

# STATE-TO-STATE ARBITRATION PURSUANT TO BILATERAL INVESTMENT TREATIES: THE ECUADOR-US DISPUTE

by Marcin Orecki\*

## Abstract

*This paper presents the state-to-state arbitration between the United States (US) and Ecuador that was a consequence of an investor-state arbitration in the Chevron case (both arbitrations pursuant to the US-Ecuador Bilateral Investment Treaty (BIT)). The questions inter alia were whether a dispute between the US and Ecuador existed at all and whether silence on behalf of the US alone could create a positive opposition in order to determine the existence of a dispute. However, one of the most important issues in the case was an alleged attempt by Ecuador to re-litigate the arbitral award of the Chevron case, and, if that were possible, to create an appellate jurisdiction of the state-to-state arbitral tribunal. This kind of jurisdiction would be contrary to the BIT's object and purpose and would risk destabilizing the international adjudicatory system. The arbitral tribunal resolved the dispute on 29 September 2012. However, as the award is not available to the public, the outcome is unknown. After evaluating the arguments, it must be noted that each argument raises doubts and the solution to this case is not straightforward. However, the arguments presented by the US, especially the policy arguments connected with investment law and arbitration principles such as de-politicization, seem to be more convincing.*

<b>Introduction</b>	2
<b>I. Preliminary remarks</b>	3
A. Chevron case. The starting point of the problem	3
B. Other cases under the US-Ecuador BIT; Interpretation of art. II (7) of the BIT	3
C. Other state-to-state arbitrations	4
<b>II. From investor-state to state-to-state arbitration</b>	5
A. Diplomatic note. Notice of arbitration	5
B. Arguments presented by the parties	6
1. The US's arguments	6
1.1. There is no dispute between the parties	6
1.2. There is no obligation imposed on the US	8
1.3. Two-track jurisdictional system in the BIT	9
1.4. Other arguments	9
2. Ecuador's arguments	11
2.1. The tribunal has jurisdiction	11
2.2. There is a dispute between the parties	12
2.3. Other arguments	14
<b>III. Discussion</b>	14
A. Dispute – it takes two to tango	14
B. “Concreteness” of a dispute	16
C. Two-track system in the BIT	16
D. Ecuador's behavior – you cannot have your cake and eat it too	18
E. Does “interpretation” equal “judicial law-making” ?	18
F. Destabilization of international adjudication ?	20
<b>Conclusions</b>	20

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\* LL.M. candidate (Geneva LL.M. in Int'l Dispute Settlement [MIDS], 2013); MA in Law (2012, University of Warsaw). I would like to thank Mr. Michele Potestà and Ms. Elizabeth Boomer for comments on an earlier draft of this paper.

"Commercial lawyers regard arbitrations between States as wholly irrelevant; and public international law teachers, advocates and officials view commercial arbitration as an essentially alien process(...)"<sup>1</sup>

### Introduction

Many<sup>2</sup> bilateral investment treaties (BITs) contain two dispute settlement clauses<sup>3</sup>: an investor-state arbitration clause and a state-to-state arbitration clause. They create two separate jurisdictional tracks. Unlike investor-state arbitrations, state-to-state arbitrations pursuant to BITs are extremely rare<sup>4</sup>, with only three such cases: *Italy v. Cuba*<sup>5</sup>, *Peru v. Chile*<sup>6</sup> and *Ecuador v. US*. The issues in the Ecuador v. US state-to-state arbitration were: what is a dispute; how to interpret the word "interpretation"; what is a difference between "interpretation" and "application"; and whether states can bring purely interpretive claims.

On September 29, 2012 the tribunal in the Ecuador-US case rendered an award. Unfortunately it is not available to the public<sup>7</sup>. Taking into account the importance of the case for the system of international adjudication as well as for investment law it would be desirable to know the decision of the tribunal.

This paper consists of three parts. The first part deals with preliminary remarks about the case, which opened a "Pandora's box". Additionally, two other state-to-state arbitrations are briefly addressed. The second part discusses the procedural history of the Ecuador v. US case, including arguments presented by the parties as well as expert opinions. The following part consists of a discussion and evaluation of the arguments presented by the United States and Ecuador.

Finally it must be added that the case is very complicated and all arguments are very sophisticated and well-reasoned. This paper provides only the basic framework of argumentation. In-depth analysis of every issue is unnecessary and falls outside the scope of this paper.

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<sup>1</sup> J. G. Wetter, *The International Arbitral Process-public and private*, 1979, at 29.

<sup>2</sup> If not almost all. See Michele Potestà, *State-to-State Dispute Settlement Pursuant to Bilateral Investment Treaties: Is there Potential?*, publication forthcoming, at 1.

<sup>3</sup> The two-track jurisdictional system in the Ecuador-US BIT is different than in other investment treaties, See W. M. Reisman, at 13-14.

<sup>4</sup> Compare A. Roberts, *Power and Persuasion in investment treaty interpretation: The Dual role of states*, AJIL, Vol. 104:179, 2010, at 183; [UNCTAD], Latest Developments in Investor-State Dispute Settlement, IIA MONITOR, No. 4, 2005, at 2 n. 3., available at <http://bit.esywa.org.lb/CMSPages/GetFile.aspx?nodeguid=a7831054-0ed6-4040-8480-4b2c7a16116e>, visited on 12.12.2012; M. Potestà, at 1.

<sup>5</sup> <http://www.italaw.com/cases/580>, visited on 12.12.2012.

<sup>6</sup> See W. M. Reisman's opinion, at 19-20

<sup>7</sup> See at <http://www.italaw.com/cases/1494>, visited on 12.12.2012.

## I. Preliminary remarks

### A. *Chevron* case. The starting point of the problem

A “dispute”<sup>8</sup> between Ecuador and the US began when the arbitral tribunal in the *Chevron* case<sup>9</sup> rendered its partial award on the merits. The facts of the *Chevron* case are as follows: because of a breach of contract, TexPet filed seven cases in Ecuadorian courts against Ecuador in the 1990s. Ecuador’s courts did not however adjudicate the cases. In 2006 Chevron and TexPet started arbitral proceedings under the US-Ecuador BIT<sup>10</sup> claiming that Ecuador’s courts failed to adjudicate the cases, constituting a violation of art. II (7) of the BIT<sup>11</sup>. In the Claimants’ view, art. II (7) does not reflect customary international law. Respondent insists that “**there is no indication whatsoever that the parties to the Treaty [Ecuador and US – M.O.] contemplated lowering the standard for establishing a denial of justice through the Treaty provisions**”<sup>12</sup>. The tribunal found that art. II (7) of the BIT is “an independent, specific treaty obligation and does not make any explicit reference to denial of justice or customary international law. The tribunal thus finds that art. II (7) (...) constitutes a *lex specialis* (...)”<sup>13</sup> and agreed with the Claimant’s interpretation;<sup>14</sup> consequently found a breach of the BIT and held Ecuador liable.

