

# AN INVESTMENT COURT THAT JUDGES THE JUDGES: A CASE OF NATURAL SELECTION?

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*Investor-state dispute settlement (ISDS) gives rise to a particular phenomenon where international tribunal judges the fairness of the domestic courts of a state. The Australian courts in the Philip Morris case came close to being ‘judged’. In light of the recent criticism surrounding ISDS, particularly the inconsistency of tribunal determinations, the question thus arises whether this system promotes the rule of law. This article evaluates whether a permanent international investment ‘court’, such as that proposed by the EU and Canada, contributes to consistency and the rule of law. In particular, this article identifies certain adequacies and inadequacies of that system. This article concludes that, while consistent standards at the international level may act as a catalyst by providing the necessary foundation, its evolutionary potential to be a ‘public’ court in the true sense is somewhat limited.*

**Keywords:** international economic law, investment law, investor-state dispute settlement (ISDS), investment court, standard of deference, Australia, Philip Morris, CETA, Chevron, Eli Lilly, denial of justice

## I INTRODUCTION

Courts and arbitral tribunals have a dynamic and symbiotic relationship. In the field of commercial arbitration, we often perceive the court system to be the institution supporting the arbitral award and process. In the context of investment treaties enforced by ISDS, courts have an added dimension. The courts (consisting of a judgment and the judicial process) can form the subject of review by an arbitral tribunal. So, if the international arbitral tribunal judges the fairness of the domestic

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courts of a state, and a domestic court in turn judges the appropriateness of the findings and process of an international arbitral tribunal, where does that leave the predictability and accountability of the ISDS system?

The *Chevron v Ecuador* dispute<sup>2</sup> provides an appropriate case study of this phenomenon, which has permeated from the local Ecuadorian courts to various international tribunals and courts of the United States, Canada, Brazil and Europe. Similarly, other ISDS claims have encroached (or come close to encroaching) on the task of judging courts of developed nations, such as the recent *Eli Lilly v Canada* case.<sup>3</sup> Australia recently survived judgment of its legislature by an investment tribunal in the *Philip Morris* case,<sup>4</sup> but are the judgments of Australia's High Court now grounds for attack? The ISDS system has been the subject of criticism, with a particular focus on the inconsistency of tribunal determinations. The question thus arises, as to whether this ostensibly circular system of judging the judges promotes the rule of law.

An evolutionary theory, that was unpopular and intensely debated from its inception,<sup>5</sup> was Darwin's theory of adaptation by natural selection. Darwin proposed that the strongest traits or features 'survive' by being the most utile for its environment.<sup>6</sup> These favourable traits are ultimately 'selected' by nature and endure through the reproductive cycle. Further, under evolutionary theory, often a mutation in the system serves to be a catalyst that expedites this evolutionary process.<sup>7</sup>

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<sup>2</sup> *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. Republic of Ecuador*, PCA Case No. 2007-2.

<sup>3</sup> *Eli Lilly and Company v. Government of Canada* (ICSID Case No. UNCT/14/2).

<sup>4</sup> *Philip Morris Asia Limited v. The Commonwealth of Australia* (UNCITRAL Arbitration, PCA Case No. 2012-12).

<sup>5</sup> The most notable confrontation took place at the 1860 Oxford Evolution Debate during a meeting of the British Association for the Advancement of Science. Bishop of Oxford Samuel Wilberforce argued against Darwin's theory. Vernon Jenson, *Thomas Henry Huxley: Communicating for Science* (University of Delaware Press, 1991), Chapter 3; AFR Wollaston, *Life of Alfred Newton: late Professor of Comparative Anatomy, Cambridge University 1866–1907, with a Preface by Sir Archibald Geikie OM* (Dutton, New York, 1921), 118–120.

<sup>6</sup> Charles Darwin defined natural selection as the 'principle by which each slight variation [of a trait], if useful, is preserved'. Charles Darwin, *On the Origin of Species by Means of Natural Selection, or the Preservation of Favoured Races in the Struggle for Life* (John Murray, 1959), 61. This theory was first published by Darwin and Alfred Russel Wallace in a joint presentation of papers in London in 1858, *On the Tendency of Species to form Varieties; and on the Perpetuation of Varieties and Species by Natural Means of Selection* and was subsequently elaborated in *On the Origin of Species by Means of Natural Selection, or the Preservation of Favoured Races in the Struggle for Life*.

<sup>7</sup> Mutations can change genes and produce variations in traits. Joseph Carroll, *On the Origin of Species / Charles Darwin* (Broadview Press, 2003), 51–52. By 1837, Darwin started his "B" notebook in *Transmutation of Species*.

The underlying question presented in this article is whether the strong, hegemonic nations have set a certain path that results in a paradigm such that other nations are under some influence to survive by adaptation. In particular, this article proposes that the investment settlement system has presented a mutation in the system in the form of the recently proposed international investment court. This ‘court’ was created and endorsed by hegemonic states and economic unions, such as the EU and Canada. One of the theories considered in this article is whether other Asia-Pacific states, like Vietnam and recently Singapore as well as Mexico, are ‘adapting’ to the model of hegemonic states, and why they do so. Unlike Darwin’s theory relating to species which unconsciously follow an evolutionary path, states maintain a greater degree of autonomy to choose to follow a certain path. As such, other states like Australia may adapt due to competitive pressure, the virtues or merits of the design of the investment court, or a combination of each.

With case examples to offer context, this article evaluates whether a permanent international investment ‘court’, such as that proposed under the EU-Canada Comprehensive Economic and Trade Agreement (CETA), the EU-Vietnam Free Trade Agreement (FTA), and by the EU under the Transatlantic Trade and Investment Partnership (TTIP), contributes to consistency and the rule of law. In particular, this article identifies certain adequacies and inadequacies of that system in the context of an evolutionary institutional shift from the existing model based on private contract-based arbitration to that of a public ‘court’. Will this model result in an elevated standard of jurisprudence of international investment law, or just similar circular outcomes? The standard of review of this ‘court’ could just as equally promote a divergence, rather than a convergence, of international investment norms. Ultimately, any convergence between domestic and international legal norms is regulated by the reciprocal standard of deference and the willingness of states to consent to a particular investment treaty standard.

Before addressing the design and the impact of an international investment court, Part I of this article considers a specific phenomenon of a perpetual engagement and potential competition of the jurisdiction between the local judiciary and investment tribunals. This section discusses the Chevron/Ecuador dispute that once emanated from a local court and permeated to various international tribunals and other domestic courts. It is proposed that this case serves as a benchmark (or the scientific control) to measure whether the investment court will improve

the overall investment system, specifically in terms of consistency, predictability and accountability.

Part II provides the empirical basis to ‘judge the judges of the judiciary’. In particular, it reviews the methodological framework as to how investment tribunals review the judicial determinations and procedures, focusing on both the general level of deference accorded to courts and the standard of legal review for specific investment obligations. Part III analyses how this existing framework is likely to impact Australia’s judicial system and how this may change with its adoption of the proposed investment court design.

As such, Part IV outlines the features of the international investment court model as far as they are relevant to consistency, legitimacy and accountability. This section then analyses whether the model court system (with an appeal mechanism) on a multilateral level will likely unify and improve the standard of review, and whether that optimises the operation of the international investment regime as a whole.

This article concludes that there are a variety of existing legal standards and interminable ways of framing an investment claim, in the absence of limiting language in the investment treaty. This article further concludes that there are certain features or (in biological terms) ‘traits’ that are beneficial to the investment court system, but it remains to be seen whether these will truly unify the legal standards of the investment system and indeed, if so, whether this will result in a stable and predictable relationship between courts and tribunals. Consistent standards at the international level may act as a catalyst by providing the necessary foundation on which both domestic courts (that support the international arbitral process and enforce the final award) and international tribunals to reciprocally develop a degree of deference or reliance. This article also concludes, however, that as long as ISDS is fundamentally constituted from its contractual/consensual-based ancestry, its evolutionary potential to be a ‘public’ court in the true sense is somewhat limited.

## II PART I: THE *CHEVRON/ECUADOR* PHENOMENON

In the current international investment system, there is a constant judicial interaction by a review of legal norms, both substantive and procedural, between investment tribunals and domestic courts. Domestic courts also function to support international arbitrations. First, courts can provide interim relief or other measures that support the arbitration

agreement, the parties or the tribunal throughout the arbitral process.<sup>8</sup> Second, domestic courts support the final product of the process, by enforcing the arbitral award pertaining to its territorial jurisdiction.<sup>9</sup> The quality of review by the international tribunal of the domestic judiciary will often depend on the jurisdiction of the tribunal (set by the arbitration agreement between the parties) and reciprocally, the quality of review of the domestic court will depend on the law of that state, and whether that court acts in the capacity of the place of arbitration (*lex arbitri*) or the place of enforcement.<sup>10</sup>

### *A The Phenomenon of the Potentially Perpetual Loop: Are we Chasing Our Tail?*

An interesting phenomenon occurs where the investment tribunal reviews the legal norms, both substantive and procedural, of domestic judicial systems. Conceptually, one could anticipate that the current design provides for a perpetual loop of judging other judgments, like a dog chasing its own tail. The process is initiated such that the domestic judicial system or its resulting judgment becomes the subject of jurisdiction and determination by an investment tribunal. The investment tribunal produces an award containing a legal standard as to the adequacy of the domestic court process or the substantive legal standard. The legal standard applied by the investment tribunal can vary, depending on the *compromis*, the governing law and legal standard provided in the investment treaty, as well as the appetite of the tribunal to enunciate a legal standard.<sup>11</sup> The final investment award is then reviewed by a domestic judicial system, either to the court of the *lex arbitri* to set aside an award (or part of it) or to a court to support the enforcement of the award. In both cases, the domestic court will likely review the jurisdiction and appropriateness of the decision of the international tribunal (including the ground of ‘public policy’)

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<sup>8</sup> For example, courts of states that are signatories to the New York Convention are required to enforce international arbitration agreements pursuant to Article II of the New York Convention, and through the adoption of Article 8 of the UNCITRAL Model Law on International Commercial Arbitration (1985) into domestic law. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Secretariat of the United Nations Commission on International Trade Law (UNCITRAL) (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 38; 21 UST 2517 (New York Convention). Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5<sup>th</sup> ed, 2009), 447.

<sup>9</sup> *Ibid*, 462-463.

<sup>10</sup> Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5<sup>th</sup> ed, 2009), chapters 7, 10 and 11.

<sup>11</sup> Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5<sup>th</sup> ed, 2009), Chapter 8.

if applicable), depending on the arbitration law of the local court and the jurisdiction provided to the investment tribunal by the treaty.<sup>12</sup>

Indeed, the ongoing Chevron/Ecuador dispute is to a large extent an empirical illustration of this phenomenon of interacting domestic and international judicial systems and legal norms.

### B From Local to International Judiciary, and Back Again

The Chevron dispute originated as a local court action to determine the liability for the clean-up of oil pollution in the Oriente region of the Amazon following Texaco's drilling operations from the 1970s.<sup>13</sup> In 1993, Ecuadorian residents of the Lago Agrio region, among others, brought a class action in New York against Texaco on behalf of 30,000 residents on the basis of negligence, nuisance and trespass and claimed damages for contamination to water, property and harm to their existence and livestock.<sup>14</sup> The case was later dismissed in 2002 on the basis of *forum non-conveniens* and after Texaco agreed to submit to Ecuador, as the most appropriate forum for the lawsuit.<sup>15</sup>

Consequently, in 2003, the Lago Agrio people presented a new claim in the Provincial Court of Justice of Sucumbios based on the same harm.<sup>16</sup> In 2011, the Sucumbios Court decided against Chevron, awarding the Lago Agrio plaintiffs around \$18 billion.<sup>17</sup>

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<sup>12</sup> New York Convention, articles V(1)(c) and V(2)(b); Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5<sup>th</sup> ed, 2009), 645-647, 656-662.

<sup>13</sup> Chevron later acquired Texaco. Patrick Keefe, 'Reversal of Fortune' (2012), *The New Yorker* (online) <<https://www.newyorker.com/magazine/2012/01/09/reversal-of-fortune-patrick-radden-keefe>>; Bret Stephens, 'Banana Republic and Friends' (2008) *The Wall Street Journal* (online) <<https://www.wsj.com/articles/SB120856180625127903>>.

<sup>14</sup> *Aguinda v. Texaco, Inc.*, No. 93 Civ. 7257 (S.D.N.Y., 3 November 1993).

<sup>15</sup> Marco Parriciatua and Francesco Sindico, 'Contours of an Indigenous Peoples' Right to Water in Latin America under International Law' (2012) 1 *International Human Rights Law Review* 211, 212, fn 7 <[http://www.fanmexico.net/sites/freshwateraction.net/files/HRLR\\_001\\_02\\_ParriciatuSindico\\_art01.pdf](http://www.fanmexico.net/sites/freshwateraction.net/files/HRLR_001_02_ParriciatuSindico_art01.pdf)>.

<sup>16</sup> Complaint [4]-[14], *Aguinda v. ChevronTexaco Corp.*, No. 002-2003 (Super. Ct. J., Nueva Loja in Lago Agrio, May 7, 2003, Ecuador). See also Lucien Dhooge, 'Yaiguaje v. Chevron Corporation: Testing the Limits of Natural Justice and the Recognition of Foreign Judgments in Canada' (2013) 38 *Canada-US Law Journal* 93, 94 <<https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?referer=https://www.google.ca/&httpsredir=1&article=1006&context=cuslj>>.

<sup>17</sup> Judgment, *Aguinda v. Chevron Corp.*, No. 002-2003 (Super. Ct. of Nueva Loja, 14 February 2011) (Ecuador) [178]-[180]. The exact amount of the judgment fluctuated after several appeals by the company. See also Lucien Dhooge, 'Yaiguaje v. Chevron Corporation: Testing the Limits of Natural Justice and the Recognition of Foreign Judgments in Canada' (2013) 38 *Canada-US Law Journal* 93, 94

Before the Sucumbios Court judgment was rendered, in 1999, Chevron initiated arbitral proceedings against Ecuador pursuant to the United States-Ecuador bilateral investment treaty (BIT).<sup>18</sup> Chevron's claim was based on 'undue delay' in resolving the case, whereby it ultimately received an award in 2011 in the amount of \$77 million.<sup>19</sup> In addition, in 2009, Chevron commenced a second BIT claim against Ecuador based on the lack of independence of the judicial system,<sup>20</sup> alleging denial of justice, unfair and inequitable treatment and discrimination related to the Lago Agrio litigation.<sup>21</sup> That second claim is still pending. As such, through both international disputes, the domestic Ecuadorian court system has been the subject of legal scrutiny and review.

Throughout these international disputes, Chevron was able to secure an interim order against Ecuador, which effectively stayed an enforcement of the \$18 billion Ecuadorian judgment.<sup>22</sup> In particular, Ecuador was ordered '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' regarding Chevron.<sup>23</sup> This order was reiterated in second

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<<https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?referer=https://www.google.ca/&htpsredir=1&article=1006&context=cuslj>>.

<sup>18</sup> Claimants' Notice of Arbitration [7]-[16], *Chevron Corp. v. Republic of Ecuador* (Permanent Court of Arbitration, PCA Case No. 2009-23, 23 September 2009).

<sup>19</sup> *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. Republic of Ecuador*, PCA Case No. 2007-2, Final Award, 31 August 2011 <<http://www.italaw.com/sites/default/files/case-documents/ita0154.pdf>>, 142. The tribunal determined that Ecuador could be held attributable for delays in its court system, despite its congested court dockets and even though Chevron had previously praised the Ecuadorian courts before courts of the United States. *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. Republic of Ecuador*, PCA Case No. 2007-2, Partial Award on the Merits, 30 March 2010 <<http://www.italaw.com/sites/default/files/case-documents/ita0151.pdf>>., [263]-[266].

<sup>20</sup> Chevron Notice of Arbitration dated 23 September 2009, <[http://www.italaw.com/sites/default/files/case-documents/ita0155\\_0.pdf](http://www.italaw.com/sites/default/files/case-documents/ita0155_0.pdf)>.

<sup>21</sup> Chevron Notice of Arbitration dated 23 September 2009, <[http://www.italaw.com/sites/default/files/case-documents/ita0155\\_0.pdf](http://www.italaw.com/sites/default/files/case-documents/ita0155_0.pdf)>, para 4, 55-65, 76(2). See also Nathalie Cely, 'Balancing Profit and Environmental Sustainability in Ecuador: Lessons Learned from the Chevron Case' (2014) XXIV Duke Environmental Law & Policy Forum 353, 365.

