

**Southern Methodist University/ Law Institute of the Americas**

---

**From the Selected Works of Omar E Garcia-Bolivar**

---

Winter March 15, 2012

## Lack of Judicial Independence and its impact on transnational and international litigation

Omar E Garcia-Bolivar



Available at: [https://works.bepress.com/omar\\_garcia\\_bolivar/17/](https://works.bepress.com/omar_garcia_bolivar/17/)

# Lack of Judicial Independence and its Impact in Transnational and International Litigation

Omar E. García-Bolívar\*

## I. Introduction

In today's world, as the economies of every country are dependent on each other, so are their judicial systems. What is decided, or not, by courts of one country more frequently is bound to have an impact beyond the countries' borders.

By the same token, the notion of due process of law has become a global concept, one that is essential for the world's peace and sustainability. Intertwined with this, the independence of the judicial system has emerged as a concept with its own strength. It is simply not feasible to guarantee due process, rule of law, and democracy without minimum judicial guarantees, which include independence from factors external to the case or anyone to solve disputes.

Of course, the existence of a system of judicial independence is relevant for public policy purposes. It would be in the interest of the citizens of a country and the policy makers that justice is adjudicated in a fair and independent manner. In that vein, other countries might have interest in the development of strong and reliable institutions elsewhere as that would guarantee stability and order in the world. But, the purpose of this article is not to discuss the relevance of

---

\* Omar García-Bolívar is an international lawyer, public policy consultant, and arbitrator. He is President of BG Consulting in Washington, D.C., specializing in law and development consultancy. Mr. García-Bolívar is an arbitrator before the International Centre for Settlement of Investment Disputes (ICSID) and the World Intellectual Property Organization (WIPO), a member of the American Arbitration Association (AAA) International Panel, and listed in the International Chamber of Commerce (ICC) Arbitrator Database. He is Chair of the Inter-American Legal Affairs Committee of the International Law Section of the Washington, D.C. Bar. He is also a professional fellow of the Law Institute of the Americas at Southern Methodist University, Dallas, Texas, and member of the board of editors of Law and Business Review of the Americas. He is associate editor of Transnational Dispute Management. He is also member of the board of editors, Revista de Direito Internacional Economico e Tributario, Brazil. Mr. García-Bolívar was listed in the 2005 edition of Marquis "Who's Who in American Law." He is admitted to legal practice in Venezuela, New York, Washington, D.C. and the U.S. Court of International Trade. He holds law degrees from Universidad Católica Andrés Bello in Venezuela, Southern Methodist University in Dallas, Texas, and the University of Edinburgh in the United Kingdom. As part of teams assembled by USAID and the World Bank the author has assessed the judicial systems of several countries and he has been an expert witness in some of the cases mentioned in this article. Some of the references made herein were presented by the author at the conference "*Judicial Independence in Latin America: rule of law and transborder consequences*" at the Washington, DC Bar on June 16, 2010. This article is in response to a request by the Law and Business Review of the Americas. He can be reached by email at [omargarcia@bg-consulting.com](mailto:omargarcia@bg-consulting.com).

judicial independence in the context of those very important areas, but rather in the context of the more trivial arena of transnational and international litigation. Thus, although one would be tempted to introduce suggestions to foster the independence of the judiciaries, that is not the purpose here.

In most cases, whether a national judiciary has transnational or international consequences is conditioned on the existence of judicial independence. How, what, and who measures the independence of a judicial system is a sensitive topic that touches the very thread of the concept of sovereignty. Thus, measuring the independence of a judicial system is a very delicate matter upon which the subjectivity should not have recourse. Unfortunately, there is no objective and uniform method to determine the independence of a judiciary.

Be that as it may, the judicial independence of countries is regularly tested in foreign fora. The purpose of this article is not to discuss the good or bad of the foreign or international review of a country's judicial system. That is a matter for a different analysis. Rather, because the independence of judicial systems can be scrutinized by foreign or international tribunals, the purpose here is, on one hand, to expose the notion of judicial independence and its implications abroad, while on the other hand, to provide interested parties with the most objective tools used by expert witnesses to determine when a judicial system can be considered independent or not. Those tools might be useful to determine with unbiased grounds when a judicial system is independent. In doing that, the party arguing the lack of independence as well as the party defending its own judicial system might benefit therefore. Thus, by highlighting the hypotheses under which the judicial independence can be an issue and proposing a methodology to measure it, this article would have fulfilled its purpose.

## II. Judicial Independence Defined

Judicial independence is a sine qua non requisite of the rule of law.<sup>1</sup> Judges are meant to be independent, impartial, and insulated from influence outside of the merits of the case.<sup>2</sup> In an independent judicial system judges are accountable for their actions but are not subject to political or economical factors in deciding the cases before them.

By being independent, judges foster the rule of law, i.e., they make the law superior and binding to everyone without distinction. But for judicial independence to exist, the law needs to guarantee this principle and judges need to be serious and respected professionals who are granted stability and are freed from political or economic influences with respect to their decisions.<sup>3</sup>

Judicial independence as part of the international concept of due process embodies “a concept of fair procedure simple and basic enough to describe the judicial process of civilized nations, our peers.”<sup>4</sup>

Domestic judicial systems can be subject to international scrutiny for different reasons.<sup>5</sup> One manifestation of denial of justice is lack of judicial independence, which also comprises judicial corruption.<sup>6</sup> In many cases, the judgment or judicial action against which there is a complaint might not be *per se* tainted by corruption or it might be difficult to prove.<sup>7</sup> But when the judicial

---

<sup>1</sup> See Susan Rose-Ackerman, Judicial independence and corruption, in **Transparency Int'l, Global Corruption Report: Corruption in Judicial Systems** 15 (Diana Rodriguez & Linda Ehrichs eds., 2007), available at [http://www.transparency.org/publications/gcr/gcr\\_2007](http://www.transparency.org/publications/gcr/gcr_2007).

<sup>2</sup> Id. at 16.

<sup>3</sup> Id.

<sup>4</sup> *Society of Lloyds v. Ashenden*, 233 F.3d 473, 477 (7th Cir. 2000).

<sup>5</sup> See Uniform Foreign Money-Judgments Recognition Act § 4(a)(1), 13 U.L.A. 263 (1986).

<sup>6</sup> See *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1347-48 (2009).

<sup>7</sup> See id.

action is the result of a judicial system widely considered to not be independent, it might expose the judicial system to international or foreign review.<sup>8</sup>

Lack of independence is usually affected by corruption either in the form of political influence or economic bribery.<sup>9</sup>

Independence implies that judges' careers do not depend on pleasing those with political and economic power. Such separation of powers is necessary both to prevent politicians from interfering with judicial decision-making and to stop incumbent politicians from targeting their political opponents by using the power of civil and criminal courts as a way of sidelining potential challengers. The judiciary needs to be able to distinguish strong, legitimate cases from those that are weak or politically motivated. Otherwise, the public and users of the court system will lose confidence in the credibility and reliability of the court system to punish and pass judgment on crimes and civil disputes, and judicial sanctions will have little deterrent effect. Individuals may conclude that the likelihood of arrest and conviction is random or, even worse, tied to one's political predilections. In such cases, the legal process does not deter corruption and it may undermine the competitiveness of democratic politics.<sup>10</sup>

Some states might have reasons to criticize some parts of the system of international law on suspicion or appearance of bias or imbalance, as some might argue is the case with the international protection of foreign investment.<sup>11</sup> As a consequence, review of its judicial systems might not be acceptable to them.<sup>12</sup> In many cases, the review can be offensive and perceived contrary to the sovereignty.<sup>13</sup> In other cases, the review might not reflect more than just a consequence of the internationalization of the law, where the judicial system is not judged; rather some of the judicial system's outputs or omissions—those with a foreign impact—are recognized

---

<sup>8</sup> See id.

<sup>9</sup> See Ackerman, supra note 1, at 16.

<sup>10</sup> Id.

<sup>11</sup> See *Loewen Group v. United States*, ICSID Case No. ARB(AF)/98/3, NAFTA award on merits, ¶ 49, (June 26, 2003).

<sup>12</sup> See id.

