

## Rollins College Rollins Scholarship Online

---

### Honors Program Theses

---

Spring 2016

# The Corporatization of Justice: Clashes Between International Arbitration and National Environmental Regulations

Scott Novak

Rollins College, [rnovak@rollins.edu](mailto:rnovak@rollins.edu)

Follow this and additional works at: <http://scholarship.rollins.edu/honors>



Part of the [International Relations Commons](#)

---

### Recommended Citation

Novak, Scott, "The Corporatization of Justice: Clashes Between International Arbitration and National Environmental Regulations" (2016). *Honors Program Theses*. Paper 40.

This Open Access is brought to you for free and open access by Rollins Scholarship Online. It has been accepted for inclusion in Honors Program Theses by an authorized administrator of Rollins Scholarship Online. For more information, please contact [rwalton@rollins.edu](mailto:rwalton@rollins.edu).

The Corporatization of Justice:  
Clashes Between International Arbitration  
and National Environmental Regulations

By Scott Novak

Honors Program International Relations Thesis  
Thesis Advisor: Dr. Dan Chong

Date: April 12, 2016

Rollins College  
Winter Park, FL

**Table of Contents**

Abbreviation List.....	3
I. Introduction: The Dispute about Dispute Mechanisms.....	4
II. International Arbitration: A Brief Overview.....	5
III. Analytical Theories of International Arbitration.....	11
A. The Economic-Rationalist Model.....	12
B. The Cultural-Sociological Model.....	17
C. The Power-Based Model.....	20
D. The Constitutionalization Model.....	24
IV. Case Studies.....	27
A. The People of Ecuador vs. Chevron Corporation.....	28
B. Methanex Corporation vs. United States of America.....	38
C. Japan and the European Union vs. Canada.....	45
D. Ethyl Corporation vs. Canada.....	53
V. A Comprehensive Power-Based Model.....	62
VI. Conclusion: Pathways to Reform.....	73
VII. Bibliography.....	77

### **Abbreviation List**

<b>BIT</b>	Bilateral Investment Treaty
<b>EU</b>	European Union
<b>EPA</b>	Environmental Protection Agency
<b>ICA</b>	International Court of Arbitration
<b>ICC</b>	International Chamber of Commerce
<b>ICSID</b>	International Center for the Settlement of Investment Disputes
<b>IIA</b>	International Investment Agreement
<b>ISDS</b>	Investor-State Dispute Settlement
<b>MMT</b>	Methylcyclopentadienyl Manganese Tri-carbonyl
<b>MTBE</b>	Methyl Tert-Butyl Ether
<b>NAFTA</b>	North American Free Trade Agreement
<b>NYC</b>	New York Convention on the Enforcement of Private Arbitral Awards
<b>SCM</b>	Agreement on Subsidies and Countervailing Measures
<b>WTO</b>	World Trade Organization

**I. Introduction: The Dispute about Dispute Mechanisms**

Since the 1990s, the number of international trade treaties has skyrocketed. Many of these treaties include within them mechanisms mandating the setup of an international trade arbitration panel should a dispute between the parties to a treaty arise. In recent years, the number of trade arbitration claims filed has been steadily increasing, which is due in part to the increase of trade treaties containing trade arbitration mechanisms.

While international arbitration systems undoubtedly provide some benefits to the establishment of international law and order, some states contend they are being used by corporations and governments to challenge a number of important national environmental rulings and regulations. In fact, states such as Ecuador have recently withdrawn their signatures from treaties containing international arbitration mechanisms because of how these mechanisms can allegedly interfere with national sovereignty. Multiple constituencies in the United States are expressing similar concerns, objecting that the arbitration clause in the pending Trans-Pacific Partnership may negatively affect environmental regulations. Thus, as international trade arbitration claims have grown in popularity, so has the debate regarding what role this kind of arbitration should play in society and the effects it should have upon citizens across the globe.

This discussion centered on how arbitration rulings impact the earth is occurring in an age where the world is facing existential environmental challenges, such as the threat of global climate change, which makes exploring the different sides to the debate on arbitration all the more timely — and dire. Therefore, in light

of the controversies surrounding arbitration and the growing importance of environmental initiatives in societies around the world, this paper aims to answer the following questions: Do international trade arbitration mechanisms undermine national environmental regulations and initiatives, and if so, in what ways does this happen, and how might these mechanisms be reformed?

In order to answer this question, two specific forms of arbitration through which environmental policies are often challenged will be analyzed: investor-state dispute (ISDS) mechanisms and arbitration between states via the World Trade Organization (WTO). After giving a brief background of arbitration systems as a whole and outlining four different international arbitration theoretical frameworks, I will apply these theories to four arbitration case studies in an attempt to identify possible environmental inequities perpetuated by these arbitration systems. I will then use these findings to form a more comprehensive power-based theory of arbitration, setting up the foundation for potential arbitration reforms.

## **II. International Arbitration: A Brief Overview**

Walter Mattli and Thomas Dietz define arbitration as “a binding, non-judicial, and private means of settling disputes based on an explicit agreement by the parties involved in a transaction.”<sup>1</sup> This agreement is usually rooted in the terms of a contract or treaty between the two parties, and in many cases the parties can choose the procedural rules and laws that they think most suits their interests. Although

---

<sup>1</sup> Walter Mattli and Thomas Dietz, “Mapping and Assessing the Rise of International Commercial Arbitration in the Globalization Era: An Introduction,” *International Arbitration and Global Governance: Contending Theories and Evidence*, (Oxford: Oxford University Press, 2014), 1.

some forms of arbitration occur solely on a domestic level, there also exists international commercial arbitration, which occurs when the two disputing parties in question reside in different countries and the matter of the dispute concerns business activities.<sup>2</sup> As arbitration lawyer Jan Paulsson has noted, "...it may be said that the international arbitral process deserves to be known in the plural, as *processes*, depending on the particular organizational frameworks and environments within which it proceeds."<sup>3</sup> Christopher R. Drahozal categorizes international commercial arbitration into two types: universal arbitration and specialized arbitration.<sup>4</sup> Universal arbitration is conducted by arbitration centers that take on arbitration cases from a wide range of industries, while specialized arbitration occurs in forums created by the international trade associations of specific industries. Examples of universal arbitration include the International Court of Arbitration of the International Chamber of Commerce, the London Court of International Arbitration, and the Arbitration Institute of the Stockholm Chamber of Commerce, whereas examples of specialized arbitration include the Society of Maritime Arbitration, the Grain and Feed Trade Association, and multiple other stock and commodity exchanges.<sup>5</sup> Some of the theoretical frameworks presented in the next section will use these kinds of arbitration as supporting examples, but none

---

<sup>2</sup> Ibid, 1-2.

<sup>3</sup> Jan Paulsson, "Preface," in *International Arbitration & Global Governance: Contending Theories and Evidence* edited by Walter Mattli and Thomas Dietz, (Oxford: Oxford University Press, 2014), ix.

<sup>4</sup> Christopher R. Drahozal, "Private Ordering and International Commercial Arbitration," *Penn State Law Review* 113, no. 4, Spring 2009, 1031-1050.

<sup>5</sup> Mattli and Dietz, "Mapping and Assessing the Rise of International Commercial Arbitration in the Globalization Era: An Introduction," 2.

of them will appear in the case study section due to the fact that state environmental regulations are not challenged in these particular forums.

Mattli and Dietz identify a third type of international arbitration, but one that is outside the realm of international commercial arbitration. This form of arbitration is called investor-state arbitration, or investor-state dispute settlement (ISDS). It has also only become popular within the last decade or so and will be the type of arbitration analyzed within this paper's case studies.<sup>6</sup> According to the *Cato*

*Institute*, the purpose of ISDS is:

to protect foreign investors from economic harm caused by host-government actions or policies that fail to meet certain minimum standards of treatment – up to and including asset expropriation. It confers special legal privileges on foreign-invested companies, including the right to sue host governments in third-party arbitration tribunals for failing to meet those standards.<sup>7</sup>

ISDS first appeared in 1959 in a bilateral trade agreement between Germany and Pakistan.<sup>8</sup> The stated intention of creating this mechanism was to promote foreign investment by protecting investors from discrimination or expropriation. In theory, ISDS helped soothe investors' worries of investing in developing countries, where legal systems were not as strong; this is a strong economic-rationalist view of arbitration, one which sees arbitration as an efficient system with positive-sum outcomes.

---

<sup>6</sup> Ibid, 3.

<sup>7</sup> Cato Institute, *The Investor-State Dispute Settlement Mechanism: An Examination of Benefits and Costs*, (Cato Institute: 2014), <http://www.cato.org/events/investor-state-dispute-settlement-mechanism-examination-benefits-costs>.

<sup>8</sup> The Economist, *The arbitration game*, (The Economist: October 11, 2014), <http://www.economist.com/news/finance-and-economics/21623756-governments-are-souring-treaties-protect-foreign-investors-arbitration>.



However, as a power-based model would be quick to counter, the intentions behind ISDS may contain inequitable, neocolonial overtones. In their quantitative empirical analysis of over 500 investment arbitration claims from 1972 to 2010, Thomas Schultz and Cédric Dupont found that until the mid-to-late 1990s, ISDS was used “as a sword in the hands of the economic interests of investors from rich countries against governments of poorer countries, but has since then also been used significantly by investors from rich countries against other rich governments.”<sup>9</sup> They also found that poor countries rarely file arbitration claims at all. Additionally, with regard to more recent trade agreements, ISDS’s purpose as a substitute for weak legal systems is not always applicable, as many of the states that agree to an ISDS mechanism with each other are not considered emerging economies with weak legal systems. The United States and Japan, for example, have well-respected legal systems that multinational corporations utilize every day. Schultz and Dupont write that, since the mid-to-late 1990s, “investment arbitrations have been filed against governments exhibiting, on average, a relatively high level of democratic development and rule of law...” However, it still “remains plausible that substituting for the domestic rule of law remains a function of certain arbitrations...while another important part of investment arbitration targets countries with a high level of respect for the law.”<sup>10</sup> Different lenses analyzing and critiquing why and how

---

<sup>9</sup> Thomas Schultz and Cédric Dupont, “Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study,” *The European Journal of International Law*, vol. 25, no. 4, (Oxford University Press: 2014), 1147-1168.

<sup>10</sup> Ibid.

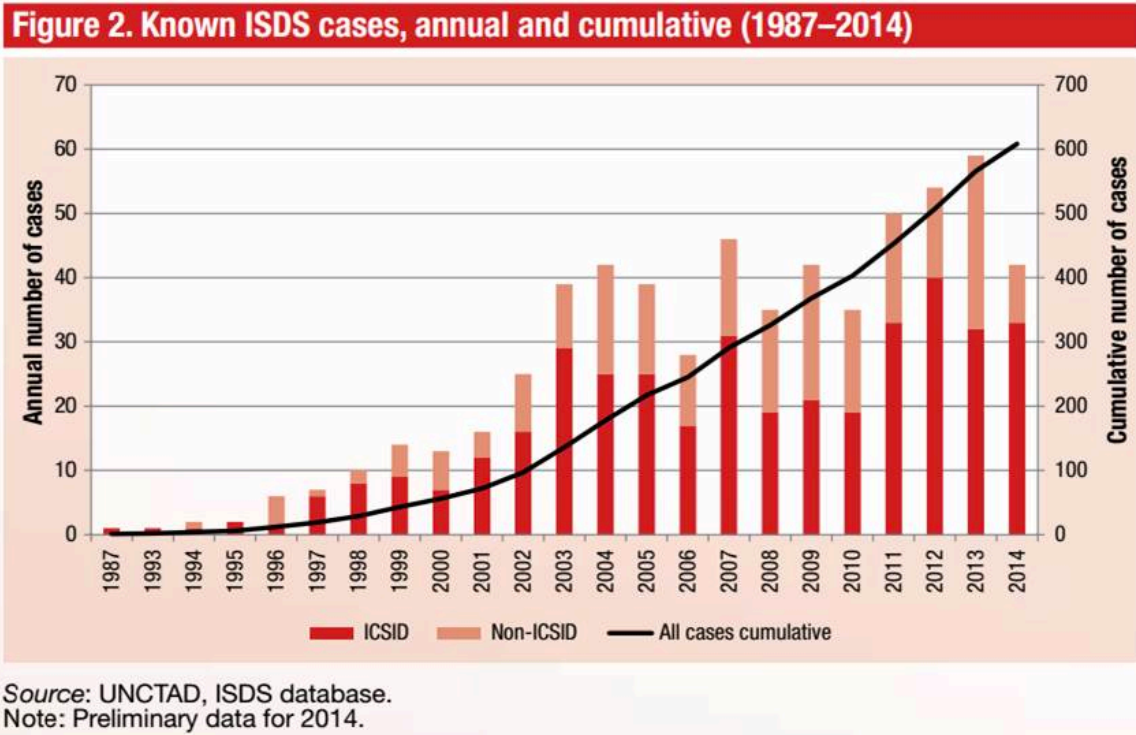
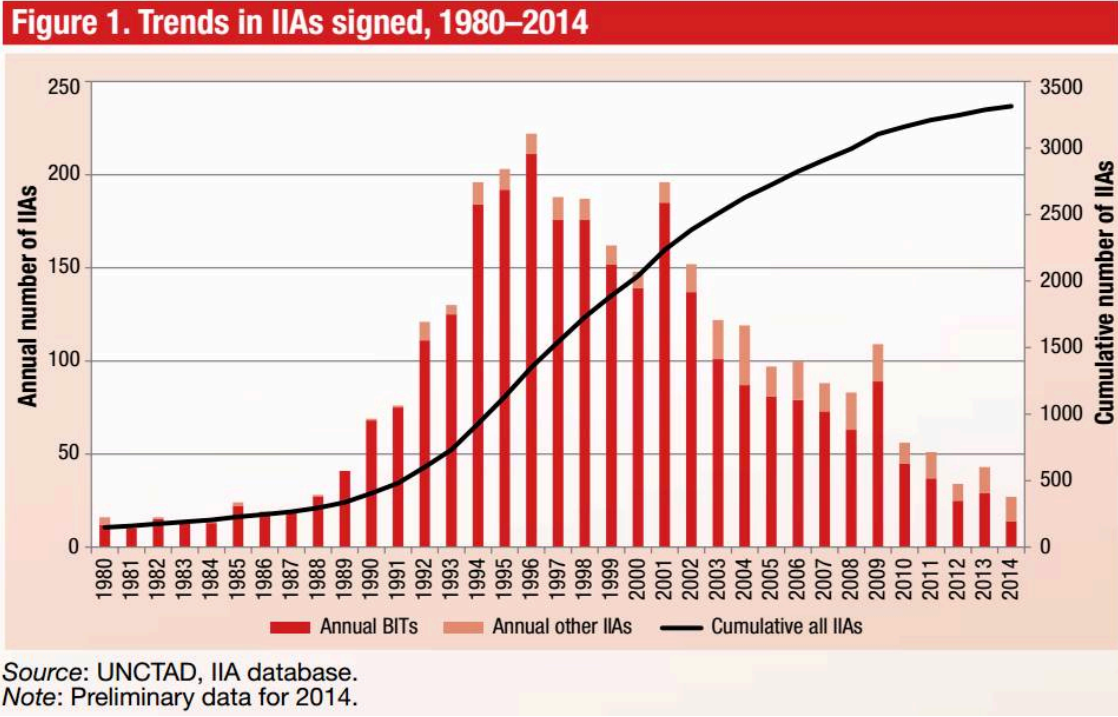
international arbitration functions will be further explored in the “Analytical Theories of Arbitration” section of this paper.

The main provider of investor-state arbitration is the International Center for the Settlement of Investment Disputes (ICSID), an institution created in 1966 that is part of the World Bank. Unlike the other arbitration centers previously mentioned, ICSID’s jurisdiction only covers disputes where one of the parties is a host state. As Mattli and Dietz note, the “explosion” of bilateral investment treaties (BITs) in the 1990s contributed to the rapid growth in popularity of ISDS claims (*see Figures 1 and 2 on pg. 10 — in the first chart, IIA stands for investment arbitration agreements*).<sup>11 12</sup> These BITs often include an ISDS mechanism mandating the setup and particular conditions of an ISDS panel in the case that one of the parties violates the treaty. In this paper, ISDS will be the primary form of arbitration under analysis in three out of four of the case studies.

