EFFECTIVE MEANS AND THE PERILS OF STANDARD-SETTING

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I. Background

As states increasingly embrace the investment opportunities of a globalised economy, so treaties promoting transnational investment have abounded. Of these, bilateral investment treaties (hereinafter BITs) now surpass 3,000 in number and have significantly extended the reach of international law into the commercial realm.[1] Half a century on from the inaugural BIT between West Germany and Pakistan, virtually all states are now signatories to such agreements, irrespective of the diverging political traditions from which they hail.[2] Their success is unquestionable. The capital flows they cultivate have shuttled vast sums into Latin America, Eastern Europe, the Middle East, Asia and Africa. Developing states have, in turn, emerged as serious sources of investment in their own right.[3] Thanks in part to BIT proliferation,[4] international investment in 2012 marked a six-fold increase on that of the early 1990s.[5]

The act of negotiating the exact investor rights and state obligations to be included within a BIT creates covenants of sorts. These impart a clarity to the resulting protections which may not otherwise have existed through mere reliance on the more nebulous principles and protections of customary international law.[6] The New York and Washington

1 Hamed El-Kady, An International Investment Landscape Policy in Transition: Challenges and Opportunities, (forthcoming), 4 TRANSNAT'L DISP. MGMT. (forthcoming 2013), available at http://www.transnational-disputemanagement. com/journal-advance-publication-article. asp?key=494

2 UNCTAD Investment Treaty Database, http://unctad.org/en/Pages/DIAE/International%20 Investment%20Agr eements%20(IIA)/Country-specific-Lists-of-BITs.aspx

3 UNCTAD WORLD INVESTMENT REPORT 99 (2012); emerging markets account for 30% of global FDI outflows.

4 Jeswald Salacuse and Nicholas Sullivan, Do BITs really work? An Evaluation of Bilateral Investment Treaties and their Grand Bargain, 46 HARV. INT'L L.J. 67, 105 (2005).

5 UNCTAD WORLD INVESTMENT REPORT 16 (2013).

6 Jeswald Salacuse, The Treatification of International Investment Law, 13 L. & BUS. REV. AM. 157, (2007).

Conventions[7] then bind the dispute resolution framework with the very certainty of enforcement and process that renders BIT investments so appealing.

Yet the apparent stability, universality and legal solidity of this mechanism cannot lead those involved in the practice and development of international law to fall victim to complacency. Nascent legal principles are to be sculpted with great prudence. They have a duty to ensure clarity of definition, foresight in relation to future (mis) interpretation, and a meticulous consideration for the expectations of the parties to the original dispute from which the new principle will sprout. Where these obligations are not fulfilled, as in Chevron v. Ecuador,[8] investors are left unclear as to their rights. Moreover, hostile state reactions to poorly-crafted principles jeopardise the current universality of investment protection norms, as well as the ICSID framework on which many existing investor rights partially repose. These concerns form the contextual landscape against which the following pages may be considered.

This paper focuses on the emergence of effective means as an independent treaty protection for investors, following its extraction from the denial of justice protection in the Partial Award for Chevron. By holding an effective means clause to be a distinct lex specialis that is easier to violate than the general denial of justice protection embedded in customary international law (and thus also afforded to BIT investors), investors find themselves significantly more empowered to bring claims against states with sluggish judiciaries, be they deliberately or involuntarily so. This new standard was reinforced in toto and greatly expanded in the first published investment treaty award against India, White Industries v. India,[9] in which it was held that the protection of

7 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 Jun. 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention]; Convention on the Settlement of Investment Disputes between States and. Nationals of Other States, 18 Mar. 1965, 575 U.N.T.S. 159.

8 Chevron Corp. and Texaco Petroleum Corp. V. Republic of Ecuador (PCA Case No. 34877), Partial Award, 30 Mar. 2010, available at http://italaw.com/documents/ChevronTexacoEcuadorPartialAward.pdf [hereinafter Chevron].

9 White Industries Australia Ltd. v. Republic of India, UNCITRAL (India-Australia BIT), Award, 30 Nov. 2011, available at http://www.iareporter.com/downloads/20120214 [hereinafter White Industries].

an effective means clause could be imported into a BIT from another through a most-favoured nation clause. To the consternation of many states, the new opportunities afforded to investors by virtue of these two awards have already been pursued in several recent investment treaty arbitrations.[10]

The following pages first outline the definitions of denial of justice and effective means. Second, the key components of the tribunals' awards in Chevron and White Industries are presented. Third, a legal critique of the way in which the new standard was formulated is offered, addressing both legal flaws and broader systemic concerns. Fourth, this paper concludes with remedies to the flaws of the Chevron approach, through the design of an objective standard for effective means grounded in comparative law and longer-term treaty amendment or clarification by states.

II. Denial Of Justice And Effective Means: A Historical Overview

A. Denial of Justice

Until Chevron, effective means (defined below) existed merely among a cluster of other indicative factors used to argue a breach of the broader denial of justice protection, which is automatically afforded to investors through the application of customary international law to BITs.[11] Evidencing a denial of justice requires an aggregation of several such indicative factors, followed by an indistinctly-defined process of overall evaluation. It therefore takes account of an investor's lack of effective means, but also extends far beyond it. A key benefit of establishing a breach of the denial of justice standard lies in the fact that this, in turn, enables investors to bring BIT claims for a breach of the fair and equitable treatment standard, of which denial of justice is a component.[12]

10 See, eg., Guaracachi Am. Inc. v. Bolivia, UNCITRAL, Statement of Claim, ¶ 210-12, 1 Mar. 201); Apotex Holdings Inc. & Apotex Inc. v USA (ICSID Case No. ARB(AF)/12/1), Memorial, ¶ 482-83, 30 Jul. 2012.

11 Most BITs contain a clause guaranteeing a treatment of investments no less favourable than that accorded by international law, of which denial of justice is one component.

12 Rumeli Telekom and Telesim Mobil Telekomikasyon Hizmetleri v Republic of Kazakhstan (ICSID Case No. ARB/05/16), 29 Jul. 2008, ¶ 654; See also Loewen v United States (ICSID Case No. ARB(AF)/98/3), 26 Jun. 2003, ¶¶ 128-129.

