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# COMMENT

# A BIT Unfair?: An Illustration of the Backlash Against International Arbitration in Latin America

## I. INTRODUCTION

Bilateral Investment Treaties (BITs) have governed regulation of foreign investments made by U.S. investors for over thirty years now, but recently these treaties have generated much controversy. With allegations that BITs terribly disadvantage developing third-world countries, at the profit of Western economic giants such as the United States, a recent rash of BIT withdrawals has swept through Latin America.[1] Bolivia, Nicaragua, Venezuela, El Salvador, and Ecuador have all disavowed BITs in the last four years.[2] The Ecuadorian Constitution has even added prohibitions against resolving disputes through international arbitration, a manner in which BITs regulate foreign investment disputes.[3] These recent developments have compelled commentators to declare that the BIT regime is in a current "legitimacy crisis," with its very existence in peril.[4]

With the survival of BITs at fulcrum, the Second Circuit recently decided a highly publicized and notorious case applying international arbitration in *Chevron Corp. v. Republic of Ecuador*.[5] This comment will discuss *Chevron* and its effects within the wider corpus of BIT international arbitration to provide an illustration of the current debate and status of the BIT framework. The purported benefits BITs provide to signatory countries exist theoretically, and to test these theoretical underpinnings, this comment will discuss *Chevron* for the purpose of providing real context to a predominately academic debate. *Chevron* shall demonstrate that theoretical effects and practical effects are not equivalent and, possibly, why the current crisis in BIT arbitration exists. This comment takes the position that, despite the great potential of BITs, the continued survival of the BIT regime depends on evenhanded and fair judicial application, considerations ignored in *Chevron*.

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1. *See* United Nations Conference on Trade & Development, *Recent Developments in International Investment Agreements (2008- June 2009)*, IIA Monitor No. 3, 6 (2009), *available at* http://www.unctad.org/en/docs/webdiaeia20098_en.pdf; *see also* Asha Kaushal, *Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime*, 50 HARV. INT'L L. J. 491, 491-93 (2009).
2. Kaushal, *supra* note 1, at 492.
3. *Id*. at n.9.
4. Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1583 (2005).
5. 638 F.3d 384 (2d Cir. 2011).

## II. HISTORY

### *A. Bilateral Investment Treaties*

Bilateral Investment Treaties (BITs) rose to prominence largely due to "uncompensated expropriation" of foreign investments by developing countries.[6] The end of World War II transitioned the world into a second phase of decolonization.[7] With fledgling states grasping for sovereign control over populaces and resources, international investment law originated from the influx of developing nations.[8] At the very onset, a tension existed between developed and developing states.[9] While Europe and the U.S. insisted on international standards for foreign investment regulation, the Third World—led by Latin America—insisted that countries should govern foreign investments by domestic standards.[10] With disagreements across the world, countries began codifying foreign investment agreements through BITs.[11] Since then, BITs have significantly molded the economic and legal architecture in the regulation of international investments.

In 1959, Germany signed the first BIT.[12] Having lost all of its foreign investments in World War II, Germany was particularly sensitive to the political risks of foreign investments.[13] In the following decade, several European countries followed Germany's lead by signing BIT agreements with various developing countries.[14] However, despite the existence of these early BITs, the 1970s marked a time of unsettled international investment regulation.[15] For example, in the early 1970s, the United Nations officially adopted a policy supporting expropriation without compensation.[16] The U.N.'s Declaration of the New International Economic Order (NIEO) essentially permitted sovereigns to seize foreign private investments at will.[17] Even when the United Nations promoted compensation for public takings, industrialized countries remained dissatisfied.[18] In 1974, the United Nations adopted the Charter of Economic Rights and Duties of States (CERDS).[19] The CERDS required sovereigns, when taking control of private investments, to compensate private investors with the fair market value for investments seized.[20] However, under the CERDS, national law, not international

6. Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS. J. INT'L L. & POL'Y 157, 169 (2005). The governments of these developing countries would often seize private investments and claim them as their own.
7. Kaushal, *supra* note 1, at 499.
8. *Id.*
9. *Id.* at 500.
10. *Id.*
11. *Id.*
12. Vandevelde, *supra* note 6, at 169.
13. *Id.*
14. *Id*.
15. Kaushal, *supra* note 1, at 501.
16. Vandevelde, *supra* note 6, at 167.
17. *Id.* The United Nations adopted the NIEO, which favored developing countries, because, at the time, developing countries possessed the numerical majority in the U.N General Assembly.
18. *Id*. at 168.
19. *Id.* at 167-68.
20. *Id*.

law, determined the amount of compensation paid by the sovereign to private investors.[21] In some cases, national law would not permit any compensation.[22]

In the backdrop of the U.N.'s effort, European countries continued signing BIT agreements with developing countries.[23] Paradoxically, these signatory developing countries insisted upon the NIEO and the CERDS, while disavowing the terms of their BIT agreements.[24] During this time, the confluence of the policies adopted by the U.N. and individually negotiated BITs created an unsettled legal terrain, unpredictable to U.S. investors.[25] U.S. investors simply lacked clear guidelines and rules of law in which to operate.[26] With the sanctity of cross-border contractual and property rights threatened, the United States required a consistent framework for managing foreign investments.[27] BITs provided the U.S. with such a mechanism, and as a result, helped stabilize the international investment market.[28]

In 1977, the United States officially adopted the BIT program and devoted the next four years to crafting a model negotiating text.[29] Finished in 1981, this model text underwent numerous revisions in the following decade.[30] However, adoption of the BITs as the standard foreign investment agreement provided a uniform method for regulating foreign investments after 1982.[31] Furthermore, development of the model text allowed the U.S. to draft more cohesive and consistent BIT agreements.[32] With adoptions of BITs and the creation of a model text, U.S. investors had a more definitive conceptualization of the legal contours in which they invested, insuring greater security of domestic capital abroad.[33]

As mentioned previously, high political risk in developing countries placed the state of domestic securities abroad in jeopardy following World War II.[34] BITs reduce this risk in two ways. First, disagreements existed over standards of law to apply, and BITs address this concern by consistently applying international standards of law, rather than the domestic law of the host nation.[35] Second, BITs, by permitting international arbitration, also further investment protection by providing a mechanism for investors to enforce their rights.[36]