<sup>13</sup> See id.

or are the source of some kind of international remedy.<sup>14</sup>

### III. Impact of Lack of Judicial Independence

There are different situations under which a judicial system is analyzed for purposes of international litigation.<sup>15</sup>

#### A. ENFORCEMENT OF A FOREIGN JUDGMENT

Judicial systems may be analyzed when a judgment is issued by the courts of one country but is to be enforced in another country.<sup>16</sup> Countries are not compelled to enforce foreign judgments but do so as a matter of comity, which “[r]ests on the principle of reciprocity which is generally the basis for relations among sovereign nations.”<sup>17</sup> Put another way, “[n]ations are not inexorably bound to enforce judgments obtained in each other’s courts. However, [many] courts will enforce foreign judgments that arise out of proceedings which comport with basic principles of due process.”<sup>18</sup> Similarly, “[e]very nation must be the final judge for itself, not only of the nature and extent of the duty but of the occasions on which its exercise may be justly demanded.”<sup>19</sup>

Thus, before a U.S. court can grant recognition of a foreign country judgment, it must “satisfy itself of the essential fairness of the judicial system under which the judgment was rendered.”<sup>20</sup>

---

<sup>14</sup> See id. at 138.

<sup>15</sup> See Society of Lloyds, 233 F.3d at 477.

<sup>16</sup> Uniform Foreign Money-Judgments Recognition Act § 1(2), 13 U.L.A. 263 (1986).

17. John S. Baker Jr. & Agustín Parise, Conflicts in International Tort Litigation Between U.S. and Latin American Courts, 42 U. Miami Inter-Am. L. Rev. 1, 24 (2010).

18. Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1413 (9th Cir. 1995).

19. Hilton v. Guyot, 159 U.S. 113, 164 (1895) (quoting Justice Story, Conflict of Laws, §§ 33-38).

20. **Restatement (Third) of Foreign Relations Law** § 482 cmt. b (1987); see also Huntington v. Attrill, 146 U.S. 657, 671 (1892)

It should be noted, however, that states within the United States that have adopted the Uniform Foreign Money-Judgments Recognition Act shall not recognize a foreign judgment rendered under a system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law.<sup>21</sup>

Consequently, although countries tend to enforce judgments of foreign courts under certain conditions, a country's lack of judicial independence may stand in the way. Occasionally a judicial system's lack of independence may prevent the judgment from being enforced by another country's judicial system.<sup>22</sup> Hence, the determination of judicial independence of the juridical system of a country can be essential to whether an obstacle can be overcome in making effective the outcome of foreign courts.<sup>23</sup>

In Hilton v. Guyot, the criterion for purposes of enforcing foreign judgments was set forth.<sup>24</sup>

It was stated:

[W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh. . . .<sup>25</sup>

---

(a court presented with a foreign judgment must "ascertain whether the claim is really one of such a nature that the court is authorized to enforce it.").

21. Uniform Foreign Money-Judgments Recognition Act § 4(a)(1).

22 Hilton, 159 U.S. 113 at 202-03 (1895).

23 Id.

24 Id.

25. Id.

Other cases have followed.<sup>26</sup> The Second Circuit in Bridgeway Corp. v Citibank,<sup>27</sup> affirmed the district court's finding that Liberia lacked a system of impartial tribunals and thus lacked the grounds to have its judgment enforced. The evidence in Bridgeway was that Liberia's courts in practice did not operate independently, specifically "[t]he Liberian Constitution was ignored" and "corruption and incompetent handling of cases were prevalent."<sup>28</sup>

In Osorio v. Dole Food Co., the U.S. District Court of the Southern District of Florida expressly said that the Nicaraguan judicial system as a whole was not independent, and thus refused enforcement of its judgment, stating "[W]hile on paper and in theory Nicaragua has all the trappings of an independent judiciary, in practice the judiciary does not act impartially."<sup>29</sup>

The Court also ruled,

[There is] persuasive evidence that direct political interference and judicial corruption in Nicaragua is widespread. . . . [Nicaragua has] a system in which political strongmen exert their control over a weak and corrupt judiciary. . . . which does not provide impartial tribunal or procedures compatible with the requirements of due process of law.<sup>30</sup>

As a corollary to measure the independence of a country's system of administration of justice for purposes of enforcing a foreign judgment in the United States the following tests should be undertaken:<sup>31</sup>

- Whether it is a system of jurisprudence likely to secure an impartial administration of justice;

---

<sup>26</sup> See, e.g., Bridgeway Corp. v. Citibank, 201 F.3d 134, 137 (2d Cir. 2000).

<sup>27</sup> Id.

<sup>28</sup> Bridgeway Corp. v. Citibank, 45 F. Supp. 2d 276, 287 (S.D.N.Y. 1999), aff'd, 201 F.3d 134 (2d Cir. 2000).

<sup>29</sup> Osorio, 665 F. Supp. 2d at 1347-48.

<sup>30</sup> Id. at 1351-52.

<sup>31</sup> **Restatement (Third) of Foreign Relations Law** § 482 (1987).

- Whether there has been opportunity for a full and fair trial;
- Whether there is nothing to show either prejudice in the court, or in the system of laws;  
and
- Whether there has not been denial of justice in civil, or proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.

The analysis for lack of independence is a systemic one.<sup>32</sup> Thus, the first test refers to the general aspects of the judiciary without any reference to a specific case.<sup>33</sup> The other three refer to the impact of the judiciary to a specific case.<sup>34</sup>

## B. FORUM NON CONVENIENS

Under the doctrine of *forum non conveniens* a jurisdiction can refuse to hear a case because its courts are not convenient to handle the case. Many issued are considered to determine that, one of which pertains to the “appropriateness” criterion under which the judicial independence is taken into account.

Generally, under this doctrine, a defendant might argue that the courts of a given country are not the appropriate forum to deal with certain cases as there are courts in other countries that are better suited to manage those particular cases.<sup>35</sup> The plaintiff can reply by arguing that the courts allegedly better suited lack judicial independence. If the argument of the defendant succeeds, a suit can be removed from a court as the forum of the plaintiff is adequate to handle the litigation.

---

<sup>32</sup> Id.

<sup>33</sup> Id.

<sup>34</sup> Id.

<sup>35</sup> Christopher A. Whytock & Cassandra Burke Robertson, Forum Non Conveniens and the Enforcement of Foreign Judgments, 111 *Colum. L. Rev.* 1444, 1446 (2011).

But if the plaintiff has counter argued that the courts of the country hearing the case lack judicial independence, the issue will be whether that country has a system of independent and impartial tribunals.<sup>36</sup> In that context, evidence of the independence of the judicial system or lack thereof would be needed.<sup>37</sup> The issue is how to objectively determine whether a system of justice is independent.<sup>38</sup>

In Schwarzinger v. Bramwell, a British Columbia court concluded that it was an adequate forum to hear a claim against Canadian defendants based on intended purchase of property in Nicaragua.<sup>39</sup> The Court decided that based on evidence of lack of judicial independence, Nicaragua was not the appropriate forum for the action.<sup>40</sup> “[T]he plaintiffs have raised a serious concern about whether the case would be decided on the merits in the Nicaraguan judicial system, which is a factor suggesting British Columbia is the appropriate forum.”<sup>41</sup>

But, in the United States the criteria on lack of judicial independence for purposes of forum non conveniens has been more lax.<sup>42</sup> In Banco Latino v. Gomez Lopez, it was said that “[T]he burden of establishing whether an alternative forum exists is not a heavy one.”<sup>43</sup> Similarly, “[a]n adequate forum need not be a perfect forum.”<sup>44</sup>

---

<sup>36</sup> Id.

<sup>37</sup> See Schwarzinger v. Bramwell, 2011 CarswellBC 512, ¶¶ 111-12 (Can. B.C. S.C.) (WL).

<sup>38</sup> See id. ¶ 59.

<sup>39</sup> Id. ¶¶ 111-12.

<sup>40</sup> Id. ¶ 106.

<sup>41</sup> Id. ¶ 110.

<sup>42</sup> See e.g., Banco Latino v. Gomez Lopez, 17 F. Supp. 2d 1327, 1331 (S.D. Fla. 1998).

<sup>43</sup> Id. (citing Carnival Cruise Lines, Inc. v. Oy Wartsila Ab, 159 B.R. 984, 990 (S.D. Fla. 1993)).

<sup>44</sup> Satz v. McDonnell Douglas Corp., 244 F.3d 1279, 1283 (11th Cir. 1979).

