UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

REPUBLIC OF ECUADOR, Petitioner, v. CHEVRON CORPORATION and TEXACO PETROLEUM COMPANY, Respondents.	:	09 Civ. 9958

DECLARATION OF PROFESSOR W. MICHAEL REISMAN

I, W. MICHAEL REISMAN, residing at New Haven, Connecticut, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746 and the laws of the United States of America, that the following is true and correct:

1. I am the Myres S. McDougal Professor of International Law at Yale Law School, where I have been on the faculty since 1965. I have published twenty-one books in my field, six of which focus specifically on international arbitration and adjudication; a seventh, which I edited, focuses on jurisdiction in international law. I am the lead editor of a casebook entitled "International Commercial Arbitration" (with Craig, Park and Paulsson). My book, "Systems of Control in International Adjudication and Arbitration," considers the role of national courts in the context of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. My book, "Foreign Investment Disputes" (2005, with Bishop and Crawford) focuses on the many problems encountered in international investment law. In addition to my teaching and scholarship, I have served as Editor-in-Chief of the *American Journal of International Law* and Vice-President of the American Society of International Law. I have also been elected to the *Institut de Droit International* and the American Law Institute. I serve as President of the Arbitral Tribunal of the Bank for International Settlements, have served as an arbitrator in numerous international commercial and public international arbitrations, as counsel in other arbitrations, as well as in cases before the International Court of Justice ("ICJ"), and as an expert witness on diverse matters of international law. With

particular reference to investment law, I have served as arbitrator in two NAFTA arbitrations and have served or am serving in five ICSID arbitrations and in one non-supervised investment arbitration. Most of the disputes on which I have arbitrated or testified have concerned bilateral investment treaties and I have considered their impact on international law in an article (with Professor Robert Sloane) in the British Yearbook of International Law.[1] A *curriculum vitae* setting forth a complete list of my activities and publications is appended to this declaration.

2. I have been asked by Chevron Corporation ("Chevron") and Texaco Petroleum Company ("TexPet") for my opinion with respect to certain international legal issues raised by the Republic of Ecuador's Petition to Stay Arbitration. In that complaint, Ecuador prays the Court to "preliminarily and permanently enjoin[] Chevron Corp. and TexPet from prosecuting or continuing to prosecute the UNCITRAL Arbitration set forth in the Notice… ."[2] The arbitration to which Ecuador refers was initiated by Chevron and TexPet on September 23, 2009 on the basis of an arbitration agreement in Article VI (1) of the United States-Ecuador Bilateral Investment Treaty ("U.S.-Ecuador BIT").[3] Specifically I have been asked to opine, as a matter of public international law, on the proper role of a national court with respect to the BIT arbitration brought by Chevron and TexPet against Ecuador.

3. For the reasons set out below, it is my opinion that a United States federal court in the present case is obliged by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "New York Convention"), to dismiss Ecuador's complaint and to order it to proceed to arbitration. (The New York Convention is incorporated in United States law in Chapter 2 of the Federal Arbitration Act ("FAA"), as discussed below.) Such a conclusion is required because: (1) the BIT's arbitration clause is valid and operable and has, moreover, been accepted as such by Ecuador; and (2) a BIT claim rests on alleged violations of obligations in a treaty and is distinct from a

---

[1] Robert D. Sloane and W. Michael Reisman, *Indirect Expropriation and its Valuation in the BIT Generation*, 74 BRITISH YEARBOOK OF INTERNATIONAL LAW 115 (2004).

[2] Petition to Stay Arbitration at para. 44. UNCITRAL refers to the United Nations Commission on International Trade Law. As provided for in the U.S.-Ecuador BIT, the arbitration brought against Ecuador is proceeding in accordance with the UNCITRAL Arbitration Rules. *See infra* at para. 13.

[3] *See* Chevron's Notice of Arbitration at paras. 70 – 73. *See also* Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment ("U.S.-Ecuador BIT"), 1997.

contract claim; it does not reinstitute other legal actions which may have arisen out of a commercial agreement. Moreover, by terms incorporated by reference in the BIT and by the international law which it applies, questions as to the arbitrability of Chevron and TexPet's complaints must be taken up first by the arbitral tribunal itself, subject only to such post-award review as may be warranted under Article V of the New York Convention. There is not a single instance where a US court has sought to intervene in and to halt a BIT case before an award has been issued.

The FAA and the New York Convention

4. It is well-established that the provisions of Chapter 2 of the Federal Arbitration Act ("FAA") apply to arbitration agreements found in U.S. treaties concerning international investment, such as the U.S.-Ecuador BIT.

