already had occasion to do so in Judgment No. 3 [*Treaty of Neuilly*].[243]

137. The Claimant's expert, Professor McCaffrey, observes that the PCIJ simply provided the term "interpretation" its natural meaning.[244] As to the Respondent's assertion that the applicable compromissory clause referred to "differences of opinion" rather than disputes, the Claimant argues that "a conflict of legal views is itself enough to give rise to a dispute" and that "there is no difference between difference of opinion and dispute regarding interpretation."[245]

138. The Claimant points to the *Case Concerning Rights of Nationals of the United States of America in Morocco* as a further example of a court exercising jurisdiction over a purely interpretive dispute in the abstract.[246] According

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[240] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, pp. 251:1–252:4.

[241] Claimant's Counter-Memorial on Jurisdiction, paras. 35–36, citing *Certain German Interests in Polish Upper Silesia*, Judgment (Merits), 1926 P.C.I.J. Series A, No. 7 [C-130] (hereinafter "*Upper Silesia*").

[242] Claimant's Counter-Memorial on Jurisdiction, para. 37, citing *Upper Silesia*, *supra* note 241, pp. 18–19.

[243] Claimant's Counter-Memorial on Jurisdiction, para. 37, citing *Upper Silesia*, *supra* note 241, pp. 18–19.

[244] Claimant's Counter-Memorial on Jurisdiction, para. 38, citing Expert Opinion of Professor Stephen McCaffrey, para. 37 (hereinafter "McCaffrey Opinion").

[245] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, pp. 243:11–245:16.

[246] Claimant's Counter-Memorial on Jurisdiction, para. 39, citing *Rights of Nationals of the United States of America in Morocco* (France v. United States of America), Judgment (27 August 1952), 1952 I.C.J. Reports 176 [C-85] (hereinafter "*Rights of US Nationals*").

to the Claimant, despite no allegations of treaty breach being made, the ICJ proceeded to rule on France's and the United States' differing interpretations of the MFN clauses in relation to U.S. consular jurisdiction in the French Zone of Morocco.[247] The Claimant notes that in that case the "United States itself put an abstract question of interpretation to the same tribunal in reply to the French submission, seeking confirmation of particular consular rights that had been granted by the same treaty."[248]

139. The Claimant also cites the jurisprudence of the Iran–U.S. Claims Tribunal.[249] For example, in *Case No. A/2*, Iran relied on analogous compromissory clauses under the General Declaration and Claims Settlement Declaration, which conferred jurisdiction over "any dispute" as to "the interpretation or performance of any provision" of the Declarations, to demand a decision on whether the Declarations permitted Iran to bring claims against U.S. nationals.[250] The tribunal ruled that, even in the absence of allegations of a breach of the Declarations, "the Tribunal has not only the power but the duty to give an interpretation on the point raised by Iran."[251] In *Case No. A/17* the tribunal also ruled, on the basis of the same clause in the Declarations, that it could provide the "merely interpretive guidance" requested by the United States as to whether the IUSCT had jurisdiction over certain pending claims before the Chamber that had been brought by Iranian banks against U.S. banking institutions.[252]

140. The Claimant thus argues that "these two cases prove beyond argument that tribunals operating under compromissory clauses like Article VII may decide purely interpretive disputes, even in the absence of an allegation of breach by the other Party" and it notes that the Respondent was a party to both cases and relied on these provisions as a basis for jurisdiction.[253] The Claimant indicates that in none of the cases did there exist an allegation of breach: there was "nothing more concrete [than] the [P]arties different interpretations of the Algiers Declarations."[254] The Claimant also refutes the assertion by the Respondent that these were the result of special consents by the parties, observing that "neither of these awards makes any reference to such

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[247] Claimant's Counter-Memorial on Jurisdiction, paras. 39–40, citing *Rights of US Nationals, supra* note 246, p. 203.

[248] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 248:7–13.

[249] Claimant's Counter-Memorial on Jurisdiction, para. 41.

[250] Claimant's Counter-Memorial on Jurisdiction, para. 41, citing *Islamic Republic of Iran* v. *United States of America*, Case No. A/2, Decision No. DEC 1-A2-FT (26 January 1982), Iran–U.S. Claims Tribunal, Decision, Part II [C-139] (hereinafter "*Case No. A/2*").

[251] Claimant's Counter-Memorial on Jurisdiction, para. 39, citing *Case No. A/2*, *supra* note 250. *See also* Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, pp. 233:14–234:4.

[252] Claimant's Counter-Memorial on Jurisdiction, para. 42, citing *United States of America* v. *The Islamic Republic of Iran*, Iran–U.S. Claims Tribunal, *Case A/17*, Decision No. DEC .37-A17-FT (18 June 1985) [C-152]. *See also* Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 234:5–21.

[253] *Id*., pp. 234:22–235:13.

[254] *Id*., p. 237:18–21.

special consent" and that the only document filed by the Respondent to support this theory comes from "a completely separate case, Case A/18" and in no way constitutes a special grant of jurisdiction.[255]

141. The Claimant further points to other arbitral tribunals which have exercised jurisdiction over disputes concerning treaty interpretation in the abstract. In *Pensions Officials of the Saar Territory*, the tribunal did not decline to exercise jurisdiction over a matter of treaty interpretation, despite there being no allegations of treaty breaches.[256] In *Interpretation of the Statute of the Memel Territory*, the PCIJ, under a compromissory clause which provided that "any difference of opinion in regard to questions of law or fact concerning these provisions," held that a difference of opinion regarding questions of law or fact could arise without any allegation of a treaty breach, noting that the clause had two prongs, one which allowed the Court to examine infractions, the other which concerned differences of opinion.[257]

142. The Claimant disputes the Respondent's interpretation of the *Cases of Dual Nationality*, arguing that the Anglo-Italian Conciliation Commission declined jurisdiction because the compromissory clause "expressly required the existence of a prior concrete claim."[258] The Claimant argues that Article 83 of the Peace Treaty required the satisfaction of five elements before the Commission could exercise jurisdiction over interpretive disputes relating to the Peace Treaty: (1) a Member State of the UN or one of its nationals had to submit a claim under the Peace Treaty for the return of property under Article 78; (2) the Italian government had to refuse to honor the property claim; (3) any dis-

[255] *Id.*, pp. 235:14–236:19 ("[N]ot only does the document fail to support the assertion of a special grant of jurisdiction, it actually undercuts the U.S. position because it affirms the Tribunal's purely interpretive jurisdiction, even in circumstances where a previous decision has been rendered. The parallels to our situation are striking. While the U.S. argues here that you should not assert jurisdiction because it would interfere with Article VI tribunals, in Case A/18, the United States stated that it had no such concern with respect to private investor claims heard by the Iran Tribunal's three Chambers. Thus the case, Case A/18, rendered by the Tribunal operating under a similar compromissory clause to Article VII, disproves the United States's allegations that you cannot 18 exercise jurisdiction over disputes, absent a breach or absent a special consent.").

[256] Claimant's Counter-Memorial on Jurisdiction, para. 44, citing *Pensions of officials of the Saar Territory (Germany, Governing Commission of the Saar Territory)*, III UN Reports of International Arbitral Awards 1553 (1934), pp. 1555–1556 [C-145].

[257] Claimant's Counter-Memorial on Jurisdiction, para. 45, citing *Interpretation of the Statute of the Memel Territory*, Judgment (Preliminary Objection) (24 June 1932), 1932 P.C.I.J. Series A/B, No. 47, pp. 247–248 [C-138]. *See also* Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, pp. 245:9–246:23 ("[The PCIJ] noted that the two procedures envisaged in Article 17, one over infractions and one over differences of opinion regarding questions of law or fact, related to two different objects […]: 'The object of the procedure before the council is the examination of 'an infraction of the provisions of the Convention,' which presupposes an act already committed, whereas the procedure before the Court is concerned with 'any difference of opinion in regard to questions of law or fact.' Such difference of opinion may arise without infraction having been noted.").

[258] Claimant's Counter-Memorial on Jurisdiction, paras. 47–48. *See also* Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 239:4–242:9.

pute arising out of that property claim had to be submitted to a two-member Conciliation Commission; (4) the two-member Conciliation Commission had to fail to resolve the dispute within three months; and (5) a third person had to be appointed to form a three-member Commission.[259] Only once the above conditions were fulfilled could a three-member Conciliation Commission be properly seized to exercise jurisdiction over the interpretation of the Peace Treaty.[260] The Claimant highlights that Article 83(2) grants the three-person Commission "jurisdiction over all *subsequent* disputes concerning the application or interpretation of the specific treaty provisions *connected to the dispute originally submitted* to the two-member Conciliation Commission."[261]

143. The Claimant submits, that in that case, the United Kingdom had simply attempted to obtain a ruling on the abstract question of whether nationals of UN governments could submit a claim if they had previously held Italian nationality and intended for the ruling to be binding on all future cases involving claims by dual nationals.[262] Given the limitations imposed on it by Article 83 of the Peace Treaty, the Claimant argues that the Anglo-Italian Conciliation Commission was mindful not to exceed its jurisdiction under a multilateral treaty and issue an abstract interpretation that would bind all parties without their express consent.[263] However, the Claimant maintains that "the treaty-based limitations found in the Peace Treaty have no analogues in Article VII of the Ecuador–US BIT" which provides the Tribunal with plenary power to exercise jurisdiction over "any dispute" relating to the Treaty's interpretation or application.[264]

144. The Claimant further asserts that the Commission did not shy away from offering general interpretations of provisions of the Peace Treaty in the context of specific claims. In the *Amabile* case for example, the US–Italian Conciliation Commission ruled on a broadly formulated question put to it by the United States on whether the submission of a claim based only on *ex parte* testimonial instruments obligated Italy to investigate the claim further

[259] Claimant's Counter-Memorial on Jurisdiction, para. 50.

[260] Claimant's Counter-Memorial on Jurisdiction, para. 50.

[261] Claimant's Counter-Memorial on Jurisdiction, para. 49.

[262] Claimant's Counter-Memorial on Jurisdiction, para. 51.

[263] Claimant's Counter-Memorial on Jurisdiction, para. 51.

[264] Claimant's Counter-Memorial on Jurisdiction, para. 52. *See also* Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 241:10–242:1 ("[T]he United States' […] assertion that the compromissory clause in the Dual Nationals case is virtually identical to Article VII is simply not true. It ignores the fact that the Commission read both paragraphs of Article 83 of the compromissory clause together as a whole. There is no parallel whatsoever with Article VII of the BIT. Unlike Article 83 which limited jurisdiction to claims arising in giving effect to the provisions of the Treaty, Article VII gives this Tribunal plenary authority to arbitrate any dispute concerning interpretation or application of the Treaty. As Professor McCaffrey states in his opinion, and I'm citing from Paragraph 33, 'It is striking that the Dual Nationals Claims was the only case the United States could find that purportedly supports its restricted approach, and that the decision its exhaustive research turned up is one in which the Tribunal's jurisdiction was confined to disputes concerning certain specified provisions of the applicable multilateral treaty.'").

if it was not *prima facie* frivolous or fraudulent.[265] Not only did the US–Italian Conciliation Commission provide such an interpretation, but it also observed that its interpretation was intended to serve as "future guidance."[266]

145. The Claimant further refers to the *Air Services Agreement* case, wherein France objected to one question of treaty interpretation submitted by the United States because it was not connected to the application of the Treaty in specific circumstances.[267] According to the Claimant, the Tribunal "also emphasized that it was not requested to state whether or not the existence of any fact or situation constitutes a breach of an international obligation. It thus distinguished this category of legal disputes from legal disputes concerning only the interpretation of a treaty; and, in respect of this, it cited the distinction [the Claimant] pointed out earlier in this respect in Article 36 of the ICJ Statute."[268]

146. Finally, the Claimant cites the tribunal in *Question of the Revaluation of the German Mark* as another example of a justiciable dispute being found to exist independently of any claim of breach:

> The Applicant's right to an authoritative interpretation of the clause in dispute…is grounded on the bedrock of the considerations which the Applicants gave and the concessions which they made in exchange for the disputed clause. They have a right to know what is the legal effect of the language used. The [t]ribunal in the exercise of its judicial functions is obliged to inform them.[269]

d) International law imposes no additional measure of concreteness or allegation of breach

147. The Claimant submits that "[j]ust as international law contains no requirement that a breach allegation must exist for a dispute to arise, so too is there no such requirement in relation to whether a dispute is sufficiently concrete."[270] The Claimant refers to Professor McCaffrey's observation that while States more often bring cases to the ICJ that arise out of alleged breaches than

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[265] Claimant's Counter-Memorial on Jurisdiction, paras. 53–54, citing *Amabile Case—Decision No. 11*, XIV UN Reports of International Arbitral Awards 115 (1952), pp. 119–129 [C-116] (hereinafter "*Amabile*").

[266] Claimant's Counter-Memorial on Jurisdiction, para. 43, citing *Amabile, supra* note 265, p. 129.

[267] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, pp. 250:20–254:16, citing *Case concerning Air Service Agreement of 27 March 1946 between the United States of America and France*, XVIII UN Reports of International Arbitral Awards 417 (1978) [C-154] (hereinafter "*Air Services Agreement*")

[268] *Id.*, p. 251:17–23.

[269] Claimant's Counter-Memorial on Jurisdiction, para. 56, citing *The Question whether the re-evaluation of the German Mark in 1961 and 1969 constitutes a cause for application of the clause in article 2(e) of the Annex I A of the 1953 Agreement on German External Debts*, XIX UN Reports of International Arbitral Awards 67 (1980), p. 89 [C-149]. *See also* Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, pp. 242:10–243:10.

[270] Claimant's Counter-Memorial on Jurisdiction, para. 58.

those calling for an interpretation of a treaty does not mean that the latter class of cases cannot be brought before international tribunals.[271] The Claimant refers to the cases mentioned above to argue that international jurisprudence is filled with examples of tribunals taking jurisdiction in the absence of breach allegations since the absence of such allegations does not render interpretive disputes inadequately concrete.[272]

148. The Claimant further argues that, while an allegation of breach is one possible manifestation of the existence of a dispute, the existence of a concrete case does not depend on the existence of a breach.[273] The Claimant submits that the Respondent mischaracterizes the ICJ's judgment in *Northern Cameroons* to elevate the concreteness requirement far beyond what the ICJ intended.[274] In *Northern Cameroons*, Cameroon applied to the ICJ to declare that the United Kingdom had breached its obligations in applying the Trusteeship Agreement. However, two days after its application, the Trusteeship Agreement was terminated by the UN and therefore the United Kingdom ceased to have rights and obligations with regard to Cameroon under the Trusteeship Agreement. The Claimant submits that it is in this context that the ICJ declined to exercise jurisdiction, since "it would be impossible to render a judgment capable of effective application."[275] Thus, the ICJ explained:

> the function of the Court is to state law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of interest between the parties. The Court's judgment must have some practical consequences in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations.[276]

149. The Claimant distinguishes *Northern Cameroons* from the case at hand, noting that in these proceedings there is "an ongoing controversy involving the substantive interest related to the determination of obligations under Article II(7)." The Tribunal's interpretation will have a clear practical consequence since it will remove uncertainty regarding existing legal rights and obligations of the Contracting Parties and will have continuing applicability on future acts of interpretation or application of Article II(7) by the Contracting Parties or tribunals constituted under Article VI.[277]

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[271] Claimant's Counter-Memorial on Jurisdiction, para. 58, citing McCaffrey Opinion, para. 42.

[272] Claimant's Counter-Memorial on Jurisdiction, para. 58.

[273] Claimant's Counter-Memorial on Jurisdiction, para. 59.

[274] Claimant's Counter-Memorial on Jurisdiction, para. 59.

[275] Claimant's Counter-Memorial on Jurisdiction, para. 60, citing *Northern Cameroons*, *supra* note 71, pp. 32–34.

[276] Claimant's Counter-Memorial on Jurisdiction, para. 60, citing *Northern Cameroons*, *supra* note 71, pp. 32–34.

[277] Claimant's Counter-Memorial on Jurisdiction, para. 62. *See also* Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 254:17–255:13 and Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 68:9–18.

150. The Claimant submits that its three experts agree that the Claimant's Request satisfies the requirement of concreteness within the meaning of *Northern Cameroons* and international law generally.[278] The Claimant thus concludes that it has complied with the element of concreteness and "has a right to know the legal effect of the language used in Article II(7), and the Tribunal, in the exercise of its judicial function under Article VII, must not overstep its authority by reading terms of limitation into Article VII that simply do not exist."[279]

e) The existence of a dispute regarding the interpretation and application of Article II(7) can be established by the Respondent's express statements

151. The Claimant asserts that the existence of a dispute concerning Article II(7) of the Treaty is clear from the Respondent's express statements.[280] The Claimant notes that the existence of a dispute is the threshold question and cites the *Mavrommatis* definition of a "dispute": "a disagreement on a point of law or fact, a conflict of legal views or interests between two persons."[281] The Claimant argues that under this meaning of dispute, "a dispute concerning interpretation can arise with no more than opposing attitudes regarding the meaning of a treaty."[282] The Claimant also asserts that the question of the existence of a dispute is "a matter for objective determination" that "must turn on an examination of the facts," including the Parties' exchanges and their conduct prior and after the commencement of legal proceedings, with substance prevailing over form.[283]

152. The Claimant argues that the Parties are fundamentally in agreement on the applicable legal principles. It contends that both the Claimant and the Respondent agree on the following applicable principles:

(i) the concept of dispute in international law is defined in *Mavrommatis*;
(ii) the existence of a dispute must be objectively determined by the Tribunal, and does not depend on the subjective views of the Parties, as explained in *Cameroon v. Nigeria* and *South West Africa*;
(iii) it must be shown that the claim of one party is positively opposed by the other; and

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[278] Claimant's Counter-Memorial on Jurisdiction, para. 63, citing Pellet Opinion, para. 38, McCaffrey Opinion, para. 46, Amerasinghe Opinion, para. 21.

[279] *Id.*, pp. 255:25–256:8, citing *Northern Cameroons*, *supra* note 71 and *Air Services Agreement*, *supra* note 267.

[280] Claimant's Counter-Memorial on Jurisdiction, para. 64.

[281] Claimant's Counter-Memorial on Jurisdiction, para. 65, citing *Nuclear Tests, supra* note 190, para. 58, and *Mavrommatis*, *supra* note 116, p. 11.

[282] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 225:15–17.

[283] Claimant's Counter-Memorial on Jurisdiction, para. 65, citing *Interpretation of Peace Treaties*, *supra* note 117; *Georgia* v. *Russia*, *supra* note 122, para. 30; *Fisheries Jurisdiction Case* (Spain v. Canada), Judgment (Jurisdiction) (4 December 1998), 1998 I.C.J. Reports 432, para. 31 [C-132].

(iv) positive opposition does not require that the respondent has verbally expressed its disagreement.[284]

153. The Claimant contends that the facts demonstrate that the Parties are in dispute concerning the interpretation of Article II(7). The Claimant finds that the Respondent has manifested positive opposition to the Claimant's interpretation in the following ways: (1) the Respondent considered the Claimant's position to be "unilateral" which means that the Respondent does not share the Claimant's interpretation given to Article II(7);[285] and (2) the Respondent's position that the *Chevron* tribunal's interpretation is *res judicata* not only for purposes of that dispute but also for the Claimant's relationships with other parties.[286] In relation to the latter, the Claimant asserts that "[b]y advancing the position that *Chevron*'s interpretation of Article II(7) is not restricted to that arbitration, the United States has placed itself in positive opposition to Ecuador."[287] The Claimant also argues that the Respondent's refusal to respond to the Claimant's Request suggests that the Respondent agrees with the *Chevron* tribunal's interpretation and therefore expressly demonstrates that a dispute exists.[288]

f) The existence of a dispute regarding the interpretation and application of Article II(7) can be established by inference

154. The Claimant also submits that the Respondent's opposition can be established by inference from its refusal to respond to the Claimant's Request regarding the interpretation of Article II(7) when a response was called for. The Claimant argues that a response was called for because "Ecuador will have wrongfully suffered as a result of the misinterpretation of the provision by the tribunal in the *Chevron* case, by the pressing need it has to determine what it must do to be in compliance with the provision and by its interest in avoiding future wrongful liability."[289] The Claimant contends that if the Respondent had agreed with its interpretation of Article II(7), it would have said so and thus obviated the need for this arbitration. The Claimant asserts that the Respondent's persistent silence with respect to the Claimant's request for interpretation

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[284] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, pp. 257:14–258:14, citing *Mavrommatis*, *supra* note 116; *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria), Preliminary Objections, Judgment (11 June 1998), 1998 I.C.J. Reports 275, para. 89 [C-128] (hereinafter "*Cameroon* v. *Nigeria*"); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion (21 June 1971), 1971 I.C.J. Reports 16, p. 24 [R-189].

[285] Claimant's Counter-Memorial on Jurisdiction, paras. 66, 69–70.

[286] Claimant's Counter-Memorial on Jurisdiction, para. 66, citing Reisman Opinion, paras. 47–51.

[287] Claimant's Counter-Memorial on Jurisdiction, paras. 66, 71.

[288] Claimant's Counter-Memorial on Jurisdiction, para. 72.