21. *Id*. at 168.
22. *Id*.
23. *Id*. at 168; Kaushal, *supra* note 1, at 501.
24. Kaushal, *supra* note 1, at 502. *See also* Vandevelde, *supra* note 6, at 169.
25. Kaushal, *supra* note 1, at 501-02.
26. *Id.*
27. Joshua Robbins, 13 U. MIAMI INT'L & COMP. L. REV. 403, 438 (2006); Kenneth J. Vandevelde, *U.S. Bilateral Investment Treaties: The Second Wave*, 14 MICH. J. INT'L L. 621, 628 (1993).
28. Vandevelde, *supra* note 27, at 628**.**
29. *Id.* at 624.
30. *Id*. at 627.
31. *Id*. at 627-28. From 1982 to 1986, represents the first wave of BITS the U.S. signed. During this time, the U.S. installed BIT agreements with Panama, Egypt, Morocco, Zaire, Cameroon, Bangladesh, Senegal, Haiti, Turkey, and Grenada. *Id.*
32. Vandevelde, *supra* note 6, at 170.
33. *Id*.
34. *Id*. at 177-78.
35. Jeswald W. Salacuse & Nicholas P. Sullivan, *Do Bits Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L. J. 67, 76 (2005); Alex R. Johnson, *Rethinking Bilateral Investment Treaties in Sub-Saharan Africa*, 59 EMORY L. J. 919, 925 (2010).
36. Johnson, *supra* note 35, at 925.

Coinciding with the United States' adoption of BITs in the early 1980s, international economics were changing.[37] Developing countries began shedding their healthy skepticism towards foreign investments.[38] This development was rooted in two main causes.[39] First, economic ideology began liberalizing internationally.[40] Second, capital became scarce due to an international lending shortage.[41] Global economic liberalization,[42] along with a private lending drought, exerted substantial pressure on developing countries to enter into BIT agreements.[43] In time, developing countries would not only permit BITs, but also compete with other developing countries to sign such treaties.[44] The need for consistent regulation and a global economic shift in philosophy caused an international explosion of BIT agreements signed in the late 1980s.[45] However, while establishing clear standards and guidelines created more legal certainty, BITs could not fully combat the fear of expropriation without a mechanism to enforce investor rights: international arbitration.

### *B. International Arbitration in Bilateral Investment Treaties*

Beginning in the mid-1980s, BITs generally allowed private investors to submit their disputes to international arbitration.[46] Today, almost all BITs provide private parties the right to arbitrate claims against sovereigns.[47] The United Nations Commission of International Trade Law (UNCITRAL) often serves as the

37. Vandevelde, *supra* note 6, at 178.
38. *Id*.; *see also* Vandevelde, *supra* note 27, at 637-38.
39. Vandevelde, *supra* note 6, at 177.
40. *Id*.
41. *Id*.
42. *Id*. During this time, developing countries were pursuing two separate but competing economic ideologies. First, developing countries in Latin America and Africa pursued import substitution, attempting to produce all goods and resources that they would otherwise have to import. *See id*. at 178-79. Essentially, import substitution countries attempted to create economic self-reliance, in hopes of establishing independence from international trade. In contrast, developing countries in Asia pursued a more liberalized growth strategy, which emphasized more, not less, reliance on foreign trade. *Id.* at 177. The goals of both ideologies were the same—expand and industrialize—but the means pursued were different. The results supported that a more liberalized policy towards foreign investments was superior to the import substitution method. *Id.* at 177-79. For example, from 1965 to 1990, the economies of eight Asian countries, which had liberalized towards foreign investments, grew at three times the rate of Latin America countries and twenty-five times the rate of African countries. *Id.* at 177. Furthermore, the collapse of the Soviet bloc further discredited the more conservative import substitution method. *Id.*
43. *Id*. at 177-78. The private lending drought was largely caused by the massive expenditures incurred by the Reagan administration, which required extensive borrowing by the U.S. government during this time. With less supply of money available, borrowers became more desperate for loans, while lenders could be pickier who received the loans. The result is that many countries felt compelled to sign BITs, as a means of assuring cautious lenders that the debts would be honored. *Id.*
44. Kaushal, *supra* note 1, at 503.
45. Vandevelde, *supra* note 6, at 179.
46. Christopher M. Ryan, *Meeting Expectations: Assessing the Long-Term Legitimacy and Stability of International Investment Law*, 29 U. PA. J. INT'L. L. 725, 733 (2008).
47. *Id.* at 733-34; *see also* Franck, *supra* note 4, at 1538.

legal and procedural framework,[48] and corresponding enforcement proceedings often occur in the U.S. and England.[49]

Arguably, the right to arbitrate may represent the "most significant right" provided by BITs.[50] Whenever conflict arises between two countries, political implications attach. Prior to the existence of BIT arbitration, private parties could only effectuate enforcement against a sovereign through state action; private parties could only bring claims against foreign states through their domestic governments via espousal.[51] As a consequence, the U.S. often ignored enforcement of private investor rights abroad for concerns of creating political discord with trading partners.[52] However, by insisting on an international forum and private decision makers, BITs extinguished political considerations from the resolution process.[53] As a result, BIT arbitration insures enforcement of private rights, when such enforcement would not otherwise be provided.[54] However, as the following case will demonstrate, adoption of this enforcement mechanism has created some unforeseen consequences for developing countries.

## III. *CHEVRON V. REPUBLIC OF ECUADOR*

On February 14, 2011, the culmination of eighteen years of litigation resulted in an $8.6 billion judgment in an Ecuadorian trial court in favor of the citizens of Ecuador.[55] When local environmentalist Donald Moncayo heard that the court in Lago Agrio held Chevron Corporation liable for decades of petroleum contamination of the Amazon rainforest, Moncayo nearly cried.[56] Emotionally he asked, "You mean we won?"[57] Well, Mr. Moncayo, not exactly. Barely a month later, March 17, the Second Circuit decided *Chevron Corp. v. Republic of Ecuador* and rendered the $8.6 billion judgment effectively null and void.[58]

In 1993, citizens of Ecuador filed a claim in the Southern District of New York against Chevron Corporation and Texaco Petroleum (collectively known as "Chevron") for causing environmental damage to the Ecuadorian rainforests.[59] Although the Ecuadorian government (Ecuador) was not a party in this action, both Ecuador and Chevron opposed trying the case in the United States.[60] Be-

48. Rebecca Golbert, *The Global Dimensions of the Current Economic Crisis and the Benefits of Alternative Dispute Resolution*, 11 NEV. L.J. 502, 506 (2011).

