Neutral Citation Number: [2005] EWHC 774 (Comm)
Case No: 2004 FOLIO 656
IN THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION COMMERCIAL COURT
IN THE MATTER OF AN ARBITRATION APPLICATION:
Between:
THE REPUBLIC OF ECUADOR Claimant/Respondent
and OCCIDENTAL EXPLORATION AND PRODUCTION COMPANY Defendant/Applicant
hearing dates: 1st, 2nd and 3rd March 2005

Mr Justice Aikens:

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

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

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

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

B. The parties and the factual background to the arbitration

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

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

Occidental made local purchases in Ecuador and imported goods and services from outside Ecuador in connection with the production of oil, which was subsequently exported in accordance with the 1999 Contract. Occidental paid VAT on these purchases and imports. It made regular applications to the

Ecuadorian Internal Revenue Service[6] for the refund of VAT payments made after July 1999.[7] At first repayments were made. But on 28 August 2001 the SRI passed Resolution 664, which denied Occidental's claims for reimbursements. Further Resolutions were made by the SRI in 2002 and 2003, denying VAT refunds to Occidental and demanding the repayment to the SRI of refunds that had been made to Occidental from July 1999 to September 2000.

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

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

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

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

C. The Bilateral Investment Treaty

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

By the end of 2002 there were 2,181 BITs in force.[12] When the USA – Ecuador Bilateral Investment Treaty was transmitted by the President of the USA to the Senate for its advice and consent to ratification, the Letter of Transmittal stated that the Treaty was designed to protect US investment and to encourage private sector development in Ecuador, as well as to support the economic reforms taking place there.[13] In the "Letter of Submittal" sent to President Clinton by the Secretary of State, submitting to the President the USA/Ecuador Treaty, "the principal BIT objectives" are set out in the letter. These objectives include the principles: (i) that investments of nationals and companies of either Party[14] will receive either "national treatment or most favoured nation treatment", whichever is the better; (ii) that investments are guaranteed freedom from performance requirements;[15] (iii) that expropriation can occur only in accordance with international standards; for a public purpose; in a non – discriminatory manner; under due process of law and upon payment of prompt, adequate and effective compensation. Most importantly for present purposes, (iv) there is the principle that nationals and companies of either Party will have access to binding international arbitration without first resorting to domestic courts in relation to investment disputes.

The scheme of the USA/Ecuador BIT is as follows:
(1) The Preamble sets out the aim of the Treaty, which is to promote greater economic cooperation and investment between the Parties, but on a defined and agreed basis;
(2) Article I sets out various definitions. "Investment" is defined broadly.[16]
(3) Article II sets out the basis on which each Party will permit and treat investment, which is in accordance with the principle set out at (i) in the preceding paragraph. It also provides that the Parties will ensure that investment will have fair and equitable treatment according to international law standards.
(4) Article III deals with expropriation or nationalisation of investments.
(5) Article IV deals with transfers, particularly of funds.
(6) By Article V the Parties agree to consult promptly to resolve any disputes in connection with the Treaty.
(7) Article VI deals with the resolution of "investment disputes" between a State Party and a national or company of the other State Party. Its terms are central to this application and I will return to them in the next paragraph.
(8) Article VII concerns the resolution of disputes between the two Parties to the treaty, ie. USA and Ecuador. If necessary, disputes are to be submitted to an arbitral tribunal, for binding decision "in accordance with the applicable rules of international law".[17]
(9) Article X deals with the tax policies of each Party and provides that each Party should strive to accord fairness and equity in the treatment of investments of nationals and companies of the other Party. It states that the provisions of the Treaty, in particular Articles VI and VII will nevertheless apply to matters of taxation only to a certain extent, as set out in the Article. This Article gave rise to argument about its scope in the arbitration between Occidental and Ecuador.
Article VI must be set out in full. It provides:
"1. For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.
2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute, under one of the following alternatives, for resolution:
(a) to the courts or administrative tribunals of the Party that is party to the dispute; or
(b) in accordance with any applicable, previously agreed dispute-settlement procedures; or
(c) in accordance with the terms of paragraph 3.
3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:
(i) to the International Centre for the Settlement of Investment Disputes ("Centre") established by the Convention on the Settlement of Investment Disputes between States and Nationals of other states, done at Washington March 18, 1965 ("ICSID Convention"), provided that the Party is a party to such Convention; or
(ii) to the Additional Facility of the Centre, if the Centre is not available; or
(iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or
(iv) to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.

(b) once the national or company concerned has so consented, either party to the dispute may initiate arbitration in accordance with the choice so specified in the consent.
4. Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph (3). Such consent, together with the written consent of the national or company when given under paragraph (3) shall satisfy the requirement for:
(a) written consent of the parties to the dispute for purposes of Chapter II of the ICSID Convention (Jurisdiction of the Centre) and for purposes of the Additional Facility Rules; and
(b) an "agreement in writing" for purposes of Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958 ("New York Convention").
5. Any arbitration under paragraph 3(a) (ii), (iii) or (iv), of this Article
shall be held in a state that is a party to the New York Convention.
6. Any arbitral award rendered pursuant to this Article shall be final and binding on the parties to the dispute. Each Party undertakes to carry out without delay the provisions of any such award and to provide in its territory for its enforcement.
7. In any proceeding involving an investment dispute, a Party shall not assert, as a defense, counterclaim, right of set-off or otherwise, that the national or company concerned has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages.
8. For purposes of an arbitration held under paragraph 3 of this Article, any company legally constituted under the applicable laws and regulations of a Party or a political subdivision thereof that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of the other Party, shall be treated as a national or company of such other Party in accordance with Article 25 (2) (b) of the ICSID Convention".
D. The dispute between Occidental and Ecuador and the arbitration
On 4 April 2002 Occidental gave notice to Ecuador[18] that a dispute had arisen. After six months had elapsed from that date, on 11 November 2002 Occidental sent a Notice to Ecuador invoking the arbitration provisions of Article VI of the BIT. The Notice stated that, in accordance with Article VI.3(a)(iii), the Notice constituted Occidental's written consent to an arbitration under UNCITRAL Rules. The Notice sets out details of the parties to the arbitration, gives a statement of the dispute and asserts that Occidental has the right to seek relief through the arbitration proceedings that it has invoked in accordance with Article VI.3 of the BIT. Paragraph 20 of the Notice alleges that Ecuador has failed to honour its obligations under the BIT and under international law. Occidental identified breaches of Articles II.3(a),[19] II.3(b),[20] and III.1[21] of the BIT and set out its case. It nominated the Honourable Charles N Brower as arbitrator.[22] Subsequently, Ecuador nominated Dr Patrick Barrera Sweeney[23] as its arbitrator. In accordance with Article 7 of the UNCITRAL Arbitration Rules ("the Rules"), Professor Francisco Orrego Vicuna[24] was appointed as Chairman of the arbitrators. The parties were unable to agree on a place where the arbitration should be held. So, in accordance with Article 16 of the Rules the arbitrators considered submissions, held a hearing on the issue and decided that it should be London.[25] In the hearing before me, it was agreed that London should be regarded as the seat of the arbitration for the purposes of section 3 of the 1996 Act.
In September 2003, Ecuador raised objections to the jurisdiction of the arbitration Tribunal and the admissibility of Occidental's claims. The parties submitted written cases on these issues, but the Tribunal decided to join those issues to the merits of the case.[26] A hearing on jurisdiction, admissibility and the merits was held in Washington DC between January 26 – 30 2004. "Post – hearing Memorials" were submitted on 16 April 2004. The Award was dated 1 July 2004 and sent to the parties on 12 July 2004.
E. The Decision of the Arbitrators on the Jurisdiction and Admissibility Issues and the Merits of

Occidental's claims.
The Award records[27] that Ecuador raised three objections to the Tribunal hearing Occidental's claims. Ecuador's arguments were:
(1) that Occidental had submitted four lawsuits to Ecuadorian courts on the question of the VAT refund, so that Occidental had irrevocably chosen to submit its claims to the courts or administrative tribunals of Ecuador in accordance with Article V.2(a) of the BIT. That choice precluded submission of the disputes to arbitration under Article VI.3.[28]
(2) In any event, Occidental's claims were precluded by the terms of Article X of the BIT, because the claim for refunds of VAT (save for any claim of expropriation) did not fall within the matters of taxation embraced in paragraphs (a), (b) and (c) of Article X.2, so that the claim was outside those matters that can be the subject of arbitration under Article VI of the BIT.
(3) Occidental's submission that there had been an expropriation of its investment by means of the taxation measures adopted by Ecuador[29] was unarguable, so that even if the claim fell within Article X.2, the Tribunal should not admit it as a claim.
The Tribunal gave its decision on each of these three arguments on jurisdiction and admissibility. On the first issue (the "fork in the road" point), it held that Occidental would only have been precluded from bringing its claim in arbitration if there had been a real choice between tribunals, each of which could have determined the same claim. That was not the case here and Occidental had simply preserved its position with regard to "non-contractual domestic law questions" in the Ecuadorian courts, whilst pursuing "treaty – based" issues in arbitration.[30]
On the second jurisdictional issue, the Tribunal concluded that the key was the proper construction of Article X of the BIT. The arbitrators rejected Ecuador's argument that all matters of taxation were outside the Treaty, apart from the specific categories mentioned in Article X.2(a), (b) and (c). The Tribunal concluded, after a close analysis of the Treaty wording and the negotiating history of the BIT, that the claim did fall within the BIT. The Tribunal held that the real issue was whether the VAT refund had been secured by the calculation of Factor X in the Participation Contract, so that it was fair of the SRI to pass Resolutions that denied Occidental the right to a refund of VAT (as Ecuador argued), or whether the refund had not been secured by Factor X, in which case the denial of a right to a refund in accordance with Ecuador's Tax Law was unfair, (as Occidental argued). The arbitrators said that, put this way, the issue "automatically" brought in the question of whether Occidental had been accorded "fair and equitable treatment", as required under Article II. Therefore the Tribunal had jurisdiction to consider the issue for two reasons. First, as there was a dispute about what was embraced by Factor X, that was a matter concerning the "observance" of the Participation Contract, which is an "investment agreement". Therefore the claim concerned a matter of taxation with respect to the "observance of terms of an investment agreement" within Article X(2)(c). Secondly, because the claim raised issues under Article II of the BIT.[31]
On the third point the Tribunal commented that, normally, a claim of expropriation should be considered on the merits. But it concluded that it was so clear in this case that there had been no expropriation that the point should be dealt with at the jurisdictional stage. The Tribunal held the expropriation claim was inadmissible.[32]
The Award then considered the merits. The arbitrators concluded[33] that: (1) the VAT refund was not within Factor X as calculated in accordance with the Participation Contract. (2) Accordingly, Occidental was entitled to have the VAT refunded under both Ecuadorian law and also Andean Community Law. (3) Because the VAT refunds had not been made, Ecuador was in breach of its obligation (under Article II.1 of the BIT) to accord Occidental a treatment no less favourable than that accorded to nationals or other companies. (4) Therefore Ecuador had also breached its obligations concerning fair and equitable treatment as required by Article II.3(a) of the BIT. (5) The claim that Ecuador had impaired the operation of Occidental's investment by arbitrary measures (contrary to Article II.3(b) of the BIT) was only partially

upheld. This was because the SRI had not acted deliberately to deprive Occidental of the VAT refunds; rather this had resulted from "an overall rather incoherent tax legal structure".
The Tribunal concluded that these breaches had caused Occidental damage. The arbitrators held that Occidental could retain the VAT refunds it had obtained and that it was entitled to be paid VAT refunds of over US$73 million for the period up to 31 December 2003. Interest was also awarded, so that the total of VAT refunds and interest due to Occidental was US$75,074,929.[34]

F. Ecuador's Challenge to the Award
The Arbitration Notice that was issued by Ecuador on 11 August 2004 attaches a document called "Particulars for Arbitration Claim Form". This sets out in detail the remedies Ecuador claimed and the grounds in support of them. As already noted, the Award is challenged on two bases: first, that the Tribunal exceeded its jurisdiction. Secondly that there were serious irregularities as to the procedure of the reference and/or that affected the Award. The present "non – justiciability" argument is directed only at the jurisdictional challenge.
The jurisdictional challenge focuses on two points. First, Ecuador says that the Tribunal wrongly interpreted and applied Article X.1 of the BIT, [35] by determining that Article X.1 imposed "an obligation on the host State that is not different from the obligations of fair and equitable treatment embodied in Article II, even though admittedly the language of Article X is less mandatory".[36] Ecuador argues that the erroneous conclusion that Article X.1 created an enforceable obligation on "the host State" led the Tribunal to hold (wrongly) that it had jurisdiction to consider the claim of Occidental that Ecuador had been in breach of its Treaty obligations (under Article II) in its treatment of Occidental in relation to the VAT refunds.[37]
Secondly, Ecuador says that the Tribunal wrongly interpreted and applied Article X.2 of the BIT[38] in holding that the dispute between Occidental and Ecuador concerned a "matter of taxation….with respect to….(c) the observance and enforcement of terms of an investment agreement…as referred to in Article VI(1)(a) or (b)".[39] The reasoning of the Tribunal was that part, at least, of the dispute found its origin in the investment agreement (ie. the Participation Contract) "insofar as it is disputed whether VAT reimbursement is included in Factor X".[40] That enabled the Tribunal to consider whether Ecuador had been in breach of Article II.
Ecuador submits that: (i) on the correct interpretation of Article X.2, it did not permit claims alleging breach of Article II which concerned any issue of taxation to be submitted for determination in accordance with Article VI, because Article II is not mentioned in Article X at all;[41] (ii) the "observance and enforcement" of the terms of the Participation Contract were not in issue between the parties, let alone "central to the dispute"; (iii) the Tribunal interpreted Article X.2 too broadly.[42]

G. Occidental's Response: the "non – justiciability" issue raised.
On 11 August 2004 Occidental issued a cross application. In that application it stated that if the court decided that it would set aside the Award on the grounds raised by Ecuador, then Occidental would wish to make a cross application to challenge the Tribunal's conclusion on jurisdiction with regard to the "expropriation" issue.[43] At that stage Occidental did not raise the "non – justiciability" point.
On 24 November 2004 Occidental issued a further Application Notice. This asserted that Ecuador's challenge to the Award under sections 67 and 68 of the 1996 Act required the court to interpret provisions of an international treaty between two foreign states (ie. the BIT). The notice continued: "It is a rule of English law, however, that such a task of interpretation is not justiciable in the English Courts. This, therefore, prevents [Ecuador's] challenge from proceeding". Occidental asked that this issue be dealt with as a preliminary point. On 21 December 2004 Colman J ordered that this be done and set a timetable for the service of evidence and a hearing of the preliminary point on "non – justiciability".

