Neutral Citation Number: [2005] EWHC 774 (Comm)

Case No: 2004 FOLIO 656

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**COMMERCIAL COURT**
**IN THE MATTER OF AN ARBITRATION APPLICATION:**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29th April 2005

**Before :**

**MR JUSICE AIKENS**

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**Between :**

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| **THE REPUBLIC OF ECUADOR** | **Claimant/ Respondent** |
| **- and -** | |
| **OCCIDENTAL EXPLORATION AND PRODUCTION COMPANY** | **Defendant/ Applicant** |

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**Mark Cran QC, David Lloyd Jones QC and Simon Birt** (instructed by **Weil, Gothal and Manges**) for the Claimant/Respondent
**Christopher Greenwood QC and Toby Landau** (instructed by **Devoise and Plimpton LLP** ) for the Defendant/Applicant

Hearing dates: 1st, 2nd and 3rd March 2005

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# Judgment Approved by the court for handing down (subject to editorial corrections)

**If this Judgment has been emailed to you it is to be treated as 'read-only'. You should send any suggested amendments as a separate Word document.**

**Mr Justice Aikens:**

## A. Summary of the Issue raised by the application of Occidental

1. This application concerns the English law doctrine of "non - justiciability". The doctrine establishes a general principle that the Municipal courts of England and Wales do not have the competence to adjudicate upon rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law. The issue arises in the context of an Arbitration Award, dated 1 July 2004, which was made by a Tribunal of three arbitrators following an arbitration between Occidental Exploration and Production Company ("Occidental") and the Republic of Ecuador ("Ecuador"). The arbitration was held under the Arbitration Rules of UNCITRAL and the seat of the arbitration was London. Ecuador then issued an Arbitration Application[1] challenging the Award under section 67(1) of the Arbitration Act 1996, on the ground that the arbitrators had exceeded their jurisdiction. Ecuador invites the court to set aside the Award.[2]

2. Occidental, which is the defendant to that application, says that the doctrine of non - justiciability applies to prevent the English Court from determining that challenge to the Award. This is because Occidental's claim, the arbitration proceedings and the Award all arose out of the terms of a Bilateral Investment Treaty between the USA and Ecuador signed on 27 August 1993 ("the BIT").

3. Occidental issued an Application Notice dated 24 November 2004 raising the point and seeking an order that the Court dismiss Ecuador's Application on the ground of non – jusiciability.[3] This is the first time that an arbitration award rendered pursuant to a Bilateral Investment Treaty has been brought before the English Courts. I was told that there are well over 2000 current BITs and that the number of arbitrations arising out of them has dramatically increased in recent years.

## B. The parties and the factual background to the arbitration

4. The following factual background is set out for the purposes of the present application. The Defendant is a Californian Corporation and has been engaged in the exploration of oil in the territory of Ecuador since 1985. Under a contract dated 21 May 1999 ("the 1999 Contract") between Occidental and Petroecuador (a state-owned corporation of Ecuador), Occidental obtained the exclusive right to carry out hydrocarbon exploration and exploitation in Block 15 of the Ecuadorian Amazon basin region. In the past Petroecuador had had the exclusive right to exploit oil in Ecuador. Under the 1999 Contract, Occidental became a principal engaged in the exploration and exploitation of Ecuador's oil fields.[4]

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1 Issued on 11 August 2004.

2 Pursuant to section 67(3)(c) of the Arbitration Act 1996 ("the 1996 Act").

3 Ecuador's Arbitration Application has also challenged the Award on the grounds of serious irregularity in the procedure and/or affecting the Award, under section 68 of the 1996 Act. Although originally Occidental's application asserted that the doctrine of non – justiciability applied to that aspect of Ecuador's application as well, that was not pursued before me: see para 43 of Occidental's Outline Argument.

4 This change was made possible by an amendment to Ecuador's Hydrocarbons Law in 1993, so as to permit participation or production – sharing agreements: **Arbitration Award para 27.**

5. The scheme of the 1999 Contract is that Occidental assumed virtually all the costs of its exploration and exploitation activities. In return, Occidental received a percentage of the oil produced and it was able to export the oil.[5] Clause 8.1 of the 1999 Contract sets out an elaborate formula which determines the percentage of the oil produced to which Occidental is entitled. It was known as "Factor X".

6. Occidental made local purchases in Ecuador and imported goods and services from outside Ecuador in connection with the production of oil, which was subsequently exported in accordance with the 1999 Contract. Occidental paid VAT on these purchases and imports. It made regular applications to the Ecuadorian Internal Revenue Service[6] for the refund of VAT payments made after July 1999.[7] At first repayments were made. But on 28 August 2001 the SRI passed Resolution 664, which denied Occidental's claims for reimbursements. Further Resolutions were made by the SRI in 2002 and 2003, denying VAT refunds to Occidental and demanding the repayment to the SRI of refunds that had been made to Occidental from July 1999 to September 2000.

7. The initial view of the SRI was that the Resolutions denying Occidental the right to VAT refunds were justified on the ground that Factor X was calculated so as to take account of VAT payments. However, it seems that subsequently both the SRI and then Ecuador (in the arbitration) took the view that Occidental had no ***right*** to VAT refunds under Article 69A of the ITRL, because VAT refunds were only available to exporters of "manufactured" products and the crude oil exported was not "manufactured".

8. Occidental filed four law suits in the Tax District Court No 1 of Quito,[8] objecting to the Resolutions that the SRI had passed so as to deny Occidental the right to VAT refunds. The various lawsuits complained that the SRI Resolutions (denying Occidental the right to VAT refunds) were a violation of provisions in Ecuadorian law, in particular Articles 65 and 69A of ITRL.[9] The fact that Occidental pursued these lawsuits in the Tax District Court gave rise to one of the issues on jurisdiction that the Arbitrators had to consider.

9. Occidental gave up submitting VAT refund applications as a futile exercise.

10. In 2002 Occidental invoked the arbitration procedures provided for in the BIT and started an arbitration against Ecuador. Occidental alleged that the actions of the SRI (for which it said the Republic of Ecuador was responsible) amounted to breaches of Ecuador's obligations under the BIT, ie. were a breach of Ecuador's treaty and public international law obligations. In order to see how this fits in with the treaty it is necessary to explain BITs in general and the provisions of this BIT in particular.

## C. The Bilateral Investment Treaty

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5 This had not been possible under previous contracts: **Witness statement of Eric Ordway: B 1/Tab 3 para 8**

6 Known as the "*Servicio de Rentas Internas*" or "SRI".

7 The applications were made under Article 69A of the Internal Tax Regime Law ("ITRL").

8 Under Ecuadorian tax law, an appeal of SRI resolutions must be made by the affected party within 20 days: **Award para 33.**

9 **Award: para 38.**

11. Bilateral Investment Treaties have been developed as a mechanism to encourage investment between states, but using "investors" that are non – governmental organisations. It is a long – standing principle of public international law that states owe duties to other states to protect their citizens. This is known as the "doctrine of international protection".[10] Effectively, BITs are treaties that acknowledge this principle of public international law, apply it to particular circumstances between two states and develop the protection of investors by giving them "standing" to pursue a state directly in "investment disputes" between an investor and a state Party in ways set out in the BIT.[11] The issue at the heart of this application is the nature of those rights and how they fit in with English Municipal law principles, when an investor has invoked its right to pursue an investment dispute through the mechanism of an arbitration which is, as both parties accept, subject to the 1996 Act and principles of English Municipal law.

12. By the end of 2002 there were 2,181 BITs in force.[12] When the USA – Ecuador Bilateral Investment Treaty was transmitted by the President of the USA to the Senate for its advice and consent to ratification, the Letter of Transmittal stated that the Treaty was designed to protect US investment and to encourage private sector development in Ecuador, as well as to support the economic reforms taking place there.[13]

13. In the "Letter of Submittal" sent to President Clinton by the Secretary of State, submitting to the President the USA/Ecuador Treaty, "the principal BIT objectives" are set out in the letter. These objectives include the principles: (i) that investments of nationals and companies of either Party[14] will receive either "national treatment or most favoured nation treatment", whichever is the better; (ii) that investments are guaranteed freedom from performance requirements;[15] (iii) that expropriation can occur only in accordance with international standards; for a public purpose; in a non – discriminatory manner; under due process of law and upon payment of prompt, adequate and effective compensation. Most importantly for present purposes, (iv) there is the principle that nationals and companies of either Party will have access to binding international arbitration without first resorting to domestic courts in relation to investment disputes.

