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Power, Authority and International Investment Law

Tai-Heng Cheng

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POWER, AUTHORITY AND INTERNATIONAL INVESTMENT LAW

TAI-HENG CHENG*

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Abstract: International investment law stabilizes investment participants' behavior and expectations and investment outcomes. This law controls global decision-making by modulating power and authority between participants through four processes: (1) *triggering* shifts in power and authority; (2) *draining* power and authority from states; (3) *transferring* this power and authority to other decision-makers; and (4) *restoring* state power and authority. Some policy-makers in both powerful and less powerful states regard these shifts in power and authority as unjustified attacks on sovereignty. To minimize these policy-makers' concerns, this article recommends modifications to international investment law that will promote global well-being further.

INTRODUCTION

International investment law has developed in response to globalization and the dramatic increase in cross-border investments. Contemporary international investments, such as power projects or tourist resorts, are so massive that they involve numerous participants,¹ including multinational corporations, joint venture vehicles, local investors, governments, their political sub-divisions and regulatory entities, insurers and banks. These participants establish their specialized roles and stabilize common expectations through a framework of norms, project agreements, guarantees, multilateral and bilateral investment treaties ("BITs"), arbitral awards and court decisions.

International investment law reinforces investment roles and expectations by redistributing power and authority among decision-makers² so that they can prevent and rectify deviations by participants from investment arrangements. Although states are the loci of power and authority in classical international law,³

1. In this article, "participants" refers to parties connected with international investments.

2. In this article, "decision-makers" refers to participants who can affect investment outcomes.

3. See OPPENHEIM'S INTERNATIONAL LAW 122 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) ("Sovereignty is supreme authority"); *id.* at 500 ("formerly, states alone used to be the subjects of international law").

international investment law transfers some of this power and authority to other decision-makers, including investors, arbitral tribunals and foreign courts. Investment treaties and contracts contain express investment protections, including the rule of law, due process and the right to own property.⁴ These provisions often demand compliance by host states even if these norms intrude upon areas of sovereign control, such as monetary policies or the exploitation of resources. If host states ignore these demands for compliance, control mechanisms are triggered. Arbitral tribunals may be constituted pursuant to dispute resolution provisions in investment agreements to restore the norms from which the host state deviated.⁵ International investment law then calls on foreign courts to enforce these arbitral decisions.⁶ When such control mechanisms are successful, participants adjust their behavior to avoid or minimize the costs of non-compliance, thereby restoring equilibrium in investment arrangements, bolstering international investment law's credibility and promoting international investments.

This introductory analysis of power and authority in international investment law raises detailed questions about the international decision-making process.⁷ When and how are shifts in power and authority triggered? What sorts of power and authority are involved? To whom is power and authority transferred? How effective is this transfer? When, if at all, might this power and authority be regained?

4. See, e.g., Agreement Between the Belgo-Luxembourg Economic Union and the Government of the Republic of India for the Promotion and Protection of Investments, Oct. 31, 1997, arts. 3-5, 2136 U.N.T.S. 144 [hereinafter Belgium-India BIT] (providing equitable and most-favored nation treatment to investments and timely compensation for expropriation); Agreement Between the Government of the Republic of Cyprus and the Government of the Republic of India for the Mutual Promotion and Protection of Investments, Apr. 9, 2002, arts. 3-5 [hereinafter Cyprus-India BIT] (copy of file with author) (expressing the same).

5. See, e.g., Belgium-India BIT, *supra* note 4, art. 9 (providing that parties arbitrate disputes that are not resolved in six months); Cyprus-India BIT, *supra* note 4, art. 9 (expressing the same).

6. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. 3, 21 U.S.T. 2518, 330 U.N.T.S. 38 [hereinafter New York Convention] (establishing that state courts are generally obliged to enforce foreign arbitral awards).

7. In this article, "decision-making" refers to the process in which decision-makers exchange claims and counter claims and deploy strategies and counter strategies to reach investment outcomes.

What are the global consequences of redistributing sovereign power and authority? Are decision-makers accountable for their use of redistributed power and authority? How should international investment law be appraised against global policies?⁸

Scholars do not appear to have addressed these questions directly. Legal discussions have usually examined the restraints that legal norms, such as fair and equitable treatment and compensation for expropriation, place on states in relation to their treatment of investments and investors.⁹ Other commentaries have examined the balance between investor protections and sovereignty over natural resources.¹⁰ This scholarship, while important, does not analyze fully international investment law's impact on global decision-making and outcomes. By focusing on international investment law's impact on sovereignty, i.e., the authority and power to self-govern in relation to internal matters such as taxation and external matters such as defense,¹¹ few scholars have taken the critical next step of examining global outcomes of shifts in power and authority.

8. In this article, "policies" refers to international law's goals.

9. See generally Stephen Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, 1999 BRIT. Y.B. INT'L L. 99 (discussing fair and equitable treatment); Giorgio Sacerdoti, *Bilateral Treaties and Multilateral Instruments on Investment Protection*, 269 RECUEIL DES COURS 261, 339-408 (1997) (defining standards of treatment of foreign investments, including fair and equitable treatment, full protection and security and most-favored nation treatment); RUDOLF DOLZER & MARGRETE STEVENS, *BILATERAL INVESTMENT TREATIES* 108-14 (1995) (discussing compensation for expropriation); F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, 1981 BRIT. Y.B. INT'L L. 241, 243-44 (discussing equitable treatment and full protection and security).

10. See Stephen M. Schwebel, *The Story of the United Nations Declaration on Permanent Sovereignty over Natural Resources*, in JUSTICE IN INTERNATIONAL LAW 401 (1994) (discussing U.N. Resolution on Permanent Sovereignty over Natural Resources); OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 300-29 (1991) (discussing the relationship between sovereignty and natural resources in the context of international business).

11. Cf. *The Island of Palmas (Award)* (Neth. v. U.S.), 2 R.I.A.A. 831, 838 (1928) (stating that sovereignty "is the right to exercise . . . to the exclusion of any other State, the functions of a State.") (per Max Huber); W. Michael Reisman, *Why Regime Change is (Almost Always) a Bad Idea*, 98 AM. J. INT'L L. 516, 516 (2004) ("[S]overeignty in its modern sense is simply the demand of each territorial community . . . to be permitted to govern itself without interference by the entire organized community" (emphasis added)).

To understand and appraise international investment law's impact on global outcomes, this article dissects the relationship between power, authority and international investment law.¹² Power refers to the ability of decision-makers to impose their will on other participants to affect outcomes.¹³ Authority refers to the deployment of power coupled with an expectation of compliance, or at least recognition of that expectation, by other participants.¹⁴ Unlike sovereignty, authority and power do not refer simply to states' autonomy to act, but also include the effect of all decision-makers' actions on other participants and on outcomes. Whereas other scholarship examines the relationship between international investments and state sovereignty, i.e., states' ability to act in relation to investments, this article's analysis of power and authority goes several steps further towards determining whether these actions secure compliance from global participants and anticipating counter-demands and responses from other decision-makers. Through such an analysis of power and authority in international investment law, global decision-making and outcomes can be appraised.

This article argues that international investment law shifts power and authority from states to investors, tribunals and other decision-makers. These shifts produce outcomes that only partially support global policies. To better promote international investment law's policies, power and authority flows should be modulated. Part II maps the four processes through which international investment law shifts power and authority between decision-makers: (1) *triggering* shifts in power and authority between decision-makers;¹⁵

12. Cf. Oscar Schachter, *The Nature and Process of Legal Development in International Society*, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY 43, 51 (R. St. J. Macdonald & Douglas M. Johnston eds., 1989) ("[I]nternational law is a product of the interplay of power and interest conditioned by material conditions and perceptions of need and aspirations.").

13. Cf. *id.* at 49 (stressing power's relationship with international law).

14. See Rosalyn Higgins, *Integrations of Authority and Control*, in TOWARD WORLD ORDER AND DIGNITY, ESSAYS IN HONOR OF MYERS S. MCDUGAL 79, 81 (W. Michael Reisman & Burns H. Weston eds., 1976) (discussing meanings of power and authority under New Haven jurisprudence); cf. H.L.A. HART, THE CONCEPT OF LAW 56-57 (2d ed. 1994) (arguing that laws are accompanied by a recognition that postulated rules are of a legal nature).

15. See discussion *infra* Part II.A.

(2) *draining* state power and authority once the international investment law has been triggered;¹⁶ (3) *transferring* this power and authority to other decision-makers;¹⁷ and (4) *restoring* power and authority to states.¹⁸ Part III appraises the effects of power and authority shifts against the global policies of development, equity and control.¹⁹ Finally, Part IV projects investment trends and makes recommendations to promote global policies further.²⁰

I. THE RELATIONSHIP BETWEEN INTERNATIONAL INVESTMENT LAW, POWER AND AUTHORITY

Although some states claim to exert great authority over foreign investments,²¹ multinational corporations and capital-exporting states have secured greater investment protections over time. Repeated signaling of proposed investment norms through international agreements and subsequent patterns of compliance with these agreements have stabilized expectations of appropriate state behavior. Arbitral tribunals and international courts have usually been custodians of international investment norms when called upon by investors and states to adjudicate investment disputes.²² National

16. See discussion *infra* Part II.B.

17. See discussion *infra* Part II.C.

18. See discussion *infra* Part II.D.

19. See discussion *infra* Part III.

20. See discussion *infra* Part IV.

21. See Rosalyn Higgins, *The Taking of Property by the State*, 176 RECUEIL DES COURS 259, 309 (1982-III) (noting that the UK government regarded its sovereign right to regulate natural resources as unconstrained by foreign licenses it had granted); Giorgio Sacerdoti, *Bilateral Investments and Multilateral Instruments on Investment Protection*, 269 RECUEIL DE COURS 261, 279 (1997) ("Most capital importing countries took the view that defining the standards of admission, treatment and compensation (in case of nationalization) of foreign investors was a matter purely within domestic law and jurisdiction.").

22. See, e.g., *Tecnicas Medioambientales v. United Mexican States* (Award), ICSID Case No. ARB(AF)/00/2 (May 29, 2003), available at <http://www.worldbank.org/icsid/cases/laudo051903FINAL.pdf> (last visited Feb. 11, 2005), translated in 43 I.L.M. 133 (2004) (adjudicating foreign investor's claim had Mexico had violated its investment treaty); *Case Concerning Elettronica Sicula S.P.A. (U.S. v. Italy)*, 1989 I.C.J. 15, 82 (July 20) (rejecting the United States' argument that Italy violated its Treaty of Friendship, Commerce and

courts have often deployed their enforcement authority to support decisions by international tribunals.²³ Through such a convergence of decision-makers towards proposed norms, international investment law has consolidated power and authority over participants.

A. TRIGGERING POWER AND AUTHORITY SHIFTS

In international investment law, triggers begin the shift of power and authority from states to other decision-makers. In the simplest case, a state, after conducting a full analysis of the costs and benefits of entering into the international investment framework, expressly signals its intention to enter this framework, such as by inviting investments. Investors respond to these signals, leading to investment agreements between local and foreign investors and host states. These investment agreements contain triggers that redistribute power and authority among investment parties.²⁴

1. Triggers

An investment treaty between a host and foreign state triggers the host state's loss of power and authority over investments in its territory to the foreign state's investors through provisions that provide investor protections and that transfer the treaty's enforcement from signatory states to their investors—the parties with direct interest in investment protections. The signatory states' investors, who may not have participated in the negotiation and conclusion of an investment treaty, may enforce the treaty's investment protections through the treaty's dispute resolution procedure, which often stipulates arbitration as the final recourse. In

Navigation).

23. See, e.g., *Czech Republic v. CME Czech Republic B.V.*, Case No. T 9737-01, slip op. (Svea Ct. App. May 13, 2003) (translation in English), available at http://www.mfcr.cz/index_en.php (last visited Nov. 18, 2004) (upholding arbitration award); *Westland Helicopters Ltd. v. Arab Organization for Industrialization*, 1995 Q.B. 282 (Eng.) (upholding leave to enforce arbitration award in investment dispute).

24. See generally Andrew Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 640 (1998) (discussing investment agreements and the reasons why states, especially developing states, ratify them despite the amount of control that developing states relinquish through these agreements).

this way, investment treaties trigger signatory states' loss of control over investments in their territory to other signatory states' investors.

Although some investment treaties restrict their triggering effect by expressly limiting who qualifies as an investor and what qualifies as an investment,²⁵ other treaties propose wide meanings for "investors" and "investments." Decision-makers, such as tribunals and investors, have reinforced these proposals by accepting that such investment treaties protect even foreign minority shareholders in investment companies.²⁶ Where minority shareholders hold beneficial interests in contract rights, these beneficial interests may be considered investments under investment treaties that define "claims to money" as investments.²⁷ The confluence of power and authority behind such far-reaching proposals constrains state power over foreign investors with direct or indirect interests in projects situated in the state's territory.

25. See, e.g., Agreement between the Government of the Republic of Austria and the Government of the Republic of India for the Promotion and Protection of Investments, Nov. 8, 1999, art. 1(c), 2164 U.N.T.S. 106 (requiring participants to hold at least 51% of shares or to exercise decisive control over the investment vehicle in order to qualify as investors under the bilateral investment treaty ("BIT")).

26. See *Case Concerning Elettronica Sicula S.p.A (ELSI) (U.S. v. Italy)* (Award), 1989 I.C.J. 15 (July 20) (holding that U.S. shareholders of an Italian corporation could bring claims against Italy for measures imposed on the corporation); *CMS Gas Transmission Co. v. Republic of Argentina* (Jurisdiction), ICSID Case No. ARB/01/8, slip op. ¶ 48 (July 17, 2003) (noting extension of foreign investor protections to a corporation's shareholders); *Enron Corp. v. Argentine Republic* (Jurisdiction), ICSID Case No. ARB/01/3, slip op. ¶ 49 (Jan. 14, 2004) (stating that under the provisions of the Argentina-U.S. bilateral investment treaty, non-controlling or minority shareholders may bring claims separate from a corporation), available at <http://www.asil.org/ilib/Enron.pdf> (last visited Dec. 28, 2004); *GAMI Invs., Inc. v. Gov't of the United Mexican States* (Final Award), slip op. ¶ 37 (UNCITRAL, Nov. 15, 2004) ("[T]he fact that [claimant] GAMI is a minority shareholder does not affect its right to seek the international arbitral remedy.").

27. See *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (Jurisdiction), ICSID Case No. ARB/01/13, 42 I.L.M. 1290, 1311, ¶ 135 (Aug. 6, 2003) (stating that under the BIT in question, investment includes every kind of asset and claims to money); *Azurix Corp. v. Argentine Republic* (Jurisdiction), ICSID Case No. ARB/01/12, slip op. ¶ 63 (Dec. 3, 2003) ("A company, shares held in a company or rights under a contract, any contract, qualify as an investment.").

“Umbrella clauses” in investment treaties are a potentially potent trigger. Umbrella clauses purport to bind signatory states to all their undertakings, including commitments that would otherwise not be treaty obligations.²⁸ Because umbrella clauses boot-strap non-treaty undertakings onto investment treaties, they are “far-reaching in scope, . . . automatic and unqualified and sweeping in their operation, [and] burdensome in their potential impact upon a Contracting Party[.]”²⁹

An umbrella clause was recently given legal effect in *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* (“*SGS v. Philippines*”).³⁰ The tribunal found that a BIT provision stating that “[e]ach Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party” transformed every contractual obligation in relation to BIT investments into international law obligations.³¹ The tribunal reasoned that protecting investments through an aggressive interpretation of umbrella clauses supported the BIT’s object of promoting investments.

