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International Decisions: Occidental Exploration and Production Company V. The Republic of Ecuador

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INTERNATIONAL DECISIONS

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A NOTE TO OUR READERS

> With this issue, Daniel Bodansky assumes his duties as editor of this section of the *American Journal of International Law*. The Board of Editors wishes to express its appreciation to David D. Caron for his distinguished service in this capacity since April 2003 (vol. 97, no. 2).

Bilateral investment treaties—national treatment—fair and equitable treatment—value-added tax

OCCIDENTAL EXPLORATION & PRODUCTION CO. V. REPUBLIC OF ECUADOR. Final Award. London Court of International Arbitration Administered Case No. UN 3467. *At* <http://ita.law.uvic.ca/documents/Oxy-EcuadorFinalAward_001.pdf>.
Arbitral tribunal, July 1, 2004.

In July 2004, an ad hoc arbitral tribunal broke new ground in investment and tax law, and awarded a U.S. States investor, Occidental Exploration and Production Company (OEPC), U.S.$75 million for the wrongful conduct of the Republic of Ecuador.[1] At issue was Ecuador's tax system, the interpretation of an investment contract, and refund requests for value-added tax (VAT). Although the tribunal did not find expropriation or impairment of OEPC's investment, it held that Ecuador violated the United States/Ecuador bilateral investment treaty (BIT)[2] by (1) failing to provide national treatment to OEPC and (2) denying OEPC fair and equitable treatment.

During the 1980s and 1990s, OEPC provided oil production services to Petroecuador, a state-owned corporation responsible for the planning, organization, and operation of oil exploration and exploitation in Ecuador. Petroecuador reimbursed OEPC for the VAT that OEPC paid on local acquisitions.[3] In 1999, OEPC and Petroecuador entered into a modified participation contract through which OEPC became an equity participant in the oil extraction, exported its portion of oil, and received compensation from Petroecuador under a participation formula known as "Factor X."[4] The contract also changed how OEPC was reimbursed for its VAT payments; rather than having VAT reimbursements "pass through" Petroecuador to OEPC as the expenses of a contractor providing services, OEPC was responsible for making VAT payments and collecting applicable refunds.[5]

During the negotiation of the 1999 contract, Ecuador's tax laws were in flux. OEPC addressed this uncertainty in two ways. First, the contract protected OEPC from changed economic expec-

[1] Occidental Exploration & Production Co. v. Republic of Ecuador, Final Award, London Court of International Arbitration Administered Case No. UN 3467 (arbitral tribunal July 1, 2004), *at* <http://ita.law.uvic.ca/documents/Oxy-EcuadorFinalAward_001.pdf> [hereinafter Award].

[2] Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment (Aug. 27, 1993) *at* <http://www.sice.oas.org/bits/usecu_e.asp> [hereinafter U.S.-Ecuador BIT].

[3] Award, *supra* note 1, paras. 25–26, 95.

[4] *Id.*, paras. 1, 27–28, 95–96.

[5] *Id.*, paras. 26, 30, 96. A central issue in the arbitration was determining whether OEPC was entitled to a refund or tax credit. *Id.*, paras. 2–3, 122–34.

tations that might arise from alterations to Ecuador's tax law and VAT collection policies.[6] Second, prior to entering into the new contract, OEPC sent a *consulta* to the Servicio de Rentas Internas (SRI)—Ecuador's tax authority—inquiring about its liability for VAT for goods imported to support the contract. OEPC did not ask about VAT for services or VAT refunds. In response, SRI informed OEPC that the goods in question would be subject to VAT.[7]

Initially, under the 1999 contract, OEPC applied for[8] and received VAT refunds from SRI. Later, however, SRI changed its position and denied the refund requests. Asserting that the contract provided OEPC with VAT refunds through the Factor X payments and that the nature of OEPC's investment activities did not provide a basis for a refund as a matter of Ecuadorian tax law, SRI issued resolutions requiring OEPC to disgorge previous refunds and denying future requests for VAT refunds.[9]

