

5-1-2016

The Hegemonic Arbitrator Replaces Foreign Sovereignty: A Comment on *Chevron v. Republic of Ecuador*

Camille Hart

Follow this and additional works at: <http://elibrary.law.psu.edu/arbitrationlawreview>



Part of the [Dispute Resolution and Arbitration Commons](#)

Recommended Citation

Camille Hart, *The Hegemonic Arbitrator Replaces Foreign Sovereignty: A Comment on Chevron v. Republic of Ecuador*, 8 Y.B. Arb. & Mediation 110 (2016).

This Student Submission - Comment is brought to you for free and open access by Penn State Law eLibrary. It has been accepted for inclusion in Arbitration Law Review by an authorized editor of Penn State Law eLibrary. For more information, please contact ram6023@psu.edu.

THE HEGEMONIC ARBITRATOR REPLACES FOREIGN SOVEREIGNTY:
A COMMENT ON *CHEVRON V. REPUBLIC OF ECUADOR*

By
Camille Hart*

I. INTRODUCTION

In *Chevron Corporation v. Republic of Ecuador*, the D.C. Circuit held that the parties did not dispute that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards¹ (New York Convention) governed arbitral awards issued pursuant to the Bilateral Investment Treaty² between the United States and the Republic of Ecuador.³ The D.C. Circuit further held that the Foreign Sovereign Immunities Act⁴ (FSIA) did not require the district court to undertake de novo review.⁵ The D.C. Circuit reasoned that the FSIA allowed federal courts to exercise jurisdiction over Ecuador if certain jurisdictional requirements were satisfied.⁶ Finally, the D.C. Circuit held that the enforcement of the arbitral award was fully consistent with the public policy of the United States.⁷

The D.C. Circuit strongly relied on the Supreme Court's seminal decision in *B.G. Group, PLC v. Republic of Argentina* to reach its decision in *Chevron*.⁸ In drawing its conclusion, the D.C. Circuit granted arbitrators broad power to interpret international agreements between sovereign nations and private actors, as well as deference upon judicial review. The culmination of the arbitrator's authority effectively replaces state sovereignty. The D.C. Circuit's decision in *Chevron* reflects the globalized law of arbitration.

* Camille Hart is an Associate Editor of the Yearbook on Arbitration and Mediation and a 2017 Juris Doctor Candidate at The Pennsylvania State University Dickinson School of Law.

¹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 4739.

² Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, Ecuador-U.S., Aug. 27, 1993, S. TREATY DOC. NO. 103-15 (providing certain legal protections to American and Ecuadorian investors when they engage in foreign investment in the reciprocal country; specifically providing that disputes against one of the parties arising out of such investments may be resolved by arbitration upon request).

³ *Chevron Corp. v. Republic of Ecuador*, 795 F.3d 200, 204 n.2 (D.C. Cir. 2015).

⁴ Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1604-1607 (2015) (enumerating the sole basis for obtaining jurisdiction over a foreign state in the courts of the United States).

⁵ *Chevron*, 795 F.3d at 205.

⁶ *Id.* at 206.

⁷ *Id.* at 209 (explaining that the public policy of the United States is the “emphatic federal policy in favor of arbitral dispute resolution”).

⁸ *See id.* at 205.

II. BACKGROUND FACTS

In 1973, Chevron Corporation (Chevron) and the Republic of Ecuador entered an agreement allowing Chevron to develop Ecuadorian oil fields on the condition that Chevron provide below-market oil to the Ecuadorian government for domestic-consumption needs.⁹ The agreement was amended in 1977 and expired in June 1992.¹⁰ As the expiration date approached, Chevron filed seven breach-of-contract lawsuits against Ecuador seeking over \$553 million in damages.¹¹