There is, however, some doubt about whether umbrella clauses are triggers. Six-months prior to *SGS v. Philippines*, the tribunal in *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* took the opposite view, i.e., that umbrella clauses do not transform contract obligations into international law obligations absent clear words evincing such an intention.³² The tribunal found that an article stating that each contracting state “shall constantly guarantee the observance of the commitments it has entered into with respect to the [BIT] investments” was insufficiently specific to turn

28. See OECD Draft Convention on the Protection of Foreign Property, art. 2, 7 I.L.M. 117, 123 (1968) (“Each Party shall at all times ensure the observance of undertakings given by it in relation to property of nationals of any other Party.”); *id.*, Notes and Comments to Art. 2, ¶ 1(b) (“any right originating under such an undertaking gives rise to an international right”).

29. *SGS v. Pakistan*, 42 I.L.M. 1290, ¶ 167.

30. *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6 (Jan. 29, 2004), available at <http://www.worldbank.org/icsid/cases/SGSvPhil-final.pdf> (last visited Feb. 20, 2005).

31. *Id.* ¶¶ 127-28.

32. *SGS v. Pakistan*, 42 I.L.M. 1290, ¶¶ 163-74.

all commitments—contractual, statutory and administrative, whether unilateral or otherwise—into international law obligations.³³

In spite of the *SGS* tribunals' directly conflicting reasoning, the triggering effect of umbrella clauses may be confirmed before too long. The trend in international investment law over the last half century has been to support investors and encourage investments by weakening state power and authority.³⁴ This trend does not show signs of abating because investors continue to seek new markets and developing states continue to seek capital, expertise and technology.³⁵ In this pro-investment climate, participants' expectations regarding umbrella clauses could well settle around a wide reading of these clauses to protect international investments further.

2. Proxy Triggers

A "proxy trigger" is a trigger that is created by parties other than a host state that erodes that state's power and authority. Tribunals and investors have combined the well-established prescription that a tribunal is competent to determine its own competence³⁶ with their recommendation that a non-signatory state should be bound by an investment agreement if its consent can be implied from the investment project's circumstances. In *Bridas S.A.P.I.C. v.*

33. *Id.*; see *Salini Construttori S.p.A v. Hashemite Kingdom of Jordan* (Jurisdiction), ICSID Case No. ARB/02/13, slip op. ¶¶ 123-126 (Nov. 15, 2004), (finding that BIT clause that obliged each party to create and maintain in its territory a legal framework favorable to investments was not an umbrella clause).

34. This trend is evinced by, *inter alia*, the increasing number of BITs. The first BITs were concluded by the Federal Republic of Germany with Pakistan and the Dominican Republic in 1959, and in forty years, 1,332 BITs had been concluded by 162 states. See DOLZER & STEVENS, *supra* note 9, at 1 (charting growth of BITs); UNCTAD, *BILATERAL INVESTMENT TREATIES IN THE MID-1990S* 8-10 (1998) (noting the dramatic increase in the number of BITs during the 1990s).

35. See DOLZER & STEVENS, *supra* note 9, at xi (stating that foreign investments are forecast to grow and that states have, in increasing numbers, concluded BITs).

36. See, e.g., International Chamber of Commerce, Rules of Arbitration (1998), art. 6 (stating that the arbitral tribunal determines its own jurisdiction), available at http://www.iccwbo.org/court/english/arbitration/pdf_documents/rules/rules_arb_english (last visited Nov. 17, 2004); *Bridas S.A.P.I.C. v. Turkmenistan* (Partial Award), ICC Case No. 9058/FMS/KGA, slip op. at 9-10 (June 25, 1999) (asserting that the arbitral tribunal had competence to determine its own jurisdiction).

Turkmenistan (Partial Award), the Bidas conglomerate entered into a joint venture agreement with a private Turkmen company for the exploitation of oil in Turkmenistan.³⁷ The government of Turkmenistan was not a signatory to the agreement, which contained an arbitration clause.³⁸ When the joint venture encountered problems, Bidas commenced International Chamber of Commerce ("ICC") arbitration against Turkmenistan.³⁹

Although Turkmenistan claimed that it was not a party to the joint venture agreement and was therefore not bound by the arbitration agreement,⁴⁰ the ICC tribunal exerted jurisdiction over Turkmenistan by accounting for "the surrounding circumstances [that] provides the context for the JV Agreement" and finding that Turkmenistan had evinced an intention to be bound by the joint venture agreement even though Turkmenistan had not signed it.⁴¹ Turkmenistan's conduct prior to the formation of the joint venture showed its high level of involvement because Turkmenistan had sought the international tender for the exploitation of its natural resource—oil. Further, some joint venture agreement provisions could only be fulfilled by Turkmenistan, including guarantees as to taxes, exchange rates and duties,⁴² and because there was a "significant overlap in personnel who controlled the project through the Government."⁴³ With a sleight of hand, the tribunal stated that these circumstances created a legitimate expectation in Bidas that Turkmenistan would be bound by the agreement and such an expectation "can translate into intention."⁴⁴

The tribunal ignored the fact that Turkmenistan had sought not to enter the investment directly and instead facilitated arrangements for Turkmen companies while keeping a close eye on its natural

37. *Bidas S.A.P.I.C. (Partial Award)*, slip op. at 2.

38. *Id.* at 2-4.

39. *Id.* at 4.

40. *Id.*

41. *Id.* at 20.

42. *Id.* at 15-17.

43. *Id.* at 19.

44. *Id.* at 19.

resources.⁴⁵ By ignoring the corporate structure of the Turkmen entity, the tribunal bound Turkmenistan to the joint venture agreement.⁴⁶ If other decision-makers accept the *Bridas* tribunal's reasoning, host states could find their power and authority eroded in spite of their intentions and efforts to preserve their control over both local and foreign venture partners operating in critical industries.⁴⁷

Some courts have, however, resisted tribunals' and investors' aggressive attempts to constrict sovereignty absent an express agreement by states to be bound by investment agreements. The U.S. Fifth Circuit opposed the *Bridas* award, holding that the four corners of the joint venture agreement did not bind Turkmenistan to arbitration because Turkmenistan neither signed the agreement nor was named as a party in the agreement.⁴⁸

In spite of such rulings against inadvertent triggers of power and authority transfers, three factors indicate that the authority of proxy triggers over states may be accepted over time. First, some courts support proxy triggers by holding that arbitral tribunals can correctly bind non-signatory states to arbitration agreements,⁴⁹ thereby allowing an investor to enforce an award against a non-signatory state in these forums. Second, arbitral tribunals have bound companies to investment agreements they did not sign under alter-

45. See *id.* at 2 (explaining that while the government of Turkmenistan negotiated with *Bridas* to form the joint venture, it was not a signatory to any of the operative documents).

46. *Id.* at 18-20.

47. See *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt (Award)*, ICC Arbitration No. VD/AS No. 3493, 3 ICSID (W. Bank) 46, 62 (Mar. 11, 1983) (finding that Egypt was bound by an investment contract that it did not sign).

48. See *Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347, 355 (5th Cir. 2003) ("[I]t is apparent that the four corners of the agreement did not bind the government to arbitrate this dispute."); see also Roger Alford, *Binding Sovereign Non-Signatories*, 19-3 MEALEY'S INT'L ARB. REP. 14 (2004) (discussing the *Bridas* Fifth Circuit decision); *Arab Republic of Egypt v. Southern Pacific Properties Ltd.*, 3 ICSID (W. Bank) 79 (*Cour d'Appel*, France, July 12, 1984) (translation in English), *aff'd Cour de Cassation* 3 ICSID (W. Bank) 96 (Mar. 11, 1987) (finding that Egypt was not bound by the arbitration agreement that it did not sign).

49. See, e.g., *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, 3 ICSID (W. Bank) 92 (Amsterdam Dist. Ct. 1984) (translation in English) (granting leave to enforce ICC award that determined that a non-signatory state was bound by an arbitration agreement).

ego, estoppel and agency theories.⁵⁰ In the incremental development of law, these prescriptions may eventually extend to non-signatory states. Third, courts and tribunals have applied principles of state responsibility for instrumentalities⁵¹ to impute the liability of companies onto states.⁵² These factors do not show signs of abating and proxy triggers may eventually penetrate states' jurisdictional defenses.⁵³

50. See *Dow Chemical France v. Isover Saint Gobain* (Interim Award), ICC Case No. 4131 (Sept. 23, 1982), in SIGVARD JARVIN & YVES DERAIS, COLLECTION OF ICC ARBITRAL AWARDS 1974-1985 150 (1990) (holding Dow Chemical Company (USA) responsible for its subsidiary, Dow Chemical France); see also Bernard Hanotiau, *Problems Raised by Complex Arbitrations Involving Multiple Contracts—Parties—Issues*, 18 J. INT'L ARB. 251, 258-61 (2001) (discussing the agency theory); Otto Sandrock, *Extending the Scope of Arbitration Agreements to Non-Signatories*, in THE ARBITRATION AGREEMENT—ITS MULTIFOLD CRITICAL ASPECTS, ASA Special Series No. 8 165 (Marc Blessing ed., 1994) [hereinafter THE ARBITRATION AGREEMENT] (explaining how an arbitration agreement extends to non-signatories under the “group-of-companies” and “piercing of the corporate veil” doctrines); Sigvard Jarvin, *Extending the Scope to Non-Signatories: Group of Companies Doctrine*, in THE ARBITRATION AGREEMENT, *id.* at 181 (examining the group of companies doctrine and its consequences).

51. See *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, U.N. GAOR Int'l L. Comm'n., 56th Sess., Supp. No. 10, at arts. 4, 8, U.N. Doc. A/56/10, ch. IV.E.1 (2001) (stating that the “conduct of any State organ shall be considered an act of that State under international law,” and that a person's conduct shall be attributed to the state if he is acting on the state's instructions or under the state's direction); *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts*, U.N. GAOR Int'l L. Comm'n., 56th Sess., Supp. No. 10, arts. 4, 8, U.N. Doc. A/56/10, ch. IV.E.2 (2001) (discussing cases on responsibility of a state for its instrumentalities and organs).

52. See *McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346, 351-52 (D.C. Cir. 1995) (holding Iran responsible for corporation over which it exercised control); *Foremost Tehran, Inc. v. Islamic Republic of Iran*, 10 IRAN-U.S. CL. TRIB. REP. 228, 241-42 (1987) (holding the same); *Maffezini v. Kingdom of Spain* (Rectification and Award), ICSID Case No. ARB/97/7 (Nov. 13, 2000, Jan. 31, 2001) (translation in English) (holding Spain responsible for the acts of its state entity); *Case Concerning Barcelona Traction, Light & Power Co. Ltd. (Belg. v. Spain)* (Second Phase), 1970 I.C.J. 4, 39, ¶ 58 (Feb. 5, 1970) (“[V]eil lifting . . . is admissible to play . . . a role in international law.”).

53. Proxy triggers will be especially authoritative where a signatory's corporate form is a sham designed to perpetrate fraud and decision-makers are keen to attach responsibility for the signatory corporation's acts to the controlling state.

3. Forum Selection Triggers

Forum selection clauses and arbitration agreements are another genus of triggers that diminish states' power and authority to determine investment outcomes. A state's court is usually its safety net. If other strategies to determine outcomes—such as negotiations or administrative actions—have failed, state courts deploy their judicial authority to determine investment outcomes. However, through forum selection triggers, investors contract that a host state's judiciary shall not interfere with their investments. These forum selection triggers effectively neutralize state courts' authority over investment disputes because national courts and international tribunals often enforce these clauses.

Forum selection triggers are particularly potent because they do not require a state's consent or even participation in their negotiation. Foreign courts and arbitral tribunals tend to respect the express intentions of contracting parties in arbitration agreements, regardless of the host state's preferences.⁵⁴ In *ICC Case No. 5294*, a Danish firm commenced arbitration under an arbitration clause in its investment contract with an Egyptian firm.⁵⁵ The Egyptian firm brought an action in Egyptian courts to declare the clause invalid because it violated Egyptian law.⁵⁶ In response, the arbitrator sitting in Switzerland found that the validity of the arbitration clause under Egyptian law was immaterial because the clause's validity was governed by the *lex fori*, i.e., Switzerland, and that the Egyptian proceedings accordingly had no effect on the arbitration.⁵⁷ Even though Egypt had a clear sovereign interest in applying its laws to disputes involving its nationals, the arbitration clause between

54. See *Compañía Minera Condesa SA v. Compañía de Minas Buenaventura SA*, 13-9 MEALEY'S INT'L ARB. REP. C-1, C-6 (German Fed. Ct., Civ. Div., Dec. 19, 1997) (noting that state courts must generally send parties to arbitration if an arbitration agreement exists); *ICC Case No. 1512* (1970) (Second Preliminary Award), in SIGVARD JARVIN & YVES DERAIS, *COLLECTION OF ICC ARBITRAL AWARDS 1974-85* 37, 38 (1990) (disagreeing with the defendant's view that host state courts may not have their jurisdiction ousted).

55. *ICC Case No. 5294* (Feb. 22, 1988), in SIGVARD JARVIN ET AL., *COLLECTION OF ICC ARBITRAL AWARDS 1986-1990* 180 (1984).

56. *Id.* at 183.

57. *Id.*

private parties effectively triggered the transfer of power and authority of Egypt's courts to the arbitral tribunal.⁵⁸

Forum selection triggers can even exclude a host state's judicial authority over disputes involving local investors. Although a state's relationships with its nationals are classically regarded as an internal sovereign matter, the policy of promoting and protecting investments has increasingly taken precedence over sovereignty over nationals. Investors have signaled that international law should exert control over state actions relating to domestic concessionaires by stipulating in investment agreements that domestic concessionaires shall be deemed to be foreign investors. In response to investors' signals, tribunals have accepted investors' recommendation and exercised jurisdiction over such domestic concessionaires.

In *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela (Jurisdiction)*, the domestic concessionaire was registered in Venezuela.⁵⁹ The investment agreement provided that the concessionaire was to be considered an investor under foreign control for the purposes of establishing International Center for Settlement of Investment Disputes ("ICSID") jurisdiction if the majority of the concessionaire's shares were held by a foreign national from an ICSID state.⁶⁰ The tribunal accepted this definition of "foreign control," stating that the parties were free to agree on a reasonable meaning of foreign control under the ICSID Convention.⁶¹ The tribunal concluded that ICSID, and not the Venezuelan courts, had jurisdiction over the dispute because the

58. *Id.* at 184 ("Egyptian Courts would not have jurisdiction of either these proceedings or the arbitrator.").

59. *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela (Jurisdiction)*, ICSID Case No. ARB/00/5, slip op. ¶ 9 (Sept. 27, 2001), (stating that the Venezuela registered company was incorporated to serve as the concessionaire for the project), available at <http://www.worldbank.org/icsid/cases/decjuris.pdf> (last visited Feb. 25, 2005).

60. Concession Agreement between Autopista Concesionada de Venezuela, C.A. and República Bolivariana de Venezuela, cls. 63-64, cited in *id.* ¶¶ 78-79.