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

H. The parties' arguments in outline

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

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

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

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

Ecuador's Argument: Mr Lloyd Jones accepted that the BIT is a treaty governed by public international law and that it has not been made a part of the Municipal law of the UK. However, he submitted that, just because the proposed application under section 67 of the 1996 Act would involve consideration of a non – incorporated treaty between two friendly states, that does not make the matter a "no – go" area for the English Court. In this case the two state Parties to the BIT had expressly agreed that disputes between an

investor and a state Party to the BIT could be determined by arbitration proceedings in states that are party to the New York Convention 1958. If there is an issue as to the scope of the jurisdiction of the arbitrators who have been appointed by the mechanism specifically set up by the state Parties to the BIT, then it should be justiciable before the court that supervises the arbitral process. Here that must be the English Court, because London is the seat of the arbitration and it is accepted that the arbitral procedure is governed by the 1996 Act.[52]

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

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

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

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

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

Mr Lloyd Jones submitted that this analysis had the following consequences. English courts have examined treaties that are not incorporated into English Municipal law if it is necessary to do so in order to determine some domestic law right or interest. Mr Lloyd Jones pointed particularly to the decision of Hobhouse J in Dallal v Bank Mellat, [59] in which the judge examined the jurisdiction of the Iran – US Claims Tribunal, which was established by a treaty between two states and which was not part of UK Municipal law. The

judgment concluded that the source of the authority of the arbitration tribunal lay in the treaty that set up the Claims Tribunal, ie. it was derived from international law. Hobhouse J decided that the tribunal derived its competence from international law and that international comity required the English Courts to recognise the validity of its decisions[60]. Therefore Bank Mellat could rely on a defence of issue estoppel to Mr Dallal's claim against it in the English Court. Mr Lloyd Jones also relied on CND v The Prime Minister.[61] In that case Simon Brown LJ said that the English courts would not interpret "an instrument operating purely on the plane of international law", unless it was necessary to do so "in order to determine rights and obligations under domestic law".[62] Mr Lloyd Jones said that in the present case Ecuador had the right, granted by section 67 of the 1996 Act, to ask the court to review the exercise of the Tribunal's jurisdiction, which it had exercised in a certain way and had decided that Occidental has private law rights that it can enforce against Ecuador in any court of a state that is party to the New York Convention.

I. Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The effect of that conclusion was that there could be no claim against the USA under NAFTA. However, the tribunal then dealt with the objection to their jurisdiction which had been taken after the main hearings on the merits, ie. that arising out of TLGI filing for protection under Chapter 11 of the US Bankruptcy

Code. Before it had gone out of business, TLGI assigned all of its right, title and interest in the NAFTA to a new company, NAFCANCO. In fact the NAFTA claim was the only interest of NAFCANCO and the pursuit of the claim its only business.[67] The tribunal held further hearings on this point and both Canada and Mexico submitted their views on the issues raised by this objection.

The point taken by the USA was that NAFCANCO was owned and controlled by a US Corporation, LGII, which had been renamed Alderwoods Inc. The USA said that the format of NAFTA and in particular Chapter 11 of it was to protect the investing parties of one Contracting Party to the treaty against the unfair practices occurring in one of the other Contracting Parties. The tribunal agreed that NAFTA "was not intended to and could not affect the rights of American investors in relation to the practices of the United States that adversely affect such American investors. Claims of that nature can only be pursued under domestic law". Further, in that case if NAFTA were being used by an American investor, then it "would in effect create a collateral appeal from the decision of the Mississippi Courts", which was not the intent of NAFTA at all.[68] Therefore the issue that the tribunal had to consider was the nationality of the claimants. Under NAFTA, was the rule the same as in customary international law, ie. that a claim for compensation (by one state against another) for a failure to protect the assets of an entity of the claimant state, could only be maintained if the entity concerned had been a national of the claimant state from the time that the claim arose until the time of resolution of the claim?

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

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

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

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

I have spent some time analysing the Loewen decision because Mr Greenwood attaches much importance to the characterisation of the claimants' claims that is made by the tribunal at paragraph 233 of the award. But there are several points to note about what the Loewen tribunal says. First, it is analysing the position under the NAFTA, as opposed to the current treaty, a BIT between Ecuador and the USA. Secondly, the precise

nature of the claim was not central to the point at issue in this part of the award; the key issue was whether there was continuity of nationality. Thirdly, it is noteworthy that when the arbitrators discuss the history of the doctrine of continuous nationality in the context of claims by one state against another, they comment on how the nature of "investment claims" has changed.[71] They note that claimants have been allowed to "prosecute claims in their own right more often" and that in such cases provision has been made for the amelioration of the strict requirement of continuous nationality. They observe that this has been spelt out in specific treaties, including many "so-called BITs".

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

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

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

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

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

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

section 67 of the 1996 Act.
That leaves the law by which the arbitral procedure is conducted. Everyone agrees that this is indeed governed by Municipal law, ie. the 1996 Act.
So which of these three groups of rights and remedies is it that Ecuador wishes the English court to consider that might infringe the "non – justiciability" principle? It is not, at least directly, the first one, ie. the substantive rights granted to Occidental by virtue of the provisions of Articles VI.1 and VI.2 of the BIT. Ecuador has to accept that if the Tribunal interpreted the BIT correctly and had jurisdiction to consider the claims asserted by Occidental, then (subject to the section 68 challenge), it cannot question the Tribunal's power to make the Award it did.
Ecuador wishes the Court to consider the second bundle of rights and obligations, ie. the right to arbitrate certain claims. The scope of those rights is to be interpreted and defined according to public international law principles. It is because those rights concern the interpretation of a treaty to which the UK is not a party and which has not been incorporated into UK Municipal law that Occidental asserts that the Court cannot exercise the power it would otherwise have (under section 67) to consider Ecuador's jurisdictional challenge.
Does the "non – justiciability" principle prevent the court from considering Ecuador's challenge to the Tribunal's jurisdiction to determine the claims asserted by Occidental?
Mr Greenwood submits that the statements of principle made by the House of Lords in leading cases make it clear that the English court must not consider the scope of the jurisdiction of the Tribunal, because that depends on the proper interpretation of a treaty that has not been incorporated into English Municipal law. Therefore the courts have no power to enforce any rights created by the treaty, which is an agreement between states and on the plane of international law. He relied in particular on statements made in the leading case of JH Rayner Ltd v Department of Trade,[74] ("the Tin Council case") particularly those of Lord Templeman and Lord Oliver. In that case various traders in the London tin market claimed sums from the member States of an international body, the International Tin Council, which had been established under a series of multi – lateral treaties to which the UK was a party. But those treaties had never been incorporated into English Municipal law. The ITC was accorded a corporate identity in English law by a series of Orders in Council. The ITC failed to meet substantial obligations to tin traders when the member States withdrew support for its activities (principally the sale and purchase of tin stocks to maintain world prices). The tin traders sought to fix liability on the States that were members of the ITC. Four main arguments were put forward in an attempt to do so. All failed at all stages of the litigation.
All the arguments required the courts to look at the various International Tin Agreements ("ITAs") that established and continued the ITC, the latest of which was called "ITA 6". Lord Oliver dealt with the issue of the extent to which the courts could consider ITA 6 under the heading of "The Principle of Non – Justiciability".[75] He set out the following principles,[76] noting that the contest was not so much in the principles themselves but the area of their operation. (1) "Municipal courts have not and cannot have the competence to adjudicate upon or to enforce the rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law." (2) "A treaty is not part of English law unless and until it has been incorporated into the law by legislation". (3) "So far as individuals are concerned, it is res inter alios acta from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations…as a source of rights and obligations [an unincorporated treaty] is irrelevant". (4) However, those "propositions do not…involve the corollary that the court must never look at or construe a treaty". Lord Oliver gave three examples where that was commonly done: where the treaty was incorporated into Municipal law directly; where it was done indirectly to give effect to treaty obligations; and where parties had entered into a "domestic" contract and incorporated the wording of a treaty.[77] (5) The court could refer to a treaty and the facts of its conclusion and terms where that was a part of the factual background against which a particular issue arose. "Which

states have become parties to a treaty and when and on what the terms of the treaty are are questions of fact. The legal results which flow from it in international law, whether between the parties inter se or between the parties or any of them and outsiders are not and they are not justiciable by Municipal courts".
Lord Oliver returned to this topic when he dealt with the appeal of one of the tin traders, Maclaine Watson & Co Ltd, which had sought the appointment of a receiver over the assets of the ITC. The argument was that one of those assets was a right of action that the ITC had as against the member states of ITA 6 to be indemnified by the member states against the liabilities of the ITC in respect of sales and purchase contracts. Two questions arose: (i) did the ITC have a cause of action for an indemnity against the member states; and if it did (ii) was that justiciable in the English courts? Lord Oliver concluded that if any right to be indemnified existed, it could only be found in ITA 6, an unincorporated treaty between sovereign states. Lord Oliver's preferred ground[78] for concluding that the court could not entertain the application for the appointment of a receiver was that the receiver would be attempting to obtain an indemnity from the member States by relying on the terms of ITA 6, an unincorporated treaty. That would involve a court having to see whether its terms provided for an indemnity either expressly or by implication. That was not a justiciable issue.[79]
Mr Lloyd Jones pointed to the fact that there have been criticisms of the breadth of the "non – justiciability" rule as stated in The Tin Council case. But in Re McKerr, [80] Lord Steyn noted that the "rule" enunciated by the House of Lords in The Tin Council case , that an unincorporated treaty can create no rights or obligations in domestic law, had been subsequently affirmed by the House in two further cases.[81] Lord Steyn observed that distinguished commentators had attacked the "narrowness" of the decision on this point, although he acknowledged that the critics would accept "the principled analysis" of Kerr LJ in the Court of Appeal that "the liability of the member states under international law is justiciable in the national court and that under international law the member states were not liable for the debts of the international organisation". He said that "a comprehensive re-examination must await another day".[82]
Despite the tempting blandishments of Mr Lloyd Jones' arguments, I must take the "rule" as I find it in The Tin Council case. The question is whether it applies to prevent the court considering Ecuador's challenge to the Tribunal's jurisdiction in this case. In order to answer that it is vital to do two things. First, to note that because the seat of the arbitration between Ecuador and Occidental is London, in principle the court has jurisdiction to entertain a challenge to the Tribunal's substantive jurisdiction. Secondly, to examine closely what the court would have to do in order to deal with that challenge.
Because the court has the jurisdiction, in principle, to examine a challenge to the substantive jurisdiction of an arbitral tribunal by virtue of section 67 of the 1996 Act, it is necessary to see if, in doing so, it would infringe any of the "rules" of non – justiciability as set out by Lord Oliver. I will go through the principles set out by Lord Oliver that I have already enumerated above.
First, will the court have to adjudicate upon or enforce rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law? It will, in part, but that is not the end of the matter. Some of the rights created by the BIT, which is a treaty between the USA and Ecuador on the plane of international law, are rights that are given to a class of entities which exist on the plane of Municipal law, ie. "investors". In particular, the right to arbitrate "investment disputes" as defined in Article VI.1, is given to Municipal law entities. That right can be exercised in an arbitral tribunal (set up under UNCITRAL arbitration rules) that will be subject to procedural laws (UNCITRAL arbitration rules and, if the seat is in England, the 1996 Act), which exist on the "Municipal" or "private" or "domestic" law plane. So, although the rights have their origin in international law, they are rights that are intended to be exercised by Municipal law entities in a tribunal that is subject to control under Municipal laws. This, in my view, distinguishes the position in the present case from that in The Tin Council case. There the essence of the decision was that the tin traders, Municipal law entities, did not have any rights against the member States in international law that the court could entertain. In this case, Occidental and Ecuador have agreed

that rights with their origin in international law will be considered by a tribunal whose procedure is subject to Municipal law.

