

**IN THE MATTER OF AN ARBITRATION UNDER THE BILATERAL INVESTMENT TREATY  
BETWEEN ECUADOR AND THE UNITED STATES OF AMERICA AND THE 1976  
ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL  
TRADE LAW**

BETWEEN

**CHEVRON CORPORATION**

AND

**TEXACO PETROLEUM COMPANY**

Claimants

AND

**THE REPUBLIC OF ECUADOR**

Respondent

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**OPINION OF JAN PAULSSON**

**12 MARCH 2012**

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**A. INTRODUCTION**

1. I hold the Michael Klein Distinguished Scholar Chair as a Professor of Law at the University of Miami and am a Centennial Professor in the Law Faculty of the London School of Economics. I am a practising lawyer with Freshfields Bruckhaus Deringer LLP. I am head of the firm's Public International Law Group and the joint head of its International Arbitration Group. I was admitted to the bar of Connecticut in 1975 and became an *avocat à la Cour de Paris* in 1977. I obtained a B.A. from Harvard College in 1971, a J.D. from Yale Law School in 1975, where I was an editor of the Law Journal, and a *Diplôme d'études supérieures spécialisées* from the University of Paris in 1977.
2. I have been counsel or arbitrator in over 500 international arbitral proceedings. These have been both commercial arbitrations between private parties and arbitrations held pursuant to international agreements where one or more of the parties was a sovereign state. I appear as counsel in inter-state disputes before the International Court of Justice. I have also advised, and continue to advise, a number of governments on the drafting of treaties and on legislation concerning international arbitration and international law. After the conclusion of this opinion, I provide lists of examples of my work as arbitrator and counsel.
3. I have published on a number of issues of international arbitration and international law. Most relevant in the present context is my monograph, *Denial of Justice in International Law*, published by Cambridge University Press in 2005, well before I knew anything about the present case. A list of my publications also follows this opinion.
4. I am the President of the International Council for Commercial Arbitration, and of the Administrative Tribunals of the Organization for Economic Co-operation and Development and the European Bank for Reconstruction and Development. I am the immediate past President of the London Court of International Arbitration and of the World Bank Administrative Tribunal. I am a member of the Permanent Court of Arbitration at The Hague. I was the General Editor of *Arbitration International* (1985-2002) and a Senior Special Fellow at the United Nations Institute for Training and Research (1995-2000). I am an Honorary Bencher of Gray's Inn.

5. I was the Delegate for Bahrain at the Working Group of the United Nations Commission on International Trade Law (*UNCITRAL*), which recently revised the *UNCITRAL* Arbitration Rules, and I have been appointed by Bahrain to the Panel of Arbitrators established by the International Centre for the Settlement of Investment Disputes.
6. I have occasionally provided expert opinions to assist courts and tribunals on particular points of law, although this does not form a significant part of my practice. I provided expert evidence on issues of denial of justice under international law which was presented by Chevron to the investment-treaty tribunal that in 2010 decided a case brought by Chevron against Ecuador.<sup>1</sup> In that case the tribunal held that claims brought by Chevron against Ecuador in Ecuadorean courts, which were unrelated to the litigation that forms the subject of my present opinion, had suffered delays of such magnitude as to contravene the Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investments (the *U.S.-Ecuador BIT*).<sup>2</sup>
7. On 14 February 2011 and 30 June 2011, at the request of counsel for Chevron, I provided expert opinions to the United States District Court, Southern District of New York, on the question of whether proceedings known as *Aguinda et al v Chevron Corporation* conducted in the Sucumbíos Provincial Court of Justice in the town of Lago Agrio, Ecuador, violated what is known in U.S. law as “the international concept of due process”. Under the factual assumptions and for the legal reasons given in those reports, in my opinion they did.
8. I am now asked by counsel for Chevron to opine on whether the Lago Agrio litigation has rendered Ecuador responsible for a denial of justice under public international law. I understand that my opinion will be submitted to an international arbitral tribunal constituted under the U.S.-Ecuador BIT to adjudicate Chevron’s claim that the Lago Agrio litigation has placed Ecuador in breach of that treaty. I note that there are two claimants in that proceeding, Chevron Corporation and Texaco Petroleum

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<sup>1</sup> *Chevron v Ecuador* (UNCITRAL Partial Award on the Merits), 30 March 2010.

<sup>2</sup> Signed 27 August 1993, entered into force 11 May 1997.

Company. Since the proceedings in Ecuador on the international-law ramifications of which I am asked to opine were against Chevron Corporation only, in the main I refer only to Chevron in this opinion.

9. As the basis for my understanding of matters of fact and Ecuadorean law relevant to my present opinion, counsel for Chevron have provided me with the following documents, which I have reviewed and considered:

- (i) Decision No 2003-0002 of the Sole Chamber of the Sucumbíos Provincial Court in the matter of *Aguinda et al v Chevron Corporation*, dated 14 February 2011;
- (ii) A clarification issued in supplement to Decision No 2003-0002 of the Sole Chamber of the Sucumbíos Provincial Court in the matter of *Aguinda et al v Chevron Corporation*, dated 4 March 2011;
- (iii) The Amended Complaint filed by Chevron on 20 April 2011 in proceedings brought by it against 47 individuals in the Southern District of New York under the Racketeer Influenced and Corrupt Organizations Act (the *RICO Complaint*);
- (iv) Declarations signed by Dr Coronel Jones on 15 February 2011 and 28 June 2011 on questions of Ecuadorean law, which I understand to have been filed in the RICO Proceedings;
- (v) The Affidavit of Dr Álvarez Grau, dated 23 February 2011 and his Supplemental Expert Report, dated 23 June 2011, describing impediments to the independence of the judiciary in Ecuador, both of which I understand also to have been filed in the RICO Proceedings;
- (vi) The appellate judgment in Proceedings No 2011-0106 of the Sole Division of the Sucumbíos Provincial Court in the matter of *Aguinda et al v Chevron Corporation*, dated 3 January 2012;
- (vii) The Emergency Motion for Relief filed on 5 January 2012 by Chevron with the United States Court of Appeals for the Second Circuit;

- (viii) A clarification issued in supplement to the appellate judgment in Proceedings No 2011-0106 of the Sole Division of the Sucumbíos Provincial Court in the matter of *Aguinda et al v Chevron Corporation*, dated 13 January 2012;
- (ix) The First Interim Award of the Tribunal in the present arbitration, on Interim Measures, dated 25 January 2012;
- (x) Letters from counsel for Chevron to the Tribunal in the present arbitration, dated 4 March 2011, 13 October 2011, 4 January 2012, 12 January 2012 and 2 February 2012;
- (xi) The Second Interim Award of the Tribunal in the present arbitration, on Interim Measures, dated 16 February 2012;
- (xii) A further clarification order in Proceedings No 2011-0106 of the Sole Division of the Sucumbíos Provincial Court in the matter of *Aguinda et al v Chevron Corporation*, dated 17 February 2012;
- (xiii) The Third Interim Award of the Tribunal in the present arbitration, on Jurisdiction and Admissibility, dated 27 February 2012;
- (xiv) Another supplementary order in Proceedings No 2011-0106 of the Sole Division of the Sucumbíos Provincial Court in the matter of *Aguinda et al v Chevron Corporation*, dated 1 March 2012;
- (xv) Article 142 of the Ecuadorean Organic Code of the Judicial Branch, concerning enforcement of judgments;
- (xvi) Article 437 of the Constitution of the Republic of Ecuador, 2008, concerning an “extraordinary action for protection” to the Constitutional Court;
- (xvii) Articles 282, 296, 320, 331, 332 and 838 of the Ecuadorean Code of Civil Procedure, 2005; and
- (xviii) Articles 3, 10, 11, 12 and 15 of the Ecuadorean Cassation Act, 2004.

10. I express no view as to the accuracy of any factual contentions made by Chevron and have not verified them or conducted my own factual investigation. Nor do I express any view on any question of Ecuadorean law. I simply assume the facts and propositions of Ecuadorean law relied on by Chevron in the documents I have listed to be true and, on that assumption, express my opinion on whether there has been a denial of justice for the purposes of public international law. I am conscious that whether the U.S.-Ecuador BIT has been breached is a question for the Tribunal hearing this arbitration. If I may be of any assistance to the arbitrators, I imagine it is because I have spent more time than is available in the course of a single case studying the many precedents on denial of justice, and reflecting on the extent to which they and the scholarly literature surrounding them indicate principles capable of general application, including to the unusual circumstances of this case.
11. In this opinion I:
- (i) provide a brief account of the concept of denial of justice in customary international law (paragraphs 12-20);
  - (ii) discuss the applicability of the customary international law standard to proceedings under the U.S.-Ecuador BIT (paragraphs 21-28);
  - (iii) describe Chevron's allegations of executive interference and collusion in the Lago Agrio proceedings which inform my opinion (paragraphs 29-32);
  - (iv) describe alleged procedural defects in the Lago Agrio trial which inform my opinion (paragraphs 33-51);
  - (v) analyse the Lago Agrio judgments' punitive damages award from the perspective of international law (paragraphs 52-55);
  - (vi) consider whether there has been any discrimination for international law purposes arising from the silence of the Lago Agrio judgment on the alleged role of Petroecuador in causing environmental harm in the Oriente region (paragraphs 56-60);

- (vii) opine on whether, if true, Chevron’s allegations indicate that the threshold test for denial of justice has been crossed (paragraph 61);
- (viii) analyse the requirement of exhaustion of domestic remedies and its qualifications under customary international law (paragraphs 62-82); and
- (ix) consider what remedies would be available to Chevron if Ecuador were to be responsible for a denial of justice under international law (paragraphs 83-100).