Thus, the criteria in the United States for refusing to enforce a judgment in connection with the lack of judicial independence is different from the ones used for considering a forum adequate or not to hear a claim.<sup>45</sup> “Only evidence of actual corruption in a particular case will warrant a finding that an alternate forum is inadequate.”<sup>46</sup> Conversely, the conclusion that a judicial system is not impartial and thus its output should not be recognized and enforced in the United States is “[a] generalization, and like all generalizations it is subject to exceptions.”<sup>47</sup>

### C. INSURANCE POLICY CLAIM

An insurance policy might have been issued to protect against non-commercial risks in a foreign country, such as indirect expropriations.<sup>48</sup> For example, a judicial order from a judicial system perceived as non-independent and which grants title to valuable goods in violation of minimum international principles of due process of law, i.e., disregarding legal arguments of one of the parties, lack of availability of court documents to one of the parties, and gross abbreviation of document filing times for one of the parties, all in violation of domestic procedural rules, might be considered a theft for purposes of insurance claims.<sup>49</sup>

In these cases, when the risk materializes in the form of a judgment that deprives a person of her assets, a thorough analysis of the judicial system of the given country is required to determine if the outcome upon which the insurance will apply is the result of a system of independent justice or not.<sup>50</sup> Additionally, in some cases not necessarily related to non-

---

<sup>45</sup> See, e.g., *Warter v. Boston Sec., S.A.*, 380 F. Supp. 2d 1299, 1310 (S.D. Fla. 2004).

<sup>46</sup> Id. at 1311.

<sup>47</sup> See Osorio, 665 F. Supp. 2d at 1349 n.16.

<sup>48</sup> See Society of Lloyds, 233 F.3d at 475 (overseer of insurance syndicate attempting to enforce foreign judgment in Illinois).

<sup>49</sup> The author is aware of a case that was presented under these circumstances but was eventually settled.

<sup>50</sup> See Society of Lloyds, 233 F.3d at 477.

commercial risk, the insurance policy can require as a precondition that local judicial remedies are exhausted. When those judicial remedies are available in a system that lacks judicial independence, an argument can be made that it would be futile to litigate in local courts and consequently consider that the precondition has been satisfied.<sup>51</sup> But, the issue in these assumptions is how to objectively determine the judicial independence or lack thereof of a juridical system of a given country.

#### D. DENIAL OF JUSTICE UNDER INTERNATIONAL INVESTMENT LAW

An investor entitled to international protection against the deeds of the host state under international investment agreements may claim that there has been a violation to the obligation of fair and equitable treatment when she has been required to litigate in a local judicial system that lacks independence.<sup>52</sup>

Some international investment agreements expressly include an obligation by the states not to deny justice to foreign investors and provide that where that occurs it would be considered a violation to the obligation to provide fair and equitable treatment.<sup>53</sup> For example, the U.S. DR-CAFTA article 10.5 (1) provides that “[e]ach Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.”<sup>54</sup> Subsequently, article 10.5(2)(a) provides: ““fair and equitable

---

<sup>51</sup> Christina Weston, The Enforcement Loophole: Judgment-Recognition Defenses as a Loophole to Corporate Accountability for Conduct Abroad, 25 **Emory Int'l L. Rev.** 731, 743 (2011) (recognizing that lack of due process and impartiality can be raised as defenses in various judgments).

<sup>52</sup> See Loewen Group, ICSID Case No. ARB(AF)/98/3, NAFTA award on merits, ¶ 64, (June 26, 2003). at ¶ 64.

<sup>53</sup> Id.

<sup>54</sup> Dominican Republic-Central America-United States Free Trade Agreement, art. 10.5(1), August 5, 2004, 43 I.L.M 514 (draft text), available at [http://ustr.gov/Trade\\_Agreements/Bilateral/CAFTA/CAFTA-DR\\_Final\\_Texts/Section\\_Index.html](http://ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html). See also United States-Chile Free Trade Agreement art 10.4, U.S.-Chile, July 6, 2003, 117 Stat. 909, available at

treatment’ includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.”<sup>55</sup>

The standard to determine the existence of denial of justice in international law is a systemic one.<sup>56</sup> “[T]he awards and texts make clear that error on the part of the national court is not enough, what is required is ‘manifest injustice’ or ‘gross unfairness’<sup>57</sup> or “palpable violation” in which “bad faith not judicial error seems to be the heart of the matter.”<sup>58</sup> The arbitral tribunals that have looked into this issue have pointed out, “A denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way.”<sup>59</sup> In another case, the arbitrators said that “[t]he question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the

---

[http://www.ustr.gov/Trade\\_Agreements/Bilateral/Chile\\_FTA/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Section_Index.html); United States-Colombia Trade Promotion Agreement art 10.5, U.S.-Colom., May 8, 2006 (draft), [available at](#)  
[http://www.ustr.gov/Trade\\_Agreements/Bilateral/Colombia\\_FTA/Draft\\_Text/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Colombia_FTA/Draft_Text/Section_Index.html); United States-Peru Free Trade Agreement art 10.5, U.S.-Peru, Dec. 7, 2005, [available at](#)  
[http://www.ustr.gov/Trade\\_Agreements/Bilateral/Peru\\_TPA/Draft\\_Texts/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Draft_Texts/Section_Index.html); United States-Panama Trade Promotion Agreement art 10.5, U.S.-Pan., June 28, 2007, [available at](#) <http://www.ustr.gov/trade-agreements/free-trade-agreements/panama-tpa/final-text>, (Providing the same guarantee and including the obligation not to deny justice under the definition of “fair and equitable treatment”).

55. *Id.* art. 10.5(2)(a).

<sup>56</sup> J.W. Garner, *International Responsibility of States for Judgments of Courts and Verdicts of Juries Amounting to Denial of Justice*, 10 *Brit. Y.B. Int'l L.* 181, 183 (1929), [available at](http://heinonline.org/HOL/Page?public=false&handle=hein.journals/byrint10&men_hide=false&men_tab=citnav&collection=fijournals&page=181) [http://heinonline.org/HOL/Page?public=false&handle=hein.journals/byrint10&men\\_hide=false&men\\_tab=citnav&collection=fijournals&page=181](http://heinonline.org/HOL/Page?public=false&handle=hein.journals/byrint10&men_hide=false&men_tab=citnav&collection=fijournals&page=181).

57. *Id.*

58. **D.P. O’Connell, International Law** 498, (2nd ed. 1970).

59. *Azinian v. Mexico*, ICSID Case No. ARB (AF)/97/2, NAFTA, ¶ 102 (Nov. 1, 1999).

impugned decision was clearly improper and discreditable . . . .”<sup>60</sup> Similarly, a subsequent arbitral tribunal pointed out that “[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety is enough, even if one applies the Interpretation according to its terms.”<sup>61</sup> In the context of denial of justice, the arbitral tribunals have stressed that different factors are to be considered, one of which could involve the court system.<sup>62</sup> “As with denial of justice under customary international law, some of the factors that may be considered are the complexity of the case, the behavior of the litigants involved, the significance of the interests at stake in the case, and the behavior of the courts themselves”<sup>63</sup>

Other international investment agreements provide that States “shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.”<sup>64</sup> Whereby the term “effective” could be interpreted as a system of judiciary able to successfully provide the intended result, i.e. justice in an independent manner.<sup>65</sup> In other words, “[effective means]” “guarantees the access to the courts and the existence of institutional mechanisms for the protection of investments.”<sup>66</sup>

---

60. *Mondev Int’l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, NAFTA, ¶ 127, (Oct. 11, 2002).

61. *See Loewen Group*, ICSID Case No. ARB(AF)/98/3, ¶ 132.

62. *See Chevron Corp. v. Ecuador*, PCA Case No. 34877 (U.S. v. Ecuador), Partial Award on the Merits, ¶ 250 (Mar. 30, 2010), [available at](http://italaw.com/documents/ChevronEcuadorFinalAward.pdf) <http://italaw.com/documents/ChevronEcuadorFinalAward.pdf>.

63. *Id.*

64. Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, art. II(7). Similarly, The Energy Charter Treaty, art.10 (12): “Each Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to Investments, investment agreements, and investment authorizations.” *See also*, The Treaty Between The United States Of America And The Oriental Republic Of Uruguay Concerning The Encouragement And Reciprocal Protection Of Investment , art.5(2)(a): “‘fair and equitable treatment’ includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.” Significantly, the principle of due process embodied in the principal legal systems of the world requires that justice be imparted in an independent manner.

65. *See Oxford Dictionary* defining “effective” as: “successful in producing a desired or intended result”.

