No. 13-7103

In the United States Court of Appeals for the District of Columbia Circuit

THE REPUBLIC OF ECUADOR,
APPELLANT

v.

CHEVRON CORPORATION AND TEXACO PETROLEUM COMPANY,
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

APPELLANT'S PETITION FOR REHEARING OR REHEARING EN BANC

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INTRODUCTION AND FED. R. APP. P. 35(b) STATEMENT

This case raises novel and exceptionally important questions at the intersection of foreign sovereign immunity, federal subject-matter jurisdiction, international commercial arbitration, and U.S. treaties. The Panel decision is the first in any circuit to determine the "jurisdictional facts" needed to establish an "agreement to arbitrate" under the Foreign Sovereign Immunities Act (FSIA). Op. 6 (citing 28 U.S.C. § 1605(a)(6)). Here, Ecuador offered by treaty to arbitrate disputes with Americans concerning new "investments" and those extant when the treaty entered into force. Chevron purportedly "accepted" the offer by initiating arbitration over an investment it terminated years earlier and which contributed no new capital to Ecuador on or after the date the treaty entered into force. The Panel did not address the mismatch of offer and acceptance, concluding instead that the treaty "includes a standing offer to all potential U.S. investors to arbitrate investment disputes," Op. 9—regardless of any limits to the offer—"which Chevron accepted [by commencing arbitration as] required by the treaty." *Id.*

The Panel compounded its error by holding that U.S. courts can find that the FSIA's prerequisite of an "agreement to arbitrate" the underlying dispute is satisfied based on a *deferential* review of the arbitrators' determination of their own jurisdiction. However, this Court previously has held that findings by a non-Article III tribunal, "without more, are not sufficient to answer the questions posed by [a] motion to dismiss for want of jurisdiction under [the] FSIA." *Foremost–*

McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 446 (D.C. Cir. 1990). Review is warranted because the Panel's decision conflicts with relevant Supreme Court and Circuit precedent.

Because a bilateral investment treaty (BIT) covers only certain investments, and thus contains only a limited offer to arbitrate investment disputes, aren't these limitations substantive terms of the State parties' offer and any agreement to arbitrate? To determine its jurisdiction under § 1605(a)(6), must a federal court examine *de novo* whether the United States and its treaty partner(s) actually agreed to arbitrate the underlying type of dispute? Finally, what sources and canons of interpretation guide construction of the treaty to make that determination?

The Panel failed correctly or adequately to answer any of those questions, despite their gravity.[1] *See BG Group, PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1205 (2014) ("Given the importance of the matter for international commercial arbitration, we granted the petition [for certiorari]."). It is uncontested that the oil operations at issue ended in 1992 when Texaco left Ecuador, and all that remained in 1997, when the BIT entered into force, were Chevron's breach of

[1] The United States is party to forty-two BITs currently in force. *Bilateral Investment Treaties Currently in Force*, U.S. INT'L TRADE ADMIN., http://tcc.export.gov/Trade_Agreements/Bilateral_Investment_Treaties/index.asp (last visited Sept. 2, 2015). Additionally, the U.S. is party to regional treaties with investment-protection provisions, including the North American Free Trade Agreement and the Central America Free Trade Agreement.

contract claims in Ecuadorian courts. Yet, the Panel treated the requirement of a qualifying investment under the U.S.-Ecuador BIT as if it were only a *procedural* precondition to arbitration, ignoring that it bears *substantively* on *whether* Ecuador agreed to arbitrate this dispute in the first instance.

The Panel's second mistake followed from its first: it concluded that the disputed *existence* of an investment must be decided under the New York Convention and does not warrant *de novo* review under the FSIA. Analogizing this case to *BG Group*, the Panel held that deference to the arbitrators' decision is appropriate. But the Panel's analogy is misplaced and fails to consider a key distinction between the two BIT provisions at issue in each case. The local-litigation requirement in *BG Group* was plainly a procedural precondition affecting only the *timing* of the arbitration. Here, by contrast, jurisdiction under § 1605(a)(6) depends on finding that Chevron in fact accepted the substantive terms of Ecuador's offer to arbitrate disputes concerning only current or future investments, as defined by the BIT. Otherwise, there was no agreement to arbitrate, and the Court does not have jurisdiction to confirm the arbitral award.

Where a U.S. court lacks jurisdiction under § 1605(a)(6) to confirm an arbitral award against a foreign state, the court must dismiss the petition to confirm, and the Convention does not authorize or require otherwise. *See GSS Grp. Ltd. v. Nat'l Port Auth.*, 680 F.3d 805, 817 (D.C. Cir. 2012). Facts bearing on whether an "agreement to arbitrate" actually was formed are jurisdictional under the FSIA and must be determined *de novo*. *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000). That review, moreover, must be based on canons of contract interpretation applicable to treaties—not, as the Panel did in *dicta*, on conclusory assertions about what the treaty provides.

The Panel found it unnecessary to examine the contractual intent of the State parties to the BIT at all. It disregarded Ecuador's views, and it did not ask for the United States' views, notwithstanding that it would have been appropriate to "invite[] the United States to participate as amicus because an international treaty is at issue[.]" *Commissions Import Export S.A. v. Republic of the Congo*, 757 F.3d 321, 323 (D.C. Cir. 2014). Undoubtedly, the United States has a strong interest in this precise issue. *See generally* Brief for the United States as *Amicus Curiae* in Support of Vacatur and Remand, *BG Group, PLC v. Republic of Argentina*, 2013 WL 4737184 (Sept. 3, 2013) ("U.S. *BG Group* Br.").

Interpreting an investment-treaty's arbitration provision "is, like a contract's interpretation, a matter of determining the parties' intent." *BG Group*, 134 S. Ct. at 1208. "Consent is especially salient . . . where the treaty is not an already agreed-upon arbitration provision between known parties, but rather a nation state's standing offer to arbitrate with an amorphous class of private investors." *Id.* at 1213 (Sotomayor, J., concurring in part). The Court did not consider the local-litigation requirement in *BG Group* to be a substantive component of the parties' consent to arbitration because there were "many indicators that Argentina and the United Kingdom did not intend the local litigation requirement to be a condition on their consent to arbitrate . . . ." *Id.* at 1215.

The Panel's decision did not consider any of these indicators to be relevant. Thus, the decision flouts, rather than respects, the State parties' intent to cabin their consent to arbitrate only disputes involving current or future investments defined by the BIT. Moreover, it short-circuits congressional intent by eroding the presumption of immunity absent a sufficient U.S. nexus or purposeful conduct deemed to constitute a waiver by the foreign state. 28 U.S.C. § 1604.

To be sure, determining whether the claim decided by the arbitrators was an investment dispute under the BIT involves both jurisdictional and merits considerations. But because it is at least in part jurisdictional, courts must review *de novo* the terms of the agreement to arbitrate. If the Panel's cursory analysis of that requirement were adopted by courts and tribunals evaluating similar treaties to which the United States is a party, the United States too could find itself forced to arbitrate a dispute it did not agree to arbitrate.

BACKGROUND

Chevron petitioned the District Court to confirm an arbitral award, relying solely on the FSIA's arbitration exception for subject-matter jurisdiction. Op. 3–4. Ecuador objected, arguing in relevant part that because Chevron's dispute did not concern an investment as defined by the BIT, Ecuador had not agreed to arbitrate Chevron's claims (involving an investment that ended five years before the treaty's effective date). J.A. 24–38. Accordingly, the FSIA's arbitration exception—which requires an applicable agreement to arbitrate—was inapposite, leaving the court without jurisdiction to confirm the award. *Id.*

For its part, "[t]he District Court rejected Ecuador's argument that the FSIA required the District Court to undertake a de novo analysis of whether the dispute was arbitrable under the BIT." Op. 4. It considered Ecuador's request for a careful analysis of the FSIA jurisdictional question "as an attempt . . . to get two bites at the apple of the merits of its dispute with Chevron[.]" J.A. 1429.

On appeal, the Panel recognized that the existence of an applicable arbitration agreement is a jurisdictional fact that must be established before proceeding to the merits of a petition to confirm an award against a foreign state. *See* Op. 6 ("For the most part, Ecuador has the better argument, and has identified the relevant jurisdictional facts," including "the existence of an arbitration agreement[.]"). It further recognized that Chevron bore the initial burden of production to support its claim that the FSIA's arbitration exception applied; if Chevron met that burden, the focus shifted to Ecuador to carry the burden of persuasion, demonstrating by a preponderance of the evidence that the arbitration exception did not apply. Op. 7–8.

Using that framework, the Panel found that Chevron "met its burden of production" simply "by producing the BIT, Chevron's notice of arbitration against Ecuador, and the tribunal's arbitration decision." *Id.* at 7. Thus, "[t]he jurisdictional task before the District Court was to determine whether Ecuador had sufficiently rebutted the presumption that the BIT and Chevron's notice of arbitration constituted an agreement to arbitrate" Chevron's claims. *Id.* at 8. Ecuador did rebut Chevron's showing, demonstrating that the BIT's offer of arbitration applied only to disputes over certain investments existing on or after the BIT's effective date, which excluded Chevron's claims in the arbitration. J.A. 30–38. The Panel rejected Ecuador's objection—not based on its own, *de novo* analysis, but rather by applying a deferential standard of review of the arbitrators' findings, concluding that whether Ecuador and the United States agreed to arbitrate the subject dispute was "properly considered as part of review under the New York Convention." Op. 10. The Panel thus failed to recognize that the burden had shifted to Chevron to rebut Ecuador's showing, and to consider whether Chevron satisfied its duty to prove an agreement to arbitrate the underlying dispute.

REASONS FOR GRANTING THE PETITION

I. The Panel Decision Establishes An Inadequate Standard For Review Of FSIA Jurisdictional Objections Involving An Agreement To Arbitrate

A sovereign's agreement to arbitrate a private party's claim "constitutes a waiver of immunity" under the FSIA. 131 Cong. Rec. 10,456 (1985). That waiver is not undertaken casually: where a State attaches substantive conditions to its waiver of immunity, "those conditions must be strictly observed, and exceptions thereto are not to be lightly implied." *Block v. N.D. ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 287 (1983); *see McKesson Corp. v. Islamic Republic of Iran*, 672 F.3d 1066, 1075 (D.C. Cir. 2012) (FSIA immunity exceptions are "narrowly drawn").

