

**IN THE MATTER OF AN AD HOC ARBITRATION  
UNDER THE UNCITRAL ARBITRATION RULES  
PCA CASE NO. 2012-10**

**MERCK SHARP & DOHME (I.A.) CORP.,**

**Claimant**

**v.**

**THE REPUBLIC OF ECUADOR,**

**Respondent**

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**EXPERT OPINION OF PROFESSOR STEVEN R. RATNER**

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**1 August 2014**

## A. Personal Background

1. I am the Bruno Simma Collegiate Professor of Law at the University of Michigan Law School, where I teach courses in public international law. Prior to joining the Michigan faculty in 2004, I was the Albert Sidney Burlinson Professor in Law at the University of Texas School of Law, and prior to joining the Texas faculty I was an Attorney-Adviser in the Office of the Legal Adviser at the United States Department of State. I received an A.B., *magna cum laude*, from Princeton University in 1982, a J.D. from Yale Law School in 1986, and a *diplôme (mention très bien)* from the Institut Universitaire de Hautes Études Internationales (Geneva) in 1993.

2. During my years at the State Department, I served, among other positions, as an Attorney-Adviser for Economic, Business, and Communications Affairs. Among my responsibilities was assistance with the negotiation of bilateral investment treaties (BITs) of the United States. I participated directly as a U.S. government lawyer in negotiations on several BITs, including that with Argentina (which is based on the same model BIT as that between Ecuador and the United States) in 1991, as well as negotiations with other states, including Costa Rica and Pakistan, that did not lead to the conclusion of BITs. I left this position in the spring of 1992 to begin an International Affairs Fellowship at the Council on Foreign Relations.

3. My academic career has focused on public international law, including international investment law. Since I began teaching law in the fall of 1992, I have taught a semester-long course on the international law on foreign investment, which I have now taught eight times. This course covers the legal protections offered to investors as well as the resolution of investment disputes, including detailed coverage of investor-state dispute settlement and forums such as ICSID arbitration. The preparation for this course, including gathering of course materials, has necessitated extensive research on developments in the field, both substantive and procedural. I

have also regularly taught a public international law or transnational law introductory course. I am the co-author of one of the leading textbooks on international law used in the United States, *International Law: Norms, Actors, Process* (2010), now in its third edition, and I contributed to the book's treatment of foreign investment. I have published a major article on indirect expropriations in the *American Journal of International Law* in 2008. I have also dealt extensively with foreign investment issues in my publications concerning the obligations of multinational enterprises under international law, including a leading article in the *Yale Law Journal* and a chapter in the *Oxford Handbook of International Environmental Law*. I have also lectured on foreign investment in the United States and abroad, including at the Tsinghua University Law School in Beijing and at Bocconi University in Milan. In addition, I have served as an expert consultant on an expropriation-related arbitration arising out of the Argentine emergency measures of the early 2000s as well as numerous other matters of public international law for the United Nations, the United States government, and private parties. I authored an expert opinion on behalf of the claimants in the UNCITRAL case of *Murphy Oil Company v. Republic of Ecuador* concerning certain jurisdictional issues that arise in the current case as well.\*

4. My scholarly work in public international law has been recognized in other contexts as well. From 1998 to 2008, I served as a member of the Board of Editors of the *American Journal of International Law*, one of the highest forms of recognition of scholars of international law. Earlier, I received both the Francis Deák Prize of the American Society of International Law for the best article in the *American Journal of International Law* and the Society's Certificate of Merit for the best scholarly book published in the field of international law. In 2009, I was

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\* I have been advised by counsel for Claimant that both parties and the tribunal in this case have access to the Partial Award on Jurisdiction of 13 November 2013 and will thus make reference to it in this opinion.

appointed to the State Department Advisory Committee on International Law, a highly select group of academic experts and practitioners who meet semi-annually with the State Department Legal Adviser and the Department's lawyers to consult on matters of public international law; I was re-appointed to the Committee this year. In 2013, I was appointed by the American Law Institute to serve as an official Adviser to the Restatement (Fourth) of the Foreign Relations Law of the United States. My appointment to my chair in 2009 represents one of the leading forms of recognition of the University of Michigan for one of its professors. My full CV, including publications, is attached at Annex 1.

5. I have been retained by Merck Sharp and Dohme (I.A.) Corp. ("MSDIA") to offer a legal opinion on several matters of international law that may be pertinent to the resolution of its dispute with the Republic of Ecuador. I have read relevant documents related to this case, including the Claimant's Notice of Dispute (dated 8 June 2009), Claimant's Notice of Arbitration (dated 29 November 2011), Claimant's Memorial (dated 2 October 2013), Respondent's Counter-Memorial (dated 27 February 2014), and the Expert Opinion of Professor Kenneth J. Vandavelde (dated 16 January 2014). I have also consulted a range of legal sources, including caselaw, treaties, and scholarly commentary.\*

## **B. Summary of Opinion**

6. Under the Vienna Convention on the Law of Treaties, the Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment ("Ecuador-United States BIT") permits of only one interpretation of the fork in the road in Article VI of the treaty: that Article VI(2) provides an irrevocable fork in the

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\* Translations from Spanish documents have been verified by counsel for Claimant.

road among domestic remedies, other agreed procedures, and international arbitration, whereas Article VI(3) provides a list of options for the investor for international arbitration, without any express or implied fork in the road among those arbitral options. To this effect, this Opinion makes four points. Part C reviews the rules of treaty interpretation for BITs and notes the importance to international tribunals of the principle of *effet utile*. Part D explains that the interpretation above is mandated by the ordinary meaning of the text of this treaty as well as the treaty's context and object and purpose. Both the wording and structure of Articles VI(2) and (3) require such an interpretation, and a contrary position would deny an *effet utile* to these provisions. States and scholars agree on the ordinary meaning of fork in the road clauses, and states have been quite explicit if they choose to create an additional fork among arbitral venues. Recourse to any possibly relevant supplementary means only confirms this view. Part E examines the expert opinion of Professor Vandeveld and finds that the inferences made therein for a second fork in the road are not supported by the United States policy or history regarding bilateral investment treaties that he discusses. Part F considers the effect of the Claimant's Notice of Dispute on the jurisdiction of this arbitral tribunal and concludes that it was not and could not have been a valid consent to the exclusive jurisdiction of ICSID, meaning that, even if the treaty had a second fork in the road, Claimant could choose to consent to submission to any of the fora listed in Article VI(3), including ad hoc arbitration under the UNCITRAL rules. In light of the lack of a second fork in the road, the Claimant's lack of valid consent to the exclusive jurisdiction of ICSID, and the circumstances of this case, nothing in the BIT or Claimant's letter precludes the Claimant from initiating UNCITRAL arbitration.

## C. Treaty Interpretation Rules for Investor-State Disputes Under Bilateral Investment

### Treaties

7. A tribunal adjudicating an investor-state dispute under a bilateral investment treaty is normally obligated to follow the rules of interpretation of treaties set forth in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties (“the Vienna Convention”), Exhibit CLM-377, which read:

#### *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 connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

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.

8. The Vienna Convention places the primary emphasis for the interpretation of a treaty on the text of the treaty. At the same time, the Vienna Convention requires a tribunal to take into account the context of the treaty (as defined in Article 31(2)), the object and purpose of the treaty, and additional factors spelled out in Article 31(3); and permits recourse to supplementary means of interpretation (as defined in Article 32).

9. Beyond the words of the Vienna Convention itself, the caselaw of international tribunals has identified several core doctrines flowing from the Convention to be followed. One is of particular importance. Numerous international tribunals have recognized that a treaty must be interpreted so as to give it, as a whole, and the individual provisions within it meaningful effect – *effet utile*. Correspondingly, treaties and treaty provisions should not be interpreted in such a way as to deny them such effect. This principle follows from the requirement of Article 31(1) that treaties be interpreted in good faith. The approaches of international courts reveal that the principle of *effet utile* means that treaty clauses must be interpreted to avoid either rendering them superfluous or depriving them of significance for the relationship between the parties.

10. Thus, in the *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russia)*, Preliminary Objections, 2011 ICJ Rep. 70, Exhibit CLM-272, the International Court of Justice (ICJ) interpreted the

phrase in the Convention allowing the parties to bring to the Court a dispute “which is not settled by negotiation or by the procedures expressly provided for in this Convention,” as requiring more than merely the existence of a dispute (as argued by Georgia) by reasoning as follows:

[I]f the phrase [quoted above] is to be interpreted as requiring only that the dispute . . . must in fact exist, that phrase would have no usefulness. Similarly, the express choice of two modes of dispute settlement, namely, negotiations or resort to the special procedures under CERD, suggests an affirmative duty to resort to them prior to the seisin of the Court. Their introduction into the text of Article 22 would otherwise be meaningless and no legal consequences would be drawn from them contrary to the principle that words should be given appropriate effect whenever possible.

*Id.* para. 134. Earlier, in the *Case Concerning the Territorial Dispute (Libya/Chad)*, 1994 ICJ Rep. 6, Exhibit CLM-275, the Court interpreted an article in a bilateral treaty between the parties as providing for the settlement of all frontier disputes according to a specific list of instruments in an Annex to the treaty. In rejecting Libya’s claims that other instruments not in the Annex could be considered, the ICJ stated that the parties could have made other choices to resolve their boundary disputes, but the language of the treaty showed that they did not, and that “[a]ny other construction would be contrary to one of the fundamental principles of interpretation of treaties. . . , namely that of effectiveness.” *Id.* para. 51. *See also Arbitration Regarding the Iron Rhine (IJzeren Rijn) Railway (Belg./Neth.)*, Permanent Court of Arbitration, 24 May 2005, paras. 49, 84, Exhibit CLM-245 (emphasizing the principle as one of “particular importance” and invoking it to justify continued applicability of the treaty article under dispute).

11. The principle of *effet utile* has also been accepted in numerous investor-state arbitration decisions. *See, e.g., Eureka B.V. v. Republic of Poland*, Partial Award, 19 August 2005, para. 248, Exhibit CLM-240 (“each and every operative clause of a treaty is to be interpreted as meaningful rather than meaningless [and] treaties, and hence their clauses, are to be interpreted so as to render them effective rather than ineffective.”); *Noble Ventures, Inc. v. Romania*, ICSID Case



No. ARB/01/11, Award, 12 October 2005, para. 52, Exhibit CLM-254 (invoking the principle in determining that “any other interpretation [of the BIT article under dispute] would deprive [that article] of practical content”); *Urbaser S.A. and Consorcio de Augas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentina*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, 19 December 2012, paras. 52, 193, Exhibit CLM-266 (invoking principle to read jurisdictional clause to require Respondent to provide effective domestic remedies). All these cases confirm what has been written in a major treatise on treaty interpretation, namely that “particular provisions are to be interpreted so as to give them their fullest weight . . . and in such a way that a reason and meaning can be attributed to every part of the text.” Richard K. Gardiner, *Treaty Interpretation* 64 (2008), Exhibit CLM-322.

12. International case law has also established that certain interpretive principles do not apply to the interpretation of treaties under the Vienna Convention. For example, tribunals have long rejected any presumption that treaties be interpreted so as to impose the least restrictive obligations on the freedom of a state. *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.)*, 2009 ICJ Rep. 213, at para. 48, Exhibit CLM-276 (“While it is certainly true that limitations of the sovereignty of a State over its territory are not to be presumed, this does not mean that treaty provisions establishing such limitations, such as those that are in issue in the present case, should for this reason be interpreted *a priori* in a restrictive way.”); *Iron Rhine Railway*, para. 53, Exhibit CLM-245 (“The principle of restrictive interpretation, whereby treaties are to be interpreted in favour of state sovereignty in case of doubt, is not in fact mentioned in the provisions of the Vienna Convention. The object and purpose of a treaty, taken together with the intentions of the parties, are the prevailing elements for interpretation.”). Rather, treaties are an exercise of the sovereignty of the state and must be interpreted according

to the Vienna Convention rules. This principle has been reiterated in the course of investor-state arbitrations. *Mondev International Limited v. United States*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 43, Exhibit RLA-54; *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objection to Jurisdiction, 21 October 2005, para. 91, Exhibit RLA-52; *Metalpar S.A. y Buen Aire S.A. v. República Argentina*, ICSID Case No. ARB/03/5, Decisión Sobre Jurisdicción Dictada, 27 April 2006, para. 92, Exhibit CLM-250. *See also* Christoph Schreuer, "Diversity and Harmonization of Treaty Interpretation in Investment Arbitration," in Malgosia Fitzmaurice et al eds., *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (2010), at 129, 132-34, Exhibit CLM-367.

13. In addition, tribunals have generally refused to interpret treaty provisions under the principle of *ex abundante cautela*, which would regard those provisions as having been added only as a matter of caution to emphasize an obligation that appears elsewhere in the treaty. As a general matter, interpreting a treaty so as to accept the redundancy of a phrase – i.e., to treat it as having no independent legal effect – is in tension with the maxim of *effet utile*, and thus it is not an accepted mode of treaty interpretation. In the *Anglo-Iranian Oil Co. Case* (UK v. Iran), 1952 ICJ Rep. 93, 105, Exhibit CLM-270, the International Court of Justice made clear that it would use the principle of *ex abundante cautela* instead of *effet utile* only because the instrument to be interpreted was a state's unilateral declaration and not a treaty. *See* International Law Commission, Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, with Commentaries thereto, art. 7, Commentary para. (3), UN Doc. A/61/10, at 369 (2006), Exhibit CLM-331 (noting differences between Vienna Convention rules and rules for interpreting unilateral declarations).

14. As a result, tribunals generally have not relied on this principle to interpret bilateral investment treaties. For example, in *Murphy v. Ecuador*, in interpreting the Ecuador-United States BIT, the tribunal applied the principle of *effet utile* rather than *ex abundante cautela*. See *Murphy Exploration & Production Company – International v. Republic of Ecuador*, PCA (UNCITRAL Rules), Partial Award on Jurisdiction, 13 November 2013, para. 180, Exhibit CLM-253. See also *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. 05/19, Decision on Objection to Jurisdiction, 17 October 2006, para. 52, Exhibit CLM-241 (“whenever possible, terms must be interpreted literally and given practical effect, which excludes redundancy.”); *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 December 2010, paras. 110-11, Exhibit CLM-235 (focusing on state’s intent rather than *effet utile* in interpreting domestic legislation, rather than a treaty).

