

**CWS-011**

**IN THE MATTER OF ICSID Case No. ARB/10/07**

**PHILLIP MORRIS BRAND Sàrl  
PHILLIP MORRIS PRODUCTS S.A.  
and  
ABAL HERMANOS S.A.**

**Claimants**

**ORIENTAL REPUBLIC OF URUGUAY**

**Respondent**

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**OPINION OF JAN PAULSSON**

**27 February 2014**

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## CONTENTS

I.	INTRODUCTION .....	1
II.	THE CONCEPT OF DENIAL OF JUSTICE.....	3
III.	CUSTOMARY INTERNATIONAL LAW AND THE SWITZERLAND-URUGUAY BIT .....	6
IV.	THE ALLEGED DENIAL OF JUSTICE.....	7
A.	<b>Claimants’ challenge to the single presentation regulation</b> .....	7
B.	<b>Claimants’ challenge to the 80% warning regulation</b> .....	8
V.	HAS THE THRESHOLD TEST FOR DENIAL OF JUSTICE BEEN CROSSED?.....	9
A.	<b>The failure of the Uruguayan legal system to adjudicate the legality of the 80% regulation was a denial of justice.....</b>	11
B.	<b>The failure of the Uruguayan legal system to properly consider and decide Abal’s challenge to the single presentation regulation was a denial of justice</b> .....	12
VI.	REMEDIES FOR DENIAL OF JUSTICE .....	13
VIII.	EXPERIENCE .....	17
IX.	Publications.....	19

## I. INTRODUCTION

1. I hold the Michael Klein Distinguished Scholar Chair as a Professor of Law at the University of Miami and am a Visiting Professor in the Law Faculty of the London School of Economics. For 20 years until my retirement in January 2012, I headed the Public International Law Group and International Arbitration Group of Freshfields Bruckhaus Deringer LLP. I was admitted to the bar of Connecticut in 1975 and became an *avocat a la Cour de Paris* in 1977. I obtained a B.A. from Harvard College in 1971, a J.D. from Yale Law School in 1975, where I was an editor of the Law Journal, and a *Diplome d' études superieures spécialisées* from the University of Paris in 1977.
2. I have published writings on a number of issues of international arbitration and international law. Most relevant in the present context is my monograph, *Denial of Justice in International Law*, published by Cambridge University Press in 2005, many years before I knew anything about the present case. A list of my publications appears below in Section IX.
3. I am the President of the International Council for Commercial Arbitration, and of the Administrative Tribunal of the European Bank for Reconstruction and Development; the immediate past President of the London Court of International Arbitration and of the World Bank Administrative Tribunal; and a member of the Permanent Court of Arbitration at The Hague. I was the General Editor of *Arbitration International* (1985-2002) and a Senior Special Fellow at the United Nations Institute for Training and Research (1995-2000). I am an Honorary Bencher of Gray's Inn.
4. I was the Delegate for Bahrain at the Working Group of the United Nations Commission on International Trade Law (UNCITRAL), which recently revised the UNCITRAL Arbitration Rules, and I have been appointed by Bahrain to the Panel of Arbitrators established by the International Centre for the Settlement of Investment Disputes.

5. I have occasionally provided expert opinions to assist courts and tribunals on particular points of law, although this does not form a large part of my practice.
6. I am now asked by counsel for the Claimant to opine on the Respondent's possible denial of justice under public international law. I understand that my opinion will be submitted to the international arbitral tribunal constituted to decide the present case.
7. As the basis for my understanding of matters of fact and Uruguayan law relevant to my present opinion, counsel for the Claimants have provided me with the following documents, which I have reviewed and considered:
  - Claimants' Request for Arbitration dated February 19, 2010;
  - Respondent's Memorial on Jurisdiction dated September 24, 2011;
  - Claimants' Counter-Memorial on Jurisdiction dated January 23, 2012;
  - Respondent's Reply on Jurisdiction dated April 20, 2012;
  - Claimants' Rejoinder on Jurisdiction dated July 20, 2012;
  - The Decision on Jurisdiction dated July 2, 2013;
  - Portions of the Claimants' Memorial on the Merits (in draft); and
  - A selection of the exhibits submitted with the above-referenced pleadings.
8. I express no view as to the accuracy of any factual contentions made by the Claimants and have not verified them or conducted my own factual investigation. Nor do I express any view on any question of Uruguayan law. I simply assume the facts and propositions of Uruguayan law relied on by the Claimants in the documents I have listed to be true and, on that assumption, express my opinion on whether there has been a denial of justice for the purposes of public international law. Whether the BIT has been breached is a