In deciding whether Ecuador agreed to arbitrate the underlying dispute and waive its immunity from suit, the Panel overlooked the substantive conditions on Ecuador's "offer." Critically, Ecuador and the United States did not agree to grant investors (of the other State) the right to arbitrate *all* investment disputes, but only those concerning investments that satisfy the BIT's definition of investment and temporal limitation. "The validity of the agreement to arbitrate is contingent upon the investor's acceptance of th[e treaty's] terms." A.M. STEINGRUBER, CONSENT IN INTERNATIONAL ARBITRATION 233 (2012).

Plainly, the United States' and Ecuador's offer to arbitrate is restricted by its terms to disputes *only* over "investments" existing on or after the BIT's effective date. A33, J.A. 292 (BIT art. XII). The United States' view is that "[b]y providing in a treaty that a particular requirement is a condition on a State's consent to enter into an arbitration agreement with an individual investor, the treaty parties contemplate that . . . courts engaging in judicial review under the [New York]

Convention will enforce the condition as written." U.S. *BG Group* Br., 2013 WL 4737184, at *22. If "[a] condition is unfulfilled, no agreement to arbitrate is formed, and the arbitrator never gains any authority to rule on any dispute between the parties—including whether an arbitration agreement exists." *Id.*

Because jurisdiction under 28 U.S.C. § 1605(a)(6) hinges on the existence of an "agreement to arbitrate," the question whether an investor accepted a foreign sovereign's offer to arbitrate *according to the terms of that offer* is a threshold, *jurisdictional* question requiring *de novo* consideration. *See Phoenix Consulting, Inc.*, 216 F.3d at 40.

The Panel recognized that "[t]he jurisdictional task before the District Court was to determine whether Ecuador had sufficiently rebutted the presumption that the BIT and Chevron's notice of arbitration constituted an agreement to arbitrate." Op. 8. But the Panel's conclusion that "Chevron accepted [Ecuador's offer to arbitrate] in the manner required by the treaty[,]" Op. 9, is unsupported by the treaty's text or any other evidence of the Contracting States' intent. True enough, Chevron invoked the proper procedural mechanism by serving a notice of arbitration. However, unless Chevron's notice addressed a dispute over an "investment" as defined in the BIT, that notice could not consummate an agreement to arbitrate. Where the Panel went wrong was concluding that it could not grant *de novo* review of the jurisdictional facts because those same facts also are determinative of Ecuador's defenses to confirmation of the award under Article V of the New York Convention. *See id.* at 7 ("Ecuador conflates the jurisdictional standard of the FSIA with the standard for review under the New York Convention.").

The Panel's mistake appears to rest on a misapplication of *BG Group*. The Panel characterized the Supreme Court as having "implicitly rejected Argentina's contention that its offer to arbitrate only applied to investors who complied with the local litigation requirement[,]" which it analogized to Ecuador's argument that its offer to arbitrate applied to only certain investment disputes. *Id.* That analogy is unsound. *BG Group* dictates that deferential review is the proper standard if, and only if, the challenge to confirmation of the arbitral award turns on procedural questions about "*when* the contractual duty to arbitrate arises," such as the "meaning and application of particular procedural preconditions for the use of arbitration." 134 S. Ct. at 1207. The Supreme Court concluded that the local litigation requirement "is of the . . . procedural[] variety." *Id.*

Conversely, the Supreme Court confirmed that *de novo* review is the correct standard where the arbitrator's jurisdiction turns on substantive questions, including "*whether* the parties are bound by a given arbitration clause." *Id.* at 1206–07 (emphasis added and citations omitted). The question *whether* Ecuador, a foreign sovereign, had agreed to arbitrate the claims presented by Chevron turns on whether Chevron asserted an "investment dispute" involving a covered investment existing when the BIT took effect. And "[t]o defer to an arbitral tribunal's ruling where the host State denies that it entered into an arbitration agreement with the particular investor would thus be to assume the very arbitral authority that the State denies ever arose." U.S. *BG Group* Br. at *22.

BG Group's treaty claims against Argentina *could have been* arbitrated without objection had it jumped through the proper procedural hoops. By contrast, Chevron's claims against Ecuador *should never have been* arbitrated—over Ecuador's objection—because those claims did not meet the substantive requirements of Ecuador's offer to arbitrate. Put another way, in *BG Group*, the purported acceptance of Argentina's offer to arbitrate without first litigating in local courts was procedurally defective, but substantively valid. Here, the purported acceptance of an offer to arbitrate disputes over new or extant investments was procedurally valid, but substantively defective. Having overlooked the crucial distinction between *BG Group* and this case, the Panel adopted an interpretation of *BG Group* plainly at odds with the Supreme Court's analysis.

II. Applicable Canons Of Contract Interpretation Should Guide The Courts' Analysis To Determine Whether Chevron Accepted Ecuador's Offer To Arbitrate

Rehearing is no less necessary in light of the Panel's *dicta* that "[e]ven if we were to conclude that the FSIA required a *de novo* determination of arbitrability, however, we would still find that the District Court had jurisdiction." Op. 10. The Panel gave two putative reasons why Chevron's lawsuits were "investments" under the BIT: the language of Article I.3 "suggests that an investment continues to exist until it has been fully wound up and all claims have been settled", and the temporal limitation in Article XII "applies only to 'investments' as defined by Article I, and *not* to the use of the term 'investments' within the definitional paragraph." *Id.* at 10–11. But the Panel provided no support for these conclusions—there is none.

"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." Vienna Convention on the Law of Treaties, art 31(1), May 23, 1969, 1155 U.N.T.S. 331. Fundamentally, an investment "contribut[es] . . . to the development of the state, by building or enhancing its infrastructure or its economy," R.D. BISHOP, ET AL., FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY 9 (2005), and "transfer[s] resources into the economy of the host state," Z. DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 163 (2009). Of course, Chevron's pre-existing investment in Ecuador had ceased to contribute to the State's economic development long before the BIT entered into force in 1997. And Chevron's lawsuits regarding their defunct investments sought to take money *out of* Ecuador. Because lawsuits "involve[] no contribution to, or relevant economic activity within" the host state, they are not investments under the BIT. *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award ¶ 162 (Mar. 31, 2011).[2]

The Panel's decision to qualify Chevron's lawsuits over a defunct investment as investments in their own right cannot be squared with the language or the purpose of the BIT, which was "designed to protect U.S. investment and encourage private sector development in Ecuador, and support the economic reforms taking place there," A17, J.A. 284 (transmittal letter from U.S. President to the Senate), and "stimulate the flow of private capital" into Ecuador, A26, J.A. 293 (BIT, preamble). A court must "give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Air France v. Saks*, 470 U.S. 392, 399 (1985). This is as much an "overriding principle" of contract interpretation as it is of treaty construction. 11 WILLISTON ON CONTRACTS § 32:2 (4th ed.). The Panel disregarded entirely the United States and Ecuador's shared expectations of what the BIT would and would not cover.

[2] The Panel's recourse to a uniquely American source (Black's Law Dictionary)—whose definition of "investment" might encompass buying stocks but is ill-suited to describe foreign investment protected by the BIT—cannot suffice to honor the State parties' contractual intent. "The derogation of state sovereignty necessary for a direct investor-state dispute resolution system is . . . only worth undertaking to the extent it helps a developing country compete to attract the *constructive sort of asset flows*, designated 'investment.'" N. Rubins, *The Notion of 'Investment' in International Investment Arbitration*, in ARBITRATING FOREIGN INVESTMENT DISPUTES: PROCEDURAL AND SUBSTANTIVE LEGAL ASPECTS 283, 286 (2004) (emphasis added).

Further, "[a]s the Supreme Court has instructed on countless occasions, [courts] are to presume 'identical words used in different parts of the same act are intended to have the same meaning.'" *Adena Regional Med. Ctr. v. Leavitt*, 527 F.3d 176, 180 (D.C. Cir. 2008). Yet according to the Panel, the term "investment" is subject to BIT Article XII's temporal limitation in Article I.1(a), but not when it is used again a few lines later in Article I.1(a)(iii). Op. 11. This inconsistent construction of an essential treaty term finds no support in the text of Article XII. And it ignores the State parties' shared intent that the BIT protections apply only to new or existing investments. The Panel's conclusory interpretation of the treaty text is particularly untenable because the "presumption that a given term is used to mean the same thing throughout a statute . . . surely is at its most vigorous when a term is repeated within a given sentence," just as "investment" is repeated within BIT Article I.[3] *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1708 (2012). If the Panel had correctly addressed this issue, it would have recognized that FSIA jurisdiction is lacking; Ecuador never agreed to arbitrate a claim of any kind based on an investment that ended years before the BIT took effect.

CONCLUSION

The Panel's decision, in a case of first impression, fails to recognize and undertake the analysis required to determine correctly whether a foreign state

[3] Indeed, the Panel's conclusion would require finding FSIA jurisdiction to confirm a hypothetical future arbitral award over litigation commenced in 2015 concerning the same investment which ended a quarter century ago.

"agreed to arbitrate" particular claims sufficient to confer jurisdiction under FSIA § 1605(a)(6). As demonstrated in its amicus brief to the Supreme Court in *BG Group*, the United States has a strong interest, both as a matter of foreign relations with its investment-treaty partners and as a potential litigant in foreign courts and arbitral tribunals, in how this Court decides the FSIA issue presented here. Accordingly, the Panel or the en banc Court should rehear this appeal, and vacate and remand to the District Court with instructions to invite the views of the United States and consider *de novo* whether Ecuador agreed to arbitrate claims regarding Chevron's lawsuits over defunct investments.

Respectfully submitted,

/s/ *Mark N. Bravin*

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SEPTEMBER 3, 2015

CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2015, I filed a copy of the foregoing via CM/ECF, which will serve it on all counsel of record.