<sup>22</sup> *Chevron Corporation v. Ecuador*, (First Interim Award on Interim Measures, PCA Case No. 2009-23, 25 January 2012). Similarly, there is no indication that the Lago Agrio people were requested to participate in the arbitral proceedings before the tribunal made such a determination.

<sup>23</sup> Order of 9 February 2011, cited in *Chevron Corporation v. Ecuador*, (First Interim Award on Interim Measures, PCA Case No. 2009-23, 25 January 2012), 11, paragraph (i) 2012 <<http://www.italaw.com/sites/default/files/case-documents/ita0173.pdf>>. The tribunal subsequently ruled: '[w]hilst the Lago Agrio plaintiffs are not named parties to these arbitration proceedings and [Ecuador] is not a named party to the Lago Agrio Case, the Tribunal records that, as a matter of international law, a State may be responsible for the conduct of its organs, including its judicial organs, as expressed in Chapter II of Part One of the International Law Commission's Articles on State Responsibility ...[and if] it were established that any judgment

and third interim awards in February 2012.<sup>24</sup> The executive arm of Ecuador's government, however, sustained that it lacked legal authority to interfere with the judgments of its judicial branch.<sup>25</sup> In addition, throughout the proceedings, Ecuador raised objections as to jurisdiction based on the effect the tribunal's award could have on third parties, such as the Lago Agrio people.<sup>26</sup> The tribunal ultimately rejected such arguments on the basis that the Lago Agrio people were not essential or 'indispensable' parties,<sup>27</sup> and notwithstanding that a determination that the BIT had the potential 'legal effect of depriving the Lago Agrio plaintiffs of rights under Ecuadorian Law that they might otherwise have enjoyed...that would be a matter for them and [Ecuador].'<sup>28</sup> Similarly, throughout the arbitral proceedings, representatives of indigenous groups attempted to participate by filing written submissions, but their requests were denied.<sup>29</sup>

### C Derivative Disputes

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made by an Ecuadorian court in the Lago Agrio Case was a breach of an obligation by the Respondent owed to the Claimants as a matter of international law, the Tribunal records that any loss arising from the enforcement of such judgment (within and without Ecuador) may be losses for which the Respondent would be responsible to the Claimants under international law, as expressed in Part Two of the International Law Commission's Articles on State Responsibility'. Order of 28 January 2011, cited in *Chevron Corporation v. Ecuador*, (First Interim Award on Interim Measures, PCA Case No. 2009-23, 25 January 2012), 8, paragraph 2 and 3.

<sup>24</sup> *Chevron Corporation v. Ecuador*, (Second Interim Award on Interim Measures, PCA Case No. 2009-23, 16 February 2012); *Chevron Corporation v. Ecuador*, (Third Interim Award on Jurisdiction and Admissibility, PCA Case No. 2009-23, 27 February 2012).

<sup>25</sup> 'Ecuador Pushes Back on Chevron's Drive to Suspend Trade Preferences', *Inside U.S. Trade* (online), 4 October 2012 <<https://insidetrade.com/inside-us-trade/ecuador-pushes-back-chevron-drive-suspend-trade-preferences>>.

<sup>26</sup> *Chevron Corporation v. Ecuador*, (Third Interim Award on Jurisdiction and Admissibility, PCA Case No. 2009-23, 27 February 2012).

<sup>27</sup> *Chevron Corporation v. Ecuador*, (Third Interim Award on Jurisdiction and Admissibility, PCA Case No. 2009-23, 27 February 2012) [4.67].

<sup>28</sup> This determination was made on the basis that the Lago Agrio people would have recourse against Ecuador or Chevron. The tribunal however, did not discuss further whether such recourse was available or viable. 'If it should transpire that [Ecuador] has, by concluding the Release Agreements, taken a step which had the legal effect of depriving the Lago Agrio plaintiffs of rights under Ecuadorian Law that they might otherwise have enjoyed, that would be a matter between them and [Ecuador], and not a matter for this Tribunal.' *Chevron Corporation v. Ecuador*, (Third Interim Award on Jurisdiction and Admissibility, PCA Case No. 2009-23, 27 February 2012) [4.70].

<sup>29</sup> The tribunal rejected the *amicus* submissions by Fundación Pachamama on the basis that it does 'not believe that the amicus submissions will be helpful to the Tribunal and neither side favours the participation of the petitioners during the jurisdictional phase of the arbitration, in which the issues to be decided are primarily legal.' *Chevron Corporation v. Ecuador*, (Procedural Order No. 8, PCA Case No. 2009-23, 18 April 2011) [18]; see also Judith Levine, 'Interaction of International Investment Arbitration and the Rights of Indigenous People' in Freya Baetens (ed), *Investment Law within International Law: Integrationist Perspectives* (Cambridge University Press, 2013) 107.

If one considers the core of the Chevron/Ecuador/Lago Agrio dispute as the Ecuadorian court and BIT tribunal proceedings, there have been derivative disputes in many other fora with different stakeholders. This too has resulted in overlapping jurisdiction between courts and international tribunals, as well as between the domestic courts of different states. These could be categorised by the groups of stakeholders that have been the subject of the derivative dispute.

First are Chevron's attempts to stay or otherwise frustrate the enforcement of the Ecuadorian judgment. Beyond Chevron's attempts within the investor-state proceedings (applying for an interim stay),<sup>30</sup> Chevron has made several endeavors before the courts of the United States. In 2011, Chevron commenced an action in New York against the Lago Agrio plaintiff's counsel, Steve Donziger and several other individuals and entities involved in the plaintiff's case, invoking the *Racketeer Influenced and Corrupt Organizations Act* (RICO Act)<sup>31</sup> and US common law, alleging extortion and fraud in that they fabricated evidence and coerced the Ecuador judicial system.<sup>32</sup> In 2014, the US court ruled in favor of Ecuador.<sup>33</sup> The US judgment did not directly affect the status of the \$18 billion Ecuadorian judgment, but it prevented the Lago Agrio plaintiff's ability to collect damages from Chevron through the US judicial system.<sup>34</sup> While it does not appear that Ecuador participated in the

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<sup>30</sup> *Chevron Corporation v. Ecuador*, (First Interim Award on Interim Measures, PCA Case No. 2009-23, 25 January 2012); *Chevron Corporation v. Ecuador*, (Second Interim Award on Interim Measures, PCA Case No. 2009-23, 16 February 2012); *Chevron Corporation v. Ecuador*, (Third Interim Award on Jurisdiction and Admissibility, PCA Case No. 2009-23, 27 February 2012).

<sup>31</sup> 18 U.S.C. § 1961 et seq.

<sup>32</sup> Amended Complaint, *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362 (S.D.N.Y. 2014) (No. 11 Civ. 691), 339–379; see also Rodrigo Mella, 'The Enforcement of Foreign Judgments in the United States: The *Chevron Corp. v. Donziger* Case' (2017) 49 *New York Journal University of International Law and Politics* 635, 642, <<http://nyujilp.org/wp-content/uploads/2010/06/NYI210.pdf>>; "Ecuador Judge Orders Chevron to Pay \$9 Billion". *The New York Times* (online). 14 February 2011. Keefe, Patrick Radden (2012). "Reversal of Fortune". *The New Yorker* (January 9).

<sup>33</sup> *Chevron Corp. v. Donziger*, 974F.Supp.2d 362 (S.D.N.Y. 2014) (Kaplan J) <<https://lettersblogatory.com/wp-content/uploads/2018/03/file0.832189753457111.pdf>>; 'In March 2014, a United States district court judge ruled that the Ecuadorian plaintiff's lead US attorney, Steven Donziger, had used 'corrupt means', including payment of almost US\$300,000 in bribes, to obtain the 2011 court verdict in Ecuador.'

<sup>34</sup> *Chevron Corp. v. Donziger*, 974F.Supp.2d 362 (S.D.N.Y. 2014) (Kaplan J); Judgment was upheld in *Chevron Corp v. Donziger et al*, 2nd U.S. Circuit Court of Appeals, No. 14-0826 <<http://files.courthousenews.com/2016/08/08/Chevron.pdf>>; see also Jonathan Stempel, 'Chevron wins U.S. ruling blocking \$8.6 billion Ecuador rainforest award', Reuters, <<https://www.reuters.com/article/us-chevron-ecuador/chevron-wins-u-s-ruling-blocking-8-6-billion-ecuador-rainforest-award-idUSKCN10J1TD>>.

RICO action,<sup>35</sup> the Lago Agrio people participated as defendants in that dispute.<sup>36</sup>

Second, the Lago Agrio plaintiffs have attempted to enforce the Ecuadorian judgment against Chevron's subsidiaries in each of the Canadian, Brazil, Argentina courts.<sup>37</sup> Each of these proceedings have been met with resistance by Chevron. Some of these enforcement proceedings are pending. The Court of Appeal for Ontario overturned an earlier judgment staying the enforcement, holding that the 'issues deserve to be addressed and determined'.<sup>38</sup> In 2013, Argentina's Supreme Court revoked an embargo on the assets and future income of Chevron's Argentinian subsidiary,<sup>39</sup> and in 2017 Argentine National Civil Court in Buenos Aires dismissed an attempt to enforce the Ecuadorian judgment in the country.<sup>40</sup>

The Lago Agrio plaintiffs have made several attempts to enforce the Ecuadorian judgment in other international fora. In 2012, in response to the Chevron arbitration, the Lago Agrio people filed a request with the Inter-American Commission of Human Rights (IACHR) against Ecuador.<sup>41</sup>

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<sup>35</sup> However, based on the reasons for judgment of the appeal, it appears that the Republic of Ecuador participated in the appeal through the submission of *amicus curiae* briefs. It is not clear from the judgment what the impact of these briefs on the appeal judgment. *Chevron Corp v. Donziger*, 974F.Supp.2d 362 (S.D.N.Y. 2014) (Kaplan J) <<https://lettersblogatory.com/wp-content/uploads/2018/03/file0.832189753457111.pdf>>, 3.

<sup>36</sup> *Chevron Corp v. Donziger*, 974F.Supp.2d 362 (S.D.N.Y. 2014) (Kaplan J) <<https://lettersblogatory.com/wp-content/uploads/2018/03/file0.832189753457111.pdf>> n 2. "LAPs" refers to the Lago Agrio plaintiffs, i.e., the plaintiffs in the Ecuadorian case., all of whom were defendants here. "LAP Representatives" refers to the two LAPs who appeared in and defended this case. The remaining LAPs and some other defendants defaulted in this case.'

<sup>37</sup> Rodrigo A. Mella , 'The Enforcement of Foreign Judgments in the United States: The *Chevron Corp. v. Donziger Case*' (2017) 49 *New York Journal University of International Law and Politics* 635, 642, <<http://nyujilp.org/wp-content/uploads/2010/06/NYI210.pdf>>; Joe Carroll, Rebecca Penty and Katia Dmitrieva, 'Chevron's \$19 Billion 'Disaster' Gets Hearing', *Bloomberg* (online), 29 November 2012 <<https://www.bloomberg.com/news/articles/2012-11-29/chevron-s-19-billion-disaster-gets-hearing-corporate-canada>>.

<sup>38</sup> *Yaiguaje v Chevron* (2013) Ontario Court of Appeal, 758, [57].

<sup>39</sup> *Aguinda Salazar v. Chevron Corporation*, Corte Suprema Justicia de law Nacion (A. 253. XLIX) <http://www.cij.gov.ar/nota-11569-La-Corte-Suprema-dejo-sin-efecto-una-sentencia-que-trababa-un-embargo-sobre-bienes-de-Chevron-Argentina.html>; Taos Turner, "Argentina's Top Court Unfreezes Chevron Assets", *Wall Street Journal* (online), 5 June 2013; Augustino Fontevecchia, 'Chevron's Argentine Shale Dream: Supreme Court Decision Paves Way For YPF Deal To Develop Vaca Muerta', *Forbes* (online), 5 June 2013 <<https://www.forbes.com/sites/afontevecchia/2013/06/05/chevrons-argentine-shale-dream-supreme-court-decision-paves-way-for-ypf-deal-to-develop-vaca-muerta/#5fa717150096>>.

<sup>40</sup> *Aguinda Salazar v Chevron Corporation*, 97260/2012, Juzgado Civil 61, Poder Judicial de la Nación <<http://theamazonpost.com/wp-content/uploads/2017/11/SE-RESUELVE.pdf>>; Chevron Corporation, 'Argentine Court Rejects Attempt to Enforce Fraudulent Ecuadorian Judgment Against Chevron' (Media Release, 1 November 2017).

<sup>41</sup> Pablo Fajardo and Aaron Marr Page, 'Letter to Dr. Santiago Canton, Executive Secretary of Inter-American Commission on Human Rights re: Precautionary Measures re Aguida v.

The request alleged that their ‘fundamental rights’ would be impacted if Chevron obtained a declaration that the \$18 billion judgment was unenforceable,<sup>42</sup> and sought an order from the IACtHR that the Ecuadoran government not interfere with enforcement of the judgment.<sup>43</sup> The plaintiffs sought precautionary measures that Ecuador ‘refrain from taking any action that would contravene, undermine, or threaten the human rights of the [plaintiffs].’<sup>44</sup> However, the Lago Agrio people withdrew their claims prior to the hearing.<sup>45</sup>

Third, Ecuador attempted to set aside the awards issued under the ISDS proceedings at the *lex arbitri* of The Hague.<sup>46</sup> These proceedings were unsuccessful, where The Hague Court denied to set aside the awards, and each judgment was upheld on appeal.<sup>47</sup>

As such, while the original action commenced in the US court system in 1993,<sup>48</sup> after 24 years it is still left unresolved and with derivative proceedings permeating in various forums. It is left unclear as to how this

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Chevron’, (9 February 2012). <<https://lettersblogatory.com/wp-content/uploads/2012/03/OAS-respo nse.pdf>>.

<sup>42</sup> Pablo Fajardo and Aaron Marr Page, ‘Letter to Dr. Santiago Canton, Executive Secretary of Inter-American Commission on Human Rights re: Precautionary Measures re Aguida v. Chevron’, (9 February 2012). <<https://lettersblogatory.com/wp-content/uploads/2012/03/OAS-respo nse.pdf>>.

<sup>43</sup> Chiara Giorgetti, ‘Mass Tort Claims in International Investment Proceedings: What are the Lessons from the Ecuador-Chevron Dispute?’ (2013) 34 *Journal of International Law* 787, 792. Pablo Fajardo and Aaron Marr Page, ‘Letter to Dr. Santiago Canton, Executive Secretary of Inter-American Commission on Human Rights re: Precautionary Measures re Aguida v. Chevron’, (9 February 2012). 2. <<https://lettersblogatory.com/wp-content/uploads/2012/03/OAS-respo nse.pdf>>.

<sup>44</sup> Pablo Fajardo and Aaron Marr Page, ‘Letter to Dr. Santiago Canton, Executive Secretary of Inter-American Commission on Human Rights re: Precautionary Measures re Aguida v. Chevron’, (9 February 2012). 2. <<https://lettersblogatory.com/wp-content/uploads/2012/03/OAS-respo nse.pdf>>.

<sup>45</sup> Pierre-Marie Dupuy and Jorge Viñuales, *Harnessing Foreign Investment to Promote Environmental Protection: Incentives and Safeguards* (Cambridge University Press, 2013), 313.

<sup>46</sup> *Republic of Ecuador v Chevron Corporation and Texaco Petroleum Corporation*, District Court of the Hague, 386934/HA ZA 11-402 and 408948/HA 11-2813 (2 May 2012) <<https://www.italaw.com/sites/default/files/case-documents/ita0923.pdf>>.

<sup>47</sup> For *Chevron I*, see *Republic of Ecuador v Chevron Corporation and Texaco Petroleum Corporation*, District Court of the Hague, 386934/HA ZA 11-402 and 408948/HA 11-2813 (2 May 2012), 4.29 <<https://www.italaw.com/sites/default/files/case-documents/ita0923.pdf>>. In 2014, the Dutch Supreme Court upheld the award <<https://www.italaw.com/sites/default/files/case-documents/italaw4017.pdf>>. In 2016, Ecuador’s attempts to nullify, or set aside, the arbitral awards rendered against Ecuador in *Chevron II* were rejected: *Republic of Ecuador v Chevron Corporation and Texaco Petroleum Corporation*, District Court of the Hague, C/09/477457 / HA ZA 14-1291 (20 January 2016) <<https://www.italaw.com/sites/default/files/case-documents/italaw7104.pdf>>. In 2017, the Appeals Court of The Hague upheld the 2016 trial court decision.