[289] Claimant's Counter-Memorial on Jurisdiction, para. 67.

gives rise to the inference that the Respondent agrees with the *Chevron* award's interpretation of Article II(7) and disagrees with the Claimant's interpretation.[290]

155. The Claimant argues that the objective determination of a dispute can be obtained by inference.[291] The Claimant points to the ICJ's pronouncement in *Cameroon* v. *Nigeria* that "a disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis*."[292] The Claimant observes that the basis on which the ICJ inferred that a dispute existed in that case was that Nigeria withheld its agreement with Cameroon on the land boundary and yet refused to indicate its position on that issue.[293] The ICJ also held in the *Certain Property* case that the inquiry into positive opposition is undertaken "for the purpose of verifying the existence of a legal dispute" but that positive opposition is not a necessary precondition for finding that a dispute exists.[294]

156. The Claimant argues that the Respondent's refusal to address the interpretation of Article II(7) is therefore compelling evidence that a dispute exists. As the ICJ held in *Georgia* v. *Russia*, "the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for."[295] The Claimant argues that this principle of international law was authoritatively elucidated in *Cameroon* v. *Nigeria*, where the ICJ held that Nigeria's refusal to respond to Cameroon's boundary delimitation request, claiming that there was no dispute, was in fact supportive of the inference that a dispute did exist.[296] The Claimant disputes the Respondent's attempt to distinguish *Cameroon* v. *Nigeria* from the case at hand. The Claimant argues that the cross-border incursions that the Respondent cites as significant concerned only a small portion of the border and were on the whole irrelevant to the core jurisdictional issue of whether a dispute existed as regarded the entire course of the boundary. The Claimant stresses that the ICJ specifically "disclaimed reliance on the very facts that the United States invokes to try and distinguish *Cameroon* v. *Nigeria*."[297]

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[290] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 82–92.

[291] Claimant's Counter-Memorial on Jurisdiction, para. 74.

[292] Claimant's Counter-Memorial on Jurisdiction, para. 74, citing *Cameroon* v. *Nigeria*, *supra* note 284, para. 89.

[293] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 263:8–12.

[294] Claimant's Counter-Memorial on Jurisdiction, para. 74, citing *Certain Property*, *supra* note 131, para. 24.

[295] Claimant's Counter-Memorial on Jurisdiction, para. 74, citing *Georgia* v. *Russia*, *supra* note 122, para. 30. *See also* Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 258:15–21.

[296] Claimant's Counter-Memorial on Jurisdiction, paras. 76–78, citing *Cameroon* v. *Nigeria*, *supra* note 284. *See also* Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 263:7–12 ("[T]he Court found that Nigeria's silence in regard to whether it agreed or disagreed with Cameroon's boundary claim was sufficient grounds for inferring that a dispute existed, even though Nigeria was, 'entitled not to advance arguments,' on the issue. That is, Nigeria was under no legal obligation to state its position.").

[297] Claimant's Counter-Memorial on Jurisdiction, paras. 79–81, citing *Cameroon* v. *Nigeria*, *supra* note 284, paras. 88, 90. *See also* Transcript (Hearing on Jurisdiction), Day 2, 26 June

157. The Claimant points to yet another reason why *Cameroon* v. *Nigeria* "is especially pertinent to our case." The Claimant recalls that, when specifically asked to state whether the assertion that there was no dispute signified that there was an agreement between Nigeria and Cameroon on the geographical coordinates of the boundary, "instead of responding to this question from the Court, Nigeria replied by maintaining its stance that there was no dispute." The ICJ drew the inference from this refusal to respond that a dispute existed. In the Claimant's view, the factual situation is analogous to the case at hand:

> The United States, like Nigeria, has refused to state whether it agrees or disagrees with Ecuador's claims. It simply maintains there is no dispute. And just as Nigeria refused to answer the Court's question about whether it agreed with Cameroon, so too the United States has refused to comply with the Tribunal's Procedural Order calling upon it to state in a Counter-Memorial on the Merits filed on 20 June whether it agrees or disagrees with Ecuador's claims in regard to Article II(7).[298]

158. The Claimant further refers to the *Headquarters Agreement* advisory opinion. In that case, the United States argued that there was no dispute because it had never expressly opposed the UN Secretary-General's views and had not referred to the matter as a "dispute". However, the ICJ rejected these arguments and found that a dispute did exist.[299] According to the Claimant, the Court also made clear in its judgment that a claim for breach of treaty obligations is not a prerequisite for finding that a dispute exists.[300]

159. The Claimant counters the Respondent's comments on the *Georgia* v. *Russia* case. While the Claimant acknowledges that the ICJ's findings of a dispute was based on Russia's express denials of ethnic cleansing, the ICJ's "factual determination was not germane to its explanation of the general rule that the existence of a dispute may be inferred from the failure of a State to respond 'in circumstances where a response is called for.'"[301]

160. In the case at hand, the Claimant argues that a response from the Respondent was called for. The Claimant cites *Georgia* v. *Russia* for the proposition that a response is called for where "the parties engaged in 'exchanges' that refer[ed] to the subject-matter of the treaty with sufficient clarity to enable a State against which a claim is made to identity that there is, or may be, a dispute with regard to that subject-matter" and that "[w]here having been

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2012, pp. 265:2–266:2 ("[T]he Court found on the basis of Nigeria's statements and actions, including military actions, that three small sectors of the boundary were disputed. But in regard to the entirety of the very extensive land boundary, the Court expressly stated that Nigeria's actions were not the basis for its finding that a dispute existed.").

[298] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, pp. 264:9–265:1.

[299] Claimant's Counter-Memorial on Jurisdiction, para. 82, citing *UN Headquarters Agreement*, *supra* note 123, para. 36.

[300] Claimant's Counter-Memorial on Jurisdiction, para. 83, citing *UN Headquarters Agreement*, *supra* note 123, para. 42.

[301] Claimant's Counter-Memorial on Jurisdiction, para. 84, citing *Georgia* v. *Russia*, *supra* note 122, para. 30.

presented with such a request, a State fails to respond, a dispute can be said to exist."[302] The Claimant maintains that Ecuador has unquestionably satisfied this standard, given that the June 8 Note specifically detailed the subject-matter of its concerns. The Claimant avers that the situation is similar to the one presented in *Cameroon* v. *Nigeria* since the Respondent was apprised of the Claimant's concerns and failed to respond.[303] The Claimant argues that a response from the Respondent was especially warranted because the *Chevron* tribunal's interpretation of Article II(7) introduced uncertainty regarding the nature and scope of the Claimant's obligations under Article II(7). The *Chevron* tribunal's interpretation conflicts with that given by the tribunal in *Duke Energy* v. *Ecuador*, as well as with the Claimant's longstanding view that the obligations reflect only customary international law.[304] Without clarification, the Claimant argues, it will be *de facto* forced to implement the *lex specialis* rule described in the *Chevron* award despite believing it to be incorrect. The Claimant therefore has a justifying and compelling need to clarify its obligations under Article II(7).[305]

161. The Claimant further contends that the Respondent's failure to take active steps to fulfill the object and purpose of the Treaty and ensure its effectiveness is inconsistent with its obligations to perform the Treaty in good faith and to comply with the principle of *pacta sunt servanda*.[306] The Claimant argues that the Respondent's inaction is inconsistent with the Preamble to the Treaty which states that one of the Parties' cooperative objectives is to stimulate the flow of private capital and economic development through agreement upon the standards of treatment to be accorded to the investments of the other Party.[307] In its view, a ruling by an Article VII tribunal on the proper interpretation of the Treaty would promote and protect investment by eliminating uncertainty in the standards of treatment required by the Treaty.[308] The Claimant avers that the Respondent's failure to respond under the circumstances creates a strong inference of a dispute.[309]

162. In the Claimant's view, "the only reasonable inference to be drawn from the [Respondent's] conduct is that it disagrees with [the Claimant's] interpretation of Article II(7)."[310] The Claimant argues that the Respondent must have its own interpretation of Article II(7) given that text of Article II(7)

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[302] Claimant's Counter-Memorial on Jurisdiction, para. 86, citing *Georgia* v. *Russia*, *supra* note 122, para. 30.

[303] Claimant's Counter-Memorial on Jurisdiction, paras. 87–88, citing Pellet Opinion, para. 25.

[304] Claimant's Counter-Memorial on Jurisdiction, para. 89.

[305] Claimant's Counter-Memorial on Jurisdiction, para. 91.

[306] Claimant's Counter-Memorial on Jurisdiction, para. 92.

[307] Claimant's Counter-Memorial on Jurisdiction, para. 93.

[308] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, pp. 356:3–15.

[309] Claimant's Counter-Memorial on Jurisdiction, para. 93.

[310] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 266:12–15.

was taken verbatim from the U.S. model, but simply does not want to share its views.[311] The Claimant notes that when the Respondent made a deliberate decision not to respond the Claimant's diplomatic note, it "was deviating from its own established policy and practice in regard to treaty partners."[312] The Claimant is of the view that "if the [Respondent] had agreed with Ecuador, there would have been no reason for it to break with its standard diplomatic practice, to deliberately refuse to respond to [the Claimant], or to refuse to consult, to discuss, or exchange views with [the Claimant] on Article II(7)."[313] Moreover, the Claimant notes that the Respondent had every incentive to inform the Claimant that it had the same interpretation of Article II(7), if that were the case, since it would have avoided arbitration and all the costs and consequences associated with it.[314]

163. The Claimant further argues that the Respondent's support for the *Chevron* Tribunal's interpretation of Article II(7) "as opposed to [the Claimant's] interpretation can be presumed from the [Respondent's] interest in securing greater protections for the investments of its own nationals, which is what the Chevron interpretation accomplished."[315] The Claimant also avers that the support is evident by the Respondent's conduct in these proceedings: "[i]ts efforts to foreclose consideration of Ecuador's interpretation, if successful, would eliminate any risk that this Tribunal might agree with Ecuador or adopt another interpretation of Article II(7) different from the one adopted by the Chevron Tribunal."[316] In addition, the Claimant contends that, even if the Respondent's refusal to respond to the Claimant's claim could be attributed to a political decision not to interfere with the interpretations of investor-State tribunals, it would constitute still further evidence that the Respondent opposes that claim.[317]

164. The Claimant also argues, relying on Professor Cheng and Judge Fitzmaurice, that the Respondent's lack of response conflicts with the principle of good faith because such a duty calls for the Respondent to make reasonable efforts to ensure that Article II(7) is interpreted and applied correctly.[318] The Claimant alleges that the Respondent's withholding of its position on the inter-

[311] *Id*., p. 266:15–24.

[312] *Id*., p. 270:2–13.

[313] *Id*., pp. 270:21–271;4

[314] *Id*., p. 217:12–24.

[315] *Id*., p. 274:13–18.

[316] *Id*., p. 275:4–13.

[317] *Id*., pp. 279:1–281:16.

[318] Claimant's Counter-Memorial on Jurisdiction, para. 94. *See also* Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 271:5–12 ("If the United States had agreed with Ecuador, good faith would have prompted it to say so to Ecuador rather than leave a treaty partner and ally unsure as to what its actual treaty obligations were or how to comply with them. Since we believe in the good faith of the United States, it can only be inferred that the United States did not agree with Ecuador on Article II(7), and chose not to respond to Ecuador's request because it did not wish to express its disagreement. Even assuming that Article II(7) applies equally to both States, the Chevron Tribunal's interpretation still primarily benefits U.S. investors since there are more than of them in Ecuador than there are Ecuadorian investors in the United States.").

pretation of Article II(7) forces the Claimant to accord to American investors advantages that may exceed those to which they are entitled under the Treaty.[319] The Claimant submits that Article V of the Treaty further underscores that a response was called for since it enshrines the Parties' commitment to discuss matters relating to the interpretation or application of the Treaty.[320] According to the Claimant, the principle of good faith in a treaty relationship serves to ensure trust and confidence and creates legitimate expectations concerning the development of a legal relationship between the parties and the Respondent's failure to respond thus gives rise to a legitimate inference that it disagrees with the Claimant's interpretation of Article II(7).[321]

165. The Claimant disputes the Respondent's assertion based on *Cameroon* v. *Nigeria* that absent an applicable treaty obligation, a State may not justifiably rely on the principle of good faith to support a claim.[322] In that case, Nigeria had argued that Cameroon's failure to inform it that it had accepted the ICJ's jurisdiction and intended to file an application breached the principle of good faith.[323] The ICJ rejected this argument holding that "there is no specific obligation in international law for States to inform other States parties to the [ICJ] Statute that they intend to subscribe or have subscribed to the Optional Clause," nor to inform of their "intention to bring proceedings before the [ICJ]".[324] Therefore, the Claimant maintains that its invocation of the principle of good faith bears no resemblance to Nigeria's.[325]

166. The Claimant further disputes the relevance of the fact that it terminated its BIT with Finland or tasked a Special Commission to review each of its 23 BITs. The Claimant argues that the domestic measures it might have undertaken or was considering taking did not affect its obligations on the international plane.[326] The Claimant argues that any discretion the Respondent may have to reserve its position on the interpretation of Article II(7) is subject to good faith which means that it "must be exercised reasonably, honestly, in conformity with the spirit of the law and with due regard to the interests of the other." The Claimant thus asserts that, while the Respondent retains its discretion not to submit an interpretation, it cannot in good faith seek to avoid the inference that a dispute exists.[327]

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[319] Claimant's Counter-Memorial on Jurisdiction, paras. 94–95.

[320] Claimant's Counter-Memorial on Jurisdiction, para. 96.

[321] Claimant's Counter-Memorial on Jurisdiction, paras. 97–98, citing *Nuclear Tests*, *supra* note 190, para. 49.

[322] Claimant's Counter-Memorial on Jurisdiction, para. 99.

[323] Claimant's Counter-Memorial on Jurisdiction, para. 99, citing *Cameroon* v. *Nigeria*, *supra* note 284, para. 36.

[324] Claimant's Counter-Memorial on Jurisdiction, para. 99, citing *Cameroon* v. *Nigeria*, *supra* note 284, para. 39.

[325] Claimant's Counter-Memorial on Jurisdiction, para. 99.

[326] Claimant's Counter-Memorial on Jurisdiction, para. 100.

[327] Claimant's Counter-Memorial on Jurisdiction, para. 101, citing B. Cheng, General Principles of Law as Applied by Courts and Tribunals (2006), pp. 133–134 [C-119].

g) The exercise of the Tribunal's contentious jurisdiction

167. The Claimant takes issue with the Respondent's characterization of the Claimant's request as seeking the exercise of appellate, referral, or advisory jurisdiction.[328]

168. The Claimant alleges that these proceedings do not bear the hallmark of an appeal, which by definition would involve a superior court review of a lower court decision with binding effect on that decision.[329] The Claimant stresses that, while it disagrees with the *Chevron* tribunal's interpretation, it accepts the award as final and binding subject to the procedures available to it under relevant municipal law.[330] The Claimant further disputes the allegation that the Ecuadorian government has expressed a desire to use the State-to-State arbitration as an appeal, stating that the Ecuadorian government only said that initiating the State-to-State arbitration is consistent with the overall goal of "avoiding the generation of an ominous precedent for Ecuador" being pursued in the District Court in The Hague.[331] Moreover, the Claimant notes that the remainder of the press release quoted by the Respondent clarified that Ecuador's motivation for commencing these proceedings was to resolve "the problems of interpretation of the BIT… and to avoid future legal claims that could harm Ecuador."[332]

169. Secondly, the Claimant takes issue with the Respondent's characterization of its Request as asking the Tribunal to exercise referral jurisdiction.[333] According to the Claimant, referral jurisdiction is a procedure under which one court refers a legal question to a "coordinate court for resolution" which, once decided, is applied in the underlying proceeding. The Claimant alleges that "an essential prerequisite is missing: a court has not referred a question to this tribunal for use in another proceeding." Moreover, no such referral could be made since the *Chevron* tribunal's mandate has expired and, even if the decision of the District Court in The Hague were appealed, the appeals court could not refer any question to an arbitral tribunal constituted under the Treaty.[334]

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[328] Claimant's Counter-Memorial on Jurisdiction, para. 103.

[329] Claimant's Counter-Memorial on Jurisdiction, para. 105. *See also* Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, pp. 289:10–290:4.

[330] Claimant's Counter-Memorial on Jurisdiction, para. 105. *See also* Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, pp. 286:25–287:4 ("Ecuador agrees that this arbitration cannot collaterally attack the Chevron Award because that award, under the terms of Article VI, is final and binding, subject only to the procedures available under Dutch law.").

[331] Claimant's Counter-Memorial on Jurisdiction, para. 106.

[332] Claimant's Counter-Memorial on Jurisdiction, para. 107, citing Press Release of the Ecuadorian Office of the Attorney General (4 July 2011) [C-146].

[333] Claimant's Counter-Memorial on Jurisdiction, para. 109.

[334] Claimant's Counter-Memorial on Jurisdiction, para. 111. *See also* Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 291:11–18 ("The dispute that Ecuador has brought before you was not referred to you by any other court or arbitral tribunal seeking your guidance on a matter pending before that court or tribunal. The present dispute is between Ecuador and the United States, and has never been presented to another court or tribunal; it has only been presented here. This is not a case of referral.").

170. Finally, the Claimant submits that these proceedings cannot constitute an exercise of advisory jurisdiction, since this would involve the provision of non-binding legal advice to organs or institutions that have requested such opinions.[335] According to the Claimant, advisory opinions are not a binding means of settling disputes whereas here the Parties are in dispute regarding the interpretation of Article II(7) and any award made by the Tribunal will be binding upon them.[336] The Claimant is of the view that the Respondent's argument in this regard "is really a repackaging of the [Respondent's] claim that there is no dispute between the Parties."[337]

171. Furthermore, the Claimant disputes the Respondent's arguments that exercising jurisdiction over its request for an interpretation of Article II(7) would exceed the judicial function of the Tribunal under Article VII of the Treaty.[338] The Claimant stresses that "[t]he clarification of the *content* of Articles II(7) and VII, as opposed to the act of their *creation*, is independent from States' consent; therefore there can be no question of judicial law-making in this case."[339]

172. The Claimant argues that the Respondent's reliance on the separate opinion of Judge Gros in the *Nuclear Tests* case and on the *Aminoil* award is misplaced.[340] With respect to the opinion of Judge Gros, the Claimant avers that the context in that case was the absence of any properly pleaded legal right or cause of action by Australia. Therefore, the exercise of jurisdiction by the ICJ in that case would have been tantamount to usurping the legislative function from States. Meanwhile, the case at hand deals with existing rules of law since the legal validity of Article VII is not in dispute.[341] As regards the *Aminoil* award, the Claimant contends that it is not seeking an equitable revision of Article II(7) or Article VII as was sought in that case; nor are the provisions an "incomplete contract."[342] The Claimant submits that it is not asking the Tribunal to "create a new rule of international law empowering it to exercise jurisdiction over Ecuador's request. Nor does Ecuador ask the Tribunal to substitute Article II(7) for a new rule of international law. Rather, Ecuador asks that the Tribunal decide the proper interpretation of an *existing* rule of international law that is manifest in Article II(7) of the Treaty."[343]

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[335] Claimant's Counter-Memorial on Jurisdiction, para. 112.

[336] Claimant's Counter-Memorial on Jurisdiction, para. 112. *See also* Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 290:5–22 ("[T]here is a dispute between Ecuador and the United States in regards to Article II(7), over which the Tribunal may exercise jurisdiction under Article VII. So, if Ecuador is right that there is a dispute that satisfies Article VII, the United States' characterization of this arbitration as an Advisory Opinion necessarily fails. The United States is not helped by arguing that the question that Ecuador has put to this Tribunal is virtually identical to the kinds of questions that the ICJ is asked when it is requested to give Advisory Opinions.").

[337] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 290:10–12.

[338] Claimant's Counter-Memorial on Jurisdiction, para. 113.

[339] Claimant's Counter-Memorial on Jurisdiction, para. 114.

[340] Claimant's Counter-Memorial on Jurisdiction, para. 116.

[341] Claimant's Counter-Memorial on Jurisdiction, para. 116.

[342] Claimant's Counter-Memorial on Jurisdiction, para. 117.

[343] Claimant's Counter-Memorial on Jurisdiction, para. 118.

h) The Parties' dispute is a legal dispute whose resolution will not have the far-reaching consequences alleged by the Respondent

173. The Claimant takes issue with the Respondent's characterization of the dispute as a political disagreement, noting that the ICJ made clear in *Border and Transborder Armed Actions Case* that political aspects do not render a dispute non-legal:

> The Court is aware that political aspects may be present in any legal disputes brought before it. The Court, as a judicial organ, is however only concerned to establish, first, that the dispute before it is a legal dispute, in *the sense of a dispute capable of being settled by the application of principles and rules of international law*, and secondly, that the Court has jurisdiction to deal with it, and that jurisdiction is not fettered by any circumstance rendering the application inadmissible…. [I]t cannot concern itself with the political motivation which may lead a State at a particular time, or in particular circumstances, to choose judicial settlement.[344]

174. The Claimant avers that, since the issues in these proceedings are capable of resolution by principles and rules of international law, there is no doubt it is a legal dispute over which the Tribunal can take jurisdiction.[345] The Claimant responds to the Respondent's characterization of its June 8 Note as a "unilateral interpretive declaration." The Claimant argues that its Note was not a unilateral declaration but an invitation to discuss the interpretation of Article II(7) that, once rebuffed, left the Claimant no choice but to seek an authoritative interpretation from the Tribunal.[346]

175. The Claimant further submits that taking jurisdiction is consistent with the object and purpose of the Treaty and would not have the destabilizing consequences alleged by the Respondent.[347] First, the Claimant avers that the decision would have no effect on the *Chevron* award and is not a re-litigation or appeal of that award.[348]

176. Secondly, the Claimant disputes the Respondent's assertion that an exercise of jurisdiction would undermine the stability and predictability of the dispute settlement process; in the absence of a doctrine of precedent in international investment law, an authoritative interpretation would "promote uniformity and stability of the law."[349] Moreover, according to the Claimant,

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[344] Claimant's Counter-Memorial on Jurisdiction, para. 119, citing *Border and Transborder Armed Actions*, *supra* note 146.