15. In one case, *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, para. 90, Exhibit CLM-262, the tribunal accepted that the parties to the Germany-Argentina BIT were acting out of caution when they included a most favored nation (MFN) treatment clause in both the article of the treaty concerning the treatment to be afforded to foreign investors generally and the article on their treatment in the event of armed conflict and emergencies. In that case, however, the *Siemens* tribunal invoked *ex abundante cautela* to demonstrate only that the simultaneous use of a phrase in a broader provision of the BIT (the general MFN clause) and a narrow provision (the clause on armed conflicts) did not deprive the broader provision of its full effect. It would be entirely different to extend the concept to imply entirely new language in a treaty.

**D. Application of Rules of Interpretation to Articles VI(2) and (3) of the Ecuador-United States Bilateral Investment Treaty**

16. Articles VI(2) and (3) of the BIT, Exhibit C-1, provide as follows:

2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute, under one of the following alternatives, for resolution:

(a) to the courts or administrative tribunals of the Party that is a party to the dispute; or

(b) in accordance with any applicable, previously agreed dispute-settlement procedures; or

(c) in accordance with the terms of paragraph 3.

3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:

(i) to the International Centre for the Settlement of Investment Disputes (“Centre”) established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 (“ICSID convention”), provided that the Party is a party to such Convention; or

(ii) to the Additional Facility of the Centre, if the Centre is not available; or

(iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), or

(iv) to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.

(b) Once the national or company concerned has so consented, either party to the dispute may initiate arbitration in accordance with the choice so specified in the consent.

## **1. The Ordinary Meaning of the Text**

17. The text of these two paragraphs sets forth an investor-state dispute settlement procedure whose plain meaning is clear. To wit, paragraph 2 urges the parties to seek a settlement by consultation and negotiation, and if this proves impossible, permits the investor, six months after the dispute arose, to submit the dispute to one of three avenues (“one of the following alternatives”) of recourse: domestic remedies, other procedures agreed by the parties, and international arbitration. Paragraph 3 then lists the options for the investor should it choose international arbitration – i.e., ICSID, the Additional Facility of ICSID, arbitration under UNCITRAL rules, or arbitration under any other agreed rules.

18. The overall structure of paragraphs 2 and 3 is one of a nested procedure. That is, paragraph 2 provides the fork in the road between domestic remedies, other agreed procedures, and international arbitration, the last of which is the possibility stated in paragraph 2(c). Paragraph 2(c) itself says that the investor may choose to act in accordance with paragraph 3, which then sets out the options for international arbitration. The structure of providing for the option of international arbitration in two paragraphs, rather than one, makes clear that the choices offered to the investor in paragraph 2 have a legally different character from the choices offered the investor in paragraph 3. Had the treaty meant for the fork in the road set forth in paragraph 2 to include a further fork among the four options for arbitration listed in paragraph 3, it would have simply listed those four choices along with the first two choices (domestic remedies and other agreed procedures), for a total of six “prongs” of the fork (i.e., domestic remedies, other agreed procedures, ICSID, the ICSID Additional Facility, arbitration under UNCITRAL rules, and arbitration under other rules). As discussed below, other treaties have adopted that approach.

19. The difference between the investor's choice in paragraph 2 and its options in paragraph 3 is confirmed by the choice of words used. Thus, paragraph 2's grant to the investor of the choice of dispute settlement "under one of the following alternatives" has a different meaning from paragraph 3's list of options for the investor from which to choose as a forum for the arbitration. The introductory phrase in paragraph 3 – "[p]rovided that the [investor] has not submitted the dispute for resolution under paragraph 2(a) or (b)" – confirms that the only irrevocable choice the investor must make is among the three methods listed in paragraph 2. While the words "or" separating the four arbitral fora under paragraph 3 make clear that each of the four are *options* for the investor (as opposed to language that would list only one forum), the word "or" does not alone mean that they are *irrevocable choices* in the sense of the three avenues listed in paragraph 2. It thus does not follow from the wording that there is no possibility for the investor to choose from a second option under some circumstances.

20. The only restriction on the investor's choice is the one explicitly provided in Article VI(3)(a)(ii) – namely, that the investor may choose to consent in writing to submit the dispute to arbitration to the ICSID Additional Facility only "if the Centre is not available," a possibility that can arise if the state party is not a party to the ICSID Convention. Thus, when the text means to limit the investor's choices, it is quite clear about doing so, whether in the fork in the road in Article VI(2), the first phrase in Article VI(3), or in the condition placed in Article VI(3)(a)(ii). One could imagine a number of places within Article VI(3) for such a second fork, e.g., through the insertion of an additional clause in Article VI(3)(b) of an irrevocable choice, yet the treaty contains no language that limits the investor's choice of arbitral forum.

21. In interpretations under the Vienna Convention, a treaty's use of different terms in nearby provisions is assumed to reflect a different meaning. For example, in the *Land, Island*

*and Maritime Frontier Dispute (El Salv./Hond., Nicar. intervening)*, 1992 ICJ Rep. 351, Exhibit CLM-280, the ICJ put particular weight on the difference in wording between one provision in the compromis – that authorized the Court to delimit the boundary line of the land areas (“Que delimite la línea fronteriza”) – and another that authorized it to make a determination of the legal situation of the islands and maritime space (“Que determine la situación jurídica”). Based on these differences, it concluded that the latter did not authorize a delimitation of the islands and maritime spaces. *Id.* para. 374. In the case of the Ecuador-United States BIT, that reasoning applies equally to the differences between Articles VI(2) and (3) and to the differences between Article VI(3)(a)(ii) and the other three options listed.

22. Indeed, to interpret the phrase “one of the following alternatives” in Article VI(2) to mean exactly the same as the mere list of arbitral options in Article VI(3) that does *not* contain that phrase – i.e., to interpret both paragraphs as creating forks in the road – would be to render that phrase completely superfluous. Such an interpretation is, quite simply, forbidden by the principle of the *effet utile*, as made clear in paragraph 9 above. Once the parties inserted the phrase, it must be given an effective meaning, as the International Court of Justice and numerous investor-state arbitration tribunals have recognized.

23. Cases interpreting these paragraphs of this treaty confirm the plain meaning. In *Murphy v. Ecuador*, the majority of the tribunal found that the treaty had only one fork in the road based on the principle of *effet utile*. *Murphy Exploration & Production Company – International v. Republic of Ecuador*, PCA (UNCITRAL Rules), Partial Award on Jurisdiction, 13 November 2013, paras. 178-83, Exhibit CLM-253. Other cases refer to the fork in the road exclusively in terms of the choice between domestic remedies and international arbitration. *See M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No.

ARB/03/6, Award, 31 July 2007, para. 181, Exhibit CLM-66 (“the ‘fork-in-the-road’ rule . . . . refers to an option, expressed as a right to choose irrevocably between *different jurisdictional systems*. Once the choice has been made there is no possibility of resorting to any other option.”) (emphasis added); *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador*, PCA Case No. 2009-23 (UNCITRAL Rules), Third Interim Award on Jurisdiction and Admissibility, 27 February 2012, para. 4.73, Exhibit CLM-108 (“The question is whether ‘the dispute’ submitted to this Tribunal has already been submitted to the national courts of Ecuador or New York so as to trigger the fork in the road provision in Article VI(3).”); *IBM World Trade Corporation v. República del Ecuador*, ICSID Case No. ARB/02/10, Decisión sobre Jurisdicción y Competencia, 22 December 2003, para. 25 Exhibit CLM-242 (“[A]rtículo VI establece entre *las alternativas* para la solución de controversias relativas a inversiones la de recurrir a los tribunales judiciales o administrativos de cualquiera de los Estados contratantes o el recurrir al arbitraje obligatorio, *entre otros posibles de elección*, al sujeto al sistema administrativo por el CIADI. . . .”)\* (emphasis added); *Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA Case No. UN3467 (UNCITRAL Rules), Final Award, 1 July 2004, para. 50, Exhibit CLM-256 (tribunal’s finding that investor may sue on different claims in different venues “cannot be taken to mean that the death knell has sounded for the ‘fork in the road’ provisions of bilateral investment treaties . . . because the functions of domestic mechanisms and international arbitration are different.”).

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\* “Article VI establishes among *the alternatives* for the resolution of investment disputes that of recourse to the judicial or administrative tribunals of either contracting Party, or recourse to binding arbitration, *among other possible choices*, to subjection to the system administered by ICSID . . . .” (emphasis added).



## 2. The Ordinary Meaning in Comparison with Other Bilateral Investment Treaties

24. To appreciate the ordinary meaning of paragraphs 2 and 3, it is useful to compare the text to other treaties that clearly do place limits on both the investor's choice of dispute settlement *and* the investor's choice of arbitral venue should it choose international arbitration. For example, the Agreement between the Italian Republic and the Lebanese Republic on the Promotion and Reciprocal Protection of Investments – interpreted in *Toto Costruzioni Generali S.P.A v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009, Exhibit CLM-264 – states in Article 7.2:

If these consultations do not result in a solution within six months from the date of written request for settlement, the investor may submit the dispute, at his choice, for settlement to:

- (a) the competent court of the Contracting Party in the territory of which the investment has been made; or
- (b) the International Center for the Settlement of Investment Disputes (ICSID) provided for by the Convention on the Settlement of Investment Disputes between States and Nationals of the other States, opened for signature at Washington, on March 18, 1965, in case both Contracting Parties have become members of this Convention; or
- (c) an ad hoc tribunal which, unless otherwise agreed by the Parties to the dispute, shall be established under the arbitration rules of the United Nations Commission of International Trade Law (UNCITRAL).

The choice made as per subparagraphs a, b, and c herein above is final.

*Id.* para. 203. Unlike the Ecuador-United States BIT, the structure in this provision uses only one operative paragraph, and the final clause makes clear that the investor has one and only one choice. That choice is not only a choice between domestic and international dispute resolution, but also the choice of a particular arbitral forum.

25. Moreover, the Agreement Between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments – discussed in *Nova Scotia Power Incorporated (Canadá) v. República Bolivariana de Venezuela*, PCA (UNCITRAL Rules), Laudo sobre Jurisdicción, 22 April 2010, Exhibit CLM-255 – provides the investor in Article XII(2) with the option to choose between domestic remedies and international arbitration, but then provides as follows in Article XII(4) regarding the arbitration venues:

The dispute may, by the investor concerned, be submitted to arbitration under:

- a. The International Centre for the Settlement of Investment Disputes (ICSID), established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington 18 March, 1965 (ICSID Convention), provided that both the disputing Contracting Party and the Contracting Party of the investor are parties to the ICSID Convention; or
- b. the Additional Facility Rules of ICSID, provided that either the disputing Contracting Party or the Contracting Party of the investor, but not both, is a party to the ICSID Convention; or

In case neither of the procedures mentioned above is available, the investor may submit the dispute to an international arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

(English version from UNCTAD web site, [www.investmentpolicyhub.unctad.org](http://www.investmentpolicyhub.unctad.org).)

26. As the Tribunal in *Nova Scotia Power* stated, this provision sets up a clear hierarchy of options binding on the investor, with ICSID first among the three. *Id.* para. 89. The Tribunal emphasized how these words made the provision unambiguous in terms of its constraints on the investor:

La redacción del artículo XII(4) no admite ambigüedad ni duda. Ésta indica que los redactores del Tratado pretendían que primero fuese necesario considerar si los mecanismos de resolución de controversias de CIADI o su Mecanismo Complementario estaban disponibles. Solamente si ninguno estaba “disponible”

tendría derecho el inversor a recurrir a un arbitraje CNUDMI.\*

*Id.* para. 90. Although this hierarchy is not, strictly speaking, a second fork in the road, this treaty, unlike the Ecuador-United States BIT, uses a one-paragraph structure and unambiguous wording to limit the investor's options.

27. Indeed, in that case, the Tribunal's interpretive methodology included a detailed comparison between Article XII(4) and choice of forum clauses in other BITs that Canada and Venezuela had concluded, clauses that did *not* constrain the investor in the way that the Canada-Venezuela BIT did. *Id.* paras. 92-95. For example, the Tribunal noted, "cuando Canadá ha querido que el arbitraje bajo CIADI o el Reglamento del Mecanismo Complementario o el Reglamento de Arbitraje CNUDMI esté disponible por igual, a elección del inversor, lo ha hecho explícitamente."<sup>†</sup> *Id.* para. 92. *See also* A. A. Mezgravis and C. González, "Denunciation of the ICSID Convention: Two Problems, One Seen and One Overlooked," *Transnational Dispute Management*, November 2012, sec. 3.1, Exhibit CLM-343 (discussing hierarchy in Venezuela-Costa Rica BIT).

28. Lastly, the Germany-Poland Treaty Concerning the Encouragement and Reciprocal Protection of Investments of 10 November 1989 clearly limits the investor's arbitral options. After providing for a procedure for non-ICSID, ad hoc arbitration in paragraph 10(3)-(5), paragraph 10(6), Exhibit CLM-288, states:

If both Contracting Parties are members of the Convention of 18 March 1965 on the settlement of investment disputes between states and nationals of other

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\* "The drafting of Article XII(4) admits of neither ambiguity nor doubt. It indicates that the drafters of the Treaty aimed that first it would be necessary to consider if the dispute resolution mechanisms of ICSID or its Additional Facility were available. Only if neither were "available" would the investor have the right of recourse to an UNCITRAL arbitration."

† "When Canada has wanted arbitration based on ICSID, the Additional Facility of ICSID, or the arbitration rules of UNCITRAL to be equally available, at the choice of the investor, it has said so explicitly."

states the arbitral tribunal provided for above may in consideration of the provisions of paragraph 1 of Article 27 of the said Convention not be appealed to in so far as agreement has been reached between the investor of one Contracting Party and the other Contracting Party under Article 25 of the Convention. This shall not affect the possibility of appealing to such arbitral tribunal in the event that a decision of the Arbitral Tribunal established under the said Convention is not complied with (Article 27) or in the case of an assignment under a law or pursuant to a legal transaction as provided for in Article 6 of the present Treaty.

