

PCA CASE No. 2009-23

IN THE MATTER OF AN ARBITRATION BEFORE A TRIBUNAL CONSTITUTED IN
ACCORDANCE WITH THE TREATY BETWEEN THE UNITED STATES OF AMERICA AND
THE REPUBLIC OF ECUADOR CONCERNING THE ENCOURAGEMENT AND RECIPROCAL
PROTECTION OF INVESTMENTS (THE “TREATY”), SIGNED 27 AUGUST 1993, AND THE
1976 UNCITRAL ARBITRATION RULES

Chevron Corporation and Texaco Petroleum Company
Claimants

v.

The Republic of Ecuador
Respondent

Expert Opinion
Of
Professor David D. Caron
As to
Article II(7) of the Treaty

September 3, 2010

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I. INTRODUCTION

1. This document is the expert opinion of David D. Caron prepared at the request of Claimants, Chevron Corporation and Texaco Petroleum Company, in PCA Case No. 2009-23, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, an arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). The information in Parts III, IV and V is, among other things, provided so as to meet the requirements set forth in Rule 5(2) of the International Bar Association Rules on the Taking of Evidence in International Arbitration (29 May 2010).

II. SUMMARY OF OPINION

2. The Question Presented.¹ This Opinion addresses the meaning of Article II(7) of the Treaty between the United States of American and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment (hereinafter the “U.S.-Ecuador BIT” or “the Treaty” or “the BIT”). In the context of this proceeding, an investigation of the meaning of Article II(7) raises two questions:

- Meaning – What is the content of the obligations required of each State Party in Article II(7); and,
- Application – How is a tribunal to ascertain in the context of an individual arbitration whether such obligations have been breached.

This Opinion thus looks to Article II(7)’s provision of “effective means of asserting claims and enforcing rights” and seeks to define the standard to be applied by the Tribunal both in general and within the context of the claims raised within this particular UNCITRAL arbitration.

¹ This paragraph is discussed more fully in Part IV of this Opinion.

3. The Governing Law.² The question presented is governed by international law. The arbitration is brought under the U.S.-Ecuador BIT. This agreement is a bilateral investment treaty (BIT) that is a product of interstate negotiation and, by their mutual intent, governed by international law. In this situation, the relevant international law is found primarily in Articles 31, 32 and 33 of the Vienna Convention on Law of Treaties (“Vienna Convention” or “VCLT”), inasmuch as these articles, particularly Articles 31 and 32, are recognized as customary international law.

4. The Meaning of Article II(7) of the Treaty. Article II(7) of the U.S.-Ecuador BIT provides that:

Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.

Looking at the ordinary meaning of the terms in their context and in light of the object and purpose in accordance with Article 31 of the VCLT, Article II(7) in my opinion sets forth a positive and mandatory obligation to establish and supply measures that are not only designed to, but are also adequate in practice to, facilitate the investor bringing a cause of action for the possession or enjoyment of a privilege, *and* for the State’s acknowledgment and preservation, as well as execution, of the investor’s powers and privileges as pertaining to every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party. In my opinion, the interpretation outlined in the preceding paragraph is a clear one; it is neither ambiguous nor manifestly absurd nor unreasonable.

5. An examination of the negotiating history of the Treaty, as well as the circumstances surrounding its conclusion, confirms this interpretation. Other arbitral awards interpreting Article II(7), as well as analogous language in Article 10(2) of the Energy Charter and Article 13 of the European Convention on Human Rights, are consistent with this interpretation.

6. The Application of Article II(7) of the Treaty. The systemic obligation placed on the State Parties by Article II(7) is necessarily considered by an arbitral tribunal, such as this one,

² This paragraph is discussed fully in Parts VI and VII of this Opinion.

in the context of a particular case. Considering the language of Article II(7) and the sources cited, as well as the task before the Tribunal, I reach the following five conclusions regarding application of Article II(7):

- First, given the placement of Article II(7) alongside other protections for investors in Article II, the Treaty contemplates that an investor may bring a claim for a breach of Article II(7);
- Second, the Treaty obligation to provide “effective means” and a claim alleging a breach of that obligation is distinct from a claim under customary international law for denial of justice; the standards are distinct as is the timing and potential remedies of each;
- Third, “effective” means are means that are designed to accomplish the intended ends, and ones that in practice are adequate to reach such ends;
- Fourth, the obligation to provide “effective means” may be breached by (1) governmental subversion in the particular case of the “means” formally provided or (2) failure of the “means” to be “effective” whether in their design or in practice;
- Fifth, ““means” are ineffective by design or in practice when on a case-by-case basis they are found to not provide an adequate basis for the investor to assert a claim or enforce a right. For example, a defense of *res judicata* implicitly entails a right to be free from re-litigation of a matter. To be free from re-litigation, a “means” to enforce such a right is effective *prima facie* only if it provides an avenue for enforcing the right before the re-litigation occurs. The timeliness of the consideration of a request for a preliminary decision may be assessed on a case-by-case basis taking into consideration all circumstances including but not limited to: (1) the complexity of the question presented, (2) the interests of the litigants and forum at stake, (3) the conduct of the litigants, (4) the conduct of the relevant authorities, and (5) the state of the proceedings.

III. QUALIFICATIONS AND BACKGROUND OF THE AUTHOR OF THIS OPINION

7. I have been a member of the Faculty of Law at the University of California at Berkeley since 1987, and have held the C. William Maxeiner Distinguished Professor of Law Chair at that University since 1996. My address is:

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My expertise in international law and international arbitration is described in the resumé and list of publications found at attachments 1 and 2.

8. I am independent of the Parties, their legal advisors and the Arbitral Tribunal, I am not aware of any circumstances that would give rise to justifiable doubts as to that statement. For the sake of thoroughness, the following circumstances nonetheless are noted. I am an active member of professional associations and know numerous individuals who serve as counsel, expert or arbitrator in international commercial arbitration and international investment arbitration. I am not familiar with the identity of all of the individuals associated with this proceeding. I note, however, that I know many individuals, including R. Doak Bishop (counsel for Claimants), as a consequence of my Chairmanship of The Institute for Transnational Arbitration from 2005 to 2009. In 1986-1987, I was employed as an associate with Pillsbury, Madison & Sutro and for a part of that time served as a junior member of a team representing Chevron Overseas Petroleum in an ICC international commercial arbitration with a private party. In February 2004, I presented four lectures in Quito, Ecuador as part of a UNITAR Training Session for Latin American officials and in which several Ecuadorian officials participated.

9. I affirm my genuine belief in the opinions reached in this Expert Opinion.

10. I do not claim expertise in Ecuadorian law nor am I fluent in the Spanish language. At several points in this Opinion, the language of the U.S.-Ecuador BIT is examined. In general, this examination is undertaken with reference to the official English text with an

awareness of the original and equally authentic Spanish text as well. Where I make reference directly to the meaning of a Spanish language term, I explicitly note this and reference the source utilized. To the best of my knowledge, no part of this Opinion rests on a disputed distinction between the equally authoritative English and Spanish texts.

IV. THE OPINION REQUESTED

11. Article II(7) of the U.S.-Ecuador BIT provides:

Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.

12. I was retained by counsel for Claimants to provide an expert opinion on the meaning of this provision generally and in the context of this arbitration specifically. The relevance of the investment protections guaranteed by Article II(7) to this arbitration lies in the nature of Claimants' claim that Ecuador has breached its obligations under Article II(7), among other provisions, of the U.S.-Ecuador BIT in that:

Ecuador has engaged in a pattern of improper and fundamentally unfair conduct, whereby Ecuador: (i) breaches and effectively seeks to repudiate the 1995 Settlement Agreement, the 1996 Municipal and Provincial Releases and the 1998 Final Release; (ii) improperly exercises *de facto* jurisdiction over Chevron; (iii) improperly assists and colludes with the Lago Agrio plaintiffs in an effort to impose the State's obligations on Claimants through the Lago Agrio Litigation, and seeks to improperly influence the courts through public statements; and (iv) abuses the criminal justice system and pursues other inequitable measures to advance Ecuador's improper goals.³

I do not seek to present a summary of Claimants' assertions, nor do I opine on the accuracy or completeness of these arguments. I observe that Claimants present evidence and argue that as a consequence of alleged governmental interference in the judiciary and the alleged failure of the Ecuadorian judicial system to ensure the timely review of preliminary objections, that they have been deprived of effective means by which to both assert their judicial claims and enforce their rights as investors.

³ *Chevron Corporation and Texaco Petroleum Company vs. The Republic of Ecuador*, Claimants' Notice of Arbitration, ¶ 68 (Sept. 23, 2009) [hereinafter "Notice of Arbitration"].

13. Given the thrust of the particular arguments of Claimants with respect to Article II(7), I address the investment protections codified in Article II(7) through a two-pronged approach. First, I seek to provide the Tribunal with a general analysis of how Article II(7) (“effective means of asserting claims and enforcing rights”) is to be interpreted based upon an examination under the Vienna Convention of its terms, language, and context. Second and critically, I consider the task before the Tribunal in this proceeding. Namely, I examine how a Tribunal is to apply the obligations of Article II(7) in the context of a particular dispute such as that presented in this arbitration. This last examination is done within the context of the Parties’ claims.

V. DOCUMENTS REVIEWED

14. In preparing this Opinion, I have had access to (1) the Parties’ submissions in this arbitration with respect to the Notice of Arbitration and Claimants’ Request for Interim Measures; (2) the Partial Award on the Merits in the “*Commercial Cases*” Arbitration between the same Parties;⁴ and (3) the memorials of the Parties in the *Commercial Cases* Arbitration. These documents were provided to the Expert by Claimants’ Counsel. In addition to materials publically available on U.S. conclusion of the BIT that I had already attained, I requested from Claimants’ counsel any publically-available materials collected regarding Ecuador’s conclusion of the U.S.-Ecuador BIT. Claimants’ counsel provided five *Acta*’s of El Congreso Nacional that discuss the U.S.-Ecuador BIT, the Ecuadorian transmittal package for the BIT, and news accounts contemporaneous with and pertaining to the drafting of the U.S.-Ecuador BIT that are cited herein.

15. I have not reviewed Claimants’ Memorial, either in draft or final form. I did request that Claimants inform me as to the articulation of their basic claims in their memorial. My understanding from Claimants is that they broadly claim a violation of three rights: (1) a right of finality such that the settlement agreements would prevent and prohibit all current and further judicial action based upon the claims released by the Ecuadorian Government; (2) a jurisdictional right by which Chevron would be relieved from litigation in Ecuador by the

⁴ *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador, Partial Award on the Merits* (Mar. 30, 2010) [hereinafter “*Commercial Cases, Partial Award*”].

fact that it never operated in Ecuador; and (3) a right founded in the U.S.-Ecuador BIT and international law that investors be treated properly in the domestic courts of the host country. It also is my understanding from Claimants that they are arguing that these rights have been violated by Respondent through, *inter alia*, a summary hearing process that is possibly incapable of effectively adjudicating complex international disputes as well as interference in the proper functioning of the judiciary through bribery, and collusion with the plaintiffs and government.

VI. THE LAW APPLICABLE TO ASCERTAINING THE MEANING OF ARTICLE II(7)

16. The U.S.-Ecuador BIT is a treaty between States undertaken on the international plane; it is an instrument governed by public international law. Although the Vienna Convention on the Law of Treaties (VCLT) is not in force between the parties, its provisions on interpretation are accepted as being reflective of customary international law.⁵ Therefore, the VCLT, as a statement of custom, provides the applicable law for the interpretation of Article II(7).

A. The Text of Articles 31-33 of the VCLT

17. The articles of the VCLT addressing interpretation are Articles 31 through 33. They provide as follows:

SECTION 3. INTERPRETATION OF TREATIES

Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

⁵ For a recent authority for this proposition, *see, e.g., Avena (Mex. v. U.S.)*, 2004 ICJ Rep. 12, 37-28, ¶ 83 (Mar. 31).

3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

Supplementary means of interpretation

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

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

Article 33

Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

B. The Method of Interpretation as Codified in the VCLT

18. It is important to stress at the outset the relationship between Article 31 and Article 32. As its name indicates, Article 31 provides the “general rule of interpretation.” The interpreter proceeds to Article 32 so as to confirm the interpretation reached under Article 31, or – as a last resort – to provide an interpretation when the result of an Article 31 analysis leaves the meaning ambiguous or manifestly absurd.

19. The *Aguas del Tunari* Tribunal succinctly captures the interpretative process of unraveling the meaning of terms within the treaty under Article 31 VCLT:

Interpretation under Article 31 of the Vienna Convention is a process of progressive encirclement where the interpreter starts under the general rule with (1) the ordinary meaning of the terms of the treaty, (2) in the context of the entire document as well as closely related documents and (3) in light of the treaty's object and purpose, and by cycling through this three-step inquiry, iteratively closes in upon the proper interpretation. ...⁶

20. In approaching this task, it is critical to observe three things about the general rule of interpretation found in the Vienna Convention, as also drawn from the holding in *Aguas del Tunari*:

First, the Vienna Convention does not privilege any one of these three aspects of the interpretation method. The meaning of a word or phrase is not solely a matter of dictionaries and linguistics. As Schwarzenberger observed, the word "meaning" itself has at least sixteen dictionary meanings. Rather, the interpretation of a word or phrase involves a complex task of considering the ordinary meaning of a word or phrase in the context in which that word or phrase is found and in light of the object and purpose of the document. Second, the Vienna Convention represents a move away from the canons of interpretation previously common in treaty interpretation and which erroneously persist in various international decisions today. For example, the Vienna Convention does not mention the canon that treaties are to be construed narrowly, a canon that presumes States can not have intended to restrict their range of action. Rather than cataloging such canons (which at best may be said to reflect a *general pattern*), the Vienna Convention directs the interpreter to focus upon the *specific case* which may, or may not, be representative of such general pattern. To say a canon reflects a widespread practice does not mean it reflects a universal one. The Vienna Convention's directive to look to the ordinary meaning of a word in its context and in light of the object and purpose of the treaty is intended to (1) to find the intent of the parties in the specific instrument, (2) to respect the possibility that the parties have used the instrument to address issues of mutual concern in innovative ways, and (3) to not forcibly conform the specific aims of a treaty to

⁶ *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, ¶ 91 (Oct. 21, 2005).

general assumptions about the intent of states, assumptions which necessarily are based on assessments of past practice.⁷

Third and finally, the word “context” is narrowly defined in Article 31(2) and does not include the circumstances surrounding the conclusion of the treaty.

21. Proceeding to the next step of analysis under Article 32, the interpreter may consider “supplementary means of interpretation” including preparatory work and the circumstances of the treaty’s conclusion. This may only occur, however, after a thorough interpretation of the treaty’s language under Article 31, and then, only to confirm the meaning as ascertained through the Article 31 interpretation, or in those instances when the Article 31 interpretation has failed to provide a definitive meaning, leaving a meaning that is “ambiguous or obscure” or “manifestly absurd or unreasonable.”

22. Finally, Article 33 is applicable in this dispute in that the English and Spanish texts of the U.S.-Ecuador BIT are equally authentic, as specified at the signature line of the BIT. The application of Article 33 is helpful to the interpretation of the U.S.-Ecuador BIT in that the equally authoritative terms of the two texts – those in English and those in Spanish – may be compared and contrasted to better ascertain or reinforce the Parties’ intent with respect to each term, Article II(7), and the BIT, in general.

VII. THE MEANING OF ARTICLE II(7) UNDER ARTICLE 31 OF THE VCLT

23. Article 31(1) calls for a good faith interpretation of the “ordinary meaning” of the terms in their context and in light of their object and purpose. I therefore begin with an analysis of each of the operative terms of Article II(7), examining it and its meaning in isolation. These words are then put back together to glean the meaning of the clause as a whole. Only after this fundamental analysis is complete do I turn to the second aspect of

⁷ *Id.*, citing Georg Schwarzenberger, *Myths and Realities of Treaty Interpretation: Articles 27-29 of the Vienna Draft Convention on the Law of Treaties*, 22 CURRENT LEGAL PROBLEMS 205, 219 (1969). See also e.g., Lauterpacht who, amidst the situation prevailing before the Vienna Convention, observed: “The view which is gaining increasing acceptance seems to be that some of the current rules of construction of treaties ... instead of aiding what has been regarded as the principal aim of interpretation, namely, the discovery of the intention of the parties, they end up by impeding that purpose.” Hersch Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 BRIT. Y.B. OF INT’L L. 48, 52 (1949).

interpretation under Article 31 VCLT: the context of the clause within the treaty. Following this, I examine it in light of the object and purpose of the treaty. Finally, these elements are reviewed as a whole iteratively so as to arrive at an interpretation of Article II(7).

A. The Individual Terms of Article II(7)

24. Article II(7) can be broken into five terms integral to the effect and meaning of the clause: (1) shall provide/establecerá; (2) effective means/medios eficaces; (3) asserting claims/para hacer valer las reclamaciones; (4) enforcing rights/respetar los derechos relativos a ... ; and (5) investment/las inversiones, investment agreements/los acuerdos de inversión, and investment authorities/las autorizaciones de inversión. I examine each in turn.

1. Shall Provide/ Establecerá

25. “Shall provide” and establecerá – directly translated as “it will establish”⁸ or it will “establish, set up, found ... enact ... decree”⁹ – are mandatory in character. “Shall”, as opposed to “may” or “can”, indicates a necessary and required action.¹⁰ So too does the Spanish term indicate an obligatory action; Black’s Law Dictionary defines “will” as: “An auxiliary verb commonly having the mandatory sense.”¹¹

26. “Provide” is defined as “to supply; to afford, to contribute.”¹² Similarly, “establecer” means “to establish, set up, found; to enact; to decree.”¹³ As such, “provide” and “establecer” appear to require an affirmative act: The State must take positive action to furnish the “effective means.”

⁸ Free Translation Online, available at <http://webtranslation.paralink.com>.

⁹ LOUIS A. ROBB, *DICCIONARIO DE TERMINOS LEGALES* (1986). I note that this text states its object is to provide a complete selection of legal terms, adapted for the different formalities of the “Hispano-American” countries. As I use the definitions for the “ordinary meaning” of the word, I do not believe that this focus is significant to my analysis.

¹⁰ *See, e.g.* Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, I.C.J. Reports 150, 159 (June 8, 1960) (“the words employed are ‘shall be’ which, on their face, are mandatory”).

¹¹ Black’s Law Dictionary, 6th Ed. (1990).

¹² *Id.*

¹³ ROBB, *DICCIONARIO supra* note 9.

27. Taken together, these equally authentic terms establish the Parties' intent that the establishment or supply of the measures proscribed in Article II(7) be a compulsory and positive obligation of the State Parties.

2. Effective Means/Medios Eficaces

28. "Effective" (which is also the direct translation of "eficaces") is used in this context as an adjective modifier in a noun clause; in this way it is tied to and describes that which it modifies. In the abstract, "effective" is defined in various dictionaries as "producing a decided, decisive, or desired effect,"¹⁴ "successful or achieving the results" desired,¹⁵ and "adequate to accomplish a purpose; producing the intended or expected result."¹⁶ Therefore, interpreting "effective" as an adjective modifier in a noun clause results in a reading that the action described by the noun – in a phrase – it works in fact: It provides in fact the intended means or desired procedural avenue.

29. "Means" is defined in Black's Law Dictionary as, "that through which, or by the help of which, an end is attained; something tending to an object desired; intermediate agency or measure; necessary condition or co-agent; instrument."¹⁷ "Medios" are synonymous, defined as "means, resources, facilities."¹⁸

30. Therefore, together, "effective means" can be interpreted as providing for measures both designed to reach a goal and to be successful in attaining that goal.

3. Asserting Claims/Para Hacer Valer las Reclamaciones

31. Here again, there is no difference between the two languages; their meanings are identical in English and in Spanish, strengthening and confirming the interpretation. Black's

¹⁴ Meriam-Webster online dictionary.

¹⁵ Cambridge online dictionary.

¹⁶ Dictionary.com.

¹⁷ BLACK'S LAW DICTIONARY, *supra* note 11.

¹⁸ ROBB, DICCIONARIO *supra* note 9.

Law Dictionary defines “assert” as “to state as true; declare; maintain.”¹⁹ “Hacer valer” is similarly defined as “to enforce, put into effect, assert.”²⁰

32. “Reclamación” also translates directly to mean “claim.”²¹ Black’s Law Dictionary defines “claim” as meaning: “To demand one’s own or as one’s right; to assert; to urge; to insist. A cause of action. Means by which or through which claimant obtains possession or enjoyment of privilege or thing. Demand for money or property as of right”²² Professor Vandeveld, in his discussion of the “claims and rights” as described in the first “effective means” clause in the 1983 U.S. Model BIT,²³ explains that: “The claims and rights that must be enforceable through effective means to a great extent overlap the claims and rights that can be arbitrated through the investor-state disputes provision.”²⁴

33. Therefore, the ordinary meaning of “asserting claims” can be interpreted as putting into effect one’s rights, taking those actions by which one brings a claim for the possession or enjoyment of a privilege.

4. Enforcing Rights/Respetar Los Derechos Relativos a ...

34. Black’s Law Dictionary defines “to enforce” as “to put into execution; to cause to take effect; as, to enforce a particular law, a writ, a judgment, or the collection of a debt or fine; to compel obedience to.”²⁵ This is illustrated in the Energy Charter Treaty, where “enforcement” and “enforce” are defined to include: “action ... by way of investigation, legal proceeding, or administrative action as well as by way of any decision or further law granting or continuing an authorization.”²⁶

35. A direct translation of “respetar los derechos relativos a ...” would be “respect the rights relating to” However, this would overlook that “respetar” appears to be

¹⁹ BLACK’S LAW DICTIONARY, *supra* note 11.

²⁰ ROBB, DICCIONARIO *supra* note 9.

²¹ *Id.*

²² BLACK’S LAW DICTIONARY, *supra* note 11. Similarly, the tribunal in *AMCO v. Indonesia*, described “claims” as “causes of action.” *Amco Asia Corp. v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Resubmitted Case, Decision on Jurisdiction, ¶ 135 (May 10, 1998).

²³ *See infra*, § VIII.A.1.

²⁴ KENNETH J. VANDEVELDE, U.S. INTERNATIONAL INVESTMENT AGREEMENTS 413 (2009).

²⁵ BLACK’S LAW DICTIONARY, *supra* note 11.

²⁶ Energy Charter Treaty, art. IV(7)(b).

potentially broader in meaning than merely “enforce”. It is defined as *cumplir* (accomplish, carry out), *acatar* (to comply with, accept) or *cuidar* (take care of, look after, pay attention to), and *conservar* (preserve, keep, conserve).²⁷ As the two definitions are equally authentic and Article 33 instructs the interpreter to adopt the meaning that does the least harm to the meanings in both languages, the ability of an investor to enforce its rights should be viewed broadly; not only to cause the rights to take effect, but also so as to include the ability of an investor to demand that rights are preserved, accepted and carried out in the host state.

36. “Rights” are described variously in Black’s Law Dictionary as “a power, privilege, faculty or demand, inherent in one person and incident upon another,” “a power, privilege, or immunity guaranteed under a Constitution, statutes or decisional laws, or claimed as a result of long usage,” and “a legally enforceable claim of one person.”²⁸ A “derecho” is defined as a “law; right; equity; claim; concession, grant.”²⁹

37. Viewing these two words together, the host State’s obligation to provide effective means of “enforcing rights,” means that the State agrees to provide methods by which the investor can attain the State’s acknowledgment and preservation, as well as execution, of the investor’s powers and privileges guaranteed to the investor by the various domestic and international systems in which it operates.

5. Investment/Inversiones, Investment Agreements/Los Acuerdos de Inversión, and Investment Authorizations/Las Autorizaciones de Inversión

38. The term “investment” is defined at Article I(1)(a) and, as the Tribunal in *Petrobart* explained, a term defined in the treaty should be given that definition in application to disputes arising under that treaty:

The term investment must ... be interpreted in the context of each particular treaty in which the term is used. Article 31(1) of the Treaty on the Law of Treaties provides, as the main rule for treaty

²⁷ The definition of “respetar” is from Diccionario de la lengua Española, WordReference.com. Definitions of the synonyms provided are from Merriam-Webster’s Spanish-English Dictionary (2008) and ROBB, DICCIONARIO *supra* note 9.

²⁸ BLACK’S LAW DICTIONARY, *supra* note 11.

²⁹ ROBB, DICCIONARIO *supra* note 9.

interpretation, that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. It is obvious that, when there is a definition of a term in the treaty itself, that definition shall apply and the words used in the definition shall be interpreted in the light of the principle set out in Article 31(1) of the Treaty on the Law of Treaties.³⁰

39. Article I(1)(a) of the BIT defines “investment” as: “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.” This includes, *inter alia*, “a claim to money or a claim to performance having economic value, and associated with an investment” (Article I(1)(a)(iii)); and “any right conferred by law or contract, and any licenses and permits pursuant to law” (Article I(1)(a)(v)). This accords with the “ordinary meaning” of “investment” which is described as: “An expenditure to acquire property or other assets in order to produce revenue; the asset so acquired. The placing of capital or laying out of money in a way intended to secure income or profit from its employment.”³¹

40. “Investment Agreement” and “Investment Authorization” are not similarly defined in the U.S.-Ecuador BIT. They are, however, defined in the 1994 U.S. Model BIT, which not only provides a helpful “ordinary meaning” for the terms, but exhibits the understanding of at least one of the State Parties to the dispute soon after the conclusion of the U.S.-Ecuador BIT.³² The 1994 U.S. Model BIT provides at Article 1(g) that an “‘investment authorization’ means an authorization granted by the foreign investment authority of a Party to a covered investment or a national or company of the other Party.”³³ At Article 1(h), the 1994 U.S. Model BIT provides that “‘investment agreement’ means a written agreement between the national authorities of a Party and a covered investment or a national or company of the other Party that (i) grants rights with respect to natural resources or other

³⁰ *Petrobart v. Kyrgyz Republic*, SCC Arbitration No. 126/2003, Award at 69 (Mar. 29, 2005).

³¹ BLACK’S LAW DICTIONARY, *supra* note 11.

³² *See infra*, § VIII.A.1.

³³ U.S. Model BIT (1994), art. 1(g).

assets controlled by the national authorities and (ii) the investment, national or company relies upon in establishing or acquiring a covered investment.”³⁴

6. Conclusions of the Textual Analysis

41. In sum, based solely upon the textual analysis and awaiting examination of the context of this clause and consideration of the light of the object and purpose of the treaty, Article II(7) of the U.S.-Ecuador BIT in my opinion places on the two State Parties a compulsory obligation to establish and supply measures that are designed to and in practice do facilitate the investor (1) in bringing an action before a governmental, judicial or other official body for the possession or enjoyment of a privilege, and (2) in attaining the State’s acknowledgment and preservation, as well as execution, of the investor’s powers and privileges as pertaining to every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party.

B. The Context of Article II(7) within the U.S.-Ecuador BIT

42. Continuing with the good faith interpretation of Article II(7) called for by Article 31(1) VCLT, I turn to the context surrounding the Article within the treaty.

43. Following the preamble and definitions set forth in Article I,

- Articles II, III and IV of the U.S.-Ecuador BIT set forth the substantive investor protections offered by the BIT by placing mandatory obligations on the host state,
- Articles V, VI and VII deal with resolution of disputes,
- Articles VIII, IX, X and XI can be characterized as dealing with the scope of the treaty and thus the scope of the duties assumed under Articles II, III and IV, and
- Article XII deals with the usual closing clause issues.

44. Article II(7) is thus one of nine numbered clauses within one of the three articles providing investment protections by placing mandatory obligations on the host state. Article II includes:

³⁴ *Id.*, art. 1(h).

- national treatment and most favored nation clauses (Article II(1));
- guarantees of fair and equitable treatment and full protection and security (Article II(3));
- provisions for non-discrimination and non-arbitrariness as well as the undertaking by each State Party to observe the obligation into which it enters with regard to investments (Article II(3));
- provisions for the unrestricted choice of managers and the free movement of employees (Articles II(4),(5)),
- the requirement that laws and regulations pertaining to or affecting investments be made public (Article II(8)), and
- the obligation to provide effective means for asserting claims and enforcing rights (Article II(7)).

45. The mandatory nature of the obligation to provide effective means as outlined above is consistently echoed and confirmed in the mandatory language throughout Article II and the investment protections. The operative word “shall” appears in each of the clauses in the Article, reiterating the compulsory nature of these investment protections.

46. It is noteworthy that Article II(7) is placed with other investment protections in Article II and not merely placed in the Preamble, as is the case in the later 2004 Model U.S. BIT, in hortatory language; e.g., ‘recognizing the importance of each state party providing effective means for asserting claims and enforce rights.’

47. It likewise is noteworthy that Article II(7) is one of several protections that provide investment protection through an obligation on the host state that is phrased in systemic terms rather than solely in terms of an act aimed at the individual investment. The requirement to make laws and regulations public, like the Article II(7)’s obligation to provide “effective means,” requires action systemically in each state. It is true that an omission at the systemic level could in fact be an omission targeted at a particular investment, but that does not alter the systemic obligation even if there is no particular intent regarding a specific investment. Such systemic provisions impose both positive duties on each State Party to

address procedural concerns at all levels of the government and judiciary, and a negative duty to not interfere with these proceedings. The compulsory obligation of making public “laws, administrative practices and procedures, and adjudicatory decisions that pertain to or affect investments” requires national and local efforts. Such a requirement necessitates a national review of lawmaking practices and the institution of procedures and processes by which new legislation and rules are reviewed, compiled, published and circulated.