---

<sup>11</sup> Mattli and Dietz, “Mapping and Assessing the Rise of International Commercial Arbitration in the Globalization Era: An Introduction,” 3.

<sup>12</sup> Elisabeth Tuerk, “Getting up to speed: IIA and ISDS trends from 2014,” *UNCTAD.org*, February 18, 2015, <http://investmentpolicyhub.unctad.org/Blog/Index/34>.



Today, there are over 3,000 trade agreements worldwide that make use of some form of ISDS, and the United States is currently a part of 50 of these agreements.<sup>13</sup> Although the United States has not suffered substantial losses from being targeted by ISDS cases yet, the number of these cases is on a record-level rise. In 2012, a record 59 ISDS cases were initiated, and in 2013, there was 56.<sup>14</sup>

Before the growth in the number of existing BITs, most countries settled trade disputes via the arbitration mechanism provided in the General Agreement on Tariffs and Trade, where both parties of a dispute had to be countries. This state-to-state arbitration under what is now the World Trade Organization (WTO) is the fourth category of arbitration in use today and will be analyzed in this paper. The WTO moderates trade disputes between member states regarding WTO rules, through its Dispute Settlement Body. Although these disputes almost always involve commercial interests, this forum of arbitration is different from international commercial arbitration and investor-state arbitration because corporations cannot be one of the primary parties of a dispute.<sup>15</sup>

### III. Analytical Theories of International Arbitration

Before beginning a discussion concerning how ISDS and WTO rulings may conflict with environmental standards, it is first necessary to explore different

---

<sup>13</sup> Office of the United States Trade Representative, *Investor-State Dispute Settlement*, (Office of the United States Trade Representative: March 2015), <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds#>.

<sup>14</sup> The Economist, *The arbitration game*.

<sup>15</sup> Some BITs have state-to-state arbitration mechanisms like the WTO does, but these will not be the focus of any of the case studies in this paper.

analytical lenses through which international relations theorists view international arbitration. Mattli and Dietz outline four different models of arbitration, each of which will be explained in this section: the economic-rationalist model, the cultural-sociological model, the power-based model, and the constitutionalization model. Note that the examples theorists give to support these various models in this section sometimes relate to international commercial arbitration rather than just ISDS or WTO arbitration specifically, but nevertheless, the insights gained from these examples can be applied just as well to the latter forms of arbitration. After applying these different models to four arbitration cases studies, I will then build on all four of these models to form a comprehensive power-based model of international arbitration.

#### *A. The Economic-Rationalist Model*

According to the economic-rationalist model, arbitration is a positive-sum game that produces positive externalities on third parties. As Thomas Hale writes, “In the context of cross-border trade, dispute settlement mechanisms can therefore be seen as providers of both private goods to firms, and, in the aggregate, the larger global public good of facilitating global economic exchange.”<sup>16</sup> In other words, because arbitration helps enforce the rules of international trade, it makes nations more willing to engage in such trade. In his study of the effects of the ratification of the 1958 New York Convention on the Enforcement of Private Arbitral Awards

---

<sup>16</sup> Thomas Hale, “What is the Effect of Commercial Arbitration on Trade?”, *International Arbitration & Global Governance: Contending Theories and Evidence*, edited by Walter Mattli and Thomas Dietz, (Oxford: Oxford University Press, 2014), 197.

(NYC) on trade between countries, Hale discovered trade flows increased, on average, by 30 percent between two countries if one country is a member of the NYC and by 63 percent if both countries are.<sup>17</sup> He also found that countries with weak court systems experienced a stronger positive trade boost after ratification of the NYC than developed countries with strong courts did, which suggests that private arbitration and public courts “are to some extent substitutable for each other.”<sup>18</sup> Ideally, then, arbitration allows developing countries with weak judiciaries to attract foreign investment that would otherwise be unavailable to them. Thus, from the economic-rationalist perspective, arbitration benefits the global economy by allowing for the optimal allocation of resources, thereby maximizing global economic growth.

Regarding the question of why arbitration came about in the first place, the economic-rationalist model views arbitration as a governance structure created for the purpose of minimizing the risks and costs of international market transactions. Globalization has made international transactions grow in size and complexity, and thus, the importance and complexity of international arbitration has grown as well. As Mattli and Dietz observe in their description of this model, “The higher the asset specificity of a transaction, for example, the greater the governance complexity needed to promote efficient exchange.”<sup>19</sup> Additionally, they write that both state and non-state actors will select or design dispute resolution mechanisms based upon

---

<sup>17</sup> Ibid, 198.

<sup>18</sup> Ibid, 198.

<sup>19</sup> Mattli and Dietz, “Mapping and Assessing the Rise of International Commercial Arbitration in the Globalization Era: An Introduction,” 7.

their evolving needs and interests in an effort to ensure the efficiency of these mechanisms in quickly solving disputes between parties.

Mattli and Dietz note that the International Court of Arbitration (ICA) of the International Chamber of Commerce (ICC) fits well within the economic-rationalist model of arbitration. This particular arbitration institution has evolved to maximize efficiency in resolving disputes between parties by creating mechanisms designed to override potential obstacles that may result from one party's noncooperation in the settlement of the dispute.<sup>20</sup> For example, if one party has a contractual obligation to enter into arbitral proceedings but refuses to do so, then the ICA has the power to appoint arbitrators and form a tribunal regardless of the party's lack of consent. Furthermore, if one party does not sign the Terms of Reference in the arbitration, the ICA court may approve them so that the proceedings can move forward. After the parties approve the Terms of Reference, additional claims can only be heard if all the parties in the dispute agree, which minimizes the chances of one party presenting claims just for the sake of holding up the arbitral proceedings. Additionally, the ICA has a strong monitoring process in place to ensure that all parties are aware of what is occurring in the dispute, that deadlines are followed, and that the award given to the winning party is fair in relation to jurisdiction and the law.

Likewise, regarding the ICC, one international arbitrator observes, "Most final awards rendered under ICC auspices are carried out voluntarily by the parties,

---

<sup>20</sup> Ibid, 8.

because [of their high] quality.”<sup>21</sup> In support of this point, Mattli and Dietz write, “Indeed, only about 5 percent of awards have been challenged, and of these only one in ten awards rendered under the aegis of the ICC have been set aside by a national court.”<sup>22</sup>

From the perspective of the economic-rationalist model, arbitration forums like the ICA must evolve to meet the needs of the clients they serve, and if they do not, they will lose business. For this reason, state intervention in commercial arbitral governance “is neither necessary nor desirable as this market pressure keeps arbitration centers on their ‘organizational toes.’”<sup>23</sup> However, states may play an indirect role by ensuring that state corruption does not negatively affect the arbitration process and by signing onto arbitral agreements such as the NYC. Of course, in dispute settlement forums such as the WTO, the role of the state is much more prominent, as states are the primary actors in this forum.

Like the ICA, many other forms of international arbitration have evolved to maximize efficiency in resolving disputes. In trade disputes moderated by the WTO, for example, there is first a consultation period lasting approximately 60 days where the Dispute Settlement Body works in an attempt to see if disputing parties can settle their differences without resorting to an arbitration panel.<sup>24</sup> If a dispute is not resolved after this period, a panel is formed to hear each party’s side of the case. If

---

<sup>21</sup> Gerald Aksen, “Ad Hoc Versus Institutional Arbitration,” *ICC International Court of Arbitration Bulletin* 2, no. 1, 1991, 12.

<sup>22</sup> Mattli and Dietz, “Mapping and Assessing the Rise of International Commercial Arbitration in the Globalization Era: An Introduction,” 8.

<sup>23</sup> *Ibid*, 9.

<sup>24</sup> World Trade Organization, “Understanding the WTO: Settling Disputes,” *WTO.org*, 2016, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/disp1\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm).



the parties do not agree on the panel's composition within 20 days, then the WTO Director-General can appoint panel members.<sup>25</sup> After the panel issues a draft of the facts of the case to the two parties for comments, it then sends a final report to the Dispute Settlement Body with a ruling as to whether any WTO rules have been violated, and if they have, how the state can rectify their laws to conform to WTO trade standards.<sup>26</sup> If there is no request for an appeal from one or both of the parties, then the Dispute Settlement Body adopts the panel's report. At this stage, the report turns into a ruling within 60 days of the report's adoption, unless a consensus by the Dispute Settlement Body rejects it. If one state fails to comply with the ruling, the other party may ask the Dispute Settlement Body for permission to impose limited sanctions (sanctions which, in most cases, only focus on the industry area out of which the dispute arose). From start to finish, the WTO dispute settlement process takes approximately one year to complete, with just a few months longer than this if one of the parties requests an appeal. Clearly, this system is meant to resolve disputes relatively quickly and serves to clarify and enforce trade rules among WTO members. Similar systems apply to ISDS structures within BITs and other trade agreements.

In summary, the economic-rationalist model views arbitration mechanisms as effective because they are neutral, market-based, and, for the most part, self-enforcing ways of ensuring compliance with trade laws. However, while the economic-rationalist model does provide insight regarding how arbitration can

---

<sup>25</sup> World Trade Organization, "A Summary of the Final Act of the Uruguay Round," *WTO.org*, 2016,

[https://www.wto.org/english/docs\\_e/legal\\_e/ursum\\_e.htm#Understanding](https://www.wto.org/english/docs_e/legal_e/ursum_e.htm#Understanding).

<sup>26</sup> World Trade Organization, "Understanding the WTO: Settling Disputes."

benefit societies, it tends to ignore the power inequities between disputing parties, as well any negative externalities that arbitration may produce; its view of arbitration is an overly optimistic one. Therefore, one needs to explore other models to gain a fuller perspective on the processes of international arbitration.

### *B. The Cultural-Sociological Model*

The cultural-sociological model concurs with the economic-rationalist model regarding its liberalist perspective of the positive effects of arbitration. However, it considers the economic-rationalist model's economic explanation of arbitration development overly simplistic.<sup>27</sup> The cultural-sociological contends that understanding the role of the legal culture in the international arbitration community provides a fuller explanation as to why arbitration has evolved in the manner that it has and can provide an explanation as to why arbitration processes may have negative effects on environmental regulations.

While Hale's economic-rationalist model largely focuses on the economic benefits resulting from international arbitration systems, it does not examine how the various cultural norms surrounding arbitration may affect the outcome of rulings, or how these norms can create a consistency among rulings that legitimizes arbitration as a form of global governance (and, by extension, the trade precedents that arbitration panels enforce). For arbitration courts to truly be a form of global governance, cultural-sociological theorist Joshua Karton argues, two requirements must be met: (1) arbitration laws must be formulated at the global level and apply

---

<sup>27</sup> Mattli and Dietz, "Mapping and Assessing the Rise of International Commercial Arbitration in the Globalization Era: An Introduction," 10.

without discrimination to the nationality and the public or private status of the parties involved and (2) arbitral decisions must have some sort of “functional consistency,” which means that similar cases should result in similar rulings.<sup>28</sup> Karton makes the case that the global legal culture of the international arbitration community enables arbitration to work towards meeting these global governance prerequisites. Defining culture as a set of shared norms affecting behavior, he writes that international arbitrators have a shared culture stemming from similar elite educational and multicultural backgrounds, work experience with international business law firms, and close relationships with the business and academic communities.<sup>29</sup> However, these cultural norms shaping arbitration are not necessarily consistent with the norms of environmentalism.

In Karton’s view, this common background has allowed three shared cultural values to emerge. First, arbitrators have a normative commitment to promoting global governance for its own sake. They possess an internationalist perspective, which Karton defines as “a point of a view that reflects a dedication to subordinating national perspectives and distinctions in favor of transnational or global ideals.”<sup>30</sup> Arbitrators’ dedication to ensuring that arbitral bodies such as the ICA and ISDS arbitral panels are “delocalized” is an example of this commitment to internationalism.<sup>31</sup>

---

<sup>28</sup> Joshua Karton, “International Arbitration Culture and Global Governance,” *International Arbitration & Global Governance: Contending Theories and Evidence*, edited by Walter Mattli and Thomas Dietz, (Oxford: Oxford University Press, 2014), 76.

<sup>29</sup> *Ibid*, 79, 84.

<sup>30</sup> *Ibid*, 96.

<sup>31</sup> *Ibid*, 96-97.

Second, arbitrators have a certain level of commitment to global governance because it fulfills the needs of the business community. After all, as Karton notes, “Arbitrators are private contractors...At its heart, arbitration is a service industry.”<sup>32</sup> Other scholars have made similar observations about international arbitration. As Fabien G elinas states, “International arbitration exists to serve the needs of international business.”<sup>33</sup> This means that, unlike a judge in a domestic court, arbitrators tend to view the disputing parties as clientele “whose goodwill, understanding, and respect for the tribunal’s authority must be cultivated and preserved.”<sup>34</sup> In interviews with Karton, arbitrators expressed the importance of tailoring the arbitration process to the needs of the individual parties involved and of possessing advanced commercial expertise, which is the third shared cultural value Karton mentions.<sup>35</sup> These facts, which stem from the culture of arbitrators, can help account for the complexity and variety among international arbitration panels today, and, as will later be detailed later on, arbitrators’ tendency to uphold commercial trade regulations while neglecting considerations of human rights and the environment.

Ralf Michaels, who also provides a cultural-sociological analysis of arbitration, notes that international arbitration still depends upon the state in terms

---

<sup>32</sup> Ibid, 107.

<sup>33</sup> Fabien G elinas, “Arbitration and the Challenge of Globalization,” *Journal of International Arbitration* 17, no. 4, 2000, 117.

<sup>34</sup> Michael Kerr, “Concord and Conflict in International Arbitration,” *Arbitration International* 13, no. 2, 1997, 121.

<sup>35</sup> Karton, “International Arbitration Culture and Global Governance,” 108.

of the state accepting and carrying out key functions of the arbitration process.<sup>36</sup> For example, state courts sometimes must review arbitral awards or force parties to concede to an arbitration ruling. Nevertheless, Michaels draws similar conclusions to Karton regarding the view that there really is a shared culture among international arbitrators, but unlike Karton, he expresses uncertainty as to whether arbitration currently constitutes a form of global governance due to its significant dependence on individual states.

Given that cultural-sociological arbitration theorists openly admit that private interests influence arbitration rulings, it is somewhat surprising that they do not seem to acknowledge the negative externalities arbitration sometimes produces due to an inequity of power dynamics between private and public parties. Rather, like the economic-rationalist model, the cultural-sociological model sees arbitration as globally beneficial, because the concern of arbitrators for international corporations allows global investments to thrive.

While the cultural-sociological does provide important inferences regarding the outcomes of arbitration rulings, studying the culture of the arbitrators is beyond the scope of this paper. Understanding cultural norms influencing arbitrators would require gaining access to the minds of those individuals, which is not amenable to this particular study. In short, when analyzing rulings from arbitral panels, it is difficult to establish in each particular case that the personal biases of arbitrators influenced the rulings. Nevertheless, the fact that there is a culture of arbitrators

---

<sup>36</sup> Ralf Michaels, "Roles and Role Perceptions of International Arbitrators," *International Arbitration & Global Governance: Contending Theories and Evidence*, edited by Walter Mattli and Thomas Dietz, (Oxford: Oxford University Press, 2014), 72.

will prove useful when investigating how such a culture emerged in the first place through particular trade norms in this paper's "Comprehensive Power-Based Model" section.

### *C. The Power-Based Model*

The power-based model of arbitration regards the economic-rationalist and cultural-sociological models as lacking a certain amount of depth when it comes to examining the consequences of arbitration on the parties involved. In order to provide a fuller perspective of *all* the externalities resulting from the arbitration process, not just the positive ones, it is to the power-based model that we now turn.