While more complex structurally than the prior examples, this treaty limits the investor's options in a way that the Ecuador-United States BIT does not.\*

29. All these treaties make clear that, when states want to constrain the investor beyond the fork in the road between domestic remedies and international dispute settlement, they are capable of doing so through the words of the treaty. Absent textual or other evidence acceptable under the Vienna Convention's methodology, no implication of an additional constraint on the investor can be read into the Ecuador-United States BIT.

### **3. The Ordinary Meaning of a Fork in the Road Clause**

30. Both the parties to this arbitration agree that the Ecuador-United States BIT contains a fork in the road clause in Article VI(2). That fork in the road clause is typical of many – although as the Italy-Lebanon, Canada-Venezuela, and Germany-Poland examples demonstrate, not all – bilateral investment treaties. The inclusion of such provisions was part of the United States government policy in the conclusion of bilateral investment treaties, and the Ecuador-United States BIT follows the United States 1992 Model BIT (with wording changes, discussed below) in this regard. Because of the agreed characterization of these provisions as a fork in the

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\* Article 24(3) of the 2004 US Model BIT provides for a list of arbitral options for the investor. An interpretation of this clause as providing an irrevocable choice for the investor, as might be suggested in August Reinisch and Loretta Malintoppi, "Methods of Dispute Resolution," in Peter Muchlinski et al. eds., *The Oxford Handbook of International Investment Law* (2008), at 691, 693 (although those authors speak of an "exclusi[ve]" and not irrevocable choice), is unconvincing given the explicitness with which forks are usually written.

road clause, it is useful to examine the general understanding of states, courts, and scholars of the ordinary meaning of a fork in the road provision.

31. While, as noted above, it is certainly possible for a fork in the road provision to limit the investor's choices among arbitral venues, the ordinary meaning ascribed to such provisions is one of an irrevocable choice *between domestic remedies and international arbitration* (or other agreed dispute resolution measures, although this option receives less attention from courts and scholars as it is rarely invoked by investors). Thus, for instance, numerous arbitral decisions define or refer to fork in the road clauses – and, in particular, clauses similar to those in the Ecuador-United States BIT – as provisions that offer such a choice. Those decisions do not further define them as requiring the investor to make an irrevocable choice between different arbitration venues (except in cases like *Toto* above, where the treaty explicitly provides this choice within the fork in the road clause itself). *See, e.g., Compañia de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para. 54, Exhibit RLA-52 (accepting tribunal's view that the fork in the Argentina-United States BIT is between domestic and international fora); *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, para. 80, Exhibit RLA-56 (noting that contractual claims are different from treaty claims and “this view applies to the instant dispute, since no submission has been made by CMS to local courts and since, even if TGN had done so . . . this would not result in triggering the ‘fork in the road’ provision against CMS.”).

32. Indeed, as a general matter, because forks in the road limit investors' options, states are clear when they wish to include them in investment treaties. Thus, tribunals insist on the explicit language of a fork and will not imply one. *See SGS Société Générale de Surveillance v.*

*Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, para. 176, Exhibit CLM-261 (contrasting explicit clauses in France-Argentina BIT and NAFTA with absence of such a clause in Switzerland-Pakistan BIT); *Camuzzi International S.A. v. Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Objections to Jurisdiction, 11 May 2005, para. 117, Exhibit CLM-234 (noting that Belgo/Luxembourg- Argentina BIT does not contain a fork in the road clause and therefore claimant may submit claim to domestic courts first). Just as tribunals will not imply a fork in the road between recourse to domestic remedies and recourse to international arbitration, they should not imply one among international arbitral venues.

33. In this regard, it is important to consider scholarly commentary on fork in the road provisions. All of the leading treatments of this issue speak of the fork as between domestic remedies, on the one hand, and international arbitration, on the other hand. None of these comprehensive discussions mentions any fork or irrevocable choice between different arbitral options. One of the leading treatises on investment law, Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2d ed. 2012), Exhibit CLM-299, states, “Another way in which BITs sometimes refer to domestic courts is a so-called fork in the road provision. Such a clause provides that the investor must choose between the litigation of its claims in the host state’s domestic courts or through international arbitration and that the choice, once made, is final.” *Id.* at 267. *See also id.* at 268 (discussing “the fork in the road provision in the Argentina-US BIT,” which is virtually identical to that in the Ecuador-United States BIT); Christoph Schreuer, “Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road,” 5 *Journal of World Investment & Trade* 231 (2004), at 239-40, Exhibit CLM-369 (“A typical clause provides that the investor must choose between the litigation of its claims in

the host State's domestic courts or international arbitration and that, once made, the choice is final. . . . This type of clause is often referred to as a 'fork in the road' provision.”).

34. Other commentators on fork in the road clauses adopt the same view. *See, e.g.*, Jacomijn J. van Haersolte-van Hof and Anne K. Hoffman, “The Relationship Between International Tribunals and Domestic Courts,” in *The Oxford Handbook of International Investment Law, supra*, at 962, 998, Exhibit CLM-325 (“‘Fork-in-the-road’ provisions in investment treaties are clauses stipulating that the investor has to make a choice between the different procedural forums offered to him under the treaty, for example local courts, previously agreed dispute settlement mechanisms, or international arbitration proceedings.”); Gabrielle Kaufmann-Kohler et al., “Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently?,” 21 *ICSID Review* 59, 67 (2006), Exhibit CLM-336 (defining fork in the road as “a clause in a treaty that requires the claimant to make an irrevocable choice of forum,” then quoting the Argentina-France BIT that provides for fork between national courts and international arbitration); Lucy Reed et al., *Guide to ICSID Arbitration* (2d ed. 2011), at 100, Exhibit CLM-361 (“[A] ‘fork in the road’ provision . . . is a stipulation that if the investor chooses to submit a dispute to the host State courts or to any other agreed dispute resolution procedure (for example, to ICC arbitration under the dispute resolution clause in the relevant investment contract), the investor forever loses the right to submit the same claims to the international arbitration procedure in the BIT.”).

35. In his comprehensive treatises on both BITs generally and United States BITs in particular, Professor Vandeveld identifies fork in the road provisions in the same terms as other scholars, i.e., as involving an irrevocable choice between domestic courts and international arbitration, and not in terms of a limitation on the various arbitral options. Thus, in *U.S.*

*International Investment Agreements* (2009), at 580, he writes, “This election-of-remedies clause, whereby an investor who submits a dispute to some form of dispute resolution other than investor-state arbitration may not later submit the same dispute to investor-state arbitration, has become known colloquially as the ‘fork in the road clause.’” In *Bilateral Investment Treaties: History, Policy, and Interpretation* (2010), at 441-442, Exhibit CLM-376, Professor Vandevelde writes, “Some BITs . . . discourage resort to local remedies. These BITs have an election of remedies clause, sometimes known as a ‘fork in the road’ clause, whereby an investor’s choice of one remedy precludes the invocation of another. For example, under this clause, a claim may not be submitted to investor-state arbitration if it previously has been submitted to local remedies.” *See also id.* at 436 (discussing BITs that give the investor choice of “multiple fora for international arbitration” without mention of any irrevocable choice of the investor among these fora.)\*

36. The uniform interpretation of scholars as to the scope of a fork in the road clause, a clause that certainly appears in the Ecuador-United States BIT, again confirms the ordinary meaning to be given to such clauses. Although states may draft treaties to provide a fork between different arbitral options, the presumption absent clear textual proof is that a fork in the road clause is limited to an irrevocable choice between domestic remedies and international arbitration (and, if also in the relevant treaty, other agreed mechanisms).

#### **4. The Context of the Treaty**

37. According to the Vienna Convention, the context of the Ecuador-United States BIT begins with the other provisions of the text. Vienna Convention, art. 31(2). With respect to the

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\* As for the interpretation of the 2004 Model BIT offered by Reinisch and Malintoppi, discussed in paragraph 28, they do not refer to the forum selection clause as a fork in the road clause.



particular issue in this case, it is significant that Article VI(4) of the BIT provides for the consent of the two states parties to “settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3.” This sentence, with its reference to paragraph 3, does not mention any limitations on that “choice,” e.g., it does not preclude that the investor might, under unusual circumstances, need to make a second “choice.” And the ordinary meaning of a “choice” does not include the notion of irrevocability. For example, a company’s choice to appoint a top manager pursuant to the investor’s rights under Article II(5) of the treaty (“engage top managerial personnel of their choice”) would not preclude the company from making another choice should that manager prove unqualified. It is further significant that Article VI(5) requires non-ICSID arbitrations to take place in a state party to the New York Convention, as this provision ensures that a non-ICSID award will be domestically enforceable; and that Article VI(6) provides for the finality and binding nature of the award and its enforcement by each state party. Both of these paragraphs are ultimately designed to ensure that the investor has recourse to effective international arbitration and enforcement of an award in its favor. They lend further support to the view that Article VI(3) does not close off the possibility of investor-state arbitration in unusual circumstances where one arbitration option becomes infeasible and the investor chooses a different arbitration option.

38. Beyond this text, no other documentation related to the fork in the road clause qualifies as context under Article 31(2) of the Vienna Convention, i.e., as either “(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;” or (b) “any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.” (The treaty does contain such a document in the exchange of letters

between the Ecuadoran Minister of Foreign Relations and the Acting United States Trade Representative dated 27 August 1993, though it does not concern the fork in the road clause.) The unilateral statements of the President of the United States to the Congress do not qualify as context, as they are not an agreement with Ecuador nor is there evidence that they have been accepted by Ecuador as an instrument related to the treaty.

39. Assuming, for the sake of argument, that the Message of Transmittal of the BIT from the President to the Congress (including the Letter of Submittal), Exhibit RLA-34, could be said to constitute such an instrument, the wording of that Message either reinforces the interpretation offered above or is, at best, inconclusive. In its explanation of Article VI, the Message states that Articles VI(2) and (3):

set forth the investor's range of choices of dispute settlement. The investor may make an exclusive and irrevocable choice to: (1) employ one of the several arbitration procedures outlined in the Treaty; (2) submit the dispute to procedures previously agreed upon by the investment and the host country government in an investment agreement or otherwise; or (3) submit the dispute to the local courts or administrative tribunals of the host country.

With respect to the arbitral venues listed in Article VI(3), the Message simply states that “the investor may choose between” ICSID, the ICSID Additional Facility, and arbitration under UNCITRAL rules. Given the care with which these Messages are prepared by experienced lawyers at the United States Department of State and the Office of the United States Trade Representative, the mention of an irrevocable choice in one context but not the other at a minimum cannot be said to support an interpretation of the treaty different from the plain meaning discussed above. Rather, it reinforces the ordinary meaning of Articles VI(2) and (3). The only evidence to the contrary is the use of the phrase “one of the several arbitration procedures” in the passage quoted above, but in my opinion this is counteracted by the contrast between the phrase “exclusive and irrevocable choice” used to describe Article VI(2) and the

mere reference that “the investor may choose” used to describe Article VI(3).

### **5. The Object and Purpose of the Treaty**

40. The object and purpose of the treaty at issue here is stated in the Preamble, namely “to promote greater economic cooperation” between the parties, to “stimulate the flow of private capital and the economic development of the Parties,” to “maintain a stable framework for investment and maximum effective utilization of economic resources,” and to “contribute to the well-being of workers in both Parties and promote respect for internationally recognized worker rights.” These purposes are stated at a high degree of generality. Because meaningful investor-state dispute resolution contributes to “stimula[ting] the flow of private capital” by foreign investors, a dispute resolution clause should be read to provide for meaningful access to arbitral fora. Precluding meaningful recourse to international arbitration absent a textual commitment to such a position does not further that purpose. As stated in *Murphy v. Ecuador* regarding the treaty at issue here, “One of the objectives of the Treaty is to give the investor access to a meaningful arbitration.” *Murphy Exploration & Production Company – International v. Republic of Ecuador*, PCA (UNCITRAL Rules), Partial Award on Jurisdiction, 13 November 2013, para. 188, Exhibit CLM-253.

41. Although this object and purpose never allows a tribunal to ignore the words of the treaty, it suggests that any interpretation of a dispute resolution clause should be consistent with those goals. As Professor Amerasinghe wrote with respect to ICSID jurisdiction, “[W]hile where jurisdiction is clearly excluded that fact should be recognized, in other cases a restrictive interpretation which would result in the ouster of jurisdiction should not be adopted where a reasonable approach could bring about the opposite result.” C.F. Amerasinghe, “The Jurisdiction

of the International Centre for the Settlement of Investment Disputes,” 19 *Indian Journal of International Law* 166, 168 (1979), Exhibit CLM-294. While it is possible that some limitations on an investor’s ability to consent to arbitration might be consistent with the object and purpose of the treaty (e.g., a ban on a second submission after a prior ruling on the merits), to interpret Article VI(3) to foreclose all realistic possibilities of arbitration would be inconsistent with the text’s object and purpose.

## **6. The *Travaux Préparatoires* of the Treaty**

42. Under Article 32 of the Vienna Convention, *travaux préparatoires* are a supplementary means of interpretation used either to confirm the meaning derived under Article 31 or to determine that meaning if Article 31 produces a meaning that is ambiguous, obscure, manifestly unreasonable, or absurd. While there is some disagreement among scholars and courts over the role for *travaux* with respect to “confirming” an interpretation based on text and context, there is no question that if a tribunal uses *travaux*, it must use them in the sense that term is understood under the Vienna Convention and authoritative interpretations of it.