49. Alexis Blane, *Sovereign Immunity as a Bar to the Execution of International Arbitral Awards*, 41 N.Y.U. J. INT'L L. & POL. 453, 456 (2009). The United States and England provide common sites for enforcement of international arbitration decisions due to "their position[s] as financial leaders and repositories of capital." *Id.*

50. Ryan, *supra* note 46, at 733.

51. *Id.* at 733-34. The government could espouse a private claim through either diplomatic negotiations or a formal suit with the International Court of Justice.

52. *Id.* at 734.

53. *Id.*

54. *Id.*

55. Republic of Ecuador v. Chevron Corp., 638 F.3d 384, 391 (2d Cir. 2011).

56. Tim Padgett & Stephan Kuffner, *Chevron v. Ecuador: Will the Plaintiffs Get Paid?*, TIME MAGAZINE (Feb. 22, 2011), http://www.time.com/time/world/article/0,8599,2053075,00.html.

57. *Id*.

58. *Chevron*, 638 F.3d at 388.

59. *Id.* at 388-89.

60. *Id.* at 389.

cause Chevron satisfied the district court with a promise to submit itself to the jurisdiction of Ecuadorian courts, the Citizens of Ecuador re-filed their claim in Lago Agrio, Ecuador.[61]

In September 2009, Chevron initiated arbitration proceedings against Ecuador in the Southern District of New York by invoking the arbitration clause within Ecuador's Bilateral Investment Treaty (BIT).[62] Chevron sought a BIT arbitral decision compelling Ecuador to intervene in the Lago Agrio litigation to clear Chevron of all liability.[63] In December 2009, Ecuador responded by petitioning for a stay of arbitration under the Federal Arbitration Act (FAA).[64] Shortly after, the Ecuadorian citizens followed Ecuador's lead, arguing arbitration should be stayed "to the extent it would seek dismissal, nullification, or avoidance of any judgment in the Lago Agrio litigation."[65] However, the Southern District of New York refused to stay arbitration, permitting the BIT arbitration and Lago Agrio litigation to proceed concurrently.[66] On appeal, the Second Circuit, in *Chevron*, addressed whether the Southern District of New York correctly refused Ecuador's request to stay arbitration.[67]

After this case was briefed, but before the Second Circuit had issued this decision, two notable yet conflicting events occurred.[68] First, while the citizens of Ecuador initially sought damages of $27.3 billion, the Lago Agrio litigation resulted in an $8.6 billion judgment against Chevron, a decision both parties intended to appeal.[69] Second, the arbitration panel issued an interim order directing Ecuador "to take all measures at its disposal to suspend or cause to be suspended the enforcement . . . of a judgment against Chevron Corporation in the Lago Agrio case."[70] Considering these events, the Second Circuit affirmed the district court's refusal to stay arbitration, upholding BIT arbitration and invalidating the $8.6 billion rendered in the Ecuadorian trial court.[71] In addition, *Chevron* raised two additional issues traditionally used to criticize BIT arbitration: inconsistency and interference with sovereign authority.

## IV. CRITICISMS OF BILATERAL INVESTMENT TREATY ARBITRATION

### *A. Inconsistent Results*

While BIT agreements have stabilized the foreign investment landscape, arbitration decisions issued under BIT agreements have undermined the consistent

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61. *Id.* at 389-90.
62. *Id.* at 390.
63. *Id.* Chevron sought an arbitral decision regarding two issues. First, Chevron argued that Ecuador had improperly interfered with the Lago Agrio litigation, a litigation Ecuador was not a party to. Second, Chevron asserted that a prior settlement agreement existed with the Ecuadorian government to release Chevron from all environmental liability in the Lago Agrio litigation. *Id.*
64. *Id*. at 390.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* at 391.
70. *Id*.
71. *Id.* at 401.

application of investment regulation.[72] Inconsistent decisions issued by BIT arbitration panels have counteracted the general stabilization effect BITs sought to achieve.[73] These decisions adversely affect both investors and developing sovereigns.[74] Investors structure their investments to take advantage of BIT arbitration provisions, but when arbitration fails to protect investors as generally expected, investor confidence can plummet.[75] On the other hand, Professor Franck reports that governments can "find themselves in an untenable position of explaining to taxpayers why they are subject to damage awards for hundreds of millions of U.S. dollars in one case but not another."[76] According to Professor Annie Leeks, "[t]he lack of consistency in the arbitral process has come under attack from a number of commentators, with some claiming that the inconsistency has become so serious that it amounts to a crisis in the international investment dispute resolution system."[77] For an extreme illustration of an arbitral decision generally inconsistent with other decisions rendered, consider *Tecnicas Medioambentales Tecmed, S.A. v. United Mexican States*.[78]

In *Tecmed*, the Mexican government denied a company's request to renew a license to operate a hazardous landfill.[79] The International Center for Settlement of Investment Disputes (ICSID) panel overseeing the decision held that the Mexican government's refusal violated its obligation to treat the company "fairly and equitably."[80] The tribunal's rationale proved troubling to commentators. Specifically, to determine whether a government treated an investor "fairly and equitably," the panel looked to investor expectations.[81] The panel held that fair and equitable treatment requires that government action "does not affect the basic expectations that were taken into account by the foreign investor to make the investment."[82] Perhaps more problematic, investors must "know *beforehand* any and all rules and regulations that will govern its investments."[83] While *Tecmed* stands for an expansive viewpoint of what constitutes fair and equitable treatment, scholars have extrapolated two conflicting implications from the *Tecmed* decision.[84]

First, as stated by one international arbitrator, "[u]nder a strict reading of the *Tecmed* rule, governments would be obligated to consult with foreign investors *in*

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72. Franck, *supra* note 4, at 1558. While normally cheaper than litigation, recent transactions costs of international arbitration have risen to match litigation. Golbert, *supra* note 48, at 507. The increased complexity of international arbitration compels this result. *Id.* Similar to litigation, international arbitration may require "extensive discovery, production and translation of documents, and [use of] expert witnesses. *Id.* The rationales of efficiency and speed may only apply to international arbitration in an illusionary sense. *Id.*

73. Franck, *supra* note 4, at 1558-59.

74. *Id.* at 1558.

75. *Id.*

76. *Id*.

77. Annie Leeks, *The Relationship Between Bilateral Investment Treaty Arbitration and the Wider Corpus of International Law: The ICSID Approach*, 65 U.T. FAC. L. REV. 1, 34 (2007).

78. Ryan, *supra* note 46, at 738-39.

79. *Id.*

80. *Id.* at 738.

81. *Id.* at 739.

82. *Id.*

83. *Id.*

84. *Id*. at 739-40.