In 1993, the United States and Ecuador signed a Bilateral Investment Treaty¹² (BIT) which took effect in 1997.¹³ Under this treaty, Ecuador made a standing offer to American investors to arbitrate disputes involving investments that existed on or after the treaty's effective date.¹⁴ In 1995, Chevron and Ecuador signed a settlement agreement conclusively terminating all rights and obligations between the parties but providing for the continuation of the pending lawsuits.¹⁵ The lawsuits remained unresolved in Ecuadorian courts for over a decade.¹⁶

In 2006, Chevron commenced an international arbitration action before a three-member tribunal based out of the Hague, Netherlands.¹⁷ Chevron claimed that Ecuador had violated the BIT by failing to resolve its lawsuits in a timely fashion.¹⁸ Ecuador objected to the tribunal's jurisdiction, arguing that it had never agreed to arbitrate with Chevron.¹⁹ Ecuador contended that Chevron's investments in Ecuador terminated in 1992, five years before the BIT's 1997 effective date,²⁰ thus the Hague had no

⁹ *Chevron*, 795 F.3d at 202.

¹⁰ *Chevron Corp. v. Republic of Ecuador*, 949 F. Supp. 2d 57, 61 (D.D.C., 2013) *aff'd*, 795 F.3d 200 (D.C. Cir. 2015).

¹¹ *See generally id.* at 61 (“These disputes largely concerned allegations that Ecuador had overstated its domestic oil-consumption needs, and appropriated more crude oil than it was entitled to acquire at the reduced price.”).

¹² *Chevron*, 795 F.3d at 202 (“[F]ormally known as the Treaty Between the Government of the United States of America and the Government of the Republic of Ecuador for the Encouragement and Reciprocal Protection of Investment.”).

¹³ *Id.* at 202.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Chevron*, 949 F. Supp. 2d at 61.

¹⁷ *Chevron*, 795 F.3d at 202-03.

¹⁸ *Id.*

¹⁹ *Chevron*, 795 F.3d at 203.

²⁰ *See* The Republic of Ecuador's Proof Opening Brief at 2, *Chevron Corp. v. Republic of Ecuador*, 795 F.3d 200 (2015) (No. 13-7103).

jurisdiction under the BIT.²¹ The tribunal rejected the jurisdictional challenge, finding that Chevron’s lawsuits were “investments” within the meaning of the BIT.²² The tribunal determined that Ecuador had delayed disposition of the lawsuits and awarded Chevron approximately \$96 million in damages.²³ Ecuador challenged the award in the District Court of the Hague, the Hague Court of Appeal, and the Dutch Supreme Court.²⁴ The verdict in Chevron’s favor was sustained at all levels.²⁵

On July 27, 2012, Chevron petitioned the United States District Court for the District of Columbia to confirm the arbitral award under the New York Convention.²⁶ Ecuador raised three arguments in opposition: first, the district court lacked subject-matter jurisdiction under the Foreign Sovereign Immunities Act; second, that confirmation should be denied under the New York Convention because the award was beyond the scope of the submission to arbitration and was contrary to United States public policy; and third, at a minimum, a stay should be granted until the Dutch Supreme Court resolved the then-pending appeal of the award.²⁷

The district court first determined that it had subject matter jurisdiction under 28 U.S.C. § 1605(a)(6)²⁸ because the award was made pursuant to the BIT and governed by the New York Convention.²⁹ Next, the district court found that that the parties had “clearly and unmistakably agreed” that the tribunal would resolve the arbitrability question.³⁰ The court then engaged in a deferential review of the tribunal’s arbitrability

²¹ *Id.* at 2-3.

²² *Chevron*, 795 F.3d at 203.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Chevron*, 795 F.3d at 203.

²⁸ The statute provides:

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if . . . the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards

²⁸ U.S.C. § 1605(a)(6) (2015).

²⁹ *Chevron*, 795 F.3d at 203.