Ecuador found this interpretation contrary to what the Contracting Parties (to the BIT) intended to agree to. This is an apple of discord between the Ecuador and US.

### B. Other cases under the US-Ecuador BIT; Interpretation of art. II (7) of the BIT

It is worth mentioning that in the *Duke energy v. Ecuador* case<sup>15</sup>, the arbitral tribunal faced similar arguments made by claimants – violation of art. II (7) of the BIT. Also the facts of the case were similar – Ecuador’s courts failed to adjudicate the case. However the tribunal did not find a violation of art. II (7) of the BIT in the *Duke*. As quoted by Ecuador in the *Chevron*, the case of (...) *Duke energy v. Ecuador* is an example “where the tribunal held that

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<sup>8</sup> US argues that there is no dispute, see further in the paper.

<sup>9</sup> *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador*, UNCITRAL, available at: <http://italaw.com/documents/ChevronTexacoEcuadorPartialAward.PDF>, visited on 12.12.2012.

<sup>10</sup> THE TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF ECUADOR CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT, WITH PROTOCOL AND A RELATED EXCHANGE OF LETTERS, SIGNED AT WASHINGTON ON AUGUST 27, 1993.

<sup>11</sup> Art. II (7) Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.

<sup>12</sup> Para. 219. Emphasis added.

<sup>13</sup> Para. 242.

<sup>14</sup> Para. 244.

<sup>15</sup> *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19.

BIT standards of protection generally do not impose stricter liability than customary international law”.<sup>16</sup>

### C. Other state-to-state arbitrations

As already indicated, state-to-state arbitration pursuant to Bilateral Investment Treaties is very rare. There are only two other cases. The *Peru v. Chile* case was an attempt (by Peru) “to block or hinder an ongoing investor-state arbitration”<sup>17</sup> where Peru was the respondent. Peru requested suspension of the investor-state proceedings as a consequence of the inter-state arbitration.<sup>18</sup> The investor-state tribunal refused to stay proceedings<sup>19</sup> consequently, state-to-state arbitration was later discontinued.<sup>20</sup> The *Peru v. Chile* case is an excellent example of an attempt to politicize investment arbitration. This attempt was correctly refused by the investor-state tribunal.

In turn *Italy v. Cuba*<sup>21</sup> dealt with diplomatic protection, which Italy attempted to exercise under art. 10 of the Italy-Cuba BIT.<sup>22</sup> The *Italy v. Cuba* case was based on a different BIT that did not contain two-track jurisdictional system.<sup>23</sup> At the end of the day, the tribunal refused all of the investors` claims.<sup>24</sup> Detailed discussion of these cases falls outside the scope of this paper.

To sum up this point it must be underlined that, unlike Peru and Italy, Ecuador seeks neither to block an ongoing investor-state arbitration<sup>25</sup> nor to exercise its diplomatic protection. Ecuador wants to obtain “only” an abstract interpretation of the BIT. However as the US argues, Ecuador attempts to re-litigate the award rendered in the *Chevron* case and seeks to create an appellate jurisdiction in the state-to-state arbitration. These attempts are contrary to the parties` intention and to the main principles of international investment law (see further in the paper).

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<sup>16</sup> Para 219. See also cases *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Ecuador*, ICSID Case No ARB/06/11 and *Noble Ventures v. Romania*, ICSID Case No. ARB/01/11.

<sup>17</sup> *Lucchetti S.A. and Lucchetti Peru S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4.

<sup>18</sup> M. Potestà, *Republic of Italy v. Republic of Cuba*, *American Journal of International Law*, Vol. 106, No. 2, at 344, n. 8.

<sup>19</sup> Parallel proceedings-investor-state and state-to-state arbitrations.

<sup>20</sup> See UNCTAD, UNCTAD, *Latest Developments in Investor-State Dispute Settlement*, IIA MONITOR, No. 4, 2005, at 2 n. 3, available at <http://bit.escwa.org.lb/CMSPages/GetFile.aspx?nodeguid=a7831054-0ed6-4040-8480-4b2c7a16116e>, visited on 12.12.2012, at 2, n. 3.

<sup>21</sup> M. Potestà calls this case as a „milestone in the law of the investment claims”, see. M. Potestà, at 2. This is true as this case was the first one fully decided. However, role of this is a little bit overestimated, as the BIT between Italy and Cuba was very specific and does not contain two-track jurisdictional system.

<sup>22</sup> *Id.*, at 341.

<sup>23</sup> See W. M. Reisman, at 20.

<sup>24</sup> M. Potestà, at 344.

<sup>25</sup> Argument made by the Ecuador.

## II. From investor-state to state-to-state arbitration

### A. Diplomatic note. Notice of arbitration

After the partial award on the merits in the *Chevron* case was rendered, the Government of Ecuador on June 8, 2010 wrote to the US Secretary of State, on the subject of the "Misinterpretation of Article II (7) of the Treaty" in the BIT case (diplomatic note<sup>26</sup>). Because Ecuador's government was not satisfied with the interpretation of art. II (7) of the BIT given by the arbitral tribunal in *Chevron* case, it tried to obtain from the US confirmation of its own interpretation (sent with the diplomatic note).

On August 23, 2010, the US replied to Ecuador that the government of the US "is currently reviewing the views expressed in [Ecuador's] letter and considering the concerns that [Ecuador has] raised".<sup>27</sup> Ecuador did not receive any reply from the US. Consequently, on June 28, 2011, Ecuador wrote to the US Secretary of State that, because the US failed to reply to Ecuador's note dated June 8, 2010, Ecuador would start an arbitration in accordance with art. VII (1) of the BIT<sup>28</sup> (notice of arbitration was enclosed).

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<sup>26</sup> Madam Secretary of State: On behalf of the Government of the Republic of Ecuador, I meet to submit to the Illustrious Government of the United States, through your Excellency, various delicate matters that have arisen around the proper interpretation and application to be given to terms of the Treaty (...)

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.(...)

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

**If such a confirming note is not forthcoming or otherwise the illustrious Government of the United States does not agree with the interpretation of Art. II.7 of the Treaty by the Government of the Republic of Ecuador, an unresolved dispute must be considered to exist between the Government of the Republic of Ecuador and the Government of the United States of America concerning the interpretation and application of the Treaty(...).**

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

<sup>27</sup> See W. M. Reisman opinion, at 7, para. 9.

<sup>28</sup> **Art. VII of the BIT:**

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.

