IN THE MATTER OF AN ARBITRATION
UNDER THE RULES OF THE
UNITED NATIONS CONFERENCE ON INTERNATIONAL TRADE LAW

Murphy Exploration and Production Company International,

Claimant

v.

The Republic of Ecuador,

Respondent

EXPERT OPINION OF PROFESSOR STEVEN R. RATNER

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15 March 2013

A. Personal Background

1. I am the Bruno Simma Collegiate Professor of Law at the University of Michigan Law School, where I teach courses in public international law. Prior to joining the Michigan faculty in 2004, I was the Albert Sidney Burleson Professor in Law at the University of Texas School of Law, and prior to joining the Texas faculty I was an Attorney-Adviser in the Office of the Legal Adviser at the United States Department of State. I received an A.B., *magna cum laude*, from Princeton University in 1982, a J.D. from Yale Law School in 1986, and a *diplôme (mention très bien*) from the Institut Universitaire de Hautes Études Internationales (Geneva) in 1993.

2. During my years at the State Department, I served, among other positions, as an Attorney-Adviser for Economic, Business, and Communications Affairs. Among my responsibilities was assistance with the negotiation of bilateral investment treaties (BITs) of the United States. I participated directly as a U.S. government lawyer in negotiations on several BITs, including that with Argentina (which is based on the same model BIT as that between Ecuador and the United States) in 1991, as well as negotiations with other states, including Costa Rica and Pakistan, that did not lead to the conclusion of BITs. I left this position in the spring of 1992 to begin an International Affairs Fellowship at the Council on Foreign Relations.

3. My academic career has focused on public international law, including international investment law. Since I began teaching law in the fall of 1992, I have taught a semester-long course on the international law on foreign investment, which I have now taught eight times. This course covers the legal protections offered to investors as well as the resolution of investment disputes, including detailed coverage of investor-state dispute settlement and forums such as ICSID arbitration. The preparation for this course, including gathering of course materials, has necessitated extensive research on developments in the field, both substantive and procedural. I

have also regularly taught a public international law or transnational law introductory course. I am the co-author of one of the leading textbooks on international law used in the United States, *International Law: Norms, Actors, Process* (2010), now in its third edition, and I contributed to the book's treatment of foreign investment. I have published a major article on indirect expropriations in the *American Journal of International Law* in 2008. I have also dealt extensively with foreign investment issues in my publications concerning the obligations of multinational enterprises under international law, including a leading article in the *Yale Law Journal* and a chapter in the *Oxford Handbook of International Environmental Law*. I have also lectured on foreign investment in the United States and abroad, including at the Tsinghua University Law School in Beijing and later this year at Bocconi University in Milan. In addition, I have served as an expert consultant on an expropriation-related arbitration arising out of the Argentine emergency measures of the early 2000s as well as numerous other matters of public international law for the United Nations, the United States government, and private parties.

4. My scholarly work in public international law has been recognized in other contexts as well. From 1998 to 2008, I served as a member of the Board of Editors of the *American Journal of International Law*, one of the highest forms of recognition of scholars of international law. Earlier, I received both the Francis Deák Prize of the American Society of International Law for the best article in the *American Journal of International Law* and the Society's Certificate of Merit for the best scholarly book published in the field of international law. In 2009, I was appointed to the State Department Advisory Committee on International Law, a highly select group of academic experts and practitioners who meet semi-annually with the State Department Legal Adviser and the Department's lawyers to consult on matters of public international law. In 2013, I was appointed by the American Law Institute to serve as an official Adviser to the

Restatement (Fourth) of the Foreign Relations Law of the United States. My appointment to the newly created Bruno Simma Chair in 2009 represents one of the leading forms of recognition of the University of Michigan for one of its professors. My full CV, including publications, is attached at Annex 1.

5. I have been retained by Murphy Exploration and Production Company ─ International to offer a legal opinion on several matters of international law that may be pertinent to the resolution of its dispute with the Republic of Ecuador. I have read relevant documents related to this case, including the ICSID Award on Jurisdiction (dated 15 December 2010), Claimant's Notice of Arbitration, Respondent's Objections to Jurisdiction, Claimant's Response to Respondent's Objections to Jurisdiction, Respondent's Reply to Claimant's Response to Respondent's First Objection to Jurisdiction, and the Expert Opinion of Professor Kenneth J. Vandevelde. I have also consulted a range of legal sources, including caselaw, treaties, and scholarly commentary.[*]

B. Summary of Opinion

6. Under the Vienna Convention on the Law of Treaties, the Ecuador-United States Bilateral Investment Treaty permits of only one interpretation on the issue before the Tribunal – that Article VI(2) provides an irrevocable fork in the road among domestic remedies, other agreed procedures, and international arbitration, whereas Article VI(3) provides a list of options for the investor for international arbitration, without any express or implied fork in the road among those options. To this effect, this Opinion makes four points. Part C reviews the rules of treaty interpretation for BITs and notes the importance to international tribunals of the principle

[*] Unless otherwise noted, translations in this opinion of Spanish language sources are provided by Claimant's counsel, though I located and analyzed these sources (in their original Spanish) independently.

of *effet utile*. Part D explains that the interpretation above is mandated by the ordinary meaning of the text of this treaty as well as the treaty's context and object and purpose. Both the wording and structure of Articles VI(2) and (3) require such an interpretation, and a contrary position would deny an *effet utile* to these provisions. States and scholars agree on the ordinary meaning of fork in the road clauses, and states have been quite explicit if they choose to create an additional fork among arbitral venues. Recourse to any possibly relevant supplementary means only confirms this view. Part E examines the expert opinion of Professor Vandevelde and finds that the inferences made therein for a second fork in the road are not supported by the United States policy or history regarding bilateral investment treaties that he discusses. Part F considers the effect of the denial of jurisdiction by the ICSID panel and concludes that the panel's finding that the Claimant did not meet the preconditions for submission of the dispute to international arbitration means that the Claimant never validly consented to submission of this claim and thus may choose to consent again to submission to any of the fora listed in Article VI(3), including ad hoc arbitration under the UNCITRAL rules. The lack of any secondary fork in the road, read in conjunction with this ability to consent anew, clearly grants this Tribunal jurisdiction to adjudicate Claimant's claims.

C. Treaty Interpretation Rules for Investor-State Disputes Under Bilateral Investment Treaties

7. A tribunal adjudicating an investor-state dispute under a bilateral investment treaty is normally obligated to follow the rules of interpretation of treaties set forth in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties ("the Vienna Convention"), which read:

Article 31
General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

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

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

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

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

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

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

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

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

Article 32
Supplementary means of interpretation

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

(*a*) leaves the meaning ambiguous or obscure; or
(*b*) leads to a result which is manifestly absurd or unreasonable.

8. The Vienna Convention places the primary emphasis for the interpretation of a treaty on the text of the treaty. At the same time, the Vienna Convention requires a tribunal to take into

account the context of the treaty (as defined in Article 31(2)), the object and purpose of the treaty, and additional factors spelled out in Article 31(3); and permits recourse to supplementary means of interpretation (as defined in Article 32).

