



Sitz Bebelplatz 1, Kommode
 D-10117 Berlin

Telefon (030) 405 414 86
Telefax (030) 405 414 88
E-Mail

christian.tomuschat@rewi.hu-berlin.de

**The Construction of Article VII of the Bilateral Investment Treaty
between the United States and Ecuador**

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IV. General Conclusion

I. Introduction

1. I am professor emeritus at Humboldt University Berlin, where I was on the Law Faculty from 1995 to 2004 as Director of the Institute of International Law. Before that time, I was on the Faculty of Law and Economics of the University of Bonn, also as Director of the Institute of International Law (1972 to 1995). I have written and edited many books, with specific emphasis on human rights and on international settlement of disputes, being one of the editors of the Commentary on the Charter of the United Nations (Oxford, 2002) and of the Commentary on the Statute of the International Court of Justice (Oxford, 2006). In addition to my teaching and scholarship, I have served as President of the German Society of International Law (1993-1997). In 1997, I was elected to the *Institut de droit international*, the leading society of scholars of international law. I served as a member of the UN Human Rights Committee (1977 to 1986) and as member and chairman of the UN International Law Commission (1985 to 1996). From 1995 to 1997 I was a judge of the Administrative Tribunal of the Inter-American Development Bank, and from 1999 to 2008 I discharged the same function as a judge of the Administrative Tribunal of the African Development Bank. I have served as counsel in cases before the European Court of Human Rights, the Court of Justice of the European Communities and before the International Court of Justice. I have also served as arbitrator in cases pending before the International Centre for Settlement of Investment Disputes.

2. I have been requested by the Office of the Legal Adviser of the U.S. Department of State to study and state my opinion on the attempt by Ecuador to initiate arbitral proceedings under Article VII of the 1993 Bilateral Investment Treaty Concerning the Encouragement and Reciprocal Protection of Investment between the Ecuador and the United States (hereinafter: BIT). The underlying facts have come to my knowledge through information provided to me through the Department of State. In particular, the relevant submissions of Ecuador have been made available to me.

II. Subject-Matter: The Facts

3. By a letter of 28 June 2011, the Republic of Ecuador has purported to initiate arbitral proceedings against the United States under Article VII of the BIT. The Government of Ecuador is convinced that Article II(7) of that instrument has been erroneously interpreted in an award delivered on 30 March 2010 in the case of *Chevron Corporation and Texaco Petroleum Company v. Ecuador* by an arbitral tribunal established in accordance with Article VI(3)(a)(iii) of the BIT. In a note of 8 June 2010, it requested the United States Government to object to this interpretation by way of an agreed statement of the two contracting parties, intended to clarify the clause concerned in the sense which it considers to reflect the true scope and meaning of that clause. The United States Government has not reacted positively to the Ecuadorian Government's demand, advising it that it is reviewing the views expressed in their request (letter of 23 August 2010). It has not taken any further steps since that time to satisfy Ecuador's wish. Ecuador deems this passiveness to amount to a dispute under Article VII of the BIT.

III. Interpretation of Article VII of the BIT

4. The main issue is whether in fact a dispute concerning the interpretation or application of the BIT has arisen between Ecuador and the United States. Only if a dispute in the technical sense of Article VII of the BIT exists is Ecuador entitled to institute arbitral proceedings in accordance with this clause. Should the differences of opinion currently opposing Ecuador to the United States lack the quality of a dispute, the request for arbitration would have to be dismissed as inadmissible, the arbitral tribunal lacking jurisdiction.

1) The Concept of Dispute

a) The Terms of the BIT

5. Pursuant to Article 31(1) of the 1969 Vienna Convention on the Law of Treaties (VCLT), a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Hence the point of departure must be the text of the provision requiring interpretation. The relevant passage of Article VII(1) of the BIT provides:

“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 ...”

Obviously, the key concept in Article VII(1) of the BIT is the word “dispute”. That word has obtained a specific meaning in international practice. It can be found in almost all international instruments that deal with judicial or arbitral settlement of legal controversies in relationships between States and/or international organizations. If no special rules have been agreed by the parties concerned, it may be safely assumed that they wished to accept the connotation which is generally attached to the concept of dispute.