43. In this context, *travaux préparatoires* must be, in the words of a leading treatise, materials “present in the negotiating process and available to the negotiators collectively.” Oliver Dörr, “Article 32: Supplementary means of interpretation,” in Oliver Dörr and Kirsten Schmalenbach, eds., *Vienna Convention the Law of Treaties: A Commentary* (2012), at 571, 575, Exhibit CLM-308. It must be “intrinsic to the negotiating process” and “have been in existence before the adoption of a treaty” (with the possible exception of reports of expert bodies like the International Law Commission). Yves le Bouthillier, “1969 Vienna Convention Article 32,” in Olivier Corten and Pierre Klein eds., *The Vienna Convention on the Law of Treaties: A*

*Commentary* (2011), vol. I, at 841, 852, 854, Exhibit CLM-300. *See also* Thomas W. Waelde, “Interpreting Investment Treaties: Experiences and Examples,” in Christina Binder et al. eds., *International Investment Law for the 21<sup>st</sup> Century: Essays in Honour of Christoph Schreuer* (2009), at 724, 778, Exhibit CLM-378 (“Caution is also required with unilateral statements, both in the conference process and through explanatory memoranda governments communicate to their legislatures before ratification.”).

44. The documentation that I have reviewed in this proceeding does not constitute *travaux* regarding the fork in the road clause or the specific issue of the investor’s choice among the listed arbitral fora. The lack of *travaux* is not surprising. Numerous issues are typically discussed by the two parties in a BIT negotiation, and documentation is rare. *See* Schreuer, “Diversity and Harmonization,” *supra*, at 138, Exhibit CLM-367.

45. Moreover, it is unlikely that the parties ever discussed either the possibility of any irrevocability of the investor’s choices under Article VI(3) or the particular issue of whether an investor, having indicated an intent to proceed with ICSID arbitration, can then initiate a case under the UNCITRAL rules after the withdrawal of the host state from the ICSID Convention. In my own experience as a negotiator of the Argentina-United States BIT, whose dispute resolution clauses are very similar to those in the Ecuador-United States BIT, the parties’ discussion of the fork in the road clause addressed its effect on (a) the requirements of some states that an investor exhaust local remedies (Argentina’s negotiating position for most of the discussions) and (b) the treaty’s requirement that the investor choose between domestic courts and international arbitration. While I was not privy to all conversations between the sides in that negotiation, based on my experience, the specific issue in this arbitration was never addressed.

In the end, there is simply no evidence that the parties to the Ecuador-United States BIT discussed this issue during their negotiations.

46. This absence of any *travaux* that would call into question the ordinary meaning of the treaty is legally quite significant. In the *Case Concerning Oil Platforms (Iran v. U.S.)*, Preliminary Objection, 1996 ICJ Rep. 803, Exhibit CLM-273, the ICJ interpreted an article of the 1955 Iran-United States Treaty of Amity, Economic Relations and Consular Rights according to its text and object and purpose. In considering an alternative interpretation (proposed by Iran), it placed significant weight on the absence of *travaux* in favor of that interpretation: “[T]he Court does not have before it any Iranian document in support of this argument [, and] the United States documents . . . show that at no time did the United States regard Article I as having the meaning now given to it by [Iran].” *Id.* para. 29. See also *Application of the Convention on the Elimination of All Forms of Racial Discrimination*, Preliminary Objections, 1 April 2011, para. 147, Exhibit CLM-279 (“the usefulness of the *travaux préparatoires* in shedding light on the meaning of Article 22 is limited by the fact that there was very little discussion of the expression [at issue in the case].”). As a result, the ordinary meaning of Articles VI(2) and (3) remains unaltered.

## **7. Conclusion Regarding the Interpretation of Articles VI(2) and (3)**

47. In light of the text, context, and object and purpose of the Ecuador-United States BIT, Articles VI(2) and (3) create a fork in the road only among domestic remedies, other agreed procedures, and international arbitration. There are no *travaux préparatoires* that suggest otherwise. The accepted methodology of the Vienna Convention on the Law of Treaties supports only one fork in the road, and not a blanket irrevocable choice by the investor among

different arbitral venues. As applied to this case, where an investor indicates an intent to proceed with ICSID arbitration but then later then chooses ad hoc arbitration under the UNCITRAL rules because the state party has subsequently withdrawn from ICSID, the BIT does not bar recourse to UNCITRAL arbitration. Such a conclusion does not mean that the investor has unfettered options under Article VI(3). It might well be the case that the BIT can be interpreted to preclude consent to a second arbitration forum in some situations, but this case does not require the tribunal to examine the full extent of those limitations.

#### **E. Professor Vandeveldel's Views on the History of BIT Negotiations**

48. Professor Vandeveldel's Opinion reviews the history of the United States BIT program. It offers an overall history of the program but not of this particular treaty. The views he offers are not *travaux préparatoires* and indeed would require a significant inferential leap in order to constitute *travaux* – namely, that the views of the United States were accepted by Ecuador during this particular negotiation. The Opinion does not demonstrate this eventuality. It is conceivable that some of the information in his opinion might constitute the “circumstances of [a treaty's] conclusion” under Article 32 of the Vienna Convention, though that term is generally limited to the factual or political background to the treaty. *See* Dörr, *supra*, at 578-79, CLM-308. A model BIT proposed by a state after the conclusion of a prior BIT may be a form of subsequent practice, although it would only be of one party. *See* Anthea Roberts, “Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States,” 104 *American Journal of International Law* 179, 221-22 (2010), Exhibit CLM-362.

49. Setting these difficulties aside and assuming, for the sake of argument, that the views of the United States are relevant as either *travaux*, circumstances or subsequent practice, it is

nonetheless important to note that the opinion that Professor Vandeveldel offers does not describe the actual views of the United States during the drafting, or subsequent to the entry into force, of the Ecuador-United States BIT *on the issue in this case*. Rather, it offers general views and certain inferences about United States policy on arbitral processes.

50. The first inference is that allowing an investor to submit a dispute to both ICSID and an ad hoc tribunal under the UNCITRAL rules “either simultaneously or consecutively, would have subverted the U.S. policy of avoiding multiple proceedings.” (Vandeveldel Opinion, para. 55.) This inference, which is not supported by any documentation or citation to other works, is unwarranted for two reasons. First, as Professor Vandeveldel emphasizes earlier in his Opinion, the key U.S. policy regarding “multiple proceedings” was for avoidance of proceedings *at both the domestic and international level over the same BIT claim* – thus the purpose of the fork in the road. *See* Vandeveldel Opinion, para. 47 (the 1992 model meant to “eliminate any doubt concerning whether an investor could submit a dispute both to local remedies and previously agreed procedures, if they were different”); *id.* para. 50 (the 1992 model meant to “foreclose[] . . . any argument . . . that a dispute might be submitted to both local remedies and previously agreed procedures” and that the United States sought “to make clear . . . that the election among remedies of (1) submission to local courts, (2) utilization of previously agreed procedures, and (3) investor-state arbitration was completely exclusive and irrevocable.”).

51. As Professor Vandeveldel says in his comprehensive 2009 treatise, “Although the 1992 model does not so state explicitly,” – though one should note that the Ecuador-United States BIT is explicit – “the intent is that the investor who chooses any of these three alternatives is foreclosed from utilizing either of the other two,” with no mention at all that the intent was to confine the investor irrevocably and in all circumstances to one arbitral venue within one of the



three alternatives for dispute settlement. *U.S. International Investment Agreements, supra*, at 588, Exhibit CLM-375. Indeed, in describing the investor’s choice of arbitral mechanisms, his treatise states that the “1992 model *specifies* [emphasis added] arbitration before ICSID, arbitration before the ICSID Additional Facility. . . . ad hoc arbitration using the UNCITRAL Arbitration Rules, or arbitration before any other institution . . . .”, *id.* at 589, while never stating – despite the care and comprehensiveness of the treatise – that these choices are, as asserted in the Opinion, irrevocable in all circumstances.

52. Second, even if the United States policy to avoid multiple proceedings extended to multiple arbitral proceedings – a proposition for which there is no evidence – it is equally unwarranted to assume that the United States would have wanted to limit its investors to one irrevocable choice *in all instances*. It is certainly possible that the United States might have wished to prevent simultaneous submission of the identical BIT dispute to different arbitral bodies – although the BIT says nothing to prevent this possibility – or even that the United States might have wanted to limit the investor to one arbitral decision on the merits – although again, the BIT says nothing to prevent this possibility. But it simply does not follow from United States policy of avoiding multiple proceedings that it would favor denying the investor any remedy where, once it has chosen the “prong” of international arbitration, it concludes that its original preferred arbitral avenue is no longer the best place to litigate because of expected jurisdictional obstacles raised by the host state. Just as it is incorrect to assume that that United States policy against multiple proceedings would be undercut even by simultaneous proceedings in domestic and international fora of different claims – a route for investors now well accepted by international arbitral panels (*see, e.g., Occidental Petroleum*, Exhibit CLM-256) – it is incorrect to assume that United States policy would be undercut by the possibility that an investor might

need to have recourse to a second arbitral venue after concluding that the case might not reach the merits in the first venue on jurisdictional grounds that the host state has just created. Such an inference does not follow from the basic thrust of U.S. policy.\*

53. The second inference is that the insertion of the words “under one of the following alternatives” into the 1994 Model BIT – identical language distinguishes the BIT with Ecuador from the 1992 Model BIT – “was to emphasize the exclusivity and irrevocability of the election among local remedies, previously agreed procedures and investor-state arbitration and NOT to indicate, by any kind of negative implication, that the choice among methods of investor-state arbitration under the BIT was not exclusive and irrevocable.” Vandeveldel Opinion, para. 57. In my view, this inference is unsupported, illogical, and ultimately irrelevant. It is unsupported because, as Professor Vandeveldel states, the key concern of the United States was the possibility of simultaneous or subsequent domestic-international dispute settlement. It is illogical because if the choice among arbitral remedies were also irrevocable, then it does not make sense that the drafters of the 1994 Model BIT would clarify the fork in the road on domestic vs. international remedies, but not the supposed fork in the road among international arbitral venues. Indeed, in the discussion of the Ecuador-United State BIT in *U.S. International Investment Agreements*, *supra*, at 644, Exhibit CLM-375, Professor Vandeveldel writes, “This phrase [“under one of the following alternatives”] was intended to make clear that the investor may choose only one of the alternatives [i.e., the three listed in Article VI(2)],” with no suggestion of any such limited choice in Article VI(3). And it is irrelevant because the text, whose ordinary meaning is paramount, indeed makes a distinction between the fork in the road and the investor’s menu of arbitral fora,

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\* Even if the United States wanted to foreclose multiple avenues of arbitration in all circumstances, an interpretation of the BIT that allows an investor to *consent to the submission* of a dispute to more than one forum does not mean that the investor will, or may under the treaty, actually *submit* the dispute to more than one forum simultaneously.

not by a silent or hidden “negative implication,” but rather, as discussed above, by a use of different words in Articles VI(2) and (3).

54. Professor Vandeveldelde’s interpretation thus deprives the words “under one of the following alternatives” of their *effet utile*, as discussed in paragraphs 17-22 above. For the same reasons, the claim in paragraph 59 of Professor Vandeveldelde’s Opinion that “the intention of the United States in the 1992 model was that an investor could elect to consent to only one of the forms of investor-state arbitration identified in the election of remedies provisions at Article VI(3)(a)” is unsupported and irrelevant to an interpretation of the Ecuador-United States BIT.

#### **F. The Legal Consequences of the Claimant’s June 8, 2009, Notice of Dispute for Purposes of Article VI(3) of the Ecuador-United States BIT**

55. Beyond the question of the fork in the road, a second issue of relevance to this case is whether Claimant ever validly consented to ICSID jurisdiction in the first place. In particular, if the BIT is read to include a fork in the road among arbitral options, it will be essential to determine if the Claimant took that fork through valid consent to the submission of the dispute to ICSID.

##### **1. Consent to International Arbitration**

56. Consent is the keystone to investor-state dispute resolution through international arbitration. As the Tribunal stated in *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Arbitral Award, 2 June 2000, Exhibit CLM-267:

The essential constituent elements which constitute the institution of arbitration are the existence of a conflict of interests, and an agreement expressing the will of the parties or a legal mandate, on which the constitution of an Arbitral Tribunal is

founded. This assertion serves to confirm the importance of the autonomy of the will of the parties, which is evinced by their consent to submit any given dispute to arbitration proceedings. Hence, it is upon that very consent to arbitration given by the parties that the entire effectiveness of this institution depends.

*Id.* para. 16. The “autonomy of the will of the parties” referred to above means that the consent must be validly given by both of the parties, the host state and the investor. This essential element of arbitration is also referred to as “perfection” of the agreement to arbitrate. *See* Andrea Marco Steingruber, *Consent in International Arbitration* (2012), at 206, Exhibit CLM-371 (“Once the arbitration agreement is perfected through the acceptance of the offer contained in the treaty, it remains in existence. . . .”). The investor’s consent “must be expressed in some positive way and cannot be substituted by the BIT or simply assumed.” *Id.* at 207. Furthermore, the parties to a BIT may condition the consent of the investor on certain requirements. If a treaty contains such conditions, then the party’s choice to consent to an arbitral process is valid if and only if it meets the conditions. *See Waste Management*, para. 17.

57. The concept of valid consent is also evident from the references to “consent” in the ICSID Convention, in particular in Article 25, which requires the investor’s consent to jurisdiction, and Article 26, which gives ICSID priority over other arbitral fora once consent has been given. In the leading commentary on the ICSID Convention, Professor Schreuer states that Article 26’s grant of priority to ICSID jurisdiction over non-ICSID jurisdiction applies “in the face of a *valid* submission to ICSID jurisdiction.” Christoph Schreuer, *The ICSID Convention: A Commentary* (2d ed. 2009), at 381, Exhibit CLM-386 (emphasis added).

## 2. Consequences of a Failure by the Investor to Consent Validly to International Arbitration

58. If an investor fails to consent validly to arbitration as required under a BIT, a tribunal may find that it lacks jurisdiction or competence (the two terms are often used interchangeably) over the investor's claim. *See, e.g., Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, para. 340, Exhibit CLM-233; *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, 15 December 2010, para. 161(c), Exhibit CLM-252; *Kiliç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award, 2 July 2013, para. 6.3.15, Exhibit CLM-246. (*But see, e.g., Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, paras. 585-91, Exhibit RLA-106, (holding that the failure of an investor to follow certain conditions specified in the treaty does not deprive the tribunal of jurisdiction)).

