

**IN RE THE ARBITRATION BETWEEN THE REPUBLIC OF ECUADOR  
AND THE UNITED STATES OF AMERICA UNDER THE TREATY CONCERNING THE  
ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENTS (1993):  
QUESTIONS OF JURISDICTION**

**OPINION**

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## I. Introduction

1. I am Distinguished Professor and Scholar at the University of the Pacific, McGeorge School of Law, where I have been a member of the faculty since 1977. I have served as a member of the International Law Commission of the United Nations (ILC) (1982-1991), as Chair of the ILC, and as the Commission's special rapporteur on the Law of the Non-Navigational Uses of International Watercourses. I served as Counselor on International Law in the Office of Legal Adviser, U.S. Department of State (1984-1985) and have served, or continue to serve, on the boards of editors of a number of journals of international law, including the *American Journal of International Law*. I am author or co-author of numerous books and articles on subjects ranging from public international law and transnational litigation and arbitration to international environmental law and the law of international watercourses. I have served, and continue to serve, as counsel in a number of cases before the International Court of Justice and the Permanent Court of Arbitration (PCA). I was nominated in 2001 by the United States as a member of the PCA's Specialized Panel of Arbitrators established pursuant to the Optional Rules for Arbitration of Disputes relating to Natural Resources and/or the Environment. Further biographical information is contained in the attached CV.
2. I have been asked by the Government of the Republic of Ecuador to study and state my opinion on the question of jurisdiction in the arbitration brought by that State against the United States of America (United States, or U.S.) under the Treaty concerning the Encouragement and Reciprocal Protection of Investment between the two States (the Treaty, or BIT).<sup>1</sup> In particular, I have been asked to state my opinion on the following jurisdictional issues raised in the United States Memorial on Jurisdiction, as well as in the opinions by Professors Reisman and Tomuschat:
  - a. What are the requirements for the existence of a dispute and have they been met in this case?

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<sup>1</sup> The Treaty was signed at Washington, D.C. 27 Aug. 1993, entered into force 11 May 1997. See Request of the Republic of Ecuador to the United States of America pursuant to Article VII of the Treaty Between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, Annex A (hereinafter Request of Ecuador).

- b. When a compromissory clause allows for arbitration of “any dispute concerning the interpretation or application” of a treaty, may a tribunal exercise jurisdiction in circumstances where the dispute at issue concerns only the interpretation of the treaty and does not include an allegation that the respondent State breached the treaty?
  - c. What are requirements of concreteness for a dispute and is Ecuador’s dispute with the United States regarding the interpretation of Article II(7) of the Treaty sufficiently “concrete” for the tribunal to exercise jurisdiction?
3. The present opinion will first review the factual background and context in which the present arbitration arose, and will then address the foregoing questions.

## II. Factual Background

4. The relevant facts may be briefly stated. They begin with a partial award rendered on March 30, 2010, by an arbitral tribunal constituted pursuant to the UNCITRAL Rules under paragraph 3(a)(iii) of Article VI of the Treaty on claims brought under the Treaty by Chevron Corporation and Texaco Petroleum Company against the Republic of Ecuador (Ecuador).
5. The Government of Ecuador was taken aback by certain key features of the partial award, since they were contrary to Ecuador's understanding of what Ecuador and the United States had agreed to in the relevant provisions of the Treaty.
6. In particular, the tribunal found that Ecuador had breached Article II, paragraph 7 of the Treaty, which provides: "Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations." While Ecuador had considered that this provision incorporated well-known obligations under customary international law, requiring that each Party have a *system* in place that provides effective means of asserting claims and enforcing rights with respect to investment, the tribunal applied the provision to the specific fact situations complained of by Chevron and Texaco. In Ecuador's view, this was tantamount to reading Article II(7) to constitute a guarantee of treatment in particular cases. Indeed, the tribunal in its partial award held that Article II(7) permits "review of investor treatment in individual cases" by arbitral tribunals.<sup>2</sup>
7. Ecuador then raised its concerns with its treaty partner in a Note of June 8, 2010, explaining to the United States that it disagreed with certain aspects of the award, in particular, what it considered to the tribunal's erroneous interpretation and application of Article II(7) of the Treaty. For Ecuador, the tribunal's interpretation of that provision called into question the common intent of the Parties regarding the nature of their mutual obligations in respect of investments of nationals or companies of the other Party. In a word, the tribunal in Ecuador's estimation held Ecuador to something that it did not understand that it had agreed to. Ecuador therefore requested that the United States confirm, by reply note, that its understanding of the meaning of Article II(7) was the

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<sup>2</sup> Note of Ecuador to the United States of 8 June 2010, Request of Ecuador, Annex B, at p. 2 referring to para. 245 of the partial award.

same as that of Ecuador, whose interpretation, as indicated generally above, was spelled out in the Note.<sup>3</sup> In this connection, Ecuador pointed out that Article 31(3) of the Vienna Convention on the Law of Treaties contemplates a “subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.”<sup>4</sup> Evidently in view of the urgency and importance of the situation created by the partial award, Ecuador’s note then indicated that should such a reply note confirming its agreement with Ecuador’s interpretation of Article II(7) not be forthcoming from the United States, or if the latter disagreed with Ecuador’s interpretation, an unresolved dispute concerning the interpretation and application of the Treaty would be considered to exist.

8. On August 23, 2010, two months after Ecuador sent its note, the United States responded by a note stating that “the U.S. government is currently reviewing the views expressed in your letter and considering the concerns that you have raised,” and that the United States “look[ed] forward to remaining in contact” on the issue.<sup>5</sup> The State Department’s Legal Adviser later informed the Ambassador of Ecuador, according to the United States, that “it would be difficult to consider a request for an interpretation of the Treaty . . . ,”<sup>6</sup> and according to Ecuador, that “his Government will not rule on this matter.”<sup>7</sup> In any event, Ecuador took this as an indication that “no further response to, and no consultation or negotiation on, the issues raised could be expected.”<sup>8</sup> In consequence, Ecuador requested that certain questions concerning the interpretation and application of the Treaty be submitted to arbitration pursuant to Article VII(1) of the Treaty, which provides in part as follows:

“Any dispute between the Parties concerning the interpretation or application of the Treaty which is not resolved through consultations or other diplomatic channels, shall be submitted, upon the request of either Party to an arbitral tribunal for binding decision in accordance with the applicable rules of international law.”