question for the Tribunal hearing this arbitration. If I may be of any assistance to the arbitrators, I suppose it is because I have spent more time than is available in the course of a single case studying the many precedents on denial of justice, and reflecting on the extent to which they and the scholarly literature surrounding them indicate principles capable of general application, including to the unusual circumstances of this case.

9. In this opinion I:

provide a brief account of the concept of denial of justice in customary international law (paragraphs 10-18);

note the applicability of the customary international law standard to proceedings under the Switzerland-Uruguay BIT (paragraphs 19-21);

describe the Claimants' allegations (paragraphs 22-29);

opine on whether, if true, the Claimants' allegations indicate that the threshold test for denial of justice has been crossed (paragraphs 30-43); and

consider what remedies would be available to the Claimants if Uruguay were found responsible for denial of justice under international law (paragraphs 44-52).

## **II. THE CONCEPT OF DENIAL OF JUSTICE**

10. The basic premise of the rule of denial of justice is that a state incurs international responsibility if it administers its laws to aliens in a fundamentally unfair manner. Whether a denial of justice has occurred in any particular case cannot be determined by the application of a formula. International law simply requires that litigants are afforded "even-handed" and "ordinary justice".<sup>1</sup> Proceedings leading to judgments that are "evidently unjust and partial" will be internationally unlawful.<sup>2</sup> As the International

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<sup>1</sup> *Idler (USA) v Venezuela* (1885) in J Moore, *The History and Digest of International Arbitrations to which the United States has been a Party* (1898) Vol IV, 3491 at p 3517.

<sup>2</sup> Vattel, *The Law of Nations*, Book II (1852 reprint) at para 350.

Court of Justice stated in discussing the concept of “arbitrariness”, it “is not so much something opposed to a rule of law, as something opposed to the rule of law”.<sup>3</sup>

11. In the context of cases involving the administrative tribunals of international organisations, the International Court of Justice has had occasion to observe that:

*certain elements of the right to a fair hearing are well recognized and provide criteria helpful in identifying fundamental errors in procedure which have occasioned a failure of justice: for instance, the right to an independent and impartial tribunal established by law; the right to have the case heard and determined within a reasonable time; the right to a reasonable opportunity to present the case to the tribunal and to comment upon the opponent’s case; the right to equality in the proceedings vis-a-vis the opponent; and the right to a reasoned decision.*<sup>4</sup>

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

*such actions in or concerning the administration of justice, whether on the part of the courts or of some other organ of the state.*<sup>5</sup> (Emphasis in the original.)

13. Thus, a denial of justice can occur not just as a result of actions of the court responsible for a judgment, but also from actions of the executive government in connection with proceedings before that court. It is also possible that abuses of legislative power may constitute or form part of a denial of justice if they have a direct impact on the administration of justice.<sup>6</sup>

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<sup>3</sup> *Elettronica Sicula S.p.A. (ELSI)*, Judgment, [1989] ICJ Reports 15 at para 128.

<sup>4</sup> *Application for Review of Judgment No158 of the United Nations Administrative Tribunal*, Advisory Opinion, [1973] ICJ Reports at para 92; recently reaffirmed in *Judgment No 2867 of the Administrative Tribunal of the International Labour Organization*, Advisory Opinion of 1 February 2012, para 30.

<sup>5</sup> G Fitzmaurice, “The Meaning of the Term ‘Denial of Justice’” 13 *British Year Book of International Law* 93 (1932) at p 94.

<sup>6</sup> *U.S. v Great Britain (Robert E. Brown case)*, Vol VI UNRIIAA 120 (1923) eg at p 129.