61. See *Autopista Concesionada de Venezuela, C.A. (Jurisdiction)*, slip op. ¶ 64 (stating that parties' definition of control is reasonable because it used the traditional share ownership test in determining control).

majority of the concessionaire's shares had come to be held by a U.S. corporation.⁶²

This ICSID award shows how a forum selection trigger can erode a state's judicial control over its local corporations. First, states consent to the ICSID Convention, which provides at Article 25 that ICSID shall have jurisdiction over investment disputes if the parties submitted to ICSID's jurisdiction in writing and agreed that a domestic investor shall be considered a foreign national because of foreign control, "as long as the definition of foreign control chosen by the parties is reasonable and the purposes of the Convention have not been abused."⁶³ Domestic investors then agree with their investment partners that the domestic investors shall be deemed to be foreign investors if mutually agreed-upon criteria for foreign control are met. Once the domestic investor meets the requirements for foreign control, the power and authority of the host state's courts over the investment project is effectively neutralized by the forum selection triggers in Article 25 of the ICSID Convention and the investment agreements.⁶⁴

Some decision-makers have proposed to make forum selection triggers even more potent by supplementing these triggers' authority with Most Favored Nation ("MFN") clauses.⁶⁵ MFN clauses may be found in contracts or treaties.⁶⁶ An MFN clause obliges parties to

62. *See id.* ¶¶ 77-142.

63. *Id.* ¶ 116.

64. *See* Tokios Tokelés v. Ukraine (Jurisdiction), ICSID Case No. ARB/02/18 (Apr. 29, 2004) (asserting ICSID jurisdiction in a dispute between Ukraine and a Lithuanian corporation that was controlled and 99% owned by Ukrainian nationals), *available at* <http://www.worldbank.org/icsid/cases/tokios-decision.pdf> (last visited, Mar. 1, 2005). *But see id.*, dissenting opinion of Chairman Prosper Weil, slip op. ¶¶ 5-6 (arguing that ICSID arbitration was intended only for international disputes between a state and foreign investors), *available at* http://www.worldbank.org/icsid/cases/tokios-dissenting_opinion.pdf (last visited, Mar. 1, 2005).

65. *See, e.g.*, Plama Consortium Ltd. v. Republic of Bulgaria (Jurisdiction), ICSID Case No. ARB/03/04, slip op. ¶ 183 (Feb. 8, 2005) (noting claimant's contention that Bulgaria-Cyprus BIT's Most Favored Nation ("MFN") provision covers dispute settlement provisions in other BITs).

66. *See, e.g.*, Agreement Between the Government of the Republic of India and the Government of the Italian Republic on the Promotion and Protection of Investments, Nov. 23, 1995, art. 4 (on file with author) (providing MFN treatment).

treat each other no less favorably than they treat third parties. Some investors have argued, and some tribunals have accepted, that an MFN clause in an international agreement can import a forum selection trigger that is more favorable to investors into that investment agreement.⁶⁷ However, because forum selection triggers have such a strong neutralizing effect on the authority of municipal courts, host states and some tribunals have been reluctant to extend the reach of forum selection triggers through MFN clauses.⁶⁸ The current equilibrium between these two positions appears to be that an MFN clause may augment forum selection triggers only if it clearly refers to such triggers,⁶⁹ such as by expressly stating that it applies to dispute resolution.⁷⁰

B. DRAINING STATE POWER AND AUTHORITY

Once triggers have been sprung, international investment law swiftly erodes state power and authority from all three branches of government. Classical international law conceived of states as the most basic legal persons. Under this view, power and authority resided in the state as an indivisible and opaque entity. Behind the sovereign veil, however, power and authority reside in each of the state's decision-makers, such as the three branches of government

67. See *Maffezini v. Kingdom of Spain* (Jurisdiction), ICSID Case No. ARB/97/7, slip op. ¶¶ 38-64 (Jan. 25, 2000) (translation in English) (finding that the Argentina-Spain BIT MFN clause imported the Chile-Spain BIT forum selection trigger).

68. See *Salini Costruttori S.p.A. v. Hashemite Kingdom of Jordan* (Jurisdiction), ICSID Case No. ARB/02/13, slip op. ¶ 119 (Nov. 15, 2004) (finding that investment agreement's MFN clause did not apply to dispute settlement clauses); *Plama Consortium Ltd. v. Republic of Bulgaria* (Jurisdiction), ICSID Case No. ARB/03/04, slip op. ¶ 198-99 (Feb. 8, 2005) (finding that BIT's MFN clause did not apply to dispute settlement provisions).

69. See *Plama Consortium Ltd. v. Republic of Bulgaria* (Jurisdiction), ICSID Case No. ARB/03/04, slip op. ¶ 223 (Feb. 8, 2005) ("[A]n MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.").

70. Compare *id.* ¶ 204 (citing example of UK model BIT's MFN clause expressly providing that the clause applies to article 1 to 11 of the BIT, which includes the dispute settlement provisions in articles 8 and 9), with *id.* ¶ 205 (noting that an MFN clause providing that it applies "with respect to all matters" does not "alleviate the doubt" about whether it applies to dispute settlement).

and their sub-divisions. A state's international acts result from the complex interactions of these decision-makers.

International investment law diminishes the authority and power of a state by restraining its internal decision-makers. Ironically, international law exerts control over internal decision-makers precisely because international law does not recognize them as legal persons. By not distinguishing between states and their organs and instrumentalities, international law holds states responsible for the acts of their branches of government.⁷¹ Consequently, although international investment law's demands for compliance are formally addressed to states, these demands pressurize internal decision-makers to avoid incurring state responsibility for their acts.

1. Executive Power and Authority

States commonly interact with foreign investors through their executive branch's agencies or instrumentalities. Government departments conclude contracts with investors and administrative agencies monitor joint venture companies' compliance with local regulations. The executive branch's power and authority is, however, diminished by international investment law, which demands that the host state respect the legitimate expectations of investors.

A recent dispute with the Czech Republic demonstrates international investment law's profound effect on executive power and authority.⁷² After the Czech Republic's succession in 1993, its Media Council granted a broadcasting license to CET 21, a Czech company, and allowed direct investments in CET 21 by CEDC, a foreign-owned company in which Robert Lauder, a former U.S.

71. See *Estate of Pellat (France) v. United Mexican States*, 5 R.I.A.A. 534, 536 (June 7, 1929); *LaGrand Case (F.R.G. v. U.S.)* (Merits), 2001 I.C.J. 466, 515 (June 27) (finding that the United States was responsible for the acts of its executive branch); *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)* (Merits), slip op., ¶¶ 106-114 (I.C.J. Mar. 31, 2004) (expressing the same), available at <http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm> (last visited Nov. 17, 2004).

72. See *CME Czech Republic B.V. v. Czech Republic* (Partial Award), slip op. (UNCITRAL, Sept. 13, 2001) (detailing investment dispute between Czech Republic and Netherlands investor), available at <http://www.mfcr.cz/static/Arbitraz/en/PartialAward.pdf> (last visited Nov. 17, 2004).

ambassador to the Czech Republic, had interests.⁷³ Subsequently, the Media Council changed its policies and instead approved the creation of CNTS, a joint investment vehicle owned by the Czech Savings Bank, CEDC and CET 21.⁷⁴ CET 21 passed its exclusive right to use the media license to CNTS, which used this right to operate a broadcasting station called "TV Nova."⁷⁵

Over time, the fledgling Czech government exerted more regulatory control over its media.⁷⁶ Concurrently, CET 21 was trying to revoke CNTS' exclusive use of its license so that it could sell the use of its license to additional providers.⁷⁷ Upon CET 21's request for advice on the media law, the Media Council issued a letter stating that business "relations between the operator of broadcasting and its service must be established on a non-exclusive basis."⁷⁸ CET 21 relied on this letter to negotiate with CNTS to end their exclusive broadcasting arrangement. When negotiations failed, CET 21 withdrew from the investment and began broadcasting through another company.⁷⁹ The foreign investors then orchestrated numerous litigations and arbitrations to recover their losses, including an action by Mr. Lauder in his own name,⁸⁰ and an action by CME Czech Republic B.V., the Lauder-controlled Netherlands successor to CEDC.⁸¹

In *CME Czech Republic B.V. v. Czech Republic (Partial Award)*, the tribunal found that the Council's regulatory actions violated the

73. *CME Czech Republic B.V. (Partial Award)*, slip op. ¶ 7.

74. *Id.* ¶ 11.

75. *Id.* ¶ 12.

76. *Id.* ¶¶ 15-16.

77. *Id.* ¶ 119.

78. *CME Czech Republic B.V. (Partial Award)*, slip op. ¶ 128.

79. *Id.* ¶ 131.

80. See *Lauder v. Czech Republic (Final Award)*, slip op. ¶ 11 (UNCITRAL, Sept. 3, 2001) (stating that Lauder commenced the proceedings against the Czech Republic to "restore the contractual and legal rights associated with [his] investments"), available at <http://www.mfcr.cz/static/Arbitraz/en/FinalAward.doc> (last visited Nov. 17, 2004).

81. See *CME Czech Republic B.V. (Partial Award)*, slip op. ¶ 2 (noting that the arbitration proceedings began on February 22, 2000).

Czech-Netherlands BIT.⁸² The tribunal stated that the Czech Republic was responsible for CME's losses that flowed from the ultimate collapse of CNTS when CET 21 withdrew from the investment.⁸³ According to the tribunal, the Media Council emboldened CET 21 by issuing its opinion that the use of the license by CNTS was non-exclusive and by remaining silent when CET 21 eliminated CNTS as the exclusive service provider.⁸⁴ It was immaterial that the immediate and operative cause of CME's losses was not the Media Council's actions, but the independent local investor's withdrawal from the investment.⁸⁵ Whereas international investment law has long prohibited states from *directly* interfering with the foreign investments in breach of international norms,⁸⁶ the *CME* award indicates that international law has become sufficiently authoritative to prohibit states from even *indirectly* influencing investment outcomes through regulatory opinions.⁸⁷

82. *Id.* ¶ 609-18.

83. *Id.* ¶ 615.

84. *Id.* ¶¶ 554, 558, 574.

85. *Id.* ¶ 559.

86. See Case Concerning Factory at Chorzów (Claim for Indemnity) (Merits), P.C.I.J. Ser. A. No. 13 (Sept. 13, 1928) (finding Poland responsible for reparation for damage caused to German companies by taking possession of the companies' factory); *Sedco, Inc. v. Nat'l Iranian Oil Co.*, Award No. 309-129-3 (July 2, 1987) 15 Iran-U.S. Cl. Trib. Rep. 23, 31-33 (1988) (holding Iran responsible for taking possession of foreign investor's oil rigs); *Asian Agricultural Prods. Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, slip op., ¶ 86 (June 21, 1990) (holding Sri Lanka responsible for its military forces' destruction of foreign investor's farm).

87. See *Himpurna California Energy Ltd. v. Republic of Indonesia* (Interim Award), 15-1 MEALEY'S INT'L ARB. REP. A-1, A-29-A-34 (2000) (UNCITRAL, Sept. 26, 1999) (finding Indonesia responsible for failing to prevent its local investor from obtaining an injunction against Indonesia's participation in the arbitration between Indonesia and a foreign investor). *But see Olguín v. Republic of Paraguay* (Award), ICSID Case No. ARB/98/5, slip op. ¶ 84 (July 26, 2001) (translation in English) ("[O]missions, however egregious they may be, are not sufficient for [expropriation] to take place."), available at <http://www.worldbank.org/icsid/cases/Olgun-award-en.pdf> (last visited Dec. 30, 2004).

2. Legislative Power and Authority

A state's international obligations to protect foreign investments constrain its legislative power and authority because international law holds states responsible for their legislative acts.⁸⁸ In *Ethyl Corp. v. Gov't of Canada*,⁸⁹ U.S. corporation Ethyl Corporation filed a North American Free Trade Act ("NAFTA") claim against Canada for enacting legislation that affected Ethyl's investment in Canada. The Canadian Parliament had enacted the 1997 Manganese-based Fuel Additives Act.⁹⁰ This Act banned the importation and inter-state transportation of methylcyclopentadienyl manganese tricarbonyl ("MMT"), a fuel additive designed to boost octane levels in gasoline.⁹¹ Ethyl had been unsuccessful in selling MMT in the United States because the Environmental Protection Agency had delayed approval for MMT until 1995 due to concerns that MMT caused emission control devices to fail and led to neurological disorders and respiratory problems.⁹² Ethyl had instead been exporting MMT to Canada. The Canadian ban thus had a potentially huge impact on Ethyl's revenues.

After the NAFTA tribunal found that it had jurisdiction over some of Ethyl's claims,⁹³ Canada was pressured into settling Ethyl's claims

88. See *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, U.N. GAOR Int'l L. Comm'n., 56th Sess., Supp. No. 10, at art. 4, U.N. Doc. A/56/10, ch. IV.E.1 (2001) ("[T]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions"); *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts*, U.N. GAOR Int'l L. Comm'n., 56th Sess., Supp. No. 10, at 86, n.113, U.N. Doc. A/56/10, ch. IV.E.2 (2001), (citing cases on state responsibility for legislative acts).

89. *Ethyl Corp. v. Canada (Jurisdiction)*, 38 I.L.M. 708 (1999) (UNCITRAL, June 24, 1998).

90. See *id.* at 714.

91. See David Wesley, *Ethyl Corporation of Virginia: The MMT Battle in Canada*, Ivey School of Business, University of W. Ontario, Ivey Doc. No. 902M48 (2001), at 2 (describing Canadian ban on MMT).

92. See *id.* at 4-5 (describing the U.S. Environmental Protection Agency's objections to MMT). By the time MMT was approved in the United States, U.S. refiners had invested in other lead substitutes. *Id.* at 1.

93. *Ethyl Corp.*, 38 I.L.M. at 730 (finding jurisdiction over some of Ethyl's claims).

within six months.⁹⁴ Under this settlement, Canada agreed to allow Ethyl to resume selling MMT in Canada, paid Ethyl \$13 million in compensation, issued a public apology and conceded that MMT was not harmful.⁹⁵

Whereas the Canadian government had full legislative authority and power to regulate the distribution of petrochemicals by Canadian corporations according to Canada's environmental and public health policies, international law constrained Canada's legislative power over foreign investors. NAFTA had sufficiently consolidated expectations on appropriate international investment behavior and provided a sufficiently authoritative means of enforcement by binding arbitration that Canada was pressured into complying with the investment demands of a foreign investor, Ethyl.⁹⁶ In this manner, international law drained Canada's legislative authority over foreign investors without even issuing a final award in the *Ethyl* dispute. Although states retain some legislative power and authority over foreign investments, the exercise of this power and authority often attracts international consequences, which can effectively impede the fully autonomous exercise of legislative power and authority.⁹⁷

94. See Todd Weiler, *The Ethyl Arbitration: First of its Kind and a Harbinger of Things to Come*, 11 AM. REV. OF INT'L ARB. 187, n.22 (2000) (noting that Canada settled the dispute in the same year as the NAFTA tribunal's decision on jurisdiction); Adam Sulkowski, *NAFTA's Indirect Expropriation Protections: Will Compensation Be Required When Ecological Protections Are Applied? (an Analysis of Metalclad Corporation's Claims Against Mexico)*, 15-2 MEALEY'S INTL. ARB. REP. 23, 29 (Feb. 2000) ("Ethyl's case never reached final arbitration.").

95. See *id.* (describing settlement terms); Friends of the Earth International, *Trade Case Study: Ethyl Corp and MMT* (stating settlement terms), at <http://foei.org/trade/activistguide/ethyl.html> (last visited Feb. 28, 2005).

96. See Sulkowski, *supra* note 94, at 29 ("Ethyl's case demonstrated that these claims for damages may present enough of a threat that governments will prefer settlement to full arbitration.").