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<sup>3</sup> Ibid., p. 3.

<sup>4</sup> Vienna Convention on the Law of Treaties, art. 31(3), 22 May 1969, U.N. Doc. A/CONF.39/27, at 289, 1155 U.N.T.S. 331, reprinted in 8 I.L.M. 679 (1969).

<sup>5</sup> Statement of Defense of Respondent United States of America, p. 6 (hereinafter U.S. Statement of Defense).

<sup>6</sup> Ibid., p. 7.

<sup>7</sup> Request of Ecuador, para. 13, at p. 7.

<sup>8</sup> Ibid.

### **III. The Requirements for the Existence of a “Dispute” have been Met in this Case**

9. Article VII(1) of the Treaty envisages the submission of any “dispute” between the parties concerning the interpretation or application of the Treaty, “upon the request of either Party,” to arbitration. In its Request, Ecuador characterizes the “questions concerning the interpretation and application of the Treaty” to be submitted to arbitration as constituting a “dispute.”<sup>9</sup> The United States has questioned whether there is such a “dispute.”<sup>10</sup> This raises the question of the meaning of the term “dispute” in the Treaty.
10. The search must be for the “ordinary meaning” of the term “dispute” under Article 31(1) of the Vienna Convention on the Law of Treaties.<sup>11</sup> To shed light on whether there is a “dispute” between the Parties within the meaning of Article VII(1), it will be helpful to consider how the term “dispute” is defined in international law and in the English language more generally.
11. In international law, the classic definition of the term “dispute” by the World Court was given by Permanent Court of International Justice (PCIJ) in its 1924 judgment in the *Mavrommatis Palestine Concessions* case. The Court stated there that: “A dispute is a disagreement on a point of law or fact, a conflict of legal views of or interests between two persons.”<sup>12</sup> This definition has guided both the PCIJ and its successor, the International Court of Justice (ICJ). The PCIJ has also referred to the expression “difference of opinion” in the context of what is necessary to invoke the jurisdiction of the Court.<sup>13</sup>
12. The ICJ has made statements from time to time to the effect that “it is not sufficient for one party to a contentious case to assert that a dispute exists with the other party.”<sup>14</sup> Of course, it is not Ecuador’s mere assertion that a dispute exists that is at issue here; rather it is the totality of the circumstances that demonstrates the existence of a dispute. The ICJ also stated that there should be “an actual controversy involving a conflict of legal

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<sup>9</sup> Request of Ecuador, paras. 2, 14.

<sup>10</sup> U.S. Statement of Defense, p. 1. See also Memorial of Respondent United States of America on Objections to Jurisdiction, pp. 15-36 (hereinafter U.S. Memorial).

<sup>11</sup> Op cit. supra.

<sup>12</sup> Judgment No. 2, P.C.I.J., Ser. A, No. 2, p. 11.

<sup>13</sup> Interpretation of the Statute of the Memel Territory, Judgment No. 18, 1932 P.C.I.J. (Ser. A/B) No 47 (June 24), Order of 24 June 1932 (“. . . the question between what Parties a difference of opinion must exist in order that it may be brought before the Court under Article 17, paragraph 2, of the Convention.” Ibid., at p. 253).

<sup>14</sup> South West Africa Cases, Preliminary Objections, 1962 ICJ Rep. p. 319, at p. 328.

interests between the parties.”<sup>15</sup> But in light of the circumstances in this case, discussed below, there is clearly a conflict of legal interests between the Parties in this case. The essence of the concept of “dispute” in international law remains, as stated in *Mavrommatis*, a disagreement between the parties.

13. More generally, the term is defined in a similar way in the English language. The Oxford Online Dictionary defines “dispute” simply as “a disagreement or argument.”<sup>16</sup>
14. According to either of these classes of definition, it would seem clear that there is a “dispute” between Ecuador and the United States. By refusing to answer a question on a matter of law affecting the legal interests of both states in respect of a bilateral treaty to which they are both parties, the United States put in issue the subject matter of the question. This is especially the case in view of the nature of the question asked by Ecuador, which concerned the *interpretation* of the Treaty. If the United States refused, as it did, to confirm Ecuador’s understanding of the authentic interpretation of Article II(7) of the Treaty, where else could Ecuador turn for confirmation but to the dispute settlement mechanism established in Article VII(1) of the Treaty? It is that provision, after all, under which either party may seek resolution of questions the parties have not been able to resolve between themselves – which amount to disputes – concerning the interpretation or application of the Treaty
15. A simple example will help to make the point. Assume that A and B have entered into a contract. A believes a key provision of the contract was intended by the parties to require B to pay A \$20,000. A requests B to confirm that B agrees with A’s understanding. B, given every opportunity to do so, does not confirm agreement with A’s understanding. This would put the matter in issue, giving rise to a dispute over which a court would have jurisdiction to issue, e.g., a declaratory judgment if A sought such relief in an action brought against B.
16. There is no reason the situation should be different here. To recapitulate, Ecuador and the United States have entered into an agreement, the BIT. Ecuador believes a key provision of the agreement, Article II(7), was intended by the parties to reflect existing requirements of customary international law regarding prevention of denial of justice.

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<sup>15</sup> Case concerning the Northern Cameroons, Preliminary Objections, 1963 ICJ Rep. p. 15, at p. 34.

<sup>16</sup> Available at: <http://oxforddictionaries.com/definition/dispute>.

The investor-state partial arbitral award of March 30, 2010, in a case of broad international significance, challenged Ecuador’s understanding by interpreting Article II(7) to go well beyond the requirements of customary international law, and thus well beyond what Ecuador thought it had agreed to. Ecuador, fearing the portent of this award for future investor-state cases against it under the Treaty, sought reassurance from the United States that the U.S. shared its interpretation of Article II(7), a central provision of the Treaty, and requested that the U.S. confirm that it shared Ecuador’s interpretation. This was not a trivial matter, and Ecuador had every reason to expect that the United States would respond. But the United States, given every opportunity to do so, failed to confirm that it agreed with Ecuador’s interpretation of Article II(7). The US’s failure to confirm that it agreed with Ecuador’s interpretation, in the context in which Ecuador requested confirmation, put the matter in issue, giving rise to a dispute.