14. The scheme of the USA/Ecuador BIT is as follows:

    (1) The Preamble sets out the aim of the Treaty, which is to promote greater economic cooperation and investment between the Parties, but on a defined and agreed basis;

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10 See: E de Vattel, *Le Droit des gens ou les principes de la loi naturelle,* vol 1, 309 (1758).

11 ***Paulsson: "Arbitration without Privity" (1995) 10 ICSID Rev – Foreign Investment LJ 232 at pages 255 – 6.***

12 UNCTAD, *World Investment Report for 2003, 17;* quoted in ***Douglas, "The Hybrid Foundations of Investment Treaty Arbitration" (2003) BYIL 151,*** hereafter ***"Douglas".***

13 Letter of President Clinton dated 10 September 1993: **B 2/Tab 19 page 317.**

14 That is either state that is a Party to the BIT.

15 Such as the need to use local products or to export goods.

(2) Article I sets out various definitions. "Investment" is defined broadly.[16]

(3) Article II sets out the basis on which each Party will permit and treat investment, which is in accordance with the principle set out at (i) in the preceding paragraph. It also provides that the Parties will ensure that investment will have fair and equitable treatment according to international law standards.

(4) Article III deals with expropriation or nationalisation of investments.

(5) Article IV deals with transfers, particularly of funds.

(6) By Article V the Parties agree to consult promptly to resolve any disputes in connection with the Treaty.

(7) Article VI deals with the resolution of "*investment disputes*" between a State Party and a national or company of the other State Party. Its terms are central to this application and I will return to them in the next paragraph.

(8) Article VII concerns the resolution of disputes between the two Parties to the treaty, ie. USA and Ecuador. If necessary, disputes are to be submitted to an arbitral tribunal, for binding decision "*in accordance with the applicable rules of international law*".[17]

(9) Article X deals with the tax policies of each Party and provides that each Party should strive to accord fairness and equity in the treatment of investments of nationals and companies of the other Party. It states that the provisions of the Treaty, in particular Articles VI and VII will nevertheless apply to matters of taxation only to a certain extent, as set out in the Article. This Article gave rise to argument about its scope in the arbitration between Occidental and Ecuador.

15. Article VI must be set out in full. It provides:

> "1. For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.
>
> 2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute, under one of the following alternatives, for resolution:

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[16] The definition starts: "*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*". It then enumerates various examples.

[17] Article VII (1).

(a) to the courts or administrative tribunals of the Party that is 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 ("ICSID Convention"), provided that the Party is a party to such Convention; or

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

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

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

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

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

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

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

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

6. Any arbitral award rendered pursuant to this Article shall be final and binding on the parties to the dispute. Each Party undertakes to carry 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".

## D. The dispute between Occidental and Ecuador and the arbitration

16. On 4 April 2002 Occidental gave notice to Ecuador[18] that a dispute had arisen. After six months had elapsed from that date, on 11 November 2002 Occidental sent a Notice to Ecuador invoking the arbitration provisions of Article VI of the BIT. The Notice stated that, in accordance with Article VI.3(a)(iii), the Notice constituted Occidental's written consent to an arbitration under UNCITRAL Rules. The Notice sets out details of the parties to the arbitration, gives a statement of the dispute and asserts that Occidental has the right to seek relief through the arbitration proceedings that it has invoked in accordance with Article VI.3 of the BIT. Paragraph 20 of the Notice alleges that Ecuador has failed to honour its obligations under the BIT and under international law. Occidental identified breaches of Articles II.3(a),[19] II.3(b),[20] and III.1[21] of the BIT and set out its case. It nominated the Honourable Charles N Brower as arbitrator.[22]

17. Subsequently, Ecuador nominated Dr Patrick Barrera Sweeney[23] as its arbitrator. In accordance with Article 7 of the UNCITRAL Arbitration Rules ("the Rules"), Professor Francisco Orrego Vicuna[24] was appointed as Chairman of the arbitrators. The parties were unable to agree on a place where the arbitration should be held. So,

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18 In accordance with Article VI.2 and 3(a) of the BIT.

19 To accord fair and equitable treatment to Occidental's investment at all times, full protection and security and treatment no less favourable than that required by international law.

20 Not to impair in any way by arbitrary or discriminatory measures the management, operation, maintenance, use or enjoyment of Occidental's investment.

21 Not to expropriate directly or indirectly through measures tantamount to expropriation all or part of Occidental's investment in Ecuador except for a public purpose, in a non – discriminatory 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 Art. II(3) of the BIT.

22 He had been a member of the Iran – USA Claims Tribunal at the Hague since 1983.

23 A distinguished Ecuadorian lawyer who had acted as Legal Advisor to the Central Bank of Ecuador.

24 Professor of International Law at the University of Chile and President of the Administrative Tribunal of the World Bank; formerly Ad Hoc Judge on the Tribunal for the Law of the Sea.

in accordance with Article 16 of the Rules the arbitrators considered submissions, held a hearing on the issue and decided that it should be London.[25] In the hearing before me, it was agreed that London should be regarded as the seat of the arbitration for the purposes of section 3 of the 1996 Act.

18. In September 2003, Ecuador raised objections to the jurisdiction of the arbitration Tribunal and the admissibility of Occidental's claims. The parties submitted written cases on these issues, but the Tribunal decided to join those issues to the merits of the case.[26] A hearing on jurisdiction, admissibility and the merits was held in Washington DC between January 26 – 30 2004. "Post – hearing Memorials" were submitted on 16 April 2004. The Award was dated 1 July 2004 and sent to the parties on 12 July 2004.

## E. The Decision of the Arbitrators on the Jurisdiction and Admissibility Issues and the Merits of Occidental's claims.

19. The Award records[27] that Ecuador raised three objections to the Tribunal hearing Occidental's claims. Ecuador's arguments were:

(1) that Occidental had submitted four lawsuits to Ecuadorian courts on the question of the VAT refund, so that Occidental had irrevocably chosen to submit its claims to the courts or administrative tribunals of Ecuador in accordance with Article V.2(a) of the BIT. That choice precluded submission of the disputes to arbitration under Article VI.3.[28]

(2) In any event, Occidental's claims were precluded by the terms of Article X of the BIT, because the claim for refunds of VAT (save for any claim of expropriation) did not fall within the matters of taxation embraced in paragraphs (a), (b) and (c) of Article X.2, so that the claim was outside those matters that can be the subject of arbitration under Article VI of the BIT.

(3) Occidental's submission that there had been an expropriation of its investment by means of the taxation measures adopted by Ecuador[29] was unarguable, so that even if the claim fell within Article X.2, the Tribunal should not admit it as a claim.

20. The Tribunal gave its decision on each of these three arguments on jurisdiction and admissibility. On the first issue (the "fork in the road" point), it held that Occidental would only have been precluded from bringing its claim in arbitration if there had been a real choice between tribunals, each of which could have determined the same claim. That was not the case here and Occidental had simply preserved its position with regard to "non-contractual domestic law questions" in the Ecuadorian courts, whilst pursuing "treaty – based" issues in arbitration.[30]

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25 Decision of 1 August 2003.
26 Award para 16.
27 At para 37.
28 This argument was dubbed "the fork in the road" argument in the Award.
29 Contrary to Article III of the BIT.
30 Award, paras 57 to 63.

