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Trading Goods for Bad: Is Public Policy Undermined by Investor State Dispute Mechanisms?

Michelle C. Perez

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I. INTRODUCTION

One of the biggest complaints about international trade agreements is that they are negotiated behind closed doors by governments, whether on a global level through the World Trade Organization (WTO), regional level like the North American Free Trade Agreement (NAFTA), the Trans Pacific Partnership (TPP), and Transatlantic Trade Investment Partnership (TTIP), or a simple bilateral trade agreement between two countries.[1] States are the only true actors in trade negotiation and have historically defended secrecy around negotiations on the grounds of "national interest and commercial confidentiality."[2] Critics of neoliberal free-trade theory argue that what actually occurs is that transnational corporations have the opportunity to advocate for regulatory structures that benefit their investment and trade strategies at the expense of consumers.[3]

Legislators and politicians around the world are routinely criticized for focusing on the needs of wealthy corporate donors instead of truly acting in the best interests of their constituents.[4] The truth is many countries are navigating through a tangled web of treaties, agreements, and national laws, in the face of competing interests and obligations to constituents. Currently, one of the most contested issues is that of Investor State Dispute Settlement (ISDS), a dispute mechanism in international treaties, and the belief that it allows a private actor to interfere with a nation's ability to set public policy.[5] Increased attention to the issue has some experts and members of the public alike arguing that investment chapters in trade agreements undermine the rule of law, water down environmental and health policies, and expose taxpayers to liability.[6]

This article will review ISDS provisions and explore possibilities on how ISDS enforcement mechanisms in trade agreements and

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[1] Patricia Ranald, *The Trans-Pacific Partnership Agreement: Reaching behind the border, challenging democracy*, 26(2) ECON. & LAB. REL. REV. 241, 242 (2015).

[2] *Id.* at 244.

[3] *Id.* at 242.

[4] *Id.*

[5] *Id.*

[6] *Id.*

investment treaties can be improved upon. Part II considers the history of free trade agreements and explores the ISDS mechanism, its history, and its increasing presence and use. Part III surveys the legal landscape through case studies under three different types of agreements, specifically NAFTA, the International Energy Charter Treaty (ECT) and a bilateral investment treaty (BIT). Part IV explores the implications ISDS cases have on the future of other BITs or bilateral and multilateral free trade agreements in the face of public mobilization and protectionist movements. Part V prescribes improvements to ISDS passages of agreements to maximize the benefits of the mechanism while avoiding its controversial pitfalls.

II. HOW DID WE GET HERE? THE FREE-TRADE REVOLUTION

To trade is to be human. In fact, trade has been central to human life since the Paleolithic era, nearly 150,000 years ago.[7] The mechanisms for trade have evolved considerably over the millennia, from the old trade caravans, to mercantilism, to international free trade, and now to the modern era of free trade agreements and investment treaties.[8] Despite the evolution of trading methods and instruments, power has always been a central facet of trade.[9] Likewise, discussions about trade and investment agreements today tend to revolve around power dynamics more so than goods and services. In fact, because tariffs at present are generally lower than they have been in recent history,[10] the focus of discussions on the modern trade agreement is typically on "nontariff barriers." The current model of free trade agreements is a very modern, recent instrument of international law and trade, with the first agreements emerging after the Second World War.[11]

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[7] *See generally,* William J. Bernstein, A SPLENDID EXCHANGE: HOW TRADE SHAPED THE WORLD, (2008).

[8] *Id*.

[9] *Id*.

[10] *Tarriffs: more bindings and closer to zero*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm2_e.htm (last visited March 9, 2018).

[11] *The GATT Years: from Havana to Marrakesh*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (last visited March 9, 2018).

A. GATT and Globalization

A new era of trade agreements to regulate the international political economy began with the Bretton Woods Agreement, signed in 1944 after the Second World War by forty-four Allied nations.[12] The agreement was the first of its kind and intended to break down international trade barriers by designing an international financial system.[13] In 1947, twenty-three countries organized an initial agreement to liberalize trade amongst them, through the General Agreement on Tariffs and Trade (GATT).[14] That same year, the United Nations held a Conference on Trade and Employment in Havana, Cuba where the number of signatories increased to fifty-six and began negotiations for a charter of a proposed International Trade Organization.[15]

After months of negotiations to draft a charter for an International Trade Organization, a number of countries refused to ratify the charter—effectively killing the possibility of a Trade Organization.[16] However, GATT was still in force and had reached a significant number of signatories, forever changing the international trade model despite being a "provisional agreement."[17] For nearly fifty years, GATT provided the legal framework and guiding principles of international trade as an ever-increasing number of countries continued to sign onto the agreement, and to meet for "trade rounds" where signatories negotiated trade liberalization and tariff reduction amendments.[18]

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[12] *See* Robert E. Asher and Edward S. Mason, THE WORLD BANK SINCE BRETTON WOODS 1 (1973).

[13] *The GATT Years: from Havana to Marrakesh*, *supra* note 12.

[14] Press Release, European Office, Geneva, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment - Adoption and Signature of the Final Act, U.N, Press Release/469 (Oct. 27, 1947) https://docs.wto.org/gattdocs/q/GG/PRESSRELEASE/469.pdf.

[15] U.N. Conference on Trade and Employment, U.N. Doc. E/CONF.2/8 (November 7, 1947), https://docs.wto.org/gattdocs/q/UN/ECONF2/8.PDF; U.N. Conference on Trade and Employment, *Final Act and Related Documents*, U.N. Doc. E/CONF.2/78 (March 24, 1948), https://docs.wto.org/gattdocs/q/UN/ECONF2/78.PDF

[16] *The GATT Years: from Havana to Marrakesh*, *supra* note 12.

[17] *Id.*

[18] *Id.*

Initially, GATT provisions centered solely on tariff reduction; however, the later provisions began to include anti-dumping provisions, and ultimately included non-tariff and systemic trade barriers.[19] Eventually, the "Uruguay Round" (or the negotiations between 1986-94) led to an extensive number of new agreements and the establishment of the WTO.[20] The world was changing rapidly and the initial provisions were struggling to keep pace with changes such as a globalized service industry, increased international investment, financial services, intellectual property protections, international telecommunications and information technology, changes in agricultural trade, and the increased use of dispute settlement mechanisms.[21] The WTO became the formal organization for signatories to GATT— the legal principles of which serve as the umbrella treaty for the organization.[22]

B. Origins and Purpose of Investor State Settlement

Conceived of in the 1950s and first seen in a treaty in 1969, the modern ISDS system was intended to foster investments in developing nations and provide protection for business investors who wanted to invest in those nations.[23] ISDS was designed to protect businesses from biased state powers and provide a neutral platform for arbitration.[24] It was an efficient, apolitical, dispute system temporarily formed outside the jurisdiction of any national courts or international bodies.[25] The mechanism allowed companies to weather political instability and avoid expropriation of assets while allowing poor, unstable nations to benefit from investments such as roads, telecommunications, or fuel.[26] An investor could confidently invest

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19 *Id.*

20 *Id.*

21 *See The Uruguay Round*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm.

22 *Id.*; *The GATT Years: from Havana to Marrakesh*, *supra* note 12.

23 Fact Sheet: Investor Dispute Settlement (ISDS), United States Office of the Trade Representative, 2015, https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds [hereinafter Fact Sheet]; HALEY SWEETLAND EDWARDS, SHADOW COURTS: THE TRIBUNALS THAT RULE GLOBAL TRADE 13-14 (2016).

24 EDWARDS, *supra* note 24 at 13-14.

25 *Id.*

26 *Id,*

in an emerging economy knowing that if her assets such as oil fields, factories, or plantations were expropriated by a foreign government, she would be able to file a claim directly against that country without worrying about its biased or corrupt court system.[27]

ISDS is binding arbitration in the international arena, designed to settle disputes between countries and foreign investors that do business within their borders.[28] Details vary but the mechanism is essentially the same.[29] Foreign companies sue a state in front of a tribunal, typically of three arbitrators, usually private attorneys, former government officials, international jurists or trade experts.[30] The business and the state each choose one of the arbitrators and usually decide on the third together.[31] Most ISDS proceedings are resolved under the rules of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention).[32] After the tribunal or arbitral panel makes a decision on the dispute using those or other previously agreed upon arbitral rules, the decisions are enforced under the United Nations Commission on International Trade Law (UNCITRAL) 1958 Convention on the Recognition and Enforcement of Arbitral Awards,[33] known as the New York Convention.[34]

C. A growing chorus of ISDS claims and concerns

The number of ISDS claims has grown nearly exponentially [35] and in ways that raise concerns from scholars and trade experts

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[27] *Id.*

[28] *See* Fact Sheet, *supra* note 24.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] About ICSID, WORLD BANK GROUP INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, https://icsid.worldbank.org/en/Pages/about/default.aspx (last visited May 5, 2018).

[33] Process Overview, WORLD BANK GROUP INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, https://icsid.worldbank.org/en/Pages/process/Overview.aspx (last visited May 5, 2018).

[34] *See generally* N.Y. Arbitration Convention, www.newyorkconvention.com

[35] *Investment Dispute Settlement Navigator*, U.N. UNCTAD, http://investmentpolicyhub.unctad.org/ISDS/FilterByYear (last visited Jan. 12, 2017).

around the globe and across the political spectrum.[36] From the 1980s to 2015, the number of ISDS claims grew along with the number of trade agreements and bilateral investment treaties, from a few hundred to nearly 3,000 ISDS agreements.[37] In 2015, the highest numbers of ISDS claims were filed in a single year to date, a total of 74 individual claims.[38] There have been at least 696 ISDS claims since the mechanism's inception, the majority of which are from the last twenty years.[39] These claims have not been evenly distributed; Argentina is the number one respondent in ISDS Claims with 59 claims against its government, and the United States is the number one home country of claimants, with United States corporations bringing 148 claims over the years.[40]

While the increased number of arbitral awards levied against developing nations has experts questioning whether this encourages development outcomes in those countries, others worry about a slippery slope towards the total erosion of state sovereignty.[41] There is

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[36] *See e.g.,* EDWARDS, *supra* note 24 at 24;GUS VAN HARTEN, CANADA'S LOPSIDED INVESTMENT DEAL WITH CHINA, (2015) ; "*The Arbitration Game,*" THE ECONOMIST, (October 11, 2014), https://www.economist.com/news/finance-and-economics/21623756-governments-are-souring-treaties-protect-foreign-investors-arbitration; Dan Ikenson, "*Eight Reasons To Purge Investor-State Dispute Settlement from Trade Agreements*" Blog, FORBES, (March 4, 2014, 4:18 PM), https://www.forbes.com/sites/danikenson/2014/03/04/eight-reasons-to-purge-investor-state-dispute-settlement-from-trade-agreements/#69639a001899; Terra Lawson-Remer, "*The Obscure Trade Provision Everyone is Talking About*" The Blog, HUFFINGTON POST, (May 16, 2014 10:38 am), https://www.huffingtonpost.com/terra-lawsonremer/the-obscure-trade-provisi_b_7297342.html; Chris Hamby, "*Secrets of a Global Super Court: Part 1 The Court that Rules the World*" BUZZFEED NEWS, (August 28, 2016,) https://www.buzzfeed.com/chrishamby/super-court?utm_term=.guGXd3wLA#.ti4kJ8NBm; Gary Clyde Haufbauer, "*ISDS is the Baby, Not the Bathwater,*" Opinions, WALL STREET J., (April 18, 2018 3:46 PM), https://www.wsj.com/articles/isds-procedure-is-the-baby-not-bath-water-1524080774

[37] *See generally International Investment Agreement Navigator,* U.N. UNCTAD, http://investmentpolicyhub.unctad.org/IIA (last visited Jan. 12, 2017).

