"Investor-State" Disputes in Trade Pacts Threaten Fundamental Principles of National Judicial Systems[1]

Free trade agreements (FTAs) and bilateral investment treaties (BITs) impose obligations on host governments to provide foreign investors with new privileges, but few if any social or environmental obligations are required of the investors. Disputes can be brought over alleged violations of these new rights, including the right to demand compensation for domestic policies that investors claim reduce the value of their investments. These disputes take place through an "Investor-State" dispute mechanism, which empowers foreign investors to bypass domestic courts and sue governments for cash damages in international tribunals.

This mechanism elevates individual corporations and investors to equal standing with agreements' signatory governments, empowering corporations to directly enforce public treaties. Foreign corporations not only circumvent sovereign immunity protections, but are empowered to sue governments to challenge domestic laws and regulations outside of domestic courts.

Opposition has been growing to the inclusion of these investor-state dispute powers in the Trans-Pacific Partnership (TPP) agreement, currently being negotiated among nine countries (Australia, Brunei, Chile, Malaysia, New Zealand, Peru, Singapore, the United States and Vietnam, with Canada, Japan and Mexico seeking to join). The United States has made it clear that it expects the TPP to include an Investor-State dispute mechanism based on the US Model BIT used in recent US FTAs, which is in turn based on the Investment Chapter 11of the North American Free Trade Agreement (NAFTA). The US investor enforcement provisions have counterparts in other countries' BITs, creating a parallel system of privatized justice that is becoming increasingly controversial. The Australian government has taken a stand against accepting the application in Investor-State dispute mechanisms in future FTAs, including the TPP.

The definition of 'Investment' in FTAs and BITs is much broader than the real property rights and other specific interests in property that are typically protected under domestic property rights law. This includes regulatory permits and licenses; financial instrument such as futures, options, and derivatives; intellectual property rights; procurement contracts between a state and a foreign investor; and concessions to natural resources granted by a national government to a foreign investor, as well as vague terms such as "assumption of risk" and "expectation of profit." As well, the standard definition of an "investor" as a person or legal entity that makes an investment has not required that person or entity's actual business activities or commitment of capital in the host country to be substantial or involve actual substantial business activities.

Vaguely worded provisions that guarantee foreign investors a "minimum standard of treatment", including "fair and equitable treatment," open the door to Investor-State claims over a wide range of government measures that are otherwise permissible under nations' Constitutions and legal systems. Despite broad support for the principle that the investor protection standards contained in investment agreements should not provide foreign investors with greater rights than those enjoyed by national investors, the current standard permits tribunals to do just that.

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Under most international investment agreements today, investors are also protected against "indirect" expropriation, which can be interpreted to mean regulations and other government actions that reduce the value of a foreign investment. Governments can be required to pay compensation based on the impact of the government measure on the value of the investment, regardless of whether there has actually been some appropriation of an asset by the government. While international arbitration tribunals cannot force a government to repeal laws or regulations, the threat of massive damages awards can have a "chilling effect" on policymaking. For instance, the threat of a NAFTA Investor-State attack by insurance firms on Ontario, Canada's proposed no-fault government auto insurance regime led to that proposal being abandoned. Canada also reversed a nationwide ban on MMT, a gasoline additive banned in many U.S. states as a probable carcinogen, after the U.S. Ethyl Corporation filed a NAFTA Investor-State case.

Attempts at clarifications and interpretive annexes have recognized and sought to limit the legal risks confronting governments from tribunals' expansive interpretations of indirect expropriation and minimum standards of treatment. But these provisions are untested and, in any case, are unlikely to deter foreign corporations from threatening and pursuing investor-disputes because arbitral rulings are so notoriously inconsistent and unpredictable.

Government actions deemed subject to these rules in past cases include the functioning of domestic court systems, denial of regulatory permits, environmental protections, emergency regulatory measures taken during financial crises, and more. The arbitral tribunal in the *Loewen v. United States* NAFTA case concluded that a jury decision in private contract litigation constituted a government measure that was subject to NAFTA's investor rules. (This case is described in more detail below.)