³⁰ *Id.*

decision and determined that it was clearly supported by the text of the BIT.³¹ Thus, the award was not beyond the scope of the submission to arbitration.³² The district court also rejected Ecuador's public policy argument and denied the requested stay.³³ Ecuador timely appealed.³⁴

III. COURT'S ANALYSIS

A. Subject-matter Jurisdiction under the Foreign Sovereign Immunities Act

The D.C. Circuit began its analysis by closely examining the FSIA. The court explained that the FSIA grants foreign states immunity from the jurisdiction of the courts of the United States.³⁵ However, Congress enumerated several exceptions³⁶ to the jurisdictional restriction, which provide the sole basis for obtaining jurisdiction over a foreign state in federal court.³⁷ At issue in this case is the arbitration exception which provides for federal court jurisdiction "to confirm an award made pursuant to such an agreement to arbitrate, if . . . the agreement or award is or may be governed by a treaty . . . in force for the United States calling for the recognition and enforcement of arbitral awards."³⁸

1. Jurisdictional Standard of the FSIA

The D.C. Circuit explained that there are two types of jurisdictional authorizations under the FSIA: (1) jurisdiction that depends on particular factual propositions, and (2) jurisdiction that depends on the plaintiff asserting a particular type of claim.³⁹ Ecuador argued that the § 1605(a)(6) exception required the district court to make three findings: (1) a foreign state agreed to arbitrate; (2) there was an award based on that agreement; and (3) the award was governed by a treaty.⁴⁰ In contrast, Chevron argued that the

³¹ *Id.*

³² *See id.*

³³ *Id.*

³⁴ *Chevron*, 795 F.3d at 203.

³⁵ 28 U.S.C. § 1604 (2015).

³⁶ *See generally* 28 U.S.C. §§ 1605-1607.

³⁷ *Chevron*, 795 F.3d at 203.

³⁸ *Id.* at 203-04; *see also* 28 U.S.C. §1605(a)(6).

³⁹ *Chevron*, 795 F.3d at 204.

⁴⁰ *Id.*

exception permits jurisdiction anytime a plaintiff asserts a non-frivolous claim involving an arbitration award.⁴¹ The D.C. Circuit determined that Ecuador had the better argument and that this case required the fact-intensive jurisdictional authorization analysis.⁴² The D.C. Circuit explained that in most instances, the existence of an arbitration agreement is a “purely factual predicate independent of the plaintiff’s claim.”⁴³ Similarly, the existence of an arbitral award was a factual question that the district court was required to resolve in order to maintain jurisdiction.⁴⁴ If there was no arbitration agreement or no award to enforce, the district court would have lacked jurisdiction over the foreign state and be required to dismiss the action.⁴⁵

The D.C. Circuit then outlined the evidentiary burdens of parties to a FSIA jurisdictional challenge claim. The D.C. Circuit stated that the plaintiff bears the initial burden of supporting its claim that the FSIA exception applies.⁴⁶ This is only a burden of production; the burden of persuasion rests with the foreign sovereign claiming immunity, which must establish the absence of the factual basis by a preponderance of the evidence.⁴⁷ The D.C. Circuit determined that Chevron met its burden of production by producing the BIT, Chevron’s notice of arbitration against Ecuador, and the tribunal’s arbitration decision.⁴⁸ Once Chevron made this showing, the burden shifted to Ecuador to demonstrate by a preponderance of the evidence that the BIT, Chevron’s notice, and the tribunal’s decision did not constitute grounds for jurisdiction.⁴⁹ Ecuador did not dispute the existence of these factual propositions as grounds for jurisdiction.⁵⁰ Instead, Ecuador challenged the district court’s conclusion that the BIT was an agreement to arbitrate.⁵¹

2. *When is an Agreement to Arbitrate Made?*

Ecuador argued that its offer to arbitrate in the 1997 BIT did not encompass Chevron’s prior breach of contract claims.⁵² Ecuador contended that before reaching the merits of Chevron’s petition, the district court was required to resolve Ecuador’s

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Chevron*, 795 F.3d at 204.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *See Chevron*, 795 F.3d at 204.

⁵⁰ *See id.*

⁵¹ *Id.* at 205.