/s/ *Mark N. Bravin*
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ADDENDUM

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 12, 2015 Decided August 4, 2015

No. 13-7103

CHEVRON CORPORATION AND TEXACO PETROLEUM COMPANY,
APPELLEES

v.

THE REPUBLIC OF ECUADOR,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:12-cv-01247)

Mark N. Bravin argued the cause for appellant. With him on the briefs were *Eric M. Goldstein* and *Eric T. Werlinger*.

Jeffrey S. Bucholtz argued the cause for appellees. With him on the brief were *Brian Callanan*, *James P. Sullivan*, *Brian A. White*, and *Caline Mouawad*.

Before: GARLAND, *Chief Judge*, and SRINIVASAN and WILKINS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WILKINS.

WILKINS, *Circuit Judge*:

For the last twenty years, the Republic of Ecuador and energy industry giant Chevron Corporation have been locked in a struggle involving a series of lawsuits related to an investment and development agreement. The dispute began in the Ecuadorian court system, where it languished unresolved for over a decade. It then proceeded to an international arbitration tribunal, whose verdict in Chevron's favor was appealed and sustained at all levels of the Dutch judiciary. The dispute made it to our shores in an action for confirmation of the arbitral award before the District Court for the District of Columbia. The District Court confirmed the arbitral award, prompting yet another appeal. We now affirm.

I.

In 1973, Chevron[1] and Ecuador signed an agreement allowing Chevron to develop Ecuadorian oil fields in exchange for providing below-market oil to the Ecuadorian government for domestic use. The deal was set to expire in 1992, and the parties were unable to agree to an extension. As the expiration date approached, Chevron filed several breach of contract suits against Ecuador. In 1995, Chevron and Ecuador signed a settlement agreement conclusively terminating all rights and obligations between the parties. The agreement provided for the continuation of the pending lawsuits.

In 1993, the United States and Ecuador signed a Bilateral Investment Treaty ("BIT")—formally known as the Treaty

[1] For purposes of this opinion, "Chevron" refers both to the Chevron Corporation and to its predecessor, Texaco Petroleum Co.

Between the Government of the United States of America and the Government of the Republic of Ecuador for the Encouragement and Reciprocal Protection of Investment—which took effect in 1997. Under this treaty, Ecuador made a standing offer to American investors to arbitrate disputes involving investments that existed on or after the treaty's effective date. J.A. 297, 300. For purposes of the BIT, the definition of "investment" included "a claim to money or a claim to performance having economic value, and associated with an investment." J.A. 294.

In 2006, Chevron commenced an international arbitration action before a three-member tribunal based out of The Hague, claiming that Ecuador had violated the BIT by failing to resolve its lawsuits in a timely fashion. Ecuador objected to the tribunal's jurisdiction, arguing that it had never agreed to arbitrate with Chevron. The basis of this objection was Ecuador's contention that Chevron's investments in Ecuador had terminated no later than 1995, two years prior to the entry into force of the BIT. The tribunal rejected the jurisdictional challenge, finding that Chevron's lawsuits were "investments" within the meaning of the BIT, and, after determining that Ecuador had delayed disposition of the lawsuits, ultimately decided against Ecuador on the majority of the breach of contract claims, awarding Chevron approximately $96 million. Ecuador challenged the award in the Dutch court system; the challenge was rejected by the District Court of The Hague, The Hague Court of Appeal, and the Dutch Supreme Court.

On July 27, 2012, Chevron petitioned the District Court to confirm the arbitral award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), which has been incorporated into the Federal Arbitration Act. *See* 9 U.S.C. §§ 201-208.

Ecuador raised three arguments in opposition: (1) that the District Court lacked subject-matter jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"); (2) that confirmation should be denied under the New York Convention; and (3) that a stay should be granted until the Dutch Supreme Court could resolve the then-pending appeal of the award.

The District Court determined that it had subject-matter jurisdiction under 28 U.S.C. § 1605(a)(6), which provides that sovereign immunity does not prevent a suit to confirm an award made pursuant to an arbitration agreement governed by an international treaty, because the award was made pursuant to the BIT and governed by the New York Convention. J.A. 1427-28. The District Court rejected Ecuador's argument that the FSIA required the District Court to undertake a de novo analysis of whether the dispute was arbitrable under the BIT. J.A. 1428-29. The District Court reviewed the question of arbitrability, however, as part of its consideration of whether the confirmation should be denied under the New York Convention, J.A. 1430-45, and found that the parties had "clearly and unmistakably agreed" that the tribunal would resolve such questions. J.A. 1436. Having made this finding, the District Court engaged in a deferential review of the tribunal's arbitrability decision and determined that it was clearly supported by the text of the BIT. J.A. 1439. The District Court rejected Ecuador's argument that confirming the order was against public policy and denied the requested stay. J.A. 1439-46. Ecuador filed a timely appeal. We affirm.

II.

As a general matter, the FSIA grants foreign states immunity from the jurisdiction of the courts of the United

States. 28 U.S.C. § 1604. In enacting the FSIA, however, Congress enumerated several exceptions to this jurisdictional restriction. These exceptions "provide[] the sole basis for obtaining jurisdiction over a foreign state in federal court." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989); *see also Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488-89 (1983). At issue in this case is the arbitration exception, which provides for federal court jurisdiction "in any case . . . in which the action is brought, either to enforce an [arbitration] agreement made by the foreign state with or for the benefit of a private party . . . or to confirm an award made pursuant to such an agreement to arbitrate, if . . . the agreement or award is or may be governed by a treaty . . . in force for the United States calling for the recognition and enforcement of arbitral awards." 28 U.S.C. § 1605(a)(6).

The District Court concluded that the jurisdictional requirements of the FSIA were met because "the Award's own language indicates it was rendered pursuant to the BIT" and "the Award is clearly governed by the New York Convention." *Chevron Corp. v. Republic of Ecuador*, 949 F. Supp. 2d 57, 62 (D.D.C. 2013). Ecuador argues that the District Court failed to determine in the first instance that an arbitration agreement existed, instead deferring to the judgment of the arbitrator. Had the District Court undertaken the correct analysis, the argument goes, it would have determined that Ecuador had never agreed to arbitrate its dispute with Chevron, thus denying the District Court jurisdiction to enforce the arbitral award. Chevron primarily argues that the statute permits jurisdiction so long as the plaintiff presents a non-frivolous claim that the foreign sovereign has consented to arbitration.

A.

There are two types of jurisdictional authorizations: (1) "jurisdiction [that] depends on particular factual propositions" and (2) "jurisdiction [that] depends on the plaintiff's asserting a particular type of claim." *Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 528 F.3d 934, 940 (D.C. Cir. 2008). Ecuador argues that the § 1605(a)(6) exception requires the District Court to make three findings: "(1) a foreign state has agreed to arbitrate; (2) there is an award based on that agreement; and (3) the award is governed by a treaty signed by the United States calling for the recognition and enforcement of arbitral awards." Appellant's Br. at 23. Chevron argues that the exception allows jurisdiction any time a plaintiff asserts a non-frivolous claim involving an arbitration award. Appellee's Br. at 30-31.

For the most part, Ecuador has the better argument, and has identified the relevant jurisdictional facts. In most instances, the existence of an arbitration agreement is a "purely factual predicate[] independent of the plaintiff's claim." *Chabad*, 528 F.3d at 940. Likewise, the existence of an award is a factual question that the District Court must resolve in order to maintain jurisdiction. If there is no arbitration agreement or no award to enforce, the District Court lacks jurisdiction over the foreign state and the action must be dismissed.[2]

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[2] The statute does not require that the District Court determine that the award is governed by a treaty; if the first two jurisdictional facts are established, the District Court has jurisdiction so long as the award "is *or may be* governed by a treaty." 28 U.S.C. § 1605(a)(6) (emphasis added). This element of the jurisdictional authorization is thus closer to the claim-based jurisdictional test proposed by Chevron. The distinction is irrelevant for purposes of this case, as

As the plaintiff, Chevron bears the initial burden of supporting its claim that the FSIA exception applies. *See id.* "[T]his is only a burden of production; the burden of persuasion rests with the foreign sovereign claiming immunity, which must establish the absence of the factual basis by a preponderance of the evidence." *Id.* Chevron has met its burden of production by producing the BIT, Chevron's notice of arbitration against Ecuador, and the tribunal's arbitration decision. Ecuador does not dispute the existence of the BIT, Chevron's notice, or the tribunal's arbitration decision, but instead challenges the District Court's conclusion that the BIT (or the combination of the BIT and Chevron's notice of arbitration) is an arbitration agreement between Ecuador and Chevron.

B.

Ecuador argues that the FSIA required the District Court to make a *de novo* determination of whether Ecuador's offer to arbitrate in the BIT encompassed Chevron's breach of contract claims. According to Ecuador, if Chevron's claims are not covered by the BIT, then Ecuador never agreed to arbitrate with Chevron, and the District Court consequently lacked jurisdiction. In Ecuador's view, the arbitrability question is therefore a jurisdictional question that must be addressed by the District Court.