Over $350 million in compensation has already been paid out to corporations in a series of Investor-State cases under NAFTA alone. This included attacks on natural resource policies, environmental protection and health and safety measures, and more. In fact, all of the 17 pending claims under only U.S. FTAs, seeking over $12.5 billion damages, relate to environmental, public health and transportation policy – not traditional trade issues.

In several instances, arbitral tribunals have gone beyond awards of cash damages and issued injunctive relief that creates severe conflicts of law. For instance, a recent order by a tribunal in the case brought by Chevron against Ecuador under a U.S.-Ecuador BIT ordered the executive branch of that country to violate its constitutional separation of powers and somehow halt the enforcement of an appellate court ruling. (This case is described below in more detail.)

The international tribunals that currently rule over Investor-State claims lack public accountability, standard judicial ethics rules, and appeals processes. These cases are heard by tribunals composed of three private sector lawyers, many of whom both serve as arbitrators and act for claimants against governments. The tribunals operate under international arbitration rules, typically those established by the World Bank's International Centre on the Settlement of Investment Disputes (ICSID) or the United Nations Commission on International Trade Law (UNCITRAL). They are empowered to order governments to compensate investors with taxpayer funds for a vast array of government actions that investors believe diminish their "expected future profits."

Investor-State claims often involve matters of vital importance to the public welfare, the environment, and national security. However, international arbitrators are not ordinarily well versed in human rights, environmental law, or the social impact of legal rulings. Further, the pacts require no exhaustion of domestic remedies before proceeding to international tribunals. The exhaustion requirement is a fundamental principle of international law.[1]

Investment disputes can even be used to impede national courts' attempts to address problems of government corruption. The Indian Supreme Court ruled in February 2012, in a case brought by the Indian Centre for Public Interest Litigation, that 122 telecommunications licenses should be cancelled on the basis their allocation was 'arbitrary and unconstitutional'.[2] In March 2012 the Norwegian telecommunications company Telenor gave notice that it will seek compensation from the Indian government for its share of the cancelled licenses using the Investor-State dispute process under the India-Singapore Comprehensive Economic Cooperation Agreement, should the matter not be resolved during the requisite six-month's notice. There is concern in India that challenges to the court could blunt moves to address corruption in public office.

Many FTAs and BITs contain a loophole that allows corporations to skirt around their own country's domestic courts and law by filing Investor-State claims through foreign subsidiaries located in a FTA or BIT partner nation. The "Denial of Benefits" language in FTAs and BITs delineates certain circumstances under which governments may deny rights under the agreement to investors that otherwise meet the definition of an "investor" having an "investment." The language is ostensibly aimed at giving governments tools to limit investor abuse of these rights. But despite these provisions, investors from countries that are not signatories to an agreement, and the foreign subsidiaries of corporations based in "Country A", are able to use the Investor-State system to attack "Country A" policies. A wide range of Investor-State tribunals has issued extremely troubling rulings on the matter and diverse commentators on all sides of the trade debate have remarked on this feature of recent FTAs and BITs.[3]

Tribunals have allowed the increasingly common and unfair practice of "nationality-shopping",[4] whereby companies re-incorporate or incorporate subsidiaries abroad, with the primary or partial motivation of taking advantage of investment agreements. Another example of this practice is an Investor-State tribunal ruling in August 2010 under the U.S.-Central America Free Trade Agreement (CAFTA) that dismissed the government of El Salvador's objections to jurisdiction in a Canadian corporation's attack on its mining regulation. The Canadian firm had reincorporated a Cayman Island's subsidiary as a U.S. corporation three months before the CAFTA investor-state case was filed. Similarly, Philip Morris Asia has initiated a dispute under the Australia-Hong Kong Bilateral Investment Treaty 1996 that aims to have Australia's Tobacco Plain Packaging Act 2011 repealed and compensation for losses incurred until that is done. Australia is challenging the tribunal's jurisdiction to hear a dispute under that agreement, on the grounds that PMAsia acquired its shares in Philip Morris Australia in February 2011 in full knowledge of the proposed plain packaging legislation. To repackage pre-existing tobacco industry complaints into a BIT claim that objects to the government doing what it said it would do is an abuse of right under Article 10 of the treaty. The tribunal established under UNCITRAL rules might or might not agree.