Contrary to the previous two positive-sum models, the power-based model perceives international arbitration largely as a realist zero-sum game that often produces negative externalities for society.<sup>37</sup> The power-based model recognizes that in disputes calling for arbitration, the parties are not always equal in their power to affect the arbitral proceedings. For example, wealthier states often have much more money and legal expertise at their expense than poorer states. Likewise, when a corporation brings a dispute against a state, power inequities are still evident; using data from the Fortune 500 and International Monetary Fund, *Business Insider* calculated that if Wal-Mart's 2010 revenues counted as GDP, for example, then it would have the 25<sup>th</sup> largest economy in the world.<sup>38</sup> Using more recently

---

<sup>37</sup> Mattli and Dietz, "Mapping and Assessing the Rise of International Commercial Arbitration in the Globalization Era: An Introduction," 12.

<sup>38</sup> Vincent Trivett, "US Mega Corporations: Where They Rank If They Were Countries," *Business Insider*, June 27, 2011, <http://www.businessinsider.com/25-corporations-bigger-tan-countries-2011-6?op=1>.

updated figures, one should ponder: What is the economic and legal power of Wal-Mart, which had net revenues of \$476.29 billion in 2014,<sup>39</sup> compared to a developing state like Rwanda, which had a GDP of \$7.90 billion in the same year?<sup>40</sup>

Regarding the role of arbitrators, Michaels, a cultural-sociological theorist, writes, “The arbitrator’s private role in dispute resolution thus becomes a public role as well; private interests dissolve into public interests, or are at least congruent with them.”<sup>41</sup> Critical theorists perceiving international arbitration through a power-based lens this statement problematic. Just because arbitrators may serve a public role by overseeing an international dispute does not mean that the interests of the private and public sectors will simply “dissolve” into each other or that they will be “congruent.” Given the dominance of state and commercial interests in international arbitration, outcomes are determined by the exertion of power, rather than by supposedly ‘neutral’ rules aiming to maximize economic efficiency or to represent shared legal norms. Because human rights and environmental activists often bring less power to bear on these arbitration processes, their interests may be overlooked in arbitration rulings.

Furthermore, while corporations can bring disputes against states under many different trade agreements, public interest class action disputes can only be brought against a corporation on the behalf of a state. Thus, international arbitration is only accessible to corporate and state parties, which makes the

---

<sup>39</sup> MarketWatch, “Annual Financials for Wal-Mart Stores Inc,” 2016, <http://www.marketwatch.com/investing/stock/wmt/financials>.

<sup>40</sup> World Bank, “GDP at market prices (current US\$)”, *World Bank*, 2016, <http://data.worldbank.org/indicator/NY.GDP.MKTP.CD>.

<sup>41</sup> Michaels, “Role and Role Perceptions of Arbitrators,” 70.

representation of local populations who remain outside of state interests but have had their basic human rights violated in some way by a particular corporation problematic, to say the least. Along these lines, critical theorist Horatia Muir Watt notes,

The contractual nature of arbitration makes it ill-equipped to consider the effects of any negative externalities generated by investment-linked activities for third parties. Indeed, treaties generally lack any specific procedure whereby communities or individuals whose interests are unaligned with those of the host State may be heard.<sup>42</sup>

Additionally, Watt observes it is not surprising that the notion of the public interest is often viewed as outside the scope of arbitral tribunals, given that the trade treaties creating these tribunals in the first place took place outside of the public sphere.<sup>43</sup> The Trans-Pacific Partnership stands as the most recent example of this phenomenon; members of the U.S. Congress could only read drafts of the agreement in a high-security room after they gave up their electronic devices, and they were not allowed to take any notes on they made on the agreement inside of the room with them when leaving.<sup>44</sup> They were also not allowed to talk about what they had read. While governments attempted to keep early drafts of the agreement from public eyes, a number of private interest groups did have a seat at the table in negotiating the agreement. In 2014, private industry and trade groups make up 480

---

<sup>42</sup> Horatia Muir Watt, "The Contested Legitimacy of Investment Arbitration and the Human Rights Ordeal: The Missing Link," *International Arbitration & Global Governance: Contending Theories and Evidence*, edited by Walter Mattli and Thomas Dietz, (Oxford: Oxford University Press, 2014), 220.

<sup>43</sup> *Ibid*, 219.

<sup>44</sup> Ailsa Chang, "A Trade Deal Read in Secret By Only A Few (Or Maybe None)", *NPR.org*, May 14, 2015, <http://www.npr.org/sections/itsallpolitics/2015/05/14/406675625/a-trade-deal-read-in-secret-by-only-few-or-maybe-none>.



of the Obama administration's network of trade advisors, representing 85 percent of the total advisors.<sup>45</sup>

While liberalist models tend to perceive arbitrators' preference for internationalism and the de-localization of national legal power as a something that will create fair, international legal standards applying equally to all countries, the realist, power-based model views de-localization as an insidious attempt by corporate interests to seize greater political and economic power. As Mattli and Dietz note, "Critical theorists see de-localization as part of a much wider project by powerful corporate elites—the mercatocracy—to push market fundamentalism, including privatization, liberalization, deregulation, and a much-diminished welfare role of the state."<sup>46</sup> Investor-state arbitration created by BITs, which often involve powerful investors and weak states, are a primary example of this phenomenon. This kind of arbitration has resulted in a number of negative externalities for the populations in the state where the foreign investment occurs; these externalities include land expropriation that damages access to food for the poor, the destruction of cultural or religious sites and practices, workforce exploitation and violence, and of course, severe environmental damage.<sup>47</sup> The case studies that soon follow will investigate whether and how these power disparities play out in the environmental realm.

---

<sup>45</sup> Christopher Ingraham and Howard Schneider, "Industry voices dominate the trade advisory system," *The Washington Post*, February 27, 2014, <http://www.washingtonpost.com/wp-srv/special/business/trade-advisory-committees/>.

<sup>46</sup> Mattli and Dietz, "Mapping and Assessing the Rise of International Commercial Arbitration in the Globalization Era: An Introduction," 12.

<sup>47</sup> *Ibid*, 13.

*D. The Constitutionalization Model*

Unlike the other models of arbitration discussed thus far, the constitutionalization model accounts for why arbitration practices change over time.<sup>48</sup> To explain some changes in arbitration through the years, Mortiz Renner argues that arbitration panels have begun to incorporate precedents and public policy norms into their rulings.<sup>49</sup> This trend has led to an increasing “constitutionalization” of arbitration rulings, which is the idea these ruling are developing over time into a consistent, global body of law with its own set of enforced norms. Renner notes that there have been signs of constitutionalization even among international commercial arbitral panels, which is a movement away from the past *ad hoc* nature of past arbitral tribunals.

Regarding the focus of this paper, one could make the case that international trade law has already been deeply constitutionalized in trade treaties, and by extension, trade arbitration rulings. Numerous trade agreements, such as the North American Free Trade Agreement (NAFTA) and WTO trade rules, ban states from discriminating against certain foreign goods over national ones, a standard referred to as ‘national treatment’, because states are supposed to give particular goods from particular states the same treatment as they give their national goods.<sup>50</sup> The fact

---

<sup>48</sup> Ibid, 14.

<sup>49</sup> Moritz Renner, “Private Justice, Public Policy: The Constitutionalization of International Commercial Arbitration,” *International Arbitration & Global Governance: Contending Theories and Evidence*, edited by Walter Mattli and Thomas Dietz, (Oxford: Oxford University Press, 2014), 117-139.

<sup>50</sup> World Trade Organization, “Principles of the trading system,” *WTO.org*, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact2\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm).

that the idea of national treatment serves as the foundation for many trade agreements should therefore give trade arbitral panels some uniformity in their rulings, since they will be concerned with enforcing this standard. If the rules governing international trade are to have legitimacy, similar claims filed under similar trade rules should have similar outcomes. It would be problematic for the WTO's legitimacy, for example, if it had allowed Canada's solar subsidy program to go forward (the subject of the final case study in this paper) but not India's.

In some ways, the constitutionalist model contradicts critical theorists' power-based model of arbitration, which sees arbitration as separated from public policy norms in most scenarios. In response to the constitutionalization model, critical theorists contend that powerful actors who are dissatisfied with one form of constitutionalized arbitration could simply move to another form, create their own form, or simply ignore arbitration rulings altogether. Likewise, Mattli and Dietz write, "Critical theorists may react skeptically to the constitutionalization model, insisting that power asymmetries in conjunction with narrow self-interest of the parties to an international dispute could act as overriding structural and behavioral impediments to the erection of a constitutionalized arbitral architecture."<sup>51</sup>

To address this concern of critical theorists, Renner writes, "The application of public policy norms directly addresses the issue of potential *negative externalities* following from arbitral dispute resolution."<sup>52</sup> For example, if legal norms concerning human rights or the environment were to be more fully integrated into the decisions

---

<sup>51</sup> Mattli and Dietz, "Mapping and Assessing the Rise of International Commercial Arbitration in the Globalization Era: An Introduction," 15-16.

<sup>52</sup> Renner, "Private Justice, Public Policy: The Constitutionalization of International Commercial Arbitration," 138.

of arbitral tribunals, then perhaps this would make arbitration a more equitable process. In fact, as will be later examined, the constitutionalization model's solution for solving the negative externalities produced by arbitration is actually very much in line with solutions advocated by critical theorists like Watt.

#### **IV. Case Studies**

This section presents the following four case studies: the People of Ecuador vs. Chevron Corporation, Methanex Corporation vs. the United States, Japan and the European Union vs. Canada, and Ethyl Corporation vs. Canada. After explaining the facts of each case, there will be an analysis applying particular aspects of the four arbitration theories.

Each case has been selected to give the reader a different insight into the potential clash between environmental regulations and international trade arbitration. They were also selected to represent a variety of successful and unsuccessful challenges to environmental regulations to illustrate scenarios when arbitration panels are likely to rule against such regulations and when they are not. Arbitration claims filed under either ISDS mechanisms or WTO rules are both included in the selection of cases, because arbitration claims have come into conflict with environmental regulations in each of these realms. Also, while three out of four of the cases focus specifically on developed states, further examples within the case analysis sections show that many developing states also face similar arbitration scenarios. Finally, these cases, although unique in their own ways, are not isolated

incidences; rather, they each reflect specific trends in how international arbitration may conflict with national environmental policies.

*A. The People of Ecuador vs. Chevron Corporation*

One of the most famous, longest—and, at the same time, one of the most current—environmental disputes that involves international trade arbitration is Ecuador’s ongoing case against Chevron Corporation regarding Texaco Inc.’s (which Chevron now owns) dumping of more than 18 billion gallons of toxic waste into streams and rivers in the Amazon used for drinking water by indigenous populations.

Before delving into the most recent 2016 arbitration rulings regarding this case, a brief historical background is necessary. Texaco had operations in Ecuador from 1964 until 1992. In 1964, Ecuador granted one of Texaco’s subsidiaries, TexPet, and a Gulf Oil subsidiary permission to explore for and produce oil in an area of Ecuador called the Orienté.<sup>53</sup> TexPet was the sole operator of the Gulf-TexPet joint venture, which was called the Consortium. In 1973, Ecuador’s state-owned oil company, now known as PetroEcuador, bought a 25 percent interest in the Consortium—12.5 percent was from TexPet, and the other 12.5 percent was from Gulf Oil. Soon after this transaction, PetroEcuador acquired Gulf Oil’s remaining equity, thereby becoming the Consortium’s majority owner. Meanwhile, TexPet held

---

<sup>53</sup> Lewis A. Kaplan, “Chevron Corporation vs. Steven Donziger, et al.,” *United States District Court, Southern District of New York*, March 3, 2014, 1, <http://www.nysd.uscourts.gov/cases/show.php?db=special&id=379>.

a 37.5 percent interest in the joint agreement. TexPet continued its involvement with the Consortium until June 1992, when the agreement expired.

After the Consortium's expiration, Texaco and the Ecuador government agreed to a Memorandum of Understanding stipulating TexPet "would be released from any potential claim for environmental harm once TexPet performed an agreed-upon remediation in the area in which it had operated."<sup>54</sup> Texaco later signed a \$40 million remediation agreement with the Ecuadorian government to pay for environmental damage that it had caused in Ecuador. However, this remediation was carried out poorly; cleanup efforts consisted of covering portions of the polluted areas with tires, concrete, and vegetation. Much of the toxic waste remains in the water and soil to this day. Chevron later merged with Texaco in 2001 to form Chevron Texaco Corporation, which was rebranded four years later as Chevron Corporation, the name the company goes by today.

In 1993, public interest lawyers filed a class-action lawsuit on behalf of 30,000 local and indigenous people in the Amazon who had developed severe health problems as a result of TexPet's toxic pollution in the area.<sup>55</sup> The lawyers chose to file the lawsuit in the District Court of New York, because that was where Texaco's company headquarters were located. After a nine-year court battle, the U.S. courts accepted Chevron's argument that the United States did not have the proper jurisdiction to settle the case. Thus, the courts rejected the lawsuit, and the lawyers filed a new class-action lawsuit in the town of Lago Agrio, Ecuador.

---

<sup>54</sup> Ibid, 6.

<sup>55</sup> Public Citizen, "TPP's Investment Rules Harm the Environment," *Citizen.org*, 2015, <http://www.citizen.org/documents/TPP-and-the-environment.pdf>.

After 18 years of court arguments in both the United States and Ecuador, the Lago Agrio court judge ruled in 2011 that Chevron should pay \$8.6 billion for cleanup costs and punitive damages.<sup>56</sup> The judge also ruled that if Chevron did not issue a public apology, then the amount would rise to \$18 billion, one of the largest fines ever imposed by a court for environmental pollution.<sup>57</sup> Because Chevron refused to apologize, the fine rose to \$18 billion. Chevron then filed an appeal to the ruling with the three-judge Provincial Court of Justice of Sucumbíos, which, on January 3, 2012, upheld the lower court's ruling. On January 20, 2012, Chevron filed another appeal, this time with Ecuador's National Court of Justice, the highest court in the country. Chevron also asked for an appeal from the Sucumbíos court again in light of the March 2010 international arbitration ruling discussed below. However, the court ruled that Chevron could not use an order from the tribunal, which asked for Ecuador's government to suspend litigation against Chevron, to escape the enforcement of the Ecuadorian courts' judgment. In November 2013, the National Court of Justice upheld a penalty of \$9.5 billion. The Ecuadorian plaintiffs proceeded to file lawsuits in Canada and Brazil in 2012 that targeted Chevron's assets in those countries in an attempt to motivate Chevron to pay the damages, but still the company refused to pay.

Instead, Chevron had petitioned the U.S. justice system for relief while filing an international arbitration claim in December 2006, and again in September 2009,

---

<sup>56</sup> Business & Human Rights Resource Centre, "Texaco/Chevron lawsuits (re Ecuador)," *business-humanrights.org*, 2015, <http://business-humanrights.org/en/texacochevron-lawsuits-re-ecuador>.

<sup>57</sup> Clifford Krauss, "Big Victory for Chevron over Claims in Ecuador," *The New York Times*, March 4, 2014, [http://www.nytimes.com/2014/03/05/business/federal-judge-rules-for-chevron-in-ecuadorean-pollution-case.html?\\_r=0](http://www.nytimes.com/2014/03/05/business/federal-judge-rules-for-chevron-in-ecuadorean-pollution-case.html?_r=0).

before the Permanent Court of Arbitration at The Hague under the authority of the U.S.-Ecuador Bilateral Investment Treaty. In March 2010, the arbitral panel ruled that Ecuador's government had violated both the investment treaty and international law by delaying rulings on the lawsuit that was then pending in Ecuador's courts. The Government of Ecuador and the plaintiffs in the lawsuit sought an injunction that would prohibit Chevron from proceeding with international arbitration under the treaty, arguing that this would violate due process rights in Ecuador. They have since appealed this ruling.