5. Of note where my expertise is concerned is the FAA's enforcement of the New York Convention, an international treaty to which the U.S. is a party, which provides for the enforcement of international arbitration agreements and the recognition and enforcement of foreign arbitral awards. The New York Convention was statutorily incorporated into U.S. law in 1970. Chapter 2 of the FAA provides:

> The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.[4]

6. One of the foundation principles of the New York Convention is that contracting states commit their courts to refrain from exercising their own jurisdiction when it is sought to be invoked by a party to a valid arbitration clause, instead referring the matter to the arbitral tribunal designated by the agreement to arbitrate. Article II of the New York Convention provides:

> 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

[4] 9 U.S.C. § 201.

> 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
>
> 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Thus, unless an agreement to arbitrate is "null and void, inoperative or incapable of being performed," the Convention requires the court of a state-party, such as the United States, to refer the parties to arbitration.

7. In Article VI(4) of the U.S.-Ecuador BIT, the United States and Ecuador explicitly agreed that the Treaty's arbitration clause would constitute an "agreement in writing" for purposes of Article II of the New York Convention, thereby making the Convention directly applicable to BIT arbitration proceedings. In the instant case, a federal court cannot find the BIT's arbitration clause "null and void, inoperative or incapable of being performed," and these are the only grounds available to it in dealing with Ecuador's Petition. Indeed, other arbitrations have already been brought under the U.S.-Ecuador BIT without the validity of its arbitration agreement ever having been challenged by Ecuador,[5] and the validity of the agreement to arbitrate is not even in dispute in this case.

The Unique International Legal Dimension of the Dispute

8. The arbitration clause in the instant case is contained in a bilateral investment treaty or BIT. BITs have become important instruments of U.S. policy for encouraging investment in foreign states to the benefit of the economic development of those states as well as to the profit of American investors; both of these objectives are American national interests. BITs oblige foreign governments to provide indispensable protections to United States investors and investments. Most important, they enable those investors, on their own initiative, to arbitrate any disputes with those foreign governments (1) before neutral international arbitral

[5] *See, e.g.*, *Empresa Eléctrica del Ecuador, Inc. v. Republic of Ecuador*, Award, ICSID Case No. ARB/05/9 (2009); *Duke Energy Electroquil Partners and Electroquil SA v. Ecuador*, Award, ICSID Case No ARB/04/19; IIC 333 (2008); and *MCI Power Group LC and New Turbine Inc v. Ecuador*, Award, ICSID Case No ARB/03/6; IIC 296 (2007).

tribunals and not before the national courts of the foreign government; and (2) on the basis of the international law rules incorporated in the BIT and not the law of the host state. In this treaty scheme, BIT arbitration is a critical component, for without it U.S. investors would be subject to the domestic courts of the host state and hence would be less likely to make major investments in countries such as Ecuador. Thus the general national policy of support for arbitration is reinforced with respect to arbitral commitments in BITs. An arbitration agreement contained in a bilateral *treaty,* while subject to Chapter 2 of the FAA, like all other arbitration clauses, is part of a political program in the effectiveness of which the United States government has indicated that it has a manifest interest.

9. The AAA arbitration which Ecuador mentions in its Petition has no bearing on Chevron and TexPet's initiation of BIT arbitration with respect to the violation of the rights assured to investors in the U.S.-Ecuador BIT. That AAA arbitration arose out of a private contractual dispute, whereas the UNCITRAL arbitration arises from an alleged violation of treaty rights which the Republic of Ecuador had assured the United States it would afford to U.S. nationals. The issues raised by Chevron and TexPet's BIT action are not the same as those which were at dispute in the other arbitration to which Ecuador has pointed in support of its estoppel argument. Chevron and TexPet's AAA arbitration sought to enforce a contractual right of indemnification against Ecuador's state-owned oil company, Petrocuador. Furthermore, the Court's order staying that arbitration was made on the basis that Ecuador was not contractually bound by the terms of a 1965 Joint Operating Agreement. Chevron and TexPet, in their UNCITRAL action, take up a different issue, seeking, *inter alia*, the enforcement of Ecuador's commitment to provide fair and equitable treatment to Chevron and TexPet, to uphold investment agreements protected by the BIT, and to refrain from discriminatory measures that have deprived Chevron of its right to due process in Ecuador.[6] The material distinctiveness of the BIT arbitration seems clear to me but the important point is that Ecuador is bound by the U.S.-Ecuador BIT, so even were this Court to find the issues raised in the two arbitrations somehow similar, Ecuador's claim that Chevron and TexPet are collaterally estopped from bringing an investment claim against Ecuador under the U.S.-Ecuador BIT would still be an issue that had to be taken up by the UNCITRAL Tribunal, in the first instance, rather than by a federal court.