Most-favoured-nation provisions in the agreements also create the possibility that foreign investors can claim greater rights than are provided under the FTA or BIT agreed to by their home country. This loophole could lead to an even larger web of excessive international investor protections, where investors could pick the most advantageous standards. That can include dispute settlement mechanisms that by-pass obligations to seek a remedy through the domestic courts. For example, Philip Morris filed a claim with ICSID in January 2010 challenging Uruguay's new tobacco control laws under a Switzerland-Uruguay BIT.[5] The claimants are

Philip Morris's Uruguay operation and two Swiss-based holding companies that are subsidiaries of Philip Morris International.[6] Under the Switzerland-Uruguay BIT the investor must try for six months to settle the dispute and, at the request of either party, submit it to the competent domestic courts. If no judgment has been issued after eighteen months the investor can take the matter to an arbitral tribunal. Using the MFN provision in the BIT, Philip Morris has claimed it is entitled to the less onerous standard that Uruguay has promised to third country's investors – for example, there is no requirement to pursue domestic litigation in the Uruguay-Australia BIT.[7] A similar argument succeeded in an earlier, high profile investment arbitration.[8] Uruguay has contested ICSID's jurisdiction under the BIT on the grounds that the domestic litigation requirement has not been satisfied, saying the MFN provision the company relies on only applies to substantive undertakings and not to procedural pre-conditions for bringing a dispute.[9] Again, it is impossible to predict how the arbitral tribunal will rule. To allow such practices deprives domestic courts of competency over matters that are properly within their jurisdiction and undermines the implicit intent to provide a period of reflection before a matter can be submitted to supra-national adjudication.

Because of the secrecy of arbitral processes and awards it is difficult to document in detail where cases have directly affronted the integrity of domestic judicial processes. The following two cases must therefore be considered the tip of the iceberg, but they provide clear justification for rejecting the application of Investor-State dispute mechanisms in proposed new agreements such as the TPP, as the Australian government is committed to do, and justify moves to renegotiate them out of existing BITs and FTAs.

Foreign Corporations Attack Jury Award and Civil Procedure Rules on Posting Bond for Appeal in Private Contract Dispute: *Loewen* NAFTA Case

The Loewen Group, a Canadian investor, initiated a case against the U.S. government in July 1998 at the World Bank's ICSID demanding $725 million in damages. This was the first NAFTA investor-state case challenging a domestic court ruling.

The investor was a Canadian funeral home conglomerate that aggressively acquired more than 1100 funeral homes across Canada and the United States.[10] In 1994 Loewen was sued in a Mississippi state court by the owner of a local funeral home who alleged anti-competitive and predatory business practices in breach of contract.[11] The civil jury made an award of $500 million, including punitive damages.[12]

Loewen decided to appeal the jury verdict. Before proceeding with the appeal, the company asked the trial court to be exempted from a long-standing rule of civil court procedure, which is similar to the U.S. federal and other nations' rules of civil procedure,[13] that requires losing defendants who wish to pursue an appeal without beginning to pay damages to the plaintiff to buy a bond securing the damages owed. The purpose of the rule is to prevent defendants from using the lengthy appeals process to hide assets or otherwise evade liability.[14] Loewen requested that the amount of the bond be reduced to $125 million – a motion that the trial court denied.[15] The investor unsuccessfully appealed that decision to the Mississippi Supreme Court, but then decided to settle the case for approximately $85 million.[16] Ironically, the plaintiff's lawyers had attempted to settle the case before the trial began; $5 million was the number they had in mind, but they were authorized to go even lower.[17] This was not the last time Loewen would land in U.S. court. In 1996, Loewen settled a similar breach of contract case for $30 million.[18]

Two years later, Loewen initiated a suit against the United States at ICSID under NAFTA's investment chapter.[19] The company demanded $725 million in compensation from U.S. taxpayers, arguing that the jury verdict, the punitive damages and the Mississippi bond requirement all violated its investor rights guaranteed under NAFTA.[20] This included a claim that its investment had been indirectly expropriated.

