

# DEFINING INVESTOR CONFIDENCE: AVOIDING INTERPRETIVE UNCERTAINTY IN *CHEVRON CORP. v. ECUADOR*

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**Abstract:** In an increasingly globalized world, foreign direct investment is becoming an incredibly important tool for investors in developed nations and the developed nations in which they are investing. Investors have increasingly been seeking protections for their investments in foreign nations. This is why approximately 2400 bilateral investment treaties were signed between various nations between 1994 and 2006. When conflicts arise, the job of interpreting these treaties often falls to investment arbitration tribunals. Indeed, in 2010, an arbitration tribunal (Tribunal) operating under the United Nations Commission on International Trade Law (UNCITRAL) rules adjudicated a dispute between Chevron and the Republic of Ecuador (Ecuador) and interpreted the bilateral investment treaty between the U.S. and Ecuador (BIT). This Comment argues that the Tribunal's interpretation of the BIT was the most reflective of the investor's expectations and thus encouraged further investment. As incentivizing this investment is the very purpose of the BIT, the Tribunal reached the best possible conclusion as to its meaning.

## INTRODUCTION

On March 30, 2010, the Tribunal established under the arbitration rules of UNCITRAL decided *Chevron Corp. v. Ecuador*, which settled several long-standing disputes between Texaco—a subsidiary of Chevron<sup>1</sup>—and Ecuador.<sup>2</sup> The arbitration concerned seven cases filed by Texaco against Ecuador when Texaco's two-decade contract for certain oil-related rights in Ecuador expired in 1992.<sup>3</sup> By the time Chevron commenced this arbitration, six of the seven cases in question had sat

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<sup>1</sup> Texaco initially filed the cases at issue in this arbitration against Ecuador; Chevron subsequently acquired Texaco and is now claiming this arbitration through its subsidiary. *Chevron Corp. v. Ecuador*, UNCITRAL Arbitration, Partial Award on the Merits, ¶¶ 134, 342 (Mar. 30, 2010), <http://ita.law.uvic.ca/documents/ChevronTexacoEcuadorPartialAward.PDF>.

<sup>2</sup> See *id.*

<sup>3</sup> *Id.* ¶¶ 133–134.

dormant for between thirteen and fifteen years with little action by the Ecuadorian judiciary.<sup>4</sup> An Ecuadorian court dismissed the last case for abandonment, but another Ecuadorian court subsequently overturned the dismissal.<sup>5</sup>

Against this background, the Tribunal found that, by the time the action was commenced in December of 2006, Ecuador had violated the BIT by causing undue delay in Texaco's Ecuadorian legal proceedings.<sup>6</sup> The Tribunal went on to dismiss Ecuador's contention that Chevron was precluded from bringing this arbitration because Texaco and Chevron had failed to exhaust every domestic legal remedy.<sup>7</sup> Ultimately, the Tribunal awarded Chevron \$698,621,904.84 in damages.<sup>8</sup> The judgment was met with swift criticism from Ecuador's attorney general who stated that "[t]his new effort to compromise the Ecuadorean state in its firm commitment to respect the independence of its judicial system . . . will not succeed."<sup>9</sup>

Part I of this Comment discusses the origins of the disputes that led to the *Chevron* case and the Interim Award regarding the Tribunal's jurisdiction. Part II discusses the traditional formulation of denial of justice under customary international law and compares it to the standard created by the Tribunal in this case. Part III argues that the Tribunal arrived at the correct decision by heavily utilizing the Vienna Convention on the Law of Treaties (Vienna Convention) to craft a standard that was extremely faithful to the text of the BIT, thus avoiding the type of uncertainty that chills investment.

## I. BACKGROUND

### A. *Texaco's Operations in Ecuador and Related Lawsuits*

Relations between the parties in the case commenced in 1964 when Ecuador gave certain rights related to the exploration and production of oil to Texaco.<sup>10</sup> In 1973, the 1964 agreement was replaced by a new agreement (1973 Agreement), which granted Texaco explora-

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<sup>4</sup> *Id.* ¶ 270.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> See *Chevron*, UNCITRAL Arbitration, ¶¶ 329–331.