On June 28, 2011 Ecuador filed a request for arbitration in which it asked the tribunal to determine following issues<sup>29</sup>:

- that the obligations of the parties under paragraph 7 of article 11 of the treaty are not greater than their obligations under pre-existing customary international law;
- that the parties' obligation under paragraph 7 of article 11 of the treaty to provide "effective means" requires only that the parties provide a framework or system under which claims may be asserted and rights enforced, but do not obligate the parties to assure that the framework or system provided is effective in particular cases;
- that paragraph 7 of article II may not be properly applied in a manner under which the fixing of compensation due for a violation of the provision is based upon determinations of rights under the respective law of the United States or Ecuador that are contrary to actual or likely determinations of the United States or Ecuadorian courts, as the case may be.

On March 29, 2012, the US filed a statement of defense contesting jurisdiction of the arbitral tribunal and, as a consequence, dismissal of the Ecuador's request.

## **B. Arguments presented by the parties**

### **1. The US's arguments**

The US's position is that the tribunal does not have jurisdiction because: there is no dispute between the parties (1.1); there is no obligation imposed on the US to respond to, let alone confirm, Ecuador's unilateral interpretation of the BIT (1.2); art. VII of the BIT creates neither advisory nor appellate nor referral jurisdiction. Should the tribunal find jurisdiction and render an award, it would constitute judicial lawmaking and it would be contrary to the BIT's object and purpose, as well as creating the risk of destabilization of international adjudication (1.3.).

#### **1.1. There is no dispute between the parties**

The US argues that Ecuador "seeks to create a "dispute" under [art. VII] of the [BIT] where none exists, and to obtain an "authoritative interpretation" to bind the parties in the absence of their mutual consent".<sup>30</sup> US submits that there is no dispute as it neither breached the BIT in "any way nor engage in any wrongful conduct that impaired Ecuador's rights under

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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.

<sup>29</sup> See para. 15 of the request for arbitration.

<sup>30</sup> Memorial on objections to jurisdiction, at 1.

the BIT”.<sup>31</sup> Furthermore, the US’s non-response did not establish that the parties have divergent views on the interpretation of Art. II (7) of the BIT.

Also the US experts’ opinions, prepared by Prof. W. M. Reisman and Prof. Ch. Tomuschat, argue that there is no dispute in the case at hand. As Ch. Tomuschat observed:

the jurisprudence of the ICJ is absolutely consistent. A legal dispute exists only if the parties are opposed to one another in respect of a specific claim raised by one party against the other which is rejected in whatever form. Divergences about the interpretation of a legal text, which have not led to such a claim, remain at a lower level of differences of opinion for which other modes of settlement may be appropriate.<sup>32</sup>

The United States has failed to take a stance vis-a-vis the request that was addressed to it. No refusal can be perceived. The [US]’s Government has refrained from providing a substantive answer<sup>33</sup>.

According to Ch. Tomuschat, Ecuador should use procedure established in art. V of the BIT in order to start state-to-state arbitration and resolve any dispute as to the BIT’s interpretation. Ecuador, however, failed to do that. As he observed, art. VII of the BIT applies only to disputes “concerning the interpretation or application of the Treaty”. This implies that there must exist dispute as to the BIT itself. In the case at hand, Ecuador seeks to obtain from the US an additional agreement that would clarify the interpretation of art. VII of the BIT, which does not satisfy requirement of the latter.<sup>34</sup>

Moreover, the US argues that there must be a **legal dispute** and not just a political one. Legal dispute means “a conflict of claims or rights between the Parties based on the Treaty that is capable of binding resolution by application of legal rules and principles”.<sup>35</sup> The US refers to the meaning of the word “dispute”<sup>36</sup> - “a conflict of claims or rights; an assertion of a right, claim, or demand on one side, met by contrary claims or allegations on the other”.<sup>37</sup> The US also points out Ch. Tomuschat’s opinion<sup>38</sup>, which states that the word “dispute” has “obtained a specific 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

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<sup>31</sup> *Id.*, at 2. Ecuador confirmed that stating that it “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” – Statement of Ecuador’s counsel – Transcript of Preparatory Meeting, Mar. 21, 2012, at 18 – see Memorial on objections to jurisdiction at 2, n. 1.

<sup>32</sup> Ch. Tomuschat, para. 7. See case *South West Africa Cases* (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962.); *Case concerning the Northern Cameroons*, (Cameroon v. United Kingdom), 1963 I.C.J. 13, at 15, at 33-4; W. M. Reisman e.g. at 17, para. 30.

<sup>33</sup> *Id.*, para 12.

<sup>34</sup> *Id.*, para 19.

<sup>35</sup> Memorial on objections to jurisdiction, at 18.

<sup>36</sup> BLACK’S LAW DICTIONARY 327 (6th ed. 1991).

<sup>37</sup> Memorial on objections to jurisdiction, at 17.

<sup>38</sup> See further in the paper.

of breach under the treaty”.<sup>39</sup> The US believes that the dispute concerning interpretation cannot arise in abstract and must stem from an actual controversy<sup>40</sup>. The US quotes the decision in the *Dual Nationality Cases*<sup>41</sup> in which the commission rejected the UK’s request for an “authoritative” interpretation. The US quoted also the ICJ case - *Northern Cameroons*<sup>42</sup> where it was stated that:

while its general function is to state the law, 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.

According to Judge Fitzmaurice “a “dispute” must be more than a mere divergence of view about matters of theoretical, scientific or academic interest”.<sup>43</sup> Also WTO doctrine and principles<sup>44</sup> and investor-state arbitral awards such as *Maffezini*<sup>45</sup> support the US arguments.

As to the “positive opposition”<sup>46</sup> which is required to determine existence of a dispute, it does not appear in the case at hand<sup>47</sup>. It is uncontested that the US did not respond to Ecuador’s request<sup>48</sup>. The US disagrees with Ecuador that silence alone can establish positive opposition.<sup>49</sup> Silence can be regarded as a positive opposition only when a state’s “actions make it obvious that its views are positively opposed to another party’s views”.<sup>50</sup> This is not the case here.<sup>51</sup> Ecuador itself admitted that the US had not taken any action whatsoever.<sup>52</sup>

As Ch. Tomuschat stated, there is no obligation “to provide an answer [to a unilateral question – M.O.], silence alone cannot be deemed to constitute rejection”<sup>53</sup>.

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<sup>39</sup> Memorial on objections to jurisdiction, at 17.

<sup>40</sup> *Id.*

<sup>41</sup> Cases of *Dual Nationality*, XIV UN REPS. INT’L ARB. AWARDS 27.

<sup>42</sup> Case *Concerning the Northern Cameroons*.

<sup>43</sup> *Id.*, at 98-99.

<sup>44</sup> Memorial on objections to jurisdiction, at 24.

<sup>45</sup> *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7.