9. Beyond the words of the Vienna Convention itself, the caselaw of international tribunals has identified several core doctrines flowing from the Convention to be followed. Two are of particular importance. First, a treaty is to be interpreted so as to give it, as a whole, and the individual provisions within it meaningful effect – *effet utile*. Correspondingly, treaties and treaty provisions should not be interpreted in such a way as to deny them such effect. This principle follows from the requirement of Article 31(1) that treaties be interpreted in good faith. The approaches of international courts reveal that the principle of *effet utile* means that treaty clauses must be interpreted to avoid either rendering them superfluous or depriving them of significance for the relationship between the parties.

10. Thus, recently, in the *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russia)*, Preliminary Objections, 2011 ICJ Rep. --, the International Court of Justice (ICJ) interpreted the phrase in the Convention allowing the parties to bring to the Court a dispute "which is not settled by negotiation or by the procedures expressly provided for in this Convention," as requiring more than merely the existence of a dispute (as argued by Georgia) by reasoning as follows:

> [I]f the phrase [quoted above] is to be interpreted as requiring only that the dispute . . . must in fact exist, that phrase would have no usefulness. Similarly, the express choice of two modes of dispute settlement, namely, negotiations or resort to the special procedures under CERD, suggests an affirmative duty to resort to them prior to the seisin of the Court. Their introduction into the text of Article 22 would otherwise be meaningless and no legal consequences would be drawn from them contrary to the principle that words should be given appropriate effect whenever possible.

Id. para. 134. Earlier, in the *Case Concerning the Territorial Dispute (Libya/Chad)*, 1994 ICJ Rep. 6, the Court interpreted an article in bilateral treaty between the parties as providing for the settlement of all frontier disputes according to a specific list of instruments in an Annex to the treaty. In rejecting Libya's claims that other instruments not in the Annex could be considered, the ICJ stated that the parties could have made other choices to resolve their boundary disputes, but the language of the treaty showed that they did not, and that "[a]ny other construction would be contrary to one of the fundamental principles of interpretation of treaties. . . . , namely that of effectiveness." *Id.* para. 51. *See also Fisheries Jurisdiction Case (Spain v. Can.)*, 1998 ICJ Rep. 432, para. 52; *Arbitration Regarding the Iron Rhine (IJzeren Rijn) Railway (Belg./Neth.)*, Permanent Court of Arbitration, 24 May 2005, paras. 49, 84 (emphasizing the principle and invoking it to justify continued applicability of the treaty article under dispute).

11. The principle of *effet utile* has also been accepted in numerous investor-state arbitration decisions. *See, e.g.*, *Eureko B.V. v. Republic of Poland*, Ad hoc arbitration, Partial Award, 19 August 2005, para. 248 ("each and every operative clause of a treaty is to be interpreted as meaningful rather than meaningless [and] treaties, and hence their clauses, are to be interpreted so as to render them effective rather than ineffective."); *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, para. 52 (invoking the principle in determining that "any other interpretation [of the BIT article under dispute] would deprive [that article] of practical content"); *Kaiser Bauxite Company v. Government of Jamaica*, ICSID Case No. ARB/74/3, Decision on Jurisdiction and Competence, July 6, 1975, *reported at* 114 *ILR* 142 (1999), para. 24 (interpreting the ICSID Convention to find that Jamaica had consented as "any other interpretation would very largely, if not wholly, deprive the Convention of any practical value").

12. Second, tribunals have long rejected any presumption that treaties be interpreted so as to impose the least restrictive obligations on the freedom of a state. *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.)*, 2009 ICJ Rep. 213, at para. 48 ("While it is certainly true that limitations of the sovereignty of a State over its territory are not to be presumed, this does not mean that treaty provisions establishing such limitations, such as those that are in issue in the present case, should for this reason be interpreted *a priori* in a restrictive way."); *Iron Rhine Railway*, para. 53 ("The principle of restrictive interpretation, whereby treaties are to be interpreted in favour of state sovereignty in case of doubt, is not in fact mentioned in the provisions of the Vienna Convention. The object and purpose of a treaty, taken together with the intentions of the parties, are the prevailing elements for interpretation."). Rather, treaties are an exercise of the sovereignty of the state and must be interpreted according to the Vienna Convention rules. This principle has been reiterated in the course of investor-state arbitrations. *Mondev International Limited v. United States*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 43; *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objection to Jurisdiction, 21 October 2005, para. 91; *Metalpar S.A. y Buen Aire S.A. v. República Argentina*, ICSID Case No. ARB/03/5, Decisión Sobre Jurisdicción Dictada, 27 April 2006, para. 92. *See also* Christoph Schreuer, "Diversity and Harmonization of Treaty Interpretation in Investment Arbitration," in Malgosia Fitzmaurice et al eds., *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (2010), at 129, 132-34.

D. Application of Rules of Interpretation to Articles VI(2) and (3) of the Ecuador-United States Bilateral Investment Treaty

13. Articles VI(2) and (3) of the BIT provide as follows:

> 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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> (a) to the courts or administrative tribunals of the Party that is a party to the dispute; or
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> (b) in accordance with any applicable, previously agreed dispute-settlement procedures; or
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> (c) in accordance with the terms of paragraph 3.
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> 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:
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> (i) to the International Centre for the Settlement of Investment Disputes ("Centre") established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 (IICSID convention"), provided that the Party is a party to such Convention; or
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> (ii) to the Additional Facility of the Centre, if the Centre is not available; or
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> (iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), or
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> (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.

1. The Ordinary Meaning of the Text

14. The text of these two paragraphs sets forth an investor-state dispute settlement procedure whose plain meaning is clear. To wit, paragraph 2 urges the parties to seek a settlement by consultation and negotiation, and if this proves impossible, permits the investor, six months after the dispute arose, to submit the dispute to one of three ("one of the following alternatives") avenues of recourse: domestic remedies, other procedures agreed by the parties, and international arbitration. Paragraph 3 then lists the options for the investor should it choose international arbitration -- i.e., ICSID, the Additional Facility of ICSID, arbitration under UNCITRAL rules, or arbitration under any other agreed rules.

15. The overall structure of paragraphs 2 and 3 is one of a nested procedure. That is, paragraph 2 provides the fork in the road between domestic remedies, other agreed procedures, and international arbitration, the last of which is the possibility stated in paragraph 2(c). Paragraph 2(c) itself says that the investor may choose to act in accordance with paragraph 3, which then sets out the options for international arbitration. The structure of providing for the option of international arbitration in two paragraphs, rather than one, makes clear that the choices offered to the investor in paragraph 2 have a legally different character from the choices offered the investor in paragraph 3. Had the treaty meant for the fork in the road set forth in paragraph 2 to include a further fork among the four options for arbitration listed in paragraph 3, it would have simply listed those four choices along with the first two choices (domestic remedies and other agreed procedures), for a total of six "prongs" of the fork (i.e., domestic remedies, other agreed procedures, ICSID, the ICSID Additional Facility, arbitration under UNCITRAL rules, and arbitration under other rules). As discussed below, other treaties have adopted that approach.

16. The difference between the investor's choice in paragraph 2 and its options in paragraph 3 is confirmed by the choice of words used. Thus, paragraph 2's grant to the investor of the choice of dispute settlement "under one of the following alternatives" has a different meaning from paragraph 3's list of options for the investor from which to choose as a forum for the arbitration. While the words "or" separating the four arbitral fora under paragraph 3 make clear that each of the four are *options* for the investor (as opposed to language that would list only one forum), the word "or" does not alone mean that they are *irrevocable choices* in the sense of the three avenues listed in paragraph 2. It thus does not follow from the wording that there is no possibility for the investor to choose from a second option under some circumstances.