The denial of justice standard encapsulates the "duty to provide decent justice to foreigners," considered among the most deeply-rooted tenets of international law.[13] Unfortunately, its universal acceptance has not immunised it against interpretative ambiguity. Indeed, its precise meaning has perplexed scholars for over two hundred years,[14] with even a single analysis capable of yielding six plausible definitions.[15] What is uncontested, however, is the remarkably high evidential burden placed on investors intending to claim a breach of the denial of justice standard.

Paulsson's evaluation of the standard is the most oft-cited; it requires the demonstration of a "particularly serious shortcoming" and "egregious" conduct by the host state or its judicial organs,[16] that "shocks, or at least surprises, a sense of judicial propriety."[17] This description builds upon the foundations laid down by the American Committee of Jurists in 1928, which equated denial of justice to an absence of "proper administration of justice" and "grossly unfair" or "manifestly unjust" judgments.[18] In Loewen v. United States,[19] Greenwood suggested that a denial of justice requires: manifest or gross unfairness; a flagrant and inexcusable violation; a palpable violation exposing bad faith (and crucially, not mere judicial error) at its core; or an undoubted mistake of substantive or procedural law prejudicing the investor.[20] A further indication can be drawn from Azinian v. Mexico, where denial of justice was said to be demonstrable through: refusal by a relevant court to

13 JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 1 (Cambridge University press, 2005).

14 Id. at 65.

15 ALWYN FREEMAN, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE 96-97 (Kraus Reprint Co. 1970) (1938); See also Jason Burke, Defining Investor Confidence: Avoiding Interpretative Uncertainty in Chevron Corp. v Ecuador, 34 B.C. INT'L & COMP. L. REV 463 (2011).

16 Gerald Fitzmaurice, The Meaning of the Term 'Denial of Justice', 13 BRIT. Y.B. INT'L L. 93-94 (1932).

17 Elettronica Sicula SpA (ELSI) (U.S. v. Italy), ICJ Judgment, 1989 I.C.J. Reports 15 (20 Jul. 1989).

18 See James Garner, International Responsibility of States for Judgments of Courts and verdicts of Juries Amounting to Denial of Justice, 10 BRIT. Y.B. INT'L L. 181, 183-84 (1929).

19 Loewen Group, Inc. v. United States (ICSID Case No. ARB(AF)/98/3), Award, 26 Jun. 2003, available at http://www.italaw.com/sites/default/files/case-documents/ita0470.pdf [hereinafter Loewen].

20 Loewen, Award, ¶ 130.

entertain a suit; subjection to undue delay by a court; administration of justice in a seriously inadequate manner; or a clearly malicious application of the law by the courts.[21]

Beyond these complimentary but nevertheless varying definitions, customary international law adds the supplementary requirement to have exhausted local remedies before bringing a denial of justice claim. A host state's highest relevant appeals court must have had the chance to overturn prior injustices and failed to do so, for the entire judiciary to be accused of the extreme injustice and partiality[22] required for a denial of justice.[23]

Although the lack of a definition with clear contours assists investors insofar as it prevents them from falling short of the evidential standard on grounds of mere legal technicality, conversely, it also provides very little certainty of success before an arbitral tribunal. The concept is very much holistic in nature, comprised of several indicative components but depending on none. As Paulsson translated, from De Visscher's original:[24]

The mere violation of internal law may never justify an international claim based on denial of justice. It may be that the defectiveness of internal law, the refusal to apply it, or its wrongful application by judges, constitute elements of proof of a denial of justice, in the international understanding of the expression; but in and of themselves they never constitute this denial.[25]

It is little wonder, therefore, that investors and practitioners of international law preach caution to investors seeking to hinge their claim upon a denial of justice claim.

21 Azinian, Davitian and Baca v. United Mexican States (ICSID Case No. ARB(AF)/97/2, Award, 1 Nov. 1999, ¶102-103; See also Mondev International Ltd v United States (ICSID Case No. ARB(AF)/99/2), Award, 11 Oct. 2002, ¶126-127.

22 VATTEL, THE LAW OF NATIONS, BOOK II (1852 REPRINT) ¶ 350.

23 Paulsson, supra note 13 at 100-101.

24 Charles De Visscher, Le déni de justice en droit international, 52 RECEUIL DES COURS 370, 376 (1935).

25 Chevron, Opinion of Jan Paulsson, 12 March 2012, ¶ 16.

B. Effective Means

Although its status as an independent treaty standard is very recent, effective means has featured peripherally in BITs since the 1980s, contrary to common misperception.[26] Many of the BITS that came to fruition following the release of the 1983 Model BIT contained precise effective means (or equivalent judicial access) clauses; such clauses have since been repositioned to the preamble, now that customary international law provides the protection necessary to render a separate, individual treaty obligation obsolete.

Providing an authoritative definition of effective means presents an immediate challenge. Short of general agreement that it is of indicative value in evidencing a denial of justice, a consensual definition does not veritably exist by virtue of its marginal importance until now.[27] It can, however, broadly be described as the right of foreign investors to the means required to assert their claims against a host state, before the courts of that host state.[28] This substantively mirrors the description of effective means in Chevron. Effective means has otherwise only been addressed in three publically-available arbitrations to date, and then only fleetingly so, within the more general context of denial of justice and consequent breaches of fair and equitable treatment. Specifically:

1. In Petrobart v. Kyrgyzstan, the tribunal agreed that an allegation that the state executive had obtained a stay of a previous judgment through ex parte interactions with the judiciary amounted to a breach of the effective means clause in the Energy Charter Treaty (hereinafter ECT).[29] Whether by reticence to take the jurisprudential step of segregating effective means as a stand-alone right, or by desire to focus on breaches of a standard it simply considered to be

26 See Joshua Robbins, The Emergence of Positive obligations in Bilateral Investment Treaties, 13 U. MIAMI INT'L & COMP. L. REV. 403, 425.

