

2013

# Mass Tort Claims In International Investment Proceedings: What Are The Lessons From The Ecuador-Chevron Dispute?

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## Recommended Citation

Chiara Giorgetti, *Mass Tort Claims in International Investment Proceedings: What are the Lessons from the Ecuador-Chevron Dispute?*, 34 J. Int'l L. 787 (2014).

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# MASS TORT CLAIMS IN INTERNATIONAL INVESTMENT PROCEEDINGS: WHAT ARE THE LESSONS FROM THE ECUADOR-CHEVRON DISPUTE?

CHIARA GIORGETTI\*

In parallel to the *Lago Agrio* and *Aguinda* litigations in the U.S. and Ecuadorian proceedings that have been discussed already,<sup>1</sup> the Chevron dispute includes an international dimension that presents equally complex and important challenges, but focuses on very different issues and involves different parties.

My remarks introduce these international proceedings first to explain the different actions taken by the parties in different forums. I then assess the viability of international dispute resolution mechanisms for mass tort claims in general, before considering more specifically whether they can provide sufficient redress to mass tort claimants. Finally, I briefly introduce alternative dispute resolution forums to assess their applicability in mass tort claims.

## 1. INTRODUCTION: THE CHEVRON/ECUADOR DISPUTE

In order to understand the Chevron/Ecuador dispute, it is important to contextualize the case historically—especially to understand Ecuador’s position and how its relation to Texaco/Chevron plays out on the international plane.

Ecuador’s first concession to Texaco Petroleum (“Tex-Pet”) and the Gulf Oil Company (“Gulf”) to explore Ecuador’s *Oriente* region was granted to both companies, as a consortium, in 1964.<sup>2</sup> In 1973,

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\* Assistant Professor of Law, Richmond University School of Law, LLM, JSD (Yale). These remarks are adapted from a presentation given at the University of Pennsylvania Journal of International Law Symposium. I would like to thank the organizers for their invitation and for organizing a thought-provoking symposium.

<sup>1</sup> Reference to prior Remarks at the University of Pennsylvania Journal of International Law Symposium: Mass Torts in a Shrinking World (Nov. 2, 2012).

<sup>2</sup> This overview is based on the chronology prepared by the Arbitration Tribunal. See Third Interim Award on Jurisdiction and Admissibility, *Chevron Corp. v. Republic of Ecuador*, No. 2009-23 (Perm. Ct. Arb. Feb. 27, 2012), available at <http://italaw.com/cases/257>.

Tex-Pet, Gulf, and Ecuador entered into another concession agreement, with terms expiring in 1992.<sup>3</sup> In 1974, PetroEcuador—a state-owned enterprise—acquired 25% of the concession.<sup>4</sup> Between 1976 and 1992, PetroEcuador's stake grew to 62.5%, while Tex-Pet maintained a 37.5% share.<sup>5</sup> The operator of the concession was Tex-Pet and the profits were split.<sup>6</sup>

In 1990, Petroamazonas—an entity expressly created as PetroEcuador's subsidiary—became the operator of the consortium.<sup>7</sup> Prior to handing over the Consortium concession, an environmental audit was performed which identified several areas that needed environmental remediation, for an estimated cost of approximately eight to thirteen million dollars.<sup>8</sup>

In 1992, the Consortium concession ended and Tex-Pet transferred its interests in the consortium to PetroEcuador.<sup>9</sup>

In 1995, Tex-Pet and Ecuador signed a settlement agreement, in which Tex-Pet agreed to undertake environmental remedial work in exchange for being released and discharged from all of its legal and contractual obligations, and from any liability for the consortium's impact on the environment.<sup>10</sup> In 1996, Tex-Pet obtained a municipal and provincial release.<sup>11</sup> Finally, in 1998, Ecuador issued the final release certifying that Tex-Pet performed all of its obligations under the 1995 Settlement Agreement, thus releasing Tex-Pet from any and all environmental liability arising out of the Consortium's operations.<sup>12</sup> The dispute between Texaco/Chevron and Ecuador arose in this context.