6. The World Court has played a leading role in defining the concept of dispute. The first relevant pronouncement was made by the Permanent Court of International Justice (PCIJ) in the *Mavrommatis Palestine Concessions* case in 1924: “A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.”ⁱ This proposition has continually been referred to also by the International Court of Justice (ICJ), the successor of the PCIJ, although, in practice, the ICJ applies the term dispute more narrowly. A conflict of interests may not reach the degree of intensity required for a dispute. In fact, the ICJ has specified in a series of decisions that the relevant criteria need to be sharpened. In particular, it has emphasized that the claim by one party must be positively opposed by the other.ⁱⁱ It seems worthwhile mentioning the passage devoted by the ICJ to the issue in the *South West Africa* cases since that passage contains in a nutshell all the essential ingredients of the legal concept of a dispute:

“ ... it is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the

ⁱ Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 11.

ⁱⁱ *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 319, at 328); *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p. 6, at 40, para. 90; *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, I.C.J. Reports 2011, para. 30.

existence of the dispute proves its non-existence. Nor is it adequate to show that the interests of the two parties to such a case are in conflict”.ⁱⁱⁱ

7. Other formulations, which point in the same direction, have been employed in the *Northern Cameroons* case, where the ICJ held that it may pronounce judgment

“only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties. The Court’s judgment must have some practical consequences in the sense that it can affect legal rights and obligations”.^{iv}

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

8. Accordingly, a dispute exists in particular when one party charges another one with having committed an international wrongful act. In such instances, both parties have a right to seize the arbitral body provided for in Article VII of the BIT. The State that believes it has a reparation claim may institute arbitration proceedings in order to assert that claim; on the other hand, the State that has been charged with an unlawful tortious action must have the right to defend itself against any allegation of wrong-doing. In the present case, nothing of that kind can be found. Ecuador is of the view that a third actor, an arbitral tribunal under the BIT, has erroneously interpreted the BIT. Such a judicial holding of an independent arbitral body cannot be attributed to the United States. The United States has neither approved nor confirmed the relevant interpretation. The judicial activity of the arbitral tribunals under the BIT lie outside its sphere of influence.

ⁱⁱⁱ Above fn. 2.

^{iv} *Case concerning the Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, I.C.J. Reports 1963, p. 15, at 33-4.*

9. In the legal doctrine, too, unrestricted unanimity prevails as to the characteristics of a dispute for the purposes of international jurisdictional clauses. Thus, the author of a leading monograph on settlement of international disputes, J.G. Merrills, describes a dispute in the following terms:

“A dispute may be defined as a specific disagreement concerning a matter of fact, law or policy in which a claim or assertion of one party is met with refusal, counter-claim or denial by another”.^v

In the Commentary on the Statute of the ICJ, when elaborating on Article 36 of that instrument, the author of the present note has also emphasized that a dispute presupposes opposing views: one party must advance a legal claim which is then rejected by the other party.^{vi}

10. Accordingly, a dispute must have the following features:

11. - A claim must have been raised. In the instant case, Ecuador requested the United States by its letter of 8 June 2010 to express its agreement with its interpretation of Article II(7) of the BIT. This was a formal diplomatic act, the content and aim of which can be identified in an unequivocal manner. The request, although it uses the term “*respetuosamente*”, is not tainted by any diplomatic formulae of courtesy that might raise doubts as to the author’s firmness of will. However, Ecuador’s request does not meet the criteria of a claim as a precondition for a dispute. It is not based on any legal grounds and it fails to specify why the United States should provide a response. Further, it does not allege that the United States had acted in a manner inconsistent with its treaty obligations.

12. - The second criterion is that of rejection of the claim raised. The United States has failed to take a stance vis-à-vis the request that was addressed to it. No refusal can be perceived. The United States Government has refrained from providing a substantive answer. As it appears, they simply do not wish to interfere with the interpretation given to Article II(7) by the arbitral tribunals

^v J.G. Merrills, *International Dispute Settlement* (Cambridge: Cambridge University Press, 2nd ed. 1993) 1.

^{vi} Christian Tomuschat, Comments on Article 36 of the ICJ Statute, in: Andreas Zimmermann, Christian Tomuschat & Karin Oellers-Frahm (eds.), *The Statute of the International Court of Justice. A Commentary* (Oxford: Oxford University Press, 2006) 597, margin note 9.

that are called upon to make determinations on the interpretation and application of the BIT at the request of private investors endowed with the right to institute arbitral proceedings according to Article VI of the BIT. According to their view in this case, the relevant legal texts should remain entrusted to the hands of those judges. Accordingly, the second determinative criterion of a dispute is not met in the instant case.