48. As a systemic obligation, the duty to provide “effective means” in Article II(7) requires the State Parties to take positive action so that the system of the national and local governments processes available operate so as to provide the promised “effective means of asserting claims and enforcing rights.” This conclusion is consistent with the textual analysis above that the resulting procedures must not only respond to the concerns with available means, but they must succeed in being effective.

C. The Object and Purpose of the U.S.-Ecuador BIT

49. The final step of an Article 31(1) VCLT interpretation is to examine the terms “in light of [the treaty’s] object and purpose.” The negotiating Parties’ intent as to the object and purpose of the treaty they are drafting is typically found in the title and goals of the BIT as exhibited in the headings and preamble. As the Tribunal is aware, moving beyond this limited context to supplementary manifestations of party intent is found instead under Article 32 and is addressed in Part VIII below. This separation of the ordinary meaning of the terms and the context in which they appear from any supplementary sources provided by other materials reflects the deep commitment of the Vienna Convention to the text of the treaty and the parties’ intent exhibited therein.

50. The U.S.-Ecuador BIT is a negotiated agreement between State Parties. At the very outset of the BIT, the State Parties set forth their mutual intention in negotiating and signing the agreement. In both the title of the BIT and its Preamble, each State Party makes clear that it desires to encourage investment from the investors of the other and signals its understanding that offering substantive protections will stimulate incoming investment.

51. The title of the U.S.-Ecuador BIT – “Treaty between the United States of American and the Republic of Ecuador concerning Encouragement and Reciprocal Protection of

Investment” – manifests a focus on “encouragement” of foreign investment through the public promise of “protection” for that investment.

52. This focus is echoed in the opening preambular clause to the BIT, which describes a primary mutual objective as “Desiring to promote greater economic cooperation between them, with respect to investment by nationals and companies of one Party in the territory of the other Party.” The second preambular embodies an assumption widely present in BITs that investment protection “will stimulate the flow of private capital” at least between the parties. The third preambular clause – “Agreeing 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” – links to the assumption that it is through investment protections that the Parties seek to attract and retain foreign investment that might go elsewhere.

53. The meaning suggested by a textual analysis of the language of Article II(7) in its context in the treaty is consonant with the apparent object and purpose of the treaty.

D. Conclusion of Article 31(1) Interpretation

54. A textual analysis of Article II(7) of the U.S.-Ecuador BIT indicates that the clause provides for a positive and compulsory obligation to establish and supply measures that are not only designed to, but also adequate in practice to, facilitate the investor bringing a cause of action for the possession or enjoyment of a privilege, *and* for the State’s acknowledgment and preservation, as well as execution, of the investor’s powers and privileges as pertaining to every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party. This is consistent with the placement and description of the investment protections, their mandatory nature, and the special nature of the systemic procedural State obligations within Article II. The meaning suggested by a textual analysis of the language of Article II(7) in its context in the treaty also is consonant with the apparent object and purpose of the treaty.

55. In my opinion, the interpretation outlined in the preceding paragraph is a clear one, is neither ambiguous nor manifestly absurd or unreasonable. I therefore turn to an analysis under Article 32 of the VCLT to confirm the meaning reached under Article 31.

VIII. Article 32 VCLT: Confirming the Textual Interpretation through Supplementary Means of Interpretation

56. Article 32 of the Vienna Convention allows for recourse to the “preparatory work of the treaty and the circumstances of its conclusion,” so as to (1) confirm the meaning which results from the textual reading called for in Article 31(1) or (2) to determine the meaning if the result of Article 31(1) is ambiguous, manifestly absurd or unreasonable. The ILC Commentary on Article 32 emphasizes the centrality of Article 31 to interpretation: “the text of the treaty must be presumed to be the authentic expression of the intentions of the parties, and that the elucidation of the meaning of the text rather than an investigation *ab initio* of the supposed intentions of the parties constitutes the object of interpretation.”³⁵

57. The following examination of supplementary materials is meant as just that: a supplemental confirmation. The guidance gleaned from the following sources is not meant to supplant the textual and internally contextual interpretation in Part VII, rather it is meant to fill out the Tribunal’s understanding of the interpretation above and to point toward its application to the dispute at hand.

58. In particular, it will be seen that the examination of supplementary materials, in addition to confirming the above interpretation, provides guidance (1) as to “means” to be considered effective for the assertion of claims and enforcement of rights, (2) as to when measures are to be deemed ineffective, and, finally, (3) as to factors that should be considered in determining whether the means provided are effective.

59. In the following paragraphs, I turn to the two supplemental sources mentioned in Article 32: preparatory work and the circumstances of the treaty’s conclusion. Preparatory work is one of the more obvious supplementary means of interpretation in that it provides some evidence of the concerns, and therefore possibly the intent, of the State Parties at the drafting of their BIT. Preparatory work illuminates the debates, the questions and the conclusions of the various pieces that go into a treaty and often sheds light on why and how the particular BIT provisions came to be. The circumstances of a treaty’s conclusion are

³⁵ Report of the International Law Commission on the Work of Its eighteenth Session, 1966 I.L.C. YEARBOOK (Vol. II) (May 4 – July 19, 1966) p. 223, ¶ 18, Commentary to Article 28 (in later iterations of the Vienna Convention on the Law of Treaties Article 28 became Article 32).

similarly effective for interpretation in that evidence produced at that time frequently includes public statements, historic conditions and governmental actions that similarly can signal a State Party's intent in signing the treaty and the focus of the State's efforts with respect to the BIT. Both of these supplementary means of interpretation have the evidentiary value of being contemporaneous with the drafting and executing of the BIT and are thus potentially more objective and less likely than submissions to be self-interested and drafted in light of a particular dispute.³⁶

60. In addition to the two supplemental sources mentioned in Article 32, I also in this Part look to other supplementary evidence that may be helpful to the Tribunal. These sources do not involve direct expressions of the State Parties; rather they offer interpretative aid by way of analogy, and the weight given to them should turn not only on how analogous the evidence is, but also on how helpful to the interpreter. In this dispute, there are several such "secondary" forms of supplementary evidence. They include (1) awards of other arbitral tribunals who analyze and discuss the U.S.-Ecuador BIT and, in particular, Article II(7) and (2) the examination of arbitral and scholarly interpretation of analogous language in treaties and customary international law.

A. "Preparatory Work of the Treaty"

61. In any interpretation, there are likely a very limited number of direct sources that qualify either as subsequent agreements or practice or supplementary means of interpretation. In this dispute, valuable supplementary materials are available from both the United States and Ecuador. Primary among the U.S. materials are the U.S. Model BITs and the language in the BIT transmittal package in the United States of the U.S.-Ecuador BIT and other similar, contemporaneous BITs. From Ecuador, the National Congressional discussions of the U.S.-Ecuador BIT by Ecuador's *El Congreso Nacional* are highly illuminating in their illustration of the provisions and concerns addressed by the Congress.

³⁶ See Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 A.J.I.L. 179, 212 (2010) (internal citations omitted).

1. The U.S. Model BIT

62. First, the U.S. Model BIT provides assistance in understanding the intent of the United States in proposing the “effective means” language. The importance of Model BITs in treaty interpretation is underscored by Anthea Roberts:

Clarifications and explanations in the treaty parties’ model BITs are another example of subsequent practice from which an agreement on interpretation may be inferred. As a model BIT represents the ‘set of norms that the relevant state holds out to be both reasonable and acceptable as a legal basis for the protection of foreign investment in its own economy,’ these clarifications and explanations fairly evidence a state’s general understanding of treaty terms and cannot be dismissed as opportunistic attempts to avoid liability in a particular case. Evidence from one treaty party alone will not establish an agreement, but such evidence can be relevant in investor-state disputes on the basis of the terms of the model BIT, regardless of whether the respondent or a nondisputing treaty party formulated the model. In limited circumstances, an updated model BIT may also be relevant to interpretation of investment treaties based on previous model BITs or ones with slightly different language.³⁷

A country’s Model BIT thus evinces the intent of at least one of the State Parties in the negotiations.

63. The United States, as do other countries, relies upon its Model BITs to guide both it and the other State Party in negotiating specific bilateral investment treaties.³⁸ Professor Vandeveld explains that the United States was particularly reluctant to deviate from its Model BITs for several reasons: (1) if a partner was unable to accept the substance of the agreement as proposed, it was possible that the partner did not have the foreign-investment policy that the BITs were intended to effect; (2) any concessions raised the risk of a possible slippery slope with other potential partners; and (3) “one important purpose of the BIT

³⁷ *Id.*, at 221, quoting Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 2003 BRIT. Y.B. INT’L L. 151, 159 (2003). Roberts explains that: “The United States, for example, besides arguing for certain interpretations before tribunals as a respondent or an intervener, modifies its Model BIT to confirm or reject specific jurisprudence, which helps to crystallize certain de facto precedents and stall or prevent the formation of others.” *Id.* at 222.

³⁸ *See* Hearing before the Committee on Foreign Relations, United States Senate, 103rd Congress, 1st Sess., Responses to the U.S. Department of State to Questions Asked by Senator Pell, at 24 (Sept. 10, 1993) (explaining that the BIT negotiation process is started by sending the BIT prototype to countries pursuing economic reform; negotiations are then commenced with interested countries based upon the prototype).

program, at least initially, was to bolster customary international law by creating a body of uniform state practice in support of certain principles.”³⁹

64. From a comparison of the U.S.-Ecuador BIT with the U.S. Model BITs, it is evident that the 1992 U.S. Model BIT served as a template for the U.S.-Ecuador BIT. With limited exceptions, the U.S.-Ecuador BIT is an exact copy of the 1992 U.S. Model BIT, including the provision guarantying effective means of asserting claims and enforcing rights.⁴⁰ The U.S.-Ecuador BIT contains only minor changes from the text of 1992 U.S. Model BIT: Articles I(f) and (g) are added; Article II(2) is added; and the bracketed language of a proposed Article 8 is removed. Based upon the U.S. policy of negotiating treaties consistent with its Model BITs, it is highly likely that the majority of the U.S.-Ecuador BIT came from the initial negotiating position of the U.S. It is also likely, however, given the dispersed deviations from the U.S. Model BIT, that Ecuador reviewed and accepted the unchanged provisions. The 1992 U.S. Model BIT therefore in my opinion properly serves as a source of supplementary interpretative evidence both as to the U.S. understanding of the meaning and purpose of Article II(7) and as to the basis on which the U.S. presented that article to Ecuador.

65. The language of “effective means” first appeared in the 1983 U.S. Model BIT in response to a disagreement among publicists concerning the content of the customary international law right guarantying an alien the right of access to the courts.⁴¹ Prof. Vandeveld explains why such a provision was needed despite the codification in all BITs of binding investor-state arbitration:

The BITs differ from prior investment-related treaties in that they provide investors with a right to binding investor-state arbitration of investment disputes. Although this remedy was intended to give an investor an alternative to legal action in the court of the host state, access to local courts remain of great importance to investors for several reasons. First, the definition of “investment dispute” excludes many types of disputes that may arise between an investor and its host state. Second, where an investor’s dispute is with a

³⁹ VANDEVELDE, *supra* note 24, at 108-9.

⁴⁰ See U.S. Model BIT (1992); VANDEVELDE, *supra* note 24, at 102, 302, 500, 556, 644, and 729.

⁴¹ VANDEVELDE, *supra* note 24, at 411. This point is noted by the Tribunal in *Commercial Cases* BIT.

private party rather than the host state, the investor-state disputes provision generally has no application. Third, the investor may have agreed with the host state to submit any disputes to local courts and, even where the investor nevertheless has the right to international arbitration, an investor may prefer for political or other reasons to adjudicate the dispute in local courts. The secretary of state has explained that, “[l]ike the treaties of Friendship, Commerce and Navigation (FCN), which precede them (the BIT program is a successor to the FCN program), BITs provide a basis for nationals and companies of the other Party to allege Treaty violations in actions in courts of the United States.”⁴²

Professor Vandeveld explains that thus the “effective means” provision is intended to create a separate obligation “to develop an effective judicial system and in that to promote the rule of law. ... That is, the BITs would discourage uses of local remedies only to the extent that investors believed local remedies to be ineffective.”⁴³

66. The first “effective means clause” is found at Article 2(8) of the 1983 Model BIT as part of the State Parties’ promise “to maintain a favorable environment for investments” in a larger and more comprehensive article.⁴⁴ This “judicial access provision,” as described by Prof. Vandeveld, conferred “three separate rights upon investors with respect to access to justice”:

First, ‘in order to maintain a favorable environment for investment,’ each party must provide ‘effective means of asserting claims and enforcing rights with respect to investment agreements, investment

⁴² VANDEVELDE, *supra* note 24, at 412-13 (quoting Trinidad and Tobago BIT submittal letter, at XI n.1).

⁴³ VANDEVELDE, *supra* note 24, at 581.

⁴⁴ U.S. Model BIT (1983). Article 2(8) reads:

In order to maintain a favorable environment for investments in its territory by nationals or companies of the other Party, each Party shall provide effective means of asserting claims and enforcing rights with respect to investment agreements, investment authorizations and properties. Each Party shall grant to nationals or companies of the other Party, on terms and conditions no less favorable than those which it grants in like situations to its own nationals or companies, and no less favorable than those which it grants in like situations to nationals or companies of any third country, whichever is the most favorable treatment, the right of access to its courts of justice, administrative tribunals and agencies, and all other bodies exercising adjudicatory authority, and the right to employ persons of their choice, who otherwise qualify under applicable laws and regulations of the forum regardless of nationality, for the purpose of asserting claims, and enforcing rights, with respect to their investments.

authorizations and properties.’ This first sentence, then creates an absolute standard for measuring the effectiveness of remedies and procedures for enforcing substantial rights. No similar provision had appeared in prior U.S. treaty practice. The treaty does not further define “effective.”

* * *

Second, Article II(8) of the 1983 model requires each party to grant to nationals and companies of the other party the better of MFN or national treatment in like situations with respect to the right of access to its courts of justice, administrative tribunals, and all other bodies exercising adjudicatory authority for the purpose of asserting claims and enforcing rights with respect to their investments. This second sentence is the successor to the judicial access provisions of the FCNs.

The third clause ensures the right to employ counsel of the parties’ choice.⁴⁵

67. In 1984, the “effective means” provision became its own subsection within Article II of the U.S. Model BIT and consists of only the first sentence of the 1983 Model – “Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations and properties”⁴⁶ – absent the previously included introductory language relating to the favorable environment for investment and the clauses addressing MFN and national treatment, all of which was thought to be unnecessary.⁴⁷ There were no further changes in 1987.⁴⁸ In 1991, the reference to “properties” was removed and replaced with “investment” as it was considered an “anomaly, since the agreement otherwise refers to protection of investment, not property.”⁴⁹ This history brings us to the 1992 Model BIT that informed the U.S.-Ecuador BIT.

68. For the sake of completeness, I note that in 1994, the language appears at Article II(4) and replaces the phrase “investment, investment agreements and investment authorizations” with “covered investments,” which potentially limits claims based upon

⁴⁵ VANDEVELDE, *supra* note 24, at 781-82.

⁴⁶ U.S. Model BIT (1984, 1987), art. II(6).

⁴⁷ VANDEVELDE, *supra* note 24, at 414.

⁴⁸ U.S. Model BIT (1987), art. II(6)

⁴⁹ VANDEVELDE, *supra* note 24, at 414.

investment authorizations that were breached without the investment coming to fruition.⁵⁰ The provision was dropped altogether in 2004; Prof. Vandeveldt explains his beliefs as to the rationale for this final edit:

U.S. drafters believed that the customary international law principle prohibiting denial of justice provides adequate protection and that a separate treaty obligation was unnecessary. Nevertheless, to make clear that BITs are intended to protect the right of judicial access, albeit implicitly through the international minimum standard, the preamble of the 2004 model was amended to state that the parties “[recognize] the importance of providing effective means of asserting claims and enforcing rights with respect to investment under national law.”⁵¹

2. U.S. BIT Transmittal Language and Committee on Foreign Relations Discussions

69. To the best of my knowledge, forty-three BITs with the United States include a provision for some form of effective means of bringing claims and enforcing rights.⁵² The discussions of the U.S. Senate Committee on Foreign Relations regarding these BITs also provide helpful supplementary interpretative information, especially the Committee’s discussions in September of 1993 in respect of eight BITs, including that of the one with Ecuador, brought before it as a part of the advice and consent process of the Senate.⁵³ Although the discussions had little to say regarding the Ecuadorian treaty in particular, the

⁵⁰ VANDEVELDE, *supra* note 24, at 414-15.

⁵¹ VANDEVELDE, *supra* note 24, at 414; U.S. Model BIT (2004), preamble. *See also* Kenneth J. Vandeveldt, *A Comparison of the 2004 and 1994 U.S. Model BITs* in YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2008-2009 283, 289 (K. Sauvant, ed., 2009).

⁵² In chronological order of ratification, they are: Cameroon (1989), Grenada (1989), Zaire (1989), Senegal (1990), Turkey (1990), Morocco (1991), Panama (1991), Czech and Slovak Federal Republic (1992, amended 2004), Egypt (1992), Sri Lanka (1993), Tunisia (1993), Argentina (1994), Bulgaria (1994), People’s Republic of Congo (1994), Republic of Kazakhstan (1994), Republic of Kyrgyzstan (1994), Republic of Moldova (1994), Poland (1994), Romania (1994), Republic of Armenia (1996), Latvia (1996), Trinidad and Tobago (1996), Ukraine (1996), Republic of Ecuador (1997, signed 1993), Estonia (1997), Georgia (1997), Mongolia (1997), Albania (1998), Azerbaijan (2001), Bahrain (2001), Bolivia (2001), Croatia (2001), Honduras (2001), Lithuania (2001), Socialist Republic of Vietnam (2001), Jordan (2003), Mozambique (2005), Uruguay (2006), El Salvador (pending), Haiti (pending), Nicaragua (pending), Russia (pending), and Uzbekistan (pending). Twelve of these incorporate the language of the 1991/1992 BITs without change: Armenia, Belarus, Ecuador, Estonia, Latvia, Lithuania, Kazakhstan, Kyrgyzstan, Moldova, Mongolia, Romania, and Ukraine. VANDEVELDE, *supra* note 24, at 417.

⁵³ Hearing before the Committee on Foreign Relations, United States Senate, 103rd Congress, 1st Sess. (Sept. 10, 1993), *supra* note 38 (the other treaties discussed were those of Argentina, Armenia, Bulgaria, Kazakhstan, Kyrgyzstan, Moldova and Romania).

discussion did turn at many points to the importance of proper dispute resolution and the use of BITs to encourage improvement of domestic policies by its treaty partner. In response to a question as to whether BITs “actually provide United States foreign investors more protection” and a request for examples of such, for instance, the Committee responded:

While the other country’s investment regime would ordinarily be consistent with the Treaty at the time a BIT is concluded, a BIT can, as a matter of domestic law in the other country serve to improve the actual treatment of investment. (One common example would be access to, and enforcement of awards arising from, international arbitration). Moreover, investors are deeply interested in the stability of the investment regime, particularly once they’ve made their investment. The BIT binds key elements of the investment regime – such as free transfers, full compensation in case of an expropriation, and no discriminatory forced divestitures. And the BIT underwrites these bindings with effective dispute settlement provisions.⁵⁴

In my opinion, the effective means provision was designed to and in fact serves these same purposes: encouraging – if not forcing – the BIT partner to ensure that its judicial and administrative reviews and actions succeed in protecting investors and provide for stability of the investment regime.

3. El Congreso Nacional del Ecuador

70. The National Congress of Ecuador considered the U.S.-Ecuador BIT on at least five separate dates in September and October of 1994, memorialized each time in an “Acta”.⁵⁵ It appears that the full text of the BIT was never provided to the Congress for review, a fact to which El H. Delgado Jara objected numerous times.⁵⁶ The text of the BIT and Protocol were read – in their entirety – to the National Congress, however, by the Secretary,⁵⁷ and a recommendation of the BIT was provided to Congress by the Subcomisión de Convenios y

⁵⁴ *Id.*, at 23.

⁵⁵ See Congreso Nacional del Ecuador, Sesión Vespertina de Congreso Ordinario, Acta No. 17 (1 Sept. 1994); Sesión Matutina del Congreso Ordinario, Acta No. 18 (2 Sept. 1994); Sesión Vespertina de Congreso Ordinario, Acta No. 35 (28 Sept. 1994), Acta No. 38 (4 Oct. 1994), and Acta No. 39 (5 Oct. 1994).

⁵⁶ See, e.g., Acta No. 17 (1 Sept. 1994), at 43-44; Acta No. 18 (2 Sept. 1994), at 6, 8, 10-11.

⁵⁷ See Acta No. 17 (1 Sept. 1994), at 24-35.

Tratados Internacionales (Subcommission on International Conventions and Treaties).⁵⁸

This recommendation was also read to the Congress and is memorialized in the Acta:

Los Miembros de la Subcomisión de Convenios y Tratados Internacionales, hemos analizado el “Convenio entre la República de los Estados Unidos de América sobre Promoción y Protección Recíproca de Inversiones” y previo al informe favorable del asesor, opinamos que es pertinente que nuestro país apruebe dicho Convenio, en aras de precautelar nuestros intereses y en favor de la cooperación internacional. Por lo que sugiere a los Honorables Miembros de la Comisión Especial Permanente de Asuntos Internacionales, emite informe favorable de este Instrumento Internacional a fin de que el H. Congreso Nacional apruebe de conformidad al Artículo 59 literal h) de la Constitución Política del Estado. ...⁵⁹

Which I translate to read:

The Members of the Subcommittee on International Conventions and Treaties, having analyzed the “Agreement between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment” provide this favorable report of the adviser; we opine that it is pertinent that our country approves the above mentioned Agreement, for the sake of precaution for our interests and in favor of international cooperation. For this we suggest to the Honorable Members of the Special Permanent Commission on International Matters, expressing this favorable report of this International Instrument in order that the Honorable National Congress passes in conformity with Article 59 literal h) of the Political Constitution of the State.⁶⁰

Following the reading of the report, the report was brought up for an immediate vote by the President and was approved by the Congress without further discussion.⁶¹

71. As mentioned above, Congressman Delgado Jara objected to the process of approving international conventions and agreements without the full text having been

⁵⁸ See Acta No. 17 (1 Sept. 1994), at 23-24.

⁵⁹ Acta No. 17 (1 Sept. 1994), at 23-24.

⁶⁰ I remind the Tribunal of my language limitations as specified above (*see supra* ¶ 10). These are informal translations for use solely as a general idea of the statements made, their accuracy is not guaranteed but neither do I base my analysis on specific terms of interpretation.

⁶¹ Acta No. 17 (1 Sept. 1994), at 24.

reviewed in written form by the Congress; he did so quite vocally several times.⁶² In an apparent attempt to educate the Congress, express his concerns about the BIT, the United States, or such an agreement with the United States (or, possibly, all of the above), Sr. Delgado spoke at great length about the BIT and, in the process, outlined and discussed several provisions for the Congress, including: art. I(g) (the definition of “delegation”); art. II(3)(b) (forbidding arbitrary or discriminatory measures); art. III(3) (losses owing to war); art. VI(6) (final and binding arbitral awards); art. VII(2) (arbitrator nomination); and Protocol, art. 2 (U.S. exceptions to national treatment).⁶³

72. Salient to this opinion and this dispute, Sr. Delgado spoke at length about Article II(7), after reading the provision in the second day of discussions, Sr. Delgado stated:

[Y]o pregunto, antes determinados convenios que existen ya firmados hace mucho tiempo, hace décadas, incluso, entre Gobiernos del Ecuador y Gobiernos de los Estados Unidos, ¿qué es lo que también se determina entre esos medios eficaces? El uso de la Fuerza, la posibilidad del bloqueo económico. Entonces, ¿qué uso de la Fuerza puede tener la República del Ecuador en relación a los Estados Unidos? ... Senores legisladores, no estamos hablando de dos Estados de igual poder, son dos Estados de diverso poder, son dos Estados totalmente diferentes en su potencialidad economic, militar y de todo tipo. . . .⁶⁴

[I ask, certain agreements already existed signed long ago, decades ago, between the Government of Ecuador and the Government of the United States, what is it that also is decided between these effective means? The use of Force, the possibility of an economic blockade. Then: what use of Force can the Republic of Ecuador have in relation to the United States? Fellow Legislators, we are not speaking about two States of equal power, they are two States of diverse power, they are two States with a total difference in their economic, military and every type of potential.]

⁶² El Señor Presidente noted that, with respect to the objections regarding Congress not having the opportunity to read the BIT raised by Sr. Delgado – regarding whom the President noted, “con quien nos separan profundas diferencias ideológicas” (“with whom we have deep ideological differences”) – that he felt Sr. Delgado’s proposal would be impossible. The President noted that each international convention is introduced with a report of the Commission on International Cases, and reviewing each agreement, article by article, would preclude Congress from completing the rest of its obligations. Acta No. 18 (2 Sept. 1994), at 12-14.

⁶³ Acta No. 35 (4 Oct. 1994), at 10-16.

⁶⁴ Acta No. 18 (2 Sept. 1994), at 10.

Apparently based upon the objections of Sr. Delgado as to the background provided, El Congreso Nacional voted on reconsideration of each of the three *convenios* under consideration; Congress voted to only reconsider the U.S.-Ecuador BIT.⁶⁵

73. During the “conocimiento”⁶⁶ of the U.S.-Ecuador BIT, Sr. Costa Febres spoke of reasons why he thought the BIT was “very positive for our country” in that it allowed a quantity of investors and investment into Ecuador, and increased the capacity for investment, capital, and jobs into Ecuador.⁶⁷ This was followed by Sr. Rivera who expressed his concern for the inequality in the BIT, and between the State Parties, both in their economic power and their focus on business and investment.⁶⁸ Sr. Alarcon Rivera objected to the level of detail – or lack thereof – provided to the Congress and requested, if not the whole BIT, then at least a more detailed report from the Commission on International Cases.⁶⁹ This led to a vote on whether the Commission should be asked to provide a more detailed report to Congress, which was denied.⁷⁰ Immediately following this vote, Congress voted on a motion by Sr. Costa to “approve the report of the commission, and therefore, the agreement,” which was approved.⁷¹

74. Following these discussions and votes, the “reconsideration” occurred the following week. Sr. Delgado spoke again of the dangers he saw in Article II(7):

[E]s decir no habla de los medios eficaces de caracter jurídico, no puede sobrentenderse, aquí lo que se autoriza simple y llanamente y podemos, después, establecer las concordancias con otros artículos para que un país puede intervenir en el otro. ... entre los Estados Unidos y el Ecuador no es posible suponer que nosotros podamos recurrir a cualquier medio eficaz. ...⁷²

[It is to say that this does not speak of effective means of a juridical character, this is not to be taken for granted, here what it authorizes simply and we can, after, establish the congruities with other items by

⁶⁵ *Id.*, at 14-15.

⁶⁶ “Conocimiento” translates to be “knowledge” and appears to be part of the reconsideration process during which the accord is discussed and further introduced.

⁶⁷ Acta No. 35 (28 Sept. 1994), at 32.

⁶⁸ *Id.*, at 45

⁶⁹ *Id.*, at 42.

⁷⁰ *Id.*, at 47.

⁷¹ *Id.*

⁷² Acta No. 38 (4 Oct. 1994), at 38.

which one country can intervene in the other. ... between the United States and Ecuador it is not possible to suppose that we could appeal to virtually every effective means.]

He also outlined various provisions of the BIT as explained above.⁷³ Despite Sr. Delgado's sustained efforts, the reconsideration was denied.⁷⁴ The President, however, allowed for a "reconsideración de la reconsideración" and scheduled it for the next day.⁷⁵

75. The following day, Sr. Delgado continued with his condemnation of Article II(7):

Señor Presidente, cualquier abogado, cualquier estudiante de Derecho sabe que tiene que remitirse un Acuerdo, un Convenio, un pacto a los terminus textual del mismo. Se fuese un asunto estrictamente jurídico, no debería haber estado la redacción, que cada parte establecerá medios jurídicos eficaces, pero aquí no se plantea medios jurídicos, sino medios de cualquier género, señor Presidente, insiste este es un Convenio antinacional, contra los intereses de la República del Ecuador, de qué manera el Ecuador va a hacer respetar en el concierto internacional con los Estados Unidos esta posibilidad, de que respete por ejemplo sus reclamaciones en cualquier campo.⁷⁶

[Mister President, any lawyer, any student of legal rights knows that one has to take an Agreement, a Convention, a pact to the terminus of its text. A strictly legal matter, the writing should not have been that every part establishes juridical effective means, but here does not arise juridical means, rather the means of every genre, mister President, I insist that this is an unpatriotic Agreement, against the interests of the Republic of Ecuador, by what manner is Ecuador to respect in international concert this possibility with the United States, to respect such claims in any field.]