Confronted with these facts, the tribunal determined that the 1999 contract was "central to the dispute"[10] and held that the Factor X compensation formula did not include a VAT refund.[11] It then denied OEPC's claim that Ecuador expropriated or impaired OEPC's investment. While acknowledging that expropriation need not involve the transfer of title and that taxes and other regulatory measures can result in expropriation, the tribunal held that there was no expropriation under the BIT; OEPC was not deprived of the use or reasonably expected economic benefit of its investment in Ecuador.[12] Similarly, the investment was not impaired through arbitrary or discriminatory measures. The crucial finding in this context was that there was no impairment since OEPC continued to exercise all of its rights to operate, maintain, use, enjoy, acquire, expand, and dispose of its investment.[13] Although no impairment was found, in *obiter dicta* the tribunal suggested that because "SRI was confronted with a variety of practices, regulations and rules dealing with the question of VAT," the situation was "a confusing [one] into which the SRI had the task of bringing some resemblance of order." Moreover, it was that "very confusion and lack of clarity that resulted in some form of arbitrariness, even if not intended by the SRI."[14]

The tribunal held that Ecuador breached the BIT in two ways. First, Ecuador breached its national-treatment obligation by failing to treat OEPC's investment as favorably as other investments—whether of Ecuador's "own nationals or companies, or of nationals or companies of any third country"—in what the BIT refers to as "in like situations."[15] Although certain industries received VAT refunds in connection with their export activities, SRI's position was that the oil industry was ineligible to receive them.[16] In its determination of which investments were in like circumstances, the tribunal did not evaluate whether OEPC received less favorable treatment than Ecuadorian companies in the oil sector; rather, the tribunal considered the appropriate

[6] In the event of a modification of the tax regime, for example, the parties would amend the contract to "reestablish the economy" of the original bargain. *Id.*, paras. 103–05, 111.

[7] OEPC asked if imports of "equipment, machinery, materials and other consumable supplies" would be subject to VAT. *Id.*, para. 102. The Award suggests that under the tax law then in effect, OEPC would have been entitled to a refund and that services were not subject to VAT. *Id*; *see also id.*, paras. 117–55 (discussing pre– and post–May 1999 Ecuadorian tax law).

[8] OEPC believed it was entitled to apply for VAT refunds since it believed that Factor X payments did not include the equivalent of VAT refunds. The 1999 contract did not refer to VAT refunds and referred only to "collection" (i.e., payments and not refunds) of VAT. Petroecuador also lacked legal capacity to negotiate with OEPC regarding VAT. *Id.*, paras. 103–08.

[9] *Id.*, paras. 3, 32.

[10] *Id.*, para. 73.

[11] *Id.*, paras. 114–15.

[12] *Id.*, paras. 83, 85, 89, 92. The tribunal explained that a deprivation must involve a significant part of the investment and affect the use of property or a reasonably expected economic benefit. *Id.*, paras. 87–90.

[13] *Id.*, para. 161; *see also* U.S.-Ecuador BIT, *supra* note 2, Art. II(3)(b).

[14] Award, *supra* note 1, paras. 162–63; *see also id.*, para. 164 (suggesting incorrect contractual interpretation was arbitrary).

[15] *Id.*, para. 167. The BIT, *supra* note 2, Art. II(1), requires that investments be treated "on a basis no less favorable than that accorded in like situations to investment . . . of its own nationals . . . or of nationals . . . of any third country, whichever is most favorable."

[16] Award, *supra* note 1, paras. 136, 168. The industries eligible for refunds included, for example, bananas, flowers, lumber, mining, African palm oil, and seafood. *Id.*

class of comparison to be exporters generally.[17] Even though SRI did not intend to discriminate against foreign investors, the tribunal concluded that Ecuador gave OEPC less favorable treatment because local companies (for example, flower exporters) received VAT refunds and OEPC (as a foreign investor in the oil industry) did not.[18] The tribunal neither considered whether Ecuadorian oil companies received more favorable treatment than OEPC nor evaluated whether foreign exporters in other sectors received treatment less favorable than their local counterparts.