[345] Claimant's Counter-Memorial on Jurisdiction, para. 120.

[346] Claimant's Counter-Memorial on Jurisdiction, paras. 121–122.

[347] Claimant's Counter-Memorial on Jurisdiction, paras. 123–124. *See also* Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, pp. 355:19–357:16.

[348] Claimant's Counter-Memorial on Jurisdiction, para. 125, citing Reisman Opinion para. 52. *See also* Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 287:1–9 ("[T]his arbitration cannot collaterally attack the Chevron Award because that award, under the terms of Article VI, is final and binding, subject only to the procedures available under Dutch law.").

[349] Claimant's Counter-Memorial on Jurisdiction, para. 126.

exercising jurisdiction would not politicize investment disputes, but rather would remove uncertainty from the Parties' legal relations and would further the Parties' agreement on the treatment to provide to investors consistent with the objectives of the Treaty.[350] In its view, "ascertaining jurisdiction […] would be a strong message to the States that [the] commitments must not be taken lightly, and that may dissuade some […] cat-and-mouse games that could be observed otherwise."[351]

177. The Claimant also denies that the assertion of jurisdiction by the Tribunal would result in other States initiating such arbitrations to stop investment arbitration proceedings initiated by investors. It argues that these are two different tracks (Article VI and Article VII) and that "the Article VI Arbitrators are totally free to let the proceedings before them develop or to stay the proceedings, depending on the judgment they make, on the seriousness or the frivolity of the interpretative issue raised by the State in the Article VII arbitration."[352] The Claimant relies on *Lucchetti* v. *Peru* as an example of where the arbitrators decided not to stay the proceedings.[353]

178. The Claimant disputes the Respondent's assertion that exercising jurisdiction would judicialize aspects of the Parties' relationship and hinder the exchange of views. First, the Claimant emphasizes that it is the Respondent who shut down lines of communications regarding this exchange.[354] Secondly, whatever the effect of Article VII, the Parties included it in the Treaty with the express understanding that it coexists with the possibility of consultations under Article V.[355] The Claimant disagrees with the Respondent's assertion that consultation about "matters" and "disputes" are two distinct mechanisms that operate in isolation of one another, and asserts that international law holds negotiation and adjudication to be complementary forms of dispute settlement.[356] According to the Claimant, the use of the words "matter" and "dispute" merely reflects that, at the initial stage of consultations, the Parties have not yet determined whether a dispute exists.[357] The Claimant avers that the fear that bringing an arbitration following the failure of negotiations would "chill" dialogue with its treaty partner would apply to all instances of State-

[350] Claimant's Counter-Memorial on Jurisdiction, para. 127.

[351] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 386:6–20.

[352] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, pp. 383:12–384:1.

[353] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 384:2–6, citing *Lucchetti*, *supra* note 180.

[354] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, pp. 385:24–386:5.

[355] Claimant's Counter-Memorial on Jurisdiction, paras. 128–130.

[356] Claimant's Counter-Memorial on Jurisdiction, paras. 131–132, citing *Aegean Sea Continental Shelf Case* (Greece v. Turkey), Jurisdiction, Judgment (19 December 1978), 1978 I.C.J. Reports 3, para. 29 [C-114]; *Alps Finance and Trade AG* v. *Slovakia*, UNCITRAL, Award (5 March 2011), para. 204 [C-115].

[357] Claimant's Counter-Memorial on Jurisdiction, para. 134.

to-State arbitration, but that the inclusion of State-to-State dispute settlement clauses indicates that States intended to provide such recourse.[358]

179. The Claimant also casts some doubts on "the prophecy that [the Tribunal's] assertion of jurisdiction would open the floodgates to State-to-State arbitrations."[359] The Claimant argues, that "differences between States, the States themselves, on the interpretation of the protection provided for in the treaty are rare." Furthermore, it argues that "arbitration between States may be a waste of time. It may be costly, costly money wise and also costly to the relationship between the two States. And for this reason, States are not likely to engage in arbitrations lightly."[360]

180. The Claimant concludes by countering the Respondent's suggestions that exercising jurisdiction would set a dangerous precedent in international law, submitting that the Tribunal cannot decline jurisdiction based on extraneous non-legal considerations. The Claimant cites Orakhelashvili who states that "[i]f interpretation is meant to clarify the content of law that has crossed the threshold of legal regulation, it naturally follows that the process of interpretation has to be independent of non-legal considerations" and that "interpretation is a purely legal, not political, task".[361]

i) The Claimant has fulfilled its obligation to consult

181. The Claimant refutes the Respondent's assertion that it had not fulfilled the preconditions set forth in Article VII. The Claimant notes that the UNCITRAL Rules do not allow a party to raise a new jurisdictional objection for the first time at the oral hearings. In addition, it contends that it "unquestionably pursued a resolution through diplomatic channels" and it observes that it was Mr. Koh who put an end to the diplomatic process on behalf of the Respondent, when he "unilaterally cut off dialogue with [the Claimant] in October 2010, advising [the Claimant] at the time that [the Respondent] had made a decision not to share with [the Claimant] its interpretation of Arti-

[358] Claimant's Counter-Memorial on Jurisdiction, para. 135.

[359] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 386:21–23.

[360] *Id.*, p. 387:9–18.

[361] Claimant's Counter-Memorial on Jurisdiction, paras. 136–137, citing A. Orakhelashvili, The Interpretation of Acts and Rules in Public International Law (2008), p. 293 [C-113]. *See also* Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 356:9–23 ("[I]t is said that your assertion of jurisdiction may bring in the future to politicizing investment disputes. One may have very serious doubts about this. These agreements on the interpretation of the investment BITs. At the year between investors and on the States because they have conflicting interests, but between the two States that are the signatories of the Bilateral Investment Treaty, as such, differences are likely not to occur often. The State of the investor as a State is likely to have concerns similar as the State hosting the investments to keep the Undertakings made by the two States within the reasonable boundaries they agreed. So I think that the fear of politicization—of making more politic—political the settlement of disputes in the field of investment is very grossly overstated.").

cle II(7)."[362] The Claimant further avers that it "did, indeed, seek and engage in consultations and other diplomatic means in this matter until the State Department, the United States Government chose to close the door on further discussions and to refuse to respond to Ecuador's Note and its concerns and its apprehensions."[363] It further explains that "it is absolutely wrong to characterize [the Diplomatic Note] as an ultimatum," which mischaracterization is in its view also demonstrated by the Parties' subsequent conduct.[364]

182. Finally, the Claimant contends that invoking Article V cannot be a prerequisite for the Tribunal's jurisdiction, since it is not mentioned in Article VII whatsoever.[365]

j) The applicability and effects of the decision is not a matter for the Tribunal

183. The Claimant notes that it does not seek a decision that is binding *erga omnes*. It is only asking for a decision which would be binding between the two Parties to the Treaty. The Claimant is of the view that the applicability of such a decision is not a matter for the Tribunal, who does not have "to decide anything about the effects of [its] decision except that is binding upon the two Parties, and it is binding in the relations between them."[366]

184. The Claimant concedes that both Parties have obligations under Article VI to comply with awards of Article VI Tribunals, "and that would not change, even though a decision has emanated from an Article VII Tribunal." Moreover, it claims that if either Party refused to pay an award, the other State would be able to provide diplomatic protection, "not espousing a claim under the interpreted provision, Article II(7), but a claim for nonperformance of the obligation to pay the award."[367]

185. As mentioned above, the Claimant insists that the decision would have no effect on the *Chevron* award. The Claimant asserts that awards made by Article VI tribunals are safe, since they have their "own authority and an erroneous interpretation of the law in regard to what [the Tribunal] would decide, that would have been made in the past by an Article VI Arbitral Tribunal would certainly not be a ground to seeking to setting aside of this arbitral award."[368] The Claimant also notes that a misinterpretation of the law is not

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[362] *Id.,* pp. 271:25–273:7. *See also* Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 53:22–56:10.

[363] *Id.*, pp. 358:12–359:10.

[364] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 50:5–53:21.

[365] *Id.,* p. 359:6–10.

[366] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, p. 69:6–17.

[367] *Id.*, pp. 353:14–354:22.

[368] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 383:2–6.

a ground for refusal of enforcement of the award under any relevant international instrument.[369]

186. Finally, the Claimant contends that in the end the authority of any eventual decision by the Tribunal will have to be determined by those called upon to consider that question. In particular, it observes:

> The last question, one they have is what will be the authority of the decision you will make on the interpretation if you proceed to the merits? One may make guesstimates, but in the end it will be incumbent on the arbitration community to organize itself. No doubt, arbitrators in investment disputes would recognize the role, the leading role, that an Article VII interpretation should have. It will be incumbent on these arbitrators to determine the exact views they make of your determination, but this should be no way be a reason for you to decline the jurisdiction that is conferred upon you by the Treaty.[370]

VII. Tribunal's Reasoning

1. Preliminary considerations

187. While not being made express elsewhere in this decision, two broad considerations guide the Tribunal's reasoning in this decision and deserve preliminary comment.

188. First, an arbitral tribunal, even though not bound by any strict doctrine of *stare decisis*, should try as far as possible to decide in a manner consistent with other applicable judicial decisions. However, when evaluating the authorities cited by the Parties in these proceedings—parsing through the *obiter dictae* and restricting oneself to the conclusions actually employed to reach a resolution of the case—the Tribunal has concluded that the case at hand is truly a novel one. While the jurisprudence guides and informs the Tribunal's decision, the Tribunal has not found any decision that truly qualifies as precedent on the fundamental questions posed by the Parties' arguments.

189. Secondly, the Tribunal notes that the two main jurisdictional issues— "concreteness" and "positive opposition"—are intertwined. As elaborated below, the Tribunal's principal concern in deciding both jurisdictional questions in this State-to-State arbitration is whether the claim on the merits has some implications or consequences for the relations between Parties at the State-to-State level. The issue of the existence of a sufficiently "concrete" State-to-State claim is therefore intimately connected to the existence or not of a State-to-State "dispute". The two objections may in fact be considered different

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[369] *Id*., p. 383:7–11. *See also* p. 364:3–10 ("And as we have already seen in the case of Ecuador in Article II(7), two different tribunals can to two very different conclusions already. And because Article VI Tribunals and Investor-State Tribunals in general do not enjoy stare decisis and their decisions are not binding on anybody but the Parties relating to that dispute, it would be no ground for a Third Party to insist that it relied upon a particular decision of an arbitral tribunal.").

[370] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, p. 388:7–18.

prongs of the *Mavrommatis* formula for determining what constitutes a proper "dispute" for adjudication. The Tribunal's conclusions on these issues, while stated separately, must be read together and both depend on the unique factual matrix presented by this case.

2. The so-called "concreteness" requirement

a) The legal framework

190. The Tribunal need not repeat here the extensive arguments put forth by the Parties already summarized above. In essence, the Respondent relies on a passage from the *Northern Cameroons* case, where the ICJ states that "it may pronounce judgment only in connection with *concrete cases* where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties."[371] On the basis of this case and a number of further authorities on the inherent limitations of the international judicial function, the Respondent concludes that a case is not justiciable before an international tribunal in the absence of an allegation of breach.

191. By contrast, the Claimant emphasizes the immediately following sentence of the ICJ's judgment, requiring only that "[t]he Court's judgment must have *some practical consequence*" and not be entirely academic.[372] The Claimant then points to various pronouncements by international tribunals of their duty to decide important questions put before them, whether abstract or not, as long as they are capable of resolution according to law.

192. At the hearing, the Claimant put forward what it considered to be examples of rulings on abstract questions of interpretation,[373] and the Respondent sought to distinguish each case produced.[374] The Claimant eventually appeared to accept a slightly higher threshold of "practical consequences"[375] and the Respondent appeared to acknowledge that the spectre of an allegation of breach might be enough.[376] Despite softening their positions, the Parties nonetheless continued to draw diametrically opposite conclusions from the same cases and facts.

193. With due respect for the skilled advocacy observed, both sides seem to focus on specific excerpts to the exclusion of considering the meaning of the passage and decision as a whole. To recall, the full passage from *Northern Cameroons* which both Parties regard as authoritative reads as follows:

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[371] See *supra*, section VI(1), paras. 57, 71. *Northern Cameroons*, supra note 71, pp. 33–34 (emphasis added).

[372] See *supra*, section VI(2), paras. 148–149. *Northern Cameroons*, supra note 71, p. 34 (emphasis added).

[373] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, pp. 230:14–255:17.

[374] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 125:22–160:20.

[375] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, pp. 350:15–351:8.

[376] Transcript (Hearing on Jurisdiction), Day 2, 26 June 2012, pp. 329:11–334:4.

> The function of the Court is to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties. The Court's judgment must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations. No judgment on the merits in this case could satisfy these essentials of the judicial function.[377]

194. The present case is, however, very different from *Northern Cameroons*, which was primarily concerned with the efficacy of a decision in that case:

> If the Court were to proceed and were to hold that the Applicant's contentions were all sound on the merits, it would still be impossible for the Court to render a judgment capable of effective application.[378]

195. At issue in *Northern Cameroons* was not whether—in the parties' respective views on the application of various UN decisions, the management of the Trust, and the treaties that instituted the mandates—there was a sufficient "conflict of legal interests between the parties," but whether its decision would "affect *existing* legal rights or obligations of the parties." The ICJ concluded that it could not give a decision from which any practical consequence could result in light of the situation created by the end of the Trust. The case had been rendered entirely moot:

> The Court finds that the proper limits of its judicial function do not permit it to entertain the claims submitted to it in the Application of which it has been seised, with a view to a decision having the authority of *res judicata* between the Republic of Cameroon and the United Kingdom. Any judgment which the Court might pronounce would be without object.[379]

196. *Northern Cameroons* is nonetheless instructive in certain respects. Much of the argument between the Parties in the instant case revolved around whether the tribunal could answer an abstract question of interpretation. But that is a false issue: a tribunal can answer such an issue if properly put before it. The ICJ in *Northern Cameroons* deemed it "undisputable" that "the Court may, in an appropriate case, make a declaratory judgment…[that] expounds a rule of customary law or interprets a treaty which remains in force, [which] judgment has a continuing applicability." The issue is whether the context of such a decision grants it the necessary practical consequence, beyond the mere elucidation of the meaning of the treaty itself, for the parties before the tribunal.

197. The relevant question does not thus merely concern the practical effect arising from a decision on the merits writ large, but requires that the decision affect the "legal rights or obligations of the parties, thus removing uncertainty from their legal relations." The use of the plural "parties" is sig-

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[377] *Northern Cameroons*, supra note 71, pp. 33–34 (emphasis added).

[378] *Northern Cameroons*, supra note 71, p. 33.

[379] *Northern Cameroons*, supra note 71, p. 38.

nificant, as is the phrase "their legal relations." They clarify that the "practical consequences" must affect and relate to both Parties who are the object of the decision to be rendered in the present case. In other words, they must relate to rights or obligations owed by Ecuador to the United States and vice-versa.

b) The existence of practical consequences in the present case

198. This case has seen discussion of the Parties' respective duties to consult or respond to each other. However, the fundamental interpretative questions put before the Tribunal—the issues of practical consequence—focus on Ecuador's obligations with respect to US investors such as Chevron, and not on obligations that are in contention with the United States. In fact, the Parties agree:

> (*a*) that Ecuador makes no claim that the US is in violation of its obligations under Article II(7) of the Treaty;
>
> (*b*) that no claim has been advanced by the US that Ecuador is in violation of its obligations under Article II(7) of the Treaty; and
>
> (*c*) that the US does not take issue with Ecuador's actual or proposed implementation of Article II(7) of the Treaty.

199. However, the Parties strongly disagree over whether Ecuador is entitled to an authoritative interpretation of Article II(7) of the Treaty in order to protect itself from liability to US investors on the basis of what it claims to be an erroneous construction of that provision.

200. Concretely, in the light of the *Chevron* award, Ecuador claims that it must know whether and how it is to adapt its legal system to comply with the *Chevron* interpretation or have confirmation that it does not have to do so. Ecuador admits, however, that this Tribunal's ruling will have no impact on the *Chevron* award itself. Indeed, Ecuador has explicitly committed itself to complying with the *Chevron* award, subject to the exhaustion of the recourses and defenses available to it in accordance with the *lex arbitri* and international instruments governing the recognition and enforcement of arbitral awards. So, Ecuador's expressed concern is prospective: it wants a decision of this Tribunal in order to better predict the outcome of future disputes regarding the interpretation of Article II(7) before future Article VI tribunals and if necessary to reform its judicial system to avoid adverse outcomes in investor-State arbitrations.

201. The US objects to resort to an Article VII arbitration for this purpose, claiming that it would undermine a principal object of BITs:

> 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.[380]

[380] US Statement of defense pp. 12–13.

202. Even if the questions advanced in this case could be considered to have clear practical consequences for Ecuador, how is this a matter that affects Ecuador's relationship with the US? Following the reasoning developed by the Parties on this point, the crucial question is how the Tribunal's decision on the merits stands to remove any legal uncertainty in that bilateral relationship.

203. Even in the cases dealing with those treaties most akin to modern BITs, the "abstract question" was of clear consequence for both parties to the treaty. For example, in the *Rights of US Nationals in Morocco*, the case concerned the disputed question of whether U.S. nationals were entitled to certain economic and consular rights as a result of a MFN clause in a commercial treaty. The same is true for the Iran–U.S. Claims Tribunal cases *A2* and *A17*, where the question concerned whether nationals of either State could bring claims before the tribunal. In essence, in all the cases cited, there were practical consequences for both parties in the resolution of the matter of interpretation placed before the tribunal. Such consequences do not arise in the instant case as it has been pleaded before this Tribunal.

204. There exists the possibility that the United States could directly allege a breach of the "effective means" obligation in Article II(7) against Ecuador, in which case there would be clear "practical consequences" for both Parties.[381] Such a case could arise in the context of either a direct claim for breach or a claim by way of diplomatic protection by the U.S. of one of its investors against Ecuador.[382] Contrary to the view expressed in Prof. Reisman's opinion submitted by the Respondent,[383] some commentators consider that recourse to State-to-State dispute resolution for breaches of a BIT may be possible, in particular where the investment dispute in question has not already been submitted to investor-State arbitration under Article VI.[384] The Tribunal makes no finding on this point, but is not persuaded to exclude this possibility outright.

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[381] The question of to whom the obligations in BITs are owed revolves around the interpretation of the primary obligation. See James Crawford, "The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect" 96 Am. J. Int'l Law 874, pp. 887–888 (2002). Even Professor Douglas, an advocate of the "direct" theory, argues that the substantive obligations in BITs may exist purely on the State-to-State plane while procedural obligations are owed directly to the investor. Zachary Douglas "The Hybrid Foundations of Investment Treaty Arbitration" (2003) 74 British Yearbook of International Law 151 p. 168.

[382] See e.g. *Italy* v. *Cuba*, where Italy alleged a breach of its rights under the Italy–Cuba BIT and brought a claim of diplomatic protection on behalf of its nationals under a comparable State-to-State compromissory clause, despite the availability of investor-State arbitration under the same Italy–Cuba BIT.

[383] Reisman Opinion, para. 23. ("[T]he 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.").

[384] Kenneth J. Vandevelde, *United States Investment Treaties: Policy and Practice* (1992), p. 191. ("The [State-to-State disputes] article [of the 1983 US Model BIT] expressly excludes two categories of disputes to which it would be otherwise applicable. […T]he omission of this language [in later Model BITs] leaves open the possibility that a dispute submitted to the [ICSID] Additional Facility could be resubmitted for resolution under the state-to-state disputes provision."); Juliane Kokott "Interim Report on 'The Role of Diplomatic Protection in the Field of the Protection of Foreign Investment'" in International Law Association, New Delhi Conference (2002), Committee on Diplomatic Protection of Persons and Property, Second Report, p. 24;

205. This prospect remains theoretical, however, and was in any event not pleaded by the Claimant here. Moreover, as further discussed below in relation to the existence of a dispute, it is impossible to exclude the possibility that the U.S., when approached by an aggrieved U.S. investor, might agree with the interpretation of Article II(7) that Ecuador has put forward.

206. Returning to *Northern Cameroons*, the present situation is not unlike the failure by Cameroon to claim any reparation for the breaches it alleged, a fact on which Judge Fitzmaurice focuses in his Separate Opinion. Had Cameroon claimed any compensation or other appropriate relief for the breaches it alleged, the result might have been different. Alternatively, had the Trusteeship Agreement remained in force, or had the possibility of a future allegation of breach remained, the judgment would have obtained the necessary "practical consequences":

> for in that case, any finding in favour of the plaintiff State functions as a prohibition on the continuance or repetition of the breach of treaty, and this may be all that is required, and in any event makes the judgment effective. Moreover, the latter necessarily operates as a finding about the correct interpretation or application of the treaty, and therefore serves a useful and effective legal purpose during the life-time of the treaty.[385]

207. The outcome might well have been different here as well if the Respondent had put forward an opinion that differed from that of Ecuador on the proper interpretation of Article II(7), expressed approval for the *Chevron* award's conclusions, or taken issue with Ecuador's actual or proposed implementation of its obligations under Article II(7). However, under the circumstances, and particularly in light of the Tribunal's conclusion below that no dispute exists regarding the interpretation of Article II(7), the Tribunal cannot conclude that a proper case for adjudication has been presented by the Claimant.

