

---

---

# THE RISE OF ARBITRAL POWER OVER DOMESTIC COURTS

Michael D. Goldhaber\*

INTRODUCTION .....	374
I. ANTISUIT INJUNCTIONS IN THE AGE OF INVESTOR ARBITRATION .....	376
A. <i>The Transplantation of Antisuit Injunctions</i> .....	377
B. <i>Interim Measures to Suspend Court Proceedings</i> .....	378
C. <i>Arbitral Suspension of Judicial Action in Chevron v. Ecuador</i> .....	380
II. DENIAL OF JUSTICE AND ITS TRIBUTARIES .....	383
A. <i>Loewen and the Limits of Denial of Justice</i> .....	385
B. <i>Denial of Justice Recognized: Pey Casado and Siag</i> .....	385
C. <i>Saipem and the Expropriation Clause as a Check on Domestic Courts</i> .....	387
D. <i>The Effective Means Clause as a Check on Domestic Courts: Chevron</i> I, White, and Potentially Chevron II .....	389
E. <i>Denial of Justice Flows Underground, Even As Remedies Grow</i> Bolder: Petrobart and ATA .....	392
III. EVALUATING ARBITRAL POWER OVER DOMESTIC COURTS .....	394
A. <i>Legal Basis and Rationale</i> .....	394
B. <i>Specific Objections to Arbitral Power Over Domestic Courts</i> .....	397
1. <i>Privileging foreign investors</i> .....	398
2. <i>Independence of the judiciary</i> .....	399
3. <i>State consent</i> .....	399
4. <i>Undermining international law</i> .....	402
IV. ARBITRAL PRUDENCE AND THE GENERAL CRITIQUES OF INVESTOR ARBITRATION .....	404
A. <i>Institutional Flaws: Secrecy, Conflicts, and the Lack of an Appeal</i> .....	404
B. <i>The Tension Between Arbitration and Human Rights</i> .....	409
C. <i>Prudence and Arbitral Review and Suspension of Judicial Action</i> .....	413
CONCLUSION .....	416

---

\*Senior International Correspondent, *The American Lawyer* and ALM Media. The author would like to thank Christopher Whytock, Catherine Rogers, Burt Neuborne, and Luke Eric Peterson for providing helpful questions or feedback on earlier drafts of this Article. The author also thanks Yves Fortier, Charles Brower, Antonio Crivellaro, Robert Volterra, George Bermann, and Robert Howse for shaping his thoughts through their participation in the N.Y.U. Law School January 28, 2012, forum “Arbitrators v. Judges: The Latent Tension of Investor Arbitration Rises to the Surface.” The views expressed are his alone.

## INTRODUCTION

On numerous occasions, domestic courts have been called upon to check the power of arbitrators.<sup>1</sup> These occurrences have not gone without notice by commentators, and there is a rich literature discussing courts' control over arbitrators.<sup>2</sup> But the opposite phenomenon—that is, the willingness of international arbitrators to check the power of domestic courts—has received no such treatment. Indeed, the existence of arbitral power over domestic courts likely comes as a surprise to observers outside the world of investor-state arbitration.<sup>3</sup> It has been seldom considered that arbitrators might control judges. Nonetheless, investment tribunals are far more willing than courts to assert control over a foreign court, and do so with increasing frequency.

The unique strength of arbitral power over courts has been dramatically demonstrated in Chevron's epic dispute over oil pollution in Ecuador. On January 25, 2012, the arbitrators hearing *Chevron Corporation v. Republic of Ecuador* issued interim orders that the Republic (including its judiciary) take all measures within its power to halt a vast Ecuadorian judgment against Chevron from becoming final and enforceable.<sup>4</sup> The very next day, American courts declined to serve as a "transnational arbiter" to block enforcement of the Ecuadorian judgment.<sup>5</sup> As the arbitrators themselves later put it:

---

1. See, e.g., *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938 (1995).

2. See, e.g., George A. Bermann, *The "Gateway" Problem in International Commercial Arbitration*, 37 YALE J. INT'L L. 1 (2012); John J. Barcelo III, *International Commercial Arbitration - Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective*, 36 VAND. J. TRANSNAT'L L. 1115 (2003); Steven H. Reisberg, *The Rules Governing Who Decides Jurisdictional Issues: First Options v. Kaplan Revisited*, 20 AM. REV. INT'L ARB. 159 (2009); Alan Scott Rau, *The Arbitrability Question Itself*, 10 AM. REV. INT'L ARB. 287 (1999); Alan Scott Rau, *Everything You Really Need To Know About 'Separability' in Seventeen Simple Propositions*, 14 AM. REV. INT'L ARB. 1 (2003).

3. Even as sophisticated an observer as John Ruggie has overlooked arbitral review of judicial action, writing that investment treaties are triggered "if an investment has been negatively affected by legislative or administrative measures." JOHN RUGGIE, *JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS* xxxv (2013).

4. *Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 2009-23, First Interim Award on Interim Measures (Jan. 25, 2012), available at <http://www.italaw.com/sites/default/files/case-documents/ita0173.pdf>.

5. While at the district court level Chevron was able to obtain a worldwide injunction against enforcement by the Ecuadorian plaintiffs of the Lago Agrio judgment, the Second Circuit vacated that order. See *Chevron v. Naranjo*, 667 F.3d 232, 242 (2d Cir. 2012) (declining to serve "as a transnational arbiter to dictate to the entire world which judgments are entitled to respect, and which countries' courts are to be treated as international pariahs."). The Second Circuit suggested that a global and preemptive antienforcement injunction by "disappointed litigants in foreign cases" would not only be ungrounded in statute, but also "radical," unprecedented, and potentially offensive to comity. *Id.*

[T]his Tribunal is the only tribunal with the power to restrain . . . the enforcement and execution of the Lago Agrio Judgment [in Ecuador]. Such restraint has not been achieved by any state court (including courts in the USA); nor could it be under the circumstances of this most unusual case.<sup>6</sup>

Chevron could only conclude that genuine transnational arbiters offer the only check on abusive domestic courts. It has abandoned its quest for declaratory relief in the U.S., and—perhaps most controversially—it is seeking a final arbitral award that holds Ecuador liable for its courts' failings.

Chevron has thus thrust into public attention the prospect of international arbitrators exercising power over domestic judges. Previously unexplored, this Article is the first to survey the exercise of arbitral power over courts—on both an interim and final basis—and evaluate the potential critiques.

This Article distinguishes two forms of arbitral power over domestic courts. Part I documents the suspension of court proceedings on a temporary basis (exemplified by the *Chevron* interim measures). Part II collects and analyzes each case where international arbitrators have conducted a *final* review of judicial action (which Chevron is now seeking).

Part I traces the historical development of the antisuit injunction, from its roots in medieval times through its contemporary use in investment arbitration. World Bank arbitrators have issued at least eleven antisuit injunctions against states this millennium, and have not provoked a general outcry. But in fact, when it migrated from commercial litigation to investment arbitration, the practice was significantly transformed. For when an antisuit injunction is directed at a state, it imposes obligations not only on the executive acting as litigant, but—as *Chevron* makes explicit—on the state's judiciary. It may be said in this scenario that an antisuit injunction amounts to an arbitral suspension of judicial proceedings. Several leading commentators have discussed the aberrations created by the grafting of standards evolved in the private context of commercial arbitration to the public or quasi-public context of investor-state arbitration.<sup>7</sup> Yet until now, this potentially problematic transplantation has escaped notice.

Part II turns to final relief. For *Chevron* calls attention to a second emerging trend within investment arbitration: Arbitrators are not merely suspending judicial action temporarily; they are also second-guessing judges, effectively vacating their rulings, and, in one case, ordering a *termination* of

---

6. *Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 2009-23, Fourth Interim Award on Interim Measures (Feb. 7, 2013), available at <http://italaw.com/sites/default/files/case-documents/italaw1274.pdf>.

7. See, e.g., Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 BRIT. Y.B. INT'L L. 151 (2004); see also Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 Am. J. Int'l L. (forthcoming 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2033167](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2033167).

court proceedings.

The urge to control rogue judges has a long tradition in international law under the denial of justice doctrine. But the guarantee by states that foreign investors will not be denied justice has undergone a transformation in recent years. Although denial of justice has not bloomed, as famously predicted by Jan Paulsson, the impulse to restore justice has flowered in different forms—expropriation, effective means, and unfair treatment more generally—which might collectively be called arbitral review of judicial action. While each illustrative case has drawn attention, their family resemblance to each other and denial of justice has gone unnoticed. Part II traces the doctrinal evolution of the denial of justice doctrine and its tributaries, focusing on the ways in which recent arbitration decisions have opened up the possibility of using expropriation and effective means clauses as checks on domestic courts.

Part III evaluates arbitral power over domestic courts from a normative standpoint. I begin by reviewing the legal bases and rationales for the exercise of arbitral power over courts, including the preeminence of international law and the unitary conception of statehood. I then discuss the potential objections: that it privileges foreign investors, disturbs the independence of the judiciary, violates the principle of state consent, and undermines international law. Part III concludes that, while none of these objections is necessarily fatal as a matter of law, they raise serious political concerns. Supervising an independent state judiciary so as to confer rights that transcend domestic law, arguably without the specific consent of the state, seems well-calculated not only to be ignored, but to inspire a backlash to the worthy project of investor-state arbitration.

The rise of arbitral power over courts brings greater urgency to the broader debates over the legitimacy of investor arbitration. Part IV reviews the leading critiques based on institutional design or human rights. In some cases I offer solutions, or at least responses, to these objections. More generally, Part IV urges prudence on the part of arbitrators in the exercise of their discretion when ordering the review or suspension of judicial proceedings.

This Article concludes that when a party has been denied justice, it should have some place to turn. But both the denial of justice doctrine and interim measures against states should be applied with discretion, under their own stringent standards. And if investment arbitrators are to review judges, they need to be as independent and transparent as judges. Only a standing appellate tribunal, enjoying judicial levels of legitimacy, would have the confidence to call a denial of justice by its proper name and to restore justice in every appropriate case.

#### I. ANTISUIT INJUNCTIONS IN THE AGE OF INVESTOR ARBITRATION

The contours of a tribunal's power to limit litigation in another tribunal are relatively well established. Such power is often manifest in an antisuit injunction—an interlocutory order forbidding a party from advancing an action

in another legal system before a final determination by the adjudicators with jurisdiction over the dispute. The concept may be traced to medieval English writs of prohibition, which enjoined parties (as well as the ecclesiastical courts themselves) from threatening the jurisdiction of monarchical courts.<sup>8</sup> Modern U.S. courts commonly issue antisuit injunctions, subject to the threshold requirements that the parties be the same in both matters; and that the resolution of one matter would be dispositive of the other.<sup>9</sup> U.K. courts recently reaffirmed their power to enjoin a foreign proceeding commenced outside the European Union.<sup>10</sup> But unlike medieval times, courts are no longer the sole tribunals wielding such equitable power. Rather, as this Part discusses, antisuit injunctions have been used with increasing frequency in investor arbitration, restraining parties from advancing judicial action until the arbitrators rule.

#### A. *The Transplantation of Antisuit Injunctions*

From the common law courts the practice of antisuit injunctions spread in 1939 to public international law,<sup>11</sup> in 1970 to commercial arbitration,<sup>12</sup> in 1983 to the Iran-Claims Tribunal,<sup>13</sup> and in 1985 to investment arbitration.<sup>14</sup> In the

---

8. See JOHN H. LANGBEIN ET AL., HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 130-31 (2009) (discussing medieval conflicts between monarchical and ecclesiastical courts); see also George A. Bermann, *The Use of Anti-Suit Injunctions in International Litigation*, 28 COLUM. J. TRANSNAT'L L. 589, 593 (1990) (tracing origin to fifteenth century England).

9. See, e.g., *China Trade & Dev. Corp. v. MV Choong Yong*, 837 F.2d 33, 35 (2d Cir. 1987).

10. See *Ust-Kamenogorsk Hydropower Plant JSC v. AES Ust-Kamenogorsk Hydropower Plant LLP*, U.K.S.C. 35 (2013).

11. See *Electricity Company of Sofia and Bulgaria (Belg. v. Bulg.)*, 1939 P.C.I.J. (ser. A/B) No. 79, at 199 (Dec. 5).

12. See Emmanuel Gaillard, *Anti-Suit Injunctions Issued by Arbitrators*, in INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? XIII ICCA CONG. SER. 235, 252 (Albert Jan van den Berg ed., 2006) (identifying the earliest example in commercial arbitration as ICC Case No. 1512 (1970)).

13. See *E-Systems, Inc. v. Iran*, 2 Iran-U.S. Cl. Trib. Rep. 51 (1983) (Award No. ITM 13-388-FT); *Rockwell International Systems, Inc. v. Iran*, 2 Iran-U.S. Cl. Trib. Rep. 369 (1983) (Award No. ITM 20-430-1); *Teledyne Industries Inc. v. Iran*, 3 Iran-U.S. Cl. Trib. Rep. 336 (1983); *Aeronutronic Overseas Services, Inc. v. Iran*, 7 Iran-U.S. Cl. Trib. Rep. 217 (1984) (Award No. ITM 44-158-1). On the path of transmission from the claims tribunal to investor arbitration, see generally Christopher Gibson, *Iran-United States Claims Tribunal Precedent in Investor-State Arbitration*, 23 J. INT'L ARB. 521 (2006).

14. See *Maritime International Nominees Establishment v. Guinea*, ICSID No. ARB/84/4, Decision on Provisional Measures (Dec. 4, 1985). While *Holiday Inns S.A. v. Morocco*, ICSID Case No. ARB/72/1, Decision on Provisional Measures (July 2, 1972), has been cited as the earliest ICSID arbitration, *Holiday Inns* merely stated that the parties were under an obligation not to pursue parallel litigation, without granting the order. Compare Gaillard, *supra* note 12, at 244-45 (arguing that *Holiday Inns* was the earliest arbitration of this kind), with CHRISTOPHER H. SCHREUER ET AL., THE ICSID CONVENTION: A

international context, antisuit injunctions are grounded not only in a tribunal's right to exclusive jurisdiction, but also—more broadly—in its power to maintain the status quo between the parties. The United Nations Commission on International Trade Law (UNCITRAL) 1976 arbitration rules give a tribunal typically broad power to order interim measures to protect or conserve the parties' rights, or the arbitral process itself.<sup>15</sup> As glossed by the commentator Gary Born, it is sufficient under UNCITRAL that the interim measures be “necessary for protective or conservatory purposes, provided only that [they] have some connection to the . . . requested relief, or other issues in dispute.”<sup>16</sup> A decisionmaker has “inherent power to protect its own jurisdiction in cases where the risk of inconsistent decisions in parallel or duplicative proceedings instituted in other fora have rendered this necessary.”<sup>17</sup> At the same time, parties must “not allow any step of any kind to be taken which might aggravate or extend the dispute.”<sup>18</sup>

In migrating to public international law and investment arbitration, the practice of using antisuit injunctions was significantly transformed in a way that has been overlooked. For when such power is directed at a sovereign state, such an order imposes obligations not only on the executive acting as litigant, but, at least tacitly, on the state's judiciary. In this respect, antisuit injunctions have gone full circle, and returned to their origins in medieval writs of prohibition. To the extent that they impose obligations directly on judges, an antisuit injunction in the investment setting may be thought of as an arbitral suspension of judicial proceedings.

### B. *Interim Measures to Suspend Court Proceedings*

As an empirical matter, antisuit injunctions have made the jump to investment arbitration with some regularity. According to the research of Rodrigo Gil, eleven or twelve International Centre for the Settlement of Investment Disputes (ICSID) investment panels issued provisional measures to suspend domestic court proceedings between 1972 and 2010.<sup>19</sup> By contrast,

---

COMMENTARY 396 (2d ed. 2009) (stating the opposite).

15. See UNCITRAL Arbitration Rules, Art. 26(1); see also ICSID Arbitration Rules, Art. 39; UNCITRAL Model Law, 2006 Revisions, Art 17(2).

16. GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1959 (2009).

17. See Paul Donin de Rosiere v. Iran, 13 Iran-U.S. C.T.R. 193, 194 (1986) (Award No. ITM 64-498-1); see also ICSID Art. 26.

