

# The Politics of International Investment Law:

Transnational Corporations, Social Movements, and the Struggle for the Future

Katja Daniels

Thesis submitted in partial fulfilment of the requirements for the degree of PhD

Department of International Politics

Aberystwyth University

March 2015

# **The Politics of International Investment Law:**

## **Transnational Corporations, Social Movements, and the Struggle for the Future**

The aim of this thesis is to understand the political struggles that underpin international investment law. Social movements of various kinds have expressed alarm over an ‘epidemic’ of international legal challenges by transnational corporations against state measures designed to protect the environment, public health, or human rights. These state measures have often been introduced directly in response to hard-fought civil society campaigns (ranging from anti-mining protests in El Salvador to climate change campaigns in Germany), yet academic analysis of what is formally known as ‘Investor-State Dispute Settlement’ proceeds on the premise that these are simply disputes between ‘investors’ and ‘states’, as indeed the term implies. In turn, where the academic focus shifts towards wider questions of why this field of law emerged, and what role it plays in global politics today, even the investors disappear from view, and only states remain. The theoretical argument of this thesis is that the state is not an *agent* in political struggles, but a *social structure* that is both the ‘congealment’ of historic social struggles and a ‘strategically selective’ arena within which social struggles are fought today. This theoretical argument challenges the state-centric premises of the academic literature, and enables a different empirical explanation of the politics of international investment law, and of the 46 investment disputes arising out of environmental protection measures that have been selected for closer analysis. Drawing upon the work of scholars such as William Robinson, Stephen Gill, and David Schneiderman, the empirical argument of this thesis is that international investment law arose at the initiative of a transnational capitalist class, and it is designed to constrain the political agency of opposing social groups by ‘locking in’ policies that favour corporations. At stake in the struggle over international investment law is ultimately the very possibility for a different future.

# Table of Contents

Acknowledgements.....	5
Abbreviations .....	6
<b>Introduction.....</b>	<b>7</b>
<b>1. Locating Agency: States and Social Groups in International Investment Law .....</b>	<b>22</b>
<b>Three Approaches to International Investment Law.....</b>	<b>23</b>
A Natural Evolution?.....	24
Politics between States?.....	25
Politics between Social Groups.....	27
<b>The State in the Structure-Agency Debate.....</b>	<b>29</b>
The State as an Agent? .....	31
The State as a Structure .....	36
Social Groups as Collective Agents.....	38
<b>Capitalism, States and Classes in Global Politics.....</b>	<b>39</b>
Capitalism and the Question of the State .....	40
Globalization and the Question of Agency .....	43
A Transnational Capitalist Class-In-Itself.....	46
A Transnational Capitalist Class-For-Itself.....	50
<b>Conclusion.....</b>	<b>52</b>
<b>2. The ‘Big Picture’: The History, Structure and Global Politics of International Investment Law .....</b>	<b>54</b>
<b>The Historical Origins of International Investment Law .....</b>	<b>55</b>
The Colonial and Post-Colonial Period .....	55
The Recent History.....	59
<b>The Structure of International Investment Law .....</b>	<b>65</b>
Investment Arbitration and Investment Arbitrators.....	66
Nationality and Transnationality in International Investment Law.....	78
<b>The Global Politics of International Investment Law .....</b>	<b>86</b>
The Concept of a ‘Transnational State’ .....	87
The Inter-state System and Structural Power .....	91
Supranational Institutions and the Limits to Democracy .....	92
The Supranational Sphere and Hidden Asymmetries .....	97
The Concept of a Transnational State Revisited.....	105
<b>Conclusion.....</b>	<b>109</b>
<b>3. Investor-State Dispute Settlement: Protection from Environmental Regulations? ...</b>	<b>111</b>
<b>The Environment in Investment Arbitration .....</b>	<b>113</b>
A Historical Overview.....	116
Argument, Methods and Structure.....	121
<b>Protection from ‘Discrimination’ .....</b>	<b>129</b>

<b>Protection From Expropriation.....</b>	<b>137</b>
Direct Expropriation.....	138
Indirect Expropriation.....	141
Concluding Remarks on Expropriation.....	159
<b>Protection from ‘Unfairness’ .....</b>	<b>160</b>
Consistency.....	163
Transparency.....	167
Adherence to Domestic Laws and Procedures .....	169
Judicial Fairness.....	172
Concluding Remarks on ‘Unfairness’.....	175
<b>Protection from Change.....</b>	<b>178</b>
‘Legitimate Expectations’ .....	181
Contractual Expectations .....	188
Concluding Remarks on Change.....	195
<b>Compensation.....</b>	<b>196</b>
<b>Conclusion.....</b>	<b>201</b>
<b>4. Investor-‘State’ Dispute Settlement: Protection from Social Movements? .....</b>	<b>207</b>
<b>Social Groups in Investment Disputes .....</b>	<b>210</b>
The Origins of Investment Disputes .....	213
The Real Parties to the Conflict.....	223
Concluding Remarks on Social Groups in Investment Disputes .....	232
<b>The Battle for the State .....</b>	<b>234</b>
State Officials and Structural Pressures .....	243
State Officials as Societal Beings.....	248
State Officials and External Pressures .....	249
Concluding Remarks on the Battle for the State.....	250
<b>International Investment Law in Social Struggle.....</b>	<b>252</b>
The Role of International Investment Law in Social Movement Victories.....	254
The Role of International Investment Law in Domestic Political Struggles .....	266
The Role of International Investment Law in Political Protests .....	272
The Role of International Investment Law in Corporate Conduct.....	278
<b>Conclusion.....</b>	<b>283</b>
<b>Conclusion .....</b>	<b>286</b>
Appendix .....	298
Bibliography.....	306

## Acknowledgements

To write a doctoral thesis is often described as embarking on a journey of discovery, and this was certainly the case for me – international investment law itself was uncharted territory, and much of the theoretical approach only came unexpectedly into sight at the very end. I am very grateful to my supervisors, Dr Jenny Mathers and Dr Carl Death, for their unfaltering encouragement and support along this journey. A special thanks to Jenny for the sense of structure and order that she brought to the research experience at those early critical junctures when chaos seemed to reign within the thesis itself, and a special thanks to Carl for always challenging and questioning me – without ever allowing me to doubt the project or my ability to complete it – and for all the incredibly helpful support in navigating academic life. Without you both, I would never have come this close to the thesis I truly wanted to write.

The Department of International Politics at Aberystwyth University has provided an amazingly friendly and intellectually stimulating environment for pursuing this project, and I would like to express my gratitude to everyone in the department who has helped me over the years. If I were to name everyone it would quickly turn into a very long list, but it is all the wonderful people in the Interpol PhD community, and the exceptionally supportive members of staff, that I have most to thank for the peace of mind and inspiration to finish this project. A special thanks to the participants in the Group on International Theory and the Global Development Research Group for all the heated debates over the years, and for challenging the very foundations of my knowledge claims. In terms of direct influences on my research, many of the turning points have come from questions at departmental seminars and external conferences – and especially from those who have kindly taken the time to read my work – and I am very grateful to everyone that has engaged with my project.

My doctoral research would not have been possible without the Environmental Politics PhD Studentship provided by the Aberystwyth University Alumni Fund, and I am very grateful to the alumni who provided the funding for it.

This project is not only motivated by intellectual curiosity, but also by a sense of justice. In this sense, the path that led me to the PhD truly began at the United World College in Norway, and I would like to thank my fellow students and my inspiring teachers for first opening my eyes to all the injustices in the world, and for teaching me that these are not inevitable and that another world is possible.

Most of all, I would like to thank my parents Päivi and Dan-Erik, my brother Ben-Erik, and my grandparents Ulla and Peder for first enabling me to pursue my dreams, and for supporting me in every possible way during the PhD itself.

## Abbreviations

BIT	Bilateral Investment Treaty
CAFTA-DR	Dominican Republic-Central American Free Trade Agreement
CETA	Comprehensive Economic and Trade Agreement (Canada-EU)
EU	European Union
FET	Fair and Equitable Treatment (investment treaty clause)
FTA	Free Trade Agreement
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Center for the Settlement of Investment Disputes
IISD	International Institute for Sustainable Development
IMF	International Monetary Fund
ISDS	Investor-State Dispute Settlement
MAI	Multilateral Agreement on Investment
MEP	Member of the European Parliament
MFN	Most Favoured Nation (investment treaty clause)
MNC	Multinational Corporation
MP	Member of Parliament
NAFTA	North American Free Trade Agreement
NGO	Non-Governmental Organization
OECD	Organisation for Economic Co-Operation and Development
PCA	Permanent Court of Arbitration
TNC	Transnational Corporation
TPP	Trans-Pacific Partnership Agreement
TTIP	Transatlantic Trade and Investment Partnership
UK	The United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
U.S.	The United States of America
WTO	World Trade Organisation

## Introduction

“We can live without gold, but we can’t live without water”.<sup>1</sup> This is the slogan of the National Roundtable against Metallic Mining (more commonly known as ‘La Mesa’), a network of civil society organizations that have campaigned against gold mining in El Salvador.<sup>2</sup> The first signs of opposition to gold mining were distinctly local; farmers in the Cabañas region were perplexed to see that the river they depended on for irrigation had dried up, and Pacific Rim – a North American mining corporation that had used river water for its exploratory mining work – was identified as the culprit.<sup>3</sup> The opposition of the surrounding community to gold mining grew stronger during the public consultation process that was required for Pacific Rim to be granted the environmental permits to proceed to the exploitation of the gold deposits it had located. Local civil society groups sought to educate themselves about mining, and returned from visits to other parts of El Salvador and neighbouring countries with stories of rivers that had been left with bright orange water as a result of acid mine drainage, with severe health consequences for the local communities that continued to use them.<sup>4</sup> The civil society groups also commissioned an American hydro-geologist to assess Pacific Rim’s environmental impact assessment, and the report provoked further concerns in respect to the proposed use of over 300 million litres of water per year – as much water in a single day as a Salvadoran family living near the mine used for household consumption in twenty years – as well as the risk of a cyanide spill into the Río Lempa, which provides over half of El Salvador’s population with drinking

---

<sup>1</sup> Robin Broad & John Cavanagh, ‘The Global Fight Against Corporate Rule’, *The Nation* (14 January 2014), available at {<http://www.thenation.com/article/177930/global-fight-against-corporate-rule#>} accessed 3 February 2015.