*advance* to taking any regulatory action."[85] Mere notice of regulation, then, would not absolve a government from liability.[86] Second, which and how many investors would *Tecmed* require the government to consult with? Although never explicitly stated in *Tecmed*, some feel that the panel's decision could be construed to require consultation with *every* foreign investo—a task simply impossible to do.[87] Consider the perverse role reversal. While investor expectations ordinarily materialize considering the regulatory body already in place, the *Tecmed* panel mandated that governments conform their regulations to investor expectations. Such a puzzling result has led "[c]ritics of the current system of international investment law [to] argue that the *Tecmed* 'rule' and other broad standards established by tribunals make it difficult for governments to govern."[88] This comment will further discuss sovereign limitations in the following section, but *Tecmed* also represents the inconsistent adjudication of issues in international arbitration, creating unsettled precedent and investor confusion.

### *B. Interference with Sovereign Authority*

An international arbitrator noted that BITs can "constrain the extent to which governments can govern."[89] Critics agree that permitting private parties to bring suits against national sovereigns exerts "an undue influence over the domestic conduct of a sovereign in ways that are detrimental either to the sovereign or to the people . . . ."[90] This potential for undue influence exists not only within actual arbitration sanctions; the mere threat of arbitral proceedings grants private investors with power to shape a state's regulatory processes and policies.[91]

Representative of this, BITs create a "two-tiered system—one that provides greater property rights to foreign investors than it does to domestic investors."[92] For example, if a domestic investor and a foreign investor start identical enterprises and have identical causes of action against a state, the foreign investor can prevail while the domestic investor fails.[93] Although national laws of a host nation constrain the domestic investor, the foreign investor can apply international laws in BIT arbitration.[94] As a result, a government may still be held liable even when its actions are "wholly consistent with domestic laws, serve the broad interests of the country, are in good faith, and are implemented in a non-discriminatory manner."[95] Sovereigns, by entering into BITs, face heightened scrutiny for actions taken against foreign investors, which places pressure on developing nations to shape policies in conformity with Western expectations.

*Chevron* signifies an example of a judicial application of BIT arbitration infringing on the policies of a national sovereignty. Specifically, commentators

85. *Id.* at 740.
86. *Id.*
87. *Id.* at 740-41.
88. *Id.* at 740.
89. *Id.* at 738.
90. Blane, *supra* note 49, at 488 (citing Ryan, *supra* note 46, at 738-39).
91. *Id.*
92. Ryan, *supra* note 46, at 737.
93. *Id.* at 738.
94. *Id.*
95. *Id.* at 739-40.

have viewed the development of the Lago Agrio litigation as representative of policy extended forth by the Ecuadorian government.[96] Although a court-appointed expert recommended damages of $27.3 billion, the Lago Agrio trial court issued a judgment for a mere $8.6 billion.[97] A professor following this case, Georgene Vairo, stated, "[t]his is way low compared with what everyone was expecting to happen . . . . [Ecuador is] trying to show the world that [its citizens] are reasonable people. This is Ecuador coming to the table."[98]

Indeed, many interpreted the Lago Agrio decision as willingness from both sides to compromise. According to a Time Magazine article, because the Lago Agrio trial court awarded only $9 billion of the $27 billion that the plaintiffs sought, "many are starting to ask an obvious question: Isn't it time for both sides to think again about settling this thing out of court?"[99] After the Lago Agrio decision, the atmosphere appeared ripe for settlement—a position, according to academics, adopted by the Ecuadorian government.[100] However, the Second Circuit, in *Chevron*, essentially killed any possibility of settlement. As a result, the Second Circuit's decision has interfered with the national policy that the Ecuadorian government intended to pursue and represents a judicial affirmation of BITs interference with governance of foreign jurisdictions.

By allowing the BIT arbitration to proceed, the Second Circuit has disrupted any realistic possibility of settlement. The relative positions of the parties have dramatically shifted. Chevron, with an order from a BIT arbitration panel absolving them of all liability, has little incentive to settle with Ecuador following the Second Circuit's decision. The arbitral panel suspended all judgments issued by the Lago Agrio court, voiding the $8 billion judgment, which many felt was quite reasonable. By stripping away Ecuadorian authority to hold Chevron liable, the Second Circuit has annihilated any remaining leverage that the sovereignty possessed. And as Judge Lewis Kaplan, who presided over the case, stated, "nobody here was born yesterday, cases are settled because of leverage."[101]

Perhaps Ecuador still maintains a degree of leverage looking forward to the subsequent arbitration enforcement proceeding that the Second Circuit mentioned in *Chevron*. The Second Circuit correctly stated that if Ecuadorian courts reach final judgment in favor of the Ecuadorian citizens and the arbitral panel reaches a final judgment in favor of Chevron, citizens of Ecuador may challenge the panel's decision in the subsequent enforcement proceeding at the district court.[102] However, in reality, Ecuadorian citizens have little chance of prevailing in such a hearing. The Southern District of New York has provided all initial decisions regarding this case, and Chevron will likely seek to enforce the arbitral decision in that court. On March 17, 2011, the same day the Second Circuit issued *Chevron*, the

96. Gonzalo Solano & Frank Bajak, *Chevron Fined $8.6 Billion in Ecuador*, BLOOMBERG BUSINESSWEEK (Feb. 14, 2011), http://www.businessweek.com/ap/financialnews/D9LCT1G00.htm.
97. *Id.*
98. *Id.*
99. Padgett & Kuffner, *supra* note 56.
100. Solano & Bajak, *supra* note 96.
101. Mark Hamblett, *Federal Judge Blocks Enforcement of Likely Judgment Against Chevron*, NEW YORK LAW JOURNAL (Feb. 9, 2011), http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202480876078&slreturn=1&hbxlogin=1. Judge Kaplan issued a temporary restraining order against the Ecuadorian plaintiffs from enforcing the Lago Agrio award outside of Ecuador. *Id.*
102. Republic of Ecuador v. Chevron Corp., 638 F.3d 384, 399 (2d Cir. 2011).