<sup>8</sup> See *id.* ¶¶ 546–550.

<sup>9</sup> See *Ecuador Rejects Ruling Awarding \$700m to Chevron*, BLOOMBERG BUSINESSWEEK (Mar. 31, 2010), <http://www.businessweek.com/ap/financialnews/D9EPOS7O0.htm>.

<sup>10</sup> *Chevron Corp. v. Ecuador*, UNCITRAL Arbitration, Partial Award on the Merits, ¶ 125 (Mar. 30, 2010), <http://ita.law.uvic.ca/documents/ChevronTexacoEcuadorPartialAward.PDF>.

tion and drilling rights in Ecuador's Amazon region, so long as Texaco provided for Ecuador's domestic oil needs at a lower price to be set by the nation.<sup>11</sup> In 1987, an earthquake shook Ecuador and seriously disrupted Texaco's ability to deliver enough oil to satisfy domestic needs, forcing Ecuador to seek out alternate sources of oil and pay more than the agreed-upon domestic price.<sup>12</sup> Ecuador later would demand that Texaco provide it with many extra barrels of crude oil at the lower agreed-upon price to compensate its government for the oil bought at a higher price during the crisis.<sup>13</sup>

Efforts to negotiate an extension of Texaco's rights to explore and exploit oil in Ecuador failed and in 1992, the 1973 Agreement expired.<sup>14</sup> In this time frame, between 1991 and 1993, Texaco filed the seven claims at issue in this case against Ecuador.<sup>15</sup> Five of these cases claimed that Ecuador had overstated its domestic needs, taking more oil than it was entitled to at the low domestic price.<sup>16</sup> Another case involved a *force majeure*<sup>17</sup> issue related to the 1987 earthquake.<sup>18</sup> The final claim regarded a violation of a refinancing agreement that had been signed between the two parties in 1986.<sup>19</sup> Texaco filed all of these cases between 1991 and 1993.<sup>20</sup> A decade later, Ecuadorian politics entered a period of crisis, during which the nation's judicial system experienced profound instability.<sup>21</sup> During this period, these seven cases sat mostly dormant despite numerous inquiries by Texaco (and Chevron, after it acquired Texaco).<sup>22</sup>

### B. Filing for Arbitration and the 2008 Interim Award

With little progress on its claims for over a decade, Chevron commenced arbitration in a UNCITRAL tribunal in December of 2006.<sup>23</sup> The BIT, which entered into force in 1997, specifies the rights that each

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<sup>11</sup> *Id.* ¶¶ 127–128.

<sup>12</sup> *See id.* ¶¶ 130–131.

<sup>13</sup> *Id.* ¶ 132.

<sup>14</sup> *See id.* ¶ 133.

<sup>15</sup> *See id.* ¶ 134.

<sup>16</sup> *Chevron*, UNCITRAL Arbitration, ¶ 135.

<sup>17</sup> *Force majeure* is “[a]n event or effect that can be neither anticipated nor controlled. The term includes both acts of nature (e.g., floods and hurricanes) and acts of people (e.g., riots, strikes, and wars).” BLACK’S LAW DICTIONARY 718 (9th ed. 2009).

<sup>18</sup> *Chevron*, UNCITRAL Arbitration, ¶ 135.

<sup>19</sup> *Id.*

<sup>20</sup> *See id.* ¶ 149 (Table 1).

<sup>21</sup> *See id.* ¶ 142–143.

<sup>22</sup> *See id.* ¶¶ 255, 270.