<sup>48</sup> ‘In November 1993, Ecuadorian plaintiffs filed the first of two class action lawsuits against Texaco in the Southern District of New York on behalf of some 30,000 inhabitants of the Oriente region.’ *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 473 (2d Cir. 2002).

saga will end and which fora (a domestic court or an international tribunal), if any, will have the final ‘say’.

#### D *Observations and Ramifications*

Beyond the delay in resolving the overall dispute,<sup>49</sup> several observations can be made of this phenomenon.

##### 1 *Legitimacy of the Process*

The question arises as to what the appropriate standing or the right of audience ought to be for stakeholders that are not parties, and whether it should be different between international tribunals and domestic courts. For example, it appears that throughout the *Chevron* ISDS dispute, the Lago Agrio people had no standing, yet Chevron was able to participate in the IACRH proceedings, and similarly Ecuador was able to participate in the enforcement proceedings before the domestic court. Legitimacy questions arise with respect to this asymmetry. It may be that investment tribunals are hesitant to give credence to non-party submissions in the absence of any expressly enabling language in the treaty that establishes its jurisdiction to do so. As such, the ability for a non-party to provide submissions by *amicus curiae* is often the subject of discretion by an investment tribunal and seldom denoted as being the subject of the tribunal’s reasons in the award.<sup>50</sup> The question becomes whether such discretionary offers of standing to non-disputing parties is legitimate or appropriate. On the one hand, providing unfettered discretion may interfere and undermine the primary objective of the ISDS process, namely to expeditiously interpret a treaty containing the host state’s legal

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<sup>49</sup> Similar concerns as to delay have also been raised in the context of the case of *Philip Morris Asia v Australia* (described below), see Jarrod Hepburn and Luke Nottage, ‘Case Note: *Philip Morris Asia v Australia* (September 29, 2016)’ (2017) 18(2) *Journal of World Investment and Trade* 307; Sydney Law School Research Paper No. 16/86, <<https://ssrn.com/abstract=2842065>> and <<http://dx.doi.org/10.2139/ssrn.2842065>>.

<sup>50</sup> Eugenia Levine, ‘*Amicus Curiae* in International Investment Arbitration: The Implications of an Increase in Third-Party Participation’ (2011) 29 *Berkeley Journal of International Law* 200, 214, 221; Eloïse Obadia, ‘Extension of Proceedings Beyond the Original Parties: Non-Disputing Party Participation in Investment Arbitration’ (2007) 22 *ICSID Review* 349; Jean E. Kalicki, ‘The Prospects for Amicus Submissions, Outside the ICSID Rules’ (14 September 2012) Kluwer Blog (online) <<http://arbitrationblog.kluwerarbitration.com/2012/09/14/the-prospects-for-amicus-submissions-outside-the-icsid-rules/>>; Compare with Yen-Chiang Chang, ‘How Does the *Amicus Curiae* Submission Affect a Tribunal Decision?’ (2017) 30(3) *Leiden Journal of International Law* 647.

obligations.<sup>51</sup> One the other hand, interpreting obligations often require consideration of its impact on the rights and expectations of other stakeholders (particularly in the case of party litigants of the underlying local court determination), as well as a state's sovereignty and right to regulate at international law.<sup>52</sup>

## 2 *Scope of Asymmetrical Relief to Investors*

Second, a related issue concerns the scope of remedies available to an investor. While the ultimate remedy for an investor is damages, an investment tribunal is charged with jurisdiction to authorise interim injunctive relief.<sup>53</sup> Remedies of damages and interim stays are asymmetrical in the sense that they are ordinarily not available to the respondent state, such as Ecuador, or to non-party stakeholders.<sup>54</sup> Framed in this manner, providing a foreign investor with the exclusive ability to obtain an award for a stay of enforcement of a court judgment is likely to be perceived as undermining the legitimacy of the international/domestic interactive system.<sup>55</sup> While there are convincing counter-arguments to these criticisms of asymmetry,<sup>56</sup> this perception of

<sup>51</sup> Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration* (Cambridge University Press, 2015), 30.

<sup>52</sup> *Ibid.*

<sup>53</sup> The tribunal is not usually provided with jurisdiction to order specific performance that repeals the measure in issue, such as seeking an injunction on the government measure. For example, see NAFTA Article 1134. Rudolf Dolzer, Christoph Schreuer, *Principles of International Investment Law* (2nd Edition, Oxford University Press, 2012), 294; Christoph Schreuer, 'Non-Pecuniary Remedies in ICSID Arbitration' (2004) 20 *Arbitration International* 325.

<sup>54</sup> Robert Howse, 'Designing a Multilateral Investment Court: Issues and Options' (2018) 36 *Yearbook of European Law* 209, 210-211.

<sup>55</sup> For general arguments and issues on foreign investor's access to ISDS proceedings, see David Gaukroger and Kathryn Gordon, 'Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community' (2012), OECD Working Papers on International Investment, 2012/03, OECD Publishing <<http://dx.doi.org/10.1787/5k46b1r85j6f-en>>. Kun Fan, 'Rebalancing the Asymmetric Nature of International Investment Agreements?' (30 April 2018) Kluwer Arbitration Blog; Australian Senate Foreign Affairs, Defence and Trade References Committee, Report on the Korea-Australia Free Trade Agreement (1 October 2014), Chapter 4 <<http://arbitrationblog.kluwerarbitration.com/2018/04/30/rebalancing-asymmetric-nature-international-investment-agreements/>>; <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Foreign\\_Affairs\\_Defence\\_and\\_Trade/Korea-Australia\\_Free\\_Trade\\_Agreement/Report/c04](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Korea-Australia_Free_Trade_Agreement/Report/c04)>.

<sup>56</sup> Such arguments have been raised in the context of the notion of 'regulatory chill', yet an argument could be made that the risk of direct action by investors against a state could even be prudent for a state's (particularly for developing state's) regulatory framework, and thus global administrative law generally. Such states benefit from its embrace of international investment standards such as fairness and a reasonable expectation of a predictable investment environment and that these standards prevent sudden reversals of (politically-based) policies that expose both foreign investors and local nationals to harm. Indeed,

legitimacy is particularly sensitive in the case vulnerable non-parties being faced with international awards that significantly affect or nullify the result of the underlying court proceedings that they were privy to.

### 3 *Standard of Deference and Review*

Third, is the question of the overall level of deference an investment tribunal should accord to the local courts that made the underlying determination. For the purposes of this article, the standard of review refers to the degree of scrutiny of the judgment by an adjudicator in relation to the evaluation of facts and law and the standard of deference refers to the general degree of restraint an adjudicator exercises, or level of interference, when performing such an evaluation.<sup>57</sup> Should the level of deference vary according to the standard of the judicial system, and how (and by whom) should this level of deference be judged? It seems fair to assume that if various tribunals applied various standards of deference, it would result in an uncertain and inconsistent process. On the other hand, it is difficult to establish from the outset a standard of review for each investment obligation that relates to domestic judicial determinations. Indeed, the jurisdiction of each investment tribunal is constrained by the language of the treaty that is the subject of interpretation. It would appear that the treaty language and the application of the rules on treaty interpretation are the foundations for consistency.

### 4 *Searching for a Solution to the Phenomenon*

To the extent that any domestic court process or judgment becomes subject to review by an international tribunal, this can create a paradigm of a perpetual loop of disputes between domestic courts and international tribunals. For example, if an investor receives a successful award (based on the judicial irregularities of a local court) that is ultimately set aside by

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Associate Commissioner Stoler stated that 'there is reason to believe that a little bit of 'regulatory chill' might be a good thing, even in Australia.' Productivity Commission, *Bilateral and Regional Trade Agreements (Productivity Commission Report 2010)* (November 2010), <<http://www.pc.gov.au/inquiries/completed/trade-agreements/report/trade-agreements-report.pdf>>, 321.

<sup>57</sup> For a considered view of the distinction of these concepts, as well as how both standards relate to *ground* of review (namely, the basis of review in the treaty, such as expropriation) and the *method* of review (the analytical technique applied), refer to Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration* (Cambridge University Press, 2015), 29-44. See also Luke Nottage, 'Rebalancing Investment Treaties and Investor-State Arbitration: Two Approaches' (2016) 17(6) *Journal of World Investment and Trade* 1015; Sydney Law School Research Paper No. 16/54 <<https://ssrn.com/abstract=2795396>>.

the court at the *lex arbitri*, the process or judgment of that latter court may in turn become reviewable by a second investor-state tribunal. This is more probable when the investor is part of a chain in a multinational corporate structure.<sup>58</sup>

There are several techniques to limit the scope or mitigate the risk of this phenomenon, focusing on the jurisdiction of both the investment tribunal and the domestic court. In addition to prescribing the *rationae materiae* and *rationae personae* of the investment treaty, the types of disputes involving a domestic judiciary could be circumscribed, as well as the associated legal standard for each type of dispute. Similarly, the scope of jurisdiction of the domestic court reviewing the decision of the international tribunal could be constrained, guided by the general level of deference accorded to an international tribunal and the legal standard relating to the court's review function. These can vary significantly depending on the domestic laws of the particular state in which the arbitration is conducted (the *lex arbitri*) and the place of enforcement.

This dynamic and interactive system can be identified as a 'constitution' in the sense of 'check and balances' between international and domestic legal norms. However, it should be noted that refining the system by these techniques is unlikely to have an immediate effect. The domestic/international legal systems are interdependent and largely reciprocal, whereby achieving a degree of consistent reliance, comity or deference is a slow evolving process. In scenarios of various jurisdiction overlaps with unpredictable or unfettered standards of review, this is likely to create a somewhat 'unstable' system, undermining any efforts of reciprocal deference (or 'trust') between international investment tribunals and domestic courts. An untrusting relationship would thereby maintain a spiraling process of tribunal and court determinations that undermine the legitimacy of the system and rule of law. The following parts of this article addresses whether this system is optimized by creating a front-end standard of review that subsequent tribunals and courts readily defer to. Namely, whether the establishment of an investment tribunal that operates with the traditional features a 'court' can assist with consistency and rule of law.

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<sup>58</sup> Such that there is a sufficient nexus between the foreign investor's upstream ownership interests and the place of arbitration.

### III PART II: THE DIVERGENCE OF STANDARDS OF REVIEW BY INTERNATIONAL TRIBUNALS

This section analyses the legal standards that investment tribunals have applied specifically in the context of reviewing the judicial process of the host state and judgments made by it. The findings demonstrate that the standard is not consistently applied. This could be attributed to the difference in the specific language of the investment obligation contained in the treaty, together with the context of the treaty itself,<sup>59</sup> but likely due to the divergence of approaches by a tribunal when interpreting the same or similar provisions.

While this section focusses on the judicial system of the host state, it is relevant to note that in the broader context, international tribunals do often review the systems and standards of quasi-judicial and administrative tribunals. For example, there have been various tribunals constituted under Chapter 19 of the NAFTA surrounding the US/Canada softwood lumber dispute, in which case an international tribunal reviews the standards of a determination of quasi-judicial tribunals, such as the International Trade Commission (ITC) of the United States, or the Canadian International Trade Tribunal (CITT).<sup>60</sup> These however, do not form part of the analysis in this article.

#### *A Arif and Eli Lilly Disputes- Review of Domestic Legal Standards*

There are two determinations by an international investment tribunal that form the focus of this section; the cases of *Eli Lilly v Canada*<sup>61</sup> and *Arif v Moldova*.<sup>62</sup> These cases are similar in that they consider the substantive law or legal standard exercised by the judiciary, rather than solely focussing on the judicial process. They differ however in several

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<sup>59</sup> Mark Villiger, 'The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The "Crucible" Intended by the International Law Commission', in Enzo Cannizzaro (ed.), *The Law of Treaties beyond the Vienna Convention* (2011) 107, 109.

<sup>60</sup> See, for example, in the context of the dispute of *Lumber IV* between the United States and Canadian softwood lumber exporters concerning the final affirmative threat-of-injury determination by the ITC made a final affirmative in 2002. For more information, refer to Ross Gorte and Jeanne Grimmett, *Softwood Lumber Imports from Canada: Issues and Events* (Paperback, 2013). Similarly, the Canadian International Trade Tribunal (CITT) is a quasi-judicial administrative tribunal that has jurisdiction to adjudicate international trade cases and matters.

<sup>61</sup> *Eli Lilly and Company v. The Government of Canada (Final Award)* (ICSID Arbitral Tribunal, Case No. UNCT/14/2, 16 March 2017).

<sup>62</sup> *Franck Charles Arif v. Republic of Moldova (Award)* (ICSID Arbitral Tribunal, Case No. ARB/11/23, 8 April 2013).

respects. In *Eli Lilly*, the tribunal focused on a law of general application, and how the legal standard changed and varied to the law of other states.<sup>63</sup> In contrast, in *Arif*, the issue the subject of dispute was with respect to how the domestic law was applied by a court in a specific instance.

In *Eli Lilly v Canada*, Eli claimed that a dramatic change in the patent law by Canadian courts amounted to a new standard. The alleged new standard was a change in the scope of the ‘utility’ standard under Canadian patent law.<sup>64</sup>

The *Arif v Moldavia* case raised questions as to about whether a Moldovan court decision amounted to a denial of justice. This was with respect to both an alleged misapplication of law by the courts (namely, the validity and legal rights accorded by a lease)<sup>65</sup> (substantive aspect), and a collusion by the courts and a fair opportunity to defend itself (procedural aspect).<sup>66</sup>

These two cases demonstrate the divergence in standards or norms applied between investment tribunals.

## 1 *Arif v Moldavia- Moldovan Court Applying Law Correctly?*

The *Arif* dispute was brought under the France-Moldova bilateral investment treaty (BIT), following a judgment by the Moldovan court that agencies of the executive branch had illegally granted exclusive rights to Franck Arif (a French national) to operate duty-free shops at the Chisnau airport.<sup>67</sup> The Moldovan courts determined that Moldovan airport officials had failed to follow the required competitive tender processes, which had

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<sup>63</sup> The Eli Lilly case has been the subject and focus of criticism in Australia by Australian Fair Trade & Investment Network Ltd (AFTINET), see ‘Foreign Corporations could sue our governments’, AFTINET <http://aftinet.org.au/cms/isds-sue-governments-tpp-2013>. See also submissions by Public Health Submissions (PHA, No. 15), cited in Amokura Kawharu and Luke Nottage, ‘Renouncing Investor-State Dispute Settlement in Australia, Then New Zealand: Déjà Vu’ (February 1, 2018) *Sydney Law School Research Paper* No. 18/03 <https://ssrn.com/abstract=3116526>, 17-18.

<sup>64</sup> *Eli Lilly and Company v. The Government of Canada (Final Award)* (ICSID Arbitral Tribunal, Case No. UNCT/14/2, 16 March 2017) [66].

<sup>65</sup> *Franck Charles Arif v. Republic of Moldova (Award)* (ICSID Arbitral Tribunal, Case No. ARB/11/23, 8 April 2013) [415]-[417].

<sup>66</sup> *Franck Charles Arif v. Republic of Moldova (Award)* (ICSID Arbitral Tribunal, Case No. ARB/11/23, 8 April 2013) [415]-[416].

<sup>67</sup> *Franck Charles Arif v. Republic of Moldova (Award)* (ICSID Arbitral Tribunal, Case No. ARB/11/23, 8 April 2013) [41]-[124]

prevented Arif's competitor (who brought the underlying case) from having a fair opportunity to compete for the same concession.<sup>68</sup>

In the tribunal's ruling, it noted that the Moldovan courts 'applied Moldovan law legitimately and in good faith',<sup>69</sup> giving Arif a 'fair opportunity' to present his case.<sup>70</sup> As to the grounds of a substantive denial of justice, the tribunal determined that even if the Moldovan court's reasoning could have been less formalistic, it was 'carefully drafted' and could be followed throughout.<sup>71</sup>

The tribunal also determined that there were two bases of a claim by an investor for denial of justice- namely the customary obligations of denial of justice and obligations under investment protection treaties.<sup>72</sup> It noted, 'that international law allows a free-standing claim for denial of justice'<sup>73</sup> and 'there is certainly and inevitably a continuous 'cross-pollination' between the two [types of claims], but they remain distinct and specific.'<sup>74</sup>

Elaborating on the customary international law standard, the tribunal stated that it amounts to 'an outrage, bad faith, willful neglect of duty, or insufficiency of actions apparent to any unbiased man'.<sup>75</sup> The specific restrictive appraisal of judicial acts was owed to the 'political and

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<sup>68</sup> *Franck Charles Arif v. Republic of Moldova (Award)* (ICSID Arbitral Tribunal, Case No. ARB/11/23, 8 April 2013) [59], [78]-[79].

<sup>69</sup> *Franck Charles Arif v. Republic of Moldova (Award)* (ICSID Arbitral Tribunal, Case No. ARB/11/23, 8 April 2013) [398].