3. The existence of a dispute

a) The legal framework

208. In order to determine whether it has jurisdiction, the Tribunal must interpret Article VII in accordance with the general rules of treaty interpretation contained in Article 31 and following of the VCLT. Article VII confers jurisdiction over "[a]ny dispute between the Parties concerning the interpretation or application of the Treaty which is not resolved through consultations or other diplomatic channels." In construing the meaning of this grant of jurisdiction to State-to-State arbitral tribunals, the Tribunal must determine whether a "dispute" exists between the Parties. However, there is a qualification regarding

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Antonio R. Parra "Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment" (1997) 12 ICSID Review 287, p. 335.

[385] *Northern Cameroons*, Separate Opinion, p. 98.

which disputes the Tribunal may assert jurisdiction over—it must be a dispute "concerning the interpretation or application of the Treaty." More precisely, the issue to be addressed is whether there is a dispute between the Parties over the interpretation or application of Article II(7) of the Treaty.

209. As with the question of "concreteness", the Parties have put forward diametrically opposed positions regarding the existence of a dispute. For the Claimant, the dispute arises out of the situation described by Ambassador Luis Benigno Gallegos in his witness statement:

> A diplomatic note was therefore prepared that set out Ecuador's views on what it understood to be the Contracting Parties' common intentions with respect to Article II(7), and asked the United States to confirm that, in fact, it shared Ecuador's interpretation of that provision. The diplomatic note further observed that, if the United States had a different understanding of Article II(7) than was described in the note, or if the United States did not respond, Ecuador would consider itself to be in dispute with the United States over the interpretation of the Treaty.

210. This was part of a broader "strategy outlined by the President of the Republic" whereby Ecuador sought to discredit the interpretation made by the *Chevron* tribunal and to validate its own views on Article II(7) of the Treaty.[386]

211. The United States initially acknowledged Ecuador's Diplomatic Note and "look[ed] forward to remaining in contact about this," but then chose not to respond further. The Respondent has also abstained from addressing the substance of the June 8 Note throughout these proceedings.

212. The Parties both acknowledge that the term "dispute" has a specific meaning in international law and practice and are largely in agreement on the legal framework to be applied, aptly and succinctly summarized by the ICJ in its judgment in *Georgia* v. *Russia*:

> The Court recalls its established case law on that matter, beginning with the frequently quoted statement by the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case in 1924: "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons." (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11.) Whether there is a dispute in a given case is a matter for "objective determination" by the Court (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74). "It must be shown that the claim of one party is positively opposed by the other" (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328) (and most recently *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 40, para. 90). The Court's determination must turn on

[386] Memo C.E. No. 1–718/2010 to Ricardo Patiño from Luis Gallegos Chiriboga (Oct. 4, 2010) (attached to Gallegos Statement).

> an examination of the facts. The matter is one of substance, not of form. As the Court has recognized (for example, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 315, para. 89), the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for.[387]

213. In respect of the existence of disagreement between the Parties, the Respondent claims that it has never expressed an opinion on—and therefore never opposed—the position of Claimant on the meaning of Article II(7). It has simply refused to express any opinion about the interpretation and remained silent on this subject. Thus, according to the Respondent, there is no disagreement or conflict between the Parties; there is no "positive opposition" between them.

214. The Claimant argues, however, that the facts and circumstances surrounding the Respondent's silence support the inference that it opposes the Claimant's position regarding the proper interpretation of Article II(7). The Claimant emphasizes that "the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for." The Claimant acknowledges that the Respondent had no strict obligation under the Treaty to respond to the June 8 Note and was entitled to remain silent. However, it considers that the progression, from the issuance of the *Chevron* award, to the Claimant's June 8 Note to the Respondent, and then the Respondent's sudden decision not to respond to the note or engage in discussions on the subject, create a situation where "a response is called for."[388]

215. The specific issue facing the Tribunal is thus whether the facts of this case allow for the inference that the Respondent disagrees with the position of the Claimant regarding the interpretation of Article II(7).

b) The inference of positive opposition

216. Three facts directly support the inference that the Claimant asks the Tribunal to draw. First, the Treaty was negotiated on the basis of the 1992 US Model BIT and the "effective means" provision was adopted verbatim from this model—which itself was the product of the inter-agency discussions that the Respondent purports to be necessary to form a view on the proper interpretation of Article II(7). The US cannot therefore plead ignorance of the intended meaning of Article II(7) of the Treaty, at least not for such fundamental questions as whether the provision is reflective of customary law or constitutes *lex specialis*. The Claimant argues therefore that the Respondent could only "either agree or disagree" with the Claimant's interpretation and, if it agreed, it would have said so, leaving the Tribunal to deduce that it must not agree.[389]

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[387] *Georgia* v. *Russia*, *supra* note 122, para. 30.

[388] See *supra* section VI(2), paras. 154–166.

[389] Transcript (Hearing on Jurisdiction), 26 June 2012, pp. 266–272.

217. Second, as the Respondent has itself acknowledged, its decision not to respond to the June 8 Note was a departure from its regular practice with its treaty partners. Indeed, this was an about-face after having courteously acknowledged receipt of the June 8 Note and stated that "the U.S. government is currently reviewing the views expressed in your letter and…look[s] forward to remaining in contact about this and other important issues that affect our two nations." This behavior confers greater significance on the Respondent's silence, from which the Claimant invites the Tribunal to infer that the Respondent disagrees with the Claimant and is trying to protect the *Chevron* interpretation from scrutiny by a State-to-State tribunal.

218. Third, the Respondent has repeatedly insisted on remaining silent on the interpretation of Article II(7) even in situations where the Respondent would be expected to address the substance of Ecuador's views on Article II(7), including in the various pleadings on the merits in these proceedings. This suggests that the Respondent's position has not been solely motivated by its objection to being presented with an "ultimatum" in the June 8 Note. Indeed the implication of such a motivation is in any event belied by the Respondent's initial response, which expressed no objection to the form or content of the June 8 Note.

219. However, the Tribunal does not regard any of these arguments—individually or collectively—as establishing an inference that the Respondent in fact disagreed with the Claimant's position. One cannot exclude other reasonable explanations for the Respondent's behavior that do not depend on the Respondent's disagreement with the Claimant's interpretation of Article II(7). In particular, the Respondent's behavior is consistent with a principled stance of not wanting to interfere with the decisions of Article VI investor-State tribunals, be they right or wrong. Given the existence of such a plausible explanation for the United States' silence, the circumstances of this case do not warrant the inference of "positive opposition".

220. The jurisprudence cited by the Parties supports this conclusion. For example, in *Georgia* v. *Russia*, Russian representatives made somewhat ambiguous statements in response to the claims leveled against the Russian Federation regarding both the unlawful use of force and ethnic cleansing. The oblique rejection by Russia of the accusatory statements made by Georgian representatives could not tenably be construed as rejecting only the claims regarding the unlawful use of force, as that would imply an admission that the Russian Federation was engaging in ethnic cleansing.

221. The situation is similar to that in the *UN Headquarters Agreement* case. The UN Secretary-General claimed that the U.S. was violating its international obligations by forcing the closing of the office of the PLO Mission to the United Nations in New York. Although the U.S. never expressly opposed

the UN Secretary-General's views, its course of conduct could only reasonably be interpreted as indicating that it believed that its actions were justified.[390]

222. The same is true for *Cameroon* v. *Nigeria*. Nigeria's silence on where certain sections of the boundary should lay between the two countries could not, given clear disputes regarding other portions of the boundary, reasonably be interpreted as indicating that it had no opinion on the boundary or that it agreed with Cameroon's position. The only reasonable interpretation was that Nigeria disagreed, even if it had not explicitly expressed its disagreement.

223. These cases demonstrate that the inference of "positive opposition" is warranted only when all other reasonable interpretations of the respondent's conduct and surrounding facts can be excluded. Such may be the case when a State remains silent when faced a serious allegation of breach of its international obligations or when the situation presents mutually-exclusive binary alternatives, one of which may be discarded as unreasonable.

224. But that is not the case here. The Claimant asserts that, if the Respondent agreed with its position, a response to its June 8 Note would be required by virtue of the Respondent's good faith obligations. Even if this were so, the Tribunal finds—*as a factual matter*—that the Respondent has put forward a reasonable alternative explanation for its decision not to respond that precludes the inference that the Respondent opposes the Claimant's views on the interpretation of Article II(7) of the Treaty.

c) The scope of the dispute: the obligation to respond or consult

225. The above reasoning does not mean that there may not be a dispute between the Parties. However, the dispute, if one exists, concerns the Respondent's refusal to respond to the June 8 Note as encapsulated in the Respondent's statement at the hearing that "the most Ecuador can do is to say that the failure of the United States to answer Ecuador's either/or demand […] created the dispute […] But that alleged dispute is over whether Ecuador had a right to issue such an ultimatum or demand and whether the Respondent had an obligation to answer. It's not over the interpretation or application of Article II(7)."[391]

226. Seen from another point of view, the question concerns the obligation to agree to a joint interpretation or engage in consultations regarding the proper interpretation of Article II(7) of the Treaty when faced with a demand such as Ecuador's. In essence, the Parties disagree about the validity of the United States' justification for not responding: that it does not want to interfere with the proper functioning of the investor-State arbitration system and thus matters subject to investor-State arbitration should be left to investor-State tribunals.

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[390] Claimant's Counter-Memorial on Jurisdiction, para. 82, citing *UN Headquarters Agreement*, *supra* note 123, para. 36.

[391] Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 108–109.

227. Such a dispute might have been brought within the ambit of Article VII if the Claimant had alleged a violation of the duty to consult under Article V in light of the Respondent's subsequent refusal to discuss the matter despite its initial indication that it "look[ed] forward to" doing so. However, Ecuador neither invoked Article V nor argued a breach thereof. Moreover, since Ecuador agrees that there is no obligation under the Treaty to respond to a request to give an interpretation and bases it arguments on general obligations of good faith in the performance of treaties and the principle of *pacta sunt servanda* such a dispute could not concern the "interpretation or application of the Treaty."

228. The Tribunal is thus left with no dispute over which it can assert jurisdiction.

4. The prerequisite obligation to consult

229. Given it conclusions leading to an absence of jurisdiction due to the absence of a dispute, the Tribunal need not consider the Respondent's further objection that the precondition of negotiation in good faith prior to resort to arbitration were not fulfilled by the Claimant, including the question of whether this allegedly late-arising objection is admissible.

5. Costs

230. The Respondent has claimed costs, including its costs for legal representation and assistance, in accordance with Article 40 of the UNCITRAL Rules, which establishes a presumption that "the costs of arbitration shall in principle be borne by the unsuccessful party." However, Article VII(4) of the Treaty—while preserving the Tribunal's discretion to "direct that a higher proportion of the costs be paid by one of the Parties"—appears to abrogate that presumption and even suggest a presumption that the "costs of the proceedings shall be paid for equally by the Parties." It is also not clear whether the Treaty permits the Tribunal to order apportionment of the Parties' costs of legal representation and assistance.

231. In any event, the Tribunal finds no reason to depart from an even division of the costs of the proceedings. Not only would this comport with the Treaty and customary practice in State-to-State arbitration, but in a novel case such as this, where substantial and reasonable arguments are made by each party, each party should bear its own costs and divide the costs of the proceedings equally.

232. The PCA shall render a final accounting of the costs of arbitration to the Parties following the issuance of this award.

6. Conclusion

233. In light of its conclusions, the Tribunal must therefore dismiss the case as a whole and put an end to the arbitration. The Tribunal nonetheless takes this final opportunity to praise the Parties and counsel on both sides for their exemplary advocacy and collaboration in what has been novel and challenging case—both procedurally and substantively. The Tribunal also wishes to thank the PCA and in particular the Registrar, Martin Doe Rodríguez, for their support to the Tribunal in meeting these challenges.

VIII. Decision

For the foregoing reasons, the Tribunal decides, by majority, as follows:

(1) The Tribunal has no jurisdiction, and the case must consequently be dismissed in its entirety, due to the absence of the existence of a dispute falling within the ambit of Article VII of the Treaty; and

(2) The fees and expenses of the Tribunal and the Registry, and other costs of the proceedings shall be paid for equally by the Parties in accordance with Article VII(4) of the Treaty.

Done this 29th day of September 2012.

[*Signed*]
Professor Raúl Emilio Vinuesa
[Subject to dissenting opinion]

[*Signed*]
Professor Donald M. McRae

[*Signed*]
Professor Luiz Olavo Baptista
[Chairman]

[*Signed*]
Martin Doe Rodríguez
[Registrar]

Dissenting Opinion of Professor Raúl Emilio Vinuesa

Preliminary Issues

1. On 2 August 2012, the President of the Tribunal circulated a draft Decision on Jurisdiction, which was upheld by the majority of the Tribunal that very day, absent any prior deliberation. By means of the Registrar of the Tribunal, I informed the Parties that not only did I dissent from such a decision and the reasoning in support thereof, but I also reserved the right to agree to or dissent from any other argument that may not have been included in the adopted Decision. After the Decision had been adopted, the President of the Tribunal circulated a new draft with reasoning that differs significantly from the former draft Decision. In view of this situation, this Dissenting Opinion presents my position in regard to the main arguments put forward by both Parties in the course of the proceedings in order to express my disagreement with the arguments of the majority which were eventually included in this Award.

I. Introduction

2. On 28 June 2011, the Republic of Ecuador (hereinafter, "*Ecuador*" or the "*Claimant*") filed a Request for Arbitration against the United States of America (hereinafter, the "*United States*" or the "*Respondent*") on the interpretation of Article II(7) of the Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment of 1993 (hereinafter, the "*Treaty*" or the "*BIT*").

3. Article II(7) of the Treaty provides that:

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

4. The Request for Arbitration filed by Ecuador was based on Article VII of the Treaty.[1]

5. Article VII(1) of the Treaty provides 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, 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.

[1] Claimant's Request, pp. 2–3.

6. According to Ecuador, the dispute arises from the erroneous interpretation and application of Article II(7) of the Treaty in the Partial Award issued in the *Chevron*[2] case.[3]

7. Ecuador maintained that the dispute arose from the United States' refusal to engage in discussions on the timely requests made by Ecuador, which called for an answer. Ecuador claimed that its efforts to reach a solution through consultations or other diplomatic channels proved to be unsuccessful and, therefore, the issue remains unresolved: "This Request for Arbitration seeks resolution of the dispute, in the interest of both Parties, by means of an authoritative determination on the proper interpretation and application of paragraph 7 of Article 11 of the 'Treaty that accords with what the Republic of Ecuador considers to have been the intentions of the Parties at the time when the Treaty was concluded."[4]

8. On 29 March 2012, the United States submitted its Statement of Defence pursuant to Article 19 of the UNCITRAL Rules and Procedural Order No. 1.

9. The Respondent asserted that there was no dispute whatsoever but rather a unilateral attempt by Ecuador to secure a new interpretation of Article II(7) of the Treaty, alleging that no provision of either the BIT nor international law supported Ecuador's request to obligate a Contracting State to interpret the Treaty.[5]

10. On 25 April 2012, the United States submitted its Memorial on Objections to Jurisdiction of the Tribunal.

11. On 23 May 2012, Ecuador submitted its Counter-Memorial on Jurisdiction.

12. The objections to the jurisdiction of the Tribunal as raised by the Respondent may be summarised as follows: Article VII of the BIT does not authorise State Parties to resort to arbitration in order to secure an abstract interpretation of a treaty clause, which means that, in the absence of a concrete case, there is no jurisdiction. Nor is there jurisdiction in the absence of a dispute or in the event of failure to infer positive opposition giving rise to such dispute from the United States' silence. There follows below a separate analysis of these objections.

II. The Compromissory Clause: Article VII of the BIT

13. Ecuador based its Request for Arbitration on Article VII of the BIT. The United States objected to the jurisdiction of the Tribunal by alleging that the Parties had failed to consent under Article VII to arbitrate issues removed

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[2] *Chevron Corporation and Texaco Petroleum Company* v. *The Republic of Ecuador*, PCA Case No. 2007–2, Partial Award of 30 March 2010.

[3] Claimant's Request, pp. 4 *et seq.*

[4] *Ibid.*, p. 7.

[5] Respondent's Statement of Defense, pp. 1–2.

from actual disputes in relation to the performance of their obligations pursuant to the Treaty. The Respondent maintained that, even if the facts show that a dispute does exist, Ecuador failed to resort to the suitable mechanism in order to engage in consultations before commencing the arbitration.[6]

14. The Respondent stated that, were a dispute to exist, such a dispute was between Ecuador and Chevron, not the United States. Rather than a request, the demand made by Ecuador to the United States by means of its Diplomatic Note was an ultimatum whereby Ecuador threatened to submit the United States to arbitration if it refused to accept the interpretation it proposed.[7]

15. According to the Respondent, since there was no violation of the Treaty, there was no concrete dispute on the interpretation of the Treaty which may be submitted to the jurisdiction of this Tribunal pursuant to Article VII.

16. The Respondent maintained that the points at issue in the Request for Arbitration posed merely abstract questions and demonstrated the lack of a concrete dispute between the Parties. The United States found Ecuador's demand to be political in nature, and thus, it could not be settled through arbitration.

17. According to the United States, the requirement of allegation of a breach is firmly enshrined in Article VII. I cite Judge Fitzmaurice in his separate opinion in the ICJ case *Northern Cameroons*, where he stated that: "This minimum, is that one party should be making or should have made a complaint, claim or protest about an act, omission, or course of conduct, present or past, of the other party".[8]

18. In my opinion, it is clear that Judge Fitzmaurice was making reference to a dispute on the application of a treaty which was claimed to have been breached, not only its interpretation. It is worth recalling that this separate opinion penned by Judge Fitzmaurice was not followed by the majority, who, on the contrary, acknowledged the Court's power to issue a declaratory judgment.[9]

19. For its part, Ecuador argued that Article VII empowers the Tribunal to issue a binding decision on a dispute between the parties concerning the interpretation and application of a Treaty and in particular on the meaning or application of a specific provision.[10]

20. Ecuador maintained that Article VII confers jurisdiction over "*any dispute*" concerning the interpretation or application of the Treaty. The Claimant based its position on the ordinary meaning of the terms of Article VII and the precedents of international jurisprudence that confirm that an Article VII

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[6] Respondent's Memorial on Jurisdiction, p. 3; Transcript (Hearing on Jurisdiction), Day 1, 25 June 2012, pp. 110:9–111:17; Transcript (Hearing on Jurisdiction) Day 2, 26 June 2012, p. 311:7–16.

[7] *Ibid.*, p. 3, Transcript (Hearing on Jurisdiction), Day 1, p. 14:11–20.

[8] *Case Concerning the Northern Cameroons* (Cameroon *v.* United Kingdom) (hereinafter "*Northern Cameroons*"), Separate Opinion of Judge Fitzmaurice, ICJ Reports 1963, p. 109.

[9] *Ibid.,* Judgment of 2 December 1963, ICJ Reports 1963, p. 37.

[10] Claimant's Counter-Memorial on Jurisdiction, p. 9.

tribunal can exercise jurisdiction over abstract disputes, insofar as such disputes concern the interpretation and application of the Treaty.[11]

21. Ecuador alleged that, in principle, international law does not demand as a prerequisite to the finding of a dispute that it involve a breach of the Treaty or that it be a concrete dispute, more than what is provided by Article VII.[12]

22. As to the terms of Article VII, Ecuador maintained that its ordinary meaning confers jurisdiction upon this Tribunal regarding any dispute concerning the interpretation or application of Article II(7). In support of its position, the Claimant cited the Permanent Court of International Justice (the "*PCIJ*") which, in interpreting a similar compromissory clause, asserted that a tribunal may exercise jurisdiction over any dispute, because the clause's jurisdictional reach was as comprehensive as possible.[13]

23. I agree with Ecuador that the fact that the phrase "interpretation or application" of Article VII of the BIT was stated in a disjunctive manner evidences the Parties' agreement that a dispute concerning the interpretation of the Treaty may be submitted to arbitration without also requiring that a dispute regarding the application of the Treaty be submitted at the same time, and *vice versa*.[14]

24. Under international law, there is no doubt that the terms "interpretation" and "application" are distinct concepts. From the viewpoint of legal doctrine, a convincing clarification was offered by the *Harvard Law School's Draft Convention on the Law of Treaties*, which defined the term "interpretation" as "the process of determining the meaning of a text", as opposed to "application", which is defined as "the process of determining the consequences which, according to the text, should follow in a given situation".[15]

25. By citing the position adopted by the United States in the case *United States Diplomatic and Consular Staff in Tehran*,[16] Ecuador argued that a dispute on the interpretation of a treaty may arise irrespective of whether there is a dispute regarding the treaty's application, provided that the parties have different viewpoints as to the meaning and scope of a treaty clause.

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[11] *Ibid.*

[12] *Ibid.*

[13] *Ibid.*, p. 10, citing *Mavrommatis Palestine Concessions* (Greece *v.* U.K.), Judgment of 30 August 1924, 1924 P.C.I.J., Series A, No. 2, p. 11.

[14] Claimant's Counter-Memorial on Jurisdiction, p. 11.

[15] *Ibid.*, citing *Harvard Law School's Draft Convention on the Law Treaties*. In addition, there is ample precedent to support the meaning of these concepts, see *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion of 30 March 1950, *ICJ Reports 1950*; *Case concerning a boundary dispute between Argentina and Chile concerning the frontier line between boundary post 62 and Mount Fitzroy*, Decision of 21 October 1994, *RIAA*, Vol. XXII. In the same vein, the opinion of Judge Higgins in the case *Oil Platforms* regarding the distinctive elements of "interpretation" and "application" cited by Ecuador is also relevant (Claimant's Counter-Memorial on Jurisdiction, pp. 11–12 citing *Oil Platforms (Islamic Republic of Iran* v. *United States of America)*, Judgment of 12 December 1996, *ICJ Reports 1996*.

[16] Claimant's Counter-Memorial on Jurisdiction, p. 13, note 18.