<sup>23</sup> *See id.* ¶ 145.

nation shall accord to foreign investors from the other.<sup>24</sup> Further, the BIT specifies that an action questioning a breach of the treaty could be commenced in an UNCITRAL tribunal.<sup>25</sup> At the jurisdictional phase of this arbitration, Ecuador argued that the Tribunal lacked jurisdiction to hear the claim for a variety of reasons.<sup>26</sup> First, Ecuador cited statements made by Chevron and Texaco in a U.S. court action, in which the corporations stated that Ecuador's judiciary was fair and competent.<sup>27</sup> Ecuador argued that Chevron should not be allowed to contradict itself and claim that Ecuadorian courts were incompetent to decide the cases at issue in this arbitration.<sup>28</sup> Second, Ecuador claimed that the cases in dispute did not concern "investment" as defined by the BIT.<sup>29</sup> Third, Ecuador argued that this claim was not ripe for adjudication as Chevron failed to exhaust all domestic remedies.<sup>30</sup> Finally, Ecuador claimed that the events giving rise to the claims took place before May 11, 1997, the date on which the BIT came into effect, thus making the BIT inapplicable.<sup>31</sup> On December 1, 2008, the Tribunal rejected Ecuador's contentions about the Tribunal's lack of jurisdiction and allowed the case to proceed to the merits phase.<sup>32</sup>

## II. DISCUSSION

### A. *Denial of Justice Under Customary International Law*

That states have a "duty to provide decent justice to foreigners" is one of the oldest precepts of international law.<sup>33</sup> A claim of "denial of justice" has long existed as a way for foreigners to vindicate this right.<sup>34</sup> Though it is widely accepted as a cause of action in international law, the exact definition of the term has been debated throughout the last

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<sup>24</sup> See generally Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Ecuador, Aug. 27, 1993, S. TREATY DOC. NO. 103-15 (1993) [hereinafter *Investment Treaty*].

<sup>25</sup> See *id.* art. VI(3)(a).

<sup>26</sup> *Chevron*, UNCITRAL Arbitration, ¶ 9.

<sup>27</sup> See *id.* ¶ 10.

<sup>28</sup> *Id.*

<sup>29</sup> See *id.* ¶ 12.

<sup>30</sup> See *id.* ¶ 13.

<sup>31</sup> *Id.* ¶ 15.

<sup>32</sup> *Chevron*, UNCITRAL Arbitration, ¶ 25.

<sup>33</sup> JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 1 (2005).

<sup>34</sup> See *id.*

century.<sup>35</sup> Much of this debate is related to the fact that the term “denial of justice” has intentionally been kept a broad and abstract concept.<sup>36</sup> Moving towards the other extreme, a bright-line rule would allow states to get away with treating foreigners poorly by conforming to legal formalities.<sup>37</sup>

Nevertheless, the most basic formulation of a standard denial of justice claim has been articulated by scholars with relative consistency.<sup>38</sup> Responsibility for denial of justice will attach to a state actor only where “the factual circumstances” are “egregious.”<sup>39</sup> Many scholars have historically argued that state actors can be held accountable for denial of justice where the actions of the judiciary are “grossly unfair” or “manifestly unjust.”<sup>40</sup> Yet the question of what constitutes a “manifestly unjust” judgment is subject to considerable debate.<sup>41</sup> Two other categories of denial of justice—the refusal to allow foreigners to assert their rights before domestic courts and judicial delays that are “equivalent to refusal”—are, however, firmly accepted by a majority of international lawyers.<sup>42</sup> Under customary international law, the foreigner seeking redress for denial of justice must also prove that she has exhausted all local remedies.<sup>43</sup> Thus, a denial of justice claim will usually be based on an allegedly unjust final decision of the nation’s highest appeals court,

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<sup>35</sup> See ALWYN V. FREEMAN, *THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE*, 96–97 (Kraus Reprint Co. 1970) (1938) (listing six varying definitions of denial of justice); PAULSSON, *supra* note 33, at 65 (stating that “two centuries of debate have focused on” what makes a decision sufficiently “manifestly unjust and one-sided” to amount to a denial of justice); Sir Gerald Fitzmaurice, *The Meaning of the Term “Denial of Justice”*, 13 BRIT. Y.B. INT’L L. 93, 93 (1932) (noting that many possible definitions of denial of justice have been used).

<sup>36</sup> See PAULSSON, *supra* note 33, at 59 n.2.

