Effective means clauses in bilateral investment treaties—so-named because they require the host state to provide the investor with "effective means" of asserting claims and enforcing rights in the state's domestic legal system—have been largely overlooked by practitioners and scholars in the field of investment treaty arbitration. In 2010, however, the tribunal in Chevron v. Ecuador articulated that effective means clauses are lex specialis, a distinct obligation on the host state to adjudicate investors' claims without "indefinite or undue delay." This approach, subsequently adopted and expanded upon by the tribunal in White Industries v. India, has engendered controversy. Indeed, Ecuador sought to bring state-to-state arbitration against the United States on the ground that the two sovereigns were in actual opposition as to the meaning of the effective means clause in their treaty. However, this arbitration was dismissed at the jurisdictional phase, saving the United States from having to articulate its view as to how such clauses should be treated at a merits hearing.

This Note traces the origins of the effective means clause and critiques the interpretation promulgated by Chevron and White Industries. It argues that the decision to treat effective means clauses as lex specialis was based on insufficient textual evidence and is flawed as a matter of interpretation. It also argues that the result is an unworkable standard: it is too
vague to inform states as to how to structure their judicial systems to comply with the clause's requirements or to inform investors as to what they must undergo in domestic courts before they have a legitimate effective means claim, and it raises legitimate fairness and equity concerns. Therefore, this Note offers two alternative approaches that subsequent tribunals could adopt to provide more principled meaning to effective means clauses, one drawing on subsequent state practice and one looking to international comparative law.

INTRODUCTION

In 2010, an arbitral tribunal issued a 265-page partial award on the merits of a dispute between Chevron Corporation and the nation of Ecuador. Notably, the Tribunal articulated a novel standard for Article II(7) of the 1997 U.S.-Ecuador Bilateral Investment Treaty (BIT), a so-called “effective means” clause requiring the parties to "provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations." By finding that the “effective means” clause is lex specialis—a distinct positive obligation on the treaty parties that is easier to violate than denial of justice under customary international law—the Tribunal made it more likely that investors will prevail in their effective means claims against the states hosting investments (the "host state").

Chevron has had far-reaching effects in the field of investment arbitration because subsequent tribunals were quick to adopt the standard and widen its application. In 2011, the Tribunal in White Industries v. India allowed an effective means clause to be imported into a BIT by application of a most-favored nation clause. Then, the Tribunal agreed that Chevron was the appropriate standard to analyze

1. See Chevron Corp. and Texaco Petroleum Corp. v. The Republic of Ecuador, PCA Case No. 34877, Partial Award on the Merits (Mar. 30, 2010), available at http://italaw.com/documents/ChevronTexacoEcuadorPartialAward.PDF [hereinafter Chevron v. Ecuador]. The wide-ranging award was due in part to Chevron's alleged bases of relief, which included violations of multiple substantive provisions of the U.S.-Ecuador BIT as well as violations under customary international law for general denial of justice claims. Id. ¶¶ 85–121.


3. See infra Part II.B.
violations of the effective means clause. This new avenue for investors has not gone unnoticed. Post-White, the number of arbitrations alleging violations of an effective means clause has increased.

_Chevron_ is also important because the award led to significant diplomatic tension between Ecuador and the United States. Ecuador ultimately launched a rare state-to-state arbitration against the United States under the auspices of the Permanent Court of Arbitration at The Hague, in which it argued that the two nations were in positive dispute regarding the interpretation of the effective means clause in their BIT. Though Ecuador’s attempt was ultimately unsuccessful on jurisdictional grounds, the act of instituting state-to-state arbitration illustrates the extent of Ecuador’s concern.

Despite _Chevron_’s evident significance, commentators have not questioned whether the effective means standard it created is functional for the states party to investment treaties, consistent with their legitimate expectations, or reasonable for investors. This Note attempts to begin to fill that void by reviewing the history of the effective means clause in the broader investment arbitration context, by analyzing and critiquing _Chevron_’s interpretation of these clauses, and by considering alternatives for how to give principled meaning to effective means clauses. In Part I, therefore, this Note provides background context for how effective means clauses arose in international treaty negotiations and how tribunals prior to _Chevron_ interpreted such clauses. Part II reviews _Chevron_’s reasoning and traces the subsequent expansion of the _Chevron_ standard in _White Industries v. India_. Additionally, Part II considers Ecuador’s unsuccessful attempt to secure a different interpretation of the effective means clause through state-to-state arbitration. Lastly, Part III presents the predominant shortcomings of the _Chevron_ standard and proposes alternatives that give greater clarity to states and investors regarding the obligations and rights effective means clauses impart.

4. See id.
5. Compare cases cited infra note 127 with Part I.C, reviewing the analysis of the only three investment tribunals that heard claims alleging a violation of an effective means clause prior to _Chevron_. However, since not all arbitral proceedings are public, it is conceivable that effective means claims were more widespread in arbitral disputes pre-_Chevron_ than Part I.C acknowledges.
6. See infra Part II.C.
7. Id.
I. BACKGROUND

A. The Origins of BITs and Investment Treaty Arbitration

Understanding *Chevron v. Ecuador* requires brief consideration of how BITs originated and came to be commonplace.  

The modern-day BIT is rooted in the 1959 investment agreement between West Germany and Pakistan. In the thirty years that followed, more than 300 BITs were negotiated and ratified, predominantly between capital-exporting countries and nations seeking economic development. In the 1990s, the number of BITs in force increased dramatically, quintupling to 1,857 by the end of the millennium. In its most recent analysis, the United Nations Conference on Trade and Development (UNCTAD) found there to be 2,833 BITs in force as of 2011, as compared to approximately 300 other forms of international investment agreements, such as multilateral free trade agreements or regional economic partnerships.

Functionally, BITs are binding covenants negotiated between sovereign states that create legal protection for private third-party in-

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9. Treaty for the Protection of Investment, West Ger.-Pak., Nov. 25, 1959, 457 U.N.T.S. 23. For brevity’s sake, this Note does not address instruments for protecting property and investment abroad that served as precursors to BITs, such as Treaties of Friendship, Commerce, and Navigation ("FCN" treaties), diplomatic overtures, and multilateral trade agreements such as the General Agreement on Tariffs and Trade (the GATT). For a thorough analysis of how these contributed to the modern system of investment treaties, see Vandevelde, supra note 8, at 170.


BITs provide several types of investor security. First, since treaty-based rights cannot be easily amended, BITs protect investors from unanticipated social or political developments in the host state that could threaten the security or fair treatment of foreign investments. Additionally, by affording sovereigns the opportunity to negotiate over the rights and obligations included in each investment treaty, BITs expand the universe of protections afforded to investors beyond the principles of customary international law. Lastly, and perhaps most critically, in the context of Chevron, BITs offer recourse to binding dispute resolution outside the courts of the host state. In exchange for offering to provide these investor protections, states impliedly enticed foreign direct investment and fostered economic growth.


14. See Jeswald W. Salacuse, The Treatification of International Investment Law, 13 L. & BUS. REV. AM. 155, 156 (2007) ("The BITs' intent was to restrain host country action against the interests of investors—in other words, to enable the form of legal commitments made to investors to resist the forces of change often demanded by the political and economic life in host countries.").

15. See id. at 157. The actual extent of this bargaining is unclear. One commentator notes that BITs tend to contain the same clauses in the same order because capital-exporting countries rarely deviate from the text of their Model BITs. See Susan D. Franck, The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions, 73 FORDHAM L. REV. 1521, 1529–30 (2005). On the other hand, provisions that carve out certain subject matter from resolution by arbitration exist to varying terms, reflecting bargained-for concessions. See, e.g., Treaty Concerning the Reciprocal Encouragement and Protection of Investments, U.S.-Cameroon, art. VIII(1), Feb. 26, 1986, S. TREATY DOC. NO. 99-22 (1986) (providing that disputes arising under certain export credit or insurance programs are not subject to resolution by state-to-state arbitration).


17. Whether BITs do in fact grow foreign direct investment—an interesting question outside the scope of this Note—has been much debated, and there does not appear to be a clear answer. Compare Jason Webb Yackee, Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?, 42 LAW & SOC'Y REV. 805, 805 (2008) (arguing that the assumption that entering into BITs will lead to greater investment is mistaken) with Jeswald W. Salacuse & Nicholas P. Sullivan, Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties
The corollary to the vast growth in the number of BITs and their expansive provisions is the rise of investment treaty arbitration. Commentators diverge on the value of investment treaty arbitration as a form of dispute resolution, but it has been increasingly popular in recent years. Since the mid-1990s, the number of claims brought against sovereigns under BIT arbitration clauses has increased dramatically. While the unprecedented growth of investment treaty arbitration has created a dynamic and quickly-changing field within international law, it has also engendered controversy. Private arbitrators tasked with interpreting treaties negotiated between sovereigns may lack information as to what the sovereigns intended by the terms of their agreement, yet must give meaning to the content of expansive treaty provisions. As *Chevron* illustrates, the interpretations tribunals provide may lead to more questions than answers.
B. The Development of the Effective Means Clause

The United States BIT program began in 1977, but the earliest U.S. BIT—signed between the United States and Panama in late 1982—included neither an effective means clause nor any reference to judicial remedies for investors in the host state. By 1983, however, the United States' model negotiating text for new BITs included a "judicial access" provision, or a clause guaranteeing "[covered investors] effective means of asserting claims against the host State in the courts of the host State." In construction and content, this proposition is largely identical to the effective means clause at issue in Chevron.