59. A second consequence if an investor has not validly consented to the jurisdiction of an arbitral tribunal (regardless of whether the investor actually instituted proceedings there, resulting in a finding of lack of jurisdiction), is that the investor is free to consent (again) and to pursue arbitral proceedings, whether within the same arbitral forum or within another one. With respect to the ability of an investor to bring a case in the same venue, numerous ICSID tribunals have found that the investor's failure to respect a so-called "cooling off" period does not deprive the tribunal of jurisdiction on the theory that, if they denied jurisdiction, the investor would be free to initiate proceedings again in ICSID, and that a denial of jurisdiction would serve only to delay the proceedings. *See, e.g., SGS v. Pakistan*, para. 184, Exhibit CLM-261; *Bayindir Insaat*

*Turizm Ticaret ve Sanayi A. Ş v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, para. 100, Exhibit CLM-1. Those decisions necessarily assume that the investor may bring the case again in ICSID if the tribunal denied jurisdiction based on invalid consent due to failure to meet the conditions to consent. *See also* Schreuer, “Travelling the BIT Route,” *supra*, at 239, Exhibit CLM-369.

60. As for proceedings in a different arbitral venue, in *Tradex Hellas S.A. (Greece) v. Republic of Albania*, ICSID Case No. ARB/94/2, Decision on Jurisdiction, 24 December 1996, reported at 14 *ICSID Review* 161 (1999), Exhibit CLM-265, the Tribunal interpreted Albania’s consent to ICSID jurisdiction in a 1993 domestic law to cover the claim at issue in part because to deny ICSID jurisdiction would force the investor to initiate arbitration under the UNCITRAL rules pursuant to Albania’s consent to such arbitration in a 1992 law, and Albania had not indicated whether it would contest jurisdiction of arbitration under the UNCITRAL rules. It wrote:

Although there is, of course, no legal duty of Albania to express itself in this ICSID procedure as to whether it would accept or also object to jurisdiction of an arbitral tribunal under the UNCITRAL Rules should Tradex commence such a procedure, by choosing not to express itself on this question, Albania leaves the option open that again it would contest jurisdiction in such a procedure. It would seem to the Tribunal that the availability of at least one of these two procedural means is a major aspect of the protection of foreign investors. Interpreting, as done above by the Tribunal, the submission to ICSID jurisdiction in . . . the 1993 Law to cover also this dispute for which UNCITRAL jurisdiction has not been accepted by Albania, would, therefore, also be consistent with the express statements by Albania in favour of investors’ protection and ICSID arbitration and the legislative pattern in its foreign investment laws in favour of investors’ protection. Furthermore, it would save not only Tradex, but also Albania, the additional considerable efforts and costs that would be necessary for a new procedure under the UNCITRAL Rules regarding the same dispute.

*Id.* at 195.

61. The Tribunal’s opinion underscores that a state’s commitment to investor protection, whether through a domestic law or a BIT, requires giving the investor access to *at least one international arbitral forum* if the state has consented to such international arbitral options and the investor chooses to use one of them (and meets the conditions to consent). Although this case does not involve a BIT, it makes clear that invalid consent due to failure to meet the conditions precedent to the jurisdiction of one arbitral venue allows the investor to make a claim in another arbitral venue to whose jurisdiction the state has already consented.

62. It is noteworthy that this consequence of lack of valid consent garnered the unanimous support of the tribunal in *Murphy v. Ecuador*. The tribunal agreed that Murphy’s consent to ICSID jurisdiction was invalid for failing to respect the “cooling off period” in the BIT, thereby allowing Murphy to proceed with UNCITRAL arbitration. *See Murphy Exploration & Production Company – International v. Republic of Ecuador*, PCA (UNCITRAL Rules), Partial Award on Jurisdiction, 13 November 2013, paras. 203-04; sep. op. Abi Saab para. 26, Exhibit CLM-253.

### **3. Application to the Situation of Claimant MSDIA**

63. In this case, MSDIA’s June 8, 2009, letter (“June 8 Letter”), Exhibit C-249, was obviously first a notice by the Claimant to Ecuador of the existence of an investment dispute. *See June 8 Letter*, at 1. With respect to consent to ICSID jurisdiction, if the Ecuador-United States BIT is interpreted (*contra* the argument above) to have a fork in the road among arbitral options, then the legal effect of the letter is two-fold. First, it indicates the investor’s consent to ICSID jurisdiction for the sole purpose of preserving the Claimant’s rights under Article 72 of the ICSID Convention in case of Ecuador’s withdrawal from the ICSID Convention. *See June 8*

Letter, at 2 (“serves to perfect ‘consent to the jurisdiction of the Centre’ for purposes of Article 72 of the ICSID Convention”). Second, it notifies Ecuador that Claimant’s consent to ICSID arbitration is conditioned on the possibility of initiating arbitration in any of the fora specified in Article VI(3)(a). *See id.* (“MSDIA reserves its right at any time to select any form of arbitration set forth under Article VI(3)(a) of the BIT.”).

64. Thus, if there were a second fork in Article VI(3), requiring the investor to make an exclusive and irrevocable choice of just one arbitral forum, then, given these two conditions explicitly stated in the letter, Claimant has not made such a choice regarding ICSID jurisdiction. In other words, if the BIT were interpreted to permit an investor to choose only one option – to quote Article VI(3)(a) of the BIT, “to consent in writing to the *submission of the dispute for settlement* by binding arbitration” to one and only one of the four arbitral options listed – then the June 8 Letter does not provide that consent regarding ICSID and ICSID alone. As pointed out in paragraph 56 above, one cannot simply assume or construct the investor’s consent to a particular mode of arbitration, especially if the treaty is read to permit only one mode. Thus, as indicated in paragraphs 59-62, in the absence of valid consent, MSDIA was free to proceed with arbitration in another forum.\*

#### **4. Professor Vandeveldel’s Views on the Validity of MSDIA’s Consent**

65. Professor Vandeveldel’s Opinion addresses the issue of MSDIA’s consent in two paragraphs. His assertion in paragraph 68 that Claimant’s choice is irrevocable has already been addressed above in paragraphs 16-54 above. In paragraph 69, he rejects the view that Claimant’s

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\* Another possible ground for finding a lack of valid consent in the June 8, 2009, letter is the BIT’s requirement in Article VI(3)(a) of the expiration of a six month “cooling off period” from the date of dispute before the investor may consent to arbitration. As noted in paragraph 62, this was one of the bases for rejecting Ecuador’s objections to UNCITRAL jurisdiction in *See Murphy Exploration & Production Company – International v. Republic of Ecuador*, PCA (UNCITRAL Rules), Partial Award on Jurisdiction, 13 November 2013, Exhibit CLM-253.



consent to ICSID jurisdiction is only an attempt at conditional consent for four reasons.

66. First, Professor Vandeveldelde says the text of the letter does not condition Claimant's consent. Yet as noted above, the letter is intended primarily "to perfect 'consent to the jurisdiction of the Centre' *for purposes of Article 72 of the ICSID Convention*" (emphasis added), and it says expressly that "MSDIA reserves its right at any time to select any form of arbitration [in the BIT]." This limitation of the scope of the consent and the reservation of rights are conditions on MSDIA's consent, even if the letter does not use that word.

67. Second, Professor Vandeveldelde asserts that the choice of the word "perfect" ("This letter serves to perfect 'consent to the jurisdiction of the Centre' for purposes of Article 72 of the ICSID Convention") means that "no unsatisfied conditions remained." But as just pointed out, the end of that same sentence states the limited purpose of the consent. The word "perfect" serves to do what Professor Schreuer stated in his treatise when he addressed the meaning of Article 72: "[T]he reference to consent in Art. 72 can only refer to perfected consent. Consent to jurisdiction is perfected only after its acceptance by both parties." *See Schreuer, The ICSID Convention: A Commentary, supra*, at 1280, Exhibit CLM-368; Christoph Schreuer, "Denunciation of the ICSID Convention and Consent to Arbitration," in Michael Waibel et al. (eds.), *The Backlash Against Investment Arbitration: Perceptions and Reality* (2010), at 353, 363-64, Exhibit CLM-366.

68. Schreuer's interpretation of Article 72 is not universally shared, *see* Steingruber, *supra*, at 219-220, Exhibit CLM-371, as it can be argued that a host state withdrawing from the ICSID Convention may still be sued there on claims arising from a BIT in which it consented to ICSID jurisdiction, regardless of the date of the claimant's consent. But a prudent claimant would not wish to bet that a tribunal would regard the claimant's lack of consent before the

state's withdrawal from ICSID as legally irrelevant under Article 72. In this case, Claimant, aware of the possibility that Ecuador would denounce the ICSID Convention – which it did less than a month after the date of Claimant's letter – was seeking to preserve the possibility of ICSID jurisdiction. However, it was not consenting to the exclusive jurisdiction of ICSID if the BIT is interpreted as permitting consent to only one arbitral forum. Whatever legal effects the letter may have had for purposes of the ICSID Convention are distinct from the question of whether the letter constitutes valid consent under the BIT.

69. Third, Professor Vandeveld asserts that because Claimant's letter states on page 2 that "these facts give rise to a claim that Ecuador has consented to resolve through ICSID," therefore "the letter describes the consent as an accomplished fact." But that sentence quoted from the letter merely restates that Ecuador has already consented to ICSID jurisdiction through the BIT. It says nothing about the Claimant's consent for purposes of the BIT.

70. Fourth, Professor Vandeveld asserts that the phrase in the fourth paragraph of Claimant's letter whereby MSDIA "hereby accepts the offer made by the Republic of Ecuador" to submit disputes to ICSID means that Claimant could not have been making a counter-offer or somehow conditioning its consent. This would be true only if that sentence were read in isolation. Rather, the following two sentences of that paragraph make clear what Claimant intended – namely the two points I have noted in paragraph 63 above. All the sentences of the letter should be read as a whole. As the International Court of Justice has said in a similar context, in interpreting a state's declarations of consent to the compulsory jurisdiction of the Court under Article 36(2) of the ICJ Statute:

The Court recalls that the interpretation of declarations made under Article 36, paragraph 2, of the Statute, and of any reservations they contain, is directed to establishing whether mutual consent has been given to the jurisdiction of the

Court. It is for each State, in formulating its declaration, to decide upon the limits it places upon its acceptance of the jurisdiction of the Court . . . Conditions or reservations thus do not by their terms derogate from a wider acceptance already given. Rather, they operate to define the parameters of the State's acceptance of the compulsory jurisdiction of the Court. There is thus no reason to interpret them restrictively. All elements in a declaration under Article 36, paragraph 2, of the Statute which, read together, comprise the acceptance by the declarant State of the Court's jurisdiction, are to be interpreted as a unity, applying the same legal principles of interpretation throughout.

*Fisheries Jurisdiction Case (Spain v. Canada)*, 1998 ICJ Rep. 432, para. 44, Exhibit CLM-277.

See also *Anglo-Iranian Oil Co. Case*, 1952 ICJ at 104-07, Exhibit CLM-270 (focusing on “intention” of Iran in its interpretation of Iran's 36(2) declaration).

71. Thus, when read as a whole, Claimant's letter of June 8, 2009, cannot be read as a valid consent to the exclusive jurisdiction of ICSID. If there were a second fork in the road under Article VI(3), MSDIA did not take that fork in its June 2009 letter. As a result, MSDIA was free to consent to the submission of the dispute to arbitration under Article VI(3) in any forum. MSDIA did so in its Notice of Arbitration of 29 November 2011, where it stated unambiguously in paragraph 23, “MSIDA therefore elects to consent to the submission of the dispute for settlement by binding arbitration [under the UNCITRAL rules].” In the absence of a provision in the treaty precluding a further choice even if the initial consent is found to be invalid – e.g., a clause stating that the investor “may choose to consent once, regardless of the ultimate legal validity of that consent,” to the various forms of arbitration – such a new choice to consent is permissible.

## **Conclusion**

72. In the end, to read the phrase “[the investor] may choose to consent” as foreclosing any further choice by the investor if the host state withdraws from ICSID while also arguing, as

does Ecuador, that ICSID lacks jurisdiction due to that withdrawal (*see Murphy v. Ecuador*, para. 164, Exhibit CLM-253), results in a denial to the investor of recourse to *any* international arbitration of the merits of its claim. That reading would deprive Articles VI(2) and (3) of their *effet utile*. It would mean that the investor, having chosen the path at the fork in the road designed to lead to a decision on his claim in international arbitration, ends up on a third path – one to no decision on the merits at all.

73. The interpretation of the treaty that permits the Claimant to consent to UNCITRAL arbitration is particularly warranted in this situation, where the legal posture of the Respondent has changed significantly due to its own withdrawal from ICSID jurisdiction and insistence that ICSID is no longer available. Thus, the interpretation suggested by Ecuador, to wit, that the Claimant must return to ICSID, which Ecuador also refuses to accept has jurisdiction, is an unreasonable interpretation of the BIT, and unreasonable interpretations or those not in good faith are precluded by the Vienna Convention (*id.* arts. 31(1), 32). *See Murphy v. Ecuador*, para. 197, Exhibit CLM-253 (calling Ecuador’s interpretation “manifestly absurd and unreasonable” under the Vienna Convention.) Rather, in light of the lack of a second fork in the road, the Claimant’s lack of valid consent to the exclusive jurisdiction of ICSID, and the circumstances of this case, nothing in the BIT or Claimant’s June 2009 letter states or even suggests that, in the unusual circumstances of this case, the investor is precluded from initiating UNCITRAL arbitration.