13. According to Ecuador's request for the institution of arbitral proceedings (p. 7), "a response was called for". Thus, Ecuador assumes that the United States was placed under a legal obligation to provide an answer. However, Ecuador fails to show that such an obligation was incumbent on the United States to express itself as to the substantive difficulty of the interpretation of Article II(7) of the BIT. The BIT does not provide for such an obligation. It confines itself to stating in Article V that the Parties agree "to discuss any matter relating to the interpretation or application of the Treaty". As the facts underlying the present differences of opinion between the two States show, the United States does not decline to enter into a discussion in general terms on any problem arising under the BIT. But it did not see fit to respond to the kind of ultimatum addressed to it by the Government of Ecuador that it should accept their interpretation of the provision.

14. A request seeking to initiate discussions on matters of interpretation or application of the BIT (Article V) would have to be framed in different terms. It cannot take the form of a claim seeking to enforce an alleged entitlement. If Ecuador had wished to rely on Article V of the BIT in communicating its note to the United States on 8 June 2010, it would have had to refer explicitly to that article. It did not do so, however. No reference is made in the note to Article V of the BIT. The fact that the road of Article V of the BIT was not chosen is also demonstrated by the wording of the note. Under Article V of the BIT, each party may invite the other to conduct talks, consultations or discussions on certain problems having appeared in the practice of the BIT. By contrast, Ecuador has attempted to employ Article VII as a mechanism designed to permit one party unilaterally to impose its views on the other contracting party. Article V of the BIT, by contrast, provides for consultations, and has not been conceived of as providing a remedy to vindicate the rights under the BIT.

15. Under general international law, there is no obligation of a State party to an international agreement to answer questions that have been put to it by another State party. The rule of *pacta sunt servanda* does not include such ancillary duties. Nor can they be derived from the principle of *bona fides*. As a rule, the parties to a treaty regulate in specific detail the procedures available for the solution of any differences or disputes that may arise during the lifetime of the treaty concerned. This model has been followed in the instant case as well. Through Articles V and VII of the BIT, the parties have provided, under different terms and conditions, for the settlement of any difficulties that they anticipated as eventualities. These rules constitute in any event *leges speciales* alongside which any existing rules of general international law would not have any *raison d'être*. General international law commands disputes to be resolved peacefully (Article 2(3) of the UN Charter),^{vii} and modalities for that purpose are set out in Article 33 of the UN Charter. Deliberately, however, the UN Charter confines itself to dealing with international disputes, which must display the specificities described above. Issues of bilateral treaty construction not reaching the threshold of a dispute are not matters of universal concern.

16. In the absence of an obligation to provide an answer, silence alone cannot be deemed to constitute rejection. Many suggestions may be addressed to a government by other States at the international level. In diplomatic practice, this happens on a daily basis. However, it belongs to the sovereign discretion of a government to choose the kind of response it considers appropriate. It may accept the suggestion, it may explicitly dismiss it, but it can also choose to do nothing, just remaining silent. Such a choice leaves the question raised in abeyance. By no means can it be construed as a step opening up a legal dispute. In the recent case of *Georgia v. Russian Federation* the ICJ emphasized that the existence of a dispute may be “inferred from the failure of a State to respond to a claim in circumstances where a response is called for”.^{viii} The above observations have made clear that no legal obligation existed for the United States Government to take a stance as to the request contained in the

^{vii} The obligation to settle disputes peacefully exists also under general international law, see ICJ, *Military and Paramilitary Activities in and against Nicaragua, Judgment, Merits, ICJ Reports* 1986, 14, at 145, para. 290.

^{viii} Above fn. 2.

letter of 8 June 2010. It may well be that in exceptional circumstances one of the contracting parties may be compelled to respond to a question put to it, even where a specific legal obligation cannot be identified. However, just the will of one of the parties does not give rise to such an exceptional situation. In any event, the requested government would have had to contribute to the situation that requires clarification.