<sup>2</sup> See Pac Rim Cayman LLC v. Republic of El Salvador, *Application for Permission to Proceed as Amici Curiae by Mesa Nacional Frente a la Minería Metálica de El Salvador*, ICSID Case No. ARB/09/12 (2 March 2011).

<sup>3</sup> Randal C. Archibold, ‘First a Gold Rush, Then the Lawyers’, *New York Times* (25 June 2011), available at {[http://www.nytimes.com/2011/06/26/world/americas/26mine.html?pagewanted=all&\\_r=1&](http://www.nytimes.com/2011/06/26/world/americas/26mine.html?pagewanted=all&_r=1&)} accessed 3 February 2015; Robin Broad and John Cavanagh, ‘Like Water for Gold in El Salvador’, *The Nation* (1-3 August 2011), available at {<http://www.thenation.com/article/162009/water-gold-el-salvador?page=0,1>} accessed 3 February 2015; Pac Rim v. El Salvador, *Application for Permission to Proceed as Amici Curiae*, p. 5.

<sup>4</sup> On visits to neighbouring countries, see: Broad & Cavanagh, ‘Like Water for Gold in El Salvador’; Lisa Fuller, ‘El Salvador and Gold Mining: International Resistance to Transnational Attacks’, *Left Turn* (1 June 2010), available at {<http://www.leftturn.org/El-Salvador-Gold-Mining>} accessed 3 February 2015. Members of local community groups nevertheless also visited a mine elsewhere in El Salvador by another North American mining company, which had resulted in significant acid mine drainage. That company also launched now discontinued investment proceedings against El Salvador, see: Meera Karunanathan, ‘Blog Post: El Salvador Mining Ban Could Establish a Vital Water Security Precedent’, *The Guardian* (10 June 2013), available at {<http://www.theguardian.com/global-development/poverty-matters/2013/jun/10/el-salvador-mining-ban-water-security>} accessed 3 February 2015; Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador, *El Salvador’s Preliminary Objections Under Article 10.20.5 of CAFTA*, ICSID Case No. ARB/09/7 (16 August 2010), para. 119.

water.<sup>5</sup> In contrast, the company maintained that the environmental impact of gold mining in the Salvadoran context would be “negligible” – indeed, “significantly cleaner than doing the laundry” – and that the growing social movement was simply composed of “anti-development” groups.<sup>6</sup>

The mining debate led to significant tensions between the supporters of the mining project – including the corporations and the members of the local community that hoped to find work with the company – and an increasingly vocal opposition concerned about the environmental effects. Four anti-mining activists were murdered, and the Inter-American Court of Human Rights issued precautionary measures to protect staff at a radio station and environmental activists who had received death threats as a result of their criticism of mining.<sup>7</sup> Local community groups joined with national civil society organizations to form La Mesa, and together they succeeded in making mining an issue in national politics. The influential Catholic Church came out in opposition to it, and soon surveys revealed that 62% of the El Salvadoran population were against mining.<sup>8</sup> In the run-up to a closely fought presidential election, both of the main political parties – including the previously mining-friendly governing party – voiced their opposition to mining.<sup>9</sup> In the context of these wider political changes, Pacific Rim found

---

<sup>5</sup> The study raised particular concerns about the seismic risks of the area and the fact that no remediation measures were proposed in the event of a cyanide spill; the cyanide detoxification process itself and the safety of the water afterwards; as well as the lack of baseline data. Robert E. Moran, ‘Technical Review of the El Dorado Mine Project Environmental Impact Assessment (EIA), El Salvador’ (October 2005); *Pac Rim v. El Salvador, Application for Permission to Proceed as Amici Curiae*, p. 8; Council on Hemispheric Affairs, ‘Pacific Rim v. El Salvador and the Perils of Free Trade in the Americas’ (30 July 2010), available at {<http://www.coha.org/pacific-rim-v-el-salvador-and-the-perils-of-free-trade-in-the-americas/>} accessed 10 January 2015.

<sup>6</sup> Pacific Rim Mining, ‘Pacific Rim Provides a Progress Report on Activities in El Salvador and Nevada,’ *News Release* (30 April 2012), available at {<http://www.pacrim-mining.com/s/News.asp?ReportID=522141>} accessed 7 January 2013, also available at {<http://www.newsfilecorp.com/release/2032/Pacific-Rim-Provides-a-Progress-Report-on-Activities-in-El-Salvador-and-Nevada#.VND-umdyYeF>} accessed 3 February 2015; Mining Watch, *Debunking Eight Falsehoods By Pacific Rim Mining / OceanaGold in El Salvador* (March 2014), p. 6; Denis Collins, ‘The Failure of Socially Responsible Gold Mining MNC in El Salvador: Ramifications of NGO Mistrust’, *Journal of Business Ethics*, 88 (2009), p. 261.

<sup>7</sup> Inter-American Commission on Human Rights, ‘Héctor Antonio García Berrios and Others, El Salvador’, *PM239/09* (7 October 2009); *Pac Rim v. El Salvador, Application for Permission to Proceed as Amici Curiae*, p. 10-11; Amnesty International, ‘Death Threats for Activists Demanding Justice’, *Urgent Action 223/09* (27 August 2009); Richard Steiner, ‘El Salvador: Gold, Guns, and Choice: The El Dorado Gold Mine, Violence in Cabanas, CAFTA Claims, and the National Effort to Ban Mining,’ *International Union for the Conservation of Nature & Commission on Environmental, Economic and Social Policy* (February 2010), p. 12-15, available at {<http://www.stopesmining.org/j25/index.php/background-on-mining/126-el-salvador-guns-gold-and-choice>} accessed 3 April 2014; The Council of Canadians, ‘Murder in El Salvador Calls Canadian Mining Interests Into Question’, *Media Release* (20 June 2011), available at {<http://www.canadians.org/fr/node/333>} accessed 10 January 2015.

<sup>8</sup> *Pac Rim v. El Salvador, Application for Permission to Proceed as Amici Curiae*, p. 6; Michael Busch, ‘El Salvador’s Gold Fight’, *Foreign Policy in Focus* (16 July 2009), available at {[http://fpif.org/el\\_salvadors\\_gold\\_fight/](http://fpif.org/el_salvadors_gold_fight/)} accessed 4 February 2015.

<sup>9</sup> *Pac Rim Cayman LLC v. Republic of El Salvador, Decision on the Respondent’s Preliminary Objections Under CAFTA Articles 10.20.4 and 10.20.5*, ICSID Case No. ARB/09/12 (2 August 2010), para. 77-79; *Pac Rim*



that the permits that it had expected to receive as a matter of course were no longer forthcoming.<sup>10</sup>

Before La Mesa could celebrate its victory in the domestic political debate, Pacific Rim decided to mount a legal challenge against the state of El Salvador before an international investment tribunal.<sup>11</sup> Pacific Rim argues that the environmental impact assessment was a “formality”, that El Salvador has no legal basis for denying it the right to mine, and that the “politically motivated” conduct of El Salvador breaches the investment chapter of the Central American Free Trade Agreement and other investment laws.<sup>12</sup> The ultimate winner in this domestic political battle that has gripped Salvadoran politics for several years will now be determined by an international investment tribunal consisting of three private arbitrators. If the corporation wins, El Salvador will face an unpalatable choice between permitting the gold mining project to proceed, or paying the corporation for its direct losses as well as, crucially, up to another several hundred million US dollars in compensation for the profits that the company would have otherwise made, if the successful civil society campaign against mining had not put an end to its plans.<sup>13</sup>

The Pacific Rim v. El Salvador dispute is part of wider developments in global politics and international law today. International investment law is estimated to be “the fastest growing area of international law at this time”, and most scholars and practitioners within this field of law and international law more broadly meet such news with delight.<sup>14</sup> Notwithstanding the

---

Cayman LLC v. Republic of El Salvador, *Memorial on the Merits and Quantum*, ICSID Case No. ARB/09/12 (29 March 2013), para. 386, 390; Rose J. Spalding, ‘El Salvador: Horizontalism and the Anti-Mining Movement’, in Richard Stahler-Sholk, Harry E. Vanden, et al (eds), *Rethinking Latin American Social Movements: Radical Action from Below* (London: Rowman & Littlefield, 2014), p. 322.

<sup>10</sup> Before the investment tribunal, El Salvador argues that the company does not meet many of the requirements for receiving an exploitation permit, but Pacific Rim maintains that these are pretexts for not awarding the permits, which is in fact due to a ‘de facto’ mining ban. Pac Rim v. El Salvador, *Memorial on the Merits and Quantum*; Pac Rim Cayman LLC v. Republic of El Salvador, *Counter-Memorial on the Merits*, ICSID Case No. ARB/09/12 (10 January 2014).

<sup>11</sup> Pacific Rim has now been taken over by Oceana Gold, which continues with the arbitration.

<sup>12</sup> The case was initially brought on the basis of CAFTA, but the case was dismissed on jurisdictional grounds and it is now proceeding on the basis of El Salvador’s own investment law instead, which also allows for international arbitration. Pac Rim v. El Salvador, *Memorial on the Merits and Quantum*, para. 219, 450, 454; Pac Rim Cayman LLC v. Republic of El Salvador, *Response to Respondent’s Preliminary Objections*, ICSID Case No. ARB/09/12 (26 February 2010), para. 53.