**B. THE CONCEPT OF DENIAL OF JUSTICE**

12. The basic premise of the rule of denial of justice is that a state incurs international responsibility if it administers its laws to aliens in a fundamentally unfair manner. Whether a denial of justice has occurred in any particular case cannot be determined by the application of a formula. International law simply requires that litigants are afforded “even-handed” and “ordinary justice”.<sup>3</sup> Proceedings leading to judgments that are “evidently unjust and partial” will be internationally unlawful.<sup>4</sup> As the International Court of Justice stated in discussing the concept of “arbitrariness”, it “is not so much something opposed to a rule of law, as something opposed to the rule of law”.<sup>5</sup>
13. In the context of cases involving the administrative tribunals of international organisations, the International Court of Justice has had occasion to observe that:

certain elements of the right to a fair hearing are well recognized and provide criteria helpful in identifying fundamental errors in procedure which have occasioned a failure of justice: for instance, the right to an independent and impartial tribunal established by law; the right to have the case heard and determined within a reasonable time; the right to a reasonable opportunity to present the case to the tribunal and to comment upon the opponent’s case; the right

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<sup>3</sup> *Idler (USA) v Venezuela* (1885) in J Moore, *The History and Digest of International Arbitrations to which the United States has been a Party* (1898) Vol IV, 3491 at p 3517.

<sup>4</sup> Vattel, *The Law of Nations*, Book II (1852 reprint) at para 350.

<sup>5</sup> *Elettronica Sicula S.p.A. (ELSI)*, Judgment, [1989] ICJ Reports 15 at para 128.



to equality in the proceedings vis-à-vis the opponent; and the right to a reasoned decision.<sup>6</sup>

14. Internationally wrongful administration of justice may be perpetrated by acts of a state's executive, legislature or judiciary. Sir Gerald Fitzmaurice stated that denial of justice concerns

such actions *in or concerning the administration of justice*, whether on the part of the courts or of some other organ of the state.<sup>7</sup> (Emphasis in the original.)

15. Thus, a denial of justice can occur not just as a result of actions of the court responsible for a judgment, but also from actions of the executive government in connection with proceedings before that court. It is also possible that abuses of legislative power may constitute or form part of a denial of justice if they have a direct impact on the administration of justice.<sup>8</sup>
16. Obviously, international law does not invest international adjudicators with authority to act as courts of appeal from national courts, but rather to determine whether the actions or inaction of national courts transgress the standards applicable in international law. Judge De Visscher explained that:

The mere violation of internal law may never justify an international claim based on denial of justice. It may be that the defectiveness of internal law, the refusal to apply it, or its wrongful application by judges, constitute elements of proof of a denial of justice, in the international understanding of the expression; but in and of themselves they never constitute this denial.<sup>9</sup>

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<sup>6</sup> *Application for Review of Judgment No 158 of the United Nations Administrative Tribunal*, Advisory Opinion, [1973] ICJ Reports at para 92; recently reaffirmed in *Judgment No 2867 of the Administrative Tribunal of the International Labour Organization*, Advisory Opinion of 1 February 2012, para 30.

<sup>7</sup> G Fitzmaurice, "The Meaning of the Term 'Denial of Justice'" 13 *British Year Book of International Law* 93 (1932) at p 94.

<sup>8</sup> *U.S. v Great Britain (Robert E. Brown case)*, Vol VI UNRIAA 120 (1923) eg at p 129.

<sup>9</sup> De Visscher, "Le déni de justice en droit international", 52 *Recueil des Cours* 370 (1935) at p 376; my translation from the original French, which reads: "Jamais la seule violation du droit interne ne peut former la base d'une réclamation internationale fondée sur un déni de justice. Il se peut que les défauts du droit interne, son refus d'application ou sa fausse application par les juges, constituent des éléments de preuve d'un déni de justice, au sens international du terme; mais par eux-mêmes et à eux seuls ils ne constituent jamais ce déni."

17. Inherent in the concept of denial of justice is that international adjudicators assess a product of the domestic legal system considered as a whole. This means that exhaustion of domestic remedies is a precondition to the existence of a denial of justice, unless the remaining remedies provide no reasonable possibility of effective redress, such as where they are merely theoretical or otherwise futile. I discuss this further in paragraphs 62-82 below.
18. An international tribunal adjudicating whether a state is responsible for a denial of justice need not make a finding about whether any particular individuals were motivated by bad faith. The test for denial of justice is objective. This was made clear in the *Martini* case:

If the decision of the Venezuelan court is legally founded, the psychological motives of the judges are irrelevant. On the other hand, the decision may be so defective that one can suppose the judges' bad faith; but in this case too, what is decisive is the objective character of the decision.<sup>10</sup>

19. Descriptions of the objective defects that must exist in the domestic administration of justice before a denial of justice can be held to have occurred have been formulated in a variety of ways by different courts and tribunals over time. One accepted formulation is that adopted by the tribunal in *Loewen v The United States*, which stated that a denial of justice exists where there is:

Manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety.<sup>11</sup>

20. Below, I opine on whether this standard has been breached in the Lago Agrio proceedings and the judgments resulting from them; but before doing so, I consider the relationship between denial of justice under customary international law and the U.S.-Ecuador BIT.

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<sup>10</sup> *Martini Case*, Vol II UNRIAA 977 (1930) p 987; my translation from the original French, which reads: "Si la sentence de la Cour Vénézuélienne est fondée en droit, les motifs psychologiques des juges ne jouent aucun rôle. D'autre part, la défectuosité de la sentence peut être telle qu'il y a lieu de supposer la mauvaise foi des juges, mais également dans ce cas c'est le caractère objectif de la sentence qui est décisif".

<sup>11</sup> *Loewen v United States* (ICSID Case No ARB(AF)/98/3), 26 June 2003, para 132.

**C. CUSTOMARY INTERNATIONAL LAW AND THE U.S.-ECUADOR BIT**

21. Article II(3)(a) of the U.S.-Ecuador BIT provides that:

Investments shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.

22. This provision protects against denials of justice in two ways. First, a denial of justice would be a breach of the “fair and equitable treatment” standard. In *Rumeli Telekom v Kazakhstan* the tribunal confirmed that: “the fair and equitable treatment standard ... also includes in its generality the standard of denial of justice”.<sup>12</sup> Second, since denial of justice is prohibited by customary international law, it is encompassed by the requirement that investments not be “accorded treatment less than that required by international law”.

23. In addition, 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 authorisations.

24. This “effective means” provision formed the basis of the *Chevron v Ecuador* award rendered in March 2010. That tribunal held that Article II(7) “constitutes a *lex specialis* and not a mere restatement of the law on denial of justice”.<sup>13</sup> The tribunal held that the Ecuadorean courts’ unreasonable delays in deciding cases brought before them by Chevron gave rise to a breach of Ecuador’s obligation under Article II(7) of the BIT to provide an effective means for U.S. investors to assert claims and enforce rights.

25. The tribunal acknowledged that “the interpretation and application of Article II(7) is informed by the law on denial of justice.”<sup>14</sup> In a 2008 case brought against Ecuador by Duke Energy, a different tribunal considered that Article II(7) of the U.S.-Ecuador

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<sup>12</sup> *Rumeli Telekom and Telesim Mobil Telekomikasyon Hizmetleri v Republic of Kazakhstan* (ICSID Case No ARB/05/16), 29 July 2008, para 654. See also *Loewen v United States* (ICSID Case No ARB(AF)/98/3), 26 June 2003, paras 128-129.

<sup>13</sup> *Chevron v Ecuador* (UNCITRAL Partial Award on the Merits), 30 March 2010, para 242.

<sup>14</sup> *Chevron v Ecuador* (UNCITRAL Partial Award on the Merits), 30 March 2010, para 244.

BIT “seeks to implement and form part of the more general guarantee against denial of justice”.<sup>15</sup>

26. The 2010 *Chevron v Ecuador* award also held that a state may breach the standard of effectiveness in Article II(7) by way of a shortcoming in its conduct that does not rise to the level of denial of justice.<sup>16</sup> Thus, the tribunal in the more recent case of *White Industries Australia v India* declined to find a denial of justice, whilst finding a breach of an effective means provision.<sup>17</sup> The tribunal in the earlier *Chevron v Ecuador* case, on which the tribunal in *White Industries Australia v India* relied, held that Article II(7) imposed a more stringent obligation on states than the rules of customary international law concerning denial of justice. Put conversely, the Tribunal held that from the perspective of a claimant, Article II(7) was a “potentially less-demanding test ... as compared to denial of justice under customary international law.”<sup>18</sup> In particular, the tribunal considered that “a qualified requirement of exhaustion of local remedies applies under the ‘effective means’ standard of Article II(7)” of the U.S.-Ecuador BIT,<sup>19</sup> and that what claimants must show is that they have “adequately utilized the means available to assert claims and enforce rights” in the domestic system.<sup>20</sup>
27. Although the decided cases of which I am aware involve investors “asserting claims and enforcing rights” as claimants in domestic proceedings, in my view the same logic would support reliance on Article II(7) by a claimant in an international investment arbitration who was a respondent in the domestic proceedings forming the subject matter of the international case. An investor must equally be able to “enforce rights” in defence of a claim brought against it in a domestic court. This conclusion is supported by an authoritative commentator on U.S. investment treaties, who has

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<sup>15</sup> *Duke v Ecuador* (ICSID Case No ARB/04/19), 18 August 2008, para 391, referred to in *Chevron v Ecuador* (UNCITRAL Partial Award on the Merits), 30 March 2010, para 242 .