97. See Lawrence Herman, *MMT & Ethyl Case—Trade Lawyer Expresses Concern!*, THE FIN. POST (Can.), Jul. 28, 1998, at 1 ("The [Ethyl] case has thus emerged as one of the most important in the annals of Canadian trade law. Even though it settled out of court, it has established a far-reaching precedent."), available at <http://www.canadianliberty.bc.ca/relatedinfo/ethylconcern.html> (last visited Feb. 10, 2005); see also *Methanex Corp. v. United States*, Claimant's Reply to Statement of Defense (UNCITRAL Aug. 28, 2000), slip op., ¶¶ 26, 38 (bringing a claim against the United States founded on, *inter alia*, the California legislature's acts). As of January 1, 2005, the tribunal has not issued a decision on the merits of

3. Judicial Power and Authority

International investment law also limits judicial power and authority. Although most constitutions stipulate that the judicial branch is the final decision-maker in legal disputes, a judiciary's power and authority can be severely constrained by international investment law. International investment law prohibits national courts from deciding investment disputes in a way that would deny investors justice. Judicial decisions that have effectively eviscerated the value of investments or that have abrogated investor protections have also been found to violate international law.⁹⁸ Indeed, investors may bring international law claims even where the executive or legislative branch has expropriated their investments and national courts have failed to remedy the expropriation fully.⁹⁹

Forum selection triggers have also neutralized courts' authority to control the outcomes of investment disputes, even though courts from both developed and developing states have favored judicial control over investment disputes when fundamental national interests are implicated.¹⁰⁰ Although investors do not have the authority on their own to exclude the courts through their investment contracts, these contractual triggers are authoritative when foreign courts and

this arbitration. See U.S. Dep't of State, "Methanex Corp. v. United States of America," at <http://www.state.gov/s/l/c5818.htm> (last visited Feb. 10, 2005).

98. See *Amco Asia Corp. v. Republic of Indonesia* (Resubmitted Case, Award, Supplemental Decision and Rectification), ICSID Case No. ARB/81/1, 1 ICSID (W. Bank) 569 ¶¶ 136-37, 146-52 (May 31, 1990, Oct. 10, 1991) (finding Indonesia responsible for judicial decisions that effectively expropriated foreign investor's investment); *Azinian v. United Mexican States* (Award), ICSID Case No. ARB(AF)/97/2, slip op. ¶ 98 (Nov. 1, 1999) (quoting former ICJ President Eduardo Jiménez de Aréchaga's analysis that a state is responsible for the acts of its courts).

99. See *GAMI Invs., Inc. v. Gov't of the United Mexican States* (Final Award), slip op., ¶ 38(B) (UNCITRAL, Nov. 15, 2004) (stating that an investor may bring a claim where "the expropriation is rescinded by the national courts but the . . . investor remains unsatisfied").

100. See Peter Cornell & Arwen Handley, *Himpurna and Hub: International Arbitration in Developing Countries*, 15-9 MEALEY'S INT'L ARB. REP. 12 (2000) (discussing a Pakistani court's refusal to enforce an arbitration agreement where the dispute involved findings about criminality); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (upholding an order to compel an arbitration that implicated U.S. antitrust policies, but reserving the right at enforcement proceedings to review the award for consistency with these policies).

tribunals support them. These courts and tribunals, through anti-suit injunctions against the litigant pursuing an action in the host state's courts, signal to the host state's courts not to exercise their powers in relation to the investment dispute.¹⁰¹ When these international law claims are accompanied by threatened or actual enforcement actions, such as contempt orders for non-compliance with injunctions,¹⁰² the litigant may be forced to terminate its suit in the host state's courts, thereby also foreclosing the host state's opportunity to exercise its adjudicatory powers.

However, state courts do not always comply with international law's signals against the exercise of their powers. The anti-suit strategy fails if foreign courts decline to issue anti-suit injunctions.¹⁰³ Even if anti-suit injunctions are obtained, the host state's courts may

101. See *Paramedics Electromedicina Comercial, Ltda. v. GE Medical Sys. Info. Technologies, Inc.*, 369 F.3d 645, 652-55 (2d Cir. 2004) ("[A]n anti-suit injunction against parallel litigation may be imposed."); *Newbridge Acquisition I, L.L.C. v. Grupo Corvi, S.A. De D.V.*, No. 02-9839, 2003 U.S. Dist. WESTLAW 42007, at *3 (S.D.N.Y. Jan. 6, 2003) (enjoining litigation in Mexican courts in support of a broad arbitration provision); *Capital India Power Mauritius I v. Overseas Private Inv. Corp.*, No. 03 Civ. 7394, slip op. (S.D.N.Y. Sept. 26, 2003) (issuing preliminary injunction against Indian court proceedings that were parallel to an ICC arbitration); *Capital India Power Mauritius I v. Maharashtra Power Dev. Corp.*, No. 03 Civ. 7394, slip op. (S.D.N.Y. Oct. 29, 2003) (granting order to compel arbitration); *Aggeliki Charis Compania Maritima SA v. Pagnan SpA*, [1995] 1 Lloyds Rep. 87 (Eng. C.A.) (upholding anti-suit injunction against Italian court proceedings on basis of arbitration agreement); *Pena Copper Mines Ltd. v. Rio Tinto Co. Ltd.*, (1911) 105 L.T. 846 (Eng. C.A.) (holding anti-suit injunction available against foreign proceedings in breach of arbitration agreement).

102. See *Paramedics Electromedicina Comercial, Ltda.*, 369 F.3d at 655-58 (upholding contempt order for failure to comply with anti-suit injunction); *Capital India Power Mauritius I v. Maharashtra Power Dev. Corp.*, No. 03 Civ. 7394, slip op. (S.D.N.Y. Nov. 21, 2003) (issuing contempt order for failure to comply with preliminary injunction against Indian court proceedings).

103. See *Airbus Industrie GIE v. Patel* [1998] 2 All E.R. 257 (H.L. 1998) (denying anti-suit injunction); *Gau Shan Co., Ltd. v. Bankers Trust Co.*, 956 F.2d 1349, 1354-58 (6th Cir. 1992) (overruling the district court's issuance of an anti-suit injunction); see generally Hans van Houtte, *Parallel Proceedings Before State Courts and Arbitration Tribunals—Is there a Transnational Lis Alibi Pendens—Exception in Arbitration or Jurisdiction Conventions?*, in *ARBITRAL TRIBUNALS OR STATE COURTS, WHO MUST DEFER TO WHOM?*, ASA Special Series No. 15 35 (Pierre A. Karrer, ed. 2001) (arguing that some international conventions allow courts to refuse jurisdiction over disputes which are within arbitrator's jurisdiction).

have exercised their adjudicatory powers prior to the injunctions.¹⁰⁴ Alternatively, the anti-suit injunction and contempt orders may be ignored by the litigant to whom these orders are addressed if this litigant is willing to incur the costs of contempt or if the litigant does not have assets in the forum.¹⁰⁵ In these situations, the national courts can continue to exert jurisdiction over investors.

International law's authoritative response to the host state's courts' actions in spite of forum selection triggers is similar to its response to judicial actions that eviscerate investments. The international tribunal claiming competence to determine the investment dispute can refuse to give legal effect to, or comply with, the decisions of the host state's courts.¹⁰⁶ International tribunals may also award damages against the host state to compensate the investor for losses flowing from the host state's courts' decisions.¹⁰⁷

104. See *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 362-63 (5th Cir. 2003) (noting that U.S. court's temporary restraining order against annulment proceedings which had begun in Indonesia did not prevent Indonesia's courts from enjoining award's enforcement).

105. See *Karaha Bodas Co., L.L.C.*, 335 F.3d at 363 (noting that Indonesian investment party elected to ignore U.S. anti-suit temporary restraining order); *Capital India Power Mauritius I v. Maharashtra Power Dev. Corp.*, No. 03 Civ. 7394, slip op. (S.D.N.Y. Nov. 21, 2003) (noting Indian party's refusal to comply with preliminary injunction against Indian court proceedings).

106. See *Compañía Minera Condesa SA v. Compañía de Minas Buenaventura SA*, 13-9 MEALEY'S INT'L ARB. REP. C-1, C-6 (German Fed. Ct., Civ. Div., Dec. 19, 1997) (rejecting the home state court's opinion); ICC Case No. 1512 (Second Preliminary Award) (Jan. 14, 1970), in SIGVARD JARVIN & YVES DERAIS, COLLECTION OF ICC ARBITRAL AWARDS 1974-85 37, 38 (1990) ("The ICC rules themselves . . . leave no room for applying the law of one or the other party.").

107. See *Himpurna California Energy Ltd. v. Republic of Indonesia* (Interim Award), 15-1 MEALEY'S INT'L ARB. REP. A-1, A-28 et seq. (2000) (UNCITRAL, Sept. 26, 1999) (finding Indonesia responsible for its court's decisions); *Himpurna California Energy Ltd. v. Republic of Indonesia* (Final Award), 15-2 MEALEY'S INT'L ARB. REP. A-1 (1999) (UNCITRAL, Oct. 16, 1999) (awarding damages against Indonesia for its court's decisions); STEPHEN SCHWEBEL, INTERNATIONAL ARBITRATION: THREE SALIENT PROBLEMS 103-04 (1987) ("Dr. F.V. Garcia Amador, . . . Special Rapporteur of the International Law Commission on State Responsibility, maintains that . . . 'non-fulfillment of the arbitration clause would directly give rise to the international responsibility of the State.'").

Municipal courts may enforce these awards,¹⁰⁸ and may bolster their authority by relying on foreign courts' jurisprudence.¹⁰⁹ This cross-pollination of juridical ideas stabilizes international investment law when it coordinates judicial strategies to support international norms in present and future investment disputes.¹¹⁰ Through this process of signaling and responding between different decision-makers, international law neutralizes the power and authority of the host state's judiciary over investments.

Compagnie d'Enterprises CFE, SA v. Government of the Republic of Yemen ("CFE") illustrates such a draining of judicial authority by international investment law.¹¹¹ In 1981, the Yemen Port Authority of South Yemen entered into a construction contract with *Compagnie Francois d'Enterprises C.F.E., S.A.* ("CFE"), for the completion and maintenance of certain Works of Al-Mukalla Harbor.¹¹² South Yemen and CFE subsequently disagreed over a number of contractual issues and CFE commenced ICC arbitration in Cyprus against Yemen.¹¹³

108. See *Westland Helicopters Ltd. v. Arab Organization for Industrialization*, 1995 Q.B. 282 (Eng.) (upholding leave to enforce arbitration award in investment dispute); *Compagnie d'Enterprises CFE, S.A. v. Republic of Yemen*, 180 F. Supp. 2d 12, 14 (D.D.C. 2001) (enforcing international arbitral award); *CBS Corp. v. Wak Orient Power & Light Ltd.*, 168 F. Supp. 2d 403, 411-15 (E.D. Pa. 2001) (confirming arbitral award).

109. See *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 371-72 (5th Cir. 2003) (finding persuasive Hong Kong court's jurisprudence on *lex arbitri* of international arbitration in question).

110. See *Karaha Bodas Co., L.L.C.*, 335 F.3d at 370-71 (noting that Hong Kong court had enforced arbitral award rendered in Switzerland in spite of Indonesian court's annulment and likewise finding that annulment should not prevent U.S. courts from enforcing award); *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 310 (5th Cir. 2004), cert. denied 125 S. Ct. 59 (2004) (affirming summary judgment enforcing arbitral award in spite of annulment by Indonesian courts and noting that Hong Kong courts had also enforced award).

111. *Compagnie d'Enterprises CFE, SA v. Gov't of the Republic of Yemen* (Final Award), ICC Case No. 7748/BGD/OLG, slip op. (Sept. 26, 1997).

112. *Compagnie d'Enterprises*, 180 F. Supp. 2d at 13.

113. See *id.* (tracking the deteriorating relationship between CFE and the Yemen Port Authority). By the time of the arbitration, North and South Yemen had merged.

The interplay between private contract claims, arbitral practice and public international law caused Yemen to lose judicial power when it entered into and remained in the international investment framework.¹¹⁴ After the arbitral tribunal issued a partial award finding that it had jurisdiction over the dispute, Yemen went before its courts to annul the award and obtain an injunction against the arbitration.¹¹⁵ Although one of the parties to the contract was Yemeni and the contract was concluded and performed in Yemen,¹¹⁶ the arbitrator relied on the arbitration agreement to ignore the Yemen court's proceedings and anti-suit injunction.¹¹⁷ The arbitrator also reasoned that under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), the proper court to set aside an arbitral award is the court at the situs of arbitration and no annulment proceeding had been brought in the Cyprus courts.¹¹⁸

Because of the risk that other courts would recognize and enforce the arbitrator's award, Yemen abandoned its judicial claim that the award was a nullity. Instead, Yemen abided by international

114. See *id.* at 12-13 (describing how, although the contract was governed by South Yemen laws, the arbitration agreement contained in the contract was governed by the ICC Rules of Arbitration). The arbitrator referred to Yemen law, the laws of foreign jurisdictions such as England, *Shari'a* law, public international law and the practice of arbitral tribunals. *Compagnie d'Enterprises CFE (Final Award)*, slip op. at 71, 87, 89, 152, 155-56, 158, 170.

115. *Id.* at 35.

116. Cf. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS (1971) §§ 186-88 (stating absent a choice of law provision in the contract, the law of the state with the most significant contacts governs the contract).

117. See *Compañía Minera Condesa SA v. Compañía de Minas Buenaventura SA*, 13-9 MEALEY'S INT'L ARB. REP. C-1, C-6 (German Fed. Ct., Civ. Div., Dec. 19, 1997) (displacing state court's jurisdiction in favor of arbitration based on arbitration agreement); see generally SCHWEBEL, *supra* note 107, at 61-143 (discussing international law requirement to comply with an arbitration agreement).

118. See *Compagnie d'Enterprises CFE (Final Award)*, slip op. at 64 (discussing enforcement of arbitration agreements); ICC Case No. 1512 (Second Preliminary Award) (1970), in SIGVARD JARVIN & YVES DERAIS, COLLECTION OF ICC ARBITRAL AWARDS 1974-85 37, 38 (1990) (finding Pakistani courts lack jurisdiction over arbitration); ICC Case No. 5294 (1988), in SIGVARD JARVIN ET AL., COLLECTION OF ICC ARBITRAL AWARDS 1986-1990 180, 184 (1984) ("Egyptian courts would not have jurisdiction of either these proceedings or the arbitrator.").

investment law's decision-making process and sought annulment in Cyprus courts. Cyprus courts, however, supported the ICC tribunal by finding that the arbitration agreement had properly transferred judicial power and authority from the Yemen courts to the ICC tribunal and Cyprus courts, and by upholding the arbitral tribunal's decision.¹¹⁹ Through this collusion of tribunals, investors and courts, international investment law wrested from Yemen its judicial authority over investment disputes in its territory.

C. TRANSFERRING POWER AND AUTHORITY TO OTHER DECISION-MAKERS

The power and authority that international investment law drains from states does not vaporize, and is often transferred to a wide range of decision-makers, including investors, foreign courts, international tribunals, foreign governments, the media, local investors and international organizations. Among these transferees, the greatest beneficiaries are foreign and international tribunals and investors.