From an international investment law prospective, therefore, the international litigation relating to the *Lago Agrio* dispute is very different from the domestic litigations dismissed in the United

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<sup>3</sup> *Id.* pt. 3, § 3.6, at 2.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* pt. 3, § 3.7, at 2. Claimants write in their brief that "throughout the existence of the Consortium, approximately 90% of the revenues generated (approximately \$25 billion) went directly to Ecuador in the form of revenues, royalties, taxes and subsidies." Claimants' Notice of Arbitration ¶ 9, *Chevron v. Republic of Ecuador*, No. 2009-23 (Perm. Ct. Arb. Sept. 23, 2009), available at <http://www.chevron.com/Documents/Pdf/Ecuadorbiten.Pdf>.

<sup>7</sup> See Third Interim Award, *supra* note 2.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* pt. 3, § 3.11, at 3-4.

<sup>10</sup> *Id.* pt. 3, § 3.17, at 5.

<sup>11</sup> *Id.* pt. 3, § 3.23, at 6-7.

<sup>12</sup> *Id.* pt. 3, § 3.26, at 7.

States on *forum non conveniens* grounds, and from those proceedings currently underway in Ecuador. The government of Ecuador, who is not party to any domestic proceedings, played an important role in the negotiation, operation, and termination of the concession, and the assessment of that role is fundamental in the international litigation.

Indeed, the current international proceedings function in an entirely different manner in terms of parties, litigants, and issues litigated. International law remains state-centered, and it points to Ecuador as the main subject of the international arbitration proceedings. Additionally, the international investment arbitration places Chevron/Texaco in opposition to Ecuador and does not directly involve the plaintiffs in related domestic proceedings.

## 2. REDRESS FROM INTERNATIONAL INVESTMENT PROCEEDINGS: THE CHEVRON/TEXACO - ECUADOR EXAMPLE

In 2009, Chevron (which acquired Texaco in 2001) and Texaco initiated proceedings against Ecuador, in accordance with the 1993 Ecuador-U.S. Bilateral Investment Treaty (“BIT”) which entered into force in 1997, and the 1976 UNCITRAL Rules of Arbitration at the Permanent Court of Arbitration (PCA) in The Hague.<sup>13</sup>

Essentially, Claimants initiated proceedings in 2009 to prevent liability and enforceability of any judgments rendered against Chevron in the *Lago Agrio* litigation, including an award of indemnification in favor of the Claimants against Ecuador for the sum of money awarded in the *Lago Agrio* judgment.<sup>14</sup>

In the proceedings, Chevron and Texaco argued that Ecuador failed to provide them with an effective means of asserting claims

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<sup>13</sup> Essential background information is available on the PCA website at: [http://www.pca-cpa.org/showpage.asp?pag\\_id=1408](http://www.pca-cpa.org/showpage.asp?pag_id=1408). Note that there are two arbitrations pending at the PCA between Chevron/Texaco and Ecuador. The first suit was filed in 2007, relates to issues of denial of justice, and in 2011 resulted in a final award of \$96 million in favor of Chevron. The second, which is discussed in this presentation, was filed in 2009 and is still pending. International investment arbitration is a dispute resolution system that provides a neutral venue to resolve disputes between a foreign investor and the host state of the investment related to the conduct and operation of foreign investments. For an introduction to international investment arbitration, see Carolyn Lamm, Chiara Giorgetti, & Mairée Uran-Bidegain, *International Centre for Settlement of Investment Disputes in THE RULES, PRACTICE, AND JURISPRUDENCE OF INTERNATIONAL COURTS AND TRIBUNALS* 77 (Chiara Giorgetti ed., 2012) [hereinafter *THE RULES, PRACTICE, AND JURISPRUDENCE*]; Brooks Daly, *Permanent Court of Arbitration, in THE RULES, PRACTICE, AND JURISPRUDENCE*, at 37.