27 J. Steven Jarreau, Anatomy of BIT: The United States-Honduras Bilateral Investment Treaty, 35 U. MIAMI INTER-AM. L. REV. 429, 484-85 (1995).

28 See its description as such in the United States' initial model for negotiating BITs in 1983, reprinted in KENNETH VANDEVELDE, UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE (1992).

29 Petrobart Ltd. V. Kyrgyz Republic (SCC Case No. 126/2003), Final Award, 29 Mar. 2005.

more substantial, the tribunal did not go on to analyse the requirements for establishing a lack of effective means, but instead emphasised how government interference violated the fair and equitable treatment provision of the ECT.

2. In Limited Liability Co. AMTO v. Ukraine,[30] the tribunal agreed that a shortcoming in a statute forming part of the host state's legislation could be considered tantamount to a breach of effective means if the legislative deficiency had the effect of denying an investor the ability to assert a claim in the courts of the host state. It found, not surprisingly, that a "fundamental criterion of an 'effective means' for the assertion of claims [is] the existence of legislation for the recognition and enforcement of property and contractual rights."[31]

3. Finally, in Duke Energy v. Ecuador, the tribunal found that whilst an effective means clause guarantees "access to the courts and the existence of institutional mechanisms for the protection of investments," the obligation itself only "seeks to implement and forms part of the more general guarantee against denial of justice."[32] From this, it is apparent that it is the functioning of institutional mechanisms that must be demonstrated by a host state, rather than their mere existence.

Collectively, these three awards are limited in their contribution to refining the definition of the effective means standard within denial of justice and certainly did not purport to do so, although they are aligned with the broad definition initially suggested above. This absence of a clearly-established status brings us to a natural juncture, and specifically, to Chevron and White Industries.

30 Ltd. Liability Co. AMTO v. Ukraine (SCC Case No. 080/2005), Final Award, 26 Mar. 2008.

31 Id., ¶ 87.

32 Duke Energy v. Ecuador (ICSID Case No. ARB/04/19), Final Award, 18 Aug. 2008).

III. A New Standard: Chevron And White Industries

A. Chevron

In the early 1970s, Texaco Petroleum Corp. (hereinafter Texaco) acquired oil exploration and production rights in Ecuador. In exchange, the Ecuadorian government negotiated the right to purchase oil from Texaco at below market price, but only to the extent required for meeting internal energy demands. By the early 1990s, Texaco had come to suspect the government of purchasing oil under the pretext of fulfilling domestic energy needs (and therefore at below market price) but in fact re-selling the oil for export (at the higher, international market price). In 1991, Texaco therefore initiated the first of what would become a multitude of claims for lost profits against the Ecuadorian government. Chevron inherited these claims upon acquiring Texaco's parent company, when litigation in Ecuador had already been set in motion.

Over a decade later in 2006, with the issue still unresolved, Chevron commenced arbitral proceedings against Ecuador under UNCITRAL rules. Its chief grievance concerned the egregious delays that it argued it had been subjected to by the Ecuadorian courts, which it considered akin to a denial of justice under customary international law. By showing that Ecuador had violated customary international law, Chevron argued that this also implied a violation of the BIT, which stated that "investment [...] shall in no case be accorded treatment less than that required by international law." As a secondary point, Chevron suggested that what decisions had been rendered by the Ecuadorian courts to date were so manifestly unjust as to be symptomatic of a denial of justice, and therefore a breach of the fair and equitable treatment right (and other rights) enunciated in the US-Ecuador BIT.[33] Ecuador countered with allegations of its own against Chevron and argued that undue delay must be indicated by a total "refusal to judge," which the Ecuadorian courts had not expressed.[34] It accused Chevron of opportunism and argued that the decisions of the Ecuadorian courts to date were not unjust and certainly not sufficiently indicative of judicial impropriety

33 Chevron, ¶¶ 167-171.

34 Chevron, ¶ 180.

as to warrant international arbitration.[35] Finally, it addressed the general backlog in its judicial system, effectively acknowledging it as an unfortunate consequence of its status as a developing state with an overstretched judiciary, and insisted that Chevron had not exhausted all local remedies as no appeal had been made to the highest relevant Ecuadorian court.[36]

The tribunal's line of analysis in its Partial Award took a quite different turn to that which may have been expected in the light of the parties' heavy emphasis on concepts of customary international law, and the denial of justice standard above all. It correctly declared its responsibility to interpret the BIT according to the rules of the Vienna Convention[37] – the primary authority on the effects of state-to-state treaties – and went to great lengths to interpret Article II(7) of the BIT, which obliged each party to "provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorisations." The Partial Award recognised a significant overlap between the protection of Article II(7) and the prohibition of denial of justice under customary international law.[38] Confusingly, the Tribunal also agreed with the view espoused in Duke Energy that Article II(7), to some extent, sought to "implement and form part of the more general guarantee against denial of justice." However, it then departed from the direction in which its analysis appeared to be headed, and established effective means as lex specialis, placing great weight on the lack of an explicit reference to denial of justice or customary international law in the effective means provisions of Article II(7).[39] The upshot is the creation of a "distinct, potentially less demanding test" for effective means as an alternative for investors to the more onerous international standard for a denial of justice claim.[40] Accordingly, actions by a host state that would not ordinarily pass the

35 Chevron, ¶ 195.

36 Chevron, ¶¶ 295-97.

37 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

38 Chevron, ¶ 242.

39 Id.

40 Id., ¶ 244.

egregiousness threshold required to establish the latter can nonetheless now be held to violate the former.[41]

The embryonic, stand-alone effective means standard was promptly sculpted by the tribunal through the precisions that followed. The fact that a host State harbours a legal system renowned for lengthy delays is not an absolute defence, yet somewhat confusingly, is relevant to determining what period of delay is reasonable.[42] The host state must ensure investors' claims are addressed without "indefinite or undue" delay, defined as the ability to "enforce legitimate rights within a reasonable amount of time."[43] The reasonableness of a delay is likely to be assessed primarily by reversion to factors established by the denial of justice standard, such as case complexity and scale, court and party behaviour and the nature of the investor interests at stake.[44] In addition, investors are required to pursue all local judicial avenues "that are available and might have rectified the wrong." However, the pursuit of all local remedies is explicitly distinguished from denial of justice requirements, and instead presented as a qualified requirement: "proof of exhaustion of local remedies is not necessary to make a prima facie case for a breach of [an effective means clause in a BIT]."[45]

And so, in just a few paragraphs, was born the independent effective means standard and a full endorsement therein of Jimenez de Aréchaga's words some forty years earlier:

State responsibility for acts of the judiciary does not exhaust itself in the concept of denial of justice.[46]

41 Victorino Tejera, Chevron & TexPet v. Ecuador: The 'Effective Means' Standard is a Lower Threshold than the Customary International Law Standard of "Denial of Justice, 15 INT'L BAR ASSOC. ARBITRATION NEWS 96, 97 (2010).