<sup>70</sup> In particular, the tribunal determined that 'the courts acted without excessive delays, 'gave reasoned decisions', took the 'necessary time', did not appear to collude with outside plaintiffs or otherwise act impartially or incompetently. Further, the court's decision to require more transparent concession proceedings promoted competition. *Franck Charles Arif v. Republic of Moldova (Award)* (ICSID Arbitral Tribunal, Case No. ARB/11/23, 8 April 2013) [415]-[416] and [447]-[453].

<sup>71</sup> *Franck Charles Arif v. Republic of Moldova (Award)* (ICSID Arbitral Tribunal, Case No. ARB/11/23, 8 April 2013) [450]-[454]. 'It is well possible that courts in jurisdictions with a different legal tradition would have been less

formalistic, that they would have reasoned in a more teleological way, that they would have tried to remedy the formal defect by economic considerations...They may be better than the ones used by the Moldovan courts. They do not disqualify, however, the national courts' application to such a degree to be so egregiously wrong that no competent and honest court would use them.' *Franck Charles Arif v. Republic of Moldova (Award)* (ICSID Arbitral Tribunal, Case No. ARB/11/23, 8 April 2013) [453].

<sup>72</sup> *Franck Charles Arif v. Republic of Moldova (Award)* (ICSID Arbitral Tribunal, Case No. ARB/11/23, 8 April 2013) [423]-[424].

<sup>73</sup> *Franck Charles Arif v. Republic of Moldova (Award)* (ICSID Arbitral Tribunal, Case No. ARB/11/23, 8 April 2013) [435].

<sup>74</sup> *Franck Charles Arif v. Republic of Moldova (Award)* (ICSID Arbitral Tribunal, Case No. ARB/11/23, 8 April 2013) [433].

<sup>75</sup> *Franck Charles Arif v. Republic of Moldova (Award)* (ICSID Arbitral Tribunal, Case No. ARB/11/23, 8 April 2013) [431], citing *B.E. Chattin (USA) v. United Mexican States (Award)* (Reports of International Arbitral Awards, Volume IV, 282, 1951, Award 23 July 1927).

international delicacy to disacknowledge the judicial decision of a court of another country'.<sup>76</sup>

By contrast, the tribunal determined that the FET standard will be breached by the judicial organ of the state in the event of 'fundamentally unfair proceedings and outrageously wrong, final and binding decisions'<sup>77</sup> with errors that amount to a 'manifest disrespect of due process',<sup>78</sup> and errors as to the substantive law to 'such a degree to be so egregiously wrong that no competent and honest court would use them'.<sup>79</sup>

The *Arif* tribunal did accord to the domestic judiciary much deference and delineated the roles of international tribunals and domestic courts, stating:<sup>80</sup>

[I]nternational tribunals must refrain from playing the role of ultimate appellate courts. They cannot substitute their own application and interpretation of national law to the application by national courts. It would blur the necessary distinction between the hierarchy of instances within the national judiciary and the role of international tribunals if "[a] simple difference of opinion on the part of the international tribunal is enough" to allow a finding that a national court has violated international law. The opinion of an international tribunal that it has a better understanding of national law than the national court and that the national court is in error, is not enough.

Ultimately, the tribunal also found that the inconsistency between the Moldovan court's ruling and an earlier Moldovan tribunal determination in favour of the investor's concession to operate the duty-free shop, contributed to a violation of the treaty's FET standard.<sup>81</sup>

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<sup>76</sup> Ibid.

<sup>77</sup> *Franck Charles Arif v. Republic of Moldova (Award)* (ICSID Arbitral Tribunal, Case No. ARB/11/23, 8 April 2013) [445].

<sup>78</sup> *Franck Charles Arif v. Republic of Moldova (Award)* (ICSID Arbitral Tribunal, Case No. ARB/11/23, 8 April 2013) [447]. Further, the tribunal went on to conclude that it 'is not convinced that the judiciary...was guided by a spirit of bias and partiality and that it was grossly incompetent as a system'. *Franck Charles Arif v. Republic of Moldova (Award)* (ICSID Arbitral Tribunal, Case No. ARB/11/23, 8 April 2013) [448].

<sup>79</sup> *Franck Charles Arif v. Republic of Moldova (Award)* (ICSID Arbitral Tribunal, Case No. ARB/11/23, 8 April 2013) [453].

<sup>80</sup> *Franck Charles Arif v. Republic of Moldova (Award)* (ICSID Arbitral Tribunal, Case No. ARB/11/23, 8 April 2013) [441].

<sup>81</sup> The tribunal also determined that the executive branch committed a further breach by enforcing the Moldovan court's orders against the investor, and was slow to provide temporary or alternatives arrangements and facilitate the investor's business in a way to minimize his losses. *Franck Charles Arif v. Republic of Moldova (Award)* (ICSID Arbitral Tribunal, Case No. ARB/11/23, 8 April 2013) [456-547].

## 2 *Eli Lilly v Canada- Canadian Courts Applying Law Consistently?*

Eli Lilly, a pharmaceutical company incorporated in the United States, brought its claims under the NAFTA on the basis of the existence of a ‘utility requirement’ under the Canadian *Patent Act*.<sup>82</sup> Namely, Eli argued that the change in the utility requirement, that the ‘invention’ be ‘useful’, was in contravention of the NAFTA Chapter 11.<sup>83</sup> Eli Lilly claimed that the legal standard applied by the Canadian court’s decision to invalidate the two patents was radically new, arbitrary and discriminatory.<sup>84</sup> As such, Eli argued, this standard contravened Canada’s obligations with respect to minimum standard of treatment (Article 1105) and unlawful expropriation (Article 1106) under NAFTA Chapter 11.<sup>85</sup>

Ultimately, the Tribunal held that Eli Lilly had failed to demonstrate a fundamental or ‘dramatic’ change in the legal standard under Canadian patent law, such that the evolution of the Canadian legal framework did not amount to arbitrariness or discrimination in violation of NAFTA Chapter 11.<sup>86</sup>

Like *Arif*, the *Eli* tribunal delineated between two legal standards pertaining to a claim of denial of justice. Unlike *Arif*, the *Eli* claim was commenced under NAFTA, such that the meaning of Article 1105 had developed with different interpretative guidance than the autonomous or unqualified standard of FET under various other BITs.<sup>87</sup> The *Eli* tribunal stated:<sup>88</sup>

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<sup>82</sup> *Eli Lilly and Company v. Government of Canada* (ICSID Case No. UNCT/14/2) - Final Award - 16 March 2017 Para 4, 63. Eli Lilly brought this claim arising from the invalidation of two Canadian patents for Straterra (atomoxetine) and Zyprexa (olanzapine).

<sup>83</sup> *Eli Lilly and Company v. The Government of Canada (Final Award)* (ICSID Arbitral Tribunal, Case No. UNCT/14/2, 16 March 2017) [66]. Under Canadian judicial authority at the time of the underlying court dispute, utility can either be demonstrated or ‘soundly predicted’. The doctrine of sound prediction was adopted in a 1979 Supreme Court of Canada decision. *Eli Lilly and Company v. The Government of Canada (Final Award)* (ICSID Arbitral Tribunal, Case No. UNCT/14/2, 16 March 2017) [67].

<sup>84</sup> *Eli Lilly and Company v. The Government of Canada (Final Award)* (ICSID Arbitral Tribunal, Case No. UNCT/14/2, 16 March 2017), [227].

<sup>85</sup> Eli also claimed that Canada contravened its obligations related to patent protection under NAFTA Chapter 17.

<sup>86</sup> *Eli Lilly and Company v. The Government of Canada (Final Award)* (ICSID Arbitral Tribunal, Case No. UNCT/14/2, 16 March 2017) [307]-[351], [420-423], [431]-[439].

<sup>87</sup> UNCTAD, *Fair and Equitable Treatment: UNCTAD Series on International Investment Agreements II* (United Nations, 2012) 17-18, 24.

<sup>88</sup> *Eli Lilly and Company v. The Government of Canada (Final Award)* (ICSID Arbitral Tribunal, Case No. UNCT/14/2, 16 March 2017) [223]. The tribunal further stated:

[T]here are distinctions to be made between conduct that may amount to a denial (or gross denial) of justice and other conduct that may also be sufficiently egregious and shocking, such as manifest arbitrariness or blatant unfairness...concepts of manifest arbitrariness and blatant

[T]he Tribunal is unwilling to shut the door to the possibility that judicial conduct characterized *other than* as a denial of justice may engage a respondent's obligations under NAFTA Article 1105, within the standard articulated in the award in *Glamis*.

The tribunal did not articulate a legal standard for expropriation by the judiciary. It did note that 'decisions of the national judiciary, the interplay between obligations under NAFTA Articles 1105(1) and 1110 will be a matter for careful assessment in any given case'.<sup>89</sup>

As for the general standard of deference, the tribunal stated that:<sup>90</sup>

[A] tribunal is not an appellate tier in respect of the decisions of the national judiciary. It is not the task of a NAFTA Chapter Eleven tribunal to review the findings of national courts and considerable deference is to be accorded to the conduct and decisions of such courts. It will accordingly only be in very exceptional circumstances, in which there is clear evidence of egregious and shocking conduct, that it will be appropriate for a...tribunal to assess such conduct against the obligations of the respondent State under NAFTA Article 1105(1)

## B Summary of Analysis

The following can be summarised on the basis of the analysis and reasoning by the investor-state tribunal.

### 1 *Two Grounds of Denial of Justice*

The *Arif* investment tribunal found there to be two denial of justice standards, a customary international law standard and an autonomous FET standard. Where the customary international law standard must

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unfairness are capable, as a matter of hypothesis, of attaching to the conduct or decisions of courts. It follows, in the Tribunal's view, that a claimed breach of the customary international law minimum standard of treatment requirement of NAFTA Article 1105(1) may be properly a basis for a claim under NAFTA Article 1105 notwithstanding that it is not cast in denial of justice terms'

<sup>89</sup> [T]he Tribunal notes that NAFTA Article 1110(1)(c) includes the requirement that...the nationalization or expropriation of an investment must be "in accordance with due process of law and Article 1105(1)". As regards decisions of the national judiciary, the interplay between obligations under NAFTA Articles 1105(1) and 1110 will be a matter for careful assessment in any given case, subject to the controlling appreciation that a NAFTA Chapter Eleven tribunal is not an appellate tier with a mandate to review the decisions of the national judiciary.' *Eli Lilly and Company v. The Government of Canada (Final Award)* (ICSID Arbitral Tribunal, Case No. UNCT/14/2, 16 March 2017) [225].

<sup>90</sup> *Eli Lilly and Company v. The Government of Canada (Final Award)* (ICSID Arbitral Tribunal, Case No. UNCT/14/2, 16 March 2017) [224].

amount to an outrage, bad faith, willful neglect of duty, or insufficiency of actions apparent to any unbiased man',<sup>91</sup> the FET standard must be 'fundamentally unfair' with 'manifest disrespect for the process' or errors as to the substantive law that are 'egregiously wrong'.<sup>92</sup> Arguably, this standard could be better articulated and leaves various judicial actions the subject of debate as to whether it could be categorised by such conduct.

Similarly, in *Eli Lilly*, the tribunal also recognized that two standards existed, stating that it is 'unwilling to shut the door' to the possibility that judicial conduct can be characterized other than as a denial of justice under NAFTA Article 1105.<sup>93</sup>

## 2 *Judicial Expropriation- Another Door Left Open*

Further, in *Eli Lilly* the NAFTA tribunal appeared to recognise that an incorrect judgment (founded on an incorrect standard) could amount to a breach of the investment obligation of expropriation.<sup>94</sup> Fundamentally, however, an international standard was not fully articulated by the investment tribunal, in order to guide investors and states as to the scope of the obligation.

## 3 *General Deference- Very General*

In both cases the respective tribunal did not completely and definitely articulate a general standard of deference to prescribe, or proscribe, the degree of discretion should be provided to a domestic court. Each tribunal merely provided some indicative limits. The *Arif* tribunal stated that a 'simple difference of opinion is not enough',<sup>95</sup> whereas the *Eli Lilly* tribunal merely indicated that 'considerable deference is to be accorded' to the decisions of local court.<sup>96</sup>

## C *Determinations by other International Tribunals as to Judicial Conduct*

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<sup>91</sup> *Franck Charles Arif v. Republic of Moldova (Award)* (ICSID Arbitral Tribunal, Case No. ARB/11/23, 8 April 2013) [441].

<sup>92</sup> *Franck Charles Arif v. Republic of Moldova (Award)* (ICSID Arbitral Tribunal, Case No. ARB/11/23, 8 April 2013) [445]-[447].

<sup>93</sup> *Eli Lilly and Company v. The Government of Canada (Final Award)* (ICSID Arbitral Tribunal, Case No. UNCT/14/2, 16 March 2017) [223].

<sup>94</sup> *Eli Lilly and Company v. The Government of Canada (Final Award)* (ICSID Arbitral Tribunal, Case No. UNCT/14/2, 16 March 2017) [221].

<sup>95</sup> *Franck Charles Arif v. Republic of Moldova (Award)* (ICSID Arbitral Tribunal, Case No. ARB/11/23, 8 April 2013) [441].

<sup>96</sup> *Eli Lilly and Company v. The Government of Canada (Final Award)* (ICSID Arbitral Tribunal, Case No. UNCT/14/2, 16 March 2017) [224].

Beyond the *Arif* and *Eli Lilly* disputes, some general observations can be made as to legal standards applied by international tribunals when reviewing the domestic judiciary.

Reverting to the very early determinations of the Mexican-United States Claims Commission, such as *Neer v. Mexico* (1926)<sup>97</sup> and *Chattin v Mexico* (1927),<sup>98</sup> such tribunals applied denial of justice in the exclusive context of customary international law. In modern history, domestic judicial conduct reviewed by investment tribunals was typically limited to procedural fairness.<sup>99</sup> Yet in a recent wave of investment disputes, the grounds of review have now evolved such that the substantive domestic law has formed the subject to review.<sup>100</sup>

As such, while the early international disputes were grounded in the customary international legal standard, the treaty law on foreign investments has changed by the proliferation of numerous investment treaties since the 1960's. This has given way to various treaty grounds, with various legal standards deriving from each ground, which appear to be still evolving. Just as the grounds are not showing any indication of being closed, the legal standards derived from such grounds are not demonstrating any sign of convergence.

**Appendix A** illustrates the variation in the types of claim, the legal standard applied and the general standard of deference provided to domestic judicial systems. The disputes considered as part of that analysis are not exhaustive, however this provides an adequate sample to demonstrate the variation in legal standards and the bases of claim.<sup>101</sup> Further, **Table 1** (below) provides a summary as to how these investment tribunals framed the claim brought by the foreign investor and the legal standard applied to judicial measures.

**Table 1: Types of Claims and Measures- How Framed?**

Claim	Legal Standard
Refusal to entertain claim	Fair and equitable treatment (FET)

<sup>97</sup> *L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States (Award)* (Reports of International Arbitral Awards, Volume IV, 60, Award 15 October 1926).

<sup>98</sup> *B.E. Chattin (USA) v. United Mexican States (Award)* (Reports of International Arbitral Awards, Volume IV, 282, 1951, Award 23 July 1927).

<sup>99</sup> Berk Demirkol, *Judicial Acts and Investment Treaty Interpretation* (CUP, 2018), 156-198.

<sup>100</sup> For a survey of cases on the basis of the grounds of review, see Berk Demirkol, *Judicial Acts and Investment Treaty Interpretation* (CUP, 2018), 30-72, 171-198.

<sup>101</sup> For a more comprehensive overview of standards of deference applied by investment tribunals general, see Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration* (Cambridge University Press, 2015).

Undue delay	Customary international law standard of denial of justice
Change/misapplication of the law <sup>102</sup>	Expropriation
Failure to provide effective means of redress	Effective means
Same legal standard as another	MFN/National Treatment

With the recent emergence of novel claims based on substantive standards by the domestic judicial system (contrasted to procedural conduct), it is conceivable that additional claims are on the horizon. For example, an investor could viably argue that a local domestic court ought to accord national treatment to an investor as a court applicant/defendant, such that a specific, more favourable legal standard that is applied across that judicial system (possibly based on different category or field of law).<sup>103</sup> The scope of the treatment (legal standard) accorded to the investor would likely depend on the scope of the ‘in like circumstances’ qualifier often pertaining to the national treatment obligation, which varies from one investment treaty to the next.<sup>104</sup> Compounded with the application of an MFN clause, this is likely to augment the list of potential comparative legal standards that are contained in other investment treaties that state is privy to. Similarly, there is scope to argue that the obligation of providing investors with ‘effective means’ to assert legal claims could extend to a requirement that the local judiciary establish a domestic law or legal standard that is somewhat consistent with third-party states.