[38] *Investment Dispute Settlement Navigator*, U.N. UNCTAD, http://investmentpolicyhub.unctad.org/ISDS/FilterByYear (last visited Jan. 12, 2017).

[39] *Id.*

[40] *Id.*

[41] *See e.g.,* Robert Gebeloff, "*Are multinational corporations undermining freedom in poor countries?*" WASHINGTON POST, (September 13, 2016),

a growing concern that the increase in ISDS claims is a sign of investors abusing the mechanism and challenging legitimate regulations.[42] In a United States Supreme Court decision that enforced an arbitration award against Argentina in 2014, Chief Justice Roberts penned a dissent finding this award objectionable.[43] In his dissent he questions the power given to private arbitrators over sovereign states and writes:

> . . . by acquiescing to arbitration, a state permits private adjudicators to review its public policies and effectively annul the authoritative acts of its legislature, executive, and judiciary . . . Given these stakes, one would expect the United Kingdom and Argentina to have taken particular care in specifying the limited circumstances in which foreign investors can trigger the Treaty's arbitration process.[44]

Opponents of ISDS argue that the dramatic rise in the number of ISDS claims is indicative of abuse and that the lack of transparency lends to inconsistent results.[45] Originally intended to protect investments in countries with "corrupt or rickety rule of law," ISDS claims are now brought against countries with strong economies such as the United States, Germany, and Australia.[46] Investors now routinely challenge host governments' laws and regulations that cut into profits because of an increased number of awards for expropriation of

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https://www.washingtonpost.com/news/in-theory/wp/2016/09/13/are-multinational-corporations-undermining-freedom-in-poor-countries/?utm_term=.53b981eb91c5; Armand De Mestral, "*The Impact of Investor-State Arbitration on Developing Countries,*" CENTER FOR INTERNATIONAL GOVERNANCE INNOVATION, (November 22, 2017), https://www.cigionline.org/articles/impact-investor-state-arbitration-developing-countries; Chris Hamby, "*Secrets of a Global Super Court: Part 2 The Billion Dollar Ultimatum,*" BUZZFEED NEWS, (August 30, 2016 6:00 a.m.), https://www.buzzfeed.com/chrishamby/the-billion-dollar-ultimatum?utm_term=.ptLDbVL5z#.rtzveJ5O8

[42] Fact Sheet *supra* note 24.

[43] *BG Group PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1215 (2014) (Roberts, J., dissenting).

[44] *Id.*

[45] EDWARDS, *supra* note 24, at 14.

[46] EDWARDS, *supra* note 24, at 15-16.

future profits.[47] Corporations with a multinational presence have grown more wealthy and powerful than many nations in this extremely globalized era, calling into question whether the ISDS mechanism still works under this inverted power dynamic.[48] Critics complain that if the corporations are now more powerful than sovereign states, protecting corporate profits from a less powerful state's various public policy decisions cannot be just.[49]

The once infrequent role of third party investors has grown to carve a new industry out from the existing arbitration boom.[50] Traditionally, third party investors would provide access to justice to parties that may not have had other means of funding arbitration, by funding the up-front costs of arbitration in return for a percentage of the award.[51] Now, third party investors, essentially monitor governments for broad national policies, laws, and regulations that may cut into corporate profits.[52] Once a proposed law has been identified, these investors find and fund companies who are likely to succeed in the complaint and take a percentage of the arbitral award.[53] Similarly, corporations are also criticized for 'back-end treaty shopping,' a term analogous to 'forum shopping,' where, in United States civil procedure, litigants 'shop' for the jurisdiction with the laws most favorable to their claims and then file a complaint where they expect to have the most favorable outcome.[54] This more objectionable form of treaty shopping is characterized by a corporation restructuring investments either after a dispute has arisen or as soon as a dispute becomes foreseeable, as a method of gaining access to an ISDS agreement more favorable to that dispute.[55]

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47 *Id.* at 15.

48 *See* Hamby, supra note 37.

49 *Id.*

50 OECD Directorate for Financial and Enterprise Affairs, *Investor State Dispute Settlement Public Consultation, 16 May- July 2012*, OECD, 36-42 (2012); CHRISTIAN HEDERER, *Third-Party Funding in International Investment Arbitration Analysis and Regulatory Options,* University of Ottawa Working Paper, Technical University of Applied Sciences Wildau Dec 2016. Available at SSRN: https://ssrn.com/abstract=2952488

51 OECD Directorate for Financial and Enterprise Affairs *supra* note 51.

52 *Id.*

53 *Id.*

54 John Lee, *Resolving Concerns of Treaty Shopping in International Investment Arbitration,* 6(2) J. INT'L DISP. SETTLEMENT 355, 358 (2016).

55 *Id.*

To make matters more complex, the dearth of ISDS decisions available before the late 1990s made for an incomplete body of jurisprudence, making it difficult to predict the result of arbitral proceedings.[56] Decisions are only binding upon the parties involved in the dispute, with no system of appeal, and arbitrators have reached dramatically different results on nearly identical facts.[57] Opponents blame the private or secret nature of the proceedings for the lack of jurisprudence.[58] Details of proceedings tend to remain confidential unless both parties choose to publish them.[59] The ICSID Tribunal typically provides on its website lists of disputes and awards, but not the submissions of the parties or details of the proceedings.[60] UNCITRAL did not publish details of any proceedings until 2014, [61] although there are some awards available through subscription services and on some institutional websites.[62] Critics also blame ambiguous language and loopholes for the amount of unpredictability in arbitral decisions. [63]

III. INVESTOR STATE DISPUTE SETTLEMENT SECTIONS, EXAMINED.

There is an increasingly large body of academic study criticizing ISDS and its effects on sovereign governments to pursue legitimate public policy objectives.[64] This type of analysis tends to focus on the end results and effects of arbitral awards and decision on public policy, but there is a greater value in looking more closely at the way the unique facts of a controversy applied to the language of a treaty or agreement affect its outcomes. While many arbitral documents

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[56] Ranald, *supra* note 1, at 248.

[57] *Id.* at 249.

[58] Stephan W. Schill, *Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach*, 52 VA. J. INT'L L. 57, 70 (2011)

[59] Ranald, *supra* note 1, at 249.

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] Schill, supra note 59 at 70; Susan D. Franck and Lindsey E. Wylie, *Predicting Outcomes In Investment Treaty Arbitration*, 65 DUKE L.J. 459, 463-7 (2015).

[64] *Id.*

are confidential, or difficult to access, there is enough public information to closely explore how the ISDS mechanism functions under different circumstances and agreements.

The three ISDS disputes explored below, each initiated under a different trade agreement, provide three case studies to examine ISDS mechanisms in action as well as the tensions between national policy and foreign investments. These disputes where chosen because the triggering actions of the host state in each claim involved public policy with either broad domestic support or a clearly stated public policy objective. First, an examination of the Keystone XL controversy against the United States, and which is currently on hold. Second, an examination of the Vattenfall controversies against Germany, partially settled through an opaque deliberation process. And last, the Philip Morris controversy against Uruguay, which was settled through a relatively transparent deliberation process and provides insight into what happens during an ISDS procedure.

A. NAFTA and the Keystone Controversy

A significant amount of academic criticism has been based on cases that arose under the NAFTA ISDS provisions, with United States corporations being awarded decisions against Canada and Mexico.[65] The Keystone XL Controversy is slightly different in that it has caught the public eye and moved the discussion out of academia.

In 2015, after attracting significant negative attention from environmental activists, the Keystone XL oil pipeline, proposed by Canadian petroleum company TransCanada, was rejected by United

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[65] *See e.g.,* Mark Green, "*Keep NAFTA's ISDS Protections for US Investors*", ENERGY TOMORROW BLOG, (October 10, 2017), http://energytomorrow.org/blog/2017/10/10/keep-naftas-isds-protections-for-us-investors; Geoffrey Gertz, "*Renegotiating NAFTA: Options for Investment Protection*" Global Views, BROOKINGS INSTITUTION (March 7, 2017), https://www.brookings.edu/wp-content/uploads/2017/03/global-20170315-nafta.pdf

States President Obama[66] and became the modern symbol of environmental victory against climate change and fossil fuel use.[67] In addition to considerable public protest both against the pipeline and against its denial, President Obama's official statement rejecting the pipeline[68] sparked a debate amongst economic and legal scholars centered on executive authority, the way trade agreements are drafted, the enforcement mechanisms within them, and the overall implications for citizens; natural and corporate persons alike.[69] In a controversial move, on January 24th, 2017, President Donald Trump issued a Presidential Memorandum Regarding Construction of the Keystone Pipeline XL, effectively reversing President Barack Obama's equally controversial executive order that prohibited con-struction and operation of cross border facilities for the Keystone XL Pipeline.[70]

Prior to Donald Trump's Presidential Memorandum on January 24, 2017, TransCanada was seeking at least $15 billion in damages from the United States for allegedly violating its obligations under

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[66] Press Release, White House, Statement by the President on the Keystone XL Pipeline (Nov. 6, 2015) (on file with the White House President Barrack Obama archive); Bill Chappell, *President Obama Rejects Keystone XL Pipeline Plan*, NPR (Nov. 6, 2015 11:39AM ET), http://www.npr.org/sections/thetwo-way/2015/11/06/455007054/president-obama-expected-to-reject-keystone-xl-plan-friday.

[67] *Keystone XL-Victory*, 350.ORG , https://350.org/kxl-victory/.