21. On the second jurisdictional issue, the Tribunal concluded that the key was the proper construction of Article X of the BIT. The arbitrators rejected Ecuador's argument that all matters of taxation were outside the Treaty, apart from the specific categories mentioned in Article X.2(a), (b) and (c). The Tribunal concluded, after a close analysis of the Treaty wording and the negotiating history of the BIT, that the claim did fall within the BIT. The Tribunal held that the real issue was whether the VAT refund had been secured by the calculation of Factor X in the Participation Contract, so that it was fair of the SRI to pass Resolutions that denied Occidental the right to a refund of VAT (as Ecuador argued), or whether the refund had not been secured by Factor X, in which case the denial of a right to a refund in accordance with Ecuador's Tax Law was unfair, (as Occidental argued). The arbitrators said that, put this way, the issue "automatically" brought in the question of whether Occidental had been accorded "fair and equitable treatment", as required under Article II. Therefore the Tribunal had jurisdiction to consider the issue for two reasons. First, as there was a dispute about what was embraced by Factor X, that was a matter concerning the "*observance*" of the Participation Contract, which is an "*investment agreement*". Therefore the claim concerned a matter of taxation with respect to the "*observance of terms of an investment agreement*" within Article X(2)(c). Secondly, because the claim raised issues under Article II of the BIT.[31]

22. On the third point the Tribunal commented that, normally, a claim of expropriation should be considered on the merits. But it concluded that it was so clear in this case that there had been no expropriation that the point should be dealt with at the jurisdictional stage. The Tribunal held the expropriation claim was inadmissible.[32]

23. The Award then considered the merits. The arbitrators concluded[33] that: (1) the VAT refund was not within Factor X as calculated in accordance with the Participation Contract. (2) Accordingly, Occidental was entitled to have the VAT refunded under both Ecuadorian law and also Andean Community Law. (3) Because the VAT refunds had not been made, Ecuador was in breach of its obligation (under Article II.1 of the BIT) to accord Occidental a treatment no less favourable than that accorded to nationals or other companies. (4) Therefore Ecuador had also breached its obligations concerning fair and equitable treatment as required by Article II.3(a) of the BIT. (5) The claim that Ecuador had impaired the operation of Occidental's investment by arbitrary measures (contrary to Article II.3(b) of the BIT) was only partially upheld. This was because the SRI had not acted deliberately to deprive Occidental of the VAT refunds; rather this had resulted from "*an overall rather incoherent tax legal structure*".

24. The Tribunal concluded that these breaches had caused Occidental damage. The arbitrators held that Occidental could retain the VAT refunds it had obtained and that it was entitled to be paid VAT refunds of over US$73 million for the period up to 31 December 2003. Interest was also awarded, so that the total of VAT refunds and interest due to Occidental was US$75,074,929.[34]

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31 Award paras 74 – 77.

32 Award para 92.

33 Award paras 199 – 200.

34 Because of the extant claims before the Ecuadorian Courts, the Tribunal made provision to prevent any double recovery by Occidental.

## F. Ecuador's Challenge to the Award

25. The Arbitration Notice that was issued by Ecuador on 11 August 2004 attaches a document called "Particulars for Arbitration Claim Form". This sets out in detail the remedies Ecuador claimed and the grounds in support of them. As already noted, the Award is challenged on two bases: first, that the Tribunal exceeded its jurisdiction. Secondly that there were serious irregularities as to the procedure of the reference and/or that affected the Award. The present "non – justiciability" argument is directed only at the jurisdictional challenge.

26. The jurisdictional challenge focuses on two points. First, Ecuador says that the Tribunal wrongly interpreted and applied Article X.1 of the BIT, [35] by determining that Article X.1 imposed "*an obligation on the host State that is not different from the obligations of fair and equitable treatment embodied in Article II, even though admittedly the language of Article X is less mandatory*".[36] Ecuador argues that the erroneous conclusion that Article X.1 created an enforceable obligation on "*the host State*" led the Tribunal to hold (wrongly) that it had jurisdiction to consider the claim of Occidental that Ecuador had been in breach of its Treaty obligations (under Article II) in its treatment of Occidental in relation to the VAT refunds.[37]

27. Secondly, Ecuador says that the Tribunal wrongly interpreted and applied Article X.2 of the BIT[38] in holding that the dispute between Occidental and Ecuador concerned a "*matter of taxation....with respect to....(c) the observance and enforcement of terms of an investment agreement...as referred to in Article VI(1)(a) or (b)*".[39] The reasoning of the Tribunal was that part, at least, of the dispute found its origin in the investment agreement (ie. the Participation Contract) "*insofar as it is disputed whether VAT reimbursement is included in Factor X*".[40] That enabled the Tribunal to consider whether Ecuador had been in breach of Article II.

28. Ecuador submits that: (i) on the correct interpretation of Article X.2, it did not permit claims alleging breach of Article II which concerned any issue of taxation to be submitted for determination in accordance with Article VI, because Article II is not mentioned in Article X at all;[41] (ii) the "*observance and enforcement*" of the terms of the Participation Contract were not in issue between the parties, let alone "*central to the dispute*"; (iii) the Tribunal interpreted Article X.2 too broadly.[42]

## G. Occidental's Response: the "non – justiciability" issue raised.

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35 Article X.1 provides: "*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*".

36 **Award:** para 70.

37 **Particulars to Arbitration Application:** para 20.

38 Article X.2 provides: "*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; ...(c) the observance and enforcement of terms of an investment agreement or authorisation as referred to in Article VI(1)(a) or (b)....*"

39 **Award:** paras 72 and 73.

40 **Award:** para 72.

41 Ecuador pointed out that this was in contrast to Articles III and IV which are both specifically mentioned in Articles X.2 (a) and (b) respectively.

42 **Particulars to Arbitration Notice:** para 19.

29. On 11 August 2004 Occidental issued a cross application. In that application it stated that if the court decided that it would set aside the Award on the grounds raised by Ecuador, then Occidental would wish to make a cross application to challenge the Tribunal's conclusion on jurisdiction with regard to the "expropriation" issue.[43] At that stage Occidental did not raise the "non – justiciability" point.

30. On 24 November 2004 Occidental issued a further Application Notice. This asserted that Ecuador's challenge to the Award under sections 67 and 68 of the 1996 Act required the court to interpret provisions of an international treaty between two foreign states (ie. the BIT). The notice continued: *"It is a rule of English law, however, that such a task of interpretation is not justiciable in the English Courts. This, therefore, prevents [Ecuador's] challenge from proceeding".* Occidental asked that this issue be dealt with as a preliminary point. On 21 December 2004 Colman J ordered that this be done and set a timetable for the service of evidence and a hearing of the preliminary point on "non – justiciability".

31. That hearing took place before me on 1, 2 and 3 March 2005. Although voluminous witness statements have been filed, the facts are not in dispute so far as this application is concerned and the arguments dealt with the law. I heard Mr Greenwood QC on behalf of Occidental and from Mr Lloyd Jones QC on behalf of Ecuador. I am very grateful to them both for their most interesting and helpful submissions. I reserved judgment.

## H. The parties' arguments in outline

32. **Occidental's Argument:** Mr Greenwood submitted that if the court had to decide the merits of Ecuador's section 67 challenge to the Award on jurisdiction, this would involve a complete rehearing of the issues and the judge would have to approach the question of jurisdiction wholly afresh and without any preconception that the Tribunal had made the right decision.[44] Therefore the court would have to interpret the BIT, rule upon its scope, effect and application and so determine the jurisdiction of the arbitrators. This exercise would involve: a consideration of the negotiating history and *travaux préparatoires* of the BIT and materials emanating from each state's government; an examination of many other treaties to which the UK was also not a party; and evidence or submissions as to the views of both states on their understanding of the scope, meaning and application of the BIT.[45] As the USA is not a party to these proceedings, all this would be done in the absence of one of the Parties to the BIT. English courts are very reluctant to rule on the rights and obligations of a state that is not a party to the proceedings before it.[46] The conclusion of the English court on the interpretation of the BIT would affect both Ecuador and the USA, as Parties to the BIT. Moreover, as the wording of this BIT is in a

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[43] Application Notice of 11 August 2004, para 10. This application was made under **section 67 of the 1996 Act.**

[44] Cf: ***Azov Shipping Co v Baltic Shipping Co [1999] 2 Lloyd's Rep 39 at 41 per Longmore J; Azov Shipping Co v Baltic Shipping Co [1999] 2 Lloyd's Rep 158 at 161 per Colman J.***

[45] This broad investigation would be necessary because Articles 31 and 32 of the ***Vienna Convention on the Law of Treaties 1969*** demands consideration of such matters in order to interpret treaties.

[46] Mr Greenwood referred in particular to the ***Buttes case (see below): [1982] AC 888 at 938C, per Lord Wilberforce,*** and the decision of the Divisional Court in ***CND v Prime Minister [2002] EWHC 2759 QB at para 37, per Simon Brown LJ.***

standard form that has been employed in many others, any ruling of the court would have an impact on other BITs to which states other than the UK are Parties.