18. See *Electricity Company*, 1939 P.C.I.J. (ser. A/B) No. 79, at 199.

19. See Rodrigo Gil, *ICSID Provisional Measures to Enjoin Parallel Domestic Litigation*, 3 WORLD ARB. & MEDIATION REV. 535, 553-64 (2009). Gil cites the following decisions: Quiborax S.A., Non-Metallic Minerals S.A. & Allan Fosk Kaplún v. Plurinational State of Bolivia, ICSID No. ARB/06/2, Decision on Provisional Measures at 46 (Feb. 26, 2010); Repsol YPF Ecuador, S.A. v. Ecuador, ICSID No. ARB/08/10, Decision on Provisional Measures (June 17, 2009); Perenco Ecuador Limited v. Ecuador, ICSID No.

only seven or eight ICSID requests for similar relief were denied during that period.<sup>20</sup> Most of the provisional measures granted were more in the nature of orders to preserve the status quo than orders to defend the tribunal's jurisdiction. The question of enjoining parallel litigation first emerged in the ICSID's first case in 1972, *Holiday Inns v. Republic of Morocco*.<sup>21</sup> There, while recognizing that it had the power to enjoin parallel litigation, the tribunal stopped short of granting the request.<sup>22</sup> It was not until 1985 that the tribunal,

---

ARB/08/6, Decision on Provisional Measures (May 8, 2009); Burlington Resources, Inc. v. Ecuador, ICSID No. ARB/08/5, Decision on Provisional Measures (June 29, 2009); City Oriente Limited v. Ecuador, ICSID No. ARB/06/21, Decision on Provisional Measures at 92 (Nov. 19, 2007); Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan, ICSID No. ARB/03/29, Decision on Provisional Measures (Nov. 29, 2004); Tokios Tokelés v. Ukraine, ICSID No. ARB/02/18, Decision on Provisional Measures at 7 (July 1, 2003); SGS Société Générale de Surveillance S.A. v. Pakistan, ICSID No. ARB/01/13, Decision on Provisional Measures (Oct. 16, 2002); Zhinvali Development Ltd. v. Republic, ICSID No. ARB/00/1, Decision on Provisional Measures at 45 (Jan. 24, 2002); Československa Obchodní Banka, a.s. (CSOB) v. Slovak Republic, ICSID No. ARB/97/4, Decision on Provisional Measures (Mar. 1, 2000); Maritime International Nominees Establishment v. Guinea, ICSID No. ARB/84/4, Decision on Provisional Measures (Dec. 4, 1985).

A twelfth case during the study period, *Vacuum Salt Products Ltd. v. Ghana*, ICSID No. ARB/92/21, Decision on Provisional Measures (June 14, 1993), is difficult to classify, because the respondent complied voluntarily before the tribunal could issue the requested provisional measure. Gil describes *Vacuum* in his case summary as a denial, but in his chart he tallies twelve cases granting and seven cases denying provisional measures to stay domestic court action. See Gil, *supra*, at 553-64.

The only more recent example of which the author is aware is *Agility for Public Warehousing Company K.S.C. v. Pakistan*, ICSID No. ARB/11/8, Decision on Provisional Measures (Jan. 30, 2012), which prohibited Pakistan from seeking to stay or enjoin the arbitration through the domestic courts. Chevron's brief in its arbitration with Ecuador cited no more recent precedents except the *final* award in *ATA Construction, Industrial & Trading Co. v. Jordan*, ICSID No. ARB/08/2 (May 18, 2010). See *Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 2009-23, Claimants' Supplemental Memorial on the Merits at 19-20 (Mar. 20, 2012), available at <http://www.italaw.com/sites/default/files/case-documents/ita0177.pdf> (citing *Burlington*, *City Oriente*, *Zhinvali*, *CSOB*, and *ATA*). It is quite possible that comparable UNCITRAL awards exist, but are not in the public domain.

20. See *Phoenix Action, Ltd. v. Czech Republic*, ICSID No. ARB/06/5, Decision on Provisional Measures (Apr. 6, 2007); *Helnan International Hotels A/S v. Egypt*, ICSID No. ARB/05/19, Decision on Provisional Measures (May 17, 2006); *Azurix Corp. v. Argentine Republic*, ICSID No. ARB/01/12 Decision on Provisional Measures (Aug. 6, 2006); *Plama Consortium Limited v. Bulgaria*, ICSID No. ARB/03/24, Decision on Provisional Measures (Sept. 6, 2005); *Víctor Pey Casado and President Allende Foundation v. Chile*, ICSID No. ARB/98/2, Decision on Provisional Measures (Sept. 25, 2001); *Vacuum Salt Products Ltd. v. Ghana*, ICSID No. ARB/92/21, Decision on Provisional Measures (June 14, 1993); *Atlantic Triton Company Limited v. Guinea*, ICSID No. ARB/84/1 (Dec. 18, 1984); *Holiday Inns S.A. v. Morocco*, ICSID No. ARB/72/1, Decision on Provisional Measures (July 2, 1972).

21. *Holiday Inns S.A. v. Morocco*, ICSID No. ARB/72/1, Decision on Provisional Measures (July 2, 1972).

22. See *Holiday Inns S.A.*, ICSID No. ARB/72/1.

in *Maritime International Nominees Establishment v. Republic of Guinea*,<sup>23</sup> enjoined state court litigation. This seemed unremarkable at the time because ICSID interim orders were non-binding, and the *state* rather than the investor had sought the injunction. But, in time, the first condition—the binding nature of the orders—changed, and the second condition—the party seeking the injunction—turned out to be an aberration. Soon after, the tribunal in *Maffezini v. Kingdom of Spain* held that “the word recommend has an equivalent meaning to the word dictate,”<sup>24</sup> and thus it followed that ICSID provisional measures are binding law. That conclusion was reached despite legislative history that suggests a conscious decision to the contrary.<sup>25</sup> Notwithstanding the formal absence of precedent in arbitration, this was entrenched within four years as “a well-established principle laid down by the jurisprudence of the ICSID tribunals.”<sup>26</sup>

Nonetheless, this precedent lay dormant until 2000. Then, in *Československa Obchodní Banka, a.s. (CSOB) v. Slovak Republic*,<sup>27</sup> this precedent was revived. The CSOB tribunal recommended that bankruptcy proceedings against the Slovak Collection Company “be suspended to the extent that such proceedings might include determinations” of questions under consideration by the tribunal, and requested the parties to bring the Order to the attention of the “appropriate judicial authorities of the Slovak Republic so that they may act accordingly.”<sup>28</sup> CSOB was significant for enjoining a case involving an entity not party to the arbitration, and for rather explicitly imposing consequences on a national court.

From 2000 through 2010, stays of domestic litigation were granted in ten of the fifteen ICSID cases where they were sought, with all ten granted in favor of investors.<sup>29</sup> The recent arbitration involving Chevron and Ecuador has pushed the law in this area further.

### C. *Arbitral Suspension of Judicial Action in Chevron v. Ecuador*

The main tribunal presiding over the dispute between Chevron and

---

23. *Maritime International Nominees Establishment v. Guinea*, ICSID No. ARB/84/4, Decision on Provisional Measures (Dec. 4, 1985).

24. *Maffezini v. Spain*, ICSID No. ARB/97/7, Decision on Provisional Measures at 9 (Oct. 28, 1999) (interpreting Art. 47 of the ICSID Convention).

25. See SCHREUER, *supra* note 14, at 764 (“The Convention’s legislative history suggests that a conscious decision was made not to grant the Tribunal the power to order binding provisional measures.”).

26. See *Tokios Tokelès*, ICSID No. ARB/02/18.

27. ICSID No. ARB/97/4, Decision on Provisional Measures (Mar. 1, 2000).

28. *Id.*

29. See *supra* notes 19 and 20. The more recent case of *Agility* provides an eleventh example.

Ecuador has taken dramatic action in a series of small interim steps. On February 9, 2011, the tribunal ordered the Republic to “take all measures at its disposal to suspend or cause to be suspended the enforcement or recognition within and without Ecuador of any judgment. . . in the Lago Agrio case.”<sup>30</sup> Then, on January 25, 2012, it used the same language, this time in the form of a preliminary award.<sup>31</sup> After a hearing, the arbitrators determined on February 16, 2012, that Chevron had established a sufficient case on jurisdiction and the merits, sufficient urgency given the risk that it would suffer substantial harm before the final award, and a sufficient likelihood that such harm would be irreparable by monetary compensation later.<sup>32</sup> The tribunal then ordered the Republic “(whether by its judicial, legislative or executive branches) to take all measures necessary to suspend or cause to be suspended the enforcement,” and in particular to preclude certification of the judgment as final.<sup>33</sup> This order was directed more explicitly to the judiciary, specified one forbidden action, and, perhaps most importantly, strengthened the verbal formula from “all measures at its disposal” to “all measures necessary.”<sup>34</sup>

Nonetheless, according to the tribunal, the Ecuadorian judiciary certified the judgment as final on August 3, 2012,<sup>35</sup> and the Ecuadorian plaintiffs followed by filing enforcement actions in Canada, Brazil, and Argentina. On February 7, 2013, the tribunal declared the Republic in violation of the aforementioned interim awards and ordered the Republic to show cause why it should not compensate Chevron for any harm caused by the finalization of the

---

30. *Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 2009-23, Order for Interim Measures at 3 (Feb. 9, 2011), available at <http://www.italaw.com/sites/default/files/case-documents/ita0167.pdf>.

31. *See Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 2009-23, First Interim Award on Interim Measures at 16 (Jan. 25, 2012), available at <http://www.italaw.com/sites/default/files/case-documents/ita0173.pdf>.

32. *See Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 2009-23, Second Interim Award on Interim Measures at 2 (Feb. 16, 2012), available at [http://www.italaw.com/sites/default/files/case-documents/ita0174\\_0.pdf](http://www.italaw.com/sites/default/files/case-documents/ita0174_0.pdf).

33. *Id.* at 3.

34. Chevron had argued that “all measures necessary” is a term of art borrowed from the ICJ’s jurisprudence, connoting that the result must be obtained regardless of the means employed. *See* Robert D. Sloane, *Measures Necessary to Ensure: the ICJ’s Provisional Measures Order in Avena and Other Mexican Nationals*, 17 LEIDEN J. INT’L LAW 673 (2004).

35. *See Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 2009-23, Fourth Interim Award on Interim Measures at 79-80 (Feb. 7, 2013), available at <http://italaw.com/sites/default/files/case-documents/italaw1274.pdf>. Ecuador has taken the position that the certification had no legal effect, because the judgment became final automatically once Chevron decided not to seek an appeal bond, and the Republic had no legal mechanism to stop the judgment from becoming final. *See Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 2009-23, Respondent’s Letter at 3 (Mar. 1, 2013).

Lago Agrio judgment.<sup>36</sup>

In this way, the tribunal slowly ratcheted up the pressure, effectively moving from a loose admonition to a loose command to a strict command, to a finding that Ecuador violated that command. During the summer of 2013, the parties are briefing the question of interim damages, as well as Ecuador's request that the tribunal reconsider its finding of interim liability. Meanwhile, the parties await the tribunal's ruling on the merits of Chevron's contract claim, and are moving toward a January 2014 trial on Chevron's treaty claims.

An antisuit injunction in the context of investor arbitration is no longer exceptional. But the Chevron interim proceedings are highly unusual in their remedial sweep, and in their party structure. In terms of remedy, *Chevron v. Ecuador* may be the first case where the arbitrators are preparing to levy damages for the violation of interim measures; and to convert an interim *order*, which is commonly enforceable only in U.S. courts,<sup>37</sup> into an interim *award*, which is widely-enforceable under international law.<sup>38</sup>

As a structural matter, *Chevron v. Ecuador* differs from the typical interim measures case in that a state entity is not a party to the litigation that the tribunal seeks to enjoin. The *Chevron* interim measures do not aim to stop a parallel proceeding, because the party opposite Chevron is not the same, and the arbitrators do not question the judges' jurisdiction. Rather, the object of the *Chevron* antisuit injunction is to preliminarily halt a tangential proceeding that is alleged to be unjust, while the arbitrators consider final relief to redress the alleged injustice. These interim measures must therefore be grounded in the tribunal's power to "preserve [a party's] rights" or "conserve the "goods forming the subject matter of the dispute," rather than in the tribunal's power to protect its own jurisdiction.<sup>39</sup>

One implication is that the injunction imposes consequences on a private party. This is certainly problematic, and forms the basis for one of Ecuador's objections.<sup>40</sup> Chevron's easiest reply is that, in this case, the private plaintiffs

---

36. That order coincidentally issued at the start of the Stanford symposium that forms the basis for this issue.

37. See BORN, *supra* note 16, at 220-23; Douglas C. Rennie & Peter Sherwin, *Interim Relief Under International Arbitration Rules and Guidelines: A Comparative Analysis*, 20 AM. REV. INT'L ARB. 317, 324-27 (2010).

38. See *Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 2009-23, First Interim Award on Interim Measures at 1 (Jan. 25, 2012), available at <http://www.italaw.com/sites/default/files/case-documents/ita0173.pdf>. Ecuador has objected that it lacks the power to do so. See *Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 2009-23, Respondent's Letter at 4-5 (Mar. 1, 2013) (arguing that Article VI(6) of the 1976 UNCITRAL rules, making awards enforceable, should apply only to awards on the merits).

39. See ICSID Arbitration Rules, Art. 39; UNCITRAL Rules, Art. 26(1).

40. See Respondent's Letter at 5 (arguing that "It is universally accepted that an arbitral tribunal cannot compel a private party to violate applicable laws in order to compel

colluded with the state. Of more central concern to this Article, the state's formal absence from the enjoined litigation makes *Chevron v. Ecuador* the purest example of an arbitral attempt to suspend judicial action. In other interim measures cases, an order that a Republic take no steps to advance litigation may fall primarily on the executive (in its role as a litigant in state court). However, in *Chevron*, there is no escaping the fact that the interim order precluding the Republic from finalizing the judgment fell on its judiciary.

Whether arbitral power over judges is objectionable—in either its interim or final form—will be considered in Part III. But first we must conceptualize the review of judicial action in *final* arbitral awards.

## II. DENIAL OF JUSTICE AND ITS TRIBUTARIES

A party with means that believes it has been denied justice in a domestic court system will inevitably pursue a cause of action in another forum aimed at the restoration of justice. Jan Paulsson has elegantly posed the question: “By what artifice might a state owe a duty to the world at large to maintain an adequate system for the administration of justice?”<sup>41</sup> The contrivance identified by Paulsson is “denial of justice”—a doctrine that was recognized with some regularity by international tribunals in the nineteenth and early twentieth centuries.

A denial of justice is a form of unfair and inequitable treatment under international law; and a guarantee by the state that foreign investors will not be subjected to unfair and inequitable treatment is contained in the vast majority of the more than 3,000 investment treaties signed by states in the past generation. As one modern tribunal summarized, a denial of justice claim may be pleaded in four circumstances: if the courts have refused to entertain a claim, delayed it unduly, administered justice in a seriously inadequate way, or misapplied the law clearly and maliciously.<sup>42</sup> However, “the factual circumstances must be

---

with an interim measure”). Whether the interim measures in fact forced the plaintiffs to violate any laws is debatable. Born makes the more-clearly applicable but less categorical statement that “[w]here parties to national court litigation differ from the parties to the arbitration agreement, an antisuit injunction will ordinarily be unavailable.” BORN, *supra* note 16, at 2011.

41. JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 1 (2005).

42. *Cf.* *Azinian v. Mexico*, 5 ICSID Rep. 269 (Nov. 1, 1999) (stating the test for clear and malicious misapplication of the law); *Mondev International Ltd v. United States*, 6 ICSID Rep. 181, 220 (2002) (same). For the best recent review of the denial of justice standards and case law in the investment treaty era, see ROLAND KLAGER, “FAIR AND EQUITABLE TREATMENT” IN INTERNATIONAL LAW 214-24 (2011). For Paulsson’s review of the denial of justice standards in the *Chevron* context, see *Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 2009-23, Opinion of Jan Paulsson (Mar. 1, 2012), available at [http://www.italaw.com/sites/default/files/case-documents/ita0176\\_0.pdf](http://www.italaw.com/sites/default/files/case-documents/ita0176_0.pdf).

egregious if state responsibility is to arise on the grounds of denial of justice,”<sup>43</sup> and “there must be a presumption of deference to the foreign court whose performance is being judged.”<sup>44</sup> Finally, it is generally agreed that claimants who wish to invoke a denial of justice claim must first exhaust domestic remedies.<sup>45</sup>

Paulsson has posited that this cause of action is undergoing a “Renaissance” in the era of investment treaties, which for the first time empower private parties to sue states directly.<sup>46</sup> As Paulsson put it, “The scope for invoking the grievance of denial of justice has broadened immensely.”<sup>47</sup> Paulsson was correct on this point, but he was premature in supposing that the doctrine would bloom simply because it is now frequently invoked. The doctrine’s modern story is not one of renaissance, but transformation. Because the denial of justice doctrine carries a stigma, and since its requirements are stringent, claims have only been granted rarely. Instead, the claims that most naturally take the form of denial of justice are being diverted into the other main branches of investment law: expropriation, effective means, and unfair treatment more generally. The denial of justice doctrine is not the only artifice by which a state might owe a duty to the world at large to maintain an adequate system of justice. Like the Nile, denial is a river with many tributaries.

---

43. See PAULSSON, *supra* note 41, at 60. For a compilation of authorities to similar effect, see *Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 2009-23, Counter-Memorial on the Merits of the Republic of Ecuador at 109-110 (Feb. 18, 2013), available at <http://www.italaw.com/sites/default/files/case-documents/italaw1426.pdf>. In addition, Ecuador had argued that the standard of evidence should be “clear and convincing.” *Id.* at 113-14. Chevron has maintained that the evidentiary test should be the balance of probabilities. See *Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 2009-23, Claimants’ Supplemental Memorial on the Merits at 185 (Mar. 20, 2012), available at <http://www.italaw.com/sites/default/files/case-documents/ita0177.pdf>.

44. Don Wallace, Jr., *Fair and Equitable Treatment and Denial of Justice: Loewen v. U.S. and Chatten v. Mexico*, in *INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY LAW* at 7 (Todd Weiler ed., 2005). For a compilation of similar authorities, see Counter-Memorial on the Merits of the Republic of Ecuador at 110-13.

45. See PAULSSON, *supra* note 41; *Loewen Group Inc. v. United States*, 7 ICSID Rep. 421, 475 (2003) (“It is an obligation to exhaust remedies which are effective and adequate and are reasonably available to the complainant in the circumstances in which it is situated.”). For the argument that exhaustion ought not to be a prerequisite, see, e.g., CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES* 233 (OXFORD UNIVERSITY PRESS 2007) (“[I]t would surely empty the development of investment arbitration of much of its force and effect if, despite a clear intention of State parties not to require the pursuit of local remedies as a precondition to arbitration, such a requirement were to be read back as part of the substantive cause of action.”).

46. PAULSSON, *supra* note 41, at 2.

47. *Id.*

A. *Loewen and the Limits of Denial of Justice*

The leading modern case on the denial of justice doctrine—*Loewen Group Inc. v. United States*—illustrates the reluctance of arbitrators to deploy the doctrine even in circumstances that cry out for it. Raymond Loewen was a Canadian funeral home king, whose company settled a petty claim by a Mississippi rival for \$175 million, rather than post a \$625 million bond to appeal the \$500 million verdict of a xenophobic Mississippi jury.<sup>48</sup> After Loewen and his company sued the U.S. under the North American Free Trade Agreement, the arbitrators agreed that Loewen had suffered a disgraceful miscarriage of justice, and even a “manifest injustice as that expression is understood in international law.”<sup>49</sup> However, the panel refused to restore justice, on a cramped reading of the requirement that the claimant exhaust domestic remedies that are reasonably available.<sup>50</sup> The arbitrators came about as close as adjudicators ever come to confessing political motives, when they noted that undue domestic intervention might imperil “the viability of NAFTA itself.”<sup>51</sup>

B. *Denial of Justice Recognized: Pey Casado and Siag*

The floodgates have hardly opened in the nine years since *Loewen*. For instance, in its memorials, Chevron cites only one modern award to support its claim of denial of justice,<sup>52</sup> namely *Petrobart v. Kyrgyz Republic*.<sup>53</sup> But a close

---

48. See *Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID (NAFTA) No. ARB (AF)/98/3, Award on Merits (June 26, 2003), IIC 254 (2003), available at <http://ita.law.uvic.ca/documents/Loewen-Award-2.pdf>; see also Noah Rubins, *Loewen v. United States: The Burial of an Investor-State Arbitration Claim*, 21 ARB. INT'L 1 (2005).

49. As Jacques Werner commented at the time: “When a party is within one day of having its assets seized, the option to appeal to the U.S. Supreme Court has at best a very remote chance of succeeding, and there is a window of opportunity to settle the case for one-third of the amount of the verdict, the reasons for settling the case for anyone having some experience of real life are self-evident.” Michael D. Goldhaber, *NAFTA Suit is Alive, Kicking*, NAT'L L.J., Mar. 1, 2004, at 1 (quoting Werner); see also PAULSSON, *supra* note 41, at 153-54 (the exhaustion requirement does not hold parties to “improbable remedies”).

50. *Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID (NAFTA) No. ARB (AF)/98/3, Award on Merits at 242 (June 26, 2003), IIC 254 (2003), available at <http://ita.law.uvic.ca/documents/Loewen-Award-2.pdf> (“Too great a readiness to step from outside into the domestic arena, attributing the shape of an international wrong to what really is a local error (however serious) will damage both the integrity of the domestic judicial system and the viability of NAFTA itself. The natural instinct, when someone observes a miscarriage of justice, is to step in and try to put it right, but the interests of the international investment community demand that we must observe the principles which we have been appointed to apply, and stay our hands.”).

51. *Id.*

52. *Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 2009-23, Claimants' Request for Interim Measures at 110 (Apr. 1, 2010), available at

reading shows that the *Petrobart* panel studiously avoided specifying whether a denial of justice had occurred.<sup>54</sup> In fact, only two modern investment arbitration awards have expressly found a denial of justice.

The first—*Pey Casado v. Chile*—arose out of Augusto Pinochet’s 1973 closure of two leftist Chilean newspapers whose shares were owned by Mr. Pey Casado and, at the time of arbitration, a Spanish foundation that he created.<sup>55</sup> The expropriation occurred too early to be covered by the Spain-Chile investment treaty, but the tribunal found unfair and inequitable treatment—including a denial of justice—based on the Chilean courts’ failure to decide the investor’s expropriation claim for seven years, from 1995 to 2002.<sup>56</sup>

One year later, a second modern investment tribunal found denial of justice, but that holding was arguably a category error; at any rate, it was not an arbitral review of judicial action. In *Siag v. Egypt*, the state seized the investor’s resort development property in Sinai after the investor obtained financing from an Israeli company.<sup>57</sup> The tribunal found a denial of justice (along with a host of other treaty violations), based on the failure of Egypt’s President, Prime Minister, and Minister of Tourism to comply with a series of eight Egyptian court rulings, from 1996 to 2003, finding the executive action invalid and the investor’s contract valid.<sup>58</sup> While the facts in *Siag* amply support many treaty violations, Egypt’s failings were administrative rather than judicial.

---

<http://www.italaw.com/sites/default/files/case-documents/ita0159.pdf> (discussing *Petrobart v. Kyrgyz Republic*, SCC Case No. 126/2003, Award (Mar. 29, 2005)).

53. *Petrobart Limited v. The Kyrgyz Republic*, SCC Case No. 126/2003, Final Award (Mar. 29, 2005).

54. *Id.* at 76 (“The Arbitral Tribunal does not find it necessary to analyse the Kyrgyz Republic’s action in relation to the various specific elements in Article 10(1) of the Treaty but notes that this paragraph in its entirety is intended to ensure a fair and equitable treatment of investments.”).

55. *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Final Award (May 8, 2008), available at <http://www.italaw.com/cases/829>. Although the denial of justice finding was expressly unaffected, the damages award (of \$10 million on \$800 million claimed) was annulled in 2012 for failure to state reasons and failure to hear arguments from the respondent. See *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment (Dec. 18, 2012).

56. *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Final Award at ¶¶ 628-36, 659 (May 8, 2008), available at <http://www.italaw.com/cases/829>.

57. *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award at ¶¶ 18-87 (June 1, 2009), available at <http://www.italaw.com/cases/1022>. In domestic court, the government expressly cited the Israeli connection in its defense, and in at least one instance included florid anti-Zionist rhetoric in its statement of facts, quoted at length in the arbitral award. *Id.* at ¶ 68.

58. *Id.* at ¶ 455, 465. On the entertaining and ethically-fraught dispute over Siag’s contingency fee, see Michael D. Goldhaber, *How Much is Too Much?*, THE AMERICAN LAWYER, June 1, 2010.

Commentators accept that justice can in some circumstances be denied through the wrongful administration of justice by the executive.<sup>59</sup> But whether or not denial of justice was a good fit, *Siag* does not belong in a discussion of the tension between arbitrators and judges. On the contrary, the arbitrators in this case vindicated the Egyptian courts.

In retrospect, it would be less correct to say that *Loewen* opened the floodgates than that it dammed the river. Where did the waters flow?

### C. *Saipem and the Expropriation Clause as a Check on Domestic Courts*

In *Saipem v. Bangladesh*, the claimant maintained that, although it had suffered a denial of justice, it had no choice but to claim expropriation because that was the only cause of action allowed by the governing treaty.<sup>60</sup> In the underlying case, the Italian investor Saipem had a pipeline contract dispute with the state oil company Petrobangla. Saipem won its ICC contract arbitration. For no apparent reason, the Bangladeshi courts revoked the authority of the ICC arbitration while it was pending, and later declared the ICC award a nullity.<sup>61</sup> In its study of the ICC record, the treaty arbitrators “did not find the slightest trace of error or wrongdoing”; nor did Bangladesh even try to persuade the treaty arbitrators that the ICC process was flawed.<sup>62</sup> The treaty arbitrators agreed with Saipem that the judge “‘simply took for granted what Petrobangla falsely presented,’” without consulting the ICC arbitrators.<sup>63</sup>

The treaty arbitrators found that, by thus abusing their supervisory jurisdiction over the commercial arbitration process, the Bangladeshi courts had committed an abuse of rights under international law, and violated its obligation under New York Convention Article II(1) to recognize arbitration agreements.<sup>64</sup> They also dismissed the argument that Saipem merely got what it was asking for by choosing a jurisdiction with weak rule of law.<sup>65</sup> In a subsequent article, claimants’ counsel Luca Radicati di Brozolo has argued that *Saipem v. Bangladesh* will be remembered as the first express holding that abusive interference in an arbitration is an international wrong, and “hopefully will bury once and for all the outrageous proposition that. . . foreign parties

---

59. See *Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 2009-23, Opinion of Jan Paulsson at ¶¶ 14-15 (Mar. 1, 2012), available at [http://www.italaw.com/sites/default/files/case-documents/ita0176\\_0.pdf](http://www.italaw.com/sites/default/files/case-documents/ita0176_0.pdf).

60. *Saipem S.p.A. v. The People’s Republic of Bangl.*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures at ¶ 121 (Mar. 21, 2007), <http://ita.law.uvic.ca/documents/Saipem-Bangladesh-Jurisdiction.pdf>.

61. *Id.* at ¶¶ 11-51.

62. *Id.* at ¶¶ 155-56.

63. *Id.* at ¶¶ 157-58.

64. *Id.* at ¶¶ 159-61, 162-169.

65. *Id.* at ¶¶ 185-86.

must accept [local courts'] decisions come hell or high water."<sup>66</sup>

Be that as it may, how did *Saipem* transform a denial of justice in a contract dispute into an expropriation? Its key interpretive move was to declare that the "residual contractual rights under the investment as crystallized in the ICC award" was itself an investment.<sup>67</sup> It followed that the Bangladeshi courts had expropriated an investment when they stripped Saipem of its ICC award. This sleight of hand may be helpful to investor lawyers because—unlike denial of justice—expropriation has no exhaustion requirement.<sup>68</sup>

The *Saipem* panel insisted it was not acting as a supranational appellate body.<sup>69</sup> And this is a standard disclaimer in descriptions of the denial of justice doctrine.<sup>70</sup> But from a realist perspective, this is nonsense. Perhaps arbitrators mean that they do not review domestic opinions for their correctness under

---

66. See Luca G. Radicati di Brozolo, *Interference by National Courts with International Arbitration: the Situation after Saipem v. Bangladesh*, in *NEW DEVELOPMENTS IN INTERNATIONAL COMMERCIAL ARBITRATION 2009*, at 24-25 (Christopher Mueller & Antonio Rigozzi, eds., 2009).

67. *Saipem S.p.A. v. The People's Republic of Bangl.*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures at ¶ 128 (Mar. 21, 2007), <http://ita.law.uvic.ca/documents/Saipem-Bangladesh-Jurisdiction.pdf>. But see Andrew Newcombe, *When is Court Interference in Arbitration Proceedings Expropriatory?*, *KLUWER ARBITRATION BLOG* (July 7, 2009), <http://kluwerarbitrationblog.com/blog/2009/07/07/when-is-court-interference-in-arbitration-proceedings-expropriatory/> (criticizing *Saipem* for its confused identification of the expropriated investment). In construing an award as part of a continuing investment, *Saipem* is part of a strong emerging majority view. Compare *Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 34877, Interim Award on Jurisdiction at ¶ 185 (Dec. 1, 2008), available at <http://italaw.com/documents/Chevron-TexacovEcuadorInterimAward.pdf>; *White Industries Australia Limited v. Republic of India*, UNCITRAL Arb., Final Award at ¶ 11.3.2 (Nov. 30, 2011), available at <http://italaw.com/cases/documents/1170>; with *GEA Group v. Ukraine*, ICSID Case No. ARB/08/16, Award at ¶¶ 161-62 (Mar. 31, 2011) (reasoning that an award is analytically distinct from the underlying investment, and involves no local economic activity). See also Jarrod Hepburn, *White v. India Award Engages with Definition of Investment and State's Obligation to "Promote"*, *INVESTMENT ARBITRATION REPORTER* (Apr. 3, 2012).

68. In dicta, the tribunal opined that *Saipem* nonetheless exhausted its practical remedies, as appealing further may have been physically dangerous, and winning a further appeal was improbable. See *Saipem S.p.A. v. The People's Republic of Bangl.*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures at ¶¶ 181-84 (Mar. 21, 2007), <http://ita.law.uvic.ca/documents/Saipem-Bangladesh-Jurisdiction.pdf>.

69. *Id.* ("[T]his [ICSID] tribunal does not institute itself as a control body over the ICC Arbitration, nor as an enforcement court, nor as a supranational appellate body for local court decisions. This Tribunal is a Treaty judge. It is called upon to rule exclusively on treaty breaches, whatever the context in which such treaty breaches arise.")

70. See, e.g., RUDOLF DOLZER & CHRISTOPHER SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 165 (2008); *Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 2009-23, Opinion of Jan Paulsson at ¶ 16 (Mar. 1, 2012), available at [http://www.italaw.com/sites/default/files/case-documents/ita0176\\_0.pdf](http://www.italaw.com/sites/default/files/case-documents/ita0176_0.pdf).

domestic law. But arbitrators do review domestic opinions for adherence to international law—just as the U.S. Supreme Court reviews U.S. state opinions for adherence to federal law. Perhaps arbitrators mean that they will not review domestic court decisions on a standard as loose or as substantive as a domestic appeals court might. However, an arbitral tribunal *will* review domestic court decisions for serious procedural inadequacies, and for clear and malicious misapplication of the law. Some commentators take the view that such an egregious error on substance is merely proof of a procedural taint like bias or corruption.<sup>71</sup> But a review remains a review even if it is arguably confined to grave procedural flaws. Pretend otherwise though it might, the *Saipem* tribunal overruled the Bangladeshi courts, and thus performed the role of an appellate chamber. Observers must focus on what a tribunal does, and not what it says. “I’m not creating a new kind of supranational appeal,” is exactly what one might expect an adjudicator to say when she is doing exactly that.