66. *Duke Energy Electroquil Partners & Electroquil S.A. V. Republic Of Ecuador* , ICSID Case No. ARB/04/19, Award, ¶ 391( Aug. 18, 2008).

The lack of judicial independence for reasons such as corruption or political interference might create conditions for monetary reparation. In those cases the investor might ask for compensation due to the grievances caused by the outcome of domestic courts. The argument of denial of justice might be linked to this hypothesis as a foreigner could argue that exposure to a system of justice that lack of independence has been tantamount to not having access to justice at all. By the same vein, in the context of international investment protection an investor may be entitled to compensation for indirect expropriations, some of which might be considered realized when the property is taken through judgments that are the product of courts that lack independence.

In some cases, investors need to exhaust local remedies before having access to the international dispute resolution mechanisms available. But, the argument of futility can successfully be made when those remedies need to be exhausted in a system where there is no judicial independence. In this case, as in the others, the objective determination of the judicial independence or lack thereof is crucial.

The former President of the International Court of Justice, Judge Jiménez de Aréchaga, believed that it was an essential condition of a state being held responsible for a judicial decision in breach of municipal law that the decision must be a decision of a court of last resort, all remedies having been exhausted.<sup>67</sup>

[I]n the present century State responsibility for judicial acts came to be recognized. Although independent of Government, the judiciary is not independent of the State: the judgment given by a judicial authority emanates from an organ of the State in just the same way as a law promulgated by the

---

67. EDUARDO JIMÉNEZ DE ARÉCHAGA, *INTERNATIONAL LAW IN THE PAST THIRD OF A CENTURY* 282 (1978).

legislature or a decision taken by the executive.<sup>68</sup>

Accordingly, before resorting to international fora, the general rule is to first reach the highest level of the local judiciary.

Although it has been said that the responsibility of the State for a breach of international law constituted by an alleged judicial action arises only when there is final action by the State's judicial system considered as a whole, it is now recognised that the judiciary is an organ of the State and that judicial action which violates a rule of international law is attributable to the State (A.V. Freeman, *The International Responsibility of States for Denial of Justice*, 31-33 (1970)). The rule of judicial finality was influenced by the principles of separation, independence of the judiciary and respect for the finality of judicial decisions. However, the judiciary, though independent of Government, is not independent of the State and the judgment of a court proceeds from an organ of the State as does a decision of the executive.<sup>69</sup>

In some cases, it might not be possible to exhaust the local remedies under a judicial system.

Certain principles of customary international law, such as the principle of "judicial finality" requiring complete exhaustion of local remedies in order to establish State Responsibility for the acts of a State's judiciary, are not applicable in the same way under this *lex specialist*. In particular, as further discussed below, specific considerations become relevant to examine whether and how the non-exhaustion of local remedies can be raised and applied in cases where the delay of the domestic courts in deciding a case is the breach, because it is the domestic courts themselves that cause the non-exhaustion of the local remedies.<sup>70</sup>

Lack of judicial independence is also relevant in the context of state responsibility for injury to aliens caused by denial of justice. Not only can an alien himself bring an action against an alleged perpetrator state if the relevant treaties are in place, but the alien's native state may also bring an action against the alleged perpetrator state. For example, in the ELSI case between the United States and Italy, a Chamber of the International Court of Justice described arbitrary conduct as that which displays "a willful disregard of due process of law, . . . which shocks, or at least surprises, a sense of judicial propriety".<sup>71</sup>

---

68. Id.

69. *Loewen Group v. United States*, ICSID Case No. ARB(AF)/98/3, NAFTA Decision on Jurisdiction, ¶ 69 (Jan. 5, 2001).

70. Chevron Corp., PCA Case No. 34877, ¶ 321.

71. *Elettronica Sicula S.p.A (ELSI) (U.S. v. Italy)*, 1989 I.C.J. 15, 76, ¶ 128 (July 20).

Previously, Judge Tanaka of the International Court of Justice, in a separate opinion in the Barcelona Traction<sup>72</sup> case between the Kingdom of Belgium and the Kingdom of Spain, expressed circumstances that give rise to a claim of denial of justice, including lack of independence.

[I]t remains to examine whether behind the alleged errors and irregularities of the Spanish judiciary some grave circumstances do not exist which may justify the charge of a denial of justice. Conspicuous examples thereof would be ‘corruption, threats, unwarrantable delay, flagrant abuse of judicial procedure, a judgment dictated by the executive, or so manifestly unjust that no court which was both competent and honest could have given it’ . . . We may sum up these circumstances under the single head of ‘bad faith’.”<sup>73</sup>

In sum, countries have an obligation to provide “fundamental fairness in the administration of justice,”<sup>74</sup> which is breached when proceedings are so faulty as to exclude all reasonable expectations of a fair decision.<sup>75</sup> States have a duty to create and maintain a system of justice that protects against or corrects unfairness to foreigners.<sup>76</sup> A system likely to secure an impartial administration of justice furthers due process of law. Flawed and biased procedures, as well as litigation delay and refusal to judge, deny due process to individuals. But more prominently, lack of impartiality by the judges is the quintessential denial of due process of law. Judges that are not independent are not impartial and consequently cannot secure an impartial administration of justice.

#### E. HUMAN RIGHTS VIOLATIONS

A victim of human rights violations in her country of origin might have individual access to

---

<sup>72</sup> Barcelona Traction, Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 3, 160, ¶ 158 (Feb. 3) (separate opinion of Judge Tanaka).

<sup>73</sup> Id.

<sup>74</sup> **Jan Paulsson, Denial of Justice in International Law** 95 (Cambridge 2005).

<sup>75</sup> Id. at 205.

<sup>76</sup> Id. at 7.

international tribunals to obtain justice. Alleged violations of human rights may involve protected rights or denial of justice. If it is the latter, introducing evidence that the local courts lack independence is required. Even when the violation of other rights is alleged, it is usually still necessary to exhaust local legal remedies before accessing the international tribunals. There is, however, an exception to the exhaustion of local remedies requirement when the local remedies are available in a system that lacks judicial independence.

The Inter-American Court of Human Rights has examined these issues extensively. It has said that:

[t]he right to be tried by an impartial judge or court is a fundamental guarantee of due process. In other words, the person on trial must have the guarantee that the judge or court presiding over his case brings to it the utmost objectivity. This way, courts inspire the necessary trust and confidence in the parties to the case and in the citizens of a democratic society.<sup>77</sup>

Similarly, the Court has stressed the importance of judicial independence for purposes of human rights.

[T]his Court has said that one of the principal purposes of the separation of public powers is to guarantee the independence of judges. Such autonomous exercise must be guaranteed by the State both in its institutional aspect, that is, regarding the Judiciary as a system, as well as in connection with its individual aspect, that is to say, concerning the person of the specific judge. The purpose of such protection lies in preventing the Judicial System in general and its members in particular, from finding themselves subjected to possible undue limitations in the exercise of their functions, by bodies alien to the Judiciary or even by those judges with review or appellate functions.<sup>78</sup>

Likewise,

[t]he right to be tried by an impartial judge or tribunal is a fundamental guarantee of due process. That is, it shall be guaranteed that the judge or the tribunal exercise maximum objectivity in the trial. In this respect, this Tribunal has established that impartiality requires that the judge in a private conflict is closer to

---

77. *Herrera Ulloa v. Costa Rica*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No.

107, ¶ 171 (July 2, 2004).

78. *Barbera v. Venezuela*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 182, ¶

55 (Aug. 5, 2008).

the facts of the cause with no subjective prejudice and, similarly, offers sufficient guarantees from the objective standpoint so that it is beyond all doubt that there is full impartiality. The impartiality of the tribunal means that its members should not have any vested interest, a premeditated decision, preference for any of the parties involved, and that they are not involved in the dispute. Personal or subjective impartiality is assumed unless there is evidence to the contrary. In turn, the so-called objective evidence consists of determining whether the questioned judge can provide convincing elements to eradicate any legitimate fears or well-grounded suspicions of partiality regarding his person.<sup>79</sup>

Thus, the robustness of a judicial system is not solely an internal matter; it has consequences beyond the borders of its own country. Some of those consequences might have individual impact as in the case of the enforcement of a judgment in a foreign country or in the case of compensation or restitution in international tribunals, but in all cases the lack of judicial independence damages the country internally and externally as a trustworthy place with which to interact.