33. Mr Greenwood submitted that it is precisely because such an exercise would require the English court to consider the executive and diplomatic actions of foreign states for which there are "*no judicial or manageable standards by which to judge these issues*",[47] that the courts have developed the doctrine of non – justiciability. This doctrine was enunciated by Lord Wilberforce in the ***Buttes Gas case*** after a full review of the authorities and it remains the law, despite some immaterial qualifications subsequently. Mr Greenwood particularly relied on the statements of principle made by Lord Oliver in ***JH Rayner (Mincing Lane) Ltd v DTI ("The Tin Council Case").***[48]

34. Allied to this principle is a second one, Mr Greenwood submitted. This is that English courts will not interpret treaties that have not been incorporated into English law. Again, Mr Greenwood relied particularly on statements of the House of Lords in the ***Tin Council Case.***[49]

35. Mr Greenwood submitted that if the court were to entertain the application of Ecuador under section 67 of the 1996 Act, it would inevitably mean that it would have to: (i) rule upon the meaning of a treaty to which the UK was not a party and which was not part of UK domestic law; (ii) rule upon the transactions between the USA and Ecuador on the plane of international law; (iii) embark upon a difficult task of treaty interpretation without being sure that it had all the relevant necessary materials before it and without the USA being a party to the proceedings. He submitted that the fact that the arbitration had its seat in London, so that the 1996 Act applied, could not justify the court trampling on the well – established principles referred to above. He pointed out that section 67(3) of the 1996 Act is not mandatory,[50] so that the court can decline to make an order if to do so would contravene other English law principles. He argued that it is clear that the 1996 Act is subject to the principle of non – justiciability because of the saving of common law principles in section 81(1) of the Act.[51]

36. **Ecuador's Argument:** Mr Lloyd Jones accepted that the BIT is a treaty governed by public international law and that it has not been made a part of the Municipal law of the UK. However, he submitted that, just because the proposed application under section 67 of the 1996 Act would involve consideration of a non – incorporated treaty between two friendly states, that does not make the matter a "no – go" area for the English Court. In this case the two state Parties to the BIT had expressly agreed that disputes between an investor and a state Party to the BIT could be determined by arbitration proceedings in states that are party to the New York Convention 1958. If there is an issue as to the scope of the jurisdiction of the arbitrators who have been

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47 Per Lord Wilberforce in ***Buttes Gas and Oil Co v Hammer ("The Buttes Gas case") [1982] AC 888 at 938 B.***

48 ***[1990] 2 AC 418 at 499 F – H.***

49 Particularly per Lord Templeman at ***page 476H to 477A; 481 B-C.***

50 It provides: "*On an application under this section challenging the award of the arbitral tribunal as to its substantive jurisdiction, the court* ***may*** *by order...* ".(emphasis mine).

51 That provides: "*Nothing in this Part shall be construed as excluding the operation of any rule of law consistent with the provisions of this Part....*" That section is at the end of Part 1, in which section 67 is also placed.

appointed by the mechanism specifically set up by the state Parties to the BIT, then it should be justiciable before the court that supervises the arbitral process. Here that must be the English Court, because London is the seat of the arbitration and it is accepted that the arbitral procedure is governed by the 1996 Act.[52]

37. Mr Lloyd Jones submitted that the court must distinguish between and consider two different matters in this case. First, the creation of the agreement to arbitrate the particular dispute that has arisen in this case between Ecuador and Occidental; and secondly, the nature of the rights that Occidental wishes to exercise by bringing its claim in the UNCITRAL arbitration proceedings.

38. As to the first matter, he submitted that the effect of Article VI.2 of the BIT was that if an *"investment dispute"* arose between an investor and a state Party, then there was a "standing offer" by the State Party to submit that dispute to one of the three methods of dispute resolution set out in Article VI.2 (a), (b) and (c), the last one of which is binding arbitration as set out in Article VI.3.[53] Occidental accepted Ecuador's "standing offer" to arbitrate by its Notice of Arbitration and Statement of Claim. This meant that the parties to the arbitration agreed to arbitrate on the terms set out in the BIT, particularly Articles VI and X. Then, once the Tribunal had decided that London would be the seat of the arbitration, the arbitration became subject to the Municipal law of the state of the seat of the arbitration, ie. in this case, the law of England and Wales.

39. Mr Lloyd Jones drew an analogy with the case of ***Philippson v Imperial Airways Limited.***[54] In that case the contract of carriage by air incorporated the Warsaw Convention 1929, at a time when it was not implemented in English domestic law.[55] But in order to determine what the parties to the contract meant by "international carriage" in the contract terms, it was necessary to construe the terms of the Warsaw Convention and interpret the definition of "international carriage" which was described in the Convention as "the carriage between two places within the territory of two "High Contracting Parties"" to the Convention. That is what Lord Atkin did, and also Lord Wright. [56]

40. As to the second matter, Mr Lloyd Jones submitted that the nature of the claim put forward by Occidental against Ecuador was a private law right, as opposed to a public international law right that was being exercised by Occidental (the investor) on

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52 Mr Lloyd Jones relied on the judgments in three Canadian cases, where courts had held that awards made by arbitral tribunals constituted under Chapter 11 of the North American Free Trade Agreement ("NAFTA") were susceptible to review by the Canadian Courts on the question of jurisdiction under the International Commercial Arbitration Act or the Commercial Arbitration Act of Canada: ***United Mexican States v Metalclad (2001) 5 ICSID Rep 236; United States of Mexico v Martin Roy Feldman Karpa, 11 January 2005; AG of Canada v SD Myers Inc, 13 January 2004.*** He also referred to ***Czech Republic v CME Czech Republic BV (2003) 42 ILM 919,*** where the Svea Court of Appeals in Sweden reviewed an issue of jurisdiction of arbitrators appointed to determine an investment dispute under a BIT between the Czech Republic and the USA.

53 ***Law and Practice of International Commercial Arbitration (4th Ed. 2004) by Redfern & Hunter para 1 – 142.***

54 *[1939] AC 332*

55 As Lord Atkin recognised: ***page 351.***

56 At pages 348 – 351; 364 - 369

behalf of the USA, as the other state Party to the BIT.[57] He submitted that it was important to note that Article VI.5 of the BIT stipulated that if the investor and state Party chose arbitration (other than one under the auspices of the International Centre for the Settlement of Investment Disputes – "ICSID"), then it had to have its seat in a state that is a party to the New York Convention 1958. That indicated that any award, made in favour of either an investor or a State Party, is to be enforceable like any other award involving private law rights, pursuant to the New York Convention 1958. The State Parties also agree that an award will be enforceable in their own states: Article VI.6 of the BIT.

41. Therefore, he submitted, the English courts might have to enforce an award made pursuant to Article VI.3(iii) of the BIT. Yet one of the grounds on which a court can refuse to enforce a New York Convention award is that it deals with a difference "*not contemplated by or not falling within the terms of submission to arbitration...*".[58] If a challenge was made to a BIT arbitration award on the ground of excess of jurisdiction, the English court would have to examine that issue and determine it in order to see to what extent (if at all) the award could be recognised or enforced: ***section 103 (4)*** of the 1996 Act.

42. Mr Lloyd Jones submitted that this analysis had the following consequences. English courts have examined treaties that are not incorporated into English Municipal law if it is necessary to do so in order to determine some domestic law right or interest. Mr Lloyd Jones pointed particularly to the decision of Hobhouse J in ***Dallal v Bank Mellat,***[59] in which the judge examined the jurisdiction of the Iran – US Claims Tribunal, which was established by a treaty between two states and which was not part of UK Municipal law. The judgment concluded that the source of the authority of the arbitration tribunal lay in the treaty that set up the Claims Tribunal, ie. it was derived from international law. Hobhouse J decided that the tribunal derived its competence from international law and that international comity required the English Courts to recognise the validity of its decisions[60]. Therefore Bank Mellat could rely on a defence of issue estoppel to Mr Dallal's claim against it in the English Court. Mr Lloyd Jones also relied on ***CND v The Prime Minister.***[61] In that case Simon Brown LJ said that the English courts would not interpret "*an instrument operating purely on the plane of international law*", unless it was necessary to do so "*in order to determine rights and obligations under domestic law*".[62] Mr Lloyd Jones said that in the present case Ecuador had the right, granted by section 67 of the