When forum selection triggers drain a state's judicial power, this power is transferred to foreign courts and tribunals selected by investment parties. In the *CFE* dispute, the accrual of authority and power over the investment dispute by the ICC arbitral tribunal and the foreign court at the site of the arbitration corresponded to the erosion of Yemen's jurisdiction over the dispute. Cyprus courts and the ICC tribunal were able to demand compliance with the tribunal's award, thereby confirming Yemen's liability for contract breaches.

International investment law also transfers power and authority from states to investors. Multinational corporations can be more powerful than the states in which they invest,¹²⁰ and may be able to

119. See General Application No. 35/98 (Nicosia Dist. Ct., Dec. 12, 1999) (unofficial translation in English by G. Cacoyannis) (copy on file with author) (dismissing Yemen's application to set aside the tribunal's ruling); see also §32.5 *Million ICC Award Stands, Nicosia Supreme Court Rules*, 17-10 MEALEY'S INT'L ARB. REP. 2 (2002) (noting Cyprus court's rejection of Yemen's request to set aside *CFE* award).

120. See *CME Czech Republic B.V. v. Czech Republic* (Final Award) (separate opinion of Ian Brownlie), slip op. ¶ 76 (UNCITRAL, March 14, 2003), available at <http://www.cetv-net.com/iFiles/1439-seperate-op-pdf-1403.pdf> (last visited Feb. 26, 2005) ("It is, of course, a truism to point out that multinationals may be more

impose imbalanced bargains.¹²¹ Even before the ink is dry on investment contracts with such corporations, states lose some authority and power to correct any imbalances. International investment law transfers this power and authority to investors, which, understandably, seek to enforce their bargains, whether fair or not, against the host state. When these investors are successful, huge burdens may be placed on states' financial resources.¹²²

Beyond control over states' resources, investors also gain control over a range of sovereign concerns because investments are not made in a vacuum. Investments are made by transforming capital and other inputs into outputs, such as electricity,¹²³ fuel,¹²⁴ tourist resorts,¹²⁵ banking services¹²⁶ and military hardware.¹²⁷ These outputs are often

powerful than small states.”).

121. See *Can Dabhol be Fired up Again?*, *ECONOMIST*, May 1, 2004 (describing the 1990s as a time “when foreign power firms swept across Asia, persuading eager politicians and bureaucrats to let them set up generating plants at inflated prices”); ABHAY MEHTA, *POWER PLAY: A STUDY OF THE ENRON PROJECT* 147 (2000) (citing the Indian government’s complaint that Enron had bribed officials to enter into a power plant project); Amnesty International, *The “Enron Project” in Maharashtra*, ASA/20/031/1987 (July 17, 1997) (noting allegations that, in an Enron power project in India, Enron bribed local officials to secure investment terms grossly unfair to India), available at <http://www.amnestyusa.org/countries/india/document.do?id=73E2D8C20C9F126F8025690000693813> (last visited Jan. 1, 2005).

122. See *CME Czech Republic B.V. (Final Award)* (separate opinion of Ian Brownlie), slip op. ¶¶ 77-78 (noting concern that arbitral awards can have “catastrophic repercussions on the livelihood and economic well-being of the population of the state against whom an action is brought”).

123. See *Himpurna California Energy Ltd. v. Republic of Indonesia (Interim Award)*, 15-1 MEALEY’S INT’L ARB. REP. 1, at A-1 (2000) (UNCITRAL, Sept. 26 1999) (describing Indonesian power project).

124. See *Kuwait v. American Independent Oil Co. (Aminoil) (Award)*, 66 INT’L L. REPORTS 519 (Mar. 24, 1982) (concerning agreement to sell petroleum and related resources); *Sedco, Inc. v. National Iranian Oil Co. (Award)*, 15 IRAN-U.S. CL. TRIB. REP. 23 (July 2, 1987) (concerning lease and operation of drilling rigs in Iran).

125. See *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt (Award)*, ICSID Case No. ARB/84/3, 3 ICSID (W. Bank) 186, 200 (ICSID, May 20, 1992) (describing foreign investment in a resort complex near the Pyramids); *Wena Hotels Ltd. v. Arab Republic of Egypt (Award)*, ICSID Case No. ARB/98/4, 41 I.L.M. 896 (2002) (Dec. 8, 2002) (discussing international hotel investments in Egypt).

126. See *Genin v. Republic of Estonia (Award)*, ICSID Case No. ARB/99/2, slip

directly linked with key sovereign concerns, such as infrastructure, tourism, international trade and defense. By constraining the power and authority of the legislature, executive and judiciary, international investment law restricts the state's ability to protect these sovereign concerns, and correspondingly, increases investors' power over these sovereign matters.

The *CME* dispute shows how international investment law transfers a state's power and authority over a key sovereign concern to an investor. By entering into the web of investment arrangements, including the Netherlands-Czech BIT, and actively seeking foreign investors to develop its media industry, the Czech Republic lost important control of its media,¹²⁸ which is a powerful tool for disseminating information and influencing public opinion. The Czech Republic's loss of media control was accompanied by an increase in the media power of CNTS, and CME as shareholder. Local investors were unable to compete successfully against CNTS and its foreign shareholders,¹²⁹ and TV Nova dominated the media industry.¹³⁰ With this market domination, CME could control, albeit incompletely, information and analysis on domestic and world events, thereby influencing public opinion to suit CME's and its shareholders' agendas.¹³¹

op. ¶¶ 1-3 (June 25, 2001) (resolving a dispute between Estonia and investors in Estonian Innovation Bank, a financial institution), available at <http://www.worldbank.org/icsid/cases/genin.pdf> (last visited Jan. 1, 2005).

127. See *Westland Helicopters Ltd. v. Arab Organization for Industrialization*, 1995 Q.B. 282 (Eng.) (discussing an international investment for the production and the sale of military equipment).

128. See *Lauder v. Czech Republic* (Final Award), slip op. ¶ 229 (UNCITRAL, Sept. 3, 2001) (explaining that the Czech Media Council's attempts to separate owners from license-holders were motivated out of "fear that a majority share of foreign capital in the license holder's Company might impact the independence of full-format broadcasts" (emphasis in original)).

129. See *id.* ¶¶ 74-99 (outlining how CNTS gradually took market shares from local investors).

130. See *CME Czech Republic B.V. v. Czech Republic* (Final Award), slip op. ¶¶ 109-12 (UNCITRAL, Mar. 14, 2003) (describing TV Nova's market dominance); *CME Czech Republic B.V. v. Czech Republic* (Partial Award), slip op. ¶ 458 (UNCITRAL, Sept. 13, 2001) (acknowledging that after just one year in business, TV NOVA "became the most successful and profitable private television station in the Czech Republic").

131. See *East European Constitutional Review*, 9 CONSTITUTION WATCH, Nos.

An international investments' impact on political independence and security is magnified when one considers that some key political figures in powerful states have close ties to multinational corporations, such as Vice President Dick Cheney's relationship with Halliburton,¹³² and that powerful states have repeatedly demonstrated their willingness to dabble in the local politics of weaker states,¹³³ such as the Reagan administration's support of Nicaraguan rebels.¹³⁴ In powerful states, political leaders with close connections to multinational corporations can pursue foreign policies through investment projects.¹³⁵ Investment projects can be used openly and benignly, such as by exchanging investment capital for open trade policies or military bases, or they can be used covertly and subversively. When media controls have been transferred to foreign controlled corporations, careful broadcast programming can influence political outcomes. When judicial controls have been transferred to foreign courts or tribunals through arbitration agreements and forum selection clauses, foreign governments may attempt to influence these courts to hand down decisions that protect their interests,¹³⁶ and judges may represent the values of their political and cultural systems.¹³⁷

1/2 (2000) ("The station's popularity makes it significant from both economic and political perspectives."), *available at* http://law.nyu.edu/eecr/vol9num_onehalf/constitutionwatch/czech.html (last visited Nov. 18, 2004).

132. See Joshua Chaffin, *Cheney's Office 'Briefed on Pentagon Deal,'* FIN. TIMES, June 14, 2004, at 4 (speculating that Halliburton won contracts with Iraq because of Vice President Cheney's relationship with the corporation).

133. See Reisman, *supra* note 11, at 516 ("States have long meddled in the politics of other states . . . whether impelled by revolutionary political, racial, or religious ideology; fear; or sheer lust for power.").

134. See *generally* Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) (Merits), 1986 I.C.J. 4 (June 27) (considering the Reagan administration's alleged ties to the Nicaraguan guerilla movement).

135. See SHERIF SEID, GLOBAL REGULATION OF FOREIGN DIRECT INVESTMENT 21 (2002) ("[F]oreign investors are to some extent within the jurisdiction and influence of a comparatively powerful foreign government.").

136. See, e.g., *Himpurna California Energy Ltd. v. Republic of Indonesia* (Final Award), 15-2 MEALEY'S INT'L ARB. REP. A-1, A-2, ¶ 19 (2000) (UNCITRAL, Sept. 26 1999) (noting that Indonesia tried to influence its party-appointed arbitrator by attempting to make *ex parte* contact on several occasions).

137. Cf. SCHACHTER, *supra* note 10, 43 ("[I]ndividual judges are, by and large, influenced by the views of their own governments.").

D. RESTORING POWER AND AUTHORITY TO STATES

Although a state can lose control over important sovereign matters by entering into the international investment framework, this control can be regained, albeit at a price. Where executive and legislative power and authority has been transferred to investors, this power and authority can be restored by expropriating the investment and compensating the investor for its losses. In *Southern Pacific Properties (Middle East) Ltd. v. Arab Rep. of Egypt (Award)* (“SPP”), in the face of imminent destruction of its antiquities, Egypt chose to protect its antiquities by repurchasing its power and authority from investors. The direct financial cost was \$27 million, the amount of the SPP award.¹³⁸

The price to repurchase power and authority from investors can be tremendous. In *CME Czech Republic B.V. (Final Award)*, the price to repurchase Czech power and authority was \$270 million, or about 10 billion Czech Korunas.¹³⁹ In contrast to the SPP dispute, in which Egypt was only made to compensate the Hong Kong investor for its actual investment, the CME tribunal awarded far more than the investor’s actual investment.

The CME tribunal calculated the cost of restoring sovereignty by analyzing CNTS’ discounted cash flow,¹⁴⁰ which involved forecasting cash-flows “to infinity” and then discounting this figure to account for certain risks.¹⁴¹ The discounted cash flow method

138. See *Southern Pacific Properties (Middle East) Ltd. v. Arab Rep. of Egypt (Award)*, ICSID Case No. ARB/84/3, 3 ICSID (W. Bank) 189, 248 (ICSID, May 20, 1992) (awarding \$27,661,000).

139. See *CME Czech Republic B.V. v. Czech Republic (Final Award)*, slip op. at 163 (UNCITRAL, March 14, 2003) (ordering Czech Republic to pay \$269,814,000 to CME); see also Daniela Lazarova, *Parliament Votes to Dissolve TV and Radio Council*, CESKI ROZHLAS, Mar. 4, 2003 (noting that Czech Republic’s loss in the arbitration would cost the country over 10 billion Korunas), available at <http://radio.cz/en/article/39293> (last visited Nov. 17, 2004).

140. See *CME Czech Republic B.V. (Final Award)*, slip op. ¶¶ 563-620 (discussing the application of the discounted cash flow method to determine investment value).

141. *CME Czech Republic B.V. v. Czech Republic (Final Award)* (separate opinion of Ian Brownlie), slip op. ¶ 98 (noting that claimant’s valuation method calculated “the net present value of [CNTS’] future cash earnings stream taken out to infinity”); see *CME Czech Republic B.V. (Final Award)*, ¶ 572 (describing valuation by forecasting “in perpetuity”).

ensured that the investors were awarded not just the value of their actual investments and reasonably certain profits, but also speculative profits, because the longer one projects income into the future, the more uncertain this projection necessarily becomes.¹⁴² The tribunal was comfortable awarding future profits “by a rough assessment,” when there were neither “hard facts” or “plausible arguments for . . . expectations,” but only “extrapolations of the CME Management Net Revenues Forecasts.”¹⁴³ The tribunal’s willingness to award profits based on such tenuous evidence stands in contrast to *Middle East Cement Shipping & Handling Co. v. Arab Republic of Egypt*, which refused to award compensation for the earning capacity of an expropriated license in the absence of “proof of concrete contracts missed and of the profits lost from them,”¹⁴⁴ and flies in the face of the well-established international law principle that speculative losses are not recoverable.¹⁴⁵

142. See *CME Czech Republic B.V. (Final Award)* (separate opinion of Ian Brownlie) slip op. ¶ 100 (noting that discounted cash flow analysis does not exclude speculative future profits); see also Louis T. Wells, *Double Dipping in Arbitration Awards? An Economist Questions Damages Awarded to Karaha Bodas Company in Indonesia*, 19-4 ARB. INT’L 471, 474 (2003) (“[P]rojecting the stream of earnings for 30 years requires some heroic assumptions.”).

143. *CME Czech Republic B.V. (Final Award)*, slip op. ¶¶ 595-96.

144. *Middle East Cement Shipping & Handling Co. v. Arab Republic of Egypt* (Award), ICSID Case No. ARB/99/6, slip op. ¶¶ 127-28 (Apr. 12, 2002), available at http://www.worldbank.org/icsid/cases/me_cement-award.pdf (last visited Nov. 18, 2004); cf. *Amco Asia Corp. v. Republic of Indonesia* (Resubmitted Case, Award, Supplemental Decision and Rectification), ICSID Case No. ARB/81/1, 1 ICSID (W. Bank) 569, 614-617, ¶¶ 186, 196 (May 31, 1990, Oct. 10, 1991) (awarding profits stipulated by Profit-Sharing Agreement); *Agip SpA v. Gov’t of the People’s Republic of the Congo*, ICSID Case No. ARB/77/1, 1 ICSID (W. Bank) 306, 327, ¶ 106 (1993) (Nov. 30, 1979) (awarding profits because the Assistance Agreement provided that AGIP would receive 1% of total sales); *Benvenuti & Bonfant SRL v. Gov’t of the People’s Rep. of Congo* (Award), ICSID Case No. ARB/77/2, 1 ICSID (W. Bank) 330, 357-58 (Aug. 15, 1980) (translation in English) (awarding profits for only five years of earnings as provided for by the relevant Agreement).

145. See *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF/97/1, 119 INT’L L. REPORTS 616, ¶¶ 121-22 (Aug. 30, 2000) (stating that awards based on speculative profit predictions are inappropriate); *Phelps Dodge Corp v. Iran*, 10 IRAN-US CL. TRIB. REP. 121, ¶¶ 24-31 (1986) (recognizing that speculative nature of future profits and awarding claimant only actual value of investment); *Middle East Cement Shipping & Handling Co. (Award)*, slip op. ¶¶ 128-29 (refusing to compensate future profits).