17. It will be shown at a later stage that no other grounds can be identified that should have prompted the United States Government to respond in explicit terms to Ecuador's request. The sole fact that Ecuador and the United States are the two parties of the BIT does not obligate either of them or both of them jointly to intervene in an authoritative manner each time that some problem arises in the interpretation and application of the BIT. Discussions in accordance with Article V are provided for to settle such problems. Ecuador, however, wishes to go far beyond any discussions; it seeks to obtain an authentic interpretation by mutual agreement. This is a request derived from a mechanism that is not provided for under the BIT. Accordingly, viewed from the perspective of the BIT's logic, the United States Government was not required to accept or rebut Ecuador's interpretation of Article II(7) of the BIT.

b) The Internal Context

18. Together with the plain meaning of the words, the internal context of the provisions concerned must be taken into account. Article 31(1) VCLT directs the interpreter explicitly to the terms of the treaty "in their context". In this regard, it is highly significant that Article V of the BIT, which must be read together with Article VII, acknowledges, side by side, two configurations which are carefully distinguished. On the one hand, Article V speaks of "any disputes in connection with the Treaty"; on the other hand, Article V, as already highlighted, mentions discussions on "any matter relating to the interpretation or application of the Treaty". In other words, Article V recognizes that there may be general matters requiring to be discussed, setting such matters apart from "disputes". Accordingly, such matters lack the quality of "disputes" – since they are of a general nature. They certainly affect the interests of the parties. But Article V of the BIT does not classify them as disputes, clearly taking the view that disputes presuppose specific additional

qualities in accordance with the general usage of the term. It corresponds to the precepts of Article 31(1) VCLT that a treaty must be interpreted in a consistent manner, since it constitutes an integrated whole. Inasmuch as Article V of the BIT distinguishes disputes and discussions of treaty interpretation, the same distinction must also apply to the interpretation of Article VII.

2) Disputes Originating from the BIT

19. Article VII of the BIT specifies that it applies only to disputes “concerning the interpretation or application of the Treaty”. In other words, the BIT itself must be the foundation of the dispute. The Parties must be in a dispute about the legal consequences to be inferred from one of the provisions of the BIT. It cannot be denied that the BIT forms the background of the present differences that have led to Ecuador’s attempt to institute arbitral proceedings pursuant to Article VII. However, the specific demand of the Ecuadorian Government is a different one. The Government sought to obtain, directly with the United States, an additional agreement that would clarify the scope and meaning of Article II(7) of the BIT, with binding effect. This is a request which cannot be derived from the BIT itself. Any such agreement defining the scope and meaning of the BIT, although related to the BIT, is a new international agreement that has its own sources of international validity. Such an agreement does not come within the purview of Article VII of the BIT.

3) The General Systemic Context

20. In addition to the wording of the provision concerned and its position within the internal context (such as preambles and annexes), Article 31(2) VCLT requires the interpreter to consider essential characteristics (such as any other agreements or instruments relating to the treaty) .

a) Legal Disputes and Advisory Opinions

21. The gist of Ecuador’s request is to press for an abstract interpretation of the BIT, apart from any actual dispute between the contracting parties, in order to clarify the meaning of Article II(7) of the BIT. Obviously, any such agreement between Ecuador and the United States would have a binding effect *pro futuro* in accordance with Article 31(3)(a) VCLT. Within the system of international law, such general directions determining the proper interpretation

of a legal text can be obtained in two ways. Either, the parties to an agreement may conclude an additional interpretive agreement that would also have the same binding force as the basic treaty itself, since it would clarify the meaning of certain provisions of it. Or else, in some institutional systems an advisory opinion can be requested under certain conditions, which are mostly narrowly circumscribed by the relevant instruments. Under the UN Charter (Article 96) and the Statute of the ICJ (Article 65), advisory opinions may be requested only by some of the institutions of the World Organization, in particular the General Assembly and the Security Council. Individual UN Member States are not entitled to request an advisory opinion, notwithstanding the interest they may have in being authoritatively informed about the correct interpretation of the provisions of the UN Charter which have a great impact on their national sovereignty.