A. Disputes between an Investor and a State Party (Article VI) and Disputes between States (Article VII)

26. The United States alleged that Article VII of the Treaty should be construed within the framework of Article VI whereby the investors of a Party may commence an arbitration proceeding against the other Party with respect to investment disputes and secure a final and binding award.[17] The Respondent maintains that this provision is vital for the operation of the BIT and constitutes a separate and essential mechanism whereby the Parties have authorised arbitral tribunals to settle actual disputes that investors may submit to arbitration directly against the host State.[18] Due to Article VI, the United States concludes that a State-to-State tribunal constituted under Article VII lacks appellate jurisdiction over such awards. As Professor M. Reisman notes, the United States alleges that Articles VI and VII create two distinct tracks of arbitration that "*assign[] a different range of disputes exclusively to each of the tracks*".[19]

27. According to the United States, the limited scope of Article VII is confirmed by the basic object and purpose of the Treaty, *i.e.*, the promotion and reciprocal protection of investment. Article VI provides the main mechanism for the settlement of disputes concerning breach by either Party of the obligations undertaken under the Treaty. On the other hand, Article VII creates a residual mechanism intended to ensure that the Parties abide by the treaty in certain circumstances.

28. According to Ecuador, the dispute resolution systems provided for Article VI and Article VII of the Treaty are distinct and independent from one another. Article VI refers to disputes between investors and a State Party regarding alleged breaches of the Treaty. Article VI does not concern all disputes, but rather only certain concrete disputes submitted by an investor against the host State. Article VI does not authorise the abstract interpretation of the Treaty in the absence of a claim for breach of the Treaty. By contrast, the mechanism of Article VII, being independent from the mechanism of Article VI, makes reference to any dispute between States concerning the interpretation or application of the Treaty. The parties to the disputes under Article VI and Article VII differ as do the scope and content of the disputes submitted under one mechanism or the other.

29. Ecuador argued that the Article VII system is not an appellate mechanism for awards issued under the dispute settlement provision of Article VI. The Claimant also submitted that Article VII did not entail a referral system or a mechanism aimed at issuing advisory opinions.

30. The United States relied on no precedent whatsoever in support of the residual nature of the dispute settlement mechanism set forth in Arti-

[17] Respondent's Memorial on Objections to Jurisdiction, p. 19.

[18] *Ibid*., pp. 19–20.

[19] *Ibid*., p. 20.

cle VII or the limited scope thereof, arguing that Article VII of the Treaty is there "[…]for example, to resolve a dispute over a Party's non-payment of an investor-State arbitration award in violation of Article VI(6) of the Treaty".[20]

31. In my view, neither the text nor the context of the Treaty allow a restrictive and partial interpretation of Article VII, let alone the dependence or subordination thereof to the mechanism provided for by Article VI of the Treaty. The mechanisms set forth in Article VI and Article VII are independent from one another. Thus, the awards issued within the framework of each system are fully independent. Consequently, the awards issued in accordance with Article VI are binding upon the Parties to the dispute only, *i.e.*, the investor of one Party and the other State Party, whereas the awards issued under Article VII are binding upon State Parties only.

B. Consultations (Article V) and Recourse to Inter-State Arbitration (Article VII)

32. According to the United States, the context of the Treaty confirms the absence of a dispute, since, for a dispute to exist, there must be a claim for breach of a treaty provision. In the Respondent's opinion, Article VII should be interpreted within the framework of the text of Article V of the Treaty.[21]

33. Article V provides that:

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

34. The United States considered that Ecuador's request concerned a "matter" or issue, *i.e.*, a situation covered by Article V, not a dispute involving the existence of a claim for breach of a Treaty provision, as enshrined in Article VII. Hence, the Respondent argued that, as long as Ecuador claimed that the United States refused to engage in consultations in order to agree upon the meaning of Article II(7), the mechanism applicable to refer such claims for resolution is set forth in Article V, not Article VII. However, Ecuador has never relied upon Article V.[22]

35. From my point of view, having read the relevant Articles of the Treaty, it cannot be concluded that Article V is a prerequisite or a condition precedent for recourse to Article VII. Therefore, Ecuador was not obligated to follow such a course of action.

36. The United States argued that if the Parties wish to clarify the meaning of the Treaty, they must reach agreement, for instance, through the consul-

[20] *Ibid*., p. 20.

[21] *Ibid*., p. 18.

[22] *Ibid*., p. 19.

tation procedure set forth in Article V.[23] In this regard, I believe that a problem arises where either party deliberately does not wish to clarify the meaning of a treaty. This situation allows the other State to resort to the mechanism agreed upon in Article VII of the Treaty, *i.e.*, arbitration.

37. Even though Article V is not a prerequisite or condition precedent to trigger recourse to Article VII, in the event of frustrated consultations and negotiations, the only alternative in order to settle a dispute is the possibility of resorting to arbitration as a method to ensure a neutral and suitable solution.

38. The myth of judicializing diplomacy in resorting to arbitration in order to settle a dispute underestimates the dispute settlement system which, in this case, is activated by the reluctance of one of the Parties to acknowledge a dispute and the frustration of prospective negotiations as the primary method to reach an agreement acceptable to both Parties. Therefore, the interpretation made by an arbitral tribunal constituted under Article VII will neither jeopardise nor undermine the arbitration mechanism between investors and States set forth in Article VI. On the other hand, it is difficult to understand how recourse to arbitration will politicise investment disputes between investors and States, where the purpose of arbitration is to interpret a treaty rule according to what the parties regarded is its content and scope, thus ensuring the necessary credibility of the system by clarifying the law in force, as the Parties stated at the time of expressing their consent to be bound.

39. According to the United States, the purpose of Article V is to foster talks, not arbitration, on a wide variety of issues concerning the interpretation or application of the Treaty, including abstract matters in relation to the meaning of Article II(7).[24] In this regard, it strikes me that recourse to arbitration may not be seriously considered a threat to the continuity of diplomatic talks, especially in the face of the specific situation where a State refuses to adopt a position, so that its unilateral attitude be understood as constituting the absence of a dispute. The position of remaining silent and not responding adopted by the United States, coupled with its expectation that its attitude should not be deemed to create a dispute by inference, will be analysed *infra*, taking into consideration such facts as may be relevant and the arguments of both Parties.

C. The Obligation to Respond and the Obligation to Agree on an Interpretation

40. The Respondent asserted that the content of neither Article VII of the BIT nor general international law support the Claimant's position of resorting to an arbitral tribunal so that it can interpret a clause of the Treaty. Ecuador's argument is opposed by the very meaning of Article VII, read in

[23] *Ibid*., p. 38.

[24] *Ibid*., pp. 64–65.

context and in light of the object and purpose of the Treaty, as well as by a century of unbroken international jurisprudence.[25]

41. According to the United States, it has no obligation to respond to Ecuador, let alone confirm its unilateral interpretation of the Treaty, *i.e.*, under both the Treaty and international law, Ecuador is not entitled to demand that the United States confirm its own interpretation of Article II(7) or submit to arbitration.

42. The United States argued that it exercised its own discretion in failing to respond to Ecuador's demand. The Respondent alleged that it retains the discretion to mutually agree on a joint interpretation or "subsequent agreement", only if it so desires in order to clarify the Parties' understanding of a particular provision. Likewise, it retains the discretion not to go into detail as to the meaning of a specific treaty provision.[26] According to the United States, no provision of the Treaty compels the Respondent to respond to Ecuador's demand to confirm its interpretation.[27]

43. The United States stated that the only provision of the Treaty where it has undertaken to engage in consultations as to the meaning of its provisions was Article V. As Professor Tomuschat has opined, this would have been the proper avenue to see if the Parties could agree to a mutually acceptable interpretive statement.[28]

44. The United States argued that general international law does not require a State to respond to an interpretative statement.[29] Accordingly, I believe that Ecuador did not object to this argument by Respondent. Undoubtedly, under general international law, there is no generic obligation whereby a State is compelled to negotiate or agree upon a new interpretation of a treaty. Nevertheless, Ecuador's demand focuses on a claim for interpretation of a treaty clause as agreed upon by the parties at the time of expressing their consent to be bound. It is evident that Ecuador may not "impose" its unilateral interpretation on either the United States or the Tribunal, but it simply submitted the dispute on interpretation to the decision of this *ad hoc* Tribunal pursuant to Article VII of the Treaty. Ecuador requests that the Tribunal acknowledge its interpretation, although it is for the Tribunal, not the Parties, to make such a determination.

45. In this context, it is relevant to highlight the United States' citation in its Memorial on Objections to Jurisdiction, of the statement made by the President of this Tribunal, whereby "[t]he role of the treaty interpreter is not to look for the will of one of the parties or the intended will of one of the parties, but the consensual will of all of the parties, which stems from the text they agreed

[25] *Ibid*., pp. 15–16.

[26] *Ibid*., pp. 36–37.

[27] *Ibid*., p. 38.

[28] *Ibid*., p. 39.

[29] *Ibid*., p. 41.

to and upon which the agreement was built".[30] The United States reiterated its view that there is no dispute because there is no concrete case, since Ecuador made no allegation of a breach of the Treaty. In addition, the Respondent noted that Ecuador confirmed that it accused the United States of no misbehaviour, of no breach of its international obligations, it has required no compensation from the United States, and it has requested no order against it.[31] Ecuador has not denied this allegation made by Respondent. Thus, it may be asserted that there was no dispute whatsoever between the Parties on the existence of an obligation to agree on the interpretation of a clause of the Treaty.

46. In my opinion, Ecuador's demand contains no requirement to "agree upon" or "impose" a given course of action, but requires that Article II(7) be interpreted in accordance with the common intention of the Parties at the time of the Treaty's negotiation and later in their expressed consent to be bound by the Treaty. Ecuador's demand is based on the compromissory clause agreed upon by the Parties in Article VII of the BIT. It makes reference to a dispute concerning the interpretation of the Treaty, not a dispute on the obligation of the United States to respond to Ecuador's demand that it confirm its own interpretation.

D. The Interpreting Function and the Lawmaking Function

47. According to the United States, were the Tribunal to issue an interpretation of Article II(7) as required by Ecuador, it would be exceeding its judicial powers and creating international law, to the detriment of the right of both Parties to interpret the Treaty.[32]

48. The Respondent maintained that Ecuador's position entailed judicializing the relationships of State Parties under the Treaty[33] by purporting to extend the scope of Article VII to situations not arising from the breach of a Treaty provision.

49. According to the United States, in view of the complete lack of any alleged breach or other wrongdoing by the United States, this Tribunal should decline Ecuador's invitation to engage in judicial lawmaking, and dismiss Ecuador's request.[34]

50. The United States alleges that the Tribunal's assertion of jurisdiction to interpret Article II(7) of the BIT would entail assuming a legislative power that the Tribunal does not have.[35] The Respondent maintained that an abstract interpretation of Article II(7) exceeds the judicial functions granted by Article VII.

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[30] *Ibid*., pp. 48–49.

[31] Transcript (Preliminary Hearing), 21 March 2012, p. 18:17–25 (Statement by Ecuador's counsel).

[32] Transcript (Hearing on Jurisdiction), 25 June 2012, p. 130:3–6.

[33] *Ibid*., p. 133:4–10.

[34] Respondent's Memorial on Objections to Jurisdiction, p. 29.

[35] *Ibid*., p. 55.

51. According to the United States, Ecuador requests that this Tribunal be "*the author of new rules*" in order to find jurisdiction under Article VII and ultimately to issue "*interpretations*" of Article II(7) that go beyond the text of the Treaty.[36]

52. On the basis of the foregoing assertion, I believe, firstly, that the Respondent clearly stated that it resists, and thus, opposes, the interpretation of Article II(7) proposed by Ecuador. Secondly, it shows an incomprehensible confusion between the interpreting function and the lawmaking function under international law, especially where, in its Memorial on Objections to Jurisdiction, the Respondent cited *verbatim* the statement made by the President of this Tribunal: "*An interpreter of law is someone who tries to explain what other people have drafted. He does not and should not create new rules. The interpreter does not have the right to say more or less than what is said in the text he is interpreting, and which is not his will but that of the author of the rules*".[37]

53. It is evident that if the interpretation alleged by Ecuador exceeds what the Parties agreed on in the Treaty, it is the Tribunal who shall determine that in addressing the merits of the case concerning the interpretation of Article II(7). The content and scope of Ecuador's interpretation does not concern the jurisdiction of the Tribunal, but rather go to the merits of the issue.

54. According to the United States, Ecuador's demand concerning the general and abstract interpretation of a Treaty clause deprives the Parties from the right to interpret the Treaty.[38] However, in this regard, I believe that it is the Treaty in particular that, by means of the compromissory clause of Article VII, gives States the possibility of resorting to arbitration in order to settle a dispute concerning the interpretation of one of its provisions.

E. Abstract Interpretation and the Existence of a Concrete Case

55. The United States claimed that Article VII of the BIT does not authorise State Parties to resort to arbitration in order to settle disputes concerning the interpretation of the Treaty in the absence of a concrete case. According to the Respondent, the concrete case requirement entails one party alleging the breach by the other party of a treaty clause.

56. The position of the United States is based on the ICJ precedent in *Northern Cameroons*.[39]

57. In turn, Ecuador stated that the ICJ's reference in *Northern Cameroons* to the notion of a concrete case is restricted to the practical consequences that

[36] *Ibid*.

[37] *Ibid*., see note 189.

[38] *Ibid*., p. 59.

[39] *Northern Cameroons* (Cameroon *v.* United Kingdom), Judgment of 2 December 1963, *ICJ Reports 1963*.

a judgment might have on the parties to the dispute, not to the existence of an allegation of breach of a rule of international law. As a result, the Claimant argued that Article VII of the BIT allows State Parties to resort to arbitration in order to settle a dispute on the abstract interpretation of a treaty in force and effect.

58. In the *Northern Cameroons* case, the ICJ held:

> The function of the Court is to state the law, but it may pronounce judgment only in connection with concrete cases *where there exists at the time of the adjudication an actual controversy* involving a conflict of legal interests between the parties. The Court's judgment must have practical consequences in the sense that *it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations. No judgment on the merits in this case could satisfy these essentials of the judicial function*.[40]

59. In my understanding, one cannot but read that paragraph in its own context: for the first time the Court referred to a "concrete case" with regard to the impossibility of delivering a judgment without legal effect due to the fact that there was no actual case. The inexistence of a case was a direct consequence of the Trusteeship Agreement's termination and the recognition of Nigeria as a new independent State. For the Court, these situations made the case moot.

60. As mentioned, the Court found that the object of the dispute disappeared due to the fact that the Trusteeship Agreement was terminated a few days after the Claimant;s application was filed. The Court further stated,

> [W]ithin two days after the filing of the Application the substantive interest which the procedural right would have protected, disappeared with the termination of the Trusteeship Agreement with respect to the Northern Cameroons. After I June 1961 there was no "trust territory" and no inhabitants for whose protection the trust functions could be exercised. […][41]

61. It follows that the "practical consequences" requirement mentioned by the ICJ in the *Northern Cameroons* case was related to the actual existence of a dispute in the sense that it must affect "existing" legal rights and obligations of the parties.

62. In the present case, Ecuador's claimed purpose is to obtain an authentic interpretation of a treaty clause through the application of international law by an impartial tribunal constituted under article VII of the BIT. The natural effect of the decision of an arbitral award concerning the interpretation of a treaty clause will be binding on both parties in relation to the proper meaning and scope of that particular clause. All other effects that a binding award may have in relation to the parties to the dispute should not be dealt with during the jurisdictional phase. It should be sufficient for the Tribunal to

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[40] *Ibid*., pp. 33–34 (emphasis added).

[41] *Ibid*., p. 36.

understand that, whatever the final outcome of its decision, it surely will bring a measure of juridical certainty on the applicable law between the parties.

F. Declaratory judgments and practical consequences in international law

63. It is illustrative to refer to certain passages in the *Northern Cameroons* case that clarifies the Court's position regarding what it meant when referring to "practical consequences" precisely in relation to its power to produce a declaratory judgment and its practical effects.

64. In that context, the *Northern Cameroons* case is also a relevant precedent concerning treaty interpretation. In reference to the declaratory effect pursued by Cameroon in its Application, the Court stated that:

> Throughout these proceedings the contention of the Republic of Cameroon has been that all it seeks is a declaratory judgment of the Court that prior to the termination of the Trusteeship Agreement with respect to the Northern Cameroons, the United Kingdom has breached the provisions of the Agreement, and that, if its application were admissible and the Court has jurisdiction to proceed to the merits, *such a declaratory judgment is not only one the Court could make but one that it should make* […].[42]

65. The Court added,

> *That the Court may, in an appropriate case, make a declaratory judgment is indisputable…* If the Court is satisfied, whatever the nature of the relief claimed, that to adjudicate on the merits of an Application would be inconsistent with its judicial function, it should refuse to do so. *Moreover the Court observes that if in a declaratory judgment it expounds a rule of customary law or interprets a treaty, which remains in force, its judgment has a continuing applicability.* But in this case there is a dispute about the interpretation and application of a treaty—the Trusteeship Agreement—which has now been terminated, is no longer in force, and there can be no opportunity for a future act of interpretation or application of that treaty in accordance with any judgment the Court might render.[43]

66. The Court then cited the PCIJ on the *Interpretation of Judgment No. 7 and 8*,[44] where it stated that

> The Court's Judgment No. 7 is in the nature of a declaratory judgment, the intention of which is to ensure recognition of a situation of law, once and for all and with binding force as between the Parties; so that the legal position thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned.[45]

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[42] *Ibid*. (emphasis added).

[43] *Ibid*., p. 37 (emphasis added).

[44] *Case Concerning the Factory at Chorzów*, 1927, *PCIJ Series A*, No. 13, p. 20.

[45] *Northern Cameroons*, ICJ *Reports 1963*, p. 37.

67. The Court also observed that,

> It may also be agreed, as Counsel for the Applicant has suggested, *that after a judgment is rendered, the use which the successful party makes of the judgment is a matter which lies on the political and not in the judicial plane*. But it is not the function of a Court merely to provide a basis for political action if no question of actual legal rights is involved. Whatever the Court adjudicates on the merits of a dispute, one or the other party, or both parties, as a factual matter, are in a position to take some retroactive or prospective action or avoidance of action, which would constitute a compliance with the Court's judgment or defiance thereof. That is not the situation here.[46]

68. The Court finally concluded that

> Whether or not at the moment the Application was filed there was jurisdiction in the Court to adjudicate upon the dispute submitted to it, circumstances that have since arisen render any adjudication devoid of purpose. Under these conditions, for the Court to proceed further in the case would not, in its opinion, be a proper discharge of its duties.[47]

69. Under those circumstances, the Court stressed that, "[a]ny judgment which the Court might pronounce would be without object".[48]

70. In conclusion, the existence of a "concrete case" depends upon the existence of a dispute of legal interests with respect to a rule of law, which is, at the time of adjudication, in force between the parties. If not, "[…] the Court is relegated to an issue remote from reality".[49]

71. Thus, the practical consequences of an award under article VII of the BIT should be understood in the sense that "*it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations*".[50]

72. Our present case concerns a treaty that is in force and binding upon Ecuador and United States. It is not for this Tribunal to decide at the jurisdictional phase on the legal consequences of its award without going into the merits. In deciding on its jurisdiction, it suffices for the Tribunal to confirm that the Treaty is in force and that the settlement of the dispute concerning interpretation is intended to provoke juridical certainty on the proper meaning and scope of a treaty clause, thus removing uncertainty from their legal obligations, with binding effects for both Parties.

73. In my understanding, the Respondent's arguments based on the *Northern Cameroons* case concerning the requirement of a concrete case and the requirement of practical consequences are misleading.

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[46] *Ibid*., pp. 37–38 (emphasis added).

[47] *Ibid*., p. 38.

[48] *Ibid*.

[49] *Ibid*., p. 33.

[50] *Ibid*., p. 34 (emphasis added).

G. Precedents Concerning the Abstract Interpretation of Treaties and their Interpretation in the Face of Concrete Cases (Allegation of Breach)

74. International courts and tribunals have repeatedly applied compromissory clauses similar to that of Article VII in order to determine whether to exercise jurisdiction over disputes concerning the interpretation of treaties in which there is no allegation of a breach of the treaty.

75. During the jurisdictional phase, both the United States and Ecuador engaged in broad arguments and discussions on the precedents relied upon by one or both Parties.

Precedents Relied Upon by the United States

76. The only case that the United States invoked in its Memorial on Objections to Jurisdiction to support its position on the inability of an international tribunal to exercise jurisdiction over a demand for interpretation of a treaty clause without allegation of breach is *Cases of Dual Nationality* settled by the Anglo-Italian Conciliation Commission, created by the compromissory clause of Article 83 of the Peace Treaty entered into with Italy in 1947.[51] The Conciliation Commission found that an authoritative abstract interpretation may create rules of law, which is not a jurisdictional function, but rather, a legislative function.[52]

77. The Commission made a distinction between the power of interpretation and the lawmaking power, based on the fact that the United Kingdom's request sought more than just the interpretation of the text, which might lead the tribunal to exceed its jurisdiction, thus performing a lawmaking function. Nonetheless, in the case at hand, Ecuador demands that Article II(7) be interpreted within the meaning and scope assigned to the clause in the course of negotiations and at the time where both Parties expressed their consent to be bound by the Treaty.

78. Ecuador did not request that a new rule be created, but that a treaty clause be construed within the meaning assigned by the Parties at the time of expressing their consent to be bound. For this reason, whether the proposed interpretation exceeds what the Parties expressly agreed upon at the time of drafting the text of the relevant clause shall be determined by the Tribunal when analysing the merits.