76. Following the appeal by Sr. Delgado, the President of the Congress called for a vote on the "reconsideration of the reconsideration" which was denied.⁷⁷ This appears to be the end of the discussion of the BIT. The BIT could now be considered approved, as it had previously been approved and the reconsideration and the reconsideration of the reconsideration had been denied.

⁷³ See *supra* ¶ 71, citing Acta No. 35 (4 Oct. 1994), at 10-16.

⁷⁴ Acta No. 38 (4 Oct. 1994), at 24.

⁷⁵ *Id.*

⁷⁶ Acta No. 39 (4 Oct. 1994), at 6.

⁷⁷ *Id.* at 13.

4. Conclusion with respect to “Preparatory Work of the Treaty”

77. Several salient points from the preparatory work of the treaty add to the interpretation of Article II(7) resulting from the Article 31 analysis, as is intended by Article 32 VCLT. First the U.S. Model BIT served as the model for the U.S.-Ecuador BIT, with minimal variations. For this reason, it is reasonable to assume that Ecuador at least did not disagree with the vast majority of the treaty that remained unchanged and therefore the exploration of the intent of the United States with respect to its Model BITs is illuminating in that it was this intent that likely guided the negotiations.

78. From the discussion of the U.S. Model BITs, we learn that the United States was concerned for the availability of effective domestic remedies as numerous types of claims do not fall within the investor-state dispute resolution provision. It was determined that such a requirement would lead to a favorable investment environment and the creation of a right to claim based on the lack of such effective domestic means ensured that investors would have recourse irrespective of other customary international law rights, such as denial of justice or international due process. In this way, the United States hoped to encourage the improvement of domestic procedures and rule of law.

79. With respect to further defining what exactly are effective measures for asserting claims and enforcing rights, however, the Model BITs provide little guidance beyond the importance of this provision to the State Parties to ensure real protection and a separate investor right. The most helpful interpretation comes from Prof. Vandeveldé’s interpretation that, in the first appearance of the effective means language in the 1983 BIT, the first part of the sentence – “in order to maintain a favorable environment for investment” – created an “absolute standard” against which to judge effectiveness.⁷⁸

80. The U.S. Senate Committee on Foreign Affairs discussions reiterate the reach of the effective means provision into the domestic systems of each treaty party. The Committee recognized the opportunity of BITs to encourage domestic development, in line with the

⁷⁸ See *supra* ¶ 66, quoting VANDEVELDE, *supra* note 24, at 781-82.

goal of the Model BIT practice to promote the rule of law. The effective means provision is among the primary provisions requiring such domestic development.

81. The debates of El Congreso Nacional, however, may be even more important for understanding what Ecuador believed “effective means” might entail than even the U.S. intent in drafting the provision. Although the Congress never read the BIT, they did hear it read to them, they reviewed an “informe” recommending it and, with thanks to Sr. Delgado, they reviewed and discussed many salient provisions of the BIT in detail. Based upon these discussions, I believe it fair to say that the BIT was reviewed by Congress and approved with at least some awareness of its provisions and implications. In addition, Sr. Delgado informed the Congress of some of the potential duties, obligations and consequences to which Ecuador agreed in signing the U.S.-Ecuador BIT and Article II(7) within it. Sr. Delgado explained, for instance, that effective means go beyond the judicial review and, in the judgment of what is effective, the standard to be applied would be determined internationally and might even be in comparison to Ecuador’s BIT partner, the United States.

82. Finally, the fact that Sr. Delgado was considered as being in ideological discord with the President, if not all of Congress, that each of his appeals were denied, and that very few other comments were made, I read as Congress’ intent that this BIT be approved. As is explored in more depth below, it appears that Congress was intent on increasing opportunities for investment and, even when faced with potential difficulties, was not dissuaded. Specifically, there are no indications that Congressional intent wavered through the various criticisms and condemnations of the effective means provision of Article II(7) .

B. “Circumstances of its Conclusion”

83. At the time of executing the U.S.-Ecuador BIT, Ecuador was pro-foreign investment. It was moving at various channels to encourage an influx of investment and greater openness of its economy. The U.S.-Ecuador BIT was not the only international agreement to be signed between the State Parties during this time period. The two countries also signed an accord with respect to intellectual property rights which was viewed in

Ecuador as further evidence of the excellent relations between the two countries and of Ecuador's status as a pioneer in the southern hemisphere for a "firm legal basis and a transparent climate for the investment of northamerican capital."⁷⁹

84. The publicity surrounding the signing of the U.S.-Ecuador BIT suggests that the BIT was negotiated by Ecuador in an attempt to attract foreign investment and that Ecuador understood that a stable and transparent investment environment was necessary to succeed in bringing international capital into Ecuador. Just following the signing of the BIT, Ecuador's Foreign Minister, Diego Paredes, explained that BITs like the U.S.-Ecuador BIT "should ensure an increased flow of investments into Ecuador as a consequence of the full guaranty of the same and an atmosphere of greater security for foreign investors and companies."⁸⁰ The Ecuadorian government said that such international steps were necessary for Ecuador to compete internationally for the uptake of capital destined to promote productive activity in the country.⁸¹

85. This pro-investment attitude and desire to facilitate the passage of the BIT and remove any impediments to U.S. investment in Ecuador is also noted by the U.S. Senate Committee on Foreign Relations:

The side letter was made an integral part of the Treaty at the request of Ecuador in order to simplify and hasten the granting of administrative and other authorization under Ecuadorian law to U.S. investors. By explicitly confirming that the treaty constitutes the necessary approval under these laws, the Ecuadorian government sought to reduce or eliminate certain bureaucratic practices identified as impediments to investment there. The U.S. government believes that these provisions will make it easier for U.S. investors to operate in Ecuador.⁸²

⁷⁹ *Ecuador y EE. UU. Firman acuerdos*, El Comercio, *Diorio Independiente*, at A-3 (Nov. 23, 1993) (this is my own translation of: "une firme base legal y un clima transparente para inversión de capitales norteamericanos").

⁸⁰ *Acuerdo Económico Ecuador-EU*, El Comercio, *Diorio Independiente*, at A-1 (Aug. 28, 1993) (again, this is my own translation of, "Paredes recalcó que con Tratados como éste se debe asegurar un mayor flujo de inversiones hacia Ecuador como consecuencia de una plena garantía de las mismas y un ambiente de mayor seguridad para los inversionistas o empresarios extranjeros").

⁸¹ *Garantía para inversiones de EEUU*, HOY, at A-1 (Aug. 28, 1993).

⁸² Hearing before the Committee on Foreign Relations, United States Senate, 103rd Congress, 1st Sess., at 37 (Sept. 10, 1993), *supra* note 38.

This is reiterated in the transmittal language of the U.S.-Ecuador BIT to the 103rd Congress from Warren Christopher:

In an exchange of letters at the time the Treaty was signed, Ecuador explicitly confirmed that the Treaty shall serve to satisfy a variety of substantive and procedural requirements imposed on U.S. investors and investments by Ecuadorian law. This understanding reflects the desire of the Government of Ecuador that the Treaty should operate in and of itself to reduce or eliminate certain bureaucratic practices identified as impediments to investment.⁸³

86. Ecuador's treaty partner in this BIT – the United States – was also intent on facilitating international investment both into and out of the United States and BITs were an integral part of U.S. international investment policies. Ambassador Charlene Barshefsky wrote to the Committee on Foreign Relations on September 10, 1993:

President Clinton stated in his transmittal of the recent BIT treaties that they will establish an agreed-upon basis for the protection and encouragement of investment. The BIT Program is thus a successful and important element of our international investment agenda. But we have several other efforts underway with respect to this investment agenda. The investment chapter of the NAFTA goes even further in some respects than the BIT, greatly liberalizing our trading partners' investment regimes. Among the industrialized countries, the U.S. currently relies on the Capital Movements Code of the OECD to bind the right of establishment. The United States also supports the OECD's conducting of a feasibility study for a comprehensive, binding multilateral investment agreement, known as the "Wider Investment Instrument"; any new instrument will have to incorporate the principles of our BIT on right of entry, post-establishment protections (including performance requirements) and dispute settlement. With respect to others' regional arrangements, we are working to ensure that integration efforts are not completed in a way that disadvantages U.S. interests—for example, through investment liberalization implemented on a non-MFN basis. With respect to the Uruguay Round TRIMs negotiations, we expect that baseline standards on local content and trade balancing requirements will be established; such an agreement will benefit the U.S. economy by automatically prohibiting these practices. Finally we are

⁸³ Republic of Ecuador, Investment Treaty with the Republic of Ecuador, Treaty Doc. 103-15, 103rd Congress, Letter from Warren Christopher (Aug. 27, 1993).

addressing investment issues with several trading partners, including Japan, in bilateral fora.⁸⁴

The U.S.-Ecuador BIT therefore fell in the overall agenda of the United States to promote investment at numerous levels, both bilateral and multilateral. Primary among these goals was ensuring effective dispute resolution for investors, and as was seen in the above discussion of the then Model BIT, an “effective means” provision was an important of effective dispute resolution.

87. The shared pro-investment attitude of the two State Parties to the U.S.-Ecuador BIT is consistent with the interpretation of Article II(7) resulting from an Article 31 analysis. The U.S. was concerned with ensuring it investors would be protected and secure in investing in Ecuador, which required a stable and transparent investment climate and, central to this, was a dispute settlement system free of interference by the host state. Ecuador understood this, recognizing that these promises to which it agreed in signing the BIT were an imperative prerequisite for capital to flow from the United States. Reading Article II(7) from a pro-investment stance confirms that the provision was meant to provide not only for sufficient law to protect investors but also real avenues of protecting rights and airing complaints and having both promptly and properly addressed at the domestic level.

C. Awards of other Arbitral Panels Addressing Article II(7) of the US-Ecuador BIT

88. Although arbitral awards do not constitute precedent for one another, they can provide guidance, if the Tribunal, as with scholarship, finds the reasoning persuasive. Typically, a tribunal will look to other awards when they address an analogous language or situation and provide a well-reasoned and legally grounded conclusion. In the present matter, two prior tribunals have examined exactly the clause present in this dispute: Article II(7) of the U.S.-Ecuador BIT. First, as this Tribunal is likely aware, this arbitration is preceded by another arbitration conducted under the UNCITRAL Rules: *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, PCA Case No. AA277 (hereinafter

⁸⁴ Hearing before the Committee on Foreign Relations, United States Senate, 103rd Congress, 1st Sess., Statement of Ambassador Charlene Barshefsky, at 20 (Sept. 10, 1993), *supra* note 38.

“*Commercial Cases*”).⁸⁵ The *Commercial Cases* arbitration in the context of a different dispute addressed, *inter alia*, the same article of the BIT. Second, there is *Duke Energy v. Ecuador*⁸⁶ which with different parties also addresses Article II(7). I examine each in turn and conclude with an analysis as to the relevance of each decision to the matter at hand.

1. The Commercial Cases Award

89. The *Commercial Cases* dispute centered on seven breach-of-contract cases in Ecuadorian courts, involving the alleged breach by Ecuador of payment obligations to TexPet under two agreements from 1973 and 1977.⁸⁷ Without reciting all of the facts of the case, I note the salient fact being delays in the Ecuadorian court proceedings that were alleged, and found, to be unreasonable in length: For over a decade, fifteen judges in three different courts did not rule on seven separate cases, six of which had stood ready for decision for nine years and, in the seventh, evidence had not been taken for fourteen years.⁸⁸ Both the Tribunal’s reasoning and its holding appear instructive to the present matter.

90. The *Commercial Cases* Tribunal determined that Article II(7) “constitutes a *lex specialis* and not a mere restatement of the law on denial of justice.”⁸⁹ The test for determining a breach of the effective means obligation is “distinct and potentially less-demanding” than that required for a denial of justice claim.⁹⁰ By contrast to denial of justice, the Tribunal noted, “a failure of domestic courts to enforce rights ‘effectively’ will constitute a violation of Article II(7).”⁹¹ The requirement, the Tribunal continued, is a positive one: “the obligation in Article II(7) is stated as a positive obligation of the host State to provide

⁸⁵ *Commercial Cases*, Partial Award, *supra* note 4.

⁸⁶ *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04-19, Award (Aug. 18, 2008).

⁸⁷ *Commercial Cases*, Claimant’s Memorial on the Merits, ¶ 2 (Apr. 14, 2007).

⁸⁸ *Id.* ¶ 9.

⁸⁹ *Commercial Cases*, Partial Award, *supra* note 4, ¶¶ 242-43 (*citing* KENNETH J. VANDEVELDE, UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE 112 (Kluwer Law & Taxation 1992) and KENNETH J. VANDEVELDE, UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE 411 (Oxford 2009)).

⁹⁰ *Id.* ¶ 244 (The Tribunal described the denial of justice standard that it describes as “informing” the inquiry into whether means are effective: “While the standard is objective and does not require an overt showing of bad faith, it nevertheless requires the demonstration of ‘a particularly serious shortcoming’ and egregious conduct that ‘shocks, or at least surprises, a sense of judicial propriety.’”).

⁹¹ *Id.* ¶244.

effective means, as opposed to a negative obligation not to interfere in the functioning of those means.”⁹²

91. In applying this standard, the *Commercial Cases* Tribunal noted that, “one cannot fully divorce the formal existence of the system from its operation in individual cases.”⁹³ Therefore, the Tribunal looked to the individual case, but with a measure of deference to system as a whole:

While Article II(7) clearly requires that a proper system of laws and institutions be put in place, the system’s effects on individual cases may also be reviewed. This idea is reflected in the language of the provision. The article specifies “asserting claims,” so some system must be provided to the investor for bringing claims, as well as “enforcing rights,” so the BIT also focuses on the effective treatment of the rights that are at issue in particular cases. The Tribunal thus finds that it may directly examine individual cases under Article II(7), while keeping in mind that the threshold of “effectiveness” stipulated by the provision requires that a measure of deference be afforded to the domestic justice system; the Tribunal is not empowered by this provision to act as a court of appeal reviewing every individual alleged failure of the local judicial system *de novo*.⁹⁴

92. In my opinion, the *Commercial Cases* award is helpful in following through on the need under Article II(7) to distinguish between measures which are acceptable and those which are ineffective. First, the Tribunal found that a breach of Article II(7) does not require a showing “of the host State’s extreme interference in the judicial proceedings.”⁹⁵ In other words, a breach of Article II(7) can exist not only because of interference in the proceedings but also because the means are not effective. Thus the Tribunal found timeliness to be of importance to the effectiveness of a measure: “For any ‘means’ of asserting claims or enforcing rights to be effective, it must not be subject to indefinite or undue delay. Undue delay in effect amounts to a denial of access to those means.”⁹⁶ It established a rule providing for such a qualification, as well as describing factors for the determination of when a delay in hearing an investor’s claim becomes so long as to warrant a finding of a breach of

⁹² *Id.* ¶ 248.

⁹³ *Id.* ¶ 246.

⁹⁴ *Id.*

⁹⁵ *Id.* ¶ 248 (countering an initial suggestion by Respondent).

⁹⁶ *Id.* ¶ 250.

the host State's obligation to provide effective means for asserting claims and enforcing rights:

The Ecuadorian legal system must thus, according to Article II(7), provide foreign investors with means of enforcing legitimate rights within a reasonable amount of time. The limit of reasonableness is dependent on the circumstances of the case. As with denial of justice under customary international law, some of the factors that may be considered are the complexity of the case, the behavior of the litigants, the significance of the interests at stake in the case, and the behavior of the courts themselves. The Tribunal must thus come to a conclusion about if and when the delay exceeded the allowable threshold under Article II(7) in light of all such circumstances.⁹⁷

93. Applying these factors, the Tribunal found the delay with respect to seven cases “had become unreasonable, and a breach of Article II(7) was completed.”⁹⁸ The *Commercial Cases* Tribunal came to this conclusion following the consideration of its stated factors. First, the Tribunal found that all of the cases had been pending for at least thirteen years, which was “significant” but not singularly determinative.⁹⁹ The Tribunal went on to find that neither the Claimant's behavior nor the complexity of the case – which the Tribunal determined to be average – justified the delay.¹⁰⁰ Instead the Tribunal found the cause for the delay in the failure of the Ecuadorian courts “to act with reasonable dispatch,” allowing, in all but one case, nine years to pass between the closing of the record and the Notice of Arbitration without rendering a first instance judgment.¹⁰¹ The Tribunal then detailed the various requests, *autos para sentencias*, and continued delays and held these actions – or inactions – to constitute a breach of Article II(7):¹⁰²

Accordingly, it is the nature of the delay, and the apparent unwillingness of the Ecuadorian courts to allow the cases to proceed that makes the delay in the seven cases undue and amounts to a breach of the BIT by the Respondent for failure to provide “effective means” in the sense of Article II(7). In particular, the Tribunal finds the existence of long delays, even after official acknowledgements by the courts that they were ready to decide the cases, to be a decisive

⁹⁷ *Id.* ¶ 250.

⁹⁸ *Id.* ¶ 251.

⁹⁹ *Id.* ¶ 253.

¹⁰⁰ *Id.* ¶¶ 253-55.

¹⁰¹ *Id.* ¶ 256.

¹⁰² *Id.* ¶¶ 257-61 and attached Table of Cases.

factor demonstrating that the delays experienced by TexPet are sufficient to breach the BIT. The Tribunal ultimately concludes that the Ecuadorian courts have had ample time to render a judgment in each of the seven cases and have failed to do so.¹⁰³

2. *Duke Energy Electroquil Partners v. Republic of Ecuador*¹⁰⁴

94. In *Duke v. Ecuador*, the Tribunal's consideration of Article II(7) of the U.S.-Ecuador BIT arose from an assertion by the Claimants that "Ecuador committed a denial of justice by failing to entertain their claims in the local arbitration as well as their tax claims in a timely fashion."¹⁰⁵ Ecuador for its part countered that it was not involved in the local arbitration award, that the tribunal observed standards of due process, and that the Claimants did not exhaust local remedies.¹⁰⁶

95. In interpreting the requirements of Article II(7) so as to assess these allegations, the *Duke* Tribunal found that: "Such provision guarantees the access to the courts and the existence of institutional mechanism for the protection of investments. As such, it seeks to implement and form part of the more general guarantee against denial of justice."¹⁰⁷ It went on to explain the central inquiry for assessing effective means:

As a preliminary comment, the Tribunal notes that the existence and availability of the Ecuadorian judicial system and of recourse to arbitration under the Mediation and Arbitration Law are not at issue here. What is at issue and must be reviewed by the tribunal is how these mechanisms performed, as well as the alleged failure of the State to respect its promise to arbitrate.¹⁰⁸

96. Assessing this question, the Tribunal found that the acts of the local tribunal could not be attributed to Ecuador (Claimant had not established in the Tribunal's eyes that the Government exercised pressure on the local arbitrators), that Electroquil never challenged the final arbitral award before the Ecuadorian courts, and therefore "the Ecuadorian system

¹⁰³ *Id.* ¶ 262.

¹⁰⁴ *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (Aug. 18, 2008).

¹⁰⁵ *Id.* ¶ 385.

¹⁰⁶ *Id.* ¶ 388.

¹⁰⁷ *Id.* ¶ 391.

¹⁰⁸ *Id.* ¶ 392.

never came into play on the award.”¹⁰⁹ Consequently, the Tribunal concluded that it was not clear that “Ecuadorian courts would assimilate an erroneous decision.”¹¹⁰ “On this basis, the Tribunal conclude[d] that the Claimants ha[d] failed to show that no adequate and effective remedies existed,” and thus the claim that Ecuador had breached Article II(7) of the BIT failed.¹¹¹

3. Conclusion with respect to Prior Arbitral Decisions Addressing Article II(7)

97. Although – as observed above – the arbitral awards discussed are not precedential, they can be considered instructive. Based upon the analysis above, I make four observations.

98. First, the reasoning of the *Commercial Cases* Partial Award is consistent with the interpretation reached in this Opinion: The obligation under Article II(7) is both a positive one – requiring proactive efforts to ensure that access is open for investors to judicial and administrative review measures – as well as a negative obligation not to interfere in the proper functioning of the provided measures.

99. Second, the reasoning of the *Duke v. Ecuador* Award is consistent with the view expressed in this Opinion that the central inquiry of Article II(7) must be how do the provided means perform? The *Commercial Cases* Tribunal states it as an inquiry into whether the domestic courts enforced rights “effectively.” Thus the interpretation of this Opinion is confirmed in finding that it is not just the form of the law, but the reality of that law, that must be considered in a determination of whether means are effective.

100. Third, the *Commercial Cases* Tribunal in considering whether certain measures are effective illustrates that, although it is the system of measures that is under review, the system is made up of individual cases and it is within these cases that evidence of ineffectiveness will be apparent. Thus, although it is the system examined, this examination is done in the context of an individual case.

¹⁰⁹ *Id.* ¶¶ 394, 398.

¹¹⁰ *Id.* ¶ 401.

¹¹¹ *Id.* ¶¶ 402-3

101. Finally, the above interpretation of Article II(7) is confirmed by the *Commercial Cases* Tribunal with respect to both extreme influence and delay. With respect to governmental involvement, the *Commercial Cases* Tribunal found that there is no requirement of “extreme interference in the judicial proceedings”. With respect to delay, the Tribunal determined that unjustified delay may also alone constitute a breach of Article II(7): “For any ‘means’ of asserting claims or enforcing rights to be effective, it must not be subject to indefinite or undue delay. Undue delay in effect amounts to a denial of access to those means.”¹¹² The Tribunal established four factors for determining if an unreasonable delay had occurred: complexity, significance of the interests at stake, and the behavior of both the litigants and the courts.

D. Confirmation through the Examination of Interpretations of Analogous Language in Treaties and Customary International Law

1. Article 10(12) of the Energy Charter Treaty

102. The Energy Charter Treaty (ECT) focuses on the “protection and promotion of investments” and does so in a similar manner to the U.S.-Ecuador BIT by placing investment protection obligations on State Parties such as guarantees of fair and equitable treatment, non-discrimination, national treatment, and most-favored-nation status. The ECT was negotiated in the early 1990’s, signed in December 1994 and came into force in April 1998.¹¹³ Although neither the United States nor the Republic of Ecuador are

¹¹² *Commercial Cases*, Partial Award, *supra* note 4, ¶ 250.

¹¹³ The Energy Charter Treaty and Related Documents, Introduction at 13, and Final Act of the European Energy Charter Conference at 23-24 [hereinafter “ECT”] available at http://www.encharter.org/fileadmin/user_upload/document/EN.pdf.

contracting parties to the ECT, the United States is a signatory of,¹¹⁴ and enjoys observer status under the 1991 Energy Charter.¹¹⁵

103. In addition, the United States (in roughly the same period that the Ecuador-U.S. BIT was negotiated) was an active negotiating party whose suggestions and demands affected much of the discussion.¹¹⁶ One commentator noted that it is unquestionable that the ECT contains a great deal of substance that can be traced directly to the US Model BIT and that this was frequently at the urging of US negotiators;¹¹⁷ while another added: "... the United States was not accustomed to deviating significantly from its Model BIT – which was the product of much inter-agency development. Agreeing to protections different from its BITs, the United States feared, would set a harmful precedent in the context of its ongoing BIT negotiations...."¹¹⁸

¹¹⁴ *See id.*, Declarations at 4 (p. 31) (the United States and Canada affirm that they will apply the provisions of Article 10 in accordance with certain considerations concerning the requirement of similar circumstances for comparison of treatment among investors and investments of different contracting parties, and justifications for differential treatment); Annex N – List of Contracting Parties Requiring At Least 3 Separate Areas to be Involved in a Transit (In Accordance with Article 7(10)(A)) (p. 97) (listing the United States and Canada); and Annex ID – List of Contracting Parties Not Allowing an Investor to Resubmit the Same Dispute to International Arbitration at a Later Stage under Article 26 (In Accordance with Article 26(3)(B)(I) (p. 97) (listing the United States)). Each reference is marked with an "Editor's Note" that the United States and Canada have not yet signed the ECT.

¹¹⁵ *See* Official Website of the Energy Charter, list of members and Observers, *available at* <http://www.encharter.org/index.php?id=61&L=1%2F%2F%2F%2F>.

¹¹⁶ *See* Craig S. Bamberger, *The Negotiation of the Energy Charter Treaty* in INVESTMENT PROTECTION AND THE ENERGY CHARTER TREATY XXXIX, XLIX (Graham Coop, Clarisse Ribeiro, eds., 2008) (explaining that "... the US was one of the most active negotiating parties. Its imprint on the ECT was profound ..."); William Fox, *The United States and the Energy Charter Treaty: Misgivings and Misperceptions* in THE ENERGY CHARTER TREATY: AN EAST-WEST GATEWAY FOR INVESTMENT AND TRADE 194, 196 (Thomas Walde ed., 1996) (referring to "the central contribution that the United States' negotiators made to the investment provisions themselves and ... to a strong dispute resolution provision (the arbitration clause) whose creation and language was very much the product of certain of the State Department negotiators").

¹¹⁷ Fox, *supra* note 116, at 200.

¹¹⁸ Emmanuel Gaillard, *How does the so-called 'fork-in-the-road' provision in Article 26(3)(b)(i) of the Energy Charter Treaty work? Why did the United State decline to sign the Energy Charter Treaty?* in INVESTMENT PROTECTION AND THE ENERGY CHARTER TREATY 221, 230 (Graham Coop, Clarisse Ribeiro, eds., 2008). In fact, the U.S. aim of securing investment protections in the ECT analogous to those found in U.S. BITs eventually became one of the main stumbling blocks for the U.S. in the ECT negotiations. As early as the summer of 1992, the U.S. position seems to have been that, if the ECT failed to largely achieve the investment protection standards set out in U.S. BITs, the result of the negotiations should be a non-binding political agreement rather than a binding legal agreement with standards lower than those negotiated in US BITs. *See* Eagleburger, Lawrence, Draft Letter to Dutch Foreign Minister Van Den Broek, August 17, 1992 (on deposit with the Energy Charter Secretariat, Brussels, Belgium) (letter from acting US Secretary of State stating that "We believe that a legally binding basic agreement should offer guarantees to traders and investors no less rigorous than those available in existing bilateral and multilateral arrangements. In fact, if it is to be of interest to our business communities and provide additional benefits to the countries of the East, the BA should expand the scope of opportunities

104. The ECT is particularly relevant to the present analysis because, as the following paragraphs demonstrate, the U.S. presence led to the inclusion of an article with language almost identical to that of Article II(7). Article 10(12) of the ECT provides:

Each Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to Investments, investment agreements, and investment authorizations.¹¹⁹

The ECT is multilateral instrument addressing specific areas of State and investor interaction such as free trade in energy, environmental protection,¹²⁰ and sovereignty over energy resources,¹²¹ and, similar to the U.S.-Ecuador BIT, focuses on the “protection and promotion of investments.”¹²²

105. Given the similarity of the language of the clauses, this Opinion looks to Article 10(12) of the ECT as a possibly relevant source for confirming the meaning of Article II(7) as derived above.

a. The Negotiating History of Article 10(12).¹²³

106. The negotiation of the ECT began at least in 1991, with a final text signed by the negotiating parties in December 1994. The “effective means” provision (what would become Article 10(12)) of the ECT first appeared as a proposal noted as a footnote to the February 5, 1993 negotiating draft. The provision was placed in its present position in the March 15, 1993 draft.

and the protections given for energy investment in Eastern Europe and NIS beyond the terms we have been able to negotiate internationally”).

¹¹⁹ See ECT.

¹²⁰ *Id.*, Introduction, at 14.

¹²¹ See *id.*, art 18.

¹²² *Id.*, art. 10. The ECT’s definition of “investment” matches that of the U.S.-Ecuador BIT in its operative clauses, as well. See ECT, art. 1(7). Also similar to a BIT, the ECT addresses expropriation, free transfer of funds, and investor-State arbitration. See *id.*, art. 26.

¹²³ The analysis in this section, as detailed in specific footnotes, is based in part on public sources and in part on documents available at the Energy Charter Secretariat in Brussels, Belgium. The Secretariat allows researchers to review the negotiating history of the Charter, but does not allow persons who are not representatives of a member government to photocopy documents naming particular officials or governments. The review of these documents was done by my assistant in Brussels, while maintaining close communications with me.

107. The attention to this article appears to have indirectly originated from a “fork in the road debate” which arose in ECT negotiations as a result of wording requested by the U.S. in a March 30, 1992 draft.¹²⁴ The “fork in the road” debate centered on whether an investor that had previously submitted a claim (arising under the investment provisions of the ECT) to national courts/tribunals of a state or through another agreed dispute settlement procedure, should still have the right to submit the claim for international arbitration under the ECT’s dispute resolution mechanism.