The U.S. government argued that the judgments of domestic courts in purely private disputes are not "measures" covered by NAFTA rules;[21] that in any case the trial-related incidents could not be attributed to the U.S. because Loewen had chosen to not exhaust its appeal options; that its settlement defeated its NAFTA claim; that the features of the legal system complained of were common internationally; that many of Loewen's problems in courts were the result of its own counsel's failed courtroom strategies (for instance, Loewen never raised many of these concerns during the domestic court trial); and that Loewen had not come even close to establishing grounds for expropriation.[22]

In January 2001 the panel issued its initial ruling, rejecting the U.S. arguments.[23] Instead, the tribunal allowed the case to proceed, surprising many observers. Further, the panel placed no limits on what types of court action or decision it considered NAFTA rules might cover. This ruling thereby opened up the possibility that all court decisions, even those of the U.S. Supreme Court, are now open to review by unaccountable NAFTA tribunals.[24]

In June 2003 the arbitral tribunal issued its final ruling, holding that, due to changed circumstances, it no longer had jurisdiction to proceed with the claim.[25] Loewen's lawyers had reorganized what had been a Canadian firm as a U.S. corporation under bankruptcy protection, thus terminating the firm's standing as a *foreign* investor.

Despite finding it had no jurisdiction, the tribunal commented on the merits in some detail and blamed the U.S. for a "miscarriage of justice" in the function of the civil court. The following comments in particular raised grave concerns that investor-state cases could inappropriately invade the realm of domestic civil court systems' functions:

- The tribunal second-guessed the jury award by concluding that Loewen "had very strong prospects of successfully appealing the damages awarded on the grounds that they were excessive",[26] even though the award resulted from Loewen's lawyers' decision to reject the $5 million settlement offer and opt for the damages stage of the case to be heard by the jury.
- The tribunal said the courts' decision not to relax the bond requirement was "an act for which Respondent is responsible in international law,"[27] even though it concluded the courts did "not transgress the minimum standard of treatment mandated" by NAFTA and were "at worst ... erroneous or mistaken."[28]
- The panel noted injustices suffered by the company, including inflammatory statements the trial lawyer was allowed to make, had rendered the conduct of the trial judge "so flawed as to constitute a miscarriage of justice amounting to a manifest injustice as that expression is understood in international law."[29] The panel declared that the United States "is responsible for any failure on the part of the trial judge in failing to take control of the trial so as to ensure that it was fairly conducted. ..."[30]
- The U.S. had observed in its defense that it is not the role for a judge in the U.S. adversarial legal system to initiate procedural or other objections, and that the trial judge had repeatedly urged Loewen to object when they saw fit.[31] Moreover, the judge admonished the plaintiff's

lawyers for perceived racially insensitive remarks,[32] and instructed the jury to not be "influenced by bias, sympathy or prejudice."[33] The judge also advised Loewen on ways to get a lower jury award.[34] The U.S. also noted that, while all the discussion of race may seem distasteful, racial distinctions are perhaps the most pertinent market-segmenting distinction in the funeral home business, as religious denominations in the U.S. often break down on racial lines.[35] Perhaps for this reason, an academic review of the NAFTA ruling concluded that the tribunal in the Loewen case failed to consider many of the facts and that "significant parts of its argumentation are incomplete, incoherent, and even contradictory."[36]

The Loewen case clearly demonstrates the perils of the Investor-State privatized system of dual track "justice". Nationals and domestic firms rely on the domestic judicial system and must comply with the rulings of domestic courts. But foreign corporations that lose tort cases in the United States, despite its court system being considered among the world's most reliable, can use the Investor-State system to attempt to evade liability through a parallel "court" where only they can initiate cases and where the private litigants in the underlying domestic case have no standing or rights.