22. None of the two institutional channels just referred to is available in the present context. The United States sees no good reason to enter into an interpretive agreement with Ecuador. As pointed out above, to conclude or not to conclude such an agreement lies within its sovereign powers to frame its foreign policy as it sees fit. On the other hand, the BIT does not provide for a mechanism under which a specific body could be requested to pronounce authoritatively, or with advisory effect only, on general problems of interpretation. Ecuador now seeks to overcome this institutional impasse by summoning the United States to subscribe to its own subjective construction of the relevant clause. Thus, it wishes to bring into being a specific mechanism not provided for by the treaty itself. It takes the view that it may at any time, whenever considered necessary and appropriate by it, call upon the United States to pronounce itself on the proper interpretation of any provision of the BIT. It does not even contend that its alleged power to require such an authoritative interpretation is limited by any objective criteria. It simply wishes to be able to proceed with its wishes for clarification at its own volition, irrespective of any act of the United States that would have taken a position to the contrary. Under its logic, it would be able to draw the United States into an arbitral proceeding according to its own political determinations, without any regard for the actual practice shown or supported by the United States.

23. It stands to reason that such an expansive understanding of Article VII of the BIT does not correspond to the systemic structure of the BIT. The conduct of arbitral proceedings cannot be a routine matter, taking also into account the considerable expenditure entailed by such a proceeding. The arbitral clause serves to settle actual difficulties, where the views and the acts of the two contracting parties are on a collision course. Article VII of the BIT focuses exclusively on the conduct of the contracting parties. Either of them must have brought into being a difficulty that requires being explored and settled. As set out above, the most obvious cases in point are instances where allegations of wrongdoing are made by one party against the other. Article VII has not been conceived as a jurisdictional clause permitting to litigate about abstract issues of treaty interpretation, similar to an advisory proceeding. Statements on problems of interpretation by an arbitral tribunal under Article VI(3)(a) of the BIT cannot be attributed to any of the contracting parties. As such, they cannot lead to a dispute under Article VII of the BIT.

24. It is not by accident that the drafters of international instruments have mostly refrained from inserting into those instruments clauses permitting to request authoritative interpretations, either with or without binding effect. To comment on the meaning of legal provisions *in abstracto* is fraught with considerable risks. The institutions charged with issuing such views will rarely be in a position to obtain a full understanding of the effects of the clauses concerned with regard to each and every individual case that may potentially come within their purview. The danger of error or misconception is great. It is normally the actual case at hand which enlightens the judges or other competent authorities about the real significance of the choice of either of the suggestions for interpretations that are in competition with one another.

b) Appeal against Arbitral Awards under Article VI of the BIT

25. Ecuador does not hide its motivation for the request addressed to the United States by its letter of 8 June 2010. It states quite openly that it considers the interpretation given to Article II(7) of the BIT by the arbitral tribunal in the case of *Chevron Corporation and Texaco Petroleum Company v. Ecuador* erroneous. This is not the place to deal with that provision. It is clear, however, that Ecuador wishes to place under governmental control the arbitral tribunals

which are responsible, under Article VI(3) and (4) of the BIT, to apply the BIT to investment disputes between an investor and the host country. In its submissions, it has denied pursuing such an intention.^{ix} However, it is clear that it wishes to assert some primacy of the political powers having framed the BIT over the jurisprudence of the arbitral tribunals to which, in fact, the development of the BIT has been entrusted. Ecuador is convinced that the “masters” of the BIT, the two contracting Parties, should have the last word. It is true that in any case Ecuador and the United States possess the ultimate power of decision with regard to the BIT. They may at any time amend the BIT, suspend it, terminate it, or clarify its meaning. But all this they can only do by common accord. In any event, the BIT places full confidence in the arbitral tribunals charged with implementing the BIT in disputes between an investor and a host State. Following the model of ICSID, it has refrained from establishing an appeal to a higher judicial body of second instance. Ecuador wishes to do away with this system. The aim pursued with its request to the United States is to place the arbitral tribunals under Article VI of the BIT under governmental control by elevating the procedure under Article VII of the BIT to the rank of a mechanism of review, even though one of the Contracting Parties, the United States, does not agree to such a fundamental reform of the BIT.