Southern District of New York issued a decision tantamount to the enforcement of the arbitral decision.[103]

The Southern District of New York ordered a preliminary injunction, preventing enforcement of the Lago Agrio judgment outside of Ecuador.[104] From this ruling, one can extrapolate that the Southern District has already passed judgment regarding Chevron's liability. Asking the district court to affirm again its decision in the enforcement proceeding will prove little difficulty for Chevron. What does the Second Circuit expect the district court to do, completely change its mind in less than a year's time? To be fair, allegations have arisen throughout the litigation that Ecuador exercised coercive practices to compel Chevron into early settlement.[105] However, the Lago Agrio judgment—which issued damages far below expectations—hardly fits within this category of wrongful conduct. As emphasized by Professor Vairo, this reduced award declared by the Lago Agrio court represented Ecuador's attempt to convince the international community that they were acting reasonably and in good faith.[106]

Despite Ecuador's reasonableness and indication of a pro-settlement policy, the Second Circuit has permitted international BIT arbitration to disrupt the governance of a national government. Ironically, *Chevron* represents a judicial utilization of dispute resolution—BIT arbitration—to prevent parties from resolving their disagreement through dispute resolution via negotiation and settlement. That such utilization prevents a national sovereign from effectively pursuing the policies of the state presents an example of the prime evil that BITs may create.

In addition, *Chevron* also contributes to what Professor Barnali Choudhury characterizes as a "democratic deficit."[107] Interference with a state's public policy necessarily implicates the democratic process.[108] Elected officials, chosen to protect the welfare of a populace, dictate a country's public policy, and any disturbance of public policy naturally challenges the legislature's policy making authority.[109] Substitution of international policy over domestic policy excludes input of local legislatures and courts, rendering citizen participation in the Democratic process more remote.[110] As a result, *Chevron*'s effect of diminishing Ecuador's sovereign authority indirectly weakens the democratic legitimacy of Ecuador's political system.

The critique that BITs interfere with sovereign control is far from novel. Indeed, many feel that sovereigns take this limitation of authority into consideration, as representative of the "grand bargain" made when entering into BIT agreements.[111] However, "bargain" connotes a tradeoff. If indeed third-world countries have traded away some sovereign authority, the obvious question is: what have these countries received? By sacrificing their sovereign authority, did devel-

103. *Id*. at 399 n.11.
104. *Id*.
105. *Id*. at 396.
106. Solano & Bajak, *supra* note 96.
107. Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 VAND. J. TRANSNAT'L L. 775, 784-85 (2008).
108. *Id*. at 778-79, 782.
109. *Id* at 782.
110. *Id.* at 784.
111. *See infra* notes 156-62 and accompanying text.

oping countries realize the intended benefits from their bargain? And if not, do BITs represent a truly reciprocal contract?

## V. BILATERAL INVESTMENT TREATIES' INTENDED BENEFITS TO DEVELOPING COUNTRIES

Non-developed countries theoretically receive three benefits by signing BITs: improved rule of law, relationship building, and increased foreign investment.[112] However, disagreement exists as to the validity of these purported benefits, which the following section discusses. The first two paragraphs of each section will discuss the debatable benefits BITs provide to developing countries, and the remainder of each section will discuss *Chevron* as an example where judicial application rendered these benefits meaningless. As this section demonstrates, benefits provided by BIT arbitration do not toll automatically, but rather depend on application by the courts. Unfair application, as was the case in *Chevron*, may contribute to the current "crisis in legitimacy" facing international arbitration.

### *A. Strengthening Legal Institutions and the Rule of Law*

Some theorists argue that BIT arbitration helps improve the rules of law within a developing country.[113] Developing countries, by signing BITs, implicitly state that deficiencies in their government institutions and/or judicial systems impair their ability to enforce their rules of law.[114] BITs fill this void by replacing domestic institutions with international institutions and national standards of law with international standards.[115] By preventing government authorities from acting arbitrarily or abusively towards foreign investors, BITs induce these administrators to treat their nationals in similar fashion.[116] Because BIT arbitration proceedings allegedly provide examples for developing countries to follow, in hopes that these countries can reform their own inadequate regulatory institutions, advocates for international arbitration assert that developing countries will adopt a heightened respect for fair governance and consistent rules of law.[117]

On the other hand, some commentators feel that BIT arbitration, as an international role model, may in fact impede sovereigns seeking to strengthen their rules of law and legal institutions.[118] Professor Tom Ginsburg argues that the effect of BITs strengthening legal institutions is unclear, and in some cases BITs

112. Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT'L L. J. 427, 441-42, 444 (2010).
113. Susan D. Franck, *Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L. J. 337, 365 (2007).
114. Salacuse, *supra* note 112, at 444.
115. *Id.*
116. *Id.*
117. *Id.*
118. Franck, *supra* note 113, at 365 ("[C]ommentators suggest that the existence of international dispute resolution for foreign investment inhibits the development of the rule of law in national courts by creating a regime that provides a privilege to foreign investors and removes investment disputes from local courts.").

may actually impair the strength of law within a developing country.[119] Professor Ron Daniels agrees and "suggests that investment treaties have subverted the evolution of robust rule of law institutions in the development world."[120] Professor Daniels goes further to suggest "that BITs *enfeeble* host state governments and, in sharp contrast to the claims made by supporters of BIT, will end up discrediting the normative legitimacy of the BIT as a rule of law demonstration project."[121] In sum, these commentators feel that only internal impetuses for change can lead to meaningful institutional improvement, and no external force, no matter how noble, can compel the strengthened rule of law.[122]

In *Chevron*, the Second Circuit weakened the strength of law in Ecuador, countering an intended benefit BITs purportedly provide to developing nations. By upholding the arbitral decision in *Chevron* while preventing final adjudication in the Ecuadorian court system, the Second Circuit has diminished, not promoted, the rule of law in Ecuador. While the Lago Agrio litigation decided whether Chevron was liable for damaging Ecuadorian rainforests, the BIT arbitration decided whether the Ecuadorian government and court system acted fairly and legitimately throughout the Lago Agrio litigation.[123] Essentially, the BIT panel was asked to pass judgment on the state of the rules of law and legal institutions presently in place in Ecuador. Of course, the panel's judgment was not favorable.[124] In addition, the confidentiality of BIT arbitration prevents Ecuador from learning the details or rationales of the panel's decision.[125] Without knowing the reasoning behind the panel's decision, Ecuador lacks the necessary information in order to improve its legal institutions.

The BIT panel essentially sent a message to the international community—which the Second Circuit affirmed with its refusal the stay arbitration—that Ecuador's rules of law and court system were inadequate to protect foreign investments. The Second Circuit has indirectly diminished the prestige of Ecuadorian courts and rules of law in the eyes of the international community. Judicial affirmation that Ecuador is too underdeveloped to handle major lawsuits may frustrate or demoralize attempts by Ecuadorian institutions to improve. Perhaps confirming Professor Ginsburg fears, *Chevron* may represent a "circumstance[] [where] BITs may lead to lower institutional quality in subsequent years."[126]

Recall that improvements to a country's rules of laws require "evolution,"[127] which connotes that time and opportunity must be provided to sovereigns for such growth to occur. After all, the argument that BITs improve rules of laws within developing countries relies on developing countries making such improvements

119. *Id.* at 366; Tom Ginsburg, *International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance*, 25 INT'L REV. L & ECON. 107, 119 (2005) ("[T]he decision to bypass domestic courts may reduce courts' incentives to improve performance by depriving key actors from a need to invest in institutional improvement.").