42 Chevron, ¶ 263.

43 Id., ¶ 250.

44 Id.

45 Id. ¶ 326.

46 Eduardo Jiménez de Aréchaga, International Responsibility, in MANUAL OF PUBLIC INTERNATIONAL LAW 555 (M Sørensen ed., 1968).

All states – and there are many – currently party to a BIT containing language not dissimilar to that of Article II(7) above (particularly if lacking any explicit link to the customary international law standard of denial of justice) will now find themselves under an obligation to allow investors to pursue claims in local courts without undue delay. Few would contest that the delay endured by Chevron in this instance appeared excessive and unwarranted. The tribunal's desire to address this injustice effectively falls well within the realm of comprehensibility, and in some sense, some may question the importance of the distinction between an effective means claim and a denial of justice claim. In Paulsson's view, "the heart of the inquiry remains the same: was justice administered in a fundamentally unfair manner?"[47] This is undoubtedly an overarching consideration for the overall direction of international law and investment protection. However, the specific practical outcome with which investors, states, tribunals and counsel are left in their immediate working contexts post-Chevron is anything but satisfactory, and merits further decortication in section III below.

B. White Industries

In the late 1980s, White Industries Australia Ltd (hereinafter WIA) entered into a contract with Indian state-owned entity Coal India Ltd (hereinafter Coal India), for the development of a coal mine in north-eastern India. A decade later, disputes arose surrounding the quality of the coal extracted and related bonus and penalty payments. The dispute was submitted to ICC arbitration, resulting in a majority award in 2002 in favour of WIA. Shortly thereafter, Coal India applied to the High Court of Calcutta to have the award set aside, as per its entitlements under the Indian Arbitration and Conciliation Act 1996. This coincided with White Industries' application to the High Court of New Delhi to have the foreign ICC award enforced under India's New York Convention obligations. These enforcement proceedings were stayed pending the outcome of the set-aside proceedings initiated in Calcutta. Come 2010, these set-aside proceedings were still pending before the Indian Supreme Court.

47 Chevron Corp. and Texaco Petroleum Corp. v. Republic of Ecuador (PCA Case No. 2009-23), Opinion of Jan Paulsson, 12 March 2012, ¶ 28.

Seeking a remedy to what it considered to be judicial paralysis after years of delay in progressing its enforcement proceedings, WIA turned its attention to using a most-favoured nation (hereinafter MFN) clause to enforce its perceived rights.[48] It brought investment arbitration proceedings against India under UNCITRAL rules in 2010, alleging that the inordinate delay suffered should equate to a breach of the effective means standard. In so doing, specific reference was made to the distinction of effective means established in Chevron. WIA argued that although the Australia-India BIT contained no effective means protection per se, such a protection should be deemed imported from Article IV(5) of the India-Kuwait BIT into the relevant India-Australia BIT by virtue of the MFN clause contained in the latter. Separately, White Industries made a more difficult claim under customary international law for breach of fair and equitable treatment as a result of a denial of justice.

India countered with two unsuccessful jurisdictional objections.[49] It subsequently addressed the claimant's attempt to transpose the effective means standard, submitting that this should not be permissible because India's negotiations for the BIT with Australia were conducted in a spirit of emphasis of national law, unlike its negotiations for its BIT with Kuwait.[50] Additionally, India argued that the effective means protection of its BIT with Kuwait, even if transposed, should not be retrospectively applied to events predating the entry into force of its BIT with Kuwait

48 MFN clauses exist in many BITs and have the effect of importing any more favourable protections afforded by a state in another BIT into the BIT containing an MFN clause. Thus states cannot provide a higher level of protection to investors of country A and not to those of country B, if the BIT with country B contains an MFN clause.

49 First, India countered that White Industries' mining contract was not a true investment as defined by the India-Australia BIT, claiming it to be an ordinary commercial contract for the supply of goods and services. Were this true, it would have left White Industries incapable of making a claim under the BIT. The Tribunal promptly dismissed this proposal and clarified that an investment should be considered to existed under the BIT wherever there are "right[s] to money or to any performance having a financial value." Second, India argued that the original ICC Award of 2002 could not be protected as an investment under the India-Australia BIT, relying on highly contentious dicta in GEA Group v. Ukraine.49 The tribunal rejected this as an erroneous departure from the developing jurisprudence and declared the ICC Award to be a "continuation or transformation of the original investment."

50 White Industries, ¶ 5.4.1.

in 2003.[51] Moreover, even if the effective means standard were imported and applied, India claimed that it would not be in violation of it. On this point, India first argued that the Chevron standard should be ignored in favour of a return to the internationally recognised denial of justice standard (which it believed would spare it from an adverse award because of a lack of sufficiently egregious actions). Secondly, India attempted to distinguish Chevron on the facts, highlighting that the litigation in question had moved at the same rate as any other in India and that delays were explicable by White's complicated litigation tactics and the well known realities of the judicial process in India.[52]

Whereas the tribunal agreed that the duration of the proceedings would not suffice to confirm a denial of justice under customary international law,[53] it concluded that it was correct to import the effective means clause from the India-Kuwait BIT and further underlined Chevron's assertion that effective means is a "distinct and potentially less demanding test, in comparison to denial of justice."[54] Its reasoning was founded upon the view that importing the clause did not have the effect of unbalancing the carefullynegotiated India-Australia BIT, nor would it contradict any particular respect for domestic law expressed therein.[55] Often overlooked, however, is the tribunal's cynicism towards India's claim that the BIT had been angled to ensure a particular emphasis of domestic law. Had the tribunal been more convinced that this was the case, it may have recognised the credibility of the argument and adopted a different analytical path.