<sup>37</sup> See *id.* at 59–60.

<sup>38</sup> See J.W. Garner, *International Responsibility of States for Judgments of Courts and Verdicts of Juries Amounting to Denial of Justice*, 10 BRIT. Y.B. INT’L L. 181, 183–84 (1929) (“[A] draft formulated by an American Committee of jurists in 1928 defines denial of justice for which the state is responsible as including the denial, delay, or exceptional difficulty of access to the courts, gross deficiencies in the judicial or remedial process, the absence of those guarantees which are indispensable to the proper administration of justice, or a ‘manifestly unjust’ judgment.”); see also PAULSSON, *supra* note 33, at 65 (citing Vattel with approval, who in 1758 proposed a three-tier definition of denial of justice, including: (1) “not admitting foreigners to establish their rights before the ordinary courts”; (2) “delays which are ruinous or otherwise equivalent to refusal”; and (3) “judgments [that are] ‘manifestly unjust and one-sided’”).

<sup>39</sup> PAULSSON, *supra* note 33, at 60.

<sup>40</sup> See Garner, *supra* note 38, at 183.

<sup>41</sup> See PAULSSON, *supra* note 33, at 65.

<sup>42</sup> *Id.*

<sup>43</sup> See *id.* at 100.

which illustrates that the entire justice system has failed to adequately protect the rights of the foreigner.<sup>44</sup>

Chevron initiated its claim partly upon this customary international law concept of denial of justice.<sup>45</sup> As a primary matter, Chevron argued that Ecuador had violated customary international law and committed a denial of justice by means of an undue delay in the court cases it filed against Ecuador that were pending for over a decade.<sup>46</sup> By proving that Ecuador violated customary international law, Chevron asserted that it also proved a violation of the BIT,<sup>47</sup> which states that “[i]nvestment . . . shall in no case be accorded treatment less than that required by international law.”<sup>48</sup> In the alternative, Chevron argued that the decisions rendered after the commencement of the action by Ecuador’s courts were so manifestly unjust as to amount to a denial of justice.<sup>49</sup> As a final matter, Chevron insisted that exhaustion of local remedies was not a requirement under customary international law,<sup>50</sup> but even if it were a requirement, it would be fulfilled in this case.<sup>51</sup>

Ecuador, for its part, emphasized the high burden that the plaintiff carries in an action for denial of justice.<sup>52</sup> According to Ecuador, a denial of justice claim based upon undue delay must assert that the state’s delay amounted to a “refusal to judge,”<sup>53</sup> which Ecuador contended that Chevron had not done.<sup>54</sup> In response to Chevron’s alternative argument alleging a denial of justice based on manifestly unjust decisions, Ecuador claimed that the decisions were not unjust, and even if they were, they did not reflect a high enough level of judicial impropriety to breach international law and thereby invoke international arbitration.<sup>55</sup> Finally, Ecuador insisted that Chevron had not exhausted all domestic remedies, as most of the cases had not been appealed to the highest court.<sup>56</sup> Despite the robust corpus of customary international

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<sup>44</sup> See *id.* at 100–01.

<sup>45</sup> See *Chevron Corp. v. Ecuador*, UNCITRAL Arbitration, Partial Award on the Merits, ¶¶ 167–169, 188, 277 (Mar. 30, 2010), <http://ita.law.uvic.ca/documents/ChevronTexacoEcuadorPartialAward.PDF>.

<sup>46</sup> See *id.* ¶¶ 167–171.

<sup>47</sup> *Id.* ¶ 167.

<sup>48</sup> Investment Treaty, *supra* note 24, art. II(3)(a).

<sup>49</sup> *Chevron*, UNCITRAL Arbitration, ¶ 188.

<sup>50</sup> *Id.* ¶ 277.

<sup>51</sup> See *id.* ¶ 279.

<sup>52</sup> *Id.* ¶ 178.

<sup>53</sup> *Id.* ¶ 180.

<sup>54</sup> See *id.* ¶ 181.