---

[6] *Chevron Corp. and Texaco Petroleum Co. v. Ecuador*, UNCITRAL, Notice of Arbitration (Sept. 23, 2009).

Competence-Competence and the Ecuador-U.S. Arbitration Agreement

10. Of particular relevance to this case is the principle of "competence-competence," or the competence of a tribunal to determine its competence. According to this principle, it is the arbitral tribunal which has the jurisdiction to determine, in the first instance, challenges to its own jurisdiction. The legal doctrine of competence-competence authorizes arbitrators to commence an arbitration and determine all disputes about its jurisdiction as long there is a valid and operable arbitration clause.[7] The principle of competence-competence is maintained in international arbitration because: (1) there is a presumption that the parties have conferred such jurisdictional power upon an arbitral tribunal when they entered into an arbitration agreement; and (2) competence to decide jurisdiction is an inherent faculty of all judicial bodies and essential to their ability to function. This fundamental tenet of international commercial and investment arbitration[8] serves to prevent untimely judicial intervention by national courts from obstructing the arbitration process in cases such as this one. If international law did not incorporate the competence-competence principle, preliminary disagreements about the jurisdiction of a tribunal would simply terminate the arbitration or send it to one or the other of the national courts of the parties, a consequence which the election of arbitration by the parties (and, in the case of BITs, its endorsement by two states) to a BIT had specifically sought to avoid.

11. It is clear from the language of the BIT that Ecuador and the United States had agreed that whichever tribunal a prospective claimant selected would have the competence to determine, in the first instance, questions of arbitrability. Article VI (4) of the Treaty is explicit that nationals and companies of either party, in investment disputes with the host government, are entitled, at their election, to direct access to binding international arbitration without first resorting to domestic courts, and that the ensuing arbitration will be conducted by application of international legal standards.

---

[7] *See* Rene David, Arbitration in International Trade 10 (1985) (Trans. of Arbitrage dans le commerce international).

[8] The doctrine of competence-competence is well established in international investment law. It is explicitly mandated under the rules of the Court of Arbitration of the International Chamber of Commerce ("ICC"), the United Nations Commission on International Trade Law ("UNCITRAL"), and the International Centre for the Settlement of Investment Disputes ("ICSID"). Each of these organizations was established for the purpose of facilitating international trade and investment.

12. Article VI(3) allows for a United States investor to submit a dispute for settlement by binding arbitration to UNCITRAL, to the International Centre for the Settlement of Investment Disputes ("ICSID"), to ICSID's Additional Facility, or "to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute." The first three options are entirely a matter of choice by the United States investor.

13. Article VII of the BIT states, in pertinent part:

> 1. Any dispute between the Parties concerning the interpretation or application of the Treaty which is not resolved through consultations or other diplomatic channels, shall be submitted, upon the request of either Party, to an arbitral tribunal for binding decision *in accordance with the applicable rules of international law*. In the absence of an agreement by the Parties to the contrary, the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), except to the extent modified by the Parties or by the arbitrators, shall govern.[9]

14. Article VIII of the BIT dictates that "[t]his Treaty shall not derogate from ... international legal obligations." In his statement addressed to the Senate upon its advice and consent to ratification of the Ecuador-U.S. BIT, President Clinton emphasized that the parties agree to "*international law standards* for ... the investors freedom to choose to resolve disputes with the host government through international arbitration."[10]

15. "International law standards," "applicable rules of international law" and "international legal obligations," as employed in the Treaty, all recognize an arbitral tribunal's competence to decide matters regarding its own jurisdiction. Even if one were to try to contest that, Article VIII itself indicates that Ecuador and the United States intended the forums available to the claimant to have competence-competence. This is because each forum for arbitration named in the U.S.-Ecuador BIT which Ecuador had agreed the United States investor has the option to invoke, incorporates the doctrine of competence-competence.

---

[9] Emphasis added.

[10] Ecuador Bilateral Investment Treaty, SENATE TREATY Doc. 103-15, 1997, Message from the President of the United States. Emphasis added.