108. The “effective means” provision seems to have grown somewhat tangentially out of this debate. Specifically, the concept set out in the “effective means” wording first appears in the ECT negotiation history in a December 8, 1992 letter from Ted A. Borek, Assistant Legal Adviser at the U.S. Department of State, to Leif Ervik of the Energy Charter Secretariat, wherein Mr. Borek addresses the fork in the road debate and considered the question as to whether, if at all, an investor would have any recourse to international arbitration if it, having chosen to go to domestic tribunals, obtains an unsatisfactory result. He observed: “It is obviously no one’s purpose to ensure that the investor always wins, but only that he has a fair and impartial forum in which to prosecute his claims.”¹²⁵ In this sense, he expresses the view that an investor could go to international arbitration because he was not given a “fair and impartial forum to prosecute his claims.” He writes:

We nonetheless recognize the possibility that in rare cases the investor, having chosen to pursue domestic remedies, will encounter what, in international law parlance, is commonly known as a “denial of justice”. In those circumstances . . . the investor could bring a claim under Article 23 to the effect that its treatments at the hands of the host State’s domestic tribunals was itself a breach of the host State’s duties under the Basic Agreement.

¹²⁴ European Energy Charter Conference Secretariat, BA 11, 30 March 1992, *Note From the Secretariat: Energy Charter Treaty (Basic Agreement) – BA 11* (EEC CS Doc. No. 18.92) (on deposit with the Energy Charter Secretariat, Brussels, Belgium). The US suggested the following wording:

An Investor that has submitted the claim to the courts or administrative tribunal of the Contracting Party that is a party to the dispute, or that has submitted the dispute for resolution in accordance with any previously agreed dispute settlement procedures, shall not be able to submit the claim to international arbitration or conciliation in accordance with the terms of paragraph 4. A Contracting Party shall not require that a dispute first be submitted to domestic court of administrative tribunals prior to international arbitration or conciliation.

¹²⁵ *Id.*

Having made this argument in the context of the fork in road debate, he completes the circle back to the guarantees that should be required of the host state, writing:

In the latter regard, it would be helpful were the Agreement to contain at some appropriate place an express guarantee along the lines of ‘Each Contracting Party shall provide investors with effective means of asserting claims and enforcing rights in its domestic tribunals with respect to investment, investment agreements, and investment authorizations.’¹²⁶

109. The negotiation history contains a statement echoing Mr. Borek’s “effective means” comment appearing as a U.S. comment in the January 19, 1993 circulated draft of the agreement. Approximately three weeks after Mr. Borek’s letter, ‘draft 32’ includes the following footnote:

USA has a general concern that whereas Article 23 provides for a choice between resort to domestic tribunals and resort to arbitration, and establishes the groundwork for the latter, it is silent as to the existence, or not, of domestic legal rights that an Investor might pursue before a domestic tribunal. In order to ensure that the alternative of a domestic tribunal versus arbitration is a genuine one, language obliging the Contracting Parties to provide effective means for an Investor to assert claims and enforce rights provided or protected by the Basic Agreement should be included.¹²⁷

110. An “effective means” provision was then introduced as a proposal via a footnote to a February 5, 1993 draft of Article 26 (numbered art. 23 at the time) with respect to a proposal by the U.S. and Japan:

“23.2: USA and J produced a proposal to be inserted at an appropriate place in this Article.

¹²⁶ Borek, Ted. A, Letter to Leif Ervik, December 7, 1992, European Energy Charter Conference Secretariat (EEC CS Doc. No. 8.12.1992/825) (on deposit with the Energy Charter Secretariat, Brussels, Belgium). It is important to note that Mr. Borek prefaces his comments by stating that “in keeping with the ground rules established at our meeting in November, these [comments] are being provided as my own thoughts and do not necessarily represent the views of my Government.” That being said, Mr. Borek was, at the time (and virtually throughout the negotiations), one of the very few individuals at the U.S. Department of State whose comments consistently appear in the negotiation history of the ECT setting out the U.S. position on matters. Mr. Borek also carbon copies several other members of the US negotiating team on this letter.

¹²⁷ European Energy Charter Conference Secretariat, BA 32, 19 January 1993, (EEC CS Doc. No. 3/93) (on deposit with the Energy Charter Secretariat, Brussels, Belgium).

() Each Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to investment, investment agreements, and investment authorizations.

Note: could alternatively be included in Article 16.”¹²⁸

111. This provision was incorporated into the text of the March 15, 1993 draft and located at the alternative place indicated in the February 5 footnote; that is, the effective means provision was placed not in the article addressing international arbitration (where the fork in the road debate arises) but rather in the article setting forth the various substantive obligations of the host state *vis a vis* investors, a position parallel to the place of Article II(7) in the U.S.-Ecuador BIT.

112. Three points are noteworthy in my opinion in this brief negotiating history. First, the negotiation time frame coincides roughly with the negotiation of the U.S.-Ecuador BIT. Second, the U.S. is an active participant in the ECT negotiations, is influenced by the same investment policies manifested in the then applicable U.S. Model BIT, and is the source of what would later be Article 10(12) of the ECT. Third, the reference in the U.S. comment to the January 19, 1993 circulated draft that the domestic tribunals need be a “genuine” option is consistent with the views of the *Commercial Cases* Tribunal and this opinion that Article II(7) of U.S.-Ecuador BIT sets forth an obligation that is *lex specialis*, that is, a treaty-based right, separate from the customary international law right of denial of justice.¹²⁹

¹²⁸ European Energy Charter Conference Secretariat, WG II Meeting 1-6 February 1993, *Room Document 23*, February 5, 1993 p 5 (on deposit with the Energy Charter Secretariat, Brussels, Belgium).

¹²⁹ As discussed above (*see supra* ¶ 68), this provision was not included in the 2004 U.S. Model BIT, though much of the language was moved to the preamble. According to Mr. Vandeveld, U.S. drafters believed the customary international law principle of denial of justice provided adequate protection so that a separate treaty obligation was unnecessary, the language of effective means was moved to and retained in the preamble to the treaty. *See* VANDEVELDE, *supra* note 24, at 414; U.S. Model BIT (2004), preamble. Arguably, the U.S. perspective with respect to the relationship between denial of justice and effective means has evolved from the view evinced in Mr. Borek’s correspondence. Likewise, it has evolved from the 1992 BIT that was the backdrop that guided the negotiations of the U.S.-Ecuador BIT. In my opinion, both Mr. Borek and the 1992 BIT strove to create a “genuine” right for investors separate from that of denial of justice. I cannot say with certainty whether this view remains in the current administration in the United States – that following the 2004 U.S. Model BIT – but I believe this to be irrelevant as it post-dates the BIT in question by over ten years. ..

b. Arbitral Decisions on ECT Article 10(12)

113. Of the twenty cases based upon the ECT of which its Secretariat is aware, two appear to address the concept of effective means and, in particular, delve into the definition of “effective means” and practical steps by which to assess whether particular national measures are to be considered effective or not.

114. In the first case, the Tribunal in *Amto v. Ukraine*¹³⁰ examined at length the requirement of the provision of “effective means,” seeking to both define the standard codified in the Parties’ agreement in Article 10(12) and to develop factors by which to determine whether measures are indeed “effective.” It held that:

The fundamental criteria of an ‘effective means’ for the assertion of claims and the enforcement of rights within the meaning of Article 10(2) [*sic.*] is law and the rule of law. There must be legislation for the recognition and enforcement of property and contractual rights. This legislation must be made in accordance with the constitution, and be publicly available. An effective means of the assertion of claims and the enforcement of rights also requires secondary rules of procedure so that the principles and objectives of the legislation can be translated by the investor into effective action in the domestic tribunals.

* * *

The Claimant’s submission presupposes that Article 10(12) requires a State not only to ensure legislation and rules are promulgated [to] recognise and enforce property and contractual rights, but also that the quality of the legislation meets minimum international standards. This must be correct because, for example, a State that has legislation on regulating an important area of law such as the institution of bankruptcy which is constitutional and accessible, but also antiquated and totally ineffective does not satisfy Article 10(12). Accordingly, Article 10(12) is not only a rule of law standard, but also a qualitative standard.¹³¹

¹³⁰ Limited Liability Company Amto (Amto) and Ukraine, SCC Arbitration No. 080/2005, Final Award (Mar. 26, 2008).

¹³¹ *Id.*, § 87.

115. The *Amtó* Tribunal recognized the difficulty in assessing whether legislation and rules are “effective.”¹³² Within the context of the ECT, the Tribunal considered that “‘effective’ is a systematic, comparative, progressive, and practical standard.”¹³³ Explaining each of the factors, the Tribunal found:

It is systematic in that the State must provide an effective framework or system for the enforcement of rights, but does not offer guarantees in individual cases. Individual failures might be evidence of systematic inadequacies, but are not themselves a breach of Article 10(12). It is comparative in that compliance with international standards indicates that imperfections in the law might result from the complexities of the subject matter rather than the inadequacies of the legislation. It is progressive in the sense that legislation ages and needs to be modernized and adapted from time to time, and results might not be immediate. Where a State is taking the appropriate steps to identify and address deficiencies in its legislation – in other words improvement is in progress – then the progress should be recognized in assessing effectiveness. Finally, it is a practical standard in that some areas of law, or the application of legislation in certain circumstances, raise particular difficulties which should not be ignored in assessing effectiveness.¹³⁴

116. Applying these factors to the facts presented in *Amtó*, the Tribunal found that the Claimant had failed to demonstrate that the State Resolution and two laws passed during and affecting the bankruptcy hearing made the procedures ineffective.¹³⁵ First, the Resolution did not violate Article 10(12) in that seven other enterprises were also affected and the court ruling made no mention of the Resolution, but was decided on other grounds.¹³⁶ The laws were also deemed to not be a violation as their passage did not coincide with any relevant date of the bankruptcy proceeding.¹³⁷

117. The second case, that of *Petrobart v. the Kyrgyz Republic*, addressed what the Claimant described as “chronic” corruption in the Republic’s governmental and public institutions,

¹³² *Id.* § 88.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* §§ 90-94.

¹³⁶ *Id.* § 92.

¹³⁷ *Id.* §§ 93-95.

including the judiciary.¹³⁸ The heart of the allegations by Petrobart was that it was owed significant sums by the State-owned gas company (KGM) for which it had won judgments in the local courts.¹³⁹ However, following the request of the Vice Prime Minister of the Kyrgyz Republic, the court stayed the execution of that judgment for three months. During this period, pursuant to a Presidential decree, KGM was restructured, with the majority of its assets being transferred to other state-owned firms. As a result, KGM became insolvent and was declared bankrupt, leaving Petrobart unable to collect its judgment.¹⁴⁰

118. The Tribunal found the Minister's letter to the court to be "an attempt by the Government to influence a judicial decision to the detriment of Petrobart."¹⁴¹ The Tribunal additionally held: "The Arbitral Tribunal considers that such Government intervention in judicial proceedings is not in conformity with the rule of law in a democratic society and that it shows a lack of respect for Petrobart's rights as an investor having an investment under the Treaty."¹⁴² It went on to explain how this intervention resulted in a breach of the Kyrgyz Republic's treaty obligations:

The Arbitral Tribunal considers that the Vice Prime Minister's letter to the Chairman of the Bishkek Court, which gave support for a stay of enforcement of the judgment of 25 December 1998, violated – in addition to Article 10(1) of the Treaty – the Kyrgyz Republic's obligation under Article 10(12) of the Treaty to ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to investments.¹⁴³

c. Conclusion with respect to the ECT as Supplemental Guidance

119. With respect to the present dispute, there are thus two areas of guidance offered from the Energy Charter Treaty: that gleaned from the negotiating history of the ECT and that which is provided by the arbitral tribunals reviewing alleged breaches under the ECT's almost identical effective means guarantee. I summarize this guidance here.

¹³⁸ Petrobart v. Kyrgyz Republic, SCC Arbitration No. 126/2003, Award at 18 (Mar. 29, 2005).

¹³⁹ *Id.* at 19.

¹⁴⁰ *Id.* at 20, 74-75.

¹⁴¹ *Id.* at 75.

¹⁴² *Id.*

¹⁴³ *Id.* at 77

120. First, with respect to the negotiating history of the ECT and the participation of the United States in this process, it is clear that the United States was an active member of the negotiations. It is also evident that the origination of the effective means language is to be found in the U.S. state practice, and is in accord with its then Model BIT.

121. Second, the arbitral opinions provide further helpful parameters as to when a particular means is or is not effective. *Amto* provides four factors for consideration: systematic, comparative, progressive, and practical.¹⁴⁴ With relevance to the interpretation and application of Article II(7) in the present dispute, the *Amto* Tribunal analysis provides that “effective means” concern the framework or system for the assertion of claims and enforcement of rights where individual failings can point to systemic inadequacies which may amount to a breach. The Tribunal also pointed to numerous considerations for determining whether means have become ineffective, including the complexity and “particular difficulties” of the subject matter and the application of legislation to it, the legislation’s antiquity, and State efforts at improvement.

122. In addition, *Amto* concludes that legislation passed during and affecting a judicial hearing does not necessarily render the means of asserting claims ineffective; especially when the legislation is of general application and the judicial decision both relies on different grounds than the legislation and does not correlate with the timing of the legislation.

123. Finally, *Petrobart* concludes that direct governmental intervention into a specific court action to the detriment of the investor does breach a State’s obligation to provide effective means for the assertion of claims and enforcement of rights.

2. Article 13 of the European Convention on Human Rights

124. The Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) has also produced analogous jurisprudence and scholarship that is potentially relevant. The provision of the Convention relevant to this dispute is Article 13 which reads:

¹⁴⁴ Limited Liability Company Amto (Amto) and Ukraine, SCC Arbitration No. 080/2005, Final Award, § 88 (Mar. 26, 2008).

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.¹⁴⁵

The protection offered by Article 13 of the Convention is not as closely aligned with that of Article II(7) as that of the ECT above, nor is the purpose of the Convention as closely aligned to the BIT as the ECT. “Structurally, human rights treaties deal primarily with the treatment by the state of its own nationals and residents, whereas investment treaties concern the treatment by one state of another treaty party’s nationals, so that investor-state disputes always involve the interests of at least two states.”¹⁴⁶ The Convention, however, “grants substantive rights to persons and permits them to enforce those rights directly before the Court, analogously with the most investor-friendly account of investor rights.”¹⁴⁷ In addition, the “remedies” of Article 13 appear to include both the procedures for airing complaints as well as the granting of appropriate remedies.¹⁴⁸ Despite the fact that Article 13 is less analogous to Article II(7), the Convention’s “machinery” of international enforcement that established the European Court of Human Rights (ECHR)¹⁴⁹ has produced relatively extensive jurisprudence defining “effective remedy” that is instructive.

125. The ECHR defined the obligations of Article 13 of the Convention with respect to its commitment to “effective remedies” in *Ilhan v. Turkey*:

The Court reiterates that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an “arguable complaint” under the Convention and to grant appropriate relief, although Contracting

¹⁴⁵ Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No. 005 (Sept. 3, 1953), available at <http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG>.

¹⁴⁶ Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 A.J.I.L. 179, 212 (2010), *supra* note 36, at 206.

¹⁴⁷ *Id.* at 203. The Convention sets forth numerous rights and freedoms (e.g., right to life; prohibition of torture, slavery and forced labor; right to marry; and right to effective remedy) that the High Contracting Parties undertake to secure to everyone in their jurisdictions. See Convention for the Protection of Human Rights and Fundamental Freedoms, Summary of the Treaty [hereinafter “Convention, Summary”] available at <http://conventions.coe.int/Treaty/en/Summaries/Html/005.htm>.

¹⁴⁸ *Ilhan v. Turkey* (22277/93) ECHR, ¶ 97 (June 27, 2000) [hereinafter “*Ilhan v. Turkey*”].

¹⁴⁹ Convention, Summary.

States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision.¹⁵⁰

126. In *Kudla v. Poland*, the ECHR determined that “effective” as used in this context means, “‘effective’ in the sense either of preventing the alleged violation or its continuation, or of providing adequate redress for any violation that had already occurred.”¹⁵¹ It goes on to explain that:

The “effectiveness” of a “remedy” within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the “authority” referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective. Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so.¹⁵²

In several other cases, the ECHR held that, “the remedy ... must be ‘effective’ in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State.”¹⁵³

127. Within Article 13’s obligation of effectiveness, the ECHR has also found a requirement of a hearing within a reasonable time. The ECHR in *Kudla v. Poland*, found that there are no inherent qualifications on the scope of Article 13 as regards an alleged failure to ensure trial within a reasonable time.¹⁵⁴ Instead, a violation of Article 13 may occur merely through the failure of a State to provide procedures to ensure a hearing within a reasonable time:

¹⁵⁰ *Ilhan v. Turkey*, ¶ 97.

¹⁵¹ *Kudla v. Poland* (30210/96) ECHR 510, ¶ 159 (Oct. 26, 2000) [hereinafter “*Kudla v. Poland*”]. Arguably, the use of the term “remedy” in the Convention is broader than that of “means” in the BIT, as “remedy” has been interpreted by the ECHR to include not only the process of investigation, but also the result of that investigative process. See *Aksoy v. Turkey* (21798/93) ECHR, ¶ 98 (Dec. 18, 1996) [hereinafter “*Aksoy v. Turkey*”] (holding that, “the notion of an ‘effective remedy’ entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access of the complainant to the investigatory procedure.”). As the ECHR is used in this context merely as analogy for determining the definition of the modifier “effective”, I do not find the difference in the procedures modified to be material to this analysis.

¹⁵² *Kudla v. Poland*, ¶ 157 (internal citations omitted).

¹⁵³ *Aksoy v. Turkey*, ¶ 95. See also *Ilhan v. Turkey*, ¶ 97; *Kudla v. Poland*.

¹⁵⁴ *Kudla v. Poland* ¶ 151.

It was not suggested that any of the single remedies referred to, or a combination of them, could have expedited the determination of the charges against the applicant or provided him with adequate redress for delays that had already occurred. Nor did the Government supply any example from domestic practice showing that, by using the means in question, it was possible for the applicant to obtain such a relief.

That would in itself demonstrate that the means referred to do not meet the standard of “effectiveness” for the purposes of Article 13 because, as the Court has already said ... the required remedy must be effective both in law and in practice.

Accordingly, the Court holds that in the present case there has been a violation of Article 13 of the Convention in that the applicant had no domestic remedy whereby he could enforce his right to a “hearing within a reasonable time” as guaranteed by Article 6 § 1 of the Convention.¹⁵⁵

In finding the violation of Article 13, the ECHR noted that the proceedings had lasted more than nine years.¹⁵⁶

128. For the dispute at hand, it appears that there are thus several applicable points of guidance offered by the ECHR jurisprudence. First, “effectiveness” is not determined by the outcome of the procedures, but by the process itself. Second, the means that must be effective may be evaluated in the aggregate as opposed to only the success of a single moment in the process. Third, measures for the enforcement of rights must be effective in both law and practice. This point is particularly salient to the dispute at hand in that it requires that procedures – if captured or otherwise made ineffective by, *inter alia*, interference, delay, or bias – be considered ineffective. Finally, and overlapping with this point of guidance, the ECHR jurisprudence provides that a delay in hearings alone – if egregious enough – may constitute a violation of the affirmative obligation to provide effective review of an affirmative claim.

¹⁵⁵ *Kudla v. Poland*, ¶¶ 159-60.

¹⁵⁶ *Id.* ¶ 123 (the ECHR noted, however, that, because of its jurisdiction *ratione temporis*, it could consider only the period of “seven years and some five months”).

3. The Meaning of “Effective” in the Jurisprudence of the International Court of Justice

129. In May of 2007, the International Court of Justice (ICJ) issued its Judgment on Preliminary Objections in a decision based upon customary international law in a case of espousal by the Republic of Guinea (Guinea) of corporate and personal claims of one of its citizens against the Democratic Republic of the Congo (DRC).¹⁵⁷ The case considers the situation of whether a remedy is not “effective” *under customary international law*, as opposed to any special meaning it might have under a treaty, convention, or agreement. The term “remedies” in this case referred to legal remedies – appeals, judicial and administrative reviews and the like, as opposed to compensation or other end results – and therefore is somewhat analogous to the “effective means” in Article II(7).¹⁵⁸

130. Guinea, through diplomatic protection, brought the claims of Mr. Diallo, a businessman of Guinean nationality, on his personal behalf and on his behalf as a shareholder and manager of two companies incorporated in the DRC.¹⁵⁹ Guinea alleged that Mr. Diallo had been arrested, imprisoned and then expelled from the DRC, and the DRC “arbitrarily [acted] to stay the domestic proceedings for the enforcement of decisions handed down in favour of Mr. Diallo’s companies;” Guinea argued that both actions prevented him from pursuing recovery of various debts owed to him and his companies by the DRC and other contractual partners.¹⁶⁰

131. The DRC’s objections turned on the local remedies rule and exhaustion. It argued that the expelling immigration officer “inadvertently” listed the cause as “refusal of entry” (which is not subject to appeal) rather than an appealable “expulsion,” and that Mr. Diallo

¹⁵⁷ Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, I.C.J. No. 103 (May 24, 2007). As the dispute had no basis in treaty or agreement, the applicable law was determined to be “contemporary” and customary international law. *See e.g., id.* at ¶¶ 39, 88-91.

¹⁵⁸ *See e.g., id.* ¶¶ 47-48, 74.

¹⁵⁹ *Id.* ¶ 11. Guinea also brought claims for the two businesses incorporated in the DRC and founded and owned by Mr. Diallo, but the ICJ dismissed the claims as it found no right to exercise diplomatic protection “by substitution” in customary international law. *Id.* ¶¶ 30, 88-94.

¹⁶⁰ *Id.* ¶ 18; *see also id.* ¶¶ 11, 17.

could in fact have appealed to Congolese authorities for permission to return to the DRC; thus, the DRC argued, Mr. Diallo had failed to exhaust local remedies.¹⁶¹ Guinea responded that, “[a]fter eight year of proceedings the DRC has shown itself to be incapable of invoking so much as a single real remedy that would have been available to Mr. Diallo” in respect of the violation of his rights as an individual.¹⁶²

132. In its holding, the ICJ noted that the DRC could not rely on an error and Mr. Diallo was justified in relying on the consequences of the legal characterization given him by DRC officials.¹⁶³ The Court continued to hold that, while local remedies must be exhausted, “judicial redress as well as redress before administrative bodies, administrative remedies can only be taken into consideration for purposes of local remedies if they are aimed at vindicating a right and not at obtaining a favor, unless they constitute an essential prerequisite for the admissibility of subsequent contentious proceedings.”¹⁶⁴ Relevant to the this Opinion, the ICJ went on to conclude that the DRC had failed to prove “the existence in its domestic legal system of available and effective remedies allowing Mr. Diallo to challenge his expulsion,” and therefore its objection based upon the failure to exhaust local remedies could not be upheld.¹⁶⁵ In other words, diplomatic espousal requires that the injured national should exhaust local remedies but only to the extent those remedies are “available and effective.”

133. The customary international law definition of “effective remedy” is thus similar to that found above: an *effective* remedy is one that guarantees *real* judicial and/or administrative avenues by which an individual or investor may vindicate its rights, rather than an inconsistent system of possible procedures with unreliable processes and outcomes. In this way, the domestic legal system must provide actual enforcement of rights, in both the means that it provides for legal or administrative redress and the application of these measures.

¹⁶¹ *Id.* ¶ 36.

¹⁶² *Id.* ¶ 37.

¹⁶³ *Id.* ¶ 46.

¹⁶⁴ *Id.* ¶ 47.

¹⁶⁵ *Id.* ¶ 48.

E. Conclusion with respect to Confirming and Supplemental Sources

134. Based upon the analysis in Part VII, I interpreted Article II(7) of the U.S.-Ecuador BIT as setting forth a positive obligation to establish and supply measures that are designed to, and be adequate in practice to, facilitate the investor bringing a cause of action for the possession or enjoyment of a privilege, *and* for attaining the State's acknowledgment and preservation, as well as execution, of the investor's powers and privileges as pertaining to every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, and a negative obligation of the government to not interfere with or otherwise inhibit the proper operation of these measures.¹⁶⁶ This interpretation is confirmed in the following ways by the additional sources reviewed.

135. The preparatory work of the treaty, as found in the U.S. Model BITs, the discussion of the United States Senate Committee on Foreign Affairs and the debate of the BIT in El Congreso Nacional confirm the interpretation. The BITs reiterated the importance of dispute resolution to a stable and transparent investment environment – all a necessity to attract investment – and the important role that the effective means provision played in these guaranties. The provision not only served to create a separate right for investors to bring claims or enforce rights, but also encouraged domestic improvement of judicial and governmental systems and thus promotion of the rule of law. The Committee on Foreign Relations reiterated that a goal of the BITs was to encourage improvement of domestic protection of foreign investment, a goal to which the effective means provision is aimed. The scope of the protection afforded by Article II(7) is also confirmed in the discussions of El Congreso Nacional, during which the view was expressed that the means provided are not merely judicial, “but of every genre”, implying an active obligation of the judiciary, the government and other responsible authorities. That effectiveness was to be judged objectively was also confirmed where it was stated that effectiveness would be judged

¹⁶⁶ See *supra* ¶ 41.

internationally and perhaps against the means provided by the treaty partner, the United States.

136. The circumstances of conclusion of the treaty are consistent with the interpretation of Article II(7) reached by an Article 31 analysis. Both State Parties were pro-investment at the time the U.S.-Ecuador BIT was signed, concluding other accords with each other and additional countries. They both recognized the importance of a stable and transparent investment climate and the centrality of effective dispute resolution to that goal. For such goals to be realized requires the provision of not only appropriate laws to protect investors but also real avenues of protecting rights and airing complaints and having both promptly and properly addressed at the domestic level.

137. The prior arbitral decisions addressing Article II(7) of the U.S.-Ecuador BIT are consistent with the interpretation that the obligation to provide effective means is a positive, proactive one with the central inquiry being how do the measures perform – were rights enforced “effectively?” – thus focusing not only on the procedures but how they are carried out. The *Commercial Cases* Tribunal’s holding contributes to the proper application of Article II(7) by noting that, although it is the system of measures that is under review, such cannot be divorced from the individual case which must also be examined. Finally, the *Commercial Cases* Tribunal helpfully explores when means are to be viewed as “effective.” With respect to respect to claim of governmental interference rendering the means ineffective, the *Commercial Cases* Tribunal found that there is no requirement of “extreme interference” in the judicial proceeding. With respect to delay, the Tribunal determined that unjustified delay may also alone constitute a breach of Article II(7). To assist in a determination of the latter – unreasonable delay – the Tribunal also provided four factors for consideration: complexity, significance of the interests at stake, and the behavior of both the litigants and the courts.

138. With respect to the examinations of analogous “effective means” language of two different treaty regimes and customary international law, they together yield salient supplemental guidance to expand upon our interpretation of Article II(7). First, in assessing the measures and application of the measures to the dispute at hand, the Tribunal should look to the complexity of the case, the age of the legislation and the State efforts to improve

it (ECT). In applying these factors, the Tribunal should, in general, consider the process as a whole, though a single instance may be viewed as symptomatic of the process and thus telling (ECHR). In addition, a tribunal is to consider whether the measures are effective both in law and in practice, thus addressing whether reasonable measures have been captured or otherwise made ineffective (ECHR). Another way to say this is that an *effective* remedy must provide *real* judicial and/or administrative avenues for enforcement of rights and assertion of claims, not an inconsistent system with unreliable processes and outcomes (customary international law).

139. In applying these considerations, the scopes and bounds of “effective means” are clearer particularly in terms of examples of what is and is not *effective*. With respect to a claim that government intervention in judicial proceedings rendered the means ineffective, for instance, the intervention likely is not one of general application that is taken coincidentally with the proceedings, rather it is more likely government interference targeted at specific proceedings (ECT). With respect to the actual *means*, they must be consistent and provide *real* opportunity to be heard and achieve reliable outcomes (customary international law). Finally, a delay in the hearings may alone constitute a violation of the provision of effective means if it that delay is unreasonable as outlined above in light of the circumstances.

IX. Application of Article II (7) to the Context of this Arbitration

140. This Part, utilizing the above interpretation and the confirming and supplementary guidance, seeks to apply Article II(7) to the context of this case. This effort raises questions about the relationship between the systemic obligation of the State under Article II(7) and how the assertion of a breach of that obligation is evaluated in a particular case, and what need be shown in the case of the latter to evidence the former.

141. Although the formal existence of judicial and legislative measures for the assertion of claims and the enforcement of rights is important in the review of the system provided for such actions, as has been seen, it is generally the performance of such measures that determines whether they are “effective” or not. The means must be effective not only in law, but in practice as well.

142. It is my understanding that Claimants do not deny the existence of judicial mechanisms in Ecuador for the hearing of their claims and the assertion of their rights. There are courts and judges and procedures that allow them to state their claims and, eventually, a decision will be issued from the court. The objections that Claimants raise to the means that are offered for asserting their claims and enforcing their rights center on (1) whether the particular measures involved are effective for complex international disputes and (2) on the application of the specific procedures offered to them.

143. From the interpretation elucidated above and the supplemental discussion consistent with the interpretation, it is evident that certain circumstances will render an otherwise formally effective means ineffective in practice. In an effort to assist the Tribunal in developing a standard against which to judge Claimants' assertions, I conclude this Opinion with an examination of two such possible avenues by which I believe means – whether effective or not as written – have become ineffective in practice, and thus actionable under the terms of the BIT. There are certainly many varieties of deficiencies that could be examined, and the bounds of ineffective remedies are not fully considered by this Opinion. I note and discuss only the two varieties of deficiencies that encompass the objections raised by Claimants in their pleadings. They are at the opposite ends of the spectrum: the first being targeted active governmental interference with the means provided, thus rendering it impossible for an investor to utilize effective means to assert its claims and enforce its rights. At the other end of the spectrum is the objective ability of the measure provided to address preliminary objections that could end the proceedings for one or more parties; here there is no intent, or fraud, or collusion required, the means will be rendered ineffective by the inability of the system to address such a threshold objection in a timely manner for either case-specific or systemic reasons. Before I embark on the exploration of these two possible violations, I address the preliminary issue of judging a system based upon a particular case.