Second, the tribunal held that Ecuador violated the BIT by failing to provide fair and equitable treatment.[19] Using the preamble of the BIT[20] and other arbitration awards as guidance, the tribunal determined that the lack of investment stability and Ecuador's failure to provide a transparent, predictable framework for planning resulted in a denial of fair and equitable treatment.[21] The tribunal pointed to SRI's "wholly unsatisfactory and thoroughly vague" response to OEPC's *consulta*, the change in Ecuador's tax law,[22] and the lack of clarity about tax practice and regulations.[23] The tribunal also concluded that a breach of fair and equitable treatment "automatically entails an absence of full protection and security."[24]

Finally, the tribunal determined that Ecuador's failure to provide a stable and predictable regulatory framework violated the minimum standard of treatment under international law because there was "certainly an obligation not to alter the legal and business environment in which the investment has been made."[25] There was little indication, however, as to what elements constitute a "legal and business environment."

* * * *

Occidental is the first non-NAFTA investment-treaty arbitration award that involves tax issues, but it has implications beyond taxation. There are several noteworthy aspects of the tribunal's decision. In particular, the tribunal (1) may have gone further than necessary in its analysis of "arbitrary" measures impairing investment, (2) articulated broad rules that did not consider a sector-by-sector analysis of national treatment, and (3) compressed the analysis of separate rights into one test for evaluating fair and equitable treatment. While the potential breadth of award is somewhat disconcerting, *Occidental* would best be construed as confined to its specific

[17] *Id.*, paras. 173–76.

[18] *Id.*, para. 177.

[19] *Id.*, para. 180. In this context, the Award quotes Article II(3)(a) of U.S.-Ecuador BIT, *supra* note 2, which provides: "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 favorable than that required by international law."

[20] The preamble provides that "fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources." U.S.-Ecuador BIT, *supra* note 2, pmbl.; Award, *supra* note 1, para. 183.

[21] Award, *supra* note 1, paras. 183–85.

[22] Until the end of April 1999, Ecuador charged VAT only on a limited number of goods, but this policy was then changed to include almost all goods and services. *Id.*, paras. 119–21. Under the old regime, Article 65 provided exporters with a tax credit and refund. Under the new scheme, Article 65 dealt only with tax credits (not refunds), and Article 69 provided that if VAT was paid on local purchases or importation of goods used in the "manufacture of goods," there was a right to a tax refund. Award, *supra* note 1, paras. 122–25. New Tax Regulation 169 provided a clear procedure for receiving a refund under Article 69, but there was contradictory case law as to whether oil producers—who were extracting a natural resource and then exporting it with minimal modification—were manufacturers. *Id.*, paras. 129, 140–42. The definition of "manufacturing" is a perennial question in tax law.

[23] Award, *supra* note 1, paras. 184, 186, 187, 196.

[24] *Id.*, para. 187.

[25] *Id.*, paras. 190–92. Part of Ecuador's legal framework was Andean Community law, which the tribunal concluded formed a basis for finding that OECP was entitled to a VAT refund. *Id.*, paras. 145–52. The tribunal noted that international law does not generally provide a right to a VAT refund, except in the specific case of Andean Community law; but it did not factor this consideration into its analysis as to whether there was a violation of fair and equitable treatment. *Id.*, para. 191.

facts—namely, a VAT dispute in which a state-related entity is a party to a contract that expressly deals with VAT matters.[26]

The tribunal's analysis of arbitrary and discriminatory impairment included *obiter dicta* that may have inadvertently opened a new realm of liability. Specifically, the tribunal suggested that if a regulator fails to provide clarity when confronted with a confusing array of statutes, regulations, and practices, then "that very confusion and lack of clarity [can] result[] in some form of arbitrariness."[27] It is possible that there were facts suggesting that Ecuador deviated substantially from what might otherwise be considered acceptable governmental behavior—which would include normal levels of regulatory uncertainty—but the tribunal articulated no such facts.[28] There is also little explanation of how or why the regulatory situation that OEPC faced is distinguishable from any other complex regulatory regime. This gap in the analysis suggests that future tribunals should be cautious in extending *Occidental*'s analysis or conclusions to future cases.