Then, in February 2011, the international arbitration panel ordered Ecuador to suspend the enforcement of any penalties against the company to the extent that such damages paid to the indigenous populations would interfere with the protection of private property rights provided by the bilateral treaty. In the same month, a U.S. court made a similar judgment in Chevron's favor, prohibiting Ecuador from enforcing any penalties against Chevron for the time being. As explained above, the government of Ecuador ignored these rulings. The same arbitral panel then decided on January 25, 2012 that it had jurisdiction under the investment treaty to decide on Chevron's liability for the harm Ecuador's indigenous people suffered from the pollution of their land.<sup>58</sup> Additionally, a global anti-suit injunction in favor of Chevron was ordered by U.S. Court of the Southern District of New York, but was then appealed a year later by the U.S. Federal Court of Appeals for the Second Circuit on grounds that such an injunction could only be sought defensively. The Ecuadorian plaintiffs had not attempted to enforce their judgment

---

<sup>58</sup> Watt, "The Contested Legitimacy of Investment Arbitration and the Human Rights Ordeal: The Missing Link," 224.



in New York or any other jurisdiction at that time, so no anti-suit injunction could be granted.

Throughout the duration of these numerous legal cases, Chevron maintained that they had no legal responsibility to pay for the environmental harm Texaco caused in Ecuador, because the government of Ecuador had already accepted reparatory payments and signed an agreement to free the company from any past liability it might have had. Notably, the arbitration tribunal contradicted this argument in March 2015, reasoning that a settlement between the Ecuadorian government and Texaco did not preclude citizens of the country from suing Chevron over the pollution one of its subsidiaries caused.

Finally, in the January of 2016, the District Court of The Hague ruled in favor of Chevron, stating the arbitration panel did have jurisdiction to rule on the case because of Ecuador's BIT with the United States; therefore, the arbitration panel's interim ruling for Ecuador to stop attempting to enforce the \$9.5 billion penalty against Chevron was upheld.<sup>59</sup> The arbitration panel has not yet issued a final ruling. Chevron now intends to make Ecuador pay damages for the violation of its 1990s settlement agreement with the government, but Ecuador has said that it will fight for an appeal to the Hague decision.

---

<sup>59</sup> TeleSur, "Ecuador to Appeal Ruling by The Hague in Chevron Pollution Case," *telesurtv.net*, January 26, 2016, <http://www.telesurtv.net/english/news/Ecuador-to-Appeal-Ruling-by-The-Hague-in-Chevron-Pollution-Case-20160126-0007.html>.

*Case Analysis*

If the situation above reads like a complicated mess of conflicting court rulings, that is because that is exactly what it is. From a power-based perspective of arbitration, this case is the epitome of the shortcomings of ISDS mechanisms.

The most apparent power disparity in the Ecuador vs. Chevron case is what groups can be represented in international trade arbitration. Where is the space in the arbitration system for class-action lawsuits on behalf of the people? In reality, there is no space, because on the level of international arbitration, the dispute must always be between state governments and corporations, or just between state governments themselves, but never between the people in a particular state and a corporation or a particular government. This means that for the people of Ecuador, there is literally no space for their grievances to be legally addressed on an international level without the government of Ecuador, a government that itself played a role in creating their grievances by partnering with TexPet in the first place. Thus, under ISDS, the only way for Ecuadorians to have had a chance at justice in the first place was to have a party that played a role in the poisoning and destruction of their environment represent them, a rather perverse state of affairs. This is the inequitable system that has already been fully constitutionalized in thousands of trade agreements. An analogy to this situation is a justice system where the only way a rape victim can achieve any sort of justice would be by having one of her rapists represent her in a claim against another one of her rapists.

Furthermore, according to the constitutionalist model, this case is an example of how the validity of trade agreements trumps other commitments

countries have signed onto. Documents regarding human rights, like the Universal Declaration of Human Rights, were not acknowledged by the U.S.-Ecuador BIT arbitration panel at all. The key difference, of course, is that the agreements Ecuador had with Chevron and the United States are legally binding, whereas many human rights commitments, such as the Universal Declaration of Human Rights and environmental commitments like the recent Paris Agreement on climate change, are not. Trade provisions regarding national treatment use the legally binding language of “shall.” On the other hand, trade provisions regarding the environment almost use “should” language, meaning that in an ideal world, states should try to meet the provisions of the treaty, but if they do not, then they will not be legally accountable in any way for their failure. So, it is quite unnecessary in this case and others to rely on the cultural-sociological model of arbitration in an attempt to discover the hidden biases of arbitrators, biases that value trade norms above environmental ones. Such a bias has been openly built into systems of international arbitration itself thanks to the legal language present in numerous international treaties.

However, there is one important caveat to include here: all of this is *not* to say that human rights and environmental norms have absolutely no legal norms of enforcement in the international system. For severe human rights violations, the International Criminal Court prosecutes individuals who commit acts such as genocide, crimes against humanity, and war crimes. The U.S. Alien Tort Claims Act of 1789 allows foreigners to sue in U.S. federal courts regarding violation of the law of nations or treaty obligations. This is one way U.S. corporations may be held accountable for atrocities they commit abroad, although it does not always work out

in practice. The Ecuadorian victims of Chevron's pollution tried to use this statute in their original 1993 U.S. class action lawsuit against the company, but the U.S. court ruled that the United States was an "inconvenient forum" and that the case was better settled in Ecuador.<sup>60</sup> Additionally, the Alien Tort Statute is just a national law in the United States, not an international one, and the International Criminal Court usually only prosecutes war criminals from developing countries, not wealthy, polluting corporations. Thus, it is fair to say that in systems of international trade arbitration, trade norms have much more legal teeth than human rights and environmental norms do, despite the fact that many trade issues have direct impacts on citizens' human rights and environment.

Finally, within the power-based model, the dispute between the people of Ecuador and Chevron perfectly illustrates how the international arbitration system often benefits rich, powerful corporations at the expense of vulnerable citizens with limited resources. One of these benefits is court shopping. Basically, if a corporation does not agree with a particular ruling, then it can petition to move the dispute into a more friendly, international forum that may provide a ruling that conflicts with the rulings of whichever national court ruled on the case previously. Regarding this situation, Watt writes, "In such cases, the last word belongs to the party with the most extra-judicial leverage."<sup>61</sup> Additionally, as lawyer Burt Neuborne observed in a

---

<sup>60</sup> Chip Pitts, "Chevron Found Guilty in \$ Billion Ecuadorian Human Rights and Environmental Case," *Amnesty International*, February 14, 2011, <http://blog.amnestyusa.org/americas/chevron-found-guilty-in-8-billion-ecuadorian-human-rights-and-environmental-case/>.

<sup>61</sup> Watt, 224

letter written on May 22, 2015 to the United States Court of Appeals for the Second Circuit:

Chevron's strategic decision in 2009 and 2011 to pursue intertwined arbitral and equitable proceedings poses many of the problems associated with parallel judicial proceedings. It is inefficiently duplicative. It involves blatant forum shopping... Most importantly, it poses a serious risk of inconsistent answers to sensitive common factual and legal questions concerning Ecuadorian courts, with no clear path to reconciling conflicting rulings.<sup>62</sup>

It is Chevron's court shopping that has turned this class-action lawsuit into a legal battle spanning over two decades, one that *still* is not fully resolved. At the end of the day, poor, indigenous families in Ecuador are living with—or in many cases, have died because of—Texaco's decades of destructive environmental pollution. As the saying goes, justice delayed is justice denied.

The economic-rationalists, in contrast, would say that this case is an example of how arbitration works best. The Ecuadorian government made certain agreements with corporations. In order for these agreements to have legitimacy, corporations need to be guaranteed that these agreements will not be broken, which is why international law is so useful and effective. It is not Chevron's fault the Ecuadorian government entered into international agreements that do not necessarily benefit Ecuadorian citizens. As Chevron said regarding the January 2016 decision from the Hague, "Today's decision reinforces the integrity of the arbitral proceedings and ensures that Ecuador will be held accountable for violations of its

---

<sup>62</sup> Burt Neuborne, "Re: Chevron Corp. v. Donziger, 14-826 (L), Chevron Corp. v. Payaguaje and Naranjo, 14-832 (Con)," letter to the United States Court of Appeals for the Second Circuit, May 22, 2014, 5, <http://www.italaw.com/sites/default/files/case-documents/italaw4302.pdf>.

international commitments.”<sup>63</sup> Therefore, from the economic-rationalist perspective, the ruling in this case strengthens the rule of international law, giving legitimacy to the past agreements governments made with corporations and with each other. Upholding the legitimacy and efficiency of the international order requires that these international courts overrule national ones. From the perspective of both Chevron and the economic-rationalist, if the people of Ecuador were to receive any kind of recourse for the harms they suffered, it should be from their own government, which was complacent in allowing such harms.

However, this economic-rationalist view of added legitimacy is rather questionable. In 2009, Ecuador withdrew from the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.<sup>64</sup> The country has also terminated 10 BITs since 2008. Currently, eight additional BITs, including the investment treaty with the United States, are under consideration of termination by Ecuador. Additionally, on May 6, 2013, Ecuadorian President Rafael Correa created the Citizen’s Audit Commission. He tasked it with auditing BITs that include ISDS provisions and examining potential deficiencies in past investment arbitrations in which Ecuador was involved. President Correa’s decree of the Commission’s creation “purports to be premised on an urgent need to review BITs and the

---

<sup>63</sup> Chevron Corp., “Chevron Corp. Statement on Dutch Court Decision on Arbitral Awards,” *Chevron.com*, January 22, 2016, [https://www2.chevron.com/chevron/pressreleases/article/01222016\\_dutchcourtdecisiononarbitralawards.news](https://www2.chevron.com/chevron/pressreleases/article/01222016_dutchcourtdecisiononarbitralawards.news).

<sup>64</sup> Francisco X. Jijón, White & Case, “Ecuador Evaluates Investment Treaty Framework,” *Latin Arbitration Law*, 2016, <http://www.latinarbitrationlaw.com/ecuador-evaluates-investment-treaty-framework/>.

dissatisfaction with the awards against Ecuador in investment arbitrations.”<sup>65</sup> Other countries may follow suit. Such occurrences demonstrate that arbitration rulings perceived as inequitable by host states may actually *delegitimize* the power of international trade arbitration, as well as the power of past trade agreements.

As for the contention that the government of Ecuador should pay its citizens reparations for the damages, this may well be true, but it does that mean that Ecuador alone should pay for the damages, especially since TexPet conducted the Consortium’s damaging operations. The larger problem here is that the current international system of law and order has, so far, allowed a major culprit of environmental pollution to get off relatively unscathed with little accountability to the people it harmed.

In short, when theorists take the economic-rationalist model at face value, they may miss core failings lodged at the very heart of international arbitration systems. Economic-rationalists must start asking themselves: whom do systems of international trade arbitration serve, and whom do they not?

---

<sup>65</sup> Ibid.

*B. Methanex Corporation vs. United States of America*

As this case study will demonstrate, ISDS cases are not always as complex and drawn out as the *Ecuador vs. Chevron* case, and sometimes, arbitration panels do rule in favor of environmental regulations, so long as those regulations align with established international trade law. In *Methanex Corporation vs. United States of America*, Methanex Corporation, a Canadian company that was and remains the world's largest distributor of methanol, sent in an arbitration claim under the United Nations Commission on International Trade Law "for alleged injuries resulting from a California ban on the use or sale in California of the gasoline additive MTBE [methyl tert-butyl ether]."<sup>66</sup> One of the primary ingredients used to manufacture MTBE is, as the name of the substance indicates, methanol.

MTBE is a fuel oxygenate.<sup>67</sup> Fuel oxygenates are added to gasoline because they allow it to burn better, thereby decreasing harmful fuel emissions. MTBE was first used in gasoline in the United States at low levels in 1979 to replace lead as an octane enhancer. MTBE concentrations in some gasoline increased after the U.S. Congress passed the 1990 Clean Air Act Amendments, which required the use of oxygenated gasoline in areas that have unhealthy levels of air pollution. However, despite its ability to reduce air pollution from the burning of gasoline, MTBE is more soluble in water than other chemicals used in gasoline, meaning it can travel faster and farther through groundwater. Even small amounts of MTBE can make water toxic for human consumption. It is also not easily biodegradable, which makes

---

<sup>66</sup> U.S. Department of State, "Methanex Corp. v. United States of America," *state.gov*, 2016, <http://www.state.gov/s/l/c5818.htm>.

<sup>67</sup> American Cancer Society, "What is MTBE?," *cancer.org*, July 17, 2014, <http://www.cancer.org/cancer/cancercauses/othercarcinogens/pollution/mtbe>.



contamination cleanups more difficult. In light of these negative impacts on human health and the environment, California governor Gray Davis issued an executive order banning MTBE in the state in 1999.

In their arbitral claim, Methanex argued that California's executive order and other U.S. state MTBE bans "expropriated parts of its investments in the United States," thereby violating Article 1110 of NAFTA, a treaty that includes the United States, Canada, and Mexico.<sup>68</sup> The corporation also contended that these bans on MTBE violated fair and equitable treatment in international trade under Article 1105, and that the United States denied it the fair national treatment that Article 1102 requires. In light of these alleged violations, Methanex sought \$970 million in damages from the United States.

The first arbitration hearing was held in July 2001, which determined that the arbitral tribunal had jurisdiction over the case. After additional hearings assessing each side's claims and interpreting the submitted evidence, the tribunal released its final judgment on August 9, 2005, dismissing all of Methanex's claims. Additionally, the tribunal ordered Methanex to cover the costs of the United States' legal fees and arbitral expenses to the tune of approximately \$4 million.

Regarding fair national treatment of products established by Article 1102 of NAFTA, the arbitration panel expressed in its official ruling,

...the Tribunal decides that Methanex's claim under Article 1102 fails, for, without regard to the question of causation, the California MTBE ban did not differentiate between foreign and domestic MTBE producers; nor, if it is

---

<sup>68</sup> Ibid.

relevant, did it differentiate between foreign and domestic methanol producers.<sup>69</sup>

Similarly, the panel dismissed Methanex's claim under Article 1105, because the U.S. regulations banned MTBE use from national producers as well as international ones. The reason for this is as follows: international trade law tends to focus on specific products and services. Under treaties like NAFTA, states are not prohibited from outlawing a particular kind of good or service; rather, the main focus is on ensuring that a state does not engage in discriminatory practices that favor a nationally produced version of a particular good over a foreign-produced version of that same good. Finally, because the United States did not seize or transfer any Methanex property, no expropriation as defined by Article 1110 occurred. Thus, Methanex lost the case, and U.S. state bans on MTBE remain to this day.

### *Case Analysis*

On the surface level, this is an example of how environmental regulations can work within the context of international trade laws. As the arbitration panel observed, the California ban on MTBE is not an example of trade discrimination because, whether or not the MTBE was from a national or foreign producer, it would still be banned in California.

The economic-rationalist model acknowledges that states have the power to regulate the products that cross their borders, so long as those regulations are in

---

<sup>69</sup> J. William F. Rowley, W. Michael Reisman, and V.V. Veeder, "Methanex Corporation and United States of America: Final Award of the Tribunal on Jurisdiction and Merits," *International Arbitration Tribunal under Chapter 11 of NAFTA and the UNCITRAL Arbitration Rules*, August 3, 2005, 262, <http://www.state.gov/documents/organization/51052.pdf>.

line with pre-existing commitments the state has made with other parties. This model emphasizes that a primary benefit of arbitration is that it keeps the disputing parties on the same terms, holding them to any agreements that they made with each other. While those concerned purely with the economic benefits corporations gain from trade may view this case negatively, supporters of the economic-rationalist model would stress that the ban on MTBE violated no legal contracts between the parties. Methanex argued that banning MTBE was discriminatory because the United States favored the national production of ethanol, a fuel oxygenate substitute, in place of the foreign production of methanol. But from the perspective of international trade law, MTBE and ethanol are fundamentally different products, so banning one product but not the other does not constitute discrimination. Therefore, if Methanex thought it was discriminatory for California to ban MTBE, it was only because Methanex did not fully understand (or wanted to twist or ignore) previous trade commitments forged between the United States and Canada. International arbitration served to clarify these commitments. In the long run, this clarification makes the international trade system stronger and more efficient, for it preserves the sovereign power of nations to regulate which products pass through their borders. If nations could no longer do this, then some nations might decide to withdraw their signatures from previous trade commitments. This scenario would make forming trade relations more difficult, creating unnecessary barriers to international trade flows. In short, this arbitration ruling protected the efficiency and reliability of international trade agreements.