14. Obviously, international law does not invest international adjudicators with authority to act as courts of appeal from national courts, but rather to determine whether the actions or inaction of national courts transgress the standards applicable in international law. Judge De Visscher explained that:

*The mere violation of internal law may never justify an international claim based on denial of justice. It may be that the defectiveness of internal law, the refusal to apply it, or its wrongful application by judges, constitute elements of proof of a denial of justice, in the international understanding of the expression; but in and of themselves they never constitute this denial.<sup>7</sup>*

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

*If the decision of the Venezuelan court is legally founded, the psychological motives of the judges are irrelevant. On the other hand, the decision may be so defective that one can suppose the judges' bad faith; but in this case too, what is decisive is the objective character of the decision.<sup>8</sup>*

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<sup>7</sup> De Visscher, "Le deni de justice en droit international", 52 *Recueil des Cours* 370 (1935) at p 376; my translation from the original French, which reads: "Jamais la seule violation du droit interne ne peut former la base d'une réclamation internationale fondée sur un déni de justice. Il se peut que les défauts du droit interne, son refus d'application ou sa fausse application par les juges, constituent des éléments de preuve d'un déni de justice, au sens international du terme; mais par eux-mêmes et à eux seuls ils ne constituent jamais ce déni."

<sup>8</sup> *Martini Case*, Vol II UNRIAA 977 (1930) p 987; my translation from the original French, which reads: "Si la sentence de la Cour vénézuélienne est fondée en droit, les motifs psychologiques des juges ne jouent aucun rôle. D'autre part, la défectuosité de la sentence peut être telle qu'il y a lieu de supposer la mauvaise foi des juges, mais également dans ce cas c'est le caractère objectif de la sentence qui est décisif."

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

*Manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety.*<sup>9</sup>

18. Below, I opine on whether this standard has been breached in the present case on the assumptions I have been instructed to make; but before doing so, I consider the relationship between denial of justice under customary international law and the BIT.

### **III. CUSTOMARY INTERNATIONAL LAW AND THE SWITZERLAND-URUGUAY BIT**

19. Article 3.2 of the Switzerland-Uruguay BIT provides that each signatory State shall accord fair and equitable treatment to investors of the other State.
20. This provision protects against denials of justice in two ways. First, a denial of justice would be a breach of the “fair and equitable treatment” standard. In *Rumeli Telekom v Kazakhstan* the tribunal confirmed that: “the fair and equitable treatment standard ... also includes in its generality the standard of denial of justice”.<sup>10</sup> Second, since denial of justice is prohibited by customary international law, it is encompassed by the requirement that investments not be “accorded treatment less than that required by international law”.
21. Judge Jiménez de Arechaga wrote that “state responsibility for acts of the judiciary does not exhaust itself in the concept of denial of justice”.<sup>11</sup> In the *Chevron v Ecuador* investment-treaty award, UNCITRAL, PCA Case No.

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<sup>9</sup> *Loewen v United States* (ICSID Case No ARB(AF)/98/3), 26 June 2003, para 132.

<sup>10</sup> *Rumeli Telekom and Telesim Mobil Telekomikasyon Hizmetleri v Republic of Kazakhstan* ICSID Case No ARB/05/16), 29 July 2008, para 654. See also *Loewen v United States* (ICSID Case No ARB(AF)/98/3), 26 June 2003, paras 128-129.

<sup>11</sup> E Jiménez de Aréchaga, ‘International Responsibility’ in M Sörensen, *Manual of Public International Law* 1968 p 555.

34877, rendered on 30 March 2010 (see paragraphs 241 et seq.), Article 11(7) of the US/Ecuador BIT , which requires “effective means of asserting claims and enforcing rights with respect to investment”, was recognised as an example of a treaty provision which may create state responsibility for acts of the judiciary without applying the test for denial of justice under customary international law. Whether the cause of action is denial of justice or some more specific treaty provision such as Article II(7), in my view the heart of the inquiry remains the same: was justice administered in a fundamentally unfair manner?

#### **IV. THE ALLEGED DENIAL OF JUSTICE**

22. The Tribunal is doubtless already familiar with the facts underlying Claimants’ allegations of denial of justice, but to resume:

##### **A. Claimants’ challenge to the single presentation regulation**

23. The Claimants identify the TCA’s decision of 29 September 2011 rejecting the request for annulment of Ministerial Ordinance 514 as a denial of justice in breach of the FET guarantee in Article 3 of the BIT.