Instead, the tribunal reaffirmed Chevron and indeed clarified it slightly, stating that effective means for asserting claims should be considered separately from effective means for enforcing rights. India was found to have failed to provide the former in relation to WIA's appeal against the set-aside motion in the High Court of Calcutta, because of "undue delay."[56] The tribunal negated to accord relevance to the resources at the disposal of India's judicial system, and the slow speed that inevitably

51 Id., ¶ 5.4.3.
52 White Industries, ¶¶ 5.4.5.
53 Id., ¶ 10.4.22.
54 Id., ¶ 4.4.5.
55 Id., ¶ 11.2.7.
56 Id., ¶ 11.4.19.

ensues from the lack thereof. The tribunal explained that the effective means standard was to be "measured against an objective, international standard" which evaluates only "whether the system of laws and institutions work effectively at the time [when rights are enforced or a claim is asserted]."[57]

In parallel, in relation to enforcing rights, the tribunal did excuse the three and a half year wait afflicting WIA's separate enforcement proceedings in the High Court of New Delhi, noting that this was not exceptional "either in the Indian context or otherwise,"[58] nor sufficient to constitute a breach of effective means in an enforcement context.[59] The award highlighted the failure of WIA's customary international law claim for breach of fair and equitable treatment, on the basis that the claimant could not legitimately have expected India to apply the New York Convention in line with international standards, and should have expected the domestic court structure in India to be overstretched.[60] This only underlined the considerable discrepancy in the thresholds which must be passed in order to evidence effective means on the one hand, and a denial of justice and thus a violation of fair and equitable treatment on the other. This evolution will undoubtedly increase the understanding of the Indian state, and countless others around the world, of the unforeseen risk of any BIT containing an effective means clause to be drawn upon by treaty-shopping investors disgruntled with the otherwise high burden of proof they would require for a denial of justice/fair and equitable treatment claim.[61] Indeed, the Indian department of Industrial Promotion and Policy has already announced that it will henceforth exclude investor-state arbitration clauses from the

57 Id., ¶ 11.3.2(f), 11.14.16, n. 78.

58 Id., ¶ 11.4.8.

59 Id., ¶¶ 11.4.5-7.

60 Id., ¶¶ 10.3.13-14.

61 Note that this assumes that tribunals continue to be willing to accept a previous arbitral award as an investment under the relevant BIT, as has been the case to date in: Saipem S.p.A. v. Bangladesh (ICSID Case No. ARB/05/07) Decision on Jurisdiction, 21 Mar. 2007, ¶ 127; Romak S.A. v. Uzbekistan, (PCA Case No. AA280), Award, 26 Nov. 2009, ¶ 211; ATA Construction, Industrial and Trading Company v. Jordan, (ICSID Case No. ARB/08/2), Award, 18 May 2010, ¶¶ 115-17; Mondev Int'l Ltd. v.United States (ICSID Case No. ARB(AF)/99/2), Award, 11 Oct. 2001, ¶ 81; But see the much-criticised stance in GEA Group Aktiengesellschaft v. Ukraine (ICSID Case No. ARB/08/16), Award, 31 March 2011, ¶ 161 (later dismissed as erroneous in White Industries).

country's future trade agreements, commenting that "it is now the view worldwide that the state should not get drawn into private disputes."[62]

A final observation pertains to the ongoing quandary surrounding enforceability. An award following investment treaty arbitration still requires a final enforcement step against the host state. This not only requires an exequatur for the award, which opens the door to limited defences from the host state in the event of the BIT award not being an ICSID award,[63] but also requires the final measures of enforcement to comply with rules on state immunity.[64] This is not of immediate relevance to White Industries, irrespective of the state's ownership of Coal India, but presents a defence to which certain states may have limited recourse under other circumstances.

IV. Flaws In The Creation Of The New Standard

Three areas of concern emerge from these two awards. First, it is argued that Chevron established an independent standard of investment protection without adequate analysis of the original intentions of the states constructing the BIT and without fully understanding the meaning of the clause it relied upon in doing so.[65] Second, the imprecise definition of effective means propounded in Chevron leaves it devoid of reliable future utility for either investors or states. Third, the two awards add to a body of case law that risks deepening state alienation from the (currently) universal processes and principles of investment treaty arbitration, and suggests different standards are currently applied to developed and developing states.

62 See Asit Mitra, India may Exclude Clause on Lawsuits from Trade Pacts, WALL ST. J., 29 Jan. 2012.

63 Stephan Balthasar, White Industries India: Redefining the Interface Between Commercial and Investment Arbitration,

78 INTERNATIONAL JOURNAL OF ARBITRATION, MEDIATION AND DISPUTE MANAGEMENT 4 (2012); See also a general overview of state immunity in LUCY REED, JAN PAULSSON & NIGEL BLACKABY, GUIDE TO ICSID ARBITRATION 180 (Kluwer Law International, 2010).

64 See generally Karl Meessen, State Immunity in the Arbitral Process, in ARBITRATING FOREIGN INVESTMENT DISPUTES 387-397 (Norbert Horn and Stefan Kroll eds., 2004).

65 J Worth, 'Effective Means' Means? The Legacy of Chevron v. Ecuador, 52 COLUM. J. TRANSNAT'L L. 1 (forthcoming, 2013).

A. Inadequate analysis of state intentions

In criticising the tribunal's approach in Chevron, it must first be acknowledged that the contents of BITs and the methods and concepts developed to assist in their interpretation are, by necessity, supple. There can be no formula applied to yield identical outcomes in all similar cases.[66] This is accentuated by the fact that arbitration is not constrained by subservience to precedent, although previous awards based on comparable factual matrices are of persuasive value. The mere fact that Chevron departed so radically from previous interpretations of effective means is not objectionable per se.