<sup>46</sup> Positive opposition „is a conflict of legal views or interests between two parties” see Mavrommatis Palestine Concessions (Greece v. U.K.), 1924 P.C.I.J. (ser. A) No. 2; *East Timor* (Portugal v. Australia) 1995 I.C.J. 90, 99-100.

<sup>47</sup> Memorial on objections to jurisdiction, at 29.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> See: *Case Concerning the Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russia); *Land and Maritime Boundary Case* (Cameroon v. Nigeria), 1998 I.C.J. 275; and *Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, 1988 I.C.J., 12, 28 (Advisory Opinion of Apr. 26).

<sup>51</sup> Memorial on objections to jurisdiction, at 29.

<sup>52</sup> *Id.*

<sup>53</sup> Ch. Tomuschat, para 16.

### 1.2. There is no obligation imposed on the US

The US submits that Ecuador has no right to demand from the US confirmation of its BIT interpretation or submit this problem to arbitration.<sup>54</sup> Moreover the US retains discretion “to agree mutually to a joint interpretation, or subsequent agreement, if they wish, which can further clarify the Parties’ understanding of a particular provision. Likewise, they retain discretion not to elaborate on the meaning of a specific treaty provision”.<sup>55</sup> The US stresses that one state cannot impose an obligation on another state to respond to its request.

Moreover, the text of the BIT does not contain such an obligation.<sup>56</sup> The only provision that imposes an obligation on the US is art. V of the BIT – the obligation to enter into consultations.<sup>57</sup> But even if the US enters into consultations, it does not mean that the US has to accept Ecuador’s interpretation.<sup>58</sup>

### 1.3. Two-track jurisdictional system in the BIT

W. M. Reisman builds his opinion on argumentation about the two-track jurisdictional system. Each track is assigned a distinct jurisdiction *ratione materiae* and *ratione personae*. Consequently, the interpretation of substantive rights and guarantees in the BIT are reserved for the investor-state [...] track under [art. VI] once that process has been engaged”.<sup>59</sup> Saying that, he concludes that the arbitral tribunal under art. VII of the BIT does not have jurisdiction *ratione materiae*.<sup>60</sup>

W. M. Reisman highlights also art. XII (4) of the BIT<sup>61</sup>, which deals with components considered as “an integral part of the Treaty(...). Possible decisions under [art. VII] are not included, which suggests that if dispute settlement under [art. VII] had been intended to provide an authoritative *pro futuro* interpretation of a substantive provision of the BIT, then the drafters would have made sure to have included that in [art. XII(4)](…)”.<sup>62</sup>

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<sup>54</sup> Memorial on objections to jurisdiction, at 36.

<sup>55</sup> *Id.*, at 37.

<sup>56</sup> *Id.*, at 38.

<sup>57</sup> ARTICLE V of the BIT: 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.

<sup>58</sup> Memorial on objections to jurisdiction, at 39.

<sup>59</sup> W. M. Reisman, at 4.

<sup>60</sup> *Id.*

<sup>61</sup> Art. XII (4) of the BIT - The Protocol and Side Letter shall form an integral part of the Treaty.

<sup>62</sup> W. M. Reisman, at 11, para 19.

#### 1.4. Other arguments

The US very strongly argues that the art. VII of the BIT creates neither advisory<sup>63</sup>, nor appellate<sup>64</sup>, nor referral jurisdiction<sup>65</sup> (“Absent the expressed consent of both Parties, the Tribunal has no authority to act as an advisory, appellate or referral body”<sup>66</sup>). Unlike the ICJ, the arbitral tribunal under art. VII of the BIT cannot give an advisory opinion.<sup>67</sup>

According to the US, Ecuador seeks to start appellate proceedings as it is not satisfied by the *Chevron* case decision. This should be denied as art. VII of the BIT does not provide for such a mechanism.<sup>68</sup> The most prominent example here is a case discussed at the beginning of this paper - *Lucchetti v. Peru*.<sup>69</sup> The US points out that, “finding jurisdiction to adjudicate the legal questions presented in this case would force the United States into a proceeding without its consent to relitigate a final award in a case in which it had no part”.<sup>70</sup>

Moreover, unlike the ICJ, the arbitral tribunal does not have jurisdiction to give preliminary rulings at the request of the BIT contracting parties.<sup>71</sup> “The Tribunal has no authority under Article VII to decide abstract legal questions”.<sup>72</sup>

The US considers Ecuador’s claim as a request “to be ‘the author of new rules’ (...) – not simply to interpret existing law – and ultimately to issue ‘interpretations’ of Article II (7) that go beyond its text (...)”<sup>73</sup>. The US points out that the tribunal should not step “into the shoes of the parties to regulate their affairs without their express consent”.<sup>74</sup>

Finally, according to the US, “granting Ecuador’s request would jeopardize the system of investment treaties, particularly investor-state dispute settlement provisions”.<sup>75</sup> As stated by the US:

Ecuador’s request, if granted, would undermine a principal rationale for investor-State arbitration, which is to *depoliticize* investment disputes and permit neutral and binding arbitration between the State and the investor.<sup>76</sup>

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<sup>63</sup> Memorial on objections to jurisdiction, at 49-50.

<sup>64</sup> *Id.*, at 50-53.

<sup>65</sup> *Id.*, at 53-55.

<sup>66</sup> *Id.*, at 48; *Oil Platforms* (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment (12 Dec. 1996), I.C.J. Reports 1996.

<sup>67</sup> Memorial on objections to jurisdiction, at 49.

<sup>68</sup> *Id.*, at 51.

<sup>69</sup> See further in this paper.

<sup>70</sup> Memorial on objections to jurisdiction, at 53.

<sup>71</sup> *Id.*, at 53-54.

<sup>72</sup> *Id.*, at 55.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*, at 56.

<sup>75</sup> *Id.*, at 59.

<sup>76</sup> *Id.*, at 60.

For all these reasons the US requested the tribunal to find that it does not have jurisdiction over the case.