No regulatory framework is absolutely clear and free of inconsistencies. If the tribunal intended to expand the right to avoid arbitrary impairment of investments so that it encompasses regulatory confusion, the award could signal the beginning of a "void for vagueness" doctrine in investment-treaty arbitration.[29] Particularly because many countries have complex regulatory regimes that provide significant interpretative discretion to implementing authorities and government regulators, adopting such a standard in future cases involving regulatory inconsistency could well have unanticipated adverse effects. On one hand, it might mean that states will be liable for regulatory regimes that are considered too vague or unclear. On the other hand, it might also mean that states will potentially be liable—for changing the "business and legal environment"—if they attempt to correct a lack of clarity or enact a new regulatory framework. Irrespective of this double bind, if current tax reform efforts in the United States are successful,[30] one wonders whether foreigners adversely affected by the resulting tax structure might be able to use *Occidental* to obtain a damage award against the United States.[31] Moreover, given the potential for liability and the cost of defending against claims such as those arising in *Occidental*, states may have an economic incentive to avoid making improvements to their regulatory frameworks. Ironically, states sensitive to these concerns may be precisely those where reform is most needed—which suggests that the needs of foreign investors may be better served by eliminating economic incentives to retain a static regulatory environment. Given the possible implications of *Occidental*, future tribunals may wish to consider whether the use of broad *obiter dicta* is appropriate in investment-treaty arbitration—where, although arbitration awards technically have no *de jure* precedential value, practitioners, investors, and states rely upon such decisions as *de facto* precedents and as indicators of their potential rights and liabilities.

Occidental may also have unintentionally strayed too far in its national-treatment analysis—specifically with respect to its conclusion that a class comprising all exporters (irrespective of

[26] There are numerous places in the Award where the tribunal makes express references to specific provisions of 1999 contract, *see, e.g.,id.*, paras. 29, 73, 93, 115, 134, 164, 166, 184, and it even explains that its analysis of the contract "is case specific," *id.*, para. 115. Another factor adding to the distinctiveness of the case is the tribunal's analysis of Andean Community law, which played a role in the tribunal's determination that OEPC was entitled to a refund. *See id.*, paras. 146–52.

[27] *Id.*, para. 163.

[28] To the contrary, despite the finding of liability, various statements in the Award suggest that the tribunal favorably viewed Ecuador's regulatory efforts. *See id.* (noting "the decisions taken by SRI do not appear to have been founded on prejudice or preference rather than on reason or fact"); *id.*, para. 177 (noting that the treatment of OEPC "has not been done with the intent of discriminating against foreign-owned companies" and that "SRI is a very professional service that did what it thought was its obligation to do under the law").

[29] This standard may not be dissimilar from the void for vagueness doctrine in U.S. administrative and tax law. The author is grateful to Professors Kristin Hickman and Gregg Polsky of the University of Minnesota for noting this resemblance.

[30] On January 7, 2005, President Bush issued an executive order to establish a Presidential Advisory Panel on Federal Tax Reform. *See* Executive Order 13,369, *at* <http://www.whitehouse.gov/news/releases/2005/01/>. The advisory panel's report will be issued in September 2005. *See* <http://www.taxreformpanel.gov>.