<sup>14</sup> Third Interim Award, *supra* note 2, pt. 1, § 1.28, at 8-10.

and enforcing rights. They also argued that they were denied fair and equitable treatment, full protection and security, and national treatment—obligations required of Ecuador in its application of the BIT.<sup>15</sup> Further, after the Ecuadorian court in the province of *Sucumbios* issued a decision awarding the *Lago Agrio* plaintiffs nineteen billion dollars in February 2011, Claimants added a claim that the judgment was a denial of justice, which was brought about by fraud and corruption, and alleged that Ecuador was in collusion with the plaintiffs in *Lago Agrio*.<sup>16</sup>

The Tribunal, sitting in The Hague, has issued four interim awards and decided it had jurisdiction to proceed to the merits.<sup>17</sup> During the pendency of the arbitration, the Tribunal ordered Ecuador to take “all measures necessary to suspend” the enforcement and recognition, within and without Ecuador, of the judgment by the *Sucumbios* provincial courts.<sup>18</sup> The Tribunal also ordered Claimants to deposit fifty million U.S. dollars with the Secretariat of the PCA as security for any contingent responsibility towards Ecuador.<sup>19</sup> In the Fourth Interim Award, the Tribunal found that Ecuador had failed to comply with the Tribunal’s order.

The merits of the case are still pending, and the Tribunal is following two-track parallel proceedings in which it will first decide on the validity and scope of the release.<sup>20</sup> Should Claimants win on the merits, the Tribunal may require Ecuador to indemnify the Claimants for any sums of money awarded in the *Lago Agrio* judgment.

The international arbitration, therefore, will only have indirect effects in the context of the mass claims for environmental damages arising out of the oil exploitation agreements. The *Lago Agrio* plaintiffs are not part of the litigation. The case at issue in the

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<sup>15</sup> *Id.*

<sup>16</sup> Lucinda A. Low, *Remarks*, in PROCEEDINGS OF THE 106TH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW: CONFRONTING COMPLEXITY 420 (Harlan Cohen, Chiara Giorgetti, & Cymie Payne eds., 2013) (noting that Chevron and Texaco’s additional claim essentially asserts Ecuador’s collusion with the *Lago Agrio* plaintiffs to hold Chevron/Texaco solely responsible for environmental damage to the exclusion of the state and PetroEcuador).

<sup>17</sup> Since the date of the University of Pennsylvania Journal of International Law Symposium, a fourth interim award has been issued. *See supra* note 2.

<sup>18</sup> *Chevron v. Ecuador*, PCA Case No. 2009-23, *supra* note 16, pt. 7, § 75, at 26.

<sup>19</sup> *Id.* pt. 7, § 75, at 26-27.

<sup>20</sup> Procedural Order No. 10, ¶ 1-3, *Chevron v. Ecuador*, No. 2009-23 (Perm. Ct. Arb. Apr. 9, 2012), available at <http://www.italaw.com/sites/default/files/case-documents/ita0913.pdf>.

international arbitration is separate and—regardless of what happens—it cannot bring direct redress to the *Lago Agrio* plaintiffs. Indeed, international investment arbitration deals with investment disputes and it positions an investor against the State in which the investment is made. It is not generally the best tool to address complex, inter-systemic, and international torts disputes.

### 3. REDRESS FROM INTERNATIONAL INVESTMENT PROCEEDINGS? THE ABACLAT V. ARGENTINA EXAMPLE

A recent, groundbreaking, decision in *Abaclat v. Argentina*, however, demonstrates the flexibility and innovative potential of international investment arbitration, and sets an important precedent for mass claims proceedings in international arbitration.<sup>21</sup>

The case was brought by 60,000 Italian investors against Argentina, after Argentina defaulted on its sovereign debt, and the sovereign bonds it had issued to these investors lost most of their value.<sup>22</sup> Claimants had rejected a non-negotiable settlement proposal, and brought a case against Argentina at ICSID alleging violation of the Italy-Argentina Bilateral Investment Treaty.<sup>23</sup>

The case is still pending on the merits. However, the Tribunal's decision accepting jurisdiction already confirmed - for the first time - that mass claims could be heard by an international investment tribunal.<sup>24</sup> The *Abaclat* Tribunal showed its willingness to consider cases that are not typical (but could become more prevalent), and cases that offer redress to multiple claimants that are small investors and lacked other forms of redress in international proceedings. The Tribunals' novel approach could open the door to other similar litigation, for example litigation related to the defaults in Greece and other European countries.<sup>25</sup>

Thus, though international investment tribunals do not typically and immediately hear mass claims, they may still be able to prospectively hear certain kinds of mass claims.