D. *The Effective Means Clause as a Check on Domestic Courts: Chevron I, White, and Potentially Chevron II*

Where else could denial of justice flow in investment treaty law? To the effective means clause, which in some investment treaties guarantees an investor an effective means to assert claims and enforce rights. As it happens, the leading case here is the first *Chevron v. Ecuador* investment arbitration (hereinafter *Chevron I*).<sup>72</sup> In this skirmish, Chevron won about \$100 million from Ecuador (really \$700 million, offset by \$600 million in taxes) for delays of 13 to 15 years in adjudicating domestic court contract disputes that began in the early 1990s, arising out of Ecuador’s diversion of oil revenue in the 1980s. At first glance it seemed that Chevron’s object was to gain leverage in future negotiations over a monetary settlement in the main dispute. On closer study, it seems clear that Chevron brought its first investment arbitration against Ecuador to make law that would be useful in its main case—either to establish that Ecuador’s judicial system was deficient, or to develop the underdeveloped law of effective means. In the latter strategy it succeeded.

*Chevron I* held that it had no need to reach the question of denial of

---

71. See MCLACHLAN, ET AL., *supra* note 45, at 229 (“An attack on the substantive outcome of the national court decision can only succeed if it is clear that there has been judicial impropriety, rather than merely a mistake of law.”); PAULSSON, *supra* note 41, at 7 (“In international law, denial of justice is about due process, nothing else – and that is plenty.”).

72. *Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 34877, Partial Award on the Merits (Mar. 30, 2010), available at <http://www.italaw.com/cases/251>. Although I refer to it as *Chevron I* for simplicity, this first Permanent Court of Arbitration investment arbitration should not be confused with the earlier American Arbitration Association commercial arbitration arising out of the same facts as the second PCA investment arbitration.

justice,<sup>73</sup> and instead, breathed life into the effective means provision. The arbitrators read the effective means guarantee as providing a special (*lex specialis*) cause of action for the undue delay component of denial of justice, intended by the treaty drafters to be determined under lower standards than customary international law.<sup>74</sup> The panel found that there is no strict requirement of exhaustion under the effective means clause, although there may be a qualified requirement, and in any event, the “delay itself usually evidences futility.”<sup>75</sup> In a word, *Chevron I* established that a state may be liable under the effective means clause if its courts are slow.<sup>76</sup> As with *Saipem* and the expropriation clause, the effect was the same as finding a denial of justice—but without a proper exhaustion requirement, and under a lower standard.<sup>77</sup> Once again, the advantages of this approach to investor-side lawyers are self-evident.

Investor-side lawyers put the newly-revived effective means clause to good use only a year later in *White v. Australia*. In a sense, *White* combined the law of *Chevron I* with the facts of *Saipem*. It applied the new legal doctrine on “slow courts” to the familiar fact pattern of state courts torpedoing a commercial arbitration. But *White* is most interesting because, unlike *Chevron I*, it analyzed the same facts under both denial of justice and effective means. This allows us to see the difference.

In the underlying dispute, White Industries of Australia won a small ICC contract arbitration against the state-owned Coal India. White promptly brought an enforcement proceeding, and defended a set-aside proceeding, in Indian

---

73. *Id.* at ¶ 275.

74. *Id.* at ¶¶ 242-44 and accompanying notes. See also *Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 2009-23, Expert Opinion of Professor David D. Caron as to Article II(7) of the Treaty at ¶¶ 6, 171 (Sept. 3, 2010), available at <http://www.italaw.com/sites/default/files/case-documents/ita0241.pdf> (concluding that the treaty guarantee of effective means is distinct from the doctrine of denial of justice under customary international law).

75. *Id.* at ¶¶ 321, 323, 326. A useful summary and reaffirmation of *Chevron I*'s reading of the effective means clause may be found in *White Industries Australia Limited v. Republic of India*, UNCITRAL Arb., Final Award at ¶ 11.3.2 (Nov. 30, 2011), available at <http://italaw.com/cases/documents/1170>.

76. See Lawrence Newman & David Zaslowsky, *Suing a Country Because its Courts are Too Slow*, N. Y. L. J., Mar. 22, 2012.

77. Ecuador argued in a state-to-state arbitration against the U.S. that the standard for finding a violation of the effective means guarantee under investment treaties should be the same as the lower standard for finding such a violation under customary international law. See *Republic of Ecuador v. United States*, UNCITRAL Arb., PCA Case 2012-5, Request for Arbitration (June 28, 2011), available at <http://www.italaw.com/cases/1494>. However, this claim was defeated at the jurisdictional stage, on the rationale that the dispute did not affect the relationship between the two states; and this argument has yet to be addressed on the merits. See Jarrod Hepburn & Luke Eric Peterson, *U.S.-Ecuador Inter-state Investment Treaty Award Released to Parties; Tribunal Members Part Ways on Key Issues*, INVESTMENT ARBITRATION REPORTER (Oct. 30, 2012).

courts. Predictably, the Indian proceedings dragged on with no resolution for nine years, including nearly four years at the Indian Supreme Court. White found that the delays of India's courts amounted to a denial of effective means to assert rights, but not a denial of justice. India argued that—as a developing nation struggling in good faith to administer justice for 1.2 billion people—it should be cut slack under both doctrines. This consideration tipped the balance in favor of India in White's application of denial of justice to the facts of that case. White determined that the lower court delay, while not ideal, was acceptable under the circumstances; and a delay of nearly-four years in the Supreme Court, however unacceptable, was not egregious enough on its own to constitute a denial of justice.<sup>78</sup> While White considered that India's developmental status was relevant under the effective means clause, it did not find it to be determinative. In finding a breach of the effective means guarantee, it took into account the full nine years of delay.<sup>79</sup> In practice, the high standards built into the denial of justice doctrine made all the difference.

Arguably, *Chevron I* looked even more like a supranational appeal than either *Saipem* or *White*, despite the usual disclaimers.<sup>80</sup> In *Saipem* and *White*, the panel's remedy was to simply reinstate the contract arbitration award that had been stymied by the courts. This is not an option in a case like *Chevron I*, where the underlying litigation had been delayed, and no result had been reached in *any* forum. There the tribunal chose to determine what was owed in the delayed court cases by deciding Ecuadorian law *de novo*. When a claim has never been adjudicated, arbitrators cannot overrule the courts—but they may choose to step into the shoes of the first-instance decisionmaker. In such a case, the tribunal functions not only as an appellate body, but a highly-intrusive one.<sup>81</sup>

In its larger dispute with Ecuador (hereinafter *Chevron II*), Chevron's investment treaty claim was initially based on the effective means clause. Chevron amended its claim to also include denial of justice under customary

---

78. *White Industries Australia Limited v. Republic of India*, UNCITRAL Arb., Final Award at 104-05 (Nov. 30, 2011), available at <http://italaw.com/cases/documents/1170>.

79. *Id.* at 118-19, 118 n.78.

80. *Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 34877, Partial Award on the Merits at ¶ 247 (Mar. 30, 2010), available at <http://www.italaw.com/cases/251> (“[T]he tribunal is not empowered by [the effective means] provision to act as a court of appeal reviewing every individual alleged failure of the local judicial system *de novo*.”).

81. Perhaps a more cautious approach would be to “remand” the case to national court, by ordering the Republic to make the investor's assertion of rights effective, while retaining supervisory jurisdiction and holding onto the possibility of *de novo* review as a last resort. Investor counsel would respond that such an approach is not only impractical, but legally unavailable, because the finding of either denial of justice or effective means strips the national courts of jurisdiction.

international law, after the Ecuadorian judgment became final.<sup>82</sup> Adding the cause of action may have made strategic sense, in part, because at the time, Ecuador was challenging the broad interpretation of the effective means clause in a state-state arbitration with the U.S.<sup>83</sup> Like *Chevron I*, *Chevron II* is unlikely to decide the case under denial of justice, because it is easier and less stigmatizing to find a violation of the effective means clause. However, the panel's choice to first rule on Chevron's contract claims<sup>84</sup> may signal that it plans to decide on still less controversial grounds.

E. *Denial of Justice Flows Underground, Even As Remedies Grow*  
*Bolder: Petrobart and ATA*

Finally, the denial of justice doctrine has flowed underground. In the *Petrobart* case, a court had stayed the execution of its judgment against the Kyrgyz state gas company at the behest of the Kyrgyz vice prime minister, which allowed time for the company to declare bankruptcy. The investor alleged that the state had violated the guarantee of an effective means to assert his rights, and five aspects of the Energy Charter Treaty provision on unfair and inequitable treatment, including Denial of Justice.<sup>85</sup> Although the tribunal was very clear that the investor had been deprived of effective means, it declined to specify which aspects of unfair and inequitable treatment had been violated.<sup>86</sup>

Like *Petrobart*, *ATA v. Jordan* effectively overruled a domestic court without clarifying exactly what treaty clause it relied upon.<sup>87</sup> While rejecting the claim for denial of justice, *ATA* found that the Jordanian court's retroactive extinguishment of a contractual arbitration clause violated the letter and spirit of the investment treaty.<sup>88</sup> In the underlying dispute, Jordan's Arab Potash Company brought a commercial arbitration against Turkey's ATA over construction of a dike on the Dead Sea. Turkey's ATA defeated the claim and prevailed on its counterclaim in the commercial arbitration. Then the Arab Potash Company instituted set-aside proceedings and brought its original claim in national courts (now seeking much higher damages). The Jordanian Court of

---

82. See *Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 2009-23, Claimants' Supplemental Memorial on the Merits at ¶ 257 (Mar. 20, 2012), available at <http://www.italaw.com/sites/default/files/case-documents/ita0177.pdf>.

83. See *supra* note 77.

84. *Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 2009-23, Procedural Order No. 10 (Apr. 9, 2012), available at <http://italaw.com/cases/documents/263>.

85. *Petrobart Limited v. The Kyrgyz Republic*, SCC Case No. 126/2003, Final Award at 25-28 (Mar. 29, 2005).

86. *Id.* at 75-77.

87. *ATA Construction, Industrial & Trading Co. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award at ¶ 113(4) (May 18, 2010).

88. *Id.*

Appeal and Cour de Cassation set aside the award, and—crucially—extinguished the right to arbitrate by retroactive application of the Jordanian Arbitration Law of 2001. In the view of the investment tribunal, the Jordanian courts were obliged by treaty to refuse to apply this rule.

ATA is most noteworthy for being the first ICSID or ad hoc investment tribunal to terminate a judicial proceeding in its final award. The tribunal “order[ed] that the ongoing Jordanian court proceedings in relation to the Dike No. 19 dispute be immediately and unconditionally terminated, with no possibility to engage further judicial proceedings in Jordan or elsewhere on the substance of the dispute.” It reasoned simply that under the Chorzow Factory standard, the only way to restore the status quo ante, and the claimant’s right to arbitration, was to halt the domestic action.<sup>89</sup> Although arbitral interim measures to suspend a court proceeding are not uncommon, these are in principle fashioned as preservation orders. A final remedy terminating a court proceeding may find precedent in the Iran-Claims Tribunal and International Court of Justice,<sup>90</sup> but these are standing tribunals.

ATA’s innovation was not trumpeted by the arbitrators, and, with a single exception, escaped all notice.<sup>91</sup> Of course, investor attorneys were quick to pick up on the development. It should come as no surprise that Chevron cited ATA as an example of a more radical remedy in justifying the interim measures taken in *Chevron v. Ecuador II*.<sup>92</sup>

\* \* \*

In sum, denial of justice has not quite flourished as predicted by Paulsson, but neither has it disappeared. The eight years since he proclaimed a Renaissance have seen six final awards finding a state in violation of an investment treaty based on the action (or inaction) of its judiciary. *Pey Casado*

---

89. *Id.* (“[T]he single remedy which can implement the *Chorzow* standard is the restoration of the Claimant’s right to arbitration.”) (citations omitted).

90. *See, e.g., Mexico v. United States (Case Concerning Avena and Other Mexican Nationals)*, 2004 I.C.J. 12, Judgment at ¶ 153 (Mar. 31, 2004) (final decision finding U.S. in violation of Vienna Convention on Consular Relations Art. 36, and directing the U.S. to give “additional review and consideration” by “means of its own choosing”); *Watkins-Johnson Co. v. The Islamic Republic of Iran*, 22 Iran-U.S. Cl. Trib. Rep. 218 (July 28, 1989) (Award No. 429-370-1) (final award holding Iranian judgment to be without legal effect); *Touche Ross & Co. v. The Islamic Republic of Iran*, 9 Iran-U.S. Cl. Trib. Rep. 284 (Oct. 30, 1985) (Award No. 197-480-1) (same).

91. *See* Luke Eric Peterson, *Tribunal Orders Jordan to Halt Local Court Proceedings and Allow Commercial Arbitration of Dispute*, INVESTMENT ARBITRATION REPORTER (Mar. 6, 2012); Luke Eric Peterson, *Analysis: Tribunal’s Ordering Domestic Courts to Terminate Case May Pique Interest of Other Claimants*, INVESTMENT ARBITRATION REPORTER (Mar. 6, 2012).

92. Inter-American Commission on Human Rights, Memorial Amicus Curiae of Chevron Corporation in Opposition to Request for Precautionary Measures at ¶ 39 & n.64 (IACHR Feb. 9, 2012), available at <http://www3.nd.edu/~ndlaw/faculty/cassel/ChevronMemorialAmicusCuriae.pdf>.

---

---

was framed as a denial of justice; *Saipem* as an expropriation; *Chevron I* and *White* as denials of effective means; *Petrobart* as a denial of effective means as well as an unspecified offense; and *ATA* as an unspecified offense. What shall we call the new amorphous phenomenon into which denial of justice has transformed? Review of administrative action is a standard term in the arbitration discourse. The only reason not to use the parallel term—arbitral review of judicial action—is to avoid the taboo suggestion that arbitrators perform any appellate role.

Yves Fortier, an esteemed arbitrator, has suggested that the *Saipem*, *Chevron I* and *White* cases reflected no doctrinal or theoretical tension between the two systems of law. “[F]ar from evidencing any tension, “ Fortier has argued, “[they] rather demonstrate the harmony between arbitral tribunals and sovereign courts as long as each adjudicating body remains within its sphere of competence.”<sup>93</sup> His point was that none of these awards address “the local court’s regular exercise of its power; [the tribunal] deals in each instance with the local court’s wrongful exercise of its remit or violation of objective international standards.”<sup>94</sup> In the author’s respectful view, Fortier was merely saying that the cases were correctly decided, and that reviewing a state’s decision for violations of international law is an arbitral tribunal’s appropriate function. That may be so, but it is not a reason why this is any less an appellate function than when a domestic court of appeal reviews a local trial court because it acted in violation of applicable law. Whether indeed the scrutiny of local courts is a proper role for an arbitrator, or a sustainable one, will be considered in the next Part.

### III. EVALUATING ARBITRAL POWER OVER DOMESTIC COURTS

Using international law to control abuses of domestic law has a sound legal basis and advances the policies that animate the investor treaty system. Even so, the practice is vulnerable to a number of objections: that it privileges foreign investors above all other victims, impugns the independence of the judiciary, ignores the will of the system’s sovereign founders, and invites sovereigns to become international scofflaws.

#### A. *Legal Basis and Rationale*

Like any order deriving force from an international treaty, an arbitral order (whether interim or final) applies to all of a nation’s organs, including its

---

93. L. Yves Fortier, *Judges v. Arbitrators 1* (Jan. 28, 2013) (unpublished manuscript) (on file with author).

94. *Id.* at 2.

courts.<sup>95</sup> And like any such order, it applies regardless of whether it forces the state to violate principles of domestic statutory or constitutional law.<sup>96</sup> This much is uncontroversial as a matter of international law.

Investment arbitrators are likely to exert the power they hold over judges in four scenarios: to protect their own jurisdiction (as in the prototypical antisuit injunction); to remedy the intrusion of state courts into a commercial arbitration (as in *Saipem*, *White*, and *ATA*); to preserve the parties' rights through interim measures (as in *Chevron II*, to halt an alleged denial of justice in progress); or to finally restore justice (as sought in the *Chevron II* final remedy).