[68] Coral Davenport, "*Citing Climate Change, Obama Rejects Construction of Keystone XL Oil Pipeline,*" N.Y., (November 6, 2015), https://www.nytimes.com/2015/11/07/us/obama-expected-to-reject-construction-of-keystone-xl-oil-pipeline.html.

[69] *See e.g.*, Dillon Fowler, *Keystonewalled: TransCanada's Discrimination Claim Under NAFTA and the Future of Investor-State Dispute Settlement*, 31 AM. U. INT'L L. REV. 103 (2016); Jeffrey Kleeger, *The Privatization Of Law & The Weakening Of Private Right*, 6 U. BALT. J. LAND & DEV. 55 (2016); Laurence E. Tribe, *Transcending the Youngstown Triptych: A Multidimensional Reappraisal of Separation of Powers Doctrine,* 126 YALE L.J. F. 86, 91-95 (2016).

[70] Memorandum from the President on the Construction of the Keystone XL Pipeline (Jan. 24, 2017) (on file with the White House).

Chapter 11 of NAFTA. [71] It sought relief in both United States federal court and through ISDS.[72] Like most modern trade agreements, NAFTA does not interfere with a government's sovereign right to impose environmental regulations as long as the regulations are not discriminatory against foreign corporations and investors.[73]

i. NAFTA

Even when first proposed in 1990, NAFTA was controversial—primarily because it was the first free trade agreement involving two wealthy, developed countries and a developing country.[74] Coming into force in 1994, NAFTA ultimately served as a template for certain provisions in multilateral trade negotiations during the Uruguay Round.[75] At the time, NAFTA was the most comprehensive free trade agreement ever negotiated, contained several groundbreaking provisions, and served as the model for other free trade agreements the United States later negotiated.[76] NAFTA created a trilateral trade bloc in North America between the United States, Canada, and Mexico.[77] NAFTA was the first major regional trade agreement that required a supplementary environmental cooperation agreement for passage.[78] It has two supplemental components, North American

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[71] *See* North American Free Trade Agreement ch. 11, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 (1993)[hereinafter NAFTA].

[72] Complaint, TransCanada Keystone Pipeline LLP v Kerry, et al., No 4:16-cv-00036, S.D. Tex, (2016) [hereinafter TransCanada Complaint]; TransCanada Corporation & TransCanada PipeLines Limited v. The United States of America, Notice Of Intent To Submit A Claim To Arbitration Under Chapter 11 Of The North American Free Trade Agreement, ICSID Case No. ARB/16/21, January 6, 2016, [hereinafter Notice of Intent]; TransCanada Corporation & TransCanada PipeLines Limited v. The Government of the United States of America, Request for Arbitration, ICSID Case No. ARB/16/21, June 24, 2016 [hereinafter Request for Arbitration]

[73] GATT at Article 2.2; NAFTA at Article 1106 (6).

[74] *See*, Stephen W Hartman, *NAFTA, the Controversy*, 25 INT'L TRADE J. 1, 3 (2010).

[75] ANGELES VILLARREAL & IAN F. FERGUSSONM CONG. RESEARCH SERV., R42965 THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA) 2 (2017).

[76] *Id.*

[77] *See id.*

[78] *See id.* at 9-10.

Agreement on Environmental Cooperation (NAAEC) and the North American Agreement on Labor Cooperation (NAALC).[79]

While political debate continues regarding the domestic benefits of trade-liberalization and signing onto NAFTA,[80] most economic research suggests NAFTA has provided a net benefit for all three signatories.[81] As of 2015, the United States' trade with its NAFTA partners has more than tripled since the agreement took effect—in-creasing more rapidly than trade with the rest of the world.[82]

Petroleum products specifically are a central component of United States trade with both Canada and Mexico, making up approximately 16% of total trade.[83] In 2014, Canada and Mexico accounted for 46% ($110.9 billion) of total United States crude oil imports ($241.8 billion).[84] Canada is the leading supplier of crude petroleum oil to the United States, followed by Saudi Arabia and Mexico.[85] NAFTA's extensive energy provisions have facilitated this energy and petroleum trade between the United States and Canada, and underscores the importance of petroleum trade by stating: "It is desirable to strengthen the important role that trade in energy and basic petrochemical goods plays in the free trade area . . . ."[86] By virtue of NAFTA and the private sector orientation of the energy sectors in both countries, American and Canadian companies effectively comprise a single integrated market for petroleum and are integrated in production, transport, and refining infrastructure.[87] Article 605 of

[79] *Id.*

[80] *See,* Robert Bowman, *A Growing Hostility To Free Trade Has Put NAFTA On Life Support*, FORBES (July 2, 2014 2:22 PM), http://www.forbes.com/sites/robertbowman/2014/07/02/a-growing-hostility-to-free-trade-has-put-nafta-on-life-support/#3c6227de3dfc.

[81] *See* Lorenzo Caliendo & Fernando Parro, *Estimates of the Trade and Welfare Effects of NAFTA,* 82 REV. ECON. STUD. 1, 1 (2014); *see* Mary E. Burfisher, et al., *The Impact of NAFTA on the United States*, 15 J. ECON. OF PERSP. 125, 125-26 (2001).

[82] M. ANGELES VILLARREAL & IAN F. FERGUSSON, CONG. RESEARCH SERV., R42965, THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA) 11 (2015).

[83] *Id.*at 12.

[84] *Id.* at 14.

[85] *Id.* at 12-13.

[86] NAFTA, *supra* note 72, at art. 601.2.

[87] PAUL W. PARFORMAK & MICHAEL RATNER, CONG. RESEARCH SERV., R41875, THE U.S.- CANADA RELATIONSHIP: JOINED AT THE WELL 12 (2011).

NAFTA places restrictions on the ability of the United States to limit exports of energy and petro-chemical goods to Canada and vice versa (Mexico is not party to Article 605).[88] Both GATT and NAFTA contain national security exceptions, though NAFTA limits the scope of the exceptions for the United States and Canada in energy trade.[89]

ii. The Keystone XL Controversy

In 2008, TransCanada sought to expand its existing pipeline to transport Canadian tar sands (or oil sands) crude to a market hub in Nebraska, where it would be processed for further transport to the Gulf Coast region refineries.[90] After announcing its plans, the company applied for a cross-border presidential permit with the United States Department of State (DOS).[91] Opposition to Keystone XL began to mount in the United States.[92] First, TransCanada ran into routing issues in Nebraska.[93] Then legislators began calling for greater environmental oversight,[94] scientists began speaking out against the project,[95] and the EPA questioned the necessity of the

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[88] NAFTA, *supra* note 72, at art. 605.

[89] *Id.*

[90] Press Release, TransCanada, Keystone Pipeline to Expand to Serve the U.S. Gulf Coast, July 16, 2008, (archived at https://www.transcanada.com/en/announcements/2008-07-16keystone-pipeline-to-expand-to-serve-the-u.s.-gulf-coast/); Keystone XL 101 Route Maps, available at http://www.keystone-xl.com/kxl-101/maps/

[91] *Keystone XL Timeline*, U.S. CHAMBER OF COMMERCE, http://www.energyxxi.org/keystone-xl-timeline (last visited March 2, 2017).

[92] Suzanne Goldenberg, "*Thousands protest at the White House against Keystone XL pipeline,*" GUARDIAN, November 6, 2011

[93] Kim Murphy, *"Keystone pipeline builder proposes changing Nebraska route*," LOS ANGELES TIMES, November 15 2011.

[94] Letter to Secretary of State Hillary Clinton from Senators Bernard Sanders, Patrick Leahy, and Ron Wyden, October 17, 2011, archived at https://foia.state.gov/searchapp/DOCUMENTS/Waterfall/193727.pdf

[95] Letter from Scientific Experts to President Obama Regarding Authorization of the Keystone XL Pipeline, August 3 2011, text available at https://climatechangepsychology.blogspot.com/2011/08/letter-from-scientific-experts-to.html; Letter to Congressional Leadership from Concerned Scientists, February 13, 2012, text available at https://350.org/top-climate-scientists-warn-congress-over-keystone-xl/

pipeline in its Environmental Impact Statement.[96] Extensive protests began, resulting in the arrest of approximately a thousand people over a few weeks,[97] including celebrities.[98] After delays, the House passed H.R 1938, or The North American- Made Energy Security Act, among others, which required a decision be made within sixty days. [99] In 2011, the State department concluded that the Keystone XL pipeline would have no significant impacts as proposed.[100] Environmental protesters had decried the pipeline for traversing Nebraska's Ogallala Aquifer, a source of drinking water to millions on the Great Plains.[101] By 2012, President Obama rejected the TransCanada permit application.[102]

Afterwards, TransCanada submitted a second request for a permit from DOS.[103]In 2013, President Obama said that he would only reject the pipeline if it did not significantly exacerbate climate

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[96] EPA Comments in response to Keystone XL Supplemental Draft EIS, June 6, 2011, available at https://www.eenews.net/assets/2011/06/07/document_gw_02.pdf

[97] Sarah Wheaton, " *Hundreds Face Arrest at Anti-Pipeline Protest*," Caucus Blog, N.Y. TIMES, March 2, 2014 ("The Keystone XL pipeline has become a touchstone for the environmental movement, and civil disobedience has been a key tactic: 1,200 were arrested at the White House over two weeks in the fall of 2011, and smaller-scale actions have taken place around the country.")

[98] CNN "Daryl Hannah Arrested at White House Protest" CNN, August 31, 2011 http://www.cnn.com/2011/SHOWBIZ/celebrity.news.gossip/08/30/daryl.hannah.protest/index.html

[99] NORTH AMERICAN-MADE ENERGY SECURITY ACT, H.R REP. 112-140, at 3 (2011). *See* Adam Vann et al., CONG. RESEARCH SERV., R42124, Proposed Keystone XL Pipeline: Legal Issues 4 (2012) at 3 ("The North American Energy Security Act (S. 1932), the American Energy Security Act (H.R. 3537), and the Middle Class Tax Relief and Job Creation Act of 2011 (H.R. 3630) also would require the Secretary of State to issue a permit for the project within 60 days of enactment, unless the President publicly determines the project to be not in the national interest.")

[100] *See* U.S. Dep't. of State, Final Environmental Impact Statement Keystone XL Project, vol.2 section 3.15 (Aug. 26, 2011).

[101] The Canadian Press Staff, *A timeline of important dates in Keystone XL pipeline history,* GLOBAL NEWS CAN., (Jan. 7, 2016) http://globalnews.ca/news/2438078/a-timeline-of-important-dates-in-keystone-xl-pipeline-history/ [hereinafter *Timeline]*.