c) The Consequences of Ecuador’s Concept

26. The position taken and defended by Ecuador would entail far-reaching consequences also for other treaties. In the instant case, the debate centres on a bilateral treaty. However, the logical inferences could not be confined to bilateral agreements, they would also extend to multilateral instruments. It should be recalled again that according to Ecuador’s main thesis the States parties to a treaty have to assume the role of guarantors of that treaty. Even in the case of a multilateral treaty every State member would accordingly have a right to require all the other Member States to ensure the correct application of the treaty. It could, after having defined its own view on a controversial issue, send a note to those other States urging them to accept its specific interpretation, warning them at the same time that non-compliance with its request would bring an international dispute into being that might entail an

^{ix} Transcript of Preliminary Conference, 21 March 2012, p. 15 (Statement of Mr. Reichler).

arbitral proceeding. States would thereby obtain the opportunity to “invent” disputes in accordance with their political preferences, pushing States into arbitral proceedings. In the case of the United Nations Charter, this could mean that Ecuador – or Ruritania – brings pressure to bear upon any other State Member of the World Organization to denounce the enlargement of the powers of the Security Council as not being in conformity with the letter and spirit of the Charter. Upon rejection of that request, it could make use of any jurisdictional clause that satisfies the requirements of Article 36 of the ICJ Statute to bring a case to the ICJ, charging the respondent with not employing due diligence for the defence of the Charter.^x

27. Boundless are the possibilities advocated by Ecuador to engender disputes that would have no other object than to obtain an authoritative decision specifying the meaning of a provision of a treaty in instances where no real dispute has emerged as yet. This expansive understanding of the concept of dispute carries with it incalculable risks and burdens. Any State would become exposed to the risk of being impleaded in situations where it has done nothing to bring about lack of clarity of the law and accordingly uncertainty in the legal framework concerned. It should not be overlooked that conducting arbitral proceedings entails considerable costs. As long as a dispute is defined in the way specified by the ICJ, dispute settlement clauses have the advantage of foreseeability of their possible results. States know that if they make specific claims or if they reject specific claims addressed to them as truly obligated parties, a proceeding may be instituted by the opponent party. There is no ground, however, why a State party to a treaty system should be made accountable for certain developments to which it has not contributed anything, but which are just the result of the operation of the system as it has been conceived and implemented.

e) The Rule of Law

28. According to the ideal of the rule of law, a precept which belongs to the core elements of today’s system of international law,^{xi} the interpretation of

^x To date, Ecuador has refrained from making a declaration under Article 36(2) of the ICJ Statute.

^{xi} See, in particular, the World Summit Outcome, General Assembly Resolution 60/1, 16 September 2005, para. 134.

legal rules, once they have been established, should be entrusted to judicial bodies, without any interference by political bodies. Many international documents manifest the adherence of the international community to the rule of law. Judicial bodies should not be put under political control. Their findings may not be disregarded as soon as they do not correspond to expectations nurtured at the time when the rules concerned were issued. This does not detract from the power of the legislative authorities concerned to alter the law if they come to the conclusion that some judicial pronouncements have erred in trying to identify the true meaning of a given legal rule. Judges are not the masters of the law they are called upon to interpret. They are no more than servants, obligated to enforce the democratic will of the responsible legislative bodies. They may have the last word on the legal texts in force, but they do not have the last word on the political choices to be made.

29. It is trivial to note, however, that to change legal rules may encounter considerable difficulties depending on the firmness of a legal rule. International treaties constitute the least flexible form of law on account of the simple proposition: *pacta sunt servanda*. By their very nature, their provisions are entrenched. If they lack any special rules as to their amendment, treaties can only be amended in accordance with the consent of all the parties involved (Article 39 VCLT). It may be hard to accept for a party to see that a treaty, in the process of its implementation by the judiciary, takes unexpected and even totally unforeseen turns. This is the risk inherent in any form of regulation of a specific subject-matter by way of treaty to the extent that judicial procedures become applicable.^{xii} If no appropriate mechanisms have been included in the treaty, a State which disagrees with the development of the judicial practice may make its voice heard. It can try to persuade the other States parties that a supplementary agreement should be concluded. Eventually, it may decide to denounce the treaty if all the steps taken by it are of no avail - if the treaty