24. Specifically, the TCA based its rejection of Abal’s request to annul the single presentation requirement on facts and arguments presented by British American Tobacco, a separate entity involved in a separate proceeding.<sup>12</sup> When Abal pointed this out, the TCA refused to correct its error, dismissing it as “not important.”<sup>13</sup> The Claimants disagree, arguing that whether the TCA considered the right set of facts and arguments *is* important, particularly given the key differences between the Abal and British American Tobacco annulment applications. By refusing to engage Abal’s specific arguments and factual circumstance, the TCA effectively failed to adjudicate Abal’s application. According to the Claimants, this amounted to a denial of justice.

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<sup>12</sup> TCA Decision 509 on Abal’s Request for Annulment of Ordinance 514, June 14, 2011 (“TCA Decision 509”) [Exhibit C-053].

<sup>13</sup> TCA Decision 801 Rejecting Abal’s Appeal for Clarification, September 29, 2011 (emphasis added) [Exhibit C-056].

**B. Claimants' challenge to the 80% warning regulation**

25. With respect to their attempt to obtain judicial review of the lawfulness of the 80% health-warning packaging regulation, the Claimants were caught in a Catch-22 situation. They wished to challenge both Law 18,256 (for having *ultra vires* allowed the Ministry of Health to elect to extend the requirement beyond 50%) as well as Decree 287 (on the footing that it lacked a legal basis to go beyond 50%). The former necessarily had to be brought before the Supreme Court, the latter before the TCA. The two jurisdictions blatantly contradicted each other, so say the Claimants; the Supreme Court held that Law 18,256 was valid because it did not grant the Ministry of Public Health authority to mandate warnings larger than 50%:

*Law No. 18.256 [...] does not delegate to the Executive Power a discretionary power to impose restrictions on top of [50%], but imposes on the tobacco company the obligation that the exterior labeling of their packs must contain a warning that occupies 'at least 50% of the total exposed principal surfaces.'*<sup>14</sup>

26. The TCA, on the other hand, affirmed that Decree 287 was valid because Law 18,256 *did authorize* the Ministry of Public Health to go beyond 50%:

*The contended decree has limited itself to what was established by law, due to the fact that it determined the percentage to be occupied by sanitary warnings that must not be less than 50% [...] and permits [...] raising the set minimum [...].*<sup>15</sup>

27. In short, the Supreme Court held that Law 18,256 was valid under the Constitution because it did *not* delegate authority to the MPH to mandate warnings covering more than 50% of the surface of cigarette packages. The TCA held that the 80% regulation was valid under administrative law because

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<sup>14</sup> Supreme Court Decision No. 1713, November 10, 2010, at Section IV [Exhibit C-051]. The Uruguayan legislature – the body that wrote and passed the Law 18,256 – also understood that it did not grant the Ministry of Public Health the authority to increase the minimum size of warning labels beyond 50%. Legislature's Answer to Abal's Unconstitutionality Action of Law 18,256, November 10, 2009, at paras. 3.9-3.11 [Exhibit C-046].

<sup>15</sup> TCA Decision 512 on Abal's Request for Annulment of Decree 287, August 28, 2012, Section V, [Exhibit C-116].

Law 18,256 *did* delegate this authority to the MPH. These contradictory holdings cannot co-exist. As a result, the courts did not resolve the core issue of whether the 80% regulation was lawful. That issue has purely and simply escaped review. The Claimants contend that the failure to resolve this core issue is a denial of justice.

28. The Claimants observe that the Supreme Court's and the TCA's decisions are final; there is no further national jurisdiction that could hear a challenge to them.
29. It follows that the claim before the present Tribunal is ripe: a) the 18-month local-litigation requirement under the BIT is inapplicable and b) there is no further municipal remedy to be exhausted.