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

In the course of his analysis of the cases and the arguments of Mr Singh QC on behalf of the CND, Simon Brown LJ pointed out that all the cases relied on by Mr Singh to show that the court had pronounced on some issue of international law were "cases where it has been necessary to do so in order to determine rights and obligations under domestic law".[86] Simon Brown LJ referred to R ex p Abbasi v Sec of State for Foreign and Commonwealth Affairs [2002] EWCA Civ 1598, R v Home Sec. ex p Launder [1997] 1 WLR 839; R v DPP ex p Kebilene [2000] 2 AC 326 and Oppenheimer v Cattermole [1976] AC 249 as all being examples of where the court examined an issue of international law in order to determine rights and obligations under English law. He noted that in the present case "there is…no point of reference in domestic law to which the international law issue can be said to go; there is nothing here susceptible of challenge in the way of the determination of rights, interests of duties under domestic law to draw the court into the field of international law".[87] Simon Brown LJ later expressed the point thus: "Here there is simply no foothold in domestic law for any ruling to be given on international law".

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

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

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

I accept that the position in the present case does not fall within the examples that Lord Oliver gives when a court can look at or construe a treaty. In particular, it is not the same as in the Philippson case. I agree with the submission of Mr Greenwood that it is an incorrect analysis of the position to suggest that Ecuador and Occidental have concluded a Municipal law contract based upon or incorporating the terms of the BIT.
But that does not affect my conclusions and analysis set out above. To my mind the exercise of examining the terms of the BIT in order to see whether or not to grant a right given by section 67 of the 1996 Act is no different in kind to that done by Hobhouse J in Dallal v Bank Mellat,[90] where he examined the authority of the US – Iran claims tribunal, which he held was derived from international law. He did that exercise in order to determine whether the claimant in the English proceedings was entitled to bring a further claim or was prevented from doing so by the defence of issue estoppel. In short Hobhouse J considered international law for the purpose of determining rights and obligations under domestic law.
Mr Greenwood's riposte to the argument that section 67 constitutes the domestic law right on which a consideration of international law issues can be founded is to say that section 67 is itself subject to the principles of "non – justiciability". Therefore a court should refrain from exercising its jurisdiction to consider the right to challenge the jurisdiction of the Tribunal, because that would raise "non – justiciable" issues. I cannot accept that argument. If it were correct, then, logically, the same must be true of the challenge made by Ecuador under section 68 of the 1996 Act.[91] It is noteworthy that Ecuador alleges that there were serious irregularities in the procedure of the Tribunal that affect the Award because, amongst other things, the Tribunal "failed to have regard to the principle of international law that international tribunals cannot declare the internal invalidity of rules of national law" and that the Tribunal exceeded its power by overriding legal proceedings before the Courts of Ecuador.[92] Those appear to me to raise issues of international law and go, once again, to the question of the jurisdiction of the Tribunal. But Mr Greenwood accepts that Ecuador can mount its section 68 challenge.
Further, if Mr Greenwood is correct, it would mean that the English court could not consider a defence to an application, under section 101 of the 1996 Act, to enforce an award by a tribunal made under Article VI.3 of this BIT. As I understood him, Mr Greenwood accepted that if an award made under VI.3 of the BIT were presented to the English court for recognition and enforcement under section 101 of the 1996 Act, the English Court would be bound to recognise and enforce it unless it upheld one of the limited grounds for refusing to do so. But he did suggest that if one of those grounds (eg. that in section 103 (2)(d), excess of jurisdiction), raised a "justiciability" issue, the court could refuse to apply that ground.[93] In my view the answer to this point is the same. An entity that is challenging the right to enforce an award has a statutory right to do so under section 103. The court would be entitled to consider the BIT to decide the scope of the arbitration agreement and whether the award was within its terms and so determine the rights of the parties granted under domestic law.
As for the practical difficulties that Mr Greenwood said would be involved if the court did have to consider the challenge to the Tribunal's jurisdiction and to interpret the BIT, I think that they should not be overestimated. The English courts do have to interpret international treaties and conventions and when they do they apply the rules of interpretation laid down in the Vienna Convention on the Law of Treaties, 1969. That is not a reason for refusing to undertake the task, however burdensome. I accept that the USA will not be a party to the proceedings, so that the court should be slow to rule on the rights and obligations of a state which is not a party to those proceedings. But that is a consequence of the structure of the dispute resolution mechanism set up by Article VI of the BIT and so must have been contemplated by the State Parties. And, if need be, the USA could make submissions through Occidental or apply to intervene to be heard on relevant points.
I appreciate also that Article VII provides the means whereby the state Parties to the BIT can resolve a dispute as to the interpretation or application of the BIT through an arbitral tribunal "in accordance with the applicable rules of international law".[94] But there is no dispute as between the USA and Ecuador, so

far as I know. And that provision of the BIT cannot detract from the rights given to Occidental to have an investment dispute resolved in accordance with the procedures laid down in Article VI. That is what it has done and that is what Ecuador wishes to challenge.

J. Conclusion

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

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

Note 1 Issued on 11 August 2004.

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

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

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

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

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

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

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

Note 9 Award: para 38.

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

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

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

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

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

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

Note 16 The definition starts: "Investment means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts". It then enumerates various examples.

Note 17 Article VII (1).

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

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

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

Note 21 Not to expropriate directly or indirectly through measures tantamount to expropriation all or part of Occidental's investment in Ecuador except for a public purpose, in a non – discriminatory manner, upon payment of prompt, adequate and effective compensation and in accordance with due process of law and the general principles of treatment provided for in Art. II(3) of the BIT.
Note 22 He had been a member of the Iran – USA Claims Tribunal at the Hague since 1983.
Note 23 A distinguished Ecuadorian lawyer who had acted as Legal Advisor to the Central Bank of Ecuador.
Note 24 Professor of International Law at the University of Chile and President of the Administrative Tribunal of the World Bank; formerly Ad Hoc Judge on the Tribunal for the Law of the Sea.
Note 25 Decision of 1 August 2003.
Note 26 Award para 16.
Note 27 At para 37.
Note 28 This argument was dubbed "the fork in the road" argument in the Award.
Note 29 Contrary to Article III of the BIT.
Note 30 Award, paras 57 to 63.
Note 31 Award paras 74 – 77.
Note 32 Award para 92.
Note 33 Award paras 199 – 200.
Note 34 Because of the extant claims before the Ecuadorian Courts, the Tribunal made provision to prevent any double recovery by Occidental.
Note 35 Article X.1 provides: "With respect to its tax policies, each Party should strive to accord fairness and equity in the treatment of investment of nationals and companies of the other party".
Note 36 Award: para 70.
Note 37 Particulars to Arbitration Application: para 20.
Note 38 Article X.2 provides: "Nevertheless, the provisions of this Treaty, and in particular Article VI and VII shall apply to matters of taxation only with respect to the following: (a) expropriation, pursuant to Article III; …(c) the observance and enforcement of terms of an investment agreement or authorisation as referred to in Article VI(1)(a) or (b)…."
Note 39 Award: paras 72 and 73.
Note 40 Award: para 72.
Note 41 Ecuador pointed out that this was in contrast to Articles III and IV which are both specifically mentioned in Articles X.2 (a) and (b) respectively.
Note 42 Particulars to Arbitration Notice: para 19.
Note 43 Application Notice of 11 August 2004, para 10. This application was made under section 67 of the 1996 Act.
Note 44 Cf: Azov Shipping Co v Baltic Shipping Co [1999] 2 Lloyd's Rep 39 at 41 per Longmore J; Azov Shipping Co v Baltic Shipping Co [1999] 2 Lloyd's Rep 158 at 161 per Colman J.
Note 45 This broad investigation would be necessary because Articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969 demands consideration of such matters in order to interpret treaties.
Note 46 Mr Greenwood referred in particular to the Buttes case (see below): [1982] AC 888 at 938C, per Lord Wilberforce, and the decision of the Divisional Court in CND v Prime Minister [2002] EWHC 2759 QB at para 37, per Simon Brown LJ.
Note 47 Per Lord Wilberforce in Buttes Gas and Oil Co v Hammer ("The Buttes Gas case") [1982] AC 888 at 938 B.
Note 48 [1990] 2 AC 418 at 499 F – H.
Note 49 Particularly per Lord Templeman at page 476H to 477A; 481 B-C.
Note 50 It provides: "On an application under this section challenging the award of the arbitral tribunal as to its substantive jurisdiction, the court may by order…".(emphasis mine).

Note 51 That provides: "Nothing in this Part shall be construed as excluding the operation of any rule of law consistent with the provisions of this Part…." That section is at the end of Part 1, in which section 67 is also placed.
Note 52 Mr Lloyd Jones relied on the judgments in three Canadian cases, where courts had held that awards made by arbitral tribunals constituted under Chapter 11 of the North American Free Trade Agreement ("NAFTA") were susceptible to review by the Canadian Courts on the question of jurisdiction under the International Commercial Arbitration Act or the Commercial Arbitration Act of Canada: United Mexican States v Metalclad (2001) 5 ICSID Rep 236; United States of Mexico v Martin Roy Feldman Karpa, 11 January 2005; AG of Canada v SD Myers Inc, 13 January 2004. He also referred to Czech Republic v CME Czech Republic BV (2003) 42 ILM 919, where the Svea Court of Appeals in Sweden reviewed an issue of jurisdiction of arbitrators appointed to determine an investment dispute under a BIT between the Czech Republic and the USA.
Note 53 Law and Practice of International Commercial Arbitration (4th Ed. 2004) by Redfern & Hunter para 1 – 142.
Note 54 [1939] AC 332
Note 55 As Lord Atkin recognised: page 351.
Note 56 At pages 348 – 351; 364 - 369
Note 57 Mr Lloyd Jones relied upon the argument set out in Douglas, pp 169 – 70; 179 – 180 and the acceptance, in argument, of that position by the USA in the case of GAMI Inc v United States of Mexico (see para 13 of the US Submissions), an arbitration conducted under Chapter 11 of the NAFTA and under UNCITRAL Rules. The contrary position was expressed by a distinguished arbitration panel in another NAFTA case: The Loewen Group Inc v USA, Award of 26 June 2003: (2003) 42 ILM 811; see particularly para 233. That Award was made under the auspices of the International Centre for Settlement of Investment Disputes – "ICSID", Washington, DC. Douglas argues that this observation is wrong in principle and an inaccurate description of the NAFTA arbitration process: pp 162 – 3; 175 – 6; 193.
Note 58 New York Convention Article V.1(c); Arbitration Act 1996 section 103(2)(d). Convention Awards are enforceable in the same manner as a judgment of the court under section 101.
Note 59 [1986] QB 441.
Note 60 At page 462A
Note 61 [2002] EWHC 2759 QB (Divisional Court)
Note 62 See: para 36. Cf para 40: "There is no foothold in domestic law for any ruling to be given on international law"; and conclusion at para 47 (i). Maurice Kay LJ and Richards J agreed with the judgment of Simon Brown LJ, whilst adding reasons of their own.
Note 63 Award of arbitrators Sir Anthony Mason, Judge Abner J Mikva and Lord Mustill given on 23 June 2003. Held under the auspices of the International Centre for Settlement of Investment Disputes, Washington DC.
Note 64 Award: para 142.
Note 65 Award: para 168.
Note 66 Award: para 217.
Note 67 Award: para 220.
Note 68 Award: paras 223 and 224.
Note 69 Award: para 232.
Note 70 Award: para 234, 237 and 240.
Note 71 See para 229 of the Award.
Note 72 See: Arts III.2; VI.1(c) and VI.2(a).
Note 73 See, eg: Armar Shipping Co Ltd v Caisse

Neutral Citation Number: [2005] EWCA Civ 1116

Case No: A3/2005/1121
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
Mr Justice Aikens

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/09/2005
Before :

LORD PHILLIPS OF WORTH MATRAVERS, MR
LORD JUSTICE CLARKE
and
LORD JUSTICE MANCE
- -
Between :
Occidental Exploration & Production CompanyAppellant
and -
The Republic of EcuadorRespondent
- -
- -

Mr Christopher Greenwood QC and Mr Toby Landau (instructed by Messrs Debevoise & Plimption Llp) for the Appellant
Mr David Lloyd Jones QC and Mr Simon Birt (instructed by Messrs Weil Gotshal & Manges Llp) for the Respondent

Hearing dates : 20, 21, 22 July 2005
- -
Approved Judgment

Lord Justice Mance:
Outline
This is the judgment of the Court. The appeal, from a judgment and order of Aikens J dated 29th April 2005, concerns the extent to which the English Courts may under s.67 of the Arbitration Act 1996 consider a challenge to the jurisdiction of an award made by arbitrators appointed under provisions to be found in a Bilateral Investment Treaty. The Treaty was signed on 27th August 1993 between the United States of America ("USA") and the Republic of Ecuador ("Ecuador"). It contained provisions "concerning the encouragement and reciprocal protection of investment" in each country by the nationals and companies of the other. These included a provision (Article VI) whereby, in the event of an "investment dispute", such nationals and

companies could enjoy direct dispute resolution rights against the other country. One of the options provided was arbitration subject to the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL"), as here occurred. The arbitration was between Occidental Exploration and Production Company ("Occidental"), a Californian corporation, and Ecuador. There was a distinguished panel of arbitrators consisting of the Honourable Charles N. Brower, Dr Patrick Barrera Sweeney and, as chairman, Professor Francisco Orrego Vicuña. Their final award was dated 1st July 2004.