#### **IV. Factors To Measure**

The independence of the judiciary is an issue that has caught the attention of the United Nations. It has expressly stressed that “[t]he independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.”<sup>80</sup>

Most democratic countries in the world provide for independence of their judiciaries in their

---

79. *Ramirez v. Venezuela*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 207, ¶ 117 (Nov. 20, 2009).

80. UN Basic Principles on the Independence of the Judiciary, 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, Milan, Italy, 08/26-09/06/1985, G.A. Res. 40/32 (Nov. 29, 1985) and G.A. Res. 40/146 (Dec. 13, 1985), U.N. GAOR, 40th Sess., Supp. no. 53, U.N. Doc. A/40/53 (1985). [hereinafter *Basic Principles on the Independence of the Judiciary*].

laws.<sup>81</sup> But the independence analysis of a judicial system of a country should focus more on the practice and less on the theory as expressed in the laws. Of course, that is not to say that the reference to judicial independence in the laws of a given country should be ignored. On the contrary, the starting point of the assessment should be the legal provisions. Not only in terms of their reference to judicial independence but also in terms of the organization and structure of the courts.

As mentioned above the first test to undertake is to analyze whether the country has a system of jurisprudence likely to secure an impartial administration of justice. As per those terms, to objectively measure the independence of the judiciary several factors need to be considered.<sup>82</sup>

#### A. APPOINTMENT OF THE JUDGES

In a system of judicial independence, judges are appointed according to their merits, academic credentials, seniority and other conditions established by the local laws.

According to the United Nations principles,

[P]ersons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory<sup>83</sup>

In addition,

[T]he term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law. Judges, whether appointed or elected, shall have

---

<sup>81</sup> Joseph B. Diescho, The Paradigm of an Independent Judiciary: It's History, Implications, and Limitations in Africa, in The Independence of the Judiciary in Namibia, 17, 18, 22, 23, 25.

<sup>82</sup> See Osorio v. Navarro, No. 07-22693-Civ-HUCK, 2009 WL 3400321 (S.D. Fla. Aug. 13, 2009) (García-Bolívar Exp. Rep. & Aff. ¶ 23) [hereinafter Garcia-Boliver Exp. Rep. & Aff.].

<sup>83</sup> Basic Principles on the Independence of the Judiciary, supra note 85, ¶ 10.

guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.<sup>84</sup>

Thus, when judges are appointed for reasons other than their professional merits or academic credentials and given an unstable term of office, their independence is compromised.<sup>85</sup> For example, when judges are appointed based on political affiliation or economic interest, as when they represent a quota of an economic sector, their independence is at stake in detriment to society at large.<sup>86</sup>

Additionally, the promotion of judges to higher judicial positions should be based on objective criteria such as ability, integrity, and experience.<sup>87</sup>

## B. DECISION MAKING

Judges should make their decisions based solely on the facts proved and the applicable law. When a government official instructs a judge on a ruling, the independence of the judiciary is sacrificed.<sup>88</sup> When a judge is unable to make a decision according to his or her own analysis of the facts and the law because he or she could be removed, the independence of the judicial office is lost.<sup>89</sup> When a judge makes a decision based on the amount of money involved, the benefit she or someone else will receive, the judiciary becomes an outlet of merchandise to be sold. In that sense, the United Nations principles point out that “[t]he judiciary shall decide matters before them . . . on the basis of facts and in accordance with the law, without any restrictions,

---

<sup>84</sup> *Id.* ¶¶ 11-13.

<sup>85</sup> See García-Bolívar Exp. Rep. & Aff. ¶ 233(a)-(b).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* ¶¶ 99-100.

<sup>89</sup> *Id.* ¶¶ 87, 99-100, 233(a)-(b).

improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.”<sup>90</sup>

Likewise,

[t]here shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.<sup>91</sup>

Further, the process of judicial review should be given consideration. In an independent judicial system, decisions should only be reversed through the appellate process.<sup>92</sup> By the same token, judges should have immunity for actions taken in their official judicial capacity.<sup>93</sup>

Repercussions for judicial decisions made in compliance with the law undermine the independence of the judiciary. The United Nations principles provide: “[W]ithout prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.”<sup>94</sup>

Likewise, courts should be assigned by objective criteria, such as by random methods or based on a judge’s areas of expertise, and not at the discretion of an individual or at the request of judges.

### C. DISCIPLINE

The existence of disciplinary mechanisms is considered when assessing judicial independence.

---

<sup>90</sup> Basic Principles on the Independence of the Judiciary, *supra* note 85, ¶ 2.

<sup>91</sup> *Id.* at ¶ 4.

<sup>92</sup> *See* García-Bolívar Exp. Rep. & Aff. ¶ 76.

<sup>93</sup> Basic Principles on the Independence of the Judiciary, *supra* note 85, ¶ 16.

<sup>94</sup> *Id.*

In most countries there is a process for submitting complaints about a judge and the public is aware both of the process and body in charge of the discipline of judges.<sup>95</sup> These disciplinary bodies are independent from the judiciary itself.<sup>96</sup> Likewise, in sophisticated judicial systems where independence is essential, the rules clearly define ethical and conflict interest issues.<sup>97</sup>

According to the United Nations principles,

[A] charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge. . . . [A]ll disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.<sup>98</sup>

#### D. REMOVAL OF JUDGES

Judges should not be removed from office at the discretion of politicians, but rather for reasons previously provided within the law and only after the proper procedures have been conducted.<sup>99</sup> When judges can be removed or disciplined at the will of any person, they are ultimately accountable to that person and not to the rule of law.<sup>100</sup>

The abovementioned principles expressly state that

[J]udges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties. . . . [D]ecisions in disciplinary, suspension or removal proceedings should be subject to an

---

<sup>95</sup> Filing a Judicial Complaint in State Courts: an Overview, **NOW Legal Defense and Education Fund**, 1-2 (2002),

<http://www.legalmomentum.org/assets/pdfs/filing.pdf>.

<sup>96</sup> See García-Bolívar Exp. Rep. & Aff. ¶¶ 67, 79, 82.

<sup>97</sup> For example, the United Kingdom's Judicial Appointments Committee publishes the relevant rules. See Conflict of Interest Rules for Selection Decisions, Judicial Appointments Commission, 1, ¶ 1, <http://jac.judiciary.gov.uk/about-jac/145.htm>

(U.K.).

<sup>98</sup> Basic Principles on the Independence of the Judiciary, supra note 85, ¶¶ 17, 19.

<sup>99</sup> See García-Bolívar Exp. Rep. & Aff. ¶¶ 80, 221.

<sup>100</sup> See id.

independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.<sup>101</sup>

## V. Methodology to Measure the Independence of a Judicial System

The assessment of the independence of a judicial system needs to be as objective as possible. A suggested method to achieve that purpose entails an analysis of all the factors mentioned above from a comprehensive perspective that considers the theory as well and the practice.<sup>102</sup>

### A. REVIEW OF THE LOCAL LEGAL FRAMEWORK

A thorough review of a country's legal framework as it pertains to the judicial system is crucial.<sup>103</sup> This review should not only cover the specific laws related to the judiciary, but also interconnected laws that might impact the operations of the courts in optimum conditions.<sup>104</sup> This analysis usually starts with the constitution of the country and considers the specific provisions related to the judicial system and appointment and removal of judges.<sup>105</sup> Of paramount importance is the design and division of the governmental branches as well as the political structure and dynamic.

For example, in some countries its constitution provides that the judicial system is independent but in reality judges owe their office mandate to the political leaders.<sup>106</sup> When the legislative branch appoints judges, one must look deeper to determine how the legislature is elected. In some countries, members of the legislature are elected in slates that are in turn

---

101. Basic Principles on the Independence of the Judiciary, *supra* note 85, ¶¶ 18, 20.

102 *See* García-Bolívar Exp. Rep. & Aff. ¶ 23.

103 *See id.* ¶ 37.

104 *See id.* ¶ 39.