⁵² *See The Republic of Ecuador’s Proof Opening Brief, supra* note 17, at 3.

objection to arbitration de novo, because if Ecuador never agreed to arbitrate, then the district court lacked subject-matter jurisdiction over the petition.⁵³ The D.C. Circuit determined that Ecuador's objection to arbitration was not a jurisdictional question for the district court.⁵⁴ The D.C. Circuit relied on the Supreme Court's decision in *B.G. Group, PLC v. Republic of Argentina* to resolve whether Ecuador's offer to arbitrate in the BIT encompassed Chevron's claims and whether de novo review was required.⁵⁵

B.G. Group concerned a dispute-resolution provision in a bilateral investment treaty (hereinafter "Treaty") between the United Kingdom and Argentina, which required an investor to litigate its claims in the local court system before submitting claims to arbitration.⁵⁶ In *B.G. Group*, the arbitration panel concluded that it had jurisdiction, determined that Argentina had waived the local litigation requirement, and found in B.G. Group's favor on the merits.⁵⁷ When B.G. Group sought to confirm the award in the district court, the court deferred to the arbitrators' determination and confirmed the arbitral award.⁵⁸ On appeal, the D.C. Circuit vacated the award.⁵⁹ The D.C. Circuit held that the interpretation and application of Article 8's local litigation requirement was a matter for courts to decide de novo, or without deference to the views of the arbitrators.⁶⁰

On certiorari, the Supreme Court reversed the judgment of the D.C. Circuit.⁶¹ The Court treated the treaty as if it were an ordinary contract between private parties and concluded that the parties had intended to allow the arbitrator to determine whether the local litigation requirement had been satisfied, thus rejecting de novo review.⁶² In doing so, the Court implicitly rejected Argentina's contention that its offer to arbitrate only

⁵³ *Chevron*, 795 F.3d at 205.

⁵⁴ In the court's words:

Ecuador conflates the jurisdictional standard of the FSIA with the standard for review under the New York Convention. . . . The jurisdictional task before the District Court was to determine whether Ecuador had sufficiently rebutted the presumption that the BIT and Chevron's notice of arbitration constituted an agreement to arbitrate.

Id. at 205.

⁵⁵ *See id.* at 205.

⁵⁶ *B.G. Group PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1203 (2014).

⁵⁷ *See id.* at 1204-05.

⁵⁸ *B.G. Group*, 134 S. Ct. at 1205.

⁵⁹ *Id.* at 1205.

⁶⁰ *Id.*

⁶¹ *Chevron*, 795 F.3d at 205.

⁶² *Id.* at 205-06.

applied to investors who complied with the local litigation requirement.⁶³ Rather, by agreeing with the United Kingdom to adopt the arbitration provision along with the rest of the treaty, Argentina formed an agreement with all potential U.K. investors to submit all investment-related disputes to arbitration.⁶⁴

With this in mind, the D.C. Circuit determined that the present case did not warrant de novo review to determine if Ecuador consented to arbitration. In signing the BIT, which included a standing offer to all potential U.S. investors to arbitrate investment disputes, Ecuador formed an agreement to arbitrate.⁶⁵

3. *The Meaning of “Investments” under the New York Convention*

Under the BIT,

investment means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party . . . and includes . . . a claim to money or a claim to performance having economic value, and associated with an investment.⁶⁶

Ecuador argued that the final phrase, “and associated with an investment,” means that a lawsuit must be associated with an investment that existed within the effective period of the BIT in order to qualify as an investment under the BIT.⁶⁷

The D.C. Circuit determined that Ecuador misread the treaty for two reasons.⁶⁸ First, Article I.3 of the BIT provided that “any alteration of the form in which assets are invested or reinvested shall not affect their character as investment.”⁶⁹ Thus, Article I.3 suggests that an investment continues to exist until it has been fully wound up and all claims have been settled.⁷⁰ Chevron's lawsuits were, therefore, continuations of its initial investment in Ecuador and protected by the BIT.⁷¹ Second, Article XII limits the application of the BIT “to investments existing at the time of entry into force as well as to investments made or acquired thereafter.”⁷² The D.C. Circuit found that Chevron's breach

⁶³ *Id.* at 206.