But the power-based model contends that there is more to this case than just a standard interpretation of international trade law. This model reminds us to look at who the disputing parties are and to take note of any potential power disparities. The amount of power a particular entity has can be defined in terms of how easily that entity can make other parties conform to its will for a desired outcome. In international arbitration courts, the political and economic resources of the parties play an important role in shaping each one's level of power.

Political power is important because the amount of perceived influence a country or corporation has may affect how willing the arbitration panel is to issue a ruling against a particularly powerful party. Based on insights from the cultural-sociological model regarding the fact that arbitration judges have their own biases, a judge might think twice about issuing a ruling against one of the P-5 countries in comparison to a relatively obscure state, like the island nation of Kiribati. While this would be difficult to conclusively establish without interviewing numerous arbitrators, Schultz and Dupont's finding that developed countries since 1998 were 1.7 times more likely than developing countries to win arbitration cases add some inconclusive support to this theory.

Likewise, economic power matters because arbitration disputes can cost the disputing parties hundreds of millions of dollars, an amount of money some nations and companies aren't willing or able to easily afford. This factor can affect the quality of lawyers a party has access to, whether or not a party chooses to pursue an appeal to an unfavorable ruling, or whether a party even files a claim in the first place. It can also affect how easily a particular party is willing to settle a claim rather

than spending funds on expensive lawyers and waiting for a ruling from an arbitral panel.

In this particular case, although Methanex is a successful corporation, its economic and political power is miniscule compared to that of the United States of America, the wealthiest (and, arguably, the most powerful) nation in history. If the state in this case had been less economically and politically powerful, or if the corporation had been more so, then the outcome might have changed. At the very least, Methanex might have sought an appeal, or fought to transfer the case to a different court system, as Chevron did. Perhaps the MTBE bans would indeed be perceived as discriminatory, setting a new definition for what constitutes trade discrimination. Although the latter situation is not at all likely because of pre-existing trade law precedent, it might be possible, given the right arbitration judges and *ad hoc* setting.

On a final note, this case was a success for environmental regulations only *because* those regulations did not violate pre-existing international trade agreements based on a technicality of what nondiscrimination means. The norm of nondiscrimination is strongly legalized in trade, as the constitutionalization model notes. This certainly increases the strength and validity of international arbitration rulings, for it demonstrates consistency in the definition of nondiscrimination and helps to constitutionalize such an interpretation. Thus, the ISDS mechanism does allow for certain narrow victories for environmental regulations falling within the definition of nondiscrimination. The problem is, we need much more room for environmental regulations and programs than this miniscule legal space allows.

What happens when elements of trade law are fundamentally opposed to environmental policies, such as recent initiatives needed to combat global climate change? As the next case will demonstrate, there are times when the technicalities of international trade law are used to overturn rather than uphold environmental laws.

### *C. Japan and the European Union vs. Canada*

Increasingly, governments are challenging renewable energy programs that rely on subsidies in other countries through the use of international trade agreements. What follows is just one example of an increasingly common trend in how arbitration can be used to shut down particular environmental programs. Unlike the other cases examined so far, this case is an example of arbitration between states through the WTO, not arbitration via an ISDS mechanism.

The story of this case starts with Silfab, an Italian corporation that manufactures solar panels. In 2010, Silfab decided to open up its first North American solar manufacturing plant in Ontario, the province with the highest population in Canada.<sup>70</sup> Despite Ontario's relative lack of sunlight compared to other places on the North American continent, this location seemed like a smart move to the corporation's executives because of a new environmental action plan Ontario passed in 2009. This plan, called the Green Energy and Green Economy Act, vowed to phase out the province's reliance on coal by 2014. To help accomplish this ambitious goal, the legislation included a feed-in tariff program allowing renewable

---

<sup>70</sup> Naomi Klein, *This Changes Everything: Capitalism vs. The Climate*, (New York, NY: Simon & Schuster, 2014), 66-67.

energy companies to sell power back to Ontario's electricity grid at guaranteed premium prices. However, in order to qualify for the program, 40 to 60 percent of a renewable energy company's workforces and material had to be local to Ontario. This provision meant that solar manufacturers like Silfab would have access to a stable market and would not be forced to compete against cheaper solar panels from Chinese manufacturers, who were and are bolstered by solar subsidies themselves. Note that under WTO law, Ontario's preferential treatment of their local solar industry counts as a subsidy, because it is, in effect, giving more money to local solar producers than to foreign solar producers for the same product, thereby creating a market distortion.

At first, this legislation was quite successful in expanding clean energy production. Journalist Naomi Klein writes, "By 2012, Ontario was the largest solar producer in Canada and by 2013, it had only one working coal-fired power plant left. And by 2014, more than 31,000 jobs had been created."<sup>71</sup> Additionally, many of the workers hired by Silfab came from Canada's nearly defunct auto sector, which had been badly damaged due to the financial troubles of General Motors and Chrysler.

These solar panel subsidies quickly ended when Japan and the European Union brought a WTO dispute against Ontario. It should be noted that certain types of subsidies under WTO rules are permissible. For example, the WTO permits agricultural subsidy programs and the granting of limited subsidies to companies adapting to new environmental laws.<sup>72</sup> However, the 1995 Agreement on Subsidies

---

<sup>71</sup> Ibid, 67.

<sup>72</sup> World Trade Organization, "The environment: a specific concern," *WTO.org*, 2016, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/bey2\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey2_e.htm).

and Countervailing Measures (SCM) bans the use of many kinds of subsidies, including subsidies like Ontario's feed-in tariff program. As such, the WTO Dispute Settlement Body ruled in 2012 that Ontario's buy-local provisions were illegally protectionist. The province complied in ending the program. According to Silfab businessman Paolo Maccario, this ruling led foreign investors to rescind their support for the factory's expansion.<sup>73</sup>

This is not the first time the subsidization of renewable energy companies has come up in international disputes. In 2010, for example, the United States considered challenging a Chinese wind power subsidy program on the basis that it violated WTO standards of fair and equal treatment of particular goods between nations.<sup>74</sup> In response, China filed a complaint in 2012 against renewable energy programs in the EU and threatened to bring a dispute challenging renewable energy subsidy programs in five U.S. states, charging the U.S. government with protectionism. Later on, in 2014, the WTO ruled against import tariffs the United States had placed on Chinese solar panels, tariffs which the United States originally enacted in reaction to China's subsidization of their own solar industry.<sup>75</sup>

Even more recently, the WTO ruled against India's solar subsidization program, the National Solar Mission, in February 2016.<sup>76</sup> In the five years since India first announced the program, the state had expanded its solar capacity from

---

<sup>73</sup> Klein, *This Changes Everything: Capitalism vs. The Climate*, 69.

<sup>74</sup> Ibid, 64-65.

<sup>75</sup> Robert Evans, "WTO faults U.S. over duties on Chinese, Indian steel goods," *Reuters.com*, July 14, 2014, <http://www.reuters.com/article/us-trade-wto-usa-china-idUSKBN0FJ1S620140714>.

<sup>76</sup> Tom Miles and David Lawder, "U.S. wins WTO dispute against India's solar rules," *Reuters.com*, February 24, 2016, <http://www.reuters.com/article/us-india-usa-solar-idUSKCN0VX1Y5>.



almost nothing to 5,000 megawatts, thanks to the long-term energy contracts and government subsidies the program provided to the solar industry. But then the United States filed a WTO dispute in 2014 against India's program, arguing that buy-local provisions unfairly disadvantaged U.S. solar companies exporting products to India. As was the case with Ontario, India's subsidization of renewable energy is no longer allowed to continue under international law. India's energy minister, Piyush Goyal, has since announced that he plans to file 16 WTO cases against the United States.<sup>77</sup> Given that there are many other countries that subsidize renewable energy, similar trade disputes may occur in the future.

### *Case Analysis*

As with the previous case between Methanex Corporation and the United States, the economic-rationalist would consider these solar subsidy trade disputes good examples of how arbitration courts help facilitate free trade on the terms to which nations have mutually agreed. Legally, the WTO arbitration panel had to rule against solar subsidies, because these subsidies do violate the fair and equal treatment of goods between nations. Ontario was indeed favoring its own solar industry over that of Japan's. Certain sectors, such as agricultural and oil companies, are exempted in some way from nondiscrimination WTO trade rules, but the solar industry is not one of these sectors. From an economic-rationalist perspective, because these trade arrangements are what nations have previously agreed to, they must keep these agreements, form new ones, or withdraw from the WTO.

---

<sup>77</sup> Ian Clover, "Indian energy minister threatens to file 16 solar cases against US with WTO," *PV-Magazine.com*, April 11, 2016, [http://www.pv-magazine.com/news/details/beitrag/indian-energy-minister-threatens-to-file-16-solar-cases-against-us-with-wto\\_100024100/#axzz45Y9BRLtf](http://www.pv-magazine.com/news/details/beitrag/indian-energy-minister-threatens-to-file-16-solar-cases-against-us-with-wto_100024100/#axzz45Y9BRLtf).

Subsidizing a good banned from subsidization under fair and equal treatment standards while still remaining a WTO member cheapens the meaning of international trade agreements and puts the whole system in jeopardy.

For the power-based analyst, on the other hand, this case demonstrates how 1940s trade norms fail to account for the modern environmental challenges nations face today. Of course, the fact that trade law has become normalized in this way also validates the constitutionalization model, but the power-based model provides a fuller analysis here, because it delves into the effects of such constitutionalization for different actors in the international order. The power-based model views this case as an example of how trade laws are built to meet the needs of nations and corporations, not the needs of the citizens who are already suffering the impacts of climate change. As Klein pointedly observes, “From a climate perspective, the WTO ruling was an outrage: If we want to keep warming below catastrophic levels, wealthy economies like Canada must make getting off fossil fuels their top priority. How absurd, then, for the WTO to interfere with that success — to let trade trump the planet itself.”<sup>78</sup>

The vast majority of scientists agree that climate change is already happening, with 2014, and then 2015, as the hottest years on record. The Paris Agreement of 2015 stands as an international recognition of the reality of these changes in our climate and the need to enact policies to mitigate how much temperatures will rise. One of the most important actions governments can take to

---

<sup>78</sup> Naomi Klein, “The price of free trade is unchecked climate change,” online version of excerpt from *This Changes Everything: Capitalism vs. The Climate*, September 12, 2014, <http://theleap.thischangeseverything.org/the-price-of-free-trade-is-unchecked-climate-change/>.

lower carbon emissions is to decrease their dependence on fossil fuels by investing in renewable energies. Unfortunately, trade rules prioritizing free market incentives over the planet are now preventing some nations from doing this.

Although the price of U.S. solar power has dropped 70 percent since 2009,<sup>79</sup> the renewable energy industry still needs heavy subsidization by the government if it is to expand and remain competitive. There are two reasons for this. The first reason is that governments across the globe have given generous subsidies to fossil fuel companies for decades. Over the past century, the U.S. federal government has granted more than \$470 billion to the oil and gas industry in the form of permanent tax breaks. (Other countries subsidize their oil and gas industries as well, and the WTO allows it.) Although the United States still subsidizes fossil fuels, renewable energies now receive larger national subsidies on a yearly basis. A 2014 *Mother Jones* report found that U.S. taxpayers subsidize the fossil fuel industry by as much as \$4.8 billion a year, whereas renewable energies are granted \$7.3 billion a year.<sup>80</sup> However, on a global scale, fossil fuels received \$493 billion in subsidies in 2014, more than four times the value of the subsidies renewable energies received, according to the International Energy Agency.<sup>81</sup>

---

<sup>79</sup> Christina Nunez, "Solar Energy Sees Eye-Popping Price Drops," *National Geographic.com*, October 2, 2015, <http://news.nationalgeographic.com/energy/2015/10/151002-solar-energy-sees-eye-popping-price-drops/>.

<sup>80</sup> Andy Kroll, Dave Gilson, Benjy Hansen-Bundy, and Alex Park, "Triumph of the Drill," *MotherJones.com*, April 2014, <http://www.motherjones.com/politics/2014/04/oil-subsidies-renewable-energy-tax-breaks>.

<sup>81</sup> International Energy Agency, "Energy Subsidies," *WorldEnergyOutlook.org*, 2016, <http://www.worldenergyoutlook.org/resources/energysubsidies/>.

The second reason why renewable energy subsidies are essential to help keep the industry going is that even though renewables are now cost-competitive with fossil fuels, the infrastructure of most nations favors fossil fuel use. For example, the United States, as is the case with other nations, has a highway system, power grid system, regulatory system, and combustion engine-centric fueling system all designed for fossil fuel use.<sup>82</sup> Energy expert Kate Gordon notes, “These massive infrastructure projects were built up with public-sector support, including tax credits, low-cost loans, and outright grants from the federal government. Companies designing new energy sources, in contrast, often have to build their own infrastructure and factor it into their costs.”<sup>83</sup> Thus, without adequate renewable energy subsidies, the world has little hope of addressing the challenges of climate change. Unless nations around the world agree to create exceptions for renewable energy under fair and equal treatment WTO laws, governments may look at cases like Ontario and India and decide that passing laws to subsidize renewables are not even worth it in the first place.

In his research on WTO subsidies, Steve Charnowitz writes:

First, the current limits on subsidies in the SCM Agreement do not take into account any policy justification for a subsidy. This means that a subsidy justified as economically rational does not get any legal deference reflecting that policy value, even when the subsidy produces positive spillovers that benefit the global community. So the fact that a government intervenes in an existing market “to correct market distortions therein” does not provide a legal excuse to use what would otherwise be illegal under WTO rules.<sup>84</sup>

---

<sup>82</sup> Kate Gordon, “Why Renewable Energy Still Needs Subsidies,” *WSJ.com*, September 14, 2015, <http://blogs.wsj.com/experts/2015/09/14/why-renewable-energy-still-needs-subsidies/>.

<sup>83</sup> *Ibid.*

<sup>84</sup> Steve Charnowitz, “Green Subsidies and the WTO,” *GW Law Faculty Publications & Other Works*, 2014,

Applying this observation to the environmental discussion at hand, this means that it does not matter whether or not subsidizing renewable energy companies would serve to correct the market distortions governments have caused by subsidizing fossil fuels throughout the past decades to the present. Given that the WTO proclaims itself to be primarily concerned with free trade, this fact is important to emphasize. In the energy industry, it turns out that there has never been such a thing as a free market after all.

However, the WTO's founding agreement does recognize sustainable development as a core principle. The 1995 Preamble to the Marrakesh Agreement Establishing the World Trade Organization states that WTO members acknowledge,

their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development...<sup>85</sup>

Charnowitz recommends that, in light of this commitment to sustainable development, WTO members need to examine whether SCM rules "are optimal for achieving the dual goals of environmental protection and open trade", concluding that right now, "current rules are not optimal."<sup>86</sup> Unfortunately, re-evaluating the SCM rules in relation to environmental subsidies is not currently a topic of discussion in WTO negotiations.

---

<sup>17</sup>[http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2341&context=faculty\\_publications](http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2341&context=faculty_publications) .

<sup>85</sup> World Trade Organization, "Sustainable development," *WTO.org*, 2016, [https://www.wto.org/english/tratop\\_e/envir\\_e/sust\\_dev\\_e.htm](https://www.wto.org/english/tratop_e/envir_e/sust_dev_e.htm).

<sup>86</sup> Charnowitz, "Green Subsidies and the WTO," 73.

*D. Ethyl Corporation vs. Canada*

This last case illustrates how corporations can use ISDS mechanisms to intimidate governments, even without relying on an official arbitration ruling.