<sup>55</sup> See *Chevron*, UNCITRAL Arbitration, ¶ 195.

<sup>56</sup> See *id.* ¶¶ 295–297.

law concerning denial of justice that both parties cited as central to their arguments, the Tribunal's opinion proceeded in quite a different direction.<sup>57</sup>

B. *A Lower Standard for U.S.-Ecuador Relations:  
The BIT's Distinct Standard*

Even though the customary international law framework discussed above informed the Tribunal's decision, the Tribunal noted that its job was to interpret the BIT according to the rules set forth in the Vienna Convention.<sup>58</sup> As such, the Tribunal used a great deal of the opinion to interpret the text of Article II(7) of the BIT,<sup>59</sup> which requires that "[e]ach Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations."<sup>60</sup>

Though the Tribunal observed that the obligations imposed by Article II(7) are similar to those imposed by customary international law,<sup>61</sup> it found that the standard set by the BIT was distinct from the standard for finding a denial of justice under customary international law.<sup>62</sup> Indeed, the Tribunal observed that the standard necessary for finding a breach of the BIT could be lower than that set by customary international law.<sup>63</sup>

Thus, rather than having to prove that the state's judicial shortcoming was "egregious," as is the general standard under customary international law,<sup>64</sup> the claimant must only prove that the state failed to provide an "effective means" for enforcing rights and bringing claims.<sup>65</sup> Specifically, the Tribunal noted that the standard for finding a denial of justice under customary international law "requires the demonstration of 'a particularly serious shortcoming' and egregious conduct that 'shocks, or at least surprises, a sense of judicial propriety.'"<sup>66</sup> By contrast, the Tribunal held that "under Article II(7), a failure of domestic courts to enforce

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<sup>57</sup> See *id.* ¶ 242.

<sup>58</sup> See *id.* ¶¶ 158–159, 244.

<sup>59</sup> See *id.* ¶¶ 241–275, 321–332.

<sup>60</sup> Investment Treaty, *supra* note 24, art. II(7).

<sup>61</sup> See *Chevron*, UNCITRAL Arbitration, ¶ 244.

<sup>62</sup> See *id.* ¶¶ 242–244.

<sup>63</sup> See *id.* ¶ 244.

<sup>64</sup> See PAULSSON, *supra* note 33, at 60.

<sup>65</sup> See *Chevron*, UNCITRAL Arbitration, ¶ 244.

<sup>66</sup> *Id.* (quoting Opinion of Jan Paulsson, para. 10 (Nov. 2008) and Respondent's Counter-Memorial on the Merits of Sept. 22, 2008).

rights ‘effectively’ will constitute a violation of Article II(7).<sup>67</sup> As to the relationship between the two standards, the Tribunal notes that judicial misconduct that violates Article II(7) “may not always be sufficient to find a denial of justice under customary international law.”<sup>68</sup> The Tribunal’s decision, therefore, creates a standard that is distinct from—and seemingly easier to violate than—the traditional standard.<sup>69</sup>

Moreover, the Tribunal decided that although a party must have exhausted local remedies in order to prove a denial of justice under customary international law, Article II(7) once again creates a distinct standard in this regard.<sup>70</sup> The Tribunal was convinced that exhaustion of local remedies was a general requirement under customary international law.<sup>71</sup> In contrast, the central issue under Article II(7) is whether the state has provided the claimant with an effective means for enforcing rights.<sup>72</sup> The Tribunal found that only “a qualified requirement of exhaustion of local remedies applies under the ‘effective means’ standard of Article II(7).”<sup>73</sup> If the respondent state can prove that valid local remedies did exist and were not pursued, a claimant’s contention that it was not provided with effective means for enforcing its rights may be defeated.<sup>74</sup> Nevertheless, proof of exhaustion of local remedies is not necessary to make a *prima facie* case for a breach of Article II(7).<sup>75</sup>

Proceeding with an analysis of the case under this legal framework, the Tribunal found that an undue delay serves to violate the new standard, as Article II(7) mandates that Ecuador “provide foreign investors with means of enforcing legitimate rights *within a reasonable amount of time*.”<sup>76</sup> Although Ecuador highlighted various legal options not used by Chevron, the Tribunal was ultimately convinced that such options would have been ineffective and thus dismissed Ecuador’s defense.<sup>77</sup> After considering and dismissing a variety of factors that could have justified a delay,<sup>78</sup> the Tribunal ruled that Ecuador’s long period of inaction constituted an undue delay, in violation of Article II(7).<sup>79</sup>

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *See id.* ¶¶ 242–244.