<sup>16</sup> *Chevron v Ecuador* (UNCITRAL Partial Award on the Merits), 30 March 2010, para 244.

<sup>17</sup> *White Industries Australia v India* (UNCITRAL Final Award), 30 November 2011, sections 10.4, 11.3-11.4.

<sup>18</sup> *Chevron v Ecuador* (UNCITRAL Partial Award on the Merits), 30 March 2010, para 244.

<sup>19</sup> *Chevron v Ecuador* (UNCITRAL Partial Award on the Merits), 30 March 2010, para 323. Also see para 268.

<sup>20</sup> *Chevron v Ecuador* (UNCITRAL Partial Award on the Merits), 30 March 2010, para 268.

referred to provisions of this kind as applying to “both the prosecution and defense of claims”.<sup>21</sup>

28. Jiménez de Aréchaga said that “state responsibility for acts of the judiciary does not exhaust itself in the concept of denial of justice”.<sup>22</sup> On the approach taken in the earlier *Chevron v Ecuador* investment-treaty award, Article II(7) is an example of a treaty provision which may create state responsibility for acts of the judiciary without applying the test for denial of justice under customary international law. Whether the cause of action is denial of justice or some more specific treaty provision such as Article II(7), in my view the heart of the inquiry remains the same: was justice administered in a fundamentally unfair manner?

**D. EXECUTIVE INTERFERENCE AND COLLUSION IN THE LAGO AGRIO PROCEEDINGS**

29. Executive interference in a court proceeding is the archetype of denial of justice.<sup>23</sup>
30. Chevron alleges that the President of Ecuador and members of his administration have openly sided with the plaintiffs in the Lago Agrio case, thus making the executive’s desired outcome in the case very clear to the judiciary.<sup>24</sup> I note Chevron’s allegation that the President also privately indicated that he would call the judge hearing the Lago Agrio trial.<sup>25</sup>
31. This communication of the executive’s will occurred in a general context in which, Chevron alleges, the executive government has a high level of influence over the Ecuadorean judiciary.<sup>26</sup> I note that this allegation is consistent with reports of authoritative observers on the subject. As ranked by the World Bank, Ecuador’s level

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<sup>21</sup> K Vandeveld, *U.S. International Investment Agreements* (2009), p 412.

<sup>22</sup> E Jiménez de Aréchaga, ‘International Responsibility’ in M Sørensen, *Manual of Public International Law* (1968), p 555.

<sup>23</sup> See *Idler (USA) v Venezuela* (1885) in J Moore, *The History and Digest of International Arbitrations to which the United States has been a Party* (1898), Vol IV, 3491 at pp 3516-3517; *U.S. v Great Britain (Robert E. Brown case)*, Vol VI UNRIAA 120 (1923) at pp 125, 129.

<sup>24</sup> Chevron’s RICO Complaint, paras 81 and 84-86; Letter from King and Spalding to the Tribunal in the present arbitration, 4 March 2011, p 3.

<sup>25</sup> Letters from King and Spalding to the Tribunal in the present arbitration of 13 October 2011, p 3 and of 4 January 2012, p 5.

<sup>26</sup> Chevron’s RICO Complaint, paras 87-94.

of respect for the rule of law is among the worst in the world.<sup>27</sup> The U.S. Department of State has identified “corruption and denial of due process within the judicial system” in Ecuador.<sup>28</sup> It has observed that the Ecuadorean judiciary is “susceptible to outside pressure and corruption”.<sup>29</sup> These general observations are supported by specific events such as the issuance of an Ecuadorean Government memorandum instructing ministers that if a first instance court issues an injunction against their ministry that is overturned on appeal, that the ministry is then to sue the first instance judge for damages, which would be payable by the judge personally.<sup>30</sup> These allegations are further supported by the facts recited in the expert reports of Dr Álvarez Grau.<sup>31</sup>

32. Whether or not the Lago Agrio court was actually influenced by the executive government’s indications of how it should rule is not a determinative point. The Ecuadorean judicial system is widely regarded by authoritative observers as being subject to executive influence. The statements of the executive to which Chevron has referred clearly indicated the executive’s, and in particular the President’s, desired outcome in this case. These efforts by the executive to interfere with the Lago Agrio trial were neither acknowledged nor cured by the judgment or the appeal.

#### **E. PROCEDURAL DEFECTS IN THE LAGO AGRIO PROCEEDINGS**

33. In the *Chattin* case it was observed that:

Irregularity of court proceedings is proven with reference to absence of proper investigations, insufficiency of confrontations, withholding from the accused the opportunity to know all of the charges brought against him, undue delay of the proceedings, making the hearings in open court a mere

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<sup>27</sup> World Bank Worldwide Governance Indicators, 2009, referred to in Chevron’s RICO Complaint, para 88.

<sup>28</sup> U.S. Department of State Human Rights Reports, Ecuador, 2007-2009, pp 1, 15 and 29, referred to in Chevron’s RICO Complaint, para 89.

<sup>29</sup> U.S. Department of State Human Rights Reports, Ecuador, 2007-2009, pp 5, 18 and 32, referred to in Chevron’s RICO Complaint, para 89.

<sup>30</sup> Chevron’s RICO Complaint, para 90.

<sup>31</sup> Affidavit of Dr Álvarez Grau, 23 February 2010; Supplemental Expert Report of Dr Álvarez Grau, 23 June 2011.

formality, and a continued absence of seriousness on the part of the Court.<sup>32</sup>

34. According to Chevron, a number of grave procedural defects afflicted the Lago Agrio trial. These included the following:

- (i) Counsel for the plaintiffs in the Lago Agrio proceedings held private meetings with judges presiding over those proceedings to discuss the substance of the case in ways never pleaded in open court.<sup>33</sup>
- (ii) Counsel for the plaintiffs in the Lago Agrio proceedings had *ex parte* contact with the judge there about whom the court should appoint as a supposedly independent expert.<sup>34</sup> The judge does not appear to have ever acknowledged these *ex parte* communications, but he did appoint the expert that the plaintiffs' counsel had urged upon him, Mr Cabrera.<sup>35</sup>
- (iii) The plaintiffs' affiliates continued to have extensive *ex parte* contact with the expert throughout the course of his work and the preparation of his reports,<sup>36</sup> and the court appears to have been aware of this contact.<sup>37</sup> Ultimately, in breach of Ecuadorean law,<sup>38</sup> those reports were authored by individuals acting under the instructions of counsel for the Lago Agrio plaintiffs, and then simply signed by the court-appointed expert,<sup>39</sup> who received payments from counsel for the plaintiffs.<sup>40</sup> This court-appointed expert was bound by law and by the oath to perform his duties "with complete impartiality and

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<sup>32</sup> *B.E. Chattin (United States) v United Mexican States*, Vol IV UNRIAA 282 (1927) at para 30.

<sup>33</sup> Chevron's RICO Complaint, paras 78, 302.

<sup>34</sup> Chevron's RICO Complaint, paras 138, 140, 302.

<sup>35</sup> Chevron's RICO Complaint, para 138.

<sup>36</sup> Chevron's RICO Complaint, para 302.

<sup>37</sup> Chevron's RICO Complaint, paras 157, 291.

<sup>38</sup> Declaration of Dr Coronel Jones, 28 June 2011, para 51.

<sup>39</sup> Chevron's RICO Complaint, paras 155-158.

<sup>40</sup> Chevron's RICO Complaint, para 185.

independence vis-à-vis the parties”.<sup>41</sup> He stated that he did “not have any relation or agreements with the plaintiff[s]”<sup>42</sup> and that the “entire expert investigation procedure was completed by (him) personally”.<sup>43</sup> This court-appointed expert was of particular significance in the Lago Agrio proceedings because he was charged with evaluating not just the damage that had been suffered, but also liability for it.<sup>44</sup>

- (iv) The reports of the court-appointed expert are unfair and unreliable. To take one example, \$428 million in damages for potable water systems was indicated without the expert taking a single sample of drinking water.<sup>45</sup>
- (v) Mr Cabrera found Chevron to be liable for damages for environmental harm assessed at \$27 billion.<sup>46</sup> Subsequently, seven new reports were filed with the Lago Agrio court. These were largely based on the evidential data or findings contained in the Cabrera reports. None of their authors conducted or directed any independent physical testing.<sup>47</sup>
- (vi) An expert engaged by the plaintiffs, Dr Calmbacher, found that the sites that he inspected did not require further remediation and did not pose a risk to human health or the environment.<sup>48</sup> His signature appears to have been taken from reports that he actually wrote and attached to fraudulent reports stating that the sites that he inspected presented a danger to the environment and required additional

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<sup>41</sup> Chevron’s RICO Complaint, para 141.