The financial costs of restoring sovereignty are not the only costs. The Czech Republic's attempts to assert regulatory control incurred political, diplomatic and economic costs. Politically, the *CME* arbitrations divided the Czech Parliament. Politicians apportioned blame and eventually dissolved the Media Council by a parliamentary vote.¹⁴⁶ Diplomatic costs were incurred when former Ambassador Lauder persuaded his government to apply pressure on the Czech government.¹⁴⁷ Economic costs were imposed on the Czech Republic when Mr. Lauder placed full page advertisements in the *New York Times* and *Washington Post*, warning potential investors against doing business in the Czech Republic.¹⁴⁸

Even if a state is willing to incur high financial and non-financial costs to regain its power and authority, there are instances where a state cannot repurchase its power and authority, such as where judicial authority has been transferred to foreign courts and tribunals. In the *CFE*, *CME* and *SPP* disputes, no amount of money paid to the arbitral tribunals or foreign courts would have led them to return jurisdiction to the host state's courts.¹⁴⁹

States do, however, have options to regain their judicial power and authority. Arbitral tribunals' and foreign courts' power and authority over an investment dispute vaporize upon the final conclusion of the

146. See Lazarova, *supra* note 139 (noting that the *CME* dispute divided the Czech parliament).

147. See *East European Constitutional Review*, *supra* note 131 (noting that U.S. congressmen Tom Lantos and Benjamin Gilman wrote to Czech Prime Minister Zeman on Mr. Lauder's behalf and Secretary of State Madeleine Albright raised the issue with Prime Minister Zeman during his United States visit in November 2000); *Himpurna California Energy Ltd. v. Republic of Indonesia* (Interim Award), 15-1 MEALEY'S INT'L ARB. REP. A-1, A-10, ¶ 79 (2000) (UNCITRAL, Sept. 26, 1999) (acknowledging that an investment dispute between Indonesia and a U.S. energy corporation involved "directly, or indirectly, bilateral relations between two important countries"); ABHAY MEHTA, *POWER PLAY: A STUDY OF THE ENRON PROJECT* 144-45 (2000) (commenting on the pressure exerted by the U.S. and UK governments against India's attempts to cancel Enron's energy investments in India).

148. See *East European Constitutional Review*, *supra* note 131 (discussing Lauder's newspaper advertisements criticizing the Czech Republic).

149. See *Compagnie d'Enterprises CFE, S.A. v. Republic of Yemen*, 180 F. Supp. 2d 12, 15 (D.D.C. 2001) (rejecting Yemen court's jurisdiction over dispute and enforcing arbitral award).

dispute between the host state and investor,¹⁵⁰ although foreign adjudication may lead to the very outcome that the host state wished to avoid. Alternatively, the host state may displace the control of the arbitral tribunal and foreign court by renegotiating the arbitral agreement or reaching settlement with the investor prior to a final award or decision.¹⁵¹ Where negotiation has failed and adjudication is likely to produce highly unattractive results for the host state, states can repudiate the New York Convention and reject foreign courts' jurisdiction. Of course, the economic and diplomatic costs of this strategy are so high that it should be reserved for dire situations.¹⁵²

II. APPRAISAL

Although some policy-makers criticize international investment law as an unjustified attack on sovereignty,¹⁵³ an accurate appraisal

150. See, e.g., ICC Rules of Arbitration, art. 6.4 (Jan. 1, 1998) (stating that the arbitral tribunal's jurisdiction extends only to "the respective rights of the parties and to adjudicate their claims and pleas"); Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, art. 25, 17 U.S.T. 1270 [hereinafter ICSID Convention] (stating that the ICSID's jurisdiction only extends to a "legal dispute arising directly out of an investment between a Contracting State . . . and a national of another Contracting State").

151. Cf. UNCTAD, *supra* note 34, at 92-93 (noting that bilateral investments treaties generally require the investor and the host country to attempt to resolve a dispute amicably before submitting it to arbitration).

152. See THOMAS FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 445 (1995) (arguing that states can ignore compensation demands for their non-compliance with investment norms, but that this strategy leads to exclusion from the investment infrastructure).

153. See Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT'L L. 365, 383-86 (2003) (stating that after NAFTA Chapter 11 cases were filed against the United States, U.S. policy-makers complained that international arbitration infringes national prerogatives); Interview with James H. Carter, President, Am. Soc'y Int'l L., ASIL Newsletter May/July 2004 1, 10 (speculating that bodies such as NAFTA tribunals are causing a backlash because they require a relinquishment of sovereignty that destabilizes domestic political groups); Adam Liptak, *Review of U.S. Rulings by NAFTA Tribunals Stirs Worries*, N.Y. TIMES, Apr. 18, 2004, § 1 at 20 (noting that Chief Justice Margaret Marshall of the Massachusetts Court stated in relation to international investment law's erosion of U.S. judicial authority, "[t]o say I was surprised to hear that a judgment of this court was being subjected to further review [by a NAFTA tribunal] would be an understatement" and that a Georgetown University law school professor has described this phenomenon as "the biggest threat to United States judicial independence").

of international investment law's redistribution of sovereign power and authority should be more nuanced. Power and authority in themselves have limited normative content. For the most part, the virtue or vice of power and authority depends on how they are deployed and with what effect.¹⁵⁴ Therefore, the distribution of decision-making power among decision-makers in the international investment framework is not, without more, either conclusively ideal or abhorrent. To appraise international investment law properly, the consequences of its shifts in power and authority must be measured against international investment law's global policies.

International investment law has two competing goals. The first goal is promoting global economic growth, which is presumably propelled by international investments.¹⁵⁵ These investments require a stable global marketplace.¹⁵⁶ Stability necessarily entails limiting the range of actions available to participants so that their behavior and responses to events are predictable.

This goal of promoting economic growth is, however, inimical to international investment law's second goal: respecting sovereignty. Sovereignty entails the freedom of a self-identified territorial community to act, especially in response to changing circumstances and threats. Restricting participants' actions and responses in the global marketplace correspondingly limits sovereignty. Conversely, because sovereignty entails the widest freedom to act, it increases uncertainty and destabilizes settled investment expectations. *Ceteris*

154. Cf. JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 229 (1979) (arguing that the rule of law "fulfils a subservient role" and is "an instrument for achieving certain goals").

155. See Kenneth Vandevelde, *Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties*, 36 COLUM. J. TRANSNAT'L L. 501, 503-04 (1998) (recognizing that international investment flows lead to economic development); see generally Kenneth Vandevelde, *The Economics of Bilateral Investment Treaties*, 41 HARV. INT'L L. J. 469, 471 (2000) (discussing "welfare maximizing effects of free-markets").

156. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974) ("[O]rderliness and predictability [are] essential to . . . international business."); *Quaak et al. v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 19 (1st Cir. 2004) ("[I]nternational commerce depends to a large extent on 'the ability of merchants to predict the likely consequences of their conduct in overseas markets'" (citations omitted)).

paribus, this instability discourages investments and puts downward pressure on global economic growth.

International investment law consequently needs to balance global economic growth with sovereignty. Although this balance changes in every situation, the interaction of three broad policies often determines the correct equilibrium. These policies are: (1) promoting global investments; (2) distributing values equitably among universal participants; and (3) preventing and correcting abuses of power and authority.

A. PROMOTING GLOBAL INVESTMENTS

The first policy of international investment law is to drive global growth by investments. This policy has been acknowledged by developed and developing states in countless BITs.¹⁵⁷ International investment law's structure and mechanics are designed to promote investment. Investment agreements, including contracts and BITs, stabilize participants' expectations about the treatment of investments and the investor's duties by signaling the participants' intentions to comply with standards articulated in the agreements. Over time, the repetition of these standards in agreements, awards, decisions and treaties has created shared expectations of appropriate behavior, upon which participants can build investment relationships. Because investors tend to be risk-averse, this increase in minimum order promotes investment.¹⁵⁸ Reducing uncertainty also reduces the cost of investments to investors and host states because investors often account for political and economic risks in their pricing of investments.

International investment law's triggers, apart from transferring power, also directly promote global investments by bringing more participants into the global marketplace. Each investment agreement

157. See, e.g., Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Armenia for the Promotion and Protection of Investments, Dec. 27, 1993, 1996 U.K.T.S. No. 102, 3, pmbl. ("Desiring to create favourable conditions for greater investment by nationals and companies of one State in the territory of the other State . . .").

158. See SEID, *supra* note 135, at 44 ("Among the most important factors an investor considers before deciding to invest in a foreign country are the host country's treatment of foreign investors . . .").

that transfers power and authority places its investment parties in the international investment framework and creates more pathways for resources to be exchanged. Capitalist theories assume this increase in access to markets promotes growth and development.¹⁵⁹

Further inquiry is, however, necessary to determine the extent that transfers of power and authority in international investment law promote investments.¹⁶⁰ Whenever investor protections do not increase investments and promote growth, international investment law's transfers of power and authority could be normatively unjustified. The salient test is: if the international investment law preserved state power and authority and offered fewer protections to investors, will investments cost more and dwindle in volume?

At a minimum, investors seek basic protections, such as compensation for expropriation.¹⁶¹ Without basic protections, investors could be reluctant to export capital to foreign states no matter how high the potential returns because profits would be vulnerable to political risks beyond investors' control. For this reason, almost every BIT and many investment agreements contain agreements to arbitrate or litigate in a forum investors regard as neutral.¹⁶² Whenever the investor is unfamiliar with the host state's legal system or believes that its judiciary would not be sympathetic to the investor's interests, arbitration agreements or forum selection clauses are critical preconditions to investment.

In contrast, more aggressive protections, such as elevating all investment undertakings into treaty obligations, are often not critical

159. See, e.g., Thomas Brewer, *International Investment Dispute Settlement Procedures: The Evolving Regime for Foreign Direct Investment*, 26 LAW & POL'Y INT'L BUS. 633, 639-40 (1995) (noting the shift in theoretical thinking about foreign direct investment from emphasizing corporate regulation to focusing on liberalizing government policies); see SEID, *supra* note 135, at 39 ("The realization that FDI can play an important role in the development of a country has spurred competition between host countries for such investment.").

160. See UNCTAD, *supra* note 34, at 122 (1998) (presenting data showing that BITs have had a weak influence on foreign direct investments).

161. See Kenneth Vandevelde, *U.S. Bilateral Investment Treaties: The Second Wave*, 14 MICH. J. INT'L L. 621, 702 (1993) (noting that the United States has consistently insisted on expropriation compensation and arbitration clauses in their BITs).

162. See UNCTAD, *supra* note 34, at 95-96 (1998) (describing arbitral mechanisms in BITs).

to promoting investments because an investor's basic investment is secure even without such aggressive protections. Profit-driven corporations may run significant risks where high returns are possible.¹⁶³ Such investors may be willing to forego aggressive investment protections if these protections would prevent or delay their deals' closings.¹⁶⁴

In the *CME* dispute, the investment agreements did not contain a liquidated damages provision accounting for future profits, even though such contractually provided-for damages would have placed on firm ground the foreign investor's claim for lost profits when investment plans went awry.¹⁶⁵ Further, Mr. Lauder invested in CNTS even though the Czech-Netherlands BIT did not expressly provide for lost future profits as compensation.¹⁶⁶ Under these circumstances, CME's belated claim for lost profits after its investment had vaporized and there was no hope of a further profit except by pursuing arbitration suggests that the protection of future profits was not a pre-condition for CME's investment, but only figured prominently in the foreign investors' minds when their investment arrangement fell apart.

In sum, basic transfers of state power and authority to investors and tribunals by international investment law can be appraised favorably because they support the policy of promoting investment and development. More aggressive investment protections, although

163. See *id.* at 122 n.10 (quoting German government's statement that "BITS definitely are not the condition *sine qua non* for foreign investors' decision [sic]").

164. For example, although investors often wish to protect the confidentiality of their investment arbitrations, investors still invest in foreign states under bilateral investment treaties, which do not generally provide that investment arbitrations are confidential. Further, investors seem to accept arbitration rules that do not protect, or inadequately protect, their confidentiality. See Alexis Brown, *Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration*, 16 AM. U. INT'L L. REV. 969, 992-99 (2001) (arguing that most arbitration institutions' rules do not provide, or inadequately provide confidentiality).

165. See generally *CME Czech Republic B.V. v. Czech Republic* (Partial Award), slip op. ¶¶ 1-24 (UNCITRAL, Sept. 13, 2001) (discussing CME's investment agreements).

166. See *CME Czech Republic B.V. v. Czech Republic* (Final Award), slip op. at 32-55 (UNCITRAL, March 14, 2003) (describing CME's claim for future profits).

likely to become established over time because of the current trend towards ever-greater investment protection, should be viewed with some suspicion because any positive effect these protections may have on global investments is insufficiently supported by evidence.

B. DISTRIBUTING VALUES EQUITABLY

International investment law, through its redistribution of state power and authority, should equitably distribute values, i.e., the universe of tangible and intangible benefits, interests and resources.¹⁶⁷ Equity should be measured between investors and states, and among states. As between investors and states, investors should receive fair returns on their investments, while states should derive benefits for their communities and retain sufficient power and authority to govern these communities and participate effectively in global decision-making. As among states, international investment law should help all states develop and participate effectively in global decision-making.

Distributing values equitably is important for three reasons. First, it is a matter of fundamental fairness that values should be distributed in a balanced manner. This notion of balance, as the *Government of Kuwait v. Aminoil* tribunal has recognized, is inherent in our concept of law:

[W]ith reference to every long-term contract, especially such as involve an important investment, there must necessarily be economic calculations, and the weighing up of rights and obligations, of chances and risks, constituting the contractual equilibrium *It is in this fundamental equilibrium that the very essence of the contract consists.*¹⁶⁸

Second, international law's most fundamental goal of promoting global well-being can only be supported if states and corporations, which are responsible for their nationals, employees and shareholders, receive sufficient benefits through international investments to improve the well-being of their constituents and stakeholders.

167. See FRANCK, *supra* note 152, at 9-22 (arguing that international lawyers "should focus on issues of fairness in the law").

168. Gov't of Kuwait v. American Independent Oil Co. (Aminoil) (Award), 66 INT'L L. REPORTS 519, 603 (Mar. 24, 1982) (emphasis added).

Third, distributing values equitably creates perceptions of fairness. Professor Amy Chua has argued persuasively that perpetuating inequities runs the risk of backlashes against markets and market-dominant minorities because a prolonged period of extreme inequity creates an explosive mix of resentment, envy and fear among the market-subservient majority.¹⁶⁹ Disfranchised populations may put pressure on their governments to retaliate violently or even self-destructively, or they may retaliate without the assistance of their government in a way that overcomes the asymmetries of global power—by committing acts of terrorism.¹⁷⁰

1. Investor-State Equity

The distribution of power and authority in international investment law is producing mixed results in regards to investor-state equity. International law has few crystallized constraints on participants during the negotiation and conclusion of investment agreements. Beyond customary law's prohibitions against fraud and coercion,¹⁷¹ there are hardly any clear norms to ensure that investment treaties are established upon a fundamental equilibrium that the *Aminoil* tribunal referred to as the "very essence of the contract."¹⁷² Likewise, the validity of investment contracts, which is determined in accordance with the contracts' choice of law clauses, is usually not dependent on any equilibrium of values in the agreements.

Due to the lack of controls over the conclusion of international investment agreements, some agreements have created real and perceived inequities between investors and nationals, resulting in violent protests that undermined investment projects at tremendous costs to investors, states and other participants. For example, in the mid-1990s, Venezuela granted to ICA Holdings, a Mexican

169. AMY CHUA, *WORLD ON FIRE* 234-5 (2003) (describing anti-Americanism as a type of adverse reaction that the market subservient majority has to the perceived "disproportionate wealth and power" held by the United States).

170. *See id.* at 254-58 (examining different instances of "homicidal fury" by members of resentful and relatively impoverished groups); SCHACHTER, *supra* note 10, at 61 (emphasizing that equity and distributive justice are vital considerations for creating durable international arrangements).

171. *See* Vienna Convention on the Law of Treaties, May 22, 1969, arts. 49, 51, 52, 1155 U.N.T.S. 331 (providing that fraud or coercion invalidates treaties).