A. Evaluating an Alleged Breach of a Systemic Obligation in the Context of an Individual Proceedings

144. Article II(7) imposes a compulsory and systemic obligation: the State must examine its local and national policies and practices and bring them into compliance with the State's

treaty obligations. It is, however, in the individual case that the allegation of a breach of Article II(7) will arise. As observed by the *Commercial Cases* and *Amto* Tribunals, the system cannot be divorced from its operation in an individual case. Inadequate procedures, ineffective means, can be most visible in individual hearings. This can be the case for at least two reasons. First, there may be direct governmental subversion of the means by which the procedures are rendered not only no longer effective, but more fundamentally no longer *real* – such as in the ECT case of *Petrobart*. Second, there may be a systemic failure in the sense that a system operating as intended is simply not effective in an objective sense.

145. The protections guaranteed to investors, including Article II(7), are set forth in Articles II, III and IV of the BIT. The ability of the investor to bring an arbitration internationally is set forth in Article VI. The BIT therefore envisions that an individual investor can bring a claim for a breach of Article II(7). It was therefore contemplated that the investor can prove a breach of its rights under the systemic obligation of Article II(7) in the context of an individual claim. The proof cannot require a demonstration by the investor that the system fails for everyone that utilizes it; such a burden would be unreasonable. The investor's burden is to prove the ineffectiveness of means within the context of its dispute.

146. This is not to say that the investor can ignore the greater judicial and legislative environment surrounding its particular case. The opportunity for appeals or *amparos* must be considered and thus the possibility of correction farther down the line. There are, however, circumstances that, as in *Petrobart*, exhibit circumstances so egregious that it shows a systemic failure *vis-à-vis* the investor. The investor is treated so poorly that a violation occurs at the level of the specific case regardless of further remedy. In other words, the fact that the system allows for such ill treatment at *any* level exhibits the system's greater failings. The examination of the particular case is thus important and can be sufficient in and of itself in that it may exhibit behavior that speaks to, and potentially condemns, the greater system.

B. Governmental Targeted Interference with the Means –The Means Offered are not Real

147. According to Claimants, both the Ecuadorian government and judiciary have operated in such a manner as to preclude the effectiveness of any available means of asserting claims or enforcing rights. Claimants argue that there has been direct interference in their case and collusion between the various actors to preclude Claimants' use of their settlement and indemnification agreements, their ability to gather and proffer evidence, and their opportunity for a fair trial.

148. First, Claimants assert that the Government of Ecuador (1) failed to notify the court of the various settlement and release agreements in force,¹⁶⁷ and (2) sought to “nullify and undermine” the 1995 Settlement Agreement and 1998 Final Release through the offices of Ecuador's Attorney General.¹⁶⁸ Second, according to Claimant, the independence of the judiciary is in question due to the actions of the Constituent Body in 2007 that made its decisions superior to all other rules of the judicial system and compliance with them mandatory with the threat of dismissal for any judge that processes an action contrary to these decisions.¹⁶⁹ Claimants assert that President Correa reiterated this by stating that judges issuing positions against the State's interests would be subject to dismissal and possible criminal prosecution.¹⁷⁰ In public statements, Claimants contend President Correa also expressed his support for the *Lago Agrio* plaintiffs and the Government's intent to help them collect evidence.¹⁷¹ Finally, Claimants point out that the Ecuadorian Executive Branch criminally indicted two Chevron attorneys who assisted in the execution of the 1998 Final Release.¹⁷²

149. With respect to their particular litigation, Claimants assert that numerous practices of the *Lago Agrio* court have rendered any possible legal process ineffective in practice.

¹⁶⁷ Claimant's Notice of Arbitration, *supra* note 3, ¶¶ 33, 67.

¹⁶⁸ *Id.* ¶ 35.

¹⁶⁹ *Id.* ¶ 36.

¹⁷⁰ *Id.* ¶ 38.

¹⁷¹ *Id.* ¶¶ 38-41.

¹⁷² *Id.* ¶ 55.

Claimants contend that there has been collusion between the plaintiffs and the expert, if not the Court itself. Claimants assert that they were precluded from having their objections to the expert report addressed, despite evidence that they purport shows numerous essential errors and collusion with the plaintiffs' representatives.¹⁷³

150. It is not the place of this Opinion to comment on the accuracy of the assertions of Claimants just mentioned. However, in my opinion it is logical that when use of means provided to an investor is targeted for failure by the host State, the means offered to it are no longer real and therefore are ineffective. This conclusion follows from the interpretation offered above that the means must not only be effective by the letter of the law, but also in practice. If means are subverted by outside – or inside – actors from operating in the way in which they were designed, they likely are not adequate in practice in facilitating investors “(1) in bringing an action before a governmental, judicial or other official body for the possession or enjoyment of a privilege, or (2) for attaining the State’s acknowledgment and preservation, as well as execution, of the investor’s powers and privileges as pertaining to every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party.”¹⁷⁴

151. This conclusion is consistent with the supplementary sources examined above. The early U.S. Model BITs illustrate an understanding that the means must be effective enough “to maintain a favorable environment for investment.” The U.S. Senate Committee on Foreign Affairs discussions recognized that a favorable investment environment may require domestic development of effective systems. The circumstances of the conclusion of the BIT exhibit two States equally intent on promoting international investment and focusing on stable and effective dispute resolution as a primary avenue toward that goal.

152. The other sources examined speak also to the requirement of effective means in law and practice. The *Duke Energy v. Ecuador* Tribunal held that, not the law, but its functioning is what is under review: “What is at issue and must be reviewed by the tribunal is how these mechanisms performed, as well as the alleged failure of the State to respect its promise to

¹⁷³ *Id.* ¶¶ 45-50.

¹⁷⁴ See Conclusion of the Textual Analysis, *supra* § VII.A.6.

arbitrate.”¹⁷⁵ This is reiterated in the customary international law examination performed under *Diallo* that held that it is the *real* avenues of recourse that must be exhausted .

153. Arbitral awards regarding the Energy Charter address very similar treaty language. The *Amto* Tribunal, for instance, held that an effective means provision “requires a State not only to ensure legislation and rules are promulgated [to] recognise and enforce property and contractual rights, but also that the quality of the legislation meets minimum international standards.”¹⁷⁶ This standard was then used to judge whether the governmental interference in judicial proceedings was sufficient to engender a violation of the effective means provision. Although the government’s actions were insufficient to qualify as a violation in *Amto*, such was not the case in *Petrobart* where the tribunal held that direct governmental intervention into a specific court action to the detriment of the investor breached the State’s obligation to provide effective means for the assertion of claims and enforcement of rights. As explained in *Commercial Cases*, however, there is no requirement of “extreme interference in the judicial proceedings;” the governmental intervention must have some concrete relationship to the investor, however, and must not be of general application and merely coincidental, as found in *Amto*.

154. One international standard consistent with this inquiry and which might provide some guidance to this Tribunal by analogy in establishing a floor of conduct below which a violation of Article II(7) would occur is the Council of Europe Recommendation on the Independence, Efficiency and Role of Judges.¹⁷⁷ This Recommendation provides at Article I(2):

- a. The independence of judges should be guaranteed pursuant to the provisions of the Convention and constitutional principles, for

¹⁷⁵ *Duke Energy Electroquill Partners & Electroquill S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, ¶ 392 (Aug. 18, 2008).

¹⁷⁶ *Limited Liability Company Amto (Amto) and Ukraine*, SCC Arbitration No. 080/2005, Final Award, § 87 (Mar. 26, 2008).

¹⁷⁷ Council of Europe, Committee of Ministers, Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges (Adopted by the Committee of Ministers on 13 October 1994 at the 518th meeting of the Ministers’ Deputies). In 2008, a project to revise this Recommendation began. Both Recommendation No. R (94) 12 and the terms of reference for the revision efforts are available at http://www.coe.int/t/e/legal_affairs/legal_co-operation/steering_committees/cdcj/CJ_S_JUST/.

example by inserting specific provisions in the constitutions or other legislation or incorporating the provisions of this recommendation in internal law. Subject to the legal traditions of each state, such rules may provide, for instance, the following:

- i. decisions of judges should not be the subject of any revision outside any appeals procedures as provided for by law;
 - ii. the terms of office of judges and their remuneration should be guaranteed by law;
 - iii. no organ other than the courts themselves should decide on its own competence, as defined by law;
 - iv. with the exception of decisions on amnesty, pardon or similar, the government or the administration should not be able to take any decision which invalidates judicial decisions retroactively.
- b. The executive and legislative powers should ensure that judges are independent and that steps are not taken which could endanger the independence of judges.
- c. All decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency. The authority taking the decision on the selection and career of judges should be independent of the government and the administration. In order to safeguard its independence, rules should ensure that, for instance, its members are selected by the judiciary and that the authority decides itself on its procedural rules. . . .
- d. In the decision-making process, judges should be independent and be able to act without any restriction, improper influence, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason. The law should provide for sanctions against persons seeking to influence judges in any such manner. Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law. Judges should not be obliged to report on the merits of their cases to anyone outside the judiciary.¹⁷⁸

¹⁷⁸ Council of Europe, Committee of Ministers, Recommendation No. R (94) 12, art. I(2). *See also* Basic Principles on the Independence of the Judiciary, *adopted by* Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *held at* Milan from 26 August to 6 September 1985, *endorsed by* General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985

Thus, the Council of Europe provides a standard by which judges must be independent in terms of their appointment, review of their decisions and their dismissal. They must be free of governmental and administrative interference, improper influence, inducements, threats or other interference. Arguably, any conduct below these floors would render legal recourse ineffective for a claimant.

155. Therefore, in examining the conduct of the Republic of Ecuador vis-à-vis Claimants, the Tribunal should, once it determines for itself its agreement with these allegations, assess whether the asserted judicial failings and governmental interference directly applied to and affected Claimants in such a way that made the recourse provided to them no longer *real*: Did these governmental and judicial actions render the means provided under Ecuadorian law for asserting claims and enforcing rights unsuccessful in achieving this goal? The interference need not be extreme or severe, though it likely must exhibit a certain level of care below international minimum standards, and it must work to make possibly otherwise effective means, ineffective and thus a breach of Ecuador's obligations under Article II(7) of the U.S.-Ecuador BIT.

C. Inability to Raise, or Lack of Decision on, Threshold Objections – The Means as Applied Are Not Objectively Effective.

156. Claimants additionally assert that Article II(7) was breached by the failure of the Ecuadorian law or courts to provide effective means whereby reasonably early in the proceedings the initiation of costly and extensive litigation may be questioned and assessed. Specifically, Claimants argue that a breach has occurred as a result of the inability of Claimants to have an early assessment of their jurisdictional threshold objections based on various settlement agreements and releases and Claimants' assertion that Chevron never operated in Ecuador.¹⁷⁹ Claimants stress that their threshold objection on the basis of the various settlement agreements and releases is, by its nature, a particularly fundamental

¹⁷⁹ Claimant's Notice of Arbitration ¶ 31 (Sept. 23, 2009), *supra* note 3 (explaining that, "In its October 2003 answer to the complaint, Chevron immediately objected to the Lago Agrio court's exercise of jurisdiction Notwithstanding, the Lago Agrio court has not ruled on Chevron's objections and continues to exercise *de facto* jurisdiction over Chevron. Although there are no grounds for Chevron to be a defendant in the Lago Agrio Litigation, Chevron has been forced to expend the time and to incur the costs associated with defending the merits of the Lago Agrio Litigation.").

objection inasmuch as such agreements have *res judicata* effect either by way of governmental agreements or court-approved agreements settling on-going litigation.

157. According to Claimants, the failure to provide effective means to address preliminary jurisdictional objections may have arisen by either of two avenues:

(a) the verbal oral proceedings, *as designed*, do not allow for the separation of issues from the general consideration of merits and thus all objections – even those that could potentially prove the court is without jurisdiction or that all claims have been addressed *res judicata* – must wait to be heard and decided until that point at which all the merits have been presented and considered; or

(b) the judge in such verbal oral proceedings has the discretion to consider preliminary objections before proceeding to the merits but that, in this case, the decision of the judge to not do so, particularly in light of the nature of those objections, makes clear that formal discretion of the judge is *in practice* not objectively effective.

158. Claimants argue that either scenario would violate Ecuador's obligation to provide effective means of asserting claims and enforcing rights. Claimants emphasize that such means can only be effective if they include protection from having matters already decided re-litigated. The first scenario would show that the law as written is ineffective in that it does not allow such preliminary threshold objections to be decided upon as a formal matter. For this reason, the written procedures – the law – have failed to provide investors with effective means of asserting their claims and enforcing their rights. The second scenario would show a violation of Article II(7)'s obligation that the procedures provided for investor recourse be adequate *in practice* to provide a *real* avenue to be heard and considered. If the judge in the *Lago Agrio* litigation had the discretion to address Claimants' early objections, particularly the objection that the matter had already been decided, but the judge did not do so and instead adopted a course of action that allowed time consuming and expensive litigation, then the law does not work in practice.

159. The distinction argued by Claimants – between mechanism and discretion – follows that reiterated above numerous times in the Article 32 VCLT analysis between the law and

practice of the means provided, both of which must provide an effective avenue for redress. I reiterate here that these procedures need not lead to a successful *result* for Claimants – in other words, they do not need to *prevail* on the consideration of the preliminary objections – it guarantees an adequate *procedure* by which investors may bring grievances and have them heard efficiently and effectively. An objection based on *res judicata* is somewhat unique because, if the assertion is non-frivolous, then the obligation to provide effective means would require that the matter be addressed before re-litigation is commenced in any significant way. If the assertion of *res judicata* is frivolous, then reasons to that effect should be provided. In other words, in my opinion “effective means” as a general matter would require deciding, one way or another, on an objection based on *res judicata* at the start of potential re-litigation.

160. In this respect, I note that an apparent objective of Article II(7) is the prevention of waste and later international disputes through the effective resolution of disputes at the domestic level. Logically, effective means of asserting claims and enforcing rights likely includes effective means for questioning and assessing the relevance and necessity of the proceedings early in the process. Often there is discretion at the trial level to decide whether an objection to the proceedings is to be heard as a preliminary matter or decided upon as a part of the merits. It is my understanding that other expert opinions will discuss Ecuadorian Law regarding the oral summary proceeding employed in this litigation. I leave it to those opinions to address whether the judge, as a formal matter, possessed discretion to rule on preliminary objections in such a proceeding. As to whether the lack of a preliminary decision in this instance on objections such as *res judicata* is objectively a breach of the obligation to provide effective means, I make two observations:

- First, as noted above, the objective effectiveness of means provided is to be decided on a case-by-case basis taking into the circumstances present. Several questions present themselves in assessing the circumstances of this particular case: What reasons were provided for denying a request for a preliminary decision? Is appeal of such a decision possible? What reasons were given on appeal? Is the basis of the objection not frivolous? Would a decision on the preliminary objection not require an examination into the

merits of the case thereby potentially resulting in overall efficiency the handling of the case?

- Second, a preliminary objection based on the ground that the matter has already been decided (*res judicata*) is a foundational objection that potentially can be addressed directly and whose resolution both upholds the legitimate expectations of the party asserting the defense to see an end to litigation and promotes overall efficiency in the proceeding.

1. Inability to Raise, or Lack of Decision on, Threshold Objections – The Effectiveness of Means Provided in Terms of Unreasonable Delay

161. Claimants also allege that, not only were their threshold objections not acted upon either as a matter of design or practice, but also that these objections have been before the court for seven years. This section of the Opinion considers how an unreasonable passage of time in deciding a case or, in this instance, a preliminary objection, may itself objectively demonstrate that the means provided are not effective.

162. Some of the supplementary materials introduced above, namely the ECHR and the *Commercial Cases* Tribunal, as well as the Inter-American Court of Human Rights that will be introduced below, illustrate that there can indeed be a violation of the obligation to provide effective means of asserting claims and enforcing rights caused solely by unreasonable delay. In *Commercial Cases*, the Tribunal held that “For any ‘means’ of asserting claims or enforcing rights to be effective, it must not be subject to indefinite or undue delay. Undue delay in effect amounts to a denial of access to those means.”¹⁸⁰ In *Kudla v. Poland*, the ECHR found a violation of the Convention’s analogous Article 13 in the State’s failure to provide procedures to ensure a hearing within a reasonable time.¹⁸¹

163. These Tribunals also have established factors by which to determine when a delay becomes unreasonable. The *Commercial Cases* Tribunal, for instance, established four factors for determining if an unreasonable delay had occurred: complexity, significance of the

¹⁸⁰ *Commercial Cases*, Partial Award, *supra* note 4, ¶250.

¹⁸¹ *Kudla v. Poland* (30210/96) ECHR 510, ¶¶ 159-60 (Oct. 26, 2000), *supra* note 151.

interests at stake, and the behavior of both the litigants and the courts. The ECHR considers five factors: the complexity of the case; the conduct of the applicant; the conduct of the relevant authorities; what is at stake for the applicant in the proceedings; and the state of the proceedings.¹⁸² The following two subsections examine these additional supplementary sources so as to outline the parameters of a possible violation of Article II(7) based upon a delay of seven years in the addressing of Claimants' preliminary objections.

a. The Practice of the European Court of Human Rights in Relation to Delay

164. Article 6(1) of the European Convention on Human Rights addresses undue trial delay in civil actions. It reads at relevant part: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within *a reasonable time* by an independent and impartial tribunal established by law."¹⁸³ In applying this requirement, the ECHR considers allegations of undue delay on a case-by-case basis utilizing the five factors listed above which echo those detailed in *Commercial Cases*.¹⁸⁴

165. The first factor is complexity of the issue. This factor may be considered self-evident as the more complicated the matter, the more likely the argument and deliberations will take longer to address these complexities.¹⁸⁵ The second factor is the applicant's

¹⁸² Els Dinjens and Warda Henning, *Undue Delay in the Case Law of the European Court of Human Rights: Varicak Marica v. Croatia Osiguranje*, Amsterdam International Law Clinic at 10 (2 November 2001), available at <http://www1.jur.uva.nl/ailec/Undue%20delay%20in%20ECHR%20case%20law.pdf>.

¹⁸³ Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No. 005 (Sept. 3, 1953), available at <http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG> (emphasis added).

¹⁸⁴ Dinjens and Henning, *supra* note 182, at 10.

¹⁸⁵ See *Duclos v. France*, ECHR 90/1995/595/682-684, Judgment (Dec. 17, 1996). Mr. Duclos was a company secretary who suffered injury during a road accident that qualified as an "industrial accident" covered by social security. His receipt of benefits and the subsequent litigation was complicated by the fact that Mr. Duclos' injuries relapsed several times, raising questions as to the level of disability and possible employment at various points. These designations and other factors had significance for the level of benefits that Mr. Duclos received, and led to numerous proceedings instituted by the applicant regarding these benefit levels. *Id.* ¶¶ 7-47. Mr. Duclos appealed to the ECHR complaining, *inter alia*, of a breach of Article 6(1) of the Convention due to the length of time of the proceedings with respect to three separate cases (9 years 7 months for the first, 8 years 8 months for the second, and 8 years 8 months and 2 weeks for the third). *Id.* ¶ 54. The Court found that, despite the government's argument of complexity of the question "which was difficult by nature" and was complicated by conflicting documentary evidence, that the case "was not a particularly complex one, especially

conduct and may also be rather obvious in its interpretation. Clearly, the court and the system cannot be to blame for an applicant who fails to abide by clearly written procedures and delays the process himself with incorrect or delayed submissions, failures to appear, and the like. This was the case in *Duclos v. France* where the applicant was without counsel for a period.¹⁸⁶ The third factor to be considered is the overall conduct of the judicial authorities overseeing the trial: Article 6 (1) imposes on State Parties the duty to organize their judicial systems in such a way that their courts can meet each of the Article's requirements, including the obligation to hear cases within a reasonable time.¹⁸⁷ The fourth factor addresses the interests of the applicant: what is at stake in the proceedings? The ECHR dealt with this consideration specifically within the context of cases addressing the provision of basic human needs,¹⁸⁸ but economic interests that are susceptible to harm based upon delay can be found for corporations as well, such as imminent attachment of assets, loss of contracts and market share. The fifth and final factor – that of the state of the review or hearings – turns on the activity or lack thereof leading to the time of consideration. If, for instance, there has been much judicial activity leading up to the point of review, it is possible that a long, but full, delay will not be actionable; while a case that lays stagnant for a significant period of time will likely be actionable.¹⁸⁹

as it was examined at first instance by a specialized tribunal experienced in dealing with such matters.” *Id.* ¶¶ 58-59 (addressing the first case).

¹⁸⁶ *Id.* at ¶ 60 (addressing the first case) The case was delayed for five months due to the applicant's lack of counsel; the ECHR, however, held that the five-month gap between the appeal on points of law and the filing of supplementary pleadings could not be regarded as excessive in light of the applicant's lack of counsel. As such, the Court found that most of the delay (six years) could not be attributed to the applicant. *Id.* The Court, in conclusion, held the delay with respect to the first case – as well as the delay with respect to each of the other two cases – to be unreasonable and thus a violation of Article 6(1). *See id.* ¶¶ 65, 78, 86.

¹⁸⁷ Dinjens and Henning, *supra* note 182, at 10, citing *Rajak v. Croatia*, 49706/99, 28 June 2001, ¶ 48, *Philis v. Greece (no.2)*, Judgment, 27/6/97, Reports 1997-IV, p. 1084, ¶ 40. *Francesco Lombardo v. Italy*, ¶ 23, *Duclos, Erik Karlsson v. Sweden*, 12782/87. With this obligation in mind, the ECHR has held that an overseeing judge must put forth a reasonable effort to resolve the trial at hand. This factor also reaches beyond the local judge, as the ECHR has held that a court's backlog may be weighed when considering the overall conduct of the judicial authorities. *Id.*

¹⁸⁸ *Id.* at 13, citing *Case of Dewicka v. Poland*, 38670/97, 4 /4/2000, ¶ 55.

¹⁸⁹ *Id.* at 14.

**b. The Practice of the Inter-American Court of Human Rights
(IACHR) in Relation to Delay**

166. Articles 8(1) and 25 of the American Convention on Human Rights (ACHR) address undue delay in a trial. Article 8(1) provides for a “Right to a Fair Trial” which includes a hearing with “due guarantees and within a reasonable time;” Article 25 provides for a “Right to Judicial Protection,” providing that “Everyone has the right to simple and prompt recourse, or any other effective recourse” The two articles have generally been coupled together by the IACHR as an unreasonable delay in a trial violates both the “reasonable time” requirement of Article 8(1) *and* the “simple and prompt recourse” requirement of Article 25. The IACHR thus considers three factors in assessing a delay that mirror those above: “a) the complexity of the matter; b) the judicial activity of the interested party; and c) the behavior of the judicial authorities.”¹⁹⁰

167. In addition to these factors, the IACHR appears to have codified another factor of “effectiveness”: Judicial action in the dispute must be judged not only by its quantity, but also its quality. In the *Case of Tomás Enrique Carvallo*, for instance, the question arose whether there was an unwarranted delay in rendering a final decision; the action had been brought in late 1986, and by 2001 no decision had yet been reached, with the case remaining at the evidentiary stage through the majority of this time.¹⁹¹ The IACHR found that, although the State had argued that the case file was replete with documents showing action in the case, “it is not the quantity but the efficacy of that action which is at issue.”¹⁹²

¹⁹⁰ IACHR, Report N° 100/01, Case 11.381, *Milton García Fajardo et al. v. Nicaragua*, October 11, 2001, ¶ 54. The case involved a labor dispute where the Nicaraguan Supreme Court violated a national statute by hearing the case for more than the requisite 45 days. *Available at* <http://www.cidh.org/annualrep/2001eng/Nicaragua11381.htm>.

¹⁹¹ IACHR, Report N° 67/01, Case 11.859, *Tomás Enrique Carvallo Quintana, Argentina*, June 14, 2001, ¶ 3, *available at* <http://www.cidh.org/annualrep/2001eng/Argentina11.859.htm>. The petitioner had filed an action before the courts seeking a rendering of accounts and damages for the alleged confiscation by the government of a regional bank that he had owned.

¹⁹² *Id.* ¶ 75. The IACHR held that: “While civil litigation necessarily has its own requirements: ‘The rule of prior exhaustion must never lead to a halt or delay that would render international action in support of the defenseless [alleged] victim ineffective.’ In this sense, the proceedings must be considered as a whole, with reference to the complexity of the case and the conduct of the complainant and the competent authorities.” *See id.* ¶ 74 (internal citations omitted).

2. Conclusion

168. Based upon this analysis, in my opinion a tribunal is seeking to assess whether the absence in Ecuadorian law of means, or the decision of its courts to not provide means, by which Claimants could have a preliminary decision on its threshold objections is a violation of Article II(7); such a tribunal should ask most fundamentally whether this omission or decision makes the means of asserting claims and enforcing rights ineffective. Does the omission of measures, or decision not to provide measures, by which jurisdictional objections can be heard and addressed prior to, or at least early in, the proceedings mean that an asserted right of an investor cannot be effectively pursued? In my opinion, the lack of formal mechanism in the law – or a mechanism in practice – to raise a non-frivolous assertion of *res judicata* and have that assertion addressed in a timely fashion means that the investor raising such a bar *prima facie* does not have an effective means to pursue his right to be free of re-litigation of a matter.

169. As a part of this consideration, the Tribunal may find it of assistance to assess that the time taken for considering the preliminary objections is objectively unreasonable. In the context of this proceedings, the Tribunal therefore might consider:

- The complexity of the litigation, which in the context of the claims of Chevron is not the complexity of the merits of the *Lago Agrio* litigation, but rather the complexity of its preliminary jurisdictional objections;
- The significance of the interests at stake which, in the context of this proceeding, includes the interests of Chevron in a timely resolution of its preliminary objections; Chevron, the *Lago Agrio* claimants and Ecuador each have substantial interests in the merits of the *Lago Agrio* litigation but it is difficult to see how those interests militate against timely resolution of preliminary issues;
- The behavior of both the litigants, which in the context of this proceeding includes the timeliness of the preliminary objections by Chevron;

- The overall conduct of the relevant authorities which, in the context of this proceeding, includes the conduct of the presiding judge in the *Lago Agrio* litigation in responding to the preliminary objections as well as other authorities in complementing or reviewing trial level decision-making in this regard.

By undertaking such an analysis, the Tribunal can assess whether, by design or by discretion, the seven years between the commencement of the *Lago Agrio* litigation and Claimants' assertion of its preliminary jurisdictional objections and today merit the conclusion that the lack of a preliminary decision on Claimants' threshold objections constitutes a breach of Ecuador's obligations of providing effective means of asserting claims and enforcing rights.

X. Conclusion

170. Article II(7) of the U.S.-Ecuador BIT provides that

Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.

In my opinion, this provision sets forth a positive and mandatory obligation to establish and supply measures that are not only designed to, but also adequate in practice to, facilitate the investor bringing a cause of action for the possession or enjoyment of a privilege, and for the State's acknowledgment and preservation, as well as execution, of the investor's powers and privileges as pertaining to every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party. In my opinion, the interpretation outlined above is a clear one, it is neither ambiguous nor manifestly absurd or unreasonable. An examination of the negotiating history of the Treaty, as well as the circumstances surrounding its conclusion, confirms this interpretation. Other arbitral awards interpreting Article II(7), as well as analogous language in Article 10(12) of the Energy Charter and Article 13 of the European Convention on Human Rights, are consistent with this interpretation.

171. The systemic obligation placed on the State Parties by Article II(7) is necessarily considered by an arbitral tribunal, such as this one, in the context of a particular case.

Considering the language of Article II(7) and the sources cited, as well as the task before the Tribunal, I reach the following five conclusions regarding application of Article II(7):

- First, given the placement of Article II(7) alongside other protections for investors in Article II, the Treaty contemplates that an investor may bring a claim for a breach of Article II(7);
- Second, the treaty obligation to provide “effective means” and a claim alleging a breach of that obligation is distinct from a claim under customary international law for denial of justice; the standards are distinct as is the timing and potential remedies of each;
- Third, “effective” means are means that are designed to accomplish the intended ends, and ones that in practice are adequate to reach such ends;
- Fourth, the obligation to provide “effective means” may be breached by (1) governmental subversion in the particular case of the “means” formally provided or (2) failure of the “means” to be “effective” whether in their design or in practice;
- Fifth, “means” are ineffective by design or in practice when on a case-by-case basis they are found to not provide an adequate basis for the investor to assert a claim or enforce a right. A defense of *res judicata* implicitly entails a right to be free from re-litigation of a matter. To be free from re-litigation, a “means” to enforce such a right is effective *prima facie* only if it provides an avenue for enforcing the right before the re-litigation occurs. The timeliness of the consideration of a request for a preliminary decision may be assessed on a case-by-case basis taking into consideration all circumstances including but not limited to: (1) the complexity of the question presented, (2) the interests of the litigants and forum at stake, (3) the conduct of the litigants, (4) the conduct of the relevant authorities, and (5) the state of the proceedings.