<sup>70</sup> *See id.* ¶ 321.

<sup>71</sup> *Chevron*, UNCITRAL Arbitration, ¶ 321.

<sup>72</sup> *See id.* ¶¶ 244, 322–324.

<sup>73</sup> *Id.* ¶ 323.

<sup>74</sup> *See id.* ¶¶ 328–329.

<sup>75</sup> *See id.* ¶ 326.

<sup>76</sup> *Id.* ¶ 250 (emphasis added).

<sup>77</sup> *See Chevron*, UNCITRAL Arbitration, ¶¶ 330–331.

<sup>78</sup> *See id.* ¶¶ 254–255, 263–265.

<sup>79</sup> *Id.* ¶ 270.



### III. ANALYSIS

The Tribunal was correct to use the Vienna Convention to carve out a standard that was distinct from the customary international law standard because such an interpretation of the BIT is the most predictable.<sup>80</sup> Such predictability best promotes investment.<sup>81</sup> Bilateral investment treaties have flourished as a way to give investors the certainty and security they seek when investing abroad.<sup>82</sup> Interpretations of bilateral investment treaties that create uncertainty for investors may serve to chill investment,<sup>83</sup> which such treaties were often meant to promote.<sup>84</sup> Ultimately, in the instant case, Chevron's expectations of its own rights under the BIT were based heavily on an interpretation informed by the Vienna Convention.<sup>85</sup> Thus, by strictly applying the Vienna Convention to its analysis of the BIT,<sup>86</sup> the Tribunal promoted certainty and security for American investors like Chevron in Ecuador.<sup>87</sup> Any other interpretation would have created uncertainty about the rights guaranteed to investors by the BIT,<sup>88</sup> thus chilling investment and contravening the paramount goal of the BIT itself.<sup>89</sup>

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<sup>80</sup> See *Chevron Corp. v. Ecuador*, UNCITRAL Arbitration, Partial Award on the Merits, ¶¶ 159, 161–162, 242–244 (Mar. 30, 2010), <http://ita.law.uvic.ca/documents/ChevronTexacoEcuadorPartialAward.PDF> (stating that both parties relied on the Vienna Convention in making their arguments regarding the substantive provisions of the BIT, explaining that the Tribunal actually applied the Vienna Convention to interpret the BIT, and ultimately creating a standard distinct from the international law standard).

<sup>81</sup> See Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 *FORDHAM L. REV.* 1521, 1538, 1558 (2005) (arguing that increasing investors' confidence in their ability to enforce rights under bilateral investment treaties promotes foreign investment and asserting that inconsistency in the interpretation of bilateral investment treaties creates uncertainty about and damages expectations of the rights afforded by such a treaty).

<sup>82</sup> See Jarrod Wong, *Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes*, 14 *GEO. MASON L. REV.* 135, 135–36 (2006).

<sup>83</sup> See *id.* at 139 (“Allowing the host State to renege on its agreement in the BIT creates uncertainty in the global marketplace and can serve only to discourage foreign investment.”).

<sup>84</sup> See *id.* at 135 (“The BIT serves to attract foreign investment by granting broad investment rights to investors and creating flexibility in the resolution of investment disputes.”).

<sup>85</sup> See *Chevron*, UNCITRAL Arbitration, ¶ 159.

<sup>86</sup> See *id.* ¶¶ 161–162.

<sup>87</sup> Cf. Franck, *supra* note 81, at 1558 (claiming that inconsistent interpretations of bilateral investment treaties decrease certainty about the rights guaranteed by the treaty, thereby damaging investors' expectations).