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Steven R. Ratner  
Ann Arbor, Michigan  
1 August 2014

## **Annex 1**

### **Curriculum Vitae of Professor Steven R. Ratner**

STEVEN RICHARD RATNER

Home Address

340 Rock Creek Drive  
Ann Arbor, Michigan 48104  
(734) 761-7752

Work Address

University of Michigan Law School  
625 South State Street  
Ann Arbor, Michigan 48109  
(734) 647-4985 (734) 763-9375 (fax)  
sratner@umich.edu

Employment

- Currently: Bruno Simma Collegiate Professor of Law, University of Michigan Law School
- 2008-09: Consultant on International Law, International Committee of the Red Cross, Geneva  
Research Fellow, Institut de Hautes Études Internationales et du Développement,  
Geneva
- 2004-09: Professor of Law, University of Michigan Law School
- 1999-2004: Albert Sidney Burleson Professor in Law, University of Texas School of Law
- Fall 2000: Visiting Professor of Law, Columbia Law School
- 1998-1999: Fulbright Senior Scholar, OSCE Regional Research Program  
Asser Research Fellow, T.M.C. Asser Institute, The Hague, Netherlands
- 1997-1999: Professor of Law, University of Texas School of Law
- 1993-1997: Assistant Professor of Law, University of Texas School of Law
- 1992-1993: International Affairs Fellow, Council on Foreign Relations  
Professor (Adjunct) of Law, Benjamin N. Cardozo School of Law, Yeshiva University
- 1986-1993: Attorney-Adviser, Office of the Legal Adviser, United States Department of State  
(Special Assistant to the Legal Adviser, Attorney-Adviser for East Asian and  
Pacific Affairs and for Economic, Business, and Communications Affairs)

Education

Yale Law School, J.D., 1986  
Institut Universitaire de Hautes Études Internationales, Geneva, 1982-83, M.A. (Diplôme, mention  
très bien), 1993  
Princeton University, A.B., 1982, magna cum laude; Major: Woodrow Wilson School of Public and  
International Affairs

### Honors and Distinctions

Adviser, American Law Institute Restatement (4<sup>th</sup>) of the Foreign Relations Law of the United States, 2013-present  
 Member, Advisory Committee on International Law, U.S. Department of State, 2009-present  
 Member, Board of Editors, American Journal of International Law, 1998-2008  
 Fulbright Scholarship, United States Information Agency, 1998-99  
 Certificate of Merit, American Society of International Law, 1998 (for best academic book)  
 Finalist, Robert W. Hamilton Annual Authors' Award, University of Texas at Austin, 1997  
 Francis Deák Prize, American Society of International Law, 1994 (for best article by younger author)  
 Council on Foreign Relations International Affairs Fellow, 1992-93  
 Superior Honor Award and Group Superior Honor Award, U.S. Department of State, 1989 and 1991  
 Daniel M. Sachs Graduating Scholarship, Princeton University, 1982

### Academic Expertise and Teaching Interests

International law	Foreign investment
International human rights	International humanitarian law
United Nations and international organizations	Ethnic and territorial conflict
Moral philosophy and international law	International criminal law

### Professional Activities

Adviser, American Law Institute Restatement (Fourth) of the Foreign Relations Law of the United States, 2013-present  
 Member, Advisory Committee on International Law, U.S. Department of State, 2009-present  
 Legal consulting on foreign investment arbitration, Alien Tort Claims Act, territorial status issues  
 Member, United Nations Panel of Experts for Accountability in Sri Lanka, 2010-2011  
 Academic expert for the Special Representative of the UN Secretary-General for Business and Human Rights, 2005-09  
 Member, Board of Editors, American Journal of International Law, 1998-2008  
 Expert on the Mediation Roster, Mediation Support Unit, United Nations Department of Political Affairs  
 Academic expert for the Netherlands Ministry of Foreign Affairs and Leiden University project on Counter-terrorism Strategies, Human Rights, and International Law, 2008-2011  
 Academic expert on the law of occupation and implementation of humanitarian law, International Committee of the Red Cross, Geneva, 2008-2012  
 Member, Multilateral Issues Team, Barack Obama for President campaign, 2007-2009

Academic advisor, United Nations Secretary-General's Policy Working Group on the United Nations and Terrorism, 2002

Member, United Nations Group of Experts for Cambodia Pursuant to General Assembly Resolution 52/135, 1998-1999

Member, Group of Experts of the Organization for Security and Cooperation in Europe High Commissioner on National Minorities to prepare recommendations on minority participation in public life, 1998-1999

Independent expert for the Organization for Security and Cooperation in Europe for advising government of Latvia on language issues, 1999

Consultant to United States Department of State on bringing Khmer Rouge leaders to justice (under the Cambodian Genocide Justice Act of 1994), 1995

Guest commentator on PBS News Hour, Fox News O'Reilly Factor, Australian TV's Lateline and Dateline, Court TV, CNN International, National Public Radio, Public Radio International, BBC Radio, Voice of America, local radio and TV, PolitiFact.com

Consultant to editors of The Crimes of War, handbook for news reporters and the public on war crimes, and the Crimes of War Project, on-line resource on international humanitarian law

Manuscript or proposal referee for Oxford University Press, Cambridge University Press, United States Institute of Peace, Radcliffe College, Carnegie Commission on Preventing Deadly Conflict, Israel Science Foundation, Ethics, World Politics, Law and Society Review, Journal of Conflict Resolution, American Journal of Political Science, Global Governance, International Theory, International Organization, British Journal of Political Science, European Journal of International Law, Review of International Studies

Member, External Review Team, Jack and Mae Nathanson Centre on Transnational Human Rights, Crime and Security, York University (Toronto), 2014

Visiting Fellow, Australian National University College of Law, 2013

Visiting Professor, Università Commerciale Luigi Bocconi, 2013

Visiting Professor, University of Haifa Faculty of Law, 2010-2011

Visiting Professor, University of Tokyo School of Law, 2006

International Visiting Scholar, University of Melbourne Faculty of Law, 2001, 2005

Member, International Board, Concord Research Center for the Interplay between International Norms and Israeli Law, School of Law, College of Management, Rishon Le Zion, Israel



Member, Executive Council, American Society of International Law, 1998-2001

Founder and Faculty Director, University of Michigan Law School Geneva International Fellows Program

Co-Founder and Director, LL.M. Program in Latin American and International Law, University of Texas School of Law, 1999-2000

Guatemala Legislative Modernization Program Coordinating Committee, University of Texas at Austin, 1997-2001

Editorial Advisory Board and Faculty Advisor, Texas International Law Journal, 1997-2004

Faculty Advisor, University of Texas School of Law internship program at the International Criminal Tribunals for the Former Yugoslavia and for Rwanda, 1996-2004

Executive Committee, Board of Advisors, Daniel Sachs Graduating Scholarship, Princeton University

Board of Trustees, Temple Beth Emeth, Ann Arbor, Michigan, 2007-08, 2009-13

Avocations: banjo, skiing, running, hiking

Languages: fluent in French, proficient in Spanish

### Publications

#### BOOKS

**The Thin Justice of International Law** (Oxford: Oxford University Press, forthcoming 2015)

**International Law: Norms, Actors, Process, Third Edition** (New York: Aspen Publishers, 2010, 1044 pp.) (with Jeffrey Dunoff and David Wippman)

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**Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy, Third Edition** (Oxford: Oxford University Press, 2009, 536 pp.) (with Jason Abrams and James Bischoff )

**International Law: Norms, Actors, Process, Second Edition** (New York: Aspen Publishers, 2006, 1115 pp.) (with Jeffrey Dunoff and David Wippman)

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**The Methods of International Law** (Washington: American Society of International Law, 2004, 271 pp.) (editor with Anne-Marie Slaughter)

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The Security Council and International Law, in David Malone ed., **The UN Security Council: From the Cold War to the 21st Century** (Denver: Lynne Rienner Publishers, 2004), at 591-605

Comments on Chapters 1 and 2, in Michael Byers and Georg Nolte, eds., **United States Hegemony and the Foundations of International Law** (Cambridge: Cambridge University Press, 2003), at 101-08

Accountability for the Khmer Rouge: A (Lack of) Progress Report, in M.Charif Bassiouni, ed., **Post-Conflict Justice** (Ardsey: Transnational Publishers, 2002), at 613-21

Democracy and Accountability: The Criss-Crossing Paths of Two Emerging Norms, in Gregory Fox and Brad Roth, eds., **Democracy and International Law** (Cambridge: Cambridge University Press, 2000), at 449-90

Ethnic Conflict and Territorial Claims: Where Do We Draw a Line?, in David Wippman, ed., **International Law and Ethnic Conflict** (Ithaca: Cornell University Press, 1998), at 112-27

Peacemaking, Peacekeeping, and Peace Enforcement: Conceptual and Legal Underpinnings of the U.N. Role, in Selig S. Harrison and Masashi Nishihara, eds., **UN Peacekeeping: Japanese and American Perspectives** (Washington, D.C.: Carnegie Endowment for International Peace, 1995), at 17-30

The United Nations in Cambodia and the New Peacekeeping, in Daniel Warner, ed., **New Dimensions of Peacekeeping** (Dordrecht: Martinus Nijhoff, 1995), at 41-67

The United Nations in Cambodia: A Model for Resolution of Internal Conflicts?, in Lori F. Damrosch, ed., **Enforcing Restraint: Collective Intervention in Internal Conflicts** (New York: Council on Foreign Relations Press, 1993), at 241-73

## OTHER WORKS

Why a UN probe of Sri Lanka would spark new hope for reconciliation, **The Globe and Mail** (Toronto), March 25, 2014 (with Marzuki Darusman and Yasmin Sooka)

Should ICRC Reports on Detainee Visits be Turned Over to Military Commission Defense Counsel?, **Just Security** Website, November 12, 2013

Beyond Courtroom Arguments: Why International Lawyers Need to Focus More on Persuasion, **EJILTalk!** Website, September 10-11, 2013 (in two parts)

Book Review, Targeted Killings: Law and Morality in an Asymmetrical World (edited by Finkelstein, Ohlin and Altman, 2012), 107 **American Journal of International Law** 274-78 (2013)

Revisiting Sri Lanka's Bloody War, **International Herald Tribune**, March 2-3, 2012, at 6 (with Marzuki Darusman and Yasmin Sooka)

**Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka** (2011) (report to United Nations Secretary-General) (with Marzuki Darusman and Yasmin Sooka)

The Law of Occupation and UN Administration of Territory: Mandatory, Desirable, or Irrelevant?, background paper prepared for International Committee of the Red Cross expert meeting on Occupation and other forms of Administration of Foreign Territory, December 2008

Administration of territories by the United Nations: Is there room for international humanitarian law?, in **International Humanitarian Law, Human Rights, and Peace Operations** (San Remo: International Institute of Humanitarian Law Roundtable Proceedings, 2008), at 169-74

Book Review, Lawless World (by Philippe Sands, 2005), 100 **American Journal of International Law** 746-51 (2006)

Memo to lawmakers: Consider our values, **The Christian Science Monitor**, August 8, 2006, at 9

Self-Defense and the World After September 11: Implications for UN Reform, in **Building a New Role for the United Nations: The Responsibility to Protect** (Madrid: Fundación para las Relaciones Internacionales y el Diálogo Exterior Working Paper, 2005), at 6-8

Book Review, Human Rights: Between Idealism and Realism (by Christian Tomuschat, 2003), 115 **Ethics** 633-38 (2005)

Introductory Remarks on Empirical Work in Human Rights, 98 **Proceedings of the American Society of International Law** 197-98 (2004)

Failure of U.S. leaders led to Abu Ghraib, **Detroit News**, September 1, 2004, at 13A

Understanding and Following the Rules of War, **The Austin American-Statesman**, June 19, 2004, A13

Make Iraq A Global Citizen Again, **International Herald Tribune**, May 20, 2003, at 9

**International Law: Norms, Actors, Process** coursebook web site, <http://sitemaker.umich.edu/drwcasebook/home> (updated periodically) (with Jeffrey Dunoff and David Wippman)

Without better proof, U.S. will lack allies in Iraq war, **Dallas Morning News**, September 6, 2002, at 21A

**Capacity-Building to Fight Terrorism: Finding the UN's Comparative Advantage** (2002), study submitted to the UN Secretary-General's Policy Working Group on the United Nations and Terrorism

Symposium, The Multinational Enterprise as Global Corporate Citizen, 21 **New York Law School Journal of International and Comparative Law** 1 (2001) (with others)

Book Review, Unspeakable Truths: Confronting State Terror and Atrocity (by Priscilla B. Hayner, 2001), 95 **American Journal of International Law** 994-97 (2001)

U.N. can't impose a new government on Afghanistan, **Dallas Morning News**, October 24, 2001, at 21A

Terrorism and the Laws of War – September 11 and its Aftermath: Expert Analysis, **Crimes of War Project** web site, [www.crimesofwar.org](http://www.crimesofwar.org). (2001)

The Bob Kerrey Case: Interpreting the Rules of Engagement in Vietnam: Expert Analysis, **Crimes of War Project** web site, [www.crimesofwar.org](http://www.crimesofwar.org). (2001)

Challenges to Fragile Democracies in the Americas: Legitimacy and Accountability, 36 **Texas International Law Journal** 359-63 (2001)

The Israeli-Arab Conflict and the Laws of War: Expert Analysis, **Crimes of War Project** web site, [www.crimesofwar.org](http://www.crimesofwar.org) (2000)

The Pinochet Precedent: Who Could be Arrested Next?: Expert Analysis, **Crimes of War Project** web site, [www.crimesofwar.org](http://www.crimesofwar.org) (2000)

Peacebuilding and Past Human Rights Abuses: Toward a Strategy of Accountability, 5 **International Peacekeeping** 75-80 (1999)

Current Development: The United Nations Group of Experts for Cambodia, 93 **American Journal of International Law** 948-53 (1999)

Memorandum of Law in Support of Concluding That Apartheid is a Crime Against Humanity Under International Law, reprinted in 20 **Michigan Journal of International Law** 267-300 (1999) (with 20 other law professors)

Quietly preventing conflict, **The Christian Science Monitor**, Aug. 18, 1999, at 9

Categories of War Crimes, Crimes Against Peace, Aggression, Apartheid, and Internal vs. International Conflict, in Roy Gutman and David Rieff, eds., **The Crimes of War: What the Public Should Know** (New York: W.W. Norton, 1999)

**Report of the Group of Experts for Cambodia pursuant to General Assembly Resolution 52/135** (1999) (report to United Nations Secretary-General) (with Ninian Stephen and Rajssoomer Lallah), UN Document No. A/53/850