172. Lastly, I return to the distinction drawn between effective remedies on the one hand and denial of justice on the other. The *Commercial Cases* Tribunal cited to this distinction

noting that the treaty-based standard of the former was “distinct and potentially less-demanding” than the customary law based standard of the latter. In my opinion, the *Commercial Cases* Tribunal is correct. To this I would add another distinction: that between remedial and preventive. The “effective measures” obligation is preventative; it attempts to avoid breaches of treaty and other obligations by ensuring an opportunity at the national level for disputes to be avoided. In this sense, the requirement of “effective means” in my opinion is a part of a broader trend seen in other treaties supporting the rule of law and access to justice.



David D. Caron

September 3, 2010

- Attachment 1 – Résumé of David D. Caron
- Attachment 2 – Publications and Presentations of David D. Caron
- Attachment 3 – Cases Cited
- Attachment 4 – Works Cited

Attachment 1

Résumé of David D. Caron

Attachment 1 – Résumé of David D. Caron

DAVID D. CARON

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PRESENT POSITIONS

- Faculty of Law, University of California at Berkeley, since 1987.
- President, American Society of International Law.
- Member, U.S. Secretary of State's Advisory Committee on Public International Law, since 1993.
- Member, Global Agenda Council, World Economic Forum.
- Barrister, 20 Essex Street Chambers, London.
- Member, Board of Editors, American Journal of International Law, 1990 to 2005, 2008 to present.
- Co-Director, Law of the Sea Institute.
- Co-Director, Miller Institute on Global Challenges and the Law, University of California, Berkeley.
- Co-Editor, WORLD ARBITRATION AND MEDIATION REVIEW.
- Co-Editor, SSRN INTERNATIONAL ENVIRONMENTAL LAW EJOURNAL.

EDUCATION

- Dr. jur. and Doctorandus (International Law), Leiden University.
- Diploma, Hague Academy of International Law.
- J.D., Boalt Hall School of Law, University of California at Berkeley.
 - Member, Order of the Coif.
 - Co-Recipient, Thelen-Marrin Writing Prize
 - Editor-in-Chief, ECOLOGY LAW QUARTERLY.
- Fulbright Scholar & M.Sc., University of Wales Center for Marine Law and Policy, Cardiff, Wales, U.K.
- B.S. with High Honors, U. S. Coast Guard Academy, New London, Connecticut.
 - Emphases in Physics and Political Science. Brigade Commander, Corps of Cadets.

EXPERIENCE

American Society of International Law and American Journal of International Law

- President, American Society of International Law, 2010 to present.
- Editor, International Decisions Section of American Journal of International Law, 2003 to 2005.
- Member, Panel on State Responsibility, American Society of International Law, since 1988.
- President, Association of Student International Law Societies (ILSA since 1987), 1982 to 1983.

American Association of Law Schools

- Chair, AALS-ASIL Joint Conference on International Law, 2007.
- Chair, Section on International Law, 1995-1996.

Hague Academy of International Law

- Lecturer, Public International Session, Summer 2006.
- Director of Research (English-speaking), Centre for Research, Fall 1995.
- Director of Studies (English-speaking), Public International Law Session, Summer 1987.
- Recipient, Diploma in Public International Law, Summer 1985.

Institute for Transnational Arbitration, a Division of the Center for American and International Law

- Chair, Advisory Council, 2005-2009.

Attachment 1 – Résumé of David D. Caron

International Law Association

- Member, International Committee on Diplomatic Protection.
- Member, International Study Group on State Responsibility.

International Courts and Tribunals – Illustrative Practice and Experience

- Listed as a Band 1 international arbitrator in CHAMBERS USA, 2005-2010.
- Member, NAFTA Chapter 11 Panel in the *Cargill v. United Mexican States* dispute, 2005-2009.
- Member, NAFTA Chapter 11 Panel in the *Glamis Gold v. United States of America* dispute, 2004-2009.
- President, ISCID Tribunal in the *Aguas del Tunari v. Bolivia* dispute, 2001-2006.
- Counsel for Ethiopia before the Eritrea - Ethiopia Claims Commission, The Hague, 2004-2005.
- Commissioner, Precedent Panel, United Nations Compensation Commission, for claims arising out of the 1991 Gulf War, Geneva, 1996 to 2003.
- Counsel, Defender of the Fund, Marshall Islands Nuclear Claims Tribunal, 1994 -1996.
- Attorney with Pillsbury, Madison & Sutro, San Francisco, with practice in transnational litigation, and ICC and JCAA international arbitration, 1986-1987.
- Legal Assistant successively to Judges Charles N. Brower and Richard M. Mosk, The Iran-United States Claims Tribunal, The Hague, 1983-1986.

International Courts and Tribunals – Organizations

- Member, Panel of Commercial Arbitrators, American Arbitration Association, since 1988.
- Member, ICC Arbitration Committee, United States Comm. for International Business, since 1995.
- Member and Founding Fellow, College of Commercial Arbitrators, since 2000.
- Member and Past President, Northern California Int'l Arbitration Club, since 2003.
- Member, Board of Directors, African Inst. Arb., Mediation, Conciliation & Research, since 2003.
- Member, Editorial Board, LAW & PRACTICE OF INTERNATIONAL COURTS, since 2001.
- Member, Advisory Council, Procedural Aspects of International Law Institute, since 1995.
- Member, Steering Committee, Mass Claims Processes, Permanent Court of Arbitration, since 2000.
- Member, Academic Council, Foundation for Int'l Commercial Arbitration and ADR, since 2002.

Research Posts, Visiting Faculty Positions and Fellowships

- Visiting Professor, University of Hawaii Richardson School of Law, January 2009.
- Distinguished Visiting Professor, Taiwan National Security Council, June 2007.
- Visiting Professor, University of San Francisco Program, Udayana University, Bali, Summer 1997.
- Visiting Professor, Hastings College of the Law, San Francisco, 1996.
- Katherine C. Ryan Distinguished Visiting Professor, St. Mary's University Institute on World Legal Problems, Innsbruck, Austria, Summer 1995.
- Visiting Professor of International Law, Cornell University, Fall 1990.
- Senior Research Fellow, Max Planck Institute for International Law, Heidelberg, 1985-1986.
- Research and Teaching Assistant to Professor Stefan A. Riesenfeld, School of Law, University of California at Berkeley, 1982-1983.
- Environmental Conservation Fellow, National Wildlife Federation, 1980-1981.

University of California

- Member, University of California (System-Wide) Marine Council, 1999 to 2002.
- Member, University Committee on Research.
- Member, Executive Committees for Institute of International Studies; and Energy & Resources Group.
- Member, Faculty Advisory Board, BERKELEY JOURNAL OF INTERNATIONAL LAW.
- Member, Advisory Committees for Peace & Conflict Studies; Human Rights Center; and US Foreign Policy Center.

Attachment 1 – Résumé of David D. Caron

United States Coast Guard

- Assistant Chief, Marine Environmental Protection and Port Security, Northern California, 1976-1979.
- Navigator and Salvage Diving Officer, USCGC POLAR STAR, 1974-1976.

HONORS

- Recipient, the 2000 Stefan A. Riesenfeld Memorial Award for contribution to international law.
- Recipient, the 1991 Francis Deák Prize for outstanding scholarship by a younger scholar.
- Recipient, the U.S. Coast Guard Achievement Medal, 1979.

OTHER POSITIONS AND QUALIFICATIONS

- Member, California State Bar.
- Member, Bar of England and Wales.
- Third Mate, U.S. Merchant Marine, and Ship Salvage Diving Officer, U.S. Navy.

Attachment 2

Publications and Presentation Of David D. Caron

Attachment 2 – Publications and Presentations of David D. Caron

DAVID D. CARON

C. William Maxeiner Distinguished Professor of International Law
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A. BOOKS

THE 2010 UNCITRAL ARBITRATION RULES: A COMMENTARY (forthcoming Oxford University Press, 2011) (co-authored with Lee Caplan).

THE OCEANS IN THE NUCLEAR AGE: LEGACIES AND RISKS (David D. Caron & Harry N. Scheiber, eds., Martinus Nijhof, 2010).

THE UNCITRAL ARBITRATION RULES: A COMMENTARY (Oxford University Press, 2006) (co-authored with Lee Caplan and Matti Pellonpää).

BRINGING NEW LAW TO OCEAN WATERS (David D. Caron & Harry N. Scheiber, eds., Martinus Nijhof, 2004).

LES ASPECTS INTERNATIONAUX DES CATASTROPHES NATURELLES ET INDUSTRIELLES/ THE INTERNATIONAL ASPECTS OF NATURAL AND INDUSTRIAL CATASTROPHES (David D. Caron and Charles H. Leben, eds., The Hague Academy of International Law, 2001).

THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION (David D. Caron and John R. Crook, eds., Transnational Publishers, 2000).

THE ECOLOGICAL AND SOCIAL DIMENSIONS OF GLOBAL CHANGE (David D. Caron, Terry Chapin, Joan Donoghue, Mary Firestone, John Harte and Lisa Wells, eds., Institute of International Studies, University of California at Berkeley, 1994).

THE UNCITRAL ARBITRATION RULES AS INTERPRETED AND APPLIED: SELECTED PROBLEMS IN LIGHT OF THE PRACTICE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL (1994) (co-authored with Matti Pellonpää).

CHALLENGES AND ISSUES IN OCEAN GOVERNANCE (David D. Caron, Christopher Carr & Harry N. Scheiber, eds., Ocean Governance Study Group, 1993).

PERSPECTIVES ON U.S. POLICY TOWARD THE LAW OF THE SEA (Charles L.O. Buderer & David D. Caron, eds., Law of the Sea Institute, 1985).

LAW OF THE SEA: U.S. POLICY DILEMMA (Bernard H. Oxman, David D. Caron & Charles L.O. Buderer, eds., Institute for Contemporary Studies Press, 1983).

Attachment 2 – Publications and Presentations of David D. Caron

B. ARTICLES, NOTES AND CHAPTERS IN BOOKS

101. “The Profound Significance of the UNCC for the Environment,” ENVIRONMENTAL LIABILITY: GULF WAR REPARATIONS AND THE UN COMPENSATION COMMISSION (Cymie Payne and Peter H. Sand, eds., Oxford University Press, forthcoming 2011).
100. “Negotiating Our Future with the Oceans,” in A PLANET FOR LIFE 2011 – OCEANS (L. Tubiana, P. Jacquet, and R.K. Pachauri, eds., forthcoming 2011).
99. “The Alien Tort Statute: An Overview of Current Issues,” 28 BERKELEY JOURNAL OF INTERNATIONAL LAW 513- 520 (2010) (coauthored with Richard M. Buxbaum)(introducing symposium of eight articles).
98. “A Call to Action: Turning the Golden State into a Golden Opportunity for International Arbitration,” 28 BERKELEY JOURNAL OF INTERNATIONAL LAW 497- 508 (2010) (coauthored with Leah Harhay).
97. “The Interpretation of National Foreign Investment Laws as Unilateral Acts Under International Law,” in LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN (Mahnoush Arsanjani, Jacob Cogan, Robert Sloane, & Siegfried Weissner eds., forthcoming 2010).
96. “The Law and Politics of a Changing Arctic: Three Images and The Agendas They Suggest,” forthcoming in THE WORLD OCEAN IN GLOBALIZATION: CHALLENGES AND RESPONSES (Davor Vidas and Peter Johan Schei, eds, Martinus Nijhof, 2010).
95. “Investor-State Arbitration: Strategic and Tactical Perspectives on Legitimacy,” 32 SUFFOLK TRANSNATIONAL LAW REVIEW 513-524 (2009) (Translated and reprinted in the Thai Arbitration Institute’s TAI JOURNAL OF ARBITRATION (August 2010)).
94. “The Oceans in the Nuclear Age: Impacts, Observations and the Agenda Ahead,” in THE OCEANS IN THE NUCLEAR AGE: LEGACIES AND RISKS 515-534 (David D. Caron & Harry N. Scheiber, eds., Martinus Nijhof, 2010).
93. “Assessing the Impact of the Nuclear Age on the Oceans and Its Legal Regime,” in THE OCEANS IN THE NUCLEAR AGE: LEGACIES AND RISKS 3-15 (David D. Caron & Harry N. Scheiber, eds., Martinus Nijhof, 2010)(coauthored with Harry N. Scheiber).
92. “Remarks on the Change of Chair in the ITA,” The Twentieth Annual Workshop of the Institute for Transnational Arbitration, 3 WORLD ARBITRATION & MEDIATION REPORTS 409-418 (2009).
91. “Introduction to Confronting Ethical Issues in International Arbitration” The Twentieth Annual Workshop of the Institute for Transnational Arbitration, 3 WORLD ARBITRATION & MEDIATION REPORTS 205-209 (2009).
90. “The Law of the Sea,” forthcoming in THE INTERNATIONAL ENCYCLOPEDIA OF PEACE (Oxford University Press, 2010).

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89. “Climate Change, Sea Level Rise and the Coming Uncertainty in Oceanic Boundaries: A Proposal to Avoid Conflict,” *MARITIME BOUNDARY DISPUTES, SETTLEMENT PROCESSES, AND THE LAW OF THE SEA* 1-17 (Seoung-Yong Hong and Jon M. Van Dyke, eds., Martinus Nijhof, 2009).
88. “Assessment of the UNCITRAL Rules Revision: A Roundtable,” *50 YEARS OF THE NEW YORK CONVENTION: ICCA INTERNATIONAL ARBITRATION CONFERENCE, DUBLIN* 615-635 (ICCA Congress series no. 14, 2009) (the transcript of a roundtable discussion between James E. Castello, King & Spalding; Georgios Petrochilos, Freshfields Bruckhaus Deringer; Michael E. Schneider, Lalive & Partners; Josefa Sicard-Mirabal, International Court of Arbitration; William K. Slate, International Center for Dispute Resolution; and Christopher To, Hong Kong International Arbitration Centre. Professor David D. Caron, University of California at Berkeley acted as Moderator).
87. “Anticipating the 2009 Fairness in Arbitration Act,” *2 WORLD ARBITRATION & MEDIATION REPORTS* 15-22 (2008).
86. “Politics, Law and Three Images of the Arctic,” *PROCEEDINGS, 102TH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW* 151-160 (2008).
85. “Are the ICSID Rules Governing Nationality and Investment Working? – A Discussion,” in *INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW* 119-141 (TJ Gierson Weiler, ed., Juris, 2008).
84. “Introduction to Investment Treaty Arbitration in the 21st Century,” *The Seventeenth Annual Workshop of the Institute for Transnational Arbitration, 24 ARBITRATION INTERNATIONAL* 1-3 (2008).
83. “The United States and the 1982 Law of the Sea Treaty,” *12 ASIL INSIGHT*, Issue 4 (June 11, 2007) (co-authored with Harry N. Scheiber).
82. “Towards A Political Theory of International Courts and Tribunals,” *24 BERKELEY JOURNAL OF INTERNATIONAL LAW* 401-423 (2007).
81. “The Iran – U.S. Claims Tribunal and Investment Arbitration: Understanding the Claims Settlement Declaration as a Retrospective BIT,” in *THE IRAN-UNITED STATES CLAIMS TRIBUNAL AT 25: THE CASES EVERYONE NEEDS TO KNOW FOR INTERNATIONAL AND INVESTOR-STATE ARBITRATION* 375-383 (Christopher Drahozal & Christopher Gibson, eds., Oxford University Press, 2007).
80. “Framing Political Theory of International Courts and Tribunals: Reflections at the Centennial,” in *PROCEEDINGS, 100TH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW* 55-62 (2006).
79. “Justice Alito and Arbitration: His Concurrence in *China Minmetals*,” *NEWS AND NOTES, THE NEWSLETTER OF THE INSTITUTE FOR TRANSNATIONAL ARBITRATION* (2006) (coauthored with Rebecca J. Wright).

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78. “Foreword,” in *TRANSBOUNDARY HARM IN INTERNATIONAL LAW: LESSONS FROM THE TRAIL SMELTER ARBITRATION* xix-xxi (Cambridge University Press, Russell A. Miller & Rebecca Bratspies, eds., 2006).

77. “If Afghanistan has Failed, Then Afghanistan is Dead: ‘Failed States’ and the Inappropriate Substitution of Legal Conclusion for Political Description,” in *THE TORTURE DEBATE IN AMERICA* 214-222 (Cambridge University Press, Karen J. Greenberg, ed., 2005).

76. “The United Nations Compensation Commission for Claims Arising Out of the 1991 Gulf War: The ‘Arising Prior To’ Decision,” 14 *FLORIDA STATE UNIVERSITY INTERNATIONAL LAW JOURNAL* 309-334 (2005).

75. “State Crimes: Looking at Municipal Experience with Organizational Crime,” in *INTERNATIONAL RESPONSIBILITY TODAY, ESSAYS IN HONOR OF OSCAR SCHACTER* 23-30 (Cambridge University Press, Maurizio Ragazzi, ed., 2005).

74. “The Reconstruction of Iraq: Dealing with Debt,” 11 *U.C. DAVIS JOURNAL INTERNATIONAL LAW & POLICY* 123-143 (2004). Reprinted in *CHIBLI MALLAT, IRAQ: GUIDE TO LAW AND POLICY* 260-269 (2009).

73. “Does International Law Matter,” in *PROCEEDINGS, 98TH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW* 311-314 (2004).

72. “The Rule–Outcome Paradox, Madness Cascades and the Fog of Preemption: Seeking the ‘Best Rule’ for Use of Force,” 27 *HASTINGS INTERNATIONAL AND COMPARATIVE LAW QUARTERLY* 481-496 (2004).

71. “The United Nations Compensation Commission and Marine Environmental Damages Arising from the Gulf War: Tribunal or Foundation?” in *BRINGING NEW LAW TO OCEAN WATERS* 393-415 (Harry N. Scheiber and David D. Caron, eds., 2004).

70. “Bringing New Law to Ocean Waters” (coauthored with Harry N. Scheiber) in *BRINGING NEW LAW TO OCEAN WATERS* 3-14 (David D. Caron and Harry N. Scheiber, eds., 2004).

69. “Louis Henkin’s Integrity, Brilliance and ‘Felicity of Expression’: Remarks on his Receipt of the 2003 Stefan A. Riesenfeld Prize,” 22 *BERKELEY JOURNAL OF INTERNATIONAL LAW* 1-7 (2004).

68. “The World of Intellectual Property and the Decision to Arbitrate,” 19 *ARBITRATION INTERNATIONAL* 441-449 (2003). Translated into Chinese by Lin Yifei of the China International Economic and Trade Arbitration Commission. Translated into Portuguese by Marcos Fontes and published as “O Mundo da Propriedade Intelectual e a Decisão pela Arbitragem” in *REVISTA DE ARBITRAGEM* (2007).

67. “Between Empire and Community -- The United States and Multilateralism 2001-2003: A Mid Term Assessment,” 21 *BERKELEY JOURNAL OF INTERNATIONAL LAW* 395- 404 (2003).

Attachment 2 – Publications and Presentations of David D. Caron

66. “The Structure and Pathologies of Local Selective Procurement Ordinances: A Study of the Apartheid-Era South Africa Ordinances,” 21 BERKELEY JOURNAL OF INTERNATIONAL LAW 159-184 (2003).
65. “The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority,” 96 AMERICAN JOURNAL OF INTERNATIONAL LAW 857-873 (2002). *Reprinted at 3 TRANSNATIONAL DISPUTE MANAGEMENT* (December 2006).
64. “The State of State Responsibility,” PROCEEDINGS, 96TH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 168-180 (2002).
63. “The United Nations Compensation Commission: Practical Justice, Not Retribution,” 13 EUROPEAN JOURNAL OF INTERNATIONAL LAW 183-199 (2002) (Coauthored with Brian Morris).
62. “Addressing Catastrophes: Conflicting Images of Solidarity and Self Interest,” in LES ASPECTS INTERNATIONAUX DES CATASTROPHES NATURELLES ET INDUSTRIELLES/ THE INTERNATIONAL ASPECTS OF NATURAL AND INDUSTRIAL CATASTROPHES (David D. Caron & Charles H. Leben, eds., The Hague Academy of International Law, 2001).
61. “International Tribunals and the Role of the Host Country,” in THE IRAN-UNITED STATES CLAIMS TRIBUNAL : ITS CONTRIBUTION TO THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION 27-36(David D. Caron & John R. Crook eds., Transnational Publishers, 2000).
60. Chapters 1, 2, 9, 22, and 26 in THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION 3-7, 11-17, 133-148, 331-338, and 363-369 (David D. Caron & John R. Crook, eds., Transnational Publishers, 2000)(Coauthored with John Crook).
59. “War and International Adjudication: Reflections on the 1899 Peace Conference,” 94 AMERICAN JOURNAL OF INTERNATIONAL LAW 4-30 (2000).
58. “U.S. Litigation Concerning Japanese Forced Labor in World War II” AMERICAN SOCIETY OF INTERNATIONAL LAW INSIGHT (October 2000) (coauthored with Adam Schneider).
57. “The Place of the Environment in International Tribunals,” in THE ENVIRONMENTAL CONSEQUENCES OF WAR: LEGAL, ECONOMIC AND SCIENTIFIC PERSPECTIVES 250-263 (Jay E. Austin & Carl E. Bruch, eds., Cambridge University Press, 2000).
56. “Remarks” in NON-STATE ACTORS AS NEW SUBJECTS OF INTERNATIONAL LAW: FROM THE TRADITIONAL STATE ORDER TOWARDS THE LAW OF THE GLOBAL COMMUNITY 79-81, 146-148 (Rainer Hoffman ed., Duncker & Humblot Publishers, 1999).
55. “The Long-Term Contribution of the Tribunal to International Law,” in REVOLUTIONARY DAYS: THE IRAN HOSTAGE CRISIS AND THE HAGUE CLAIMS TRIBUNAL – A LOOK BACK 173-177 (Andreas Lowenfeld, Lawrence W. Newman and John W. Walker, Jr. eds., Juris Publishing, 1999).

Attachment 2 – Publications and Presentations of David D. Caron

54. "Stefan Albrecht Riesenfeld (1908-1999)," 93 AMERICAN JOURNAL OF INTERNATIONAL LAW 465-467 (1999).
53. "Ships: Nationality and Status," 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (1999).
52. "Stefan A. Riesenfeld, International Law and the University of California," 16 BERKELEY JOURNAL OF INTERNATIONAL LAW 1-9 (1998) (co-authored with Richard M. Buxbaum).
51. "Protecting Trade and Turtles: The WTO and the Coherency of International Law," 1 TRANSLEX 3, 15 (December 1998) (co-authored with Hans Rudolf Trüeb).
50. "State Crimes in the ILC Draft Articles on State Responsibility: Insights from Municipal Experience with Corporate Crimes," in PROCEEDINGS, 92TH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 307-312 (1998).
49. "The Basis of Responsibility: Attribution and Other Transsubstantive Rules of State Responsibility," in THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY 109-184 (Richard B. Lillich & Daniel B. Magraw, eds., 1998).
48. "Decisions 36 Through 42 and Associated Panel Reports of the United Nations Compensation Commission," 36 INTERNATIONAL LEGAL MATERIALS 1279-90 (1997).
47. "The Present State of Research Carried Out by the English-Speaking Section of the Centre for Studies and Research," in REPORT ON THE WORK OF 1995 SESSION OF THE HAGUE ACADEMY CENTRE FOR RESEARCH IN INTERNATIONAL LAW AND INTERNATIONAL RELATIONS ON "INTERNATIONAL ASPECTS OF NATURAL AND INDUSTRIAL CATASTROPHES" 1-28 (1996).
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45. "The International Whaling Commission & The North Atlantic Marine Mammal Commission: The Institutional Risks of Coercion for Consensual Structures," 89 AMERICAN JOURNAL OF INTERNATIONAL LAW 154-174 (1995).
44. "Post Award Proceedings Under the UNCITRAL Rules of Arbitration," 11 ARBITRATION INTERNATIONAL 429-454 (1995) (co-authored with Lucy F. Reed).
43. "Peaceful Settlement of Disputes Through the Rule of Law," in BEYOND CONFRONTATION INTERNATIONAL LAW FOR THE POST COLD-WAR ERA, 309-334 (Lori F. Damrosch, Gennady Danilenko & Rein Müllerson eds., 1995) (co-authored with Galina Shinkaretskaya, Institute of State and Law, Moscow).
42. "The UNCC and the Search for Practical Justice," in THE UNITED NATIONS COMPENSATION COMMISSION, 367-378 (Richard B. Lillich ed., 1995).
41. "The Law of the Sea and the United States: Reflections Given the Small Likelihood of Ratification in 1995," in IMPLICATIONS OF ENTRY INTO FORCE OF THE LAW OF THE SEA

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TREATY FOR U.S. OCEAN GOVERNANCE 14-16 (Biliana Cicin-Sain & Robert Knecht, eds. 1995).

40. “Decisions 14 Through 23 of the United Nations Compensation Commission,” 33 INTERNATIONAL LEGAL MATERIALS 235-242 (1995).

39. “Governance and Collective Legitimation in the New World Order,” 6 HAGUE YEARBOOK OF INTERNATIONAL LAW 29-44 (1994).

38. “Addendum” to the entry on “United States-Iran Agreement of January 19, 1981 (Hostages and Financial Arrangements),” in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1222-1229 (2000) (co-authored with Stefan A. Riesenfeld).

37. “The Institutional Risks of Coerced 'Greening' in a Consensual World,” in MOVING AHEAD ON OCEAN GOVERNANCE 29-30 (Biliana Cicin-Sain & Robert Knecht, eds. 1994).

36. “Analyzing and Understanding Treaties in the Area of International Environmental Law,” in TEACHING INTERNATIONAL ENVIRONMENTAL LAW: IDEAS AND EXPERIENCES FROM THE SEMINAR ROOM AND THE LECTURE HALL 8-16 (E. Howard ed., World Wildlife Fund, 1994).

35. “The Legitimacy of the Collective Authority of the Security Council,” 87 AMERICAN JOURNAL OF INTERNATIONAL LAW 552-588 (1993). Selected for inclusion in COLLECTIVE SECURITY LAW, a volume in The Library of Essays in International Law (Robert McCorquodale, ed., Ashgate Publishing), as an “important and influential” essay. Selected for inclusion in “The United Nations” (Paul Taylor and Sam Daws eds., 1997), a volume in The International Library of Politics and Comparative Government (David Arter, ed., Dartmouth Publishing), as an “important and influential essay in political and social science.”

34. “Towards an Arctic Environmental Regime,” 24 OCEAN DEVELOPMENT AND INTERNATIONAL LAW 377-392 (1993).

33. "The Attribution of Acts of Parastatals: The Significance of the Practice of the Iran-U.S. Claims Tribunal," PROCEEDINGS OF THE SECOND JOINT AMERICAN SOCIETY OF INTERNATIONAL LAW AND NEDERLANDSE VERENIGING VOOR INTERNATIONAAL RECHT CONFERENCE 6-9 (1993).

32. "The Permanent Court of Arbitration: 'Seeking the Most Effective Means of...a Real and Lasting Peace'," PROCEEDINGS OF THE SECOND JOINT AMERICAN SOCIETY OF INTERNATIONAL LAW AND NEDERLANDSE VERENIGING VOOR INTERNATIONAAL RECHT CONFERENCE 166-169 (1993).

31. “Initiatives Affecting Ocean Governance in the Arctic,” in CHALLENGES AND ISSUES IN OCEAN GOVERNANCE 31-40 (David D. Caron, Christopher Carr and Harry N. Scheiber eds., 1993).

30. “Strengthening the Collective Authority of the Security Council,” PROCEEDINGS, 87TH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 303-310 (1993).