⁶⁴ *Id.*

⁶⁵ *See id.*

⁶⁶ *Chevron*, 795 F.3d at 206.

⁶⁷ *Chevron*, 795 F.3d at 206.

⁶⁸ *See id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Chevron*, 795 F.3d at 206.

of contract lawsuits were associated with its pre-BIT investment activities and existed when the BIT entered into force.⁷³ The lawsuits themselves were, therefore, investments within the meaning of the treaty.⁷⁴

B. Confirmation under the New York Convention

Ecuador raised two additional arguments against confirmation of the award under Article V(1)(c) and Article V(2)(b) of the New York Convention.⁷⁵ The D.C. Circuit ultimately found no merit in the arguments and determined that the district court properly confirmed the award in Chevron's favor.⁷⁶

1. Article V(1)(c)

Article V(1)(c) of the New York Convention provides that an award may be refused if it “deals with a difference not contemplated by or not falling within the terms of the submission to arbitration.”⁷⁷ The D.C. Circuit determined that the district court did not need to reach the question of whether Chevron's lawsuits fell within the terms of submission to arbitration because the answer was provided in *B.G. Group*.⁷⁸ Additionally, Article VI of the BIT provides that the investor company may submit a matter to arbitration in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).⁷⁹ The D.C. Circuit explained that a BIT's incorporation of the UNCITRAL arbitration rules served as clear and unmistakable evidence that the parties intended arbitrators to decide arbitrability.⁸⁰

⁷³ *See id.* at 207.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 207.

⁷⁷ *Chevron*, 795 F.3d at 207 (quoting Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. 5, June 10, 1958, 330 U.N.T.S. 4739).

⁷⁸ *See id.* (holding that signing the BIT, which included a standing offer to all potential foreign investors to arbitrate investment disputes, constituted an agreement to arbitrate).

⁷⁹ *Id.*; *see also* UNCITRAL Arbitration Rules (Dec. 15, 1976).

⁸⁰ *Chevron*, 795 F.3d at 207-08.

2. Article V(2)(b)

Article V(2)(b) of the New York Convention allows refusal of an award if “the recognition or enforcement of the award would be contrary to . . . public policy.”⁸¹ Ecuador argued that the award discarded the forum-selection clause which required that Chevron's claims be litigated in Ecuadorian courts.⁸² The D.C. Circuit determined that by signing the BIT, Ecuador agreed to arbitration of precisely this type of action.⁸³ Ecuador also argued that confirmation would be inconsistent with respect for its foreign sovereignty.⁸⁴ The D.C. Circuit found that Ecuador ceded that authority by signing the BIT and then failing to resolve Chevron’s suits in a timely fashion.⁸⁵ The D.C. Circuit also found that enforcement of the arbitral award was fully consistent with the United States public policy in favor of arbitration.⁸⁶

IV. SIGNIFICANCE

Chevron is a landmark case because it highlights several important principles undergirding contemporary arbitration. In affirming the *B.G. Group* decision, the D.C. Circuit endorsed the arbitrator’s decisional role of interpreting international treaties between sovereign nations and private actors.⁸⁷ The arbitrator’s new sovereign power, coupled with great deference by the courts, creates an arbitrator that is vested with absolute authority.

The D.C. Circuit interpreted the bilateral investment treaty between Chevron and Ecuador retroactively. In other words, although Chevron’s underlying lawsuits arose before the treaty took effect, the D.C. Circuit found that Chevron’s claims were encompassed in the treaty, because the BIT was a standing offer to all potential U.S. investors to arbitrate disputes.⁸⁸ The BIT’s retroactive measure has important implications for practitioners in all circuits. Practitioners representing sovereign nations will have to grapple with the reality of being bound to an arbitration agreement to which they did not affirmatively consent. Instead of disputes being adjudicated in their court systems, their consent to arbitration will be inferred from the presence of a signed

⁸¹ *Id.* at 207 (quoting Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. 5, June 10, 1958, 330 U.N.T.S. 4739).