The Relationship between the International Criminal Court and the Security Council: An Appraisal of the United States Position, **Cooperazione fra Stati e Giusizia Penale Internazionale** 237-43 (Societa Italiana di Diritto Internazionale ed., 1999)

Book Review, Possession Contestée et Souveraineté Territoriale (by Marcelo G. Kohen, 1997), 92 **American Journal of International Law** 782-84 (1998)

The Genocide Convention After Fifty Years, 92 **Proceedings of the American Society of International Law** 1-3 (1998)

Evaluating Peacekeeping Missions, 41 **Mershon International Studies Review** 151-65 (1997) (with Paul Diehl, Robert Johansen, William Durch, and A. Betts Fetherston)

Book Notice, International Rules: Approaches from International Law and Relations (Robert Beck et al. eds. 1996), 91 **American Journal of International Law** 220-21 (1997)

The Attempt to bring the Perpetrators of the Cambodian Genocide to Trial, in Albert J. Jongman ed., **Contemporary Genocides: Causes, Cases, Consequences** (Leiden: PIOOM, 1996) (with Jason S. Abrams)

Criminal Accountability for Human Rights Abuses, **Townes Hall Notes**, Spring 1996, at 50-51

**Striving for Justice: Accountability and the Crimes of the Khmer Rouge** (1995) (consultants' study for U.S. Department of State) (with Jason S. Abrams)

If Peace is to Work, Peacekeepers are Crucial, **The Christian Science Monitor**, November 16, 1995, at 19

The End of Sovereignty?, 88 **Proceedings of the American Society of International Law** 71-84 passim (1994) (remarks at roundtable discussion)

Controlling the Breakup of States: Toward a United Nations Role, 88 **Proceedings of the American Society of International Law** 42-46 (1994)

Clinton Administration Gets Some Lessons in UN Protocol, **The Christian Science Monitor**, November 1, 1993, at 18



Case Note, Land, Island and Maritime Frontier Dispute, Application to Intervene, 85 **American Journal of International Law** 680-86 (1991) (also in P.H.F. Bekker, ed., **Commentaries on World Court Decisions** (The Hague: Martinus Nijhoff, 1997))

Case Note, International Tin Council v. Amalgamet, 82 **American Journal of International Law** 837-40 (1988)

Speeches, Paper Deliveries, and other Engagements by Invitation

July 10-11, 2014 – Legal Experts Meeting on the Law Regulating Humanitarian Relief Operations in Armed Conflict (Oxford, UK), invited expert

March 17, 2014 – Canadian Red Cross International Humanitarian Law Conference on Engaging Non-State Actors (Windsor, Canada) – “Understanding the ICRC’s Strategies of Persuasion”

March 12, 2014 – University of Michigan Center for International and Comparative Law seminar on Upheaval in Ukraine (Ann Arbor, Michigan), featured speaker

February 28, 2014 – University of Richmond Conference on Normative Theory and International Law (Richmond, Virginia) – “Ethics and International Law: Integrating the Global Justice Project(s)”

February 7, 2013 – Universiteit Leiden Law School colloquium (Leiden, Netherlands), “The Thin Justice of International Law”

February 6, 2013 – Goethe Universität Normative Orders Cluster (Frankfurt, Germany), “The Thin Justice of International Law”

November 2, 2013 – New York University School of Law Center for Human Rights and Global Justice Conference on International Human Rights Fact-Finding in the Twenty-First Century (New York, New York), “International Standards for Accountability: Guidelines in Human Rights Fact-Finding”

October 18, 2013 – University Living Center (Ann Arbor, Michigan), “Crisis in Syria: Legal and Political Issues About Disarming Assad”

September 11, 2013 – University of Michigan Center for International and Comparative Law and Human Rights Advocates seminar on Attacking Syria: The Key Legal Issues (Ann Arbor, Michigan), featured speaker

August 2, 2013 – Australian National University College of Law Centre for International and Public Law and Centre for Military and Security Law Public Seminar (Canberra, Australia), “Drone Strikes, US Policy and the Law,” featured speaker

August 1, 2013 – Australian National University College of Law Centre for Military and Security Law Workshop on International Humanitarian Law, Anti-Terrorism Laws and Non-State Actors (Canberra, Australia), Keynote Address

July 31, 2013 – Australian National University College of Law Centre for Military and Security Law (Canberra, Australia), “Accountability and the Sri Lankan Civil War”

July 30, 2013 – Australian National University College of Asia and the Pacific Regulatory Institutions Network (Canberra, Australia), “The Thin Justice of International Law”

June 24, 2013 – State Department Advisory Committee on International Law (Washington, D.C.), commentator on Kiobel case

June 6, 2013 – Fondazione Corriere della Sera “Societas” series (Milan, Italy), “Cyber War and Drones: The Implications of War without Soldiers,” featured speaker

June 5, 2013 -- Università Commerciale Luigi Bocconi Research Division Claudio Dematté Seminar (Milan, Italy), “Modern challenges to investment treaties”

June 5, 2013 – Università Commerciale Luigi Bocconi faculty seminar (Milan, Italy), “The Thin Justice of International Law”

May 23, 2013 – International Judicial Conference on Opportunities and Challenges Facing the Judiciary of the 21<sup>st</sup> Century (Berlin, Germany), featured speaker

April 4, 2013 – American Society of International Law Annual Meeting panel on the Future of Human Rights Fact-Finding (Washington, D.C.), featured speaker

February 14, 2013 – Jack and Mae Nathanson Centre, Osgoode Hall School of Law panel on Sri Lanka: Challenges: Implementing International Human Rights and Accountability for Human Rights Violations (Toronto, Canada), featured speaker

October 8, 2012 – University of Michigan Law School International Law Workshop (Ann Arbor, MI), “Justice After War Crimes in Sri Lanka: A UN Insider’s Perspective”

October 4, 2012 – New York University School of Law Hauser Colloquium (New York, NY), “The Thin Justice of International Law”

September 11, 2012 – Arizona State University College of Law faculty colloquium (Phoenix, AZ), “The Thin Justice of International Law”

June 12, 2012 -- American Law Institute Expert Meeting on a New Restatement of Foreign Relations Law (Washington, D.C.), invited expert

May 30-June 1, 2012 – International Committee of the Red Cross Expert Meeting on Strengthening Compliance with International Humanitarian Law (Geneva, Switzerland), invited expert

March 30, 2012 – University of Michigan Conference on Law and Human Rights in Global History (Ann Arbor, Michigan), commentator on panel on “Instruments of Implementation: Courts, Commissions, and Conventions”

March 26, 2012 – John Marshall Law School Faculty Scholarship Roundtable (Chicago, Illinois), “The Justice of International Law”

January 20, 2012 – University of Basel and Graduate Institute of International Studies Authors’ Retreat on Transparency in International Law (Thun, Switzerland), “Behind the Flag of Dunant: Secrecy and the Compliance Mission of the International Committee of the Red Cross”

January 18, 2012 – Geneva Academy of International Humanitarian Law and Human Rights Roundtable discussion on Delivering on the Commitment to Accountability in Sri Lanka (Geneva, Switzerland), featured speaker

October 6, 2011 – Interfaith Council for Peace and Justice panel on U.N. Recognition of Palestinian Statehood (Ann Arbor, Michigan), featured panelist

September 22, 2011 – Wayne State University Law School panel on the General Assembly Resolution on Palestinian Statehood (Detroit, Michigan), featured panelist

June 6, 2011 – State Department Advisory Committee on International Law (Washington, D.C.), luncheon talk on the UN Secretary-General’s Panel of Experts on Sri Lanka

May 13, 2011 – Temple Law School Workshop on Synthesizing Insights from International Law and International Relations (Philadelphia, Pennsylvania), “Persuading to Comply: On the Deployment and Avoidance of Legal Argumentation”

March 29, 2011 – Yale Law School Seminar on Law and Globalization (New Haven, Connecticut), “Between Minimum and Optimum World Public Order: An Ethical Path for the Future”

December 26, 2010 -- Hebrew University Faculty of Law International Law Year in Review (Jerusalem, Israel), “The Obama Administration and Counter-Terrorism”

June 21, 2010 – State Department Advisory Committee on International Law (Washington, D.C.), commentary on Legal Advisor Koh’s Speech to the American Society of International Law

April 8-10, 2010 – Roundtable on Interdisciplinary Research on Global Justice (Ann Arbor, Michigan) (co-chair, lead organizer), “International Law and the Cosmopolitan/Nationalist Divide”

November 23, 2009 – University of Michigan Middle East Law Students Association Panel (Ann Arbor, Michigan), “The Goldstone Report: Gaza, Israel, and International Law”

October 2, 2009 – Temple Law School International Law Roundtable on Does the Constitution Follow the Flag? (Philadelphia, PA), invited participant

September 14, 2009 – University of Michigan Law School International Law Workshop (Ann Arbor, Michigan), “Detaining Terrorism Suspects Without Trial: Is it Legal Under U.S. and International Law?”

June 11-13, 2009 – Netherlands Ministry of Foreign Affairs and Grotius Center of Leiden University Project on Counter-terrorism Strategies, Human Rights, and International Law,” Working Group on the Use of Force Against Non-State Actors (The Hague, Netherlands), “Self-Defense Against Terrorists: The Meaning of Armed Attack”

March 26, 2009 -- Institut de Hautes Études Internationales et du Développement Law Section public lecture (Geneva, Switzerland), “Toward an Ethical Posture for International Organizations”

March 17, 2009 -- University of Geneva Faculty of Law public lecture (Geneva, Switzerland), “How to Stop Worrying About Fragmented International Law: Lessons from the Law(s) on Investment”

February 27, 2009 -- Institut de Hautes Études Internationales et du Développement Inter-Agency Group Lunch (Geneva, Switzerland), “How to Stop Worrying About Fragmented International Law: Lessons from Foreign Investment”

January 27, 2009 – Institut de Hautes Études Internationales et du Développement Roundtable on Gaza and International Law (Geneva, Switzerland), panelist

December 16, 2008 – International Committee of the Red Cross Expert Meeting on the Law of Occupation (Geneva, Switzerland), “The Law of Occupation and UN Administration of Territory: Mandatory, Desirable, or Irrelevant?”

September 5, 2008 – International Institute of Humanitarian Law Round Table on International Humanitarian Law, Human Rights, and Peace Operations (San Remo, Italy) – “Administration of Territories by the United Nations: Is There Room for IHL?”

May 20, 2008 – State Bar of Michigan Committee on Human Rights Panel on Corporate Responsibility for Human Rights (Dearborn, Michigan), panelist and commentator

May 13, 2008 – Osher Lifelong Learning Institute at the University of Michigan Distinguished Lecture (Ann Arbor, Michigan), “The War on Terror: The Role of International Law”

January 21, 2008 – University of Michigan Inter-Humanitarians Council lecture (Ann Arbor, Michigan), “International Law, Human Rights, and the ‘War on Terrorism’”

December 14, 2007 – United Nations Office of the Special Representative for the Prevention of Mass Atrocities policy advisory group meeting on Prevention of Genocide and Mass Atrocities and the Responsibility to Protect (Stellenbosch, South Africa), panelist and commentator

December 7, 2007 – Temple Law School Symposium on Ruling the World? Constitutionalism, International Law, and Global Government (Philadelphia, PA), commentator on paper by Professor Michael Doyle

October 25, 2007 – Northwestern University School of Law and Katholieke Universiteit Leuven Faculty of Law Symposium on Corporate Human Rights Responsibility (Chicago, IL), “Who Has the Duty to Remedy Abuses?: An Academic Perspective”

September 28, 2007 – International Committee of the Red Cross and Washington College of Law Expert Roundtable Meeting on Teaching International Humanitarian Law at US Law Schools (Washington, D.C.), invited participant

June 6, 2007 – Minerva Center for Human Rights Conference on Forty Years after 1967: Reappraising the Role and Limits of the Legal Discourse on Occupation in the Palestinian-Israeli Context (Jerusalem and Tel Aviv, Israel), “Occupation and Territorial Boundaries: Facts -- and Law -- on the Ground”

April 20, 2007 – Georgetown Law School Legal Theory Workshop (Washington, DC), “Do International Organizations Play Favorites?: An Impartialist Account”

March 26, 2007 – Wayne State University School of Law Edward Wise Symposium (Detroit, MI), “Can We Compare Evils?: The Enduring Debate on Genocide and Crimes Against Humanity”

March 10, 2007 – University of Michigan Symposium on the Tanner Lecture on Human Values (Ann Arbor, MI), commentator on the Tanner Lecture by Samantha Power

March 2, 2007 – University of California at Los Angeles School of Law faculty colloquium (Los Angeles, CA), “Do International Organizations Play Favorites?: An Impartialist Account”

February 16, 2007 – University of Fribourg Conference on the Philosophy of International Law (Fribourg, Switzerland), commentator on paper by Professor David Luban

February 10, 2007 – Michigan Journal of International Law Symposium on State Intelligence Gathering and International Law (Ann Arbor, MI), panel moderator on The Desirability, Feasibility, and Methodology of Applying International Law to Intelligence Activities

December 17, 2006 – University of Bern International Symposium on Justice, Legitimacy, and Public International Law (Bern, Switzerland), “Reimagining International Institutions: An Impartialist Account”

November 17, 2006 – New York University Center for Human Rights and Global Justice and Realizing Rights Workshop on Attributing Corporate Responsibility for Human Rights under International Law (New York, NY), participant and commentator

September 29, 2006 – Washington University in St. Louis Conference on Judgment at Nuremberg (St. Louis, MO), “Can We Compare Evils? The Enduring Debate on Genocide and Crimes Against Humanity”

June 22, 2006 -- International Law Society of the University of Tokyo Colloquium (Tokyo, Japan), “Renditions and Targeted Killings in The Global War on Terror: What Place for International Law?”

April 20, 2006 -- Eastern Michigan University Conference on The Crisis in Darfur: International Response to Genocide in the 21st Century (Ypsilanti, MI), “Responding to Mass Atrocities: Intervention, Prosecution, or Both?”