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<sup>21</sup> See generally, *Abaclat v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011), available at <http://www.italaw.com/sites/default/files/case-documents/ita0236.pdf>.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 41.

<sup>24</sup> *Id.* at 109-201.

<sup>25</sup> Global Arbitration Review reports that Cypriots and Slovak investors have filed the first ICSID claim against Greece arising from its 2012 restructuring of sovereign debt. See GAR, 7 May, 2013.

#### 4. PROCEEDINGS AT THE INTER-AMERICAN COMMISSION OF HUMAN RIGHTS

A second international forum has played a role in the *Lago Agrio-Aguinda* dispute. In response to the Chevron-Ecuador international Arbitral Tribunal's order on interim measures, the *Lago Agrio* plaintiffs filed a request for preliminary measures with the Inter-American Commission of Human Rights (the Commission or the Inter-American Commission) against Ecuador.<sup>26</sup>

The *Aguinda* plaintiffs alleged that their right to be compensated for environmental damage would be violated if the Claimants obtained the relief they sought in the international arbitration and the Ecuadorian judgment in their favor was not enforced.<sup>27</sup> The plaintiffs thus requested that the Inter-American Commission indicate provisional measures to ensure that the Ecuadorian government would not interfere with the enforcement of the judgment by the Ecuadorian provincial courts.<sup>28</sup>

Generally, the Inter-American Human Rights Commission can hear cases alleging enumerated human rights violations, if those cases are brought by nationals of a signatory state of the Inter-American Convention on Human Rights and if the cases are brought against the signatory state.<sup>29</sup> Under Article 25 of the Commission's Rules of Procedure, the Commission can grant

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<sup>26</sup> Ted Folkman, *Breaking: Lago Agrio Plaintiffs Sue Ecuador in the Inter-American Commission on Human Rights*, LETTERS BLOGATORY (Feb. 9, 2012), <http://lettersblogatory.com/2012/02/09/chevron-ecuador-oas/>. The blog post also includes a link to the Petition.

<sup>27</sup> *Id.*

<sup>28</sup> Specifically, plaintiffs requested measures sufficient to ensure that "1. the Republic of Ecuador will refrain from taking any action that would contravene, undermine, or threaten the human rights of the Afectados to life, physical integrity, and health, or their rights to a fair trial in all respects, to judicial protection, to the determination of remedies for their claims and the enforcement of any remedies so determined, and to equal protection of the law without discrimination" and "2. the Republic of Ecuador take all appropriate measures to affirmatively protect the Afectados' right to life, physical integrity, health, a fair trial, judicial protection, the determination and enforcement of remedies for claims, and equal protection of the law without discrimination." *Id.*

<sup>29</sup> For an overview of the Commission and of the Inter-American Courts on Human Rights, see Christina M. Cerna, *The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights*, in *THE RULES, PRACTICE, AND JURISPRUDENCE*, *supra* note 13, at 365.

precautionary measures on a showing of imminent threat and irreparable harm.<sup>30</sup>

The *Aguinda* petitioners, however, withdrew their claims before it could be heard by the Commission and after the Commission asked for evidence of harm to health and life.<sup>31</sup> The reasons that precipitated the withdrawal are not clear, though there is speculation that plaintiffs were reluctant to antagonize Ecuador at this particular juncture of the international arbitration.<sup>32</sup>

The petition raises interesting questions about the jurisdiction of the Commission and regarding the interaction between international investment arbitral awards and the international human rights protection system.

Petitioning the Commission can result in a more immediate remedy for alleged mass torts than the remedies available in international investment arbitration. The Commission can give reparations (although the amounts it usually awards are dwarfed by the nineteen billion dollars in damages awarded by the *Sucumbios* provincial court). Further, the Commission has already decided positively on issues relating to indigenous peoples. In *Awes Tingni v. Nicaragua*, for example, it recognized the communal property rights of indigenous inhabitants and called upon Nicaragua to delimit, demarcate, and title the lands to the whole community.<sup>33</sup> When seized on the matter, the Inter-American Court of Human Rights approved preliminary measures to defend

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<sup>30</sup> *Id.*

<sup>31</sup> Low, *supra* note 16, at 421.