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

30. The objectives of public policy may collide with the rule of law, as when the constitutional organs of a State determine that pursuit of the public interest requires legislative changes that impede the enjoyment of private rights.
31. This is a paradox, because the rule of law itself is an objective of public policy. It is indeed the means by which other important objectives – such as the mobilization of private capital resources in commercial enterprises that generate employment and finance innovation – are pursued in a liberal democratic society.
32. It may happen that those who most actively pursue a particular public policy objective may view the insistence of those who benefit from the status quo on their legal entitlements as an impediment to public welfare.
33. The debate is fundamental, but is not always framed in the same terms. There is a variable intensity in the claims of precedence of those who seek change in the public interest. One key distinction is that between conduct long established as illegal and conduct that is *becoming* unlawful. Someone engaged in a wholly proscribed activity like smuggling cannot complain that

his business is harmed by the imposition of greater criminal sentences on his couriers and mules. But someone whose activity has been entirely legal – perhaps for generations, perhaps with significant benefit to the community in terms of employment and tax revenues – may properly be in a position to complain if his business is suddenly declared a nuisance to be outlawed, as the result of determinations which may be controversial.

34. French administrative law knows a venerable principle of *l'égalité devant les charges publiques*; the cost of attaining public welfare should have an equal incidence on all citizens, or (to put it another way) the entire burden should not be borne only by the few whose essential interests are affected.
35. That is not, however, the fundamental issue here.
36. Rather, the central concern is the entitlement of a party whose interests are being significantly and adversely affected to insist that the adverse decision be controlled by the basic tenets of the rule of law, lest decisions purporting to be in the public interest become the province of arbitrariness, or the tyranny of political elites or majorities. The more important the public policy pursued, the more important that it be effected punctiliously, by lawful means – not the other way around! – so that the goal may be attained in a secure way.
37. Abal's grievances in this case recall the notorious 19th Century *Idler case*,<sup>16</sup> where the Supreme Court of Venezuela was held to have been constituted illicitly in order to reverse its own prior decisions in favour of the claimant. Of present relevance is the following passage from the US-Venezuela Commission's award:

*Venezuela could, of course, constitute her courts as she desired, but having established them, it was Idler's right, if his affairs were drawn in litigation there, to*

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<sup>16</sup> Joseph Idler (US v. Venezuela); J.B. Moore, *History and Digest of International Arbitrations to which the United States Has Been a Party* 3491, (US Government Printing Office, 1898). The case, concerning a dispute arising from the delivery of military equipment for the Bolivarian wars of liberation which was estimated to amount to 5% of Venezuela's annual revenues, involved 70 years of disputation.

*have them adjudicated by the courts constituted under the forms of law.*<sup>17</sup>

38. Turning to the present case: Abal was entitled to believe that the Uruguayan legal system afforded it the opportunity of judicial review as to the lawfulness of the regulations that require that: (i) 80% of tobacco packages be covered with a health warning; and (ii) manufacturers be limited to a single presentation of their cigarette brands. If the facts are accepted as pleaded, they seem to fall under the rubric of “refusal to judge” the claims. International tribunals have rarely (indeed if ever) been faced with explicit refusals; they unsurprisingly tend to be couched in terms of ostensible formal justification.<sup>18</sup> Such justification, however cannot erase the fact that this behaviour amounts to a denial of justice.

**A. The failure of the Uruguayan legal system to adjudicate the legality of the 80% regulation was a denial of justice**

39. Abal’s position is that the 80% regulation is not valid under Uruguayan law for two separate (and independently sufficient) reasons: (i) Decree 287 could not have that effect because it cannot go beyond the ambit of Law 18,256, which limits the requirement to 50%; and (ii) even if Law 18,256 is read to allow a requirement in excess of 50%, that would Constitutionally entail an impermissible delegation of legislative authority. The core question – whether the Ministry of Health may legally impose a mandatory health warning covering 80% of cigarette packages – has, in the circumstance of this case, been left unanswered by the Uruguayan courts, and there is no further recourse available within the system.

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<sup>17</sup> *Ibid.* at p.3508.

<sup>18</sup> “As one might expect, a malingering court is likely to make some show of activity. The international tribunal then faces the challenge of determining whether there was in fact a disguised refusal to deal with the case. The leading precedent is perhaps the Fabiani case, decided in 1896 by the President of the Swiss Confederation, acting by special authority as sole arbitrator under the Franco-Venezuelan treaty of 1864. Fabiani had secured a private arbitral award in his favour in France in 1880. It had been duly granted *exequatur* by the competent court in that country. He presented the award for enforcement in Venezuela, only to be met with a long series of meretricious suspensions and interlocutory appeals, culminating in the refusal of a tribunal *d’exception*, especially selected to deal with his case, even to schedule a meeting. Fabiani, who had been bankrupted in the meanwhile made a substantial recovery on account of the denial of justice.” Jan Paulsson, *Denial of Justice in International Law* pp. 176-177.