In the absence of any attempts to curtail the expansion of international standards and claims, such arguments remain to be tested in the international investment regime.

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<sup>102</sup> Goldhaber, 383 cited by Robert French, ‘ISDS- Litigating the Judiciary’ (Chartered Institute of Arbitrators Centenary Conference, Hong Kong (21 March 2015), 13 <<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj21mar15.pdf>>.

<sup>103</sup> Indeed, a similar argument was raised by the claimant in the *Loewen v United States* (see Appendix A). The NAFTA tribunal appeared to acknowledge that a claim framed in this manner is conceivable. *Loewen Group and Raymond Loewen v United States of America* (Award, ICSID (Additional Facility Rules), 26 June 2003) [138]-[140].

<sup>104</sup> Jurgen Kurtz, ‘The Use and Abuse of WTO Law in Investor–State Arbitration: Competition and Its Discontents’(2009) 20(3) *The European Journal of International Law* 749, 754-755; Christopher Arup ‘Services and Investment Chapters in Free Trade Agreements: Liberalisation, Regulation and Law’, Working Paper (March 2008) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1122202](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1122202)>, 8, also Carrier Arnett, ‘Comment: The Mexican Trucking Dispute: A Bottleneck to Free Trade’ (2003) 25 *Houston Journal of International Law* 561.

#### IV PART III: IMPLICATIONS FOR AUSTRALIA'S JUDICIAL SYSTEM: *PHILIP MORRIS* UNDER A NEW GUISE

This section addresses the impact of imprecise legal standards on Australia's judiciary, as a prelude to the consideration of those investment court traits that could affect Australia and its general outlook in the international investment regime. Currently, Australia is exposed to claims brought by investors that were unsuccessful litigants before the local judicial system. It is also on the receiving end of the divergent legal standards and grounds of an investment claim. It is uncertain whether Australia will aspire to adopt an institution such as a multilateral investment court with the allure of a globally standardised rules-based institution. This uncertainty is compounded by the fact that Australia has switched its position as to the inclusion of ISDS arbitration in its BITs and FTAs especially over the last 15 years.<sup>105</sup>

##### *A Australia in the Global Political Economy*

In terms of hegemonic power and position in the global political economy, Australia can be perceived to be a country that is 'stuck in the middle' of influencing an institution such as a multilateral investment court.<sup>106</sup> Australia may have some innate desire to participate in the design of a multilateral investment court based on the merits of advancing consistent and predictable rules-based investment system, similar to the WTO. In addition, Australia may also be under some influence to adapt to

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<sup>105</sup> Following the 2011 Trade Policy Statement's rejection of ISDS, the position of the Australian Government shifted again in 2013 as the newly elected (Liberal-led Coalition) government reverted to the previous position of including ISDS on a 'case-by-case basis'. For a detailed review of Australia's history with respect to the incorporation of ISDS arbitration in investment treaties, see Kyle Dickson-Smith and Bryan Mercurio, 'Australia's Position on Investor-State Dispute Settlement: Fruit of a Poisonous Tree or a Few Rotten Apples' (2018) 40 *Sydney Law Review* 213, 227. See also Luke Nottage, 'Investor-State Arbitration Policy and Practice in Australia' in Armand deMestral (ed), *Second Thoughts: Investor-State Arbitration Between Developed Democracies* (Centre for International Governance Innovation, 2017), <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2802450](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2802450)> and Andrew Mitchell, Elizabeth Sheargold and Tania Voon, *Regulatory Autonomy in International Economic Law: The Evolution of Australian Policy on Trade and Investment* (Elgar, 2018) 18-21.

<sup>106</sup> Kyle Dickson-Smith and Bryan Mercurio, 'Australia's Position on Investor-State Dispute Settlement: Fruit of a Poisonous Tree or a Few Rotten Apples' (2018) 40 *Sydney Law Review* 213, 261. See also Andrew Carr, 'Australia as a Middle Power: Fighting or Fanning the flames of Asia?' *Policy Brief* (online) (Nº 208 - September 2015) <[http://fride.org/download/PB208\\_Australia\\_as\\_a\\_middle\\_power.pdf](http://fride.org/download/PB208_Australia_as_a_middle_power.pdf)>; David Scott, 'Australia as a Middle Power: Ambiguities of Role and Identity' (2013) 14(2) *Seton Hall Journal of Diplomacy and International Relations* 111 <<https://dscottcom.files.wordpress.com/2017/03/australia-middlepower.pdf>>; Andrew Carr, 'Is Australia a middle power?' *Australian Institute of International Affairs* (7 March 2014), <<http://www.internationalaffairs.org.au/australianoutlook/is-australia-a-middle-power/>>.

this system, arising from a competitive 'contagion' effect created by bilateral arrangements. The increase of bilateral and regional trade agreements is purported to create a self-reinforcing, or contagious, process<sup>107</sup> that compels other states to follow. It may also evolve to a path dependence on prevailing treaty mechanisms such as the investment court system. In what has been described as a 'prisoner's dilemma',<sup>108</sup> such countries are caught in a race to enter into more preferential trade agreements (PTAs), and increase the standards of protections in PTAs, in order to remain competitive for FDI.<sup>109</sup>

Australia currently has at least 10 PTAs (including the recently signed the CPTPP)<sup>110</sup> as well as 20 BITs that,<sup>111</sup> for the most part, incorporate the core investment obligations of expropriation, fair and equitable treatment (FET) (which incorporates the legal norm of a denial of justice),<sup>112</sup> national treatment and MFN.<sup>113</sup>

In light of the range of obligations made, there are various implications for Australia's judicial system. The disparate language of investment obligations, compounded by the varying legal standards and each

<sup>107</sup> Eric Neumayer, Peter Nunnenkamp and Martin Roy, 'Are Stricter Investment Rules Contagious? Host Country Competition for Foreign Direct Investment through International Agreements' (2016) 152(1) *Review of World Economics* 177, 177.

<sup>108</sup> Andrew Guzman noted the following with respect to least developed countries (LDCs): 'LDCs face a prisoner's dilemma in which it is optimal for them, as a group, to reject the Hull Rule, but in which each individual LDC is better off "defecting" from the group by signing a BIT that gives it an advantage over other LDCs in the competition to attract foreign investors.' Andrew Guzman, 'Why LDCs Sign Treaties That Hurt Them: The Popularity of Bilateral Investment Treaties' (1998) 38 *Virginia Journal of International Law* 639, 666-667.

<sup>109</sup> Eric Neumayer, Peter Nunnenkamp and Martin Roy, *Are Stricter Investment Rules Contagious? Host Country Competition for Foreign Direct Investment through International Agreements* (March 2015) SSRN <<http://ssrn.com/abstract=2580108>>; Joseph Stiglitz and Andrew Charlton, *Fair Trade for All: How Trade Can Promote Development* (Oxford University Press, 2006), 10-40.

<sup>110</sup> Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (signed 8 March 2018, not ratified).

<sup>111</sup> This calculation excludes other less comprehensive trade and investment related agreements, such as the *Trade and Economic Cooperation Arrangement Between the Government of Canada and the Government of Australia* (signed and entered into force 10 November 1995); *Energy Charter Treaty*, signed 17 December 1994 (entered into force 16 April 1998); *Agreement between the Government of Australia and the Government of Fiji on Trade and Economic Relations*, signed 11 March 1999 (entered into force 15 December 1999); *Agreement on Trade and Commercial Relations between the Government of Australia and the Government of Papua New Guinea*, signed 6 November 1976 (entered into force 1 January 1977).

<sup>112</sup> Berk Demirkol, *Judicial Acts and Investment Treaty Arbitration* (Cambridge University Press, 2018) 34, 171-198.

<sup>113</sup> International Investment Agreements Navigator, *Breaches of IIA provisions alleged and found*, [Investment Policy Hub](http://investmentpolicyhub.unctad.org/IIA/CountryBits/11#iiaInnerMenu) <<http://investmentpolicyhub.unctad.org/IIA/CountryBits/11#iiaInnerMenu>>. Kyle Dickson-Smith and Bryan Mercurio, 'Australia's Position on Investor-State Dispute Settlement: Fruit of a Poisonous Tree or a Few Rotten Apples' (2018) 40 *Sydney Law Review* 213, 226.

tribunal's appetite to entertain a particularly framed basis of claim, exposes the Australian judicial system to be the subject of review with relative uncertainty as to the outcome of dispute. This begs the question as to whether Australia ought to adopt a prudent proactive (rather than reactive) approach by clarifying and constructively delineating the standard of review and level of deference accorded to Australian courts.

### B *The Philip Morris Example- A Close Call?*

The exposure of Australian courts could be readily identified with respect to the recent *Philip Morris v Australia* dispute. Australia was recently subject of an ISDS claim brought by Philip Morris. Philip Morris framed its claim as one of a contravention of Australia's obligations under the Hong Kong-Australia BIT, namely expropriation and FET, by proscribing colours and design features, and other intellectual property rights on cigarette packages through 'plain packaging laws'.<sup>114</sup> The claim brought against Australia was denied at the jurisdiction stage, on the basis of that Philip Morris' changed in corporate structure in order to gain the protection of the Hong Kong-Australia BIT, which ultimately constituted an abuse of process.<sup>115</sup>

Philip Morris, with other tobacco companies, also brought a contemporaneous parallel challenge in the High Court, alleging that the legislation violated the Australian Constitution by acquiring their intellectual property without compensation on just terms.<sup>116</sup>

If Philip Morris was able to proceed beyond the jurisdiction stage in the *Philip Morris v Australia* arbitration, it is foreseeable that Philip Morris would frame an investment claim such as to require the tribunal to review the legal standard applied by the High Court as to expropriation of its intellecton property.<sup>117</sup> It is also not unreasonable that Philip Morris would

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<sup>114</sup> *Philip Morris Asia Limited v. The Commonwealth of Australia* (UNCITRAL Arbitration, PCA Case No. 2012-12), Notice of Claim, [10], [15].

<sup>115</sup> *Philip Morris Asia Limited v. The Commonwealth of Australia (Award on Jurisdiction and Admissibility)* (UNCITRAL Arbitration, PCA Case No. 2012-12, 17 December 2015), [585] <[https://www.italaw.com/sites/default/files/case-documents/italaw7303\\_0.pdf](https://www.italaw.com/sites/default/files/case-documents/italaw7303_0.pdf)>.

<sup>116</sup> *British American Tobacco Australasia Limited v The Commonwealth*, [2012] HCA 43, 250 CLR 1 <<http://www.hcourt.gov.au/cases/case-s389/2011>>. The High Court's decision of 5 October 2012, held that the 'plain packaging' legislation did not violate section 51(xxi) of the Australian Constitution.

<sup>117</sup> To make the High Court judgment the subject of the arbitration, however, Philip Morris would be requires to amend its claim or commence another arbitration. Indeed, the Chief Justice of the High Court of Australia stated that '[I]t is possible that the tribunal, in the context of an argument about expropriation, might be asked to form a view about the correctness of the High Court's conclusion that there was no acquisition within the meaning of s 51(xxi) of the Constitution. There are therefore two issues of general significance illuminated by this particular case — the use of ISDS to challenge legislative and administrative acts by

maintain a claim that the standard of expropriation applied by the High Court ought to be consistent with Australia's obligation of expropriation under the Hong Kong-Australia BIT.

With this exposure of its judicial system in mind, it may be prudent for Australia to consider achieving consistency through the proposed investment court model and digress from its current *ad hoc* approach of including/excluding ISDS in BITs and FTAs,<sup>118</sup> in an attempt to curb any significant divergence of international legal standards. Indeed, the following section of this article analyses the design of the investment court model proposed by Canada and European Union, and the implications of this design for states such as Australia.

#### C A Case in Point: Power Rental/APR Energy v Australia

Indeed, Australia is currently facing the prospect of a claim of at least US\$260 million brought by US investor (APR) under the US-Australia FTA.<sup>119</sup> The foreign investor is asserting, *inter alia*, a denial of justice and judicial expropriation on the basis of an unsuccessful Australian court judgment.<sup>120</sup> Specifically, APR Energy is claiming that the Supreme Court of New South Wales applied an incorrect legal standard under Australia's *Personal Property Securities Act* (PPSA) and *Corporation Act*.<sup>121</sup> Further, APR Energy is attempting to import dispute settlement provisions through AUSFTA's MFN obligation, based on the Australia-Mexico BIT.<sup>122</sup> As

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governments and its use to call into question the decisions of national courts. Speech by Chief Justice Robert French, 'Investor-State Dispute Settlement—A Cut Above the Courts', *Supreme and Federal Courts Judges' Conference* (Darwin, 9 July 2014) 6 <<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj09jul14.pdf>>.

<sup>118</sup> Kyle Dickson-Smith and Bryan Mercurio, 'Australia's Position on Investor-State Dispute Settlement: Fruit of a Poisonous Tree or a Few Rotten Apples' (2018) 40 *Sydney Law Review* 213, 227. Similar arguments have been made in the context of a common approach by Australia and New Zealand; see Amokura Kawharu and Luke Nottage, 'Renouncing Investor-State Dispute Settlement in Australia, Then New Zealand: Déjà Vu' (February 1, 2018) *Sydney Law School Research Paper No. 18/03* <<https://ssrn.com/abstract=3116526>> and Kawharu, Amokura and Nottage, Luke R., Models for Investment Treaties in the Asian Region: An Underview' (2016) 34(3) *Arizona Journal of International and Comparative Law* 462, 509-524; *Sydney Law School Research Paper No. 16/87* <<https://ssrn.com/abstract=2845088>>.

<sup>119</sup> Power Rental Asset Co Two LLC (AssetCo), Power Rental Op Co Australia LLC (OpCo), APR Energy LLC's Notice of Dispute (30 November 2016), <<https://www.italaw.com/sites/default/files/case-documents/italaw8748.pdf>>

<sup>120</sup> The author greatly appreciates and thanks Luke Nottage for raising this point. Power Rental Asset Co Two LLC (AssetCo), Power Rental Op Co Australia LLC (OpCo), APR Energy LLC's Notice of Dispute (30 November 2016), 3 <<https://www.italaw.com/sites/default/files/case-documents/italaw8748.pdf>>.

<sup>121</sup> Ibid.

<sup>122</sup> Power Rental Asset Co Two LLC (AssetCo), Power Rental Op Co Australia LLC (OpCo), APR Energy LLC's

such, while this claim against Australia appears tenuous,<sup>123</sup> it represents an opportunity for Australia to consider the impact of the diversity of investment standards and their interaction with those entrenched in Australia law.

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Notice of Dispute (30 November 2016), <<https://www.italaw.com/sites/default/files/case-documents/italaw8748.pdf>>.

<sup>123</sup> Amokura Kawharu and Luke Nottage, 'Renouncing Investor-State Dispute Settlement in Australia, Then New Zealand: Déjà Vu' (February 1, 2018) *Sydney Law School Research Paper* No. 18/03 <<https://ssrn.com/abstract=3116526>>, 31.

## V PART IV: THE INTERNATIONAL INVESTMENT COURT- TRAITS WORTH SELECTING FOR?

This section will analyse how the proposed ‘investment court’ will likely impact the existing system of divergent and imprecise international standards. It outlines the design of the investment court that are pertinent for this discussion, then considers whether such traits attempt to seriously curtail the ‘Chevron/Ecuador phenomenon’ of indeterminate interactions of international and domestic legal norms and overlaps that was discussed in Part I. Namely, this section addresses whether the features of the court contributes to improving reliability of the legal standards and the rule of law, and a promotes a willingness to comprehensively consider a broader framing of issues and stakeholder impacts beyond a mere interpretation of investment obligations contained in the treaty.

In light of the foreseeable enactment of a bilateral investment court under the CETA and EU-Vietnam FTA,<sup>124</sup> and the EU’s recent step to negotiate a convention establishing a multilateral court,<sup>125</sup> the comments made in this section concentrate on the envisioned multilateral court model proposed by the European Union and Canada.<sup>126</sup>

### *A The Design of the Investment Court- Towards a Public Court*

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<sup>124</sup> Comprehensive Economic and Trade Agreement (CETA) (text dated 29 February 2016) (signed, provisionally and partially in force 21 September 2017)

<[http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc\\_154329.pdf](http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf)>; EU- Vietnam FTA (text dated January 2016) (not signed, not ratified), Section 3(4), Article 13 <[http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc\\_154210.pdf](http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154210.pdf)>.