Regarding the place of any arbitration, the Treaty says only that it "shall be held in a state that is a party to the New York Convention". There are over 130 such states. But Article 16(1) of UNCITRAL, to which the Treaty refers, provides that

"Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration".

Occidental and Ecuador were unable to agree upon a place, and the arbitrators by decision dated 1 August 2003 determined that it should be London. The factor "tipping the balance" in favour of London (over Washington D.C.) was its "perception …. as being neutral". Hearings were actually held in Washington, but the award dated 1st July 2004 records the place of arbitration as London.

By their award the arbitrators determined the dispute in favour of Occidental, save on one point relating to whether there had been expropriation, which was not in the event relevant to the result. Ecuador by claim form dated 11 August 2004 seeks to have the award set aside under both ss.67 and 68 of the 1996 Act. Also on 11 August 2004, Occidental issued a claim form seeking, in the event of a challenge to the award by Ecuador and if necessary, to re-visit the point on expropriation. But by application notice dated 24 November 2004 Occidental raised a prior objection, that Ecuador's challenge requires the English court to interpret provisions of the Bilateral Investment Treaty between the USA and Ecuador, in contravention of a rule of English law making such an issue "non-justiciable". Colman J directed the trial of a preliminary issue relating to that objection. Before Aikens J the objection was abandoned as regards the points raised under s.68. By his judgment and order under appeal, Aikens J also decided it against Occidental as regards the points raised under s.67. Aikens J was not, and we are not, concerned with the merits of Ecuador's challenge under either of ss.67 and 68.

Occidental's investment

The investment to which Occidental's claim related arose under a contract dated 21 April 1999 with Petroecuador (a state-owned corporation of Ecuador). Occidental thereby obtained the exclusive right to carry out hydrocarbon exploration and exploitation in Block 15 of the Ecuadorian Amazon basin region. Occidental assumed virtually all the costs, and received in return a percentage of the oil produced and the right to export it. The percentage was determined under an elaborate formula in clause 8.1 of the contract known as "Factor X".

The costs incurred by Occidental involved it in paying VAT. As an exporter, it sought reimbursement of this VAT from the Ecuadorian tax authority, the Servicio de Rentas Internas ("SRI"). At first, in respect of periods from July 1999 to September 2000, this was afforded by SRI, but thereafter and in respect of subsequent periods it was refused. SRI initially justified its refusal on the ground that Factor X had been calculated on a basis covering Occidental's potential VAT liabilities. Latterly (although Ecuador suggests that the arbitrators failed to appreciate this) the justification advanced by SRI and Ecuador changed and was and is that VAT refunds are only available to exporters of "manufactured" products, within which description it

is contended that the crude oil exported did not fall.
The Bilateral Investment Treaty
The judge summarised the scheme of the Treaty:
"14. ….. (1) The Preamble sets out the aim of the Treaty, which is to promote greater economic cooperation and investment between the Parties, but on a defined and agreed basis.

(2) Article I sets out various definitions. "Investment" is defined broadly.
(3) Article II sets out the basis on which each Party will permit and treat investment ….. It also provides that the Parties will ensure that investment will have fair and equitable treatment according to international law standards.
(4) Article III deals with expropriation or nationalisation of investments.
(5) Article IV deals with transfers, particularly of funds.
(6) By Article V the Parties agree to consult promptly to resolve any disputes in connection with the Treaty.
(7) Article VI deals with the resolution of "investment disputes" between a State Party and a national or company of the other State Party. Its terms are central to this application ……..
(8) Article VII concerns the resolution of disputes between the two Parties to the treaty, ie. USA and Ecuador. If necessary, disputes are to be submitted to an arbitral tribunal, for binding decision "in accordance with the applicable rules of international law"."
(9) Article X deals with the tax policies of each Party and provides that each Party should strive to accord fairness and equity in the treatment of investments of nationals and companies of the other Party. It states that the provisions of the Treaty, in particular Articles VI and VII will nevertheless apply to matters of taxation only to a certain extent, as set out in the Article. This Article gave rise to argument about its scope in the arbitration between Occidental and Ecuador."
More specifically, Articles II, V, VI, VII and X of the Treaty provide:
"II.3(a) Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.
(b) Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal of investments. For purposes of dispute resolution under Articles VI and VII, a measure may be arbitrary or discriminatory notwithstanding the fact that a party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a Party.
…..
V. The Parties agree to consult promptly, on the request of either, to resolve any disputes in connection with the Treaty or to discuss any matter relating to the interpretation or application of the Treaty.
VI.1. For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.
2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute, under one of the following alternatives, for resolution:

(a)to the courts or administrative tribunals of the Party that is party to the dispute; or
(b) in accordance with any applicable, previously agreed dispute-settlement procedures; or
(c) in accordance with the terms of paragraph 3.
3.(a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2(a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:
(i) to the International Centre for the Settlement of Investment Disputes ("Centre") established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington March 18, 1965 ("ICSID Convention"), provided that the Party is a party to such Convention; or
(ii) to the Additional Facility of the Centre, if the Centre is not available; or
(iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or
(iv) to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.
(b) Once the national or company concerned has so consented, either party to the dispute may initiate arbitration in accordance with the choice so specified in the consent.
4. Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph (3). Such consent, together with the written consent of the national or company when given under paragraph (3) shall satisfy the requirement for:
(a) written consent of the parties to the dispute for purposes of Chapter II of the ICSID Convention (Jurisdiction of the Centre) and for purposes of the Additional Facility Rules; and
(b) an "agreement in writing" for purposes of Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958 ("New York Convention").
5. Any arbitration under paragraph 3(a) (ii), (iii) or (iv), of this Article shall be held in a state that is a party to the New York Convention.
6. Any arbitral award rendered pursuant to this Article shall be final and binding on the parties to the dispute. Each Party undertakes to carry out without delay the provisions of any such award and to provide in its territory for its enforcement.
7. In any proceeding involving an investment dispute, a Party shall not assert, as a defense, counterclaim, right of set-off or otherwise, that the national or company concerned has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages.
8. For purposes of an arbitration held under paragraph 3 of this Article, any company legally constituted under the applicable laws and regulations of a Party or a political subdivision thereof that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of the other Party, shall be treated as a national or company of such other Party in accordance with Article 25 (2) (b) of the ICSID Convention.
VII.1 Any dispute between the Parties concerning the interpretation or application of the Treaty which is not resolved through consultations or other diplomatic channels, shall be submitted, upon the request of either Party, to an arbitral tribunal for binding decision in accordance with the applicable rules of international law. In the absence of an agreement by the Parties to the contrary, the arbitration rules of …. UNCITRAL, except to the extent modified by the Parties or

by the arbitrators, shall govern. …..

…..

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

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

(a) expropriation, pursuant to Article III;

(b) transfers, pursuant to Article IV; or

(c) the observance and enforcement of terms of an investment agreement or authorization as referred to in Article VI (1) (a) or (b),

to the extent they are not subject to the dispute settlement provisions of a Convention for the avoidance of double taxation between the two Parties, or have been raised under such settlement provisions and are not resolved within a reasonable period of time."

The award

On 4 April 2002 Occidental gave notice to Ecuador that a dispute had arisen, and, after allowing six months to lapse, on 11 November 2002 Occidental wrote consenting in writing to the submission of the dispute to arbitration under UNCITRAL rules, as provided in Article VI.3(a)(iii) of the Treaty. Occidental alleged breaches of Articles II.3(a) and (b) and III.1. The arbitrators were appointed. In September 2003, Ecuador raised objections to any consideration by the tribunal of Occidental's claims on three grounds. The first was that, following the refusal of reimbursement of VAT, Occidental had brought proceedings in Ecuador under Ecuadorian law. The tribunal decided that this did not preclude Occidental's separate claim in the arbitration, and this is no longer in issue. The second was that Occidental's claims, relating as they did to matters of taxation, were precluded by Article X. This, in Ecuador's submission, limits the application of Article VI to the three categories of complaint specified in Article X.2(a), (b) and (c) and even then only permits jurisdiction subject to the closing caveat in Article X.2. The third (linked with the second through Article X.2(a)) was that the claim that there had been any expropriation was on any view "inadmissible" (i.e. evidently unfounded).

The tribunal agreed with Ecuador in relation to the third objection. But it nevertheless rejected the second objection. It did so, first, on the ground that the claim could, because of the arguments founded on Factor X, be regarded as involving "the observance and enforcement of terms of an investment agreement or authorisation as referred to in Article VI(1)(a) or (b)". Ecuador asserts that no such basis for jurisdiction was ever suggested by Occidental, whose claims were expressly limited to alleged breaches of rights conferred or created by the Treaty under Article VI.1(c). The second ground on which the tribunal rejected the second objection was, it would seem, that Article X.2 is not an exclusive definition of the circumstances in which matters of taxation can give rise to arbitration under Article VI, and that Article X.1 may be relied on in arbitration in areas outside the three areas covered by Article X.2(a), (b) and (c). Ecuador wishes to challenge this interpretation of Article X.

Having held that it had jurisdiction, the tribunal considered the merits of Occidental's claims, apart from that based on expropriation. It found that Occidental was entitled to the refund of all VAT paid as a result of the importation or local acquisition of goods or services used for the production of oil for export, and awarded it compensation of US$71,533,649 together with interest totalling US$3,541,280. It made certain other orders (some of which Ecuador seeks to challenge, under s.68 of the Arbitration Act 1996, as beyond the tribunal's powers under UNCITRAL rules, although that challenge gives rise to no issue before us).

The issues

Before us, the issues have mirrored those argued extensively before Aikens J. In bare outline, Mr Greenwood QC for Occidental submits that Ecuador's challenge to the tribunal's jurisdiction under s.67 raises issues upon which English Courts cannot or should not adjudicate. First, it would require the Court to enforce or interpret the terms of the Treaty, contrary to a principle stated in J H Rayner (Mincing Lane) Ltd. v. DTI ("the Tin Council case") [1990] 2 AC 418. Secondly and in any event, it would require the Court to "adjudicate upon the transactions of foreign sovereign states" contrary to a wider principle of "judicial restraint or abstention" stated by Lord Wilberforce in Buttes Gas and Oil Co. v. Hammer [1982] AC 888, 931G. The first principle may be viewed as a particular concretisation of the second wider principle. In support of these submissions, Mr Greenwood suggests (though less emphatically than before the judge) that the rights and duties in issue in the arbitration should be seen as state rights – Occidental was in other words claiming no more than to enforce the rights which the United States of America would have in international law against Ecuador in respect of any breach of the Treaty towards a United States national or company. But, assuming that Occidental was in the arbitration claiming in its own right, Mr Greenwood submits that any adjudication by an English Court upon the question whether the arbitrators acted within their jurisdiction would still depend upon the application or interpretation of an international treaty and be impermissible. The underlying rationale of the House of Lords authorities which, on his case, lead to this conclusion is, he submits, judicial restraint in the national and international interests, reinforced in the specific area of unincorporated treaties by the constitutional consideration that it is for Parliament, and not the United Kingdom Government or the Courts, to introduce new law at a domestic level. As to the need for the judicial restraint, he submits that a decision on the scope of the matters submitted to arbitration could involve a decision upon the scope of the rights enforceable not just by Occidental but necessarily also by the USA, and could have international implications.

Mr Lloyd Jones QC for Ecuador submits in response that the Court is concerned with an agreement to arbitrate, arising in a manner contemplated by the Treaty but nonetheless separate from the Treaty and made between different parties, only one of them party to the Treaty. English law having become the curial law of the arbitration (albeit only as a result of a decision of the arbitrators pursuant to the terms of the agreement to arbitrate), he submits that neither of the principles which Mr Greenwood invokes should be understood as precluding the English Court from considering and determining an objection to the arbitrators' jurisdiction under s.67 of the Arbitration Act 1996, even if this would involve construing those parts of the Treaty (particularly Articles VI and X, and possibly also Article III) at which it is necessary to look in order to determine the scope of the matters falling within the scope of Ecuador's offer to arbitrate which Occidental accepted.