17. Not only is this result intuitive, it is confirmed by the judgments of the ICJ in *Nigeria v. Cameroon*<sup>17</sup> and *Georgia v. Russia*.<sup>18</sup> Both of these cases stand for the proposition that a dispute can be inferred from a failure to respond where a response is called for. A response was certainly called for by the United States in this case; the U.S. failure to respond gave rise to the dispute that Ecuador brings before this Tribunal.

18. The United States contends that the situation had not ripened into a “dispute” and that Ecuador should have availed itself of the provisions of Article V of the Treaty. Article V provides as follows:

“The Parties agree to consult promptly, on the request of either, to resolve any disputes in connection with the Treaty, or to discuss any matter relating to the interpretation or application of the Treaty.”

According to the United States: “To the extent Ecuador’s claim is that the United States refused to enter into negotiations with it to agree on the meaning of Article II(7), it is Article V and not Article VII that provides the mechanism for raising that complaint. But Ecuador never invoked Article V.”<sup>19</sup>

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<sup>17</sup> *Land and Maritime Boundary (Cameroon v. Nigeria)*, Preliminary Objections, Judgment, I. C. J. Reports 1998, p. 275, para. 89.

<sup>18</sup> *Case concerning Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russia)*, ICJ Judgment (2011), para. 30.

<sup>19</sup> U.S. Memorial, p. 19.

19. As an initial matter, there is nothing in Article V or in Article VII(1) that makes explicit invocation of Article V a precondition for invoking the arbitral provisions of Article VII(1). Therefore, Ecuador was not required to “invoke[]” Article V.
20. However, the facts show that Ecuador effectively followed the procedures outlined in Article V by initiating communications regarding the interpretation of Article II(7) with the State Department through its embassy in Washington. It is clear from the facts, as recounted generally above, that Ecuador made every effort to engage the United States on this matter, which was – and is – of great importance to Ecuador, without success. It was the United States that effectively refused “to discuss [the] matter relating to the interpretation . . . of the Treaty.”<sup>20</sup> Put simply, the U.S. did not respond. Taking its version of events, the United States effectively put the matter off, saying – after the passage of a significant amount of time – that the United States “look[ed] forward to remaining in contact” on the issue,<sup>21</sup> and that “it would be difficult to consider a request for an interpretation of the Treaty . . .”<sup>22</sup> In light of this position of the United States, it is reasonable to conclude that further pursuit of the issue by Ecuador would have been futile.
21. Confronted with this situation, especially given the context of the great significance of the matter to Ecuador, Ecuador was entitled to consider that a dispute had arisen with the United States concerning the interpretation or application of the Treaty. It was reasonable for Ecuador to believe, based on the conduct of the United States in the context of Ecuador’s request for confirmation of its interpretation, that the U.S. did not share Ecuador’s interpretation of the Treaty. That there is a dispute was in fact confirmed by the circumstances.
22. Several additional points should be addressed before moving on to the next topic. First, the United States in its Memorial states that Ecuador seeks to “obtain an ‘authoritative interpretation’ to bind the Parties in the absence of their mutual consent.”<sup>23</sup> But according to the U.S. Government’s article-by-article analysis of the provisions of the

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<sup>20</sup> Treaty, Article V.

<sup>21</sup> Statement of Defense of Respondent United States of America, p. 6 (hereinafter U.S. Statement of Defense).

<sup>22</sup> Ibid., p. 7.

<sup>23</sup> U.S. Memorial, “Preliminary Statement”, para.1, at p. 1.

Treaty, Article VII “constitutes each Party’s prior consent to arbitration.”<sup>24</sup> No further consent by the United States is required.

23. Second, the U.S. states in its Memorial that Ecuador is raising a “political disagreement[] between the Parties . . . in this arbitration.”<sup>25</sup> It is difficult to see how a request for an “interpretation” of a provision of a treaty, which is expressly permitted by that treaty, can constitute a “political disagreement”. Given the rather long and somewhat mysterious silence on the U.S. side following Ecuador’s attempts to discuss the matter, and the strong nature of the United States reaction to Ecuador’s Request in the U.S. Statement of Defense and Memorial, it would seem that it is the United States itself that may be injecting political considerations into what Ecuador raised as a straightforward request for arbitration to resolve a dispute over the interpretation of a provision of the Treaty. How this can be “political” in nature is impossible to see.
24. And third, in stating that the Tribunal’s “acceptance of jurisdiction in this case would be inconsistent with . . . nearly a century of unbroken international jurisprudence confirming the meaning of “dispute,”<sup>26</sup> the United States demonstrates its determination to avoid the very kind of state-to-state arbitrations that are expressly provided for in Article VII(1) of the Treaty. The Memorial refers to Professor Reisman’s opinion for the proposition that “granting Ecuador’s request in this case would undermine the system of investment arbitration” and states that “[i]t would add tremendous uncertainty to the final and binding nature of investor-State awards.”<sup>27</sup> There is no basis for this kind of hyperbole in this case. Ecuador does not ask the Tribunal to overturn any arbitral award. Ecuador simply requests an interpretation of a specific provision of the Treaty, *viz.*, Article II(7), as expressly permitted by Article VII(1) of the Treaty. Since Article II(7) is the fundamental provision of the Treaty concerning investors’ assertion of claims and enforcement of rights under the domestic law of the Parties, it is hardly likely that Ecuador would repeatedly, as the Memorial implies, “unilaterally seek a preferred interpretation of the Treaty through State-to-State arbitration prior to [during or after] an

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<sup>24</sup> U.S. Department of State, Article-by-Article Analysis of the Provisions of the Treaty, Article VII (State-State Arbitration), 7 Sept. 1993, Senate Treaty Doc. 103-15, Request of Ecuador, Annex A.

<sup>25</sup> U.S. Memorial, at pp. 3-4; see also, e.g., *ibid.*, p. 18.

<sup>26</sup> U.S. Memorial, p. 5.