<sup>125</sup> Council of the European Commission, ‘Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes’ (20 March 2018) <<http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf>>; European Commission, ‘The Multilateral Investment Court project’ <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608>>; The EU declared that its proposed investment court system is a stepping-stone toward a future multilateral dispute settlement mechanism. The idea is to integrate the EU’s appellate mechanism into ‘multiple agreements and between different partners... on the basis of an *opt-in* system’ to eventually replace all investment dispute resolution mechanisms in EU deals.

<sup>126</sup> For a more comprehensive review of the investment court system and how that court impacts on the operation of the *ICSID Convention* and the enforcement system of the New York Convention, see Kyle Dickson-Smith, ‘Does the European Union Have New Clothes?: Understanding the EU’s New Investment Treaty Model’ (2016) 17(5) *The Journal of World Investment & Trade* 773.

Using the CETA investment court as a basis,<sup>127</sup> the following features are relevant to this discussion:

1. Permanent judges, not Party-Appointed- The court consists of a standing roster of 15 judges, of which three are selected and appointed by the 'President' of the tribunal for each claim that is commenced by the investor.<sup>128</sup> The standing roster will consist of five judges of EU, five of Canadian nationality, and the other five of another nationality.<sup>129</sup> Neither the investor nor respondent directly select an arbitrator or judge of their choice. The judges will be paid a monthly retainer fee, and the disputing parties will be required to contribute to these costs on an equal basis;<sup>130</sup>
2. Interim Relief- There is an express declaration that the tribunal may provide a remedy of interim relief;<sup>131</sup>
3. Other Stakeholder Interests- There is an express declaration that non-state entities may submit briefs to the judges of the court if they raise issues that are 'directly relevant' to the dispute before the tribunal;<sup>132</sup>
4. General Exceptions- The court incorporates general exceptions that apply to specific investment provisions.<sup>133</sup>

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<sup>127</sup> Similarly, the EU first proposed an investment court in the context of the negotiations with the United States, for the Transatlantic Trade and Investment Partnership. European Commission, 'Transatlantic Trade and Investment Partnership: Trade in Services, Investment and E-Commerce: Chapter II – Investment' (Proposal) (November 2015) section 3(4) ('Investment Court System') <[http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc\\_153955.pdf](http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf)>. Kyle Dickson-Smith, 'Does the European Union Have New Clothes?: Understanding the EU's New Investment Treaty Model' (2016) 17(5) *The Journal of World Investment & Trade* 773, 776.

<sup>128</sup> CETA, Article 8.27(7).

<sup>129</sup> CETA, Article 8.27(2).

<sup>130</sup> CETA, Article 8.27(13); TTIP, Section 3, articles 10(12), 28(4); Christian Tietje and Freya Baetens, 'The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership' (2014) 9 and 26 <<http://www.investmentpolicycentral.com/sites/g/files/g798796/f/201409/the-impact-of-investor-state-dispute-settlement-isds-in-the-ttip%20%281%29.pdf>>, 119.

<sup>131</sup> CETA, Article 8.34. Traditionally, such recourse may be stipulated in the ancillary procedural rules, such as the *UNCITRAL Arbitration Rules* 1976, Article 26 <<https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf>>.

<sup>132</sup> CETA, Annex 29-A, articles 43-46.

<sup>133</sup> CETA, Article 28.3; European Commission, 'Transatlantic Trade and Investment Partnership: Trade in Services, Investment and E-Commerce' (Proposal) (July 2015) Chapter 7 ('Exceptions') article 7-1 <[http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc\\_153669.pdf](http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153669.pdf)>.

These general exceptions are very similar to Article XX of the General Agreement on Tariffs and Trade (GATT).<sup>134</sup>

5. Appeal mechanism- The court's Appeal Tribunal would generally follow similar principles and mandate to the WTO Appellate Body,<sup>135</sup> which essentially 'corrects' the decisions of the first-instance tribunal in a consistent and timely manner.<sup>136</sup> The Appeal Tribunal would correct errors of law and manifest errors of fact following a review of the first-instance tribunal's factual findings.<sup>137</sup> The appeal mechanism does not expressly mandate that the first instance tribunal will be bound by an earlier decision of the appeal tribunal, nor state that the appeal tribunal is bound by previous determinations by the appeal body;<sup>138</sup>

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The general exceptions apply to the remaining protections in the investment chapter (namely, national treatment, MFN, performance requirements).

<sup>134</sup> On these type of exceptions, Kyle Dickson-Smith, 'Does the European Union Have New Clothes?: Understanding the EU's New Investment Treaty Model' (2016) 17(5) *The Journal of World Investment & Trade* 773, 790-794; Catharine Titi, *The Right to Regulate in International Investment Law* (Nomos and Hart 2014) 169; Andrew Newcombe, 'General Exceptions in International Investment Agreements' in Marie-Claire, Segger, Markus W Gehring and Andrew Newcombe (eds), *Sustainable Development in World Investment Law* (Kluwer Law International 2011) 351.

<sup>135</sup> There are some relevant distinctions however. Article 17(6) of the WTO Dispute Settlement Understanding limits the scope of review by the Appellate Body to 'errors of law'. Arguably however, the language 'including an objective assessment of the facts of the case' in Article 11 of the DSU provides the Appellate Body with a deferential standard in relation to the panel's findings of fact. *Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization*, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) ('DSU'); See also Simon Lester, 'The Appellate Body's Review of the Meaning of Domestic Law', *International Economic Law and Policy Blog* (online). See Nicolette Butler, 'Possible Improvements to the Framework of International Investment Arbitration' (2013) 14 *Journal of World Trade and Investment* 613, 614.<<http://worldtradelaw.typepad.com/ielpblog/2018/03/appellate-body-factual-questions.html>>.

<sup>136</sup> However, there are some differences between the Appeal Tribunal and the WTO Appellate Body, namely the scope of review. See Kyle Dickson-Smith, 'Does the European Union Have New Clothes?: Understanding the EU's New Investment Treaty Model' (2016) 17(5) *The Journal of World Investment & Trade* 773, 799-803.

<sup>137</sup> CETA, Article 8.28(2). Specifically, the text states 'errors in the application or interpretation of applicable law'.

<sup>138</sup> Section 3, Article 30(1) of the EU draft of the TTIP states that final awards 'issued...by the Tribunal or the Appeal Tribunal shall be binding between the disputing parties and will not be subject to any legal remedy. Kyle Dickson-Smith, 'Does the European Union Have New Clothes?: Understanding the EU's New Investment Treaty Model' (2016) 17(5) *The Journal of World Investment & Trade* 773, 801. See also CETA Article 8.28, which is silent on this issue. There is an argument, however, that an interpretation by the appellate tribunal could be adopted by the CETA Joint Committee to become binding: 'An interpretation adopted by the CETA Joint Committee shall be binding on a Tribunal established under this Section. The

6. 'Self-Enforcing' Awards- The investment court process provides its own self-enforcement mechanism, and incorporates the same grounds to annul or set aside the award as those prescribed under Article 52 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (*ICSID Convention*);<sup>139</sup>

In addition, the CETA and the EU-Vietnam FTA mandates that the parties pursue the establishment of a multilateral investment tribunal and appellate mechanism.<sup>140</sup>

With the amalgamation of all of these features, the investment court model represents a paradigm shift, from the traditional model, that was largely<sup>141</sup> based on private contractual arbitration, to one of a 'public court'.<sup>142</sup> Namely, in essence, the model removes from the disputing parties the ability to appoint decision-makers directly; provides improved guidance for the participation by other parties that may have an interest in the outcome of the dispute; provides express exceptions of general application with prescriptive language that are orientated for the benefit of a state to regulate public policies;<sup>143</sup> adopts an appeal mechanism to improve the consistency of the determinations made;<sup>144</sup> and reduces the

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CETA Joint Committee may decide that an interpretation shall have binding effect from a specific date', CETA Article 8.31(3).

<sup>139</sup> CETA, Article 8.28(2)(3); TTIP, section 3, articles 30(1) and 29(1)(c). Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (*ICSID Convention*) 1965, 575 UNTS 159.

<sup>140</sup> CETA, Article 8.29, which states that Canada and the EU 'shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes.' EU-Vietnam FTA, Section 3(15).

<sup>141</sup> It is relevant to note that while the *UNCITRAL Arbitration Rules* that are adopted by disputing parties in various ISDS arbitral disputes, the *ICSID Convention* was largely inspired by model rules that focussed on inter-state disputes, namely the *Institut de Droit International Draft Rules for International Arbitration Procedure* (1875) and more-so the *ILC Draft Rules on Arbitration Procedure* (1953). R Doak Bishop and Silvia M Marchili, *Annulment Under the ICSID Convention* (Oxford University Press, 2012), 7-14. In any case, a fundamental attribute of both the ICSID and *ad hoc* international arbitration tribunal regimes is the requirement of consent to an arbitration agreement by each disputing party. The author greatly appreciates and thanks Amokura Kawhara for raising this point.

<sup>142</sup> For a discussion of the nature of early contract-based arbitrations with the ICSID, such as claims based on concession contracts, see Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press, 2015).

<sup>143</sup> Andrew Newcombe, 'General Exceptions in International Investment Agreements' in Marie-Claire Segger, Markus Gehring and Andrew Newcombe (eds), *Sustainable Development in World Investment Law* (Kluwer Law International 2011), 356.

<sup>144</sup> European Commission, 'Concept Paper: Investment in TTIP and Beyond – The Path for Reform' (May 2015) <[http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc\\_153408.PDF](http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF)>, 8 (stating that '[t]he bilateral appellate mechanism could be modelled largely on the institutional set-up of the WTO Appellate Body, with some adaptations both to make it specific for ISDS,

system's reliance on domestic courts to enforce awards by way of the enforcement obligations contained within the treaty.

The multilateral design of the investment court is somewhat unresolved. The model appears to be one of an 'opt in' system for other states, such that parties elect to be bound by way of a separate treaty,<sup>145</sup> presumably like the *ICSID Convention*. Questions remain as to how a multilateral court will function. For example, a fundamental question remains as to how the tribunals of each tier of the investment court (the first instance and appeal tribunal) are designed to make consistent determinations based on various treaties with separate language, context and purpose. This is unlike the design of the WTO, where the appeal tribunal is structured to correct underlying tribunal determinations that are based on one treaty that 164 states are members of,<sup>146</sup> namely the WTO Agreement.<sup>147</sup> By comparison, the ability of the investment court to ensure consistency through correctness of determinations by the appeal tribunal appears to be limited.

Indeed, the following section considers whether the design of the investment court at a multilateral level will improve the predictability and legitimacy of both the determinations of the court and the underlying fundamental interactive relationship between international and domestic fora.

### B Multilateral Investment Court- Systemic Convergence or Divergence?

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and in light of experience in the WTO'); Suggested Changes to the ICSID Rules and Regulations, ICSID Working Paper #2 (May 12, 2005), <<https://icsid.worldbank.org/en/Documents/resources/Suggested%20Changes%20to%20the%20ICSID%20Rules%20and%20Regulations.pdf>>; David Gantz, 'An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges' (2006) 39 *Vanderbilt Journal of Transnational Law* 39; Ian Laird and Rebecca Askew, 'Finality Versus Consistency: Does Investor-State Arbitration Need an Appellate System' (2005) 7(2) *Journal of Appellate Practice & Process* 285, 297.

<sup>145</sup> Council of the European Commission, 'Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes' (20 March 2018) <<http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf>>; European Commission, 'The Multilateral Investment Court project' <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608>>; The EU declared that its proposed ICS is a stepping-stone toward a future multilateral dispute settlement mechanism. The idea is to integrate the EU's appellate mechanism into 'multiple agreements and between different partners...on the basis of an *opt-in* system' to eventually replace all investment dispute resolution mechanisms in EU deals. [This notion appears to have first arisen in the European Commission's Concept Paper of May 2015; see 'Concept Paper: Investment in TTIP and Beyond – The Path for Reform' (May 2015) <[http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc\\_153408.PDF](http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF)>, 16.]

<sup>146</sup> World Trade Organisation, 'Members and Observers' <[https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm)>.

<sup>147</sup> Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187; 33 I.L.M. 1153, signed on April 15, 1994.

This section considers the ramifications of turning one investment court, such as that incorporated in CETA and the Vietnam-EU FTA, into the sole dispute settlement arena for various states.

### 1 *The Internal Mechanical Structure*

A perceived advantage of this design is that it establishes a forum to determine a dispute involving multiple investors of different nationalities. A regulatory measure by a state can affect numerous foreign investors. An example is the proliferation of cases following the Argentina financial crisis of 2001, which permeated to (at least) 20 disputes under various BITs such as the Argentina-US BIT and the Argentina-Spain BIT.<sup>148</sup> Under the multilateral court system, one tribunal of three panelist could determine that dispute. While different parties would invite dissimilar issues and based on diverse treaty texts, there would obviously be some efficiencies and benefits of economies of scale in resolving these disputes contemporaneously.

However, ambiguity remains as to whether the awards will be binding, with no express mechanism to make awards binding on subsequent tribunals (at both the appellate and first-instance level) within the investment court system.<sup>149</sup>

Yet there is a possibility that, despite the difference of treaty language, having different treaties interpreted by the same 15 members of the court could result in convergence, such that similar treaty obligations are interpreted similarly. Indeed, once a trend begins of some consistent interpretations by an investment court's appeal tribunal, other states may be inclined to amend the language of the treaty provisions in order to secure (or avoid) the same interpretation. As such, states would retain flexibility to draft treaty obligations based on a negotiation of only two or more parties (in comparison with a multilateral treaty with 164 members

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<sup>148</sup> For example, *Continental Casualty v Argentine Republic* (Award) (ICSID Case No ARB/03/09, 5 September 2008), *CMS Gas Transmission Company v Argentine Republic* (Decision on Jurisdiction) (ICSID Case No ARB/01/08, 17 July 2003); *Enron Corporation Ponderosa Assets LP v Argentine Republic* (Award) (ICSID Case No ARB/01/3, 22 May 2007); *Sempra Energy International v Argentina* (Award) (ICSID Case No ARB/02/16, 18 September 2007). See Caroline Henckels, 'Balancing Investment Protection and the Public Interest: The Role of the Standard of Review and the Importance of Deference in Investor-State Arbitration' (2013) 4(1) *Journal of International Dispute Settlement* 197, 203. For a list of disputes, refer to UNCTAD, 'Investment Dispute Settlement Navigator' <<http://investmentpolicyhub.unctad.org/ISDS/CountryCases/8?partyRole=2>>.

<sup>149</sup> Section 3, Article 30(1) of the EU draft of the TTIP; CETA Article 8.28 and 8.31(3).

such as the WTO). Similarly, a state can ‘wait and see’ before determining what works for it before joining this multilateral system. Thus, from both substantive and procedural perspectives, states (both inside and outside the multilateral investment court system) can observe how investment obligations are being interpreted by the court and adjust the scope of their own treaty commitments accordingly.

In contrast, from the perspective of the investor, there is a shift in power with respect to the arbitral procedure, transferring from the private investor to the state. That is, the investor is now confronted with a ‘take it or leave it’ set of procedural rules that are generally not drafted in their direct interest. This contrasts to the traditional ISDS model, which provides more autonomy and (as such) symmetrically to each disputing party. From this perspective, the process appears to be more vulnerable to influence by non-disputing parties.

## 2 *On the Road- Interaction with Other States*

It is relevant to consider the broader impacts of the overall international investment regime in the context of the global political economy.

Fundamental questions arise as to whether this court system will evolve to an institution that results in a competitive contagious process set by a hegemon that other states are compelled to follow.<sup>150</sup> Namely, each state may face ‘prisoner dilemma’ on the basis of its desire to better compete for capital,<sup>151</sup> which may create a new form of path dependence resulting from the greater bargaining position of hegemons such as the EU and Canada. Indeed, this could create a newly evolved lineage, such that

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<sup>150</sup> Joseph Stiglitz and Andrew Charlton, *Fair Trade for All: How Trade Can Promote Development* (Oxford University Press, 2006) 10–40. There is a broader political economy argument to explain why states are encouraged to enter into PTIAs. A (less-developed) state is likely to be dependent on trade and capital imported from a hegemonic (developed) state and, as such, will attempt to create a competitive advantage (relative to other states) by providing investor protections in a PTIA. This, in turn creates a self-reinforcing, or ‘contagious’, system that compels other state to follow. A similar theory has been described as a ‘prisoner’s dilemma’. See Eric Neumayer, Peter Nunnenkamp and Martin Roy, ‘Are Stricter Investment Rules Contagious? Host Country Competition for Foreign Direct Investment Through International Agreements’ (March 2015) <<http://ssrn.com/abstract=2580108>>.