120. Franck, *supra* note 113, at 366 ("[F]oreign investors rationally refrain from championing good and generalized law reforms in the developing state, preferring instead to protect their interests by relying on the BIT rule of law enclave.").

121. *Id.*

122. Salacuse, *supra* note 112, at 444. *See also* Frank, *supra* note 113, at 336.

123. Republic of Ecuador v. Chevron Corp., 638 F.3d 384, 399 (2d Cir. 2011).

124. *Id.*

125. Leeks, *supra* note 77, at 34.

126. Ginsburg, *supra* note 119, at 122.

127. Franck, *supra* note 113, at 366.

themselves. Otherwise, as stated by Professor Daniels, BIT arbitration is simply "enfeebling" state governments from improving.[128] Furthermore, the Second Circuit's refusal to provide such time and opportunity comes at a detriment to Ecuador, beyond the scope of simply discrediting Ecuadorian courts.

### *B. Improving Trade Relations*

Proponents of international arbitration argue that trade relations between countries improve with passages of BITs.[129] BITs can liberalize emerging markets by convincing less-developed countries to view private capital more favorably.[130] In the process, more private access reduces barriers to entry, removes regulatory impediments, and fosters the continued operation of private capital.[131] Because BITs liberalize the economic philosophies of developing countries closer to the economic edicts exercised by developed countries, BITs can strengthen relations between signatory countries.[132] Improved relations can assist developing countries in obtaining favors from developed countries.[133] These favors can include increased trade, foreign aid, security assistance, technological transfers, and other intangible benefits.[134]

Furthermore, with transitions of power in developing countries so commonplace, new regimes can establish rapport and trust with industrialized neighbors by entering into BITs. For example, in 2005, a leftist party seized power in Uruguay.[135] By ratifying a BIT agreement with the U.S., the newly minted government gained immediate international legitimacy and preserved its export markets in the U.S.[136]

In *Chevron*, the Second Circuit's decision impairs the trade relationship between the United States and Ecuador, counter to an intended benefit BITs purportedly provide to developing nations. While the existence of BIT agreements generally serves to strengthen relationships between countries, the *Chevron* decision will likely—if it has not already—impair relations between the U.S. and Ecuador. Common sense and recent developments support this position.

Intuitively, the next question is how the Ecuadorian government is supposed to react after the Second Circuit's decision. The Second Circuit's decision in *Chevron* renders nearly a decade of litigation in Ecuador's own courts meaningless. A foreign tribunal adjudicates its domestic legal process as defunct to the entire world. A multi-billion dollar judgment is ripped from its hands, and a foreign multi-national—after ravaging perhaps the country's greatest natural resource—walks away without paying Ecuadorian citizens a dime. All of this, arguably, the Ecuadorian government can blame on the ratification of the BIT

128. *Id.*
129. *Id*. at 352.
130. *Id*. at 361-62.
131. Salacuse, *supra* note 112, at 443-44.
132. *Id.* at 443.
133. *Id.* at 442.
134. *Id.*
135. *Id*.
136. *Id.*

agreement with the United States. Common sense compels the Ecuadorian government to feel quite jaded with the BIT regime, and who can blame them?

Evidence exists that Ecuador has backlashed against the international investment regime.[137] In 2010, after Chevron initiated BIT arbitration in late 2009, Ecuador formally withdrew from the International Center for Settlement of Investment Disputes (ICSID), an entity commonly conducting BIT arbitration.[138] Furthermore, recently Ecuador unilaterally withdrew from nine BIT agreements and intends to renegotiate the rest, including the agreement with the U.S.[139] In fact, Ecuador has recently incorporated a specific provision banning BIT arbitration into its constitution.[140] Of particular importance, Article 422 of Ecuador's constitution mandates that Ecuador must not enter "international treaties in which Ecuador gives sovereign jurisdiction to international arbitration for certain controversies between the State and private natural or juridical persons."[141] While no one has asserted that the *Chevron* case exclusively and directly caused this shift in policy, mere coincidence appears unlikely as well, especially considering the temporal proximity between these events. At the very least, the Second Circuit's decision contributed to Ecuador adopting this anti-BIT policy. If trade treaties strengthen relations between signatory countries and the Second Circuit's decision contributed to Ecuador's newfound opposition to such treaties, *Chevron*'s application of the BIT has weakened—not strengthened—relations between the U.S. and Ecuador. Having diminished Ecuador's rules of law and trade relations with the U.S., *Chevron* negates any effect of additional capital that the BIT potentially could have provided.

### *C. Increasing Direct Foreign Investment*

Generally, investors make investment decisions based on two main considerations: expected return and risk. BITs, by providing clear and enforceable international rules, reduce foreign investment risk.[142] Because BITs reduce investment risk, proponents argue that the existence of a BIT compels institutional investors to invest more than had a BIT agreement not existed.[143] Thus, developing countries theoretically should receive more foreign contributions by signing BIT agreements.[144] While these contributions usually manifest in tangible forms, such as financing and development of road construction, energy production, or increased telecommunications capacity, investment can take on broader, less tangi-

137. *See* United Nations Conference on Trade & Development, *supra* note 1, at 6; Salacuse, *supra* note 112, at 469-70.

138. Salacuse, *supra* note 112, at 469.

139. *See* United Nations Conference on Trade & Development, *supra* note 1, at 6; *see also Ecuador's Plans to Terminate All Bilateral Investment Treaties*, WIKILEAKS (Oct. 27, 2009), *available at* http://www.cablegatesearch.net/cable.php?id=09QUITO905.

140. United Nations Conference on Trade & Development, *supra* note 1, at 6 n.9.

141. *Id*.