The impetus behind the inclusion of the judicial-access provision is not entirely evident. One argument is that the effective means clause was necessary during the early years of the U.S. BIT program because of ambiguity as to investors' rights to access the courts of the host state under general principles of international law. According to this view, effective means clauses serve two purposes. First, they codify the customary international law principle against the denial of justice. As articulated by a commonly cited arbitral tribunal, the test for establishing denial of justice is:

[W]hether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the

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21. Vandevelde, supra note 8 at 170.
24. Kenneth J. Vandevelde, U.S. International Investment Agreements 411 (2009). This argument was cited approvingly by the Chevron Tribunal as justification for the standard it elucidated for the effective means clause. See Chevron v. Ecuador, supra note 1, ¶ 243.
25. There are several articulations for what constitutes denial of justice under customary international law. In a comprehensive review of the denial of justice concept, Jan Paulsson endorsed a three-tier definition with origins from the 1700s. Under this articulation, denial of justice prohibits "not admitting foreigners to establish their rights before the ordinary courts"; "delays which are ruinous or otherwise equivalent to refusal"; or "judgments [that are] 'manifestly unjust and one-sided.'" Jan Paulsson, Denial of Justice in International Law 65 (2005).
available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment.\textsuperscript{26}

Second, the inclusion of an effective means clause imposes an additional positive obligation on the parties beyond the denial of justice threshold by providing the specific rights of access to local courts for investors.\textsuperscript{27} This reasoning mirrors the reasoning provided for the BIT regime in the first instance: customary international law was insufficient to protect investors, so states bargained for additional protections in investment treaties.\textsuperscript{28}

While the origins of the effective means clause are cloudy, its popularity in U.S. treaty practice is apparent. Many, but not all, investment treaties signed after the 1983 model negotiating language was devised, such as the 1983 U.S.-Senegal BIT and the 1985 U.S.-Turkey BIT, included detailed effective means clauses.\textsuperscript{29} In 1991, the Chief Counsel for International Commerce in the U.S. Department of Commerce listed effective means clauses as an absolute standard of protection commonly included in U.S. BITs.\textsuperscript{30} Nonetheless, some BITs from this period did not include an effective means clause, which may indicate that these clauses were actively consid-

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\end{equation}

\textsuperscript{26} Mondev Int'l Ltd. v. United States, ICSID Case No. ARB(AF)/99/2, Award, ¶ 127 (Oct. 11, 2002).


\textsuperscript{28} See generally Jeswald W. Salacuse, The Emerging Global Regime for Investment, 51 HARV. INT'L L.J. 427, 438–39 (2010) (arguing that the impetus for the U.S. BIT program was that “international law offered foreign investors no effective enforcement mechanism for pursuing claims against host countries”).

\textsuperscript{29} Senegal Bilateral Investment Treaty, U.S.-Sen., art. II(9), Dec. 6, 1983, S. TREATY DOC. No. 99-15 (“In order to maintain a favorable environment for investments in its territory by nationals or companies of the other Party, each Party shall provide effective means of asserting claims and enforcing rights with respect to investment agreements, investment authorizations and properties.”); Turkey Bilateral Investment Treaty, U.S.-Turk., art. II(8), Dec. 3, 1985, S. TREATY DOC. No. 99-19 (“Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.”).

\textsuperscript{30} Eleanor Lewis, Legal Protections Provided to U.S. Investors Under the Bilateral Investment Treaty Program, BUS. AM., Feb. 11, 1991, at 12. Absolute protection, Lewis clarified, referred to protection “provided to a foreign investment no matter what type of treatment is given to investments by host country or third-country nationals and companies” and also included the “requirements of fair and equitable treatment, full protection and security (which generally refers to physical safety), and treatment no less than that required by international law.” Id.
"EFFECTIVE MEANS" MEANS?

However, the 2004 and 2012 revisions of the U.S. Model BIT text moved the effective means clause from the substance of the treaty provisions to the preamble. This change is reflected in the most recently negotiated U.S. BITs. According to Chevron, the U.S. drafters removed the effective means clause in 2004 because by then "customary international law provided adequate protection and . . . a separate treaty obligation was no longer necessary." Despite this recent shift in U.S. treaty practice, the long history of including effective means clauses in U.S. BITs means that a sizeable number of U.S. investment treaties currently in force include such a provision. Moreover, effective means clauses are also present in non-U.S. BITs as well as in the multilateral Energy Charter Treaty.


34. Some have suggested that effective means clauses are a relatively new treaty development, but this seems unsupported by U.S. treaty practice. Contra Robbins, supra note 27, at 425.

35. See, e.g., Agreement for the Encouragement and Protection of Investments,
C. Pre-Chevron Interpretation of the Effective Means Clause

Despite the prevalence of the effective means clause in U.S. and international treaty practice, there has not been substantial scholarly analysis as to the clause’s meaning. This may be due to low practical demand, since, until recently, few investors brought claims arguing that their rights under this provision were violated. One academic analysis of the effective means clause prior to Chevron highlights the vagaries of the standard by stating bluntly, “[n]o definition is provided for determining when a Party should be deemed to have provided ‘effective means.’” The author, an attorney for the U.S. Customs and Border Protection Agency, suggested that the clause imparted something more than mere access to the judicial system of the host state, such as the existence of a “fair and impartial system” that can produce “timely and reasoned” determinations so that investors can “assert claims and enforce rights” in a meaningful fashion. However, he acknowledged that what it means to “assert claims and enforce rights” is not universally consistent, potentially limiting the viability of his articulation.

The few investment tribunals that analyzed effective means clauses prior to Chevron differed in their approaches. The first instance was the 2005 case of Petrobart v. The Kyrgyz Republic. In
that dispute, Petrobart alleged that Kyrgyzstan’s Vice Prime Minister had obtained a stay of Petrobart’s judgment against a state-owned energy company through *ex parte* communication with the Kyrgyzstani court. Petrobart argued that this interference constituted a violation of the effective means clause in the Energy Charter Treaty. The Tribunal agreed with that argument, but did not provide substantive analysis as to how this conduct constituted a violation of the effective means clause. Rather, the Tribunal resolved the dispute by finding that the Kyrgyzstani government’s interference in the judicial system violated a different Energy Charter Treaty provision on fair and equitable treatment.

The second investment arbitration dispute regarding violation of an effective means clause was *Limited Liability Co. AMTO v. Ukraine* in 2008. The AMTO claimants argued that Ukraine’s entire Bankruptcy Code was legislatively inadequate and that it denied them effective means through which to assert their claims in Ukraine’s courts because it fell short of international standards. In assessing this argument, the AMTO Tribunal adopted a philosophical approach to fleshing out the effective means clause in the Energy Charter Treaty:

“Effective” is a systematic, comparative, progressive and practical standard. It is systematic in that the State must provide an effective framework or system for the enforcement of rights, but does not offer guarantees in individual cases. *Individual failures might be evidence of systematic inadequacies, but are not themselves a breach of Article 10(12).* It is comparative in that compliance with international standards indicates that imperfections in the law might result from the complexities of the subject matter rather than the inadequacies of the legislation. It is progressive in the sense that legislation ages and needs to be modernized and adapted from time to time, and results might not be immediate . . . it is a practical standard in that some areas of law, or the application of legislation in certain circumstances, raise particular difficulties

42. *Id.* at 28–29.
43. *Id.* at 26.
45. *Id.* § 85.
which should not be ignored in assessing effectiveness.\textsuperscript{46}

The AMTO Tribunal thus accepted the premise that a legislative shortcoming in the host state could lead to a violation of the effective means clause;\textsuperscript{47} however, it concluded that Ukraine’s bankruptcy laws were sufficient and did not trigger such a violation.\textsuperscript{48} AMTO articulated that investors have “effective means” of asserting their claims and enforcing their rights as long as the host state has a public rule of law that respects property and contract rights and sufficient rules of procedure to allow investors to access remedies in domestic tribunals.\textsuperscript{49}

The third tribunal to consider an effective means clause was \textit{Duke Energy v. Ecuador}, which issued its award a few months after AMTO. Duke Energy offered only brief analysis of the effective means clause, stating that it “seeks to implement and form part of the more general guarantee against denial of justice.”\textsuperscript{50} Specifically, the Tribunal articulated that the effective means clause concerns systemic or institutional means of protecting investments, such as access to the courts.\textsuperscript{51} In its view, the \textit{functioning} of institutional mechanisms, rather than the mere existence of such mechanisms, was the most critical determinant of whether a state had breached the effective means standard.\textsuperscript{52} The opinion did not consider the functioning of Ecuador’s dispute resolution systems, however, because the tribunal

\begin{itemize}
  \item \textsuperscript{46} \textit{Id.} \textsuperscript{\textsection} 88 (emphasis added).
  \item \textsuperscript{47} \textit{Id.} \textsuperscript{\textsection} 75 (stating that the effective means clause in the Energy Charter Treaty imparts a specific obligation on states to ensure that investors can assert claims and enforce their rights. Thus, “[l]egislative failures affecting the administration of justice in cases under the ECT can therefore be measured against the express standard established by Article 10(12).”).
  \item \textsuperscript{48} \textit{See id.} \textsuperscript{\textsection} 89 (detailing how the Ukrainian Bankruptcy Code provided an effective means to enforce a creditor’s rights in the Ukraine).
  \item \textsuperscript{49} \textit{Id.} \textsuperscript{\textsection} 87 ("The fundamental criteria of an ‘effective means’ for the assertion of claims and the enforcement of rights … is law and the rule of law. There must be legislation for the recognition and enforcement of property and contractual rights. This legislation must be made in accordance with the constitution, and be publicly available. An effective means of the assertion of claims and the enforcement of rights also requires secondary rules of procedure so that the principles and objectives of the legislation can be translated by the investor into effective action in the domestic tribunals. There is no question that the Ukraine satisfies this fundamental criteria.”).
  \item \textsuperscript{50} \textit{Duke Energy v. Ecuador}, ICSID Case No. ARB/04/19, Award, \textsuperscript{\textsection} 391 (Aug. 18, 2008), \textit{available at} http://italaw.com/sites/default/files/case-documents/ita0256.pdf.
  \item \textsuperscript{51} \textit{Id.}
  \item \textsuperscript{52} \textit{Id.} \textsuperscript{\textsection} 392.
\end{itemize}
was persuaded that Duke Energy's claim was local in nature; thus, the Ecuadorian legal system was never implicated.53

II. CHEVRON, WHITE, AND THE REPUBLIC OF ECUADOR V. THE UNITED STATES OF AMERICA

As is apparent from the differing approaches recounted above, no consistent legal framework for analyzing alleged violations of the effective means clause existed prior to *Chevron*. This Part illustrates how the *Chevron* Tribunal derived its standard and how that standard quickly came to be accepted and applied by other tribunals, as evidenced by the *White Industries* arbitration. Then, by analyzing Ecuador's attempt to clarify or change *Chevron*’s interpretation of the effective means clause through state-to-state arbitration against the United States, this Part raises some of the predominant challenges to the *Chevron* interpretation that will be further discussed in Part III.