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57 Mr Lloyd Jones relied upon the argument set out in ***Douglas, pp 169 – 70; 179 – 180*** and the acceptance, in argument, of that position by the USA in the case of ***GAMI Inc v United States of Mexico (see para 13 of the US Submissions),*** an arbitration conducted under Chapter 11 of the NAFTA and under UNCITRAL Rules. The contrary position was expressed by a distinguished arbitration panel in another NAFTA case: ***The Loewen Group Inc v USA, Award of 26 June 2003: (2003) 42 ILM 811; see particularly para 233.*** That Award was made under the auspices of the International Centre for Settlement of Investment Disputes – "ICSID", Washington, DC. ***Douglas*** argues that this observation is wrong in principle and an inaccurate description of the NAFTA arbitration process: ***pp 162 – 3; 175 – 6; 193.***

58 ***New York Convention Article V.1(c); Arbitration Act 1996 section 103(2)(d).*** Convention Awards are enforceable in the same manner as a judgment of the court under ***section 101.***

59 ***[1986] QB 441.***

60 ***At page 462A***

61 ***[2002] EWHC 2759 QB (Divisional Court)***

62 ***See: para 36. Cf para 40: "There is no foothold in domestic law for any ruling to be given on international law";*** and conclusion at ***para 47 (i).*** Maurice Kay LJ and Richards J agreed with the judgment of Simon Brown LJ, whilst adding reasons of their own.

1996 Act, to ask the court to review the exercise of the Tribunal's jurisdiction, which it had exercised in a certain way and had decided that Occidental has private law rights that it can enforce against Ecuador in any court of a state that is party to the New York Convention.

## I. Analysis

43. **Points of Agreement:** There are a number of matters that are not in dispute between the parties. These include the following points:

(1) The BIT is an agreement between states on the plane of international law.

(2) In this case the nature of Occidental's allegations against Ecuador is that Ecuador has been in breach of its international law treaty obligations towards the USA that are set out in the BIT, particularly in Article II.3. Occidental argued that, as a result of these breaches, it suffered loss, totalling US$75 million. In the arbitration Occidental claimed a private law remedy, ie. damages or compensation of US$75 million.

(3) The Tribunal awarded damages or compensation of some US$75 million. That Award, if not challenged, can be given recognition and can be enforced under the provisions of the New York Convention 1958.

(4) The seat of the arbitration between Occidental and Ecuador, which was only decided after the Tribunal had been constituted and had heard argument on the point, was London.

(5) Part One of the Arbitration Act 1996, (which includes section 67), applies to arbitrations "*where the seat of the arbitration is in England and Wales and Northern Ireland*": see section 2(1) of the 1996 Act. Therefore, unless the court is prevented from doing so by some principle of non – justiciability, the court has jurisdiction to determine Ecuador's challenge to the Award of the Tribunal as to its substantive jurisdiction, which is made under section 67 of the 1996 Act.

(6) There is a general principle of English common law which has been called, for convenience, the "non – justiciability" principle. The argument concerns its scope and application in this case.

44. **The issues to be decided:** Two issues have to be decided, in my view. They are:

(1) What is the nature of the right or remedy that Ecuador wishes the English Court to consider that might infringe the "non – justiciability" principle in English law?

(2) Does the "non – justiciability" principle prevent the court from considering that right or remedy?

45. **What is the nature of the right or remedy that Ecuador wishes the English Court to consider that is said to infringe the "non – justiciability" principle in English law?**

Two sets of rights and remedies require consideration. First, there are those which arise under the BIT itself. Secondly, there are the rights arising from the fact that Occidental called on Ecuador to arbitrate a dispute and an arbitration has taken place with its seat in London.

46. During the hearing there was much debate on whether the rights and remedies that Occidental was seeking to enforce in the UNCITRAL arbitration arose under public international law or Municipal or private law. Mr Greenwood submitted that they were the former; Mr Lloyd – Jones that they were the latter. It is obvious that the BIT creates obligations between Ecuador and the USA on the plane of public international law. For example, Article III imposes obligations on the states not to expropriate or nationalise investments except in limited, defined circumstances.

47. However, this BIT (in common with others) also clearly gives investors the right to make claims directly against states – in Mr Greenwood's phrase, it gives them "standing". Mr Greenwood submitted that the rights, eg. those set out in Articles II.3, III and X.1, remain public international law rights which are rights of the states, which the investor is permitted to enforce. He relies particularly on statements of the arbitration tribunal in the ***Loewen case,***[63] which was an Award made under Chapter 11 of the NAFTA. As the ***Loewen case*** featured strongly in much of the argument about the nature of the rights and claims of Occidental, I should explain the nature of that arbitration and the decision of the tribunal on the relevant point.

48. The claimant in the ***Loewen case*** arbitration was a Canadian corporation that was owned and controlled by a US corporation. The respondent was the Federal Government of the USA. The arbitration arose out of a commercial dispute between two groups of companies, both of which, at the time, contained US corporations. One group was the Loewen group; the other was the O'Keefe group. The latter brought proceedings in the Mississippi State Court against the Loewen group for damages for breaches of commercial contracts. The jury awarded the O'Keefe group damages (including punitive damages) of US$500 million. The Loewen group did not raise the necessary and very large bond to appeal the verdict and so settled with the O'Keefe group for US$175 million. By the time of the NAFTA arbitration, the Loewen group had purported to assign any claims it had under NAFTA to a Canadian corporation, which was owned and controlled by a US corporation. That fact gave rise to one of the principal issues in the case.

49. In the NAFTA arbitration the claimants were The Loewen Group Inc, ("TLGI", a Canadian corporation) and Mr Raymond Loewen, a Canadian citizen and the principal shareholder and chief executive of TLGI. They sought compensation for damage inflicted on TLGI and another Loewen company (Loewen Group International Inc – "LGII"), and for damage to Mr Loewen's interests which were said to be a direct result of alleged violations of Chapter 11 of the NAFTA, that had been committed primarily in the State of Mississippi in the course of the litigation between the Loewen group and the O'Keefe group.

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63 Award of arbitrators Sir Anthony Mason, Judge Abner J Mikva and Lord Mustill given on 23 June 2003. Held under the auspices of the International Centre for Settlement of Investment Disputes, Washington DC.

50. The tribunal first heard and dismissed one ground of objection to the competence and jurisdiction of the tribunal and it adjourned other grounds. The tribunal went on to consider the merits and the adjourned questions concerning competence and jurisdiction. After the final hearing on the merits, the USA raised a further objection to the competence and jurisdiction of the tribunal, based on the reorganisation of TLGI under Chapter 11 of the US Bankruptcy Code. That reorganisation had resulted in the assignment by TLGI of its NAFTA claims to a newly created Canadian corporation, NAFCANCO, which was owned and controlled by a US Corporation.

51. On the merits, the arbitrators concluded that the trial and verdict in the Mississippi court were improper and could not be squared with minimum standards of international law and fair and equitable treatment.[64] They then had to consider the question of whether the claimants had a valid claim for an international wrong. That required the tribunal to decide whether it lacked jurisdiction because the claimants had not exhausted their "local remedies" before a party could bring a complaint of a breach of international law by a State. That in turn required the tribunal to decide whether the State in question (ie. the USA) provided local (or domestic) remedies, in the form of rights of appeal, that were effective, adequate and reasonably available to the complainant in the circumstances of the case.[65] The arbitrators decided that, because Loewen did not explain why it had entered into the settlement, it could not hold that the domestic remedies were ineffective, inadequate or not reasonably available. It held that Loewen had failed to pursue its domestic remedies "*notably the [Mississippi] Supreme Court option*", so that Loewen had not shown a "*violation of customary international law and a violation of NAFTA for which [the USA] is responsible*".[66]

52. The effect of that conclusion was that there could be no claim against the USA under NAFTA. However, the tribunal then dealt with the objection to their jurisdiction which had been taken after the main hearings on the merits, ie. that arising out of TLGI filing for protection under Chapter 11 of the US Bankruptcy Code. Before it had gone out of business, TLGI assigned all of its right, title and interest in the NAFTA to a new company, NAFCANCO. In fact the NAFTA claim was the only interest of NAFCANCO and the pursuit of the claim its only business.[67] The tribunal held further hearings on this point and both Canada and Mexico submitted their views on the issues raised by this objection.