17. The only restriction on the investor's choice is the one explicitly provided in Article VI(3)(a)(ii) – namely, that the investor may only choose to consent in writing to submit the dispute to arbitration to the ICSID Additional Facility "if the Centre is not available," a possibility that can arise if the state party is not a party to the ICSID Convention. Thus, when the text means to limit the investor's choices, it is quite clear about doing so, whether in the fork in the road in Article VI(2) or in the condition placed in Article VI(3)(a)(ii).

18. In interpretations under the Vienna Convention, a treaty's use of different terms in nearby provisions is assumed to reflect a different meaning. For example, in the *Land, Island and Maritime Frontier Dispute (El Salv./Hond., Nicar. intervening)*, 1992 ICJ Rep. 351, the ICJ put particular weight on the difference in wording between one provision in the compromis -- that authorized the Court to delimit the boundary line of the land areas ("Que delimite la línea fronteriza") -- and another that authorized it to make a determination of the legal situation of the islands and maritime space ("Que determine la situación jurídica"). Based on these differences, it concluded that the latter did not authorize a delimitation of the islands and maritime spaces.

Id. para. 374. In the case of the Ecuador-United States BIT, that reasoning applies equally to the differences between Articles VI(2) and (3) and to the differences between Article VI(3)(a)(ii) and the other three options listed.

19. Indeed, to interpret the phrase "one of the following alternatives" in Article VI(2) to mean exactly the same as the mere list of arbitral options in Article VI(3) that does *not* contain that phrase – i.e., to interpret both paragraphs as creating forks in the road – would be to render that phrase completely superfluous. Such an interpretation is, quite simply, forbidden by the principle of the *effet utile*, as made clear in paragraph 9 above. Once the parties inserted the phrase, it must be given an effective meaning.

20. Cases interpreting these paragraphs of this treaty confirm the plain meaning. *See M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, para. 181 ("the 'fork-in-the-road' rule . . . . refers to an option, expressed as a right to choose irrevocably between *different jurisdictional systems*. Once the choice has been made there is no possibility of resorting to any other option.") (emphasis added); *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador*, UNCITRAL Rules, Third Interim Award on Jurisdiction and Admissibility, 27 February 2012, para. 4.73 ("The question is whether 'the dispute' submitted to this Tribunal has already been submitted to the national courts of Ecuador or New York so as to trigger the fork in the road provision in Article VI(3)."); *IBM World Trade Corporation v. República del Ecuador*, ICSID Case No. ARB/02/10, Decisión sobre Jurisdicción y Competencia, 22 December 2003, para. 25 ("[A]rticulo VI establece entre *las alternativas* para la solución de controversias relativas a inversiones la de recurrir a los tribunales judiciales o administrativos de cualquiera de los Estados contratantes o el recurrir al arbitraje obligatorio, *entre otros posibles de elección*, al

sujetos al sistema administrativo por el CIADI. . . ."[*]) (emphasis added); *Occidental Exploration and Production Company v. Republic of Ecuador*, UNCITRAL Arbitration, Final Award, 1 July 2004, para. 50 (tribunal's finding that investor may sue on different claims in different venues "cannot be taken to mean that the death knell has sounded for the 'fork in the road' provisions of bilateral investment treaties . . . because the functions of domestic mechanisms and international arbitration are different."). Although none of these cases concerned the exact issue here – namely a claim by Ecuador of a second fork in the road – it is significant that these cases refer to the fork in the road exclusively in terms of the choice between domestic remedies and international arbitration.

2. The Ordinary Meaning in Comparison with Other Bilateral Investment Treaties

21. To appreciate the ordinary meaning of paragraphs 2 and 3, it is useful to compare the text to other treaties that clearly do place limits on both the investor's choice of dispute settlement *and* the investor's choice of arbitral venue should it choose international arbitration. For example, the Agreement between the Italian Republic and the Lebanese Republic on the Promotion and Reciprocal Protection of Investments -- interpreted in *Toto Costruzioni Generali S.P.A v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009 -- states in Article 7.2:

> If these consultations do not result in a solution within six months from the date of written request for settlement, the investor may submit the dispute, at his choice, for settlement to:

[*] Translation provided by Claimant's counsel: "Article VI establishes among *the alternatives* for the resolution of investment disputes that of recourse to the judicial or administrative tribunals of either contracting Party, or recourse to binding arbitration, *among other possible choices*, to subjection to the system administered by ICSID . . . ." (emphasis added).

> (a) the competent court of the Contracting Party in the territory of which the investment has been made; or
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> (b) the International Center for the Settlement of Investment Disputes (ICSID) provided for by the Convention on the Settlement of Investment Disputes between States and Nationals of the other States, opened for signature at Washington, on March 18, 1965, in case both Contracting Parties have become members of this Convention; or
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> (c) an ad hoc tribunal which, unless otherwise agreed by the Parties to the dispute, shall be established under the arbitration rules of the United Nations Commission of International Trade Law (UNCITRAL).
>
> The choice made as per subparagraphs a, b, and c herein above is final.

Id. para. 203. Unlike the Ecuador-United States BIT, the structure in this provision uses only one operative paragraph, and the final clause makes clear that the investor has one and only one choice. That choice is not only a choice between domestic and international dispute resolution, but also the choice of a particular arbitral forum.

22. Similarly, the Agreement Between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments, discussed in *Nova Scotia Power Incorporated (Canadá) v. República Bolivariana de Venezuela,* UNCITRAL Rules, Award on Jurisdiction, 22 April 2010, provides the investor in Article XII(2) with the option to choose between domestic remedies and international arbitration, but then provides as follows in Article XII(4) regarding the arbitration venues:

> The dispute may, by the investor concerned, be submitted to arbitration under:
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> a. The International Centre for the Settlement of Investment Disputes (ICSID), established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington 18 March, 1965 (ICSID Convention), provided that both the disputing Contracting Party and the Contracting Party of the investor are parties to the ICSID Convention; or

> b. the Additional Facility Rules of ICSID, provided that either the disputing Contracting Party or the Contracting Party of the investor, but not both, is a party to the ICSID Convention; or
>
> In case neither of the procedures mentioned above is available, the investor may submit the dispute to an international arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

(English version from UNCTAD web site, www.unctadxi.org.)

23. As the Tribunal in *Nova Scotia Power* stated, this provision sets up a clear hierarchy of options binding on the investor, with ICSID first among the three. *Id.* para. 89. The Tribunal emphasized how these words made the provision unambiguous in terms of its constraints on the investor:

> La redacción del artículo XII(4) no admite ambigüedad ni duda. Ésta indica que los redactores del Tratado pretendían que primero fuese necesario considerar si los mecanismos de resolución de controversias de CIADI o su Mecanismo Complementario estaban disponibles. Solamente si ninguno estaba "disponible" tendría derecho el inversor a recurrir a un arbitraje CNUDMI.[*]

Id. para. 90. Again, unlike the Ecuador-United States BIT, this treaty uses a one-paragraph structure and unambiguous wording to limit the investor's options.