Ecuador conflates the jurisdictional standard of the FSIA with the standard for review under the New York Convention. For FSIA purposes, Chevron made a prima facie showing that there was an arbitration agreement by producing the BIT and

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the parties do not dispute that the New York Convention governs arbitral awards issued pursuant to the BIT.

the notice of arbitration. Once Chevron made this showing, the burden shifted to Ecuador to demonstrate by a preponderance of the evidence that the BIT and the notice to arbitrate did not constitute a valid arbitration agreement between the parties. *Cf. Chabad*, 528 F.3d at 940. The jurisdictional task before the District Court was to determine whether Ecuador had sufficiently rebutted the presumption that the BIT and Chevron's notice of arbitration constituted an agreement to arbitrate.[3]

The Supreme Court's recent decision in *BG Group, PLC v. Republic of Argentina*, 134 S. Ct. 1198 (2014), is instructive on this point. In *BG Group*, Argentina's primary argument was similar to Ecuador's in the present case. By its terms, the Bilateral Investment Treaty between the United Kingdom and Argentina required an investor to litigate its claims in the local court system before submitting the claims to arbitration. 134 S. Ct. at 1204. BG Group submitted a claim to arbitration without observing this process. The arbitration panel concluded that Argentina had waived the local litigation requirement and found in BG Group's favor on the merits. *Id.* at 1204-05. When BG Group sought to confirm the award in the District Court for the District of Columbia, the District Court deferred to the arbitrators'

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[3] The District Court eschewed making this determination as part of its jurisdictional analysis. This was error. The statute requires the District Court to satisfy itself that the party challenging immunity has presented prima facie evidence of an agreement between the parties and that the sovereign asserting immunity has failed to sufficiently rebut that evidence. There is no need to remand, however, because the District Court elsewhere found that the BIT and the notice of arbitration together constituted an agreement between the parties. *See Chevron*, 949 F. Supp. 2d at 63 ("The Court thus finds [Chevron] had a valid agreement to arbitrate under the BIT.").

determination regarding the local litigation requirement. *Republic of Argentina v. BG Group PLC*, 715 F. Supp. 2d 108, 121-22 (D.D.C. 2010). This Court reversed, holding that "[b]ecause the Treaty provides that a precondition to arbitration of an investor's claim is an initial resort to a contracting party's court . . . the question of arbitrability is an independent question of law for the court to decide." *Republic of Argentina v. BG Group PLC*, 665 F.3d 1363, 1371 (D.C. Cir. 2012).

The Supreme Court reversed. The Court "treat[ed] the document . . . as if it were an ordinary contract between private parties"—Argentina and BG Group—and concluded that the parties had intended to allow the arbitrator to determine whether the local litigation requirement had been satisfied. *BG Group*, 134 S. Ct. at 1206 (majority op.). In doing so, the Court implicitly rejected Argentina's contention that its offer to arbitrate only applied to investors who complied with the local litigation requirement. As the Chief Justice noted in his dissent, "[t]he majority opinion nowhere explains when and how Argentina agreed *with BG Group* to submit to arbitration. Instead, the majority seems to assume that, in agreeing with the United Kingdom to adopt [the arbitration provision] along with the rest of the treaty, Argentina thereby formed an agreement with all potential U.K. investors . . . to submit all investment-related disputes to arbitration." *BG Group*, 134 S. Ct. at 1216 (Roberts, C.J., dissenting).

While we are mindful of the Chief Justice's concerns, we agree with his interpretation of the Court's opinion. The BIT includes a standing offer to all potential U.S. investors to arbitrate investment disputes, which Chevron accepted in the manner required by the treaty. The FSIA therefore allows federal courts to exercise jurisdiction over Ecuador in order to consider an action to confirm or enforce the award. The dispute over whether the lawsuits were "investments" for purposes of the treaty is properly considered as part of review under the New York Convention.

C.

Even were we to conclude that the FSIA required a *de novo* determination of arbitrability, however, we would still find that the District Court had jurisdiction. In order to prevail on its jurisdictional argument, Ecuador would have to demonstrate by a preponderance of the evidence that Chevron's suits were not "investments" within the meaning of the BIT. This Ecuador has failed to do.

For purposes of the BIT, "'investment' means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party . . . and includes . . . a claim to money or a claim to performance having economic value, and associated with an investment." BIT Article I.1(a)(iii), J.A. 294. Ecuador argues that the final phrase – "and associated with an investment" – means that a lawsuit must be associated with an investment that existed within the effective period of the BIT in order to qualify as an investment under the BIT. This is a misreading of the treaty terms for two reasons.

First, Article I.3 provides that "[a]ny alteration of the form in which assets are invested or reinvested shall not affect their character as investment." In conjunction with the BIT's non-exhaustive definition of "investment," Article I.3 suggests that an investment continues to exist until it has been fully wound up and all claims have been settled. Chevron's lawsuits were therefore continuations of its initial investment in Ecuador and protected by the BIT.

Second, Article XII limits the application of the BIT "to investments existing at the time of entry into force as well as to investments made or acquired thereafter." J.A. 300. The investments referred to by this article are investments as defined in Article I, and include "a claim to money or a claim to performance having economic value, and associated with an investment." J.A. 294. Ecuador argues that the Article XII temporal limitation applies both to the claim and to the investment with which that claim is associated. We disagree. In our view, Article XII applies only to "investments" as defined by Article I, and *not* to the use of the term "investments" within the definitional paragraph. A lawsuit that existed at the time of entry into force of the BIT is consequently an "investment" for BIT purposes so long as that lawsuit is associated with an investment as generally defined: "An expenditure to acquire property or assets in order to produce revenue; the asset so acquired." BLACK'S LAW DICTIONARY (6th ed. 1990). Chevron's breach of contract lawsuits indisputably were associated with its pre-BIT investment activities, and the lawsuits indisputably existed when the BIT entered into force. The lawsuits themselves were therefore "investments" within the meaning of the treaty.

The District Court correctly determined that the BIT and Chevron's notice to arbitrate satisfied the jurisdictional requirements of the FSIA. Even if the FSIA required the *de novo* review of arbitrability suggested by Ecuador, however, the District Court would still have properly exercised jurisdiction because Ecuador failed to demonstrate by a preponderance of the evidence that Chevron's lawsuits were not protected by the BIT.

III.

Ecuador's arguments against confirmation of the award under the New York Convention are largely coextensive with its arguments related to the District Court's jurisdiction. There is no merit to these arguments, and the District Court properly confirmed the award.

As recognized by the court below, "the [New York Convention] affords the district court little discretion in refusing or deferring enforcement of foreign arbitral awards." *Belize Soc. Dev. Ltd. v. Gov't of Belize*, 668 F.3d 724, 727 (D.C. Cir. 2012); *see also* Appellee's Brief Add. 3 (New York Convention provision setting forth exclusive grounds on which enforcement of an award may be refused). Ecuador asserts two grounds on which confirmation of the award should be denied: Articles V(1)(c) and V(2)(b) of the New York Convention. Article V(1)(c) provides that an award may be refused if it "deals with a difference not contemplated by or not falling within the terms of the submission to arbitration," and V(2)(b) allows refusal if "the recognition or enforcement of the award would be contrary to the public policy" of the country in which enforcement is sought.

Ecuador's reliance on Article V(1)(c) is misplaced. The District Court did not need to reach the question of whether Chevron's lawsuits fell within the terms of submission to arbitration because the BIT allows the arbitration tribunal to make that determination. As discussed *supra*, the Supreme Court has analyzed a similar bilateral investment treaty as if it were a contract between the sovereign and the investor corporation seeking to confirm an arbitral award. "Where ordinary contracts are at issue, it is up to the parties to determine whether a particular matter is primarily for arbitrators or for courts to decide. If the contract is silent on the matter . . . courts presume that the parties intend courts, not arbitrators, to decide . . . disputes about 'arbitrability.'" *BG Group*, 134 S. Ct. at 1206 (internal citations omitted). The BIT is not silent on who decides arbitrability. Article VI of the BIT provides that the investor company may submit a matter to arbitration "in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL)." BIT Art. VI(3)(a)(iii), J.A. 298. Under these rules, which the BIT incorporates by reference, "[t]he arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause," and "shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part." UNCITRAL Arbitration Rules, G.A. Res. 31/91 art. 21 (Dec. 15, 1976). Ecuador therefore consented to allow the arbitral tribunal to decide issues of arbitrability—including whether Chevron had "investments" within the meaning of the treaty. *See also Oracle America, Inc. v. Myriad Group A.G.*, 724 F.3d 1069, 1077 (9th Cir. 2013) ("Incorporation of the UNCITRAL arbitration rules . . . constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability."); *Schneider v. Kingdom of Thailand*, 688 F.3d 68, 72 (2d Cir. 2012) ("[A] bilateral investment treaty's incorporation of the . . . UNCITRAL rules [is] clear and unmistakable evidence that the parties intended questions of arbitrability to be decided by the arbitral panel in the first instance.") (internal quotation marks omitted). There was no need for the District Court to independently determine that Chevron's suits satisfied the BIT's parameters once it had concluded that the parties had delegated this task to the arbitrator.

Ecuador's Article V(2)(b) arguments are similarly rooted in the "erroneous premise" that the BIT does not apply. *See*

Appellant's Br. at 55-56 ("Finally, the District Court erred by failing to deny confirmation on public-policy grounds. At the root of its incorrect analysis was the erroneous premise that the Republic and Chevron agreed to arbitrate."). Relying on this premise, Ecuador identifies two aspects of American public policy that are purportedly inconsistent with confirmation of the award. First, Ecuador argues that "the Award is repugnant to the policy that forum-selection clauses in agreements between sophisticated parties will be upheld" because Chevron and Ecuador had contractually agreed that Chevron's claims would be litigated in Ecuadorian courts. Appellant's Br. at 57-58. Second, Ecuador argues that confirmation is inconsistent with respect for foreign sovereignty, claiming that "the Tribunal effectively usurped the jurisdictional authority of the Ecuadorian judiciary, the only adjudicative body authorized to hale the Republic into court to respond to Chevron's lawsuits." Appellant's Br. at 58.

The primary flaw with the first argument is that it misapprehends the nature of Chevron's action. Chevron's breach of contract claims were brought in Ecuadorian courts, as required by the initial investment agreement and ratified by the 1995 settlement agreement.[4] Chevron's arbitration action alleged that Ecuador had unduly delayed resolution of those

[4] As Chevron notes, the 1995 settlement agreement did not expressly indicate that the claims would remain in Ecuadorian courts: "Any and all claims, of any type . . . which are separate from this agreement and which exist judicially between the parties, shall continue to be heard before the authorities having the appropriate jurisdiction." J.A. 182. While the use of the word "continue" indicates that the claims were to remain in Ecuadorian courts (where they were at the time of the settlement agreement), the language does not plainly foreclose proceedings before other authorities.

claims in violation of the BIT. J.A. 813-14. The issue initially before the arbitration panel was not whether Ecuador had breached its contract with Chevron, but instead whether Ecuador had breached the BIT by failing to resolve the contract suits in a timely fashion. In signing the BIT, Ecuador agreed to arbitration of precisely this type of action. *See* Art. II(7), J.A. 297 ("Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.").