With regard to the nature of the rights pursued in the arbitration, the judge concluded that investors like Occidental were not enforcing rights of the USA, but were given "the right to pursue, in their name and for themselves, claims against the other State party" (paragraph 61). He then held, and this was not in issue before us, that Occidental's substantive claims were governed by principles of international law (in the same way that any claims arising between the USA and Ecuador would be). He held that the arbitration agreement coming into existence between Occidental and Ecuador was likewise subject to international law. This is in issue before us, although neither side suggests that the answer is crucial to its own case. Finally, the judge held, and it is common ground before us, that the arbitral procedure was governed by the law of England as the law of the place of arbitration. Hence, the possibility of applications under the Arbitration Act 1996. Turning to the issues of justiciability, the judge did not consider that examination by the Court of Ecuador's challenge under s.67 to the arbitrators' jurisdiction would "infringe any of the "rules" of non-justiciability …. set out

by Lord Oliver" in the Tin Council case (paragraphs 72 to 81). He accepted the distinction advanced by Mr Lloyd Jones between adjudication upon rights operating purely at the international level and adjudication upon international rights intended to be exercised in a tribunal subject to control under municipal laws; and he considered that s.67 gave a "foothold" in domestic law to challenge the jurisdictional ruling of the tribunal.

The nature of the rights to which Occidental's claim relates

In support of the proposition that Occidental was enforcing rights of the USA under the Treaty, Mr Greenwood referred us to the traditional position regarding the protection of nationals under international law. This was summarised by the Permanent International Court of Justice in the Case of the Mavrommatis Palestine Concessions (1924) PCIJ Rep Series A, No. 2:

"It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law.

The question, therefore, whether the present dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint. Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant."

One feature of the traditional protection is that it is up to the protecting State of the injured national whether and how far to make it available. This was put starkly in the Barcelona Traction, Light and Power Co. Case (Belgium v. Spain) [1970] ICJ Rep 44, paras. 78-79:

"The Court would here observe that, within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting …..

The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular claim"

See also Oppenheim's International Law (9th Ed.) Vol. 1 para. 410.

Bilateral investment treaties such as the present introduce a new element, and create a "very different" situation (cf Zachary Douglas in The Hybrid Foundations of Investment Treaty Arbitrations (2003) BYIL 151, 169). The protection of nationals is crystallised and in the present Treaty expanded to cover every kind of investment "owned or controlled directly or indirectly by nationals or companies of the other Party" (Article 1), but the investor is given direct standing to pursue the State of the investment in respect of any "investment dispute". An investment dispute is defined as

"a dispute ….. arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorisation granted by that Party's foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment".

Under the present Treaty, a dispute may thus arise out of or relate to (a) a commercial agreement, (b) an executive authorisation or (c) an alleged breach of a Treaty right. Article VI(3)(a) of the present Treaty provides the investor with various ways in which to pursue an investment dispute – (i) by use of International Centre for the Settlement of Investment Disputes ("ICSID"), provided the

State is a party to the relevant Convention, (ii) by use of the Centre's Additional Facility, if the Centre is not itself available, (iii) by UNCITRAL arbitration, as here occurred, or (iv) by using any other arbitration institution or rules agreed between the parties to the dispute.

Where a dispute arises out of or relates to a commercial agreement made with the investor, it would seem to us both artificial and wrong in principle to suggest that the investor is in reality pursuing a claim vested in his or its home State, and that the only improvement by comparison with the traditional State protection for investors is procedural. It would potentially undermine the efficacy of the protection held out to individual investors, if such protection was subject to the continuing benevolence and support of their national State. Douglas, at p.170 in the article already cited, draws attention to arbitrations where the national State by intervention or in submissions opposed its investor's claims or the tribunal's jurisdiction to hear them; but, if the claims were the State's, such opposition should have been of itself fatal.

In the case of a claim of type (c) - and probably also (b) – any substantive right would have to be found in the Treaty. The Treaty would have to be regarded as conferring or creating direct rights in international law in favour of investors either from the outset, or at least (and in this event retrospectively) as and when they pursue claims in one of the ways provided. These alternative analyses are advanced by Douglas at pp.182-4. The former analysis is in our view natural and preferable, but it does not matter which applies.

That treaties may in modern international law give rise to direct rights in favour of individuals is well established, particularly where the treaty provides a dispute resolution mechanism capable of being operated by such individuals acting on their own behalf and without their national state's involvement or even consent. Oppenheim's International Law (9th Ed.), para. 375 put the matter in this way in 1992:

"States can, …. and occasionally do, confer upon individuals, whether their own subjects or aliens, international rights strictu sensu, ie rights which they can acquire without the intervention of municipal legislation and which they can enforce in their own name before international tribunals", See also Oppenheim, para. 7, as well as McCorquodale, The Individual and the International Legal System in Evans' International Law (OUP) (2003), pp. 304-6. Most frequently cited in this connection is the Permanent Court of International Justice's Advisory Opinion in the Jurisdiction of the Courts of Danzig Case (1928) PCIJ Rep Series B No. 15, p.1, considering the effect of a treaty (the Beamtenabkommen) made on 22 October 1921 between Poland and Danzig. The Beamtenabkommen regulated the employment conditions of Danzig railway employees who had, after the First World War, passed into the service of the Polish Railways Administration. Poland's contention that this treaty only created inter-State rights was rejected. The Court said that:

"It may be readily admitted that, according to a well established principle of international law, the Beamtenabkommen, being an international agreement, cannot, as such, create direct rights and obligations for private individuals. But it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and enforceable by the national courts. That there is such an intention in the present case can be established by reference to the terms of the Beamtenabkommen. (pp.17-18)"

The Court thus looked at the intention of the States making the treaty and held, in that light, that the Beamtenabkommen "constitutes part of the provisions of the "contract of service", that is "the series of provisions which constitute the legal relationship between the Railways Administration and its employees"; and that the relevant officials could sue the Administration direct in the Danzig courts.

In the more recent LaGrand Case (2001) 40 ILM 1069, the International Court of Justice held that

article 36(1)(b) of the Vienna Convention on Consular Relations, requiring prison authorities to "inform the person concerned without delay of his rights under this subparagraph" creates "individual rights". By this we read the Court as meaning rights of the person concerned operating independently of and not derivative from any rights of such person's national state (even though that state, Germany, was invoking such rights under the compulsory jurisdiction article of the relevant Optional Protocol). In the area of human rights a number of treaties provide individuals with rights of access to vindicate the protection afforded by the treaty. The European Convention on Human Rights is thus enforceable by victims of the breach of such rights, and "any person, non-governmental organisation or group of individuals" may seek to establish that he is a victim by bringing a direct claim before the European Court of Human Rights in Strasbourg (cf article 34 of the Convention).

Turning therefore to the present Treaty, its language makes clear that injured nationals or companies are to have a direct claim for their own benefit in respect of all three types of claim specified in (a), (b) and (c). The natural conclusion is that all three types of claim are capable of pursuit by investors in their own right. As Douglas puts it in his article at p.182:

"The fundamental assumption underlying the investment treaty regime is clearly that the investor is bringing a cause of action based upon the vindication of its own rights rather than those of its national State."

We note that this is how the matter is also seen by the authors of a number of recent international arbitration awards, faced with arguments relying on the Barcelona Traction case to limit or control the protection available to investors under bilateral investment treaties. We will not cite all of them. But in Enron Corporation v. The Argentine Republic (ICSID Case No. ARB/01/3; January 14. 2004) the tribunal said that the Barcelona Traction case "has been held not to be controlling in investment claims such as the present, as it deals with the separate question of diplomatic protection in a particular setting" (para. 38) and that:

….what the State of nationality of the investor might argue in a given case to which it is a party cannot be held against the rights of the investor in a separate case to which the investor is party. This is precisely the merit of the ICSID Convention in that it overcame the deficiencies of diplomatic protection where the investor was subject to whatever political or legal determination the State of nationality would make in respect of its claim" (para. 48).

Similar statements appear in LG&E Energy Corporation v. Argentine Republic ICSID Case No. ARB/02/1; April 30, 2004, para. 52, in GAMI Investments Inc. v. United Mexican States NAFTA Final Award 15 November 2004, para. 30, in Camuzzi International S.A. v. The Argentine Republic ICSID Case No. ARB/03/2; May 11, 2005, paras. 138-145, where the tribunal observed that diplomatic protection "cannot be considered the general rule in the system of international law presently governing the matter, but as a residual mechanism available when the affected individual has no direct channel in its own right", and in Camuzzi International S.A. v. The Republic of Argentina ICSID Case No. ARB/03/7, para. 44, where the tribunal said of the Barcelona Traction case that:

"…. this decision of the International Court of Justice referred particularly to the protection that could be expected by the shareholders in this case, but specifying that they can enjoy other protection, if there is a specific agreement in this regard. In this case, this is precisely the situation. There is an applicable international juridical agreement. This agreement is the Treaty and according to it, Camuzzi has the right to request, directly and immediately, the protection of its rights by accessing the Tribunal."

Finally, we mention Gas Natural SDG S.A. v. The Argentine Republic ICSID Case No. ARB/03/10,

where the tribunal stated:
"The scheme of both the ICSID Convention and the bilateral investment treaties is that in this circumstance, the foreign investor acquires rights under the Convention and Treaty, including in particular the standing to initiate international arbitration." (para. 34)
Mr Greenwood relied on the decision and reasoning of another distinguished arbitration panel (Sir Anthony Mason, Judge Abner J. Mikva and Lord Mustill) in The Loewen Group, Inc. v. USA (2003) 42 ILM 811. Claims were made by a Canadian company ("TLGI") for discrimination by the USA contrary to article 1102 of the North American Free Trade Agreement ("NAFTA"). Subsequent to the arbitration hearing on their merits, TLGI filed for relief under Chapter 11 of the United States Bankruptcy Code, and a reorganisation plan was approved, whereby (a) immediately before TLGI went out of business, it assigned the claims to a new Canadian corporation ("Nafcanco"), (b) the rest of its business operations were then reorganised as a new United States corporation, which owned and controlled Nafcanco. The claims were Nafcanco's only asset and their pursuit its only business. All of the benefits of any award in favour of Nafcanco would have enured to the new United States corporation (i.e. as Nafcanco's parent and controller). The arbitrators held that their jurisdiction to determine the claims before them had ceased, since the real claimant was now a United States corporation. They applied the general principle of international law, whereby there must be "continuous national identity from the date of the events giving rise to the claim … through the date of the resolution of the claim …..". They recognised that NAFTA allowed an individual investor to "make a claim on its own behalf and submit the claim to international arbitration" (paragraph 223) and that "As claimants have been allowed to prosecute claims in their own right more often, provision has been made for amelioration of the strict requirement of continuous nationality" (paragraph 229). But they found no such ameliorating provision in NAFTA, and they rejected any resemblance between, on the one hand,
"rights of action under private law aris[ing] from personal obligations (albeit they may be owed by or to a State) brought into existence by domestic law and enforceable through domestic tribunals and courts"
and, on the other hand,
"NAFTA claims [which] have a quite different character, stemming from a corner of public international law in which, by treaty, the power of States under that law to take international measures for the correction of wrongs done to its nationals has been replaced by an ad hoc definition of certain kinds of wrong, coupled with specialist means of compensation" (paragraph 233).
The arbitrators concluded that:
"There is no warrant for transferring rules derived from private law into a field of international law where claimants are permitted for convenience to enforce what are in origin the rights of Party states" (paragraph 233).
The award on this point in Loewen is controversial (cf The Hybrid Foundations of Investment Treaty Arbitrations (2003) BYIL 151, especially 175-6). But we do not, in any event, consider that its reasoning or decision affects the proper conclusion regarding the nature of the rights capable of pursuit by investors under the present Bilateral Investment Treaty. The provisions of NAFTA, although it is a trilateral investment treaty, appear for present purposes to be materially the same as those of the present Treaty, but even the tribunal in Loewen accepted that the claimant was pursuing claims "in its own right" and "on its own behalf". The statement that NAFTA "claimants are permitted for convenience to enforce what are in origin the rights of Party states" was said in a context where the tribunal was concerned to emphasise that the rights (to whomsoever they belonged) remained subject to international law principles governing continuity of nationality. It is

reading too much into this compressed language to conclude that the tribunal meant that the rights enforced remained simply and solely the rights of the States, which claimants were being given some form of power to enforce, as third parties or attorneys. But, if the tribunal in Loewen meant to suggest that the rights conferred under a bilateral (or multilateral) investment treaty such as the present remain of the same character as the rights identified by the Permanent Court of International Justice in Case of the Mavrommatis Palestine Concessions or by the International Court of Justice in the Barcelona Traction case, we would respectfully disagree with its analysis.