53. The point taken by the USA was that NAFCANCO was owned and controlled by a US Corporation, LGII, which had been renamed Alderwoods Inc. The USA said that the format of NAFTA and in particular Chapter 11 of it was to protect the investing parties of ***one*** Contracting Party to the treaty against the unfair practices occurring in one of the other Contracting Parties. The tribunal agreed that NAFTA "*was not intended to and could not affect the rights of American investors in relation to the practices of the United States that adversely affect such American investors. Claims of that nature can only be pursued under domestic law*". Further, in that case if NAFTA were being used by an American investor, then it "*would in effect*

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64 Award: para 142.
65 Award: para 168.
66 Award: para 217.
67 Award: para 220.

*create a collateral appeal from the decision of the Mississippi Courts",* which was not the intent of NAFTA at all.[68] Therefore the issue that the tribunal had to consider was the nationality of the claimants. Under NAFTA, was the rule the same as in customary international law, ie. that a claim for compensation (by one state against another) for a failure to protect the assets of an entity of the claimant state, could only be maintained if the entity concerned had been a national of the claimant state from the time that the claim arose until the time of resolution of the claim?

54. The argument of the USA was that even if a claim under NAFTA had existed at a time when the claimants were Canadian entities, if subsequently they became (even in part) US entities, then there was no longer "diversity of nationality" between the entity claiming and the respondent State, so that a NAFTA claim that had existed beforehand ceased to do so. The tribunal remarked that the effect of the assignment and change of nationality of the claimant interests was something "*a private lawyer might well exclaim [was an] uncovenanted benefit to the defendant [that] would produce a result so unjust that it could be sustained only by irrefutable logic or compelling precedent, and neither exists".*[69] It is in that context that the remarks of the tribunal which are relied on so heavily by Mr Greenwood, arise.

55. In paragraph 233 of the Award, the arbitrators pointed out that NAFTA claims are not the same as rights of action under private law that arise from personal obligations, which are brought into existence by domestic law and are enforceable through domestic tribunals and states. The tribunal stated that NAFTA claims had quite a different character which stemmed from public international law. The passage on which Mr Greenwood relies then continues:

> "*...by treaty, the powers of States under [public international law] to take international measures for the correction of wrongs done to its nationals has been replaced by an* ***ad hoc*** *definition of certain kinds of wrong, coupled with specialist means of compensation. These means are both distinct from and exclusive of the remedies for wrongful acts under private law: see Articles 1121, 1131, 2021 and 2022 [of NAFTA].....There is no warrant for transferring rules derived from private law into a field of international law where claimants are permitted for convenience to enforce what are in origin the rights of Party states. If the effects of a change of ownership are to be ascertained we must do so, not by inapt analogies with private law rules, but from the words of Chapter Eleven [of NAFTA], read in the context of the treaty as a whole, and of the purpose which it sets out to achieve".*

56. The tribunal concluded that, under the provisions of NAFTA, the rule of continuous nationality obtained. It also concluded that the consequence of TLGI's decision to go into Chapter 11 insolvency was that the "*chain of nationality"* that NAFTA required had been broken so that the tribunal had no jurisdiction to determine the claim.[70]

57. I have spent some time analysing the ***Loewen*** decision because Mr Greenwood attaches much importance to the characterisation of the claimants' claims that is made by the tribunal at paragraph 233 of the award. But there are several points to note

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68 Award: paras 223 and 224.

69 Award: para 232.

70 Award: para 234, 237 and 240.

about what the ***Loewen*** tribunal says. First, it is analysing the position under the NAFTA, as opposed to the current treaty, a BIT between Ecuador and the USA. Secondly, the precise nature of the claim was not central to the point at issue in this part of the award; the key issue was whether there was continuity of nationality. Thirdly, it is noteworthy that when the arbitrators discuss the history of the doctrine of continuous nationality in the context of claims by one state against another, they comment on how the nature of "investment claims" has changed.[71] They note that claimants have been allowed to "*prosecute claims in their own right more often*" and that in such cases provision has been made for the amelioration of the strict requirement of continuous nationality. They observe that this has been spelt out in specific treaties, including many "*so-called BITs*".

58. I am satisfied that the tribunal did not intend to make any general comment on the nature of claims made under BITs against states by investors that are entities created and existing under Municipal (or "domestic" or "private") law. I am equally satisfied that the tribunal did not intend to lay down any general rule that, whatever the nature of the claim by the Municipal law entity, it was being made on behalf of the other State Party to the treaty.

59. That does not solve the question of the nature of the rights and remedies given to an investor under a BIT. Mr Lloyd Jones pointed to the fact that, by Article VI, the BIT creates a direct relationship between a State Party and an investor so it can enforce its own rights. But that does not answer the question on the nature of the rights. Secondly Mr Lloyd Jones observed that the BIT confers rights which have effect in the Municipal law of Ecuador and can be enforced in the Municipal courts of Ecuador.[72] But those facts do not help in the analysis from the standpoint of the English law and jurisdiction.

60. Mr Greenwood emphasised that if the rights are private or Municipal law rights, then, classically under English conflicts of laws rules, they must be governed by some proper law or other, which is determinable at the time the rights are created.[73] There is nothing in the BIT to suggest that this exercise would be conducted if an investor made a claim against a state under the provisions of Article VI. Instinctively, it seems to me improbable that the Contracting State Parties intended that investors should be given the right to make claims that are governed by a particular Municipal law.

61. In the absence of anything else to guide me I go back to the fact that the BIT creates rights and obligations between states on the level of public international law. Given the wording of the BIT, and in particular the wording of Article VI.1 and VI.2, two points seem to me to be logical. First, that the State Parties to the BIT intended to give investors the right to pursue, in their name and for themselves, claims against the other State party. Secondly, that those rights are granted under public international law and must be determined on principles of public international law, as they were by the Tribunal in this case.

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71 See para 229 of the Award.

72 See: Arts III.2; VI.1(c) and VI.2(a).

73 See, eg: ***Armar Shipping Co Ltd v Caisse Algerienne D'Assurance et de Reassurance [1981] 1 WLR 207 at 215 per Megaw LJ.***

62. Next there is the question of the rights and remedies created by the arbitration. Mr Greenwood correctly pointed out that there are two aspects to these rights. First there is the agreement to arbitrate, which is contained in the BIT itself. As I have already indicated, that is in the form of a standing offer to arbitrate by the State Party, which offer can be accepted by the investor. Is that agreement governed by a Municipal law? If it is then it has to be capable of identification at the moment that the agreement is made.

63. Again it seems to me inherently unlikely that the arbitration agreement would be governed by a Municipal law. The arbitration agreement between parties will determine the scope and nature of the issues that can be arbitrated between the parties. In the case of the BIT the scope of the arbitration agreement which is created by operation of Article VI.3 (a) and (b) must be within the confines of the wording of the BIT itself, in particular that of Article VI.1. There is no doubt that those provisions are governed by public international law. It would be logical that the arbitration agreement which is based on the BIT is also governed by the same law. Indeed, because the substantive rights and obligations created by the BIT are so intertwined with the scope of any arbitration concerning them, any other answer would be unworkable. In the current case the Tribunal dealt with both the merits and the jurisdiction of the Tribunal together and did so according to principles of public international law. The decision to ***use*** those principles for determining their jurisdiction (ie. the scope of the arbitration agreement), was obviously right. Whether those principles were ***used correctly*** is a different point and that is what Ecuador wishes to challenge under section 67 of the 1996 Act.

64. That leaves the law by which the arbitral procedure is conducted. Everyone agrees that this is indeed governed by Municipal law, ie. the 1996 Act.

65. So which of these three groups of rights and remedies is it that Ecuador wishes the English court to consider that might infringe the "non – justiciability" principle? It is not, at least directly, the first one, ie. the substantive rights granted to Occidental by virtue of the provisions of Articles VI.1 and VI.2 of the BIT. Ecuador has to accept that if the Tribunal interpreted the BIT correctly and had jurisdiction to consider the claims asserted by Occidental, then (subject to the section 68 challenge), it cannot question the Tribunal's power to make the Award it did.

66. Ecuador wishes the Court to consider the second bundle of rights and obligations, ie. the right to arbitrate certain claims. The scope of those rights is to be interpreted and defined according to public international law principles. It is because those rights concern the interpretation of a treaty to which the UK is not a party and which has not been incorporated into UK Municipal law that Occidental asserts that the Court cannot exercise the power it would otherwise have (under section 67) to consider Ecuador's jurisdictional challenge.