<sup>88</sup> See *id.*

<sup>89</sup> See Investment Treaty, *supra* note 24, pmbl. (stating that the United States and Ecuador entered into the BIT “desiring to promote greater economic cooperation between

In a globalized world with increasing amounts of investment flowing across national borders, parties looking to invest in foreign nations seek increasing amounts of security.<sup>90</sup> To this end, many nations have sought to guarantee expansive protection to investors by entering into bilateral investment treaties.<sup>91</sup> These treaties “govern[] the treatment of investments made in the territory of each state by individuals or companies from the other state.”<sup>92</sup> These investment treaties have proliferated, particularly between 1994 and 2006, by which time there were approximately 2400 bilateral investment treaties between various nations.<sup>93</sup>

Given that the increasingly popular use of bilateral investment treaties has at its core the goal of securing foreign investment,<sup>94</sup> interpretations that create uncertainty about the rights enshrined in such treaties ultimately discourage investment.<sup>95</sup> Jarrod Wong, a former legal adviser at the Iran-U.S. Claims Tribunal, in talking about the “umbrella clause”<sup>96</sup> of certain bilateral investment treaties, highlights several arbitral decisions that he argues were under-protective of investment because they failed to faithfully interpret the text of the relevant treaties.<sup>97</sup> Wong argues that a failure to interpret an “umbrella clause” in accordance with its text and history allows host states to renege on their responsibilities under bilateral investment treaties, creating uncertainty for investors from which foreign investment will suffer.<sup>98</sup>

Similarly, in an article addressing a number of inconsistent arbitral decisions arising out of bilateral investment treaties, Susan D. Franck, a practitioner and professor of international arbitration law, also expresses concern about the deleterious effects of interpretive uncertainty

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them, with respect to reinvestment by nationals and companies of one Party in the territory of the other Party” and “recognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties”); Wong, *supra* note 82, at 139.

<sup>90</sup> See Franck, *supra* note 81, at 1525.

<sup>91</sup> See Wong, *supra* note 82, at 135–36.

<sup>92</sup> *Id.* at 141.

<sup>93</sup> See *id.* at 135–36.

<sup>94</sup> See *id.*

<sup>95</sup> See *id.* at 139.

<sup>96</sup> An “umbrella clause” is a clause that “imposes a requirement on each Contracting State to observe all investment obligations entered into with investors from the other Contracting State.” *Id.* at 136. Liberally interpreted, such a clause allows an arbitration tribunal interpreting a bilateral investment treaty to exercise “jurisdiction over breach-of-contract claims since a breach of the investment contract is also a breach of the umbrella clause.” See Wong, *supra* note 82, at 137.

<sup>97</sup> See *id.*

<sup>98</sup> See *id.* at 139.

on foreign investment.<sup>99</sup> She states that “[i]nconsistency creates uncertainty and damages the legitimate expectations of investors and Sovereigns.”<sup>100</sup> Franck notes that one main effect of bilateral investment treaties is to increase investment incentives by granting rights to investors and thus reducing the risks associated with investment; it logically follows that throwing such rights into doubt will increase risk and thereby stifle investment.<sup>101</sup>

The interpretation of the BIT at issue in *Chevron* that best encourages investment is one that protects the expectations of investors by applying the source widely accepted as an accurate statement of customary international law on treaty interpretation—the Vienna Convention.<sup>102</sup> Such an interpretation is the least likely to create the type of confusion that would chill the very investment that a bilateral investment treaty is designed to ensure.<sup>103</sup> To that end, the Tribunal noted that *Chevron* firmly accepted that the correct way to interpret the BIT was by using the Vienna Convention, which reflects customary international law with regard to treaty interpretation.<sup>104</sup> Therefore, an interpretation of the BIT based firmly in the Vienna Convention would be most reflective of the investor’s expectations and therefore most likely to create the desired certainty and investment.<sup>105</sup>

The Tribunal found that the relevant provisions of the Vienna Convention with regard to treaty interpretation are Articles 31 and 32.<sup>106</sup> First, Article 31 states that a treaty should be “interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>107</sup> As stated by the Tribunal, the explicit refusal to include customary international law as the standard for finding a breach of the BIT meant that there was a different standard.<sup>108</sup> Indeed, the “effective means” standard created by the court is exceptionally consistent with this interpretive tenet in that it specifically uses the words of the BIT

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<sup>99</sup> See Franck, *supra* note 81, at 1558.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 1538.