40. In the present case, the facts as alleged include the following essential sequence. Abal was entitled, by the “forms of law” comprising the judicial organs of the State of Uruguay (using the terms of the passage from *Idler*), to have its case adjudicated in such a fashion that its contention, as defined in the preceding paragraph, would in fact be adjudicated by the courts established to be instances of final recourse in their respective domains. Abal’s claims were not so adjudicated. This was the functional equivalent of locking Abal out of the court building: the plainest kind of denial of justice.

**B. The failure of the Uruguayan legal system to properly consider and decide Abal’s challenge to the single presentation regulation was a denial of justice**

41. In its Reply at the jurisdictional stage, the Respondent asserted that the Claimants’ complaint with respect to their challenge to Ordinance 514 gave precedence to form over substance because “the TCA’s reasons for rejecting their challenge were equally applicable to all of them” (para. 72). This means that there is no dispute as to the essential proposition being advanced by the Claimants: *their* case was indeed not heard; the Respondents’ purported justification was to argue that it doesn’t matter; the point of principle had been decided and the outcome was a foregone conclusion.

42. No decision in this matter could conceivably be reached at this level of generality. It falls to the present Tribunal to consider whether the points raised by the Claimants’ before the TCA merited individual consideration. Even if a complaint against a Ministerial Ordinance is raised on the sole grounds that the person who signed it was not the Minister, it is not enough to say that the lawfulness of the Ordinance was upheld in another case, brought by another party; the new plaintiff may have a new proof of an imposture.

43. A fortiori, it is unsatisfactory in this case to assert that the legality of Ordinance 514 was a foregone conclusion; it may have been unlawful *as applied to the Claimants*. The Claimants’ argument, as very succinctly first set out in paragraph 213 of their Rejoinder on Jurisdiction, is that: “The facts and

arguments presented by BAT are vastly different from those presented by Abal.” If that is so (and this is quintessentially a matter for the arbitrators, with respect to which I do not see how my views could be of any interest) the only possible foregone conclusion must be that they did not have their day in court. The wrong committed by the TCA was perhaps as basic as any denial of justice alleged in the annals of international jurisprudence: *the TCA simply did not hear the case*, but rather apparently disposed of it by assuming that it was similar to another case, and confirmed this injustice by refusing to clarify its action.

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

44. Persons convicted of crimes may nevertheless go free because the law does not tolerate the manner in which the conviction was obtained, namely by the use of illegally obtained evidence, no matter how decisive. The reason for this is not sympathy for the offender, but concern for the general population. If the only consequence of the use of illegally obtained evidence would be that the case could start over until the prosecution got it right, there would be little incentive for the police to be punctilious; in many cases they would get away with illegal searches, and even in those cases where they were found out they could simply try again.
45. There is an obvious and valid analogy with respect to denial of justice under international law. The primary remedy is the nullification of the injustice, but complications arise as soon as one begins to apply the *Chorzow* test of putting the injured party in the same position as he would have been in had the delict not occurred. For it is not satisfactory to reason that once the victim is placed in status quo ante, he is right where he was, namely exposed to the same system whose decision was just quashed; thus essentially telling the offending State that it is now entitled to try again. That would greatly reduce the incentive to eschew denials of justice, because in many instances it would be possible to go through the motions again and repair the elements of the process which offended the international jurisdiction, and still reach the same outcome.

46. Here the comparison with the criminal justice system reaches its limits of usefulness, because there is nothing to compare with the rule of double jeopardy, namely that a person cannot be tried twice. A wrongful expropriation can be nullified, but that does not mean that the objective of expropriation is frustrated; the process can be recommenced to achieve its public policy objectives. How can this sentence be reconciled with the immediately paragraph? Will the remedy not end up being symbolic, if the value of the affected rights is depressed by the prospect that they will once again be substantially impaired, if not destroyed?
47. The answer must be case-specific, and perhaps impossible to capture in a single abstract formulation. Restitution is the primary remedy. In the context of denial of justice, restitution is annulment, or, as the ILC Articles on State Responsibility put it: “to re-establish the situation which existed before the wrongful act was consummated.” (Art. 35.)
48. But of course the final judgments of which the Claimants complain were effective immediately, so their annulment now does not eliminate the prejudice. Therefore, compensation is due. This possibility was not missed by the ILC, which continued as follows in Art. 36(1):