In the April of 1997, the Canadian Parliament banned the import and interprovincial transport of the gasoline additive methylcyclopentadienyl manganese tri-carbonyl (MMT), which is, like MTBE, an octane enhancer.<sup>87</sup> After Canada phased out leaded gasoline, MMT was used in roughly 90% of gasoline in the country.<sup>88</sup> However, many public health scientists consider MMT to be dangerous to public health because it contains manganese, “a potent neurotoxin when inhaled.”<sup>89</sup> Automobile manufacturers also argued that MMT causes damage to emissions diagnostics and control equipment in cars, thereby increasing fuel emissions.<sup>90</sup> For these reasons, the state of California imposed a total ban on the use of manganese additives in unleaded gasoline in 1976.<sup>91</sup> Additionally, the U.S. Congress passed an amendment to the Clean Air Act in 1977 that prohibited the use of manganese additives in unleaded gasoline unless the Environmental Protection Agency (EPA) granted a waiver. Ethyl Corporation (today called the Afton Chemical Corporation), the same U.S. company that invented leaded gasoline, is the sole producer of MMT,

---

<sup>87</sup> Public Citizen, “NAFTA Chapter 11 Investor-to-State Cases: Bankrupting Democracy,” *Citizen.org*, 8, <https://www.citizen.org/documents/ACF186.PDF> .

<sup>88</sup> Katherine Blumberg and Michael P. Walsh, “Status Report Concerning the Use of MMT in Gasoline,” *International Council on Clean Transportation*, September 2004, 5, [http://www.theicct.org/sites/default/files/publications/MMT\\_ICCT\\_2004.pdf](http://www.theicct.org/sites/default/files/publications/MMT_ICCT_2004.pdf).

<sup>89</sup> Ray J. Minjares and Michael Walsh, “Methylcyclopentadienyl Manganese Tricarbonyl (MMT): A Science and Policy Review,” *International Council on Clean Transportation*, January 2009, 1, [http://www.theicct.org/sites/default/files/publications/MMT\\_dec08.pdf](http://www.theicct.org/sites/default/files/publications/MMT_dec08.pdf).

<sup>90</sup> Public Citizen, “NAFTA Chapter 11 Investor-to-State Cases: Bankrupting Democracy,” 8.

<sup>91</sup> Blumberg and Walsh, “Status Report Concerning the Use of MMT in Gasoline,” 5.

and it actively promotes MMT use in many developing countries. It requested waivers from the EPA multiple times but was denied. After the most recent waiver request in 1994, the EPA believed that Ethyl had demonstrated that MMT did not damage emissions control devices in automobiles, but the agency still denied the waiver because of uncertainty about MMT's impact on public health. In response, Ethyl sued the EPA and won, because the EPA does not have the authority to refuse waivers based on public health concerns. Today, the EPA mandates that fuel contain no more than 1/32 grams of manganese per gallon in the United States.<sup>92</sup>

Along with these bans and regulations, it should be noted that MMT use is not necessary in the production of fuel. According to the EPA, "...the oil industry in the United States has been able to provide very clean, high-quality and low-emission fuel which meets the performance requirements of the vehicle industry — including octane — without the use of MMT."<sup>93</sup> Many other countries either do not rely on or have effectively banned MMT in their fuels as well, including New Zealand, Germany, and Japan.

In response to Canada's MMT ban, Ethyl filed an arbitration dispute under NAFTA against the Canadian government a few days after the legislature passed the ban (a threat the company made while the Parliament was debating the ban). Ethyl argued that the MMT ban violated NAFTA's Chapter 11 requirement of national treatment (Article 1102), prohibition of expropriation (Article 1110), and

---

<sup>92</sup> Environmental Protection Agency, "EPA Comments on the Gasoline Additive MMT," *EPA.gov*, October 5, 2015, <https://www.epa.gov/gasoline-standards/epa-comments-gasoline-additive-mmt>.

<sup>93</sup> Minjares and Walsh, "Methlycyclopentadienyl Manganese Tricarbonyl (MMT): A Science and Policy Review," 4.

prohibition of performance requirements (Article 1106).<sup>94</sup> Ethyl sought \$251 million in damages “to cover losses resulting from the ‘expropriation’ of both its MMT production plant and its ‘good reputation.’”<sup>95</sup> This was the highest investor-state dispute claim ever submitted to the ICSID at the time.

The pressure of this significant potential liability persuaded the Canadian government to agree to pay an out-of-court settlement of \$13 million to Ethyl on July 20, 1998, before the arbitration panel issued a ruling. In comparison, Environment Canada, the government’s environmental agency, had a total budget of roughly \$11 million that same year. The Canadian government also had to issue a statement for Ethyl to use in advertising stating that “... ‘current scientific information’ did not demonstrate MMT’s toxicity or that MMT impairs functioning of automotive diagnostic systems.”<sup>96</sup>

### *Case Analysis*

Ethyl’s claim is similar in many ways to Methanex’s unsuccessful claim against the United States in the earlier case study. The arbitration panel may have used an identical line of reasoning, that because Canada banned all MMT, it was not discriminating against any particular state. But the Methanex case occurred after Canada settled with Ethyl, so there was no way that the precedent of the Methanex

---

<sup>94</sup> U.S. Department of State, “Ethyl Corp. v. Government of Canada,” *State.gov*, 2016, <http://www.state.gov/s/l/c3745.htm>.

<sup>95</sup> Michelle Sforza and Mark Vallianatos, “Ethyl Briefing Paper,” *Citizen.org*, 2016, [http://www.citizen.org/trade/article\\_redirect.cfm?ID=6221](http://www.citizen.org/trade/article_redirect.cfm?ID=6221).

<sup>96</sup> Public Citizen, “NAFTA Chapter 11 Investor-to-State Cases: Bankrupting Democracy,” 9.



case could have given the Canadian government insight about the outcome of the Ethyl case.

First and foremost, Ethyl's case against Canada demonstrates how arbitration disputes can be used to intimidate states into rescinding regulations that may be in the best interest of the environment and the health of the public. As the following excerpts from English transcripts of the Canadian Parliament's debate regarding whether to ban MMT illustrate, even the mere threat of an arbitration dispute is enough to give some legislators pause at enacting certain environmental regulations:

**Mr. Benoît Sauvageau (Terrebonne, Bloc Québécois party):**

In February, the Minister for International Trade wrote to his colleague, the environment minister, to warn him that Bill C-29, which prohibits the importation of MMT, runs totally contrary to Canada's obligations under NAFTA and the WTO.

Considering that Ethyl Corp. is about to make a \$275 million claim under NAFTA if Bill C-29 is passed, can the minister tell us how he will ensure that Canada will win its case before NAFTA?

**Hon. Arthur C. Eggleton (Minister for International Trade, Liberal party.):** Mr. Speaker, the government is proceeding with Bill C-29 for many different reasons. We will defend our position with respect to NAFTA. Just because they put in a claim does not mean they will be successful.

**Mr. Benoît Sauvageau (Terrebonne, BQ):** Mr. Speaker, is the minister telling us that, if the federal government goes ahead with Bill C-29, in spite of his department's warnings, it could end up having to pay Ethyl Corp. \$275 million coming from Canadian taxpayers?

**Hon. Sergio Marchi (Minister of the Environment, Lib.):** Mr. Speaker, this government is convinced that for many reasons Bill C-29 is in the best interests of Canadians, both environmentally and healthwise.

Second, Ethyl Corp. is entitled to its opinion. Are you suggesting that a U.S. multi-

**The Speaker:** Colleagues, always address the Chair in your answers.

**Mr. Marchi:** ...Is the member suggesting that a U.S. multinational corporation should dictate what the Government of Canada should do in the best interests of Canadians, both environmentally and healthwise? Our answer to that is a clear no.<sup>97</sup>

Sauvageau is clearly concerned about Ethyl's threat of a trade arbitration lawsuit and views this as a reason not to pursue the MMT ban. The threat of the lawsuit accomplished its intended effect at scaring some legislators away from supporting the ban, just as the actual arbitration claim intimidated the government to reverse the ban and pay Ethyl reparations for any profits it may have suffered.

But not all legislators shared Sauvageau's views. Among them was Susan Whelan:

**Ms. Susan Whelan (Essex-Windsor, Lib.):**

Ms. Ellen Silbergeld of the Environmental Defence Fund served on the EPA peer review panel on the EPA's health assessment document on manganese. She testified:

"Regardless of the effects of MMT on emissions control, there is no dispute that manganese is neurotoxic to humans. It is on this basis that EPA should deny this waiver. Particularly since Ethyl has yet again failed to provide evidence on two critical points. One, that the use of MMT will not affect human health and two, that the use of MMT will not measurably add to the environmental loading of manganese in critical compartments directly related to human exposure."

We cannot ignore this evidence. We must act with prudence. I am equally concerned that we must act now rather than regret our inaction later...

Finally, my message to Ethyl Corporation is that this government does not respond to corporate threats and it is the Government of Canada that sets policy in this country, not U.S. corporations.<sup>98</sup>

In the end, Whelan proved to be wrong. Because of the relatively new investor-state arbitration system set in place under NAFTA, a U.S. corporation really

---

<sup>97</sup> "Canada House of Commons Parliamentary Record," *Parliament of Canada*, September 25, 1996,

<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=2332613>.

<sup>98</sup> Ibid.

can shape policy in Canada. This fact further solidifies the power-based critique that the other cases have developed. From an economic perspective, the Canadian government would have had much to lose from an arbitration ruling in Ethyl's favor. Ethyl, on the other hand, had far less to risk and much more to gain from a ruling; if the arbitration court did happen to rule against Ethyl, it would probably have had to pay Canada's legal fees, but certainly not the hundreds of millions of dollars Ethyl was asking for. Furthermore, the functioning of Ethyl as a corporation depends on MMT significantly more than the functioning of the Canadian government depends on MMT. To put things in perspective: Ethyl's \$251 million claim against Canada is the same amount as 22 years of funding for Environment Canada at its 1998 funding level. With this in mind, it's easy to understand how Canadian government officials who care about the environment thought that the risk of having to pay a \$251 million claim to Ethyl was simply too gargantuan. With the incentives skewed for and against each party in this way, Canada's settlement with Ethyl makes sense from a power-based perspective. Once again, 'power' in arbitration is not defined solely by how many resources the parties have at their disposal, but also by how *much* of those resources parties are willing to expend on a particular case. Canada's settlement with Ethyl is a prime example of this.

Meanwhile, the economic-rationalist, cultural-sociological, and constitutionalization models do not offer as much insight into this case. These models focus on how arbitration rulings bolster international legitimacy and efficiency, how rulings are shaped by the culture of arbitrators, and how rulings become constitutionalized within the international system, respectively — but there

was never a ruling in this case. If anything, this case demonstrates how the economic-rationalist model again falls short in its analysis of arbitration; instead of serving to enforce clarity and efficiency for both sides in trade disputes, the system for settling such disputes is circumvented by the power inequities present within that very system. After all, if the parties had gone through with arbitration, then perhaps Canada would have been successful in upholding its ban on MMT, just as the United States was in upholding its MTBE regulations.

Regarding constitutionalization, however, the *Ethyl vs. Canada* case does set a different sort of precedent outside of the legal realm: if a particular government tries to inflict a regulation affecting company profits, then corporations can file an inflated arbitration claim against the government to intimidate them into repealing the regulation. Along with this precedent, an equally concerning implication here is that if a wealthy state like Canada can be intimidated in repealing regulations because of potentially costly arbitration disputes, then developing states that do not have nearly as much money to spend on their legal infrastructures may be even more vulnerable to corporate arbitral intimidation. Notably, Philip Morris International filed a \$25 million claim in 2014 against Uruguay because of the health warning labels the government was trying to place on their cigarette packages.<sup>99</sup> Uruguay said they would have already had to drop its tobacco regulations if former New York mayor Michael Bloomberg had not donated \$500,000 to help cover legal fees. Arbitral intimidation can take the form of a mere threat from a particular

---

<sup>99</sup> Philip Morris International, "Uruguay Bilateral Investment Treaty (BIT) Litigation," *PMI.com*, 2016, [http://www.pmi.com/eng/media\\_center/company\\_statements/pages/uruguay\\_bit\\_claim.aspx](http://www.pmi.com/eng/media_center/company_statements/pages/uruguay_bit_claim.aspx).

corporation or industry rather than a full-blown arbitral claim, and sometimes the threat alone is enough to stop environmental and health regulations in their tracks.

For example, Namibia passed a tobacco control law in 2010 that aimed to limit tobacco advertising and place large health warnings on cigarette packages, but three years later, the government had yet to carry out a single major provision of the law.<sup>100</sup> Tobacco companies had threatened to file arbitration disputes against the Namibian government; fearful of a costly legal battle, the Namibian government backed down. Bashupi Maloboka, a former Health Ministry official in Namibia who helped push for the passage of the tobacco control law, said, in reference to the tobacco industry, “The fear is that they have the money and they have the resources, so they can pay for anything.”<sup>101</sup> Likewise, Togo also backed down from passing a tobacco control law in 2013 — a law that would have placed picture warnings in place of written warnings on cigarette packages, as 40% of the state’s population is illiterate — because of threats from Philip Morris.<sup>102</sup> Developing states’ fears of the economic costs a legal dispute might bring are understandable when one investigates the economic power of each party: in 2013, Togo’s GDP was \$4.3 billion,<sup>103</sup> whereas Philip Morris’ net revenue was \$80 billion.<sup>104</sup>

---

<sup>100</sup> Sabrina Tavernise, “Tobacco Firms’ Strategy Limits Poorer Nations’ Smoking Laws,” *NYTimes.com*, December 13, 2013, <http://www.nytimes.com/2013/12/13/health/tobacco-industry-tactics-limit-poorer-nations-smoking-laws.html? r=0>.

<sup>101</sup> *Ibid.*

<sup>102</sup> Chuck Idelson, “Trade Deals Should Come With Their Own Warnings for Public Health,” *National Nurses United*, February 18, 2015, <http://www.nationalnursesunited.org/blog/entry/trade-deals-should-come-with-their-own-warnings-for-public-health>.

<sup>103</sup> Central Intelligence Agency, “The World Factbook,” *CIA.gov*, <https://www.cia.gov/library/publications/the-world-factbook/geos/to.html>.

Additionally, corporate arbitral intimidation can influence far more states than just the state against which the arbitration dispute is filed. Other African governments have witnessed what Namibia and Uganda have gone through and may be reluctant to put their own states through the same legal disputes, battles that they often cannot afford because of lack of money and/or specialized legal expertise. Once again, the power-based emphasis on how the economic strength of states and corporations affects how each party responds to arbitration cannot go unnoticed.

There is one final way in which power dynamics are crucial in understanding the inequities arbitration sometimes causes: cases like Canada's shift power dynamics between states and corporations by violating the precautionary principle, which demands that, if whether a product causes some kind of harm is unclear, then the burden is on the corporation manufacturing the product to prove that it is *not* harmful.<sup>105</sup> Until then, the government has the right to protect its citizens by regulating or banning the product as it sees fit. In short, scientific uncertainty of a product's safety should not disqualify the government from taking precautionary measures to protect the public from the product in question.

There are many examples of the precautionary principle in international law. The World Charter for Nature, adopted by the UN General Assembly in 1982, stands as the first international recognition of this principle. Additionally, the 1987 Montreal Protocol and the 1992 Rio Declaration on the Environment both draw

---

<sup>104</sup> Stock Analysis on Net, "Philip Morris International Inc.: Income Statement," 2016, <https://www.stock-analysis-on.net/NYSE/Company/Philip-Morris-International-Inc/Financial-Statement/Income-Statement>.

<sup>105</sup> Public Citizen, "NAFTA Chapter 11 Investor-to-State Cases: Bankrupting Democracy," 10.

upon the precautionary principle. Furthermore, the European Union's Lisbon Treaty signed in 2007 states in paragraph 2, article 191:

Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.<sup>106</sup>

In contrast to the international norm of the precautionary principle, situations like the ones explored in this case analysis prevent states from applying this principle to protect the populations they are responsible for governing. As Carol Browner, the EPA Administrator at the time of the U.S. Court of Appeals ruling against the EPA, said, "The American public should not be used as a laboratory to test the safety of MMT."<sup>107</sup> Nor should any other country, for that matter.

## **V. A Comprehensive Power-Based Model**

The case studies in this paper demonstrate three ways in which states and corporations can use international trade arbitration to bring down environmental programs and regulations:

### **1. Corporations can use ISDS mechanisms to delay or avoid paying damage claims from victims of pollution in other states. (*Ecuador vs. Chevron*)**

---

<sup>106</sup> "Treaty of Lisbon," *European Union Law*, December 13, 2007, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:12012E/TXT>.