A. *Chevron*’s Effective Means Standard

1. Factual Background

In 1973, Texaco Petroleum (TexPet) obtained oil-exploration and production rights in Ecuador. As part of the agreement, the Ecuadorian government could purchase oil from TexPet at a below-market price for use in meeting domestic energy needs.54 For any use other than domestic consumption, Ecuador was contractually obligated to pay the fair international market price.55 In 1991, TexPet brought the first of seven eventual claims against the Ecuadorian government.56 It alleged that Ecuador was in breach of the TexPet...
agreement because Ecuador had requested oil for domestic consumption at the below-market price, which it later exported and sold on the international market for profit.\textsuperscript{57} TexPet sought more than $553 million in damages, including interest, for its lost profits.\textsuperscript{58} Chevron became a named party in the litigation when it acquired Texaco, TexPet's parent company, after the litigation in Ecuador had already commenced.

In 2006, while many of these cases were still pending, Chevron initiated arbitration against Ecuador under the UNCITRAL rules per the U.S.-Ecuador BIT. Chevron alleged that the “egregious delay” it had experienced in Ecuadorian courts amounted to a “denial of justice” under customary international law and, additionally and in the alternative, violated protections afforded to Chevron under the BIT.\textsuperscript{59} Specifically, Chevron argued that Ecuador violated Chevron’s substantive rights under the BIT’s “fair and equitable treatment” clause\textsuperscript{60} and the “effective means” clause\textsuperscript{61} as well as provisions relating to the non-arbitrary protection of investments.\textsuperscript{62} Ecuador countered that the delays in the Ecuadorian justice system resulted from Chevron’s “conscious passivity in advancing its cases” to attempt to generate a denial of justice claim\textsuperscript{63} and from the general backlog in its system due to its developmental status.\textsuperscript{64} Moreover, it claimed that Chevron’s initial litigation was spurious, designed to

\begin{itemize}
  \item\textsuperscript{57} Id.
  \item\textsuperscript{58} Id.
  \item\textsuperscript{59} Id. \textsuperscript{33}(11).
  \item\textsuperscript{60} Id. \textsuperscript{33}(12). \textit{See also} Ecuador Bilateral Investment Treaty, U.S.-Ecuador, art. III (2)(a), Aug. 27, 1993, S. TREATY DOC. NO. 103-15 (providing that “[i]nvestment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.”)
  \item\textsuperscript{62} Id.
  \item\textsuperscript{63} Id. \textsuperscript{34}(3).
  \item\textsuperscript{64} Id. \textsuperscript{34}(4). It is worth noting, however, that shortly after the notice of arbitration was served on the Republic of Ecuador, the Ecuadorian courts decided some of the seven outstanding cases. Chevron contends that this was in response to the pressure of the arbitration, whilst Ecuador counter-claims it was the result of judicial reforms. \textit{Compare id.} \textsuperscript{¶} 33(11) (“in response to [the notice of arbitration] ... some of the now-politicized courts began to take some action”) \textit{with id.} \textsuperscript{¶} 34(4) (“reforms over the years have reduced court backlogs and expedited the adjudicatory process.”). Chevron further contends that the decisions it received were grossly incompetent and in manifest disregard of the law. \textit{Id.} \textsuperscript{¶} 33(11).
\end{itemize}
generate leverage and offset expected damages from a case then pending in the Southern District of New York, which alleged that TexPet's refining operations in Ecuador caused environmental damages and injuries to Ecuadorian residents.65

2. *Chevron*'s Analysis of the Effective Means Claim

At the outset of its analysis, the *Chevron* Tribunal implied that it had little guidance on how to interpret the effective means clause or give content to what constitutes a violation thereof.66 It initially agreed that the effective means clause overlapped considerably with denial of justice under customary international law, as both are directed at preventing the same class of wrongs.67 However, the Tribunal then asserted that the effective means clause is *lex specialis*,68 that is: an independent treaty obligation rather than a mere restate-

65. *Id.* ¶ 34(1). That case, *Aguinda v. Texaco, Inc.*, was later dismissed on grounds of *forum non conveniens*, in part because Chevron argued that Ecuador was a fair and adequate alternate forum. See *id.* ¶ 34(5). The *Aguinda* case was eventually relitigated in Lago Agrio, Ecuador, where it became commonly known as the *Lago Agrio* Action. The multi-billion dollar judgment against Chevron resulting from that litigation has spawned a different arbitration, currently pending.

66. *Id.* ¶ 241 (stating that effective means clauses are relatively rare and that "only three cases"—Petrobart, AMTO, and *Duke Energy*—had previously considered such provisions).

67. *Id.* ¶ 242. The Tribunal acknowledged that it was adopting a similar position to that espoused by the Tribunal in *Duke Energy*, but differentiated itself because *Duke Energy* dismissed the effective means claim due to lack of exhaustion of local remedies; thus, *Chevron* claimed that in *Duke Energy*, the effective means issue was not ripe so it was not fully considered. See supra note 53 and accompanying text.

68. *Chevron v. Ecuador*, PCA Case No. 34877, Partial Award on the Merits, ¶ 242 (Perm. Ct. Arb. Mar. 30, 2010), available at http://italaw.com/sites/default/files/case-documents/ita0151.pdf. The interpretative canon *lex specialis derogat legi generali* provides that when conflicts arise between two bodies of international law or ambiguities arise within a single body of law, the legal norm that is tailored most specifically to the particular context should govern. It is "merely a technique based on the premise that the most specific rule best gives effect to the intentions of the parties." Anja Lindroos, *Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis*, 74 NORDIC J. INT'L L. 27, 36 (2005). The maxim is not included in the Vienna Convention on the Law of Treaties, but has been used extensively both domestically and internationally as a tool of treaty interpretation. See Rep. of the Study Group of the Int'l Law Comm'n, 58th Sess., May 1–June 9 and July 3–Aug. 11, 2006, A/CN.4/L.682, ¶¶ 56, 60 (Apr. 13, 2006). The canon can serve to resolve conflict (as where two provisions are both valid and acceptable to a set of facts and there is no hierarchically preferred provision) or as a means of providing greater specificity to a general provision. *Id.* ¶¶ 56–58.
ment of the principal of denial of justice.69 Whereas denial of justice is determined by an objective standard and requires the claimant to show a serious shortcoming on the part of the host State, egregious conduct that shocks, or at least surprises, a sense of judicial propriety,70 the Tribunal stated that “a distinct and potentially less-demanding test is applicable under the effective means clause.”71 Thus, while the interpretation and application of the effective means clause are informed by the law on denial of justice, conduct that would not be sufficiently egregious to amount to a denial of justice under customary international law may nonetheless violate the effective means standard.72

The Tribunal fleshed out the distinct standard it created for effective means clauses in several ways. First, a State must establish judicial systems and laws that work effectively in a given case and allow investors’ claims to be adjudicated without “indefinite or undue delay.”73 By this, the Tribunal stated it meant that “[t]he Ecuadorian legal system must thus, according to Article II(7), provide foreign investors with means of enforcing legitimate rights within a reasonable amount of time.”74 To give meaning to what is “reasonable,” the Tribunal suggested looking back to the factors that inform the determination of denial of justice under customary international law: “the complexity of the case, the behavior of the litigants involved, the significance of the interests at stake in the case, and the behavior of the courts themselves.”75 While normal court congestion and backlogs are relevant for determining whether the period of delay is reasonable, the Tribunal stated that it is not an absolute defense

69. Chevron v. Ecuador, PCA Case No. 34877, Partial Award on the Merits, ¶ 242 (Perm. Ct. Arb. Mar. 30, 2010), available at http://italaw.com/sites/default/files/casedocuments/ita0151.pdf. The Tribunal stressed that had the BIT explicitly clarified the extent to which effective means was intended to mean denial of justice or had it used “language corresponding to the prevailing standard for denial of justice at the time of drafting” it would have found differently. Id.

70. Id. ¶ 244; see also supra note 25 and accompanying text.

71. Chevron v. Ecuador, supra note 69, ¶ 244.


74. Id.

75. Id.
that a State generally has a judicial system with long delays. Second, the Tribunal considered the onus on the investor as a participant in the domestic litigation. Thus, claimants are subject to "a qualified requirement" to exhaust local remedies before they can argue breach of an effective means clause. The claimant must "make use of all remedies that are available and might have rectified the wrong," even where the claimant does not have a high likelihood of succeeding in its local attempts. As the standard pertains to the facts in *Chevron*, the Tribunal found that Ecuador had violated the effective means clause and resolved the case on those grounds rather than Chevron's claims under denial of justice. This determination rested on the factual finding that the Ecuadorian courts had not adjudicated certain lawsuits with "reasonable dispatch," based on the factors enumerated above, and that Chevron did not have any mechanism by which it could have accelerated the resolution of its claims. To determine available damages, the Tribunal ruled that it would "step into the shoes and mindset of an Ecuadorian judge and come to a conclusion about what the proper outcome of the cases should have been; that is... determine what an Ecuadorian court, applying Ecuadorian law, would have done in these cases." Ultimately, the arbitrators found that Chevron would have prevailed on the merits of its contract claims in Ecuadorian courts and, had its claims not been subject to undue delay such that instituting arbitration was warranted, Chevron would have recovered damages in the amount of 698 million USD.