<sup>13</sup> On the standard of compensation applicable in international investment law, see Chapter 3. Pacific Rim is requesting approximately USD 75 million for the costs incurred through its exploratory work, and a further USD 239 million in lost profits. These figures are often obscured in the arbitral calculations, but can here be inferred from the difference between the out-of-pocket figure in the Notice of Intent and the request for compensation in the Memorial. Pac Rim Cayman LLC v. Republic of El Salvador, *Notice of Intent*, ICSID Case No. ARB/09/12 (9 December 2008), para. 38; Pac Rim v. El Salvador, *Memorial on the Merits and Quantum*, para. 692.

<sup>14</sup> Stephan Schill suggests that a first glance at the literature might suggest that voices critical of international investment law are prevalent, but that this is a “distorted view” – most international investment lawyers are still

few critical voices that have emerged in recent years, the tendency is – to cite Bruno Simma, a former judge on the International Court of Justice – to celebrate international investment law as “one of the great international legal success stories”.<sup>15</sup> Scholars and practitioners of international investment law express “amazement” at the “proliferation” of international investment agreements that have taken place in the last couple of decades.<sup>16</sup> Indeed, there are now over 2,800 bilateral investment treaties in force, as well as over 300 other investment treaties (both multilateral trade and investment treaties such as NAFTA and sectoral treaties such as the Energy Charter), and these form an interlocking network of treaty protection for much of the world’s foreign investments.<sup>17</sup> Scholars and practitioners of international law are particularly impressed with the fact that almost all such investment treaties provide corporations with the right, at their own initiative, to initiate arbitration proceedings against the states in which they operate, and to have their claims resolved and enforced at the international level. To cite Stephen Schwebel, a frequent arbitrator and formerly a judge on the International Court of Justice, this is “one of the most progressive developments of international law of the last century”.<sup>18</sup>

Corporations have greeted these developments with enthusiasm – since this field of law first began to take off in the mid-1990s, they have initiated international arbitration proceedings against states on at least 568 separate occasions, and even this figure does not include what is estimated to be many more cases that are confidential.<sup>19</sup> Corporate law firms describe investment arbitration as a “most powerful weapon”, and it is now used to challenge everything

---

favourable towards international investment law. Stephan Schill, ‘W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law’, *The European Journal of International Law*, 22:3 (2011), p. 899; Charles Brower & Stephan Schill, ‘Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?’, *Chicago Journal of International Law*, 9 (2008-2009), p. 472.

<sup>15</sup> Bruno Simma, ‘Foreign Investment Arbitration: A Place for Human Rights?’, *International and Comparative Law Quarterly*, 60 (2011), p. 574.

<sup>16</sup> L. Yves Fortier, ‘Investment Protection and the Rule of Law: Change or Decline?’, *The British Institute of International and Comparative Law 50<sup>th</sup> Anniversary Event Series*, (2009), p. 5; L. Yves Fortier, ‘Expectations of Governments and Investors vs. Practice: A View from the Bench’, *ICSID Review*, 24:2 (2009), p. 350; Horacio Grigera Naón, ‘The Settlement of Investment Disputes Between States and Private Parties: An Overview from the Perspective of the ICC’, *Journal of World Investment*, 1 (2000), 60.

<sup>17</sup> UNCTAD, *World Investment Report 2013 - Global Value Chains: Investment and Trade for Development* (New York & Geneva: United Nations, 2013), p. 101. These compose an interlocking network through MFN clauses, as will be discussed in Chapter 2.

<sup>18</sup> Stephen Schwebel, ‘A Critical Assessment of the U.S. Model BIT’, *Keynote Address at the British Institute of International & Comparative Law Conference*, London (15 May 2009), available at {[www.bicil.org/files/4253\\_schwebel-biicl15may2009speech\\_cor2.pdf](http://www.bicil.org/files/4253_schwebel-biicl15may2009speech_cor2.pdf)} accessed 10 February 2015; see also, Stephen Schwebel, ‘The Overwhelming Merits of Bilateral Investment Treaties’, *Suffolk Transnational Law Review*, 32 (2008-2009), p. 267.

<sup>19</sup> UNCTAD, ‘Recent Developments in Investor-State Dispute Settlement (ISDS)’, *IIA Issues Note*, 1 (April 2014), p. 1.

from tobacco plain packaging regulations in Australia to prohibitions on ‘fracking’ for shale gas in Canada.<sup>20</sup> Approximately half of the world’s countries have defended themselves before an investment tribunal at one point or another, and some states have done so repeatedly.<sup>21</sup> Investment law scholars and practitioners view this “litigation explosion” as “nothing short of extraordinary”, and estimate that this makes investment arbitration the most used dispute settlement tool in the history of international law.<sup>22</sup> There is a tendency within much International Relations scholarship to assume that international law is little more than a form of normative guidance, but international investment law is backed by effective mechanisms for resolving and enforcing claims. A distinctive appeal of international investment law lies in the fact that it provides corporations with compensation not only for any direct losses, but also for estimated future lost profits – in one recent case, a company that had spent USD 5 million on developing an investment project received a further USD 900 million in compensation for its estimated future lost profits when the project fell through as a result of the state’s actions.<sup>23</sup> When a corporation wins such a case, it can be reassured by the fact that “such arbitral awards are among the most effectively enforceable in the international system”.<sup>24</sup>

The enthusiasm of corporations and many scholars of international law is nevertheless not shared by La Mesa, the social movement that had arisen against Pacific Rim’s proposed gold mine. La Mesa and its constituent civil society organizations, proud to have organized the

---

<sup>20</sup> Freshfields Bruckhaus Deringer in the context of the Argentina crisis, cited in Luke Eric Peterson, *All Roads Lead out of Rome: Divergent Paths of Dispute Settlement in Bilateral Investment Treaties* (Nautilus Institute for Security and Sustainable Development & International Institute for Sustainable Development, et al., 2002), p. 5, available at {[www.iisd.org/pdf/2003/investment\\_nautilus.pdf](http://www.iisd.org/pdf/2003/investment_nautilus.pdf)} accessed 11 February 2015; Philip Morris Asia Limited v. Australia, *Notice of Arbitration* (21 November 2011); Lone Pine Resources Inc. v. Government of Canada, *Notice of Intent to Submit a Claim to Arbitration Under Chapter Eleven of the North American Free Trade Agreement*, UNCITRAL Ad Hoc Arbitration (8 November 2012).

<sup>21</sup> UNCTAD, ‘Recent Developments in Investor-State Dispute Settlement (ISDS)’, *IIA Issues Note*, 1 (April 2014), p. 1.

<sup>22</sup> ‘Litigation explosion’ is a term used by UNCTAD, cited in Susan Franck, ‘Empirically Evaluating Claims About Investment Treaty Arbitration’, *North Carolina Law Review*, 86 (2007-2008), p. 44; William Rowley, ‘ICSID At A Crossroads’, *Global Arbitration Review*, 1:1 (2006), p. 1; Bernasconi-Osterwalder & Howard Mann, ‘A Response to the European Commission’s December 2013 Document ‘Investment Provisions in the EU-Canada Free Trade Agreement (CETA),’ *International Institute for Sustainable Development Report* (February 2014), p. 1, available at: {<http://www.iisd.org/publications/response-european-commissions-december-2013-document-investment-provisions-eu-canada>} accessed 23 May 2014.

<sup>23</sup> The company had sought to develop a tourist resort in Libya, but Libya failed to vacate the land that it had promised to the investor. The USD 900 million is for “the certain profits (minimum value) that it should have realized from investing in the project’s 14 resorts and facilities throughout a period of 83 years”. Mohamed Abdulmohsen Al Kharafi & Sons Co. v. the Government of the State of Libya, *Final Arbitral Award*, Ad Hoc Arbitration (22 March 2013), p. 385-386; Diana Rosert, ‘Libya Ordered to Pay US\$935 Million to Kuwaiti Company for Cancelled Investment Project; Jurisdiction Established Under Unified Agreement for the Investment of Arab Capital’, *Investment Treaty News*, 1:5 (19 January 2014), p. 14.

<sup>24</sup> José E. Alvarez, ‘The Internationalization of U.S. Law’, *Columbia Journal of Transnational Law*, 47:3 (2009), p. 565.

successful campaign against mining in El Salvador, but without a seat before the international investment tribunal that will decide on the case, has requested permission to submit an *amicus curiae* (‘friend of the court’) briefing to the tribunal. Within it, La Mesa laments that “[t]he momentous gains that *amici* and their allies have achieved in the last decade are at stake in this arbitration” and that the corporation is attempting “to leverage international investment law to essentially hang a price tag on its opponents’ successes in domestic public policy debates”.<sup>25</sup> In making such a claim, La Mesa makes a further observation that serves as the foundation for this doctoral thesis:

“Claimant [Pacific Rim] is using this proceeding to gain an advantage in what is fundamentally not a dispute between it and the Republic [of El Salvador], but rather between it and the independently-organized communities who have risen up against Claimant’s projects”.<sup>26</sup>

From climate change campaigners in Germany to local communities concerned with pollution in the Peruvian Andes, environmental movements are finding the success of their domestic political campaigns challenged in international investment tribunals.<sup>27</sup> Yet there is a disjuncture between the way that the academic literature on the subject has approached investment disputes, and the understanding that is developing within social movements themselves. Within the academic international investment law literature, the story begins where the involvement of the social movements end: in the arbitral process, to which the civil society groups are not invited to formally participate, are very often not allowed to attend, and are sometimes allowed no knowledge of whatsoever.<sup>28</sup> Scholars of international investment law normally adopt the perspective of the dispute settlement process itself, which is captured in the formal term for this practice: Investor-*State* Dispute Settlement (ISDS). The battle lines drawn within the investment proceedings – investor v. state – are the only battle lines that are visible on the investment arbitration map, and the social movements, from whom the disputes originate, are normally invisible to academic researchers in the same way that they are invisible to the tribunal itself. This is in a sense not surprising; the lawyers that populate this academic discipline are

---

<sup>25</sup> Pac Rim v. El Salvador, *Application for Permission to Proceed as Amici Curiae*, p. 2.