[102] *Id.*

[103] *Id.*

change.[104] The following year, the Department of State released its final environmental impact statement that reiterated that pipeline would not significantly exacerbate climate change.[105] However, a Nebraska district judge declared the pipeline's route was unconstitutional, triggering DOS to extend interagency review of this pipeline because of the ongoing litigation regarding the pipeline in Nebraska.[106] By early 2015, the House and the Senate had agreed upon a bill that would allow the Keystone pipeline to be built, with most commentary in favor of its construction focused around creating jobs and strengthening the economy.[107] President Obama vetoed the bill and Congress failed to override the veto.[108]

TransCanada requested that DOS suspend review while litigation continued in Nebraska.[109] Meanwhile, President Obama faced pressure from the public and from Congressional Representatives to officially reject TransCanada's Keystone XL pipeline application before the UN Convention on Climate Change on Nov 30, 2015.[110] On November 3, 2015 the Department of State officially rejected the permit,[111] and on November 6, 2015, President Obama announced the rejection in a press conference.[112] The main argument for rejection was that would set the tone for the United States' seriousness about climate change.[113]

TransCanada Corp. pursued legal action against President Obama's rejection of the Keystone XL Pipeline in two forums.[114] The suit was in United States federal court, in the Southern District

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104 Remarks by the President on Climate Change, Georgetown University, Jun. 25, 2013 (on file with the White House President Barack Obama Archive) at https://obamawhitehouse.archives.gov/the-press-office/2013/06/25/remarks-president-climate-change)

105 *See Timeline supra* note 102.

106 *Id.*

107 *Id.*

108 *Id.*

109 *Id.*

110 *See Timeline supra* note 102.

111 U.S. Dep't of State, Record of Decision and National Interest Determination, TransCanada Keystone Pipeline L.P. Application for Presidential Permit, section 7.0 (Nov. 3, 2015), https://2012-keystonepipeline-xl.state.gov/documents/organization/249450.pdf [hereinafter Record of Decision]

112 Press Release, *supra* note 67.

113 *See generally* Record of Decision, *supra* note 112.

114 *See* Timeline *supra* note 102.

of Texas, and accused President Obama of "exceed[ing] his authority . . . when he blocked the pipeline's construction."[115] The United States Chamber of Commerce, Oklahoma, Kansas, Montana, Nebraska, South Dakota, and Texas filed briefs supporting TransCanada's lawsuit against the Obama administration—a sure sign of competing national interests.[116] The second suit was an international petition seeking to recover $15 billion in costs and damages that TransCanada incurred in relation to the Keystone XL Pipeline denial through ISDS. [117]

By filing its two complaints, TransCanada added fuel to a growing resistance against free-trade agreements, and amplified the chorus of misgivings about the investment-arbitration and environmental provisions in the then proposed TPP.[118] Critics viewed TransCanada's NAFTA claims against the United States as a canary in the coal-mine, raising concerns on three major issues.[119] First, concerns regarding the effect that investor state dispute settlements may have on the United States' ability to implement environmental protection policies and exercise its sovereignty.[120] Second, the mounting objections regarding the lack of transparency in arbitral tribunals.[121] And third, that this was another alarming example of international

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[115] Complaint *supra* note 73,

[116] Amicus Brief, TransCanada Keystone Pipeline LLP v Kerry, et al., No 4:16-cv-00036, S.D. Tex, (2016) (available at http://www.chamberlitigation.com/cases/transcanada-keystone-pipeline-lp-v-kerry-et-al);

[117] Notice Of Intent *supra* note 73; Request for Arbitration, *supra* note 73.

[118] *See* Ben Beachy, "*The Corporation behind Keystone XL Just laid bare the TPP's Threats to Our Climate*" SIERRA CLUB, (January 7, 2016), https://www.sierraclub.org/compass/2016/01/corporation-behind-keystone-xl-just-laid-bare-tpp-s-threats-our-climate; Jefferey Sachs, Brook Güven, and Lisa Sachs, "*Op Ed: TransCanada lawsuit highlights need to scuttle TPP*" MSNBC, (July 16, 2016), http://ccsi.columbia.edu/files/2016/07/MSNBC-TransCanada-lawsuit-highlights-need-to-scuttle-TPP-July-2016.pdf

[119] Sachs *supra* 119.

[120] Beachy *supra* 119 ("It is part of a rising trend of fossil fuel corporations using trade and investment deals to attack environmental victories in private tribunals."); Sachs *supra* 119; *Statement of Caroll Muffett on TransCanada Lawsuit Using the Investment Chapter of NAFTA*, CENTER FOR INTERNATIONAL ENVTL. L. (Jan. 6, 2016), http://www.ciel.org/news/8886/.

[121] EDWARDS *supra* note 24 at 13

law appearing to prioritize corporate dominance over public policy.[122]

iii. Analysis of Keystone XL under NAFTA

The primary dispute mechanisms in NAFTA can be found under Chapters 11, 19, and 20.[123] Of particular importance in the Keystone XL debate are Chapter 11 and Chapter 20. The language in Chapter 11 establishes the ISDS mechanism, allowing investors to seek recourse against the offending host government through ICSID or UNCITRAL rules, with enforcement from the host government's domestic courts.[124] Chapter 20 provides for scientific review boards that can be called on by the arbitration panel in consultation with the aggrieved party to provide reports on any factual issues related to environmental, health or other scientific categorizations.[125]

Like most other investment treaties, NAFTA commits its host governments to a Fair and Equitable Treatment, or FET standard, meaning that host governments must extend fair and equitable treatment to investors of other states.[126] In other arbitral settings, states have been found in violation of FET agreements for failing to be transparent in administrative decision-making, or in inconsistent actions of state agencies towards the investor such as encouragement and approval from one agency and denial of permits from another.[127] Violations based on administrative inconsistencies speak to the concept of the "legitimate expectations of the investor," which protects the rights of investors to make decisions based on an expectation of

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[122] Statement of Caroll Muffett, *supra 121.*("With a single press release, TransCanada has proven what concerned citizens have argued for decades – that the primary purpose of ISDS is to subvert democratic processes and the public interest, in the name of private profit."); Haley Sweetland Edwards, "*Keystone Pipeline Challenged in Shadowy 'Court'*" TIME, January 7, 2016

[123] *See generally,* NAFTA *supra* note 72.

[124] *Id.* at Chap. 11.

[125] *Id.* at Chap. 20.

[126] *Id.* at Chap. 11, art. 1105.

[127] *See e.g.,* Metalclad Corporation v. United Mexican States, ICSID case No ARB/AF/97/1, Tribunal Decision August 30, 2000. (The Tribunal found that because there was no clear rule concerning construction permits requirements in Mexico, had "failed to ensure a transparent and predictable framework for Metalclad's planning and
investment"(¶ 99))

consistent actions from its host government—a key concept underlying ISDS and protecting Foreign Direct Investments.[128]

In its Notice of Intent to pursue arbitration, TransCanada claims that the United States breached its obligations under Articles 1102, 1103, 1105, and 1110 of NAFTA subsequently causing damages to TransCanada.[129] It argued that the United States unjustifiably delayed processing of the permit, unjustifiably denied the permit, and unjustly discriminated against the pipeline.[130]

Article 1110 establishes the possibility of indirect expropriation, by prohibiting state actions that are "tantamount to expropriation." The text reads as follows:

> 1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:
>
> (a) for a public purpose;
>
> (b) on a non-discriminatory basis;
>
> (c) in accordance with due process of law and Article 1105(1); and
>
> (d) on payment of compensation in accordance with paragraphs 2 through 6.[131]

This language is ambiguous and when interpreted narrowly or broadly either interpretation will lead to different results. However, in this situation the facts indicate a likely resolution in favor of TransCanada under both interpretations.

TransCanada's permit was denied for symbolic reasons rather than on the basis of scientifically supported negative environmental

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[128] *See* Elizabeth Snodgrass, *Protecting Investors' Legitimate Expectations – Recognizing and Delimiting a General Principle*, 21 ICSID REV. - FOREIGN INV. L.J. 1, 11 (2006)

[129] Notice of Intent, *supra* note 73.

[130] *Id.* at ¶ 8.

[131] *NAFTA, supra* note 72, Chap. 11, art. 1110.

impacts.[132] However, similar projects moved forward.[133] While numerous opponents of the Keystone XL Pipeline, including members of Congress made statements questioning the national benefits a pipeline to assist in the export of Canadian oil via the United States ports in the Gulf of Mexico, any argument that this discrimination was on the basis of Canadian corporate citizenship would be tenuous at best. However, there is no indication in the NAFTA text that the discrimination in question must be based on investor citizenship. The text merely points to any discrimination that exists. Even under a narrow interpretation, the fact that Keystone XL was singled out from other pipelines and evaluated with an additional element of 'public perception' that did not ostensibly apply to other pipeline construction does not look favorable for the United States govern-ment.

In regards to the idea that permit denial rises to the "tantamount to expropriation" standard in Article 1110,[134] TransCanada has some weight to its case. For a purpose without any obvious tangible results, the permit denial for the Keystone XL pipeline foreclosed TransCanada's ability to benefit from its time spent and billions in investments.[135] The lack of obvious tangible results supports arguments that the decision was arbitrary, rather than measured, predictable, and fair. The United States government would need to make a strong case that foreign policy and intangible gains of international soft power are a significant public policy benefit. The United States could also point to the massive protests to demonstrate that the pipeline was a source of civil unrest and that its denial was in the service of public interests. However, this reasoning would be stretching the definition of public interest.

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[132] Secretary of State John Kerry Press Statement on the Keystone XL Pipeline Permit Determination, November 6, 2015 ("The critical factor in my determination was this: moving forward with this project would significantly undermine our ability to continue leading the world in combatting climate change . . . while it would facilitate the transportation to the United States of one of the dirtiest sources of fuel on the planet, the proposed project by itself is unlikely to significantly impact the level of crude extraction or the continued demand for heavy crude oil at refineries in the United States." https://2009-2017.state.gov/secretary/remarks/2015/11/249249.htm

[133] *See generally* Notice of Intent*, supra* note 86.

[134] NAFTA*, supra* note 72, Chap. 11, art. 1110.

[135] Complaint, *supra* note 73 at ¶ 49.