142. Salacuse & Sullivan, *supra* note 35, at 77.

143. *Id.*

144. *Id.*; *see also* Susan D. Franck, *Integrating Investment Treaty Conflict and Dispute Resolutions Systems Design*, 92 MINN. L. REV. 161, 168-69, 171 (2007) (noting that developing countries sign BITs despite "mixed empirical evidence as to [BITs'] actual success in securing foreign investment").

ble forms like intellectual property rights.[145] Additional capital streaming into a developing economy stimulates economic growth and reduces global poverty.[146] BITs' effect of risk reduction does not operate as a short-sighted benefit.[147] Rather, some argue that BITs permanently reduce political risk by improving the rule of law within a developing country.[148]

However, several studies have questioned the BIT regime's ability to generate any additional foreign investment in practice.[149] Professor Salacuse pointed out that even the World Bank has publicly questioned whether BITs in fact increase direct foreign investments in a signatory country.[150] Furthermore, the relationship between BITs and economic prosperity appears even more attenuated.[151]

While the Second Circuit's application of the BIT agreement between the U.S. and Ecuador has surely assisted Chevron in securing themselves against liability in Ecuador, *Chevron* will likely not increase foreign investments in Ecuador. Admittedly, this comment cannot prove empirically that Ecuador received no increase in foreign investments after signing its BIT agreement with the United States. However, even assuming *arguendo* that the BIT agreement did promote foreign investment in Ecuador, the Second Circuit's application of the BIT agreement could not have increased foreign investments. If BITs do in fact promote foreign investment, revocation of a BIT agreement would necessarily diminish foreign investments. Yet, as previously discussed, the Second Circuit's decision, at the very least, has contributed to Ecuador's disavowal of BITs and therefore, prevented any prospective investments Ecuador would have received.

Furthermore, certain implications from *Chevron* may actually impair foreign investments in Ecuador. The Second Circuit, by refusing to stay arbitration, permitted the BIT panel to send a clear message to international investors that Ecuador lacks the legal infrastructure and strength of law to protect foreign investments. Because of the Second Circuit's decision, all investors know that any investments made in Ecuador entail a high political risk, and "empirical evidence . . . suggests that without other favorable conditions such as political stability, BITs do not significantly affect investment flows."[152]

In summary, the Second Circuit's application of the BIT arbitration provision in *Chevron* impeded the intended benefits Ecuador sought from ratifying its BIT. To pursue these benefits, Ecuador implicitly surrendered a degree of sovereign control, as part of BIT's "grand bargain." However, because Ecuador sacrificed sovereignty but gained none of the purported benefits of its BIT agreement, the Second Circuit, in *Chevron*, rendered the BIT agreement between the U.S. and Ecuador an unequal bargain in favor of the developed country. This unequal dis-

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145. Franck, *supra* note 144, at 168-69.
146. Patricia M. Robin, *The BIT Won't Bite: The American Bilateral Investment Treaty Program*, 33 AM. U. L. REV. 931, 935 (1984); Franck, *supra* note 144, at 168-69.
147. Salacuse, *supra* note 112, at 443-44.
148. *Id.* at 444.
149. Salacuse, *supra* note 112, at 468; Salacuse & Sullivan, *supra* note 35, at 67-75; *see, e.g.*, Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract FDI? Only a Bit ... and They Could Bite* (2003), http://elibrary.worldbank.org/docserver/download/3121.pdf?expires=1346986831&id=id&accname=guest&checksum=360D4489E3D402F9ADE6AA450C25A587.
150. Salacuse, *supra* note 112, at 468-69.
151. *Id.* at 469.
152. Leeks, *supra* note 77, at 38.

tribution of rights contributes to what many commentators characterize as an international investment crisis. As the following section indicates, in order to preserve the current BIT arbitration system, considerations of fairness should factor into criteria for the resolution of such claims.

## VI. UNEQUAL DISTRIBUTION OF CONTRACTUAL RIGHTS

While BITs purportedly advance both developed and non-developed countries, concern already exists that the benefits BITs provide remain unbalanced.[153] Most BIT agreements in place today are drafted in favor of developed countries, and, therefore, developed countries receive the majority of the benefits.[154] This uneven distribution of rights reflects the patently unequal bargaining positions between the parties, especially considering the historical necessity and competitive forces compelling developing countries to enter into BITs.[155] The very fact that the vast majority of investment treaties are negotiated in a bilateral, not multilateral, setting reflects attempts by developed countries to magnify their bargaining position.[156] In lieu of the unequal bargaining positions between the parties, the prior justifications for developing countries to enter into BITs, part of a supposed "grand bargain," may no longer apply. As Professor Salacuse points out, if signatory developing countries do not believe that BITs fulfill the "fundamental objective of promoting investment and ultimately economic prosperity, then the justification for its continued existence becomes problematic."[157]

### *A. Grand Bargain Far from Grand*

Many scholars have labeled BITs as a "grand bargain."[158] Between developed and developing countries, the "grand bargain" represents a promise of investment security in exchange for the promise of future investments.[159] However,

153. Calvin A. Hamilton & Paula I. Rochwerger, *Trade & Investment: Foreign Direct Investment Through Bilateral and Multilateral Treaties*, 18. N.Y. INT'L L. REV. 1, 57 (2005).
154. *Id.* at 20.
155. Kaushal, *supra* note 1, at 503-04.

> [T]he diffusion of BITs is associated with competitive pressures among developing countries to capture a limited pool of assets available for foreign investment. The proliferation of BITs is propelled by this competition for capital . . . . This confluence of factors leaves developing countries with little real choice but to sign the charter of a new era.

*Id*. *See also* Hamilton & Rochwerger, *supra* note 153, at 26-27 ("The pressure to gain the financial investment of the more developed nation will often lead a host country to give up concessions that in the long run may not be in the best interests of the country's environment, resources, or population.").
156. Salacuse & Sullivan, *supra* note 35, at 78.
157. Salacuse, *supra* note 112, at 469.
158. Paul M. Blyschak, *State Consent, Investor Interests and the Future of Investment Arbitration: Reanalyzing the Jurisdiction of Investor-State Tribunals in Hard Cases*, 9 ASPER REV. INT'L BUS. & TRADE L. 99, 115 (2009); *see also* Kevin P. Gallagher & Melissa B.L. Birch, *Do Investment Agreement Attract Investment?*, 7 J. OF WORLD TRADE & INVESTMENT 961 (2006).
159. Salacuse & Sullivan, *supra* note 35, at 77.

the "grand bargain" can also represent an internal tradeoff.[160] Developing sovereigns trade away domestic authority for hopes of additional foreign investment.[161]

At the cost of losing sovereignty without receiving benefits, BIT agreements may signify an asymmetrical distribution of contractual rights. For example, in *Chevron*, while BIT arbitration infringed on Ecuadorian authority by preventing settlement, BIT arbitration did not improve Ecuador's rules of law, trade relations with the U.S, or the amount of foreign investment flowing into the sovereign. As consideration involved in BITs loses its mutuality, contracting parties may wish to withdraw from such agreements. As more and more host nations realize that BITs do not deliver on their promises, developing countries have begun to backlash against the BIT regime and investment arbitration, particularly in Latin America.[162] Left unchecked, "there is no reason to assume that this tangible dissatisfaction with the BIT regime will remain limited to Latin America."[163] This dissatisfaction with the "grand bargain" made has led some commentators to conclude that investment arbitration, and the BIT regime overall, currently faces a "crisis of legitimacy."[164] By shedding much of the international regime previously adopted, Latin America appears to embody this crisis, and decisions like *Chevron* only exacerbate the problem.