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29. "The Arctic," 3 YEARBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 305-309 (1993) (co-authored with James Aquilina).
28. "Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal," 7 ICSID FOREIGN INVESTMENT LAW JOURNAL 21-56 (1992). *Relied upon in CDC Group v. Republic of the Seychelles, ICSID Case No. ARB /02/14, Annulment Decision at paragraph 34 (June 29, 2005) (Charles Brower, President; Michael Hwang; and David Williams; as Committee).*
27. "International Dispute Resolution: Comparing the Roles Accorded the Parties and the Community Surrounding Them," PROCEEDINGS, 85TH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 65-71 (1992).
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25. "The Frog That Wouldn't Leap: The International Law Commission and Its Work on International Watercourses," 3 COLORADO JOURNAL OF INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 269-279 (1992).
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22. "Protection of the Stratospheric Ozone Layer and the Structure of International Environmental Law-Making," 14 HASTINGS INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 755-780 (1991). Selected for inclusion in 23 LAND USE & ENVIRONMENT LAW REVIEW (1992) at 681-706 "as one of the best articles published within the last year." Selected for inclusion in INTERNATIONAL ENVIRONMENTAL LAW ANTHOLOGY (Anthony D'Amato & Kirsten Engel, eds., 1995). Selected for inclusion in INTERNATIONAL ENVIRONMENTAL LAW (Paula M. Pevato ed., 2003), a volume in The Library of Essays in International Law (Robert McCorquodale, ed., Ashgate Publishing), as an "important and influential" essay. Extracted for inclusion in MARK JANIS AND JOHN NOYES, INTERNATIONAL LAW: CASES AND COMMENTARY (1st edition, 1997) and subsequent 2nd and 3rd (2005) editions.
- 21 "Iraq and the Force of Law: Why Give a Shield of Immunity?," 85 AMERICAN JOURNAL OF INTERNATIONAL LAW 89-92 (1991).
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18. "The Gulf War, the United Nations Compensation Commission and the Search for Practical Justice," 24 THE TRANSCRIPT 26-30 (Fall 1991).
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14. "La protection de la couche d'ozone stratospherique et la struture de l'activite normative internationale en matiere d'environnement," 36 ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL 704-726 (1990).
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12. "International Sanctions, Ocean Management and the Law of the Sea: A Study of Denial of Access to Fishing," 16 ECOLOGY LAW QUARTERLY 311-354 (1989). *Extracted for inclusion in* DAVID HUNTER, DURWOOD ZAELEKE AND JAMES SALZMAN, *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* (3rd edition, 2006).
11. "The Law of the Environment: A Symbolic Step of Modest Value," 14 YALE JOURNAL OF INTERNATIONAL LAW 528-541 (1989).
10. "Ships: Nationality and Status," 11 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 289-297 (1989).
9. "Flags of Vessels," 11 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 127-128 (1989).
8. "Interim Measures of Protection: Theory and Practice in Light of the Iran-United States Claims Tribunal," 46 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENLICHES RECHT UND VÖLKERRECHT 465-518 (1986).
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6. "Liability for Transnational Pollution Arising from Offshore Oil Development A Methodological Approach" 10 *ECOLOGY LAW QUARTERLY* 641-683 (1983). Co-recipient, 1983 Thelen-Marrin Prize by the School of Law, University of California at Berkeley.
5. "Reconciling Domestic Principles and International Cooperation," in *LAW OF THE SEA: U.S. POLICY DILEMMA* 3 -10 (Bernard H. Oxman; David D. Caron & Charles L.O. Buderer eds., ICS Press, 1983).
4. "Ocean Disposal of Radioactive Wastes: International Law and California," in 2 *OCEAN STUDIES SYMPOSIUM* 591-613 (California Coastal Commission, ed., 1983).
3. "Deep Seabed Mining: A Comparative Study of Municipal Legislation by the United States of America and the Federal Republic of Germany," 4-16 *MARINE POLICY* 4 (1981).
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1. "Emergency Disposal of Oil Spill Wastes in Northern and Central California," in *DISPOSAL OF OIL AND DEBRIS RESULTING FROM A SPILL CLEANUP OPERATION* 62-75 (Farlow, J.S. & Swanson, D., eds.) (1980).

C. BOOK REVIEWS, EDITORIALS, AMICUS BRIEF PARTICIPATION AND ARBITRAL DECISIONS PUBLICLY AVAILABLE

BOOK REVIEWS

THE ICSID CONVENTION: A COMMENTARY by Christoph H. Scheuer, 98 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 219-220 (2004).

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“Book Reviews and Libel Proceedings,” 104 AMERICAN JOURNAL OF INTERNATIONAL LAW 226-227 (2010) (coauthored with Lori F. Damrosch, Bernard H. Oxman, and Richard B. Bilder.

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“The Less-Than-Golden State of International Arbitration,” THE RECORDER – SUPPLEMENT at pp 3,5 (April 2010)(with Leah Harhay).

“A Pre-emptive Pardon for Those Who Tortured Could Backfire,” SAN FRANCISCO DAILY JOURNAL and LOS ANGELES DAILY JOURNAL (January 15, 2009)(with Ariel Meyerstein).

“Council Comment: Reform Priorities at International Trade and Investment Institutions,” 21 ASIL NEWSLETTER 6-7 (Aug/Oct 2005).

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AMICUS BRIEF PARTICIPATION

Brief of Professors of International Litigation and Foreign Relations law, as *Amici Curiae*, in support of Respondents before the U.S. Supreme Court in *Mohamed Ali Samantar v. Bashe Abdi Yousef* (2010)(with Michael D. Ramsey, William S. Dodge, Stephen B. Burbank, Richard M. Buxbaum, Kevin M. Clermont, Thomas H. Lee, Edward T. Swaine.)

Brief of Professors of International Law as *Amici Curiae* in Support of Respondents before the U.S. Supreme Court in *Republic of the Philippines v. Mariano J. Pimentel* (2008)(with William J. Aceves, M. Cherif Bassiouni, Sherri Burr, John Cerone, Roger S. Clark, Connie De la Vega, Hurst Hannum, Bert Lockwood, Linda A. Malone, James A.R. Nafziger, Ved Nanda, Jordan J. Paust, Carole Petersen, John Quigley, Naomi Roht-Arriaza, Lelia Nadya Sadat, Michael Scharf, Harry N. Scheiber, Dinah Shelton, Barbara Stark, Beth Stephens, Johan D. Van der Vyver, David Weissbrodt, and Burns H. Weston).

Brief of Federal Courts and International Law Professors as *Amici Curiae* in Support of Petitioners before the U.S. Supreme Court in *Lakhdar Boudiene v. George Bush and Khaled Al Odab*

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v. United States of America (2007)(with Stephen Vladeck, David Vladeck, Lori Damrosch, Mark Drumbl, Deborah Pearlstein, Edward Purcell, John Quigley, Lauren Robel and Beth Stephens).

Brief for Arbitration Scholars and Experts as *Amici Curiae* in Support of Appellant before the United States Court of Appeals for the Second Circuit in *United States of America v. Jeffrey Stein, et al.* (2007) (with Thomas E. Carbonneau, Christopher Gibson, Robert B. von Mehren, and Arthur W. Rovine).

Brief of International Law and Jurisdiction Professors as *Amici Curiae* in support of the Petitioners before the U.S. Supreme Court in *Shafiq Rasul v. George W. Bush* (2004) (with John Barton, Barry Carter and Anne-Marie Slaughter).

Brief of April 13, 1998 of International Law Professors as *Amicus Curiae* in support of Petitioner in *Breard v. Greene*, 118 S. Ct. 1352 (1998) (No. 97-1390) (with George A. Bermann, Abram Chayes, Lori Fisler Damrosch, Richard N. Gardner, Louis Henkin, Harold Hongju Koh, Andreas F. Lowenfeld, W. Michael Reisman, Oscar Schachter, Anne Marie Slaughter, and Edith Brown Weiss.)

* * *

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Cargill, Inc. v. United Mexican States (A NAFTA Chapter 11 Arbitration before the ICSID Additional Facility) Final Award (Michael C. Pryles, President; David D. Caron, Member; Donald M. McRae, Member) (September 18, 2009).

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Agua del Tunari, S. A. v. Republic of Bolivia, ICSID Case No. ARB/02/3 (David D. Caron, President; Henri C. Alvarez, Member; and Jose Luis Alberro-Semerena, Member), Decision on Respondent's Objections to Jurisdiction (21 October 2005).

Report and Recommendations Made by the Panel of Commissioners Concerning the Fifteenth Installment (the Trade in Goods & Supply of Services Installment) of "E2" Claims (Bernard Audit - Chair, Jose Maria Abascal, David D. Caron), United Nations Compensation Commission for Claims Arising Out of the 1990 Gulf War, U.N. Doc. S/AC.26/2003/29 (18 December 2003).

Report and Recommendations Made by the Panel of Commissioners Concerning the Thirteenth Installment (the Goods & Services Installment) of "E2" Claims (Bernard Audit - Chair, Jose Maria Abascal, David D. Caron), United Nations Compensation Commission for Claims Arising Out of the 1990 Gulf War, U.N. Doc. S/AC.26/2003/10 (26 June 2003).

Report and Recommendations Made by the Panel of Commissioners Concerning the Eleventh Installment (the Goods & Services Installment) of "E2" Claims (Bernard Audit - Chair, Jose Maria Abascal, David D.

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Caron), United Nations Compensation Commission for Claims Arising Out of the 1990 Gulf War, U.N. Doc. S/AC.26/2002/22 (3 October 2002).

Report and Recommendations Made by the Panel of Commissioners Concerning the Ninth Installment (the Insurance and Telecommunications Installment) of "E2" Claims (Bernard Audit - Chair, Jose Maria Abascal, David D. Caron), United Nations Compensation Commission for Claims Arising Out of the 1990 Gulf War, U.N. Doc. S/AC.26/2001/11 (22 June 2001).

Report and Recommendations Made by the Panel of Commissioners Concerning the Seventh Installment (the Trade in Goods & Supply of Services Installment) of "E2" Claims (Bernard Audit - Chair, Jose Maria Abascal, David D. Caron), United Nations Compensation Commission for Claims Arising Out of the 1990 Gulf War, U.N. Doc. S/AC.26/2001/27 (14 December 2001).

Report and Recommendations Made by the Panel of Commissioners Concerning the Fifth Installment (the Banking and Financial Industry Installment) of "E2" Claims (Bernard Audit - Chair, Jose Maria Abascal, David D. Caron), United Nations Compensation Commission for Claims Arising Out of the 1990 Gulf War, U.N. Doc. S/AC.26/2000/17 (29 September 2000).

Report and Recommendations Made by the Panel of Commissioners Concerning the Second Installment (the Tourism Installment) of "E2" Claims (Bernard Audit - Chair, Jose Maria Abascal, David D. Caron), United Nations Compensation Commission for Claims Arising Out of the 1990 Gulf War, U.N. Doc. S/AC.26/1999/6 (19 March 1999).

Report and Recommendations Made by the Panel of Commissioners Concerning the Third Installment (the Transportation Installment) of "E2" Claims (Bernard Audit - Chair, Jose Maria Abascal, David D. Caron), United Nations Compensation Commission for Claims Arising Out of the 1990 Gulf War, U.N. Doc. S/AC.26/1999/22 (9 December 1999).

Report and Recommendations Made by the Panel of Commissioners Concerning the First Installment of "E2" Claims (Bernard Audit - Chair, Jose Maria Abascal, David D. Caron), United Nations Compensation Commission for Claims Arising Out of the 1990 Gulf War, U.N. Doc. S/AC.26/1998/7 (2 July 1998).

D. PRESENTATIONS AND CONFERENCE ACTIVITIES

2010

“What Difference, the Difference Between Principles and Rules in International Law Adjudication,” Keynote Address at the “Foundations of International Law” Conference, University of Pennsylvania, Philadelphia, April 24, 2010.

“Why International Courts and Tribunals Look and Act as They Do: A Theory of Bounded Strategic Space and Positional Logics,” presented at the Faculty Colloquium, Sandra Day O’Connor College of Law, Arizona State University, Tempe, April 23, 2010.

“Images of a Changing Arctic: The Legal and Political Challenges Ahead,” presented at Arizona State University, Tempe, April 22, 2010.

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“Revisiting Annulment in ICSID Arbitration,” Vale Institute, Columbia Law School, April 8, 2010.

Panelist, “What Should be the Outcome of the ILC’s Work: Draft Treaties, Draft Articles, Reports?” a panel within the Conference entitled “The International Law Commission in the 21st Century: What Should It Be Doing to Make A Contemporary Difference?” at George Washington University Law School, Washington, D.C., March 29, 2010.

Moderator, “A Conversation with Meg Kinnear, Secretary General of ICSID,” Annual Meeting of the American Society of International Law, Washington D.C., March 26, 2010.

Opening Remarks, “The Development and Effectiveness of International Administrative Law,” A Joint Symposium of the World Bank Administrative Tribunal and the American Society of International Law, Washington D.C., March 23, 2010.

“Images of a Changing Arctic: The Legal and Political Challenges Ahead,” presented at Washington & Lee College of Law, Lexington, March 22, 2010.

“Why International Courts and Tribunals Look and Act as They Do: A Theory of Bounded Strategic Space and Positional Logics,” presented as the Transnational Law Lecture, Washington & Lee College of Law, Lexington, March 22, 2010.

“Arbitrating with State Parties: The Debate as to the Relative Equality-Inequality of the Parties,” presented at “East Meets West: Evolving Issues in International Arbitration in the Asia-Pacific Region,” an International Chamber of Commerce Conference, San Francisco, March 15, 2010.

Panelist, “Managing the Arctic,” a panel within the Conference entitled “North American Futures: Canadian & U.S. Perspectives,” The Berkeley – British Columbia Symposium, University of California at Berkeley, March 12, 2010.

Commentator on Address by Fatou Bensouda, Deputy Prosecutor, International Criminal Court, on “Gender Violence and International Criminal Law,” presented at the School of Law, University of California at Davis, March 8, 2010.

“Scholarship and Practice: The Connections and the Tensions,” remarks to the national Junior Scholars International Law Workshop, Hastings College of the Law, San Francisco, February 26, 2010.

“Imaging the Arctic: Reflections on Law, Politics and Sustainability,” 29th Annual Myres McDougal Distinguished Lecture, University of Denver, February 13, 2010.

Panel Chair, “Towards Transparency in Arbitration,” in the Berkeley Journal of International Law Riesenfeld Symposium, “Advancing Arbitration,” University of California, Berkeley, February 10, 2010.

Panelist, A Forum on the Experience of Veterans in American Society, University of California, Berkeley, February 3, 2010.

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Participant, Meeting of the Advisers on the Draft of the Restatement of the Law Third – The U.S. Law of International Commercial Arbitration, The American Law Institute, Philadelphia, January 29-30, 2010.

Panel Chair, “The International Dynamic,” in “Beyond Copenhagen: Forging a Global Response to Climate Change,” a Center for Law, Energy & the Environment Conference, University of California, Berkeley, January 28, 2010.

2009

“The Small, The Useful and The Impossible: The Experience of UNCITRAL in Revising Its Rules,” The 16th Annual Goff Arbitration Lecture presented at the Hong Kong International Arbitration Center, Hong Kong, December 10, 2009.

“Transparency and Amicus Briefs in International Arbitration,” presented at Faculty Seminar, City University of Hong Kong, Hong Kong, December 9, 2009.

“Three Images of a Changing Arctic and The Futures They Represent,” The Cleveringa Lecture, presented at the Residence of the Dutch Ambassador, Washington, D.C., December 3, 2009.

“Three Images of a Changing Arctic and The Futures They Represent,” The Cleveringa Lecture, presented at the Netherlands Club, New York City, December 2, 2009.

Participant, Second Meeting of the Global Agenda Councils of the World Economic Forum, Dubai, November 19-22, 2009.

Participant, Geneva Initiative Roundtable on a Human Rights Court Convention, November 9, 2009.

Participant, “The U.S. Supreme Court and International Law: Continuity or Change?,” University of Santa Clara, November 6-7, 2009.

Panelist, “Transparency in International Arbitration,” International Law Association, American Branch, International Law Weekend, New York, October 22-24, 2009

Panel Chair, “The Law of the Sea and the Russian Arctic-Economic and Security Perspectives,” International Law Association, American Branch, International Law Weekend, New York, October 22-24, 2009.

“The Oceans in the Nuclear Age,” presented at Faculty Seminar, School of Law, University of California at Berkeley, September 29, 2009.

Commentator on Anupam Chander’s “Googling Freedom,” Northern California International Law Scholars Symposium, University of California at Davis, September 1, 2009.

Panelist, “Maritime Industries and Climate Change,” the 4th INHA University and Law of the Sea Institute Conference, “Law of the Sea and Ocean Policy Issues relating to the Pacific Ocean

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and the Pacific Rim,” University of Hawaii, August 26-27, 2009.

Panel Chair, “The Regulation of Fisheries and Whales,” the 4th INHA University and Law of the Sea Institute Conference, “Law of the Sea and ocean Policy Issues relating to the Pacific Ocean and the Pacific Rim,” University of Hawaii, August 26-27, 2009.

Panelist, “Public International Law and Foreign Policy,” Annual Meeting of the Deutsch-Amerikanische Juristen-Vereinigung, University of California, Berkeley, August 13, 2009

Co-Chair, Annual Meeting of the Deutsch-Amerikanische Juristen-Vereinigung, University of California, Berkeley, August 12-15, 2009.

“The Evolving Structure of International Investment Law,” Law Faculty Seminar, Xiamen University, Xiamen, China, July 9, 2010.

“Climate Change and the Oceans,” a series of five lectures, Xiamen Academy of International Law, Xiamen, China, July 6-10, 2009

Presiding Chair, “Confronting Ethical Issues in International Arbitration,” the 20th Annual ITA Workshop, Dallas, June 18-19, 2009.

“New Challenges: Arctic Marine Environment and Biodiversity,” presented at “Change in the Arctic Environment and the Law of the Sea,” the 33rd Center for Ocean Law and Policy Conference, Seward, Alaska, May 20-22, 2009.

“The Many Faces of Causation,” presented at “Damages in International Arbitration: Strategies, Techniques & Presentation,” the ITA – CANACO Americas Workshop, Mexico City, April 1-2, 2009.

Presiding Chair, “Damages in International Arbitration: Strategies, Techniques & Presentation,” the ITA – CANACO Americas Workshop, Mexico City, April 1-2, 2009.

Presiding Chair, “When Arbitrations Go Bad,” the 6th ITA –ASIL Conference, Washington, D.C., March 25, 2009.

“Arctic Boundaries & Climate Change: The Changing Concept of Space and Place in the Arctic and the Ensuing Battle of the International Community to Law Claim,” presented at the Center for Law, Energy & the Environment, University of California, March 17, 2009.

“ICSID Revisited: Evaluating the Effectiveness of the 2006 Amendments to ICSID Arbitration Rules,” a panel discussion at “Overhauling International Dispute Resolution: Challenges and Potential Solutions to International Solutions to International Dispute resolution in the 21st Century,” a Conference at the University of California at Davis Scholl of Law, Davis, CA, March 13, 2009.

“Piracy Off the Coast of Somalia: Challenges to Deterrence, Pursuit, and Prosecution,” at McGeorge School of Law, University of the Pacific, Sacramento, March 2, 2009.

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“Russia and a Changing Arctic,” presented at “Russia and the Rule of Law: New Opportunities in Domestic and International Affairs,” a Conference sponsored by Washington College of Law, American University, February 11, 2009.

Chair, “Expert’s Discussion on Ethics in International Arbitration,” the Mid Year Conference of the Institute for Transnational Arbitration University of California at Berkeley, January 30-31, 2009.

“Understanding the Structure and Evolution of Investor State Arbitration,” at The Judiciary Center, The State Supreme Court Building, Honolulu, Hawaii, January 20, 2009.

“Images of the Arctic: Past, Present and Future,” presented at the Modesto – Ceres Rotary Club, Modesto, January 9, 2009.

2008

Commentator, ASIL-ABILA Joint Project on Transparency in International Arbitration, Washington, D.C., December 5, 2008.

“Investment Arbitration: Understanding the Structure of an Expanding Practice Area,” presented to the International Law Society and Berkeley Journal of International Law, November 18, 2008

Participant, Inaugural Meeting of the Global Agenda Councils of the World Economic Forum, Dubai, November 7-10, 2008.

“Images of the Arctic: Past, Present and Future,” presented at “Ocean Governance: Structures, Functions and Innovation,” a Joint Conference of the Law of the Sea Institute and INHA University, Berkeley, November 4-5, 2008.

“Investor-State Arbitration: Strategic and Tactical Perspectives on Legitimacy,” Closing Address at the “Investor-State Arbitration: Perspectives on Legitimacy and Practice Conference” at Suffolk University Law School, Boston, MA, October 31 and November 1, 2008.

Presiding Co-Chair, “Insider Insights in Complex Energy Disputes,” the 4th Institute for Transnational Arbitration Americas Initiative Workshop, in conjunction with the Comitê Brasileiro de Arbitragem, Sao Paulo, Brazil, September 22, 2008.

“The Law and Politics of a Changing Arctic: Three Images and The Agendas They Suggest,” presented at “The World Ocean in Globalization: Challenges for Marine Regions,” an International Conference sponsored by the Fridtjof Nansens Institute, Oslo, Norway, August 23, 2008.

“The Oceans in the Nuclear Age: Legacies and Risks,” presented at the Summer Academy of the International Foundation for the Law of the Sea, The International Tribunal for the Law of the Sea, Hamburg, August 22, 2008.

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“The Revision of the UNCITRAL Arbitration Rules: A Lens on the Cutting Edge of International Arbitration,” presented to joint meeting of Morrison & Foerster and the Northern California International Arbitration Club, San Francisco, California, July 10, 2008.

Presiding Chair, “Damages in International Arbitration: Strategies, Techniques and Presentation,” 19th Annual Workshop of the Institute for Transnational Arbitration, Dallas, June 18-20, 2008.

“The International Arbitration System: Fundamentals and Challenges,” presented at the 45th Academy of American and International Law, the Center for American and International Law, Dallas, Texas, June 16, 2008.

Chair, Assessment of the UNCITRAL RULES Revision: A Roundtable (James E. Castello, Dewey & LeBoeuf; Georgios Petrochilos, Freshfields Bruckhaus Deringer; Michael Schneider, Lalive & Partners; Josefa Sicard-Mirabel, International Chamber of Commerce; William K. Slate, International Center for Dispute Resolution; Christopher To, Hong Kong International Arbitration Centre), ICCA Congress, Dublin, June 10, 2008.

“Stefan A. Riesenfeld, the Arctic and the Law of the Sea, presented at a Joint Assembly of the Deutsch-Amerikanische Juristen-Vereinigung and the International Association of Boalt Alumni, University of Köln, Neuer Senatssaal, Hauptgebäude, June 6, 2008.

Co-Chair (with Kathryn Mengerink and Harry Scheiber), an Environmental Law Institute & Law of the Sea Institute Joint Conference, “Managing for a Healthy California Current Ecosystem,” University of California at Berkeley, April 28 & 29, 2008.

“Politics, Law and Images of the Arctic,” presented at the 102nd Annual Meeting of the American Society of International Law, April 10, 2008.

Presiding Chair, “Soft Law Instruments in International Arbitration,” the 5th Joint Conference of the Institute for Transnational Arbitration and the American Society of International Law, Washington D.C., April 9, 2008

“Why International Courts and Tribunals Look and Behave as They Do,” presented at the School of Law, University of Georgia, Athens, Georgia, April 4, 2008.

“Law and Adaptation to Climate Change,” presented at “Adapting Law and Policy in the Face of Climate Change,” a Conference of the University of Georgia, , Athens, Georgia, April 4, 2008.

Participant, “Legitimacy and Hegemony Workshop,” Institute of International Studies, University of California at Berkeley, March 30 & 31, 2008.

“Three Images of the Changing Arctic – Concluding Remarks on the Conference,” presented at a Canadian Studies Program Conference entitled “The Ice Is Melting: Consequences of Climate Change in the Canadian North,” University of California at Berkeley, March 07, 2008.

“From Babylon to Manhattan: The Evolution of Human Rights,” presented at “2048: Drafting the Future of Human Rights,” University of California at Berkeley, February 29, 2008.

Attachment 2 – Publications and Presentations of David D. Caron

Co-Chair (with Professor Jonathan Simon, Professor Laurel Fletcher, and Kirk Boyd) of Conference and Project, “2048: Drafting the Future of Human Rights,” University of California at Berkeley, February 29, 2008.

Panelist, “Climate Change: The Adaptability of Law,” California Center for Environmental Law & Policy Spring Speaker Series, University of California at Berkeley, February 28, 2008

“Nuclear Options, Oceanic Questions,” presented at “Energy Security and Climate Change: The Nuclear Option,” a Conference of The Center for Energy and Environmental Security, University of Colorado Law School, Boulder, Colorado, February 1, 2008.

“The Future of the Investment Protection Regime,” presented at University of Colorado Law School, Boulder, Colorado, February 1, 2008.

Chair, “Expert’s Discussion on Damages and ‘Soft Law’ in International Arbitration,” the Mid Year Conference of the Institute for Transnational Arbitration University of California at Berkeley, January 18, 2008.

2007

“An International Judicial System? Framing Comments,” presented at “International Courts and Tribunals in the 21st Century: The Future of International Justice,” a conference of the Project on International Courts and Tribunals, The Peace Palace, The Hague, November 30 and December 1, 2007.

“Legacies and Trajectories: Challenges to the Arctic Environment,” presented at “Joint Norway-Berkeley Conference on the High North: Resource Exploitation and Environmental Challenges in a Changing Arctic,” University of California at Berkeley, November 19-20, 2007.

“Taking Stock of Sustainable Development: From Rhetorical Bridge to Substantive Content,” presented at “sustainable Development at Twenty: A Principle at Odds with Itself?” a conference at McGeorge School of Law, Sacramento California, November 17, 2007.

“What Next for Iraq, Iran and Afghanistan,” presented at the Modesto Rotary Club, November 16, 2007.

“Two Perspectives on Climate Change” (with Daniel Farber), at the Berkeley Law Faculty Workshop, November 15, 2007.

Co-Chair (with Cymie Payne) and Panelist, “Picking Up the Pieces: Reflections on the United Nations Compensation Commission,” University of California at Berkeley, September 27, 2007.

“The International Arbitration System: Fundamentals and Trajectories,” presented at the 44th Academy of American and International Law, the Center for American and International Law, Dallas, Texas, June 22, 2007.

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Presiding Chair, “Insider Insights: Complex Energy Disputes,” 18th Annual Workshop of the Institute for Transnational Arbitration, Dallas, June 21-22, 2007.

Chair, “What is Wrong with the Way We Teach and Write About International Law,” a Joint Conference of the Association of American Law Schools and the American Society of International Law, Vancouver, June 17-20, 2007.

“A Political Theory of International Courts & Tribunals,” presented at National Taiwan University, Taiwan, June 14, 2007.

“The Future of the International Investment Protection Order,” presented at National Chiao Tung University, Taiwan, June 13, 2007.

“Ocean Law and Adaptation to Climate Change: Sea Level Rise and Maritime Baselines,” presented at National Cheng Chi University, Taiwan, June 13, 2007.

“An Empirical Study of the Making of Treaties in the United States,” presented at the Institute of European and American Studies, Academia Sinica, Taiwan, June 12, 2007.

“The Law of the Sea Treaty and the Making of Treaties in the United States,” presented at the Foreign Service Institute, Ministry of Foreign Affairs, Taipei, Taiwan, June 10, 2007.

“Sea Level Rise and Maritime Baselines: Avoiding Conflict from Uncertainty,” presented at the Institute of the Law of the Sea, National Taiwan Ocean University, Taiwan, May 31, 2007.

“The United Nations: An Introduction to the United Nations using Iran as a Focal Point,” presented at Berkeley High School, Berkeley, California, May 4, 2007.

“Fundamentals and Challenges in International Arbitration,” presented within the Diploma Program of the Chartered Institute of Arbitrators held at Pepperdine University, April 16-18, 2007.

“Understanding Why International Courts and Tribunals Behave and Look as They Do,” presented at Stanford International Law Colloquium, Palo Alto, California, April 9, 2007.

“The Historical Importance of the Administrative Tribunals,” opening remarks presented at “International Administrative Tribunals and the Rule of Law,” a Joint Colloquium of the American Society of International Law and the World Bank Administrative Tribunal, World Bank, Washington, D.C., March 27, 2007.

“The Future of ICSID and the International Investment Regime,” a lecture presented at the Argentine Council for International Relations (“CARI”), Buenos Aires, Argentina, March 16, 2007.

“The Evolution of ICISD and the Challenges Ahead,” closing remarks presented at “Investment Treaty in the 21st Century,” a conference held in Buenos Aires, Argentina, March 14-16, 2007.

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“Understanding the Motivations for Consolidation in Complex Arbitration,” remarks presented at “The Forum on Current issues in International Commercial Arbitration,” a forum held in Buenos Aires, Argentina, March 16, 2007.

“Why International Courts and Tribunals Look and Behave as They Do,” a lecture in the Twelfth Annual Speakers Series at Willamette University College of Law, Willamette, Oregon, February 27, 2007.

Panel Moderator and Commentator, “Cap and Trade as a Tool for Climate Change Policy, An International Conference for Law, Business and Policy Practitioners,” a Conference held at University of California at Berkeley, February 22-23, 2007

“The Millennium Fades: Hope and Arbitration at the 1899 Peace Conference,” presented at “Symposium on Law, War and History,” University of California at Berkeley, February 16, 2007.

Co-Chair and Commentator, “Investment Arbitration – Lessons from Practice: A Discussion Among Experts,” the Mid Year Institute for Transnational Arbitration Conference held at the University of California at Berkeley, January 12, 2007.

2006

“Understanding Why International Courts and Tribunals Behave and Look as They Do” and “Approaching the Task of Creating an International Court or Tribunal,” a one day seminar for the attorneys of the Office of the Legal Advisor, U.S. Department of State, Washington, D.C., November 2, 2006.

Sea Level Rise and Maritime Baselines Avoiding Conflict from Uncertainty,” presented at “Towards a Framework for the New Order of the Sea,” a Joint Conference of the Law of the Sea Institute and INHA University, Seoul, Korea, October 24, 2006.