A similar consideration forecloses Ecuador's claim of jurisdictional usurpation. The Tribunal did not usurp the authority of the Ecuadorian judiciary; Ecuador ceded that authority, first by signing the BIT, and then by failing to resolve Chevron's legal actions in a timely fashion.

Contrary to Ecuador's protestations, enforcement of the arbitral award is fully consistent with the public policy of the United States, most notably the "emphatic federal policy in favor of arbitral dispute resolution," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985). By signing the BIT, Ecuador agreed to allow independent and neutral arbitrators to determine whether an investor company could take advantage of the substantive and procedural protections in the BIT. Chevron followed the proper procedure to request arbitration under the BIT, and the arbitrator determined that it had jurisdiction. Four courts have also considered and rejected Ecuador's argument that Chevron did not have the right to avail itself of the BIT's arbitration clause. Ecuador has given us no reason to conclude that these many authorities ruled in error.

IV.

For the foregoing reasons, we affirm the District Court's confirmation of the arbitral award to Chevron.

So ordered.

Ecuador Bilateral Investment Treaty

Signed August 27, 1993; Entered into Force May 11, 1997

103D CONGRESS *1st Session*

SENATE TREATY Doc. 103-15

INVESTMENT TREATY WITH THE REPUBLIC OF
ECUADOR

MESSAGE
FROM
THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

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

September 10, 1993.--Treaty was read the first time and, together with the accompanying papers, referred to the Committee on Foreign Relations and ordered to be printed for the use of the Senate

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1993
69-118

THE WHITE HOUSE, *September 10, 1993.*
To the Senate of the United States:

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith the Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, with Protocol and related exchange of letters, signed at Washington on August 27, 1993. Also transmitted for the information of the Senate is the report of the Department of State with respect to this Treaty.

This is the first bilateral investment treaty with an Andean Pact country, and the second such Treaty signed with a South American country. The Treaty is designed to protect U.S. investment and en-courage private sector development in Ecuador, and support the economic reforms taking place there. The Treaty's approach to dispute settlement will serve as a model for negotiations with other Andean Pact countries.

The Treaty is fully consistent with U.S. policy toward inter-national and domestic investment. A specific tenet, reflected in this Treaty, is that U.S. investment abroad and foreign investment in the United States should receive fair, equitable, and nondiscriminatory treatment. Under this Treaty, the Parties also agree to international law standards for expropriation and compensation for expropriation, free transfers of funds associated with investments, freedom of investments from performance requirements, and the investors freedom to choose to resolve disputes with the host government through international arbitration.

I recommend that the Senate consider this Treaty as soon as possible, and give its advice and consent to ratification of the Treaty, with Protocol and related exchange of letters, at an early date.

WILLIAM J. CLINTON.

LETTER OF SUBMITTAL

S/S 9320385
DEPARTMENT OF STATE,
Washington, DC, September 7, 1993.

The PRESIDENT
The White House.

THE PRESIDENT: I have the honor to submit to you the Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of In-vestment, with Protocol and a related exchange of letters, signed at Washington on August 27, 1993. Irecommend this Treaty, with Protocol and exchange of letters, be transmitted to the Senate for its advice and consent to ratification.

The bilateral investment treaty (BIT) with Ecuador represents an important milestone in the BIT program. It is the first bilateral investment treaty signed with a member of the Andean Pact, and the second BIT signed with a South American country. (A BIT was signed with Argentina in 1991.) This Treaty will assist Ecuador in its efforts to develop its economy by creating conditions more favorable for U.S. private investment, helping to attract such investment and, thus, strengthening the development of the private sector. It is U.S. policy, however, to advise potential treaty partners during BIT negotiations that conclusion of a BIT does not necessarily result in immediate increases in private U.S. investment flows.

To date, 13 BITs are in force for the United States--with Bangladesh, Cameroon, the Czech Republic, Egypt, Grenada, Morocco, Panama, Senegal, Slovakia, Sri Lanka, Tunisia, Turkey, and Zaire. In addition to the Ecuador Treaty, the United States has signed, but not yet brought into force, BITs with Argentina, Armenia, Bulgaria, the Congo, Haiti, Kazakhstan, the Kyrgyz Republic, Moldova, Romania, and Russia--and a business and economic relations treaty with Poland, which contains the BIT elements.

The Office of the United States Trade Representative and the Department of State jointly led this BIT negotiation, with assistance from the Department of Commerce, Treasury, and OPIC.

THE U.S.-ECUADOR TREATY

The Treaty with Ecuador satisfies the principal BIT objectives, which are:

-- Investments of nationals and companies of either Party in the territory of the other Party (investments) receive the better of national treatment or most-favored-nation (MFN) treatment both on establishment and thereafter, subject to certain specified exceptions;

-- Investments are guaranteed freedom from performance requirements, including requirements to use local products or to export goods;

-- Expropriation can occur only in accordance with international law standards: for a public purpose; in a nondiscriminatory manner; under due process of law; and upon payment of prompt, adequate, and effective compensation;

-- Investments are guaranteed the unrestricted transfer of funds in a freely usable currency; and

-- Nationals and companies of either Party, in investment disputes with the host government, have access to binding international arbitration, without first resorting to domestic courts.

The U.S.-Ecuador Treaty eliminates Article VIII of the prototype text. This language had excluded from the dispute settlement provisions of the BIT those disputes arising under the export credit, guarantee or insurance programs of the Export-Import Bank of the United States, as well as those arising under any other such official programs pursuant to which the Parties agreed to other means of settling disputes. The Export-Import Bank, the Overseas Private Investment Corporation and other relevant government agencies indicated prior to this negotiation that they saw no need to maintain such a provision.

The U.S.-Ecuador Treaty also differs from the prototype in that it includes provisions at Article 1, paragraph 1 (f) and (g), and Article II, paragraph 2, which clarify and extend the requirements of the Treaty with respect to state enterprises. This new language is discussed in further detail in the, article-by-article analysis of the Treaty below.

In addition, the Treaty also includes minor clarifying changes to the text of Article VI, paragraph 2; a provision to preserve contractual arrangements made as part of any debt-equity conversion program in Ecuador, in the Protocol; Ecuador's exceptions to the obligation to provide national treatment, in the Protocol; and a related exchange of letters. These elements are further described below.

The following is an article-by-article analysis of the provisions of the Treaty:

Preamble

The Preamble states the goals of the Treaty. The Treaty is premised on the view that an open investment policy leads to economic growth. These goals include economic cooperation, increased flow of capital, a stable framework for investment, development of respect for internationally-recognized worker rights, and maximum efficiency in the use of economic resources. While the Preamble does not impose binding obligations, its statement of goals may serve to assist in the interpretation of the Treaty.

Article I (Definitions)

Article I sets out definitions for terms used throughout the Treaty. As a general matter, they are designed to be broad and inclusive in nature.

Investment

The Treaty's definition of investment is broad, recognizing that investment can take a wide variety of forms. It covers investments that are owned or controlled by nationals or companies of one of the Treaty partners in the territory of the other. Investments can be made either directly or indirectly through one or more subsidiaries, including those of third countries. Control is not specifically defined in the Treaty. Ownership of over 50 percent of the voting stock of a company would normally convey control, but in many cases the requirement could be satisfied by less than that proportion.

The definition provides a non-exclusive list of assets, claims and rights that constitute investment. These include both tangible and intangible property, interests in a company or its assets, "a claim to money or performance having economic value, and associated with an investment," intellectual property rights, and any right conferred by law or contract (such as government-issued licenses and permits). The requirement that a "claim to money" be associated with an investment excludes claims arising solely from trade transactions, such as a simple movement of goods across a border, from being considered investments covered by the Treaty.

Under paragraph 2 of Article I, either country may deny the benefits of the Treaty to investments by companies established in the other that are owned or controlled by nationals of a third country if 1) the company is a mere shell, without substantial business activities in the home country, or 2) the third country is one with which the denying Party does not maintain normal economic relations. For example, at this time the United States does not maintain normal economic relations with, inter alia, Cuba or Libya.

Paragraph 3 confirms that any alternation in the form in which as asset is invested or reinvested shall not affect its character as investment. For example, a change in the corporate form of an investment will not deprive it of protection under the Treaty.

Company

The definition of "company" is broad in order to cover virtually any type of legal entity, including any corporation, company, association, or other entity that is organized under the laws and regulations of a Party. The definition also ensures that companies of a Party that establish investments in the territory of the other Party have their investments covered by the Treaty, even if the parent company is ultimately owned by non-Party nationals, although the other Party may deny the benefits of the Treaty in the limited circumstances set forth in Article 1, paragraph 2. Likewise, a company of a third country that is owned or controlled by nationals or companies of a Party. will also be covered. The definition also covers charitable and non-profit entities, as well as entities that are owned or controlled by the state.

National

The Treaty defines "national" as a natural person who is a national of a Party under its own laws. Under U.S. law, the term "national" is broader than the term "citizen;" for example, a native of America Samoa is a national of the United States, but not a citizen.

Return

"Return" is defined as "an amount derived from or associated with an investment," and the Treaty provides a non-exclusive list capital gains; or other fees; provides breadth to the Treaty's transfer provisions in Article IV.

Associated Activities

The Treaty recognizes that the operation of an investment requires protections extending beyond the investment to numerous related activities. This definition provides an illustrative list of such investor activities, including operating a business facility, borrowing money, disposing of property, issuing stock and purchasing . These activities are covered by Article II, paragraph 1, which guarantees the better of national or MFN treatment for investments and associated activities.

State Enterprise
"State enterprise" is defined as an enterprise owned, or controlled through ownership interests, by a Party.

Delegation
"Delegation" is defined to include a legislative grant, government order, directive or other act which transfers governmental authority to a state enterprise or authorizes a state enterprise to exercise such authority.

The definitions of "state enterprise" and "delegation" are included to clarify the scope of the obligations of Article II, paragraph 2, which provides that any governmental authority delegated to a must be exercised in a manner consistent with the Party obligations under the Treaty.