<sup>42</sup> Chevron’s RICO Complaint, para 186.

<sup>43</sup> Chevron’s RICO Complaint, para 187.

<sup>44</sup> Chevron’s RICO Complaint, para 141.

<sup>45</sup> Chevron’s RICO Complaint, para 171.

<sup>46</sup> Chevron’s RICO Complaint, para 166.

<sup>47</sup> Chevron’s RICO Complaint, paras 190-198, 325.

<sup>48</sup> Chevron’s RICO Complaint, para 111.



remediation.<sup>49</sup> Those fraudulent reports were submitted to the Lago Agrio court.<sup>50</sup>

35. The trial judgment held that the Lago Agrio court could not investigate Chevron's allegations of fraud because the Lago Agrio trial was proceeding by way of "expedited oral trial" and thus could not be suspended for an investigation of such a kind (page 51). Dr Coronel describes this kind of trial as having an "abbreviated nature".<sup>51</sup> If the form of trial by which this dispute was adjudicated could not allow the court to investigate allegations that the evidence before it was tainted by fraud, particularly fraud of the magnitude alleged here, then, as soon as there is any colourable claim of fraud, trials of this kind in Ecuador appear by their very nature to be incapable of complying with the minimum standard of due process required by international law.
36. At page 51 the trial judgment asserted that: "No pressure has actually been exerted on this Court". The court's *ipse dixit* as to its own robustness cannot be determinative one way or another as to whether the impropriety did or did not have an effect. In any event, it is the procedural impropriety that makes the proceedings and the judgment produced by them defective, not whether that impropriety did or did not have a substantive effect on the judge or any other official obliged to serve the court.
37. Paradoxically, although the judgment held that the court could not investigate Chevron's allegations of fraud concerning the Cabrera reports, it also made the positive finding, at page 50, that
- a review of the case file shows that there were no defects in the appointment of the expert Cabrera, or in the delivery of his report. There are no legal grounds whatsoever for declaring the nullity of either his appointment or his expert report.
38. Having made this finding, the judgment nevertheless went on to accept Chevron's petition that the reports "not be taken into account to issue this verdict" (page 51).

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<sup>49</sup> Chevron's RICO Complaint, paras 120, 316.

<sup>50</sup> Chevron's RICO Complaint, paras 120, 325.

<sup>51</sup> Declaration of Dr Coronel Jones, 28 June 2011, para 42.

Similarly, the judgment stated that it would not take the conclusions submitted under Dr Calmbacher's name into consideration in order to, among other reasons, "avoid potential nullities or harm on an issue that has not been able to be clarified" (page 49).

39. The Cabrera report has been described by an organisation working with counsel for the Lago Agrio plaintiffs as the "single most important technical document for the case".<sup>52</sup> The naked assertion that it would not be taken into account because of concerns about its legitimacy, and the emphatic declaration at page 8 of the supplement to the judgment of 4 March 2011 that "the report had NO bearing on the decision", surely did not cleanse the trial of the fraud related to a document of such significance. This is particularly so because subsequent expert reports were based on the technical and factual information in the Cabrera reports, on the basis of which they applied theoretical assumptions to arrive at damages calculations, rather than making any assessment of whether there was any harm in fact, and if so, who caused it.<sup>53</sup>
40. The difficulty can be seen, for example, in the fact that, having stated that it would not rely on the reports of Mr Cabrera (page 51), the judgment then referred to at least one of the experts who did so rely,<sup>54</sup> notably in its discussion of the report of Mr Douglas C. Allen, at page 181 of the judgment. The judgment's reference to Mr Allen's report formed part of the reasoning leading to the order that Chevron pay more than \$5.3 billion "for a clean-up of soils".
41. Chevron has alleged that the trial was tainted by fraud and other forms of impropriety in numerous instances additional to the reports of Dr Calmbacher and Mr Cabrera. These include allegations of bribery, threats to judicial officers and *mala fides* use of criminal proceedings.<sup>55</sup> If Chevron's allegations are true, they confirm that the unfairness of the trial could not be cured simply by asserting in the judgment that two

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<sup>52</sup> Chevron's RICO Complaint, para 149.

<sup>53</sup> Chevron's RICO Complaint, paras 190-198.

<sup>54</sup> Chevron's RICO Complaint, para 194.

<sup>55</sup> Chevron's RICO Complaint, paras 3, 77, 91-94; 140, 199-213; Letter from King and Spalding to the Tribunal in the present arbitration, 4 March 2011, p 3.

prominent examples of evidence said to be fraudulent would not be taken into account. This was not a case where there were some irregularities in a trial, and an appellate court took the view that although those irregularities occurred, they would not have changed the outcome and so there was no need to grant any relief. Here, the Lago Agrio appellate judgment contains no meaningful analysis of Chevron's many allegations of serious procedural misconduct afflicting the trial. I also note Chevron's allegations about irregularities in the constitution of the appellate bench.<sup>56</sup>

42. Chevron alleges that Mr Donziger, Mr Fajardo, members of the Amazon Defense Front and others had frequent *ex parte* contact with the judge and the court-appointed expert to advance the case of the plaintiffs in improper ways.<sup>57</sup> Insofar as Mr Donziger is concerned, these allegations appear to have been dismissed at page 51 of the judgment on the formalistic basis that Mr Donziger was not a plaintiff in the case, and that the court file contained no record of his having been granted a power of attorney by any of the plaintiffs. This finding was made even though the judgment acknowledged on that same page that Mr Donziger's "ties to the plaintiffs' legal team are obvious" and that he had a public role as their "spokesman".
43. The consideration relevant to determining whether there has been a denial of justice is whether the incidents in question led to a manifestly unfair trial, not the exact formal relationship between the person responsible for a number of them and the court. Even on the basis of the Lago Agrio judgment's own approach – that an individual's formal relationship with the parties and the court is a determinative factor – it is difficult not to observe that Mr Fajardo was counsel of record before the Lago Agrio court,<sup>58</sup> and yet the judgment appears not to have made any findings about Chevron's allegations of impropriety on his part.
44. The appellate judgment made the following remark about Chevron's allegations concerning this impropriety:

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<sup>56</sup> Chevron's RICO Complaint, para 327; Letter from King and Spalding to the Tribunal in the present arbitration, 12 January 2012, p 5.

<sup>57</sup> Chevron's RICO Complaint, paras 78, 138-142.

<sup>58</sup> Chevron's RICO Complaint, para 11.

Mention is also made of fraud and corruption of plaintiffs, counsel and representatives, a matter to which this Division should not refer at all, except to let it be emphasized that the same accusations are pending resolution before the authorities of the United States of America due to a complaint that has been filed by the very defendant here, Chevron, under what is known as the RICO act, and this division has no competence to rule on the conduct of counsel, experts or other officials or administrators and auxiliaries of justice, if that were the case.

45. Taking this statement at face value, if the appellate court had no competence to rule on the conduct of counsel, experts and public officials, and the extent to which that conduct may have compromised the integrity of the proceedings from which the appeal was brought, then the appellate court was simply not institutionally capable of ensuring compliance with the standards of due process required by international law.

46. In its supplementary clarification, in response to a request for clarification by the plaintiffs, the appellate judgment held as follows:

regarding whether or not the defendant's accusations with respect to irregularities in the preparation of the trial court judgment have been considered, it is clarified that yes such allegations have been considered, but no reliable evidence of any crime has been found.

47. The appellate judgment further clarified that it was not

admissible to detain the processing of this principal law suit – or worse, to annul it – in order to discuss and make a pronouncement on the interminable and reciprocal accusations over misconduct of some of the parties' attorneys, experts or contractors, which is why these could not affect the final result of the lawsuit.

48. Thus, having said in its judgment that it had no competence to rule on Chevron's allegations of misconduct by individuals involved with the trial, in a supplementary order issued shortly afterwards, it said that it had considered those allegations and determined that there was no evidence of a "crime", but then said that delay or annulment of the proceedings to consider allegations of procedural misconduct was not "admissible" and "could not affect the final result of the lawsuit". Whatever one may make of this, there is no meaningful analysis in either the trial or appellate

judgment of the very serious allegations of procedural impropriety made by Chevron. There appear to be only assertions that they could not be considered because of the nature of the proceeding, or assertions that they were unfounded, without any explanation.

49. Chevron alleges that information held by the plaintiffs and their counsel in the Lago Agrio proceedings, which was never placed on the official court record of the case, appeared in the judgment of the court and in the Cabrera reports.<sup>59</sup> The direct transfer of information from the plaintiffs to the court and its appointed expert, without being placed on the record of the proceedings, and so without Chevron having had an opportunity to make submissions about it, is a manifest breach of fundamental standards of due process. The most significant question is not whether one of the parties to litigation sought to breach fundamental rules of due process. The most significant question is whether the court has tolerated, or even actively participated in such obviously impermissible conduct.
50. In the 13 January 2012 supplemental clarification to the appellate judgment, Chevron's allegation that the trial judgment was based on information foreign to the record of the proceedings is dismissed as being factually incorrect. I take no position on what actually happened; I simply opine that if Chevron's allegations that text from documents created by representatives of the plaintiffs appeared in the judgment without attribution and without having been placed on the record of the proceedings, then this would be a fundamental breach of due process, compounded by the perfunctory dismissal of the allegation by the appellate judgment.
51. Neither the trial nor appellate judgment demonstrate any meaningful investigation of Chevron's allegations of serious procedural defects in the Lago Agrio proceedings.