172. *Kuwait v. Aminoil*, 66 INT'L L. REPORTS at 603.

company, a concession for the improvement and maintenance of its Caracas-La Guaira Highway System. Venezuela, pursuant to its concession obligations, increased highway tolls by four to twenty-fold to finance the project, even though the new rates were unacceptable to Venezuelans. Major protests erupted, eventually disrupting the toll system. This backlash against investors and markets brought the concession to a halt: in September 2002, ICA abandoned the highway.¹⁷³ Although the investor recovered some damages in an arbitral proceeding against Venezuela, these damages did not fully ameliorate the consequences of inequity: Venezuela's economy was damaged through the protests, both parties had to bear the costs of arbitration and prior dispute resolution negotiations, and Venezuelans were injured in the protests.¹⁷⁴

Although international investment law exerts inadequate control over the conclusion of investment agreements to ensure that such agreements are equitable to states and investors, control mechanisms can correct imbalances after investment agreements are concluded. When agreements are or become inequitable, a state party has a self-help remedy: it can restore power and authority by expropriating the investment and allowing tribunals to adjudicate disputes concerning perceived inequities.

However, arbitral awards reveal that international investment law provides inconsistent support for the policy of equity. Whereas the determination of whether a state is responsible for failed investments accounts for equitable considerations, the assessment of damages once a state is found responsible may ignore the need to reach an equitable outcome. When appraising liability at the merits stage of proceedings, tribunals often account for context and policy concerns to correct inequitable investment arrangements,¹⁷⁵ such as when determining if non-discrimination provisions which prohibit treating

173. *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela* (Award), ICSID Case No. ARB/00/5, slip op. ¶¶ 1-50 (Sept. 23, 2003), available at http://www.worldbank.org/icsid/cases/Award_Total.pdf (last visited Dec. 20, 2004).

174. See *id.* (noting the detrimental effects of the investment project).

175. See *Azinian v. United Mexican States* (Award), ICSID Case No. ARB(AF)/97/2, ¶¶ 105-15 (Nov. 1, 1999) (finding Mexico justified in canceling waste management concession granted as a result of unconscionable and incomplete representations by the U.S. investor).

foreigners less favorably than nationals have been violated. The tribunal in *S.D. Myers, Inc. v. Gov't of Canada (Partial Award)* stated: "an evaluation of 'like situations' in the investment context should take into account policy objectives,"¹⁷⁶ and that the key inquiry is "whether the different treatment of situations found to be 'like' is justified by legitimate public policy measures that are pursued in a reasonable manner."¹⁷⁷

In *Genin v. Republic of Estonia*, the tribunal determined that Estonia's regulatory investigations against the Estonian Innovation Bank, which was controlled by U.S. citizen Alex Genin, were non-discriminatory and "constituted entirely legitimate and fully proper exercises of the central bank's regulatory and supervisory responsibilities."¹⁷⁸ The tribunal accounted for:

the particular context in which the dispute arose, namely, that of a recently nascent independent state, coming rapidly to grips with the reality of modern financial, commercial and banking practices and the emergence of state institutions responsible for overseeing and regulating areas of activity perhaps previously unknown.¹⁷⁹

The *Genin* and *S.D. Myers* awards accordingly show that for the purposes of establishing liability, international investment law may consider whether the distribution of values between states and investors is equitable.

In contrast, awards of damages run the risk of inequities between states and investors because compensation standards do not tend to account for equity. International investment law gives scant regard to the possibility that compensation to investors may debilitate the host

176. *S.D. Myers, Inc. v. Gov't of Canada (Partial Award)*, 40 I.L.M. 1408, ¶ 248 (2001) (UNCITRAL, Nov. 12, 2000); see *GAMI Invs., Inc. v. Gov't of the United Mexican States (Final Award)*, slip op., ¶ 114 (UNCITRAL, Nov. 15, 2004) (holding Mexico's expropriation of sugar mills owned by a corporation in which the claimant had shares was not discriminatory even though other sugar mills were not expropriated because the expropriation "was plausibly connected with a legitimate goal of policy (ensuring that the sugar industry was in the hands of solvent enterprises)").

177. *S.D. Myers, Inc. (Partial Award)*, 41 I.L.M. 1408 at ¶ 246.

178. *Genin v. Republic of Estonia (Award)*, ICSID Case No. ARB/99/2, slip op. ¶ 353 (June 25, 2001).

179. *Id.* ¶ 348.

state. The majority of the *CME* tribunal did not consider whether the Czech Republic would be able to bear the cost of its \$270 million award.¹⁸⁰ Although compensation in a number of international law contexts is capped to avoid an overwhelming financial burden for states,¹⁸¹ the majority of the *CME* tribunal did not acknowledge this norm. Under prevailing standards of compensation in international investment law, a state's economy may be debilitated if the state is compelled to regain its power and authority from other decision-makers.

2. *Inter-State Equity*

In addition to condoning inequities between states and investors, international investment law perpetuates certain inter-state inequities when it inflicts different outcomes on weak and powerful states. Some arbitral tribunals deciding claims against developing states have found these states responsible for the losses suffered by foreign investors because they deemed the states' courts' decisions against the investor to constitute denials of justice. In *Amco Asia Corp. v. Republic of Indonesia*, English barrister and International Court of Justice judge Rosalyn Higgins chaired the arbitral tribunal that determined that the Indonesian judiciary's denial of justice to Amco incurred state responsibility for Indonesia to compensate Amco for its investments.¹⁸² Likewise, in *Himpurna California Energy Ltd. (Interim Award)*, the tribunal chaired by Freshfields Bruckhaus

180. See *CME Czech Republic B.V. v. Czech Republic (Final Award)* (separate opinion of Ian Brownlie), slip op. ¶ 75 (noting imbalance between amount of damages awarded and Czech Republic's ability to pay it).

181. See SCHACHTER, *supra* note 10, at 324 ("[A] good case can be made that 'less than full value would be just compensation' when the State would otherwise have an 'overwhelming financial burden.'"); *CME Czech Republic B.V. (Final Award)* (separate opinion of Ian Brownlie), slip op. ¶ 77-78 (noting international law principle against subjecting state to "economic ruin"); Vladimir-Djuro Degan, *State Succession Especially in Respect of State Property and Debts*, 4 FINN. Y.B INT'L L. 130, 191 (1993) (explaining that equity limits quantum of predecessor state's debts for which successor states became responsible to ensure that successor states survived as viable entities).

182. *Amco Asia Corp. v. Republic of Indonesia (Resubmitted Case, Award, Supplemental Decision and Rectification)*, ICSID Case No. ARB/81/1, 1 ICSID (W. Bank) 569, ¶¶ 136-37, 146-52 (May 31, 1990, Oct. 10, 1991).

Deringer partner Jan Paulsson held Indonesia responsible for its court's injunction purporting to suspend the arbitral proceedings.¹⁸³

In contrast, in *Loewen Group, Inc. v. United States of America*, a tribunal chaired by former Australia High Court Chief Justice Anthony Mason found the United States not responsible for its court's flagrant denials of justice that eviscerated a foreign investor's investments. The Canadian Loewen Group were embroiled in a dispute with Mississippi companies owned by the O'Keefes over contracts worth around \$1 million and the exchange of two O'Keefe funeral homes worth \$2.5 million for a Loewen insurance company valued at \$4 million.¹⁸⁴ The Mississippi court that adjudicated the dispute allowed racial and class biases to infect the trial.¹⁸⁵ The tribunal condemned the trial as a "disgrace," and stated that "by any standard of evaluation, the trial judge failed to afford Loewen the process that was due."¹⁸⁶ At the end of the trial, the jury awarded \$400 million in punitive damages to the U.S. plaintiff against the foreign party.¹⁸⁷ Unable to appeal this decision without going into bankruptcy because the bond for appeal under Mississippi law was \$625 million, Loewen settled the case for \$175 million.¹⁸⁸

Unlike the *Amco* and *Himpurna* tribunals, the *Loewen* tribunal refused to find the United States responsible for Loewen's losses as a result of the U.S. court's denial of justice. The NAFTA tribunal determined that denial of justice in international law is only perfected where the investor has exhausted all local remedies, including appealing to the highest court of the host state.¹⁸⁹ Although the tribunal acknowledged Loewen's inability to post the \$625 million

183. *Himpurna California Energy Ltd. v. Republic of Indonesia* (Interim Award), 15-1 MEALEY'S INT'L ARB. REP. A-1, A-29-A-34 (2000) (UNCITRAL, Sept. 26, 1999).

184. *Loewen Group, Inc. v. United States of America* (Award), ICSID Case No. ARB(AF)/98/3, 42 I.L.M. 811, 812-13 (2003) (June 26, 2003).

185. *Id.* ¶ 4 (indicating that the judge permitted a number of prejudicial references by O'Keefe, including references to Loewen's foreign nationality and race-based distinctions between the parties).

186. *Id.* ¶ 119.

187. *Id.* ¶ 101.

188. *Id.* ¶¶ 7, 209 (noting that Loewen entered into a settlement when it could instead have filed for bankruptcy to stay the execution of the award).

189. *Id.* ¶¶ 167-71.

bond,¹⁹⁰ the tribunal reasoned that Loewen nonetheless failed to exhaust local remedies because Loewen could have gone into Chapter 11 bankruptcy and appealed against the state court decision.¹⁹¹ Alternatively, the tribunal decided Loewen could have petitioned to the U.S. Supreme Court with an application for a stay of execution of the judgment against the bond requirement.¹⁹²

The *Loewen* award is remarkable. The exhaustion of local remedies is not an unyielding international law principle.¹⁹³ Neither the *Amco* nor *Himpurna* tribunals articulated this purported condition precedent for denial of justice. Indeed, in *Himpurna*, local remedies were far from exhausted: like Loewen, Himpurna did not appeal the host state's lower court decision to Indonesia's highest court before pursuing arbitration.¹⁹⁴

Even if the exhaustion of local remedies is applicable to denial of justice claims, by the *Loewen* tribunal's own admission, the international law rule is that remedies must effectively be exhausted rather than absolutely exhausted.¹⁹⁵ The tribunal's finding that Loewen should have petitioned to the Supreme Court, which would have had a very limited chance of succeeding, rather than settle for a third of the verdict prompted Swiss arbitrator Jacques Werner to

190. *Id.* ¶ 185 (“[T]he provision of absolute security was beyond the capacity of [Loewen].”).

191. *Id.* ¶ 214-17.

192. *Id.* ¶ 210; see also *Loewen Group, Inc. v. United States of America* (Supplementary Decision), ICSID Case No. ARB(AF)/98/3 (Aug. 17, 2004), ¶¶ 19-20 (upholding award), available at <http://www.international-economic-law.org/Loewen/Loewen%20%20Decision%20on%20Request%20for%20Reconsideration.pdf> (last visited Dec. 31, 2004).

193. See A.A. CACADO TRINDADE, *THE APPLICATION OF THE RULE OF EXHAUSTION OF LOCAL REMEDIES IN INTERNATIONAL LAW* 110-12 (1983) (challenging the local remedies rule); SCHACHTER, *supra* note 10, at 213 (proposing limitations to the exhaustion of local remedies rule).

194. See *GAMI Invs., Inc. v. Gov't of the United Mexican States* (Final Award) (UNCITRAL, Nov. 15, 2004), slip op., ¶ 38(B) (stating that foreign investor “is entitled to seek international relief on account of wrongful expropriation” even though investor had not sought *any* relief before the host state's courts).

195. See *Loewen Group, Inc. v. United States of America* (Award), ICSID Case No. ARB(AF)/98/3, 42 I.L.M. 811, ¶¶ 167-68 (2003) (June 26, 2003) (stating that the local remedies rule “is an obligation to exhaust remedies which are effective and adequate and are *reasonably available to the complainant in the circumstances in which it is situated*” (emphasis added)).

exclaim: "In what world does the Arbitral Tribunal live?"¹⁹⁶ The notion that an international law claim can only be pursued by going into bankruptcy similarly bears no relation to commercial realities or business practices.

Whatever the technical merits or flaws of the *Loewen* award, it raises serious equitable issues. The *Loewen* award creates the perception, if not reality, that international law inequitably distributes power and authority among states. Whereas weak states lose judicial power over disputes and their decisions are arguably reviewed by tribunals, powerful states such as the United States seem to be less vulnerable to such review. The *Loewen* tribunal concluded that the review of U.S. decisions was for the state "to regulate according to its own chosen appreciation of the ends of justice" (emphasis added).¹⁹⁷ This state of affairs has caused further antagonism against global market-dominant minorities such as the United States. As one U.S. reporter observed: "the U.S. victory would anger many investment lawyers around the world who saw *Loewen's* loss as proof that the United States will not abide by the rules it imposes on others."¹⁹⁸

In fairness, the *Loewen* tribunal may have felt constrained not to issue an award against the United States in spite of the U.S. court's egregious violations of international investment law. U.S. policy-makers have long sought to limit international law's authority over the United States if they perceived that this authority could be deployed against U.S. interests. Two years ago, Senator John Kerry sponsored a bill that would weaken investor protections under NAFTA out of fear that the United States would face billions of dollars in claims yearly.¹⁹⁹ President George W. Bush similarly withdrew United State's support for several important multilateral treaties, including the Nuclear Test Ban Treaty, the Climate Change

196. Michael D. Goldhaber, *NAFTA Suit is Alive, Kicking*, NAT'L L. J., Vol. 26, No. 26 at 1 (Mar. 1, 2004) (quoting Jacques Werner).

197. *Loewen Group, Inc. (Award)*, 42 I.L.M. 811, ¶ 242.

198. Goldhaber, *supra* note 196.

199. S.A. 3430 (Kerry Amendment to H.R. 3009), 107th Cong., 148 Cong. Rec. S4504 (2002) (proposing, *inter alia*, that foreign investors receive no greater legal rights than U.S. citizens and that international law's minimum treatment norm offer no greater protection than the U.S. Constitution's due process clause).

Treaty and the Rome Convention.²⁰⁰ The *Loewen* tribunal may well have been concerned that a decision against the United States could provoke the United States to deploy its global power to weaken international investment law's infrastructure.²⁰¹ The *Loewen* tribunal hinted at this consideration when it stated "[t]oo great a readiness to step from outside into the domestic arena . . . will damage . . . the viability of NAFTA itself."²⁰² If this assessment is accurate, it could certainly justify a modicum of sympathy for the tribunal. This assessment also regrettably supports the criticism that international investment law redistributes values inequitably among states because important decision-makers like NAFTA tribunals, out of fear of retaliation against the international infrastructure by a superpower, deploy their authority to support that superpower.

C. PREVENTING AND CORRECTING ABUSES

When international investment law fails to support its policies of promoting investment and distributing values equitably, international investment law should deploy corrective mechanisms. Early intervention mechanisms against investors or states that abuse power and authority include negotiation among investors and states, diplomatic pressure by the state of the investor's incorporation and other interested states, and signals by the international business community about appropriate investment behavior.

When these strategies do not succeed, international investment law's next corrective mechanism is adjudication by arbitral tribunals or foreign courts, which power and authority are triggered by forum selection clauses or arbitration agreements. Such tribunals often correct deviations from international investment law's policies. Where an investor has abused its power, the host state is permitted to unilaterally claim back its authority and power over its resources and

200. See President Bill Clinton, Address at the Democratic National Convention (June 26, 2004), in *Clinton: Time Again to Choose a More Perfect Union*, CNN, July 27, 2004 (noting the international treaties for which the Bush administration withdrew support), available at <http://www.cnn.com/2004/ALLPOLITICS/07/26/dems.clinton.transcript> (last visited Nov. 14, 2004).