Article II (Treatment)
Article II contains the Treaty's major obligations with respect to the treatment of investment.

Paragraph 1 generally ensures the better of MFN or national treatment in both the entry and post-entry phases of investment. It thus prohibits both the screening of proposed foreign investment on the basis of nationality and non-discriminatory measures once the investment has been made, subject to specific exceptions provided for in a separate Protocol. The United-States and Ecuador have both reserved certain exceptions in the Protocol to the Treaty, the provisions of which are discussed in the section entitled "Protocol."

Paragraph 2 is designed to ensure that a Party cannot utilize state owned or controlled enterprises to circumvent its obligations under the Treaty. To this end, it requires each Party to observe its treaty obligations even when it chooses, for administrative or other reasons, to assign some portion of its authority to a state enterprise, such as the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees or other charges. Paragraph 2 also supports competitive equality for investments by requiring that a Party ensure that state enterprises accord the better of national or MFN treatment in the sale of its goods or services in the Party's territory.

Paragraph 3 guarantees that investment shall be granted "fair and equitable" treatment. It also prohibits Parties from impairing, through arbitrary or discriminatory means, the management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal of investment. This paragraph also sets out a minimum standard of treatment based on customary international law.

In paragraph 3(c), each Party pledges to respect any obligations it may have entered into with respect to investments. Thus, in dispute settlement under Articles VI or VII, a Party would be foreclosed from arguing, on the basis of sovereignty, that it may unilaterally ignore obligations to such investments.

Paragraph 4 allows, subject to each Party's immigration laws and the entry of each Party's nationals into the territory of the other for purposes linked to investment and involving the commitment of a "substantial amount of capital." This paragraph serves to render nationals of a BIT partner eligible for treaty investor visas under U.S. immigration law and guarantees similar treatment for U.S. investors.

Paragraph 5 guarantees companies the right to engage top managerial personnel of their choice, regardless of nationality.

Under paragraph 6, neither Party may impose performance requirements such as those conditioning investment on the export of goods produced or the local purchase of goods or services. Such requirements are major burdens on investors.

Paragraph 7 provides that each Party must provide effective means of asserting rights and claims with respect to investment, investment agreements and any investment authorizations. Under paragraph 8, each Party must make publicly available all laws, administrative practices. and adjudicatory procedures pertaining to or affecting investments.

Paragraph 9 recognizes that under the U.S. federal system, States of the United States may, in some instances, treat out-of-State residents and corporations in a different manner than they treat in-State residents and corporations. The Treaty provides that the national treatment commitment, with respect to the States, means treatment no less favorable than that provided to U.S. out-of-State residents and corporations.

Paragraph 10 limits the Article's MFN obligation by providing that it will not apply to advantages accorded by either Party to third countries by virtue of a Party's membership in a free trade area or customs union or a future multilateral agreement under the auspices of the General Agreement on Tariffs and Trade (GATT). The free trade area exception in this Treaty is analogous to the exception provided for with respect to trade in the GATT.

Article III (Expropriation)
Article III incorporates into the Treaty the international law standards for expropriation and compensation.

Paragraph 1 describes the general rights of investors and nationalization. These rights also apply standards to direct or indirect state measures "tantamount to expropriation or nationalization," and thus apply to "creeping expropriations" that result in a substantial deprivation of the benefit of investment without taking of the title to the investment.

Five requirements are listed. Expropriation must be for a public purpose; be carried out in a non-discriminatory manner; be subject to prompt, adequate, and effective compensation; be subject to due process; and be accorded the treatment provided in the standards of Article 11 (3). (These standards guarantee fair and equitable treatment and prohibit the arbitrary and discriminatory impairment of investment in its broadest sense.)

The second sentence of paragraph 1 clarifies the meaning of "prompt, adequate, and effective compensation." Compensation must be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known (whichever is earlier); be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable; be freely transferable; and be calculated in a freely usable currency on the basis of the prevailing market rate of exchange.

Paragraph 2 entitles an investor claiming that an expropriation has occurred to prompt judicial or administrative review of the claim in the host country, including a determination of whether they conform to international law. to the better of national or MFN losses related to war or civil disturb, does not specify an absolute obligations to pay compensation for such losses.

Article IV (Transfers)
Article IV protects investors from certain government exchange controls limiting current account and capital account transfers.

In Paragraph 1, the Parties agree to permit "transfers related to an investment to be made freely and without delay into and out of its territory." Paragraph 1 also provides a non-exclusive, list of transfers that must be allowed, including returns (as defined in Article 1); payments made in compensation for expropriation (as defined in Article III); payments arising out of an investment dispute; payments made under a contract, "including the amortization of principle and interest payments on a loan; proceeds from the liquidation of all or part of an investment; and additional contributions to capital for the maintenance or development of an investment.

Paragraph 2 provides that transfers are to be made in a "freely usable currency" at the prevailing market rate of exchange on the date of transfer with respect to spot transactions in the currency to be transferred. "Freely usable" is a standard of the International Monetary Fund; at present there are five such "freely usable" currencies: the U.S. dollar, Japanese yen, German mark, French franc and British pound sterling.

Paragraph 3 recognizes that notwithstanding these guarantees, Parties may maintain certain laws or obligations that could affect transfers with respect to investments. It provides that the Parties may require reports of currency transfers and impose income taxes by such means as a withholding tax on dividends. It also recognizes that Parties may protect the rights of creditors and ensure the satisfaction of judgments in adjudicatory proceedings through their laws, even if such measures interfere with transfers. Such laws must be applied in an equitable, nondiscriminatory and good faith manner.

Article V (State-State, Consultations)
Article V provides for prompt consultation between the Parties, at either Party's request, on any matter relating to the interpretation or application of the Treaty.

Article VI (State-Investor Dispute Resolution)
Article VI sets forth several means by which disputes between an investor and the host country may be settled.

Article VI procedures apply to an "investment dispute," a term which covers any dispute arising out of or relating to an investment authorization, or an agreement between the investor and the host government or to rights granted by the Treaty with respect to an investment.

When a dispute arises, Article VI provides that the disputants should initially seek to resolve the dispute by consultation and negotiation, which may include non-binding third party procedures. Should such consultations fail, paragraphs 2 and 3 set forth the investor's range of choices of dispute settlement. The investor may make an exclusive and irrevocable choice to: (1) employ one of the several arbitration procedures outlined in the Treaty; (2) submit the dispute to procedures previously agreed upon by the investment and the host country government in an investment agreement or otherwise; or (3) submits the dispute to the local courts or administrative tribunals of the host country. Paragraph 2 of Article VI of the Ecuador BIT adds to the prototype BIT language a phrase reiterating that the investor may choose among these three alternatives. This addition does not alter the operation of this provision. Under the Treaty, the investor can take an investment dispute to binding arbitration after six months from the date that the dispute arises. The investor may choose between the International Center for the Settlement of Investment Disputes (ICSID) (if the host country has joined the Centre--otherwise the ICSID Additional Facility is available) and ad hoc arbitration using the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). The Treaty also recognizes that, by mutual agreement, the parties to the dispute may choose another arbitral institution or set of arbitral rules.

Paragraph 4 contains the consent of the United States and Ecuador to the submission of investment disputes to binding arbitration in accordance with the choice of investor.

Paragraph 5 provides that a non-ICSID arbitration shall take place in a country that is a party to the United Nations Convention the Recognition and Enforcement of Arbitral Awards. This requirement enhances the ability of investors to enforce their arbitral awards. In addition, paragraph 6 includes a separate commitment by each Party to enforce arbitral awards rendered pursuant to Article VI procedures.

Paragraph 7 provides that in any dispute settlement procedure, a Party may not invoke as a defense, counterclaim, set-off or in any other manner the fact that the company or national has received or will be reimbursed for the same damages under an insurance or guarantee contract.

Paragraph 8 is included in the Treaty to ensure that ICSID arbitration will be available for investors making investments in the form of companies created under the laws of the Party with which in there is a dispute.

Article VII (State-State Arbitration)
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.

Article VIII (Preservation of Rights)
Article VIII clarifies that the Treaty is meant only to establish a floor for the treatment of foreign investment. An investor may be entitled to more favorable treatment through domestic legislation, other international legal obligations, or a specific obligation assumed by a Party with respect to that investor. this provision ensures that the Treaty will not be interpreted to derogate from any entitlement to such more favorable treatment.

Article IX (Measures Not Precluded)
The first paragraph of Article IX reserves the right of a Party to take measures for the maintenance of public order and the fulfillment of its international obligations with respect to international peace and security, as well as those measures it regards as necessary for the protection of its own essential security interests. These provisions are common in international investment agreements.

The maintenance of public order would include measures taken pursuant to a Party's policy powers to ensure public health and safety. International obligations with respect to peace and security would include, for example, obligations for rising out of Chapter VII of the United National Charter. Measures permitted by the provision on the protection of a Party's essential security interests would include security-related actions taken in time of war or national emergency; actions not an arising from a state of war or national emergency must have a clear and direct relationship to the essential security interest of the Party involved.

The second paragraph allows a Party to promulgate special formalities in connection with the establishment of investment, provided that the formalities do not impair the substance of any Treaty rights. Such formalities would include, for example, U.S. reporting requirements for certain inward investment.

Article X (Tax Policies)
The Treaty exhorts both countries to provide fair and equitable treatment to investors with respect to tax policies. However, tax matters are generally excluded from the coverage of the prototype BIT, based on the assumption that tax matter are properly covered in bilateral tax treaties.

The Treaty, and particularly the dispute settlement provisions, do apply to tax matters in three areas, to the extent they are not subject to the dispute settlement provisions of a tax treaty, or, if so subject, have been raised under a tax treaty's dispute settlement procedures and are not resolved in a reasonable period of time.

The three areas where the Treaty could apply to tax matters are expropriation (Article III), transfers (Article IV) and the observance and enforcement of terms of an investment agreement or authorization (Article VI (1) (a) or (b)). These three areas are important for investors, and two of the three expropriatory taxation and tax provisions contained in an investment agreement or authorization are not typically addressed in tax treaties.