Non-justiciability

We turn to the core aspect of Mr Greenwood's case, non-justiciability. The wider basis on which this is asserted was identified by Lord Wilberforce in Buttes Gas. The civil claims pursued between private individuals or concerns in that case were not founded on any investment treaty, or even on any private law contract referring to the provisions of any treaty. But the defence of justification raised by Mr Hammer and Occidental as defendants (in response to Buttes Gas's libel claim) and Occidental's counterclaim for conspiracy to defraud could, on the unusual facts of that case, only have been decided by considering a range of extremely contentious international matters: an allegation that the Ruler of Sharjah had back-dated a decree extending his territorial waters; a claim to sovereignty by the Government of Iran made subsequent to such decree; instructions to the ruler of Umm al Qaiwain by the United Kingdom political agent; intervention by Her Majesty's naval, air and military forces then operating in the relevant area under treaty arrangements; and further intervention by the Iranian Government. In the single full speech given by Lord Wilberforce, these issues were held to be non-justiciable, on the basis of a general principle of English law that "the courts will not adjudicate upon the transactions of foreign sovereign states" (p.931G and 932A). This was explained as a matter of "judicial restraint or abstention" and to be "inherent in the very nature of the judicial process" (p.931G and 932A). In applying this principle to the facts of the case, Lord Wilberforce said "the important inter-state issues and/or issues of international law which would face the court":

"…..have only to be stated to compel the conclusion that these are not issues upon which a municipal court can pass. …… [T]here are ….. no judicial or manageable standards by which to judge these issues, or to adopt another phrase ….., the court would be in a judicial no-man's land: the court would be asked to review transactions in which four sovereign states were involved, which they had brought to a precarious settlement, after diplomacy and the use of force, and to say that at least part of these were "unlawful" under international law. I would just add ….. that it is not to be assumed that these matters have now passed into history, so that they now can be examined with safe detachment."

We note in parenthesis that the House did not have to address what would have happened to the libel claim, if Buttes Gas had insisted on pursuing it, after it was held that the defence of justification was non-justiciable – though Lord Wilberforce commented that "this would seem unjust". The injustice was avoided since Buttes was held to its offer to abandon the libel claim in this event.

In British Airways Board v. Laker Airways Ltd. [1985] AC 58, Lord Diplock, with whose speech all other members of the House agreed, said that:

"The interpretation of treaties to which the United Kingdom is a party but the terms of which have not either expressly or by reference been incorporated in English domestic law by legislation is not a matter that falls within the interpretative jurisdiction of an English court of law."

This was however in the context of a claim that the US Government had been in breach of treaty obligations (so that the considerations later identified in Buttes Gas were potentially in play). The case was not concerned with a situation where the interpretation of treaty wording may be relevant

to the construction of an agreement with a private party, or with any investment treaty. In Westland Helicopters Ltd. v. Arab Organisation for Industrialisation [1995] QB 282, international arbitration proceedings under a joint venture agreement had led to an award in Westland's favour against the Organisation. The award was converted into a judgment and Westland obtained garnishee orders nisi against six London banks. Colman J was faced with a claim by an Egyptian intervener to be the same as (or a successor to) the Organisation by virtue of domestic Egyptian laws. The justification for such laws was in issue but was said by the intervener to lie in an international law principle of necessity which was in turn said to be invoked by breach by the other member states setting up the Organisation of the treaty by which it was set up. Colman J held such issues to be non-justiciable. On the other hand, in Kuwait Airways Corporation v. Iraqi Airways Company (Nos. 4 and 5) [2002] 2 AC 883, the House of Lords held that the principle in Buttes Gas did not prevent the English courts from identifying the plain breach of the United Nations Charter involved in Iraq's invasion of Kuwait and subsequent expropriation of the Kuwait civil aviation fleet. The problems of adjudication confronting the court in Buttes Gas were absent, the standard to be applied was clear and manageable and the outcome not in doubt: see at paras 25, 113, 125 and 146 per Lords Nicholls, Steyn, Hoffmann and Hope. Lord Steyn regarded the proposition that Buttes Gas established "an absolute rule ….. that courts in England will not adjudicate upon acts done abroad by virtue of sovereign authority" as "too austere and unworkable an interpretation of the Buttes case" (p.1101E).

The narrower and more clear-cut basis on which Mr Greenwood advances his case was stated in the Tin Council case. The International Tin Council ("ITC") was a body constituted by an international treaty not incorporated into law in the United Kingdom. The ITC was also created a legal person in the United Kingdom by article 5 of the International Tin Council (Immunities and Privileges) Order 1972 made under the International Organisations Act 1968. The ITC in its form as a legal person in the United Kingdom - rather than the states who were its members and the parties to the international treaty - was held accordingly to be the contracting party in the contracts it had entered into with the appellant companies. There was no basis in English law for holding the member states liable for its debts, and, even if in international law any such basis had existed, there would have been no basis for enforcing such a liability in a United Kingdom court. If under international law the (unincorporated) treaty made the ITC the agent of its members when contracting, this too was a liability which a United Kingdom court could not enforce, if it could not be found in the 1972 Order. A claim for the appointment of a receiver over ITC's assets, including any claims it might have under the treaty to be indemnified by its members in respect of its liabilities to the appellants, failed for similar reasons.

The two main speeches, with which the three other members of the House of Lords agreed, were delivered by Lords Templeman and Oliver. Lord Templeman's speech stresses the inability of United Kingdom courts to enforce unincorporated "treaty rights and obligations conferred or imposed by agreement or by international law" (see e.g. pp.476H-477A and 480D-E), although it suggests that such courts might look at an unincorporated treaty "for the purpose of resolving any ambiguity in the meaning and effect of the Order of 1972" (p.481G). Lord Oliver expressed himself more widely at pp.499F-500D:

"It is axiomatic that municipal courts have not and cannot have the competence to adjudicate upon or to enforce the rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law. That was firmly established by this House in Cook v Sprigg [1899] A.C. 572, 578, and was succinctly and convincingly expressed in the opinion of the Privy Council delivered by Lord Kingsdown in Secretary of State in Council of India v Kamachee Boye Sahaba (1859) 13 Moo. P.C.C. 22, 75:

‘The transactions of independent states between each other are governed by other laws than those which municipal courts administer: such courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make.’

On the domestic plane, the power of the Crown to conclude treaties with other sovereign states is an exercise of the Royal Prerogative, the validity of which cannot be challenged in municipal law: see: Blackburn v Attorney-General [1971] 1 W.L.R. 1037. The Sovereign acts

‘throughout the making of the treaty and in relation to each and every of its stipulations in her sovereign character, and by her own inherent authority; and, as in making the treaty, so in performing the treaty, she is beyond the control of municipal law, and her acts are not to be examined in her own courts:’ Rustomjee v The Queen (1876) 2 Q.B.D. 69, 74, per Lord Coleridge C.J.

That is the first of the underlying principles. The second is that, as a matter of the constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is res inter alios acta from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant.”

However, he continued at pp.500D-501B by recognising some exceptions:

“These propositions do not, however, involve as a corollary that the court must never look at or construe a treaty. Where, for instance, a treaty is directly incorporated into English law by Act of the legislature, its terms become subject to the interpretative jurisdiction of the court in the same way as any other Act of the legislature. Fothergill v Monarch Airlines Ltd [1981] A.C. 251 is a recent example. Again, it is well established that where a statute is enacted in order to give effect to the United Kingdom’s obligations under a treaty, the terms of the treaty may have to be considered and, if necessary, construed in order to resolve any ambiguity or obscurity as to the meaning or scope of the statue. Clearly, also, where parties have entered into a domestic contract in which they have chosen to incorporate the terms of the treaty, the court may be called upon to interpret the treaty for the purposes of ascertaining the rights and obligations of the parties under their contract: see, for instance, Philippson v Imperial Airways Ltd. [1939] A.C. 332.

Further cases in which the court may not only be empowered but required to adjudicate upon the meaning or scope of the terms of an international treaty arise where domestic legislation, although not incorporating the treaty, nevertheless requires, either expressly or by necessary implication, resort to be had to its terms for the purpose of construing the legislation (as in Zoernsch v Waldock [1964] 1 W.L.R. 675) or the very rare case in which the exercise of the Royal Prerogative directly effects an extension or contraction of the jurisdiction without the constitutional need for internal legislation, as in Post Office v Estuary Radio Ltd [1968] 2 Q.B. 740.

It must be borne in mind, furthermore, that the conclusion of an international treaty and its terms are as much matters of fact as any other fact. That a treaty may be referred to where it is necessary to do so as part of the factual background against which a particular issue arises may seem a statement of the obvious. But it is, I think, necessary to stress that the purpose for which such reference can legitimately be made is purely an evidential one. Which states have become parties to a treaty and when and what the terms of the treaty are are questions of fact. The legal results which flow from

it in international law, whether between the parties inter se or between the parties or any of them and outsiders, are not and they are not justiciable by municipal courts."

The unenforceability in the United Kingdom of unincorporated treaties under the reasoning in the Tin Council case was at the heart of the further decisions of the House of Lords in R .v Home Secretary, ex p. Brind [1991] 1 AC 696, especially at pp.748B and 762C-D per Lords Bridge and Ackner and R v. Lyons [2003] 1 AC 976, especially paras. 27, 79 and 104 per Lords Hoffmann, Hobhouse and Millett. Lord Hoffmann referred to the Tin Council case as establishing that the English courts "have no jurisdiction to interpret or apply" unincorporated international treaties. Mr Lloyd Jones referred us to Lord Steyn's suggestion in In re McKerr [2004] 1 WLR 807 that the reasoning, though not the actual decision, in the Tin Council case would one day receive "comprehensive re-examination". But, like Aikens J, we would regard any root and branch re-examination of its reasoning as a matter for a higher Court.

In ex p. Brind, the House again acknowledged that reference might be made to an unincorporated treaty (in that case the European Convention on Human Rights) to resolve an ambiguity in English primary or secondary legislation (pp.748B-C, 760G-761E and 763C, per Lords Bridge, Ackner and Lowry); and there are a number of modern authorities where English Courts have been assisted in one context or another in deciding upon the proper approach under English law by having regard to treaties or principles in international law: see e.g. A v. Secretary of State for the Home Department [2004] UKHL 56; [2005] 2 WLR 87, per Lord Bingham at paras. 19 and 68; R (European Roma Rights Centre) v. Immigration Officer at Prague Airport [2004] UKHL 55; [2005] 2 WLR 1, per Lord Steyn at paras. 44-45 and Baroness Hale at paras. 98-100. In the Kuwait Airways case, a critical feature of the House of Lords decision was the provisions of the United Nations Charter and Security Council Resolutions; and Lord Steyn at para. 114 rejected as "marching logic to its ultimate unreality" Iraqi Airways's submission that, because these were unincorporated, they must be disregarded.

English courts are not therefore wholly precluded from interpreting or having regard to the provisions of unincorporated treaties. Context is always important. Philipson v. Imperial Airways, to which Lord Oliver referred in the Tin Council case, was itself a case where the English courts interpreted such provisions in an international convention in order to arrive at the meaning of a domestic law contract for carriage by air: see per Lord Atkin at pp.346-9, Lord Russell at p.353 (though he found the meaning of the relevant convention unclear, and ended up applying the domestic principle of contra proferentem) and Lord Wright at pp.364-9. In Arab Monetary Fund v. Hashim ("AMF v. Hashim") [1991] 1 AC 114, 166B, Lord Templeman himself pointed out that "passages extracted and amassed from a lengthy speech" - that of Lord Oliver in the Tin Council case – "deal with different issues and different facts". The present case concerns very different issues from those in play in either the Tin Council case or AMF v. Hashim. Mr Greenwood in argument described the principles in both Buttes Gas and the Tin Council case as "carving out a small and carefully circumscribed sphere". We need therefore to consider with care the proper scope and application in the present context of general statements expressed in different contexts. In The Campaign for Nuclear Disarmament v. The Prime Minister ("the CND case") [2002] EWHC 2759 QB a Divisional Court presided over by Simon Brown LJ (as he was), identified the principle under discussion as a principle:

"whereby the court has no jurisdiction to declare the true interpretation of an international instrument which has not been incorporated into English domestic law and which it is unnecessary to interpret for the purposes of determining a person's rights and duties under domestic law".

The question arises whether in the present case there is a sufficient foothold of the nature

contemplated by these last words.