The Loewen case also sends a message that foreign investors can evade justice by attacking the workings of state, local and federal courts, and shifting the cost of their damages awards to. taxpayers. The U.S. justice system guarantees a strong role for citizen juries. A jury trial is broadly viewed as an important safeguard for equalizing the imbalance between citizens and more powerful or wealthy interests. The ramifications go beyond attacking the principle of a jury trial – the Loewen case attacks the U.S. civil justice system, which allows juries to use damages awards to send a strong messages to defendants who abuse their power and resources to cheat consumers, pollute the environment or evade the law. In sum, Loewen Group argued that the U.S. civil justice system has the possibility of being NAFTA-illegal because of its structural features – jury trials, requirements to post bonds on appeal and the like.

Chevron Obtains Investor-State Tribunal Ruling Ordering Ecuador's Executive Branch to Violate Constitutional Separation of Powers to Halt its Judiciary from Enforcing a Ruling in Environmental Contamination Case

Chevron operated in Ecuador from 1964 to 1992 under the Texaco brand. During this time it admitted to dumping more than 16 billion gallons of toxic "water of formation" into the streams and rivers used by local inhabitants for their drinking water, decimating indigenous groups and causing dramatically increased rates of cancer.

Legal claims against Chevron were lodged in the U.S. courts on behalf of indigenous and *campesino* farmer residents affected by the company's oil operations in the Ecuadorian Amazon. After a decade of litigation the case was heading to a jury trial in the U.S. federal court. Chevron moved in 2002 to transfer to Ecuadorian courts, arguing that it could only obtain a fair trial in Ecuador. The plaintiffs agreed to the transfer after Chevron signed an agreement to abide with the final ruling of Ecuador's courts. In 2011, after an eight-year trial in Ecuador that generated over 220,000 pages of evidence, the Ecuadorian court ordered Chevron to pay $18 billion to clean up the environmental damage. An Ecuadorian appellate court affirmed the decision in January 2012. Anticipating an adverse judgment, Chevron had already stripped its assets from

Ecuador. Its executives vowed never to pay, despite Chevron's promise to U.S. courts that it would abide by the decision as a condition of moving the trial to Ecuador.

Having lost the case in Ecuador's domestic courts on the merits, Chevron – one of the wealthiest corporations on the planet with revenues of $240 billion in 2011 – sought to escape its liability by commencing a private arbitration that would shift the clean-up costs to the government of Ecuador, a country where the per capita income is $4,000 per annum. In other words, Chevron wants the victims of its contamination to pay for the clean up of their ancestral lands.

Chevron instigated an Investor-State case using the U.S.-Ecuador BIT.[37] Ostensibly, the U.S.-Ecuador BIT is designed to allow U.S. investors to seek monetary damages from the government of Ecuador if they can show an expropriation or unfair treatment. In this case, Chevron turned the treaty on its head to use it as a tool to try to immunize itself from liability in a private litigation. Although this BIT took effect in 1997, five years *after* the oil company abandoned its Ecuador operations, the tribunal constituted under ICSID rules issued an initial award that ordered Ecuador's government to interfere in its independent judiciary and suspend the case until the investment tribunal can rule.[38] This was despite the Ecuadorian Constitution's separation of powers and a provision that "[t]he Constitution is the supreme norm and prevails over any other norm in the legal system."

The investor-state ruling also poses conflicts for Ecuador's other international law obligations.