67. **Does the "non – justiciability" principle prevent the court from considering Ecuador's challenge to the Tribunal's jurisdiction to determine the claims asserted by Occidental?**

Mr Greenwood submits that the statements of principle made by the House of Lords in leading cases make it clear that the English court must not consider the scope of the jurisdiction of the Tribunal, because that depends on the proper interpretation of a

treaty that has not been incorporated into English Municipal law. Therefore the courts have no power to enforce any rights created by the treaty, which is an agreement between states and on the plane of international law. He relied in particular on statements made in the leading case of ***JH Rayner Ltd v Department of Trade,***[74] ***("the Tin Council case")*** particularly those of Lord Templeman and Lord Oliver. In that case various traders in the London tin market claimed sums from the member States of an international body, the International Tin Council, which had been established under a series of multi – lateral treaties to which the UK was a party. But those treaties had never been incorporated into English Municipal law. The ITC was accorded a corporate identity in English law by a series of Orders in Council. The ITC failed to meet substantial obligations to tin traders when the member States withdrew support for its activities (principally the sale and purchase of tin stocks to maintain world prices). The tin traders sought to fix liability on the States that were members of the ITC. Four main arguments were put forward in an attempt to do so. All failed at all stages of the litigation.

68. All the arguments required the courts to look at the various International Tin Agreements ("ITAs") that established and continued the ITC, the latest of which was called "ITA 6". Lord Oliver dealt with the issue of the extent to which the courts could consider ITA 6 under the heading of "*The Principle of Non – Justiciability*".[75] He set out the following principles,[76] noting that the contest was not so much in the principles themselves but the area of their operation. (1) "*Municipal courts have not and cannot have the competence to adjudicate upon or to enforce the rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law.*" (2) "*A treaty is not part of English law unless and until it has been incorporated into the law by legislation*". (3) "*So far as individuals are concerned, it is* ***res inter alios acta*** *from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations...as a source of rights and obligations [an unincorporated treaty] is irrelevant*". (4) However, those "*propositions do not...involve the corollary that the court must never look at or construe a treaty*". Lord Oliver gave three examples where that was commonly done: where the treaty was incorporated into Municipal law directly; where it was done indirectly to give effect to treaty obligations; and where parties had entered into a "domestic" contract and incorporated the wording of a treaty.[77] (5) The court could refer to a treaty and the facts of its conclusion and terms where that was a part of the factual background against which a particular issue arose. "*Which states have become parties to a treaty and when and on what the terms of the treaty are are questions of fact. The legal results which flow from it in international law, whether between the parties* ***inter se*** *or between the parties or any of them and outsiders are not and they are not justiciable by Municipal courts*".

69. Lord Oliver returned to this topic when he dealt with the appeal of one of the tin traders, Maclaine Watson & Co Ltd, which had sought the appointment of a receiver over the assets of the ITC. The argument was that one of those assets was a right of action that the ITC had as against the member states of ITA 6 to be indemnified by

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[74] ***[1990] 2AC 418, at 476 (Lord Templeman) and 499 - 500 (Lord Oliver of Aylmerton).***

[75] ***At page 499E.***

[76] Lords Keith, Brandon and Griffiths agreed with Lord Oliver and also with Lord Templeman, who gave the only other substantial speech. Lord Templeman made the same points in different language.

[77] Lord Oliver cited the ***Philippson case [1939] AC 332*** as an example of this last category.

the member states against the liabilities of the ITC in respect of sales and purchase contracts. Two questions arose: (i) did the ITC have a cause of action for an indemnity against the member states; and if it did (ii) was that justiciable in the English courts? Lord Oliver concluded that if any right to be indemnified existed, it could only be found in ITA 6, an unincorporated treaty between sovereign states. Lord Oliver's preferred ground[78] for concluding that the court could not entertain the application for the appointment of a receiver was that the receiver would be attempting to obtain an indemnity from the member States by relying on the terms of ITA 6, an unincorporated treaty. That would involve a court having to see whether its terms provided for an indemnity either expressly or by implication. That was not a justiciable issue.[79]

70. Mr Lloyd Jones pointed to the fact that there have been criticisms of the breadth of the "non – justiciability" rule as stated in ***The Tin Council case.*** But in ***Re McKerr,*** [80] Lord Steyn noted that the "rule" enunciated by the House of Lords in ***The Tin Council case*** , that an unincorporated treaty can create no rights or obligations in domestic law, had been subsequently affirmed by the House in two further cases.[81] Lord Steyn observed that distinguished commentators had attacked the "narrowness" of the decision on this point, although he acknowledged that the critics would accept *"the principled analysis"* of Kerr LJ in the Court of Appeal that *"the liability of the member states under international law is justiciable in the national court and that under international law the member states were not liable for the debts of the international organisation"*. He said that *"a comprehensive re-examination must await another day"*.[82]

71. Despite the tempting blandishments of Mr Lloyd Jones' arguments, I must take the "rule" as I find it in ***The Tin Council case.*** The question is whether it applies to prevent the court considering Ecuador's challenge to the Tribunal's jurisdiction in this case. In order to answer that it is vital to do two things. First, to note that because the seat of the arbitration between Ecuador and Occidental is London, in principle the court has jurisdiction to entertain a challenge to the Tribunal's substantive jurisdiction. Secondly, to examine closely what the court would have to do in order to deal with that challenge.

72. Because the court has the jurisdiction, in principle, to examine a challenge to the substantive jurisdiction of an arbitral tribunal by virtue of section 67 of the 1996 Act, it is necessary to see if, in doing so, it would infringe any of the "rules" of non – justiciability as set out by Lord Oliver. I will go through the principles set out by Lord Oliver that I have already enumerated above.

73. First, will the court have to adjudicate upon or enforce rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law? It will, in part, but that is not the end of the matter. Some of the rights created by the BIT, which is a treaty between the USA and

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78 He noted that in the Court of Appeal, Ralph Gibson LJ had also held that a claim for an indemnity would involve considering the agreement of sovereign states in international law, so would be precluded by *"act of state non – justiciability"*: ***see pages 519 E – F and 522F.***

79 ***At pages 521E and 522E.***

80 ***[2004] 1 WLR 807 at 821,***

81 ***R v Sec of State for the Home Dept, Ex p Brind [1991] 1 AC 696; R v Lyons [2003] 1 AC 976.***

82 ***At page 822C -H.***

Ecuador on the plane of international law, are rights that are given to a class of entities which exist on the plane of Municipal law, ie. "investors". In particular, the right to arbitrate "*investment disputes*" as defined in Article VI.1, is given to Municipal law entities. That right can be exercised in an arbitral tribunal (set up under UNCITRAL arbitration rules) that will be subject to procedural laws (UNCITRAL arbitration rules and, if the seat is in England, the 1996 Act), which exist on the "Municipal" or "private" or "domestic" law plane. So, although the rights have their origin in international law, they are rights that are intended to be exercised by Municipal law entities in a tribunal that is subject to control under Municipal laws. This, in my view, distinguishes the position in the present case from that in ***The Tin Council case.*** There the essence of the decision was that the tin traders, Municipal law entities, did not have any rights against the member States in international law that the court could entertain. In this case, Occidental and Ecuador have agreed that rights with their origin in international law will be considered by a tribunal whose procedure is subject to Municipal law.

74. In this regard, it is instructive to note the approach of the Divisional Court in ***The CND v The Prime Minister.***[83] In that case the CND sought declaratory relief from the court as to the true meaning of the UN Security Council Resolution 1441, and more particularly whether that Resolution authorised States to take military action in the event of non – compliance by Iraq with its terms. Simon Brown LJ summarised the application thus: "*In short, the court is being invited to declare that the UK Government would be acting in breach of international law were it to take military action against Iraq without a further Resolution*".[84] The Court held that it had no jurisdiction to declare the true interpretation of an international instrument (the Resolution) which had not been incorporated into domestic law "*and which it is unnecessary to interpret for the purposes of determining a person's rights or duties under domestic law*".[85]

75. In the course of his analysis of the cases and the arguments of Mr Singh QC on behalf of the CND, Simon Brown LJ pointed out that all the cases relied on by Mr Singh to show that the court had pronounced on some issue of international law were "*cases where it has been necessary to do so in order to determine rights and obligations under domestic law*".[86] Simon Brown LJ referred to ***R ex p Abbasi v Sec of State for Foreign and Commonwealth Affairs [2002] EWCA Civ 1598, R v Home Sec. ex p Launder [1997] 1 WLR 839***; ***R v DPP ex p Kebilene [2002] 2 AC 326*** and ***Oppenheimer v Cattermole [1976] AC 249*** as all being examples of where the court examined an issue of international law in order to determine rights and obligations under English law. He noted that in the present case "*there is...no point of reference in domestic law to which the international law issue can be said to go; there is nothing here susceptible of challenge in the way of the determination of rights, interests of duties under domestic law to draw the court into the field of international law*".[87] Simon Brown LJ later expressed the point thus: "*Here there is simply no foothold in domestic law for any ruling to be given on international law*".