As a matter of policy, arbitral power over domestic courts is designed in all these scenarios to serve as a shield against state courts favoring local parties in local disputes. In many such cases, the local parties are state-connected.<sup>97</sup> Surely there should be a way to stop humdrum protectionism in whatever branch of government from gumming up disputes that aim to properly uphold the rights of investors. Surely there should be a way to correct the most obscene injustices that transpire in national courts—a runaway Mississippi jury driving *Loewen* into bankruptcy, overzealous plaintiffs allegedly writing their own \$19

---

95. See *Draft Article 4(1) on Responsibility of States for Internationally Wrongful Acts*, in Rep. of the Int'l Law Comm'n, 53d sess., U.N. GAOR, 56th Sess., Supp. No. 10, at 43, U.N. Doc. A/56/10 (2001) ("The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions."). See also *Report of the International Law Commission, Fifty-Third Session*, U.N. GAOR, 56th Sess., Supp. No. 10, at 85-86, U.N. Doc. A/56/10 (2001) ("[T]he reference to a State organ . . . extends to organs of government of whatever kind or classification, exercising whatever functions. No distinction is made for this purpose between legislative, executive or judicial organs.").

96. Vienna Convention on the Law of Treaties, May 23, 1969, art. 27, 1155 U.N.T.S. 331 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."); *Draft Article 4(1) on Responsibility of States for Internationally Wrongful Acts*, in Rep. of the Int'l Law Comm'n, 53d sess., U.N. GAOR, 56th Sess., Supp. No. 10, at 43, U.N. Doc. A/56/10 (2001) ("An act of a State must be characterized as internationally wrongful if it constitutes a breach of an international obligation, even if the act does not contravene the State's internal law – even if, under that law, the State was actually bound to act in that way."); *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Advisory Opinion, 1932 P.C.I.J. (ser. A/B) No. 44 (Feb. 4), at 24-25 ("a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law").

97. Indeed, in virtually every instance of arbitral review of domestic courts reviewed herein, the local party had significant state involvement. In *Pey Casado* and *Chevron I*, the investor's underlying conflict was directly with the government. The domestic court counterparties to *Petrobart*, *Saipem*, and *White Industries* were all state-controlled. *ATA*'s counter-party began as state-controlled, although the state disposed of its controlling interest over the course of the long dispute. Even *Chevron v. Ecuador II* (if the tribunal agrees to engage in arbitral review) would not necessarily be an exception. For although *Chevron*'s opponents in the underlying case are private citizens, *Chevron* alleges that they colluded with the state, and undertook contractually not to sue the state oil company *PetroEcuador*. As for *Loewen*, which arose out of a jury trial, the investor was not the victim of government protectionism, but its negative cousin, popular xenophobia.

billion judgment in Ecuador. The U.S. Second Circuit's refusal to restore justice in the *Chevron* case only renders more poignant the need for an international mechanism to check the power of domestic courts.

If one accepts the premise that arbitration promotes investment,<sup>98</sup> then protecting investor rights in any of these scenarios should redound to the benefit of all citizens by advancing economic development. In addition, strengthening justice for one type of party should, in an ideal world, strengthen justice for all. To take a pertinent example, Chevron's exposure of Ecuadorian corruption affecting all litigants—it has produced evidence that 105 unrelated opinions were ghostwritten<sup>99</sup>—should ideally lead to improvements in the purity of justice for all Ecuadorian parties. In these ways, the exercise of arbitral power over domestic courts may advance the core objectives of the investment treaty regime. *Saipem*, *White*, and *ATA* addressed the special predicament of commercial arbitrators who had been frustrated by state courts challenging their authority, at one or several points in the arbitration's life cycle. Ordinarily, commercial arbitrators will try to use their own interim measures to enjoin the parallel litigation. But when the state courts in the law of the seat refuse to back down, the only solution open to the commercial arbitrators—to disregard the courts of the arbitral seat—is problematic both in practice and under traditional legal theories of arbitration.<sup>100</sup> For those who wish to ensure the smooth functioning of commercial arbitration, the

---

98. Unfortunately, the jury remains out on this central empirical question. See generally KARL P. SAUVANT & LISA E. SACHS, *THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES AND INVESTMENT FLOWS* (2009).

99. Michael D. Goldhaber, *Chevron by the Numbers: 60 Law Firms, 114 Gibson Dunn Lawyers, 117 Charges of Ghostwriting*, THE AM. L. LITIG. DAILY (Mar. 4, 2013), [http://www.americanlawyer.com/digestTAL.jsp?id=1202590909084&The\\_Global\\_Lawyer\\_Chevron\\_by\\_the\\_Numbers\\_60\\_Law\\_Firms\\_114\\_Gibson\\_Dunn\\_Lawyers\\_117\\_Charges\\_of\\_Ghostwriting](http://www.americanlawyer.com/digestTAL.jsp?id=1202590909084&The_Global_Lawyer_Chevron_by_the_Numbers_60_Law_Firms_114_Gibson_Dunn_Lawyers_117_Charges_of_Ghostwriting).

100. For an extreme example of the practical obstacles, see Marie-France Schaad, *The Abduction of an Arbitrator—A Disturbing Account of a State's Attempt to Derail an International Arbitration*, 4 ASA Bull. 511, 523 (1999). On the clash with classical conceptions of arbitration see EMMANUEL GAILLARD, *LEGAL THEORY OF INTERNATIONAL ARBITRATION* (2010) (“In the vision that reduces arbitrators to occasional organs of the State in which the arbitration takes place, arbitrators have no choice, in situations in which courts of that State issue an injunction aimed at discontinuing the arbitration, but to take note of such injunction and mechanically comply with it. . . [O]nly the representation that recognizes the existence of an arbitral legal order allows arbitrators faced with an injunction that they deem unfounded pursuant to generally accepted principles of international arbitration to proceed with their mission and issue an award.”). Although Luca di Brozolo writes sympathetically of commercial arbitrators' power to disregard the law of the seat, he likewise notes that doing so may sit uncomfortably with classical theories of arbitration; and that arbitrators who are subject to the state's jurisdiction may be the targets of fines, seizures, and arrest. See di Brozolo, *supra* note 66, at 3-13. For the leading case on disregarding the law of the seat, see *Himpurna Calif. Energy Ltd. v. Republic of Indonesia*, Final Award (Oct. 16, 1999) XXV Y.B. Comm. Arb. 109, 182-83 (2000).

availability of investment arbitration to effectively oversee the local courts' supervision of commercial arbitration is a major breakthrough.<sup>101</sup>

*Chevron v. Ecuador II* presents the special circumstance of a denial of justice in progress. Peterson has suggested, by analogy to expropriation, that the harm to Chevron from Ecuador's breach of the interim measures might be repaired by monetary compensation.<sup>102</sup> But Peterson's analogy is inapt because unlike expropriation, denial of justice cannot be lawful and cannot have a legitimate public purpose. There is a difference between the state choosing to nationalize a \$19 billion asset, and the state permitting or colluding in a conspiracy by private parties to steal \$19 billion by rigging a judicial result through bribery and fraud.

Moreover, in the particular circumstances of the case, it is hard to see how compensation could restore the status quo ante. Peterson is correct that the arbitrators have thus far failed to explain their finding that the harm flowing from the finalization of the Lago Agrio judgment would be irreparable. One is left to speculate that a recovery by the plaintiffs might disrupt Chevron's operations, deprive it of productive capital, reduce its market capitalization, place Chevron under pressure from shareholders to settle the remainder of the claim, and require years of uncertain litigation to collect compensation from a defiant state. In addition, if Chevron's allegations are taken as true, then enforcement by the plaintiffs would result in unjust enrichment of the perpetrators of fraud, as well as their funders and contingency fee lawyers, which might encourage such frauds in the future. Arbitrators empowered to preserve the status quo between the parties can hardly stand by as this baroque sequence of events lurches into motion.

### B. *Specific Objections to Arbitral Power Over Domestic Courts*

Early NAFTA challenges to environmental rules engendered an intense conversation about arbitral review of administrative action.<sup>103</sup> Arbitral review

---

101. See di Brozolo, *supra* note 66, at 23-28.

102. Luke Eric Peterson, *Analysis: As Ecuador is Held in Breach of Order to Block Enforceability of Lago Agrio Judgment, Tribunal Remains Reticent as to Why it Sees Harm to Chevron as Irreparable*, INVESTMENT ARBITRATION REPORTER (Feb. 11, 2013).

103. For a taste of the sometimes-strident public discourse, see Mike McKee, *Skirting the Law: Under NAFTA, Foreign Companies Can Avoid American Courts*, THE RECORDER (Feb. 24, 2004); John D. Echeverria, *The Real Contract on America*, THE ENVIRONMENTAL FORUM 28 (July/August 2003). For general doctrinal discussions, see Andrew Newcombe, *The Boundaries of Expropriation in International Law*, 20 ICSID REV. (2005); Jan Paulsson & Zachary Douglas, *Indirect Expropriations in Investment Treaty Arbitrations*, in ARBITRATING FOREIGN INVESTMENT DISPUTES: PROCEDURAL AND SUBSTANTIVE LEGAL ASPECTS 152 (N. Horn & S. Kröll, eds. 2004); Jan Paulsson, *Indirect Expropriation: Is the Right to Regulate at Risk?* (Dec. 2005), [www.oecd.org/dataoecd/5/52/36055332.pdf](http://www.oecd.org/dataoecd/5/52/36055332.pdf); Thomas Waelde & Abba Kolo, *Multilateral Investment Treaties and Environmental*

of judicial action has gone unexamined, even though it is vulnerable to the same critiques, and then some.

### 1. *Privileging foreign investors*

A common objection to arbitral review of administrative and judicial action is that arbitral supervision privileges foreign investors over all other claimants. There is no clear U.S. authority on the question most analogous to *Saipem*, of whether a U.S. state judicial decision can effect a taking.<sup>104</sup> What is clear is that a domestic investor who loses her case on final appeal in a national court has no further recourse; and a foreign investor now does.

Like it or not, this imbalance is inherent in the idea of international

---

*Expropriation of Foreign Investment*, CEPMLP 5:2 (2000), [www.dundee.ac.uk/cepmlp/journal/html/vol5/article5-2.html](http://www.dundee.ac.uk/cepmlp/journal/html/vol5/article5-2.html). For consideration of particular cases, see L. J. Dhooge, *The North American Free Trade Agreement and the Environment: Lessons of Metalclad Corporation v. United Mexican States*, 10 MINN. J. OF GLOBAL TRADE 209, 289 (2001); Courtney Kirkman, Note, *Fair and Equitable Treatment: Methanex v. United States and the Narrowing Scope of NAFTA Article 1105*, 34 LAW & POL'Y INT'L BUS. 343, 346 (2002); H. Olasolo, *Have Public Interests Been Forgotten in NAFTA Chapter 11 Foreign Investor/Host State Arbitration? Some Conclusions from the Judgment of the Supreme Court of British Columbia on the Case of Mexico v. Metalclad*, in 8 NAFTA: LAW AND BUSINESS REVIEW OF THE AMERICAS 189-210 (2002); Howard Mann, *The Final Decision in Methanex v. United States: Some New Wine in Some New Bottles* (2005), [http://www.iisd.org/pdf/2005/commentary\\_methanex.pdf](http://www.iisd.org/pdf/2005/commentary_methanex.pdf); Judith Wallace, *Corporate Nationality, Investment Protection Agreements, and Challenges to Domestic Natural Resources Law: The Implication of Glamis Gold's NAFTA Chapter 11 Claim*, 17 GEO. INT'L ENVTL. L. REV. 365 (2005); Todd Weiler, *Metalclad v. Mexico: A Play in Three Parts*, 2 J. WORLD INV. 685 (2001); Todd Weiler, *Good Faith and Regulatory Transparency: The Story of Metalclad v. Mexico*, in INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 701 (Todd Weiler ed., 2005).

104. The question of whether a U.S. state judicial decision can effect a taking was squarely presented in the U.S. Supreme Court case of *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't'l Protection*, 130 S. Ct. 2592 (2010). Unfortunately, the fractured decision did not yield a clear answer. Justice Antonin Scalia might be dismayed to learn that his position—that a judicial decision can effect a taking—is consonant with international law. Compare *id.* at 2614-17 (Kennedy, J., concurring, joined by Sotomayor, J.) (arguing that the question should be analyzed under the due process rather than the takings clause), and *id.* at 2618-19 (Breyer, J., concurring, joined by Ginsburg, J.) (declining to take a position), with *id.* at 2592 (plurality opinion written by Scalia, J., joined by Roberts, Thomas, and Alito) (“The Takings Clause. . . is not addressed to the action of a specific branch or branches. It is concerned simply with the act, and not with the governmental actor. . . There is no textual justification for saying that the existence or the scope of a State’s power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation. Nor does common sense recommend such a principle. It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat. . .”). See also *Brinkerhoff-Faris Tr. & Savings Co. v. Hill*, 281 U.S. 673, 680 (1930) (rejecting the idea of judicial takings categorically); *Brace v. United States*, 72 Fed. Cl. 337, 358-59 & n.35 (2006) (same).

investment law. Investment treaties are specifically designed to promote foreign investment by giving foreign investors unique legal rights that compensate for deficiencies in domestic law.

The contrary suggestion—that the rights created in international law must be coextensive with the rights under domestic law—recalls the Calvo Doctrine. It appeals to those who find it insulting that anyone might desire a more perfect system of law than their own. This sentiment may be irreconcilable with international law, but it remains a popular one. Stoking nationalist resentment by insulting domestic laws is a step that should therefore be taken with an appropriate sense of caution.

### 2. *Independence of the judiciary*

Arbitral review of judicial action is vulnerable to the additional critique that it undermines the principle of an independent judiciary. But does it really? A moment's thought shows that the main rationales for independent judges – to check the historically-dominant branches of government, and to avoid politicizing the courts – only relate to the separation of powers within a single level of government.<sup>105</sup> After all, the U.S. Supreme Court routinely reviews state courts on questions of federal law.

On closer examination, this objection too is about sovereignty. No one objects to U.S. Supreme Court review of U.S. state courts, because the surrender of some state sovereignty to the federal government is well-settled in the contemporary U.S. The partial cession of sovereignty inherent in all international treaties is less thoroughly-accepted, and less openly-acknowledged. Arbitral power over domestic courts heightens nationalist discomfort with treaty law because the sanctity of judicial independence in many nations—and the prestige that it confers—puts the judiciary at the core of sovereign pride and identity.

### 3. *State consent*

We come now to the only serious legal objection to arbitral power over courts. State consent forms the foundation for arbitral authority under classical theories of international law.<sup>106</sup> There is little question that investment treaties

---

105. See generally ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

106. State consent is to some degree passé under any of the competing transnational conceptions of international arbitration. See generally Gaillard, *supra* note 12. If an arbitrator's role is to act as an agent for the arbitration community or, even more broadly, to uphold the emerging principles of international economic law, then arbitral power over domestic courts causes no cognitive dissonance. See, e.g., Alec Stone Sweet & Florian Grisel, *Transnational Investor Arbitration: From Delegation to Constitutionalization*, in

were designed to create arbitral power over administrative action. But is there evidence that, in signing investment treaties, states intended to create the various facets of arbitral power over judicial action?

For interim measures affecting court proceedings, the question is whether states intended them to be binding. The practice of giving binding power to ICSID interim measures flies in the face of both the ICSID Convention's plain meaning ("recommend"), and the clear legislative history;<sup>107</sup> the only justification ever given for the interpretation was that it was necessary to make the system effective. Under the UNCITRAL 1976 rules, Ecuador makes a provocative but shakier argument that the *Chevron II* arbitrators exceeded their powers when they converted interim measures into an enforceable award.<sup>108</sup>

Among the final doctrines affecting court proceedings, only the effective means clause has inspired a thoughtful discussion of intent—and that discussion is not fully persuasive. Investors are guaranteed effective means to bring claims and enforce rights in 43 U.S. investment treaties signed since 1989.<sup>109</sup> It is clear that this treaty provision envisages arbitral review of judicial action, but what is its relationship with the older doctrine of denial of justice under customary international law? Is *Chevron I* correct that effective means should be understood as denial of justice lite?