As briefly alluded to above, the Vienna Convention is the foremost source of guidance on interpretation of state-to-state treaties, and thus BITs. Unofficially known as the treaty of treaties, it has come to be considered part of customary international law and therefore can be applied to states which may not have signed or ratified it.[67] It is comprised of both compulsory and supplementary provisions on treaty interpretation. The relevant compulsory provisions, in short, require arbitrators to act in good faith and apply the terms of the treaty by taking account of the treaty's context, object and purpose.[68] The supplementary provisions may be applied where the meaning of the disputed treaty is unclear, allowing the intentions of the states involved to be analysed – usually through consideration of preparatory documents arising in the course of BIT negotiation.[69]

The tribunal in Chevron recognised the compulsory provisions of the Vienna Convention and duly set about analysing the BIT's context. In particular, it noted that the BIT's fair and equitable treatment clause

66 Suzannah Linton and Firew Tiba, The International Judge in an Age of Multiple International Courts and Tribunals, 9 CHI. J. INT'L. L. 407, 420.

67 THIRD RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: INTERNATIONAL AGREEMENTS (1987); see also George K. Foster, Recovering 'Protection and Security': The Treaty Standard's Obscure Origins, Forgotten Meaning, and Key Current Significance, 45 VAND. J. TRANSNAT'L L. 1095, 1105 (2012).

68 Vienna Convention art. 31.

69 See Tony Cole, The Boundaries of Most Favored Nation Treatment in International Investment Law, 33 MICH. J. INT'L L. 537, 573-74 (2012).

(Article II(3)) stipulated that investments were to be granted at least the minimum protection required by customary international law. In contrast, it remarked that the effective means clause (Article II(7)) contained no such reference to customary international law standards. Whereas it would have been entitled to turn to supporting documents under the supplementary provisions of the Vienna Convention, the tribunal simply surmised that the effective means clause must have been intended to be easier to violate than it otherwise would have been under customary international law. A priori, this may not seem an unreasonable assumption, particularly given the proximity of the two clauses to one another within the treaty text, and as a result, some commentators have judged the tribunal's interpretation consistent with its duties.

However, such a conclusion would be short-sighted. The intended meaning of the fair and equitable treatment protection to which the tribunal compared the effective means clause cannot possibly have been defined with any certitude by the tribunal.[70] Its wording ("the minimum that international law requires") is well recognised as lacking established meaning and consequently, tribunals have freely disagreed with one another over the scope of identically-worded fair and equitable treatment clauses: either the protection provided is limited to the minimum standard under international law, or it is taken to have become a self-standing norm of customary international law, or it is an independent, objective BIT standard to be understood through the plain meaning approach of statutory interpretation.[71] The tribunal's willingness to interpret the meaning of the fair and equitable treatment clause as definitively as it did, and to then assume a specific intent simply because of the omission of a reference to international law in the effective means clause is therefore somewhat curious. Its supplementary duties under the Vienna Convention invited it to investigate more extensively the intentions of the United States and Ecuador in their formulation of the two clauses. Indeed, a sizeable current of academic thought on this

70 J Worth, supra note 65.

71 Courtney Kirkman, Fair and Equitable Treatment: Methanex v. United States and the Narrowing Scope of Nafta Article 1105, Note, 34 LAW & POL'Y INT'L BUS. 343, 345 (2002); Theodore Kill, Don't Cross the Streams: Past and Present Overstatement of Customary International Law in Connection with Conventional Fair and Equitable Treatment Obligations, Note, 106 MICH. L. REV. 853, 855-56 (2008).

subject would stress the primacy of state intentions over even seemingly explicit BIT wording, let alone wording that has required the application of a questionable interpretation.[72]

A similarly contestable approach was adopted by the tribunal in establishing the object and purpose of the BIT. Its conclusion that the raison d'être of the effective means clause was to introduce a lower threshold than would otherwise have been the case[73] was heavily reliant upon the account of a leading lawyer working within the US State Department in the 1980s. Though there is no reason for his account of US aims to have been inaccurate, the tribunal took little account of Ecuador's intentions. It also failed to acknowledge a key contextual point, namely that developing states are more likely to view effective means clauses as simply falling among a cluster of several other norms which developed states continually encourage them to foster – including such things as due process, transparency, or human rights obligations. – rather than being an independent, enforceable right.[74] Thus even if US intentions were clear, there is no reason to conclude that the clause was understood similarly by Ecuador.

B. An unhelpful definition

A second and more succinct criticism is levelled against the unhelpful nature of the definition of the new protection that results from Chevron. A priority for any investor or state considering the impact of an award is to be able to extract those indicators which might assist in ensuring that a claim can or cannot be made, for breach of effective means in this particular case. It is crucial to the interests of both parties to understand where to expect the dividing line distinguishing excusable

72 Stephen Schwebel, May Preparatory Work Be Used to Correct Rather than Confirm the 'Clear' Meaning of a Treaty Provision?, in THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY 541, 546 (Jerzy Makarczyk ed., 1996), c.f. Mahnoush Arsanjani and William Reisman, Interpreting Treaties for the Benefit of Third Parties: The "Salvors' Doctrine" and the Use of Legislative History in Investment Treaties, 104 AM. J. INT'L L. 597, 598 (2010).

73 Chevron, ¶ 243.

74 José Alvarez, 14th Annual Herbert Rubin and Justice Rose Luttan Rubin International Law Symposium: A Special Tribute to Andreas Lowenfeld: A Bit On Custom, 42 N.Y.U. J. INT'L L. & POL. 17, 32 (2009).

delays from inexcusable delays to fall, in relation to investor access to the courts of host states. Chevron makes no attempt to dispense any rigorous guidelines on this matter, yet it is this very question which defines the power of the new treaty protection to which the tribunal gave life. As "reasonable" delay remains the dominant (and vague) factor, states cannot derive any helpful guidance on how much delay to court access is acceptable in their respective domestic contexts. It is simply apparent that the defence of a generally sluggish domestic court system will not, in and of itself, protect states. In response, are states expected to afford priority to the claims of foreign investors over other matters of a domestic nature so as to spare them the otherwise usual delays, and is this a realistic and just expectation? Would indicative guidelines on average court timeframes for investment disputes suffice, if communicated by a host state to an investor prior to receiving any investment? These are warranted and foreseeable questions to which Chevron offers no definitive answers and few suggestions.