[31] Confining the reasoning of *Occidental* to the particular facts and law of the case may give this argument less force.

the nature of the commercial activities) constitutes a group that is in like circumstances. By broadening the class of businesses in "like circumstances" and failing to conduct a sector-by-sector analysis, the tribunal has made it easier for investors to establish a BIT violation. While the tribunal's determination may reflect the economic reality of the impact of VAT refunds, there are other reasons why future tribunals should proceed cautiously when drawing inferences from *Occidental*. A broad interpretation of "like circumstances" runs counter to a legitimate expectation that treaties should be interpreted in accordance with their plain meaning[32] and also appears to ignore that the purpose of national treatment is to provide competitive equality between national and foreign investors, and to prevent blind preference of domestic investors.[33] *Occidental* suggests, in effect, that if states wish to avoid future liability, they must treat all exporters alike irrespective of the otherwise legitimate, nondiscriminatory bases for making distinctions among economic sectors.

Rather than using the approach suggested by *Occidental*, future tribunals analyzing "like circumstances" may wish to consider reasoned analyses from NAFTA tribunals[34] and the Organisation for Economic Co-operation and Development's commentary[35]—which suggest that when analyzing "like circumstances," comparisons should be made between companies operating in the same sector. In contrast to *Occidental*, these sources acknowledge that states may have legitimate bases for making economic distinctions—ones that are not intended to have a detrimental impact on foreign investors.[36] For example, since Ecuador's oil industry accounts for approximately 40% of the country's export earnings and 25% of its public sector revenues,[37] there is obviously a compelling reason to regulate it effectively. Why should a state be prevented from distinguishing between economic sectors when revenue can be generated efficiently by taxing a sector with a significant, as opposed to a *de minimis*, impact on the economy—as long as the available evidence suggests that, for each distinct sector, foreigners and nationals are subject to the same treatment? Moreover, industries receiving VAT refunds—such as banana, flower, and lumber producers, as well as fisheries[38]—involve related types of economic activity: the cultivation of renewable products. In lieu of a policy that rewards the extraction and harvesting of a nonrenewable resource, should states not be able to reward economic efforts designed to provide for future sustainable production? The lack of actual comparability between oil and other goods taken into consideration in *Occidental* suggests that tribunals should be cautions about adhering to its analysis of "like situations"—particularly in view of the case's idiosyncratic factual and legal context concerning the 1999 contract and the impact that it had upon the tribunal's reasoning. In the future, tribunals would be well served by remembering that the purpose of national treatment is to offer foreign investors competitive equality in the local marketplace of the country of investment.

[32] 1 OPPENHEIM'S INTERNATIONAL LAW 1278–79 (Robert Jennings & Arthur Watts eds., 9th ed. 1992). *But see* Hersch Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 1949 BRIT. Y.B. INT'L L. 48, 59–63.

[33] *Compare* Award, *supra* note 1, paras. 173, 175 (focusing on comparing exporters generally and rejecting comparisons between nationals and foreigners), *with* UN CONFERENCE ON TRADE & DEVELOPMENT, NATIONAL TREATMENT 1, 3, 8, UN Doc. UNCTAD/ITE/IIT/11 (Vol. IV) (2000) (noting the aim of national treatment is to subject foreign and domestic investors to the same competitive conditions in the host country market).

[34] Pope & Talbott Inc. v. Canada, Merits, Phase 2, paras. 75, 78 (NAFTA Ch. 11 Arb. Trib. Apr. 10, 2001), *at* <http://ita.law.uvic.ca/documents/PopeandTalbot-Merit.pdf>, *discussed in* David A. Gantz, Case Report: Pope & Talbot, Inc. v. Canada, 97 AJIL 937 (2003); *see also* S.D. Myers, Inc. v. Canada, Partial Award, para. 245 (NAFTA Ch. 11 Arb. Trib. Nov. 13, 2000) (liability), at <http://ita.law.uvic.ca/documents/SDMeyers-1stPartialAward.pdf>, *discussed in* Charles H. Brower II, Case Report: S.D. Myers, Inc. v. Canada, 98 AJIL 339 (2004).