To counter the claim that the decision was unfairly arbitrary the United States could rely on the fact that the permit is a discretionary rather than ministerial or administrative permit. An administrative permit is one in which an agency or governmental body must dis-pense the permit once it is determined that the applicant has con-formed to whatever applicable statutes, ordinances, or regulations require, without any deliberation or exercise of judgment. A discre-tionary permit, on the other hand, is one in which the agency or gov-ernmental officials who dispense the permit must use their discre-tion. This means that when analyzing whether or not to award the permit to the applicant, there are no circumstances that mandate per-mit issuance.

Articles 1102, 1103, and 1105 establish the FET standards along with Most Favored Nation (MFN) Treatment standards as the minimum standards of treatment.[136] Here, TransCanada's success would rely upon an interpretation of the language that does not require that the cause of discrimination be its status as a foreign corporation. Additionally, this line of argumentation is weakened by the fact that United States corporations pursued the other pipelines that were approved without any fanfare or difficulty.[137] Traditionally, one of the chief complaints against ISDS is that the mechanism is only available to foreign investors and domestic corporations do not have the opportunity to challenge their government in an arbitral setting. In this case, the fact that neither domestic corporation has access to ISDS with the United States could be used to argue that without this avenue TransCanada is already receiving treatment more favorable to other corporations. While this argument is tenuous and uses the complaints against ISDS, it is still a potential defense for the United States.

To date the United States has never lost an arbitration dispute under NAFTA,[138] however based on a preliminary analysis of the facts and the NAFTA text, it is quite possible that this case could have been the first loss for the United States. A $15 billion award enforced against the United States would be a devastating and expensive first blow under this mechanism—an expensive bill left for

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136 *NAFTA, supra* note 72, Chap. 11, arts. 1102-03, 1105.

137 Complaint *supra* note 73 at ¶¶25-27.

138 Mark Green *supra* note 66.

the American taxpayer to a pay for the ability to say it temporarily had the appearance of a strong stance on climate change. One can only speculate on the final results of this arbitration would have been; the United States may have avoided a negative arbitral award when the Trump Administration granted TransCanada the presidential permit for the Keystone XL pipeline, and rendered the issues moot.[139]

B. International Energy Charter Treaty and the Vattenfall Controversy

Similarly to NAFTA, the International Energy Charter Treaty (ECT) was developed in the early 1990s to facilitate trade, specifically in the post-cold war European energy sector.[140] The formation of the WTO and the end of the Cold War provided the opportunity to overcome economic divisions between Western European and Post-Soviet nations.[141] In the 1970s and 1980s, despite pressure from the United States,[142] Western European countries had begun negotiations and construction of a natural gas pipeline from the Soviet Union. By December 1991 and the end of the Cold War, a political declaration, the European Energy Charter, announced the general principles of an energy trade and investment treaty signatories intended to develop.[143] What is now known as the ECT was signed in 1994, and together with the Protocol on Energy Efficiency and

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[139] Order Regarding Notice Of Granting Of Presidential Permit And Of Voluntary Dismissal, TransCanada Keystone Pipeline LLP v Kerry, et al., No 4:16-cv-00036, S.D. Tex, (2017); Luciana Lopeez, *"Trump administration grants permit for Keystone pipeline- TransCanada"*, Reuters, March 24, 2017 8:55 AM https://www.reuters.com/article/usa-pipeline-keystone/trump-administration-grants-permit-for-keystone-xl-pipeline-transcanada-idINKBN16V1L0

[140] *The Energy Charter Process*, INT'L ENERGY CHARTER, http://www.energycharter.org/process/overview/.

[141] *Id.*

[142] *See* Paul Lewis, *U.S. Asks Its Allies To Deny To Soviet Parts for Pipeline,* N.Y. TIMES (Jan. 11, 1982), http://www.nytimes.com/1982/01/11/world/us-asks-its-allies-to-deny-to-soviet-parts-for-pipeline.html); *See generally* JOHN HARDT, CONG. RESEARCH SERV; DONNA L. GOLD, IB82020 CONG. RESEARCH SERV; SOVIET GAS PIPELINE: U.S. OPTIONS (1982). (accessible at https://digital.library.unt.edu/ark:/67531/meta-crs8790/m1/1/high_res_d/IB82020_1982Oct08.pdf).

[143] *The Energy Charter Process*, INT'L ENERGY CHARTER, http://www.energycharter.org/process/overview/.

Related Environmental Aspects (PEEREA), created the framework that facilitated an integrated energy sector.[144]

The ECT expanded the foundational trade rules of GATT and the WTO to create open energy markets, establish protections for Foreign Direct Investments (FDI), encourage energy efficiency, and establish energy transit protocols amongst its 54 signatories.[145] Today's version of the ECT, initially signed into force in 2015, has 86 signatory countries, in addition to the European Union (E.U.), the European Atomic Energy Community (EAEC/Euratom), and the Economic Community of West African States (ECOWAS).[146]

i. The Vattenfall Controversies: Vattenfall I & II

In 2004, Swedish company Vattenfall purchased HEW, an electricity provider located in Hamburg, Germany, and made plans to replace the existing coal power plant with a larger power plant.[147] In 2006, the United Nations released a report, known as the Stern Review, on the Economics of Climate Change.[148] The report was named after Nicholas Stern, a former World Bank chief economist who led the research efforts.[149] This report forecasted a global economic crisis unless climate change was effectively curtailed.[150] Meanwhile, when this 700-page report was released, Vattenfall had already filed applications required by existing regulations for the new plant

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144 *The Energy Charter Treaty*, INT'L ENERGY CHARTER, https://energycharter.org/fileadmin/DocumentsMedia/Legal/1994_ECT.pdf ; *Energy Efficiency Group,* INT'L ENERGY CHARTER, https://energycharter.org/who-we-are/subsidiary-bodies/energy-efficiency-group/.

145 *The Energy Charter Treaty*, INT'L ENERGY CHARTER, http://www.energycharter.org/process/european-energy-charter-1991/

146 *Overview: The International Energy Charter*, INT'L ENERGY CHARTER, [hereinafter ECT Overview]. http://www.energycharter.org/process/international-energy-charter-2015/overview/

147 Sebastian Knauer, *Power Plant Battle Goes to International Arbitration,* DERSPIEGEL ONLINE (July 15, 2009 6:38 PM), http://www.spiegel.de/international/germany/vattenfall-vs-germany-power-plant-battle-goes-to-international-arbitration-a-636334-2.html.

148 *Id.*

149 *A Heating Bill for the Planet,* DERSPIEGEL ONLINE (Oct. 31, 2006, 4:05 PM), http://www.spiegel.de/international/climate-change-a-heating-bill-for-the-planet-a-445651.html.

150 *Id.*

to comply with air and water pollution standards.[151] While the impression at the time was that Vattenfall was well underway to obtaining its permits, the climate report had a significant political impact and environmental groups were protesting the continued use of coal.[152] Politicians were declaring that there were plenty of available measures to stop the power plant's construction, if they were elected.[153]

Vattenfall was asked to make improvements to its plans and use the latest technologies to protect the new environmental objectives to avoid ecological harms to the local river, the Elbe, by using less water for cooling.[154] Finding these requests burdensome and costly, it pursued negotiations with agencies, and an administrative judgment to avoid the constantly changing requirements and costs.[155] Even though the Administrative court granted Vattenfall the permits, it stipulated a significant number of changes.[156] Vattenfall argued the changes were uneconomical and would result in a significant loss in value.[157] It argued that any ecological benefits of reduced water usage would reduce output and productivity; thus, it would be contesting the decisions and seeking $1.4 billion in damages through international arbitration under the ECT.[158]

In 2009, despite retaining counsel and placing its required Plaintiff's fee of $25,000 into a trust account in New York to begin the arbitration, Vattenfall announced it would be opening a power plant with a €200 million high tech hybrid cooling tower that would use one-tenth of the amount of water from the river.[159] However, Vattenfall did not file any applications and appeared to be waiting for the resolution of the arbitration before doing so.[160] On March 11, 2011, the International Center for Settlement of Investment Disputes released a certified copy of an award indicating that Vattenfall and

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151 Knauer, *supra* note 147.
152 *Id.*
153 *Id.*
154 *Id.*
155 *Id.*
156 Knauer, *supra* note 147.
157 *Id.*
158 *Id.*
159 *Id.*
160 *Id.*

Germany settled their case, presumably for an undisclosed amount.[161]

On that same day, March 11, 2011, a magnitude 9.0 earthquake struck the Pacific Coast of Japan, with its epicenter in the northeastern Tōhoku region.[162] It is one of the strongest recorded earthquakes in history and the strongest earthquake that has ever hit Japan.[163] The tsunami that followed caused an unprecedented loss of human life and physical devastation in its wake, including the disruption of eleven nuclear reactors, and the nuclear meltdowns and hydrogen explosions at the Fukushima Daiichi nuclear power plant.[164]

Germany has a decades-long history of public debate around nuclear energy, with consistent opposition to expansion of nuclear power, and Fukushima pushed it over the tipping point.[165] Immediately following the disaster, an estimated 110,000 Germans took to the streets to protest against the expansion of nuclear power in Germany.[166] Just days after the Fukushima earthquake, German Chancellor Angela Merkel announced the permanent closure of seven of the country's seventeen nuclear reactors, focusing on the country's oldest reactors.[167] She also announced plans to "accelerate the energy conversation" on Germany's shift to renewable energy sources, or Energiewende.[168] By the end of March, Germany witnessed its largest recorded anti-nuclear demonstration, which was organized

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[161] Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG, v. Fed. Republic of Germany, ICSID Case No. ARB/09/06,Award, (March 11, 2011). [hereinafter Vattenfall (I) Award]

[162] *2011 Japan Earthquake- Tsunami Fast Facts,* CNN News (Updated March 16, 2018, 2:18 PM), https://www.cnn.com/2013/07/17/world/asia/japan-earthquake---tsunami-fast-facts/index.html.

[163] *Id.*

[164] *Id.*

[165] Paul Hockenos, "*Why Germans are so skeptical about nuclear energy,*" WORLD POLICY, (May 10, 2012) https://worldpolicy.org/2012/05/10/why-germans-are-so-skeptical-about-nuclear-energy/; Rebecca Staudenmaier, "*Germany's nuclear phase-out explained,*" DW, (Jun. 15, 2017), http://www.dw.com/en/germanys-nuclear-phase-out-explained/a-39171204.

[166] Ben Knight, *Merkel shuts down seven nuclear reactors,* DW (March 15, 2011), http://dw.com/p/10ZL6.

[167] Nathalie Bernasconi-Osterwalder & Martin Dietrich Brauch, IISD, *The State of Play in Vattenfall v. Germany II: Leaving the German public in the dark* (Dec. 2014).