<sup>26</sup> *Ibid.*, p. 2.

<sup>27</sup> The Renco Group, Inc. v. The Republic of Peru, *Notice of Arbitration and Statement of Claim*, UNCT/13/1 (9 August 2011); Bear Creek Mining Corporation, ‘Bear Creek Announces its Intent to Commence an Arbitration Against Peru – Santa Ana Dispute’, *News Release* (12 August 2014), available at {<http://www.bearcreekmining.com/s/news.asp?ReportID=676144>} accessed 4 February 2015; Vattenfall AB, Vattenfall Europe AG and others v. The Federal Republic of Germany, *Request for Arbitration*, ICSID Case No. ARB/09/6 (30 March 2009).

<sup>28</sup> The submission of an *amicus curiae* brief does not render the civil society groups formal participants, and confidentiality is still a common feature of investment arbitration. See Chapter 2.

interested in the law – the legal dispute between the formal parties before the tribunal – and not the politics that underpin it.

The aim of this thesis is to investigate the *politics* of international investment law. Politics, in the broad sense adopted here, refers to the governance of societies and of the social order within which we live. Since people often have different and conflicting interests and values, politics – to use Harold Lasswell’s classic definition – is fundamentally about “Who Gets What, When, How”.<sup>29</sup> International investment law is part of the governance structure of societies today, and to investigate the politics of international investment law is to investigate how this field of law affects who gets what, when, and how. The study of politics is nevertheless not only about who gets what, when, and how, but it also raises the important question of *why* – what is it that determines who gets what, when and how? The research questions that motivate this project are as follows:

- What are the political implications of international investment law and investment arbitration?
- Why does international investment law have these political implications?

The discipline of international investment law does provide some possible answers to these political questions. While lawyers often directly insist that they are only interested in the legal questions and not the political ones,<sup>30</sup> the legal analysis itself provides a glimpse into the political implications – it is the legal outcome of investment disputes that influences what kind of role international investment law plays in global politics today, and consequently who gets what, when and how. Lawyers do frequently extrapolate from the legal analysis of investment disputes to the political consequences of international investment law itself; for instance, scholars may offer conclusions as to whether or not states remain unfettered in their ability to introduce public interest regulations on the basis of research into particular investment treaty obligations or investment disputes. More broadly, the existing scholarly effort to understand why international investment law emerged in the first place – and how it forms part of the

---

<sup>29</sup> Harold Lasswell, *Politics, Who Gets What, When, How* (New York: Peter Smith, 1950); Robert Garner et al, *Introduction to Politics*, 2<sup>nd</sup> ed (Oxford: Oxford University Press, 2012), p. 2-6.

<sup>30</sup> For instance, Jorge Viñuales’ recent book specifies that his work “does not seek to provide an analysis of the investment-environment equation from an economic or political perspective”, while Åsa Romson’s treatment of the same subject “aims at a ‘legal’ answer to its questions, rather than a ‘political’ or ‘sociological’ answer”. Jorge Viñuales, *Foreign Investment and the Environment in International Law* (Cambridge, Cambridge University Press, 2012), p. 2; Åsa Romson, *Environmental Policy Space and International Investment Law* (Stockholm: Acta Universitatis Stockholmiensis, 2012), p. 30.

governance structure of societies today – is, in accordance with the definition provided above, unavoidably political. The argument made here is therefore not that there is a complete absence of political analysis within the discipline of international investment law, although there is certainly a shortage,<sup>31</sup> but that the theoretical premises informing the (implicit or explicit) political answers within this discipline lead to problematic conclusions.

The foremost of such questionable theoretical premises is the conception of the state as an actor. The academic literature tends to proceed on the assumption that Investor-State Dispute Settlement is simply about resolving disputes between investors (i.e. corporations) and states, yet the decision to analytically conceive of the state as an agent in its own right serves to render invisible the social movements from whom investment disputes often emerge. In turn, where attention turns to broader questions in respect to the emergence of international investment law as a whole, and its role in global politics, even the corporations are often lost from view and only states remain. The political origins and trajectory of international investment law are often couched in distinctly state-centric terms, and the influence of any non-state actors (e.g. transnational corporate lobbying groups) tend to be mentioned only in passing, if at all. This thesis makes two related arguments: one theoretical, one empirical. In order to provide a better explanation of the politics of international investment law, this thesis proceeds from the theoretical argument that the state is not an *agent* in its own right, but a political *structure*, which is in turn both the ‘congealment’ of previous political struggles and an arena for current struggles. In order to understand how international investment law affects who gets what, when and how, this thesis will therefore not treat the state as a ‘who’ – and simply address the question of how this field of law affects states – but it will rather seek to understand the political implications for different groups of people. Similarly, in order to understand why international investment law has these political implications, this thesis will not simply explain it as an outcome of the agency of particular states – assumed to pursue their ‘national interests’ – but it will rather explain it as an outcome of the agency of particular social groups. This theoretical argument enables the empirical argument that will be advanced in this thesis: that international investment law arose at the initiative of a transnational capitalist class, and that it is currently implicated in political struggles around the world that are ultimately between transnational

---

<sup>31</sup> Kyla Tienhaara, as one of the few political scientists within this field, suggests that “it is imperative that scholars from other disciplines now become more actively engaged in the critical debates surrounding investment law”. Kyla Tienhaara, ‘Regulatory Chill and the Threat of Arbitration: A View from Political Science’, in Chester Brown & Kate Miles (eds) *Evolution in Investment Treaty Law and Arbitration* (Cambridge, Cambridge University Press, 2011), p. 606.

corporations and their opponents amongst local communities or social movements, of which the dispute *Pacific Rim v. La Mesa* is only one example.

This thesis is structured into one shorter introductory chapter, which sets out and defends the theoretical, conceptual and wider political premises of the thesis, and three longer empirical chapters, that draw upon these premises in order to provide a better explanation of international investment law.

Chapter 1 begins by elucidating the theoretical premises of the thesis, and how they differ from those that are prevalent within the international investment law literature. The central argument is that only human beings are political agents, and that the political struggles that underpin international investment law are undertaken by human beings, acting collectively to achieve their aims. In contrast, the political agent (in so far as there is one) in the study of international investment law is often the *state*, conceived as an actor in its own right. This chapter explains why the state should rather be conceived of as a social structure, which is itself the outcome of historic political struggles between social groups, and an arena for social struggles today. This is not to deny that state *officials* – as human beings – are agents in their own right, but to suggest that they do not possess the unity that would be required for them to be helpfully conceived of as a collective actor. The rejection of the notion of the state as an actor enables the investigation, undertaken in subsequent chapters, into the political struggles between opposing societal groups that ultimately underpin international investment law. This immediately raises the question of who these opposing societal groups are, and this question cannot be answered in reference to international investment law alone. The first chapter therefore concludes by setting out the wider political framework that serves as the foundation for the thesis, and it defends the claim that we live in an age of global capitalism distinguished by the rise of a transnational capitalist class. On this basis, subsequent chapters reveal how the collective agency of a transnational capitalist class is imperative for understanding the politics of international investment law.

Chapter 2 explores the ‘big picture’ of international investment law: of the political struggles through which international investment law first emerged, and the role that it plays in global politics today. It contains three sections. The first section investigates why international investment law was first brought into being, and it seeks to move beyond the state-centrism inherent in most of the available historical narratives in order to highlight the involvement of societal groups. More specifically, it highlights the role of an emerging transnational capitalist

class in the making of international investment law, and the role of political struggles between a transnational capitalist class and opposing social movements in its current trajectory. The second section proceeds to detail the institutional structure of international investment law, and how that institutional structure reflects the needs of a distinctly *transnational* capitalist class. The third section investigates the role of international investment law in wider global politics, and it argues that William Robinson's concept of a 'transnational state' is helpful in allowing us to do so. Robinson maintains that the 'transnational state' contains within itself both transformed national states (which now support a transnational capitalist class) as well as supranational institutions, but he does not fully explain how these different political institutions relate to each other. Drawing upon insights from how international investment law relates to national states, as well as the work of Stephen Gill and David Schneiderman, the section highlights the significance of supranational institutions in 'locking in' the interests of a transnational capitalist class beyond the reach of the state, and how it limits the range of political possibilities open to opposing social groups acting at the national level. Drawing further upon insights from how international investment law is situated vis-à-vis other fields of international law and other supranational institutions, the section also highlights the significance of the fragmentation of supranational sphere of politics for securing the interests of a transnational capitalist class. This chapter therefore provides the wider context that forms the basis for the investigation that follows in subsequent chapters into the particular social struggles that international investment law is implicated in around the world today.

Chapter 3 begins the investigation into the Investor-State Dispute Settlement process itself, and how international investment law protects transnational corporations from measures that are, formally, introduced by states. Investment treaties only allow corporations to initiate arbitration against states in order to challenge measures taken by those states, and if corporations were always to lose these disputes (and if state officials and people more broadly were aware of that fact) then it would be safe to say that international investment law would only have negligible political consequences. It would not, in the end, influence 'who gets what'; that question would be resolved through political struggles in other institutional contexts. Corporations nevertheless do win investment disputes, and the aim of this chapter is to understand the extent to which corporations can challenge state measures. International investment treaties are formally known as treaties for the 'protection' of investments, and this chapter therefore asks the question: protection from what? Are corporations only protected from a limited and unusual set of possible state actions, or does the protection afforded by investment treaties reach far into the



normal policy-making processes of states? The first section of this chapter justifies the selection of cases that has been selected for this thesis, namely investment disputes that arise from measures that states have taken to protect the environment. The second, third, fourth and fifth sections explore in detail what precisely corporations are protected from, so as to ascertain the extent to which corporations are protected from state measures taken to safeguard what is normally conceived of as the legitimate public interest of environmental protection. The sixth section explores the generous measure of compensation provided in the event of a corporate legal victory. This chapter therefore provides the legal basis upon which any understanding of the political consequences of international investment law ultimately rests.