In *Chevron I*, the arbitrators expressly concluded that the treaty drafters intended to make the effective means guarantee *lex specialis*.<sup>110</sup> Citing the legal historian Kenneth Vandavelde, they emphasize that the effective means clause was adopted in U.S. investment treaties at a time when the denial of justice principle was unclear in customary international law; and the effective means clause was withdrawn from the U.S. model BIT after the denial of justice principle was clarified.<sup>111</sup> However, this sequence of events does not establish an intent to allow arbitral review of judicial action under standards

---

HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 118 (P.M. Dupuy et al. eds., 2009); Ernst-Ulrich Petersmann, *Constitutional Theories of International Economic Adjudication and Investor-State Arbitration*, in Dupuy, *supra*, at ch. 8.

107. See *supra* note 24; see also SCHREUER, *supra* note 14, at 764.

108. *Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 2009-23, Respondent's Letter at 4-5 (Mar. 1, 2013). Ecuador makes an interesting point that the 2010 version of the rules (enacted a few months after *Chevron II* was filed) do not allow for interim measures to be converted into awards. But the plain meaning of Articles 26 and VI(6) seems to support the legality of the arbitrators' actions.

109. *Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 2009-23, Expert Opinion of Professor David D. Caron as to Article II(7) of the Treaty at ¶ 69 (Sept. 3, 2010), available at <http://www.italaw.com/sites/default/files/case-documents/ita0241.pdf>.

110. *Id.* at ¶ 6, 171 (concluding that the treaty guarantee of effective means is distinct from the doctrine of denial of justice under customary international law); see also *Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 34877, Partial Award on the Merits at ¶ 244 (Mar. 30, 2010), available at <http://www.italaw.com/cases/251>.

111. *Id.* at ¶ 243 and accompanying notes.

*more intrusive than* denial of justice. The more logical inference is that the unclear status of denial of justice created a need to draft a new provision that would achieve the same purposes as the older doctrine. Only if the law had been clear would the creation of a new clause imply a different standard.

Ecuador sought an authoritative interpretation of the effective means clause in a state-to-state arbitration with the U.S., but was stymied at the jurisdictional stage.<sup>112</sup> In its *Chevron II* merits brief, Ecuador ironically cites Vandevelde for the general notion that U.S. investment treaties intended to reaffirm traditional international law; and invokes a range of commentators and cases to support this point in the context of effective means.<sup>113</sup> This debate merits further study by legal historians; and careful consideration by future tribunals.

Beyond effective means, it seems doubtful that the treaty drafters had any specific intent to provide an easy substitute for denial of justice via the expropriation clause, or some unspecified other clause, or the spirit of the treaty. The tribunals that made findings on these grounds made no attempt to discern the governing treaties' intent.

Advocates of a robust investment treaty regime might give the all-purpose response that, in submitting to arbitral review of state action, nations generally intended to submit to arbitral review of state action in all its forms. Or they might argue that judicial organs are covered by the plain meaning of each treaty provision due to the unitary conception of the state under international law. Even if one accepts these points, relying on other portions of a treaty to evade the denial of justice standards that evolved organically is at best unwise.

What about denial of justice itself? The fact that the status of denial of justice itself was unclear during the second half of the twentieth century—and that there was any perceived need to draft a substitute—raises questions as to whether treaties signed during that era consistently reflected an expectation that judicial action would be reviewed under the doctrine of denial of justice itself. The simple counter-argument is that the precept never died, and states may fairly be presumed to have incorporated a flickering principle of fine pedigree.

Legally, this may be a sufficient retort. But there is a difference between what states may be presumed to have intended and what they are willing to put up with. Whether states are at peace with arbitral power over domestic courts

---

112. For Ecuador's request for state-to-state arbitration on this very question, see *Republic of Ecuador v. United States*, UNCITRAL Arb., PCA Case 2012-5, Request for Arbitration (June 28, 2011), available at <http://www.italaw.com/cases/1494>. Regrettably, Ecuador lost on jurisdiction before any light could be shed on the merits. See Hepburn & Peterson, *supra* note 77.

113. *Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 2009-23, Counter-Memorial on the Merits of the Republic of Ecuador at ¶¶ 363, 382-86 (Feb. 18, 2013), available at <http://www.italaw.com/sites/default/files/case-documents/italaw1426.pdf>.

will be seen from their diplomatic responses.<sup>114</sup> The response of India's finance minister to *White v. India* was unambiguous and straightforward: "We cannot allow the highest court of the land to be subjected to any foreign courts or tribunals."<sup>115</sup>

#### 4. *Undermining international law*

A final objection to arbitral power over domestic courts is that it is often ineffective and thus undermines the authority of international law. The *Loewen* arbitrators may well have been right in suggesting that holding the U.S. liable for denial of justice would have completely undermined NAFTA Chapter 11. Orders directed at a court by an international tribunal are apt to be ignored by a hegemonic state. Consider the outcome in *Medellin*, where the U.S. Supreme Court defied the International Court of Justice's order in *Avena*.<sup>116</sup> Similarly, such orders are apt to be ignored by a rogue state like Ecuador, where the courts rendered the *Chevron* judgment enforceable in apparent defiance of interim measures. States that fall far from either extreme—like Jordan, which honored the *ATA* award—offer the best scenario for compliance.

The record of compliance with ICSID provisional measures suspending domestic litigation is abysmal. Of the ten such measures granted between 2000 and 2010, at least eight were flouted.<sup>117</sup> In *Perenco and Burlington*,<sup>118</sup> the

---

114. See Deepshikha Sikarwar & Joji Thomas Philip, *India to Relook at 82 BIPAs as Foreign Investors Invoke Global Arbitration*, THE ECONOMIC TIMES (Apr. 5, 2013), [http://articles.economictimes.indiatimes.com/2013-04-05/news/38306801\\_1\\_investment-protection-bipas-nation-treatment](http://articles.economictimes.indiatimes.com/2013-04-05/news/38306801_1_investment-protection-bipas-nation-treatment); Janet M. Eaton, *Multiple Countries Rejecting Investor State Dispute Settlement*, SIERRA CLUB CANADA (Apr. 12, 2012), <http://justinvestment.org/2012/04/multiple-countries-rejecting-investor-state-dispute-settlement/>; Adam Green, *BITs in Pieces*, FINANCIAL TIMES (Oct. 19, 2012), available at <http://blogs.ft.com/beyond-brics/2012/10/19/south-africa-bits-in-pieces/?#axzz2TCzKz0gw>.

115. See *Bilateral Investment Pacts Can't Be Subject to Foreign Jurisdictions: FM*, FIRSTPOST (Apr. 16, 2013), <http://www.firstpost.com/economy/bilateral-investment-pacts-cant-be-subject-to-foreign-jurisdictions-fm-702494.html>.

116. *Medellin v. Texas*, 552 U.S. 491 (2008) (holding that the ICJ decision in *Avena* was not binding federal law, and therefore not enforceable by federal courts against Texas); see also *Federal Republic of Germany v. U.S.*, 526 U.S. 111 (1999) (per curiam) (declining to comply with ICJ interim measures in *LaGrand* case); *Breard v. Greene*, 523 U.S. 371 (1998) (per curiam) (declining to comply with ICJ interim measures in *Paraguay v. U.S.*).

117. See discussions in Gil, *supra* note 19, of *Quiborax*, *CSOB*, *Tokios Tokelés*, *Bayindir*, and the four pre-*Chevron* provisional measures involving Amazonian oil fields (*City Oriente*, *Repsol*, *Perenco*, and *Burlington*). See also Gil, *supra* note 19, at 573, 578 (noting the inefficacy of provisional measures against Bolivia in the *Quiborax* arbitration, and observing that "ICSID Tribunals have the power to enjoin criminal domestic proceedings, but not necessarily the tools to enforce this power").

118. See *Burlington Resources, Inc. v. Ecuador*, ICSID No. ARB/08/5, Decision on Provisional Measures (June 29, 2009); *Perenco Ecuador Limited v. Ecuador*, ICSID No. ARB/08/6, Decision on Provisional Measures (May 8, 2009).

ICSID tribunal's provisional measures ordering Ecuador to refrain from any action, including oil seizures, to collect the disputed tax levies, were ignored when Ecuador took over the claimant's oil fields in July 2009, and terminated its contracts the next year. ICSID tribunals may keep saying that "recommend" means "dictate," but in reality, courts are unwilling to take dictation.

Even final awards that do not interfere with the judiciary have been flouted by a half dozen states that have submitted to investor arbitration.<sup>119</sup> Most prominently, Argentina has ignored at least four large awards, prompting some commentators to perceive an existential crisis.<sup>120</sup> A fortiori, the incautious exercise of arbitral power over judicial action is asking for trouble.

\* \* \*

Arbitral power over judicial action is firmly rooted in the unitary concept of statehood, and advances the core objectives of international investment law. The first objections that leap to mind—that it goes beyond domestic law, or undermines an independent judiciary—are not so much arguments under international law as expressions of discomfort with the idea of international law. Whether and to what extent the signatories to investment treaties intended to bestow arbitrators with power over judges is a serious legal question. The conclusion in *Chevron I* that effective means was designed as an easy alternative to denial of justice is far from clear. The idea that any other clause or the treaties as a whole intended to provide an easy alternative to denial of justice is dubious. Even the treaties' incorporation of denial of justice itself is not entirely certain, given that many treaties were signed during that doctrine's Dark Ages. Though it may be a fair legal presumption that signatories to investment treaties incorporated denial of justice, states may be unwilling to abide by aggressive interpretations or transformations of that principle. Supervising an independent state judiciary so as to confer rights that transcend domestic law, arguably without the specific consent of the state, seems well-calculated not only to be ignored, but to inspire a backlash to the worthy project of investor-state arbitration.

In a just world, parties like Loewen and Chevron should have some place to turn for their denial of justice. In the long run, if investment arbitrators wish to provide that recourse, then they need to respect the doctrine's bounds, and implement institutional reform.

---

119. See Luke Eric Peterson, *How Many States Are Not Paying Awards Under Investment Treaties?*, INVESTMENT ARBITRATION REPORTER (May 7, 2010). See also Michael D. Goldhaber, *The Global Lawyer: Does Investment Arbitration Work?*, THE AM. L. LITIG. DAILY (June 28, 2013) (reviewing the record of payment for investment treaty awards in excess of \$100 million).

120. William Burke-White, *The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System*, 3 ASIAN J. WORLD HEALTH 199, 223 (2008).

IV. ARBITRAL PRUDENCE AND THE GENERAL CRITIQUES OF INVESTOR  
ARBITRATION

The rise of arbitral review gives new urgency to the debates over the legitimacy of investor arbitration. These include a range of institutional critiques and arguments based on human rights. With these critiques in mind, the political vulnerability of international investment law counsels in favor of exercising greater prudence when arbitrators are asked to exert power over domestic courts; properly addressing human rights arguments when raised; and above all, enhancing the system's legitimacy through institutional reform.

A. *Institutional Flaws: Secrecy, Conflicts, and the Lack of an Appeal*

Most of the central critiques of investor arbitration relate to institutional flaws, which have inspired a sizable literature.<sup>121</sup> Secrecy is perhaps the system's most obvious flaw,<sup>122</sup> and when a secret tribunal reviews a democratic national court, the contrast is hard to ignore. During the *Loewen* arbitration, the leading newspaper of New Orleans queried whether a "secret tribunal" of "obscure arbiters" should "trample the voice of the people."<sup>123</sup> Nor

---

121. See, e.g., Michael D. Goldhaber, *The Global Lawyer: Arbitration Without Legitimacy*, THE AM. L. LITIG. DAILY (June 7, 2013). For the best collection of skeptical essays, see THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY (Michael Waibel et al. eds., 2010), especially the introduction, and Chapters 17, 18, and 20. For more radical critiques, see M. Sornarajah, *Starting Anew in International Investment Law*, COLUMBIA FDI PERSPECTIVES, No. 74, July 16, 2012; Gus Van Harten et al., *Public Statement on the International Investment Regime* (Aug. 31 2010), <http://www.osgoode.yorku.ca/public-statement/documents/Public%20Statement%20%28June%202011%29.pdf>. For a nuanced defense of the system, see Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHI. J. INT'L L. 471 (Winter 2009).

122. See, e.g., Hugo Perezcano Diaz, *Transparency in International Dispute Settlement Proceedings on Trade and Investment*, in APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES 193 (Karl P. Sauvant ed., 2008); Susan D. Franck, *Challenges Facing Investment Disputes: Reconsidering Dispute Resolution Options in International Investment Agreements*, in APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES 143 (Karl P. Sauvant ed., 2008); Howard Mann, *Transparency and Consistency in International Investment Law: Can the Problems Be Fixed by Tinkering?*, in APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES 213 (Karl P. Sauvant ed., 2008); Michael K. Tracton, *Provisions in the New Generation of U.S. Investment Agreements to Achieve Transparency and Coherence in Investor-State Dispute Settlement*, in APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES 201 (Karl P. Sauvant ed., 2008); Jack J. Coe, Jr., *Transparency in the Resolution of Investor-State Disputes: Adoption, Adaptation, and NAFTA Leadership*, 54 U. KAN. L. REV. 1339 (2006); Michael D. Goldhaber, *Focus Europe, Private Practices*, AM. LAWYER (Summer 2003), available at <http://www.americanlawyer.com/focuseurope/privatepractices.html>.

123. PAULSSON, *supra* note 41, at 228; see also *id.* at 231 (citing Public Citizen ads during the Nafta debate denouncing "Secret Courts for Corporations").

have the Ecuadorian plaintiffs suing Chevron missed any chance to score propaganda points on the issue of secrecy.<sup>124</sup>

It has often been remarked that confidentiality is more appropriate in a purely commercial arbitration than in the semi-public or public context of a standard investor-state arbitration, which implicates the interests of taxpayers, and often calls upon arbitrators to balance competing visions of the public interest.<sup>125</sup> Transparency is *a fortiori* demanded if the public is asked to entrust the arbitrators with the suspension or review of public court proceedings.

The case for transparency, as well as broad participation rights, is at its maximum when—as in *Chevron v. Ecuador*—an investor-state tribunal is asked to suspend and then review a national court trial where the plaintiffs were a third party not before the tribunal, and where groups representing civil society may justly claim to have interests implicated in both proceedings. Even if the human rights claims of the Ecuadorian plaintiffs are judged to be cynical, or are found impossible to assess given the plaintiffs' alleged fraud, that judgment would gain credibility if it were the product of a transparent and inclusive process.

Secrecy is the systemic issue on which investment arbitration has responded best, but the response has not been uniform. Following early public controversies, the NAFTA system effectively began opening hearings to the public, publishing awards and briefs, and allowing intervention of third parties at the tribunals' discretion.<sup>126</sup> Under rules adopted by the World Bank in 2006, ICSID arbitrators must publish parts of all awards; may over the objection of the parties allow intervention by third parties, and may with the consent of the parties open hearings to the public.<sup>127</sup> For several years, UNCITRAL became the refuge for investors that desired secrecy. In 2013 UNCITRAL belatedly adopted transparency rules that go further than ICSID in some respects, with the hearings and most pleadings required to be public.<sup>128</sup> But two large

---

124. See, e.g., Adam Klasfeld, *Ecuadoreans Blast 'Secret' Hague Tribunal Convened for Chevron*, COURTHOUSE NEWS SERVICE (Feb. 10, 2012), <http://www.courthousenews.com/2012/02/10/43767.htm>; Press Release, Amazon Defense Coalition, *Criticism of Chevron Grows Over Use of 'Secret' Panel to Evade \$18 Billion Ecuador Judgment* (Feb. 13, 2012), <http://chevrontoxico.com/news-and-multimedia/2012/0213-criticism-of-chevron-grows-over-use-of-secret-panel>.

125. See, e.g., Goldhaber, *supra* note 122; Monique Pongracic-Speier, *Confidentiality and the Public Interest Exception: Considerations for Mixed International Arbitration*, 3 J. WORLD INVESTMENT 231, 232 (2002).