24. Indeed, in that case, the Tribunal's interpretive methodology included a detailed comparison between Article XII(4) and choice of forum clauses in other BITs that Canada and Venezuela had concluded, clauses that did *not* constrain the investor in the way that the Canada-Venezuela BIT did. *Id.* paras. 92-95. For example, the Tribunal noted, "cuando Canadá ha querido que el arbitraje bajo CIADI o el Reglamento del Mecanismo Complementario o el Reglamento de Arbitraje CNUDMI esté disponible por igual, a elección del inversor, lo ha hecho

[*] Translation provided by Claimant's counsel: "The drafting of Article XII(4) admits of neither ambiguity nor doubt. It indicates that the drafters of the Treaty aimed that first it would be necessary to consider if the dispute resolution mechanisms of ICSID or its Additional Facility were available. Only if neither were "available" would the investor have the right of recourse to an UNCITRAL arbitration."

explícitamente."* *Id.* para. 92. *See also* A. A. Mezgravis and C. González, "Denunciation of the ICSID Convention: Two Problems, One Seen and One Overlooked," *Transnational Dispute Management*, November 2012, sec. 3.1 (discussing hierarchy in Venezuela-Costa Rica BIT).

25. All these treaties -- in particular the interpretation given to the Canada-Venezuela BIT in the *Nova Scotia* case -- make clear that when states want to constrain the investor beyond the fork in the road between domestic remedies and dispute settlement, they are capable of doing so through the words of the treaty. Absent textual or other evidence acceptable under the Vienna Convention's methodology, no implication of an additional constraint on the investor can be read into the Ecuador-United States BIT.

3. The Ordinary Meaning of a Fork in the Road Clause

26. Both the parties to this arbitration agree that the Ecuador-United States BIT contains a fork in the road clause in Article VI(2). That fork in the road clause is typical of many – although as the above two examples demonstrate, not all -- bilateral investment treaties. The inclusion of such provisions was part of the United States government policy in the conclusion of bilateral investment treaties, and the Ecuador-United States BIT follows the United States 1992 Model BIT (with wording changes, discussed below) in this regard. Because of the agreed characterization of these provisions as a fork in the road clause, it is useful to examine the general understanding of states, courts, and scholars of the ordinary meaning of a fork in the road provision.

* Translation provided by Claimant's counsel: "When Canada has wanted arbitration based on UNCITRAL, the Additional Facility of UNCITRAL, or the arbitration rules of UNCITRAL to be equally available, at the choice of the investor, it has said so explicitly."

27. While, as noted above, it is certainly possible for a fork in the road provision to limit the investor's choices among arbitral venues, the ordinary meaning ascribed to such provisions is one of an irrevocable choice *between domestic remedies and international arbitration* (or other agreed dispute resolution measures, although this option receives less attention from courts and scholars as it is rarely invoked by investors). Thus, for instance, numerous arbitral decisions define or refer to fork in the road clauses – and, in particular, clauses similar to those in the Ecuador-United States BIT -- as provisions that offer such a choice. Those decisions do not further define them as requiring the investor to make an irrevocable choice between different arbitration venues (except in cases like *Toto* above, where the treaty explicitly provides this choice within the fork in the road clause itself). *See, e.g.*, *Compania de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case. No. ARB/97/3, Decision on Annulment, 3 July 2002, para. 54 (accepting tribunal's view that the fork in the Argentina-United States BIT is between domestic and international fora, though later annulling the decision regarding whether the claimant had taken the domestic prong); *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, para. 80 (noting that contractual claims are different from treaty claims and "this view applies to the instant dispute, since no submission has been made by CMS to local courts and since, even if TGN had done so . . . . this would not result in triggering the 'fork in the road' provision against CMS.").

28. In this regard, it is important to consider scholarly commentary on fork in the road provisions. All of the leading treatments of this issue speak of the fork as between domestic remedies, on the one hand, and international arbitration, on the other hand. None of these comprehensive discussions mentions any fork or irrevocable choice between different arbitral

options. One of the leading treatises on investment law, Rudolf Dozer and Christoph Schreuer, *Principles of International Investment Law* (2d ed. 2012), states, "Another way in which BITs sometimes refer to domestic courts is a so-called fork in the road provision. Such a clause provides that the investor must choose between the litigation of its claims in the host state's domestic courts or through international arbitration and that the choice, once it has been made, is final." *Id.* at 267. *See also id.* at 268 (discussing "the fork in the road provision in the Argentina-US BIT," which is virtually identical to that in the Ecuador-United States BIT); Christoph Schreuer, "Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road," 5 *Journal of World Investment and Trade* 231 (2004), at 239-40 ("A typical clause provides that the investor must choose between the litigation of its claims in the host State's domestic courts or international arbitration and that, once made, the choice is final. . . . . This type of clause is often refered to as a 'fork in the road' provision.").

29. Other commentators on fork in the road clauses adopt the same view. *See, e.g.,* Jacomijn J. van Haersolte-van Hof and Anne K. Hoffman, "The Relationship Between International Tribunals and Domestic Courts," in Peter Muchlinksi et al. eds., *The Oxford Handbook of International Investment Law* (2008), at 962, 998 ("'Fork-in-the-road' provisions in investment treaties are clauses stipulating that the investor has to make a choice between the different procedural forums offered to him under the treaty, for example local courts, previously agreed dispute settlement mechanisms, or international arbitration proceedings . . . . As soon as he, for example, selects the local courts of the host state and has initiated proceedings accordingly, he will not be able to submit the same claim to one of the other forums provided for in the treaty, including international arbitration."); Gabrielle Kaufmann-Kohler et al., "Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings

Arising from the Same or Related Situations Be Handled Efficiently?," 21 *ICSID Review* 59, 67 (2006) (defining fork in the road as "a clause in a treaty that requires the claimant to make an irrevocable choice of forum," then quoting the Argentina-France BIT that provides for fork between national courts and international arbitration); Lucy Reed et al., *Guide to ICSID Arbitration* (2d ed. 2011), at 100 ("[A] 'fork in the road' provision . . . is a stipulation that if the investor chooses to submit a dispute to the host State courts or to any other agreed dispute resolution procedure (for example, to ICC arbitration under the dispute resolution clause in the relevant investment contract), the investor forever loses the right to submit the same claims to the international arbitration procedure in the BIT.").

30. In his comprehensive treatises on both BITs generally and United States BITs in particular, Professor Vandevele identifies fork in the road provisions in the same terms as other scholars, i.e., as involving an irrevocable choice between domestic courts and international arbitration, and not in terms of a limitation on the various arbitral options. Thus, in *U.S. International Investment Agreements* (2009), at 580, Professor Vandevelde writes, "This election-of-remedies clause, whereby an investor who submits a dispute to some form of dispute resolution other than investor-state arbitration may not later submit the same dispute to investor-state arbitration, has become known colloquially as the 'fork in the road clause.'" In *Bilateral Investment Treaties: History, Policy, and Interpretation* (2010), at 441, Professor Vandevelde writes, "Some BITs . . . discourage resort to local remedies. These BITs have an election of remedies clause, sometimes known as a 'fork in the road' clause, whereby an investor's choice of one remedy precludes the invocation of another. For example, under this clause, a claim may not be submitted to investor-state arbitration if it previously has been submitted to local remedies." *See also id.* at 436 (discussing BITs that give the investor choice of "multiple fora

for international arbitration" without mention of any irrevocable choice of the investor among these fora.) And in "Arbitration Provisions in the BITs and the Energy Charter Treaty," in Thomas W. Wäelde ed., *The European Energy Charter Treaty: An East-West Gateway for International Investment & Trade* (1996), at 409, 416, Professor Vandevelde, in discussing international arbitration options, states that "it has become increasingly common for BITs to provide for more than one means of investor-state dispute resolution," without any mention of limits on the investor's selection of arbitral fora.