#### **F. THE PUNITIVE DAMAGES AWARD**

52. I note the opinion of Dr Coronel that punitive damages is "not a concept existing in Ecuadorean law", and that Ecuadorean law recognizes compensation only for harm

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<sup>59</sup> Chevron's RICO Complaint, para 326; Letters from King and Spalding to the Tribunal in the present arbitration of 4 March 2011, p 4, of 4 January 2012, pp 4-5, and of 12 January 2012, p 5.

actually caused as a direct consequence of the breach of a legal obligation.<sup>60</sup> Assuming this to be accurate, the imposition of a punitive order of more than \$8.6 billion in circumstances where there is no foundation for this type of award in Ecuadorean law is the kind of exceptional breach of domestic law that can form the basis of a finding of denial of justice, since, whatever the basis for such an award, it could in no even arguable way be said to have been the applicable law.<sup>61</sup>

53. Civil law systems generally reject the very concept of punitive damages on the grounds that punishment is reserved for the competent public authorities, and must not depend on the initiatives, resourcefulness, and motivations of private litigants. This is why it is not surprising to me that I have never heard of punitive damages under any law in Latin America, save a recent consumer-protection law in Argentina whose very innovativeness is testimony to its singularity.<sup>62</sup> Consistently with the general position in Latin America, I note that Dr Coronel has opined that the kind of punitive sanction imposed in the Lago Agrio proceedings “is foreign to the Ecuadorean legal system”<sup>63</sup> and that he knows of no other case in which an Ecuadorean judge has awarded punitive damages.<sup>64</sup>
54. Page 186 of the trial judgment announced that Chevron could avoid the punitive component of the monetary award if it apologised to “those affected by Texpet’s operations in Ecuador” three times within fifteen days of the delivery of the judgment by way of public announcements in the leading print media in Ecuador and the United States. Perhaps the best that could be said about this approach is that it is “idiosyncratic”, and even idiosyncrasy may breach international law.<sup>65</sup> Behind this imaginative contrivance, for which no legal foundation is cited (and I note that Dr Coronel opines that none exists) seems to have lain a hardly concealed ultimatum – admit your guilt and thereby abandon all hope of appealing or resisting the

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<sup>60</sup> Declaration of Dr Coronel Jones, 15 February 2011, para 12. The same point is made in his declaration of 28 June 2011, para 26.

<sup>61</sup> See De Visscher, “Le déni de justice en droit international”, 52 *Recueil des Cours* 370 (1935) p 376.

<sup>62</sup> Argentinean Law 26.361 of March 12, 2008, Article 25, which added Article 52 bis to Law 24.240.

<sup>63</sup> Declaration of Dr Coronel Jones, 15 February 2011, para 14.

<sup>64</sup> Declaration of Dr Coronel Jones, 28 June 2011, para 25.

<sup>65</sup> *Waste Management, Inc v United Mexican States* (ICSID Case No ARB(AF)/00/3), 30 April 2004, para 98.

enforcement of the vast principal judgment, or face the risk of having to pay an equally vast penalty as well.

55. The supplementary clarification issued by the appellate court specifically characterised the \$8.6 billion to be paid by Chevron if it declines to apologise in the form indicated by the court as a “punitive” order imposing an “exemplary punishment”. It stated that the order concerning the apology was made “*ex officio*” and that it could not be used as a “confession or admission”, but was only “a measure of symbolic reparation and nothing more”. This supplementary clarification goes into detail about the form that an apology would have to take, and, although the time set by the trial judgment in which the apology was to occur had long since passed by the time of the appellate ruling, the appellate court appears to have effectively re-issued the order to apologise, and to have confirmed the consequences that would follow a failure to do so. Like the trial judgment, the appellate judgment cited no legal foundation for the possibility of such a remedy or the extraordinary magnitude of the consequences of failing to perform it.

**G. DISCRIMINATION BETWEEN CHEVRON AND PETROECUADOR**

56. Despite the judgment’s length, one is struck by its failure to address meaningfully whether TexPet, rather than Petroecuador, caused the harm said to exist. I note that Dr Coronel confirms in his opinion of 28 June 2011 that under Ecuadorean law compensation is payable only where the harm to be compensated was caused by the wrongful act for which liability is found.
57. I have not reviewed the evidential record that was before the Lago Agrio court. I have not reviewed the Cabrera reports. I have read the assessment of the evidential record, including the Cabrera reports, in the judgment issued by the Lago Agrio court. The judgment devotes much attention to describing alleged harm in the area in question. It devotes virtually none to the question of whether it was caused by TexPet or Petroecuador. I understand that neither TexPet nor Chevron has had any role in the area in question since 1992 and that Petroecuador has engaged in significant extractive operations there from 1992 until the present.<sup>66</sup> I also note Chevron’s

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<sup>66</sup> Chevron’s RICO Complaint, paras 37 and 40.

allegation that representatives of the Lago Agrio plaintiffs reached an agreement with the Ecuadorean government that the plaintiffs would not sue Petroecuador, in return for government support for their claim against Chevron.<sup>67</sup> I further note the following statement by counsel for the plaintiffs: “Our legal theory is that Texaco is liable for all of the existing damage, even that caused by Petroecuador.”<sup>68</sup> In these circumstances, the identity of the entity found by the judgment to be responsible for any alleged harm being assessed in 2011 is obviously a significant issue.

58. At page 123 of the judgment three reasons are expressed “to exclude the damages that are the responsibility of Petroecuador from the scope of the present judgment.” The third of them is that “the obligation of reparation imposed on the perpetrator of damage is not extinguished by the existence of new damages attributable to third parties.” Although doubtless true, that cannot excuse a court from performing the task of determining whether a defendant did or did not cause the harm for which compensation is sought.
59. The judgment appears to acknowledge that there are “damages that are the responsibility of Petroecuador”. The judgment purports to exclude any assessment of this harm from the scope of its judgment for the following two additional reasons. First, “in this trial there appear as parties only the plaintiffs and the defendant company, while the third parties that are presumably responsible for new damages (Petroecuador), have not been able to present any defense whatsoever in this proceeding”. Second, “no claim for reparation has been made for damages caused by third parties ...”. Actually, the judgment appears to have held Chevron liable for whatever damage it found to exist, without any consideration of whether TexPet caused the harm for which compensation was being awarded. Since the judgment does not suggest that any expert, including Mr Cabrera, addressed the question of who actually caused any harm that was said to exist, and the judgment does not conduct that analysis either, it is difficult to reach any conclusion other than that the judgment’s approach was arbitrary.

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<sup>67</sup> Chevron’s RICO Complaint, paras 60-62.

<sup>68</sup> Chevron’s RICO Complaint, para 130.



60. I note that in the 4 March 2011 clarification of the Lago Agrio judgment, at page 8: “The Court expands the judgment by indicating that the damage caused by Petroecuador has not been considered, using a time-based approach that divides liability and attributes it to the perpetrator of the harm committed depending on who was the industry’s operator.” Whatever the merits of this approach may be, I simply note that I see no evidence of it in the assessment of damages set forth in the principal judgment issued the month prior, and that this “expansion” of the reasoning is not accompanied by any alteration of the damages order. Finally, I note Chevron’s allegation that the cost of remediating each oil pit assessed by the court-appointed expert in the Lago Agrio trial is many times greater than Petroecuador’s average actual cost for the remediation of an oil pit.<sup>69</sup>

#### **H. HAS THE THRESHOLD TEST FOR DENIAL OF JUSTICE BEEN CROSSED?**

61. If Chevron’s factual allegations about the conduct of the Lago Agrio proceedings are true, plainly it follows that the threshold of procedural impropriety required to establish a claim for denial of justice has been crossed. The only remaining legal questions relate to exhaustion of remedies in Ecuador, and what remedy would be available to Chevron under international law if Ecuador were to be found to have violated the U.S.-Ecuador BIT. It is to those two questions that I now turn.

#### **I. EXHAUSTION OF DOMESTIC REMEDIES**

62. Before an international tribunal may find a denial of justice to have occurred, the domestic legal system as a whole must have been put to the test and, as a system, have failed to meet the standard required by international law. As stated in the *Ambatielos Claim*:

It is the whole system of legal protection, as provided by municipal law, which must have been put to the test.<sup>70</sup>

63. An aspect of this principle is the rule that local remedies must be exhausted.<sup>71</sup> Insofar as denial of justice is concerned, this is not just a requirement for the admissibility of

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<sup>69</sup> Chevron’s RICO Complaint, para 170.

<sup>70</sup> *Ambatielos Claim* (Greece v United Kingdom), Vol XII UNRIAA 83 (1956) p 120.

<sup>71</sup> Eg *Ambatielos Claim* (Greece v United Kingdom), Vol XII UNRIAA 83 (1956) pp 118-120; *Jennings, Laughland Co v Mexico Case* No 374 in JB Moore, *The History and Digest of International*

a claim.<sup>72</sup> It is a substantive element of the delict; since errors are endemic to any legal system, a state must be granted a reasonable opportunity to take measures to correct faulty results.<sup>73</sup> Unless a litigant has tested the domestic system as a whole, and, as a system, it has failed, a state cannot be responsible for a denial of justice.