[168] Knight, *supra* note 167.

around the slogan, "heed Fukushima—shut off all nuclear power plants."[169] Within a few months, legislation passed to officially phase out nuclear power plants from the country by 2022.[170]

Soon after the legislation was enacted, several nuclear power plant operators announced their intentions to contest the law.[171] Two of the oldest nuclear reactor facilities were owned and operated by Vattenfall.[172] The Vattenfall CEO at the time claimed that an immediate shutdown would cost the company $1.5 billion in 2011 revenue alone.[173]

On May 31 2012, the Swedish energy company, relying on its rights as a foreign investor, registered another claim at the ICSID against the German government under the ECT.[174] Like the recent TransCanada case against the United States, Vattenfall covered all its bases and also filed a lawsuit before Germany's Federal Constitutional Court.[175]

ii. Analysis of Vattenfall I & II under the ECT

Unlike other bilateral and multilateral investment treaties, the ECT does not require investors to first exhaust national or E.U. legal remedies before pursuing ISDS.[176] The ECT also does not prevent investors from pursuing both methods concurrently, or to try the other forum if the first is unsuccessful.[177] While ICSID rules do not require that proceedings remain confidential, the proceedings of

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[169] MARK FULTON ET AL., THE 2011 INFLECTION POINT FOR ENERGY MARKETS 32 (DB Climate Change Advisors, Deutsche Bank Grp, May 2011).

[170] Judgment of the First Senate of 06 December 2016, 1 BvR 2821/11, BVerfG, http://www.bverfg.de/e/rs20161206_1bvr282111en.ht.

[171] Staudenmaier, *supra* note 166.

[172] Bernasconi-Osterwalder & Brauch *supra* note 168 at 2.

[173] *Id*.

[174] Vattenfall AB and others v. Federal Republic of Germany, ICSID Case No. ARB/12/12 [hereinafter Vattenfall II] https://www.italaw.com/cases/1654

[175] Bernasconi-Osterwalder & Brauch, *supra* note 168.

[176] Christoph Schreuer, *Interaction of International Tribunals and Domestic Courts in Investment Law*, CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS (2010) 72-73

[177] *See* The Energy Charter Treaty, art. 26 § (3)(b)(i), Dec. 1994.

both Vattenfall cases are unavailable for review,[178] so an examination of procedural orders and public filings can be used for analysis.

Vattenfall filed its first complaint against the German federation claiming that the provisions set out in Part 3 of the ECT for the protection and promotion of investments were violated by requiring the environmental permits.[179] Article 10(1) of the ECT requires contracting parties to "encourage and create stable, equitable and transparent conditions for investors of other contracting parties."[180] Likewise, Article 13 of the ECT establishes that investments may not be nationalized, expropriated, or subjected to "an action equivalent to nationalisation or expropriation" without compensation.[181]

In the second Vattenfall case, Germany first objected to the tribunal jurisdiction and merits of the case under ICSID's Arbitration Rule 41(5).[182] Under ICSID Arbitration Rule 41(5), a party may file an objection against a claim that is "manifestly without merit."[183] While this rule allows an early conclusion to the arbitration process, this is only appropriate where the claim is without merit on its face.[184] The proceedings continued,[185] indicating that the tribunal found there was at least possible controversy on the face of the complaint. Vattenfall's arguments most likely rest upon the argument that environmental regulations constitute indirect expropriation and that it had a legitimate expectation to be free of arbitrary measures, as there was no direct expropriation of property when Germany passed the regulations. In cases of indirect expropriation, the investor retains its property but is so adversely affected by regulatory

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178 Nathalie Bernasconi-Osterwalder, Background paper on Vattenfall v. Germany arbitration, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, (July 2009) 4.

179 Request for Arbitration, Vattenfall AB,Vattenfall Europe AG, Vattenfall Europe Generation AG, v. Fed. Republic of Germany, ICSID Case No. ARB/09/06, (March 30 2009), [hereinafter Vattenfall (I) Request for Arbitration] ¶ 69, https://www.italaw.com/sites/default/files/case-documents/ita0889.pdf

180 The Energy Charter Treaty, art. 10, § 1, Dec. 1994.

181 *Id.* at art. 13, Dec. 1994.

182 Vattenfall II, *supra* note 175

183 *Manifest Lack of Legal Merit- ICSID Convention Arbitration,* ICSID, https://icsid.worldbank.org/en/Pages/process/Manifest-Lack-of-Legal-Merit.aspx.

184 *Id.*

185 Vattenfall II, *supra* note 175

measures that it amounts to losing the benefit of the property rights.[186]

Just as in the dispute between the United States and TransCanada under NAFTA, the resolution of the dispute between Vattenfall and Germany can only be speculation at this point, due to the confidential nature of the proceedings. Unlike the Keystone dispute, however, there is likely to be a resolution as none of the causes of the dispute will change in the foreseeable future.

C. The 1988 Switzerland – Uruguay Bilateral Investment Treaty

The controversy between Philip Morris and Uruguay is of particular interest because, unlike the Keystone XL and Vattenfall cases, this dispute has already been resolved, with a significantly larger amount of procedural documents available for public examination.

Signed in 1988,[187] the bilateral investment treaty between Switzerland and Uruguay establishes fairly conventional rules for trade between the two countries. The BIT provides the standard provisions found in modern bilateral agreements; a provision for fair and equitable treatment, one for most favored nation treatment, one against expropriation, exceptions for public policy considerations and of course provisions for ISDS.

i. Philip Morris v. Uruguay

Philip Morris International is multinational cigarette and tobacco company with products sold in 180 countries— its best-selling and most recognized product is Marlboro cigarettes.[188] Its corporate headquarters are in New York and its operational headquarters are in Lausanne, Switzerland.[189] In the early 20th Century to-

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[186] OECD Directorate for Financial and Enterprise Affairs, *"Indirect Expropriation" and the "Right to Regulate" in International Investment Law,* September 2004, OECD, 2-4 (2004).

[187] Switzerland-Uruguay Bilateral Investmnt Treaty, Available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/3121

[188] PHILIP MORRIS INT'L, https://www.pmi.com.

[189] *Company Info.*, PHILIP MORRIS INT'L, https://www.pmi.com/company-information.

bacco smoking was extremely common and even supported by medical academia.[190] In fact, during the 1930s, the companies' tobacco advertisements were a steady source of income for numerous medical organizations and journals, including the New England Journal of Medicine and the Journal of the American Medical Association.[191] However, as more research and evidence emerged showing the negative health impacts of smoking, physicians and the public began to quit smoking and consuming tobacco.[192] Tobacco companies responded with advertisements implying health benefits of smoking such as weight loss,[193] and severely tarnished their credi-bility.[194] Philip Morris now runs a health information web site out-lining the health issues of tobacco.[195] However, it has been criticized as a "public relations effort intended to help the company avoid pun-ishment and regulation."[196] Because tobacco is considered "the sin-gle greatest cost of preventative death globally,"[197] Philip Morris and its competitors are increasingly seen as controversial companies and subject to restrictive legislation from governments and ongoing campaigns warning the public of health impacts.[198]

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[190] Martha N. Gardner & Allan M. Brandt, "*The Doctors' Choice is America's Choice," The Physician in US Cigarette Advertisements, 1930-1953,* 96 AM. J. PUB. HEALTH 222 (2005).

[191] *Id.*

[192] *Id.*

[193] *Id.*

[194] Elizabeth A. Smith & Ruth E. Malone, *Philip Morris's Health Information Web Site Appears Responsible but Undermines Public Health,* 25 PUB. HEALTH. NURSING 554 (2008).

[195] *Id.*

[196] *Id.*

[197] WHO REPORT ON THE GLOBAL TOBACCO EPIDEMIC, 2008: THE MPOWER PACKAGE 8, World Health Organization, (2008).

[198] *See e.g.,* Sabrina Tavernese, "*Tobacco Firms' Strategy Limits Poorer Countries' Smoking Laws,*" N.Y. TIMES, (Dec. 13, 2013) https://www.nytimes.com/2013/12/13/health/tobacco-industry-tactics-limit-poorer-nations-smoking-laws.html; Matthew Bramall & Paul Kenlyside, "*Big tobacco bullies the global south. Trade deals are their biggest weapon,*" GUARDIAN, (Jul. 17, 2017), https://www.theguardian.com/commentisfree/2017/jul/17/big-tobacco-trade-deals-new-markets-bat

Globally, tobacco consumption kills approximately 5.1 million people per year[199] and, according to the World Health Organization (WHO), is responsible for nearly 12% of all deaths for adults over 30 years old.[200] In 2003, at the 56th annual World Health Assembly, member states signed the Framework Convention on Tobacco Control (FCTC). [201] The FCTC entered into force in 2005 with 180 parties.[202] The legally binding treaty committed all member states to implement country-level tobacco control measures to combat the negative public health effects of tobacco consumption.[203]

Uruguay was one of the first countries to sign and ratify the treaty.[204] Though Uruguay had enacted legislation in 1982 to restrict tobacco advertisements to minors and to print text warnings on boxes, those efforts were not as successful as they could have been.[205] At the time FCTC was ratified, both in Uruguay and in the rest of the Southern regions of Latin America, smoking was a socially accepted behavior and public awareness regarding the risks of tobacco use was low, while the smoking prevalence rate was 33.3%. [206]

In 2006, former oncologist and President of Uruguay Tabaré Vàsquez made a speech outlining his vision to make Uruguay a "smoke free" country.[207] That year, Uruguay banned smoking in public spaces, raised taxes on tobacco products, and required large

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[199] WHO GLOBAL REPORT: MORTALITY ATTRIBUTABLE TO TOBACCO, World Health Org. (2012). Available at: http://www.who.int/tobacco/publications/surveillance/rep_mortality_attributable/en/.

[200] Philip Morris Brands SARL, Philip Morris Products S.A, & Abal Hermanos S.A., v. Oriental Repubic of Uruguay, ICSID Case No. ARB/10/7Arbitral Award, (July 8, 2016) [hereinafter Philip Morris Int'l v. Uruguay Award].

[201] WHO Framework Convention on Tobacco Control, May 21, 2003, 42 I.L.M. 518 (2003) [hereinafter WHO FCTC]

[202] *Id.*

[203] *Id.*

[204] Philip Morris Int'l v. Uruguay Award, *supra* note 201 ¶ 85.