[35] ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, NATIONAL TREATMENT FOR FOREIGN-CONTROLLED ENTERPRISES 22 (1993); *see also* UNCTAD, *supra* note 32, at 33.

[36] Ecuador had no specific animus to target and penalize foreign investors. Award, *supra* note 1, para. 177.

[37] These figures, as of July 2005, are drawn from CIA World Factbook 2005: Ecuador, *at* <http://www.cia.gov/cia/publications/factbook/>; *see also South America: Ecuador; More Investment Needed*, PETROLEUM ECONOMIST, Sept. 2004, at 21, *available in* LEXIS, News Library, Allnws File.

[38] Award, *supra* note 1, para. 136. Although mining involves a nonrenewable resource, the vast majority of the other industries that qualify for VAT refunds are ones relating to the cultivation of renewable resources.

The final noteworthy issue in *Occidental* is its analysis of fair and equitable treatment. Although the BIT refers to three textually distinct rights,[39] the tribunal compresses its analysis of these three rights into the question of whether there has been a violation of the right to "fair and equitable" treatment.[40] *Occidental* not only adopts the troublesome transparency analysis in *Metalclad*[41]—which was set aside[42]—but takes matters a step further by articulating a rule that suggests that a BIT can be breached either by a change in the regulatory framework,[43] or by an administrative opinion that provides a "wholly unsatisfactory and thoroughly vague answer" to an unspecific request for advice.[44] Unless *Occidental* is limited to its peculiar facts, the tribunal's analysis, as noted earlier, may inadvertently establish liability whenever governments either fail to provide clear legal and business frameworks, or change those frameworks during the life of an investment. If so interpreted, the guarantee of "fair and equitable treatment" may encourage states to hold their investment regimes static (at least until a BIT is terminated or revised). Commercial actors know that changes in laws and regulations are part of the transaction costs of doing business; when OECP entered into the 1999 contract, it knew that the VAT scheme was in the process of being amended. Why, then, should foreign investors be allowed to consider investment treaties to be insurance contracts that provide compensation when an adverse event materializes during the evolution of their investments?[45]

The potential breadth of the tribunal's award may have an important impact upon investment law and foreign relations. When faced with an adverse decision that subjects a state to unanticipated liability, what options do states have to respond? While countries such as the Czech Republic[46] and Argentina[47] have initiated or threatened to redress their grievances through set-aside or enforcement procedures, these tactics are part of the traditional arbitration process. States may begin considering nontraditional options with increasing frequency—which may make investment arbitration part of a larger foreign relations dialogue. Notably, Ecuador has been the first country to suggest publicly that it may withdraw from its bilateral investment treaties.[48] Ecuador also is trying to pass legislation to exclude oil companies from receiving VAT refunds and has instructed its agents to initiate proceedings to terminate its contractual relationships with OEPC.[49] The flip side of Ecuador's efforts is that the United States is exerting

[39] *See supra* note 19 and accompanying text.

[40] Although treating these issues as separate may have led to a different result, the tribunal took the view, *see supra* note 24 and accompanying text, that a breach of fair and equitable treatment "automatically entails an absence of full protection and security."

[41] *Metalclad* found a breach of fair and equitable treatment caused by a lack of transparency where "all affected investors of another party" were not aware of "all relevant legal requirements for the purpose of initiating, completing, and successfully operating investments made, or intended to be made." Metalclad Corp. v. Mexico (NAFTA Ch. 11 Arb. Trib. Aug. 30, 2000), 40 ILM 36, 47 (2001), *discussed in* William S. Dodge, Case Report: Mexico v. Metalclad Corporation, 95 AJIL 910 (2001).

[42] *Metalclad* was set aside largely because the transparency standard was outside of NAFTA's Chapter 11. Mexico v. Metalclad Corp., Reasons for Judgment, 2001 B.C.S.C. 664, *at* <http://www.courts.gov.bc.ca>.