<sup>27</sup> *Ibid.*

investor-State arbitration . . .”<sup>28</sup> The resolution of the issues before the Tribunal in this case would settle the matter.

25. For the foregoing reasons, I conclude that there is a “dispute” between Ecuador and the United States within the meaning of Article VII(1) of the Treaty.

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<sup>28</sup> Ibid.

#### **IV. There is a Dispute between the Parties concerning the Interpretation of the Treaty, Giving the Tribunal Jurisdiction to Resolve It under Article VII(1) of the Treaty**

26. By its terms, the Treaty provides for arbitration of “[a]ny dispute between the Parties concerning the *interpretation or* application of the Treaty . . .” (Treaty, Article VII(1), emphasis added.) According to the U.S. Government’s article-by-article analysis of the provisions of the Treaty, Article VII “constitutes each Party’s prior consent to arbitration.”<sup>29</sup> Now, however, the United States is seeking to avoid arbitration of a dispute that has arisen between itself and its treaty-partner.
27. The United States has cited many grounds on which it does not believe the dispute over Ecuador’s interpretation of Article II(7) should be arbitrated, including that the Tribunal does not have jurisdiction over a dispute concerning the pure interpretation of a provision of the Treaty. Yet the U.S. Memorial admits that “issues regarding the ‘interpretation’ or ‘application’ of the Treaty may be presented and adjudicated in any arbitration pursuant to Article VII, *either independently or in combination . . .*”<sup>30</sup> This would seem answer enough to the United States own argument.
28. Indeed, on its face, the argument that there is no jurisdiction over disputes concerning only interpretation has no merit. The Treaty does not say that disputes concerning “interpretation *and* application” of the Treaty may be submitted by either party to arbitration. Use of the disjunctive “or” between the terms “interpretation” and “application” is the normal formula used in dispute resolution clauses of treaties, and the Parties no doubt simply utilized that pre-existing formula.
29. The United States contends that for the Tribunal to have jurisdiction, there must have been an alleged breach of the Treaty: “this Tribunal has jurisdiction only to adjudicate a (1) concrete case alleging a violation of the Treaty by one Party . . .”<sup>31</sup> Otherwise, so the U.S. theory goes, the dispute would be “abstract,”<sup>32</sup> and the Tribunal would in effect have been asked to give an advisory opinion or to exercise appellate or referral

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<sup>29</sup> Senate Treaty Doc. 103-15, op cit supra.

<sup>30</sup> U.S. Memorial, p. 17 (emphasis added).

<sup>31</sup> Ibid., pp. 20-21; pp. 21, et seq.

<sup>32</sup> Ibid., “Preliminary Statement,” at p. 3.

jurisdiction – something that is not contemplated by the Treaty.<sup>33</sup> But advisory, appellate or referral jurisdiction is not at issue here. What is at issue is a difference of opinion – a “dispute” – as to the meaning of a treaty provision. If the Parties to the Treaty had intended to restrict the jurisdiction of arbitral tribunals established pursuant to Article 7 to concrete cases, surely they would have stated this expressly.

30. But relevant the safeguard is not in a requirement that there be an alleged breach, but rather in the requirement that there be a dispute between the Parties. If there is a dispute, there is no question of an advisory opinion: the Tribunal is asked to resolve a concrete dispute, as shown in section III above.
31. The United States in its Memorial cites the 1954 decision of the Anglo-Italian Conciliation Commission in *Cases of Dual Nationality*<sup>34</sup> as support for its contention that this Tribunal lacks jurisdiction.<sup>35</sup> In fact, the Memorial states that this was the only case the United States could find “that has squarely addressed the question before this tribunal . . .”<sup>36</sup> In that case, brought under the Treaty of Peace with Italy of 10 February 1947,<sup>37</sup> the United Kingdom requested that the commission interpret the meaning of a provision of the peace treaty and the commission found that it lacked jurisdiction to do so. Whether this case is in fact apposite will be examined presently. However, the *Dual Nationality* case must be seen in context. In its search for cases that support its position the United States may have overlooked, *inter alia*, the decision of another post-World War II conciliation commission, that of the Italian-United States Conciliation Commission in the *Amabile* case.<sup>38</sup> There the Italian-United States Conciliation Commission, established under Article 83 of the Treaty of Peace with Italy like the commission in *Cases of Dual Nationality*, also interpreted Article 78 of that treaty. It gave a general interpretation concerning the question of the types of evidence that claimants could use to establish their claims and the weight to be given to such evidence, “for the future guidance of the Agents of the two Governments . . .”<sup>39</sup> This is precisely what the Government of Ecuador seeks in this case: an authoritative interpretation of

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<sup>33</sup> *Ibid.*, p. 20.

<sup>34</sup> Cases of Dual Nationality – Decision No. 22 of 8 May 1954, 14 UNRIAA p. 27 (2006).

<sup>35</sup> U.S. Memorial, p. 22.

<sup>36</sup> *Ibid.*

<sup>37</sup> 49 UNTS p. 126.

<sup>38</sup> Amabile Case – Decision No. 11 of 25 June 1952, 14 UNRIAA p. 115 (2006).

<sup>39</sup> *Ibid.*, at p. 123.

Article II(7) of the BIT “for the future guidance of . . . the two Governments” and of investor-State arbitration tribunals established under the Treaty.