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76. *Id.* ¶ 263.
77. *Id.* ¶ 323.
79. *Id.* ¶¶ 269, 326.
80. *Id.* ¶ 275.
81. *Id.* ¶ 256.
82. *Id.* ¶¶ 257–62 (detailing the procedural steps undertaken by Chevron to attempt to expedite the litigation of suits).
83. *Id.* ¶ 375.
84. *Id.* ¶ 550.
B. The Application of Chevron's Effective Means Standard in White Industries

1. Factual Background

In 2002, White Industries, an Australian company, obtained an ICC arbitral award following a contractual dispute with Coal India. In September of that same year, Coal India moved to have the award set aside at the High Court in Calcutta pursuant to the Indian Arbitration and Conciliation Act of 1996. Before White Industries learned of the set-aside motion, it filed to enforce the award in the High Court in Delhi under the New York Convention. After learning of Coal India's set-aside motion, White argued that the Calcutta court lacked jurisdiction to set aside the award. Nonetheless, in 2003, the Calcutta High Court rejected its petition to dismiss the set-aside motion. White's appeal on this issue was later dismissed by the Division Bench of the Civil Appellate Division of the High Court at Calcutta and it appealed to the Indian Supreme Court in 2004. The Delhi Court, meanwhile, did not stay the enforcement proceedings until 2006. By the time White Industries brought arbitration against India under the Australia-India Bilateral Investment Treaty in 2009, the Supreme Court of India had yet to hear White's appeal.

2. White's Analysis of the Effective Means Clause

At arbitration, White alleged that the inordinate delay in Indian courts to enforce the ICC award violated the provisions on fair and

86. Id. ¶ 3.2.35.
87. Id. ¶¶ 3.2.35–36. When White became aware of the set-aside motion, it filed an application with the Supreme Court of India to transfer Coal India's application to the Delhi High Court and applied for ex parte stay on the proceedings in Calcutta. While the Supreme Court did issue a temporary stay, after several rounds of briefings both the motion to set aside the award in Calcutta and the motion to enforce in Delhi ended up occurring contemporaneously for reasons that are not entirely evident in the facts as presented. See id. ¶¶ 3.2.40–3.2.55.
88. Id. ¶ 4.3.4(a).
89. Id. ¶¶ 3.2.56–59.
90. White Industries Australia Ltd. v. India, UNCITRAL (India-Austl. BIT), Award, ¶ 3.2.63. The Tribunal issued its award in November 2011, but it was only made public in February 2012.
equitable treatment, expropriation, and most-favored nation treatment in the India-Australia BIT.\textsuperscript{91} Specifically referencing \textit{Chevron}, White additionally argued that India's failure to enforce the ICC award constituted breach of the "effective means" clause in Article IV(5) of the India-Kuwait BIT, which White argued applied because the India-Australia BIT included a most-favored nation clause.\textsuperscript{92} The most-favored nation clause instructs that India and Australia must treat investment on their territories "on a basis no less favorable than that accorded to investments of investors in any third country."\textsuperscript{93} India argued that the effective means clause could not be incorporated through application of the most-favored nation clause and was thus unavailable as a basis for White's claim.\textsuperscript{94} India adopted the position that the effective means provision from the India-Kuwait BIT could not be incorporated to the India-Australia BIT because India had different aims and objectives when negotiating the BIT with Australia.\textsuperscript{95} Notably, it claimed that in the treaty negotiations, India and Australia agreed to a strong emphasis on national law and the Tribunal needed to respect those intentions in interpreting the India-Australia BIT.\textsuperscript{96} Moreover, India argued that the effective means provision in the India-Kuwait BIT could not apply to events occurring prior to 2003, when the India-Kuwait BIT entered into force.\textsuperscript{97}

In the event that the Tribunal incorporated the effective means clause into the India-Australia BIT, India claimed that it would not be in breach of that provision. First, it argued for a wholesale rejection of the \textit{Chevron} standard and a return to the framework used under denial of justice,\textsuperscript{98} in which case India argued that its conduct was not sufficiently egregious as to constitute a violation.\textsuperscript{99} Secondly, India attempted to distinguish \textit{Chevron} factually, such that its reasoning would not apply given the different basis underlying the

\textsuperscript{91} Id. ¶ 4.4.1.

\textsuperscript{92} Id. ¶¶ 4.4.3–6; see also Agreement Between the Government of Australia and the Government of the Republic of India on the Promotion and Protection of Investments, Aus.-Ind., art. IV(2), Feb. 26, 1999.

\textsuperscript{93} Id. art. IV(2).

\textsuperscript{94} White Industries Australia Ltd. v. India, UNCITRAL (India-Austl. BIT), Award, ¶¶ 5.4.1–2 (Nov. 30, 2011).

\textsuperscript{95} Id. ¶ 5.4.2.

\textsuperscript{96} Id.

\textsuperscript{97} Id. ¶ 5.4.3.

\textsuperscript{98} Id. ¶¶ 5.4.5, 5.2.10–19.

\textsuperscript{99} Id. ¶ 5.2.13.
India asserted that the White litigation had moved as quickly as any other litigation would in Indian courts and that delays were natural due to national conditions as well as White’s litigation strategy.\(^\text{101}\)

In the final award, the White Tribunal found that neither the duration of the proceedings nor the delay of the Indian Supreme Court in hearing White’s appeal reached the level of egregious conduct such that it would constitute a denial of justice under customary international law.\(^\text{102}\) However, it allowed the effective means clause to be incorporated from the India-Kuwait BIT because the clause would not “subvert” the carefully negotiated balance of the BIT and was not, in the Tribunal’s estimation, contrary to any emphasis on domestic law evident in the India-Australia BIT.\(^\text{103}\) Given the inclusion of the effective means provision, the Tribunal applied the Chevron test with a slight deviation: in its view, effective means of “asserting claims” had to be analyzed separately from effective means of “enforcing rights.”\(^\text{104}\)

Using this bifurcated approach, the Tribunal found that India had not provided effective means of asserting claims in its handling of White’s appeal on the set-aside motion in the Calcutta High Court.\(^\text{105}\) While not amounting to a denial of justice, the “undue delay” in the judicial system was nonetheless a breach of the effective means provision under the Chevron test.\(^\text{106}\) The Tribunal, however, discounted the relevance of India’s large population or the resources available to it to operate its court system; rather, “the focus of such a lex specialis is whether the system of laws and institutions work effectively at the time the promisee seeks to enforce its rights / make its

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100. Id. ¶ 5.4.5.

101. Id. ¶ 5.4.4.


103. White Industries Australia Ltd. v. India, UNCITRAL (India-Austl. BIT), Award, ¶ 11.2.7 (Nov. 30, 2011). The Tribunal seemed skeptical of India’s claim that there was indeed greater emphasis on domestic law in the India-Australia BIT versus any other, leaving open the possibility that a country whose investment agreement contained more unique provisions emphasizing domestic law might succeed with this line of argument.

104. Id. ¶¶ 11.4.2–3.

105. Id. ¶ 11.4.19.

106. Id. ¶¶ 11.3.3, at 116 n.77.
Simultaneously, though, the Tribunal found that India had not violated the effective means clause at the point of enforcing rights in the Delhi High Court. While procedural defects in the Delhi High Court, such as allowing Coal India to untimely respond to motions and file objections, resulted in delays, the three and a half years the case spent in the Delhi High Court before the Court issued its stay did not rise to the level of breaching the effective means clause. The reality is,” the Tribunal wrote, “that White’s application was being strenuously defended and the pleadings schedule was not exceptional, either in the Indian context or otherwise.”

C. The Republic of Ecuador v. The United States of America

1. Diplomatic Overtures post-Chevron

Following the decision of the Chevron Tribunal, Ecuador transmitted a diplomatic note to the United States. The note outlined Ecuador’s position regarding the effective means provision in the BIT. First, Ecuador argued that its obligations under the effective means clause were no greater than those under denial of justice per customary international law. Second, it argued that the effective means clause referred to the provision of a framework or system under which claims may be asserted and rights enforced, but did not create obligations in particular cases. Lastly, Ecuador argued that arbitral tribunals do not have the jurisdiction to decide compensation for violations of the effective means clause as Chevron did, as this allows tribunals to step into the shoes of the judiciary and may result in an outcome different from what the domestic courts determine. The diplomatic note requested that the United States reply to confirm

107. Id. at 118 n.78.
108. Id. ¶¶ 11.4.5–7.
109. Id. ¶ 11.4.8.
111. Id. ¶ 8.
112. Id.
113. Id. ¶ 9.
its agreement on Ecuador's interpretation. In October 2010, however, following some sporadic contact between the U.S. State Department and Ecuador's Embassy in Washington, D.C., the State Department Legal Advisor advised that the United States would not answer Ecuador's note nor respond to the issues raised therein.

2. Ecuador's Claim for State-to-State Arbitration

On June 28, 2011, Ecuador submitted a statement of claim, instituting state-to-state arbitral proceedings on the issue of the interpretation and application of the effective means clause in the U.S.-Ecuador BIT. In its request to initiate arbitration, Ecuador argued that the United States was required to respond to Ecuador's diplomatic note regarding the effective means clause; thus, Ecuador alleged that there was an outstanding dispute between the sovereigns regarding the interpretation and application of their bilateral investment treaty. To resolve the dispute, Ecuador requested "authoritative determination on the proper interpretation and application of... the Treaty that accords with what the Republic of Ecuador considers to have been the intentions of the Parties at the time when the Treaty was concluded." Ecuador subsequently affirmed that it was not seeking arbitration to appeal or vacate the Chevron decision; rather, it sought to clarify the rights and obligations of the parties under the BIT.