105 *Id.*

106 *See id.* ¶¶ 89, 180, 191.

chosen by the strongmen of the parties, a circumstance that diminishes the ultimate independence of the courts.<sup>107</sup>

## B. CONSULTATION WITH LOCAL STAKEHOLDERS

Lawyers, businessmen, union members, judges, policy makers, non-governmental organizations, chambers of commerce, universities, media, and common users of the courts whose opinion can be obtained are important stakeholders of the judiciary.<sup>108</sup> A 360 degree analysis of the opinions is generally necessary to confirm that the views of one sector of the country are also shared by other sectors.<sup>109</sup> For example, one sector of the country might have a negative opinion of the judicial system because the judiciary issued a decision that affected its interest. But, the same opinion might not be shared by other sectors of the country; in which case, it would be necessary to consult additional sectors of the country to determine a shared view on the factors relevant to the independence of the judiciary.

In some cases the opinions of the stakeholders are easily available as they have been published, but in other cases it would be necessary to directly consult them through surveys or questionnaires<sup>110</sup> specifically tailored to consider their views on the issues of interest vis-à-vis the independence of the judicial system.<sup>111</sup>

## C. REVIEW OF EMBLEMATIC CASES

By reviewing cases where there is a widespread perception that a judicial decision was not

---

<sup>107</sup>. Osorio, 665 F. Supp. 2d at 1348.

<sup>108</sup> See García-Bolívar Exp. Rep. & Aff. ¶¶ 38, 40, 42.

<sup>109</sup> Id. ¶ 42.

<sup>110</sup> See García-Bolívar Exp. Rep. & Aff. ¶¶ 38, 40-42.

<sup>111</sup>. For the USAID reports, the author was part of a team that conducted both tailored questionnaire and direct interviews with stakeholders.

made solely based on the facts and the law, but by outside influence, it is possible to assess the level of independence of a judiciary.

In Osorio v. Dole Food Co.,<sup>112</sup> for example, reference was made to the “Esso” case.

Accordingly, in 2007, based on a complaint filed by the Nicaraguan Customs Authority alleging that American oil company Esso Standard Oil was late in paying its customs duties, a Nicaraguan Judge ordered seizure of all the company’s facilities.<sup>113</sup> The judicial measure was taken without requesting that the Customs Authority post a bond, as required by law, and without affording Esso other due process guarantees, such as service of process.<sup>114</sup>

Reportedly the court appointed a government officer to act as a temporary administrator of Esso’s assets on behalf of the Customs Authority. The government officer leased some of Esso’s tanks to the Nicaraguan State owned Petroleum Company, which needed them to store petroleum. Subsequently, the facilities were returned to Esso, but remained subject to the government-imposed lease with the Nicaraguan State owned Petroleum Company. Under political pressure Esso settled with the Government of Nicaragua and allowed it to use its facilities but outrage for violation of basic principles of rule of law was widely expressed.<sup>115</sup>

Then U.S. Ambassador to Nicaragua, Paul Trivelli, said “that action was unjustified, amounted to confiscation and was of great concern.”<sup>116</sup> He also urged the Nicaraguan government respect the rule of law.<sup>117</sup>

Cases like this, plus an analysis of the previously discussed factors and use of the suggested

---

112. Osorio, 665 F. Supp. 2d at 1307.

113. García-Bolívar Exp. Rep. & Aff. ¶ 111.

114. Id.

115. Id.

116. Id.; see also Eduardo Marengo & Esteban Solis, EEUU Amenaza, El Nuevo Diario (Aug. 21, 2007).

117. García-Bolívar Exp. Rep. & Aff. ¶ 111.

methodology, can lead to the conclusion that a judicial system lacks independence.<sup>118</sup>

#### D. VALIDATION THROUGH SECONDARY SOURCES

An important tool in determining the independence of a judicial system is validation by the opinions of others. The purpose of the validation is to confirm the findings yielded by the analysis while considering the opinions of others who differ on the conclusion. The goal is to find inconsistencies in the conclusions or consider aspects that were not previously analyzed.

Unfortunately, in the world of indicators and indexes there are none related to judicial independence. But, there are some indicators and reports that can be helpful to validate the analysis of the independence of a judicial system in order to produce an objective opinion. The following is a list of secondary sources that can be used to validate conclusions on the independence of a judiciary. As the independence of a judicial system needs to be measured in a timeframe, consideration should be given to the year in which these reports and indexes are produced.

1. U.S. Department of State, Country Reports on Human Rights Practices.<sup>119</sup> These reports are produced every year pursuant to federal law and prepared by the U.S. Government. They are meticulously constructed after extensive investigation aimed at producing objective and accurate findings.

For example, the 2007 report on Ecuador said:

While the constitution provides for an independent judiciary, in practice the judiciary was at times susceptible to outside pressure and corruption. The media reported extensively on the susceptibility of the judiciary to bribes for favorable decisions and resolution of legal cases and on judges parceling out cases to outside lawyers who wrote judicial sentences on cases before the court and sent

---

<sup>118</sup> *Id.* ¶¶ 232-33.

<sup>119</sup> 2007 Country Reports on Human Rights Practices, U.S. Dep't of State, <http://www.state.gov/g/drl/rls/hrrpt/2007/index.htm> (last visited Jan. 11, 2012).

them back to the presiding judge for signature.<sup>120</sup>

2. The U.S. Department of State Commercial Guides.<sup>121</sup> The U.S. Department of State issues a guide annually on how to do business in every country with which the United States maintains diplomatic relations. It is intended to provide assistance to U.S. companies when doing business in those countries. The report is re-published online by the U.S. Embassies.

In the 2001 Guide on Panama, the report said:

Panama is a representative democracy with three branches of government: executive and legislative branches elected by direct vote every five years, and a nominally independent judiciary appointed by the executive. Because the current Panamanian judicial system is inefficient at best, and corrupt at worst, many U.S. companies doing business in Panama have arbitration agreements in place as an alternative to the courts<sup>122</sup>

3. Office of the U.S. Trade Representative (U.S.T.R.), National Trade Estimate Report on Foreign Trade Barriers.<sup>123</sup> The U.S.T.R. is the main representative of the U.S. government for foreign trade matters.<sup>124</sup> Its office issues annual reports describing barriers to U.S. business abroad. It deals with the issue of rule of law as it relates to the flow of trade.<sup>125</sup>

In its 2009 report on Nicaragua, it said: “U.S. companies have raised concerns that Nicaragua’s legal system is weak, cumbersome, and subject to political influence and that many

---

120. 2007 Country Reports on Human Rights Practices, Ecuador, U.S. Dep’t of State (Mar. 6, 2007),

<http://www.state.gov/g/drl/rls/hrrpt/2006/78890.htm>.

121. Country Commercial Guides, U.S. Dep’t of State, <http://www.state.gov/e/eb/rls/rpts/ccg/> (last visited Jan. 11, 2012).

122. 2007 Country Reports on Human Rights Practices, Panama, U.S. Dep’t of State (Mar. 11, 2008),

<http://www.state.gov/g/drl/rls/hrrpt/2007/100648.htm>.

123. U.S.T.R. Trade Barriers Report. <http://www.ustr.gov>

124. Mission of the USTR, Office of the U.S. Trade Representative, <http://www.ustr.gov/about-us/mission> (last visited Dec. 28, 2011).

125. Reports and Publications, Office of the U.S. Trade Representative, <http://www.ustr.gov/about-us/press-office/reports-and-publications> (last visited Dec. 28, 2011).

members of the judiciary, including those at high levels, are believed to be corrupt.”<sup>126</sup>

4. Other reports produced by the U.S. government can be useful, such as the U.S. Department of State, Country Reports on Terrorism,<sup>127</sup> which under federal law requires the Secretary of State to provide to Congress each year a full and complete report on terrorism with regard to those countries and groups meeting criteria set forth in the legislation.

5. Similarly the U.S. Department of State, Bureau of International Narcotics and Law Enforcement Affairs,<sup>128</sup> which under federal law requires the Secretary of State to provide to Congress each year a full and complete country-by-country report concerning international drug trade, chemical control, money laundering and financial crimes.<sup>129</sup>

6. USAID is an agency of the U.S. government that provides economic development and humanitarian assistance around the world in support of the foreign policy goals of the United States.<sup>130</sup> Occasionally it produces reports on countries in which it operates. In 2005, it issued the Trade and Commercial Law Assessment-El Salvador.<sup>131</sup>

The state of El Salvador’s judicial system is no less than dire: the system suffers from untenable delays, inadequate training of both professional and administrative

---

126. 2009 Nat’l Trade Estimate, *supra* note 122, at 357.

127. Country Reports on Terrorism, U.S. Dep’t of State, <http://www.state.gov/s/ct/rls/crt/> (last visited Dec. 28, 2011).