32. Returning to *Cases of Dual Nationality*, that decision in fact provides little support for the contention of the United States that this Tribunal lacks jurisdiction, because it is not analogous to the present case. The jurisdiction of the Anglo-Italian Commission was based on a tightly restricted compromissory clause contained in Article 83(2) of the Treaty of Peace with Italy of 10 February 1947.<sup>40</sup> That clause conferred jurisdiction upon the Conciliation Commission established under Article 83(1) of the treaty only over disputes concerning the “application or interpretation of Articles 75 and 78 and [various Annexes and parts thereof] of the present Treaty . . . .” Those provisions required the restoration by Italy of “all legal rights and interests in Italy of the United Nations and their nationals,” including property. Thus, the Commission’s competence was limited “to determining the disputes arising from claims presented according to the terms of article 78 of the Peace Treaty . . . .”<sup>41</sup> There is no corresponding restriction in Article VII of the Treaty. More fundamentally, the underlying treaty in the *Dual Nationality* case was multilateral, not bilateral as in the present case. In the view of the Commission, this imposed an important constraint upon its freedom to adopt a general interpretation: “an authentic interpretation would demand . . . the agreement of all the contracting parties . . . .”<sup>42</sup> In the present case, there is agreement, in the form of Article VII of the Treaty, by “all the contracting parties” – the United States and Ecuador – on the jurisdiction of this Tribunal to render binding decisions on “the interpretation or application of the Treaty”. The U.S. State Department put it succinctly: “The article constitutes each Party’s prior consent to arbitration.”<sup>43</sup> No other states will be affected by the Tribunal’s decision.
33. Thus the *Cases of Dual Nationality* decision does not seem to be apposite to the present case. It is striking that this was the only case the United States could find that purportedly supports its restrictive approach, and that the decision its exhaustive search turned up is one in which the tribunal’s jurisdiction was confined to disputes concerning certain specified provisions of the applicable multilateral treaty. Again, this is to be

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<sup>40</sup> Op cit. supra.

<sup>41</sup> *Cases of Dual Nationality*, op cit. supra, p. 34.

<sup>42</sup> Ibid.

<sup>43</sup> U.S. Department of State, Article-by-Article Analysis of the Provisions of the Treaty, Article VII (State-State Arbitration), 7 Sept. 1993, Senate Treaty Doc. 103-15, Request of the Republic of Ecuador, Annex A.

contrasted with Article VII of the U.S.-Ecuador BIT, which confers arbitral jurisdiction in relation to “[a]ny dispute concerning the interpretation or application of *the Treaty*”<sup>44</sup> between the U.S. and Ecuador.

34. Having shown why the *Dual Nationality* commission believed it lacked jurisdiction to decide a dispute of a general nature relating to the interpretation of a provision of the Peace treaty, and why those considerations are not present in this case, it must be recalled that the commission in *Amabile* did not consider itself to be so constrained in making observations for the future guidance of the parties despite the fact that similar conditions prevailed as in the *Dual Nationality* case.
35. There are a number of other decisions in which international tribunals have interpreted treaty provisions in the absence of an allegation of breach.<sup>45</sup> It is not surprising that states would seek such interpretations since, unlike the situation on the domestic level, there are very few decisions or commentaries interpreting provisions of treaties, especially those that are bilateral, to assist the parties and others interested in the agreements.
36. The PCIJ, for its part, gave such interpretations in several cases. A direct recognition of the possibility of “interpretations unconnected with concrete cases of application,”<sup>46</sup> and of the value thereof, was given by the PCIJ in the Case concerning *Certain German Interests in Polish Upper Silesia*.<sup>47</sup> There the Court stated as follows:

“[T]he objection based on the abstract character of the question which forms the subject of submission No. 1 is likewise ill-founded. Article 14 of the Covenant gives the Court power to ‘hear and determine any dispute of an international character which the Parties thereto submit to it’. There are numerous clauses giving the Court compulsory jurisdiction in questions of the interpretation and application of a treaty, and these clauses, amongst which is included Article 23 of the Geneva Convention, *appear also to cover interpretations unconnected with concrete cases of application*. Moreover, there is no lack of clauses which refer solely to the interpretation of a treaty; for example, letter *a* of paragraph 2 of Article 36 of the Court’s Statute.<sup>48</sup> There

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<sup>44</sup> Treaty, Article VII(1) (emphasis added).

<sup>45</sup> See, e.g., Interpretation of Paragraph 4 of the Annex Following Article 179 of the Treaty of Neuilly, Judgment No. 4, P.C.I.J., Ser. A, No. 3, September 12, 1924, p. 4; Rights of Nationals of The United States of America in Morocco, 1952 ICJ Rep. p. 176, judgment of 27 August 1952; *Pensions of Officials of the Saar Territory*, Award of September 4, 1934, 3 UNRIAA p. 1553; Iran-U.S. Claims Tribunal, Case No. A/2, Decision No. DEC 1-A2-FT, 1-Iran.U.S.C.T.R. p. 101; Iran-U.S. Claims Tribunal, Case A17, United States of America v. The Islamic Republic of Iran, Decision No. DEC 37-A17-FT, June 18, 1985.

<sup>46</sup> Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, P.C.I.J., Ser. A, No. 7, p. 17, at p. 18.

<sup>47</sup> Ibid.

<sup>48</sup> This is also true in the case of Article 36(2)(a) of the ICJ’s Statute. (Author’s footnote.)

seems to be no reason why States should not be able to ask the Court to give an abstract interpretation of a treaty; *rather would it appear that this is one of the most important functions which it can fulfill.* It has, in fact, already had occasion to do so in Judgment No. 3 [*Treaty of Neuilly*<sup>49</sup>].

Article 59 of the Statute,<sup>50</sup> which has been cited by Poland, does not exclude purely declaratory judgments. The object of this article is simply to prevent legal principles accepted by the Court in a particular case from being binding upon other States or in other disputes. It should also be noted that the possibility of a judgment having a purely declaratory effect has been foreseen in Article 63 of the Statute,<sup>51</sup> as well as in Article 36 already mentioned.”<sup>52</sup>

37. Thus the PCIJ simply gave the term “interpretation”, when appearing in a jurisdictional provision, its natural meaning: the tribunal in question has jurisdiction to interpret a treaty provision when the interpretation is unconnected with a concrete case. The Court also, and importantly for the present case, recognized that “giv[ing] an abstract interpretation of a treaty” would appear to be “one of the most important functions which it can fulfill.” The same is true of the Tribunal in this case.
38. In the Case concerning *Rights of Nationals of The United States of America in Morocco*,<sup>53</sup> the ICJ had no difficulty with the fact that France, in its submissions, asked the Court to interpret treaty provisions without alleging any breach of obligations under the applicable treaties. The dispute, or controversy, concerned different interpretations of provisions (most-favored-nation clauses) of the relevant treaties, as is the case in the present arbitration.
39. Finally it should be noted that well-known claims tribunals have also asserted jurisdiction over purely interpretive disputes. This is the case with the Iran-United States Claims Tribunal, which has taken this step in at least two cases.<sup>54</sup>
40. The cases referred to in the foregoing paragraphs show that it is accepted in international, state-to-state, adjudication that courts and tribunals may assert jurisdiction in cases

<sup>49</sup> Interpretation of Paragraph 4 of the Annex Following Article 179 of the Treaty of Neuilly, Judgment No. 4, P.C.I.J., Ser. A, No. 3, September 12<sup>th</sup>, 1924, p. 4.