114. Id. ¶¶ 11–12.
115. Id. ¶ 13.
118. Id.
119. In the Arbitration under the Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investments and the UNCITRAL Arbitration Rules, PCA Case No. 2012-5, Claimant's
In its Statement of Defense, the United States argued that there was no jurisdiction for state-to-state arbitration. The United States contended that to give rise to state-to-state arbitration, international law requires "positive opposition concerning a concrete set of facts affecting the parties' legal rights and obligations." The United States, however, had espoused no position on the interpretation of the effective means clause that would be in conflict with Ecuador's interpretation. Claiming that Ecuador was trying to obtain "arbitration by ultimatum," the United States denied that it was obligated to set forth an interpretation of a treaty provision on command:

Ecuador cannot compel the United States to take a position on Ecuador's interpretation of the Treaty by unilaterally declaring that a failure to do so creates a dispute concerning that interpretation. Each State Party has the right, but not the obligation, to interpret the Treaty and to comment on the other Party's interpretation of the Treaty.

Additionally, the United States asserted that Ecuador was merely attempting to secure a unilateral interpretation of the effective means clause because it was unhappy with the outcome in Chevron, which was not a valid exercise of state-to-state arbitration.

3. The Tribunal Denies Arbitration on Jurisdictional Grounds

Following the Tribunal's hearing on jurisdiction in July, it cancelled the hearings on the merits that had previously been sched-
uled for early August 2012. The Tribunal’s ultimate decision has
not been made public. However, reports indicate that the Tribunal
subscribed to the views put forth by the United States: there was no
positive dispute between the two sovereigns because the silence of
the United States on the effective means clause did not amount to ac-
tual opposition to Ecuador’s views, nor could the United States be
forced to give an interpretation. Undoubtedly, by resolving the
dispute at the jurisdictional stage, the Tribunal relieved the United
States of having to provide a public articulation of its views on how
the effective means clause in the U.S.-Ecuador BIT should be applied
or interpreted.

III. CRITIQUES OF CHEVRON AND SUGGESTIONS FOR FUTURE
TRIBUNAL ANALYSIS

White Industry’s successful argument to incorporate an effec-
tive means clause into a BIT by way of the most-favored nation
clause has not escaped the notice of claimants currently bringing in-
vestment arbitration claims against sovereigns. If recent trends are
any indication, effective means clauses will be at issue in a growing
number of investment disputes. But is Chevron the appropriate
standard for future tribunals to apply?

Three points of analysis are advanced in this Part. First, this
Note argues that Chevron’s conclusion that the effective means
clause is lex specialis based on the treaty text rests on a paucity of ev-
dence regarding what the United States and Ecuador intended to ac-
complish in their BIT. There is a reasonable argument that the par-
ties meant for “effective means” to entail something besides the
customary international law standard for the denial of justice, but this

Award Released to Parties; Tribunal Members Part Ways on Key Issues, INVESTMENT
articles/20121030_1.

126. Id.

clause in the U.S.-Bolivia BIT into the U.K.-Bolivia BIT through that BIT’s most favored
nation clause); Apotex v. United States, ICSID Case No. ARB(AF)/12/1, Memorial of
ization/203095.pdf (arguing that NAFTA incorporates the “effective means” clause in the
U.S.-Jamaica BIT through the most-favored nation clause and stating that Chevron is the
correct standard for interpreting the effective means clause).
conclusion does not inherently justify the vague framework *Chevron* proposed. Second, this Note argues that *Chevron*'s vagaries make it unworkable in practice. With "reasonable" delay as the main parameter, states do not have the *ex ante* notice they require to structure judicial systems and institutions that comply with the effective means clause. Moreover, the standard does not serve investors, who have little concept of how long they must languish in the host state's national courts before they have a legitimate effective means claim. Last, for these reasons, this Note argues that future arbitral tribunals should articulate a more principled standard for effective means claims. An ideal standard will draw upon subsequent state practice where it is available or on the domestic laws of the states that are party to a particular investment treaty.

A. *Chevron*'s *Imposition of Lex Specialis for the Effective Means Clause is Questionable*

The divergence between *Petrobart, AMTO, Duke Energy,* and *Chevron* regarding the effective means clause may be startling to those familiar with the binding authority of precedential case law. In bilateral investment treaty arbitrations, however, precedent is less important. Each tribunal has the independent power to interpret the provisions of the treaty before it. Inconsistent decisions are common because "different tribunals can come to different conclusions about the same standard in the same treaty."\(^{128}\) This is so even where the arbitrators use established means of treaty interpretation because those rules contain inherently malleable concepts that are themselves subject to interpretation.\(^{129}\)

To interpret a BIT provision and apply it to the facts of the dispute before them, arbitrators typically use the criteria offered in the Vienna Convention on the Law of Treaties (VCLT).\(^{130}\) The

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128. FRANCK, *supra* note 15, at 1545, 1574–83 (reviewing how three different tribunals came to contradictory conclusions regarding the meaning of the "fair and equitable treatment" provision in NAFTA).

129. See Suzannah Linton & Firew Kebede Tiba, *The International Judge in an Age of Multiple International Courts and Tribunals*, 9 CHI. J. INT'L L. 407, 420 (2009) ("Treaty interpretation is not a mathematical equation or a mechanical process that yields the same outcome in all similar cases. Much will depend on who is doing the interpretation—in other words, the international judge.").

VCLT, which became effective in January 1980, sets forth canons of treaty interpretation and aims to prevent conflicts in interpretation, particularly for successive treaties on the same topic.\textsuperscript{131} Arbitral tribunals apply the principles of the VCLT because the Convention is generally considered part of customary international law in contemporary practice, which means that the provisions of the VCLT might apply even to non-signatories through the construction of their other treaties.\textsuperscript{132}

The VCLT provides both obligatory and supplementary means of treaty interpretation. Article 31 provides the obligatory means of interpretation. Principally, arbitrators must act in good faith and give ordinary meaning to the terms of the treaty "in their context and in light of [a treaty's] object and purpose."\textsuperscript{133} The object and purpose of the treaty are informed by the treaty's complete text, the parties' concurrent agreements related to the treaty, or any instrument made by one of the parties regarding the treaty that was accepted by the other party.\textsuperscript{134} Lastly, arbitrators are obligated to consider any subsequent agreement between the parties regarding the interpretation of the treaty or any relevant rules of international law that bear on the relationship between the parties.\textsuperscript{135}

The arbitrators may use supplementary means of treaty interpretation to either confirm the meaning of the provision that resulted from application of Article 31 or when the application of the manda-
tory rules "leaves the meaning ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable."\textsuperscript{136} Thus, the VCLT creates a system in which the text of the treaty is given dominance per Article 31, but the arbitral tribunal may consider the subjective intentions of the parties in limited circumstances through analysis of supplementary materials.\textsuperscript{137} However, there is little consensus on the extent to which the plain text of the treaty may be overcome by countervailing party intent evident in the supplementary materials, if at all.\textsuperscript{138}

The \textit{Chevron} Tribunal noted the VCLT and provided a succinct summary of its interpretative requirements in its consideration of the applicable law.\textsuperscript{139} Per Article 31, the Tribunal started with analyzing the BIT's context. It noted that the effective means clause in the U.S.-Ecuador BIT is situated near a clause requiring fair and equitable treatment (FET). Yet, whereas the latter specified that investments were to be treated per the minimum required by international law, the effective means clause had no such accompanying explanation.\textsuperscript{140} From this distinction, the Tribunal inferred that the effective means clause must import a lower bar for violation than that required under international law.\textsuperscript{141}

Undoubtedly, there is a strong argument that the plain text

\textsuperscript{136} Id. art. 32.

\textsuperscript{137} The supplementary materials usually considered are the \textit{travaux préparatoires}, or the materials the parties created prior to and during the treaty negotiation. See Tony Cole, \textit{The Boundaries of Most Favored Nation Treatment in International Investment Law}, 33 \textit{MICH. J. INT'L L.} 537, 573-74 (2012).


and ordinary terms of the treaty confirm this interpretation: had the parties wanted the effective means standard to reflect the *de minimis* requirements of international law, they would have so specified just as they did for the FET clause.\textsuperscript{142} This conclusion, however, is based on limited textual evidence and gives rise to a string of faulty assumptions. *Chevron*'s counterfactual misguidedly assumes that the minimum standard under international law imposed for FET was a baseline that was understood by the United States and Ecuador at the time they entered into the BIT. Secondly, it assumes that the treaty parties consciously did not include this standard for the effective means clause, and thus intended that clause to be subject to some other test.

It is unclear, however, what the treaty parties envisaged by including "the minimum that international law requires" as a standard for FET because there is no general agreement as to the precise meaning of those terms.\textsuperscript{143} As recent debate illustrates, scholars and practitioners diverge over whether "fair and equitable treatment is limited to the international minimum standard in international law, whether it is an independent and objective standard based on the plain meaning approach of statutory interpretation, or whether it has evolved into an independent norm of customary international law."\textsuperscript{144} In practice, the VCLT has allowed tribunals to come to different results regarding the meaning of identical FET clauses based on the object and purpose of the investment treaty at issue.\textsuperscript{145} Therefore, it is an over-simplification to compare the text of the FET clause and the effective means clause in a BIT to draw conclusions about party intent.

*Chevron*'s conclusion is also questionable if examined for its consistency with the BIT's object and purpose, as VCLT Article 31 obligates. The *Chevron* Tribunal was persuaded that the object and purpose of the effective means clause was to codify a standard that would allow greater access to the courts than that provided by inter-

\textsuperscript{142} For more elaboration on the argument that *Chevron*'s interpretation was consistent with the VCLT, see Jason Burke, Student Comment, *Defining Investor Confidence: Avoiding Interpretive Uncertainty in Chevron v. Ecuador*, 34 B.C. INT'L & COMP. L. REV. 463 (2011).