[43] *See supra* notes 20–25 and accompanying text; *see also* Award, *supra* note 1, paras. 183,185 (suggesting that the "stability of the legal and business framework is thus an essential element of fair and equitable treatment" and citing *Tecnicas Medioambientales Tecmed v. Mexico* to suggest that governments should "act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments").

[44] Award, *supra* note 1, paras. 183–85.

[45] This question is the one raised Joanna Page when she suggests that "rights available under [an investment treaty] may be wider, more effective, and, since no premium is payable, cheaper than [political-risk insurance]." *See* Joanna Page, *Political Risk Insurance: Is It Worth It?* TRANSNAT'L DISP. MGMT., June 2005, *at* <http://www.transnational-dispute-management.com/news/tdm2-2005_4.pdf>.

[46] Czech Republic v. CME Czech Republic B.V., Case No. T 8735-01 (Svea Ct. App. May 15, 2003) (Swed.), *at* <http://ita.law.uvic.ca/documents/CME2003-SveaCourtofAppeal_000.pdf>.

[47] *See Argentina Government Rejects Utilities World Bank Tribunal Claims* (Oct. 18, 2004) *at* <http://www.noticias.info/Archivo/2004/200410/20041018/20041018_36590.shtm>.

[48] *See* Juliette Kerr, *Ecuador's Procurator-General Says Most Oil Companies Violated Contracts*, WORLD MARKETS ANALYSIS, Sept. 22, 2004, *available in* LEXIS, News Library, Allnws File.

[49] *See Oxy Faces Ecuador Trouble*, INT'L OIL DAILY, Aug. 24, 2004, *available in* LEXIS, News Library, Allnws File; Juliette Kerr, *Petroecuador Files Complaint Against Occidental for Breach of Contract*, WORLD MARKETS ANALYSIS, Sept. 17, 2004, *available in* LEXIS, News Library, Allnws File.

pressure upon Ecuador to retreat from its current position in the VAT dispute,[50] and U.S. financial aid to Ecuador may be cut from $210 million to $37 million.[51] Cases such as *Occidental* are useful, however, in the sense that they enable states to obtain more information about the scope and potential interpretation of rights that they may be granting investors. Armed with this extra information as to how they might inadvertently cede their sovereignty, states can make more informed decisions about the rights that they grant to investors in the future. By scrutinizing treaty rights in this manner during treaty negotiations, a state can form more realistic expectations, thereby preventing post hoc dissatisfaction with awards and also, more generally, giving states enhanced confidence about the areas in which they can legislate and regulate, and with what consequences.

Ultimately, *Occidental* asks more questions than it answers about the rights in investment treaties. It serves as a vital reminder that tribunals should be mindful of the need both to articulate those considerations that form the *ratio decidendi* of their awards and to consider with great care whether to extend an analysis of one case to another case where the facts or the legal context are substantially dissimilar. Perhaps more importantly, *Occidental* moves to center stage the question of how a state may and may not respond when attempting to address unfavorable awards. Although investment-treaty arbitration may have been created, in part, to privatize the development of international investment law, the hybrid nature of the mechanism and the state of current jurisprudence suggest that such arbitration is now, for better or worse, part of a larger foreign relations dialogue.

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[50] Kintto Luca, *America's Social Reform: Debate Grows over Trade Tribunal Rulings*, IPS-Inter Press Service/Global Information Network, July 29, 2004, *available in* LEXIS, News Library, Allnws File; *Investment Disputes Jeopardize Free Trade Deal*, BUS. NEWS AM., Oct. 7, 2004, *available in* LEXIS, News Library, Allnws File.

[51] U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT, ECUADOR: USAID PROGRAM PROFILE, *at* <http://www.usaid.gov/locations/latin_america_caribbean/country/ecuador/>; *see also* Gareth Chetwynd, *Oxy Rows with Quito*, *Upstream*, Oct. 1, 2004, *available in* Westlaw, ALLNEWS database.