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83 ***[2002] EWHC 2759 QB***

84 ***Para 2 of the judgment.***

85 Conclusion (i) ***at para 47 of the judgment.***

86 ***Para 36.***

87 ***Para 36.***

76. In my view, in this case there is a foothold in domestic law for a ruling to be given on international law. That foothold is the right given by section 67 of the 1996 Act to a party to an arbitration, whose seat is in England, Wales and Northern Ireland, to challenge the jurisdictional ruling of the arbitral tribunal. That is a Municipal, private or domestic law right. There is nothing in the 1996 Act to say that it is not available in certain circumstances. Even if the 1996 Act is subject to the principles of "non – justiciability" in general, the effect of the analysis of Simon Brown LJ in ***the CND case*** must be that the court is entitled to consider an unincorporated treaty if it has to do so in order to determine rights that exist under domestic law.

77. Secondly, will the court be considering a treaty that is not part of English law? It would. But, in my view, it is entitled to do so if it must in order to determine the domestic law right of Ecuador to challenge the jurisdictional ruling of the Tribunal.

78. So far as Lord Oliver's third principle is concerned, in this case the BIT, although unincorporated in English law, is not entirely *"res inter alios acta from which [individuals] cannot derive rights and by which they cannot be deprived of rights or subjected to obligations".*[88] Article VI.1, VI.2 and VI.3 does create rights and obligations for *"individuals"* ie. investors. It is the scope of those rights and obligations on which the Tribunal has ruled that Ecuador wishes to challenge under section 67.

79. As for Lord Oliver's analysis of the position in the receivership application in ***The Tin Council case,*** in my view the situation is again different in the present case. In that case Lord Oliver held that the right of indemnity that the receiver would have asserted would have been one that only existed (if at all) in international law by virtue of ITA 6. The court would not adjudicate on that, because if it existed at all it must have been purely on the international law plane and had no reference to any domestic law rights or obligations.[89] In this case the arbitral Tribunal has already made a ruling on the existence of rights that a Municipal law entity (Occidental) has and which can be enforced under Municipal law. It is the domestic law right of Ecuador to challenge that ruling which leads into a consideration of international law.

80. I accept that the position in the present case does not fall within the examples that Lord Oliver gives when a court can look at or construe a treaty. In particular, it is not the same as in the ***Philippson case.*** I agree with the submission of Mr Greenwood that it is an incorrect analysis of the position to suggest that Ecuador and Occidental have concluded a Municipal law contract based upon or incorporating the terms of the BIT.

81. But that does not affect my conclusions and analysis set out above. To my mind the exercise of examining the terms of the BIT in order to see whether or not to grant a right given by section 67 of the 1996 Act is no different in kind to that done by Hobhouse J in ***Dallal v Bank Mellat,***[90] where he examined the authority of the US – Iran claims tribunal, which he held was derived from international law. He did that exercise in order to determine whether the claimant in the English proceedings was

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88 ***At page 500C of the report.***

89 Although the applicants had, in both the CA and the HL, relied on domestic law analogies to demonstrate the existence of the right to indemnity by virtue of the terms of ITA 6.

90 ***[1986] QB 441.***

entitled to bring a further claim or was prevented from doing so by the defence of issue estoppel. In short Hobhouse J considered international law for the purpose of determining rights and obligations under domestic law.

82. Mr Greenwood's riposte to the argument that section 67 constitutes the domestic law right on which a consideration of international law issues can be founded is to say that section 67 is itself subject to the principles of "non – justiciability". Therefore a court should refrain from exercising its jurisdiction to consider the right to challenge the jurisdiction of the Tribunal, because that would raise "non – justiciable" issues. I cannot accept that argument. If it were correct, then, logically, the same must be true of the challenge made by Ecuador under section 68 of the 1996 Act.[91] It is noteworthy that Ecuador alleges that there were serious irregularities in the procedure of the Tribunal that affect the Award because, amongst other things, the Tribunal "*failed to have regard to the principle of international law that international tribunals cannot declare the internal invalidity of rules of national law*" and that the Tribunal exceeded its power by overriding legal proceedings before the Courts of Ecuador.[92] Those appear to me to raise issues of international law and go, once again, to the question of the jurisdiction of the Tribunal. But Mr Greenwood accepts that Ecuador can mount its section 68 challenge.

83. Further, if Mr Greenwood is correct, it would mean that the English court could not consider a defence to an application, under section 101 of the 1996 Act, to enforce an award by a tribunal made under Article VI.3 of this BIT. As I understood him, Mr Greenwood accepted that if an award made under VI.3 of the BIT were presented to the English court for recognition and enforcement under section 101 of the 1996 Act, the English Court would be bound to recognise and enforce it unless it upheld one of the limited grounds for refusing to do so. But he did suggest that if one of those grounds (eg. that in section 103 (2)(d), excess of jurisdiction), raised a "justiciability" issue, the court could refuse to apply that ground.[93] In my view the answer to this point is the same. An entity that is challenging the right to enforce an award has a statutory right to do so under section 103. The court would be entitled to consider the BIT to decide the scope of the arbitration agreement and whether the award was within its terms and so determine the rights of the parties granted under domestic law.

84. As for the practical difficulties that Mr Greenwood said would be involved if the court did have to consider the challenge to the Tribunal's jurisdiction and to interpret the BIT, I think that they should not be overestimated. The English courts do have to interpret international treaties and conventions and when they do they apply the rules of interpretation laid down in the Vienna Convention on the Law of Treaties, 1969. That is not a reason for refusing to undertake the task, however burdensome. I accept that the USA will not be a party to the proceedings, so that the court should be slow to rule on the rights and obligations of a state which is not a party to those proceedings. But that is a consequence of the structure of dispute resolution mechanism set up by Article VI of the BIT and so must have been contemplated by

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91 Occidental's application of 24 November 2004 did indeed claim that Ecuador's section 68 application could not be heard because it offended the principles of "non – justiciability".

92 Grounds 7(1) and (4) of Ecuador's Application: **B1/TAB 2 pages 17 and 18.**

93 He relied on a statement of Mance LJ in ***Dardana v Yukos [2002] 2 Llyd's Rep 326 at 330 para 8.*** But that did not refer to a justiciability issue, but domestic law defences such as estoppel.

the State Parties. And, if need be, the USA could make submissions through Occidental or apply to intervene to be heard on relevant points.

85. I appreciate also that Article VII provides the means whereby the state Parties to the BIT can resolve a dispute as to the interpretation or application of the BIT through an arbitral tribunal "*in accordance with the applicable rules of international law*".[94] But there is no dispute as between the USA and Ecuador, so far as I know. And that provision of the BIT cannot detract from the rights given to Occidental to have an investment dispute resolved in accordance with the procedures laid down in Article VI. That is what it has done and that is what Ecuador wishes to challenge.

## J. Conclusion

86. For all these reasons,[95] I have concluded that the doctrine of non – justiciability does not prevent the court from entertaining Ecuador's application to challenge the substantial jurisdiction of the Tribunal under section 67 of the 1996 Act. Indeed, in my view it would be odd if the English court could not do so, once the Tribunal had chosen London as the seat of the arbitration and had therefore made its procedure subject to Part 1 of the 1996 Act.

87. Accordingly, I must dismiss the application of Occidental dated 24 November 2004, which was, effectively, to strike out Ecuador's application to challenge the Tribunal's substantive jurisdiction under section 67 of the 1996 Act.

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94 Article VII.1

95 I should note that Ecuador raised a further argument based on Article 6 of the ECHR, but I did not need to address that in the light of my conclusions.