16. Article 41 of the ICSID Convention, to which Ecuador was a party at the time of the BIT's ratification, states:

> (1) The Tribunal shall be the judge of its own competence.
>
> (2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

17. Article 21 of the UNCITRAL Rules uses comparable language:

> 1. The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.
>
> 2. The arbitral tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of article 21, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

18. Thus, Ecuador consented to submit potential questions of arbitrability to an arbitral tribunal under the BIT, as the treaty expressly adopted international law standards where arbitration was concerned, and each of the arbitral institutions listed in the BIT has explicit rules incorporating the doctrine of competence-competence in their tribunals' jurisdictions.

19. Moreover, none of Ecuador's allegations go to the validity or operability of the arbitration clause itself and, hence, none even engage any of a United States' court's treaty and statutory powers not to order arbitration. To the contrary, Ecuador's allegations all implicate either procedural issues, with no relation to Article II(3) of the New York Convention, or constitute challenges to the primary investment agreements rather than to the validity of the arbitration agreement

itself. To be specific, Ecuador prays that the Court should stay the Arbitration initiated by Chevron and TexPet because the Arbitration is allegedly precluded by principles of waiver and estoppel.[11] These are precisely the kinds of issues to be taken up, at this stage, by the arbitral tribunal itself and not to be preempted by a domestic court.

20. Ecuador does not allege that the claims that Chevron and TexPet have brought against Ecuador in the UNCITRAL Arbitration are beyond the proper definition of an "investment dispute" under Article VI(I) of the BIT—therefore falling outside the ambit of the agreement to arbitrate. But the point of emphasis is that, even if an "investment dispute" did not exist, it is the arbitral tribunal itself, and not a national court such as this Court, which has the competence to decline jurisdiction. Similarly, if it proves to be beyond the arbitral Tribunal's power to grant a form of relief to Chevron and TexPet which would affect the rights of persons not party to the BIT's arbitration clause, as Petitioner argues,[12] it is within the arbitral Tribunal's competence to decline jurisdiction over such matters.

21. In the event that the Tribunal were to manifestly exceed its jurisdiction, the international arbitral system which Ecuador accepted with respect to U.S. investors provides ample and effective checks on an arbitral tribunal's excesses. Petitioner would then have the opportunity to contest the enforcement of the award in the proper jurisdiction. The point of emphasis is that a domestic court is not the appropriate venue, at this phase of the arbitral process, in which to try to contest arbitrability of the questions raised. Indeed, a finding in a U.S. judicial venue at this phase of the dispute that certain of Chevron and TexPet's claims are not arbitrable would deprive Chevron and TexPet of their right to arbitrate as set forth in the BIT and could, ironically, constitute a treaty violation on the part of the United States. It is likely for that reason that, to date, no U.S. federal court has ever sought to enjoin a party from pursuing a BIT arbitration.

Conclusions

22. In my opinion, the Court should decline to enjoin Chevron and TexPet from pursuing their right to arbitration under the BIT for the following reasons:

a. The New York Convention, as incorporated in United States law, dictates that federal courts "shall recognize an agreement in

[11] *Id.* at para. 36.
[12] *See* Petition to Stay Arbitration at para. 37.

writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship ...." Ecuador has a defined legal relationship with Chevron and TexPet under the various investment agreements and an obligation to arbitrate under the U.S.-Ecuador BIT, which guarantees investors the right to submit a dispute to arbitration.

b. The only grounds for a federal court to intervene and to prevent an arbitration are if the agreement to arbitrate is "null and void, inoperative or incapable of being performed." None of those contingencies applies in the instant case. Chevron and TexPet's claims arise from a BIT, negotiated and executed by the federal government. Moreover, for the Court to look to domestic jurisprudence to attempt to circumvent the validity of the BIT's agreement to arbitrate would constitute a violation of international law.

c. Under the doctrine of competence-competence, which is incorporated in the Ecuador-U.S. BIT by means of its designation of international legal standards and the rules of the arbitral institutions which it makes available for the investor's choice, an arbitral tribunal has the right to determine its own jurisdiction in the first instance. Thus it is the tribunal selected by the claimant which must decide whether the complaints brought by Chevron and TexPet are properly within the scope of the BIT.

23. Other possible reasons for dismissing Ecuador's petition are beyond the scope of my assignment to report on international law.

24. In closing, I affirm that the above represents my independent opinion on the matters in the instant case which implicate international law.

I declare under penalty of perjury that the foregoing is true and correct. Executed January 19, 2010 at New Haven, Connecticut.

W. Michael Reisman

BETH BARNES
NOTARY PUBLIC
MY COMMISSION EXPIRES OCT. 31, 2011

Beth A. Barnes, Notary Public
January 19, 2010