Article XI (Application to Political Subdivisions)
Article XI makes clear that the obligations of the Treaty are applicable to all political subdivisions of the Parties, such as provincial, state and local governments.

Article XII (Entry into Force, Duration and Termination)
The Treaty enters into force thirty days after exchange of instruments of ratification and continues in force for a period of ten years. From the date of its entry into force, the Treaty applies to existing and future investments. After the ten-year term, the Treaty will continue in force unless terminated by either Party upon one year's notice. If terminated, all existing investments would continue to be protected under the Treaty for ten years thereafter.

Protocol
The Treaty addresses debt-equity programs, under which an investor purchases debt of a country at a discount and receives local currency in an amount equivalent to the debt's face value. These programs normally require that the investor postpone repatriating the investment made with the local currency obtained in the conversion. Investors may choose to enter into such programs because they obtain more local currency than they otherwise would receive for a given amount of foreign exchange. The treaty's Protocol provides that any deferral of transfers agreed to under debt-equity conversion programs would not be superseded by the treaty's guarantee of transfers without delay. This provision in the Protocol was added at the suggestion of the United States. The United States has been generally supportive of debt-equity conversion programs as part of the overall solution to the debt problem and has considered them to be an important element in commercial bank financing programs which reduce debt and debt service.

U.S. bilateral investment treaties allow for sectoral exceptions to national and MFN treatment. The U.S. exceptions are designed to protect governmental regulatory interests and to accommodate the derogations from national treatment and, in some cases, MFN treatment in existing federal law.

The U.S. portion of the Protocol contains a list of sectors and matters in which, for various legal and historical reasons, the federal government or the states may not necessarily treat investments of nationals or companies of the other Party as they do U.S. investments or investments from a third country. The U.S. exceptions from national treatment are: air transportation; ocean and coastal shipping; banking; insurance; government grants; government insurance and loan programs; energy and power production; local customhouse brokers; owners of real property; ownership and operation of broadcast stations; ownership of shares in the Communications Satellite Corporation; the provision of common carrier telephone and telegraph services; the provision of submarine cable services; use of land and natural resources; mining on the public domain; maritime and maritime-related services; and, primary dealership in U.S. government securities.

Ownership of real property, mining on the public domain, maritime and maritime-related services, and primary dealership in U.S. government securities are excluded from MFN as well as national treatment commitments. The last three sectors are exempted by the United States from MFN treatment obligations because of U.S. laws that require reciprocity. Enforcement of reciprocity provisions would deny both national and MFN treatment.

The listing of a sector does not necessarily signify that domestic laws have entirely reserved it for nationals. Future restrictions or limitations on foreign investment are only permitted in the sectors listed; must be made on an MFN basis,, unless otherwise specified in the Protocol; and must be appropriately notified. Any additional restrictions or limitations which a Party may adopt with respect to listed sectors may not affect existing investments. The Ecuador Treaty adds language to the prototype BIT reiterating that listing an exception to national treatment does not relieve the

Parties from their obligations to accord national and most-favored-nation treatment.

Because the U.S. exceptions to national treatment and MFN treatment are based on existing U.S. law, they are not altered during negotiations.

Ecuador's exceptions to national treatment are: traditional fishing (which does not include fish processing or aquaculture); and broadcast radio and television stations. These exceptions were based on provisions of investment measures consideration by the Government of Ecuador. Ecuador has not received any sectoral exceptions to MFN treatment in the Protocol.

Exchange of Letters
In an exchange of letters at the time the Treaty was signed, Ecuador explicitly confirmed that the Treaty shall serve to satisfy a variety of substantive and procedural requirements imposed on U.S. investors and investments by Ecuadorian law. This understanding reflects the desire of the Government of Ecuador that the Treaty should operate in and of itself to reduce or eliminate certain bureaucratic practices identified as impediments to investment.

The exchange of letters clarifies, for example, that certain local training nationality requirements for employment will be waived for U.S. investors. The letters confirm that the Treaty shall satisfy any and all authorizations necessary for issuing Ecuadorian visas for certain executives and key personnel. Except where itemized in paragraph four of the Protocol, investment is permitted in areas and enterprises that would otherwise require special administrative or other foreign investment authorizations. The Government of Ecuador state that this would make automatic its discretion to permit foreign investment, inter alia, along the border, on the coast, and in "non-traditional" fisheries. The letters constitute an understanding between the governments and are an integral part of the Treaty.

The other U.S. Government agencies which negotiated the Treaty join me in recommending that it be transmitted to the Senate at an early date.
Respectfully submitted,

Warren Christopher

TREATY BETWEEN
THE UNITED STATES OF AMERICA AND
THE REPUBLIC OF ECUADOR
CONCERNING THE ENCOURAGEMENT
AND RECIPROCAL PROTECTION OF INVESTMENT

The United States of America and the Republic of Ecuador hereinafter the "Parties");

Desiring to promote greater economic cooperation between them, with respect reinvestment 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;

Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maxim effective utilization of economic resources;

Recognizing that the development of economic and business ties can contribute to the well-being of workers in both Parties and promote respect for internationally recognized worker rights; and

Having resolved to conclude a Treaty concerning the encouragement and reciprocal protection of investment;

Have agreed as follows:

ARTICLE I

1. For the purposes of this Treaty,

(a) "investment" means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes:

(i) tangible and intangible property, including rights, such as mortgages, lions and pledges;

(ii) a company or shares of stock or other interests in a company or interests in the assets thereof;

(iii) a claim to money or a claim to performance having economic value, and associated with an investment;

(iv) intellectual property which includes, inter alia, rights relating to:
literary and artistic works, including sound recordings;
inventions in all fields of human endeavor;
industrial designs;
semiconductor mask works;
trade secrets, know-how, and confidential business information; and
trademarks, service marks, and trade names; and

(v) any right conferred by law or contract, and any license and permits pursuant to law;

(b) "company" of a Party means any kind of corporation, company, association, partnership, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned or controlled;

(c) "national" of a Party means a natural person who is a national of a Party under its applicable law;

(d) "return" means an amount derived from or associated with an investment, including profit; dividend; interest; capital gain; royalty payment; management, technical assistance or other fee; or returns in kind;

(e) "associated activities" include the organization, control, operation, maintenance and disposition of companies, branches, agencies, offices, factories or other facilities for the conduct of business; the making, performance and enforcement of contracts; the acquisition, use, protection and disposition of property of all kinds including intellectual property rights; the borrowing of funds; the purchase, issuance, and sale of equity shares and other securities; and the purchase of foreign exchange for imports.

(f) "state enterprise" means an enterprise owned, or controlled through ownership interests, by a Party.

(g) "delegation" includes a legislative grant, and a government order, directive or other act transferring to a state enterprise or monopoly, or authorizing the exercise by a state enterprise or monopoly, of governmental authority.

2. Each Party reserves the right to deny to any company the advantages of this Treaty if nationals of any third country control such company and, in the case of a company of the other Party, that company has no substantial business activities in the territory of the other Party or is controlled by nationals of a third country with which the denying Party does not maintain normal economic relations.

3. Any alteration of the form in which assets are invested or reinvested shall not affect their character as investment.

ARTICLE II

1. Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the most favorable, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Protocol to this Treaty. Each Party agrees to notify the other Party before or on the date of entry into force of this Treaty of all such laws and regulations of which it is aware concerning the sectors or matters listed in the Protocol. Moreover, each Party agrees to notify the other of any future exception with respect to the sectors or matters listed in the Protocol, and to limit such exceptions to a minimum. Any future exception by either Party shall not apply to investment existing in that sector or matter at the time the exception becomes effective. The treatment accorded pursuant to any exceptions shall, unless specified otherwise in the Protocol, be not less favorable than that accorded in like situations to investments and associated activities of nationals or companies of any third country.

2. (a) Nothing in this Treaty shall be construed to prevent a Party from maintaining or establishing a state enterprise.

(b) Each Party shall ensure that any state enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Party's obligations under this Treaty wherever such enterprise exercises any regulatory, administrative or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees or other charges.

(c) Each Party shall ensure that any state enterprise that it maintains or establishes accords the better of national or most favored nation treatment in the sale of its goods or services in the Party's territory.

3. (a) Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.

(b) Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. For purposes of dispute resolution under Articles VI and VII, a measure may be arbitrary or discriminatory notwithstanding the fact that a party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a Party.

(c) Each Party shall observe any obligation it may have entered into with regard to investments.

4. Subject to the laws relating to the entry and sojourn of aliens, nationals of either Party shall be

permitted to enter and to remain in the territory of the other Party for the purpose of establishing, developing, administering or advising on the operation of an investment to which they, or a company of the first Party that employs them, have committed or are in the process of committing a substantial amount of capital or other resources.

5. Companies which are legally constituted under the applicable laws or regulations of one Party, and which are investments, shall be permitted to engage top managerial personnel of their choice, regardless of nationality.

6. Neither Party shall impose performance requirements as a condition of establishment, expansion or maintenance of investments, which require or enforce commitments to export goods produced, or which specify that goods or services must be purchased locally, or which impose any other similar requirements.

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

8. Each Party shall make public all laws, regulations, administrative practices and procedures, and adjudicatory decisions that pertain to or affect investments.

9. The treatment accorded by the United States of America to investments and associated activities of nationals and companies of the Republic of Ecuador under the provisions of this Article shall in any State, Territory or possession of the United States of America be no less favorable than the treatment accorded therein to investments and associated activities of nationals of the United States of America resident in, and companies legally constituted under the laws and regulations of other States, Territories or possessions of the United States of America.

10. The most favored nation provisions of this Treaty shall not apply to advantages accorded by either Party to nationals or companies of any third country by virtue of:

(a) that Party's binding obligations that derive from full membership in a free trade area or customs union; or

(b) that Party's binding obligations under any multilateral international agreement under the framework of the General Agreement on Tariffs and Trade that enters into force subsequent to the signature of this Treaty.

ARTICLE III

1. Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ("expropriation") except: for a public purpose; in a nondiscriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(3). Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be calculated in a freely usable currency an the basis of the prevailing market rate of exchange at that time; be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable; and be fully transferable.