201. See Alvarez & Park, *supra* note 153, at 399 (arguing that investment arbitration must accommodate political realities and host state interests to avoid a backlash against investor victories).

202. *Loewen Group, Inc. (Award)*, 42 I.L.M. 811 ¶ 242.

investment, such as in the *Genin* award.²⁰³ Conversely, where an investor has not abused its power but the host state desires to restore its authority over sovereign matters, the host state is required to compensate the investor, such as in the *SPP* award.²⁰⁴

Arbitral tribunals' power and authority are buttressed by foreign courts' enforcement powers. This collusion of authority is usually sufficient to restore international investment law's policies, even if such restoration requires years of litigation. In 1978, the Arab Organization for Industrialization ("AOI"), which had been formed by Qatar, Egypt and the United Arab Emirates, contracted with Westland to purchase military helicopters. After the Camp David Accords were signed, AOI withdrew from the investment in 1979. ICC arbitration was commenced in 1980, and, in 1993, a final award was entered against AOI for \$385 million, and Westland was found to owe \$30 million advanced on the project. This award was confirmed by the Swiss Supreme Court in the same year. U.S., French and English courts then granted enforcement against AOI's and its member states' foreign assets. These enforcement actions eventually pressured the Arab states and AOI to settle with Westland. Westland settled the U.S. action for \$25 million, the French action for \$115 million, and finally, in 1994, the English action for \$50 million and a write-off of Westland's \$30 million advance.²⁰⁵ This dispute's resolution through implicit cooperation between investors, tribunals, courts and states represents a typical global decision-making process that corrects imbalances.

203. See *Genin v. Republic of Estonia* (Award), ICSID Case No. ARB/99/2, slip op. ¶ 363 (June 25, 2001) (finding Estonia's revocation of foreign investor's banking license justified by investor's abuse).

204. See *Southern Pacific Properties (Middle East) Ltd. v. Arab Rep. of Egypt* (Award), ICSID Case No. ARB/84/3, 3 ICSID (W. Bank) 189, 226-27, ¶¶ 158-59 (May 20, 1992) (stating that a state may cancel an foreign investment project to protect its antiquities, but must pay compensation to the foreign investor).

205. See *Westland Helicopters Settles Dispute Over 385 Million Award*, 9-8 MEALEY'S INT'L ARB. REP. 3 (Aug. 1994) (describing Westland dispute); *Westland Helicopters Ltd. v. Arab Organization for Industrialization*, 1995 Q.B. 282 (Eng.) (detailing history of Westland dispute).

1. Imperfect Control over Investment Parties

In spite of international law's tremendous power and authority, it is not always able to control powerful states. As the *Loewen* award indicates, powerful states can undermine international investment law's policies without incurring high costs that are routinely imposed on weaker states when decision-makers defer to powerful states. Such deference undermines international law's corrective policy.

Less powerful states can also elect to incur the costs of opposing the authority of international investment law, thereby overcoming its corrective authority. In the *Himpurna* dispute, MidAmerican Energy Holdings Co. pursued arbitrations against its Indonesian investment partner for lost investments and obtained an award of almost \$400 million. The Indonesian partner ignored this award. When MidAmerican commenced UNCITRAL arbitration against Indonesia under Indonesia's investment guarantee, Indonesia attempted to influence its party-appointed arbitrator through numerous *ex parte* communications. When this strategy failed, Indonesia sent agents to a Netherlands airport to escort the arbitrator to Indonesia so that a full tribunal could not be constituted. Even though the incomplete tribunal issued a final award against Indonesia, Indonesia ignored this award and MidAmerican had to claim \$290 million in political risk insurance coverage for its losses.²⁰⁶ By persistently ignoring international law's authority, even less powerful states can sometimes undermine international investment law's policies.

2. Tribunals' Misuse of Authority

In addition to lacking an authoritative response to states and investors that effectively ignore tribunals and courts, international investment law does not currently have a complete response when tribunals and courts misdirect their authority to undermine international investment laws policies. Investment parties are attracted to arbitration because, *inter alia*, the limited right of appeal places the winning party in a stronger bargaining position to settle after an award has been rendered. This limited right of appeal

206. *Indonesia Doesn't Pay Awards; MidAmerican Energy Get \$290 Million on Political Risk Claim Insurance Coverage*, 14-12 MEALEYS' INT'L ARB. REP. 1 (Dec. 1999) (describing Indonesia's refusal to pay award and investor's recourse to insurers).

supports international investment law's policies when tribunals reach the right decision, but poses serious problems for global policies when tribunals reach the wrong decision, such as when wildly extravagant damages are awarded, as in the *CME* award, or when tribunals decline to deploy their authority and power to correct investor-state inequities, as in the *Loewen* award.

Although annulment proceedings provide some control, this is an incomplete mechanism because tribunals and courts may only review the award for limited abuses such as the failure to state reasons or for manifestly exceeding the tribunal's powers.²⁰⁷ The *CME* and *Loewen* awards would probably withstand review under these standards. Because these limitations on review are necessary to protect the finality and efficacy of arbitration,²⁰⁸ annulment proceedings are likely to be effective only against the most egregious abuses of arbitral authority.²⁰⁹

International investment law's imperfect review is supplemented by another imperfect control: enforcement proceedings in national courts. A claimant often pressurizes the losing party to settle after an award is obtained by seeking enforcement orders in states where the losing party has assets. By refusing to enforce an unjust award, national courts can rectify the inequities of the award.

However, the criteria for refusing to enforce an award are not directed at promoting international investment law's policies, but at protecting national interests. Article 5 of the New York Convention

207. See ICSID Convention, *supra* note 150, at art. 52 (stating grounds for application for annulment of arbitral award); *Maritime International Nominees Establishment v. Republic of Guinea* (Decision on Annulment), ICSID Case No. ARB/84/4, 4 ICSID (W. Bank) 79, 86-88 (Dec. 22, 1989) (clarifying limited grounds for annulment); *Compañía de Aguas del Aconquija S.A. v. Argentine Republic* (Decision on Annulment), ICSID Case No. ARB/97/3, 41 I.L.M. 1135 ¶¶ 62-63 (2002), (July 3, 2002), (stating that annulment may be granted only on grounds set out in Article 52 of the ICSID Convention and not for "a trivial cause").

208. See W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 1989 DUKE L.J. 739, 744 (1989) (arguing additional layers of control increase a range of costs).

209. *But see* ICSID Secretariat, Possible Improvements of the framework for ICSID Arbitration (Oct. 22, 2004), at 14-16 (noting that investment treaties increasingly create appeals mechanisms and that an ICSID appeal process could foster coherence in case law emerging under investment treaties).

allows a court to refuse to enforce an award if the award contradicts a fundamental state policy, but there is no provision for the refusal to enforce an award that is contrary to international investment law's policies.²¹⁰ Although limiting exceptions to enforcement promotes finality and predictability in arbitration, these limitations also result in highly-imperfect controls over abusive tribunals.

3. *Weak Res Judicata and Lis Pendens Controls*

Stronger controls are also needed over investors that pursue substantially similar claims in multiple forums. Investors may use different corporate forms to pursue claims for recovery of the investment under different investment agreements,²¹¹ including BITs and contracts, thereby multiplying their chances of recovery. Multi-forum arbitration can lead to two or more tribunals issuing contradictory awards. Such conflicting jurisprudence muddies the content of investment norms and can confuse participants when these norms are applied to facts.

In the *CME* dispute, in addition to the *CME* claim under the Netherlands-Czech BIT, *CME*'s controlling shareholder, Robert Lauder, pursued an almost identical claim, with the same allegations, on the same facts, under almost identically-worded provisions of the U.S.-Czech BIT. The two tribunals reached conflicting conclusions. While the *CME* tribunal found that the Czech Republic had violated the investor treaty protections and that these violations had caused *CME* to lose its investment, the *Lauder* tribunal found that the Czech Republic had only acted in an arbitrary and discriminatory manner through its Media Council's revocation of its initial decision to allow CEDC to invest directly in CET 21, but that this revocation did not cause *CME* to lose its investments.²¹²

210. New York Convention, *supra* note 6, art. 5 (providing that a state may refuse to enforce an award that is contrary to its public policy).

211. See *Lauder v. Czech Republic (Final Award)*, slip op. ¶ 175 (UNCITRAL, Sept. 3, 2001) (stating that the claimant, by pursuing arbitration in his own capacity and through his company, was "seeking the same remedies in a different fora"); Brown, *supra* note 164, at 1017 ("Complex international business transactions often produce multiple disputes involving several parties.").

212. *Lauder (Final Award)*, slip op. ¶¶ 222-35.

Despite the similarity of claims in *CME* and *Lauder*, the *CME* tribunal, which rendered its interim award after the *Lauder* final award, did not feel constrained by *Lauder*. The *CME* tribunal reasoned that “the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, *inter alia*, differences in the respective texts, objects and purposes, subsequent practice and *travaux préparatoires*.”²¹³ The *CME* tribunal did not elaborate on the application of this approach to the facts, and observers, including investors, host states and their attorneys, are left to wonder how the *CME* tribunal reached opposite results even though the objects and purposes of both BITS and the subsequent practice of the Czech Republic in relation to investments were similar.

Although the *CME* awards might be technically distinguishable from the *Lauder* award,²¹⁴ and indeed the Czech Republic had objected to being bound by the *Lauder* award in the *CME* arbitration,²¹⁵ the different outcomes on the same facts and substantially similar investor protections creates uncertainty in the law and encourages investors to forum shop. In order to protect the policies of equity and promoting investments, international investment law should develop stronger mechanisms to prevent an investment participant from pursuing similar claims in multiple forums.²¹⁶

213. *CME Czech Republic B.V. v. Czech Republic* (Final Award), slip op. ¶ 433 (UNCITRAL, March 14, 2003).

214. See *Czech Republic v. CME Czech Republic B.V.*, Case No. T 9737-01, slip op. at 69-71, 95-98 (Svea Ct. App. May 13, 2003) (translation in English) (holding *lis pendens* and *res judicata* requirements not satisfied by *CME* award), available at http://www.mfcr.cz/index_en.php (last visited Nov. 18, 2004); Hans Bagner, *Swedish Appeals Court “Strikes Delicate Balance” in Czech Republic v. CME*, 18-6 MEALEY’S INT’L ARB. REP. 34, 36 (June 2003) (discussing Swedish court’s holding that there was no *lis pendens* and *res judicata* between *Lauder* and *CME* awards).

215. See *CME Czech Republic B.V. (Final Award)*, slip op. ¶ 428 (noting that Czech Republic did not agree to consolidate *CME* and *Lauder* arbitrations). The Czech Republic’s strategy is difficult to understand, because its refusal to join proceedings doubled its chances of losing.

216. See *Case Concerning the Legality of Use of Force* (Preliminary Objections) (Serb. & Mont. v. Fr.), Joint Declaration of Vice President Ranjeva, Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby, slip

III. RECOMMENDATIONS

Decision-makers can strengthen international investment law and overcome its present shortcomings. By appraising international investment law's intricate power and authority dynamics, the strengths and defects of international investment law become clear. International investment law's policies can be better promoted through five structural adjustments.

First, in order to promote investments while preserving a state's authority and power to adjust to changing circumstances for the benefit of its communities, consumers of foreign capital should carefully consider which investment protections are required and which are unnecessary to attract capital. Arbitral tribunals and courts should also use this policy approach to help determine appropriate investment behavior and compensation standards. Such an approach, if widely adopted by decision-makers, should protect legitimate expectations without legitimizing wild expectations.

Second, in order to avoid investor-state inequities, states and investors need to carefully calculate the immediate and hidden costs of investment agreements before entering into an investment project. When investors and states decide to embark on an investment project, they should manage the local communities' expectations about the project's likely positive and negative impacts. Properly managed expectations minimize the risk of backlashes against perceived inequities. A deeper structural change would be to prescribe that, like the doctrine of unconscionability in some national legal systems, manifestly imbalanced investment agreements are invalid. However, this is a controversial proposal which needs an extended period of signaling between participants before it may be widely accepted.

Third, as international investment law increases its power and authority, this authority should be exerted over both powerful and weak decision-makers to demand equal compliance with international norms. When non-compliance is anticipated, the damage to international law from permitting deviant behavior to go uncorrected must be carefully balanced against the damage to

op., ¶ 3 (I.C.J. Dec. 15, 2004) ("Consistency is the essence of judicial reasoning. This is especially true in different phase of the same case or with regard to closely related cases.").

international law from having a participant ignore demands for compliance. In many situations, prescribing normatively undesirable outcomes to secure the compliance of powerful states causes more structural damage than making the correct normative demand and having that demand ignored. Once international investment law's legitimacy is lost, international investment law's authority and power to promote its policies vaporizes.²¹⁷

Fourth, efficacy and finality require that corrections do not continue *ad infinitum*. Instead, arbitral tribunals and courts should properly perform their corrective functions in the first instance. Arbitrators, like judges, need to be carefully selected. Although *ad hoc* party-appointed arbitrators might have different considerations from impartial judges with security of tenure, arbitrators should account for international investment law's global policies when resolving disputes. Arbitrators have a constitutive effect on law because their signals on appropriate investment behavior are observed by many participants and are often followed. To use this authority properly, arbitrators ought to be pro-investment, not pro-investor or pro-state.

Fifth, decision-makers should prevent multi-forum adjudication to protect international investment law's predictability and legitimacy. Investment agreements should restrict adjudication to one mutually acceptable forum. If parties pursue dispute resolution in multiple arenas, decision-makers should implicitly or expressly co-ordinate their responses. Investment parties may be prevailed upon to consolidate proceedings, and tribunals should acknowledge the appropriate *res judicata* and *lis pendens* effect of prior decisions.

These five proposals should steer international investment law as it hurtles along its growth trajectory.²¹⁸ Barring a cataclysmic geopolitical event which fundamentally alters international investment law's decision-making process, the benefits of international investments are too great for states and corporations to contemplate

217. Cf. Jonathan I. Charney, *Disputes Implicating the International Credibility of the Court: Problems of Non-Appearance, Non-Participation, and Non-Performance*, in THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 288, 302 (Lori Damrosch ed., 1987) ("[T]he [ICJ] must have the support of a broad spectrum of the international community in order to function effectively.").

218. See Sacerdoti, *supra* note 9, at 261-75 (identifying the trend towards greater investments).

withdrawing from global investment markets.²¹⁹ National courts have recognized the importance of international investment to their economies and are generally supporting international investment law.²²⁰ Pro-investment arbitrators will continue issuing awards that support global investment. In this inescapable investment network, we have a shared responsibility to increase everyone's well-being by adjusting international investment law's decision-making processes to further harmonize its goals and better promote its policies.

219. See DOLZER & STEVENS, *supra* note 9, at xi ("Foreign direct investment is today the largest single source of external finance for developing countries"); UNCTAD, *supra* note 34, at 146 ("[T]he number of TNCs [transnational corporations] headquartered in developing countries is growing and more TNCs are seeking to expand abroad."); Stephen M. Schwebel, *Report of the Committee on Nationalization of Property of the American Branch of the International Law Association*, in JUSTICE IN INTERNATIONAL LAW 385, 385-86 (1994) ("Economic interdependence is universal and acute.").

220. See, e.g., *Gau Shan Co., Ltd. v. Bankers Trust Co.*, 956 F.2d 1349, 1354 (6th Cir. 1992) ("The modern era is one of world economic interdependence, and economic interdependence requires cooperation and comity between nations.").