<sup>151</sup> Whereby ‘each individual LDC is better off “defecting” from the group by signing a BIT that gives it an advantage over other LDCs in the competition to attract foreign investors.’ See Julien Chaisse, ‘The Shifting Tectonics of International Investment Law – Structure and Dynamics of Rules and Arbitration on Foreign Investment in the Asia-Pacific Region’ (2015) 47 *George Washington International Law Review* 563, 570 (citing Andrew T Guzman, ‘Why LDCs Sign Treaties That Hurt Them: The Popularity of Bilateral Investment Treaties’ (1998) 38 *Virginia Journal of International Law* 639, 666–667).

certain states with less hegemonic power are compelled to adapt by maintaining a competitive edge.<sup>152</sup> Similarly, states (such as Australia) may find it prudent to adopt the investment court design in order to directly participate as the crafter and drafter of these institutional rules before the architecture is established to solely offer a ‘take it or leave it’ dichotomous choice of an established hegemonic model.<sup>153</sup>

General patterns of divergence could emerge. It may result in various dissents and divergence by less-developed states, based on perceptions of the system’s legitimacy, as was recently demonstrated by the denouncement of ICSID system by Bolivia, Ecuador and Venezuela and of ISDS generally by New Zealand.<sup>154</sup> Certain states may desire to start their own ‘court’ independent from that of the EU/Canada system. Other hegemons, particularly the United States and China, would likely baulk at this type of institution.<sup>155</sup>

In this respect, any perception by states of maintaining a ‘first-mover’ advantage to tailor the interpretative and procedural rules could be quashed. States like Australia may opt instead to adopt a ‘wait and see’ approach and first determine whether to follow a pre-existing court design. Such an approach, however, has been discouraged (particularly for Australia and New Zealand), in favour of a state’s ability to readily participate in the process in order to achieve or influence a balanced

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<sup>152</sup> Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (CUP 2015); Muthucumaraswamy Sornarajah, Columbia FDI Perspectives No. 74: Starting Anew in International Investment Law, Vale Columbia Centre on Sustainable International Investment (July 16, 2012) <[http://ccsi.columbia.edu/files/2014/01/FDI\\_74.pdf](http://ccsi.columbia.edu/files/2014/01/FDI_74.pdf)>; see also William Greider, *One World, Ready or Not: The Manic Logic of Global Capitalism* (1997); David Fidler, ‘The Return of the Standard of Civilization’ (2001) 2 *Chicago Journal of International Law* 137; Muthucumaraswamy Sornarajah, ‘Power and Justice in International Law’ (1997) 1 *Singapore Journal of International and Comparative Law* 28.

<sup>153</sup> It may also lead to a ‘path dependence on prevailing treaty mechanisms such as ISDS. It is believed that this places a significant burden on less-developed countries.’; Lisa E Sachs and Karl P Sauvant, ‘BITs, DTTs, and FDI Flows: An Overview’ in Karl P Sauvant and Lisa E Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (Oxford University Press, 2009) xxvii.

<sup>154</sup> Ignacio Vincentelli, ‘The Uncertain Future of ICSID in Latin America’ (2010) 16 *Law & Business Reviews of the Americas* 409, 410 <<https://scholar.smu.edu/cgi/viewcontent.cgi?referer=https://scholar.google.ca/&httpsredir=1&article=1464&context=lbra>>. Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (CUP 2015). On New Zealand’s approach, see Amokura Kawharu and Luke Nottage, ‘Renouncing Investor-State Dispute Settlement in Australia, Then New Zealand: Déjà Vu’ (February 1, 2018) *Sydney Law School Research Paper* No. 18/03 <<https://ssrn.com/abstract=3116526>>, 6.

<sup>155</sup> Julien Chaisse and Matteo Vaccaro-Incisa, Columbia FDI Perspectives No. 219: The EU investment court: challenges on the path ahead, Vale Columbia Centre on Sustainable International Investment (12 February 2018) <<http://ccsi.columbia.edu/files/2016/10/No-219-Chaisse-and-Vaccaro-Incisa-FINAL.pdf>>, 2.

outcome, an outcome that may not be achieved through a multilateral process involving various hegemonic states with divergence interests.<sup>156</sup>

### 3      *What is Under the Hood- Is it a Court or an Arbitral Process?*

Further, an investor's ability to enforce the award may be impaired. While the CETA text contains an obligation to enforce the award by the EU and Canada, the investor may look to enforce the award beyond these territories by utilising the *New York Convention*, depending on where the assets of the responding state are located. The *New York Convention* and accompanying *UNCITRAL Model Law* prescribes certain requirements as to the nature of the arbitration agreement and process.<sup>157</sup> Yet, given the language of the text is styled in such a manner to represent a court process, rather than an arbitration,<sup>158</sup> and a requirement of the investor to consent to the adoption of heavily prescribed procedural rules in a 'take or leave it' manner (rather than a design negotiated autonomously by the parties), this may undermine the ability to enforce the award outside the CETA territory. Indeed, some domestic courts, such as those in the United States and Canada, have set aside arbitration clauses on the basis of representing an unconscionable adhesion contract.<sup>159</sup> Similarly, there are constitutional issues to be resolved surrounding the consistency of the investment court design with the *ICSID Convention*.<sup>160</sup> Overall, this could result in an investor shying away of its willingness to undertake dispute settlement through the *ICSID Convention*.<sup>161</sup>

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<sup>156</sup> Amokura Kawharu and Luke Nottage, 'Renouncing Investor-State Dispute Settlement in Australia, Then New Zealand: Déjà Vu' (February 1, 2018) *Sydney Law School Research Paper* No. 18/03 <<https://ssrn.com/abstract=3116526>>, 41.

<sup>157</sup> *New York Convention*, Article II and V; *UNCITRAL Model Law on International Commercial Arbitration* 1985, Article 7-15.

<sup>158</sup> This is more likely to be the case in the context of EU proposed TTIP text, which describes the investment dispute settlement mechanism as a 'court' comprised of 'judges'. In order for the award to be enforced under the New York Convention, it is required to be a 'commercial dispute' and awarded by a 'body', see Article I(2); Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5<sup>th</sup> ed, 2009) 13–14. Similarly, it may be argued that as the CETA is posited as a public court process, it is not 'capable of settlement by arbitration', per Articles II(1) and V(2)(a) New York Convention.

<sup>159</sup> See, for example, the United states Supreme Court case of *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333 <<https://www.supremecourt.gov/opinions/10pdf/09-893.pdf>>; and the Supreme Court of Canada case of *Michelle Seidel v. TELUS Communications Inc.*, [2011] 1 S.C.R. 531.

<sup>160</sup> Kyle Dickson-Smith, 'Does the European Union Have New Clothes?: Understanding the EU's New Investment Treaty Model' (2016) 17(5) *The Journal of World Investment & Trade* 773, 803-806.

<sup>161</sup> N Jansen Calamita, 'The (In)Compatibility of Appellate Mechanisms and Existing Instruments of the Investment Treaty Regime' (2017) *Journal of World Investment & Trade* 18 (2017) 585, 604-613; Kyle Dickson-Smith, 'Does the European Union Have New Clothes?:

Similarly, shifting to the ideal of a ‘court’, in the true sense of the term, is likely to be restrained by the jurisdiction of tribunal, where a determination of the issues involve the interests of a non-party (such as a litigant in the underlying court proceedings). International tribunals, like the International Court of Justice, are not charged with inherent jurisdiction similar to that of domestic courts, and are ordinarily constrained by the principle, pronounced by the *Monetary Gold* case, that a tribunal should not exercise jurisdiction if the subject matter of the decision would determine the rights and obligations of a state which is not a party to the proceedings.<sup>162</sup> Such jurisdictional restraints are relevant where there is an absence of consent by non-parties and where deciding on the subject matter of the case affects the rights of such non-parties (as an ‘indispensable party’).<sup>163</sup> It is not clear whether the *Monetary Gold* principle applies in the context of investor-state arbitration.<sup>164</sup> Indeed, Ecuador raised this principle in its argument objecting to jurisdiction in the *Chevron* dispute, and subsequently with respect to the merits, where the tribunal found that this did not preclude it from exercising its jurisdiction.<sup>165</sup>

#### 4 *Is it a ‘Good’ Model?*

Then there are fundamental questions of legitimacy. Indeed, what makes the appeal tribunal findings more ‘correct’ than those of the underlying panel or other tribunal panels constituted outside of the multilateral investment system? Legitimacy of a judicial system should not be inevitably equated to the consistency achieved through the correction of judgments. Certainly, the appeal tribunal will readily arrive at a different conclusion than that of other panels, and not necessarily because the

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Understanding the EU’s New Investment Treaty Model’ (2016) 17(5) *The Journal of World Investment & Trade* 773, 806.

<sup>162</sup> *Case of the Monetary Gold removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Preliminary Question, Judgment, 15 June 1954, I.C.J. Rep. 1954 (*Monetary Gold*).

<sup>163</sup> *Ibid.*

<sup>164</sup> This is particularly the case where the tribunal’s ultimate remedy, to award damages, differs to that of the International Court of Justice. Arguably, it would more likely restrain the investment court’s ability to award injunctive relief or similar declaratory judgments.

<sup>165</sup> *Chevron Corporation v. Ecuador*, (Third Interim Award on Jurisdiction and Admissibility, PCA Case No. 2009-23, 27 February 2012), [4.60]-[4.70]. The tribunal stated that it ‘does not, however, have to decide that disagreement, because it considers that even if the *Monetary Gold* principle should be applicable in this arbitration it would not operate so as to prevent the Tribunal from exercising jurisdiction over the Parties’ dispute. The following paragraphs explain the Tribunal’s reasoning, assuming (for the sake of argument) that the principle should be applicable here.’ The tribunal went on to address the particular aspects of the *Monetary Gold* principle. *Chevron Corporation v. Ecuador*, (Second Partial Award on Track II, PCA Case No. 2009-23, 30 August 2018), Part VII [7.40].

underlying finding was ‘wrong’, but rather because the reviewing tribunal interprets the legal or factual findings differently. Indeed, the critics’ narrative surrounding the legitimacy of the existing investment regime is based on the consistency, rather than the correctness, of tribunal determinations.<sup>166</sup>

### B *Whether Prescribed Standards with Deference are Useful Traits*

As such, assuming the promise of the investment court materialises and becomes prevalent, several general overall observations can be made as to the impact of this trajectory.

#### 1 *Prescribing the Standard of Review*

We appear to be moving in a direction of reducing a private investor’s ‘second bite of the apple’, by prescribing further limits on investor rights. Namely, the investment court attempts to prescribe the rights of an unsuccessful litigant, whom appeared before the local judiciary, in the capacity of an investor when the international tribunal reviews judgments on domestic legal norms. Substantively, these are prescribed through the incorporation of express general exceptions. Procedurally, there is greater potential for the standing of non-party stakeholders (previously determined on a discretionary basis) to influence the process and outcome.<sup>167</sup>

Prescribing language for a standard of review is a challenging task. It is difficult to judge whether, for example, the *Eli Lilly* tribunal should have applied at the outset a standard of ‘*manifest unreasonableness*’, rather than ‘*reasonableness*’, contravened the international investment obligation of the minimum standard of treatment or expropriation, pertaining to the underlying judgment of the domestic court.<sup>168</sup> Fundamentally, questions of legitimacy arise when an investment regime becomes too prescriptive and encroaches on a judiciary’s ability and autonomy to determine domestic

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<sup>166</sup> Sophie Nappert, ‘Escaping From Freedom? The Dilemma of an Improved ISDS Mechanism’ (2015) EFILA Inaugural Lecture, 26 November 2015 <[https://efilablog.files.wordpress.com/2015/11/efila-annual-lecture-sophie-nappert-two-column\\_textdefa-27-11-2015.pdf](https://efilablog.files.wordpress.com/2015/11/efila-annual-lecture-sophie-nappert-two-column_textdefa-27-11-2015.pdf)>. (‘In a developing field of law like investment treaty law, such a result would not contribute to the legitimacy and predictability of the two-tiered court process any more than a series of zigzagging decisions from different ad hoc tribunals do at present.’).

<sup>167</sup> TTIP Article 23(5); CETA Annex 29-A.

<sup>168</sup> See *Eli Lilly and Company v. The Government of Canada (Final Award)* (ICSID Arbitral Tribunal, Case No. UNCT/14/2, 16 March 2017), [218]. Compare with Caroline Henckels, ‘Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA and TTIP’ (2016) 19(1) *Journal of International Economic Law* 27.

legal norms, rather than leave adequate general discretion for that judicial system to decide.

## 2 *General Deference and Reliance: Towards a Trusting Relationship*

The question remains whether this evolutionary development will have consequences on the general deference, or 'trust', yielded between international and domestic tribunals.

The development represents two significant changes: the appearance of a public court (through the adoption of express public policy exceptions and the standing of other affected members), and a greater effort to achieve the consistency of legal determinations. It is not clear whether these traits will contribute to more deference being afforded to states, through its local judiciary,<sup>169</sup> and thereby generate more reciprocal reliance and trust between international tribunals and local courts.

The constitution of the domestic legal system lends support to the argument that international tribunals should provide more deference to a local judiciary.<sup>170</sup> Domestic laws of states are usually embedded or loaded with their own inherent balance of multi-faceted obligations.<sup>171</sup> The domestic court's own system of balancing such obligation will depend on

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<sup>169</sup> That is, arguably the incorporation of express general exceptions in investment agreements, when compared to the current system of ISDS arbitration, will not provide more deference to states incorporating public welfare objectives - see Andrew Mitchell, James Munro and Tania Voon, 'Applying General Exceptions to International Investment Agreements – Risks and Effectiveness' [forthcoming]. See also Caroline Henckels, 'Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA and TTIP' (2016) 19(1) *Journal of International Economic Law* 27, 46. The incorporation of general exceptions into investment agreements has been criticised as reducing the regulatory flexibility that exists in the current *acquis* of investment tribunal determinations, with exhaustive lists of permissible objectives and rigid qualifications as to their application (such as the analysis pertaining to whether the measure is 'necessary'). Andrew Newcombe, 'General exceptions in international investment agreements' (2011) in Marie-Claire, Segger, Markus Gehring and Andrew Newcombe (eds), *Sustainable Development in World Investment Law* (Kluwer Law International 2011) 351, 355, 369–370; Celine Lévesque, 'The Inclusion of GATT XX Exceptions in IIAs: A potentially risky policy' in Roberto Echandi and Pierre Sauvé (eds) *Prospects in International Investment Law and Policy* (Cambridge University Press, 2013), 364; Nicholas DiMascio and Joost Pauwelyn, 'Non-discrimination in trade and investment treaties: Worlds apart or two sides of the same coin?' (2008). 102 *American Journal of International Law* 48, 76, 82–83, <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1669333](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1669333)>; Andrew Mitchell and Caroline Henckels, 'Variations on a Theme: Comparing the Concept of "Necessity" in International Investment Law and WTO Law' (2013) 14 *Chicago Journal of International Law* 93.

<sup>170</sup> For a considered theoretical framework as to the rationale for deference in international investment adjudication, see Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration* (Cambridge University Press, 2015), 34–44.

<sup>171</sup> Robert French, 'ISDS- Litigating the Judiciary' (Chartered Institute of Arbitrators Centenary Conference, Hong Kong (21 March 2015), 16 <<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj21mar15.pdf>>.

the right or interest in issue and the overall constitutional framework of the host state. For example, when domestic common law courts apply the tort of negligence to a specific factual scenario, in considering whether a duty of care was owed, that court already conducts the appropriate balancing exercise between the individual's right and the wider public interest.<sup>172</sup> Arguably, supplanting international investment norms into this analytical framework is likely to undermine that traditional balance.

Yet, should the degree of deference that is proffered by international tribunals vary according to the perceived standard of the legal system or the type of domestic law? Namely, one could argue that international tribunals should accord more deference to a local judiciary where it perceives that the domestic legal system is developed to have already accorded a high-quality balancing analysis, particularly one with democratic accountability.<sup>173</sup> Similarly, the claim for greater deference could be stronger in cases where domestic courts adjudicate private rights between nationals, such as a tort or transaction, when compared to legal issues of greater public interest, such as pertaining to public law with broader societal welfare impacts. Likewise, depending on host state's adoption of monist or dualist legal systems, its domestic law is likely to be readily embedded with various legal norms of public international law.<sup>174</sup> As one invites these and other contextual factors into the international analytical framework, they are likely to undermine the consistency and predictability of interpretations by international tribunals. This contextual approach, in addition to the introduction of other indeterminate and unrestrained factors through the particular standard of review for each investment obligation, would only appear to be a slippery slope.