79. The Conciliation Commission declined jurisdiction as it was to act under a compromissory clause which expressly required a breach of treaty. The Commission asserted that it had to limit its activities to determining the dis-

[51] Respondent's Memorial on Jurisdiction, pp. 57–58; Claimant's Counter-Memorial on Jurisdiction, pp. 21–22.

[52] Transcript (Hearing on Jurisdiction), 25 June 2012, p. 130:7–25.

putes arising from claims presented according to the terms of Article 78 of the Peace Treaty.[53] However, the compromissory clauses of Article 83 of the Peace Treaty differs fundamentally from Article VII of the BIT relied upon in this case.

80. According to Ecuador, in the *Cases of Dual Nationality,* Italy first was required to fail to satisfy a claim in the face of the alleged breach as enshrined in the Peace Treaty. A bi-national Commission would then intervene, whereupon, in the event that the dispute was not settled, the arbitration mechanism was set in motion. Furthermore, Ecuador alleged that the Commission was especially mindful not to exceed the limits of its jurisdiction and make an abstract interpretation of future application that would be binding on all parties without their express consent.[54]

81. On my reading, the text of the Award makes clear that the Commission expressed that, in the exercise of its jurisdictional functions, it "[…] can only conclude that the Commission must limit its activities to determining the disputes arising from claims presented according to the terms of Article 78 of the Peace Treaty". Consequently, it understood that it had not been granted the power "to exceed the limits which the Peace Treaty assigns formally to its jurisdiction […] One cannot exceed the limits which the principles, the text and the spirit assign to the competence of the Commission […]".[55]

82. In this regard, we may conclude that it is clear that the Anglo-Italian Commission had no jurisdiction as its jurisdiction was conditional upon the text and spirit of the compromissory clause of the treaty which limited it to the existence of a dispute concerning breach of the relief scheme. Within such a framework, the compromissory clause differs fundamentally from that agreed upon by the Parties in the instant case through Article VII of the BIT. Therefore, in my opinion, the only precedent relied upon by the United States is irrelevant.

83. What is highly revealing about the *Cases of Double Nationality* is that the Anglo-Italian Commission assumed that it had features inherent in any conciliation commission, and thus, such functions as were not inherent therein had to be expressly acknowledged in the treaty that created them.[56]

84. Moreover, the United States alleged that the existence of a concrete case concerning the breach of a rule of international law is evidenced by precedents from tribunals settling disputes between investors and States, such as ICSID tribunals. Regarding this argument, it should be borne in mind that for an ICSID tribunal to have jurisdiction, there must be an alleged breach of an investment protection treaty. ICSID arbitration tribunals only have jurisdiction over disputes between investors and States in which the breach of a treaty clause relied upon as a basis for the jurisdiction of the tribunal must be alleged.

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[53] Transcript (Hearing on Jurisdiction), 26 June 2012, p. 240:4–10.

[54] Claimant's Counter-Memorial on Jurisdiction, pp. 24–25.

[55] *Cases of Dual Nationality*, Anglo-Italian Conciliation Commission, Decision No. 22 of 8 May 1954, *RIAA*, Vol. XIV, p. 34.

[56] *Ibid*., p. 35.

Precedents Relied Upon by Ecuador

85. In turn, Ecuador made reference to a series of international precedents in which it found consistent and repeated application of compromissory clauses, similar to that of Article VII of the BIT, admitting the exercise of the judicial function for the purpose of interpreting clauses, without a specific allegation of a breach of treaty.

86. A brief reference to such precedents sets in context the importance of the scope that international tribunals attach to clauses similar to that of Article VII of the BIT so as to determine their own jurisdiction.

87. In the case *Certain German Interests in Polish Upper Silesia*,[57] the PCIJ dismissed a jurisdictional objection based on the allegedly abstract character of the question at issue because a State is not precluded from seizing a tribunal's jurisdiction in relation to an abstract issue of treaty interpretation.[58]

88. The Court held:

> 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 fulfil. It has, in fact, already had occasion to do so in the Judgment No. [Treaty of Neuilly].[59]

89. In this case, the United States alleged[60] that the compromissory clause at issue in *Certain German Interests* covered "differences of opinion" and not a "dispute". Therefore, the United States argued that a lower standard was established in order to secure jurisdiction. However, the text of the compromissory clause that gave rise to the precedent mentioned *supra* clearly evidenced that the parties understood that they were referring to "international disputes". The simple reading of the relevant portions of the ruling indicates that the Court made no distinction whatsoever between a "difference of opinion" and a "dispute" concerning interpretation.

90. The United States maintained that in *Judgment No. 3* of the PCIJ, Bulgaria and Greece had expressly consented to the Court's interpretation of the Treaty of Neuilly. By applying such reasoning to the case at hand, I understand that Article VII of the BIT also evidences an agreement, although in this general case it is an agreement to arbitrate "any dispute", including those on abstract interpretations of the Treaty.

91. The case concerning the *Rights of Nationals of the United States of America in Morocco* is another example of acknowledgement by the ICJ of its ability to interpret a treaty for the purpose of clarifying the parties' rights and

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[57] *Certain German Interests in Polish Upper Silesia (Merits)*, (1926), *PCJI Series A*, No. 7.

[58] Claimant's Counter-Memorial on Jurisdiction, p. 14.

[59] *Certain German Interests in Polish Upper Silesia (Merits)*, (1926), *PCJI Series A*, No. 7, pp. 18–19.

[60] Transcript (Hearing on Jurisdiction), 25 June 2012, p. 147:14–24.

obligations, thus removing the absence of certainty as to the law in force.[61] According to the United States, even though it was the accused party France brought the case to the ICJ. Thus, not surprisingly, France did not frame the issues in terms of alleged treaty breaches, but rather sought a declaration of its rights and obligations under the treaty.[62] Nevertheless, the simple reading of the case demonstrates that the Court eventually issued a decision regardless of the breach of any obligation under the agreements invoked.

92. In the case concerning the *Interpretation of the Statute of the Memel Territory*, the PCIJ claimed to have jurisdiction over the interpretation of Article 17 of the Statute irrespective of the existence of a breach. The Permanent Court asserted:

> The actual text of Article 17 shows that the two procedures relate to different objects. The object of *the* procedure before the Council is the examination of an 'infraction of the provisions of the Convention', which presupposes an act already committed, whereas the procedure before the Court is concerned with 'any difference of opinion in regards to questions of law or fact.' Such difference of opinion may arise without any infraction having been noted".[63]

93. Article 17 of the Statute stated that "*any difference of opinion*" constituted "*a dispute of an international character*" pursuant to Article 14 of the Covenant of the League of Nations.[64]

94. In addition, the Court held that the purpose of proceedings before the Council involved breach of treaty clauses, which assumes an act that has already occurred, whereas proceedings before the Court concerned any difference of opinion on questions of fact or of law.

95. In the case of *Pensions of Officials of the Saar Territory*,[65] the arbitral tribunal found that it had jurisdiction over a request for the interpretation of Article 10 of the Baden-Baden Agreement even though no breach of the treaty had been alleged.

96. Such a criterion was also adopted by the Tribunal in the case of *The Re-Valuation of the German Mark*, in deciding on the interpretation of the 1953 Agreement on German External Debts, regardless of the existence of an allegation of breach of the relevant agreement. The Tribunal held:

> The Applicant's right to an authoritative interpretation of the clause in dispute […] is grounded on the bedrock of the considerations which the Applicants gave and the concessions which they made in Exchange for

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[61] *Rights of Nationals of the United States of America in Morocco* (France *v.* United States of America), Judgment of 27 August 1952, *ICJ Reports 1952*.

[62] Transcript (Hearing on Jurisdiction), 25 June 2012, pp. 145:18–146:1.

[63] *Interpretation of the Statute of the Memel Territory*, Judgment (Preliminary Objections) (1932), *PCIJ Series A/B*, No. 49, p. 248.

[64] See text of Art. 17 in Claimant's Counter-Memorial on Jurisdiction, p. 20, note 41.

[65] *Pensions of officials of the Saar Territory*, Germany—Government Commission of the Saar Territory, *RIAA*, Vol. III (1934).

> the disputed clause. They have the right to know what is the legal effect of the language used. The Tribunal in the exercise of its judicial functions is obliged to inform them.[66]

97. Apart from such precedents, it is worth analysing conclusive precedents from the Iran–United States Claims Tribunal, whereby the Tribunal exercised jurisdiction over matters concerning abstract interpretation.

98. Within the framework of Case No. A/2, the Iran–United States Claims Tribunal maintained that:

> According to article VI paragraph 4 of the Claims Settlement Declaration, "any question concerning the interpretation or application of this agreement shall be decided by the Tribunal upon request of either Iran or the United States", and according to paragraph 17 of the General Declaration, and Article II, paragraph 3 of the Claims Settlement Declaration, any dispute arising between the Parties as to the interpretation of any provision of the General Declaration may be submitted by either Party to binding arbitration by the Tribunal. On that dual basis, the Tribunal has not only the power but the duty to give an interpretation on the point raised by Iran.[67]

99. Case No. A/17 is another example of a precedent of the Iran–United States Claims Tribunal in which the Tribunal acknowledged that its decision concerned solely interpretative guidance.[68] Thus, it did not involve a decision concerning the breach of an applicable rule of international law.

100. The United States tried to mitigate the weakness of its position in the face of the cases determined by the Iran–United States Claims Tribunal by claiming that in those cases, the parties had expressly consented to the extension of the tribunal's jurisdiction.[69] Contrary to the position of the United States, the simple reading of both awards indicates that none of those decisions made reference to a special consent of the parties in order to empower the tribunal to hear interpretation disputes irrespective of treaty breaches.

101. The United States also argued that, in the context of cases A/2 and A/17, the parties had never objected to the jurisdiction of the Tribunal. In support of its position, the Respondent cited the concurring opinion of two of the judges who stated that it was the Parties' practice to modify the Tribunal's jurisdiction when necessary by mutual consent.[70] Ecuador considers the United States' argument regarding the fact that neither party had objected to the

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[66] *The Question whether the re-valuation of the German Mark in 1961 and 1969 constitutes a case for the application of the clause in article 2(e) of the Annex I A of the 1953 Agreement on German External Debts*, *RIAA*, Vol. XIX (1980) p. 89.

[67] *Islamic Republic of Iran* v. *United States of America*, Iran–United States Claims Tribunal, Case No. A/2, Decision No. DEC 1-A2-FT, 26 January 1982, Part II.

[68] *United States of America* v. *Islamic Republic of Iran*, Iran–United States Claims Tribunal, DEC. 37-A17-FT, 18 June 1985.

[69] Transcript (Hearing on Jurisdiction), 25 June 2012, p. 140:7–12.

[70] *Ibid*., pp. 159:19–160:12.

jurisdiction of the Tribunal in the foregoing cases irrelevant since neither of these awards was based on the absence of such objections.[71]

102. In sum, I believe that both those cases indicate that tribunals operating under compromissory clauses similar to that of Article VII of the Treaty are empowered to settle disputes regarding the interpretation of a treaty, even absent allegations of breach.

103. According to the United States, all cases cited by Ecuador arose initially out of claims of treaty breach, thus easily satisfying the concreteness requirement.[72] The Respondent maintained that sometimes issues of interpretation were dominant because the dispute turned primarily on resolving opposing positions as to the meaning of treaty provisions, while sometimes issues of application were dominant.

104. During the oral hearings, the United States asserted that all cases argued by Ecuador either support its own position on the need of a concrete case in full—which means that they arose from allegations of treaty breaches—, or else they may be distinguished since the disputing parties agreed to extend the tribunal's jurisdiction.[73]

105. In my view, that the originality of these arguments exceeds the bounds of legal imagination is evident from a simple comparison of the plain text of the decisions cited, and their reasoning and logic, with the compromissory clauses that empowered the tribunals to settle disputes concerning the interpretation of a treaty.

H. Conclusion on the Scope of the Compromissory Clause of Article VII

106. International jurisprudence is consistent regarding the exercise of jurisdiction over disputes concerning the interpretation of a treaty absent an allegation of treaty breach. Such jurisprudence applied the specific agreements which conferred jurisdiction upon every tribunal to hear interpretation disputes absent an allegation of violation of law.

107. The most conclusive acknowledgement by conventional international law distinguishing interpretative disputes from those regarding the application of a treaty is found in the wording of Article 36(2) of the Statute of the International Court of Justice, which recognises the possibility of exercising jurisdiction over treaty interpretation disputes regardless of jurisdiction over other matters.

108. Article 36(2) of the Statute of the International Court of Justice provides that:

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[71] Transcript (Hearing on Jurisdiction), 26 June 2012, p. 237:3–7.

[72] Transcript (Hearing on Jurisdiction), 25 June 2012, pp. 136:22–137:1.

[73] *Ibid*., p. 126:11–22.

> […] in all legal disputes concerning:
>
> *a*. the interpretation of a treaty;
>
> *b*. any question of international law;
>
> *c*. the existence of any fact which, if established, would constitute a breach of an international obligation;
>
> *d*. the nature or extent of the reparation to be made for the breach of an international obligation.

109. The precedents cited *supra* simply confirm that the only possible interpretation of the text and context of Article VII of the BIT is that the Tribunal has jurisdiction to interpret Article II(7) and inform the Parties regarding its content and scope, thus creating legal certainty on the law in force between the Parties.

110. The references made by the United States to precedents on dispute resolution between investors and States[74] are inapposite to the case at hand, since the jurisdiction of such tribunals is limited to disputes concerning the breach or violation of a provision of an investment protection treaty, and not to hear interpretation disputes outside the framework of an alleged treaty breach.

111. The formula of Article VII was not invented by the parties to the BIT, but repeats a traditional compromissory clause of general international law which has been applied since the turn of the 20th century. Treaty interpretation may be neither wide nor narrow. It should abide by the terms and conditions agreed upon by the parties. The text and context of Article VII give rise to no confusion, obscurity, ambiguity or absurd or unreasonable results. The express text, as construed in good faith according to its ordinary meaning, determines without ambiguity or confusion that any dispute concerning treaty interpretation may trigger the dispute settlement mechanism which was agreed upon by the Parties. Such an interpretation confirms the need to preserve the requisite legal certainty on the content and scope of the law in force of each provision of the Treaty.

112. The compromissory clause contained in Article VII was freely agreed upon by the Parties, and, according to the United States, it is the clear expression of their will to submit to arbitration.[75] Article VII does not require or condition the parties to exhaust diplomatic channels prior to arbitration. It requires the existence of a dispute, but is not conditional upon an allegation of breach of a rule of international law.

113. In this context, a decision of this Tribunal on the content and scope of Article II(7) of the BIT would have practical consequences for both Parties through an authoritative interpretation clarifying the Parties' rights and obligations and thus removing the uncertainty derived from contrasting or opposed interpretations between them. Accordingly, the practical conse-

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[74] Respondent's Memorial Jurisdiction, pp. 24 *et seq*.

[75] In accordance with the Memorandum of the President of the United States of America to the U.S. Congress in connection with the Ecuador–U.S. BIT.

quences of any judgment or award are established with regard to both Parties to the dispute insofar as the legal rule subject to interpretation or application by the Tribunal is in force and effect.

114. For the purpose of determining whether the Tribunal has jurisdiction or not, it suffices to look at Ecuador's claim for interpretation of Article II(7) of the BIT in accordance with the common will of the Parties at the time of expressing their consent to be bound by the Treaty. Ecuador's prospective claims as to the scope of the clause subject to interpretation concern the merits of the case, and therefore, a decision in favour of the jurisdiction of the Tribunal does not entail a pre-judgment on the correctness of the interpretation alleged by Claimant.

115. Article VII constitutes the legal framework applicable in order to submit a dispute on the interpretation of a treaty clause to the jurisdiction of an arbitral tribunal. Ecuador's demand concerns an interpretation dispute, not a dispute on the obligation of the United States to negotiate or agree upon a new interpretation of the Treaty.

III. Existence of a Dispute

116. The Respondent objects to the jurisdiction of the Tribunal on the grounds that there is not dispute on the interpretation of Article II(7) of the BIT as alleged by Ecuador. This objection focuses on the content and scope of the definition of "dispute".

117. The United States argues once again that, for a dispute to exist, there must be a concrete case—an allegation of treaty breach—as well as express positive opposition. Ecuador maintains that the definition of "dispute" is not limited to the existence of a concrete case and that the Respondent has demonstrated its positive opposition, both expressly and in an implied manner.

118. International jurisprudence is consistent in referring to the definition of a "dispute" and the conditions for its existence under international law.

119. In this context, in the case of *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (hereinafter, *Georgia* v. *Russia*), the ICJ held:

> The Court recalls its established case law on that matter, beginning with the frequently quoted statement by the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case in 1924: "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" (*Judgement No. 2, 1924, P.C.I.J., Series A, No. 2,* p. 11) Whether there is a dispute in a given case is a matter for "objective determination" by the Court (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950,* p. 74). "It must be shown that the claim of one party is positively opposed by the other" (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objec-*

> *tions, Judgment, I.C.J. Reports 1962*, p. 328) (and most recently *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of Congo* v. *Ruanda), Jurisdiction and Admissibility, I.C.J. Reports 2006,* p. 40, para. 90). The Court's determination must turn on a determination of the facts. The matter is one of substance not of form. As the Court has recognized (for example, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998,* p. 315, para. 89), the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for. While the existence of a dispute and the undertaking of negotiations are distinct as a matter of principle, the negotiations may help demonstrate the existence of the dispute and delineate its subject matter.[76]

120. In the case of *Questions relating to the Obligation to Prosecute or Extradite* between Belgium and Senegal, the Court confirmed the content of the definition of a "dispute" between States.[77]

121. Returning to the *Mavrommatis* case, the PCIJ found that a dispute is "a disagreement on a point of law or fact, a conflict of legal views or interests between two persons."[78] Accordingly, an interpretation dispute may arise from the opposing attitudes of two States as to the interpretation of a treaty clause.

122. The definition of "dispute" should not be at issue for the Parties. However, at the time of its expounding on its objection to jurisdiction, the United States invoked a requirement—the existence of a concrete case—which is not part of the traditional definition or its expression in the most recent precedents of international tribunals.

123. As demonstrated above, under international law, for a dispute to exist, it is not necessary for either party to have alleged the breach of a rule of international law attributable to the other party. Nevertheless, the Respondent summarizes the argument for the purpose of denying that the scope of Article VII of the BIT covers interpretative disputes—alleging the inexistence of a concrete case—in order to maintain that the positive opposition requirement depends inextricably on the existence of a concrete case.

Positive Opposition

124. According to the United States, the notion of a "dispute" does not encompass Ecuador's claims. The Respondent cites its expert, Professor Tomuschat, in order to assert that the word "dispute" has "obtained a specific

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[76] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia *v.* Russian Federation), Judgment of 1 April 2011, *ICJ Reports, 2011*, para. 30, p 16.

[77] *Questions relating to the Obligation to Prosecute or Extradite* (Belgium *v.* Senegal), Judgment of 20 July 2012, *ICJ Reports 2012*, paras. 45–46.

[78] *The Mavrommatis Palestine Concessions*, Judgment No. 2 (1924), *PCIJ Series A*, No. 2, p. 11.

meaning in international practice," requiring that the parties to a treaty have put themselves in positive opposition with one another over a concrete case involving a claim of breach under the treaty.[79]

125. In short, the United States reiterated its arguments on the need for a breach allegation in order to apply Article VII of the BIT, as well as to establish the requirement that a "dispute" exists. According to Respondent, there is no "dispute" between the parties since there is no positive opposition in relation to any allegation of treaty breach.[80]

126. According to Ecuador, a dispute on the interpretation of a BIT clause exists, since the United States is in positive opposition to the content of such an interpretation. This positive opposition was both expressed, by means of the positions adopted by the United States in the course of the arbitration proceeding, and implied, by inference from the attitudes assumed prior to the commencement of this proceeding.

a) Express Positive Opposition

127. Ecuador alleged that the United States has manifested its positive opposition to Ecuador's interpretation through its express statements showing that it considers Ecuador's position to be "unilateral". Its express opposition is also manifest in its taking the position that the interpretation given by the *Chevron* tribunal was "*res judicata*" not only for purposes of that dispute but also for Ecuador's relationships with other parties (including the United States).[81]

128. In this regard, it can also be stated that the position adopted by the United States is that Ecuador's interpretation of Article II(7) entails the exercise of a lawmaking power that this Tribunal does not enjoy. Such a position inextricably leads to the express acknowledgement of the United States' positive opposition to the meaning of Article II(7) purported by Ecuador.

129. Accordingly, the United States maintained that the jurisdiction of the Tribunal must be determined at the time of the filing of the Request for Arbitration: "In order for this Tribunal to have jurisdiction, therefore, it must determine that the United States had put itself in positive opposition with Ecuador over the meaning of Article II.7 as of June 28, 2011, the date of the Request for Arbitration and Statement of Claim".[82]

130. According to Ecuador, the position adopted by the United States in the course of this proceeding confirms the existence of a dispute arising prior to 28 June 2011, the date when Ecuador learned about the end of the diplomatic exchanges which followed the Note of 8 June 2010. In Ecuador's opinion, the

[79] Respondent's Memorial on Jurisdiction, p. 17.

[80] *Ibid.*, p. 29.

[81] Claimant's Counter-Memorial on Jurisdiction, para. 66.

[82] Transcript (Hearing on Jurisdiction), 25 June 2012, p. 169:2–6.

critical date of the dispute is the date on which the United States served notice of its refusal to respond to Ecuador's claims.