April 8, 2006 -- University of North Carolina at Greensboro Conference on Philosophical Issues in International Law (Greensboro, NC), “Predator and Prey: Seizing and Killing Suspected Terrorists Abroad”

November 29, 2005 – University of Michigan Center for Southeast Asian Studies Lectures Series Seminar on the Khmer Rouge Genocide Trial (Ann Arbor, MI), featured speaker

November 8, 2005 – University of Michigan Bioethics, Values and Society Faculty Seminar on Physician Involvement in Hostile Interrogations (Ann Arbor, MI), commentator on paper by Professor Fritz Allhoff

October 10, 2005 – University of Michigan Institute for the Humanities Brown Bag Lecture (Ann Arbor, MI), “The War Crimes Tribunals for Yugoslavia: Are Trials after Atrocities Effective?”

September 16, 2005 – University of Michigan International Perspectives on Human Rights Brown Bag Seminar (Ann Arbor, MI), “The Role of Human Rights Law During Military Occupations”

June 3, 2005 – Fundación para las Relaciones Internacionales y el Diálogo Exterior (FRIDE) Roundtable on Building a New Role for the United Nations (Madrid, Spain), “Self-Defense and the World After September 11: Implications for UN Reform”

May 13, 2005 – Tsinghua University School of Law Conference on New Developments for Sino-American Commercial Law (Beijing, China), “The Expropriation Battles – Act II: Regulatory Takings”

April 11, 2005 – University of Michigan Law School Agora on Reading the Torture Memos (Ann Arbor, MI), “The Torture Memos: Making Lite of International Law?”

February 7, 2005 – Michigan State Journal of International Law Symposium on The Relevance of International Criminal Law to the Global War on Terrorism (East Lansing, MI), “Are the Laws of War Applicable to the War on Terrorism?”

January 10, 2005 – University of Windsor Faculty of Law Panel on Torture, Human Rights, and the Search for Global Justice (Windsor, Canada): “Suing Foreign Human Rights Abusers: U.S. and International Practice”

November 1, 2004 – University of Michigan Law School Workshop on U.S. Detentions During the “War on Terrorism”: International Law and American Justice (Ann Arbor, MI): Introduction and remarks on “The Impact of U.S. Detention Policy and Practices on International Law”

October 7, 2004 – Belgrade Centre for Human Rights Workshop (Belgrade, Serbia and Montenegro), “The International Criminal Court and the Limits of Global Tribunals”

October 6, 2004 -- Belgrade Centre for Human Rights Public Lecture (Belgrade, Serbia and Montenegro), “Participation of Minorities in Public Life: Beyond the Legal Standards”

June 8, 2004 – Concord Research Center Conference on Democracy and Occupation (Rishon Le Zion, Israel), “Occupations by Democracies and by International Organizations: The Challenges of Convergence”

February 12, 2004 – University of Texas Tejas Club (Austin, TX), “Saddam Hussein, Human Rights, and Guantanamo Bay”

November 6-7, 2003 – University of Texas School of Law Conference on International War Crimes Trials: Making a Difference? (Austin, TX), Opening Remarks, panel moderator, Concluding Remarks

October 9, 2003 – University of Georgia School of Law Faculty Colloquium (Athens, GA), “Is International Law Impartial?”

September 12, 2003 -- University of Toronto Faculty of Law (Toronto, Canada), Workshop on Canada and the Use of Force: Caught Between Multilateralism and Unilateralism, invited participant

June 25, 2003 – American Civil Liberties Union Central Texas Chapter (Austin, TX), “The International Criminal Court”

June 20, 2003 -- Texas Exes Alumni College lecture program (Austin, TX), “The United Nations and Iraq”

May 24, 2003 – Stanford University Center for International Security and Cooperation workshop on How to Build a State (Palo Alto, CA), “Rebuilding International Personality: Some Guidance from International Law and Practice”

April 29, 2003 – University of Texas School of Law panel on *Henry V* and the Ways of War: Legal and Ethical Issues (Austin, TX), “*Henry V* and the Law of War”

April 25, 2003 – Vanderbilt University Law School Legal Theory Workshop (Nashville, TN), “Precommitment Theory as a Framework for Self-Restraint by States: Explanation and Examples”

April 17, 2003 – University of California Boalt Hall School of Law Workshop on International Law (Berkeley, CA), “Precommitment Theory as a Framework for Self-Restraint by States: Explanation and Examples”

January 24, 2003 – International Peace Academy conference on The UN Security Council in the Post-Cold War Era (New York, NY), “Does the UN Security Council Create Law?”

December 18, 2002 – Tel Aviv University Faculty of Law international conference on Liberty, Equality, Security (Tel Aviv, Israel), “Overcoming Temptations to Violate Human Dignity in Times of Crisis: On the Possibilities for Meaningful Self-Restraint”

December 17, 2002 – University of Haifa Faculty of Law conference on Democracy versus Terror: Where are the Limits? (Haifa, Israel), “Jus ad Bellum and Jus in Bello After September 11”

October 11, 2002 – University of Houston Law Center Friday Frontier faculty colloquium (Houston, TX), “Jus ad Bellum and Jus in Bello After September 11”

September 20, 2002 – Texas Law Review Symposium on Precommitment, Bioethics, and Constitutional Law (Austin, TX), “Precommitment Theory and International Law: Starting a Conversation”

September 5, 2002 – Texas International Law Journal Symposium on Judicialization and Globalization of the Judiciary (Austin, TX), “The International Criminal Court and the Limits of Global Judicialization”

May 2, 2002 – Columbia University Center on International Organization Roundtable on the United Nations and Terrorism (New York, NY), “Capacity-Building to Fight Terrorism: Finding the UN’s Comparative Advantage”

April 30, 2002 – Amnesty International, University of Texas Chapter (Austin, TX), “The Pitfalls of International Criminal Justice”

October 26, 2001 – University of Göttingen Institute of International Law Symposium on the United States and International Law (Göttingen, Germany), “The United States and the ‘International Community’: The Inevitability of Multiple Visions”

October 12, 2001 – Canadian Department of Foreign Affairs and International Trade’s Canadian Centre for Foreign Policy Development Roundtable on Afghanistan: Governance Scenarios and Canadian Policy Options (Ottawa, Canada), “Failed States and Governance: Lessons Learned”

May 29, 2001 – Australian Red Cross Solferino Lecture (Melbourne, Australia), “Overcoming Impunity?: Not so Fast”

May 23, 2001 – University of Melbourne Faculty of Law International Law Interest Group (Melbourne, Australia), “A Theory of Human Rights Obligations for Corporations”

February 12, 2001 – University of Chicago Law School Workshop on International Law (Chicago, IL), “Corporations and Human Rights: Toward a Theory of International Legal Responsibility”

January 26, 2001 – Autonomous Region of Trentino-Alto Adige Conference on Organising Cohabitation: The Trentino-South Tyrol Experience and Prospects for the Balkans (Trento, Italy), “International Guarantees of Autonomy: Limitations and Warnings”

December 4, 2000 – Columbia Law School Society for Law and Ideas (New York, NY), “Overcoming Impunity for Human Rights Abuses: An Insider’s/Outsider’s Perspective”

November 27, 2000 – New York Law School Conference on The Multinational Enterprise as Global Corporate Citizen (New York, NY), “Corporations and Human Rights in International Law”

November 21, 2000 – Columbia Law School Society for Law and Ideas and Society of International Law (New York, NY), “American Exceptionalism and the Future of International Law and Organization,” respondent to address by Edward Luck

October 20, 2000 – Johns Hopkins University Paul H. Nitze School of Advanced International Studies, Washington Interest in Negotiation Group (Washington, DC), “Intermediaries and International Norms: The Work of the OSCE High Commissioner on National Minorities”

July 28, 2000 -- Centro Para Accion Legal en Derechos Humanos and American University Washington College of Law Conference on Contemporary Perspectives in International Criminal Law (Antigua, Guatemala), “Transitory Transitions and the Problem of Impunity”



May 12, 2000 -- Organization for Security and Cooperation in Europe Seminar to Launch the Lund Recommendations on the Effective Participation of National Minorities in Public Life (Vienna, Austria), "The General Principles of the Lund Recommendations"

February 25, 2000 -- University of Texas Conference on Challenges to Fragile Democracies in the Americas (Austin, TX), "Looking Forward and Looking Back: Democracy, Accountability, and Fragile Governments in the Americas"

January 9, 2000 -- First Unitarian Universalist Church (Austin, TX), "Prosecuting and Preventing Crimes Against Humanity"

November 12, 1999 -- University of Texas Center for Russian, East European, and Eurasian Studies (Austin, TX), "Preventing Ethnic Conflict: The Work of Europe's Minorities Commissioner"

October 21, 1999 -- Texas International Law Society Conference on Preventing Ethnic Conflict: Emerging Answers from Kosovo (Austin, TX), "Ethnic Conflict in Europe: An Overview from International Law"

October 16, 1999 -- World Federalist Association Fall Assembly (Dallas, Texas), "Cambodia and the U.N.: Bringing the Khmer Rouge to Justice"

July 9, 1999 -- International Criminal Tribunal for the Former Yugoslavia (The Hague, Netherlands), "Democracy and Accountability: On a Normative Collision Course?"

May 18, 1999 -- T.M.C. Asser Instituut (The Hague, Netherlands), "Accountability of the Khmer Rouge for Human Rights Atrocities: National and International Responses (and Non-Responses)"

March 5, 1999 -- Rijks Universiteit Leiden, Faculty of Law (Leiden, Netherlands), "Democracy and Accountability: The Criss-Crossing Paths of Two Emerging Norms"

June 13, 1998 -- Italian Society of International Law Annual Meeting (Siena, Italy), "The Relationship between the International Criminal Court and the Security Council: An Appraisal of the United States Position"

June 10-11, 1998 -- Training Programme in the Civilian Personnel of Peace-keeping/Humanitarian Operations and Election Monitoring Missions: Volunteers, Officers, Observers (Pisa, Italy), "Coordinating the Actors in Peacekeeping Operations within the United Nations System and Other Organizations"

April 23, 1998 -- University of Texas Learning Activities for Mature People (Austin, TX), "Prosecuting Human Rights Atrocities from Nuremberg 1945 to Rome 1998"

April 1, 1998 -- American Society of International Law Annual Meeting (Washington, D.C.), "The Genocide Convention After 50 Years"

March 20, 1998 -- United Nations Department of Political Affairs retreat on Human Rights in Negotiating Processes (Tarrytown, NY), "Promoting Reconciliation and Combatting Impunity"

January 7, 1998 – Association of American Law Schools Annual Meeting (San Francisco, CA), “The Global Law School: Myths and Reality,” and panelist and discussion leader for day-long workshop on “Staging the Law School of the Future”

September 18, 1997 – Hofstra Law School Symposium on War Crimes and War Crimes Tribunals (Hempstead, NY), “Why Only War Crimes?: Delinking Human Rights Offenses from Armed Conflict”

November 15, 1996 – United Nations Department of Political Affairs retreat on UN mediation and peacekeeping (New York, NY), featured speaker

October 12, 1996 – Admiral Nimitz Museum Conference on Justice in the Aftermath (Fredericksburg, TX), “A Brief History of War Crimes”

August 6, 1996 – Court TV broadcast of trial in the International Tribunal for the Former Yugoslavia (New York, NY), guest commentator

May 30, 1996 – Libera Universita Internazionale degli Studi Sociali seminar on international economic law (Rome, Italy), guest lecturer

May 27, 1996 – Universita degli Studi di Siena, Facolta de Giurisprudenza graduate seminar (Siena, Italy), guest lecturer

April 23, 1996 – Austin Council on Foreign Affairs (Austin, TX), “Prosecuting War Crimes in the Former Yugoslavia”

April 20, 1996 – Lee College Conference on War in the 20<sup>th</sup> Century (Baytown, TX), panelist

March 4, 1996 – Harvard Law School seminar on Lawyers Without Borders (Cambridge, MA), guest lecturer

December 14, 1995 – Yale Law School Schell Center for International Human Rights panel on Rwanda, the Former Yugoslavia, and Other Current Developments in International Criminal Law (New Haven, CT), panelist

November 10-11, 1995 – Cornell Law School Workshop on International Law and Ethnic Conflict (Ithaca, NY), commentator

August 21-22, 1995 – Yale University Cambodian Genocide Program Conference on International Criminal Law in the Cambodian Context (Phnom Penh, Cambodia), featured participant and lecturer

July 7, 1995 – United States Institute of Peace Conference on Accountability for War Crimes and Genocide in Cambodia (Washington, D.C.), featured participant

June 15, 1995 – Travis County Bar Association International Law Section (Austin, TX), “Recent Developments in Foreign Investment Law”

June 10, 1995 – Southwestern Legal Foundation Academy of American and International Law (Austin, TX), “Foreign Investment in the United States and the Exon-Florio Legislation”

March 3, 1995 – University of Texas School of Law Symposium on International Intervention for the Cause of the Human Rights (Austin, TX), moderator

June 21, 1994 – Dallas Bar Association International Law Section (Dallas, TX), “U.S. Bilateral Investment Treaties: A New Source of Law for the U.S. Investor Abroad”

June 2, 1994 – Council on Foreign Relations Annual Seminars Presented by the International Affairs Fellows (Washington, D.C.), “Lessons Learned from Peacekeeping Operations: The Roles of the United States and the United Nations”

May 17, 1994 – U.S.-Japan Conference on UN Peace Efforts and Japan-U.S. Relations (Yokohama, Japan), “UN Peace Efforts: Legal Bases and Recent Experiences”

April 9, 1994 – American Society of International Law Annual Meeting (Washington, D.C.), participation in panel “The End of Sovereignty”

April 7, 1994 – American Society of International Law Annual Meeting (Washington, D.C.), “Controlling the Break-up of States: Towards a United Nations Role”

March 10, 1994 – International Colloquium on New Dimensions of Peace-keeping (Geneva, Switzerland), “The United Nations in Cambodia and the New Peacekeeping”

October 29, 1993 – American Branch of the International Law Society International Law Weekend (New York, NY), “United Nations Conservatorship over Failed States: From Theory to Reality”