\textsuperscript{144} *Id.* at 346.

national law. While this is certainly a viable theory and is advocated by American attorneys who worked on the U.S. BIT program in its infancy, it is not the only explanation nor does it purport to explain Ecuador's position or its legitimate expectations. Other scholars have suggested that developing states may have viewed effective means clauses as merely "open-ended invitations to deploy relevant CIL or general principles of law, given, for example, emerging principles to promote due process, transparency, or accountability across a number of regimes, including those involving human rights." According to this view, the Chevron Tribunal could have taken more careful stock of prevailing custom between the United States and Ecuador at the time they entered into the agreement. In the alternative, the Tribunal could have analyzed supplementary materials (to the extent they exist) under Article 32 of the VCLT. While the Tribunal was not obligated to do so, this effort would have bolstered its conclusion that the effective means clause is *lex specialis*.

146. See Chevron v. Ecuador, PCA Case No. 34877, Partial Award on the Merits, ¶ 242 (Mar. 30, 2010), http://italaw.com/sites/default/files/case-documents/ita0151.pdf. The Tribunal concluded that the effective means clause "was thus created as an independent treaty standard to address a lack of clarity in the customary international law regarding denial of justice." Id. ¶ 243.

147. For this conclusion, the Tribunal drew extensively on the argument of Kenneth J. Vandevelde, a lawyer in the U.S. State Department in the 1980s when many early U.S. BITs were being negotiated. Deference to his work is clearly merited since it is reflective of his experience.


149. Note that the Chevron standard is not well-received in the developing world, so additional justification behind the standard could bolster it. One Indian writer reviewing the White Industries award, for example, wrote that the inclusion of the effective means clause by way of the MFN, "enabled White Industries to indulge in treaty shopping and arrive at a result that India did not anticipate. The ruling also clearly demonstrates how sovereign functions of the Indian judiciary could amount to violation of India's BITs. Hence, one expects that this ruling should trigger a critical review of India's BIT program." Prabhash Ranjan, *The White Industries Arbitration: Implications for India's Investment Treaty Program*, INVESTMENT TREATY NEWS QRTLY., Issue 3, Vol. 2, (Apr. 2012). His premonition was on point. In February 2013, the Indian government suspended all active BIT negotiations until it could complete a formal review of its own model BIT to better protect itself from what it considers spurious litigation. *India Places All BIT Talks on Hold, Pending Review of Own Model Deal*, INSIDE U.S. TRADE, Feb. 1, 2013, at 5 (Feb. 2013).
B. The Chevron Standard Fails to Provide Sufficient Notice and Is Flawed on Equity Grounds

Tension between capital-exporting and capital-importing states over the protections afforded to foreign investments versus the rights of sovereigns predates the onset of bilateral investment treaties and the rise in investor-state arbitration. This pre-existing tension is compounded by the fact that most investment treaty arbitrations are against less-developed countries (LDCs), the majority of which are in Latin America. Many of those states, confronted with significant unanticipated costs of arbitrating such disputes, have contemplated measures to limit or domesticate investment treaty arbitration. Several have opted to withdraw from ICSID or to nullify their pre-

150. For example, the Calvo Doctrine in Latin America rejected imperialism on the part of wealthy states, called for exclusive local jurisdiction, and limited diplomatic protection. Wenhua Shan, “North-South Divide” to “Private-Public Debate”: Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law, 27 NW. J. INT’L L. & BUS. 631, 632 (2007). In practice, it meant that foreign investors were limited to relief provided in national courts, keeping investor-state disputes within the host state. Bernardo M. Cremades, Disputes Arising Out of Foreign Direct Investment in Latin America: A New Look at the Calvo Doctrine and Other Jurisdictional Issues, DISP. RESOL. J., 78, 80 (2004).

151. As calculated by UNCTAD as of 2010, fifty-one developing countries and fifteen countries with economies in transition had responded to claims under an investment treaty as compared to seventeen developed countries. Most claims were filed against Argentina (fifty-one cases), Mexico (nineteen), the Czech Republic (eighteen), and Ecuador (sixteen). See UNCTAD, IIA ISSUE NOTE NO. 1: LATEST DEVELOPMENTS IN INVESTOR–STATE DISPUTES SETTLEMENT, 2 (Mar. 2011), http://unctad.org/en/Docs/webdiaeia20113_en.pdf. In 2011 alone, developing or transition economies were the respondents in thirty-eight of the forty-six new cases. UNCTAD, IIA ISSUES NOTE NO. 1: LATEST DEVELOPMENTS IN INVESTOR–STATE DISPUTES SETTLEMENT 2 (Apr. 2012), http://unctad.org/en/PublicationsLibrary /webdiaeia2012d10_en.pdf.

152. It is worth noting that many developing states ultimately prevail in investor-state arbitration and do not end up paying large awards to investors. See Susan D. Franck, Development and Outcomes of Investment Treaty Arbitration, 86 N.C. L. REV. 1, 49 (2007) (finding that states did not pay awards in approximately two thirds of investor-state disputes). However, the costs of defense for a state to establish non-liability may be immense. See Eric Gottwald, Leveling the Playing Field: Is It Time for a Legal Assistance Center for Developing Nations in Investment Treaty Arbitration?, 22 AM. U. INT’L L. REV. 237, 254 (2007) (using the Czech Republic, which announced costs of $3.3 million in 2004 and $13.8 million in 2005 to defend against investor claims, to exemplify how “the cost of treaty arbitration is beyond the means of many developing nations”).

153. See Shan, supra note 150, at 635.

vously ratified treaties in favor of a different investment strategy.155

The inequality perceived to exist in international investment arbitration as it currently stands is not the fault of any single tribunal nor is it the result of any single award, but the legitimacy of the system is called into question when arbitral tribunals create investment laws that "inflict different outcomes on weak and powerful states."156 There are significant concerns that LDCs are systemically disadvantaged in investor-state arbitration claims, and arbitration merely serves to perpetuate inequities. For instance, LDCs are less able to afford outside legal counsel and must frequently rely on their attorneys general to represent them in arbitral proceedings. This may be disadvantageous. These attorneys may struggle to learn the specialized meaning of treaty terms or arbitral processes because the system lacks transparency and they do not have access to previous awards, which are commonly available at private law firms with long histories of representing investors.157

Such structural constraints have created a double standard in investment arbitration in which the judicial decision-making and competencies of strong states are less likely to be reviewed by arbitral tribunals and found wanting than those of LDCs.158 Comparing Loewen v. United States with Chevron illustrates this proposition.159

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158. See generally, Guillermo Aguilar Alvarez, The New Face of Investment Arbitration: Capital Exporters as Host States under NAFTA Chapter 11, 28 YALE J. INT'L L. 365, 366–69 (2003) (articulating a "double standard" in American attitudes toward investment arbitration in which arbitration is valued to correct misbehavior by foreign host states, but disregarded when claims are filed against the United States as under NAFTA); Cheng, supra note 156, at 511 (stating that "whereas weak states lose judicial power over disputes and their decisions are arguably reviewed by tribunals, powerful states such as the United States seem to be less vulnerable to such review.").

159. Loewen v. United States, Award, ICSID Case No. ARB(AF)/98/3 (NAFTA Ch. 11
In Loewen, a Canadian claimant brought arbitration under NAFTA against the United States, arguing that he had been denied fair and equitable treatment as a party to litigation in Mississippi. The arbitral tribunal conceded that "the conduct of the trial by the trial judge was so flawed that it constituted a miscarriage of justice amounting to a manifest injustice as that expression is understood in international law." Nonetheless, it ultimately found for the United States because Loewen had not appealed his case to the United States Supreme Court, thereby failing to exhaust all available local remedies as is required under the denial of justice standard. The Tribunal submitted that the exhaustion requirement under international law obligated Loewen to exhaust all reasonably available, effective, and adequate remedies, which included appealing to the highest court of the United States.

Loewen fails to examine whether an appeal to the Supreme Court legitimately constitutes an effective or reasonable remedy. The United States Supreme Court only hears approximately eighty cases per year out of the more than 10,000 petitions for writ of certiorari it receives, or .008 percent. Chevron's standard of exhaustion was akin to that employed by Loewen: claimants were obligated to pursue effective remedies available to them. In contrast, Chevron found that effective means clauses do not impart a strict requirement of exhaustion of local remedies, again due to their lex specialis na-

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160. Id. The complicated facts of the dispute are outside the scope of this Note, but it is relevant that Loewen believed, and evidence supported, that an unprecedented $500 million verdict against him was due in part to nationality, racial, and class-based discrimination. Moreover, the Mississippi State Supreme Court refused to reduce the appeal bond and required Loewen to post a $625 million bond within seven days in order to pursue its appeal, lest it face immediate execution of the judgment. Id. ¶ 3.

161. Id. ¶ 54.

162. Id. ¶¶ 151–54 (concluding that "no instance has been drawn to our attention in which an international tribunal has held a State responsible for a breach of international law constituted by a lower court decision when there was available an effective and adequate appeal within the State's legal system.").

163. Id. ¶¶ 167–68.

164. Supreme Court of the United States, Frequently Asked Questions, http://www.supremecourt.gov/faq.aspx (last accessed Jan. 18, 2013). Tai-Heng Cheng has similarly suggested that such recourse was futile for Loewen, as he would have gone bankrupt attempting to satisfy the verdict in Mississippi after the Mississippi Supreme Court refused to lower the bond for good cause. See Cheng, supra note 156 at 510–11.

Without an exhaustion requirement, the Tribunal used the delay in the Ecuadorian court system as evidence that other remedies would be futile. It is inconsistent that certain claimants against the United States are obligated to pursue a remedy with a .008 percent chance of success before pursuing arbitration, whereas investors bringing claims against Ecuador are not so required if they suffered some level of delay in Ecuador’s lower courts. While any amount of delay is burdensome on the parties, how much delay is reasonable is an open question for each tribunal after Chevron. This approach has the benefit of flexibility, but can lead to inconsistent outcomes. If an appeal is considered an effective remedy for claimants to pursue in the United States but not in Ecuador, what should a party interested in investing in Brazil infer? In practice, Chevron leaves states and investors with little in the way of guidance.