^{xii} For this reason, in France for a long time special procedures existed under which the interpretation of treaties was the prerogative of the Government, see Patrick Daillier, Mathias Forteau and Alain Pellet, *Droit international public* (Paris: LG.D.J., 8th ed. 2009) 258-261, para. 151. This practice has come to its end under the requirements of the rule of law, see judgment *GISTI* of the Conseil d'Etat, 29 June 1990, *Recueil Lebon*, 171. The European Court of Human Rights has also rejected this practice, denying the Government a monopoly of interpreting international treaties, see *Beaumont v. France*, Application No. 15287/89, judgment of 24 November 1994, § 38: When a civil right under Article 6(1) of the European Convention on Human Rights is at stake, its interpretation and application requires full judicial review.

contains a clause to that effect or may be denounced under Article 56 VCLT. But it cannot unilaterally, as long as it remains a State party, reverse developments, enforcing its own views if it feels that a wrong course is being steered by the institutions responsible for the actual implementation of the treaty.

30. It may be useful to realize that similar problems need to be addressed in every constitutional system where judges have been established as the authoritative last instance in matters of constitutional construction. The history of constitutional jurisprudence is full of examples where the judges produced answers which nobody had expected and which, accordingly, created considerable turmoil before some practical accommodation could be found. Again, it is true that judgments of a constitutional court are not, in theory, the last word. The primacy of the *pouvoir constituant* of the people remains unaffected. However, the rules governing constitutional amendments are generally so complex that any effort to launch a bill of constitutional reform would be condemned from the very outset. In a regime under the rule of law, such hardship experiences must be endured. Constitutional courts cannot be disbanded because some pronouncement unexpectedly disturbs the prevailing political harmony, causing considerable difficulties. To remain faithful to the rule of law may be considered also as a moral attitude which, in the long run at least, strengthens the general belief in the advantages of strict compliance with the law.

31. It must certainly be admitted that a bilateral treaty on the mutual protection and encouragement of investments does not embody the same lofty ideals as a constitutional document. However, the key lesson remains the same. The law must be heeded although in some instances such compliance may require certain sacrifices. To avert unbearable consequences, mechanisms of flexibility are available almost everywhere. Not all of them are unrestrictedly effective and provide remedial solutions to all the problems encountered. But one can generally assume that the relevant mechanisms are well thought-out and that their limitations are not arbitrary, but correspond to the inherent structures of the edifice of international law. Indeed, it was a wise decision of the drafters of the BIT to confine the method of settlement of differences of opinion to the

two procedures set out in Articles V and VII of the BIT, rejecting any intermediate additional procedure under which general interpretive directives could be produced. Such a mechanism would have necessitated the creation of a standing monitoring body, an institution which normally can only be found within the framework of multilateral treaties where many actors must be kept under discipline.

4) The Object and Purpose of the BIT

32. Ultimately, it should be recalled that investment protection treaties providing for arbitration between investors and their host States have been devised with the aim of alleviating the burden for the national States of the investors to provide diplomatic protection in all instances where allegations are raised that the host States has not complied with its duties to respect the investments made in their territories. Investment disputes should be taken out from their political context, being instead entrusted to independent arbitrators, the pronouncements of which the contracting parties would respect. Ecuador's request now departs from that general orientation. According to the concept advocated by Ecuador, the responsible arbitral tribunals would lose their responsibility for the interpretation of the BITs concerned. All controversial points would be settled by agreement between the parties concerned, through a political process. In fact, this can of course be done. But this is not the model that has taken shape in the BIT. The BIT aims to depoliticize investment disputes by pushing the home State of the investor back to the sidelines. Ecuador, by contrast, brings the contracting parties back to centre-stage.

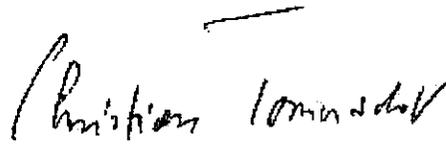
5) Conclusion

33. In sum, it turns out that Ecuador's concept of "dispute" might entail serious institutional consequences, re-configuring the entire system of settlement of investment disputes.

IV. General Conclusion

34. Ecuador's request intended to open up the way of Article VII of the BIT for arbitration on the meaning of Article II(7) of the BIT does not come within the purview of Article VII of the BIT. It must be dismissed.

Berlin, 24 April 2012

A handwritten signature in black ink that reads "Christian Tomuschat". The signature is written in a cursive style with a horizontal line above the name.

Christian Tomuschat

Former member, UN Human Rights Committee

Former member and chairman, UN International Law Commission