When an international tribunal provides less deference to a domestic court judgment, it is more susceptible to creating, or further contributing to, a divergence between international and domestic legal norms. Consider, for example, the alternative result where the *Eli Lilly* tribunal deems the

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<sup>172</sup> Mark Aronson, 'Government Liability in Negligence' (2008) 32 *Melbourne University Law Review* 44, 47. Richard Wright, 'Negligence in the Courts: Introduction and Commentary' (2002) 77 *Chicago-Kent. Law Review* 425, 444, 468. <<http://scholarship.kentlaw.iit.edu/cklawreview/vol77/iss2/2>>.

<sup>173</sup> Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration* (Cambridge University Press, 2015), 41-42.

<sup>174</sup> For example, states may already be infused with customary international legal norms and treaty norms pertaining to human/indigenous rights, health and environment. Vaughan Lowe, *International Law* (Oxford University Press, 2007), 125-126. David Feldman, 'Monism, Dualism and Constitutional Legitimacy' (1999) 20 *Australian Year Book of International Law* 105 <<http://www.austlii.edu.au/au/journals/AUYrBkIntLaw/1999/7.html>>.

legal standard rendered by the Canadian Federal Court of Appeal<sup>175</sup> to be inconsistent with the international investment obligations. The underlying domestic legal principle of the Federal Court would remain to be binding and with the force of law, in light of the common law principle of precedent or *stare decisis*,<sup>176</sup> but inconsistent with the international norm determined by the tribunal. Further, while investment tribunals are not ordinarily accorded with jurisdiction to make a binding declaratory judgment for specific performance that discharges or repeals the measure in issue,<sup>177</sup> the ability to award damages may have the effect of encouraging similar international claims by investors as patent litigants. Indeed, the *Chevron* tribunal perceived that any inconsistency arising by its award simply ought to be rectified by the responding state. That tribunal stated that if ‘there were an inconsistency between [Ecuador’s] obligations under the BIT and the Lago Agrio plaintiffs’ rights as determined by the Courts in Ecuador, it would be for [Ecuador] to decide how to resolve that inconsistency.’<sup>178</sup> Notwithstanding that investment tribunal determinations (based on distinct treaties) are not legally binding on subsequent tribunals,<sup>179</sup> the *jurisprudence constante* such tribunals contribute to can diverge from domestic legal norms and resultantly undermine the stability of the overall international/domestic interactive system and thus the rule of law. That is, like Newton’s Third Law of every action resulting in an equal and opposite reaction,<sup>180</sup> aggressive intervention in one forum is more likely to result in reactive adjustments by subsequent adjudicators. Thus, settling on an appropriate standard of review and general deference in some form

<sup>175</sup> *Eli Lilly and Company v. The Government of Canada (Final Award)* (ICSID Arbitral Tribunal, Case No. UNCT/14/2, 16 March 2017), [80]-[84], [94].

<sup>176</sup> Charles Cooper, ‘Stare Decisis: Precedent and Principle in Constitutional Adjudication’ (1987) 73 *Cornell Law Review* 401; William Douglas, ‘Stare Decisis’ (1949) 49(6) *Columbia Law Review* 735.

<sup>177</sup> Rudolf Dolzer, Christoph Schreuer, *Principles of International Investment Law* (2nd Edition, Oxford University Press, 2012), 294; Christoph Schreuer, ‘Non-Pecuniary Remedies in ICSID Arbitration’ (2004) 20 *Arbitration International* 325.

<sup>178</sup> *Chevron Corporation v. Ecuador*, (Third Interim Award on Jurisdiction and Admissibility, PCA Case No. 2009-23, 27 February 2012), [4.67].

<sup>179</sup> Further, the International Law Commission in its commentaries on draft versions of Articles 31–33 of the Vienna Convention stated ‘in law there is only one treaty – one set of terms accepted by the parties and one common intention with respect to those terms’ International Law Commission, *Draft Articles on the Law of Treaties with Commentaries*, UN Doc. A/6309/Rev. 1 (1966), Article 27, paragraphs 4–5. See also Andrea Bjorklund, ‘Investment Treaty Arbitral Decisions as *Jurisprudence Constante*’ in Colin Picker, Isabella Bunn and Douglas Arner (eds) *International Economic Law: The State and Future of the Discipline* (Hart Publishing, 2008) 265, 275; August Reinisch, ‘The Role of Precedent in ICSID Arbitration’ (2008) *Austrian Arbitration Yearbook* 495; Akshay Kolse-Patil, ‘Precedents in Investor State Arbitration’ (2010) 3(1) *The Indian Journal of International Economic Law* 37, 44.

<sup>180</sup> Sir Isaac Newton (translated by John Machin), *Philosophiæ Naturalis Principia Mathematica (Principia)*, Volume I (Benjamin Motte, 1729) 20.

delivers significant value to the international/domestic interactive system. An investment court with an appellate mechanism is likely to facilitate a more coordinated approach to establish consistent principles relating to both standard of review and general deference. It is anticipated that such consistency will serve as a lodestar for other states to follow (or avoid) when establishing their own treaty standards.

This article, however, stops short of defining what the standard of review and deference should be. It is acknowledged that it is difficult to do so in the abstract, without the benefit of a specific factual scenario, just as common law courts have been doing so for centuries.<sup>181</sup>

## VI CONCLUSION

The investment court model, as that proposed in the CETA and the EU-Vietnam FTA, carries the potential to have extensive impact. The model establishes a series of features that represents a true paradigm shift of the nature of investor-state dispute settlement, evolving from a model significantly based on private contractual arbitration to that of a public institution.

Indeed, this shift appears to modify the nature of the reciprocal relationship between domestic courts and international tribunals. The Chevron/Ecuador phenomenon demonstrates concerns with finality and the rule of law arising from this dynamic association between domestic and international decision-makers. Ultimately, the nature of this relationship is dependent on the appropriate balance between the desire to administer compliance with international or domestic legal obligations, on the one hand, and to offer a sufficient degree of deference or comity on the other. This relationship already has some established legal benchmarks to work from. In particular, most states are guided by the requirements of the *New York Convention* when enforcing arbitration agreements and international awards.<sup>182</sup> That stated, the balance of the relationship can be tested, by denouncing or withdrawing from the *ICSID Convention* (as in the case of Ecuador, Bolivia and Venezuela),<sup>183</sup> or a

<sup>181</sup> Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration* (Cambridge University Press, 2015), 186.

<sup>182</sup> New York Convention, Article V, such as arbitral tribunal's authority was exceeded, no adequate notice to the parties was provided, or that the recognition of the award 'would be contrary to the public policy' of the country enforcing or recognizing the award.

<sup>183</sup> Ignacio Vincentelli, 'The Uncertain Future of ICSID in Latin America' (2010) 16 *Law & Business Reviews of the Americas* 409, 410 <<https://scholar.smu.edu/cgi/viewcontent.cgi?referer=https://scholar.google.ca/&httpsredir=1&article=1464&context=lbra>>.

series of investment treaties it is privy to (in the recent case of India)<sup>184</sup> or the *New York Convention*. The question raised in this article was whether this relationship can be developed and improved by the features of an investment court. The consistency of tribunal determinations is likely to be a basis on which to cultivate a stable relationship, if such determinations accords appropriate deference to the local judiciary, as well as to stakeholders other than the disputing parties.

Beyond the technical changes of the investment dispute mechanism, if the court model is multilateralised to be adopted by a handful of hegemonic states, the landscape of the investment settlement regime is likely to be permanently altered. Whether the development will achieve a critical mass is uncertain and, at this stage, unlikely. Two underlying compounding factors to drive this evolutionary leap appear to be the merits and legitimacy of the international court system and any contagion and competitive effects arising from the inertia built by the EU.

Further consideration and discourse is required to resolve the question of whether the investment court model is a legitimate one. The design of the investment court appears to resolve some of criticisms with the traditional ISDS process, such as consistency of decisions and public participation, and more expressly recalibrates public policy considerations. Yet questions remain as to whether such features deeply resolve issues of legitimacy. As with any evolutionary change, we ought to take stock of what is lost in the process. In this case, there may be repercussions of distancing ISDS from the private contractual arbitration model on which it was founded. There are likely to be impacts to the process by removing its inherent autonomy, flexibility, adaptability and achievable simplicity of arbitration (such impacts may not necessarily be felt solely by the investor). Similarly, the loss of judicial flexibility and diversity arising out of tribunal determinations is worth reflective consideration. Form should not necessarily give way to substance. A public court may be more subservient to the pressures of the ideal of public precedent at the expense of engaging in an analysis that is flexibly tailored and crafted to

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<sup>184</sup> Prabhash Ranjan and Pushkar Anand, 'Chapter 19: Investor State Dispute Settlement in the 2016 Indian Model Bilateral Investment Treaty: Does it Go Too Far?' in Julien Chaisse and Luke Nottage (eds), *International Investment Treaties and Arbitration Across Asia* (Brill, 2018), 579.

Prabhash Ranjan, 'India and Bilateral Investment Treaties – A Changing Landscape' (2014) 29(2) *ICSID Review* 419; Vineet Bhagwat, Jonathan Brogaard, and Brandon Julio, 'A BIT Goes a Long Way: Bilateral Investment Treaties and Cross-border Mergers' (2017), 3 <<http://www.mtsu.edu/econfin/Vineet2018.pdf>>; Julia Calvert, 'Constructing investor rights? Why some states (fail to) terminate bilateral investment treaties' (2018) 25(1) *Review of International Political Economy* 75.

the interests of the foreign investor (and possibly to the state). Similarly, despite the appearance of a public court, the design of the EU and Canada maintains the inherent features of a contractual and consensual arbitration mechanism. Fundamentally, the court retains its essence as a treaty incorporating an arbitration agreement between the state and the investor, establishing the consent to arbitrate and the jurisdiction of the arbitral tribunal.<sup>185</sup> This inherent foundation appears to prevent any development to move beyond the legal confines of the existing enforceability regime of awards adopted by the *New York Convention*. Perhaps the need for a public investment court will give way to these institutional restraints, however real, and the international legal system will find a way.

Thus, whether the implementation of an investment court has established an evolutionary path, laid by Canada and the EU for other states to follow, remains to be seen. The evolutionary process does not appear to be one of 'natural' selection conducive to the survival of the fittest states. Unlike the adaptive process proposed by Darwin, states are conscious participants to the evolutionary cycle.<sup>186</sup> To some extent, states can choose to follow the court design or not, based on the particular perceived economic, diplomatic and other needs, as well their position in the political economy. As such, the drawing force of a multilateral court is likely to depend on the individual state.

Time, on the other hand, is a constant.<sup>187</sup> Time is the underlying medium of any evolutionary process. As to whether the relationship between domestic courts and international tribunals will evolve to a truly symbiotic one, time will certainly tell.

#### **Appendix A: Summary of Legal Claims/Standards in International Tribunals**

Type of Claim	Treaty Obligation Considered	Outcome/Other Issues	Standard of Review and Deference	Exhaustion of local remedies considered?
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<sup>185</sup> Christopher Dugan, *et al*, *Investor-State Arbitration* (Oxford University Press, 2011) 221-222; Andrea Bjorklund, 'Contract without Privity: Sovereign Offer and Investor Acceptance' (2001) 2 *Chicago Journal of International Law* 183.

<sup>186</sup> Compare with Jean Frédéric Morin, Joost Pauwelyn and James Hollway, 'The Trade Regime as a Complex Adaptive System: Exploration and Exploitation of Environmental Norms in Trade Agreements' (2017) 20 *Journal of International Economic Law* (2017), 365 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3008543](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3008543)>: 'We argue that the trade regime seems to evolve as a complex adaptive system, at the edge of order and chaos.'

<sup>187</sup> Subject (of course) to Einstein's theory of relativity; for example: Albert Einstein, 'Zur Elektrodynamik bewegter Körper [Translation: On the Electrodynamics of Moving Bodies]' (1905) 17 (10) *Annalen der Physik* 891.

<i>Chevron v Ecuador</i> (2018) Chevron II	Due Process (independence): judicial corruption	Denial of Justice (FET/MST) Effective means	Successful	The relevant test was ‘whether any shock or surprise ... occasioned by the... judgment ... leads ... to justified concerns as to the judicial propriety’. The judgment must not merely contain legal mistakes; it must be ‘clearly improper and discreditable’. ‘[A] court is permitted a margin of appreciation before the threshold of a denial of justice can be met’ <sup>188</sup>	Yes
<i>Eli Lilly v Canada</i> (2017)	Standard of Canadian patent law Court’s failure to exercise standard under patent law	Denial of Justice (FET/MST) Judicial conduct FET Denial of Justice (Expropriation)	Unsuccessful	Only in very exceptional circumstances, in which there is clear evidence of egregious and shocking conduct	No?
<i>Awdi v. Romania</i> (2015)	Court’s repeal of law as unconstitutional	Denial of Justice (FET)	Unsuccessful on Denial of Justice claim	Not to review matters of domestic law. Will accept the findings of local courts as long as no deficiencies, in procedure or substance, unacceptable from the viewpoint of international law, such as in the case of a denial of justice. <sup>189</sup>	No
<i>Dan Cake v. Hungary</i> (2015)	Court’s failure to convene the hearing to postpone bankruptcy proceedings	Denial of Justice (FET) Impairing use or liquidation of the investment by unfair or	Successful	Administering justice in a seriously inadequate way;	Yes

<sup>188</sup> *Chevron Corporation v. Ecuador*, (Second Partial Award on Track II, PCA Case No. 2009-23, 30 August 2018) Part VIII [8.26], [8.27], [8.42].

<sup>189</sup> *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award 2 March 2015, citing *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, para 99; *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, para 453-454, *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award, 3 July 2008, para 106.

	Domestic bankruptcy law was not compatible with international standards (later abandoned by claimant) <sup>190</sup>	discriminatory measures		clearly improper and discreditable; manifest injustice in the sense of a lack of due process leading to an outcome which shocks a sense of judicial propriety.	
<i>Infinito Gold v. Costa Rica</i> (2014) (Merits Determination Pending)			Pending		
<i>Arif v Moldavia</i> (2013)	Collusion by the courts with party Misapplication of the Moldovan law	Denial of Justice (FET/CIL) Legitimate Expectations (FET) Judicial Expropriation	Partially successful (FET only)	Some deference: Need more than a 'difference of opinion'	Yes
<i>Apotex v United States</i> (2013)	Interpretation of US law	Denial of Justice (FET/MST)	Unsuccessful (jurisdiction denied)	Adopted <i>Loewen</i> analytical framework Not appellate courts/cannot substitute; more than a difference of opinion	N/A (jurisdiction denied)
<i>White Industries v India</i> (2011)	Delay of process (set aside application) (2002-2009) Apply New York Convention according to international standards	Effective Means/MFN Denial of Justice Legitimate Expectations Judicial Expropriation	Partially successful (effective means only)	Effective means standard, adopting <i>Chevron I</i> , is a 'less demanding' test than denial of justice; laws and institutions to 'work effectively'; objective international standard. Other factors considered: complexity, behaviour, interests	Yes

<sup>190</sup> That is, Dan Cake claimed that 'Hungary's failure to provide a decent and workable legal framework regarding insolvency procedures is a clear violation of Hungary's obligation to provide full protection and security'. *Dan Cake S.A. v. Hungary*, ICSID Case No. ARB/12/9, Award 24 August 2015, para 82; see also Gábor Kókényesi, "Denial of Justice" as a Basis for the ICSID Ruling against Hungary', *Kluwer Arbitration Blog* (online) <<http://arbitrationblog.kluwerarbitration.com/2016/03/01/denial-of-justice-as-a-basis-for-the-icsid-ruling-against-hungary/>>.

<i>Chevron v Ecuador</i> (2011) (Chevron I)	Due Process (delay)	Effective means of asserting claims	Successful	Factors considered: complexity, behaviour, interests <sup>191</sup>	Yes (to effective means standard)
<i>Saipem v Bangladesh</i> (2009)	Failure for domestic courts to enforce award	Expropriation	Successful	Correctness: ie consistent with Article II of NY Convention	Yes Determined not to be a pre-requisite to expropriation
<i>Loewen v United States</i> (2005)	Court's failure to carry out trial in non-discriminatory manner	Denial of Justice (FET/MST) National treatment (through opposing successful litigant) Judicial Expropriation	Denial of justice claim dismissed because of the failure to exhaust local remedies	Manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety. Bad faith or malicious intention is not required [132]. A judicial decision which is in breach of domestic law and is discriminatory amounts to manifest injustice under international law. Some general deference, but standard unclear	Yes

<sup>191</sup> *Chevron v Ecuador*, Partial Award on the Merits (2010).