Chapter 4 continues and concludes the investigation into how Investor-State Dispute Settlement is implicated in political struggles around the world today. If the previous chapter investigated *what* international investment law protects corporations from, this chapter proceeds to the question: protection from *whom*? In contrast to the legal analysis presented previously, this chapter moves beyond the notion of Investor-State Dispute Settlement to consider the underlying political struggles between opposing societal groups that investment disputes arise from, and the consequences of international investment law in the context of such political struggles. The first section argues that the underlying political contestation between opposing societal groups is often rendered invisible or misrepresented within the academic study of international investment law, and it details how many of the investment disputes had initially involved a transnational corporation on the one hand, and local community groups, environmental organizations or wider social movements on the other. The second section explores how each of these non-state actors have often sought to make use of the state in their struggles with each other, and how the victory of the social movement in such domestic political debates turns a dispute between non-state actors into an investor-state dispute. The third section investigates the political consequences of international investment law for such underlying political struggles around the world today.

In order to understand the political struggles that international investment law is implicated in, the thesis draws upon a range of different sources. Most importantly, the thesis is based on a close reading of investment awards, as well as the corporations' and the states' legal submissions (notices of arbitration, memorials, counter-memorials, etc) and, where available, *amicus curiae* submissions by NGOs. A list of the 46 investment disputes in respect to the environment that have been chosen for closer examination is detailed in the appendix. These

legal awards and submissions are on the surface about the law, but reading between the lines they reveal the political struggles that the cases reflect, and what is at stake in those struggles. The thesis furthermore draws extensively on other sources to complement the legal sources, ranging from corporate news releases, lobbying documents, government documents, through to news searches via both Nexis and online search engines. Most importantly, to address the absence within the arbitral setting of the social groups from whom investment disputes often originate, the thesis draws upon the campaigning materials of those groups and of other non-governmental organizations that support them. Through an analysis of a variety of different sources, the thesis seeks to piece together an understanding of political struggles that are ultimately between transnational corporations and opposing social groups, and how these struggles are waged through the structures of the state and, finally, through international investment law.

The intended audience for this doctoral thesis is three-fold. Its original contribution is to provide a new perspective on international investment law, a perspective that brings the underlying political struggles between transnational corporate actors and their opponents to the forefront of the analysis. That new perspective is juxtaposed with the perspectives prevalent within the specialist field of international investment law, and the aim is to illuminate political struggles that this particular specialist literature leaves in the dark. Furthermore, this thesis seeks to offer a contribution to the study of international politics. International investment law is still considered a field of “exotic and highly specialized knowledges” even to other international lawyers,<sup>32</sup> and it is even more so to scholars of international politics. The wider aim is therefore to show that international investment law is not an obscure field of international law of interest only to legal specialists, but that it is directly implicated in political struggles around the world today. Its growing influence means that it deserves more sustained attention from scholars of international politics than it has hitherto received. The political struggles highlighted in this thesis pit transnational corporations against local communities, non-governmental organizations, or social movements, and this study will be of particular interest to scholars of global politics that draw upon Marxist theory. Indeed, the thesis itself draws upon Marxist theory to explain the wider political context, and the thesis in turn contributes to the task of understanding global capitalism and the nature and practice of class struggle today. Finally, this

---

<sup>32</sup> This was contrasted to other areas of international law that were only ‘specialist’, such as trade law and human rights law. Martti Koskenniemi in a 2006 report, cited in Schill, ‘W(h)ither Fragmentation?’, p. 877 (Schill nevertheless maintains that this is changing).

thesis seeks to contribute to a growing debate on international investment law beyond academia, at this particular juncture provoked both by a number of controversial investment disputes and by the high-profile negotiations to conclude the Transatlantic Trade and Investment Partnership (TTIP) and the Trans-Pacific Partnership Agreement (TPP).<sup>33</sup> The perspective advanced in this thesis is new to the academic study of international investment law, but it is a perspective that increasingly seems to inform the criticisms of non-governmental organizations and wider social movements. The aim is therefore to articulate this nascent civil society perspective in more definite terms, and to provide an analysis of international investment law that can help to inform these ongoing debates.

The empirical contribution that is made in this thesis towards understanding the political struggles that underpin international investment law is necessarily tentative; it is not intended to provide any definite conclusions. This could be said of any empirical study, but there are two reasons why this is an especially important caveat in the context of this thesis. Firstly, the nature of the argument – that the decision to treat the state as a ‘black box’ serves to conceal the underlying political struggles between opposing societal groups – raises obvious methodological difficulties in respect to the identification of which societal group influences state action in what particular circumstances, and how they have done so. Secondly, the breadth of this study contrasts with the more modest but more definite doctoral work that often emerges within this field, and that often deals with a small number of investment disputes or a particular investment treaty obligation in a depth and detail that cannot be accomplished here. The aim of this thesis is not to provide a conclusive empirical investigation, but to provide a new perspective on international investment law, and to illustrate how that new perspective illuminates political struggles and political implications that the existing literature on the topic leaves in the dark. For this reason, the breadth of the thesis should be understood as an advantage rather than a limitation. The inevitable simplification of a complex reality that follows is necessary to convey the big picture and further serves to address the criticism that international investment law is often “disguised in complexity”.<sup>34</sup> In summary, the thesis should

---

<sup>33</sup> The investment disputes that have attracted particular civil society criticisms are the Pacific Rim case considered above; *Lone Pine Resources v. Canada*, *Notice of Intent* (in respect to fracking for shale gas); *Philip Morris v. Australia*, *Notice of Arbitration* (in respect to tobacco plain packaging regulations); *Infinite Gold Ltd. v. Republic of Costa Rica*, *Request for Arbitration*, ICSID Case No. ARB/14/5 (6 February 2014) (in respect to mining); *Chevron Corporation & Texaco Petroleum Company v. Republic of Ecuador*, *Notice of Arbitration*, PCA Case No 2009-23 (23 September 2009) (in respect to environmental degradation caused by oil exploitation), etc.

<sup>34</sup> Foreword by Jim Shultz in Thomas McDonagh, *Unfair, Unsustainable, and Under The Radar: How Corporations Use Global Investment Rules to Undermine a Sustainable Future* (Democracy Center, 2013), p. iii.

be judged on the extent to which it brings to light political struggles that the current investment law literature does not, and the extent to which it provides a plausible – if inconclusive – explanation of those political struggles.

To conclude this introduction, to consider the politics of international investment law is to consider how this field of law influences ‘who gets what’ in the context of particular political struggles. Does La Mesa get the safer and larger quantity of water that it fears mining would put at risk, or does Pacific Rim get the gold that lies hidden beneath the hills in a concession that has been promisingly named ‘El Dorado’?<sup>35</sup> This thesis nevertheless also argues that there is more at stake in these struggles. These particular disputes are in a sense manifestations of a wider political struggle; a struggle *for the future*. The question is how open the future should be to political change. Transnational corporate actors place their formidable lobbying powers at the service of promoting favourable political changes every day – they are by no means objecting to political change in general – but the aim behind international investment law is to ensure political closure of a particular kind. International investment treaties are approached as “powerful tools for managing and mitigating political risk”, and political risk is understood to involve any future political changes that work to the detriment of corporations.<sup>36</sup> The expectation, to cite one investment tribunal, is that states should act in such a manner that corporations “may know *beforehand* any and all rules and regulations that will govern its investments”.<sup>37</sup> International investment law forms part of what Stephen Gill contends is a wider political agenda to ‘lock in’ favourable policies at a particular point in time and to extend them far into the future.<sup>38</sup> The future, in respect to the particular policies that have been ‘locked

---

<sup>35</sup> *Pac Rim v. El Salvador, Memorial on the Merits and Quantum*.

<sup>36</sup> The quote is from the corporate lawfirm Freshfields Bruckhaus Deringer, ‘Bilateral Investment Treaties: Managing the Risk of Government Intervention’, available at: <http://www.freshfields.com/uploadedFiles/SiteWide/Knowledge/Bilateral%20investment%20treaties%20Managing%20the%20risk%20of%20government%20intervention.pdf> accessed 20 June 2014. See also, Paul Comeaux & Stephen Kinsella, ‘Reducing Political Risk in Developing Countries: Bilateral Investment Treaties, Stabilization Clauses, and MIGA and OPIC Investment Insurance’, *New York Law School Journal of International and Comparative Law*, 15:1 (1994), p. 4 (political risk is the ‘risk of government intervention’); Matthew Shinkman, ‘The Investors’ View: Economic Opportunities Versus Political Risks in 2007-11’, in The Economist Intelligence Unit & Columbia Program on International Investment, *World Investment Prospects to 2011: Foreign Direct Investment and the Challenge of Political Risk* (2007), pp. 84-94 (political risk stems, among other things, from ‘shifting legal and regulatory frameworks’); Jeswald Salacuse, ‘The Emerging Global Regime for Investment’, *Harvard International Law Journal*, 51:2 (2010), p. 450 (an ‘unexpected change in the rules is a principal form of political risk, perhaps its very essence’).

<sup>37</sup> *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States, Award*, ICSID Case No. ARB(AF)/00/2 (29 May 2003), p. 154.