31. The uniform interpretation of scholars as to the scope of a fork in the road clause, such as that which appears in the Ecuador-United States BIT, again confirms the ordinary meaning to be given to such clauses. Indeed, it confirms that any additional "fork within a fork" is not part of the ordinary meaning of Articles VI(2) and (3). Although states may draft treaties to provide a fork between different arbitral options, the presumption absent clear textual proof is that a fork in the road clause is limited to an irrevocable choice between domestic remedies and international arbitration (and, if also in the relevant treaty, other agreed mechanisms).

4. The Context of the Treaty

32. According to the Vienna Convention, the context of the Ecuador-United States BIT begins with the other provisions of the text. Vienna Convention, art. 31(2). With respect to the particular issue in this case, it is significant that Article VI(4) of the BIT provides for the consent of the two states parties to "settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3." This sentence, with its reference to paragraph 3, does not mention any limitations on that "choice," e.g., it does not preclude that the investor might, under unusual circumstances, need to make a second

"choice." It is further significant that Article VI(5) requires non-ICSID arbitrations to take place in a state party to the New York Convention, as this provision ensures that a non-ICSID award will be domestically enforceable (a guarantee for ICSID awards under Article 54 of the ICSID Convention); and that Article VI(6) provides for the finality and binding nature of the award and its enforcement by each state party. Both of these paragraphs are ultimately designed to ensure that the investor has recourse to effective international arbitration and enforcement of an award in its favor. They lend further support to the view that Article VI(3) does not close off the possibility of investor-state arbitration in unusual circumstances where one arbitration option becomes infeasible and the investor chooses a different arbitration option.

33. Beyond this text, no other documentation related to the fork in the road clause qualifies as context under Article 31(2) of the Vienna Convention, i.e., as either " (*a*) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; or (*b*) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty." (The treaty does contain such a document in the exchange of letters between the Ecuadoran Minister of Foreign Relations and the Acting United States Trade Representative dated 27 August 1993, though it does not concern the fork in the road clause.) The unilateral statements of the President of the United States to the Congress do not qualify as context, as they are not an agreement with Ecuador nor is there evidence that they have been accepted by Ecuador as an instrument related to the treaty.

34. Assuming, for the sake of argument, that the Message of Transmittal of the BIT from the President to the Congress (including the Letter of Submittal) could be said to constitute such an instrument, the wording of that Message either reinforces the interpretation offered above or

is, at best, inconclusive. In its explanation of Article VI, the Message states that Articles VI(2) and (3) allow the investor to "make an exclusive and irrevocable choice to (1) employ one of the several arbitration procedures" as well as the two other "prongs" in the fork. With respect to the arbitral venues listed in Article VI(3), the Message simply states that "the investor may choose between" ICSID, the ICSID Additional Facility, and arbitration under UNCITRAL rules. Given the care with which these Messages are prepared by experienced lawyers at the United States Department of State and the Office of the United States Trade Representative, the mention of an irrevocable choice in one context but not the other at a minimum cannot be said to support an interpretation of the treaty different from the plain meaning discussed above. Rather, it reinforces the ordinary meaning of Articles VI(2) and (3). The only evidence to the contrary is the use of the phrase "one of the several arbitration procedures," but in my opinion this is counteracted by the contrast between the "exclusive and irrevocable choice" to describe Article VI(2) and the mere reference that "the investor may choose" in describing Article VI(3).

5. The Object and Purpose of the Treaty

35. The object and purpose of the treaty at issue here is stated in the Preamble, namely "to promote greater economic cooperation" between the parties, to "stimulate the flow of private capital and the economic development of the Parties," to "maintain a stable framework for investment and maximum effective utilization of economic resources," and to "contribute to the well-being of workers in both Parties and promote respect for internationally recognized worker rights." These purposes are stated at a high degree of generality. Because meaningful investor-state dispute resolution contributes to "stimula[ting] the flow of private capital" by foreign investors, a dispute resolution clause should be read to provide for meaningful access to arbitral

fora. Precluding meaningful recourse to international arbitration absent a textual commitment to such a position does not further that purpose. As Professor Amerasinghe wrote with respect to ICSID jurisdiction, "[W]hile where jurisdiction is clearly excluded that fact should be recognized, in other cases a restrictive interpretation which would result in the ouster of jurisdiction should not be adopted where a reasonable approach could bring about the opposite result." C.F. Amerasinghe, "The Jurisdiction of the International Centre for the Settlement of Investment Disputes," 19 *Indian Journal of International Law* 166, 168 (1979). While this object and purpose never allows a tribunal to ignore the words of the treaty, it suggests that any interpretation of a dispute resolution clause should be consistent with those goals.

6. The *Travaux Preparatoires* of the Treaty

36. Under Article 32 of the Vienna Convention, *travaux preparatoires* are a supplementary means of interpretation used either to confirm the meaning derived under Article 31 or to determine that meaning if Article 31 produces a meaning that is ambiguous, obscure, manifestly unreasonable, or absurd. While there is some disagreement among scholars and courts over the role for *travaux* with respect to "confirming" an interpretation based on text and context, there is no question that if a tribunal uses *travaux*, it must use them in the sense that term is understood under the Vienna Convention and authoritative interpretations of it.

37. In this context, *travaux preparatoires* must be, in the words of a leading treatise, materials "present in the negotiating process and available to the negotiators collectively." Oliver Dörr, "Article 32: Supplementary means of interpretation," in Oliver Dörr and Kirsten Schmalenbach, eds., *Vienna Convention the Law of Treaties: A Commentary* (2012), at 571, 575. It must be "intrinsic to the negotiating process" and "have been in existence before the adoption

of a treaty" (with the possible exception of reports of expert bodies like the International Law Commission). Yves le Bouthilllier, "1969 Vienna Convention Article 32," in Olivier Corten and Pierre Klein eds., *The Vienna Convention on the Law of Treaties: A Commentary* (2011), vol. I, at 841, 852, 854. *See also* Thomas Waelde, "Interpreting Investment Treaties: Experiences and Examples," in Christina Binder et al. eds., *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009), at 724, 778 ("Caution is also required with unilateral statements, both in the conference process and through explanatory memoranda governments communicate to their legislatures before ratification.").