<sup>32</sup> Charles N. Brower & Diane Brown, *From Pinochet in The House of Lords to the Chevron/Ecuador Lago Agrio Dispute: The Hottest Topics in International Dispute Resolution*, 26 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 1, 31-32 (2013).

<sup>33</sup> *Awes Tingni v. Nicaragua*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001), available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_79\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_esp.pdf). For an overview of the case, see Claudio Grossman, *Awes Tingni v. Nicaragua: A Landmark Case for the Inter-American System*, 8 HUM. RTS. BRIEF 2, 2 (2001), available at <http://www.wcl.american.edu/hrbrief/08/3/grossman.pdf> ("In 1996, the Republic of Nicaragua issued a Korean corporation permission to cut trees in the communal lands of the Mayagna indigenous community, the Awes Tingni. This community unsuccessfully tried to prevent the Government of Nicaragua from proceeding further in this endeavor. Community members attempted to solve the problem first by negotiating with the government, and then by resorting to the national judiciary. Finally, the case was brought to the Inter-American Commission on Human Rights (Commission), and then before the Inter-American Court on Human Rights (Inter-American Court). This case marks the first time the Inter-American Court has been called upon to address the property rights afforded to indigenous populations in the Americas.").



the private property of the indigenous people and awarded compensation.<sup>34</sup>

In this case, however, plaintiffs renounced to full litigation, which, in any event, would have only provided limited monetary compensation.

##### 5. WHAT ARE THE LESSONS FROM OTHER INTERNATIONAL ADJUDICATIVE MECHANISMS?

This brief analysis demonstrates that neither international investment arbitration nor the Inter-American Human Rights system can provide full redress in mass tort claims. Indeed, while each has advantages and disadvantages and can provide limited redress and compensation when certain characteristics exist, at present, there are no international forums that have general jurisdiction over mass tort claims.

It is therefore useful to briefly examine, in closing, alternative dispute resolution mechanisms that could serve as a useful blueprint in the development of a specific forum for mass tort claims. The paragraphs below very briefly examine four examples. The first two examples, the United Nations Compensation Commission and the Iran-U.S. Claims Tribunal are examples of *ad hoc* mechanisms created to hear mass claims between sovereigns. The following two examples, the Claims Resolution Process and the International Oil Pollution Compensation Fund, are examples of private forums created to hear mass claims.

1. The United Nations Compensation Commission (UNCC) was created by the UN Security Council to provide compensation for claims arising out of the invasion of Kuwait by Iraq in 1990-91.<sup>35</sup> The UNCC worked for several years, issued millions in compensation, and made important findings on environmental damages caused by oil pollution—a possible subject for mass claims.<sup>36</sup> From 1991 to 2005, UNCC received and examined more

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<sup>34</sup> Grossman, *supra* note 33, at 3 (noting the Commission's requests that the Court require Nicaragua to "demarcate the territorial boundaries of its indigenous populations and to abstain from granting licenses allowing the use of removal of natural resources . . . until the precise demarcation has taken place" and to "provide compensation, both material and moral, for the suffering the community experienced . . . and pay the legal expenses incurred by the Awas Tingni").

<sup>35</sup> See *Introduction*, THE UNITED NATIONS COMPENSATION COMMISSION, [www.uncc.ch/introduc.htm](http://www.uncc.ch/introduc.htm) (last updated July 29, 2008). See also Timothy J. Feighery, *The United Nations Compensation Commission*, in THE RULES, PRACTICE, AND JURISPRUDENCE, *supra* note 13, at 515.