The answer to this question can in our view only be found by taking into account, first, the special character of a bilateral investment treaty such as the present and, second, the agreement to arbitrate which it is intended to facilitate and which is both recognised under English private international law rules and (since England is the place of arbitration) subject to the Arbitration Act 1996. The Treaty involves, on any view, a deliberate attempt to ensure for private investors the benefits and protection of consensual arbitration; and this is an aim to which national courts should, in an internationalist spirit and because it has been agreed between States at an international level, aspire to give effect - compare the reasoning of the Permanent Court of International Justice in the Jurisdiction of the Courts of Danzig case, cited in paragraph 19 above. The present Treaty holds out to investors on a standing basis the right "to choose to consent in writing to the submission of the dispute for settlement by binding arbitration" in any one of four specified ways (although the fourth, as pointed out, involves further agreement); and, once such consent is given, "either party to the dispute may initiate arbitration in accordance with the choice so specified in the consent". The Treaty expressly goes on to provide that the consent of the relevant State "hereby" to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the relevant investor's written consent, together with the investor's written consent when choosing such arbitration, shall satisfy the requirement for written consent under the ICSID Convention and for "an 'agreement in writing' for purposes of Article II of the [New York] Convention ….."; and that any arbitration shall be held in a State party to that Convention. This purpose can only be fulfilled, in a legal system with a dualist approach to international law like the English, if the operation of the mechanism for consensual arbitration in the Treaty does in fact generate an "agreement in writing". The application of the New York Convention depends on such an agreement, and the provisions of the Arbitration Act 1996 (ss.100-104) relating to the enforcement of foreign arbitral awards give effect to this requirement in English law. We would not in the circumstances accept Mr Greenwood's submission that the consensual aspect of the arbitration contemplated in Article VI of the Treaty is a matter of mere form. It must, as it seems to us, have been intended to give rise to a real consensual agreement to arbitrate, even though by a route prescribed in the Treaty.

Further, as Mr Greenwood accepts, the agreement to arbitrate which results by following the Treaty route is not itself a treaty. It is an agreement between a private investor on the one side and the relevant State on the other. The question may then arise: under what law is that agreement to arbitrate to be regarded as subject, applying the principles of private international law of the English forum? Mr Lloyd Jones argues that the arbitration agreement coming into existence between Occidental and Ecuador is subject to Ecuadorian law (with matters of procedure being subject to the law of England as the place of arbitration). His proposition is that Ecuadorian law has the closest and most real connection with any agreement to arbitrate between a US investor and Ecuador, while United States law would have the closest and most real connection with any agreement to arbitrate between an Ecuadorian investor and the USA. He points out that UNCITRAL article 1(2) contemplates that there may be "provisions of the law applicable to the arbitration from which the parties cannot derogate", and that the normal position with arbitration agreements is that they are subject to some national law. But, dramatic though the expansion has been in recent years in the number of bilateral investment treaties, there is very limited authority anywhere on the nature or effect of arbitrations under such treaties. It is common ground that English private international law recognises an agreement to arbitrate substantive issues such as the present according to international law (cf Orion v. Belfort [1962] 2 Ll.R. 257, 264, per Megaw J, Dicey & Morris, The Conflict of

Laws Vol. 1, para. 16-031 and Mustill & Boyd's Commercial Arbitration (2nd Ed.) pp.80-81), and it is also clear that the present is such. (The words "in accordance with the law" in s.46(1)(a) and "the law determined by the conflict of laws rules which it considers applicable" in s.46(3) of the Arbitration Act 1996 are capable of having this broad meaning, and s.46(1)(b) now adds further to the flexibility of arbitration, by permitting an agreement to arbitrate issues in accordance with other, non-legal considerations.) All this being so, we would be minded to accept that, under English private international law principles, the agreement to arbitrate may itself be subject to international law, as it may be subject to foreign law. That possibility also appears to us to have been embraced as long ago as 1962 by Megaw J in Orion v. Belfort (above). And, if one assumes that this is possible, then that is the view that we would, like the judge, take of this particular arbitration agreement. Although it is a consensual agreement, it is closely connected with the international Treaty which contemplated its making, and which contains the provisions defining the scope of the arbitrators' jurisdiction. Further, the protection of investors at which the whole scheme is aimed is likely to be better served if the agreement to arbitrate is subject to international law, rather than to the law of the State against which an investor is arbitrating.

In the light of the preceding paragraph we have some reservations about one aspect of the judgment of Hobhouse J (as he then was) in Dallal v. Bank Mellat [1986] 1 QB 441. At pp.456B-D, in relation to the principles applicable to consensual arbitration, he may be read as having insisted that any agreement to arbitrate must be subject to the proper law of a municipal legal system, rather than international law. We note that Mustill & Boyd does not read Hobhouse J as requiring more than that any choice of international law to govern an agreement to arbitrate should be express. We are however unclear why even this should be necessary. We add that the issue in Dallal was whether an adjudication of the Iran-US Claims Tribunal should be recognised as a decision by "a court of competent jurisdiction" for the purposes of the principle in Henderson v. Henderson (1843) 3 Hare 100. Hobhouse J in the event recognised it for such purposes on an alternative basis, drawing on the analogy of a "statutory" arbitration. At pp.458A-D, he may on one reading still have thought it necessary to identify some validating municipal law. But he went on to refer to authorities recognising the competence of international tribunals established by treaty or by State acquiescence to adjudicate in other countries upon issues affecting the nationals of, and choses in action sited within, such States (see pp.458A-462E); and to say that "…. competence can be derived from international law and international comity requires that the courts of England should recognise the validity of the decisions of foreign tribunals whose competence is so derived" (p. 461H). We note that in R v. Lyons, Dallal v. Bank Mellat was considered and was treated, at least by Lord Hoffmann, as if concerned simply with a decision of a tribunal set up under an international treaty without any municipal legal authority (cf p.996D-F). Dallal v. Bank Mellat was distinguished not on the ground that decisions of the European Court of Human Rights could not bind because, in English eyes, the Court was no more than a body set up under an international treaty, but because (a) the issues were different and in any event (b) such decisions could not override an Act of Parliament. If English law recognises the binding force of a "quasi-statutory" adjudication at the international level, it is, in our view, hard to see why it should not be possible for a State and an investor to enter into an agreement to arbitrate of the type contemplated by the present Bilateral Investment Treaty subject to international law.

However, if this is not possible and any such agreement must, under English private international law, be subject to a municipal law, then, since the present agreement was clearly intended to be binding, it must be subject to Ecuadorian or United States law. There is no reason to doubt that it would be valid and enforceable as intended under either or both of these laws. But, bearing in mind

that it would be an agreement by a United States investor relating to an investment in Ecuador and to an alleged breach of duty by Ecuador towards the investor in Ecuador, we would (on the present hypothesis) accept Mr Lloyd Jones's submission that the governing law would be that of Ecuador. Ultimately, however, we do not consider that it matters what law governs the agreement to arbitrate. The strength or otherwise of Mr Greenwood's submissions that the English court cannot or should not entertain a challenge to the arbitrators' jurisdiction under s.67, because this would involve considering, construing and applying the Treaty provisions regarding jurisdiction, cannot depend critically upon whether or not the agreement to arbitrate is subject to international or Ecuadorian law. Even if it were generally subject to Ecuadorian law, it would not be possible to consider, construe or apply the Treaty provisions regarding jurisdiction without taking into account its international legal meaning as between Ecuador and the USA.

The question thus squarely arises whether the principles in either Buttes Gas or the Tin Council case preclude the English Court from considering a challenge to the jurisdiction of the arbitrators, when the determination of this challenge would involve construing the Treaty provisions by reference to which their consensual jurisdiction is defined. Mr Greenwood submits that nothing in the Treaty itself can affect the application of such principles. They are domestic legal principles, not dependent upon or capable of being altered by treaty, still less by a Treaty to which the United Kingdom is not party. He submits that, since the jurisdiction of the arbitrators is to be ascertained by examination of the Treaty, any determination of the extent of their jurisdiction will also reflect or bear on the proper scope of the issues which the two States have agreed to discuss or resolve between themselves under Article V of the Treaty and which, if no such resolution is achieved, either State is able to refer to inter-State arbitration under Article VII. But that does not, we think, make the subject-matter of the dispute between an investor and a State the same as any dispute (if any) that may exist between the two States. And, even if it does, we consider that Mr Greenwood's submissions fail to recognise the combined force of the two factors mentioned in the first two sentences of paragraph 32 above. The case is not concerned with an attempt to invoke at a national legal level a Treaty which operates only at the international level. It concerns a Treaty intended by its signatories to give rise to rights in favour of private investors capable of enforcement, to an extent specified by the Treaty wording, in consensual arbitration against one or other of its signatory States. For the English Court to treat the extent of such rights as non-justiciable would appear to us to involve an extension, rather than an application, of existing doctrines developed in different contexts. Mr Greenwood highlights the possibility that a State might be upset by a decision interpreting a bilateral investment treaty, and drew our attention to a letter of protest dated 1 October 2003 by the Swiss Government following SGS Société Générale de Surveillance SA v. Pakistan ICSID Case ARB/01/13. But the Treaty itself provides for separate dispute resolution between a private investor and either of the States party to it, both of whom must be taken to have been content to accept any such risk. And the argument anyway carries him too far. Société Générale de Surveillance SA v. Pakistan was a decision not of a court, but of an ICSID arbitration tribunal to which the State had on any view agreed. Further, recourse to a court, when and if permissible, would (one hopes) be likely to correct any error in interpretation, rather than to perpetuate or introduce one. It is not without irony that Ecuador is here seeking (without any protest by the United States) to invoke the Court's jurisdiction, while Occidental is resisting it.

In the case of an ICSID arbitration, no recourse to the English court is currently possible under the Arbitration Act 1996: see the Arbitration (International Investment Disputes) Act 1966 s.3(2). The ICSID scheme also differs in having its own enforcement mechanism, so that the New York Convention is inapplicable. Neither of these factors suggests to us that the English Court should

refrain from exercising jurisdiction under s.67 in respect of an arbitration conducted under Article VI.3(a)(iii) and UNICITRAL rules.

Mr Greenwood also referred us to the provisions in the Treaty for inter-State arbitration. We would agree that it is highly probable that courts could not exercise jurisdiction over an inter-state arbitration under Article VII (because it would not be based on an agreement to arbitrate within the meaning of the Arbitration Act 1996 or of the New York Convention and/or because of s.9(2) of the State Immunity Act 1978). But again this has in our view no bearing on the question whether the English Court can and should exercise jurisdiction over an investor-State arbitration under Article VI.

Nonetheless, we shall consider further whether there is any basis for the principles in Buttes Gas and the Tin Council case to apply having regard to the terms and effect of the Treaty and to what has taken place consequent upon it. Here, the provisions of the present Treaty between the two States contemplate and have led, as between one of the States and an investor, to an agreement - recognised under English private international law principles - to arbitrate a dispute which may cover the interpretation of any aspect of the Treaty, including aspects going to the arbitrators' jurisdiction. That agreement to arbitrate, recognised under English private international law, gives rise to rights between the parties to it, including the right to have disputes arbitrated within its terms and not to have disputes arbitrated which fall outside its terms.

We see no good reason why any arbitration held pursuant to such an agreement, or any supervisory role which the court of the place of arbitration may have in relation to any such arbitration, should be categorised as being concerned with "transactions between States" so as to invoke the principle of non-justiciability in Buttes Gas. No-one suggests that any of such issues was non-justiciable before the arbitrators, whether they were issues going (a) to their jurisdiction or (b) to the substance of the investor's claims. It is apparent that such arbitrations have become frequent, and that the majority have led to published awards, of which we have been shown a considerable number. Appeals on the substance of such awards could not come before an English court under s.69(1) of the Arbitration Act 1996 except in so far as they were regarded as raising a question of law within the meaning of that section. But it is not suggested that there is any equivalent limitation of the issues of jurisdiction which may normally be raised in court under s.67. If issues regarding jurisdiction are justiciable before the arbitrators, we do not find it easy to see why they should be regarded as non-justiciable before the English Court. It is true that, on our preferred view, the present agreement to arbitrate was subject to international law, and that any doctrine of non-justiciability operates, of its nature, in domestic rather than international law (cf Bank Nacional de Cuba v. Sabbatino 376 U.S. 398). But the issues of jurisdiction, with which the arbitrators were entrusted, were from a technical viewpoint issues which a court of law would also appear qualified and able to determine. Differing views may, perhaps, be held by some as to whether the carefully thought out scheme of the Arbitration Act 1996 now fulfils all the (it may well be, differing) needs or desires of all who resort to English arbitration subject potentially to the English Courts' jurisdiction under the Act. But this case is not a forum for arguing about such matters, and it has not been argued as if it were. This case concerns not the scheme of the Arbitration Act 1996, but whether there is a general principle of non-justiciability in English law which precludes the conventional operation of the Act, for reasons of constitutional propriety or because of wider considerations of judicial restraint, having regard to inherent limitations in the judicial role and/or to this country's national and international interests.

As to judicial restraint, we accept that the resolution of the present issues of jurisdiction is not likely to be as clear-cut as was the case with the different issues of international law in the Kuwait Airways

case. But nothing appears to have been or to be likely to be involved in the resolution of the present issues which could make them remotely comparable in difficulty of manageability or resolution or in sensitivity to the issues in Buttes Gas. It is also inherent in the Treaty itself that issues of jurisdiction involving one State will be determined in the absence of the other, by an independent arbitration tribunal. We cannot see how the objection to their being raised in court under s.67 can in these circumstances be said to depend on any limitation "inherent in the very nature of the judicial process". We find it equally impossible to see how the objection could be said to raise any considerations relating to this country's national and international interests remotely equating to those found in Buttes Gas.