C. Systemic concerns and the double standard of Chevron and Loewen

It is an unfortunate reality that the majority of investment treaty arbitrations are filed against developing states and that a feeling of persecution may result for those habitually targeted. This feeling has emerged in spite of awards more often favouring states than investors in recent years.[75] It was recently calculated that 66 developing or transitioning states had responded to BIT claims, compared to only 17 developed states, with the percentage of claims against developing states very high and rising steadily.[76] Developing states devote substantial financial and intellectual resources to responding to claims each year. The vast pool of potential claims that have and will become available as a direct consequence of White Industries amplification of Chevron risks inciting many to rescind their existing BITs, or withdraw from the ICSID dispute resolution framework altogether. Although arguably legally justifiable, White Industries showed as little regard for the intentions of state parties as Chevron before it. The impact of the award

75 UNCTAD WORLD INVESTMENT REPORT, 96 at n.32 (2012); in recent years, 40 per cent of cases have lead to awards in favour of states and approximately 30 per cent in favour of investors. Approximately 30 per cent were settled.

76 UNCTAD, IIA ISSUE NOTE NO. 1: LATEST DEVELOPMENTS IN INVESTOR-STATE DISPUTES SETTLEMENT 2 (2011), http://unctad.org/en/Docs/webdiaeia20113_en.pdf

in White Industries has perhaps been underestimated. It appears to have escaped attention that Ecuador has terminated BITs with nine states and declared a further six unconstitutional in their current form, on the back of Chevron and White Industries. In so doing, how many investment opportunities benefitting both investors and states will not now see the light of day?

Major emerging states such as India, Brazil, Russia, Mexico and South Africa continue to resist signing and/or ratifying the Washington (or "ICSID") Convention. Recently, Ecuador, Venezuela and Bolivia have all withdrawn from ICSID. Although indicative of a fracture in the ICSID system, these measures are not in themselves of catastrophic consequence to investors – most BITs also allow for disputes to be resolved under the UNCITRAL framework, as a substitute for ICSID.[77] Of potentially longer-term concern is the risk of states responding to the creation of legal principles which they deem excessively pro-investor, economically liberal or dismissive of sovereignty, by detaching themselves from the institutional framework from which they are derived. This threatens the very universality of investment protection. One likely alternative, and potential threat to the universality of norms and institutional frameworks, is the rise of a regional approach to BIT arbitration. Recently, it has been announced that UNASUR will implement plans to limit the jurisdiction and reach of ICSID. The high concentration of investment claims brought against Latin American states, specifically, appears to have driven governments there to elaborate rules for an alternative investment protection and dispute settlement mechanism in the region, in which greater consideration would be given to sovereign and regulatory needs, and where appeal and precedents mechanisms would be put in place. Such a change could potentially be radical in its effects, establishing a regional pole to rival ICSID, a challenge to the usual finality of awards, and the end of universally-endorsed protection standards.

One may query the direction connection of these systemic and ideological concerns to Chevron and White Industries, and thus their

77 Sergey Ripinksy, Venezuela's Withdrawal From ICSID: What it Does and Does Not Achieve, International Institute for Sustainable Development, 13 Apr. 2012, available at http://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-fromicsid-what-it-does-and-does-not-achieve/

place in these pages. Simply put, they add to the double standards perceived in the protections afforded against developed states versus those afforded against developing states. Such perceptions are derived from a simple comparison of cases, such as Chevron and Loewen.[78] The latter case involved a Canadian claim for a denial of justice and thus a breach of the fair and equitable treatment standard owed to the investor under NAFTA. The tribunal agreed that a miscarriage of justice amounting to a manifest injustice had occurred, yet ultimately delivered an award in the United States' favour because, in not bringing its case to the US Supreme Court, the claimant was deemed not to have exhausted all reasonable and effective local remedies.[79] This award was highly protective of the US. The notion that the US Supreme Court offered Loewen a reasonably effective remedy is farfetched. The court hears less than 0.01 per cent of the cases it is requested to adjudicate. Moreover, the particularities of the claimant's financial situation meant that seeking to take the case to the US Supreme Court would have bankrupted it in the process, thereby removing it as a viable option in any case.[80] The requirement to exhaust local remedies was formally the same as in Chevron,[81] yet in Chevron the effective means clause was not found to impose such a stringent requirement to exhaust local remedies. Without this, the tribunal freed itself to use delays in Ecuador's judicial system to state that any further effective remedies such as appeals would be unproductive. A claimant against the United States is thus compelled to pursue remedies with microscopic prospects of success, whilst a claimant against Ecuador enjoys dispensation from this requirement as a result of delays in the country's lower courts.

78 J Worth, supra note 65.

79 Loewen, ¶¶ 151-154, 167-169.

80 Tai-Heng Chenga, Power, Authority, and International Investment Law, 20 AM. U. INT'L L. REV. 465, 510-11 (2005).

81 Chevron, ¶ 321, 326.

V. Viable Alternatives

Two possible solutions may be advanced as a means of improving the uncomfortable effective means standard with which we now find ourselves; one short-term, and one longer-term.

A. Short-term Comparative approaches and the Calvo Doctrine

Comparative public law would undeniably offer a degree of coherence upon which a tribunal might anchor its future conclusions on the meaning of an effective means clause.[82] It would require tribunals to undertake extensive examinations of how states in civil and common law systems, and of developed and developing status, have historically defined the point at which stalemate in advancing through their judicial system becomes unacceptable. This is potentially of great use, yet the broad scope of the domestic and international law investigations required lead to time and cost issues that detract from its value, as well as a concern that tribunals might weight their evaluation to correspond to the expectations of the jurisdictions from which they originate.