<sup>38</sup> Stephen Gill, ‘Constitutionalizing Inequality and the Clash of Globalizations’, *International Studies Review*, 4:2 (2002), pp. 47-65; Stephen Gill, ‘Globalisation, Market Civilisation, and Disciplinary Neoliberalism’, *Millennium: Journal of International Studies*, 24:3 (1995), pp. 399-423; Stephen Gill, ‘New Constitutionalism, Democratisation and Global Political Economy’, *Global Change, Peace & Security*, 10:1 (1998), pp. 23-38.

in’, is therefore expected to look much the same as the present. Yet all over the world, people come together to collectively organize for a different future than the one that corporations have come to expect – a future, say, where mining is no longer permitted. It is in such circumstances that the social movements’ struggle for a different future comes into contact with international investment law, which is, to cite a key textbook, intended to “provide for stability and predictability in the sense of an investment-friendly climate”.<sup>39</sup> In precisely such a context, La Mesa laments that “the democratic gains [that La Mesa] and their constituent communities have earned, for literally the first time in El Salvador’s history, could be drastically undermined”.<sup>40</sup> This sentiment is shared by Jim Shultz, the director of the Democracy Center, an NGO involved in the Cochabamba Water War in Bolivia that led to an investment dispute with Bechtel. In light of what the South Centre refers to as an ‘epidemic’ of investment disputes,<sup>41</sup> Shultz observes that the struggle over international investment law:

“[Is] not about one corporation, it’s not about one country. It is about whether we genuinely have democracy, it’s about whether or not people actually have the right, as a people, to write the rules that determines what their futures are, and the futures for their children”.<sup>42</sup>

---

<sup>39</sup> Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press, 2008), p. 22.

<sup>40</sup> *Pac Rim v. El Salvador, Application for Permission to Proceed as Amici Curiae*, p. 2.

<sup>41</sup> Martin Khor, ‘The Emerging Crisis of Investment Treaties’ *South Bulletin*, 69 (21 November 2012), p. 2.

<sup>42</sup> Network for Justice in Global Investment, *Global Investment Rules: Threat to Democracy and the Environment*, video (November 2011), min: 7.40, available at {<http://justinvest.org/2011/12/video-global-investment-rules-threat-to-democracy-and-the-environment/>} accessed 13 February 2015.

## Chapter 1

# Locating Agency: States and Social Groups in International Investment Law

The wider aim of this doctoral thesis is to understand how international investment law is implicated in political struggles around the world today, and how it arose from such political struggles in the first place. The aim of this first chapter is to show that the theoretical premises that currently inform research into international investment law make such a task difficult, if not impossible. The analytical decision to treat the state as an agent serves to render invisible the real political struggles between human beings, acting collectively, that ultimately underpin international investment law. In order to bring the political agency of those human beings back in, this first chapter will defend a new set of theoretical premises in respect to the state and to the structure-agency debate.

To illustrate the theoretical assumptions that inform international investment law, the first section of this chapter will explore three different approaches to understanding why international investment law emerged, and why it has evolved in the way that it has. Within the first approach, the history of international investment law is presented as undergoing an almost natural emergence and evolution, where agency of any kind is not part of the story that unfolded. Within the second approach, the history of international investment law is explained in reference to political agency, negotiation and (at times) struggle, but the agents in this story are states. In contrast to these two approaches, this chapter presents a third approach: one in which the history of international investment law is explained in reference to political agency, but one in which the agents are not states. The second section of this chapter will lay the theoretical foundations for the approach adopted in this thesis: one that explains the history of international investment law in reference to the political agency of human beings, acting collectively as part of social groups, and acting through political structures such as the state. In order to do so, the section will first provide an explanation of the structure-agency debate and what is at stake, before situating states and social groups within that explanation. Having discussed states as structures and people as agents in the abstract, the third section will explain the particular structures and agents that are most important for understanding the trajectory of international investment law. It will begin with an investigation into the macro structure of capitalism, and in that context explain the relationship between the structure of the capitalist state and the agency of social classes. It will thereafter turn to the meso structure that forms the wider context

for this thesis, namely global capitalism and globalization, and it will explain why a transnational capitalist class should be understood as an important collective agent at this particular historical juncture.

### **Three Approaches to International Investment Law**

Almost all understandings of the emergence and evolution of international investment law share certain empirical commonalities. It is generally agreed that international investment law emerged as a legal regime that was distinctly beneficial for corporations; to cite José Alvarez, the early investment treaties “deployed every lawyerly device imaginable to achieve a single unitary object and purpose: to protect the foreign investor”.<sup>1</sup> It is also generally agreed that the current state of international investment law has more recently encountered a ‘backlash’; to cite Bruno Simma, “this awesome edifice has more recently developed some visible cracks”.<sup>2</sup> As a result, some modest changes have been made to investment treaties (e.g. in the form of ‘right to regulate’ clauses) and to the institutional structure of investment arbitration (e.g. in respect to greater transparency). The differences within the literature lie in the particular explanations for *why* international investment law emerged in the way that it did, and *why* it has subsequently evolved in the way that it has. The next chapter will provide a particular historical explanation in response to those questions, but this chapter will first address the theoretical premises that serve as foundations for the different explanations. This section will elucidate two approaches to understanding the emergence and evolution of international investment law, in order to illustrate how the discipline suffers from a structure-agency problem that renders the most important agents in this story invisible. The problem with the two approaches is not that they are empirically wrong; it is that they are conceptually problematic. It should nevertheless be made clear from the outset that these two approaches are not ones that particular scholars self-identify with – indeed, scholars often fluctuate between all three – and the purpose is not to offer a perfect characterization of the literature. The aim is rather to try to make explicit some theoretical premises that are usually left implicit, in order to show the advantages of a consistent application of the third approach that will be proposed here.

---

<sup>1</sup> José E. Alvarez, ‘The Return of the State’, *Minnesota Journal of International Law*, 20:2 (2011), p. 231.

<sup>2</sup> Bruno Simma, ‘Foreign Investment Arbitration: A Place for Human Rights?’, *International and Comparative Law Quarterly*, 60 (2011), p. 575; on the ‘backlash’, see: Michael Waibel et al. (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Alphen aan den Rijn: Kluwer Law International, 2010); Asha Kaushal, ‘Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime’, *Harvard International Law Journal*, 50:2 (2009), pp. 491-538.

## *A Natural Evolution?*

Within the primarily legal or policy literature on the subject, the history of international investment law is often, normally implicitly, presented as one of a natural evolution.<sup>3</sup> International investment law emerged in order to address a particular problem (the lack of protection for foreign investors), but, to cite an UNCTAD report, it subsequently “brought to light unanticipated – and partially undesired – side effects” of the investment agreements.<sup>4</sup> Any subsequent changes to such agreements are consequently presented as a normal response to such unanticipated side-effects, and the semi-automatic end point is expected to be a ‘balanced’ international investment regime. This sense of natural evolution is further supported by the common use of anthropomorphic metaphors to describe the history of this field of law: international investment law is “in its infancy”, but it is undergoing normal “growing pains”, or perhaps a “teething period”, and it is expected to eventually reach “maturity”.<sup>5</sup> Such metaphors normalize the history of international investment law, and lends its particular historical trajectory a sense of inevitability.

Unwilling to delve into politics, lawyers may be inclined to present international investment law as undergoing a natural evolution, and in some circumstances this is portrayed as a distinctly *legal* evolution – international investment law may now be in its “state of adolescence”, but it will nevertheless “prove capable of correcting its own mistakes as erroneous decisions are discarded while the fittest survive”.<sup>6</sup> The problem with the above representations is the lack of any explicit consideration of agency. The argument made in this thesis, to cite Karl Marx, is that “[h]istory does nothing [...] history is nothing but the activity

---

<sup>3</sup> The scholars cited here often revert to a state-as-agent approach elsewhere in their analysis, but for comparative purposes this is presented as a distinct perspective.

<sup>4</sup> UNCTAD, *Fair and Equitable Treatment: A Sequel*, UNCTAD Series of Issues in International Investment Agreements II (New York & Geneva: United Nations, 2012), p. iv; UNCTAD, *World Investment Report 2013, Global Value Chains: Investment and Trade for Development* (New York and Geneva: United Nations, 2013), p. 107. UNCTAD, *Investment Policy Framework for Sustainable Development* (New York: United Nations, 2012), p. 43.

<sup>5</sup> L. Yves Fortier, ‘Expectations of Governments and Investors vs. Practice: A View from the Bench’, *ICSID Review*, 24:2 (2009), p. 362; Susan D. Franck, ‘Empirically Evaluating Claims About Investment Treaty Arbitration’, *North Carolina Law Review*, 86 (2007-2008), p. 4; Susan D. Franck, ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions’, *Fordham Law Review*, 73 (2004-2005), p. 1523; Silvia Constain, ‘ISDS Growing Pains and Responsible Adulthood’, *Transnational Dispute Management*, 11:1 (2014), pp. 1-3; (the latter two nevertheless suggests that to achieve ‘responsible adulthood’ the investment regime will require more guidance from states).

<sup>6</sup> José E. Alvarez, *The Public International Law Regime Governing International Investment* (Nijhoff: Brill Pocketbooks of the Hague Academy of International Law, 2011), p. 360.



of human beings pursuing their own aims”.<sup>7</sup> The sense of natural evolution that is often evident in how investment law scholars present the emergence and evolution of this regime conceals the very possibility that particular actors brought this field of law into being, and that its future will be determined by political contestation between such actors.

### ***Politics between States?***

In response to the common perception that the constraints on states’ regulatory powers were an ‘unanticipated side effect’ of international investment treaties, Daniel Price, the lead U.S. negotiator of NAFTA and an experienced investment arbitrator, maintains that the “enormously broad” scope of protection for corporations “is not an accident. The parties did not stumble into this. The parties did not inadvertently do this. This was a carefully crafted definition”.<sup>8</sup> Price therefore explicitly acknowledges the role of political agency in the story that unfolded, but the agents in his story are states: the parties that formally negotiated the treaties. This is the most common way of explaining the history of international investment law, both from its proponents within the mainstream of the discipline and from its critics on the fringes.