- The nation has ratified a number of treaties that broadly require it to guarantee the right of all persons to a fair trial, including, as stated in Article 8 of the binding American Convention on Human Rights,[39] "the determination of [one's] rights and obligations of a civil, labor, fiscal, or any other nature."
- Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR)[40] requires Ecuador to "ensure . . . an effective remedy [and] ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities".
- Ecuador is bound by the 1989 Indigenous and Tribal Peoples Convention (International Labor Organization, Convention No. 169),[41] which requires it to ensure that indigenous peoples are "safeguarded against the abuse of their rights and shall be able to take legal proceedings, either individually or through representative bodies, for the effective protection of these rights."
- Article 40 of the 2007 UN General Assembly Declaration on the Rights of Indigenous Peoples, which declares that "indigenous peoples have the right of access to and to prompt decision through just and fair procedures for the resolution of conflicts and disputes . . . as well as to effective remedies for all infringements of their individual and collective rights".

Chevron had previously tried a version of this strategy, but that was thrown out in U.S. court. In 2004 Chevron sued Ecuador at the American Arbitration Association in New York, demanding it indemnify the company on the basis of an untenable interpretation of the 1964 operating agreement governing the oil concession. Ecuador managed to redirect the case to U.S. federal court, which examined Chevron's claims and rejected them top to bottom.[42] The arbitration was permanently stayed in 2007. Not surprisingly given this and other disputes, Ecuador gave formal notice in July 2009 that it would withdraw from ICSID;[43] that became effective in 2010, but does not affect the existing arbitration.