<sup>50</sup> This is also true in the case of Article 59 of the ICJ’s Statute. (Author’s footnote.)

<sup>51</sup> This is also true in the case of Article 63 of the ICJ’s Statute. (Author’s footnote.)

<sup>52</sup> Certain German Interests in Polish Upper Silesia, Merits, op. cit. supra, pp. 18-19 (emphasis added).

<sup>53</sup> 1952 ICJ Rep. p. 176, judgment of 27 August 1952.

<sup>54</sup> See the Tribunal’s decisions in cases A2 and A17: Request for interpretation: Jurisdiction of the Tribunal with respect to claims by the Islamic Republic of Iran against nationals of the United States of America, Case No. A/2, Decision No. DEC 1-A2-FT, 1-Iran.U.S.C.T.R. p. 101; and Iran-U.S. Claims Tribunal, Case A17, United States of America v. The Islamic Republic of Iran, Decision No. DEC 37-A17-FT, June 18, 1985.

involving only interpretation of treaty provisions without any breach thereof. Indeed, international tribunals often do this without question, as a matter of routine. Doubtless most cases involve an alleged breach of obligation rather than a request for pure interpretation of a treaty. But the fact that the latter cases are in the minority should not be taken as an indication that international tribunals are not competent to decide them.

## V. The Dispute is Sufficiently Concrete to be Resolved by the Tribunal

41. It will be evident from what has been said in the two previous sections that concreteness of the dispute is not an issue in this case. The dispute is about the correct interpretation of Article II(7) of the Treaty: Ecuador believes it incorporates standards of customary international law relating to the avoidance of denial of justice, while the United States, by its conduct, has put this interpretation in issue, as discussed in section III above. The parties will have ample opportunity to refine their positions further during the pleading process in the arbitration. But there is no doubt concerning what this dispute is about.
42. As shown earlier, there is no requirement in international practice that a dispute relate to “a ‘concrete case’ alleging a treaty violation.”<sup>55</sup> As support for the proposition that this is a *sine qua non* for the Tribunal’s jurisdiction under Article VII(1) of the Treaty, the United States cites the Anglo-Italian Conciliation Commission’s decision in the *Dual Nationality Cases*,<sup>56</sup> shown above to be inapposite to the present case, the *Northern Cameroons* judgment of the ICJ,<sup>57</sup> the World Trade Organizations dispute settlement system,<sup>58</sup> decisions of investor-State and other ad hoc tribunals,<sup>59</sup> and its own practice.<sup>60</sup> Remarkably, the United States evidently could not find any decisions of the PCIJ or more than the one judgment of the ICJ that support its position. This is perhaps understandable, however, because as suggested earlier, states more often bring cases to the World Court that arise out of alleged breaches than those calling for an interpretation of a treaty. But such a phenomenon should not lead to the conclusion that the latter class of cases cannot be brought before international tribunals.
43. It would unduly prolong the present opinion to examine all of the decisions cited by the United States, in view of the cases reviewed above. However, a few words should be said about *Northern Cameroons*, to correct the impression that may have been left by the brief treatment of it in the Memorial of the United States.

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<sup>55</sup> U.S. Memorial, heading 2, at p. 21.

<sup>56</sup> Ibid., p. 22.

<sup>57</sup> Ibid., p. 23.

<sup>58</sup> Ibid., p. 24.

<sup>59</sup> Ibid., pp. 24-26.

<sup>60</sup> Ibid., pp. 26-27.

44. *Northern Cameroons* was a case brought by the Republic of Cameroon seeking a declaratory judgment stating that prior to the termination of the Trusteeship Agreement relating to the Northern Cameroons the United Kingdom had breached its provisions. The Court found that it could, in an appropriate case, issue such a judgment, but that it must have a continuing applicability. In the present case, the applicable treaty was no longer in force. The Court therefore decided not to proceed further in the case.
45. The discussion of this case by the United States omits this crucial factual context, leaving the impression that the case is factually apposite to the present one. This not being so, the Court's pronouncements concerning the need for an actual controversy "at the time of the adjudication" takes on an entirely different complexion.
46. In contrast to *Northern Cameroons*, there is a current controversy in the present case, and a decision of this Tribunal would have a continuing applicability – that is in fact the reason Ecuador is seeking such a decision. But the Court in *Northern Cameroons* could not have better described the situation in the present case when it referred to the kind of circumstances in which it would have proceeded further in the case, namely, those in which its judgment "can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations."<sup>61</sup> The Court referred to these circumstances as "essentials of the judicial function."<sup>62</sup>
47. In sum, the dispute brought before the Tribunal by Ecuador is concrete, and none of the authority cited by the United States casts doubt on that proposition.

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<sup>61</sup> *Case Concerning the Northern Cameroons (Cameroon v. United Kingdom)*, Preliminary Objections, Judgment of 2 December 1963, ICJ Reports 1963, p. 15 at p. 34.

<sup>62</sup> *Ibid.*

## **VI. Conclusions**

48. For the reasons and on the basis of the authority set out above, it may be concluded that:

- a. The requirements for the existence of a “dispute” have been met in this case;
- b. The Tribunal has jurisdiction to resolve the dispute between the Parties concerning the interpretation of the Treaty, without the need for any allegation of breach thereof; and
- c. The dispute between the Parties is sufficiently concrete to be resolved by the Tribunal.