## 2. Ecuador`s arguments

Ecuador argues that the tribunal has jurisdiction (2.2.1.); that there is a dispute between the parties (2.2.2.); and answers the other arguments of the US, which Ecuador considers as an attempt to “divert the Tribunal’s focus away from the actual legal issues pertaining to its jurisdiction toward what can only be seen as red herrings, irrelevancies and mischaracterizations”(2.2.3.).<sup>77</sup>

### 2.1.The tribunal has jurisdiction

Ecuador starts its argumentation submitting that art. VII of the BIT:

confers jurisdiction over “any dispute” concerning “interpretation or application” of the Treaty. Both the ordinary meaning of this provision and the jurisprudence of international courts and tribunals confirm that a Tribunal (...) is entitled to exercise jurisdiction over disputes that are abstract, so long as the dispute in question concerns a matter of treaty “interpretation” or “application”.<sup>78</sup>

Ecuador refers to the *Mavrommatis case*<sup>79</sup> and points out the language used in the art. VII of the BIT which is broad enough to cover disputes of any nature.<sup>80</sup> Ecuador also underlines that the parties “phrased Art. VII’s grant of jurisdiction in the disjunctive -- providing for jurisdiction over any dispute concerning “interpretation *or* application”(...)”<sup>81</sup>, which shows “[p]arties’ intention to confer upon a tribunal jurisdiction over disputes concerning both the interpretation of the Treaty, and separately, disputes concerning its application”.<sup>82</sup> As argued by Ecuador, “**interpretation**” means the process of determining the meaning of a text and “**application**,” means the process of determining the consequences which, according to the

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<sup>77</sup> Ecuador’s Counter-Memorial on Jurisdiction, at 51.

<sup>78</sup> *Id.*, at 9, para.25.

<sup>79</sup> *Mavrommatis Palestine Concessions* (Greece v. U.K.), 1924 P.C.I.J. (ser. A) No. 2.

<sup>80</sup> Ecuador’s Counter-Memorial on Jurisdiction, at 10, para. 27.

<sup>81</sup> *Id.*, at 10 para. 28.

<sup>82</sup> *Id.*, at 10-11, para. 28.

text, should follow in a given situation.<sup>83</sup> Consequently, disputes over interpretation can be decided separately from disputes over application.<sup>84</sup>

Ecuador argues that the tribunal has jurisdiction over disputes “regarding interpretation of a treaty in the absence of a claim that the treaty has breached”.<sup>85</sup> The jurisdiction to adjudicate an abstract dispute over interpretation of the treaty was found in *Certain German Interests in Polish Upper Silesia*<sup>86</sup> and *Case Concerning Rights of Nationals of the United States of America in Morocco*<sup>87</sup>. Also the Iran-US Claims Tribunal caselaw confirms Ecuador’s argument.<sup>88</sup>

Ecuador rebuts the US’s argument that international law imposes the requirement of an allegation of breach of any other measure of concreteness.<sup>89</sup> Ecuador argues that in the present case there exists an ongoing controversy “involving the substantive interest related to the determination of obligations under Art. II (7)”.<sup>90</sup>

## 2.2. There is a dispute between the parties

According to Ecuador, the existence of a dispute is confirmed by the express statements of the US as well as “the [US]’s refusal to respond to Ecuador’s request regarding the interpretation of that provision, despite the fact that a response was unquestionably called for”.<sup>91</sup> “The “mere denial” of a dispute by a respondent State does not prove its non-existence”.<sup>92</sup> The existence of a dispute must be determined objectively under international

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<sup>83</sup> Ecuador’s Counter-Memorial on Jurisdiction, at 11, para 29. Ecuador quotes Harvard Law School’s Draft Convention on the Law of Treaties. Ecuador also support this distinction by few cases : *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion (30 Mar. 1950), I.C.J. Reports 1950, at 29-31; *Case concerning a boundary dispute between Argentina and Chile concerning the delimitation of the frontier line between boundary post 62 and Mount Fitzroy*, RIAA Vol. XXII (1994), para. 75; *Case Concerning the Factory at Chorzów*, 1927, P.C.I.J. Series A, No. 9 at 39.

<sup>84</sup> See *Oil Platforms*, (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment (12 Dec. 1996), I.C.J. Reports 1996, at. 803 *et seq.*, para. 15; See also *United Nations Headquarters, Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreements of 26 June 1947*, Separate Opinion of Schwebel, at 51; *United States of America v. Iran; United States Diplomatic and Consular Staff in Tehran*, Memorial of the Government of the United States of America (12 Jan. 1980), at 153.

<sup>85</sup> Ecuador’s Counter-Memorial on Jurisdiction, at 13, para. 34.

<sup>86</sup> *Case Concerning the Factory at Chorzów*, Dissenting Opinion of Judge Ehrlich, 1927, P.C.I.J. Series A, No. 9.

<sup>87</sup> *Rights of Nationals of the United States of America in Morocco* (France v. United States of America), Judgment (27 Aug. 1952), I.C.J. Reports 1952.

<sup>88</sup> *Islamic Republic of Iran v. United States of America* Case No. A/2, Part II; *United States of America v. The Islamic Republic of Iran*, Case A/17.

<sup>89</sup> Ecuador’s Counter-Memorial on Jurisdiction, at 28.

<sup>90</sup> *Id.*, at 31, para. 62.

<sup>91</sup> *Id.*, at 32, para. 64.

<sup>92</sup> *Id.*, at 32, para 65. *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion (30 Mar. 1950), I.C.J. Reports 1950, at 74.

law.<sup>93</sup> Ecuador states that the US's positive opposition can be ascertained *inter alia* by inference, quoting in this respect the *Georgia v. Russia* case.<sup>94</sup>

Ecuador submitted three expert opinions prepared by Prof. A. Pellet, Prof. S. McCaffrey, Prof. C.F. Amerasinghe. All of them agree that there is a dispute between the parties.<sup>95</sup> As to the evolution of a term "dispute", A. Pellet disagrees with Ch. Tomuschat by quoting the *Mavrommatis* decision, which says that "positive opposition" has never been "considered as a pre-requisite for the existence of a dispute (...)".<sup>96</sup> Furthermore, he quotes the *Georgia v. Russia* case which stated that the expression of "positive opposition" must not be taken literally.<sup>97</sup> According to A. Pellet, "silence must be interpreted in the circumstances as an implied rejection of the request".<sup>98</sup>

As to the admissibility of purely interpretative claims under international law, A. Pellet argues that "the answer to this question is clearly given in (...) the case concerning *Certain German interests in Polish Upper Silesia*, a precedent on which the Memorial as well as Professor's Reisman and Tomuschat's Expert Opinions keep silence".<sup>99</sup>

As to the concreteness of the dispute A. Pellet states that in light of the case, "the present dispute satisfies the requirement of concreteness under international law notwithstanding the absence of an allegation that the treaty was breached".<sup>100</sup>

C. F. Amerasinghe in his opinion additionally rebuts the two-track argument raised by W. M. Reisman, stating:

(...) it seems highly probable and logical that [art. VII] was included so that any interpretation under [art. VII] would have to be respected by investor-state arbitral tribunals, especially, *but not only* when a conflict has arisen among arbitral awards under [art. VI]. (...) It is noted that [art. VII] covers interpretation of an agreement between sovereign states which should take precedence over investor-state relations<sup>101</sup>.