38. The documentation that I have reviewed thus far in this proceeding does not constitute *travaux* regarding the fork in the road clause or the specific issue of the investor's choice among the listed arbitral fora. This is not surprising. Numerous issues are typically discussed by the two parties in a BIT negotiation, and documentation is rare. *See* Schreuer, "Diversity and Harmonization," *supra*, at 138. Thus, it is unlikely that the parties ever discussed either the possibility of any irrevocability of the investor's choices under Article VI(3) or the particular issue of whether an investor, denied ICSID arbitration and then facing the prospect of relitigation there after withdrawal of the host state from ICSID, can then initiate a case under the UNCITRAL rules. In my own experience as a negotiator of the Argentina-United States BIT, whose dispute resolution clauses are very similar to that in the Ecuador-United States BIT, the parties' discussion of the fork in the road clause addressed its effect on (a) the requirements of some states that an investor exhaust local remedies (Argentina's negotiating position for most of the discussions) and (b) the requirement of the investor to choose between domestic courts and international arbitration. While I was not privy to all conversations between the sides in that negotiation, based on my experience the specific issue in this arbitration was never addressed. In

the end, there is simply no evidence that the parties to this treaty discussed this issue during their negotiations.

39. This absence of any *travaux* that would call into question the ordinary meaning of the treaty is legally quite significant. In the *Case Concerning Oil Platforms (Iran v. U.S.*), Preliminary Objection, 1996 ICJ Rep. 803, the ICJ interpreted an article of the 1955 Iran-United States Treaty of Amity, Economic Relations and Consular Rights according to its text and object and purpose. In considering an alternative interpretation (proposed by Iran), it placed significant weight on the absence of *travaux* in favor of that interpretation: "[T]he Court does not have before it any Iranian document in support of this argument [, and] the United States documents . . . show that at no time did the United States regard Article I as having the meaning now given to it by [Iran]." *Id.* para. 29. *See also Application of the Convention on the Elimination of All Forms of Racial Discrimination*, para. 147 ("the usefulness of the *travaux préparatoires* in shedding light on the meaning of Article 22 is limited by the fact that there was very little discussion of the expression [at issue in the case]."). As a result, the ordinary meaning of Articles VI(2) and (3) remains unaltered.

7. Conclusion Regarding the Interpretation of Articles VI(2) and (3)

40. In light of the text, context, and object and purpose of the Ecuador-United States BIT, Articles VI(2) and (3) create a fork in the road only among domestic remedies, other agreed procedures, and international arbitration. Nothing in the *travaux preparatoires* suggests otherwise. The accepted methodology of the Vienna Convention on the Law of Treaties supports only one fork in the road, and not a blanket irrevocable choice by the investor among different arbitral venues.

E. Professor Vandevelde's Views on the History of BIT Negotiations

41. Professor Vandevelde's Opinion reviews the history of the United States BIT program. It offers an overall history of the program but not an analysis of this particular treaty. As history, it may resemble the *travaux preparatoires*, but the views he offers require two inferential leaps in order to constitute *travaux* – that the views of the United States have somehow been accepted by its BIT partners during the negotiations, and that the views of the United States were accepted by Ecuador during this particular negotiation. The Opinion does not demonstrate either eventuality. It is also conceivable that some of the information in his opinion might constitute the "circumstances of [a treaty's] conclusion" under Article 32 of the Vienna Convention, though that term is generally limited to the factual or political background to the treaty. *See* Dörr, *supra*, at 578-79. A model BIT proposed by a state after the conclusion of a prior BIT may be a form of subsequent practice, although it would only be of one party. *See* Anthea Roberts, "Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States," 104 *American Journal of International Law* 179, 221-22 (2010).

42. Setting these difficulties aside and assuming, for the sake of argument, that the views of the United States are relevant as either *travaux*, circumstances, or subsequent practice, it is nonetheless important to note that the opinion that Professor Vandevelde offers does not describe the actual views of the United States during the drafting, or subsequent to the entry into force, of the Ecuador-United States BIT *on the issue in this case*. Rather, it offers general views and certain inferences about United States policy on arbitral processes.

43. The first inference is that allowing for an investor to submit a dispute to both ICSID and an ad hoc tribunal under UNCITRAL rules "either simultaneously or consecutively, would have subverted U.S. policy of avoiding multiple proceedings." (Vandevelde Opinion, para. 56.)

This inference, which is not supported by any documentation or citation to other works, is unwarranted for two reasons. First, as Professor Vandevelde emphasizes earlier in his Opinion, the key U.S. policy regarding "multiple proceedings" was for avoidance of proceedings *at both the domestic and international level over the same BIT claim* – thus the purpose of the fork in the road. *See* Vandevelde Opinion, para. 48 (the 1992 model meant to "eliminate any doubt concerning whether an investor could submit a dispute both to local remedies and previously agreed procedures, if they were different"); *id.* para. 51 (the 1992 model meant to "foreclose[] . . . any argument . . . that a dispute might be submitted to both local remedies and previously agreed procedures" and that the United States sought "to make clear . . . that the election among remedies of (1) submission to local courts, (2) utilization of previously agreed procedures, and (3) investor-state arbitration was completely exclusive and irrevocable.").

44. As Professor Vandevelde says in his comprehensive 2009 treatise, "Although the 1992 model does not state so explicitly," -- though one should note that the Ecuador-United States BIT is explicit – "the intent is that the investor who chooses any of these three alternatives is foreclosed from utilizing either of the other two," with no mention at all that the intent was to confine the investor irrevocably and in all circumstances to one arbitral venue within one of the three alternatives for dispute settlement. *U.S. International Investment Agreements, supra,* at 588. Indeed, in describing the investor's choice of arbitral mechanisms, his treatise states that the "1992 model *specifies* [emphasis added] arbitration before ICSID, arbitration before the ICSID Additional Facility. . . . ad hoc arbitration using the UNCITRAL Arbitration Rules, or arbitration before any other institution . . . ." , *id.* at 589, while never stating – despite the care and comprehensiveness of the treatise – that these choices are, as asserted in the Opinion, irrevocable in all circumstances.

45. Second, even if the United States policy to avoid multiple proceedings extended to multiple arbitral proceedings – a proposition for which there is no evidence -- it is equally unwarranted to assume that the United States would have wanted to close off all arbitral options to one of its investors *in all instances.* It is certainly possible that the United States might have wished to prevent simultaneous submission of the identical BIT dispute to different arbitral bodies -- although the BIT says nothing to prevent this possibility -- or even that the United States might have wanted to limit the investor to one arbitral decision on the merits – although again, the BIT says nothing to prevent this possibility. But it simply does not follow from United States policy of avoiding multiple proceedings that it would favor denying the investor any remedy where, once it has chosen the "prong" of international arbitration, one arbitral avenue finds it lacks jurisdiction. Just as it is incorrect to assume that that United States policy against multiple proceedings would be undercut even by simultaneous proceedings in domestic and international fora of different claims, e.g., for contract violations vs. BIT violations – a route for investors now well accepted by international arbitral panels (*see, e.g.*, *Occidental Petroleum*) – it is incorrect to assume that United States policy would be undercut by even the possibility that an investor might need to have recourse to a second arbitral venue after lack of success -- particularly jurisdictional success -- at the first venue. Such an inference simply does not follow from the basic thrust of U.S. policy.