Respectfully submitted,



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Attachment: CV

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### Employment

Distinguished Professor and Scholar, University of the Pacific, McGeorge School of Law (2000 - present); Professor of Law, 1977-2000  
Counselor on International Law, Office of the Legal Adviser, U.S. Department of State (1984-1985)  
Professor of Law, Southwestern University School of Law (1974-1977)

### Professional Activities

Member, United Nations International Law Commission (ILC) (1982-1991); Chair of the ILC for its Thirty-Ninth Session, 1987-1988; Special Rapporteur for the Commission's draft articles on "The Law of the Non-Navigational Uses of International Watercourses" (1985-1991), adopted by the ILC on first reading in 1991, which formed the basis for the negotiation of the United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses of 21 May 1997  
Counselor on International Law, Office of the Legal Adviser, U.S. Department of State (1984-1985)  
Counsel to Slovakia in the case concerning the *Gabčíkovo-Nagymaros Project* (*Hungary/Slovakia*) before the International Court of Justice (1993 - present)  
Counsel to Nicaragua in the case concerning the *Dispute Regarding Navigational and Related Rights* (*Costa Rica v.Nicaragua*) before the International Court of Justice (2005 - 2009)  
Counsel to India, Proceedings before Neutral Expert under the Indus Waters Treaty 1960, Difference regarding the Baglihar Hydro-electric Plant (2005-2006)  
Counsel to Uruguay in the case concerning *Pulp Mills on the River Uruguay* (*Argentina v. Uruguay*) before the International Court of Justice (2008-2010)  
Counsel to India, Arbitration concerning the Kishenganga Dam (*Pakistan v. India*), Permanent Court of Arbitration (2010- )  
Counsel to Nicaragua, *Certain Activities Carried Out by Nicaragua in the Border Area*

(*Costa Rica v. Nicaragua*) before the International Court of Justice (2010 - )

Counsel to Nicaragua, Case concerning *Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v. Costa Rica)* before the International Court of Justice (2011 - )

Faculty Chair (elected by faculty), University of the Pacific, McGeorge School of Law, 2006-2007

Special Legal Adviser, Secretariat, North American Commission for Environmental Cooperation, North American Agreement on Environmental Cooperation (1995 - present)

Counselor, and member of Executive Council, American Society of International Law, 2008 - 2010)

Legal Adviser, Negotiating Committee of the Nile River Basin States (2003 - 2006), and to the Nile River Basin Council of Ministers (2006-2007)

Legal and Institutional Consultant, Nile River Basin Cooperative Framework project, United Nations Development Program (UNDP) (September 1998 - December 2003)

Legal Counsel, Nile Basin Initiative (2002-2003)

External Adviser on Water Law, British Department for International Development & Adam Smith Institute project to assist the Palestinian Authority Negotiations Affairs Department (August, 1999 - 2011)

Member, Committee on the Scientific Bases of Colorado River Basin Water Management, National Research Council, National Academy of Sciences, 2006-2007 (produced report, *Colorado River Basin Water Management: Evaluating and Adjusting to Hydroclimatic Variability*, National Academies Press, 2007)

Member, Panel of Arbitrators Experienced in Environmental Law, established under the Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment, Permanent Court of Arbitration, The Hague (2001 - )

Member, Core Team, World Bank and Government of Netherlands International Waters Training Program (2001 - )

Consultant, World Bank meetings on the Water Charter for the Senegal River, with representatives of Mali, Mauritania, Senegal and the Senegal River Basin Organization (OMVS) (Washington, April-May, 2002)

Team Leader, British Department for International Development & Adam Smith Institute program of training and capacity building for the Government of Kyrgyzstan in the fields of international law and the law of international watercourses (May-October, 2002)

Member, Scientific Committee, One Drop Foundation, (2007 - )

Consultant, project concerning Sustainable Development of the Lake Victoria Basin, Swedish International Development Agency (sida) and East African Community (1999-2000 )

Consultant to (past or present): UNDP; Adam Smith Institute; Office of the Legal Adviser, U.S. Department of State; World Conservation Union (IUCN); United

Nations Environment Programme (UNEP); World Bank; Water and Energy Commission of Nepal, 1998 (as member of Panel appointed by the Commission); Ministry of External Affairs, India

Rapporteur, Committee on Transnational Enforcement of Environmental Law, International Law Association (1997-2002)

Visiting Professor of Law, University of California, Davis School of Law (King Hall), Spring Semester, 2003

Visiting Professor, Graduate Institute of International Studies, University of Geneva, Switzerland, May-June 1998 (course: International Environmental Law)

Visiting Professor, University of Fribourg, Switzerland, Faculty of Law, January-February 1994 (taught International Environmental Law [*Internationales Umweltschutzrecht*] in German)

Member, United States Delegation, Working Group of the Whole for the Elaboration of a Convention on the Law of the Non-Navigational Uses of International Watercourses, United Nations Headquarters, New York, 7-25 October 1996

ILC Liaison, ABA Section of International Law and Practice

Member, Deutsche Gesellschaft für Völkerrecht (German Association of International Law)

Member, Experts Group of Environmental Law, World Commission on Environment and Development (Brundtland Commission)

Member, Board of Advisers, International Institute for Environmental Studies and Disaster Management, People's Republic of Bangladesh (1988-89)

Past Member, Executive Council, American Society of International Law (ASIL) (completed term 1988)

Chair, ASIL Committee on the Hudson Medal (1993-94; 1997-98)

Member, ASIL Nominating Committee (1990-91); Committee on the Hudson Medal (1994-95); Organizing Committee for 1998 Annual Meeting

Member, ASIL Panel on State Responsibility; ASIL Study Group on International Environmental Law

Member, Steering Committee of Experts, Forum on International Law of the Environment, Group of Seven Industrialized Countries, Siena, Italy, April 1990, and Chair of Working Group I of the Forum

Member, Group of Senior Legal Experts on the Revision of the Montevideo Programme for the Development and Periodic Review of Environmental Law, United Nations Environment Programme (UNEP)

Member, Commission on Environmental Law, International Union for the Conservation of Nature and Natural Resources (IUCN)

Member and Rapporteur, Working Group on a Draft International Covenant on Environment and Development, IUCN Commission on Environmental Law & International Council of Environmental Law; Member, Steering Committee of Working Group

Co-Chair, Committee on International Environmental Law, ABA Section of International

Law (1992-93)

Chair, Sub-Group on the Work of the International Law Commission Relating to State Responsibility, Panel on State Responsibility, American Society of International Law

Member, Advisory Board, LL.M. Program in International Legal Studies, Golden Gate University School of Law