131. Ecuador maintains that the documents filed during this arbitration demonstrate that the Respondent has manifested its opposition to Ecuador's interpretation of Article II(7) on several occasions.[83]

132. In this regard, I consider that the Respondent's allegations during the proceeding may not give rise to a dispute over which this Tribunal may exercise jurisdiction on account of the fact that such a dispute must have arisen upon the commencement of the arbitration proceeding.[84] However, were it to be shown that such dispute arose prior to the commencement of the actual proceeding, the position adopted by the United States throughout the proceeding would be conclusive evidence that the dispute alleged by Ecuador already existed.

133. Consequently, only if the attitudes assumed by the United States prior to the commencement of this proceeding allow an inference of positive opposition to Ecuador's interpretation of Article II(7) would it be possible to determine the existence of a dispute, which could then be confirmed by the positions adopted by the Respondent in the course of this arbitration proceeding.

134. Therefore, it is essential to analyse the basic rules of international law on the establishment of a positive opposition by inference from the attitudes of a State in order to determine whether a dispute exists in the instant case.

b) Positive opposition by inference

135. In Ecuador's view, the positive opposition of the United States may be established by inference from its behavior and its attitude in refusing to respond to Ecuador's request when a response was unquestionably called for and by stating that there was no dispute.[85]

136. Ecuador held that international jurisprudence allows inferring the existence of a dispute in the case at hand.[86] Its argument was mainly based on the precedents set by the ICJ in *Georgia* v. *Russia Federation* and *Cameroon* v. *Nigeria*.

137. According to Ecuador, due to the specific circumstances in which this case arose, the attitude and the acquiescence of the United States are inconsistent with its fundamental duty to perform the Treaty in good faith.[87] Ecuador affirmed that the *bone fide* principle within a treaty relationship serves

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[83] Claimant's Counter-Memorial on Jurisdiction, pp. 34 *et seq*.

[84] *Questions relating to the Obligation to Prosecute or Extradite* (Belgium *v.* Senegal), Judgment of 20 July 2012, *ICJ Reports 2012*, paras. 46, 48; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia *v.* Russian Federation), Judgment of 1 April 2011, *ICJ Reports 2011*, para. 30.

[85] Claimant's Counter-Memorial on Jurisdiction, para. 67.

[86] *Ibid*., para. 75.

[87] *Ibid*., para. 92.

to ensure trust and create legitimate expectations concerning the development of legal relationships between the parties.[88]

138. Ecuador, acknowledging that in absence of a specific obligation of a treaty, a State may not justifiably base itself on the *bona fide* principle to ground its claim,[89] argued breach of good faith by the United States in relation to the application of the Treaty.[90] Ecuador concluded that while the United Stated retained the ability not to give an interpretation, it could not in good faith seek to avoid the implications of such a choice, namely, the inference that a dispute exists.[91]

139. On the other hand, according to the United States, silence alone cannot establish positive opposition. It is only when a party's actions make it obvious that its views are positively opposed to another party's views that silence could allow an objective determination of positive opposition.[92]

140. The argument of the United States can be reduced to the view that absent a claim for any Treaty breach, there is no duty to respond to Ecuador's demand.[93]

141. As regards the precedents relied on by Ecuador regarding the possibility to infer the existence of a dispute through positive opposition, the United States held that in each of those cases and even in the absence an explicit statement by the parties denying the claim, the actions of the parties constituted clear evidence that they opposed the allegation of breach, thus creating a dispute.[94]

142. From the standpoint of both Parties it may be concluded that, in the case at hand, the interpretation of a treaty clause was requested, which only requires the existence of opposing viewpoints or interests between the parties. This dispute regards the interpretation of a treaty provision that, in accordance with the wording of article VII, does not require one of the parties to be charged with the violation of one Treaty provision by the other party. It is clear that the United Stated has adopted specific behavior that permits, in the particular circumstances of this case, the inference of its stance regarding the interpretation of Article II(7) of the Treaty.

143. The cited jurisprudence confirmed that failure by one of the parties to provide a response to the other party's demand may be construed as positive opposition for the purposes of giving rise to a dispute between States. Silence by one of the parties, within the framework of particular circumstances in a specific case, accounts for the positive opposition to the explicit request of the other party. The simple invocation by a State of its intention to refrain from

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[88] *Ibid.*, para. 98.

[89] Conf. *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria; Equatorial Guinea intervening)*, Decision on 11 June 1998, *ICJ Reports 1998*.

[90] Claimant's Counter-Memorial on Jurisdiction, para. 99.

[91] *Ibid.*, para. 101.

[92] Respondent's Memorial on Objections to Jurisdiction, pp. 29–30.

[93] *Ibid.*, p. 32.

[94] *Ibid.*, pp. 32 *et seq.*

responding to a request grounded on the inexistence of a dispute, is sufficient evidence of the very existence of said dispute.

144. The fact that Ecuador does not allege a breach of a Treaty provision does not limits its right to request the interpretation of a Treaty provision subject to the compromissory clause of Article VII, nor does it inhibit inferring from the other party's behavior the existence of a positive opposition to its request, which gives rise to a dispute on interpretation.

145. The requirement of positive opposition does not necessarily imply of the expression of different interests, and evidencing simple opposition by one State to the request by the other State will suffice. In the *South West Africa* case, the ICJ held that:

> […] a mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of a dispute proves its non existence. *Nor is it adequate to show that the interests of the two Parties to such a case are in conflict*. It must be shown that the claim of one Party is positively opposed by the other.[95]

146. Taking into consideration the above criteria, I believe that, under international law, there can exist a dispute between States which stems from the attitude of one of the parties regarding the claim brought by the party on the interpretation of a treaty clause.

147. In short, the requirement of a positive opposition does not necessarily imply an *expressis verbis* opposition.[96] To infer positive opposition from the attitude of a State requires that the claim brought by the other State must be express and clear. In addition, it is necessary that the State against which a claim is brought was given the opportunity to apprehend the content and the scope of the claim, and that positive opposition is grounded on an objective determination of the circumstances in the particular case.

148. In my opinion, in the event that the conditions above were met in this case, they would support the existence of a dispute inferred from the positive opposition of the United States by its actions and omissions *vis-á-vis* Ecuador's claims.

c) Inference of positive opposition in international law

149. General international law, as applied by the International Court of Justice, has recognized the possibility to infer from a State's attitude the existence of a dispute, even when that State has alleged that there is no such dispute. The most relevant cases discussed by both Parties are *Georgia* v. *Russia* and *Cameroon* v. *Nigeria*.

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[95] *South West Africa* (Ethiopia *v.* South Africa; Liberia *v.* South Africa), Decision of 21 December 1962, *ICJ Reports 1962*, p. 328 (emphasis added).

[96] *Cameroon* v. *Nigeria*, *ICJ Reports 1998*, p. 315.

150. The possibility to infer the existence of a dispute from a State's attitude has also been recognized by Respondent's expert Professor Tomuschat.

151. On that point, Professor Tomuschat expressed that "[i]n the recent case of Georgia *v.* Russian Federation the ICJ emphasized that the existence of a dispute may be 'inferred from the failure of a State to respond to a claim in circumstances where a response is called for'". But even if for Professor Tomuschat, no legal obligation existed for the United States Government to take a stance as to the request contained in the letter of 8 June 2010. He concedes that: "[i]t may well be that in exceptional circumstances one of the contracting parties may be compelled to respond to a question put to it, even where a specific legal obligation cannot be identified. However, just the will of one of the parties does not give rise to such an exceptional situation. In any event, the requested government would have had to contribute to the situation that requires clarification."[97]

152. The United States has also admitted that proposition when Counsel for the United States during the Hearing on Jurisdiction expressed that "[…] in most cases this opposition is evidenced by public statements of the Respondent. *In a few cases, however, the ICJ has found that the actions of the Respondent manifest its opposition so clearly that an oral or written statement of its opposition is not necessary*".[98]

153. It is appropriate now to refer to the ICJ cases discussed by the Parties in the present case in relation to the inference of a dispute from State's actions or omissions.

154. In the *Georgia* v. *Russia* case, the Court

> […] observes at this stage that a dispute is more likely to be evidenced by a direct clash of positions stated by the two Parties about their respective rights and obligations in respect to the elimination of racial discrimination, in an exchange between them, *but, as the Court has already noted, there are circumstances in which the existence of a dispute may be inferred from the failure to respond to a claim* (see paragraph 30) Further, in general, in international law and practice, it is the Executive of the State that represents the State in its international relations and speaks for it at the international level […].[99]

Paragraph 30 provides that "[…] the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for […]".[100]

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[97] Respondent's Memorial on Jurisdiction, Expert Opinion of Professor Tomuschat, pp. 8–9.

[98] Hearing on Jurisdiction, June 25, 2012, Transcripts p. 170: 18–22 (emphasis added).

[99] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia *v.* Russian Federation), Decision of 1 April 2011, *ICJ Reports 2011*, para. 37 (emphasis added).

[100] *Ibid.*, para. 30.

155. For the Court, the failure of a State "to respond" does not depend on the existence of a prior legal obligation but rather is based on the circumstances where a response is called for. In that context, the Court has inferred the existence of a dispute from the simple acknowledgment by a State of the subject matter of a claim against it and from the mere rejection of such claim.

156. It is relevant to take note that the rejection by the Russian Federation of the Georgian claims was inferred by the Court from two official Russian statements: the first one, was made by the representative of the Russian Federation at the Security Council meeting on 10 August 2008, and the second was made by the Russian Minister of Foreign Affairs in a Joint press conference with the Minister of Foreign Affairs of Finland in his capacity as Chairman-in-Office of the OSCE on the 12 of August 2008.[101]

157. Those exchanges and the above-mentioned press conference did not contain any express statement by the Russian Federation which accepted or recognized the existence of a dispute. That is why the ICJ objectively determined the existence of the dispute by inference from the Russian Federation's rejection of the very existence of a dispute.[102]

158. The case concerning the *Land and Maritime Boundary between Cameroon and Nigeria* (Preliminary Objections) is another relevant ICJ precedent on the determination of the existence of a dispute by inference from the attitude of one of the parties.[103] In that case, Nigeria alleged as its fifth preliminary objection that there is no dispute concerning *"boundary delimitation as such"* throughout the whole length of the boundary from the tripoint in Lake Chad to the sea, and 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.[104]

159. The Court stated that "there can be no doubt about the existence of disputes with respect to Darak and adjacent islands, Tipsan, as well as the peninsula of Bakassi".[105] However, given the great length of the boundary, the Court concluded that "it cannot be said that these disputes in themselves concern so large a portion of the boundary that they would necessarily constitute a dispute concerning the whole of the boundary".[106] It added that

> Further, the Court notes that, with regard to the whole of the boundary, there is no explicit challenge from Nigeria. *However, a disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not necessarily be stated expressis verbis. In the determination of the existence of a dispute, as in other matters, the position or the attitude of a party can be estab-*

[101] *Ibid*., paras. 109–112.

[102] *Ibid*., para. 113.

[103] *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria*, *ICJ Reports 1998*.

[104] *Ibid*., p. 313.

[105] *Ibid*. para. 87.

[106] *Ibid*., para. 88.

> *lished by inference, whatever the profess view of that party*. In this respect the Court does not found persuasive the argument of Cameroon that the challenges by Nigeria to the validity of the existing titles to Bakassi, Darak and Tipsan, necessarily calls into question the validity as such of the instruments on which the course of the entire boundary from the tripoint in Lake Chad to the see is based, and therefore proves the existence of a dispute concerning the whole of the boundary.[107]

160. The Court clearly stated that positive opposition to a claim from one party by the other need not be express. Therefore, in determining the existence of a dispute, the stance taken by a party may be established by inference, regardless of the viewpoints it expresses.

161. In reference to the border incidents the Court observed

> Even taken together with the existing boundary disputes, the incidents and incursions reported by Cameroon do not establish by themselves the existence of a dispute concerning all of the boundary between Cameroon and Nigeria.[108]
>
> However the Court notes that Nigeria has constantly reserved in a manner in which it has presented its own position on the matter. *Although Nigeria knew about Cameroon's preoccupation and concerns, it has repeated, and has not gone beyond, the statement that there is no dispute concerning boundary delimitation as such. Nigeria has shown the same caution in replying to the question asked by a Member of the Court in the Oral Proceedings* (see paragraph 85 above).[109]

162. Regarding the answer provided by Nigeria to a question formulated by one of the judges, the Court stated

> 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 its legal basis, though clearly it does differ with Cameroon about Darak, and adjacent islands, Tipsan and Bakassi.[110]
>
> 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 the 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

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[107] *Ibid.*, para. 89 (emphasis added).

[108] *Ibid.*, para. 90.

[109] *Ibid.*, para. 91 (emphasis added).

[110] *Ibid.*, para. 92.

> there is no dispute between the two States. Because of Nigeria's position, the exact scope of the dispute cannot be determined at present; a dispute nevertheless exists between the two Parties, at least as regards the legal basis of the boundary. It is for the Court to pass upon this dispute.[111]

163. The Court, in assessing Nigeria's denial of the existence of a dispute on the entire border with Cameroon, believed that it was placed in a situation where it could not decline its jurisdiction on the basis that there was no dispute between those two States. Lack of acknowledgement by one State of the existence of a dispute faced with the claims brought by another State, does not inhibit the tribunal from exercising its jurisdiction.

164. Likewise, the Court acknowledged that the Party which denies the existence of the dispute can express its arguments during the merits stage of the proceedings for the matters at issue. Thus, the Court confirmed that in order to determine if it had jurisdiction to decide on a case where a party denied the existence of a dispute, it could infer from the attitudes of the party in question that such dispute existed *prima facie* in order to analyze the merits of the claims brought by the other party.

165. Given the principles applied by the ICJ in the precedents cited above to determine the existence of a dispute by inference from the denial of a dispute by a State, it may be concluded that these cases are relevant for the assessment of the legal effects of the silence alleged by the United States and the legal consequences of its statement that there is no dispute.

d) Relevant Facts for the Determination of a Positive Opposition by Inference

166. It is clear that in the case at hand there is a factual scenario that predetermines the context in which the dispute on the interpretation of a Treaty clause could have arisen between the Parties. Thus, it is necessary to refer to the facts that allegedly generated a dispute on the interpretation of Article II(7) of the BIT.

167. First, it should be noted that the facts alleged by Ecuador were not challenged by the United States.[112] These relevant facts refer to certain diplomatic exchanges including official letters exchanged by the Parties and a meeting held between representatives of the Parties, followed by telephone conversations.

168. Regarding the exchange of official letters, we shall first refer to the letter sent by the Ecuadorian Minister of Foreign Affairs, Mr. Patiño Aroca, to the Secretary of State, Ms. H. Clinton, on 8 June 2010. In this letter, Ecuador stated:

> On behalf of the Government of the Republic of Ecuador, I meet to submit to the Illustrious Government of the United States, through your Excellency, various delicate matters that have arisen around the proper interpretation and application to be given to the terms of the Treaty

[111] *Ibid*., para. 93 (emphasis added).

[112] Transcript (Hearing on Jurisdiction), 25 June 2012, p. 97:1–11.

> between the Republic of Ecuador and the United States of America concerning the Encouragement and Reciprocal Protection of Investments which was signed on August 27, 1993 and which entered into force on May 11, 1997 […]. These issues put into question the common intent of the Parties with respect to the nature of their mutual obligations regarding investments of nationals or companies of the other Party. They also threaten to undermine the proper administration of the procedures for resolving disputes between investors of one State and the other State.[113]

169. After describing its concern for the Arbitral Award rendered in *Chevron* v. *Ecuador,* "[…] the Government of the Republic of Ecuador respectfully request[ed] that the Illustrious Government of the United States of America confirm, by a note of reply, the agreed […]" interpretation that the Government of Ecuador has outlined above. According to Ecuador, the dispute is preceded by the incorrect interpretation and application of Article II(7) of the Treaty[114] in the partial Award rendered in *Chevron*.[115]

170. At the end of the letter, Ecuador concludes that:

> If such a confirming note is not forthcoming or otherwise the Illustrious Government of the United States does not agree with the interpretation of Art. II.7 of the Treaty by the Government of the Republic of Ecuador, an unresolved dispute must be considered to exist between the Government of the Republic of Ecuador and the Government of the United States of America concerning the interpretation and application of the Treaty.[116]

171. Ecuador's letter led to a meeting held in the Department of State on 17 June 2010, between the Ecuadorian Ambassador to the United States, Mr. Gallegos, and the Legal Advisor of the Department of State, Mr. Koh.[117] The meeting evidenced a mutual intention to remain in contact in relation to the matters outlined in the letter dated 8 June 2010.[118]

172. The formal reply of the United States to Ecuador's letter mentioned above was signed by the Assistant Secretary of the Bureau of Western Hemisphere Affairs on 23 August 2010.

173. The letter of the Assistant Secretary read as follows:

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[113] Letter 13528 GM/2010 addressed by the Minister of Foreign Affairs of Ecuador to the Secretary of State of the United States of America on 8 June 2010, non-official translation provided by the Republic of Ecuador.

[114] Letter 13528 GM/2010 addressed by the Minister of Foreign Affairs of Ecuador to the Secretary of State of the United States of America on 8 June 2010, pp. 4 *et seq.*

[115] Chevron Corporation and Texaco Petroleum Company *v.* Republic of Ecuador, PCA case No. 2007–2, Partial Award, 30 March 2010.

[116] Letter 13528 GM/2010 addressed by the Minister of Foreign Affairs of Ecuador to the Secretary of State of the United States of America on 8 June 2010, p.4, non-official translated provided by the Republic of Ecuador.

[117] Claimant's Counter-Memorial on Jurisdiction, para. 15.

[118] Witness Statement of Mr. Ambassador Luis Benigno Gallegos of 23 May 2012, Annex to the Counter-Memorial.

> Thank you for your letter of June 8 addressed to Secretary Clinton regarding the interpretation of Article II (7) of the Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment. Secretary Clinton asks me to reply on her behalf.
>
> The Department of State wishes to convey to the Government of Ecuador that the U.S. Government is currently reviewing the views expressed in your letter and considering the concerns that they have raised. We look forward to remaining in contact about this and other important issues that affect our nations.[119]

174. This letter acknowledges the content and scope of the request put forth by Ecuador in its letter dated 8 June 2010. By means of such letter, the United States informed that it was duly considering the concerns raised by Ecuador.

175. The letter of the Assistant Secretary does not express any kind of unease or animosity in relation to Ecuador's proposal. Furthermore, the letter expressed the interest of the Department of State in keeping in touch regarding the matters outlined and some other important matters of common interest to both States.

176. From that date onwards, Ecuador alleged that it attempted to contact the Legal Advisor, Mr. Koh, through several telephone calls. Eventually, Mr. Koh and Mr. Gallegos had a telephone conversation on 8 October 2010. According to Ecuador, during that conversation, Mr. Koh stated that the United Stated would not reply to the request made by Ecuador in its letter dated 8 June[120] since, according to the United States, it was difficult to consider a request for the interpretation of a treaty while Ecuador was in the process of terminating that agreement.[121]

177. Ecuador held that the dispute arose from the United States' refusal to discuss Ecuador's request which should have been answered. Ecuador contended that its efforts to reach a solution by consultations or by other diplomatic channels proved unsuccessful and, thus, the matter remained unresolved. Ecuador stated that "[the] Request for Arbitration seeks resolution of the dispute, in the interest of both Parties, by means of an authoritative determination on the proper interpretation and application of paragraph 7 of Article 11 of the 'Treaty that accords with what the Republic of Ecuador considers to have been the intentions of the Parties at the time when the Treaty was concluded".[122]

178. During the Hearing on Jurisdiction, the Respondent's counsel affirmed that the United States had decided not to reply to the request submitted

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[119] Letter by the Assistant Secretary of the Bureau of Western Hemisphere Affairs, dated 23 August 2010.

[120] Witness Statement of Mr. Ambassador Luis Benigno Gallegos of 23 May 2012, Annex to the Counter-Memorial.

[121] Respondent's Statement of Defense, p. 7.

[122] Claimant's Request, p. 7.

by Ecuador. Accordingly, they stated: "To be clear, the United States did respond to Ecuador by stating that it would remain silent on Ecuador's interpretation".[123]

179. Thus, confirmation was given of Ecuador's allegations regarding the content of the telephone conversation between Ecuador's Ambassador and the Legal Advisor of the United States Department of State.

180. According to the United States, Ecuador has invented a dispute by means of an ultimatum based on the formula "to agree or to dispute". From a strictly objective standpoint, in order to justify the above statement, the United States must demonstrate Ecuador's bad faith when faced with the United States own actions, having failed to respond to Ecuador and having denied the existence of the dispute.

181. The United States attempted to justify its alleged silence by reference to certain facts and actions by Ecuador. The United States stressed the fact that Ecuador threatened to denounce the Treaty whose interpretation was being pursued, apart from having denounced the Washington Convention (ICSID Convention). In addition, the United States affirmed that the Constitutional Court of Ecuador found that the provisions of the BITs between investors and a State Party is unconstitutional, which Ecuador now relies on as the sole grounds for this Tribunal's jurisdiction, are unconstitutional.[124] Similarly, the United States noted that on 7 July 2011, Ecuador submitted a claim before The Hague's District Court seeking to annul the awards rendered in *Chevron,* although it had already presented its Request for Arbitration on 28 June 2011.

182. Ecuador stated that the United States' failure to respond cannot be based on or justified by its denunciation of other BITs or other internal measures, since such measures cannot modify the international obligations of Ecuador.[125]

183. According to Ecuador, it is important to consider that the Treaty whose interpretation is pursued was and is in force, and that pursuant to Article XII, even if denounced, it continues to protect investors who made investments before the date of denunciation for ten more years.[126]

184. Concerning these facts, I consider that the letter sent by Ecuador of 8 June 2010, was not initially regarded by the United States as an ultimatum, but rather as an invitation to make future diplomatic exchanges. In any event, Ecuador's decision to commence an arbitration proceeding cannot be considered inamicable. Ecuador alleged that the Request for Arbitration was based on the impossibility to continue negotiating, in view of the response it received to its questions.