Post-Chevron and White, the judicial competency and functioning of the court systems of many LDCs may soon be up for debate; yet, neither award contains tangible instructions for a state on how to comply with effective means clauses in its treaties, both systemically or in specific disputes. That the tribunals refrained from elucidating any bright line requirements is understandable—by keeping it vague, they avoided directly identifying any single judicial system as inherently in violation because of its structure or level of capacity. Adversely, states are unable to gauge whether the baseline level with which their judiciary functions is sufficient to protect them from future claims.

C. Giving New Content to Effective Means Clauses

Future arbitral tribunals asked to accept the Chevron approach to the effective means clause have a difficult choice. Chevron offers the path of least resistance, but the flaws in its reasoning and its inequitable results should not be overlooked. But even if future arbitrators are willing to consider alternative approaches to Chevron, some have questioned the true independence of arbitrators, many of whom serve on multiple investor-state tribunals over the course of their career as arbitrators. See Leah D. Harhay, Investment Arbitration in 2021: A Look to Diversity and Consistency, 18 Sw. J. INT’L L. 89, 92 (2011) (“of the relatively small universe of arbitrators that fill the many arbitral seats . . . it is no secret that the majority of investment tribunals are made up of the
there is not an easy solution that the *Chevron* Tribunal simply overlooked: it is inherently difficult to give the effective means clause principled understanding because its terms are vague and the intent of the treaty parties who included it in their BITs is generally unknown. This Part reviews three options for future tribunals: first, re-imposing the denial of justice standard under customary international law; second, looking to states for guidance on interpretation; and third, developing an objective standard by reference to domestic legal principals. Ultimately, this Note concludes state practice is a sound tool when it is available, but in the short-term, development of an objective standard by tribunals is a more feasible alternative.

1. Re-imposing the Denial of Justice Standard

On one end of the spectrum, future tribunals could simply find that effective means clauses require a violation commensurate with the standard used for denial of justice under international law. This approach recognizes that there is a lack of clarity surrounding the origins and purpose of the effective means clause. When party intent is unclear, imposition of a lesser standard derived by arbitrators may not necessarily accord with the object and purpose of the treaty. However, this conservative approach to applying effective means clauses is only weakly justified, as there is no evidence the treaty parties sought to impose the denial of justice test to the effective means clause. Without more guidance from the treaty parties,
the text of the BIT alone is insufficient foundation upon which to conclude that the denial of justice test is appropriate for effective means clauses.

2. Subsequent Guidance from the States Party to the BIT

One method of informing tribunals is through increased state agency regarding the meaning of the effective means clause. States can communicate the meaning of a treaty provision to tribunals through either of two predominant methods: coordination to issue joint interpretive statements or treaty amendment.172

Interpretative statements, which are issued after the treaty enters into force, are a "direct way for treaty parties to engage in an interpretive dialogue with tribunals" but they do not require changing the treaty text.173 Issuance of interpretative statements has succeeded in ameliorating uncertainty in the past. For instance, after several arbitral tribunals offered differing views over whether fair and equal treatment was an additional right or a minimum standard under customary international law, the NAFTA Free Trade Commission issued a "Note of Interpretation" asserting that fair and equitable treatment was a minimum standard.174 In contrast to the majority of BITs, however, NAFTA contains an article which expressly authorizes the treaty parties to make authoritative interpretative statements that bind investor-state tribunals.175

Thus, one predominant drawback to advocating that the United States and Ecuador cooperate to issue guidance regarding the meaning of the effective means clause is that it is not clear that they retain this authority under their BIT. In his expert opinion on jurisdiction in the Ecuador-U.S. arbitration, Professor Michael Reisman asserted that had the tribunal issued an interpretation on the effective means clause, it would not have been binding on future tribunals, only on the states.176 Analogously, he argued that the United States and

173. Id.
Ecuador could not jointly issue a binding interpretative statement, because the BIT does not expressly allow them to do so and states cannot decide “ex ante to reserve to themselves the power to change the rights they are creating for the benefit of third parties.” Other scholars reject his approach and argue that states retain the sovereign right to subsequently agree to new interpretations on the meaning of their treaty terms under international law. This is reflected in VCLT article 31(3) which obligates treaty interpreters to consider the subsequent practice and agreements of treaty parties.

Moreover, even assuming that subsequent practice is available, a secondary concern is that the United States and Ecuador may not be willing or able to explicitly agree to a joint agreement on the meaning of the effective means clause. Indeed, this has already


178. See United Nations Conference on Trade and Development, IIA ISSUE NOTE NO. 3: INTERPRETATION OF IIAS: WHAT STATES CAN DO, 3 (Dec. 2011), http://unctad.org/en/docs/webdiaicia2011di0_en.pdf [hereinafter UNCTAD] (“States are the drafters and masters of their treaties. Even though States have delegated the task of ruling on investor claims to arbitral tribunals, they retain a certain degree of interpretive authority over their treaties: by virtue of general public international law, they can clarify their authentic intentions and issue authoritative statements on the proper reading of their treaties.”); see also Roberts, supra note 172, at 199.

179. Roberts, supra note 172, at 199. Assuming that interpretative statements are available to the parties, an additional issue outside the scope of this Note is how much deference an investment tribunal would have to give such a statement. Roberts notes that there is a split of opinion on whether such interpretations are binding or merely authoritative. Id. Suzanne Spears is more circumspect. Specifically examining interpretative language regarding sovereign regulatory decisions, she notes that “[s]uggested approaches . . . include the ‘least restrictive alternative’ approach developed by the WTO Appellate Body in the trade law context, the three levels of scrutiny familiar to U.S. constitutional law, the ‘margin of appreciation’ doctrine developed by the European Court of Human Rights, the doctrine of ‘necessity’ developed by the European Court of Justice, the ‘proportionality’ analysis first developed by some national administrative and constitutional courts, and the ‘reasonable nexus to rational government policies’ standard developed by some investor-state tribunals in the context of the non-discrimination standard found in IIAs. It remains to be seen which, if any, of these approaches will be taken up on a consistent basis by investor-state tribunals interpreting new-generation IIAs.” Spears, supra note 174, at 1048–49 (citations omitted).

180. Roberts notes that explicit interpretative agreements are rare, stating that “few
occurred in practice, as is evident from the United States’ reluctance to offer its view on the rights and obligations the effective means clause imparts either via diplomatic channels or in the Ecuador-U.S. state-to-state arbitration. However, as investors increasingly assert BIT claims against developed states such as the United States, Germany, and Canada, the potential for treaty parties to develop compromise positions on vague clauses is growing. As respondents in investment treaty arbitrations, developed nations have new incentives to clarify their obligations under their BITs that they may have previously lacked. Despite their potential, the present reality is that tribunals rarely have explicit interpretative statements from states available to inform their interpretation.

Instead, tribunals might consider de facto interpretative agreements. These are produced when developed states, acting as respondents in investment arbitrations, offer their positions on the meaning of BIT provisions. For example, in the current *Apotex v. United States* arbitration, the United States will have to respond with its views on whether the MFN clause in NAFTA imports an effective means clause from another U.S. BIT and if so, whether *Chevron* is the appropriate standard for giving content to that clause. If the views of the United States accord with those of Ecuador, subsequent tribunals may extrapolate an agreement between the two states from the like-minded respondent pleadings. While this appears to be a
viable option to help tribunals frame their analysis of the effective means clause in the future, it relies on access to the pleadings, which is not necessarily assured.\textsuperscript{186} Additionally, like an express interpretative statement, a de facto agreement on the effective means clause requires an agreement between the two sovereigns. As a state respondent, the United States has reasons to argue for a moderate effective means standard that it did not violate; however, this does not mean it will necessarily adopt Ecuador’s position.\textsuperscript{187}

In addition to the issuance of joint interpretative statements or de facto interpretative agreement, states can offer guidance to arbitral tribunals by amending their treaties. In contrast to interpretative statements, amendments are intended to change the meaning of the treaty terms and modify existing obligations.\textsuperscript{188} While it is clearly within the states’ purview to renegotiate a treaty to amend its terms, the amendment process is more formalistic and tends to require domestic ratification. This could be an impediment to its widespread use to clarify the effective means provision.\textsuperscript{189} Nonetheless, UNCTAD reported that by the end of 2008, approximately 132 BITs had been renegotiated, predominantly to reflect compatibility with European Union requirements.\textsuperscript{190} More recently, the shifting dynamic in which former capital-exporting states are becoming respondents in investment treaty arbitrations has led states to amend their Model


\textsuperscript{186} See Cornel Marian, Note, Balancing Transparency: The Value of Administrative Law and Mathews—Balancing to Investment Treaty Arbitrations, 10 PEPP. DISP. RESOL. L.J. 275, 276–77 (2010) (stating that arbitration is typically confidential and the procedural requirements of public transparency vary based on the rules under which the arbitration is conducted).

\textsuperscript{187} The balance of interests the United States faces remains different than those of Ecuador, since the United States is both a capital-importer and a capital-exporter, whereas Ecuador remains predominantly a capital-importer. See Anthea Roberts, State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretative Authority, 55 HARV. INT’L L.J. (forthcoming 2014). Thus, permitting interpretive disputes would force the United States to “plead towards the middle by adopting more balanced interpretations that [it is] prepared to live with as either a capital-exporting state that is concerned about its investors or a capital-importing state that is concerned about its own liability.” \textit{Id.}

\textsuperscript{188} See Roberts, supra note 172, at 221.

\textsuperscript{189} See UNCTAD, supra note 178, at 3.