### *B. A More Just Result?*

To be clear, this comment does not assert that the Second Circuit should have stayed arbitration because the court issued a legally incorrect decision. Rather, considering the unequal bargaining positions and distribution of contractual rights within Ecuador's BIT, as well as the general dissatisfaction with the BIT mechanism overall, this comment takes the position that the Second Circuit should have stayed arbitration to make the BIT agreement more equitable. In light of the mass disavowals of BITs by Latin American countries, had the Second Circuit considered a more equitable approach, one that appreciates the disparate positions of the parties, the court could have taken a step toward combating the current crisis facing the BIT regime.

Though it may appear extreme, this position has support in the academic community, with several commentators advocating for a balancing approach when considering the respective rights of investors and the sovereign in BIT arbitration.[165] For example, one commentator suggests that while arbitral panels currently view their duty as belonging to investors, panels should aim for neutrality "to balance the interests of investors and state parties in an objective and depoliticized

160. Kaushal, *supra* note 1, at 510.
161. *Id.*
162. Blyschak, *supra* note 158, at 121-23; *see also* United Nations Conference on Trade & Development, *supra* note 1, at 6.
163. Blyschak, *supra* note 158, at 123.
164. Franck, *supra* note 4, at 1584.
165. *See, e.g.*, Leeks, *supra* note 77, at 38-39; PHILLIPE SANDS, LAWLESS WORLD: AMERICA AND THE MAKING AND BREAKING OF GLOBAL RULES (2005); JOOST PAUWELYN, CONFLICTS OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW (2009); Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AM. J. INT'L L. 535 (2001); Blyschak, *supra* note 158, at 134-35.

manner."[166] Professor Benjamin Davis agrees, suggesting further that courts can utilize the New York Convention, incorporated into many BITs and the BIT in *Chevron*, to preserve a more "neutral" international arbitral process.[167] Professor Davis is particularly concerned with international arbitration adversely affecting the rights of the "most vulnerable populations" in less developed countries.[168]

By leaving the BIT panel's decision undisturbed, the Second Circuit has provided no benefit to Ecuador. With the arbitral decision in place, the best Ecuador can hope for is a favorable final judgment in Ecuadorian courts. However, final judgment in Ecuador leaves undisturbed the Southern District of New York's injunction, issued the same day as and specifically mentioned by *Chevron*, preventing enforcement of the Lago Agrio litigation. Plaintiffs cannot capture Chevron's assets to force the company to pay the $8.6 billion judgment anyway. Furthermore, and as mentioned in Part I, the Southern District of New York, by issuing this injunction, is unlikely to deny enforcement of the arbitration decision in the subsequent enforcement proceeding.

The Second Circuit's decision perplexes considering the irrevocable effect on the parties. Had the Second Circuit, in just this instance, stayed arbitration as Ecuador requested, both parties win. Consider the following scenarios. Perhaps the parties could have settled, in which case Ecuador's pro-settlement policy comes to fruition and is undisturbed by judicial action. Ecuadorian citizens receive a degree of compensation, but Chevron avoids potential liability nearing $30 billion. Any settlement Chevron would have to pay would likely not exceed the $8.6 billion judgment of the Lago Agrio decision. Considering the Southern District of New York's injunction preventing enforcement of the Lago Agrio judgment, Ecuador would be hard pressed to ask for more.

Or, as the Second Circuit expressly discussed, the Ecuadorian court system could have corrected itself through its appeals process. In this scenario, Chevron, of course, is thrilled to be free of liability. Ecuador's rules of law, as well as the legitimacy of its court system, would be strengthened without foreign influence. International investors would feel confident to invest or continue to invest in Ecuador. Under either scenario, Ecuador captures at least some of the intended benefits of its BIT, making its agreement a little grander than the situation now. With the Second Circuit's decision, Ecuador will likely receive nothing.

Perhaps a sense of unease could rest in holding Chevron partially liable if Chevron had absolutely no fault at all, but that is not the case. Most environmental scientists agree that Chevron did not adequately clean its drilling operations.[169] The issue is not whether Chevron is liable, but rather how much liability they should incur.[170] The Second Circuit could have allowed alternative dispute resolution—settlement—before relying on a tool for dispute resolution mechanism—BIT arbitration—to deprive Ecuadorian citizens of all remedies.

166. Blyschak, *supra* note 158, at 135.
167. Benjamin Davis, *Occupy Arbitration Power and Review in Supreme Court Judicial Review of Arbitration Clauses and Awards* 1-2 (Working Paper, 2011) (on file with author).
168. *Id*.
169. Padgett & Kuffner, *supra* note 56. Recall that Texaco and Chevron merged after the citizens of Ecuador commenced this lawsuit. *See supra* note 59.
170. *Id*.

## VI. CONCLUSION

While the cost is substantial, BITs remain contractual instruments. Sustaining cost without realizing utility, signatory countries have shifted their sentiments regarding BITs and foreign investment. In recent years, a backlash has swept through Ecuador and its Latin America neighbors, and the flames of insurrection threaten the global investment landscape. If the BIT framework is to persist, courts applying BIT treaties may need to balance the interests of investors and developing countries. Only a more equal distribution of rights will persuade developing sovereigns that BITs remain a viable regulatory device.

As *Chevron* demonstrates, Ecuador may freely contract away sovereignty for consideration of a strengthened rule of law, improved trade relations, and increased foreign investment. However, these benefits do not universally toll but rather depend on specific applications by the judiciary. *Chevron* does not appear to provide these benefits as BITs generally intend. At the very least, *Chevron* does not further these benefits. The Second Circuit should have considered the consequential effects of its decision on both the country of Ecuador and the perception of BITs. *Chevron* highlights some of the primary dangers associated with BITs and helps to prove that BITs cannot achieve their full potential without evenhanded judicial application.

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