<sup>36</sup> *Id.*

than 2.6 million claims seeking a total of approximately \$352 billion dollars in compensation.<sup>37</sup> For example, the UNCC Governing Council approved the payment of more than \$3.2 billion in compensation for over 860,000 successful small claims brought by individuals that had to leave Iraq or Kuwait because of the conflict.<sup>38</sup> The UNCC proved to be an effective mechanism to identify and review small claims, and it is, therefore, a good template for mass torts remedy. However, UNCC was a unique body that was created *ad hoc* and was—unwillingly—financed by Iraq.<sup>39</sup> Its ‘duplicability’ for other similar causes is therefore doubtful.

2. The Iran-U.S. Claims Tribunal has jurisdiction to hear small claims that are brought by U.S. or Iranian claimants against Iran or the United States respectively.<sup>40</sup> The Iran-U.S. Tribunal is also an *ad hoc* institution created by the will of the United States and Iran to resolve disputes in the aftermath of the Iranian revolution and the Iranian Hostage Crisis.<sup>41</sup> This Tribunal was similarly established by the agreement of those parties involved and its ability to be replicated is doubtful.

3. The Claims Resolution Process (CRP) provided the first opportunity for Holocaust victims, and their heirs, to have an independent body resolve their claims to assets that were deposited in Swiss banks.<sup>42</sup> Swiss banks provided \$1.25 billion to

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<sup>37</sup> See *The Claims*, THE UNITED NATIONS COMPENSATION COMMISSION, <http://www.uncc.ch/theclaims.htm> (last updated July 29, 2008).

<sup>38</sup> See *Category “A” Claims*, THE UNITED NATIONS COMPENSATION COMMISSION, [http://www.uncc.ch/claims/a\\_claims.htm](http://www.uncc.ch/claims/a_claims.htm) (last updated July 29, 2008).

<sup>39</sup> See *id.*

<sup>40</sup> Declaration of Algeria Concerning the Settlement of Claims by the United States & Islamic Republic of Iran, art. II (Iran-U.S. Cl. Trib. 1981), available at <http://www.iusct.net/General%20Documents/1-General%20Declaration%E2%80%8E.pdf>. See, generally, Jeremy K. Sharpe, *Iran-United States Claims Tribunal*, in *THE RULES, PRACTICE, AND JURISPRUDENCE*, *supra* note 13, at 545.

<sup>41</sup> See Declaration of Algeria, *supra* note 40, at 2, 8 (noting that the declaration in question “[seeks] a mutually acceptable resolution of the crisis in their relations arising out of the detention of the 52 United States nationals in Iran” and that “[i]f any other dispute arises between the parties as to the interpretation [of the provisions]” the parties agree to be bound by a tribunal and the Claims Settlement Agreement).

<sup>42</sup> See *Insurance Claims Resolution Process*, HOLOCAUST VICTIM ASSETS LITIGATION (SWISS BANKS), <http://www.swissbankclaims.com/InsuranceClaims.aspx> (last updated May 17, 2012) (specifying that “[t]he insurance claims resolution process derives from three important documents: (1) the Settlement Agreement in the Holocaust Victim Assets class action litigation in the U.S. District Court for the Eastern District of New York, Chief Judge Edward R.

settle claims by members of five represented classes.<sup>43</sup> The CRP was instituted as part of that Settlement Agreement and was active until December 2012.<sup>44</sup>

4. The International Oil Pollution Compensation Funds (IOPC Funds) include three intergovernmental organizations<sup>45</sup> that provide compensation for damage resulting from oil spills from tankers.<sup>46</sup> Under the regime, tanker owners are liable to pay compensation, up to a certain limit, for damages following an escape of persistent oil from their ships.<sup>47</sup> If that amount does not cover all the admissible claims, further compensation is available from the Fund if the damage occurs in a sovereign state that holds a membership to that Fund.<sup>48</sup> Additional compensation may also be available from a Supplementary Fund if the state is a member of that Fund as well.<sup>49</sup> The three Funds are not normally paid by

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Korman presiding (the 'Court'); (2) the Final Order and Judgment of the Court approving the Settlement Agreement of July 26, 2000 (as corrected on August 2, 2000); and (3) the Plan of Allocation and Distribution proposed by Special Master Judah Gribetz, approved by Judge Korman on November 22, 2000").