64. The rule that local remedies must be exhausted is subject to qualifications. A litigant need not exhaust local remedies if such exhaustion would be ineffective – eg pursuit of the available remedy would be futile, or the remedy on offer is theoretical – because it would not provide meaningful redress for the wrong complained of.<sup>74</sup>

65. In its Draft Articles on Diplomatic Protection the International Law Commission explained that local remedies do not need to be exhausted where:

There are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress.<sup>75</sup>

66. This reflects the Separate Opinion of Sir Hersch Lauterpacht in the *Norwegian Loans* case, in which he indicated that the requirement of previous exhaustion of local remedies would be inoperative if one could “rule out, as a matter of reasonable possibility, any effective remedy before Norwegian courts.”<sup>76</sup>

67. In short, local remedies need not be resorted to where they offer no reasonable possibility of effective redress to the foreign litigant.

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*Arbitrations to which the United States has been a Party*, Vol iii (1898), p 3136; E Jiménez de Aréchaga, “International Law in the Past Third of a Century”, 159 *Recueil des Cours* 1 (1978) at pp 281-282

<sup>72</sup> Contra Articles on the Responsibility of States for Internationally Wrongful Acts, drafted by the International Law Commission, and annexed to United Nations General Assembly Resolution 56/83 of 12 December 2001, Article 44.

<sup>73</sup> Cf *Interhandel* (Switzerland v United States of America), [1959] ICJ Reports 6, 27; Paulsson, *Denial of Justice in International Law* (2005), pp 107-112.

<sup>74</sup> See *U.S. v Great Britain (Robert E Brown Case)*, Vol VI UNRIAA 120 (1923) p 129; *Finnish Ships Arbitration* (1934) 3 RIAA, p 1479; *Panevezys-Saldutiskis Railway Case*, PCIJ Series A/B, No 76 (1939) p 19; *Ambatielos Claim* (Greece v United Kingdom), Vol XII UNRIAA 83 (1956) pp 122-123; *Interhandel Case* (Preliminary Objections) [1959] ICJ Reports 6, pp 27-29.

<sup>75</sup> See Article 15(a) of the International Law Commission Draft Articles on Diplomatic Protection (2006), adopted by General Assembly Resolution 62/27 (2008).

<sup>76</sup> *Certain Norwegian Loans* [1957] ICJ Reports 9, p 39.

68. An example of this may be seen in the approach of the European Commission of Human Rights. Where a claimant sought to prevent his extradition or expulsion, a court action that would not suspend an order to extradite or expel did not need to be exhausted.<sup>77</sup> This is an example of remaining remedies not offering effective redress in the sense that, no matter how they were decided, they could not address the particular difficulty suffered by the particular claimant. Another example is where a trial court has determined a question of fact essential to the claim in a manner fatal to the claimant's case on any possible view of the applicable law, and further appeal is available only on questions of law. In those circumstances further appeal would not constitute an effective remedy, and therefore need not be pursued for the system as a whole to have been tested.<sup>78</sup>
69. The broader form of futility arises where an international tribunal is satisfied that the local courts are notoriously lacking in independence, such that, even though theoretically available remedies might theoretically satisfy the claim, the lack of independence of the judiciary in the relevant domestic jurisdiction renders the pursuit of those remedies futile, with the consequence that the claimant is not obliged to pursue them. This was the case in *Robert Brown*, where: "All three branches of the Government conspired to ruin [an] enterprise".<sup>79</sup> As Jiménez de Aréchaga expressed it: "The actual ineffectiveness of a remedy may be the result of some defect in the administration of justice, such as complete subservience of the judiciary to the government of the State."<sup>80</sup>
70. The Inter-American Court of Human Rights put it thus:

it is not enough that such recourses exist formally; they must be effective ... remedies that, due to the general situation of the country or even the particular circumstances of any given case, prove illusory cannot be considered effective. This may

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<sup>77</sup> *Becker v Denmark* (App No 7011/75) EComHR 3 October 1975, pp 227, 232-233.

<sup>78</sup> See *Claim of Finnish Shipowners against Great Britain in Respect of Certain Finnish Vessels during the War* (1934) III UNRIAA 1479, 1543; *Ambatielos Claim* (Greece v United Kingdom), Vol XII UNRIAA 83 (1956) p 119.

<sup>79</sup> *U.S. v Great Britain (Robert E. Brown case)*, Vol VI UNRIAA 120 (1923) 129.

<sup>80</sup> E. Jiménez de Aréchaga, "International Law in the Past Third of a Century", 159 *Recueil des Cours* 1 (1978) 294.

happen when, for example, they prove to be useless in practice because the jurisdictional body does not have the independence necessary to arrive at an impartial decision or because they lack the means to execute their decisions.<sup>81</sup>

71. If a claimant can establish that the system as a whole is fundamentally defective, and that therefore that claimant or its claim had no reasonable prospect of success, then international law does not require the claimant also to show that it has actually exhausted the futile local remedies theoretically open to it.
72. Finally, I note that there is authority for the proposition that under Article II(7) of the U.S.-Ecuador BIT, so long as the claimant in the international case has “adequately utilized the means available to assert claims and enforce rights” in the domestic system, the customary international law requirement that local remedies be exhausted may be qualified.<sup>82</sup>
73. Leaving aside this last possibility, and focussing on a denial of justice claim, applying these general principles to the present case suggests three questions. First, has Chevron exhausted domestic remedies in Ecuador? If not, second, do the specific domestic remedies remaining to be exhausted by Chevron in Ecuador provide a reasonable possibility of effectively redressing the mistreatment that Chevron alleges that it has suffered? Third, is the Ecuadorean system of justice, considered as a whole, fundamentally defective?
74. I understand that under Ecuadorean law, once the trial judge in the provincial court delivered judgment in the Lago Agrio case, Chevron had 60 days to appeal as a matter of right to the full chamber of the provincial court. During that time the judgment was not enforceable. Chevron did so, and its appeal was unsuccessful. I understand that cassation to the National Court of Justice is now available and that Chevron has commenced cassation proceedings.<sup>83</sup> I further understand that extraordinary review by the Constitutional Court is also possible on points of constitutional law, including fundamental breaches of due process, and that Chevron

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<sup>81</sup> *Las Palmeras*, (Case No 11.237), IACtHR 6 December 2001, para 58.

<sup>82</sup> *Chevron v Ecuador* (UNCITRAL Partial Award on the Merits), 30 March 2010, paras 268 and 323.

<sup>83</sup> Order in Proceedings No 2011-0106 of the Sole Division of the Sucumbíos Provincial Court in the matter of *Aguinda et al v Chevron Corporation*, dated 17 February 2012.

has not yet initiated such a review. I proceed on the basis that these further avenues of recourse are available, but that the judgment is already enforceable under Ecuadorean law.<sup>84</sup> I note that the appellate court issued an order on 1 March 2012 in which it recorded

the plaintiffs' motion dated February 24, 2012 at 3:44 p.m., in which they requested that this division 'under the terms of Art. 3(c) of the Convention on Extraterritorial Validity of Foreign Judgments – ratified by the Republic of Ecuador – issue an order stating that the judgment issued by the Sole Division is final for purposes of seeking its extraterritorial enforcement under the terms and conditions established in the referenced Convention.

75. The appellate court ordered as follows:

Because it is consistent with the law, the Division grants this request and states that this order constitutes, for all purposes and procedural requirements, the declaration that the decision issued at this level of jurisdiction is final and binding.

76. Apparently, representatives of the plaintiffs in the Lago Agrio proceedings have made clear their intention to enforce the judgment outside Ecuador upon the judgment becoming enforceable under Ecuadorean law.<sup>85</sup> Many legal systems would apply the law of Ecuador to the question of when an Ecuadorean judgment becomes enforceable. When foreign recognition and enforcement of the Ecuadorean judgment is sought in such jurisdictions, the fact that the judgment has now been said by an Ecuadorean court to be enforceable under Ecuadorean law will create a *prima facie* right to recognition and enforcement in those foreign jurisdictions even though further appeals may be pending in Ecuador. Subsequent appeals in Ecuador will be of limited, if any, practical value if the judgment has already been enforced elsewhere by the time that those appeals are decided. Thus, in the circumstances of this case, the production of an enforceable judgment is for practical purposes a final product of the Ecuadorean legal system.

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<sup>84</sup> Emergency Motion for Relief filed on 5 January 2012 by Chevron with the United States Court of Appeals for the Second Circuit (*Chevron's Emergency Motion for Relief*), pp2 and 14-16; Order in Proceedings No 2011-0106 of the Sole Division of the Sucumbíos Provincial Court in the matter of *Aguinda et al v Chevron Corporation*, dated 17 February 2012.

<sup>85</sup> Chevron's RICO Complaint, paras 331-334; Chevron's Emergency Motion for Relief, pp 2-3, 6-7, 10.