128. Bureau of International Narcotics & Law Enforcement Affairs, U.S. Dep’t of State, <http://www.state.gov/p/inl/>

(last visited Dec. 28, 2011).

129. Narcotics Control Reports, U.S. Dep’t of State, <http://www.state.gov/p/inl/rls/nrcrpt/index.htm> (last visited Dec. 28, 2011).

130. About USAID, USAID, [http://www.usaid.gov/about\\_usaid/](http://www.usaid.gov/about_usaid/) (last visited Dec. 28, 2011).

131. Trade & Commercial Law Assessment – El Salvador: Final Report, BIZCLIR.com (Jan. 2005), <http://www.bizclir.com/galleries/country-assessments/El%20Salvador.pdf>.

staff, a lack of judicial independence, and otherwise unqualified personnel who hold important positions, including judges. There is an absence of public confidence in the system that is charged with supporting meaningful implementation of a commercial law structure.<sup>132</sup>

Some indexes and indicators relate indirectly to judicial independence.

1. Governance Research Indicator Country Snapshot, World Bank.<sup>133</sup> The World Bank is a multilateral organization with the goal of reducing poverty and advancing economic development.<sup>134</sup> It produces indicators on governance.<sup>135</sup> One of its governance indicators assesses the rule of law in a particular country.<sup>136</sup> The rule of law category includes several indicators that assess the extent to which people “have confidence in and abide by the rules of society.”<sup>137</sup> These include perceptions of the incidence of crime, the effectiveness and predictability of the judiciary, and the enforceability of contracts.<sup>138</sup> For example, in 2010, Bolivia scored 13.3 in rule of law, with 100 being the highest possible score.<sup>139</sup>

---

<sup>132</sup> Id. at I-7.

<sup>133</sup> Governance, **World Bank**, <http://wbi.worldbank.org/wbi/topic/governance> (last visited Dec. 28, 2011).

<sup>134</sup> About Us, **World Bank**,

<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,pagePK:50004410~piPK:36602~theSitePK:29708,00.html>  
(last visited Dec. 28, 2011).

<sup>135</sup> Worldwide Governance Indicators, **World Bank**, <http://info.worldbank.org/governance/wgi/index.asp> (last visited Dec. 28, 2011).

<sup>136</sup> See Key Variables, **World Bank**, <http://web.worldbank.org/WBSITE/EXTERNAL/WBI/WBIPROGRAMS/KFDLP/EXTUNIKAM/0,contentMDK:20588132~menuPK:1453369~pagePK:64168445~piPK:64168309~theSitePK:1414721,00.html> (last visited Dec. 28, 2011).

<sup>137</sup> Id.

<sup>138</sup> Id.

<sup>139</sup> World Governance Indicators: Rule of Law, **World Bank**, <http://info.worldbank.org/governance/wgi/index.asp> (last visited Jan. 11, 2012); the full dataset can be downloaded at <http://info.worldbank.org/governance/wgi/pdf/wgidataset.xls>.

2. World Bank Corporate and Public Ethics Indices.<sup>140</sup> The World Bank produces indices on corporate and public ethics for more than 102 countries.<sup>141</sup> Its index on judicial and legal effectiveness deals with judicial independence, judicial bribery, the quality of a country's legal framework, property protection, parliament effectiveness, and police effectiveness.<sup>142</sup> In 2007, Pakistan scored 4.8 in the index on judicial and legal effectiveness, with 100 being the highest possible score.<sup>143</sup>

3. Transparency International, Global Corruption Report—Corruption in Judicial Systems.<sup>144</sup> Based in Germany, this organization is considered the paramount international watchdog on corruption.<sup>145</sup> It issues annual reports on the status of corruption in almost all countries of the world.<sup>146</sup> It also counts with the Global Corruption Barometer, a survey that “assesses general public attitudes toward, and experience of, corruption in dozens of countries around the world.”<sup>147</sup> Likewise, it provides countries with National Integrity System reports which are detailed reports on the status of corruption in the countries comprising the judicial system.<sup>148</sup>

---

140Corporate Corruption/Ethics Indices: Country Averages (2004), World Bank, <http://siteresources.worldbank.org/INTGOVANDANTICORRUPTION/Resources/ETHICS.pdf> (last visited Jan. 11, 2012).

141 See id.

142 See id.

143 See id.

144Global Corruption Report 2007 Corruption in Judicial Systems, Transparency Int'l, [http://www.transparency.org/publications/gcr/gcr\\_2007](http://www.transparency.org/publications/gcr/gcr_2007) (last visited Dec. 28, 2011).

145 About Transparency International, Transparency Int'l, [http://www.transparency.org/about\\_us](http://www.transparency.org/about_us) (last visited Dec. 28, 2011).

146 See Transparency International's Annual Reports, Transparency Int'l, [http://www.transparency.org/publications/annual\\_report](http://www.transparency.org/publications/annual_report) (last visited Dec. 28, 2011).

147 Global Corruption Barometer, Transparency Int'l, [http://www.transparency.org/policy\\_research/surveys\\_indices/gcb](http://www.transparency.org/policy_research/surveys_indices/gcb) (last visited Dec. 28, 2011).

148 NIS Reports by Country, Transparency Int'l, [http://www.transparency.org/policy\\_research/nis/nis\\_reports\\_by\\_country](http://www.transparency.org/policy_research/nis/nis_reports_by_country) (last visited Dec. 28, 2011).

The Transparency International 2007 Global Corruption Report on judicial systems stated that there is a

[P]erception . . . [that] . . . the judiciary . . . [is] . . . corrupt and politicized in most Central American countries, with the exception of Costa Rica . . . [I]n Nicaragua, the disappearance of a large sum of money from a Supreme Court bank account resulted in a public outcry . . . [T]here are certainly Supreme Courts that have done just as badly (Nicaragua, Honduras) using their powers to install their protégés and control their further actions.<sup>149</sup>

4. Heritage Foundation, Index of Economic Freedom.<sup>150</sup> This U.S. based foundation produces an annual report that measures and ranks 184 countries across ten specific freedoms including freedom from corruption.<sup>151</sup> In 2011, Nicaragua scored twenty-five in freedom from corruption with 100 being the highest possible score.<sup>152</sup>

Corruption is perceived as pervasive. Nicaragua ranks 130th out of 180 countries in Transparency International's Corruption Perceptions Index for 2009. Influence peddling in the judicial branch puts foreign investors at a sharp disadvantage in any litigation. Corruption and political deal-making, especially within the ruling Sandinista party, the National Police, and the judiciary, are viewed as pervasive. In January 2009, the Supreme Court freed former President Arnoldo Alemán from house arrest and vacated corruption charges against him.<sup>153</sup>

5. Global Integrity, Country Report.<sup>154</sup> This U.S.-based organization provides independent information on governance and corruption in different countries.<sup>155</sup> In 2010, Guatemala scored

---

149. Global Corruption Report, *supra* note 150.

150. Index of Economic Freedom, **Heritage Foundation**, <http://www.heritage.org/index/> (last visited Jan 12, 2012).

<sup>151</sup> About the Index, **Heritage Foundation**, <http://www.heritage.org/index/about> (last visited Dec. 28, 2011).

<sup>152</sup> Index of Economic Freedom, *supra* note 156.

<sup>153</sup>Nicaragua Information on Economic Freedom, **Heritage Found.**, <http://www.heritage.org/index/country/Nicaragua> (last visited Dec. 28, 2011).

154. Global Integrity Report 2010, **Global Integrity**, <http://www.globalintegrity.org/information/downloads> (last visited Dec. 28, 2011).

<sup>155</sup> Our Impact, **Global Integrity**, <http://www.globalintegrity.org/about/impact> (last visited Dec. 28, 2011).

forty-six in Judicial Independence, Fairness, and Citizen Access to Justice with 100 being the highest possible score.<sup>156</sup>

6. Freedom House, Country Report.<sup>157</sup> This world freedom watchdog organization issues annual country reports on different topics related to freedom, such as rule of law. In 2011, its report on Colombia said: “The justice system remains compromised by corruption and extortion. The Constitutional Court and Supreme Court have, on multiple occasions, demonstrated independence from the executive. Lower courts are more susceptible to political and criminal influence, and both judges and prosecutors confront serious risks when investigating powerful figures.”<sup>158</sup>

7. Bertelsmann transformation index.<sup>159</sup> This is a global ranking report produced by the Germany-based Bertelsmann organization that analyzes and evaluates development and transformation processes in 119 countries while providing a comprehensive view of the status of democracy, market economy, and the quality of political management.<sup>160</sup> In 2011, its report on Honduras said: “The separation of powers is established in the constitution. Yet in practice, the judiciary is not fully independent. Clientelistic networks of political and economic groups still dominate the judicial system, so that the judiciary cannot be seen as an autonomous and effective

---

156. Integrity Indicators: Guatemala 2010, <http://www.globalintegrity.org/report/Guatemala/2010/> (last visited Jan. 12, 2012).