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<sup>93</sup> Ecuador's Counter-Memorial on Jurisdiction, at 32; *Case Concerning East Timor* (Portugal v. Australia) 1995 I.C.J. 90, 99-100; *Libyan Arab Jamahiriya v. United Kingdom*, Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial incident at Lockerbie, Preliminary Objections, Judgment (27 Feb. 1998), I.C.J. Reports 1998, para. 22; *Cameroon v. Nigeria case*, Land and Maritime Boundary Case (Cameroon v. Nigeria), para. 87; *Democratic Republic of the Congo v. Rwanda*, Concerning Armed Activities on the Territory of the Congo (New Application: 2002), Judgment (Jurisdiction) (2 Feb. 2006), I.C.J. Reports 2006 para. 90.

<sup>94</sup> Ecuador's Counter-Memorial on Jurisdiction, at 38, para. 75; similar *Cameroon v. Nigeria*.

<sup>95</sup> A. Pellet, at 20, S. McCaffrey, at 8, para 14, C.F. Amerasinghe, at 7 para 17.

<sup>96</sup> A. Pellet, para 7.

<sup>97</sup> *Id.*, para 8.

<sup>98</sup> *Id.*, at 20; See also *AAPL v. Sri Lanka, Asian Agricultural Products Ltd. v. Sri Lanka*, ICSID Case No. ARB/87/3, para. 3; *Siemens AG v. Argentina*, ICSID ARB/02/8, para. 159.

<sup>99</sup> A. Pellet, at 6, para. 11; the same argument was made by other Ecuador's experts see e.g. C.F. Amerasinghe, at 8; *Rights of Nationals of the United States of America in Morocco* (France v. United States of America), Judgment (27 Aug. 1952), I.C.J. Reports 1952, at 179.

<sup>100</sup> A. Pellet, at 20.

<sup>101</sup> C.F. Amerasinghe, at 10, para 28.

As to the “discretion” argument raised by the US, Ecuador replies that indeed the US has “discretion not to express its position on the meaning of Art. II (7)” but this discretion is subject to the principle of good faith<sup>102</sup>. Consequently, the US “cannot in good faith seek to avoid the implications of such a choice, namely, here, the inference that a dispute exists”.<sup>103</sup>

### 2.3. Other arguments

All other arguments raised by the US are useless according to Ecuador, and create an “attempt to divert the Tribunal’s focus away from the actual legal issues pertaining to its jurisdiction”.<sup>104</sup> Ecuador’s request for the resolution of a dispute concerning the interpretation of art. II (7) of the BIT does not invite the exercise of appellate or referral or advisory jurisdiction<sup>105</sup>. The interpretation of art. II (7) of the BIT by the tribunal in this case does not constitute judicial law-making.<sup>106</sup> It is a legal dispute and not a political one.<sup>107</sup> Exercise of jurisdiction by the tribunal in this case would be consistent with the BIT’s object and purpose<sup>108</sup>.

## III. Discussion

### A. Dispute – it takes two to tango

As the US puts it: “[i]t takes two parties to make a treaty, and two parties in disagreement over its interpretation or application to create a dispute”.<sup>109</sup> It is true. The existence of a dispute is a primary condition for the court to exercise its judicial function.<sup>110</sup> A “dispute”<sup>111</sup> can be understood in various ways. There is a liberal understanding (*Mavrommatis*) and a narrow understanding (the claim of one party is positively opposed by the other party<sup>112</sup>), and there is no uniform approach in this regard, which is highlighted by the experts.

It is worth mentioning that a definition of legal dispute can also be found in art. 36 (2) of the ICJ statute. As pointed out in the US submission, there must be a legal dispute (not

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<sup>102</sup> Ecuador’s Counter-Memorial on Jurisdiction, at 51, para 101.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*, at 51, para. 102.

<sup>105</sup> *Id.*, at 51-55.

<sup>106</sup> *Id.*, at 55-58.

<sup>107</sup> *Id.*, at 58-59.

<sup>108</sup> *Id.*, at 60-62.

<sup>109</sup> Memorial on objections to jurisdiction, at 29.

<sup>110</sup> See. *Nuclear Tests Case (Australia v. France)*, International Court of Justice (ICJ), 20 December 1974, I.C.J. Reports 1974, at 253.

<sup>111</sup> Existence of dispute must be determined objectively by the court.

<sup>112</sup> Case Concerning the Northern Cameroons.

political) and there must be an element of concreteness. Ch. Schreuer states in this respect that:

[i]n order to amount to a dispute capable of judicial settlement, the disagreement between the parties must have some practical relevance to their relationship and must not be purely theoretical. It is not the task of international adjudication to clarify legal questions in abstracto.<sup>113</sup> Actual or concrete damage is not required before such a party may bring legal action. But the dispute must go beyond general grievances and must be susceptible of being stated in terms of a concrete claim”.<sup>114</sup>

In general, disputes require positive opposition. A. Pellet argues however that positive opposition can “manifest itself by the silence kept on a formal request made by the other”.<sup>115</sup> This is confirmed in particular by the *Georgia v. Russia* case. However the dispute between Ecuador-US is quite different. Unlike in *Georgia v. Russia*, in the *Ecuador-US* case, the US did not breach any BIT provision (even allegedly) and was not a party to the disagreement about interpretation. It was the *Chevron* tribunal that gave a different interpretation and not the US. The *Chevron* tribunal’s actions and interpretations cannot be attributed to the US. In the *Georgia v. Russia* case, Russia did not respond and remained silent. However it was Russia who was accused of an alleged breach of the convention. One may argue that the US’s silence cannot constitute positive opposition in itself in light of the facts of the case.

However the US’s silence can eventually constitute breach of art. V of the BIT.<sup>116</sup> Consequently, Ecuador could start proceedings under art. VII of the BIT but only with respect to the application of the BIT. On the other hand, this implies that the interpretation of art. II (7) of the BIT will fall outside the jurisdiction *ratione materiae* of the tribunal. It would only be the breach of art. V of the BIT within the tribunal’s jurisdiction.

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<sup>113</sup> Ch. Schreuer, *What is a legal dispute ?*, I. Buffard/J. Crawford/A. Pellet/S. Wittich (eds.), *International Law between Universalism and Fragmentation. Festschrift in Honour of Gerhard Hafner*, 959-980, 2008, The Netherlands, at 970.

<sup>114</sup> *Id.*; see also *AES v. Argentina*, ICSID Case No. ARB/02/17, at para. 43.

<sup>115</sup> A. Pellet, a. 20; Similarly Ch.Schreuer, “Failure to respond to the demands of the other party will not exclude the existence of a dispute”, Ch. Schreuer, at 964.

<sup>116</sup>

Art. V	Art. VII
The Parties agree to consult promptly, on the request of either, to resolve <b>any disputes</b> in connection with the Treaty, or to discuss <b>any matter</b> relating to the interpretation or application of the Treaty	<b>Any dispute</b> 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.