*The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.*

49. Before she went on to serve as Judge (and President) of the International Court of Justice, Professor Rosalyn Higgins QC had the occasion, when she chaired the ICSID Tribunal in *Amco II*, to consider whether the victim of a denial of justice might have suffered no damage because it was clearly exposed to losing its case even if it had been conducted properly. The Tribunal rejected that proposition as follows:

*To argue, as did Indonesia, that though there had been procedural irregularities a “fair BKPM” [the regulatory agency which had committed the denial of justice] would still have revoked the license, because of*

*Amco's own shortcomings, is to misaddress causality. The Tribunal cannot pronounce upon what a "fair BKPM" would have done. This is both speculative, and not the issue before it. Rather, it is required to characterise the acts that BKPM did engage in and to see if those acts, if unlawful, cause damage to Amco. It is not required to see if, had it acted fairly, harm might then have rather been attributed to Amco's own fault.*<sup>19</sup>

On this footing, the arbitrators went on to award damages calculated by reference to the fair market value of the business of which Amco was deprived as a result of the wrongful termination of the license.

50. In *Denial of Justice in International Law*, I suggested at pages 223 et seq. that this approach left unresolved some issues of proximate cause in cases where intervening factors contributed to the prejudice, whether acts of the claimant (e.g. conduct justifying forfeiture of its rights) or of a third party (e.g. breach of a private contract). Those concerns do not seem to apply here, where the Claimants are not alleged to have engaged in any unlawful behaviour; activity which was lawful when it was carried out does not become retrospectively unlawful by the enactment of regulations.
51. The damage suffered by the Claimants is the financial impact of being constrained by regulations whose lawfulness the Claimants were deprived of an opportunity to challenge – an opportunity to which they were entitled. Claimants are entitled to full compensation for these damages. Following the frustration of the Claimants' attempts to challenge the denial of justice, the outcome is, as I understand it, nevertheless final and unappealable as a matter of Uruguayan law. This means that the regulations will continue to stand, and will continue to cause demonstrable prejudice to the Claimants. As the tribunal in *Amco II* held, the task for the tribunal is to nullify the denial of justice and to repair the prejudice it has caused, not to examine the merits of the aborted challenges as though it were standing in the place of either the Supreme Court or the TCA, and imagining how either of those courts might have decided in the absence of a denial of justice.

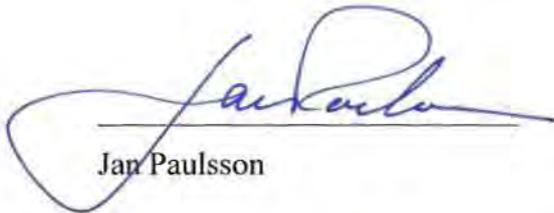
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<sup>19</sup> *Amco Asia Corporation and others v Indonesia* (ICSID Case No ARB/81/1), 31 May 1990, para 174.

## VII. CONCLUSION

52. I have set out my views as to the principles applicable to the Tribunal's determination whether there has, in principle, been a denial of justice. Taking the facts as pleaded by the Claimants, I believe the Respondent engaged in a denial of justice through its handling of Abal's challenges to the single presentation and 80% regulations. If the Tribunal shares my view, this should give rise to an order of full compensation.

This Opinion is based on my professional expertise, and I certify that its contents are in accordance with my sincere beliefs.