Co-Chair, “Towards a Framework for the New Order of the Sea,” a Joint Conference of the Law of the Sea Institute and INHA University, Seoul, Korea, October 24-25, 2006.

Chair, Workshop of American Society of International Law, West, held at School of Law, University of California, October 14, 2006.

“Genetic Disorders in International Institutions: The International Tribunal for the Law of the Sea,” presented at a Conference Celebrating the Scholarship of Professor Harry N. Scheiber, School of Law, University of California, September 15, 2006.

Chair, “Governing and Living in a Time of Terror,” a Conference of the Berkeley Project on Law and Terrorism, held at the School of Law, University of California, September 8-9, 2006.

“A Political Theory of International Courts and Tribunals,” a series of five lectures presented at the Summer Session of the Hague Academy of International Law, The Hague, July 31 to August 4, 2006.

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“Framing Political Theory of International Courts and Tribunals: Reflections at the Centennial,” presented at the 100th Annual Meeting of the American Society of International Law, Washington, D.C., March 30, 2006.

“The Iran – U.S. Claims Tribunal and Investment Arbitration: Understanding the Claims Settlement Declaration as a Retrospective BIT,” presented at “The Iran-United States Claims Tribunal at 25: The Cases Everyone Needs to Know for International and Investor-State Arbitration,” the 3rd Joint Conference of the Institute for Transnational Arbitration and the American Society of International Law, Washington D.C., March 29, 2006.

Presiding Chair, “The Iran-United States Claims Tribunal at 25: The Cases Everyone Needs to Know for International and Investor-State Arbitration,” the 3rd Joint Conference of the Institute for Transnational Arbitration and the American Society of International Law, Washington D.C., March 29, 2006.

“Translating Climate Change Science into Public Policy,” presented at 2006 Peder Sather Symposium, University of California, Berkeley, March 20, 2006.

Presiding Chair, the 2th Institute for Transnational Arbitration Americas Initiative Workshop, in conjunction with the CANACO, Mexico City, Mexico, March 6, 2006.

Co-Chair, “The Oceans and the Nuclear Age: Legacies and Risks,” a Law of the Sea Institute Conference held at the University of California, Berkeley, February 10-11, 2006.

“Detainees in the Global War on Terror: Guantanamo Bay and Beyond,” the U.S. Coast Guard Academy's Homeland Security Law Lecture series and an New England NPR Radio Debate held at the U.S. Coast Guard Academy, New London, CT, February 1, 2006. (The debate was between David Kennedy, Harvard Law School; Todd Gazaino, Heritage Foundation; David Caron, University of California at Berkeley; and David Rivkin, Baker & Hoeteler.)

Moderator, “Anatomy of a Debacle,” a panel within “Apres Le Deluge: Rebuilding a Sustainable City After Katrina,” a CCELP Conference held at the University of California, January 19, 2006.

Chair, “The Algiers Accords and the Iran –United States Claims Tribunal: 25 years On,” the Mid Year Conference of the Institute for Transnational Arbitration held at the University of California, January 13, 2006.

2005

Commentator on an American Society of International Law Centennial Event presentation by Carl Landauer entitled “The Ambivalences of Power: Launching the *American Journal of International Law* in an Era of Empire and Globalization,” University of California at Berkeley, November 2, 2005.

“The Security Council as World Judge: The Powers and Limits of the Security Council in Relation to Judicial Functions,” presented at a Forum sponsored by the Permanent Mission of the Austria to the United Nations and the Institute for International Law and Justice of New

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York University at the United Nations Headquarters, the Dag Hammarskjöld Library, October 27, 2005.

“The Oceans in the Nuclear Age Project,” presented at a Tri-Valley CAREs Forum, Berkeley, October 19, 2005.

“International Investment Arbitration: Challenges and Practice,” presented at Duke University Law School, September 30, 2005.

“A Political Theory of International Courts and Tribunals,” presented at the Faculty Colloquium at Duke University Law School, September 30, 2005.

“Reflections on What Should the United States Do,” presented at “Terrorism: Rights, Liberties, and the Rules of Engagement,” the 9th Annual Travers Ethics Conference, University of California at Berkeley, May 6, 2005 (as part of a panel with Eric Stover, Jane Wales and Steven Weber).

Co-Chair (with Roger Alford), “The Involvement of Non-Disputing Parties in International Arbitration,” the 1st Joint Institute for Transnational Arbitration – American Society of International Law Conference, Washington, D.C., March 30, 2005.

“International Law in the United States Legal System: Observance, Application and Enforcement,” a Roundtable Discussion at Santa Clara University, San Jose, California, January 28, 2005.

“The Future of ICSID and Bilateral Investment Arbitration,” presented at the Northern California International Arbitration Club, The Faculty Club, University of California, Berkeley, January 26, 2005.

2004

“The United States and Treaties,” presented at Queen Mary’s College, University of London, November 12, 2004.

“The Challenge of Arbitrators: Independence, Impartiality, and Violence,” presented at Kings College, University of London, November 11, 2004.

“The United States and The International Criminal Court, presented at the U.S. Coast Guard Academy, October 22, 2004.

“The Future of the Law of the Sea,” University of Oregon, Eugene, Oregon, October 15, 2004.

“Exploring Careers in International Law, presented to International Studies Program, University of Oregon, Eugene, Oregon, October 15, 2004

“The United States and the Laws of Power: Looking Back on the Bush Administration and U.S. Foreign Policy,” the Wayne Morse Distinguished Lecture, University of Oregon, Eugene, Oregon, October 14, 2004.

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“The UNCC and Proximate Cause in War,” presented at Faculty Colloquium, University of Oregon, Eugene, Oregon, October 13, 2004

“The Laws of War,” a debate with Professor Thomas Barnes at the University of California at Berkeley, October 5, 2004.

“Torture: The Memos and the War,” presented at the Faculty Club, the University of California at Berkeley, October 1, 2004.

“The Oceans in the Nuclear Age Project,” presented at a Law of the Sea Institute Workshop, Berkeley, April 30, 2004.

“Responding to Failed States and Rogue States,” Presented at the Peder Sather Symposium, the University of California at Berkeley, April 20, 2004.

“Revisiting Legitimacy,” presented at the Law School at University of California at Los Angeles, April 15, 2004.

“Does International Law Matter,” presented at a plenary session of the Annual Meeting of the American Society of International Law, Washington, D.C., April 2, 2004.

“The Future of Investment Arbitration,” Presented at an Institute of Transnational Arbitration and American Society of International Law Workshop, Washington, DC, March 31, 2004.

“The Reconstruction of Iraq and the Challenge of Dealing with Debt,” presented at the Law School at University of California, Davis, March 12, 2004.

“Globalization and International Law in the New Millennium,” A Series of Four Lectures Presented at a UNITAR Session for Latin American International Law Specialists in Quito, Ecuador, February 2004.

“The Wisdom and Limits of Second Best Solutions,” presented at a Hastings International and Comparative Law Quarterly Scholar’s Forum on “The Future of Force: Waging War in the 21st Century,” Hastings College of the Law, San Francisco, February 6, 2004.

2003

“The UNCC and the ‘Arising Prior To’ Decision,” Presented as the Inaugural Richard B. Lillich Distinguished Lecture at Florida State University, October 23, 2003

Chair of Panel, “Investment Forum, British Institute of International and Comparative Law,” Law, London, October 9, 2003

“Lessons from Seven Years with the UNCC,” Presented at the School of Law, University of California at Berkeley, October 2, 2003.

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“September 11th: Terror Two Years Later,” presented at the University of California, September 11, 2003.

Co Chair (with Timothy Feighery), “A Roundtable on Lessons Learned from the United Nations Compensation Commission,” Palais des Nations, Geneva, July 2, 2003.

“The Structure of International Commercial Arbitration,” presented at the Palais des Nations, Geneva, June 3, 2003.

“Twists and Turns in International Commercial Arbitration,” presented at the Inaugural Meeting of the Northern California International Commercial Arbitration Club, San Francisco, May 15, 2003.

“Legality of Regime Change,” a panel discussion between David Caron, Michael Nacht and Joel Paul, a World Affairs Council Forum, San Francisco, April 23, 2003.

“Implications of War in Iraq,” presented at the Chancellor’s Forum on the War, Zellerbach Auditorium, University of California at Berkeley, April 1, 2003

“Louis Henkin’s Integrity, Brilliance and ‘Felicity of Expression’: Remarks on his Receipt of the 2003 Stefan A. Riesenfeld Prize,” presented at the 2003 Stefan A. Riesenfeld Symposium, School of Law, University of California at Berkeley, February 28, 2003.

Commentator on Erik Franckx’s “Multilateralism and Marine Issues in the Southeast Atlantic,” presented at Law of the Sea Institute Conference entitled “Multilateralism and International Ocean Resources,” at School of Law, University of California at Berkeley, February 21-22, 2003.

Commentator on Jeffrey Dunoff’s “Mission Impossible: Resolving the WTO’s Trilemma,” presented at International Trade Roundtable, School of Law, University of California at Berkeley, January 31, 2003.

“Between Empire and Community: The United States and Multilateralism,” presented at the Faculty Workshop, School of Law, University of California at Berkeley, January 30, 2003.

Chair and Moderator for “Between Empire and Community: The United States and Multilateralism – A mid term Assessment 2001-2003,” A Public Workshop, University of California at Berkeley, January 22, 2003.

2002

“Working in International Law,” presented at the World Affairs Council and University of California at Berkeley International Career Symposium, Berkeley, October 23, 2002.

“The Acceptability of Using Force: The United States and Europe After the Century of War,” comments presented at the conference “International Law and Justice in the 21st Century: The Enduring Contributions of Thomas M. Franck,” at New York University, New York City, October 5, 2002.

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“The World of Intellectual Property and the Decision to Arbitrate,” presented at “Technology Transfer Disputes and the Role of Technology in Arbitration,” the 13th Annual Workshop of the Institute for Transnational Arbitration, Dallas, TX, June 20, 2002.

“Of Community and Empire,” presented at the Sixth Peder Sather Symposium , “After 9/11: American and European Perspectives on Security, Globalization and Conflict Resolution,” at the University of California at Berkeley, April 29-30, 2002.

“What Happened After the Gulf War: An Update on Claims for Damage to the Environment,” presented to the Environmental Law Society at Boalt Hall, April 24, 2002.

“The U N Compensation Commission and the Gulf War: Tribunal or Foundation?” presented at “Bringing New Law to Ocean Waters,” an international conference at the University of California at Berkeley, April 6, 2002.

Co Chair (with Harry N. Scheiber), “Bringing New Law to Ocean Waters,” an international interdisciplinary conference at the University of California at Berkeley, April 4-7, 2002

Panelist, “The New Sovereignty,” a conference of the Hastings International And Comparative Law Review, San Francisco, Hastings College of the Law, February 1, 2002

2001

“The New Security Demands: Understanding United States' Hesitancy on Effective with Arms Control Treaties,” presented at "Nuclear Weapons after September 11: Terrorism, Geopolitics and International Responses -- The Chancellor's Forum on Nuclear Danger and Global Survival, International House, Berkeley, November 8, 2001.

“The Making of Treaties in the United States: Establishing a Basis for Debate," presented at George Washington University, Washington, November 2, 2001.

“Terrorism, Counter-terrorism and the International Legal Regime,” presented at a Panel Discussion, "Some Legal Dimensions of the U.S. Response to September 11," at Boalt Hall, University of California at Berkeley, October 1, 2001.

“Events and Aftermath of September 11th,” The Graduate Student Assembly, University of California at Berkeley, September 28, 2001.

“Thinking About September 11th,” A Berkeley Journal of International Law Public Lecture, University of California at Berkeley, September 21, 2001

“The United Nations Compensation Commission: Practical Justice, Not Retribution,” presented at “The Impact of International Law of a Decade of Measures against Iraq: A European-American Dialogue, The European University Institute, Florence, Italy (Coauthored with Brian Morris, presented by Timothy Feighery due to conflicting circumstances), May 25, 2001

“The Visible College of International Arbitrators,” presented at the 95th Annual Meeting of the American Society of International Law, Washington D.C., April 5, 2001.

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“Unexpected Consequences of NAFTA,” presented to the Boalt Hall School of Law Alumni Association, The Sutter Club, Sacramento, CA, February 21, 2001.

2000

“Arbitrating Environmental Disputes: The Experience of the United Nations Compensation Commission for Claims Arising out of the 1990-1991 Gulf War,” presented at the 17th Joint AAA-ICC-ICSID Colloquium on International Arbitration, The World Bank, Washington, D.C., November 10, 2000.

“The Life Cycle of an International Claims Institution,” presented at the United Nations Compensation Commission, Geneva, Switzerland, September 12, 2000.

“Where do the Elephant Seals Go: Knowledge and Law in the Oceans,” presented at Boalt Hall School of Law, University of California at Berkeley, August 31, 2000.

“Understanding The Right of Return,” presented at the Stefan A. Riesenfeld Symposium 2000 on “A Legacy of War: Displaced Masses in the Twenty-First Century,” University of California at Berkeley, April 15, 2000.

“The Role of NGOs in a Debt Relief Regime,” presented at the Institute of International Studies MacArthur Workshop on Globalization, Governance and the Environment, University of California at Berkeley, April 14, 2000.

Chairman and Moderator, Panel on “Negotiating the Canada-U.S. Salmon Treaty,” The NAELS Conference on Ocean and Environmental Law: “Sea Change,” Stanford Law School, CA, March 10-11, 2000

[Ocean Law Conference Lunch Address]

1999

“Summing up: Litigating the Heart of the Arbitration,” presented at the 10th Annual Workshop of the Institute for Transnational Arbitration, Dallas, Texas, June 17, 1999.

“Kosovo: International Law and the United Nations,” presented at an Institute of International Studies Forum, “Kosovo: The War in the Balkans,” University of California at Berkeley, May 6, 1999.

“The United States and the United Nations,” presented as a part of the World Affairs Council’s 1999 Great Decisions Program, San Francisco World Affairs Council, March 17, 1999.

1998

“The Treaty Practice of the United States 1976 to 1992: Some Preliminary Findings,” presented at U.S. Department of State Advisory Committee on Public International Law, Washington, D.C., June 15, 1998 (with Timothy Trenkle).

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“The Place of the Environment in International Tribunals,” presented at “The First International Conference on Addressing the Environmental Consequences of War,” The Smithsonian Institution, Washington, D.C., June 12, 1998.

“The Book of the Berkeleyites,” Convocation Address to the Graduating Class in International and Area Studies at the University of California at Berkeley, May 16, 1998.

“The Place of International Organizations in Municipal Law: *AMF v. Hashim* as a Tale of Two Countries,” presented at “Boalt in the Global Age,” Berkeley, April 8, 1998.

“State Crimes in the ILC Draft Articles on State Responsibility: Insights from National Experience with Corporate Crimes,” presented at the Annual Meeting of the American Society of International Law, Washington, D.C., April 4, 1998.

“The Legalization of International Order,” presented as Inaugural Lecture of the C. William Maxeiner Distinguished Professorship, University of California at Berkeley, March 17, 1998.

“The International Criminal Court Negotiations: The Lasting Choices Ahead,” presented at the Opening Ceremony of the Resource Center for the United Nations, The Presidio, San Francisco, February 27, 1998.

“Competing Systems of Legalization in the Peacekeeping Context: Implications for the UN System,” presented at Conference on “International Institutions for the Lawful Use of Force and International Institutions for Economic Integration: Designing Command and Control Structures for Complex Multinational Settings,” Chicago Kent College of the Law, Chicago, February 11, 1998.

1997

Chairman, Roundtable on International Legal History, The University of California at Berkeley and the Max Planck Institute on European Legal History, Berkeley, CA, October 2, 1997.

Chairman and Moderator, Panel on “Dispute Resolution in Asia,” Berkeley Journal of International Law Conference on “Trade and Business with Asia,” Berkeley, CA, September 18, 1997.

“The Collective and the Individual in Forgiveness and Punishment,” presented at a Center for the Study of Religion and Culture Conference on “Forgiveness and Punishment? Legal, Ethical and Religious Perspectives on South Africa’s Truth and Reconciliation Commission,” University of California, Berkeley, April 14, 1997.

“Mass Torts in International and Domestic Fora,” presented at “Recent International Developments in Trade, Human Rights, Environment and Dispute Resolution, the Sixth Annual ASIL Regional Conference, Golden Gate University, San Francisco, March 21, 1997.

“International Law and East Timor,” presented at Portuguese Studies Program Conference on East Timor, University of California, Berkeley, March 1, 1997.

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Panel Chair and Panelist, “Developments in Inter-jurisdictional Management of Fisheries,” presented at an Ecology Law Quarterly Conference entitled “The Ecosystem Approach: New Departures for Land and Water,” University of California, Berkeley, February 21 and 22, 1997.

1996

Workshop Co-Chairman (with Jan Paulsson) and Panel Chairman, The 7th Annual Workshop of the Institute for Transnational Arbitration, “The Transnational Arbitration of High-Tech Disputes,” Dallas, TX, June 20, 1996.

"Reflections on Ruggie's Anatomy of an Institution," presented to the Multilateralism Group of the Institute of International Studies, University of California, Berkeley, March 19, 1996.

“Human Rights Litigation and Systemic Utilities,” respondent at “Practising and Preaching: Implementing Human Rights Law in the United States,” a Conference at the University of California, Berkeley, March 16, 1996.

“The Long-Term Contribution of the Tribunal to International Law,” presented at a Conference entitled “The Iran Hostage Crisis and The Hague Claims Tribunal - A Look Back” at New York University School of Law, New York, January 19-20, 1996.

Chairman, The Sixth Berkeley Conference of International Legal and Relations Scholars, “Sources: A Conversation with Professor D’Amato” and “Nuclear Weapons: A Conversation with John Crook and John Burroughs,” January 18, 1996.

1995

Chairman, “The United Nations, Multilateralism and Catastrophes,” an Institute of International Studies Conference, University of California at Berkeley, CA, November 9-10, 1995.

Drafter, The Joint Statement Issued by Eleven Nobel Peace Laureates on the Occasion of the Fiftieth Anniversary of the Signing of the U.N. Charter, San Francisco, June 24, 1995.

"Post Award Proceedings Under the UNCITRAL Rules of Arbitration," presented at the 7th Annual Meeting of the Institute of Transnational Arbitration, Dallas, Texas, June 22, 1995.

"What is Martial Law," commentator on address by Nasser Hussain, presented at the Townsend Center on Human Rights, University of California at Berkeley, March 22, 1995.

"The Security Council: Understanding Critiques of Illegitimacy," presented at a Yale U.N. Studies Workshop at the East-West Center, University of Hawaii, Honolulu, March 9, 1995.

"The Law of the Sea Treaty and the United States: Reflections on Ratification in 1995," presented at Annual Meeting of the Ocean Governance Study Group, Honolulu, Hawaii, January 9, 1995.

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1994

"The Changing Law of the Sea," presented at the U.S. Coast Guard Commanding Officers Conference, Coast Guard Island, California, December 13, 1994.

"Evaluating the New WIPO Arbitration Rules for Intellectual Property Disputes," presented at the ICSID, ICC & AAA Joint Colloquium on International Commercial Arbitration, San Francisco, October 17, 1994.

"The Influence of Law on Land Use," presented at the Global Change Colloquium, Department of Geography, University of California at Berkeley, September 19, 1994.

"The United Nations Compensation Commission and the Search for Practical Justice," presented at the Sokol Colloquium, "The United Nations Compensation Commission," University of Virginia, April 16, 1994.

"On Collective Legitimation as a Means of Governance," presented at the International Jurisprudence Colloquium, New York University, April 14, 1994.

"The IWC and NAMMCO: The Institutional Risks of 'Coerced Greening' in a Consensual World," presented at "Moving Ahead on Ocean Governance," a Conference of the Ocean Governance Study Group, Lewes, Delaware, April 10, 1994.

"Understanding and Analyzing International Environmental Treaties," presented at a Workshop on "The Teaching of International Environmental Law," at the Annual Meeting of the American Society of International Law, April 9, 1994.

Chairman and Moderator, Panel on "Reforming the United Nations," Annual Meeting of the American Society of International Law, Washington D.C., April 6, 1994.

Chairman, The Fifth Berkeley Conference of International Legal and Relations Scholars, "The U.S. Legal Advisor, A Conversation with Conrad Harper, Legal Adviser, U.S. Department of State on the Role of the Legal Adviser in the State Department and the International Criminal Court," Berkeley, March 18-19, 1994.

"The Whaling Commission and the Protection of the Human Environment," presented at "Global and Regional Developments in International Protection of Environmental and Human Rights," at Golden Gate University, San Francisco, March 18, 1994.

"International Law and IR Theory -- Building Bridges," presented with Professor Ernst Haas at the International Relations Colloquium, Institute of International Studies, University of California at Berkeley, February 23, 1994.

1993

"The Permanent Court of Arbitration: 'Seeking the Most Effective Means of...a Real and Lasting Peace'," presented at the Second Joint American Society of International Law and Nederlandse Vereniging voor Internationaal Recht Conference, The Hague, July 23, 1993.

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"The Attribution of Acts of Parastatals: The Significance of the Practice of the Iran-U.S. Claims Tribunal," presented at the Second Joint American Society of International Law and Nederlandse Vereniging voor Internationaal Recht Conference, The Hague, July 22, 1993.

"Governance and Collective Legitimation in the New World Order," presented at the "Conference Commemorating the 70th Anniversary of the AAA," The Hague, July 20, 1993.

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"What Changes When Debates About the Environment Become Transnational?: The Multiplication of Division and the Dynamics of Reconciliation," presented at the Annual Meeting of the Law and Society Association, Chicago, May 29, 1993.

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"The Dynamics of Reconciliation in Global Environmental Negotiations," presented at "Global and Regional Developments in International and Environmental Law," a regional meeting of the American Society of International Law, Golden Gate University, San Francisco, March 19, 1993.

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"Governance of the Arctic," presented at the Ocean Governance Study Group Conference, Berkeley, January 11, 1993.

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1992

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"The Legitimacy of the Security Council," presented at Alumni House, University of California at Berkeley, November 9, 1992.

Participant, Conference on Parliamentary Participation in Treaty-Making, Geneva, November 6-10, 1992.

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Member, Program Committee, American Society of International Law Annual Meeting, April 1992.

Participant, "International Arbitration in the 21st Century: Towards 'Judicialization' and Uniformity?," the 12th Sokol Colloquium, University of Virginia, March 27-28, 1992.

"The Resolution of Claims Against Iraq After the Gulf War," presented at "Current International Problems Affecting the Pacific Rim," a Regional Meeting of the American Society of International Law, Golden Gate University School of Law, March 19, 1992

"Global Environmental Change and the Point Where Science Meets Policy," Institute of International Studies Global Environmental Change Seminar, Berkeley, February 25, 1992 and March 10, 1992 (with Professor Terry Chapin).

"The Structure of Authority in the Security Council," United Nations Association of the East Bay, Berkeley, March 9, 1992

Chairman, The Third Berkeley Conference of International Law Scholars with Representatives of the U.S. Trade Representative Office (Joshua Bolton) and the United Nations on NAFTA and U.N. Reform, Asilomar, February 14-16, 1992.

Panelist, Ocean Governance Study Group Conference, Honolulu, Hawaii, January 15-18, 1992.

1991

"The Frog That Wouldn't Leap," presented at the 2d Doman Colloquium, "The Law of International Watercourses," University of Colorado, Boulder, October 18, 1991.

"The Gulf War and the UN Compensation Commission: A Search for Practical Justice," presented at Cornell Law School, Ithaca, September 13, 1991 and at the School of Law, University of California at Berkeley, September 25, 1991.

"Settling the Kuwaiti Claims," presented to the University of California Orientation in American Law Program, Berkeley, August 9, 1991.

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"The Trail Smelter Arbitration Revisited," presented at "International Environmental Law -- Global Trends and Policies," a conference sponsored by Hastings College of the Law, February 23, 1991

"The Road Not Considered: Legal Responses to the Iraqi Invasion of Kuwait," presented at "International Law and the War in the Gulf," a panel discussion and forum sponsored by Boalt Hall School of Law, University of California at Berkeley, February 1, 1991.

"The Protection of Civilians and Property Under the Fourth Geneva Convention," presented at "International Symposium on Iraqi Aggression Against Kuwait," sponsored by the Kuwaiti Government, Cairo, January 7, 1991.

1990

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"The International Regime for the Protection of the Stratospheric Ozone Layer: Reflections on International Environmental Law-Making," presented at University of Michigan School of Law, Ann Arbor, November 16, 1990.

"Future Directions in International Resolution of Disputes," presented at University of Michigan School of Law, Ann Arbor, November 16, 1990.

"Wither Resolution of Private International Disputes?," (with Arthur Rovine, Esq.) presented at Cornell Law School, Ithaca, November 14, 1990

"Protection of the Ozone Layer and the Structure of International Environmental Law-Making," presented at Cornell Law School, Ithaca, November 13, 1990.

"The Influence of Rhetoric on Foreign Affairs: Iraq's Invasion of Kuwait," presented at Cornell Law School, Ithaca, October 18, 1990.

"The Place of the Foreigner: Law as a Mirror of Our Hopes and Failings," presented at Die Reaktion der Normalen, a Conference of the Max Planck Institute for European Legal History, Frankfurt, June 29, 1990.

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"The Emerging Structure of International Environmental Law-Making," presented at "International Environmental Law -- The Changing Scene," an American Bar Association and California Bar Association program, San Francisco, May 25, 1990.

"A Perspective on Problems Ahead: Global Warming and the Territorial Seas," presented at "Ocean Resources, Industries and Rivalries 1800 to the Present," an international experts' conference at the University of California at Berkeley, May 6, 1990.

"The Greening of International Law," Global Warming Symposium, University of California at Berkeley, April 16, 1990.

"Attribution Amidst Revolution: The Experience of the Iran-United States Claims Tribunal," presented at the Annual Meeting of the American Society of International Law, Washington, D.C., March 29, 1990.

Conference Co-Director (with Thomas G. Barnes), "Canadian and United States Strategic Concerns in the Arctic,"
Canadian Studies Program, University of California at Berkeley, March 23-24, 1990.

"Achieving Diversity in Graduate Studies at Boalt Hall," presented at the Annual Meeting of the Association of American Law Schools, San Francisco, January 5, 1990.

1989

"The Pacific Islands and the Rising Sea Level: Rethinking the Law of Baselines," presented at the Annual Meeting of the Association of Pacific Island Legislatures, Pohnpei, Federated States of Micronesia, December 7, 1989.

"The Act of State in State Responsibility: Theory and Practice in Light of the Iran-United States Claims Tribunal," presented to the Panel on State Responsibility of the American Society of International Law, Washington D.C., November 17, 1989.

"When Law Makes Climate Change Worse: Rethinking the Law of Baselines in Light of a Rising Sea Level," presented at the Annual Meeting of the Western Legislative Conference, Monterey, November 11, 1989.

Chairman, Ocean Resources Program for the Annual Meeting of the Western Legislative Conference, Monterey, CA, November 11-12, 1989.

"Reflections on a Right to Healthy and Sustainable Environment" presented at "Human Rights and the Future - An Open Forum of the USSR-USA Scholars' Dialogue on Human Rights", University of California at Berkeley, August 11, 1989.

"Recent Developments in International Marine Environmental Protection," presented at the Annual Meeting of the American Society of International Law, Chicago, IL, April 17, 1989.

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1988

"A Comparative Study of Municipal South Africa Anti Procurement Ordinances" presented to the Bar Association of San Francisco, Nov. 16, 1988.

"The United States and the Law of the Sea" presented at the First Unitarian Church of San Francisco, May 30, 1988.

"International Sanctions, Ocean Management and the Law of the Sea: A Study of Denial of Access to Fishing," presented at a Sho Sato Symposium, "Japan, the United States, and Pacific Ocean Resources," Berkeley, CA, April 5-6, 1988.

Co-Chair (with Professor Harry N. Scheiber), "Japan, the United States, and Pacific Ocean Resources," the Sho Sato Symposium, School of Law, University of California at Berkeley, Berkeley, CA, April 5-6, 1988.

"International Law and the Protection of Shipping in the Gulf" presented at the Annual Conference of the International Studies Association, St. Louis, April 1, 1988.

Before 1988

"The Legal Nature of Arbitration before the Iran-United States Claims Tribunal" presented at the Max Planck Institute for Comparative Public and International Law, Federal Republic of Germany, April 28, 1986.

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"Coastal Transnational Pollution Problems Between Mexico and the United States: Options for Resolution" presented at the 2d American Bar Association Mexico Asociacion Nacional de Abogados Conference on Environmental Problems Between Mexico and the United States, Mexico City, June 3 & 4, 1983.

"Policymaking Despite Uncertainty: Deep Seabed Mining" presented at a University of Oregon Symposium, "The U.S. and The Law of the Sea, A Northwest Inquiry", Portland, Oregon, March 25 & 26, 1983.

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"Emergency Disposal of Oil Spill Wastes in Northern and Central California," presented at an American Society of Testing & Materials Symposium, Denver, Colorado, November 6, 1978.

"The Social Process Viewed Through Concepts of Physics" presented at the Eastern States Science Conference, Pennsylvania State University, State College, PA, 1973.

Attachment 3

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