157. **Freedom House**, <http://www.freedomhouse.org> (last visited Dec. 28, 2011).

158. Freedom in the World 2011 – Colombia, **Freedom House**, [http://expression.freedomhouse.org/reports/freedom\\_in\\_the\\_world/2011/colombia](http://expression.freedomhouse.org/reports/freedom_in_the_world/2011/colombia) (last visited Dec. 28, 2011).

159. Transformation: BTL Bertelsmann Stiftung, Bertelsmann Transformation Index, <http://bti2006.bertelsmann-transformation-index.de/11.0.html?&L=1> (F.R.G.) (last visited Jan. 11, 2012).

160 Id.

counterweight to the other powers.”<sup>161</sup>

8. Business Anti-Corruption Portal.<sup>162</sup> Co-funded by the Danish International Development Agency (Danida), this portal has the purpose of supporting small and medium-sized enterprises (SMEs) in avoiding and fighting corruption and in creating a better business environment by providing relevant information for businesses to fulfill their missions.<sup>163</sup> In the 2011 report on Guatemala, it said:

The judiciary is troubled by corruption, inefficiency, and the intimidation of judges, prosecutors, and witnesses, according to both Freedom House 2010 and the US Department of State 2009. The Transparency International Global Corruption Barometer 2007 reveals that citizens perceive the judiciary to be among the most corrupt institutions in Guatemala. Almost half of the respondents to the Latinobarómetro 2008 (see English version) public opinion poll consider that it is possible to receive a favourable sentence by bribing a judge.<sup>164</sup>

9. The World Justice Project Rule of Law Index is a quantitative assessment tool designed to offer a “detailed and comprehensive picture of the extent to which countries adhere to the rule of law in practice,” including access to justice as provided by independent adjudicators.<sup>165</sup> In 2011

---

161. Honduras Country Report, **Bertelsmann Transformation Index**, [http://www.bertelsmann-transformation-index.de/fileadmin/pdf/Gutachten\\_BTI2010/LAC/Honduras.pdf](http://www.bertelsmann-transformation-index.de/fileadmin/pdf/Gutachten_BTI2010/LAC/Honduras.pdf) (F.R.G.) (last visited Jan. 11, 2012).

162. Corruption Country Profiles, **Business Anti-Corruption Portal**, <http://www.business-anti-corruption.com> (last visited Dec. 28, 2011).

<sup>163</sup> About this Portal, **Bus. Anti-Corruption Portal**, <http://www.business-anti-corruption.com/about/about-this-portal/> (last visited Dec. 28, 2011).

<sup>164</sup> Guatemala Country Profile, **Bus. Anti-Corruption Portal**, <http://www.business-anti-corruption.com/country-profiles/latin-america-the-caribbean/guatemala/corruption-levels/judicial-system/> (last visited Dec. 28, 2011).

<sup>165</sup> World Justice Project Rule of Law Index, **World Justice Project**, <http://worldjusticeproject.org/rule-of-law-index/> (last

El Salvador scored less than 0.5, out of 1.0 possible in the sub-factor “absence of corruption in the judicial branch.”<sup>166</sup> The report also stressed, “Civil courts are generally accessible, but slow, and corruption in the judicial system is a serious cause for concern.”<sup>167</sup>

The statements of international organizations per se are not conclusive on the existence or lack of an independent judiciary. But, when those statements are consistent among each other and with other analysis and opinions, the conclusion more often tends to indicate that the judicial system lacks a system of impartial tribunals. Of course, each opinion, statement, and indicator requires a specific comparative and perspective oriented analysis which takes into account the different factors abovementioned and the different angles of the issue. For example, the indicator might refer to corruption in the country and not specifically in the judiciary or the opinion or statement might reflect cases where the interests of the government are at risk.

By the same token, opinions of the local organizations, governmental documents, surveys that gather the opinion of the country’s residents, and local media opinions and news are also instrumental in validating conclusions on the independence of judicial systems.

Similarly, the time period under which the assessment is conducted and the reform initiatives are important pieces in the goal of reaching an objective analysis. On looking at the evolution of the judicial independence, the analysis is able to show whether there has been improvement or deterioration over time. For example, if the judicial system is in bad condition as it relates to

---

visited Dec. 28, 2011).

<sup>166</sup> Mark Agrast, Juan Botero, Alejandro Ponce, World Justice Project Rule of Law Index 2011, **World Justice Project**, [http://worldjusticeproject.org/sites/default/files/wjproli2011\\_0.pdf](http://worldjusticeproject.org/sites/default/files/wjproli2011_0.pdf) (last visited Jan. 11, 2012).

<sup>167</sup> Id. at 26

independence but serious and thorough reform plans are under way, the conclusion could differ between one period and another.

## **VI. Conclusion**

Judicial independence is not only a key element of a sound democracy but also a key element of a sound economy. In a world where the economies are no longer an internal issue, the lack of judicial independence is a matter of potential transnational litigious consequences.

This article highlights some situations where the lack of judicial independence can not only affect the effectiveness of a judgment beyond the territory of a country, but also make the state responsible internationally. There could be other situations where the lack of judicial independence could have a foreign impact. Likewise, the consequences can exceed those pointed out herein. For one, the lack of judicial independence at a minimum is bad publicity for countries. The consequences of a tainted image vis-à-vis international credit in the broad sense of the term are obvious. Countries eager to attract capital and have access to international financing tools are likely to be negatively affected by a consistent perception that the judiciary is not independent. Of course, foreign investors can find ways around weak judicial systems to solve their potential disputes. But, those paths require design of corporate, contractual, and even treaty structures, for which professional advice and advocacy is needed, all of which increase the costs of the business.

On the other hand the citizens of the country affected by the malaise of the lack of judicial independence have no way out. That in itself is a cause of concern for the damage it causes internally to those who might not have any recourse to obtain justice, as the democracy could be malfunctioning. It is also potentially a cause of international instability as the pressure put on a political system that cannot deliver justice can eventually turn into social unrest and potential violence that undermines the political structure of a country and compromises the peace and the

geopolitical equilibrium with its neighbors. Migration, border conflicts, and international intervention can be the ultimate consequences of this state of affairs. Thus, although lack of judicial independence is not a determinant of social unrest and political turmoil, the bottom line is that weak judiciaries are not good for anyone.

In today's world, countries compete against each other for capital, credit, resources, and even brain power. In that continuum, it is becoming increasingly more common that countries are measured, compared, and ranked in different areas such as business climate,<sup>168</sup> corruption,<sup>169</sup> and competitiveness.<sup>170</sup> Unfortunately, there are no indicators specifically devoted to measure objectively, uniformly, and consistently the judicial independence of a country. But, some methodology can be used to approach the issue from a holistic perspective.

The result of an assessment can be used for tangible matters of transnational litigation and international dispute resolution such as the ones described in this article. Such an assessment can be used by either party for purposes of proving the judicial independence or the lack thereof. It can be used by the parties in conflict or by the adjudicator, either a judge or an arbitrator. But more importantly, it can be used by countries—both policy makers and social innovators—to

---

168. The World Bank issues the doing business indicators annually. See About Doing Business: Measuring for Impact, Doing Business, <http://www.doingbusiness.org/~media/FPDKM/Doing%20Business/Documents/Annual-Reports/English/DB12-Chapters/About-Doing-Business.pdf> (last visited Jan. 11, 2012).

169. Transparency International issues global corruption indexes annually. See Transparency International, <http://www.transparency.org> (last visited Dec. 28, 2011).

170. World Economic Forum issues the world competitiveness indexes annually. See Reports, World Economic Forum, <http://www.weforum.org/reports> (last visited Dec. 28, 2011).

obtain a diagnostic of the judiciary and from there design reforms, advocate for changes and eventually undertake an ultimate program of transformations. That is a challenging task, but one that should be the object of another essay.