It must be nevertheless said that, it is also hard (even though possible) to argue that the US breached art. V of the BIT, as the latter was never invoked by Ecuador. Moreover, Ecuador did not request consultations with the US as to the interpretation of art. II (7) of the BIT. Ecuador sent its unilateral interpretation of the latter to the US, and asked for confirmation of its own interpretation, saying simultaneously that, if the US did not respond, Ecuador would start arbitral proceedings. As such, an “offer which cannot be refused” does not constitute a request for consultations under art. V of the BIT.

### **B. “Concreteness” of a dispute**

Another disputed element is the “concreteness” of a legal dispute. A. Pellet argues that there is no need for a concrete breach of the convention – a dispute about interpretation is a dispute in itself. This is confirmed by the language of art. VII of the BIT which uses word “or” between “interpretation” and “application”. This is true. On the other hand, there is the argument raised by Ch. Tomuschat, who pointed out that art. VII of the BIT allows a party to start proceedings only when any provisions of the BIT have been breached (there is an initial requirement for a BIT breach in and of itself). Jurisdiction of the art. VII tribunal is based on the breach of the BIT.

Assuming, for the sake of argument, that it is possible to render purely interpretative decisions under art. VII of the BIT (like an ICJ advisory opinion), W. M. Reisman says that possible decisions under art. VII of the BIT are not included in art. XII (4) of the BIT<sup>117</sup> and as a consequence will not be relevant *pro futuro* for any tribunal.<sup>118</sup> One may disagree with that statement. Such a decision could be considered as parties' subsequent agreement<sup>119</sup> as to the interpretation of the BIT and should be taken into account by future investor-state tribunals under art. 31 (3) (a) of the Vienna Convention on the Law of Treaties<sup>120</sup>.

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<sup>117</sup> W. M. Reisman, at 11, para. 19.

<sup>118</sup> M. Potestà suggests that the investor-state tribunal may and will probably take into account such authoritative decision on interpretation, however, they will not be bound, M. Potestà, at 8; See under different scenario—consultation between the Czech Republic and Netherlands and joint statement was taken into account by the tribunal-CME Czech Republic.

<sup>119</sup> However one may argue, that the tribunal's award could not be considered as a Parties' agreement, therefore art. 31(3) (a) of the VCLT will not apply. On the other hand subsequent practice of the states may include judicial acts (A. Roberts, at 200), and “ [a ]subsequent agreement turns on the fact of an agreement between the treaty parties, not its form” (A. Roberts, at 199).

<sup>120</sup> 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.

### C. Two-track system in the BIT

As correctly observed by W. M. Reisman, the Ecuador-US BIT establishes a two-track jurisdictional system. He suggests that these two tracks are separate and exclusive, but one may argue that he draws partially wrong conclusions. It is true that the investor-state track is separate from the state-to-state track. The former gives exclusive jurisdiction to adjudicate investor's claims against a state. The tribunal has the power to interpret and apply the BIT's provisions in a particular case, under particular circumstances. It is clear that contracting states cannot initiate state-to-state proceedings in order to obstruct investment arbitral proceedings. That is the main aim of investment arbitration – depoliticization. However it does not mean (exclusivity of interpretation in a particular case) that states cannot interpret the BIT.<sup>121</sup> Ecuador is right by saying that the parties are the masters of the BIT. It does not mean, of course, that they can review awards rendered by the investor-state tribunals. But it means that they can amend the BIT or conclude additional agreements as to the BIT's interpretation. Here, the problem is much more complicated and demands more attention. As noted, “[a] key problem in the investment treaty field is that the balance of power between treaty parties and tribunals concerning the authority to interpret investment treaties is askew”.<sup>122</sup> In addition, the delegation of power to resolve investor-state disputes, from states to tribunals (investor-state track) as well as the delegation of power to interpret BITs “is implied and partial, rather than express and exclusive”.<sup>123</sup> This interpretative power “minus the formal and informal powers retained by treaty parties to influence their interpretations, including through dialogue”<sup>124</sup> creates a zone of discretion given to the arbitral tribunals.

The argument that arbitral tribunals under art. VI of the BIT have exclusive jurisdiction *ratione materiae* to interpret substantive rights under the BIT leads to absurdity, and would make art. VII of the BIT a dead letter. W. M. Reisman argues that this is not true and gives the example of “disputes arising from one state's non-enforcement of a final award; or disputes when one state purports to denounce the treaty”.<sup>125</sup> However, Reisman's examples only deal with an application of the treaty. Art. VII of the BIT states: “(...)disputes concerning

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<sup>121</sup> Or as said by the US: Parties are “the masters of the meaning of their treaties”, Memorial on objections to jurisdiction, at 56; About the possibility to resolve questions of “abstract interpretation of the treaty (positively) see M. Potestà, at 3.

<sup>122</sup> A. Roberts, at 179.

<sup>123</sup> *Id.*, at 180.

<sup>124</sup> *Id.*, at 185.

<sup>125</sup> W. M. Reisman, at 17, para. 30.

**interpretation**<sup>126</sup> or application". What happened with the "interpretation" aspect? It is unsupportable to recognize only one ground of the article when it consists of two. One may argue that disputes may occur between parties as to the interpretation of the BIT.<sup>127</sup> For example, in the case at hand, a question of interpretation of the BIT would arise if the US responded to Ecuador that, in its opinion, art. II (7) of the BIT should be interpreted differently. In this scenario it is obvious that there would be a dispute between the parties and that the tribunal, under art. VII of the BIT, would have jurisdiction<sup>128</sup>. This is an overlap about which C.F. Amerasinghe wrote.<sup>129</sup>

#### **D. Ecuador's behavior – you cannot have your cake and eat it too**

It is true that Ecuador's behavior is inconsistent. On the one hand, Ecuador says that it aims only to obtain from the tribunal an authoritative interpretation of art. II (7) of the BIT in order to avoid legal uncertainty that now exists. Moreover, Ecuador argues that it does not aim to appeal or undermine the credibility of the *Chevron* award. On the other hand, Ecuador explicitly stated that it is not satisfied by the interpretation in *Chevron*. As noted by W. M. Reisman<sup>130</sup>, the arguments made by Ecuador in the interstate arbitration and annulment proceeding concerning *Chevron* award are strangely similar - if not identical. One may add to this Ecuador's general attitude toward investment arbitration, BITs and the ICSID Convention – which could be defined as hostile<sup>131</sup>. As pointed out by the US, the constitutional tribunal of Ecuador found the Ecuador-US BIT unconstitutional. However Ecuador ignores this fact and tries to proceed under the same "unconstitutional" BIT in the state-to-state arbitration.