The mainstream literature on the subject tends to proceed from the assumption, to cite Jeswald Salacuse, that “[s]tates form and participate in international regimes in order to protect and advance their national interests”.<sup>9</sup> The early investment treaties all emerged in order to protect the foreign direct investments of corporations from the ‘capital-exporting’ states in the West to the ‘capital-importing’ states of the Third World, and the literature therefore proceeds from an investigation into why it was in the national interests of those respective states to conclude such treaties. It is often recognized that “[c]apital-exporting states have been the primary force driving the negotiation of investment treaties”, and it is assumed that they do so to protect ‘their’ corporations in their foreign ventures.<sup>10</sup> In contrast, ‘capital-importing states’ agreed to sign such treaties in order to “gain an advantage in the competition for investment”.<sup>11</sup> How, then, do you explain the subsequent changes to international investment law in recent years, the so-

---

<sup>7</sup> Cited in Laurence Cox & Alf Gunvald Nilsen, *We Make Our Own History: Marxism and Social Movements in the Twilight of Neoliberalism* (London: Pluto Press, 2014), p. 21.

<sup>8</sup> Daniel M. Price, ‘Chapter 11 – Private Party vs. Government, Investor-State Dispute Settlement: Frankenstein or Safety Valve?’ *Canada-U.S. Law Journal*, 26 (2000), p. 109.

<sup>9</sup> Jeswald W. Salacuse, ‘The Emerging Global Regime for Investment’, *Harvard International Law Journal*, 51:2 (2010), p. 436.

<sup>10</sup> *Ibid.*, p. 436.

<sup>11</sup> Andrew T. Guzman, Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties, *Virginia Journal of International Affairs*, 38 (1998), p. 688.

called ‘backlash’? Alvarez observes that if “[t]he United States led the charge in favor of investor protections, it now appears to be leading the drive in the opposite direction”, and further explains that “many of the states that established the regime are having *second thoughts* about the amount of sovereign ‘policy space’ they have ceded”.<sup>12</sup> In a more systematic manner, Karen Halverson Cross argues that the current changes are due to the fact that “the line between capital-exporting and capital-importing states has increasingly blurred” and that states are now operating behind what John Rawls termed a ‘veil of ignorance’ in respect to their investment-related national interests.<sup>13</sup> The ‘backlash’ is an indication that states in the West are “not willing to commit to the strong investment protections that they themselves had pressured capital-importing countries to undertake”.<sup>14</sup> Within the mainstream literature, the agents in this story are therefore states, and their respective ‘national interests’ can be inferred from their status as either capital-importing or capital-exporting.

Much of the critical literature on international investment law is inspired by a Third World Approaches to International Law (TWAIL) perspective and, except for the normative implications, it tends to provide a remarkably similar explanation of the course of events. The TWAIL literature argues that “by having exercised substantial economic, military, political power over the former colonies, Europe and the United States have established patterns of dominance that persist till date”.<sup>15</sup> In this context, the emergence of international investment law is conceived as a means for Western states to protect their corporations’ investments in the Third World by legal means, since the end of colonialism and wider developments in international law had made it increasingly objectionable to do so through the use of force.<sup>16</sup> The current ‘backlash’ against the investor-friendly rules, to cite M. Sornarajah, “obviously results from the fact that the shoe is on the other foot. The erstwhile capital-exporting States are becoming massive recipients of capital”.<sup>17</sup> The international investment regime may therefore increasingly “come to haunt” the very states that created it, and these states in the West may be

---

<sup>12</sup> (My emphasis) Alvarez, ‘The Return of the State’, p. 235, 234.

<sup>13</sup> Karen Halverson Cross, ‘Converging Trends in Investment Treaty Practice’, *North Carolina Journal of International Law and Commercial Regulation*, 38 (2012), p.156.

<sup>14</sup> *Ibid*, p. 179.

<sup>15</sup> James Thuo Gathii, ‘TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography’, *Trade Law and Development*, 3:1 (2011), p. 38.

<sup>16</sup> M. Sornarajah, *The International Law on Foreign Investment*, 3<sup>rd</sup> ed (Cambridge: Cambridge University Press, 2010), p. 20.

<sup>17</sup> M. Sornarajah, ‘Evolution or Revolution in International Investment Arbitration? The Descent Into Normlessness’, in Chester Brown & Kate Miles (eds) *Evolution in Investment Treaty Law and Arbitration* (Cambridge, Cambridge University Press, 2011), p. 639.

“bent on backtracking” on rules that they had once imposed on others.<sup>18</sup> From a similar vantage point, Kate Miles argues that international investment law had originally “been shaped at a fundamental level through this ‘colonial encounter’ into a mechanism that protected only the interests of capital-exporting states”, but now that “developed states begin to find themselves on the receiving end of investor-state complaints [...] a more balanced conceptualization of international investment law” may follow.<sup>19</sup> For Sornarajah, the moral of the story is clear: “it is good that the pain and the indignity that such control has inflicted on the poorer states now attends those at the source. Some relief may result”.<sup>20</sup> Within this critical perspective, the colonial origins and imperialist nature of international investment law is brought to the fore, but the primary agents are still states.

### ***Politics between Social Groups***

This thesis argues that both of the above approaches are based on a problematic understanding of agency; of *who* is responsible for the emergence and evolution of this regime. In the first approach, the question of agency disappears altogether – the history of international investment law is portrayed as the outcome of a natural evolutionary process. In the second approach, agency is attributed to states – it is states (primarily in the West) that have acted to create and to change the international investment regime.

This lack of attention or mis-attribution of agency leads to an analysis where social groups are assumed to have a negligible role to play in the emergence and evolution of international investment law. Indeed, even where such social groups (organized through corporations or corporate lobbies, NGOs, or social movements) are empirically acknowledged, their agency is nevertheless accorded little weight in the explanation itself.<sup>21</sup> This is problematic in an explanatory sense – and the next chapter will argue that bringing social groups back in will lead

---

<sup>18</sup> Sornarajah, *The International Law on Foreign Investment*, p. 4; see also M. Sornarajah, ‘Mutations of Neoliberalism in International Investment Law’, *Trade, Law & Development*, 3:1 (2011), p. 203.

<sup>19</sup> Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge: Cambridge University Press, 2013), p. 2; Kate Miles, ‘International Investment Law: Origins, Imperialism and Conceptualizing the Environment’, *Colorado Journal of International Environmental Law and Policy*, 21:1 (2010), p. 47.

<sup>20</sup> M. Sornarajah, ‘The Clash of Globalisations and the International Law of Foreign Investment’, Simon Reisman Lecture in International Trade Policy, Norman Patterson School of International Affairs (12 September 2002), p. 16.

<sup>21</sup> For instance, Cross recognizes the role of civil society actors in the demise of the MAI and Alvarez records ‘sharp divisions’ within the U.S. in respect to the development of the new U.S. Model BIT. Halverson Cross, ‘Converging Trends in Investment Treaty Practice’, p. 178; Alvarez, ‘The Return of the State’, p. 240.

to a better explanation of international investment law – but it is also problematic in a practical and a normative sense. Our explanations are not politically innocent; they influence how we perceive the world and therefore how we act within it.<sup>22</sup> The first approach presents the history of international investment law as the outcome of a natural evolution, and this lends it a sense of inevitability. In contrast, an agential approach highlights that the future of international investment law is what agents make of it, and it therefore opens up the possibility for a range of different futures. The second approach presents the history of international investment law as the outcome of the agency of states, and in addition to the problems of the first approach (‘we’ are not states, and our potential agency is unacknowledged) it can also result in questionable normative conclusions. In portraying the history of international investment law as the outcome of the agency of states, Jacob Werksman concludes that “[i]t is one of history’s happier ironies, that the victims of this particular experiment are likely to be the governments of two countries [the U.S. and Canada] that have been pushing the need for increased investor protection harder than most”.<sup>23</sup> Such normative conclusions are present in much of the literature that treats states as agents: a note of hypocrisy is present in the claim that states in the West are now ‘backtracking’ on investment rules that they had once forced onto others. The third approach advocated here opens up such normative assumptions to scrutiny. Once the search for agency shifts from states to social groups, there is an empirical possibility that international investment law emerged at the initiative of a capitalist class, and that this capitalist class is still fighting tooth and nail to maintain and expand the corporate privileges it has come to appreciate. In contrast, these investment rules have not ‘come to haunt’ the very states that created them, but they have rather come to haunt other social groups – from local communities to environmental movements – who are seeing the outcome of their hard-fought campaigns questioned in international investment tribunals. Once a focus on social groups is adopted, the ‘happy irony’ of the state-centric narrative is quickly lost and the moral of the story becomes rather more questionable.

The third approach proposed here will not sideline the state, in the same way that much of the literature sidelines social groups; it will rather propose an alternative conception of the state

---

<sup>22</sup> Robert Cox, ‘Social Forces, States and World Order: Beyond International Relations Theory’, *Millennium: Journal of International Studies*, 10:2 (1981), p. 126-155.

<sup>23</sup> Jacob Werksman, ‘Commentary: In Response to the Paper by Konrad von Moltke and Howard Mann, Misappropriation of Institutions: Some Lessons from the Environmental Dimension of the NAFTA Investor-State Dispute Settlement Process’, *International Environmental Agreements: Politics, Law and Economics*, 1 (2001), p. 123.

that allows for a consideration of both. In the investment law literature the theoretical premises of the state-as-agent approach is not explored or defended, and as such the precise nature of the state and its relationship (if any) to other social groups is left undefined. At times, the emphasis on the ‘national interest’ of the state – which is taken as a given – may suggest that social groups need not be considered. At other times, such social groups are mentioned in passing but not accorded much explanatory weight, and it is possible that this is due to an understanding of the state and social groups as separate actors that are externally related; on the basis of such a premise, the agency of social groups may indeed pale in comparison to the agency of states. The third approach proposed here does not side-line the state; it will rather account for the importance both of the state (as a social structure) and social groups (as agents) in the emergence and evolution of international investment law.