⁸² *See id.* at 208.

⁸³ *Id.*

⁸⁴ *See id.* at 208 (Ecuador claimed “that the Tribunal effectively usurped the jurisdictional authority of the Ecuadorian judiciary, the only adjudicative body authorized to hale the Republic into court to respond to Chevron's lawsuits.”).

⁸⁵ *Chevron*, 795 F.3d at 209.

⁸⁶ *Id.* at 209 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985)).

⁸⁷ *Chevron*, 795 F.3d at 205-06, 209.

⁸⁸ *Id.* at 202, 206.

bilateral investment treaty. In contrast, practitioners representing commercial clients can take solace in the fact that their potential lawsuits will be construed as investments within the meaning of the treaty and, thus, will fall safely under the BIT.

It is also important to note that before making its way into the D.C. Circuit, the dispute between Chevron and Ecuador was appealed to the highest Dutch Court and also decided in the U.S. District Court for the District of Columbia.⁸⁹ The judgment in Chevron's favor was sustained at every level.⁹⁰ This sine qua non removes the stigma that the Supreme Court's decision in *B.G. Group* was alien to the law of arbitration or hostile to foreign sovereigns. The Dutch court's identical verdicts in the *Chevron* case illustrates that there is a global law of arbitration and it accepts *B.G. Group* as good law.

The globalized law of arbitration has granted substantial deference to arbitration tribunals, resulting in all-powerful arbitrators that are equipped with the necessary tools to decide issues of international law. Hence, the arbitrators place in the international community has been significantly bolstered through the *Chevron* decision.

V. CRITIQUE

The D.C. Circuit construed the BIT as a contract and found that Chevron and Ecuador had intended the arbitrators to decide the scope of the submission to arbitration.⁹¹ Although the D.C. Circuit followed the lead of the Supreme Court in *B.G. Group*, it is not altogether clear why construing the BIT as a contract to find consent was appropriate. In some cases, it is acceptable to presume party consent; however, in cases where a foreign sovereignty is a party, inferring consent should never be appropriate because the effect of the contract can be detrimental to the state and its citizens.

FSIA was enacted to grant foreign states immunity from the jurisdiction of the federal courts of the United States.⁹² The FSIA arbitration exceptions are the sole basis for compelling a foreign state into federal court.⁹³ Nevertheless, the circumstances for which a foreign state may be compelled to arbitrate are so vast that the exceptions seem to function like a handbook on how to compel foreign states into arbitration.⁹⁴ Ultimately, FSIA and the arbitration exceptions grant foreign states immunity with one hand and revoke it with the other.

Using deferential review, the D.C. Circuit upheld the district court and the arbitration tribunal's decision below.⁹⁵ *Chevron* declares that arbitrators have the

⁸⁹ *Id.* at 202-03.

⁹⁰ *Id.*

⁹¹ *Id.* at 205-06.

⁹² *See* 28 U.S.C. §1602 (2015).

⁹³ *See* 28 U.S.C. §§ 1605-1607.

⁹⁴ *See id.*

⁹⁵ *Chevron*, 795 F.3d at 209.

authority to interpret international treaties between sovereign nations and private actors.⁹⁶ Accordingly, arbitrators can determine jurisdictional and arbitrability issues, matters once reserved for the courts.⁹⁷ Arbitrator sovereignty thus replaces the sovereignty of foreign nations. Like *B.G. Group*, the hegemony of the arbitrator is well defined while the position of the state is minimized under *Chevron*.⁹⁸

The D.C. Circuit answered the question of whether private arbitrators should have authority to command state action all too easily; such a hard question deserves careful consideration. While Ecuador's actions may have been arbitrary and capricious, it was still a sovereign state and entitled to respect. Ecuador argued that the plain meaning of three separate contracts evinced no intent to submit to arbitration.⁹⁹ This argument had some merit, yet the D.C. Circuit completely disregarded it. This begs the unfortunate question of whether a country in the position of the United States would have been treated similarly.