<sup>107</sup> John H. Cushman Jr., "E.P.A. Accuses A Company Of Distortion," *NYTimes.com*, March 8, 1996, <http://www.nytimes.com/1996/03/08/us/epa-accuses-a-company-of-distortion.html>.

**2. Corporations can use arbitration claims to intimidate states into repealing environmental regulations or to prevent the passing of such regulations altogether. (*Ethyl vs. Canada*)**

**3. States can use WTO rules to shut down the renewable energy programs of other states with which they are competing. (*EU and Japan vs. Canada*)**

This state of affairs is problematic for a number of reasons.

First, it means that victims of extreme environmental pollution have a reduced chance of attaining justice through this kind of system, as evidenced by the *Ecuador vs. Chevron* case.

Second, it means that, at a time when climate change presents a severe long-term threat to states across the globe, environmental programs that would help transition societies away from fossil fuel dependence are being shut down, as in the *EU and Japan vs. Canada* case. This is a particularly crucial point to stress, for getting such progressive renewable energy programs passed on a national level can be enough of a challenge in itself. As Robert D. Putnam notes in his theory of two-level games in international diplomacy, states are always made up of various competing constituencies.<sup>108</sup> In international relations theory, scholars often refer to states as if they were cohesive units for the sake of simplicity, but one should always be aware of the complexities Putnam rightly observes behind this idea of uniform state interests. For example, the United States has declared its commitment to combatting climate change by signing onto the Paris Agreement. However, one of the key constituencies in the United States is the Republican Party, a party that has the climate change denial as a core component of its platform. In effect, the Democratic-

---

<sup>108</sup> Robert D. Putnam, "Diplomacy and Domestic Politics: The Logic of Two-Level Games," (*International Organization* 42, no. 3, Summer 1988), 427-460.



controlled Executive Branch has been forced to carry out the nation's efforts to reduce fossil fuel emissions, because the Republican-controlled Congress refuses to pass legislation leading to a renewable energy transition. Although most other states do not have to endure such an extreme situation when it comes to the denial of climate change, there are plenty of constituencies around the world (most notably, the fossil fuel companies themselves) lobbying states to resist enacting new environmental policies.

Third, these findings mean that, as multinational corporations continue to grow in wealth and power, we can expect these arbitral clashes with the environment to continue if no attempts at reforming this system are made. After all, many of the arbitral claims noted in this study are relatively recent, and corporations who can benefit from such international legal tactics in protecting their profits will surely take note.

In light of these problems, I will now present a comprehensive power-based model of international trade arbitration, building on key insights from the case studies and all four of the arbitration models presented so far (*See Figure 3 on pg. 71*). Regarding the four models of arbitration, Mattli and Dietz state, "Types or models are organizing devices of a complex reality, privileging certain key factors over others. The various models need not be mutually exclusive, but can overlap, interact, or even inform each other."<sup>109</sup> As the name 'comprehensive power-based model' suggests, my model will focus on incorporating the other models' perspectives via a power-based framework. I will then use the model as a

---

<sup>109</sup> Mattli and Dietz, "Mapping and Assessing the Rise of International Commercial Arbitration in the Globalization Era: An Introduction," 6.

foundation for identifying the current inequities in international trade arbitration and how they might be addressed.

At its heart, the original power-based model highlights the power inequities within the arbitration process and the negative externalities it often produces. Yet despite these critical observations, it would be a mistake to not mention any of the benefits arbitration contributes to society, or to conclude arbitration should be outlawed altogether. The economic-rationalist model provides crucial answers as to why structures of arbitration developed in the first place and acknowledges some of the positive impacts of arbitration upon certain constituencies. As previously mentioned, providing avenues for arbitration has been shown to increase trade flows between countries, helping spur economic growth. Intuitively, this makes sense, for the more assurances investors have regarding the safety of their investments, the more likely they will be to invest; as such, arbitration can be seen as an additional protection for foreign investors. Therefore, it seems that certain investments in developing countries with weak legal systems may not have taken place were it not for the existence of international arbitration systems (although, as Schultz and Dupont's empirical analysis of investment arbitration finds, this mechanism is surely used for reasons other than a substitution for weak legal systems). Hence, a comprehensive power-based model realizes the importance of arbitration in the global economy while critiquing it, which means that calling for an end to ISDS mechanisms in trade agreements is simply not a feasible option.

On the other hand, the cultural-sociological model inadvertently makes an excellent case for the power-based model, as previously mentioned. The culture of

arbitration does indeed tend to favor corporate interests rather than the interests of the general public, which puts the legitimacy of certain arbitral rulings up to a fair amount of debate. Again, we can see this phenomenon within the Trans-Pacific Partnership negotiations. While the Office of the United States Trade Representative may describe ISDS as “a neutral, international arbitration procedure” that provides an “impartial, law-based approach to resolve conflicts,”<sup>110</sup> the setup of Trans-Pacific Partnership ISDS courts would be far from neutral, given that the courts would hire corporate lawyers to sit on arbitration panels instead of independent judges.<sup>111</sup> As Senator Elizabeth Warren wrote in a recent editorial for *The Washington Post*, “If you’re a lawyer looking to maintain or attract high-paying corporate clients, how likely are you to rule against those corporations when it’s your turn in the judge’s seat?”<sup>112</sup> Additionally, the judges on ISDS courts are usually paid \$600 to \$700 an hour, which gives them little incentive to dismiss cases.<sup>113</sup> Because the nature of the arbitration process in these courts is often secretive and lacks any requirements to consider legal precedent in their rulings, it allows the lawyers serving as judges to have plenty of leeway to make creative rulings in favor of multinational corporations. As the analysis of the case studies showed, there is already a definitive bias regarding which international laws have teeth (trade

---

<sup>110</sup> Office of the United States Trade Representative, *Investor-State Dispute Settlement*.

<sup>111</sup> Elizabeth Warren, “The Trans-Pacific Partnership clause everyone should oppose,” *WashingtonPost.com*, February 25, 2015, [http://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9\\_story.html](http://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html).

<sup>112</sup> *Ibid.*

<sup>113</sup> *The Economist*, *The arbitration game*.

treaties) and which ones do not (environmental treaties). Cultural-sociological research indicating arbitrators have certain corporate, capitalist biases make a great deal of sense, given that the legal technicalities of the international agreements they must consider in their rulings force such biases upon them in the first place.

Furthermore, while some constitutionalist theorists may argue for the potential incorporation of public policy norms favoring the public interest into arbitration rulings, it seems more likely that, at this point in time, it is the corporate norm of favoring private interests over public ones that has already been constitutionalized within international agreements, and by extension, ISDS and WTO dispute mechanisms. Critical theorists may use the constitutionalization model to identify common constitutionalized patterns favoring corporate interests above all else and illustrate the real dangers if these patterns continue to become constitutionalized, as they already have been in many trade forums.

The power-based model also sheds light on many of the current inequities within the arbitration system. As the Ecuador vs. Chevron case illustrates, there is no platform in international trade arbitration through which to achieve justice on their own for groups of citizens negatively affected by the actions of states or corporations. This situation becomes particularly problematic when citizens harmed by the actions of a corporation can only be represented by a government that helped to enable those harms. Furthermore, even though investment arbitration mechanisms are, in theory, available for any state or corporation to use, it is almost always corporations or governments from rich states that use them. Poor states are often the defendant of arbitral claims, but rarely ever the plaintiff.

Even though this may be partly because poorer states are more likely to violate trade agreements they have signed, it is nevertheless evident that poor states like Togo and Uruguay do not have the same legal expertise or financial resources to put towards dealing with arbitral claims that rich corporations do.

The power-based model indicates that in forums like the WTO, it is important to keep in mind that the political and corporate spheres in many countries are inseparably intertwined with each other. The Japan and the European Union, for example, both host a variety of companies with strong interests to put a halt to any government programs that would give Canadian solar companies a competitive advantage.

On an empirical level, Schultz and Dupont's study of 541 investment arbitration claims from 1972 to 2010 provide evidence supporting power-based critiques of arbitration. As mentioned at the beginning of this paper, although investment arbitration was used primarily against developing countries before the mid-to-late 1990s, claims are no longer filed almost exclusively against these countries. The researchers note that "nearly half of the claims are brought against states that were, in the year the claim was filed, either high-income or upper-middle income states on the World Bank scale."<sup>114</sup> This means that in the period after the mid-to-late 1990s, investment arbitration has been used more often to settle disputes between developed countries rather than between an investor from a developed country and the government of a developing one. In isolation, this finding might make arbitration appear to be a more equitable process than it historically

---

<sup>114</sup> Ibid, 1154-1155.

had been up until the end of the 1990s. However, in the context of challenges to environmental policies via arbitration, many of the places where such regulations are being challenged are developed countries. Wealthier countries often give off more pollution than poorer countries, and they are also more likely to have stronger government structures that can better create and enforce environmental regulations. Given this context, the fact that arbitration claims no longer discriminate against developing countries instead highlights the newfound legal strength corporations have gained during the same mid-to-late 1990s period, when ISDS mechanisms in trade deals proliferated.

Additionally, the Schultz and Dupont's study found that the investors filing claims were from high-income countries (again, according to World Bank metrics) in the year the claim was filed in 88 percent of the cases they investigated. At the other end of the spectrum, the home state of the investor was a middle-income, lower-middle income, or low-income country only 3 percent of the time. The remaining 9 percent of cases was when the investor was from an upper-middle income country.<sup>115</sup> Thus, Schultz and Dupont write, "The shift of the system is this: [investment arbitration] was a developed vs. developing instrument; it now is a developed vs. developed/developing instrument."<sup>116</sup> Furthermore, during the 1998-2010 (the period after investment arbitration shifted away from targeting developing countries), high-income countries were 1.7 times more successful in winning investment arbitrations cases than low-income countries. This rate

---

<sup>115</sup> Schultz and Dupont, "Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study," 1154-1155.

<sup>116</sup> *Ibid*, 1157.

excludes cases that were settled before an arbitration ruling could be issued; approximately 30 percent of the 541 claims investigated fall into this category. Such a finding could be partly attributed to the lack of legal expertise to handle arbitration cases in developing countries, but it may also indicate that developing countries are just more likely to violate trade norms they have agreed to than developed ones. The reasons behind this statistic were not examined in the study, but they are interesting to consider when examining the power dynamics behind international arbitration. With these facts in mind, it is hard to avoid the conclusion that investment arbitration remains a tool almost exclusively for corporations or governments from developed countries, not poor ones.

An even more concerning hypothesis that emerges from a power-based analysis of the case studies is this: Wealthy states may be able to keep some of their environmental regulations and programs, but corporations will dominate arbitration in the long-run, because they have much more at stake. Sometimes private interests will be willing to sacrifice more resources on arbitration proceedings than states are, even if the states seem to possess more political and economic power than the corporations do. One explanation for this is that a corporation sometimes has much more at stake in an arbitration ruling than a state does; therefore, the corporation may be willing to expend much more to meet its goal than governments will, as the *Ethyl vs. Canada* case study illustrates. Regarding this particular case study, what if all countries started banning MMT based on an arbitration precedent that might have emerged from that dispute? Ethyl might go bankrupt. No matter which way the ruling turned out, Canada's very existence was

not threatened by the outcome in the same way that Ethyl's very existence was.

Additionally, on an individual level, corporations have investors with much to lose if the corporation goes bankrupt, whereas government employees don't face the same financial incentives; if the government loses a case, chances are, the government employees will still have their job security and pensions at the end of the day.

Therefore, even in cases when the government has more political and economic capital than the corporation making a claim, it may be unwilling to use that capital to fight the claim in question and choose to settle instead.

These issues concerning ISDS that are exposed by a comprehensive power-based model matter in a larger context, because the ability for corporations to sue states gives corporations a historically unprecedented level of international power. The arbitration system is thus a factor in what I call the 'rise of the corporate sovereign.' Societies must ensure this new kind of sovereignty is balanced with the public interest of civilian populations.



<b>A Comprehensive Power-Based Model</b>			
<b>How this study modifies existing theories of arbitration:</b>			
<b>Economic-Rationalist</b>	<b>Cultural-Sociological</b>	<b>Power-Based</b>	<b>Constitutionalization</b>
<ul style="list-style-type: none"> <li>• There must be some forum where international trade disputes can be settled.</li> <li>• Arbitration can serve to clarify and strengthen the rule of international law.</li> </ul>	<ul style="list-style-type: none"> <li>• There is a legally enshrined bias of enforcing trade regulations over environmental ones.</li> <li>• This bias has created an arbitration culture favorable to corporate powers.</li> </ul>	<ul style="list-style-type: none"> <li>• Only states or corporations can use arbitration.</li> <li>• Corporations and governments from rich states are the parties almost always the ones filing arbitral claims, not poor ones.</li> <li>• Rich states are more likely to win arbitral cases than poor states.</li> <li>• Corporations can be more willing to pursue claims than states are to defend themselves against them.</li> <li>• Corporations can use claims to intimidate other states into repealing regulatory laws, or discourage them from passing such laws in the first place.</li> </ul>	<ul style="list-style-type: none"> <li>• Corporate trade interests have already been constitutionalized in the international trade system.</li> <li>• If arbitration is to have continued international legitimacy, human rights and environmental must be constitutionalized, too.</li> </ul>

*Figure 3 – An Overview of the Comprehensive Power-Based Model of Arbitration.*

## VI. Conclusion: Pathways to Reform

Although the United States has never lost an arbitration case so far, this trend may end in the future. The United States is the eighth-largest target of arbitral claims and has been the subject of 15 claims over the years.<sup>117</sup> The *Cato Institute* predicts, “As the percentage of global Fortune 500 companies domiciled outside the United States continues to increase, U.S. laws and regulations are likely to come under greater scrutiny.”<sup>118</sup> Hence, as more and more multinational corporations realize that the ISDS mechanism is a useful way to avoid regulations and paying potential fines, this mechanism may be increasingly used against the United States and other countries. In response to this situation, South Africa plans to withdraw from treaties it has made with ISDS clauses, and India is considering doing the same, just as Ecuador has already started doing. In the future, more countries may consider following Brazil’s long-standing example of refusing to sign any trade agreement that includes an ISDS provision.<sup>119</sup> These factors make opening the discussion of possible solutions to international trade arbitration’s crisis of legitimacy and the clashes it has had with environmental policies all the more important.

Now, it is impossible to discuss the ways in which international trade arbitration can be reformed without discussing the ways in which international trade agreements can be reformed. This is because the rules of trade arbitrations

---

<sup>117</sup> Daniel J. Ikenson, *A Compromise to Advance the Trade Agenda: Purge Negotiations of Investor-State Dispute Settlement*, (Cato Institute: March 4, 2014), <http://www.cato.org/publications/free-trade-bulletin/compromise-advance-trade-agenda-purge-negotiations-investor-state>.

<sup>118</sup> *Ibid.*

<sup>119</sup> The Economist, *The arbitration game*.

systems are determined by such agreements. Therefore, an examination of how to improve the arbitration process must also be an examination of how to improve the treaties that govern that process.

A popular solution to the inequities within arbitration systems is to do away with the systems altogether. When the United States was negotiating the Trans-Pacific Partnership with other countries, progressive U.S. members of Congress, such as Senators Bernie Sanders and Elizabeth Warren and Congressman Alan Grayson, objected to the agreement's ISDS mechanism. Advocacy groups such as Public Citizen have also been long-time opponents of ISDS mechanisms in trade agreements. Given the ways in which ISDS mechanisms have been used to hurt citizens and the environment, the objections to including them in trade agreement are understandable. But as previously noted, without ISDS mechanisms, there would be no way to clarify disputes on an international level and enforce agreements which states have signed onto, thus weakening international law. That is why I contend that any push for an end to the practice of international trade arbitration is fundamentally counterproductive to achieving substantive reforms in an international system that is here to stay.