Jan Paulsson

Date: 27 February 2014

## VIII. EXPERIENCE

As an arbitrator, I have been appointed to preside over tribunals and have been appointed both by states and by commercial parties. I have served as an arbitrator in more than 200 cases, including the following:

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

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

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

## IX. PUBLICATIONS

### *Books*

THE IDEA OF ARBITRATION, Oxford University Press, 2017

DENIAL OF JUSTICE IN INTERNATIONAL LAW, Cambridge University Press, 2005

GUIDE TO ICSID ARBITRATION, Kluwer, 2004 (with L Reed and N Blackaby)

INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION, Oceana; 1st edition 1983, 2nd edition 1990, 3rd edition 2000 (with W L Craig and W W Park)

THE FRESHFIELDS GUIDE TO ARBITRATION AND ADR CLAUSES, Kluwer, 1st edition 1993 (with J M H Hunter, N K Rawding and D A Redfern), 2nd edition 1999 (with N K Rawding, L Reed, and E A Schwartz)

INTERNATIONAL COMMERCIAL ARBITRATION, Foundation Press, 1997 (with W M Reisman, W L Craig and W W Park)

### *Articles and Contributions to Edited Collections*

*Universal Arbitration – What we Gain, What We Lose*, ARBITRATION (Journal of the Chartered Institute of Arbitrators: 2013)

*Why Good Arbitration Cannot Compensate For Bad Courts*, 30 J. Int. Arb.345 (2013)

*Arbitrage international: la construction de sa légitimité En Temps Réel – Cahier N 47-Septembre 2011* (with Elie Kleiman).

*Thinking Simply about Public Policy*, in AMICORUM FOR SERGE LAZAREFF (2011)

*Arbitration in Three Dimensions*, 60 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 291 (2011)

*Cultural Differences in Advocacy in International Arbitration*, in D. Bishop and E. Kehoe (eds), THE ART OF ADVOCACY IN INTERNATIONAL ARBITRATION 2<sup>nd</sup> ed. (2010)

*Enclaves of Justice*, University of Miami Legal Studies Research Paper No. 2010-25

*Moral Hazard in International Dispute Resolution*, 25(2) ICSID REVIEW – FOREIGN INVESTMENT LAW JOURNAL 339 (2010)

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*The Role of Precedent in Investment Arbitration*, in K. Yannaca-Small ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS (2010)

*Scholarship as Law*, in M.H. Arsanjani et al, LOOKING INTO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN (2010)

*El poder de los Estados para hacer promesas significativas a los extranjeros*, 6(21) REVISTA DE ECONOMIA Y DERECHO 7 (2009)

*El orden público como criterio para negar el reconocimiento y la ejecución de laudos arbitrales*, in G. S. Tawil and E. Zuleta (eds.), EL ARBITRAJE COMERCIAL INTERNACIONAL ESTUDIO DE LA CONVENCION DE NUEVA YORK CON MOTIVO DE SU 50º ANIVERSARIO 609 (Abeledo Perrot, Buenos Aires: 2008)

*International Arbitration is not Arbitration*, 2008:2 STOCKHOLM INTERNATIONAL ARBITRATION REVIEW 1 (2008)

El orden

*Unlawful Laws and the Authority of International Tribunals*, 23(2) ICSID REVIEW – FOREIGN INVESTMENT LAW JOURNAL 215 (2008)

*Neer-ly Mised*, 22 ICSID REVIEW – FOREIGN INVESTMENT LAW JOURNAL 2 (2007) (with Georgios Petrochilos)

*Ghosts of Chorzów* (reflections on the international law of expropriation), in Todd Weiler (ed.), INTERNATIONAL INVESTMENT LAW AND ARBITRATION 777 (2005)

*Jurisdiction and Admissibility*, in G. Aksen et al (eds.), GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION 601 (2005)

*Indirect Expropriations in Investment Treaty Arbitrations* in N. Horn (ed.), ARBITRATING FOREIGN INVESTMENT DISPUTES 145 (2004) (with Zachary Douglas)

*Interference by National Courts* in L W Newman and R D Hill (eds.), THE LEADING ARBITRATORS GUIDE TO INTERNATIONAL ARBITRATION 107 (2004)

*The Involvement of States in International Disputes with Foreign Investors* in J. Lacarte and J. Granados (eds.), INTER-GOVERNMENTAL TRADE DISPUTE SETTLEMENT 491 (2004)

*The Timely Arbitrator: Reflections on the Böckstiegel Method* in R Briner, et al (eds.), LAW OF INTERNATIONAL BUSINESS AND DISPUTE SETTLEMENT IN THE 21<sup>ST</sup> CENTURY: *Liber Amicorum* for Karl-Heinz Böckstiegel (2001).

*Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment* (LSA), 9 ICC COURT BULLETIN 14 (May 1998)

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