ENDNOTES

[1] Interhandel Case (Switz. v. U.S.), 1959 I.C.J. Rep. 5, 27 (Mar. 21).
[2] *Centre for Public Interest Litigation and others (Petitioners) v Union of India and others (Respondents)*, Writ Petition No 423 of 2010, 2 February 2012
[3] See e.g. Report of the Subcommittee on Investment of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty, Annex B, Anderson et. al collective statement, Sept. 30, 2009. Available at: www.state.gov/e/eb/rls/othr/2009/131118.htm. Statement of Linda Menghetti, Emergency Committee for American Trade, Before Committee on Ways & Means, May 14, 2009. Available at http://waysandmeans.house.gov/Hearings/Testimony.aspx?TID=8180. Mark Kantor, "International investment law protections for Chinese investment into the US," in Karl Sauvant, ed., *Investing in the United States: Is the US Ready for FDI from China?* (Northampton, MA: Edward Elgar, 2010), at 142, 146.
[4] See discussion in Rachel Thorn & Jennifer Doucleff, "Disregarding the Corporate Veil and Denial of Benefits Clauses: Testing Treaty Language and the Concept of 'Investor'", in Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung, and Claire Balchin (eds.), *The Backlash against Investment Arbitration*, (Netherlands: Kluwer Law International, 2010)).
[5] *FTR Holdings S.A. (Switzerland) v Oriental Republic of Uruguay*, Request for Arbitration, ICSID Case No. ARB/10/7, February 2010.
[6] Switzerland has a large number of BITs, which makes it attractive for transnational companies to establish holding companies there. Weiler notes that 'Philip Morris International maintains its worldwide investments through various holding companies, including Switzerland-based FTR Holding S.A. and Switzerland-based *Philip Morris Products S.A.* Together, these two companies own and control Uruguay-based Abal Hermanos S.A., Todd Weiler *Philip Morris vs. Uruguay: An Analysis of Tobacco Control Measures in the Context of International Investment Law* (Physicians for Smoke-Free Canada, 7/28/10) 2-3.
[7] Article 13 of the *Australia-Uruguay BIT* does not require Australian investors to pursue litigation in the domestic courts before lodging an arbitration claim against Uruguay at ICSID.
[8] *Emilio Agustin Maffezini v Kingdom of Spain*, ICSID Case No. ARB/97/7, 2000
[9] *Philip Morris Brands Sarl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay, Uruguay's Memorial on Jurisdiction,* 24 September 2011, ICSID Case no. ARB/10/7
[10] "Canadian Funeral Home Firm Battles $150 Million Biloxi Judgment," *Miami Herald*, Nov. 25, 1998.
[11] Second Amended Complaint, May 16, 1994, at 6-19, *O'Keefe v. Loewen Group, Inc*., No. 91-67-423 (Miss. Circ. Ct. 1st Jud. Dist., Hinds County 1995).
[12] *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award (June 26, 2003), at paras. 96 and 101. Available at: http://www.state.gov/documents/organization/22094.pdf
[13] Counter-Memorial of the United States of America, *Loewen Group v. the United States* (Mar. 30, 2001), at 144-152. Available at: http://www.state.gov/documents/organization/7387.pdf [Henceforth "Counter-Memorial"]
[14] Ibid.
[15] Counter-Memorial, at 57-59.
[16] Counter-Memorial, at 64.
[17] Personal communication between Mary Bottari, Public Citizen, and Michael S. Allred, attorney for O'Keefe Aug. 17, 2001.
[18] *Provident American Corporation v. The Loewen Group Inc* (U.S.D.C. Ed. Pa. CA. No. CIV. A. 92-1964). (Mar. 10, 1995). Settlement amount known from personal communication between Mary Bottari, Public Citizen, and Provident attorney Bret Flaherty, Aug. 21, 2001.
[19] Notice of Claim, *Loewen Group Inc. v. the United States* (Oct. 30, 1998), at para. 20. [Henceforth "Notice of Claim"] Available at: http://www.state.gov/documents/organization/3922.pdf
[20] Notice of Claim, at paras. 139, 162 and 187.
[21] Decision on the Arbitral Tribunal on Hearing of Respondent's Objection to Competence and Jurisdiction, *Loewen Group Inc. v. the United States* (Jan. 5, 2001), at para. 32. [Henceforth "Decision on Jurisdiction"] Available at: http://www.state.gov/documents/organization/3921.pdf
[22] Counter-Memorial, at 65-186.
[23] Decision on Jurisdiction, at para. 60.
[24] Decision on Jurisdiction, at paras. 45 and 54.
[25] Memorial of the United States of America on Matters of Jurisdiction and Competence Arising From The Restructuring of The Loewen Group, Inc., *Loewen Group Inc. v. the United States,* (March 1, 2002), at 3-9.
[26] Final Award, at para. 114.
[27] Final Award, at para. 212.
[28] Final Award, at para. 189.
[29] Final Award, at para. 54.
[30] Final Award, at para. 53.
[31] Counter-Memorial, at 66-69.
[32] Counter-Memorial, at 20.
[33] Counter-Memorial, at 49.
[34] Counter-Memorial, at 53.

[35] Counter-Memorial, at 25-26.
[36] Dirk Pulkowski, "The Final Award in Loewen v. United States," in W.M. Reisman, G. Aguilar Alvarez (eds.), *The Reasons Requirement in International Investment Arbitration: Critical Case Studies* (2008), at 321.
[37] See Steven Donziger, Laura Garr and Aaron Marr Page, '*Rainforest Chernobyl Revisited:* The Clash of Human Rights and BIT Investor Claims: Chevron's Abusive Litigation in Ecuador's Amazon', Washington College of Law, Human Rights Brief, 2012, 8-14
[38] *Chevron Corporation and Texaco Petroleum Company v The Republic of Ecuador*, Second Interim Award on Interim Measures, Feb. 16, 2012, PCA Case No. 2009-23
[39] Ratified by Ecuador on Dec. 8, 1997
[40] Ratified by Ecuador on Mar. 6, 1969
[41] Ratified by Ecuador on May 15, 1998
[42] Carlyn Kolker, "Jungle Warfare", *Global Litigation*, 2006, 20 at 30, Available at amlawdaily.typepad.com/amlawdaily/files/junge_warfare.pdf
[43] On July 6, 2009 the World Bank received written denunciation of the Convention on ICSID from the Republic of Ecuador, to take effect from January 7, 2010.