Listed in: *Who's Who in Service to the Earth; Who's Who Environmental Registry*

Member, Advisory Board, *Austrian Journal of Public and International Law* (until 1996); *Austrian Review of International and European Law* (1996 - )

Member, Board of Advisors, *Environmental Policy and Law*

Member, Scientific Committee, International Association for Water Law

Member, International Advisory Board, *The Transnational Lawyer*

Member, Board of Directors, *Berkeley Journal of International Law* (1996 - )

Member, Board of Editors, *American Journal of International Law* (1993-1998)

Member, S.J.D. Advisory Committee, Golden Gate University School of Law 1996- )

Former Chair, Committee on International Environmental Law, American Branch, International Law Association

Past Member, Executive Committee, International Law Section, California State Bar (completed term 1991)

Former Associate Editor, *California International Law Section Newsletter*

Past Member, Council, Section of International Law and Practice, American Bar Association (ABA) (completed term 1987)

Former Chair, International Courts Committee, ABA Section of International Law and Practice

Former Chair, Committee on Private International Law, ABA Section of International Law and Practice (1977-1981)

### Education

B.A. (History), 1967, University of Colorado

J.D., 1971, University of California, Berkeley (Boalt Hall)  
(Founding Member of Board of Editors, *Ecology Law Quarterly*)

Dr. iur., 1974 (magna cum laude), University of Cologne, Germany

### Fellowships, Honors and Awards

Order of the Dual White Cross, Republic of Slovakia (highest distinction awarded by Slovakia to foreign nationals), presented October 9, 2007

Holder of the 2007 Merv Leitch, Q.C. Memorial Visiting Chair, University of Calgary Faculty of Law and University of Alberta Faculty of Law; 2007 Merv Leitch, Q.C. Memorial Lecture, "International Water Law and Management for the 21<sup>st</sup> Century"

Certificate of Merit for High Technical Craftsmanship, American Society of International Law, 2002 (for *The Law of International Watercourses, Non-Navigational Uses*, Oxford University Press 2001)

Best Paper Published in *Water International* in 2007, for "The Jordan River Basin: Part 2: Potential Future Allocations to the Co-riparians," co-authored with David J. H. Phillips, Shaddad Attili, and John S. Murray. The prize is shared with Mark Zeitoun, for "The Conflict vs. Cooperation Paradox: Fighting Over or Sharing of Palestinian-Israeli Groundwater?"

Speaker, McGeorge Distinguished Speakers Series, 2000-2001, November 2, 2000  
("Negotiating Water: Lessons from Palestine and the Nile")

Myres S. McDougal Lecturer, University of Denver College of Law,  
February 27, 1999 ("Water, Water Everywhere, But Too Few Drops to Drink:  
The Coming Fresh Water Crisis & International Environmental Law")

Distinguished Faculty Award, University of the Pacific, 1996

Research Fellow, Alexander von Humboldt Foundation, January,  
1983 - July, 1984 (worked at the Environmental Law Centre of the International Union for the Conservation of Nature and Natural Resources (IUCN), Bonn, Germany, and at the University of Cologne)

Research Fellow, Max Planck Association, January-December,  
1972 (worked at Max Planck Institute for Private International and Comparative Law, Hamburg, Germany)

### Selected Publications

#### Books and Monographs

*The Law of International Watercourses*, Oxford University Press, 2<sup>nd</sup> ed. 2007 (1<sup>st</sup> ed. awarded Certificate of Merit for High Technical Craftsmanship, 2002, by the American Society of International Law)

*Understanding International Law*, LexisNexis Publishers, 2006

*International Environmental Law and Policy*, with Edith Brown Weiss, Daniel B. Magraw and A. Dan Tarlock, Aspen, 2<sup>nd</sup> ed., 2007

*Global Issues in Environmental Law*, with Rachael Salcido, West, 2009

*Transnational Litigation in Comparative Perspective: Theory and Application*, with Thomas O. Main, Oxford University Press, 2010

*Public International Law: Cases, Problems, and Texts*, with Dinah Shelton and John Cerone, LexisNexis Publishers, 2010

*Bridges Over Water: Understanding Transboundary Water Conflict, Negotiation and Cooperation*, with Ariel Dinar (economist, The World Bank and Johns Hopkins University), Shlomi Dinar (political scientist, Florida International University) & Daene McKinney (engineer, University of Texas-Austin), World Scientific Publishing, 2007

*Guidebook for Policy and Legislative Development on Conservation and Sustainable Use of Freshwater Resources*, with Gregory S. Weber, United Nations Environment Programme, 2004

*Negotiator's Handbook on International Freshwater Agreements*, United Nations Environment Programme, 2005

*Environmental Pollution and Individual Rights: An International Symposium*, co-edited with Robert Lutz, Kluwer, 1978

*Private Remedies for Transfrontier Environmental Disturbances*, IUCN Environmental Policy and Law Paper No. 8, International Union for the Conservation of Nature and Natural Resources, Morges, Switzerland, 1975

*Pollution Suits between Citizens of the Republic of Mexico and the United States: A Study in Private International Law (Ansprüche aus Immissionen über die Grenze zwischen Mexico und den USA im internationalen Privatrecht)*, 14 Berkeley-Kölner Rechtsstudien (Berkeley-Cologne Legal Studies), C.F. Müller, 1976 (doctoral dissertation)

Seven reports to the U.N. International Law Commission on the Law of the Non-Navigational Uses of International Watercourses, 1985-1991

#### Other Publications

Numerous articles, chapters and other works. List available on request.

#### Foreign Languages

German (speaking, reading and some writing ability); French (reading and some speaking ability); and Spanish (basic working knowledge)

#### Memberships (partial list)

American Society of International Law  
Deutsche Gesellschaft für Völkerrecht (German Association of International Law)  
International Council of Environmental Law

International Law Association  
California State Bar Association (Inactive)  
Section of International Law and Practice, American Bar Association  
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Student Body President, Berkeley High School, 1962-63  
President, Sigma Alpha Epsilon Fraternity, University of Colorado, Boulder, 1965-66  
Platoon Honor Man, Boot Camp, U.S. Marines, MCRD, San Diego, CA, 1968  
U.S. Marine Reserve; U.S. Naval Reserve (honorably discharged as Lieutenant)