Although Ecuador's behavior is inconsistent, one may disagree with W. M. Reisman's proposition as to the *res judicata* effect. He proposes that Ecuador is attempting to use state-to-state arbitration as an appellate review. Taking into account the two-track jurisdictional mechanism in the BIT, according to W. M. Reisman, *res judicata* should be applied. This is

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<sup>126</sup> Emphasis added.

<sup>127</sup> The only problem which may occur is determination whether a legal dispute exists between the parties.

<sup>128</sup> Interpretative decision was allowed under NAFTA, compare *Methanex case*, *Methanex v. United States*, Jurisdiction and Merits, pt. IV, ch. C, (NAFTA Ch. 11/UNCITRAL Arb. Trib. Aug. 3, 2005), para. 22.

<sup>129</sup> C.F. Amerasinghe, at 10, para. 28.

<sup>130</sup> W. M. Reisman, at 26-27, para. 48-49.

<sup>131</sup> This statement is a simplification made for the sake of simplicity of this paragraph. The situation of arbitration in Latin America, including Ecuador constitutes a complex issue which falls outside the scope of this paper. See for example, E. Gaillard, *Anti-Arbitration Trends in Latin America*, NYLJ, International Arbitration Law, Vol. 239, No. 108, June 5, 2008; J. Briones, A. Tagvoryan, *Is International Arbitration In Latin America in Danger ?*, available at: <http://studentorgs.law.smu.edu/getattachment/International-Law-Review-Association/Resources/LBRA-Archive/16-1/Article8.pdf.aspx>, visited on 10.12.2012.

not correct. Even though the claims made by Ecuador are almost identical, the BIT contains a two-track mechanism, and Ecuador may be trying to pretend that it does not want to appeal the *Chevron* award, *res judicata* cannot be applied here. In order to apply the latter, three elements must be identical: cause of action, claims, and parties. The last condition is not met.

### E. Does “interpretation” equal “judicial law-making” ?

The US raised the argument that the tribunal, by exercising its jurisdiction over a dispute and rendering an interpretative award, would not be interpreting, but making law.<sup>132</sup> The US quoted Baptista, which said:

[a]n 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<sup>133</sup>

The US asserts that interpretation of art. II (7) of the BIT “in an abstract and general manner, outside the context of a concrete case, in a way that deprives the Parties of the right to construe the Treaty they have made”<sup>134</sup> would be making law. It is true that the borderline between interpretation and creation is thin.<sup>135</sup> A. Roberts said that “[i]n theory, treaty parties are supreme when creating the law and tribunals are supreme when applying it in particular cases”.<sup>136</sup> As Ch. Tomuschat explained about the rule of law:

[i]t may be hard to accept for a party to see that a treaty, in the process of its implementation by the judiciary, takes unexpected and even totally unforeseen turns. This is the risk inherent in any form of regulation of a specific subject-matter by way of treaty to the extent that judicial procedures become applicable.<sup>137</sup>

This argument was said in the context of the interpretation and application of the BIT’s provision by the investor-state tribunals. However, this is also true in the state-to-state proceedings. As art. VII of the BIT allows for interpretation of its provisions (as consented by

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<sup>132</sup> As to the judicial law-making see e.g. Jan Komarek, *Judicial Lawmaking and Precedent in Supreme Courts*, LSE Law, Society and Economy Working Papers 4/2011; William D. Popkin, *Law-Making Responsibility and Statutory Interpretation*, Indiana Law Journal, Vol. 68, Issue 3, Article 16.

<sup>133</sup> Baptista, *Interpretation and Application of WTO Rules*, at 130 - Memorial on objections to jurisdiction, at 55; See also *Cases of Dual Nationality; AMINOIL*, In the Matter of an Arbitration Between Kuwait and the American Independent Oil Company, Award, Mar. 24, 1982, 21 I.L.M. 976, 1015-16.

<sup>134</sup> Memorial on objections to jurisdiction at – 58-59.

<sup>135</sup> “In practice, however, international courts play a critical role in the development of international law because the distinction between interpreting and creating the law is a fiction”, A. Roberts, at 188.

<sup>136</sup> *Id.* at 179.

<sup>137</sup> Ch. Tomuschat at 15, para. 29.

the contracting parties) it must be respected, even though “it might be hard to accept for a party to see that a treaty (...) takes unexpected and even totally unforeseen turns”.<sup>138</sup> The US states that nothing in art. VII of the BIT allows a tribunal to issue “interpretations” which “under Ecuador’s theory, bind future tribunals interpreting the scope of that provision”.<sup>139</sup> In fact, art. VII of the BIT allows a tribunal to issue binding awards as to treaty interpretation.

#### F. Destabilization of international adjudication ?

A final issue is the outcome of these proceedings and its influence on international adjudication. It is not surprising that this unusual dispute was raised by a country from Latin America.<sup>140</sup> It shows that it is still difficult for e.g. Ecuador to restrain itself from mixing political issues with neutral investor-state arbitrations. Although denied by Ecuador, it seems that the country attempts to “write the treaty anew through unilateral initiation of inter-state litigation which the BIT reserves for other disputes(...)”.<sup>141</sup>

Moreover, Ecuador’s submission could “undermine the validity and credibility of the award which the investor has won(...)”.<sup>142</sup> “[Ecuador-M.O.] states quite openly that it considers the interpretation given to art. II (7) of the BIT by the arbitral tribunal in the case of [*Chevron*] erroneous”.<sup>143</sup> But as Ch. Tomuschat rightly said, “[t]his [state-to-state arbitration-M.O.] is not the place to deal with that provision”.<sup>144</sup> In the words of W. M. Reisman “[t]his is elevating a State’s unilateral unhappiness and its disappointment in bilateral investment arbitration to an inter-state “dispute” and allowing it to circumvent the treaty by compelling renegotiation of specific provisions”.<sup>145</sup>

#### Conclusions

The state-to-state arbitration between Ecuador and the US is full of unanswered questions. Unfortunately we do not know the outcome of these questions, as the award is not available to the public. As discussed above, each argument has a weak spot. However, it seems that the

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<sup>138</sup> *Id.*

<sup>139</sup> Memorial on objections to jurisdiction, at 55-56.

<sup>140</sup> See supra note 131.

<sup>141</sup> W. M. Reisman, at 29, para. 53.

<sup>142</sup> *Id.* at 29, para 54.

<sup>143</sup> Ch. Tomuschat, at 12, para. 25.

<sup>144</sup> *Id.*

<sup>145</sup> W. M. Reisman, at 30, para 55.

US's position is stronger. It seems that the US legal and policy-related arguments (re: the purpose of the BIT, investment law and the role of international adjudication) are stronger than Ecuador's. Ultimately, it would be desirable to know how the tribunal resolved this complicated "catch 22" situation.