46. Third, the claim in paragraph 58 of Professor Vandevelde's Opinion that the insertion of the words "under one of the following alternatives" into the 1994 Model BIT – identical language distinguishes the BIT with Ecuador from the 1992 Model BIT -- "was to emphasize the exclusivity and irrevocability of the election among local remedies, previously agreed procedures and investor-state arbitration and NOT to indicate, by any kind of negative

implication, that the choice among methods of investor-state arbitration under the BIT was not exclusive and irrevocable," is both unsupported and ultimately irrelevant. It is unsupported because, as Professor Vandevelde states, the key concern of the United States was the possibility of simultaneous or subsequent domestic-international dispute settlement. And it is irrelevant because the text, whose ordinary meaning is paramount, indeed makes a distinction between the fork in the road and the investor's menu of arbitral fora, not by a silent or hidden "negative implication," but rather, as discussed above, by a use of different words in Articles VI(2) and (3).

47. Professor Vandevelde's interpretation thus deprives the words "under one of the following alternatives" of their *effet utile*, as discussed in paragraphs 16-19 above. For the same reasons, the claim in paragraph 60 of Professor Vandevelde's Opinion that "the intention of the United States in the 1992 model was that an investor could elect to consent to only one of the forms of investor-state arbitration identified in the election of remedies provisions at Article VI(3)(a)" is unsupported and irrelevant to an understanding of the Ecuador-United States BIT.

48. Fourth, the claim in paragraph 66 of Professor Vandevelde's Opinion that because the United States wanted "to reduce the number of remedies that would have been available to investors in the absence of a BIT by providing -- explicitly in the 1992 and 1994 models – that an investor could not submit the same dispute to local remedies and previously agreed procedures," therefore "[i]t is scarcely imaginable, under the circumstances, that the United States chose the 1992 model . . . as a moment in which to increase the number of fora to which the same dispute is submitted by authorizing submission of the same dispute both to ICSID arbitration and *ad hoc* arbitration under the UNCITRAL rules" is a syllogism based on speculation. Rather, as he repeatedly states in his Opinion and book, the United States concern was with the fork in the road between domestic remedies and international arbitration. There is

no basis to assume that the United States had *any* particular views on the possibility of the investor seeking a second avenue of arbitration under some limited circumstances. To the best of my recollection as a BIT negotiator for the United States, the issue in this arbitration did not concern the United States.

49. Finally, the differences between the fork in the road and the list of arbitral venues makes the analogy drawn by Professor Vandevelde in paragraph 62 of his Opinion unwarranted. He writes:

> [I]f an investor submits a dispute to local remedies, but fails to prevail because the dispute is time barred in that forum, the investor would not be able to rely upon the consent embodied in the 1992 model BIT to submit the dispute to investor-state arbitration. Similarly, an investor that submits a dispute to, for example, ICSID arbitration may not subsequently submit the dispute to *ad hoc* arbitration in accordance with the UNCITRAL rules merely because the claim was dismissed by the ICSID tribunal.

However, as noted, above, these two cases are not "similar[]," but wholly different, for the fork in the road clause is exclusively aimed at the former scenario and not the latter.

50. Thus, while Professor Vandevelde's Opinion offers some background on the position of the United States during the preparation of its various model BITs regarding the fork in the road provisions, the inferences in the Opinion regarding the supposed link between that policy and the meaning of Articles VI(2) and (3) with respect to the investor's choice of arbitral fora are not supported or warranted.

F. The Legal Consequences of the ICSID Jurisdictional Award for Purposes of Article VI(3) of the Ecuador-United States BIT

51. The methods of interpretation of the Vienna Convention on the Law of Treaties, as applied to Articles VI(2) and (3) of the Ecuador-United States, demonstrate that the only

irrevocable choice for the investor under the fork in the road clause is the choice specified in Article VI(2). Such a conclusion does not mean that the investor has unfettered options under Article VI(3). For example, were the current arbitration proceeding at ICSID, Article 26 of the ICSID Convention states that, once both parties have given their consent to ICSID jurisdiction, they may not utilize any other arbitration forum. It might well be the case that the BIT can be interpreted to preclude other simultaneous arbitrations, though the text does not specifically do so.

52. The issue presented in this case is a more narrow one, namely: in the specific circumstances where an ICSID tribunal has found that ICSID lacks jurisdiction because the investor has not met the six-month condition in the BIT, and the investor then chooses ad hoc arbitration under the UNCITRAL rules because the state party has subsequently withdrawn from ICSID, is recourse to UNCITRAL arbitration barred by the BIT?

1. Consent to International Arbitration and Conditions on Such Consent

53. Article VI(3) of the BIT states that, after the six-month period, "the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration to [the four arbitral options]." This provision provides the legal basis for the investor's consent to arbitration in a particular arbitral forum. The consent of the state party is already obtained in the BIT itself, and in particular Article VI(4).

54. Consent is the keystone to investor-state dispute resolution through international arbitration. As the Tribunal stated in *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Arbitral Award, 2 June 2000:

> The essential constituent elements which constitute the institution of arbitration are the existence of a conflict of interests, and an agreement expressing the will of the parties or a legal mandate, on which the constitution of an Arbitral Tribunal is founded. This assertion serves to confirm the importance of the autonomy of the will of the parties, which is evinced by their consent to submit any given dispute to arbitration proceedings. Hence, it is upon that very consent to arbitration given by the parties that the entire effectiveness of this institution depends.

Id. para. 16. It is equally clear that the parties to a BIT may condition the consent of the investor on certain requirements, and it is my opinion (shared by Ecuador in its 28 July 2011 letter to ICSID, at 2) that the ICSID Tribunal in this case found that the six-month consultation provision was such a condition. If a treaty contains such conditions, then the party's choice to consent to an arbitral process is valid if and only if it meets the conditions. *See Waste Management*, para. 17.

2. Consequences of a Finding by an Arbitral Tribunal that an Investor has Failed to Meet the Conditions for Consent to International Arbitration

55. If an arbitral tribunal finds that an investor fails to meet the conditions for consent to arbitration as required under a BIT, three legal results ensue.

a. Lack of Jurisdiction of the Tribunal

56. First, and unsurprisingly, the tribunal will find that it lacks jurisdiction or competence (the two terms are often used interchangeably) over the investor's claim. *See, e.g.*, *Antoine Goetz et consorts v. République de Burundi*, ICSID Case No. ARB/95/3, 10 February 1999, Sentence, para. 93 (rejecting claims for tax reimbursement as not meeting BIT's conditions for jurisdiction and declaring them "irrecevables"); *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, para. 340 ("the inadmissibility of claims has the same consequence as the failure to meet the requirements for

jurisdiction under Article 25 of the ICSID Convention or the BIT, such consequence being that the Tribunal cannot exercise jurisdiction over the dispute."); *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, 15 December 2010, para. 161(c) (in *dispositif* stating that "ICSID lacks jurisdiction over this proceeding and this Arbitral Tribunal lacks competence to resolve it."). In his dissenting opinion in *Ablacat and Others v. Argentine Republic*, ICSID Case ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, Professor Abi-Saab found that because, in his view, the Argentina-Italy BIT contained a clause that "condition[s] . . . the consent of the party or parties making them to submit to the jurisdiction of the judicial or arbitral organ," *id.* para. 23, "the result of the non-fulfilment of the requirements should have been the same, the dismissal of the case." *Id.* para. 25. Not all arbitral tribunals have read such clauses as strict conditions – indeed, the majority in *Ablacat* did not do so – but when they do, the legal consequence of a finding of lack of jurisdiction is inevitable.

b. Lack of Valid Consent by the Investor

57. The second and equally important legal consequence of a ruling by a tribunal that an investor has failed to meet the conditions for consent is that the investor's consent to the submission of the dispute is not lawfully valid under the BIT. In terms of Article V(3) of the BIT, as a result of the denial of jurisdiction, the investor has not validly consented to submit the dispute to arbitration in that forum (or any other forum) at all. The investor's choice to consent is not a valid choice and is without legal effect.