[205] Amicus Curiae Brief Submitted by Pan American Health Org., Philip Morris Brands SARL, Philip Morris Products S.A, & Abal Hermanos S.A., v. Oriental Repubic of Uruguay, ICSID Case No. ARB/10/7 [hereinafter PAHO Amicus Brief] ¶ 20

[206] PAHO Amicus Brief at ¶19

[207] TODD WEILER, PHILIP MORRIS VS. URUGUAY: AN ANALYSIS OF TOBACCO CONTROL MEASURES IN THE CONTEXT OF INT'L INVESTMENT LAW (Physicians for a Smoke Free Canada, July 28, 2010) 3.

warnings and graphic images including diseased lungs and rotting teeth on cigarette packages.[208] In 2008 and 2009, additional laws and regulations were introduced, with implementation methods such as increasing fines for non-compliance, banning promotion of 'light' or 'mild' cigarettes, and requiring health warnings take up 80% of all tobacco packaging.[209] Philip Morris challenged the regulations in Uruguayan courts, arguing that they violated several provisions in the BIT between Switzerland and Uruguay, including its intellectual property rights.[210] In February 2010, Philip Morris filed a complaint against Uruguay under the Switzerland-Uruguay BIT seeking $25 million in damages.[211]

The complaint was not received well by the international community, and a variety of Amicus briefs and supporting documents came in from several organizations.[212] In an expert opinion analyzing tobacco control measures in the context of international investment laws, Todd Weiler noted that the arbitration move was a deliberate political statement with its claim under the BIT.[213] In particular, Weiler made note that Uruguay has a fairly small population size of 3.4 million and that Philip Morris had structured its holding companies in Switzerland.[214] He argued that if Philip Morris were to prevail in its claim against Uruguay, it would be nearly certain that "its choice of Switzerland as a corporate base indicates that more claims against other developing nations could follow."[215]

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208 *Id* at 4.

209 *Id.*

210 Philip Morris Int'l v. Uruguay Award *supra* note 201 at ¶153-167.

211 Philip Morris Int'l v. Uruguay Award *supra* note 201.

212 *Investment Dispute Settlement: Philip Morris v. Uruguay,* INVESTMENT POLICY HUB, *See* http://investmentpolicyhub.unctad.org/ISDS/Details/368; *see generally* Amicus Curiae Brief, Pan American Health Org., March 6 2015 (ICSID Case No. ARB/10/7); Amicus Curiae Brief, World Health Org. & WHO Framework Convention on Tobacco Controls, March 6 2015 (ICSID Case No. ARB/10/7) [hereinafter WHO Amicus Brief].

213 WEILER, *supra* note 208.

214 *Id.*

215 *Id.*

ii. Analysis of the Philip Morris Controversy under the BIT

In its claim, Philip Morris asserted that Uruguay violated Articles 3(1), 3(2), 5, and 11, of the BIT.[216] Article 3 (1) of the Switzerland-Uruguay BIT contains a treaty standard that prohibits the host government from imposing "unreasonable or discriminatory measures" that impair enjoyment, use, sale, and liquidation, among other things, of foreign investments made in its territory.[217] Under Article 3 (2) of the treaty, investors are entitled to a MFN treatment afforded to other foreign investors[218]. Additionally, like all BITs, the Switzerland-Uruguay BIT has a FET standard, specifically contained in Article 3 (2) of the treaty.[219] Article 9 mandates that a dispute be submitted to the host government's courts for resolution over a period of 18 months, meaning that disputes are not to be removed to an international forum until the host government has been accorded an opportunity to resolve the controversy. [220]Article 5 prevents expropriation, nationalization, or any other measure "with similar effect" unless the host government's measures "are taken in for the public benefit, on a non-discriminatory basis, under due process of law . . . "[221]

Philip Morris's claim against Uruguay was particularly weak. Philip Morris had rushed into initiating arbitration proceedings before the 18-month period required by Article 10.[222] While there was a possibility that Uruguay could have had the case dismissed for failing to meet the required 18-month period of domestic proceedings, the tribunal found that by the time the arbitral proceedings had begun the requisite 18-month period had been satisfied.[223] If the tribunal had not declared that the 18-month period was satisfied,

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216 Philip Morris Int'l v. Uruguay Award, *supra* note 201 at ¶175.

217 Agreement between the Swiss Confederation and the Oriental Republic of Uruguay
On the Reciprocal Promotion and Protection of Investments [hereinafter Switzerland - Uruguay BIT] (Oct. 7, 1988), art. 3 § 1

218 Switzerland - Uruguay BIT art. 3 §2

219 *Id.*

220 Switzerland - Uruguay BIT, art. 9 § 2; Philip Morris Int'l v. Uruguay Award *supra* note 201 ¶ 503

221 Switzerland – Uruguay BIT at art. 5; Philip Morris Int'l v. Uruguay Award *supra* note 201 ¶182.

222 Philip Morris Int'l v. Uruguay Award, *supra* note 201 ¶ 25.

223 *Id* at ¶ 581

Philip Morris could have tried another method. It could have attempted to get around this requirement by using the Most Favored Nation clauses to reach any other BIT Uruguay may have that does not have an 18-month rule. The successfulness of maneuvers like this is questionable but has worked in other arbitral proceedings so its potential efficacy in this situation remains unexplored.

Philip Morris's claim was based on the concept of *de facto* appropriation under Article 5 of the BIT—an expropriation of the value of its intangible future profits, foreclosed via the ban on lines of cigarette brands labeled in a misleading manner such as 'light'.[224] An analysis under Article 5 of the BIT would require an action of expropriation as a matter of law. The text reads:

> (1) Neither of the Contracting Parties shall take, either directly or indirectly, measures of expropriation, nationalization or any other measure having the same nature or the same effect against investments belonging to investors of the other Contracting Party, unless the measures are taken for the public benefit as established by law, on a non-discriminatory basis, and under due process of law, and provided that provisions be made for effective and adequate compensation. The amount of compensation, interest included, shall be settled in the currency of the country of origin of the investment and paid without delay to the person entitled thereto.[225]

Under a literal construction of the FET standard, Philip Morris argued that the FET provisions require a tribunal to review Uruguay's laws on a standard of objective fairness and equity, with little deference to the right of a sovereign to set public policy in the public interest.[226] However, any claim about inherent substantive fairness or equity of a state's action needs to be supported by evidence of manifestly unfair conduct that could not be rationally supported by a legitimate non-discriminatory policy goal for that "treatment" of

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224 *Id* at ¶¶ 183-87

225 Switzerland – Uruguay BIT at art. 5 § 1

226 Philip Morris Int'l v. Uruguay Award, *supra* note 201 at ¶309

an investor to successfully rise to the level of a breach of a FET standard.[227]

Empirical evidence from other countries supports that advertising regulations are an effective method of reducing tobacco consumption and have a net benefit to public health.[228] Philip Morris would have to demonstrate that this type of advertising regulation only shifts the tobacco market, and creates an unfair burden to it alone. In fact, that Philip Morris brought a claim against Uruguay at all indicates it is concerned by the efficacy of these regulations. The burden to demonstrate arbitrary and patently unfair regulatory adoptions or effects in this example is extremely high, and made it improbable that Philip Morris could succeed with this line of argumentation. With the burden already quite high under the broadest interpretation, it is not surprising that Philip Morris was unsuccessful when the tribunal took the more narrow approach.

In addition to the improbability of being able to meet this burden, Philip Morris did not properly weigh the influence of the FCTC. Article 7 of the FCTC is a self-executing obligation and mandates parties to adopt and implement their obligations under Articles 8 through 13.[229] Article 11 of the FCTC requires regulation for packaging and labeling tobacco products and grants parties to exceed the mandates within it.[230] The tribunal found that meeting these obligations was fully within the rights and responsibilities of the government of Uruguay.[231]

The general consensus was that not only was this a great victory for Uruguay and the concept of national sovereignty, but it was also a signal that commercial rights only go so far.[232] When addressing the victory in a televised address to the people of Uruguay, President Tabaré Vásquez said, "It is not acceptable to prioritize commercial

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227 *Id* at ¶¶311-12, 317, 320

228 WHO Amicus Brief, *supra* note 213 at ¶¶ 23-40

229 *See* WHO FCTC, *supra* note 202.

230 *Id* at art. 11.

231 Philip Morris Int'l v. Uruguay Award *supra* note 201 at ¶305-07

232 *See e.g.,*Malena Castaldi, Anthony Esposito, "*Phillip Morris loses tough-on-tobacco lawsuit in Uruguay*" REUTERS, (Jul. 8 2016) https://www.reuters.com/article/us-pmi-uruguay-lawsuit-idUSKCN0ZO2LZ;
Laurent Huber, "*Uruguay's Victory Over Philip Morris Will Change The World*" The Blog, HUFFINGTON POST, (Jul 19, 2016) https://www.huffingtonpost.com/laurent-huber/uruguays-victory-over-phi_b_11021106.html

considerations over the fundamental right to health and life."[233] After its victory in the case, Uruguay declared that as of 2017 cigarettes in Uruguay would be sold in generic packaging.[234]

IV. A GROWING MOVEMENT AGAINST GLOBALIZATION AND FREE TRADE

A. Reversing the liberalization of Trade

The TPP was a multilateral treaty negotiated between 12 countries to create a trade bloc between the Americas and the Pacific Rim.[235] For the United States, it was a strategic foreign policy pivot towards Asia to serve as a counterbalance to China's strong influence on the region.[236] Most of the countries involved in negotiations already had bilateral trade agreements or smaller multilateral agreements with other members.[237] This meant that despite the potential to become the largest multilateral trading bloc in history, as a newer multilateral agreement, many were skeptical of whether the TPP could provide a considerable increase in access to markets. [238] There were also doubts that the TTP would provide significantly measurable economic gains for any country other than the United States, at the same time that others questioned the benefits to the United States.[239] While the text was based on established models of bilateral and multilateral treaties from the United States,[240] it did not help that the parties to the TPP agreed not to release any text of the treaty until after it was signed by the governments and not to release draft negotiating texts until four years after the signing.[241]

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233 Benedict Mander, *Uruguay defeats Philip Morris test case lawsuit,* FIN. TIMES (July 8, 2016), https://www.ft.com/content/1ae33bc8-454e-11e6-9b66-0712b3873ae1.

234 *A partir de 2017 los cigarrillos se venderán en empaquetado generic,* EL OBSERVADOR, July 13, 2016 16:42 http://www.elobservador.com.uy/a-partir-2017-los-cigarrillos-se-venderan-empaquetado-generico-n940912

235 Ranald, *supra* note 1, at 243.

236 *Id.*

237 *See generally* Ranald*, supra* note 1, at 243.

238 Ranald, *supra* note 1, at 244.

239 *Id.*

240 *Id.*

241 *Id*.