126. Meg Kinnear, *Transparency and Third Party Participation in Investor-State Dispute Settlement*, Making the Most of International Investment Agreements: A Common Agenda, Symposium Co-Organized by ICSID, OECD and UNCTAD (Sept 12, 2005).

127. ICSID Arbitration Rules, Art. 32, 37 and 48.

128. U.N. Comm'n on Int'l Trade Law [UNCITRAL], Working Group II (Int'l Arbitration & Conciliation), *Report of the Working Group on Arbitration and Conciliation on the Work of Its Fifty-eighth Session* (2012), available at

loopholes remain. First, the UNCITRAL transparency rules will only apply to existing treaties if both parties opt in.<sup>129</sup> Second, most treaties (new or old) give the parties the right to opt for any rules, and thereby opt for secrecy. The continued availability of a more secret track assures that parties in the most sensitive cases will often opt for secrecy, and undermine the legitimacy of the system.

While the awards and briefs have become public in the main *Chevron* case (usually with some delay),<sup>130</sup> the tribunal declined to hold open hearings and summarily denied the petitions of three non-profit groups to intervene in the case.<sup>131</sup> Furthermore, the arbitrators have so far written their orders in narrow technical language, with minimal reasoning, rather than engaging with a wider public. Despite the Second Circuit's abdication of any legal supervisory role in Ecuador, the U.S. courts continue to dominate public consciousness of the *Chevron* dispute.

A second critique focuses on the independence, and perceived independence, of the tribunals.<sup>132</sup> Investment arbitrators are private individuals

---

[http://www.uncitral.org/uncitral/en/commission/working\\_groups/2Arbitration.html](http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html).

Although most pleadings will be published automatically and promptly, the notice of arbitration will not be published until the tribunal is constituted, expert reports and witness statements must only be published upon request, and the remaining exhibits must only be published upon request at the discretion of the arbitrators.

129. Luke Eric Peterson, *UN Working Group Finalizes UNCITRAL Transparency Rules, But They Won't Apply to Stockpiles of Existing Investment Treaties*, INVESTMENT ARBITRATION REPORTER (Feb. 15, 2013).

130. See *Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 2009-23, available at <http://italaw.com/cases/documents/263>.

131. See *Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 2009-23, Letter to Amici from Permanent Court of Arbitration (Apr. 26, 2011); *Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 2009-23, Procedural Order No. 8 (Apr. 18, 2011); *Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 2009-23, Submission of Amici (Nov. 5, 2010); *Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 2009-23, Petition for Participation as Non-Disputing Parties (Oct. 22, 2010); see also INT'L INST. FOR SUSTAINABLE DEVELOPMENT, *Arbitral Tribunal in Chevron v. Ecuador Heightens Concerns About the Legitimacy of the Proceedings After it Closes Them Off to the Public*, [http://www.iisd.org/investment/dispute/chevron\\_vs\\_ecuador\\_2011.aspx](http://www.iisd.org/investment/dispute/chevron_vs_ecuador_2011.aspx) (last accessed July 13, 2013).

132. See, e.g., Nathalie Bernasconi-Osterwalder, et al., *Arbitrator Independence and Impartiality: Examining the Dual Role of Arbitrator and Counsel*, INT'L INST. FOR SUSTAINABLE DEVELOPMENT (Oct. 29, 2010), available at [http://www.iisd.org/pdf/2011/dci\\_2010\\_arbitrator\\_independence.pdf](http://www.iisd.org/pdf/2011/dci_2010_arbitrator_independence.pdf); Thomas Buergenthal, *The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law*, TDM 5 (2006), available at <http://www.transnational-dispute-management.com/article.asp?key=820>; Arthur Marriott, *The Arbitrator is Counsel*, TDM 5 (2006), available at <http://www.transnational-dispute-management.com/article.asp?key=873>; Mark J. Beeley, *Arbitrator Bias Through Acting as an Advocate*, TDM 1 (2005), available at <http://www.transnational-dispute-management.com/article.asp?key=380>; Mark Kantor, *Arbitrator-Counsel Conflicts – Role of Transparency*, TDM 1 (2005), available at <http://www.transnational-dispute-management.com/article.asp?key=332>; Howard Mann, *The*

who sell their services as adjudicators, of a few recurring legal issues, to litigants on the open market. Worse, many of them continue to sell their services *as advocates* on the open market. I have referred to the latter phenomenon by the shorthand “two hats, too many.”<sup>133</sup> The Canadian scholar Gus Van Harten has argued persuasively that independence of the decisionmaker is a sine qua non for a legitimate system of dispute resolution.<sup>134</sup> While the caliber of leading investment arbitrators is outstanding, and their character is sterling, the mere appearance of a conflict of interest is an open invitation to denigrate the system.

As usual, *Chevron v. Ecuador II* provides the ultimate example. In that dispute, Chevron employs one of the world’s leading investment arbitrators as an advocate (James Crawford of Cambridge University), and has filed expert declarations by three others (Jan Paulsson of the University of Miami, David Caron of U.C. Berkeley School of Law and, in the related litigation, Michael Reisman of Yale Law School).<sup>135</sup> It is important to note that all four of these eminent arbitrators are even more eminent commentators, and investment law is a young field where commentary plays a crucial shaping role. While independence is not a prerequisite for commentary, as it should be for public law adjudication, it is surely a virtue. This “third hat” problem has until now gone unremarked.

A final critique is the lack of a fully-formed appeal on the merits. Arbitrations are generally subject only to minimal scrutiny in either a national court of the jurisdictional seat or before an ICSID annulment committee, on a handful of grounds including corruption and manifest disregard of the law. The inevitable creation of inconsistent jurisprudence gives rise to arbitrary outcomes for parties and unsettled legal doctrine. Most to the point here, there is relatively little control on the first panel’s power.

The Second Circuit’s vacatur of the injunction on enforcing the Ecuadorian judgment against Chevron shows what a difference a full appeal on the merits may make. One may agree or disagree with this particular appellate ruling. One may even accept that an appeal is no more or less likely to be correct than the first-level result. But the mere absence of an appeal on the merits enables losing

---

*Emperor’s Clothes Come Off: A Comment on Republic of Ghana v. Telekom Malaysia Berhad, and the Problem of Arbitrator Conflict of Interest*, TDM 1 (2005), available at <http://www.transnational-dispute-management.com/article.asp?key=377>; Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 HARV. INT’L L. J. 271 (2003).

133. Michael D. Goldhaber, *Focus Europe, Are Two Hats Too Many?*, AM. LAWYER (Summer 2005).

134. GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 172-74 (2006).

135. Some may regard offering an expert opinion as distinct from advocacy. But both practices are off limits for judges, because both give the appearance of bias.

parties to undermine the legitimacy of investment arbitration. And the mere existence of an appeal on the merits enhances the legitimacy of the New York federal courts. In the long run, legitimacy matters more than the correctness of any one result.

The best response to the criticism that investment arbitrators cannot be entrusted with great power is to make international arbitrators more worthy of being trusted. Over the past decade investment arbitrators have shown a tendency to enhance their own powers through broad interpretation of their jurisdiction,<sup>136</sup> while mostly ignoring proposals to enhance their own legitimacy. They've been able to get away with it so far because states remain hungry for foreign investment, and because it's hard for states to either withdraw from treaties or renegotiate them. But to build a stable edifice that will last—and to justify arbitral power over domestic courts—arbitrators need to heed the cries for systemic reform. Even as the facts in *Chevron v. Ecuador* dramatize the need for arbitral power over domestic courts, they also underscore the need for institutional reform of investment arbitration.

The no-brainer response to the two-hats problem is to force arbitrators to wear one hat.<sup>137</sup> But an appellate body would go further, by taking arbitrators out of the business of selling their services altogether, and it would address other issues besides. Indeed, the secrecy problem, the two-hats problem, and the appeal problem could be solved in one blow with the creation of a standing appellate tribunal for investment arbitration, operating under judicial standards of transparency.<sup>138</sup> The creation of an appeals mechanism in investment arbitration was embraced as a U.S. policy goal in 2002,<sup>139</sup> and has been supported by a diverse collection of voices, ranging from the system's leading critics to its truest believers.<sup>140</sup> Indeed, the desirability of an appeal in

---

136. Gus Van Harten, *Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration*, 50 OSGOODE HALL L. J. 211 (2012). Whether the tendency documented by Van Harten establishes bias is beyond the scope of this Article.

137. For two models that implement such a policy, see S. African Dev. Cmty., *SADC Model Bilateral Investment Treaty Template with Commentary* (2012), available at <http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf>, and Joseph R. Brubaker & Michael W. Kulikowsky, *A Sporting Chance? The Court of Arbitration for Sport Regulates Arbitrator-Counsel Role Switching*, 10 VA. SPORTS & ENT. L.J. 1 (2010).

138. See Michael D. Goldhaber, *The Global Lawyer: Arbitration Annulment of \$128 million Sempra Award Shows Flaws in ICSID Non-appeal Appeals*, THE AM. L. LITIG. DAILY (July 13, 2010); Michael D. Goldhaber, *Uncommon Law*, THE AM. L. LITIG. DAILY (Dec. 1, 2007); Michael D. Goldhaber, *Wanted: A World Investment Court*, FOCUS EUROPE (Summer 2004).

139. Bipartisan Trade Promotion Authority Act of 2002, 19 U.S.C. § 3802(b)(3)(G)(iv) (2000).

140. See, e.g., VAN HARTEN, *supra* note 134, at 180-84; Jacques Werner, *Limits of Commercial Investor-State Arbitration: The Need for Appellate Review*, in Dupuy, *supra*

investment arbitration may be the only thing under the sun on which Chevron arbitration counsel Doak Bishop and James Crawford agree with the Ecuadorian plaintiffs' counsel Steven Donziger and Aaron Marr Page.<sup>141</sup> Appellate reform is not a pipe dream. The World Bank briefly proposed establishing an appellate facility to review both ICSID and ad hoc cases as authorized by treaty.<sup>142</sup> Other leaders of the arbitration establishment have called for the creation of an appellate mechanism in international commercial arbitration, which might easily accommodate state-investor cases.<sup>143</sup>

Some investor counsel privately resist this idea because states would have significant input on the selection of standing arbitrators. But that is exactly the point. It would stabilize the system and secure the real achievements of the past generation to put an institutional brake on the rapid development of investor-friendly jurisprudence. Rather than apply an arbitrary prudential screen, a standing appellate body would develop consistent treaty norms with prudence.

Paulsson objects that arbitration is designed to depoliticize investment disputes. "Does the world need more politics," he asks rhetorically, "or more law?"<sup>144</sup> This purist view forgets that international law exists at the sufferance of sovereigns. If arbitrators increasingly presume to suspend or review judicial actions, they should expect a backlash unless they design structures that place themselves beyond reproach, and they should welcome the participation of sovereigns in that process.

### B. *The Tension Between Arbitration and Human Rights*

As one might imagine, the Ecuadorian plaintiffs suing Chevron are not proponents of arbitral review. Their objections are best laid out by their lead lawyer Steven Donziger and their Inter-American lawyer Aaron Marr Page in a provocative Human Rights Brief article entitled *Rainforest Chernobyl Revisited*.<sup>145</sup> Perhaps influenced by Donziger's experience as a journalist in the

---

note 106, at 115-17. For opposing arguments, see, e.g., Irene M. Ten Cate, *International Arbitration and the Ends of Appellate Review*, 44 N.Y.U. J. INT'L L. & POL. 1109, 1169-1203 (2012).

141. See Doak Bishop, *The Case for an Appellate Panel and its Scope of Review*, 2 TRANSNAT'L DISP. MGMT. 8 (2005); James Crawford, *Is There a Need for an Appellate System?*, 2 TRANSNAT'L DISP. MGMT. 8 (2005); Steven Donziger, Laura Garr & Aaron Marr Page, *Rainforest Chernobyl Revisited: The Clash of Human Rights and BIT Investor Claims: Chevron's Abusive Litigation in Ecuador's Amazon*, 17 HUM. RTS. BR. 8, 14 (2010).

142. ICSID, *Possible Improvements of the Framework for ICSID Arbitration*, ICSID Secretariat Discussion Paper, Oct. 22, 2004, <http://www.worldbank.org/icsid/improve-arb.pdf>.

143. See Ten Cate, *supra* note 140, at n.2 (collecting sources advocating an appeal in commercial arbitration).

144. PAULSSON, *supra* note 41, at 245.

145. Donziger et al., *supra* note 141, at 10-14.

Reagan era, the article denounces investment arbitration as a Star Wars-style shield against human rights claims. To the contrary, Page thinks human rights should trump investor rights. On behalf of the Ecuadorian plaintiffs, he filed a request for precautionary measures from the Inter-American Commission, to neutralize the arbitral interim measures. There Page declared:

The idea that an arbitral panel would even contemplate ordering a sovereign state to violate its human rights obligations is repugnant not only to the substance of international human rights law but to the very core of the international legal order. It would constitute an effective declaration by the panel that international investment law created to help facilitate the resolution of private business disputes overrides international human rights law.<sup>146</sup>

The application of this argument to the *Chevron* case cannot be taken seriously if we accept (as have the arbitrators and New York federal judge Lewis Kaplan) that *Chevron* is likely to prove its allegations of fraud by the Ecuadorian plaintiffs. Enjoining a judgment procured by fraud cannot violate the plaintiffs' process rights; nor could a fraudulent case vindicate plaintiffs' substantive rights to life and health, or if relevant a healthy environment.<sup>147</sup> Structurally, the human rights objection is likely to fail for similar reasons in any well-founded claim for denial of justice.

However, Page is correct that investment arbitrations frequently implicate human rights.<sup>148</sup> The clearest recurring example is the tension between the human right to water and the investor's right to compensation when a privatized water concession is allegedly expropriated.<sup>149</sup> Perhaps the most

---

146. Inter-American Commission on Human Rights, Request for Precautionary Measures, Pablo Fajardo & Aaron Marr Page (IACHR Feb. 9, 2012) at 5 (on file with author). Specifically, the Ecuadorian plaintiffs invoked the right to a fair trial, the right to judicial protection, the right to determination and enforcement of remedies, the right to equal protection of the law, the right to life, physical integrity and health, and the right to access information necessary to defend rights. *Id.* at 4-5. Regrettably, this request became moot after Ecuador ignored the arbitral interim measures. For the responsive filing, see Inter-American Commission on Human Rights, Memorial Amicus Curiae of Chevron Corporation in Opposition to Request for Precautionary Measures (IACHR Feb. 9, 2012), available at <http://www3.nd.edu/~ndlaw/faculty/cassel/ChevronMemorialAmicusCuriae.pdf>.

147. The right to a healthy environment was not in fact raised in the Ecuadorian plaintiffs' letter to the Inter-American Commission, perhaps because the American Convention on Human Rights only guarantees that rights in its Additional Protocol, which Ecuador has not ratified. See Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Nov. 14, 1988, art. 11, 28 I.L.M. 156, 165.

148. See generally Dupuy, *supra* note 106; LUKE ERIC PETERSON, HUMAN RIGHTS AND BILATERAL INVESTMENT TREATIES: MAPPING THE ROLE OF HUMAN RIGHTS LAW WITHIN INVESTOR-STATE ARBITRATION (2009).

149. See, e.g., *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3; *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3; *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12; *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi*

controversial example was the use of an investment treaty by Italian stone quarries to resist the requirement of partial black ownership in post-apartheid South Africa.<sup>150</sup> More generally, state actions challenged by investors are often justified, sometimes legitimately and sometimes not, by the state's obligation to protect health or the environment.<sup>151</sup> Most any exercise of the state power to regulate in the public interest may be reframed as observing a positive obligation to promote social and economic rights recognized in international treaties, and sometimes incorporated in national constitutions.<sup>152</sup>

Arbitral interference with any expression of human rights will understandably provoke an outcry, even if a tribunal's orders are unimpeachable. *Chevron II* underscores the need to acknowledge, and address, the tension.

Arbitrators have responded to calls that they should consider human rights by allowing civil society groups to submit amicus briefs in select cases. However, they have not been swayed by their arguments. Reviewing the six investment arbitrations to admit amicus briefs through 2009,<sup>153</sup> James Harrison

---

Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19; Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic ICSID Case No. ARB/03/17; Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania, ICSID Case No. ARB/05/22.