58. The concept of valid consent is evident from the ICSID Convention, where the references to "consent," in particular in Article 25, which requires the investor's consent to jurisdiction, and Article 26, which gives ICSID priority over other arbitral fora once consent has

been given. Thus, in *Holiday Inns v. Morocco*, reported in Pierre Lalive, "The First 'World Bank' Arbitration (*Holiday Inns v. Morocco*) – Some Legal Problems," 1980 *British Year Book of International Law* 123, the Tribunal discussed the arbitration clause in a contract between Holiday Inns and the government of Morocco that it found implicitly conditioned the parties' consent to ICSID arbitration on the future adherence of Switzerland and Morocco to the ICSID Convention. It concluded that the claimant's consent took place only once those conditions subsequent were met, writing: "As for the date of consent contemplated by Article 25(2) b of the Convention, it will automatically be the date on which the two corresponding consents coincide." *Id.* para. 20, at 146. Similarly, in the leading commentary on the ICSID Convention, Professor Schreuer states that Article 26's grant of priority to ICSID jurisdiction over non-ICSID jurisdiction applies "in the face of a *valid* submission to ICSID jurisdiction." Christoph Schreuer, *The ICSID Convention: A Commentary* (2d ed. 2009), at 381 (emphasis added). Thus, when the investor has not met the conditions precedent to the "cho[ice] to consent" to one of the arbitral fora in the BIT, his consent is not valid consent.

c. Freedom of the Investor to Re-initiate Arbitral Proceedings in its Choice of Forum

59. Lastly, it follows from the lack of valid consent to submit the dispute to the first arbitral forum that the investor is free to pursue new arbitral proceedings, whether within the same arbitral forum or within another one. With respect to the ability of an investor to bring a case in the same venue, numerous ICSID tribunals have declined to read six-month settlement clauses as conditions on the investor's consent to arbitration on the theory that, if they denied jurisdiction, the investor would be free to initiate proceedings again in ICSID, and that a denial of jurisdiction would serve only to delay the proceedings. *See, e.g.*, *SGS Société Générale de*

Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction, 6 August 2003, para. 184; *Bayindir Insaat Turizm Ticaret ve Sanayi A. Ş v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, para. 100. Those decisions necessarily assume that the investor may bring the case again in ICSID if the tribunal denied jurisdiction based on failure to meet the conditions. *See also* Schreuer, "Travelling the BIT Route," *supra*, at 239.

60. As for proceedings in a different arbitral venue, in *Tradex Hellas S.A. (Greece) v. Republic of Albania*, ICSID Case No. ARB/94/2, Decision on Jurisdiction, 24 December 1996, *reported at* 14 *ICSID Review* 161 (1999), the Tribunal interpreted Albania's consent to ICSID jurisdiction in a 1993 domestic law to cover the claim at issue in part because to deny ICSID jurisdiction would force the investor to initiate arbitration under the UNCITRAL rules pursuant to Albania's consent to such arbitration in a 1992 law, and Albania had not indicated whether it would contest jurisdiction of arbitration under the UNCITRAL rules. It wrote:

> Although there is, of course, no legal duty of Albania to express itself in this ICSID procedure as to whether it would accept or also object to jurisdiction of an arbitral tribunal under the UNCITRAL Rules should Tradex commence such a procedure, by choosing not to express itself on this question, Albania leaves the option open that again it would contest jurisdiction in such a procedure. It would seem to the Tribunal that the availability of at least one of these two procedural means is a major aspect of the protection of foreign investors. Interpreting, as done above by the Tribunal, the submission to ICSID jurisdiction in . . . . the 1993 Law to cover also this dispute for which UNCITRAL jurisdiction has not been accepted by Albania, would, therefore, also be consistent with the express statements by Albania in favour of investors' protection and ICSID arbitration and the legislative pattern in its foreign investment laws in favour of investors' protection. Furthermore, it would save not only Tradex, but also Albania, the additional considerable efforts and costs that would be necessary for a new procedure under the UNCITRAL Rules regarding the same dispute.

Id. at 195.

61. The Tribunal's opinion underscores two points: First, the Tribunal confirms that, had it dismissed the case, the investor would have been able to institute a new procedure under the UNCITRAL rules. Second, it suggests that a state's commitment to investor protection, whether through a domestic law or a BIT, requires giving the investor access to *at least one international arbitral forum* if the state has consented to such international arbitral options and the investor chooses to use one of them (and meets the conditions to consent). Although this case does not involve a BIT, it makes clear that the denial of jurisdiction by one arbitral venue allows the investor to make a claim in another arbitral venue to whose jurisdiction the state has already consented. While it is conceivable that a bilateral investment treaty could specifically deny the claimant the right to institute arbitral proceedings in a second venue having lost in the first venue on jurisdiction, the default position is that such recourse is permitted.

3. Application to the Situation of Claimant Murphy

62. In light of these legal conclusions and my opinion about the prior ICSID decision, the denial of jurisdiction by the ICSID tribunal in the previous phase of this claim means that, for purposes of the Ecuador-United States BIT, the investor never validly consented to ICSID jurisdiction. As a result, the investor is free to initiate arbitral proceedings under Article VI(3) as if it had not done so before. In the absence of a specific provision in the treaty precluding a further choice even if the initial consent is found to be invalid – e.g., a clause stating that the investor "may choose to consent once, regardless of the ultimate legal validity of that consent," to the various forms of arbitration -- such a new choice to consent is permissible.

63. Indeed, to read the phrase "[the investor] may choose to consent" as foreclosing any further choice if one arbitral forum concludes that it lacks jurisdiction would be to deny the

investor recourse to *any* international arbitration of the merits of its claim. That reading would deprive Articles VI(2) and (3) of their *effet utile.* It would mean that, having chosen a path in the fork in the road designed to lead to a decision on his claim, he ends up on a third path – one to no decision on the merits at all.

64. The interpretation of the treaty so as to permit a new choice to consent is particularly warranted in a situation where the legal posture of the respondent in the first forum has changed significantly due to its withdrawal from ICSID jurisdiction. The interpretation offered by Ecuador, to wit, that the Claimant must return to ICSID but that ICSID lacks jurisdiction over Claimant's claims (see, e.g., Ecuador's 28 July letter to ICSID), is an unreasonable interpretation of the BIT, and unreasonable interpretations or those not in good faith are precluded by the Vienna Convention (*id.* arts. 31(1), 32). Rather, nothing in the BIT states or even suggests that, in these unusual circumstances following denial of jurisdiction by ICSID, the investor is precluded from initiating UNCITRAL arbitration. In light of the lack of a second fork in the road, the consequences of the ICSID panel's jurisdictional decision, and the circumstances of this case, the Ecuador-United States BIT clearly provides this Tribunal with jurisdiction.

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Steven R. Ratner
Ann Arbor, Michigan
15 March 2013

Annex 1

Curriculum Vitae of Professor Steven R. Ratner