The Office of the United States Trade Representative (USTR) launched a website providing information addressing the most common and contentious concerns around the trade agreement, to ease the public's growing fears.[242] In the section addressing ISDS, USTR made arguments expounding on the benefits of ISDS to American companies, and listed new safeguards proposed to improve ISDS including public participation and increased transparency.[243] Other TPP countries, such as Australia, pushed non-economic advantages in is public marketing of the trade deal.[244] Nevertheless, thousands of citizens from TPP countries signed petitions and lead protests against secret negotiations, and a strong opposition to the trade agreement gained momentum, and delayed negotiations.[245] In addition to concern about provisions on intellectual property, human rights, and environmental issues, there was significant public concern about ISDS provisions.[246]

Leading up to the 2016 United States presidential election, opposition to the treaty became so strong that most candidates denounced the TPP in primaries, with the final Democratic and Republican candidates running platforms against the trade deal.[247] After winning the presidential election and taking office, the first action President Donald Trump took was to formally withdraw from the TPP.[248] While public opposition had grown to the point that Congress refused to move forward on the agreement, the executive order for immediate withdrawal was a symbolic message that the new administration went beyond resisting liberal free-trade ideology to its complete rejection.[249]

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[242] *See generally* THE TRANS PACIFIC PARTNERSHIP, OFFICE OF THE U.S. TRADE REPRESENTATIVE, www.USTR.gov/tpp.

[243] USTR, *Upgrading and Improving Investor State Dispute Settlement Fact Sheet,* THE TRANS PACIFIC PARTNERSHIP, OFFICE OF THE U.S. TRADE REPRESENTATIVE, www.USTR.gov/tpp.

[244] Ranald, *supra* note 1, at 244.

[245] *Id.*at 253-54.

[246] *Id.*

[247] William Mauldin, *Donald Trump Withdraws U.S. From Trans-Pacific Partnership,* WALL STREET J. (Jan. 23, 2017, 8:04 PM), https://www.wsj.com/articles/trump-withdraws-u-s-from-trans-pacific-partnership-1485191020?mg=id-wsj.

[248] *Id.*

[249] *Id.*; Bowman at 81.

Likewise, the Trans-Atlantic Trade Investment Partnership Agreement (TTIP) between the United States and the E.U. faced public opposition and debate because drafts proposed including ISDS provisions.[250] By 2014, the European Commission decided to pause negotiations in response to public concern.[251] In addition to the traditional fears of job and economic losses under free-trade, European citizens in particular expressed fears that the ISDS provisions in the TTIP would allow the world's largest corporations to force nations to roll back public health, banking, or food and environmental safety measures.[252]

Another sign of the changing tide against free-trade is the increasing number of countries that are now opting to renegotiate or terminate trade treaties in critical response to ISDS processes.[253]For example, after finding the ISDS provisions unconstitutional for serving as a "waiver of sovereign jurisdiction," Ecuador started the process to terminate its bilateral agreements with the United States, Argentina, Canada, Chile, China, Finland, France, Germany, the Netherlands, Sweden, Switzerland, Venezuela and the United Kingdom.[254] Due to the sunset provisions in its agreements, investments in Ecuador remain protected for ten years after withdrawal, but without the ability to bring arbitral claims against Ecuador, which officially withdrew from the ICSID Convention in 2009.[255] Similarly, Argentina, Bolivia, and Venezuela also withdrew from the ICSID Convention.[256]

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250 Ranald, *supra* note 1, at 250.

251 *Id.*

252 Lee Williams, *What is TTIP? And six reasons the answer should scare you,* INDEPENDENT (Jan. 2016), http://www.independent.co.uk/voices/comment/what-is-ttip-and-six-reasons-why-the-answer-should-scare-you-9779688.html.

253 Ranald, *supra* note 1, at 250.

254 Herbert Smith Freehils, *Further Steps given by Ecuador to terminate its bilateral investment treaty with the USA*, DISPUTE RESOLUTION ARBITRATION NOTES (March 20, 2013, 9:10 AM), http://hsfnotes.com/arbitration/2013/03/20/further-steps-given-by-ecuador-to-terminate-its-bilateral-investment-treaty-with-the-usa/.

255 *Id.*

256 *See* Diana Marie Wick, *The Counter-Productivity of ICSID Denunciation and Proposals for Change*, 11 J. INT'L BUS. L. 239, 242 (2012)

In similar actions, Indonesia withdrew from more than 60 bilateral investment treaties in 2014.[257] In 2016, India initiated renegotiation for 47 investment treaties requiring that foreign investors exhaust all domestic legal remedies before pursuing ISDS.[258] Italy announced its withdrawal from the ECT in 2015 with a sunset period of one year.[259]

B. Proposed Alternatives to ISDS

In response to the considerable backlash to ISDS, a number of other changes are already under way to salvage the benefits of free trade while protecting sovereign states from the negative effects of ISDS. Generally speaking, successful recommendations and attempts at international investment agreement reform require a two-pronged approach.[260] First, existing treaties and treaty models must be renegotiated and modernized to provide transparency and further safeguards.[261] Second, entirely new treaty models should be formulated and explored.[262] Nearly 110 countries have reviewed and changed their national or international investment policies or both.[263] There has also been a significant shift in the drafting prac-tices at the bilateral level to take steps preserving a nation's right to

[257] Ben Bland & Shawn Donnan, *Indonesia to terminate more than 60 bilateral investment treaties,* FIN. TIMES, (March 26, 2014), https://www.ft.com/content/3755c1b2-b4e2-11e3-af92-00144feabdc0.

[258] Glyn Moody, *India Seeks to Renegotiate 47 Investment Treaties because of their Corporate Sovereignty Clauses*, TECHDIRT (June 6, 2016, 11:23 PM), https://www.techdirt.com/articles/20160601/09145134594/india-seeks-to-renegotiate-47-investment-treaties-because-their-corporate-sovereignty-clauses.shtml.

[259] Gaetano Iorio Fiorelli, *Italy Withdraws from Energy Charter Treaty*, GLOBAL ARBITRATION NEWS (May 6, 2015), https://globalarbitrationnews.com/italy-withdraws-from-energy-charter-treaty-20150507/.

[260] Joerg Weber, "*How to make IIA reform work? A formidable challenge*," INVESTMENT POLICY HUB, "Mar 10, 2016" http://investmentpolicyhub.unctad.org/Blog/Index/52

[261] UNCTAD's Reform Package For The International Investment Regime, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, 18 (2017). http://investmentpolicyhub.unctad.org/Upload/Documents/Reform_Package_web.pdf.

[262] *Id* at 83.

[263] Joerg Weber, "*How to make IIA reform work? A formidable challenge*," INVESTMENT POLICY HUB, "Mar 10, 2016" http://investmentpolicyhub.unctad.org/Blog/Index/52

regulate or pass laws otherwise conducive to successful sustainable development.[264] Treaties on the multilateral treaty level that are under negotiation include more provisions for transparency in ISDS. For example, the general body of UNCITRAL drafted a Convention increasing Transparency in Treaty Based Investor-State Arbitration.[265] Other ideas include the creation of a supra-national body or court to resolve disputes.

Take the case of the Comprehensive Economic and Trade Agreement (CETA). The public backlash in response to the disclosure that the TTIP would include ISDS sparked a proposal for a permanent Investment Court System to replace ISDS mechanisms in all E.U. bilateral trade agreements. During the final stages of legal revision, in February 2016, in the bilateral trade agreement between Canada and the E.U., CETA began including amendments to include the ICS. CETA is the first significant free trade agreement to replace the ISDS systems with the new ICS.[266]Because protecting investors is important to the global community at large, the E.U. and Canada are working create a process likely to be accepted multilaterally.[267] The concept of the ICS was developed with a 12-week public comment period and meetings with stakeholder groups. [268] Major improvements the ICS would provide would be that it would be pub-

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[264] *See e.g.,* Mark Weaver, *The Proposed Transatlantic Trade And Investment Partnership (Ttip): Isds Provisions, Reconciliation, And Future Trade Implications*, 29 EMORY INT'L L. REV. 225 (2014); Edward Guntrip, *Self-Determination and Foreign Direct Investment: Reimagining Sovereignty in International Investment Law*, 65 INT'L & COMP. L. Q., 829 (2016); Stephan W. Schill, *Reforming Investor-State Dispute Settlement: A (Comparative and International) Constitutional Law Framework*, 20 J. INT'L ECON L. 3, 649 (2017)

[265] U.N. Commission on Int'l Trade Law, *U.N. Convention on Transparency in Treaty Based Investor-State Arbitration*, (Dec. 10, 2014).

[266] *CETA explained*, EUROPEAN COMMISSION (Dec. 16, 2016(, http://ec.europa.eu/trade/policy/in- focus/ceta/ceta-explained.

[267] *Consultation Strategy: Impact Assessment on the Establishment of a Multilateral Investment Court for investment dispute resolution,* EUROPEAN COMMISSION (Sep. 30 2016), http://trade.ec.europa.eu/doclib/docs/2016/october/tradoc_154997.pdf.

[268] *Id* at 4.

lic, with professional and independent judges and work transparently.[269] CETA's proposal also includes reforms such as a code of conduct, an appellate mechanism and banning frivolous claims.[270]

V. THE UNCERTAIN FUTURE OF ISDS AND FREE-TRADE

While the concept of a multilateral investment court may sound like an inevitable resolution to the ISDS dilemma, it is still under development. Stakeholders beyond investors, business organizations, and public authorities need to be included in the negotiations, such as trade unions, academic scholars, and the arbitrator community. A multilateral investment court also paradoxically brings state sovereignty into question while trying to protect it, by needing binding international agreement to submit to its jurisdiction. However, without changes to the current model of ISDS mechanisms the growing concerns against corporate rights and priorities overtaking a nation's ability to set policy and prioritize the needs of citizens.

Without reforms to ISDS, the future of free trade is at risk. For countries to continue to benefit from the free flow of trade (and in the case of the European Union, labor) trade agreements need to provide a method for investors to confidently protect their assets in other countries. Transparency and public participation may be the most simple and efficient way to preserve the gains made in the global economy, while making the ISDS process more palatable. ISDS cases with much more transparency, such as the Philip-Morris v. Uruguay dispute, provide insight into the decision-making process and make the arbitration easier to understand and hopefully less frightening to the broader public. The public availability of amicus briefs and the legal reasoning behind the arbitral award take away the mystery and contribute to a growing body of jurisprudence for lawmakers, investors and arbitrators to look to before making investments, passing laws, or even signing onto treaties.

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269 CETA NOW, About CETA, http://cetanow.eu/about-ceta-now/

270 *Id.*