Arbitral tribunals are well-accustomed to considering the behaviour of states domestically in a balanced manner alongside principles of international law, rather than depending wholly upon them to define international law. In order to establish a global standard through which investors and states could expect a tribunal to undertake its evaluation, a variation on the Calvo Doctrine emerges as the most credible tool.[83] The theory at its heart is that BIT jurisprudence should establish principles and standards of protection no more repressive than those expected by developed states of their own judicial systems.[84] This would significantly narrow the scope of the tribunal's evaluation to developed states only, without necessarily resulting in analyses skewed against developing states – there are countless examples of sluggish judiciaries

82 J Worth, supra note 65.

83 The Calvo Doctrine can be summarised as a foreign policy doctrine that holds that jurisdiction in international investment disputes lies with the country in which the investment is located; J Worth, supra note 65.

84 SANTIAGO MONTT, STATE LIABILITY IN INVESTMENT TREATY ARBITRATION 75 (2009).

in developed states, and of complex cases taking lengthy periods to be heard even in jurisdictions usually know for their efficiency. Furthermore, the Calvo Doctrine also acknowledges comparative public law's stance that it is state action giving rise to a liability determined by local administrative or constitutional law that is at issue in most BIT cases.[85] This allows tribunals an opportunity to focus on a particular body of domestic law as comparative standard and to give respondent states notice of the standard against which they will be compared. It also enables experts on a particular developed state's judicial system to be hired by both parties to the proceedings. In the short term, this appears to be the least unjust and most workable solution.

B. Longer-term State input

In the longer-term, states are likely to take greater steps to issue guidance on BIT interpretation. This is typically achievable through joint statements on interpretation issued by the signatory states or through direct treaty amendment.[86] Interpretative statements have been used to establish a uniform interpretation by tribunals of the fair and equitable treatment standard under NAFTA, where disputes over whether it was an additional right or a minimum standard of customary international law had previously been rife.[87] Unlike NAFTA, however, most BITs do not contain a clause expressly allowing future interpretative statements of a kind that would be binding upon future tribunals. There exists a normative argument in certain international arbitration circles that states should not retain, upon signing a BIT, the right to alter the provisions they have previously created for third parties (investors) to rely upon. However, Article 31(3) of the Vienna Convention indicates otherwise, as it encourages tribunals to consider subsequent agreements between the treaty parties.[88] UNCTAD itself has also stated that although the task of ruling on investment claims is delegated to tribunals, states retain a right under international law to (later) confirm their original intentions

85 J Worth, supra note 65.

86 Anthea Roberts, Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States, 104 AM. J. INT'L L. 179, 216 (2010).

87 Susan D. Franck, The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions, 73 FORDHAM L. REV. 1521, 1582 (2005).

88 Roberts, supra note 86 at 199.

and provide detail of these through joint statements.[89] Currently, there is a reticence on the part of developed states to cooperate with developing states' attempts to issue interpretative statements, as evidenced incidentally, between the United States and Ecuador following Chevron.[90] As claims are increasingly brought against developed states, however, there is reason to anticipate that these states may reconsider whether allowing tribunals to determine these questions as is currently the case is truly beneficial. Developed states may well progressively warm to the idea that it might better serve their national interests (and those of their investors) to take a more active part in jointly clarifying the intentions of their BITs. Although not an idea warmly received by all scholars and practitioners, direct clarificatory acts by states are likely to emerge in the long-term as a key tool for tribunals to interpret effective means and other contentious protection standards.

As a less controversial substitute, the public nature of many investment treaty awards and the surge in their number means that tribunals may also be increasingly able to take greater consideration of states' responses in other pleadings on similar matters, where these exist.[91] Pleadings before tribunals form a part of state practice - if two states have expressed overlapping views in separate pleadings in separate cases regarding their interpretation of effective means (or any other protection), some degree of agreement can cautiously be deduced and applied to the BIT between those two states.[92] Whether a capital-exporting state could then agree with a capital-importing state to issue a formal, joint position on interpretation of a standard such as effective means remains to be seen, but de facto statements in pleadings are nonetheless persuasive in their own right.

Interpretative statements and de facto statements clearly offer great potential in clarifying BIT protections and the standards they are

89 UNCTAD, IIA ISSUE NOTE NO. 3: INTERPRETATION OF IIAS: WHAT STATES CAN DO 3 (2011).

90 As this predicted trend becomes more commonplace, it will be interesting to observe what action might be taken by an investor against his own state in the event that an interpretative statement were issued with the effect of radically diminishing the rights in the BIT on which he relied at the time of choosing to make an investment.

91 J Worth, supra note 65.

92 Roberts, supra note 86 at 221.

intended to comprise. Yet the ambiguity surrounding their immediate achievability is a sufficient hindrance in the short-term, even if longer-term changes in practice suggested above give rise to optimism. If state practice cannot currently be interpreted because of a lack of interpretative or de facto statements, and if arbitrators do not consider themselves in a position to otherwise give the ordinary meaning to an effective means clause as per their compulsory duties under the Vienna Convention, then for present purposes, that ordinary meaning must be identified through the use of comparative public law and the Calvo Doctrine.

VI. Conclusion

As a result of the awards rendered in Chevron and White Industries, effective means has become an independent treaty protection with a potentially deep bite and far-reaching consequences. It offers a more viable claim and an easier-to-breach standard than that catered for by customary international law through denial of justice clauses. In theory, the repercussions of this evolution may be felt by all states. In reality, developing states with under-resourced or uncooperative judiciaries will bear the brunt of the burden, and may, like India, be surprised to see the new right exercised by investors under BITs in which that right was never intended to have existed. Whilst it was entirely reasonable to conclude that undesirable delays had occurred in both Chevron and White Industries, the method by which a new protection was afforded to investors was obscure. Regrettably, investors, states, scholars and practitioners alike are left with an effective means standard that was poorly justified, insufficiently defined and actively oblivious to states' intentions. Such awards only contribute to the systemic concerns – justified or not – of several developing states over the long-term viability of current investment treaty protections and investment arbitration institutions. Thankfully, tribunals have both immediate and long-term alternatives at their disposal, should they see fit to refine the effective means standard into the more firmly-grounded and transparent protection that would surely be welcomed by investors and states alike.