150. Foresti v. Republic of South Africa, ICSID Case No. ARB(AF)/07/1 (Jan. 8, 2007), available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=ListCases&caseId=C90&actionVal=ViewCase>. For a human rights critique, see Ruggie, *supra* note 3, at 59, 87, 184. On the case's inconclusive ending, see Luke Eric Peterson, *Discontinuance of Bilateral Investment Treaty Claim Leaves Some Questions Unresolved for South Africa; Future Shape of BIT Program Still up in the Air*, INVESTMENT ARBITRATION REPORTER (Aug. 28, 2010).

151. See, e.g., *Methanex v. U.S.*; *Metalclad v. Mexico*; *Tecmed v. Mexico*; *Glamis Gold v. U.S.*; *Pacific Rim Mining Corp. v. El Salvador*, *Renco v. Peru*; *FTR Holding S.A. (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7 (Mar. 26, 2010); *Phillip Morris Asia Ltd. v. Commonwealth of Australia*, UNCITRAL Arb., PCA Case No. 2012-12.

152. A version of this argument has been advanced by Argentina to defend the emergency measures taken by that state during its economic crisis of 2000-2001. See *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. Arb/01/08, Award at ¶ 114 (May 12, 2005); *Siemens v. Argentina*, ICSID Case No. Arb/02/08, Award at ¶ 75 (Feb. 6, 2007). In both cases the argument was summarily rejected by the tribunal. See Clara Reiner & Christoph Schreuer, *Human Rights and International Investment Arbitration*, in Dupuy, *supra* note 106, at 89-90.

153. James Harrison, *Human Rights Arguments in Amicus Curiae Submissions: Promoting Social Justice?*, in Dupuy, *supra* note 106, at 396, 407-10 (discussing *UPS v. Canada*, *Glamis Gold v. U.S.*, *Suez and Vivendi v. Argentina*, *Suez and Interaguas v. Argentina*, *Biwater Gauff v. Tanzania*, and *Methanex v. U.S.*). The intervenors in each case used the overarching language of human rights, except in *Methanex*, where they spoke specifically in terms of environmental rights.

concludes that none of the intervenors affected the outcomes.<sup>154</sup> Harrison goes so far as to gently suggest that the arbitrators might effectively be coopting the human rights advocates.<sup>155</sup> Amicus participation will only have a “legitimizing function for the tribunal,” he argues, to the extent that it is “viewed as meaningful.”<sup>156</sup> Nigel Blackaby and Caroline Richard argue, in a similar spirit, that admitting amici is at most a “political ‘quick fix’” unless the amici are allowed access to the pleadings.<sup>157</sup>

The next step is for arbitrators to actually engage with human rights arguments, whether they are raised by nonprofit intervenors or by the respondent state. As Alec Stone Sweet and others have argued, proportionality balancing provides the most elegant way to resolve the tensions between investor rights and any competing public interest.<sup>158</sup> Some arbitrators have begun to self-consciously apply the technique, and human rights jurisprudence has coincidentally been the agent of transmission.<sup>159</sup> But there is nothing intrinsic to human rights jurisprudence about the proportionality principle, which appears in many constitutional and administrative systems of law.<sup>160</sup> Some commentators perceive balancing at work in cases where arbitrators have awarded relatively low damages,<sup>161</sup> or argue that, as a normative matter,

---

154. *Id.* at 411-12. The author is aware of no subsequent arbitration that would alter this conclusion. It is true that in *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19 (2007), the amicus brief of the European Commission at least succeeded in framing the debate, but the Commission’s argument was ultimately rejected.

155. *Id.* at 419-20 (“It may be in the interests of tribunal panels to appear engaged with . . . amicus submissions, while continuing to make their decisions on the basis of the international investment law principles where their expertise lies.”).

156. *Id.* at 418.

157. Nigel Blackaby & Caroline Richards, *Amicus Curiae: A Panacea for Legitimacy in Investment Arbitration?*, in *THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY* 253, 273-74 (Michael Waibel et al. eds., 2010).

158. See, e.g., Alec Stone Sweet, *Investor-State Arbitration: Proportionality’s New Frontier*, 4 *LAW & ETHICS OF HUM. RTS.* 47 (2010); Alec Stone Sweet & Florian Grisel, *Transnational Investor Arbitration: From Delegation to Constitutionalization*, in Dupuy, *supra* note 106, at 118; Jasper Krommendijk & John Morijn, ‘Proportional’ by What Measure(s)? *Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration*, in Dupuy, *supra* note 106, at 422.

159. Sweet & Grisel, *supra* note 158, at 132 (discussing the borrowing of proportionality reasoning by *Tecmed v. Mexico* and *Azurix v. Argentina* from the European Court of Human Rights).

160. See generally Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 *COLUM. J. TRANSNAT’L L.* 73 (2008); Bruno De Witte, *Balancing of Economic Law and Human Rights by the European Court of Justice*, in Dupuy, *supra* note 106, at 197.

161. See Pierre Thielborger, *The Human Rights to Water Versus Investor Rights: Double-Dilemma or Pseudo-Conflict?*, in Dupuy, *supra* note 106, at 487, 498 (reading *Azurix v. Argentina*); Ioana Knoll-Tudor, *The Fair and Equitable Standard and Human Rights Norms*, in Dupuy, *supra* note 106, at 310, 340 (reading *MTD v. Chile*).

balancing is appropriately applied at the remedial stage.<sup>162</sup> Provided that it is done forthrightly, the trend toward proportionality balancing, at any stage in the analysis, is greatly to be encouraged. It provides a disciplined way to distinguish between arbitrary state action cloaked in a fig leaf (which is what these treaties are designed to protect investors from), and state action that substantially advances a legitimate public purpose—think of tobacco regulation or the Black Economic Empowerment Act. Proportionality will ensure that an investment treaty is not unthinkingly interpreted as a stabilization pact, which would be incorrect, fatal to investment protection, and most importantly unjust.

However, any suggestion that investment arbitrators should be in the business of adjudicating human rights goes too far.<sup>163</sup> Arbitrators lack the expertise and (as currently constituted) the legitimacy to undertake such a role.<sup>164</sup> As Philip Alston responded to a similar suggestion in the WTO context, human rights advocates should be careful what they wish for.<sup>165</sup>

### C. *Prudence and Arbitral Review and Suspension of Judicial Action*

As dramatized by the Second Circuit's vacatur in the *Chevron* case, U.S. court injunctions of parties proceeding in other national courts are significantly constrained by considerations of comity.<sup>166</sup> Most civil law judges abjure the power to grant antisuit injunctions altogether.<sup>167</sup> And for commercial arbitrators, it is "a delicate authority that should be exercised with special care and restraint."<sup>168</sup> If so much caution must be shown by adjudicators in

---

162. Knoll-Tudor, *supra* note 161, at 341 (arguing that "fairness and equity" demand that damages take into account investor behavior, including human rights violations, that may have contributed to the investor's losses); Ursula Kriebaum, *Is the European Court of Human Rights an Alternative to Investor-State Arbitration?*, in Dupuy, *supra* note 106, at 219, 245 (noting the use of balancing at the remedial stage as an advantage of the ECHR approach to property rights, in contrast to "all-or-nothing" approach of investment arbitration).

163. See, e.g., Todd Weiler, *Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order*, 27 B.C. INT'L & COMP. L. REV. 429 (2004) (arguing that respondents should be allowed to bring human rights counterclaims).

164. See Reiner & Schreuer, *supra* note 152, at 96 (questioning the suitability of arbitrators to adjudicating human rights given their relative lack of transparency and legitimacy); PETERSON, *supra* note 148, at 45 (noting arbitrators' general lack of human rights expertise).

165. See Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 EUR. J. INT'L L. 815, 816 (2002) (arguing that enforcement of human rights by the WTO would have extremely negative consequences for human rights because of their different ideological underpinning).

166. See, e.g., *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 16 (1st Cir. 2004) (noting that a U.S. court asked to issue an antisuit injunction must not interfere unduly with sovereign judicial processes).

167. BORN, *supra* note 16, at 1042.

168. BORN, *supra* note 16, at 2011.

enjoining a *party* acting before a national court, how much more care must be taken by investment arbitrators, whose orders fall directly on the national courts?

Discretion is built into antisuit injunctions under either of the leading investment arbitration rules. A tribunal “*may* take any interim measures it deems necessary,” or “*may*, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.”<sup>169</sup> In practice, investment tribunals issuing antisuit injunctions apply standards similar to those commonly used for preliminary injunctions in U.S. courts. ICSID arbitrators must find the relief to be necessary and urgent, and agree that the feared harm would be irreparable; in addition to urgency and irreparable harm, *Chevron II* demanded a sufficient showing of likely success on jurisdiction and the merits.<sup>170</sup>

Professor Gil takes the view that these standards for interim relief are modified in the investment context to take into consideration the state’s powers to formulate its own policies and conduct its own domestic proceedings.<sup>171</sup> Ecuador argues that the arbitrators’ discretion in granting interim measures is “subject to fundamental principles of law such as the constitutional doctrine of the separation of powers.”<sup>172</sup> In support, Ecuador cites *Plama v. Bulgaria*, which declined to exercise its discretion to suspend judicial action under Article 26, while expressing doubt that it had “the power to impose its will on an independent judiciary.”<sup>173</sup> Another example of discretion in granting provisional measures affecting state proceedings is *SGS v. Pakistan*. In that case, the tribunal ordered the Government not to initiate a court case to hold the claimant in contempt, but declined to enjoin “all [future] proceedings in the courts of Pakistan relating in any way to this arbitration,” because “[w]e cannot enjoin a State from conducting the normal processes of criminal, administrative and civil justice within its own territory [or] purport to restrain the ordinary

---

169. UNCITRAL Arbitration Rules, Art. 26(1) (emphasis added); ICSID Arbitration Rules, Art. 47 (emphasis added).

170. *Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 2009-23, Second Interim Award on Interim Measures at ¶ 2 (Feb. 16, 2012), available at [http://www.italaw.com/sites/default/files/case-documents/ita0174\\_0.pdf](http://www.italaw.com/sites/default/files/case-documents/ita0174_0.pdf); SCHREUER, *supra* note 14, at 776.

171. Gil, *supra* note 19, at 579. See also Laurent Lévy, *Anti-Suit Injunctions Issued by Arbitrators*, in INT’L ARBITRATION INST., ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION 115, 115-28 (Emmanuel Gaillard ed., 2005) (“[A]rbitrators must ensure that these measures do not violate a party’s fundamental right of seeking relief before national courts”).

172. *Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 2009-23, Respondent’s Letter at 5-6 (Mar. 1, 2013).

173. *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order at ¶ 43 (Sept. 6, 2005). It should be noted, however, that in the continuation of this passage, the *Plama* arbitrators suggest that their reasoning might not apply to a claim for denial of justice.

exercise of these processes.”<sup>174</sup>

The need for caution is at its height when international adjudicators are issuing *final* relief to redress the failings of national courts, and this is reflected in the standards that evolved to constrain the practice in its only traditional form.

A denial of justice finding, as we have seen, requires egregious facts, an exhaustion of domestic remedies, and a “presumption of deference to the foreign court.”<sup>175</sup> To disguise denial of justice in another cause of action is to lose the benefit of these safeguards. On this point, Ecuador’s reasoning in its reply to Chevron is persuasive: The same safeguards should apply “[s]o long as the factual core of the Claimants’ due process claims remains focused on ‘the manner in which the national system has administered justice.’”<sup>176</sup> True prudence demands a forthright approach, and respect for a doctrine’s limits.

If the denial of justice doctrine is too hot to handle for decisionmakers of embattled legitimacy, then it should not be transformed into a less offensive-sounding cause of action, like the guarantee of effective means. While subterfuge may be an effective way for arbitrators to make law, this approach is the opposite of prudential, because it achieves the same ends as denial of justice while lowering the doctrinal hurdles.

However, when the doctrinal hurdles are well and truly cleared, a denial of justice should be denounced absolutely. The *Loewen* panel was widely perceived to be result-driven, because in its haste to protect “the viability of Nafta,” it committed several errors of fact, and possibly of law.<sup>177</sup> The nearly-unanimous and sometimes-venomous criticisms that rained down on the *Loewen* tribunal from the arbitration community should be sufficient proof that it is not a good idea to warp your substantive conclusions without principle.<sup>178</sup>

The difficulty of knowing when to defer makes it unwise for investment arbitrators in all cases to adopt a formal doctrine of deference, like the “margin of appreciation” granted to state decisions by the European Court of Human

---

174. *SGS Société Générale de Surveillance S.A. v. Pakistan*, ICSID No. ARB/01/13, Decision on Provisional Measures at 301, 305 (Oct. 16, 2002).

175. Wallace, *supra* note 44, at 7.

176. *Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 2009-23, Counter-Memorial on the Merits of the Republic of Ecuador at ¶ 357 (Feb. 18, 2013), available at <http://www.italaw.com/sites/default/files/case-documents/italaw1426.pdf>.

177. Quite apart from the correctness of the panel’s holdings as to jurisdiction over *Loewen Corp.* and exhaustion of domestic remedies, the panel simply forgot the claim of *Raymond Loewen*, on which there was no doubt of jurisdiction, and incorrectly stated that *Loewen* had failed to submit evidence explaining its failure to appeal. See *Rubins*, *supra* note 48.

178. Michael D. Goldhaber, *A “Completely Appalling” Decision*, TMD 3 (2004), [www.transnational-dispute-management.com/article.asp?key=198](http://www.transnational-dispute-management.com/article.asp?key=198); Goldhaber, *supra* note 49.

Rights.<sup>179</sup> The problem with any such standard—and the most honest experts on ECHR jurisprudence will tell you that this notoriously includes the margin of appreciation—is that it's prone to being applied so inconsistently as to be indeterminate.<sup>180</sup>

#### CONCLUSION

If a party has been denied justice in court, then it is a happy circumstance that the state denying justice has agreed to a remedy under international law, and justice should rightly be restored. But arbitral power over judges will not last unless it is used more wisely. Interim measures suspending court action should be applied with discretion, and without overstating their power to bind. The denial of justice doctrine should be applied with discretion, under its own stringent standards, and in its own name. Arbitrators should not only recognize human rights amici, but grant them access to pleadings, and give proportionate weight to public interest arguments from whatever source. Most importantly, arbitrators who would oversee open and independent judges need to conduct themselves with openness and independence.

The rise of arbitral power over domestic courts reinforces the need for arbitral institutions with judicial levels of legitimacy. Over time, and in appropriate cases, a standing appellate tribunal would give arbitrators the confidence to call a denial of justice by its proper name. The Renaissance of denial of justice, prophesied by Paulsson, is awaiting the Reformation of international investment law.

---

179. See William W. Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 YALE J. INT'L L. 283, 333-46 (2010) (urging adoption of the margin of appreciation standard in international investment law). For an example of the margin of appreciation standard being applied by investment tribunal, see, e.g., *Frontier Petroleum Services Ltd. v. The Czech Republic*, UNCITRAL Arb., Final Award (Nov. 12, 2010), available at <http://italaw.com/cases/documents/517>.

180. See, e.g., Anthony Lester, *The European Convention on Human Rights in the New Architecture of Europe: General Report*, 8TH INTERNATIONAL COLLOQUY ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS, BUDAPEST at 227, 236-37 (September 20-23, 1995) (Council of Europe Publishing) ("The concept of the 'margin of appreciation' has become as slippery as an eel. Again and again the Court now appears to use the margin of appreciation as a substitute for coherent analysis of the issues at stake."); *Z v. Finland*, No. 9/1996/627/811, 25 Eur. H. R. Rep. 371 (1997) (De Meyer, J. dissenting in part) ("The empty phrases concerning the State's margin of appreciation—repeated in the Court's judgments for too long already – are unnecessary circumlocutions, serving only to indicate abstrusely that the States may do anything the Court does not consider incompatible with human rights"); Nicholas Lavender, *The Problem of the Margin of Appreciation*, 4 EUR. HUM. RTS. L. REV. 380 (1997) (collecting similar critiques).