The D.C. Circuit endorsed the arbitration tribunal's retroactive application of the BIT to Chevron's breach of contract claims. The district court of the Hague, the Hague Court of Appeal, the Dutch Supreme Court, and the District Court for the District of Columbia all affirmed this view.¹⁰⁰ Five different jurisdictions' approval of the retroactive measure demonstrates the globalized law of arbitration. Therefore, what the United States has determined regarding the sovereignty of the arbitrator is not contrary to the international law of arbitration. The uniformity of international arbitration law has useful implications for practitioners because outcomes will be more predictable. However, this degree of arbitrator sovereignty conflicts with the basic arbitration principle that arbitration is a matter of consent.¹⁰¹ Ecuador vigorously contended that it

⁹⁶ *See id.*

⁹⁷ *See id.*

⁹⁸ *See id.*; *see also* *B.G. Group PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1205 (2014).

⁹⁹ Specifically, Ecuador argued:

First, the 1973 Concession Agreement governing Chevron's oil investments in Ecuador required all disputes arising from that investment to be submitted to Ecuadorian courts. . . .

Second, the 1995 Settlement Agreement and Release between Chevron and the Republic, confirming the termination of Chevron's investment in Ecuador, provided that Chevron's pending lawsuits against the Republic shall continue to be heard before the authorities having the appropriate jurisdiction—i.e., the Ecuadorian courts.

Third, in 1997, the Ecuador-U.S. Bilateral Investment Treaty (Treaty) entered into force

The Republic of Ecuador's Proof Opening Brief, *supra* note 17, at 1-2 (italics in original).

¹⁰⁰ *See Chevron*, 795 F.3d at 203; *see also Chevron*, 949 F. Supp. 2d at 61.

¹⁰¹ *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662,681 (2010) (“[T]he FAA imposes certain rules of fundamental importance, including the basic precept that arbitration ‘is a matter of consent, not coercion.’”).

did not consent to arbitration, yet the arbitrators in their sovereign capacity found that Ecuador submitted to arbitration.¹⁰²

The arbitrators in this case upheld the private interests of Chevron Corporation and, as a result, reached a very pro-commercial resolution. Additionally, the courts treated Ecuador as a commercial entity, especially in construing the BIT as a contract.¹⁰³ This phenomenon evinces support for the depoliticization of states in an effort to prevent sovereign nations from abusing private actors. However, depoliticization of states in arbitration is undesirable because it overlooks the political role of sovereign states. Sovereign states have a duty to protect and foster the public interest of their citizens. Conversely, depoliticization separates the state's political identity from the state's corporate identity, favoring multinational commercial entities at the expense of the sovereign's citizens.

In the end, Chevron was awarded approximately \$96 million.¹⁰⁴ While that is not a substantial figure for a country, and the attorneys' fees probably cost just as much, it nevertheless may be unenforceable if Ecuador is insolvent. Arbitration awards are esteemed because they are valid, irrevocable and enforceable.¹⁰⁵ But if arbitral awards prove unenforceable against foreign nations due to insolvency, what is the point?

VI. CONCLUSION

The implications of the *Chevron* decision are far-reaching. The D.C. Circuit grants arbitrators the authority to interpret international treaties and subjects their arbitral decisions to great deference. The result is a hegemonic arbitrator with the power to effectively shape international law and bind sovereign nations. While it may appear that the court has gone too far, the globalized law of arbitration fully supports the D.C. Circuit's approach.

¹⁰² *Chevron*, 795 F.3d at 203.

¹⁰³ *See Chevron*, 795 F.3d at 205-06.

¹⁰⁴ *Id.* at 203.

¹⁰⁵ Federal Arbitration Act, 9 U.S.C. § 2 (2015).