BITs to "rebalance" investor protection with sovereign needs. While this approach proactively addresses vague clauses in future treaties, it does not directly address interpretative issues in existing treaties. Thus, amendment is unlikely to be relevant to near-term efforts to create an effective means standard that is functional and gives effect to party intent.

3. Designing an Objective Test from International and Domestic Law

State practice bears promise for informing future tribunals on the content of the effective means clause, but the extent to which it exists varies and its potential is uncertain. In the alternative, therefore, tribunals themselves must develop a principled standard for understanding the effective means clause—one that gives states more notice than *Chevron* through additional detail yet respects the fact that a range of systems provides investors with an effective means of asserting their claims and enforcing their rights.

In this effort, reference back to the obligations of the VCLT is necessary. As recounted in Part III.A, Article 31(1) of the VCLT provides that it is obligatory for treaty interpreters to interpret the agreement "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." Context is commonly defined by reference to the treaty text or subsequent party agreement whereas "ordinary meaning" often leads arbitrators to consult dictionary defini-

191. *Id.* See also Roberts, *supra* note 172, at 40 n.198 (suggesting that the United States and China have moved to be more state-friendly and more investor-friendly, respectively, over the course of their BIT programs based on the states' changing roles in investment treaty arbitration). States can also undertake to reform their investment agreements proactively to include interpretive language, which encourages arbitrators to give appropriate consideration to the state's objectives, regulatory needs, or development context. *See* Spears, *supra* note 174, at 1048. For instance, several years following the issuance of the NAFTA Interpretative Note, both the United States and Canada amended their Model BITs to reinforce the interpretation of fair and equitable treatment as a minimum standard rather than an additive right. *Id.* at 1054.


193. *Id.* at 828–29.

194. *Id.*
tions. Article 32 provides that interpreters may utilize "supplementary means of interpretation" to confirm the interpretation derived under Article 31, or where the Article 31 interpretation "leaves the meaning ambiguous or obscure," or "leads to a result which is manifestly absurd or unreasonable." However, asking private arbitrators to give "ordinary meaning" to the terms of treaties negotiated between sovereigns begs a bigger question. If there is not an agreed-upon ordinary meaning of a treaty clause evident from dictionary definitions, party intent and subsequent practice, or international law—as is arguably the case for the effective means clause—then whose ordinary meaning is at stake?

This question has no easy answer, but it seems evident that some other source of law must guide the tribunal as it attempts to give principled content to vague treaty provisions. One option that has been suggested but remains undeveloped is the use of comparative public law. Comparative public law conceptualizes inherently vague standards of international investment law, such as what constitutes an effective means of asserting claims or enforcing rights, through comparison to domestic or multilateral legal regimes. The validity of this approach rests on the understanding that requiring

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196. Id. at 1105-06.

197. The use of the dictionary to provide ordinary meaning is particularly troublesome in the international investment context, where terms may have different usages and contexts across nations. See Stephen C. Mouritsen, The Dictionary Is Not a Fortress: Definitional Fallacies and a Corpus-Based Approach to Plain Meaning, Note, 2010 BYU L. REV. 1915, 1916 (2010) (quoting Professor Lawrence Sloan's pithy comment, "we speak as though there were only one dictionary, whose lexicographer got all the definitions 'right' in some sense that defies analysis.").

198. This is not per se invalid based on the plain text of most investment treaties, which often do not provide choice of law clauses on the merits of disputes. See, e.g., Richard H. Kreindler, The Law Applicable to Investment Disputes, in 19 ARBITRATING FOREIGN INVESTMENT DISPUTES 401, 414 (Norbert Horn & Stefan Krol, eds., 2004) (stating that international law is commonly thought to be applicable).


200. Id. at 87-88. These multilateral legal regimes include the European Court of Justice (ECJ), the European Court of Human Rights (ECHR), and the World Trade Organization (WTO). See id. at 78.
states to provide claimants with effective means of asserting their claims and enforcing their rights is not an ungrounded concept plucked from the ether and placed into investment treaties. Rather, effective means clauses are a function of the broader relationship between the state and the private actor, which has long been the province of constitutional and administrative law.\footnote{201} Thus, a tribunal employing the comparative methodology in interpreting the effective means clause would look to how other states or multilateral institutions provide access to the courts and at what point non-responsiveness or languidness in the justice system renders it ineffective.\footnote{202}

As an interpretive tool, comparative public law provides a broad basis from which to understand “the ordinary meaning states attribute to certain concepts of investment law”\footnote{203} and has the benefit of inclusiveness. Conversely, the comprehensiveness of comparative public law may be the very thing that makes it unworkable in practice. Tribunals may struggle to narrow their inquiry to only a manageable number of states or multilateral bodies or to determine which states or institutions are relevant.\footnote{204} The feasibility constraint is especially important for effective means because of the variation in state practice. To derive general principles regarding what constitutes an effective means of asserting claims and enforcing rights, a tribunal would need to review the practices of a wide array of states in both the civil and common law traditions to prevent sample bias. Yet, it must also be cognizant of legitimate time and manpower con-

\footnote{201. See generally id. at 60 (“[T]he problems dealt with in investor-state arbitration . . . including questions of nondiscrimination, the respect for due process, and the protection of property and economic interests against expropriation and other undue government interferences, have already played a role in domestic administrative and constitutional litigation.”). In Thunderbird, an arbitral tribunal under NAFTA agreed with this approach given the broader goals of the international investment system. It stated that “at issue is the abuse of governmental power towards a private party that did and could legitimately trust in governmental assurances it received . . . [t]he issue is to keep a government from abusing its role as sovereign and regulator after having made commitments . . . .” Thunderbird v. Mexico, UNCITRAL, Separate Opinion of Thomas Wälde, ¶ 13 (NAFTA Ch. 11 Arb. Trib. Dec. 2005), available at http://italaw.com/documents/ThunderbirdSeparateOpinion.pdf.}

\footnote{202. Schill, supra note 199, at 85–88.}

\footnote{203. Id. at 89; see also id. at 88 (claiming that comparative public law will help to “concretize and clarify the interpretation of the often vague standards of investment protection and determine the extent of state liability in specific contexts.”).}

\footnote{204. See id. at 90–93 (reviewing the various comparative law paradigms and stating that “[d]epending on the purpose of comparative analysis, the choice of legal orders to be taken into account will vary” but for the elucidation of general legal principles consideration of “both domestic law and other international legal regimes” is required).}
straints. Thus, it is simply not clear that the comparative public law approach is functional for tribunals, even if it does represent an inclusive ideal.

Therefore, a variation on the comparative public law approach that responds to some of the feasibility issues may be preferred. One such approach, the Updated Calvo Doctrine, has investment tribunals applying the same standard to a particular investment treaty issue that a developed state would apply if it were addressing the claim domestically. In conception, the Updated Calvo Doctrine is based on the theory that “BIT jurisprudence should not crystallize rules of protection of investments that are more demanding than those which developed countries courts apply in favour of their own national investors.” However, it also incorporates the public comparative law concept that what is fundamentally at issue in most investment treaty claims is arbitrary state action or omission against individuals that gives rise to liability, as determined by domestic administrative or constitutional law. In analyzing an effective means claim specifically, therefore, the tribunal would examine how the European or American court would proceed, which might involve consideration of the right to due process or analysis of administrative laws regulating the courts.

The Updated Calvo Doctrine contains some of the same costs as the comparative public law approach, but they are of a smaller magnitude because the universe of states under consideration is limited. Admittedly, it raises the concern of over-reliance on the practices of any one state to the detriment of the international legal principles. However, tribunals are well-tasked to consider the practices of the developed state as conjunctive to the guiding principles of international law, rather than a replacement thereof. Moreover, by orienting tribunals to a specific body of domestic law, the Updated Calvo Doctrine retains benefits that outweigh its costs: increased legitimacy; notice to the state of the standard to which it is

205. See Santiago Montt, State Liability in Investment Treaty Arbitration 75 (2009). For a review of the principles of the original Calvo Doctrine, see supra note 150 and accompanying text.

206. Id.

207. See id. at 294–95.

208. See Schill, supra note 199, at 86 (arguing that the comparative public law approach is preferable specifically because it recognizes that “international investment law remains an international discipline that is detached from the domestic public law of any one state”).

209. See Montt, supra note 205 at 138–39 (noting that by adopting interpretations that states cannot control or overturn, “arbitral tribunals partially deprive the people of control
to be compared; and reasonable burden on the parties, who can, if necessary, retain an expert to help them analyze the standard of a single state. Thus, in the short-term, investment tribunals could and ought to utilize either the Updated Calvo Doctrine or the comparative public law approach to give principled content to the effective means clause and to meet the legitimate expectations of both states and investors.

CONCLUSION

The often-overlooked effective means clause was given new teeth by the Chevron Tribunal and greatly extended in application by White Industries. While it is undoubtedly true that investors experienced disconcerting delays and chaos in the judicial systems of both Ecuador and India, Chevron’s creation of an expansive, unmoored standard has created uncertainty that helps neither states nor investors. Indeed, if the recent trend is any indication, the judicial functioning and competency of any number of states—including the United States—will soon be under examination by arbitrators, with unpredictable results. The weaknesses in Chevron’s approach can and ought to be remedied through reference to subsequent state practice and, where that is unavailable, by using domestic law principles to inform the analysis.

Jessica Wirth*

over the content of their legal system applicable within the state’s territory, and consequently over the policy choices” and thereby suggesting that return to domestic law recognizes that the tribunal’s authority was divested from the sovereign).

* Managing Editor, Columbia Journal of Transnational Law; J.D. Candidate, Columbia Law School, 2014; B.A., Duke University, 2009. The author would like to thank Professor Anthea Roberts for providing feedback throughout the writing process, the editors of the Columbia Journal of Transnational Law for their diligence in preparing this Note for publication, and her family and Zack for their unconditional love and support.