77. Historically, denial of justice cases have typically involved domestic proceedings conducted from start to finish within one legal system. The present case is to my knowledge novel among denial of justice cases in the sense that it involves an avowed intention to seek to enforce an Ecuadorean judgment outside Ecuador once the judgment is enforceable under Ecuadorean law, but before all available domestic remedies have been exhausted within Ecuador. Since, as I understand it, Chevron does not have sufficient assets in Ecuador for the judgment to be enforced there,<sup>86</sup> there is apparently no possibility of, or intention to seek, enforcement of the Ecuadorean judgment in Ecuador.
78. This novel feature makes Judge Lauterpacht's observation in *Norwegian Loans* apposite here:

the requirement of exhaustion of local remedies is not a purely technical or rigid rule. It is a rule which international tribunals have applied with a considerable degree of elasticity. In particular, they have refused to act upon it in cases in which there are, in fact, no effective remedies available owing to the law of the State concerned or the conditions prevailing in it.<sup>87</sup>

79. The exhaustion of domestic remedies rule is designed to allow a state in which a breach of the standards of international law has occurred an opportunity to redress it by its own means; it is not designed to prevent a claim of denial of justice from being successful when a product of that state's legal system has become exportable and the wronged party is at peril of enforcement in other jurisdictions as a result. Once the Ecuadorean judgment became enforceable under Ecuadorean law, and thus liable to enforcement under the law of other jurisdictions, then no remedy within Ecuador could rectify the situation following enforcement of the judgment outside Ecuador. To use the words of the *Ambatielos* tribunal: "Remedies which could not rectify the situation cannot be relied upon by the defendant State as precluding an international

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<sup>86</sup> Cf Chevron's RICO Complaint, para 332.

<sup>87</sup> *Certain Norwegian Loans* [1957] ICJ Reports 9, p 39.

action”.<sup>88</sup> Any further avenues of recourse in Ecuador would be merely theoretical and thus need not be exhausted.

80. Even apart from the peril of extra-territorial enforcement: taking Chevron’s pleadings to be factually founded, the description of Ecuador’s judicial system in those pleadings suggests that any further appeal would be futile. The executive has taken an active interest in these proceedings in an institutional context in which there is no meaningful chance of the judiciary assessing the matter independently of the executive’s expressed wishes. As U.S. Secretary of State Fish famously stated: “A claimant in a foreign state is not required to exhaust justice in such state when there is no justice to exhaust.”<sup>89</sup>
81. At its conclusion, the appellate judgment accuses Chevron of “committing a clear act of bad faith by filing an appeal”. Where that is the attitude to the exercise by Chevron of rights of review within Ecuador, it is difficult to see how further exercise of such rights could be regarded as having a reasonable possibility of providing effective redress.
82. The threshold of impropriety required to establish denial of justice has manifestly been crossed; and on the propositions of fact and Ecuadorean law pleaded by Chevron, once the judgment became enforceable within and without Ecuador, there was no reasonable possibility of an effective remedy within Ecuador left to exhaust.

#### **J. REMEDIES FOR DENIAL OF JUSTICE**

83. It is trite that if a state is responsible for conduct that is unlawful under international law, it is obliged to make full reparation for the consequences of its wrongful conduct<sup>90</sup> and that this involves putting the wronged party in the position it would have been in had the wrongful conduct not occurred.<sup>91</sup>

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<sup>88</sup> *Ambatielos Claim* (Greece v United Kingdom), Vol XII UNRIIAA 83 (1956) p 119.

<sup>89</sup> Moore, *Digest of International Law*, Vol. VI (1906) 677.

<sup>90</sup> Articles on the Responsibility of States for Internationally Wrongful Acts, drafted by the International Law Commission, and annexed to United Nations General Assembly Resolution 56/83 of 12 December 2001, Article 31.

<sup>91</sup> *Factory at Chorzów* (Merits), PCIJ, Series A, No 17 (1928), p 47.

84. In appropriate cases, reparation may be achieved by an international tribunal issuing a declaration.<sup>92</sup> A declaration may constitute “in itself appropriate satisfaction”<sup>93</sup> and in such circumstances may be the sole remedy awarded by an international tribunal.
85. If an international tribunal declares a domestic legal act to have been unlawful as a matter of international law, that domestic legal act will be a nullity for international law purposes.<sup>94</sup> If an act is a nullity under international law, that nullity will have *erga omnes* effect – i.e. it will be a nullity for all states, not just for the state that produced the legal act.<sup>95</sup> The significance of this is that if the tribunal hearing the present case finds the Lago Agrio judgment to have been unlawful as a matter of international law, that finding will render the judgment a nullity for international law purposes, and it will be a nullity under international law for all states, not just for Ecuador. A declaration is the most obvious mechanism to record this nullity and to communicate it to any court, anywhere, hearing an application for recognition and enforcement of the Lago Agrio judgment. Dr Mann remarked that “a declaration would not only vindicate the innocent party in the eyes of the world, but might also serve as a defence or as *res judicata* in other proceedings and thus have some value for the victim.”<sup>96</sup>
86. In addition to a declaration, in a case of denial of justice constituted by a fundamentally unfair judgment imposing an unsatisfied liability on a defendant, an international tribunal may order as a matter of international law that the state concerned annul any domestic-law obligations imposed by the judgment of the domestic court.<sup>97</sup> This would be a form of restitution.

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<sup>92</sup> *Corfu Channel Case* [1949] ICJ Reports 4, pp 35-36; *Factory at Chorzów (Interpretation)*, PCIJ, Series A, No 13 (1927), p 20.

<sup>93</sup> *Corfu Channel Case* [1949] ICJ Reports 4, pp 35 and 36.

<sup>94</sup> *Idler (USA) v Venezuela*, J Moore, *The History and Digest of International Arbitrations to which the United States has been a Party* 3491 at 3516-3517 (1885); cf *Legal Status of Eastern Greenland*, PCIJ Series A/B, No 53 (1933) p 22 at 75.

<sup>95</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (1970), Advisory Opinion, [1971] ICJ Reports 6, para 126.

<sup>96</sup> FA Mann, “The Consequences of an International Wrong in International and National Law” (1977) 48 *British Yearbook of International Law* 1, 65.

<sup>97</sup> *Martini Case*, Vol II UNRIIA 977 (1930) p 1002.



87. In the *Martini* case the impugned Venezuelan judgment imposed obligations on the Italian defendant to pay certain sums of money. The defendant had never actually paid those sums, but the obligations to pay them existed as a matter of Venezuelan law. In those circumstances the tribunal held that the appropriate form of reparation was the annulment under Venezuelan law of the payment obligations imposed by the judgment. Applying the rule enunciated in the *Chorzów Factory* case,<sup>98</sup> the Tribunal in *Martini* said:

In pronouncing their annulment [i.e. the annulment of the obligations imposed by the judgment], the Arbitral Tribunal underlines that an illegal act has been committed and applies the principle that the consequences of the illegal act must be erased.<sup>99</sup>

88. An order by an international tribunal that a state annul the obligations imposed by a domestic judgment, rather than that the state annul the judgment itself, is consistent with the view that it is “the *effect* of [a domestic judgment that] was a denial of justice”.<sup>100</sup>
89. The International Court of Justice last month followed a similar approach in the case concerning *Jurisdictional Immunities of the State* brought by Germany against Italy.<sup>101</sup> The Court held that decisions of Italian courts finding the state of Germany liable for acts committed by members of the German army against Italian citizens between September 1943 and May 1945 contravened the sovereign immunity conferred on Germany by customary international law. In particular, the Court held that:

The decisions and measures infringing Germany’s jurisdictional immunities which are still in force must cease to have effect, and the effects which have already been produced by those decisions and measures must be reversed,

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<sup>98</sup> *Factory at Chorzów* (Merits), PCIJ, Series A, No 17 (1928) p 47.

<sup>99</sup> *Martini Case*, Vol II UNRIIA 977 (1930) p 1002; my translation from the original French, which reads: “En prononçant leur annulation, le Tribunal Arbitral souligne qu’un acte illicite a été commis et applique le principe que les conséquences de l’acte illicite doivent être effacées”.

<sup>100</sup> *Idler (USA) v Venezuela*, J Moore, *The History and Digest of International Arbitrations to which the United States has been a Party* 3491 at 3517 (1885) (emphasis in the original).

<sup>101</sup> *Jurisdictional Immunities of the State* (Germany v Italy: Greece Intervening), Judgment of 3 February 2012.

in such a way that the situation which existed before the wrongful acts were committed is re-established.<sup>102</sup>

90. Accordingly, in the dispositive section of its judgment, the Court found, by fourteen votes to one,

that the Italian Republic must, by enacting appropriate legislation, or by resorting to other methods of its choosing, ensure that the decisions of its courts and those of other judicial authorities infringing the immunity which the Federal Republic of Germany enjoys under international law cease to have effect.<sup>103</sup>

91. This new judgment of the Court is consistent with its earlier finding in the *Case Concerning the Arrest Warrant of 11 April 2000*.<sup>104</sup> In that case Belgium, in breach of international law, had issued an arrest warrant against the Minister for Foreign Affairs of the Democratic Republic of Congo and circulated that warrant amongst other states. The International Court of Justice observed that at the time of its judgment the warrant was “still extant” under Belgian law and “remain[ed] unlawful” as a matter of international law.<sup>105</sup> Thus the Court ordered that Belgium “must, by means of its own choosing, cancel the arrest warrant ... and so inform the authorities to whom that warrant was circulated.”<sup>106</sup>

92. The same rationale applies to a denial of justice constituted by a fundamentally unfair judgment rendered against a defendant, the judgment debt of which has not been paid. At the time of the international tribunal’s decision, the obligations imposed by the domestic judgment will be “still extant” as a matter of the domestic law under which the judgment was rendered and will “remain unlawful” as a matter of international law. Applying the logic of the *Arrest Warrant* and *Jurisdictional Immunities of the State* cases, an appropriate remedy is for the international tribunal to order the respondent state to annul those obligations within its own legal system.