<sup>102</sup> See *Chevron*, UNCITRAL Arbitration, ¶ 159; Franck, *supra* note 81, at 1538, 1558.

<sup>103</sup> See Wong, *supra* note 82, at 135, 139.

<sup>104</sup> See *Chevron*, UNCITRAL Arbitration, ¶ 159.

<sup>105</sup> See *id.*; Franck, *supra* note 81, at 1538.

<sup>106</sup> See *Chevron*, UNCITRAL Arbitration, ¶¶ 161–162.

<sup>107</sup> Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

<sup>108</sup> *Chevron*, UNCITRAL Arbitration, ¶ 242.

itself.<sup>109</sup> Further, Article 32 of the Vienna Convention allows a tribunal to consider other factors—such as the “preparatory work of the treaty and the circumstances of its conclusion”—but only to confirm the meaning dictated by Article 31.<sup>110</sup> Applying Article 32, the Tribunal noted that this BIT was drafted at a time when the United States deemed more specific protection for investors to be desirable, thus confirming the “effective means” standard mandated by Article 31.<sup>111</sup> Ultimately, the Tribunal’s interpretation of the BIT was remarkably consistent with the Vienna Convention.<sup>112</sup> As Chevron had based its arguments around the Vienna Convention, this interpretation most closely reflected its expectations.<sup>113</sup> Ultimately, this interpretation promoted the most possible certainty for potential future investors.<sup>114</sup>

#### CONCLUSION

The concept of denial of justice is not a new one under customary international law. Indeed, decades of scholarship have coalesced around a general theory that, to amount to a denial of justice, judicial misconduct must be egregious. Moreover, a party claiming to be a victim of denial of justice must prove that it has exhausted all local remedies. In *Chevron*, however, the Tribunal found that while the customary international law standard of denial of justice was influential, it was not determinative, as the job of the Tribunal was to interpret the BIT. As such, the Tribunal found that Article II(7) set forth a distinct “effective means” standard, which was less demanding than customary international law with regard to proving denial of justice and exhaustion of local remedies. This less demanding standard is preferential because the Tribunal strictly applied the Vienna Convention to create a faithful, text-based interpretation of the BIT. Because the Vienna Convention had in-

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<sup>109</sup> See Investment Treaty, *supra* note 24, art. II(7) (“Each party shall provide *effective means* of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.”) (emphasis added); Vienna Convention, *supra* note 107, art. 31(1) (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”); *Chevron*, UNCITRAL Arbitration, ¶ 242 (“The Tribunal thus finds that Article II(7), setting out an ‘effective means’ standard, constitutes a *lex specialis* and not a mere restatement of the law on denial of justice.”).

<sup>110</sup> Vienna Convention, *supra* note 107, art. 32.

<sup>111</sup> See *Chevron*, UNCITRAL Arbitration, ¶ 243.

<sup>112</sup> See Vienna Convention, *supra* note 107, arts. 31–32; *Chevron*, UNCITRAL Arbitration, ¶¶ 242–244.

<sup>113</sup> See *Chevron*, UNCITRAL Arbitration, ¶ 159.

<sup>114</sup> See Franck, *supra* note 81, at 1538.

formed Chevron's interpretation of the BIT and its rights as an investor, the Tribunal ultimately confirmed Chevron's expectations and avoided creating the type of interpretive uncertainty that can chill the very investment that the BIT was meant to foster. Such an approach for future Tribunals interpreting the BIT would further increase certainty for investors and incentivize U.S. investment in Ecuador.