So, what are ways in which arbitration could be made more equitable? The most obvious reform is for states to include stronger environmental protections in future trade agreements. The international community needs to start using "shall" instead of "should" when it comes to the environment, although in light of the "should" language of the Paris Agreement, the chances that this will happen on a large scale in the current international political realm are low. Instead of trying to

pass a legally binding environmental treaty that applies to all nations, states may instead find it more productive to use BITs or other smaller multilateral trade platforms in which to negotiate, or renegotiate, treaties so that they include stronger environmental protections. This would be one method for how environmental norms could begin to be constitutionalized in international arbitration systems. This would allow arbitrators to start incorporating environmental norms into their rulings, thereby helping to reshape the culture of international trade arbitration.

Because of the clear power disparities regarding the accessibility of arbitration and the states it is likely to benefit, the international community should work to establish an international arbitration defense fund for poor states. In order to prevent poor states from abusing the availability of this support, the use of the fund could be restricted to arbitration cases trying to block the implementation of health or environmental regulations within those states. The World Bank, which manages the ICSID, would be an ideal home for such a program.

Finally, there should be a platform where a class action lawsuit can occur in international arbitration that doesn't require representation by a corporation or a government. The international system is made up of many more groups than just states or corporations, and if we truly want the system to be equitable, then international arbitration systems need to accommodate these groups. Otherwise, we will have more cases like Ecuador, where an oppressed people must be represented in arbitration by a corrupt government that signed the deal with the oil company oppressing them in the first place to receive even a chance at justice.

As international trade arbitration continues to grow in popularity, it becomes all the more important to recognize these problems now and work towards reform — otherwise the current arbitration `norms may become even more constitutionalized than they already are, making reforms to the system increasingly difficult.

## VII. Bibliography

Aksen, Gerald. "Ad Hoc Versus Institutional Arbitration," *ICC International Court of Arbitration Bulletin* 2, no. 1, 1991.

American Cancer Society. "What is MTBE?" *Cancer.org*. July 17, 2014.  
<http://www.cancer.org/cancer/cancercauses/othercarcinogens/pollution/mtbe>.

Blumberg, Katherine and Michael P. Walsh. "Status Report Concerning the Use of MMT in Gasoline." *International Council on Clean Transportation*. September 2004.  
[http://www.theicct.org/sites/default/files/publications/MMT\\_ICCT\\_2004.pdf](http://www.theicct.org/sites/default/files/publications/MMT_ICCT_2004.pdf).

Business & Human Rights Resource Centre, "Texaco/Chevron lawsuits (re Ecuador)." *business-humanrights.org*. 2015. <http://business-humanrights.org/en/texacochevron-lawsuits-re-ecuador>.

"Canada House of Commons Parliamentary Record." *Parliament of Canada*. September 25, 1996.  
<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=2332613>.

Cato Institute. "The Investor-State Dispute Settlement Mechanism: An Examination of Benefits and Costs." *Cato.org*. 2014. <http://www.cato.org/events/investor-state-dispute-settlement-mechanism-examination-benefits-costs>.

Chang, Ailsa. "A Trade Deal Read in Secret By Only A Few (Or Maybe None)", *NPR.org*, May 14, 2015,  
<http://www.npr.org/sections/itsallpolitics/2015/05/14/406675625/a-trade-deal-read-in-secret-by-only-few-or-maybe-none>.

Charnovitz, Steve. "Green Subsidies and the WTO." *GW Law Faculty Publications & Other Works*. 2014.  
[http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2341&context=faculty\\_publications](http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2341&context=faculty_publications)

Clover, Ian. "Indian energy minister threatens to file 16 solar cases against US with WTO." *PV-Magazine.com*. April 11, 2016. [http://www.pv-magazine.com/news/details/beitrag/indian-energy-minister-threatens-to-file-16-solar-cases-against-us-with-wto\\_100024100/#axzz45Y9BRLtf](http://www.pv-magazine.com/news/details/beitrag/indian-energy-minister-threatens-to-file-16-solar-cases-against-us-with-wto_100024100/#axzz45Y9BRLtf).

Central Intelligence Agency. "The World Factbook." *CIA.gov*.  
<https://www.cia.gov/library/publications/the-world-factbook/geos/to.html>.

Cushman Jr., John H. "E.P.A. Accuses A Company Of Distortion." *NYTimes.com*. March 8, 1996. <http://www.nytimes.com/1996/03/08/us/epa-accuses-a-company-of-distortion.html>.

Drahozal, Christopher R. "Private Ordering and International Commercial Arbitration." *Penn State Law Review* 113, no. 4. Spring 2009, 1031-1050.

Dupont, Cédric and Thomas Schultz. "Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study." *The European Journal of International Law*, vol. 25, no. 4, (Oxford University Press: 2014), 1147-1168.

Environmental Protection Agency. "EPA Comments on the Gasoline Additive MMT." *EPA.gov*. October 5, 2015. <https://www.epa.gov/gasoline-standards/epa-comments-gasoline-additive-mmt>.

Evans, Robert. "WTO faults U.S. over duties on Chinese, Indian steel goods." *Reuters.com*. July 14, 2014. <http://www.reuters.com/article/us-trade-wto-usa-china-idUSKBN0FJ1S620140714>.

Gélinas, Fabien. "Arbitration and the Challenge of Globalization." *Journal of International Arbitration* 17, no. 4, 2000.

Gordon, Kate. "Why Renewable Energy Still Needs Subsidies." *WSJ.com*. September 14, 2015. <http://blogs.wsj.com/experts/2015/09/14/why-renewable-energy-still-needs-subsidies/>.

Hale, Thomas. "What is the Effect of Commercial Arbitration on Trade?" *International Arbitration & Global Governance: Contending Theories and Evidence*. Edited by Walter Mattli and Thomas Dietz, (Oxford: Oxford University Press, 2014).

Idelson, Chuck. "Trade Deals Should Come With Their Own Warnings for Public Health." *National Nurses United*. February 18, 2015. <http://www.nationalnursesunited.org/blog/entry/trade-deals-should-come-with-their-own-warnings-for-public-health>.

Ikenson, Daniel J. "A Compromise to Advance the Trade Agenda: Purge Negotiations of Investor-State Dispute Settlement." *Cato.org*. March 4, 2014. <http://www.cato.org/publications/free-trade-bulletin/compromise-advance-trade-agenda-purge-negotiations-investor-state>.

Ingraham, Christopher and Howard Schneider. "Industry voices dominate the trade advisory system." *The Washington Post*. February 27, 2014. <http://www.washingtonpost.com/wp-srv/special/business/trade-advisory-committees/>.

International Energy Agency. "Energy Subsidies." *WorldEnergyOutlook.org*. 2016. <http://www.worldenergyoutlook.org/resources/energysubsidies/>.

Jijón, Francisco X., White & Case. "Ecuador Evaluates Investment Treaty

Framework." *Latin Arbitration Law*. 2016.

<http://www.latinarbitrationlaw.com/ecuador-evaluates-investment-treaty-framework/>.

Kaplan, Lewis A. "Chevron Corporation vs. Steven Donziger, et al." *United States District Court, Southern District of New York*. March 3, 2014.

<http://www.nysd.uscourts.gov/cases/show.php?db=special&id=379>.

Karton, Joshua. "International Arbitration Culture and Global Governance." *International Arbitration & Global Governance: Contending Theories and Evidence*, edited by Walter Mattli and Thomas Dietz, (Oxford: Oxford University Press, 2014).

Kerr, Michael. "Concord and Conflict in International Arbitration." *Arbitration International* 13, no. 2, 1997, 121-144.

Klein, Naomi. "The price of free trade is unchecked climate change." Online version of excerpt from *This Changes Everything: Capitalism vs. The Climate*. September 12, 2014. <http://theleap.thischangeseverything.org/the-price-of-free-trade-is-unchecked-climate-change/>.

Klein, Naomi. *This Changes Everything: Capitalism vs. The Climate*, (New York, NY: Simon & Schuster, 2014).

Krauss, Clifford. "Big Victory for Chevron over Claims in Ecuador." *NYTimes.com*. March 4, 2014. [http://www.nytimes.com/2014/03/05/business/federal-judge-rules-for-chevron-in-ecuadorean-pollution-case.html?\\_r=0](http://www.nytimes.com/2014/03/05/business/federal-judge-rules-for-chevron-in-ecuadorean-pollution-case.html?_r=0).

Kroll, Andy, Dave Gilson, Benjy Hansen-Bundy, and Alex Park. "Triumph of the Drill." *MotherJones.com*. April 2014. <http://www.motherjones.com/politics/2014/04/oil-subsidies-renewable-energy-tax-breaks>.

Lawder, David and Tom Miles. "U.S. wins WTO dispute against India's solar rules." *Reuters.com*. February 24, 2016. <http://www.reuters.com/article/us-india-usa-solar-idUSKCN0VX1Y5>.

MarketWatch. "Annual Financials for Wal-Mart Stores Inc." 2016. <http://www.marketwatch.com/investing/stock/wmt/financials>.

Mattli, Walter and Thomas Dietz. "Mapping and Assessing the Rise of International Commercial Arbitration in the Globalization Era: An Introduction." *International Arbitration and Global Governance: Contending Theories and Evidence*, (Oxford: Oxford University Press, 2014).

Michaels, Ralf. "Roles and Role Perceptions of International Arbitrators." *International Arbitration & Global Governance: Contending Theories and Evidence*. Edited by Walter Mattli and Thomas Dietz, (Oxford: Oxford University Press, 2014).



Minjares, Ray J. and Michael Walsh. "Methlycyclopentadienyl Manganese Tricarbonyl (MMT): A Science and Policy Review." *International Council on Clean Transportation*. January 2009.

[http://www.theicct.org/sites/default/files/publications/MMT\\_dec08.pdf](http://www.theicct.org/sites/default/files/publications/MMT_dec08.pdf).

Neuborne, Burt. "Re: Chevron Corp. v. Donziger, 14-826 (L), Chevron Corp. v. Payaguaje and Naranjo, 14-832 (Con)." Letter to the United States Court of Appeals for the Second Circuit. May 22, 2014.

<http://www.italaw.com/sites/default/files/case-documents/italaw4302.pdf>.

Nunez, Christina. "Solar Energy Sees Eye-Popping Price Drops." *National Geographic.com*. October 2, 2015.

<http://news.nationalgeographic.com/energy/2015/10/151002-solar-energy-sees-eye-popping-price-drops/>.

Office of the United States Trade Representative. "Investor-State Dispute Settlement." *USTR.gov*. March 2015. <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds#>.

Paulsson, Jan. "Preface." *International Arbitration & Global Governance: Contending Theories and Evidence*. Edited by Walter Mattli and Thomas Dietz, (Oxford: Oxford University Press, 2014).

Philip Morris International. "Uruguay Bilateral Investment Treaty (BIT) Litigation." *PMI.com*. 2016.

[http://www.pmi.com/eng/media\\_center/company\\_statements/pages/uruguay\\_bit\\_claim.aspx](http://www.pmi.com/eng/media_center/company_statements/pages/uruguay_bit_claim.aspx).

Pitts, Chip. "Chevron Found Guilty in \$ Billion Ecuadorian Human Rights and Environmental Case." *Amnesty International*. February 14, 2011.

<http://blog.amnestyusa.org/americas/chevron-found-guilty-in-8-billion-ecuadorian-human-rights-and-environmental-case/>.

Public Citizen. "NAFTA Chapter 11 Investor-to-State Cases: Bankrupting Democracy." *Citizen.org*. <https://www.citizen.org/documents/ACF186.PDF>.

Public Citizen. "TPP's Investment Rules Harm the Environment." *Citizen.org*. 2015. <http://www.citizen.org/documents/TPP-and-the-environment.pdf>.

Renner, Moritz. "Private Justice, Public Policy: The Constitutionalization of International Commercial Arbitration." *International Arbitration & Global Governance: Contending Theories and Evidence*. Edited by Walter Mattli and Thomas Dietz, (Oxford: Oxford University Press, 2014).

Rowley, J. William F., W. Michael Reisman, and V.V. Veeder. "Methanex Corporation

and United States of America: Final Award of the Tribunal on Jurisdiction and Merits." *International Arbitration Tribunal under Chapter 11 of NAFTA and the UNCITRAL Arbitration Rules*, August 3, 2005, 262.

<http://www.state.gov/documents/organization/51052.pdf>.

Sforza, Michelle and Mark Vallianatos. "Ethyl Briefing Paper." *Citizen.org*. 2016.

[http://www.citizen.org/trade/article\\_redirect.cfm?ID=6221](http://www.citizen.org/trade/article_redirect.cfm?ID=6221).

Stock Analysis on Net. "Philip Morris International Inc.: Income Statement." 2016.

<https://www.stock-analysis-on.net/NYSE/Company/Philip-Morris-International-Inc/Financial-Statement/Income-Statement>.

Tavernise, Sabrina. "Tobacco Firms' Strategy Limits Poorer Nations' Smoking Laws." *NYTimes.com*. December 13, 2013.

[http://www.nytimes.com/2013/12/13/health/tobacco-industry-tactics-limit-poorer-nations-smoking-laws.html?\\_r=0](http://www.nytimes.com/2013/12/13/health/tobacco-industry-tactics-limit-poorer-nations-smoking-laws.html?_r=0).

TeleSur. "Ecuador to Appeal Ruling by The Hague in Chevron Pollution Case."

*telesurtv.net*. January 26, 2016. <http://www.telesurtv.net/english/news/Ecuador-to-Appeal-Ruling-by-The-Hague-in-Chevron-Pollution-Case-20160126-0007.html>.

The Economist. "The arbitration game." *The Economist.com*. October 11, 2014.

<http://www.economist.com/news/finance-and-economics/21623756-governments-are-souring-treaties-protect-foreign-investors-arbitration>.

"Treaty of Lisbon." *European Union Law*. December 13, 2007. [http://eur-](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:12012E/TXT)

[lex.europa.eu/legal-content/EN/TXT/?uri=celex:12012E/TXT](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:12012E/TXT).

Trivett, Vincent. "US Mega Corporations: Where They Rank If They Were Countries."

*Business Insider*. June 27, 2011. <http://www.businessinsider.com/25-corporations-bigger-tan-countries-2011-6?op=1>.

Tuerk, Elisabeth. "Getting up to speed: IIA and ISDS trends from 2014." *UNCTAD.org*.

February 18, 2015. <http://investmentpolicyhub.unctad.org/Blog/Index/34>.

U.S. Department of State. "Ethyl Corp. v. Government of Canada." *State.gov*. 2016.

<http://www.state.gov/s/l/c3745.htm>.

U.S. Department of State. "Methanex Corp. v. United States of America." *State.gov*.

2016. <http://www.state.gov/s/l/c5818.htm>.

Watt, Horatia Muir. "The Contested Legitimacy of Investment Arbitration and the Human Rights Ordeal: The Missing Link." *International Arbitration & Global Governance: Contending Theories and Evidence*. Edited by Walter Mattli and Thomas Dietz, (Oxford: Oxford University Press, 2014).

Warren, Elizabeth. "The Trans-Pacific Partnership clause everyone should oppose." *WashingtonPost.com*. February 25, 2015.

[http://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9\\_story.html](http://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html).

World Bank. "GDP at market prices (current US\$)." *World Bank.org*. 2016.

<http://data.worldbank.org/indicator/NY.GDP.MKTP.CD>.

World Trade Organization. "A Summary of the Final Act of the Uruguay Round." *WTO.org*. 2016.

[https://www.wto.org/english/docs\\_e/legal\\_e/ursum\\_e.htm#Understanding](https://www.wto.org/english/docs_e/legal_e/ursum_e.htm#Understanding).

World Trade Organization. "Principles of the trading system." *Understanding the WTO: Basics*. 2016.

[https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact2\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm).

World Trade Organization. "The environment: a specific concern." *WTO.org*. 2016.

[https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/bey2\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey2_e.htm).

World Trade Organization. "Understanding the WTO: Settling Disputes." *WTO.org*.

2016. [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/disp1\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm).

World Trade Organization. "Sustainable development." *WTO.org*. 2016.

[https://www.wto.org/english/tratop\\_e/envir\\_e/sust\\_dev\\_e.htm](https://www.wto.org/english/tratop_e/envir_e/sust_dev_e.htm).