185. In this regard, it is difficult to understand to what extent the decision to trigger a dispute settlement mechanism that had been previously agreed by the

[123] Transcript (Hearing on Jurisdiction), June 25 2012, p. 186:4–6.

[124] Respondent's Memorial on Objections to Jurisdiction, pp. 13–14.

[125] Claimant's Counter-Memorial, para. 100.

[126] *Ibid.*

Parties can compromise the good faith of the State resorting to this mechanism faced with the alleged absence of an openness to negotiate by the other party.

186. Accordingly, it should be recalled that Article VII of the BIT does not require reference to diplomatic channels or consultations before having recourse to arbitration. Furthermore, the negotiations provided for in Article V are not a condition precedent to trigger the arbitration mechanism established in Article VII of the BIT. Therefore, in this case the uncontested facts suggest that the somewhat precarious diplomatic endeavors by Ecuador were thwarted by the notice that the United Stated had decided not to respond, followed by Ecuador's lack of insistence to resume conversations.

187. In any case, the commencement of arbitration proceedings is independent from negotiations or the continuation of previously undertaken negotiations or diplomatic overtures. Therefore, to verify the required positive opposition of the United States to the request submitted by Ecuador, the critical date of the dispute would be the time in which the United States decided to inform Ecuador of its intention not to respond and in which, based on such failure to respond, its silence confirmed the existence of a dispute on the interpretation of Article II(7) of the BIT.

188. In sum, the sequence of relevant facts in the relations maintained between both Parties evidences a closed door towards future diplomatic relations concerning the request submitted by Ecuador in the letter of 8 June 2010, and the discussions held by the representatives of the Parties of 17 June 2010.

189. Ecuador finally presented its Request for Arbitration on 28 June 2011, relying upon Article VII of the BIT.

190. The relevance or irrelevance of negotiations undertaken before the commencement of an arbitration in case at hand can be determined by following the principles applied in international case law.

191. Thus, it is helpful to note that in *Mavrommatis,* even considering that Article 26 of the Palestine Mandate[127] established that only those cases in which the dispute could not be settled by negotiations could have recourse to the Permanent Court—unlike the BIT between Ecuador and the United States—, the PCIJ affirmed:

> Negotiations do not of necessity always presuppose a more or less lengthy series of notes and dispatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short; this will be the case if a deadlock is reached, or it finally a point is reached at which one of the parties definitely declares himself unable, or

[127] Article 26 provides: "The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or application of the provisions of the Mandate, such despite, if it can not be settle by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations".

> refuses, to give way, and then can therefore be no doubt that the dispute can not be settled by diplomatic negotiations.[128]

192. The Court then expressed:

> […] on January 26th 1924, the Greek Legation in London wrote to the Foreign Office in order to ascertain whether in the opinion of the British Government, "M. Mavrommatis claims could not satisfactory met" or submitted to arbitration…; and the note of His British Majesty's Secretary of State for Foreign Affairs, dated April 1st, 1924 *was regarded by Greece as a definitely negative reply.*[129]

193. On this point, the Court concluded that:

> The matter had reached this stage when the Greek Government, *considering that there was no hope of effecting a settlement by further negotiation* […] sent to the Foreign Office a dispatch dated May 12, 1924, informing its Britannic Majesty's government of its decision to refer the dispute to the Court […] a decision which […] it proceeded to carry out on the following day […].[130]

194. Although *Mavrommatis* is a case concerning diplomatic protection and the alleged breach of the Palestine Mandate, it is a valid precedent for the purposes of defining the role of diplomatic exchanges in relation to the inference of a dispute from the positive opposition of a State. It is also a relevant precedent that evidences that the claiming State must determine whether there are any possibilities left to continue negotiating or whether the attitude of the other State implies a refusal that thwarts any attempt to negotiate.

195. In the understanding that the wording of Article VII does not require previous negotiations, the relevance of diplomatic exchanges between Ecuador and the United States provides a clear benchmark to assess the context in which it is possible to objectively infer the positive opposition of one of the Parties towards the claim of the other.

e) The Respondent's positive opposition to Ecuador's interpretation of Article II(7)—Silence in International Law

196. The main disagreement between the Parties relates to whether the Respondent's silence and its refusal to respond leads, in the particular circumstances of the case, to the inference that United States is opposed to Ecuador's interpretation of article II(7) of the BIT.

197. State silence as such cannot be thought to have any meaning unless connected with a legal or factual situation particularly the act or claim of

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[128] The Mavrommatis Palestine Concessions, PCIJ, Series A, No 2, p. 13.

[129] *Ibid*., p. 14 (emphasis added).

[130] *Ibid*., p. 15 (emphasis added).

another State. The ICJ has determined that silence may also speak, but only if the conduct of the other State calls for a response.[131]

198. In that context is relevant to note that the International Law Commission Special *Rapporteur* on Unilateral Acts of States has expressed that silence, as a State behaviour having legal effects, is reactive. It acquires juridical value when a State is faced with a situation, normally an act performed or a claim raised by another State, which calls for its reaction.[132]

199. International tribunals have managed to take into account objective criteria in order to evaluate a State's silence as an issue separate from the actual intent of the silent State. Political motivations behind a State's silence have been rejected by the ICJ as relevant.[133] Reference to objective criteria guarantees legal certainty and credibility.

200. In several occasions the ICJ has determined the legal effects of a State's silence, interpreting the context in which a reaction was expected or "called for". [134]

201. The circumstances under which silence has to be interpreted is a matter of substance not of form.[135] The intention behind the State's refusal to respond is irrelevant under international law.[136]

202. It is relevant therefore to take note of the United States position as expressed by Counsel during the Hearing on Jurisdiction: "To be clear, the United States did respond to Ecuador by stating that it would remain silent on Ecuador's interpretation".[137]

203. This means that there is a response by the United States: to maintain silence. But the legal effects of silence do not depend from the intention or will of the silent State. The effects of silence depend upon the objective determination of the circumstances in which silence has been manifested.[138]

204. The United States has not referred to a single precedent to support its position in relation to the legal effects of silence. It could not even demonstrate its own pretended effects derived from silence. International precedents have confirmed that the State's intention regarding its silence is not relevant to

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[131] Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment of 23 May 2008, ICJ Reports 2008, para. 121.

[132] Conf. S. Kopela, "The legal value of silence in the jurisprudence of the International Court", p. 91 (quoting (2001) I *Yearbook of the ILC*, 197 [27] [meeting of the 26 July 2001]).

[133] *Minquiers and Ecrehos* (France/United Kingdom), Judgment of 17 November 1953, *ICJ Reports 1953*.

[134] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia *v.* Russian Federation), Judgment of 1 April 2011, ICJ Reports, 2011.

[135] *Ibid.,* para. 30, p. 16.

[136] Conf. Land and Maritime Boundary between Cameroon and Nigeria (Cameroon *v.* Nigeria; Equatorial Guinea intervening), Judgment of 11 June 1998, ICJ Reports 1998.

[137] Transcript (Hearing on Jurisdiction), June 25, 2012, p. 186: 4–6.

[138] Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion of 30 March 1950, ICJ Reports 1950.

determine the legal effects of its behaviour. Moreover, in the present case there is a clear intent by the Respondent "not to respond".

205. In the present case, positive opposition can be inferred from the United States' attitude. International law, as applied by the ICJ, has established the possibility of inferring the existence of a dispute from different attitudes assumed by States; even from the circumstances in which a State's denial of the existence of a dispute would imply the very existence of such dispute.

206. The United States argued that the only way to evidence positive opposition is by opposing the other State's claim through a State's words or actions.[139] This argument by the United States is in contradiction with the ICJ's reiterated recognition of the ability to infer positive opposition that arises from a State's owns actions or omissions. As stated by the ICJ, positive opposition is not reduced to express opposition.[140]

207. Silence is a clear manifestation of the will and intention of the United States not to reveal its own interpretation. Silence cannot benefit the State that wantonly decides not to respond to a treaty partner's request or claim. The United States has not denied that it has its own interpretation and it has also confirmed during the First Hearing that a treaty interpretation by the United States Government could vary from one administration to another.[141]

208. The United States allegation that the case concerns a "dispute" created by one party giving an ultimatum to the other, to "either agree with our interpretation or there is a dispute", is unfounded on the facts. The United States' note dated August 23, 2010, in answering the so-called Ecuador's ultimatum, recognised the initiation of an informal consultation process. That process was later on deadlocked by United States' attitude of not responding and further by assuming that there was no dispute.

209. The United States' notification to Ecuador of its intention not to respond, constituted within the factual circumstances of the informal diplomatic intercourse between the Parties a relevant unilateral act from which positive opposition *vis a vis* the requesting State can be directly inferred.

210. Under these circumstances the calling for a response was directly related to the need to promote assurances of fair juridical certainty attached to the interpretation of treaties, as well as transparency and good faith in their interpretation and application.

211. There are no multiple possibilities as to the interpretation of the United States' determination not to respond. At the Hearing on Jurisdiction, the United States counsel confirmed that there are only two possibilities: to agree or to disagree.

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[139] Transcript (Hearing on Jurisdiction), June 25, 2012, p. 162:9–15.

[140] *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria*, *ICJ Reports 1998,* para. 89.

[141] Transcript (Preparatory Meeting), 21 March 2010, Mr. Koh, pp. 100:23–101:6.

212. Counsel for the United States has maintained, "*[s]ilence can express either agreement or disagreement with the proposed interpretation*. States may consider it unnecessary to respond to an interpretative declaration because they share the views expressed therein, or they may feel that the interpretation is erroneous, but there is no point in saying so since, in any event, the interpretation would not, in their view be upheld by an impartial third party in case of a dispute. It is impossible to determine which of these two hypotheses is correct".[142]

213. The United States assumed, from its decision not to respond, that there was no dispute. The United States' decision not to respond produced legal effects independently from its own will or intention. If there is no dispute there is an agreement, there is not a third possibility. There are no legal precedents on limbo situations generated by the wanton silence of a party to a treaty when confronted with a claim made by other party.

214. In my understanding, the United States has confirmed that there are only two substantive ways in which Ecuador's request could be answered: to agree or to disagree. The discretional power of a State to maintain silence does not alter the number of options from which it will be possible to infer an agreement or a disagreement. Under those circumstances, the State's intention to maintain silence is an expression of its interest, for whatever reason, not to reveal its position.

215. From the United States' attitude denying the existence of a dispute it is illogical to imply its agreement with Ecuador. Thus, the only alternative left under the present factual circumstances is to infer the United States'positive opposition to Ecuador request.

216. The inference of positive opposition on the part of the United States from its attitude towards the present case was equally confirmed by the positions taken by the United States during the present arbitration proceedings, repeatedly and impliedly expressing doubts regarding Ecuador's claim.

e) Conclusion and Consequences on the Existence of a Dispute

217. By virtue of the foregoing and considering that, according to the judicial precedents cited by the Parties, this is a substantive rather than a procedural issue, I hereby conclude that there is a dispute between Ecuador and the United States on the interpretation of Article II(7) of the BIT, since the United States' positive opposition to Ecuador's claim was determined by inference from the objective determination of the facts and circumstances relevant to the case at issue.

218. As already stated in several passages of this Dissent, under article VII consultations or negotiations are not a pre-requisite for recourse to arbitration. Thus a State party is entitled to activate the compromisory clause of article VII by which both States agreed on a binding State to State arbitration

[142] Transcript (Hearing on Jurisdiction), June 25, 2012, p. 193:1–9 (emphasis added).

system for the settlement of their disputes concerning the interpretation or the application of the treaty. Thus, in a State-to-State arbitration under article VII the parties to the treaty have already committed themselves to settle their disputes (any dispute) concerning the interpretation or application of the treaty.

219. The United States' affirmation that "[…] the practice of States in their Treaty relations recognizes that the way the Parties to a treaty control or clarify its meaning is through negotiation and agreement … The avenues for the management and interpretation of treaties are to be pursued at the discretion and mutual interest of States that are Parties to the treaties"[143] may be considered as a valid presumption pending on the agreement of the Parties. But such a presumption could not derogate from a previously agreed compromissory clause for the settlement of any dispute concerning the interpretation of a treaty, such as article VII of the BIT.

220. The above conclusion is in accordance with the message of the President of the United States to the United States Congress in connection with the ratification of the Ecuador–United States BIT expressing that: "Article VII provides for binding arbitration of disputes between the United States and Ecuador that are not resolved through consultations or other diplomatic channels. *The article constitutes each Party's prior consent to arbitration*".[144]

221. The United States' allegation that under article VII of the BIT one party cannot be forced to do something that it had not agreed in the BIT to do[145] contradicts the express wording of that treaty clause. Article VII speaks for itself.

222. I understand that the legal precedents discussed by the Parties support, *prima facie* and in the factual circumstances of the case, the existence of a dispute over which this Tribunal can exercise its jurisdiction in accordance with Article VII of the BIT.

IV. Conclusions on the Opinion of the Majority

223. By virtue of all the foregoing reasons, I dissent from the arguments of the majority, and therefore, from the conclusion arrived at thereby.

224. First, I consider that the magnitude of the case and the efforts made by the Parties in the preparation and presentation of their relevant positions deserve a proper legal analysis of all the subjects put forward, to the exclusion of mere speculation, as utilized by the majority on the alleged intention of the Parties.

225. Accordingly, I disagree with the fact that the majority analyses in depth, neither the content of the compromissory clause of Article VII of the BIT, nor the positions of the Parties as to the scope thereof. The majority does

[143] *Ibid.*, p. 196:1–11.

[144] In accordance with the Memorandum addressed by the President of the United States of America to the United States Congress in relation to the BIT between Ecuador and the United States. (emphasis added).

[145] Respondent's Memorial on Objections to Jurisdiction, pp. 62 *et seq.*

nothing but assume that there must be a concrete case for a dispute to exist between States insofar as the claim on the merits has implications or consequences between the Parties.

226. I disagree with the reasoning of the majority on these issues, as it limits itself to an erroneous interpretation of the finding of the ICJ contained in a single paragraph of the judgment issued in the case concerning *Northern Cameroons* and in the Separate Opinion of Judge Fitzmaurice.

227. In this Award, the majority overlooks the fact that, in *Northern Cameroons*, the Court admitted that a dispute existed and that, given that the treaty relied upon was no longer in force and effect, the Court held that issuing a judgment would have no legal consequences or effects. In *Northern Cameroons*, according to the Court, the existence of practical consequences of a judgment was not related to the existence of a dispute, but to the force and effect of the legal rule which was the subject-matter of the dispute. It is worth recalling that, in its Separate Opinion, Judge Fitzmaurice expressed his dissent from the majority of the Court as to the existence of a dispute between Cameroon and the United Kingdom as well as the power to issue a declaratory judgment asserted by the Court.

228. I disagree with the statement whereby a concrete case as defined by the majority is required under international law for a dispute on treaty interpretation to exist. The precedents from international courts and tribunals analysed above fail to support the position adopted by the majority.

229. With regard to the practical consequences of the Award, the majority errs when holding that the principal issue of interpretation before the Tribunal focuses on Ecuador's obligations *vis-á-vis* such investors as Chevron, not on obligations concerning the United States.[146] On the basis of this assumption, the majority erroneously finds that a decision by the Tribunal would only have consequences for Ecuador, not the United States, as the majority presumes—on no further grounds—that the United States would not claim an interpretation different from that determined by a tribunal under Article VI of the Treaty.

230. With reference to the cases cited by Ecuador in order to show that a breach of a rule of international law need not be established for a tribunal to exercise jurisdiction, the majority believes that there were practical consequences for both Parties in the settlement of an interpretive dispute in all cases. According to the majority, such practical consequences do not arise in the instant case.[147] The majority speculates that such consequences could only arise for one of the Parties within the framework of a direct claim of breach or a claim for diplomatic protection by the United States in favour of one of its investors against Ecuador.[148] The majority adds to the confusion by stating that

[146] Award, para. 198.

[147] Award, para. 204.

[148] *Ibid.*

"[t]he Tribunal makes no finding on this point, but is not persuaded to exclude this possibility outright",[149] to go on to assert that it is impossible to exclude the possibility that the United States, when approached by an aggrieved investor, might agree with the interpretation that Ecuador has put forward.[150]

231. I disagree with this conclusion of the majority, since, in my view, the legal consequences of an award do not depend on the future acts or omissions of one of the Parties, let alone on the speculative inferences that the Tribunal may make on such prospective future attitudes of one of the Parties.

232. Further, I disagree with the conclusion of the majority on the existence of practical consequences in the case at hand hailing from the fact that the majority's assertion that it cannot conclude that a proper case for adjudication has been presented by the Claimant was grounded on its own conclusion on the inexistence of a dispute on the interpretation of Article II(7), to which it expressly admits that it would only make reference thereafter.[151] Not only do I disagree with the conclusion, which, I opine, features speculative grounds unsupported in law on the position that one of the Parties would purportedly assume, but I also disagree with the elliptical and misleading manner in which the majority presents its reasoning on grounds which have not yet been addressed thereby.

233. In regard to the issue concerning the existence of a dispute, the majority, upon citing the ICJ in the case of *Georgia* v. *Russia* regarding the definition of dispute, decides to disregard the content of such definition to then put forward reasons as to the practical consequences of a judgment, thereby mistaking the precise scope attached thereto by the Court in *Nothern Cameroons*.

234. The majority acknowledges that the specific issue facing the Tribunal is thus whether "the facts of this case" allow for the inference that the Respondent disagrees with the position of the Claimant regarding the interpretation of Article II(7).[152] Nonetheless, rather than analyzing the facts and circumstances surrounding the case, the majority decides on the basis of arguments-rather than on the basis of "the facts of this case"—that it cannot infer "from any of these arguments" that the Respondent disagrees with the position of the Claimant.

235. The reasoning of the majority is grounded on the fact that it cannot exclude other reasonable explanations regarding the behavior of the Respondent that are not dependent upon its disagreement with Ecuador's interpretation of Article II(7). The majority goes on and holds that the behavior of the Respondent is consistent with its desire not to interfere with decisions issued by Tribunals constituted under Article VI. Given the existence of such a plausible explanation for the United States' silence, the majority concludes that the circumstances of the case warrant no inference of positive opposition.

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[149] *Ibid.*

[150] Award, para. 205.

[151] Award, para.207.

[152] Award, para. 215.

236. I disagree with the above conclusion and I dissent from its rationale as it merely focuses on a simplistic subjective speculation that lacks any legal support

237. The majority disregards its obligation under international law to determine whether a dispute exists through an objective determination, and not from a merely subjective determination that depends on the purported intention of one of the Parties, which the majority affords itself the luxury of presuming. It should be recalled that, on several occasions, the ICJ recognized the obligation to make an objective determination: "*Whether there is a dispute in a given case is a matter for objective determination by the Court…The Court's determination must turn on a determination of the facts*".[153]

238. I also disagree, on the basis that it is not impossible to understand the critical path of reasoning taken by the majority, who then admit in paragraph 215 of the Award that the issue facing the Tribunal is "whether the facts of this case allow for the inference" only to then reach the conclusion in paragraph 219 that it cannot infer opposition since it "cannot exclude other reasonable explanations for the Respondent's behaviour", which must, after all, refer to its intention, and therefore, to its full discretion.

239. I disagree with the conclusion of the majority that regards as a relevant factual matter that the Respondent has given a reasonable alternative explanation for its decision not to respond as a factual matter[154], thereby precluding any chance of inferring its opposition from an objective determination as required under the applicable law.

240. My dissent on this point is grounded on the fact that, should an alternative explanation exist, a situation which the majority fails to prove this conclusion would contradict other arguments put forward by the Respondent regarding its decision not to respond, *e.g.* the admission on the part of the United States of having failed to take a stance; or holding that the Treaty's interpretation could change from one government administration of the United States to the next.[155]

241. I disagree with the majority in that the Award ignores the significance attached by international law to unilateral acts of States and in that it minimizes the legal consequences that international law attaches to the silence of a State faced with a situation where claims are being made by another State.

242. I disagree with the statement of the majority that the jurisprudence cited by the Parties endorses its conclusion that an inference of "positive

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[153] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia *v.* Russian Federation), Judgment of 1 April 2011, *ICJ Reports, 2011*, para. 30; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion of 30 March 1950, *ICJ Reports 1950*.

[154] Award, para. 224.

[155] Transcript (Preparatory Hearing), 21 March 2012, "[…] as you know, some times those determinations [on treaty interpretation] can change from one administration to next, and that makes even more important that we not prematurely make such decisions because we are in the middle of an election season and other issues are at stake […]": Mr. Koh, p. 101:1–6.

opposition" is warranted only when all other reasonable interpretations of the respondent's conduct and surrounding facts can be excluded.[156] My dissent is grounded on the fact that the above statement departs from the text and context of the very precedents cited. It is worth noting that such a strong statement finds support in no part of any authority.

243. Lastly, I disagree with the exclusively speculative statements of the majority concerning the existence of a possible dispute over the duty to respond or engage in consultations,[157] given that the Parties neither understood that such a dispute existed, nor put forward arguments on its purported existence.

244. In case of doubt, the Spanish original version prevails.

The Hague, 29 September 2012.

[*Signed*]
Professor Raúl Emilio Vinuesa
[Arbitrator]

[156] Award, para. 223.

[157] Award, paras. 225 *et seq.*