Mr Greenwood sought to support his submissions on non-justiciability by reference to the decision of the International Court of Justice in East Timor (Portugal v. Australia) (1995) ICJ 90. The Court there refused, in the absence of Indonesia as a party, to entertain a claim brought by Portugal challenging Australia's right to conclude a treaty with Indonesia to delimit the continental shelf in the area of the Timor Gap. Portugal's claim was based on the proposition that it alone remained in law the administering power in respect of East Timor, despite the Portuguese authorities' withdrawal from East Timor in 1975 followed by Indonesia's intervention in and control of East Timor since 1975. Portugal's claim against Australia necessarily depended upon showing that Indonesia had acquired no legal status in respect of East Timor and that Australia and Indonesia therefore had no right to enter into the Treaty. The very subject-matter of Portugal's claim was the lawfulness of Indonesia's conduct. But the Court also made clear that it was "not necessarily prevented from adjudicating when the judgment it is asked to give might affect the legal interests of a State which is not party to the case" (para.34). Further, the position is clearly quite different where, as here, a Treaty between two States makes clear that an investor national of one of the States may pursue direct rights against the other, without the involvement, presence or even consent of his own national State. Where the Treaty contemplates and provides for dispute resolution means of this nature, the principle of international law to be found in the East Timor Case cannot help in either international or national law to identify whether or when a national court may appropriately exercise a supervisory jurisdiction provided by the relevant procedural law.

Mr Greenwood also held out to us, briefly, the spectre of an English Court having to reconsider the correctness of an arbitration panel's ruling on the validity of the Treaty. Although there is no such issue in this case, in another case an issue might, he observes, arise about, say, duress or the completion and validity of the Treaty. We leave aside the improbable nature of such an issue. Even so, we question the example of duress, because that would appear likely only to make the Treaty voidable, and so not to affect the jurisdiction of an arbitration agreement arising from the operation of its terms. It is, we suspect, even conceivable that a valid agreement to arbitrate could result from the operation in good faith of the terms of a Treaty which for some reason subsequently proved not to have been validly executed. However that may be, (a) we are not persuaded that it would necessarily be incongruous for an English Court to reconsider even an issue of validity, if the arbitrators had done so, and (b) if it would be incongruous, the reason could well be that, in this particular context as opposed to the present, the principle in Buttes Gas did apply.

As to the narrower principle of jurisdiction stated in the Tin Council case, Mr Lloyd Jones submits that the present situation is on all fours with Philipson v. Imperial Airways. The judge did not go so far, pointing out that in Philipson there was "a Municipal law contract". But, as we have observed, under English private international law, an agreement to arbitrate may be subject not merely to English, but also to any foreign law or to public international law. The mere fact that the agreement was here subject to international law does not seem to us to differentiate the present case

from Philipson.

A more compelling distinction between this case and Philipson is perhaps that the contract in Philipson was entirely independent of the Treaty, and, since it simply incorporated Treaty concepts or terms, independent of the Treaty's validity in international law. That brings one back to the position, already discussed, of a challenge to jurisdiction based on a contention that the Treaty was for some reason invalid. The spectre briefly conjured up and argued by Mr Greenwood in this regard relates to a different kind of jurisdictional issue from the present. The present jurisdictional issues arise under an agreement to arbitrate which both parties to the arbitration accept to have been validly made and implemented. The English Courts, which under the relevant English law principles of private international law recognise the agreement, are being asked to interpret its scope in order to give effect to the rights and duties contained in the agreement to arbitrate. That in our view satisfies both the essential elements of the Philipson case, and the criterion for jurisdiction identified in the CND case.

On no view do we regard it as a critical distinction that one party to the present arbitration was a State, Ecuador. Indeed, one may argue that the presence as party to the arbitration of the State arguing (and indeed raising) the relevant jurisdictional issues makes it easier, rather than more difficult, to contemplate an English Court ruling on the interpretation of the scope of the arbitration provisions in the Treaty. And we consider that the fact that the States party to the Treaty deliberately chose to provide for a mechanism for dispute resolution which invokes consensual arbitration, with its domestic legal connotations, is a factor which should make the English Court hesitate long about subjecting such arbitration proceedings to special principles of judicial restraint developed in relation to international transactions or treaties lacking any foundation or incorporation in domestic law.

These considerations are by themselves in our view sufficient to decide this appeal in Ecuador's favour. But Mr Lloyd Jones also advances two fall-back arguments. The first is based on evidence that, under Ecuadorian law, the Treaty is self-executing, and becomes part of Ecuadorian law – indeed at a level superior to that of any ordinary domestic law. On that basis, he submits that, even if the agreement to arbitrate was not itself a sufficient justification for an English Court to consider the scope of the arbitration contemplated by the Treaty, the incorporation into Ecuadorian law removed any objection. He referred to AMF v Hashim, where the English Court was able to recognise the existence of the AMF, because it had been incorporated in the United Arab Emirates. But matters of status and contract are subject to different principles in private international law. If the agreement to arbitrate had been subject to Ecuadorian law, Mr Lloyd Jones's argument could have had force. As it is, it seems to us of no assistance to Ecuador.

Mr Lloyd Jones also suggests, with reference to Jones v. The Ministry of the Interior (the Kingdom of Saudi Arabia) [2004] EWCA Civ 1394; [2005] 2 WLR 808, that it would be an infringement of the right of access to the courts under article 6 of the European Convention on Human Rights, if the issue of the arbitrators' jurisdiction could not be raised under s.67 of the Arbitration Act 1996. We find it unnecessary to go into this very briefly argued suggestion, which has on its face some implausibility in the case of a State claiming to be protected in respect of its supposed human rights.

The judge's approach and further considerations

The judge took a different route to the same conclusion. He considered, firstly, that s.67 by itself confers on Ecuador a right to challenge the jurisdiction of the arbitrators, and, secondly, that the exercise of considering the arbitrators' jurisdiction is no different in kind from that undertaken by Hobhouse J in Dallal v. Bank Mellat.

As to the first point, we would agree with Mr Greenwood that there is a potential problem about

treating s.67 as by itself conferring a right for the purposes of satisfying the test suggested by Simon Brown LJ in the CND case. It is not so much that s.67 is procedural, although Simon Brown LJ was probably focusing on substantive rights. It is rather that the prior question arises whether s.67 is itself to be read as subject to any principle of non-justiciability, and this question has, we think, to be answered by looking more widely than at s.67 alone. Mr Lloyd Jones does not suggest that s.67 is in mandatory terms, capable by themselves of overriding any principle of non-justiciability. Bearing in mind its use of the word "may", its language could be read as subject to such principle, particularly when s.81(1) provides that "Nothing in this Part shall be construed as excluding the operation of any rule of law consistent with the provisions of this Part ….". So it is necessary to look beyond s.67 in order to determine whether the principle of non-justiciability extends to prevent an English Court considering arbitrators' jurisdiction in circumstances such as the present.

Turning to the judge's second point, in our view Dallal and later authority considering it do offer some further support to Ecuador's case on this appeal. It is true that Hobhouse J was not concerned with any challenge to the jurisdiction of the Iran-United States Claims Tribunal over the issues which it determined; and it is also true, as already observed, that on one reading of his judgment he was concerned to find a basis in municipal law for any recognition of that Tribunal's adjudication (cf pp.456B-C and 458A-D). On the other hand, he was on any view prepared to look at unincorporated international treaties and at State conduct or acquiescence in order to determine whether to recognise the Tribunal's competence and decision; and R v. Lyons throws no doubt on the legitimacy of this (cf paragraphs 30-32 above). At p.462D Hobhouse J pointed out that, in determining whether the Tribunal's adjudication was a decision by a "court of competent jurisdiction" for the purposes of the principle in Henderson v. Henderson, all he was doing was "giving effect to an English procedural remedy in respect of a procedural complaint that is recognised by English law". Neither judicial restraint nor the unincorporated nature of the relevant treaty or international law prevented him doing this. Once again, this demonstrates that, given the right context, the English Court can and will have regard to an international treaty and general international law. As in Dallal, so here Ecuador is seeking a procedural remedy which is on its face available in respect of proceedings over which the English Courts have been given, under the Arbitration Act 1996, a certain (albeit limited) supervisory jurisdiction. In our view, although Dallal is not direct authority on the present point, it shows that the principle of non-justiciability is not, in any of its aspects, absolute, and need not and should not be applied over-rigidly. We add that the more stress is laid, as Mr Greenwood sought to do, on the relatively formal way in which consensus to arbitrate was achieved under the present Treaty, the closer the analogy between the present arbitration and the "statutory" arbitration which Hobhouse J identified in Dallal.

The fact that the Treaty is at pains to bring about an award capable of enforcement under the New York Convention is in our view a still more significant factor. The Convention provides both for recognition and enforcement and, under Article V, for limited circumstances in which recognition and enforcement "may be refused, at the request of the party against whom it is invoked" if that party provides appropriate proof of such circumstances. These include that:

"(a) ….. the said agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the law of the country where the award was made; or ……

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; ….".

These provisions, relating to recognition and enforcement and to the circumstances in which the same may be refused, are reflected in English law in s.103(1) and (2)(b), (c) and (d) and (4) of the Arbitration Act 1996. In a judgment in Dardana Ltd. v. Yukos Oil Co. [2002] 2 Ll.R. 326, with which the other members of the Court agreed, Mance LJ rejected (at p.333) an argument that the word "may" in s.103(2) had a "permissive, purely discretionary, or [as he saw it] arbitrary, force". The word "may" in that subsection must also have been intended to reflect the corresponding word in the New York Convention.

The present Treaty expressly contemplated the application of the New York Convention. It seems to us that all concerned must be taken to have understood that the usual grounds for opposing recognition and enforcement would apply, including any grounds based on want or excess of jurisdiction by the arbitrators, to which s.103 of the 1996 Act gives effect. The wider doctrine of non-justiciability, inspired by the United States "political question" doctrine and introduced into English law in Buttes Gas, cannot be regarded as directed to or as undermining this point. The narrower doctrine, based on the principle that international agreements do not create direct rights and obligations in favour of private persons and recognised in English law in the Tin Council case, is well established in international law – see the Jurisdiction of the Courts of Danzig case. But that case also shows that the position is quite different in international law where two States have deliberately agreed to confer rights intended to be enforceable domestically on private persons. Viewed in that context, we see no incongruity in a conclusion that the consensual arbitration intended under the Treaty carries with it the usual procedural and supervisory remedies provided under English law as the relevant procedural law. That being so, we do not see any sensible basis for suggesting that there is or should be any difficulty about an English Court, in the context of an English award, determining the scope of arbitrators' jurisdiction under s.67 or (in the case of an application to enforce) under s.66. It is also to be noted that, under s.66, the English Court is given no option at all but to refuse enforcement, if "the person against whom it is sought to be enforced shows that the tribunal lacked jurisdiction to make the award". Mr Greenwood suggests valiantly that a sensible distinction might, if necessary, be drawn between the "proactive" intervention involved under s.67 and the "reactive" involvement of a court under ss.66 and 103. That would be a quite inadequate basis for the application of what is said to be a fundamental, or even constitutional, principle regarding non-justiciability in the one context but not in the other. We do not consider that anything in English law compels so unsatisfactory a conclusion. We also note that we were shown cases in which courts in other countries have exercised or assumed that it was open to them to exercise equivalent supervisory power to review the jurisdiction of arbitrators appointed under investment treaties – see e.g. Czech Republic v. CME Czech Republic B.V. (Svea Court of Appeal, Sweden; 15 May 2003), especially at pp.69-71 and Canada v. S.G. Myers, Inc. (Kelen J, Canadian Federal Court; 13 January 2004), especially paras. 33-35. We were not shown any authorities to contrary effect.

For completeness, we mention one further minor point. The Treaty provides, as one of the available dispute resolution methods, recourse to the courts or administrative tribunals of the State party to the dispute. In a country like Ecuador with a monist system, under which the Treaty was self-executing at a high constitutional level, it would not even require legislation to enable investors, if they wished, to pursue the State in its own courts on any of the Treaty grounds. The scope of the concept of "investment dispute" in Article VI and of the protection afforded by Article X would then

be determined by a domestic State court. This possibility is at least to be borne in mind when considering whether the English Court should regard as non-justiciable a similar issue, when sought to be raised (here by the State itself) on a challenge to the jurisdiction of an arbitration panel appointed under an agreement reached as contemplated by the third of the available dispute resolution means.

Conclusions

We accept that the English principle of non-justiciability cannot, if it applies, be ousted by consent. We are however concerned with issues regarding its proper scope and interpretation in a novel context. The considerations which we have identified in paragraphs 51-56 above all militate against an understanding of that principle, in either of its aspects, which would tend, if anything, to undermine the chosen scheme of those involved. They reinforce the conclusion that we would, for reasons summarised in paragraphs 31-47 above, anyway reach.

For these reasons, we would conclude that the judge reached the correct conclusion and would dismiss Occidental's appeal in respect of Aikens J's determination of the preliminary point in favour of Ecuador.