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<sup>102</sup> *Jurisdictional Immunities of the State* (Germany v Italy: Greece Intervening), Judgment of 3 February 2012, para 137.

<sup>103</sup> *Jurisdictional Immunities of the State* (Germany v Italy: Greece Intervening), Judgment of 3 February 2012, para 139.

<sup>104</sup> *Case Concerning the Arrest Warrant of 11 April 2000* [2002] ICJ Reports 3.

<sup>105</sup> *Case Concerning the Arrest Warrant of 11 April 2000* [2002] ICJ Reports 3, paras 76 and 78.

<sup>106</sup> *Case Concerning the Arrest Warrant of 11 April 2000* [2002] ICJ Reports 3, para 78; also see para 76.

93. So long as the obligations arising under the impugned domestic judgment remain extant under the applicable domestic law, the defendant will be at peril of attempts to enforce that judgment. This ongoing peril constitutes a “continuous breach of an international obligation”<sup>107</sup> – namely the obligation not to deny justice to aliens – and creates a situation in which an international tribunal may order the responsible state to cause its continuing wrong to cease.<sup>108</sup> It is clear that a state “responsible for an internationally wrongful act is under an obligation to cease that act, if it is continuing.”<sup>109</sup> The only way for that cessation to occur in the present case is for the obligations arising from the domestic judgment to be annulled.
94. Whether it is an act of the respondent state’s legislature, executive, or judiciary that gives rise to the state’s international responsibility is not determinative of what declaratory, restitutionary or other orders can be made by an international tribunal. Of course a state is a unitary entity for international-law purposes.<sup>110</sup> As Judge Jiménez de Aréchaga observed:

Although independent of the Government, the judiciary is not independent of the State: the judgment given by a judicial authority emanates from an organ of the State in just the same way as a law promulgated by the legislature or a decision taken by the executive.<sup>111</sup>

95. Domestic courts of many states will give effect to decisions of international tribunals binding upon the state concerned. Even where that is not the case, the fact that the separation of powers between the branches of a state’s internal governance may create difficulties for the implementation in the domestic legal system of an international decision that is binding on the state does not reduce or modify the international-law obligation by which the state as a whole is bound.

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<sup>107</sup> *Rainbow Warrior*, Vol XX UNRIIAA 217 (1990) para 114.

<sup>108</sup> Cf *L’Affaire de la Société Radio-Orient*, Vol III UNRIIAA 1871 (1940) pp 1880-1881 translated into English at 37 AJIL 341 (1943) pp 348-349.

<sup>109</sup> *Jurisdictional Immunities of the State* (Germany v Italy: Greece Intervening), Judgment of 3 February 2012, para 137.

<sup>110</sup> See Draft Articles on the Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission and submitted to the United Nations General Assembly, 2 ILC Yearbook 1 (2001) Article 4 and the commentary thereto.

<sup>111</sup> E. Jiménez de Aréchaga, “International Law in the Past Third of a Century”, 159 *Recueil des Cours* 1 (1978) 278.

96. In the recent case between Germany and Italy, the International Court of Justice stated that:

It has not been alleged or demonstrated that restitution would be materially impossible in this case, or that it would involve a burden for Italy out of all proportion to the benefit deriving from it. In particular, the fact that some of the violations may have been committed by judicial organs, and some of the legal decisions in question have become final in Italian domestic law, does not lift the obligation incumbent upon Italy to make restitution. On the other hand, the Respondent has the right to choose the means it considers best suited to achieve the required result. Thus, the Respondent is under an obligation to achieve this result by enacting appropriate legislation or by resorting to other methods of its choosing having the same effect.<sup>112</sup>

97. In the case of a denial of justice constituted by the rendering of a fundamentally unfair judgment against a defendant, the judgment debt of which has not been satisfied, a restitutionary order directing Ecuador, by a method of its own choosing, to annul the obligations arising under the judgment as a matter of Ecuadorean law would be the only form of reparation that would erase the threat of international enforcement at its source.
98. International tribunals finding that a generally-applicable regulatory framework is in breach of international law can be reluctant to order the state to repeal that framework, preferring to order compensation as a less-intrusive remedy.<sup>113</sup> That concern is inapplicable where what is internationally unlawful is not a generally-applicable regulatory framework, but a single defective judgment, annulment of the obligations purportedly arising from which would directly affect only the parties to the judgment, none of which can be regarded as having any right to the benefit of a judgment so unfair as to be internationally unlawful.
99. In the event that Ecuador were to fail to comply with a restitutionary order directing it to annul the effect of the Lago Agrio judgment in domestic law, the declaratory remedy would be especially important. The significance of the declaration would be

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<sup>112</sup> *Jurisdictional Immunities of the State* (Germany v Italy: Greece Intervening), Judgment of 3 February 2012, para 137.

<sup>113</sup> See, for example, *LG&E v Argentina*, ICSID Case No ARB/02/1, 25 July 2007 (Award) para 87.

that it would not rely on any action being taken by Ecuador. Whatever Ecuador's posture when faced with an eventual award, that award would communicate the international-law status of the Lago Agrio judgment to other states whose courts may be called upon to consider recognition and enforcement of that judgment.

100. In addition to a declaration and an annulment order, if Chevron had suffered actual financial harm as a result of a breach of the U.S.-Ecuador BIT by Ecuador, an award of monetary compensation would also be appropriate.

**K. CONCLUSION**

101. I conclude with a general observation about the assessment of domestic judgments by international tribunals. The prolixity and ostensible erudition of a judgment can do nothing to save it if it is otherwise defective. If the crafting of the judgment seeks to dissimulate a failure of due process it may reveal itself to be a pretence of form precisely designed to cover injustice.

I confirm that the foregoing represents my true and independent professional opinion.

Executed in Paris on 12 March 2012



Jan Paulsson

## L. EXPERIENCE

As an arbitrator, I have been appointed to preside over tribunals and have been appointed both by states and by commercial parties. I have served as an arbitrator in more than 150 cases, including the following:

- *Azinian v Mexico*, Washington D.C., expropriation claim, first case decided on the merits under the North American Free Trade Agreement
- *Channel Tunnel v U.K. and France*, The Hague, claimed violation of the 1986 Treaty of Canterbury and the Concession Agreement concluded under that treaty
- *Desert Line v Yemen*, Paris, construction contract claim under Oman-Yemen Bilateral Investment Treaty
- *Enrho v Kazakhstan*, London, energy dispute regarding control of pricing and taxation
- *GAMI Investments v Mexico*, Vancouver, expropriation claim under the North American Free Trade Agreement
- *Generation Ukraine v Ukraine*, Paris, expropriation claim under U.S.-Ukraine Bilateral Investment Treaty
- *HEP v Slovenia*, Paris, dispute regarding obligations concerning a nuclear power plant
- *Himpurna v Indonesia*, Jakarta, claim concerning sale of electricity and government undertakings in support of a state corporation
- *Lemire v Ukraine*, London, dispute under Ukraine-U.S. Bilateral Investment Treaty related to licences for radio frequencies
- *Luchetti v Peru*, Washington D.C., jurisdictional issue under Peru-Chile Bilateral Investment Treaty
- *Motorola v Turkey*, Washington D.C., investment dispute under U.S.-Turkey Bilateral Investment Treaty
- *Pantechniki v Albania*, Paris, denial of justice claim under Albania-Greece Bilateral Investment Treaty
- Court of Arbitration for Sport, appeals panels at the Olympic Games in Atlanta (1996), Nagano (1998), and Sydney (2000)

I act as counsel for states, corporations and individuals. Some examples include:

- *Atlantic Triton v Guinea* (for Guinea)
- *Bahrain v Qatar* (for Bahrain)
- *Belize v Guatemala* (for Belize)
- *Barbados v Trinidad & Tobago* (for Barbados)
- *Biwater Gauff v Tanzania* (for Tanzania)
- *Burlington Resources v Ecuador* (for Burlington Resources)
- *ConocoPhillips v Venezuela* (for ConocoPhillips)
- *Eritrea v Yemen* (for Eritrea)
- *Foresti v South Africa* (for South Africa)
- *Gruslin v Malaysia II* (for Malaysia)
- *Helnan v Egypt* (for Egypt)
- *Klöckner v Cameroon* (for Cameroon)
- *LETCO v Liberia* (for Liberia)
- *Libananco v Turkey* (for Turkey)
- *Peru v Chile* (for Chile)
- *RSM v Grenada* (for Grenada)
- *Saluka v Czech Republic* (for Saluka)
- *SGS v Pakistan* (for Pakistan)
- *Soufraki v UAE* (for Soufraki)
- *SPP v Egypt* (for SPP)
- *Total v Argentina* (for Total)
- *World Duty Free v Kenya* (for Kenya)
- More than 20 cases before the Court of Arbitration for Sport arising from the Olympic Games in 2002, 2004 and 2006 (for the International Olympic Committee)

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