2. A national or company of either Party that asserts that all or part of its investment has been expropriated shall have a right to prompt review by the appropriate judicial or administrative authorities of the other Party to determine whether any such expropriation has occurred and, If so, whether such expropriation, and any associated compensation, conforms to the principles of

international law.

3. Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favorable than that accorded tb its own nationals or companies or to nationals or companies of any third country, whichever is the most favorable treatment, as regards any measures it adopts in rotation to such losses.

ARTICLE IV

1. Each Party shall permit all transfers related to an investment, to be made freely and without delay into and out of its territory. Such transfers include: (a) returns; (b) compensation pursuant to Article III; (c) payments arising out of an investment dispute; (d) payments made under a contract, including amortization of principal and accrued interest payments made pursuant to a loan agreement; (e) proceeds from the sale or liquidation of all or any part of an investment; and (f) additional contributions to capital for the maintenance or development of an investment.

2. Transfers shall be made in a freely usable currency at the prevailing market rate of exchange on the date of transfer with respect to spot transactions in the currency to be transferred.

3. Notwithstanding the provisions of paragraphs 1 and 2, either Party may maintain laws and regulations (a) requiring reports of currency transfer; and (b) imposing income taxes by such means as a withholding tax applicable to dividends or other transfers. Furthermore, either Party may protect the rights of creditors, or ensure the satisfaction of judgments in adjudicatory proceedings, throuqh the equitable, nondiscriminatory and good faith application of its law.

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 broach of any right conferred or created by this Treaty with respect to an investment.

2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute, under one of the following alternatives, for resolution:

(a) to the courts or administrative tribunals of the Party that is a party to the dispute; or

(b) in accordance with any applicable, previously agreed dispute-settlement procedures; or

(c) in accordance with the terms of paragraph 3.

3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:

(i) to the International Centre for the Settlement of Investment Disputes ("Centre") established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 (IICSID 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 out 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.

ARTICLE VIII

This Treaty shall not derogate from:

(a) laws and regulations, administrative practices or procedures, or administrative or adjudicatory decisions of either Party;

(b) international legal obligations; or

(c) obligations assumed by either Party, including those contained in an investment agreement or an investment authorization,

that entitle investments or associated activities to treatment more favorable than that accorded by this Treaty in like situations.

ARTICLE IX

1. This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

2. This Treaty shall not preclude either Party from prescribing special formalities in connection with the establishment of investments, but such formalities shall not impair the substance of any of the rights set forth in this Treaty.

ARTICLE X

1. With respect to its tax policies, each Party should strive to accord fairness and equity in the treatment of investment of nationals and companies of the other Party.

2. Nevertheless, the provisions of this Treaty, and in particular Article VI and VII, shall apply to matters of taxation only with respect to the following:

(a) expropriation, pursuant to Article III;

(b) transfers, pursuant to Article IV; or

(c) the observance and enforcement of terms of an investment agreement or authorization as referred to in Article VI (1) (a) or (b), to the extent they are not subject to the dispute settlement provisions of a Convention for the avoidance of double taxation between the two Parties, or have been raised under such settlement provisions and are not resolved within a reasonable period of time.

ARTICLE XI

This Treaty shall apply to the political subdivisions of the Parties.

ARTICLE XII

1. This Treaty shall enter into force thirty days after the data of exchange of instruments of ratification. It shall remain in force for a period of ten years and shall continue in force unless terminated in accordance with paragraph 2 of this Article. It shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter.

2. Either Party may, by giving one year's written notice to the other Party, terminate this Treaty at the end of the initial ten year period or at any time thereafter.

3. With respect to investments made or acquired prior to the date of termination of this Treaty and to which this Treaty otherwise applies, the provisions of all of the other Articles of this Treaty shall thereafter continue to be effective for a further period of ten years from such date of termination.

4. The Protocol and Side Letter shall form an integral part of the Treaty.

IN WITNESS WHEREOF, the respective plenipotentiaries have signed this Treaty.
DONE in duplicate at Washington on the twenty-seventh day of August, 1993, in the English and Spanish languages, both texts being equally authentic.

FOR THE UNITED STATES OF AMERICA:

FOR THE REPUBLIC OF ECUADOR:

PROTOCOL

l. The Parties note that the Republic of Ecuador may establish a debt-equity conversion program under which nationals or companies of the United States may choose to invest in the Republic of Ecuador through the purchase of debt at a discount.

The Parties agree that the rights provided in Article IV, paragraph 1, with respect to the transfer of returns and of proceeds from the sale or liquidation of all or any part of an investment, may, as such rights would apply to that part of an investment financed through a debt-equity conversion, be modified by the terms of a debt-equity conversion agreement between a national or company of the United States and the Government of the Republic of Ecuador or any agency or instrumentality thereof.

The transfer of returns and/or proceeds from the sale or liquidation of all or any part of an investment shall in no case be on terms less favorable than those accorded, in like circumstances, to nationals or companies of the Republic of Ecuador or any third country, whichever is more favorable.

2. The United States reserves the right to make or maintain limited exceptions to national treatment, as provided in Article 11, paragraph 1, in the sectors or matters it has indicated below:

air transportation; ocean and coastal shipping; banking; insurance; government grants; government insurance and loan programs; energy and power production; customhouse brokers; ownership of real property; ownership and operation of broadcast or common carrier radio and television stations; ownership of shares in the Communications Satellite Corporation; the provision of common carrier telephone and telegraph services; the provision of submarine cable services; use of land and natural resources; mining on the public domain; maritime services and maritime-related services; and primary dealership in United States government securities.

The treatment accorded pursuant to these exceptions shall, unless specified in paragraph 3 of this Protocol, be not less favorable than that accorded in like situations to investments and associated activities of nationals or companies of any third country.

3. The United States reserves the right to make or maintain limited exceptions to most favored nation treatment, as provided in Article II, paragraph 1, in the sectors or matters it has indicated below:

ownership of real property; mining on the public domain; maritime services and maritime-related services; and primary dealership in United States government securities.

4. The Republic of Ecuador reserves the right to make or maintain limited exceptions to national treatment, as provided in Article II, paragraph 1, in the sectors or matters it has indicated below:

traditional fishing (which does not include fish processing or aquaculture); ownership and operation of broadcast radio and television stations.

The treatment accorded pursuant to these exceptions shall be not less favorable than that accorded in like situations to investment and associated activities of nationals or companies of any third country.

THE UNITED STATES TRADE REPRESENTATIVE
Executive Office of the President
Washington. D.C. 20506

27 August 1993

Dear Mr. Minister:

I have the honor to confirm receipt of your letter which reads as follows:

"I have the honor to confirm the following understanding which was reached between the Government of the Republic of Ecuador and the Government of the United States of America in the course of negotiations of the Treaty Concerning the Encouragement and Reciprocal Protection of Investment (the "Treaty"):

With respect to Article 11, paragraph 4, the Government of the Republic of Ecuador confirms that the Treaty shall serve to satisfy the requirements for any and all authorizations necessary under its laws for nationals of the United States to enter and to remain in the territory of the Republic of Ecuador or the purpose of establishing, developing, administering or advising on the operation of an investment to which they, or a company of the United States that employs them, have committed or are in the process of committing a substantial amount of capital or other resources. Such authorizations include those granted by the Labor Ministry, such as to waive local training requirements established as a condition to the entry of highly trained and specially qualified employees that are essential to the company's operations. Nationals of the United States, however, can be required to fulfill limited formalities in connection with entry and sojourn in the Republic of Ecuador, including the presentation of a visa application and relevant documentation.

With respect to Article II, paragraph 5, the Government of the Republic of Ecuador confirms that the Treaty shall serve to satisfy the requirements for any and all authorizations necessary under its laws for the engagement of foreign nationals as top managers.

In addition, the Government of the Republic of Ecuador indicates that under the Ecuadorian Constitution, including Article 18, and the laws of the Republic of Ecuador, foreign nationals and companies may need special administrative or other authorizations that are specific to the investments of foreign persons. The Government of the Republic of Ecuador confirms that the Treaty shall serve to satisfy the requirements for any and all such authorizations, except for those sectors or matters in which the Republic of Ecuador may make or maintain limited exceptions to national treatment, as provided in Article II, paragraph 1 and listed in paragraph 4 of the Protocol.

I have the honor to propose that this understanding be treated as an integral part of the Treaty.

I would be grateful if you would confirm that this understanding is shared by your government.

His Excellency
Diego Paredes,
Minister of Foreign Relations of the
Republic of Ecuador,
Quito."

I have the further honor to confirm that this understanding is shared by my Government and constitutes an integral part of the Treaty.

Sincerely,

Rufus H. Yerxa
Acting United States Trade Representative

[TRANSLATION]

Washington, D.C., August 27, 1993

His Excellency
Ambassador Rufus Yerxa
Acting United States Trade Representative
Washington, D.C.

Mr. Ambassador:

I have the honor to confirm the following Understanding, which was reached between the Government of Ecuador and the Government of the United States of America in the course of negotiations of the Treaty Concerning the Encouragement and Reciprocal Protection of Investment (the "Treaty)":

[For the text of the understanding, see Ambassador Yerxa's letter immediately preceding.]

I have the honor to propose that this understanding by treated as an integral part of the Treaty.

I would be grateful if you would confirm that this understanding is shared by your Government.

Accept, Excellency, the assurances of highest consideration.

[s] Diego Paredes

CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici.

The following parties and *amici* appeared below:

Respondent: The Republic of Ecuador, a foreign State.

Petitioners: (a) Chevron Corporation, a corporation organized under the laws of the State of Delaware, with its principal place of business in San Ramon, California.

(b) Texaco Petroleum Company, a wholly owned subsidiary of Chevron Corporation, with its principal place of business in San Ramon, California.

Amici: None.

(B) Rulings Under Review.

On July 1, 2013, The Republic of Ecuador noticed its appeal of the June 6, 2013 Memorandum Opinion entered by the Honorable James E. Boasberg, reported as *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador*, 949 F. Supp. 2d 57 (D.D.C. 2013), and the accompanying Order.

(C) Related Cases. There are no related cases.