<sup>43</sup> See *Overview*, HOLOCAUST VICTIM ASSETS LITIGATION (SWISS BANKS), <http://www.swissbankclaims.com/Overview.aspx>. See also Roger P. Alford, *The Claims Resolution Tribunal*, in *THE RULES, PRACTICE, AND JURISPRUDENCE*, *supra* note 13, at 365.

<sup>44</sup> See, e.g., Helena Bachmann, *A New Lease on Life for the Mysterious Lost Bank Accounts of Switzerland*, *TIME*, Mar. 21, 2013, <http://world.time.com/2013/03/21/a-new-lease-on-life-for-the-mysterious-lost-bank-accounts-of-switzerland>.

<sup>45</sup> The three funds are the 1971 Fund, the 1992 Fund, and the Supplementary Fund.

<sup>46</sup> *The Funds: Structure*, INTERNATIONAL OIL POLLUTION COMPENSATION FUNDS, <http://www.iopcfunds.org/about-us/structure/> (last visited Apr. 11, 2013).

<sup>47</sup> International Maritime Organization Protocol of 1992 to Amend the International Convention on Civil Liability for Oil Pollution Damage of 29 November 1969, art. 4 (Nov. 27, 1992) ("[T]he owner of a ship at the time of an incident . . . shall be liable for any pollution damage caused by the ship as a result of the incident.").

<sup>48</sup> *Id.* at art. 8 ("Where an incident has caused pollution damage in the territory, including the territorial sea or an area referred to in Article II, of one or more Contracting States or preventive measures have been taken to prevent or minimize pollution damage in such territory including the territorial sea or area, actions for compensation may only be brought in the Courts of any such Contracting State or States.")

<sup>49</sup> Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, art. 4, May 16, 2003 ("The Supplementary Fund shall pay compensation to any person suffering pollution damage if such person has been unable to obtain full and adequate compensation for an established claim for such damage under the terms of the 1992 Fund Convention, because the total damage exceeds, or there is a risk that it will exceed, the applicable limit of compensation . . .").

states; instead, they are financed by levies on certain types of oil that are carried by sea, and they are paid by the entities receiving the oil after sea transport.<sup>50</sup>

Each of these dispute resolution mechanisms can provide some interesting elements for the development of a specific system to hear mass claims. The UNCC and the Iran-U.S. Claims Tribunal both developed specific procedures to hear mass claims, though they only hear cases against a State. The CRP and IOPC are privately funded initiatives that rely on the will of the parties and provide compensation for specific, well-determined cases. They also provide interesting examples of possible blueprints for mass claims or environmental damage compensation based on a private agreement.

## 6. CONCLUSION

When they sought to internationalize their disputes, Chevron and the *Lago Agrio* plaintiffs relied on two different and imperfect dispute resolution methods. Chevron initiated international investment arbitration proceedings under a bilateral investment agreement. The *Lago Agrio* plaintiffs requested preliminary measures to block the interim award from the Inter-American Human Rights Commission. Neither of the chosen forums provides a full remedy for mass tort violations; however, each has certain advantages. International dispute resolution is certainly moving toward a wider acceptance of individual claims; the ICISD *Abaclat v. Argentina* jurisdictional decision illustrates well the potential for future developments.

This paper also briefly considered additional forums that could provide examples of alternative mechanisms to resolve mass tort claims.

One of the important lessons to be learnt from the *Lago Agrio*, *Aguinda*, and *Chevron* litigation is the need for an international forum that can provide individual remedies in complex litigation. International law needs to catch up with mass tort violations, and ensure that international mass tort claimants can be given acceptable redress.

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<sup>50</sup> As of November 1, 2012, there were 108 States that were party to the 1992 Fund Convention and the 1992 Civil Liability Convention. Three additional states will join by June 27, 2013, bringing the total to 112 states. See IOPC Secretariat, *Status of the 1992 Fund Convention and The Supplementary Fund Protocol*, IOPC Doc. OCT12/8/1 (Aug. 31, 2012), available at <http://documentservices.iopcfunds.org/meeting-documents/download/docs/3644/lang/en/>.

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