### **The State in the Structure-Agency Debate**

In a statement that is often seen to capture the essence of the structure-agency debate, Marx famously observed that “[m]en make their own history, but they do not make it as they please; they do not make it under self-selected circumstances, but under circumstances existing already, given and transmitted from the past”.<sup>24</sup> To avoid a problematic understanding of the state, this thesis seeks recourse to the structure-agency debate. The understanding of the structure-agency debate that will serve as a foundation for this thesis is one in which the agents in the story are human beings. As they exercise their agency, these human beings encounter not only the present agency of other people, but also pre-existing social structures that constrain or enable their agency. An important contribution of a critical perspective to world politics is its ability to “unmask the apparent objective status of structures”.<sup>25</sup> These pre-existing social structures are not ‘givens’ or natural phenomena, but are in turn “the results of other people’s collective action”.<sup>26</sup> This is an important distinction; to cite Andreas Bieler, “understanding structure as the result of strategies in the past, makes it possible to reflect on the freedom of action in the present”.<sup>27</sup>

---

<sup>24</sup> Karl Marx, *The Eighteenth Brumaire of Louis Bonaparte*, available at:

{<https://www.marxists.org/archive/marx/works/1852/18th-brumaire/ch01.htm>} accessed 6 March 2015.

<sup>25</sup> Andreas Bieler & Adam David Morton, ‘The Gordian Knot of Agency-Structure in International Relations: A Neo-Gramscian Perspective’, *European Journal of International Relations*, 7:5 (2001), p. 26

<sup>26</sup> Cox & Nilsen, *We Make Our Own History*, p. vii.

<sup>27</sup> Andreas Bieler, ‘Class Struggle over the EU Model of Capitalism: Neo-Gramscian Perspectives and the Analysis of European Integration’, *Critical Review of International Social and Political Philosophy*, 8:4 (2005), p. 517.

Structures and agents each have distinct properties and causal powers.<sup>28</sup> Structures “do not ‘do’ anything per se”; they do not ‘act’ – they only enable certain forms of action and restrain other forms.<sup>29</sup> Structures are prior to individuals; Colin Wight observes that “from the point of view of specific participants entering these settings, they are experienced as already-established forms of organisation, with which they have to contend in various ways”.<sup>30</sup> However, to cite Robert Cox, this does not mean that structures are “in any deeper sense prior to the human drama itself”.<sup>31</sup> In so far as social structures are the outcome of past collective agency, they are also often the outcome of historical social struggles between opposing collective agents – as such, they resemble “a kind of truce line” from social struggles of the past.<sup>32</sup> Social structures can take ideational, material or institutional forms, and they often combine all three elements.<sup>33</sup> The distinctive properties of agency, in turn, are self-consciousness, reflexivity and intentionality.<sup>34</sup> Agency and personhood are often closely connected; scholars who accord the state agency normally also personify it.<sup>35</sup> Purposeful action based on consciousness is, from a Marxist perspective, indeed part of our human ‘species being’.<sup>36</sup> While human beings are influenced by the ideational structures of the world into which they are born, agents are not simply a reflection or ‘bearers’ of such ideational structures – our consciousness enables us to reflect and sometimes to question the ideas of the societies in which we live, and to act accordingly. To cite Wight, “what goes on in the heads of these agents makes a difference”.<sup>37</sup>

Ralph Miliband maintains that “in the politics of Marxism there is no institution which is nearly as important as the state”, yet as the first section of this chapter has indicated, the ‘state’ can be conceptualized in different ways.<sup>38</sup> This section will approach the state from the vantage point

---

<sup>28</sup> Colin Wight, *Agents, Structures and International Relations: Politics as Ontology* (Cambridge: Cambridge University Press, 2006); Jonathan Joseph, ‘Hegemony and the Structure-Agency Problem in International Relations: A Scientific Realist Contribution’, *Review of International Studies*, 34 (2008), p. 117.

<sup>29</sup> William Robinson, ‘Social Theory and Globalization: The Rise of the Transnational State’, *Theory and Society*, 30:2 (2001), p. 164; Joseph, ‘Hegemony and the Structure-Agency Problem’, p. 117.

<sup>30</sup> Wight, *Agents, Structures and International Relations*, p. 114; see also Margaret S. Archer, *Realist Social Theory: The Morphogenetic Approach* (Cambridge: Cambridge University Press, 1995), p. 135-161.

<sup>31</sup> Robert Cox, *Production, Power and World Order: Social Forces in the Making of History* (New York: Columbia University Press, 1987), p. 395.

<sup>32</sup> Cox & Nilsen, *We Make Our Own History*, p. 57.

<sup>33</sup> For a perspective on how these relate, see Cox, ‘Social Forces, States and World Order’, p. 135-138.

<sup>34</sup> Joseph, ‘Hegemony and the Structure-Agency Problem’, p. 117;

<sup>35</sup> However, a different definition of agency will also result in a different assessment in respect to whether states have agency, see Colin Wight, ‘State Agency: Social Action without Human Activity?’ *Review of International Studies*, 30 (2004), p. 273.

<sup>36</sup> See Cox & Nilsen, *We Make Our Own History*, p. 26-31.

<sup>37</sup> Wight, *Agents, Structures and International Relations*, p. 199.

<sup>38</sup> Cited in Colin Hay, ‘Marxism and the State’, in Andrew Gamble et al (eds) *Marxism and Social Science* (Basingstoke: Macmillan Press, 1999), p. 156.

of the structure-agency debate, and it will first consider the common understanding that the state is an agent, before setting out an alternative perspective in which the state is a social structure, and in which agency is reserved for human beings and social groups.

### *The State as an Agent?*

In everyday language and the media, it is common to personify the state and to treat it as an actor in its own right, and this practice is reflected in academia.<sup>39</sup> If the international investment law literature is problematic in its treatment of the state, then the subject of International Relations – which this thesis draws upon for an understanding of the wider global political context – commits precisely the same mistake. Alexander Wendt observes that “[i]n a field in which almost everything is contested”, the idea that “state personhood is meaningful and at some fundamental level makes sense [...] seems to be one thing on which almost all of us agree”.<sup>40</sup> Indeed, given the origins and the distinctive focus of the discipline, Colin Wight maintains that for scholars of International Relations “to ask if the state really is an agent is akin to asking Descartes to doubt his own existence”.<sup>41</sup> This section will therefore draw upon both international investment law and International Relations to explore the notion of state agency.

Scholars within both disciplines revert to state agency without articulating the particular understanding of the state that underlies such premises, but it seems that the state is treated as an agent in at least four different ways. Firstly, the state can be treated as an agent in the formal and legal sense; for instance, the state is said to have ‘signed’ a treaty, even though the state cannot hold a pen. The Montevideo Convention on the Rights and Duties of States makes clear that the state is “a person of international law” and this thesis will follow common practice in treating the state as an agent in this respect.<sup>42</sup> The problem is not to theoretically acknowledge that the state is, as an actual social fact, a legal actor in international law and international relations. The problem is rather that academic and non-academic representations of the state insist upon conceiving it as an agent in an *analytical* sense, where the explanation or understanding of a particular phenomena relies on the idea of state agency. In such accounts,

---

<sup>39</sup> Alexander Wendt, ‘The State as Person in International Theory’, *Review of International Studies*, 30:2 (2004), p. 289.

<sup>40</sup> *Ibid.*, p. 289.

<sup>41</sup> Wight, *Agents, Structures and International Relations*, p. 178

<sup>42</sup> Montevideo Convention on Rights and Duties of States (26 December 1933), art. 1, available at {<http://www.oas.org/juridico/english/treaties/a-40.html>} accessed 7 March 2014.

the state did not only 'sign' a treaty but the reasons *why* it signed a treaty is answered by recourse to state agency.

In a second sense, the state is therefore conceived as an actor in its own right, and the state's action is explained in reference to what 'it' wants, 'its' national interests, or 'its' 'second thoughts' on a particular matter. This often involves a decision to 'black box' the state and the consideration of domestic factors is deemed unnecessary for the analysis. Some scholars actively suggest that the state *is* an agent; Wendt, in this respect, suggests that "states are people too" and the state is deemed to possess many of the human traits normally associated with personhood and agency, such as intentionality and perhaps even consciousness.<sup>43</sup> Most scholars nevertheless treat the state 'as if' it were a person because doing so is deemed useful. In International Relations many theories explicitly start from the premise that states can be helpfully treated as rational and unitary actors and their behaviour explained in reference to their objective attributes and their position within the international system.<sup>44</sup> In international investment law this decision is often implicit, but it seems to be the foundational premise of the common explanation that this field of law emerged and evolved as a result of the agency of capital-exporting and capital-importing states that each pursued their respective 'national interests'. Treating the state as an agent may seem to be an attractive analytical short-cut, but it rests on problematic assumptions. The state cannot have interests, and the recourse to 'national interests' obscures the question of whose interests these actually are; the interest of all the people, or only of a particular social group? If the state is treated as a unitary actor from the outset, such questions cannot be asked. In so far as this approach conceals and deems beyond the scope of the analysis the agency and conflicting interests of opposing social groups, it leads to a problematic understanding of the political struggles that underpin international investment law.

In a third sense, the state is often treated as an agent, but this is explicitly or implicitly a form of short-hand for state officials or the government. These state officials are in turn deemed to act with sufficient cohesiveness that it makes sense to refer to them as a collective agent in the singular rather than discrete agents in the plural. An expectation of such cohesiveness can be premised on the notion that state officials have distinct interests, as a group, by virtue of their position within the state. This appears to be the contention of the 'new imperialism' literature

---

<sup>43</sup> Wendt, 'The State as Person in International Theory', p. 291.

<sup>44</sup> E.g. Kenneth Waltz, *Theory of International Politics* (London: McGraw Hill, 1979).



within Marxist theory, where scholars such as David Harvey and Alex Callinicos claim that capitalism involves “two distinct logics of power”, one economic and the other geopolitical.<sup>45</sup> From that premise, Harvey suggests that capitalists are motivated by profit, while “statesmen usually seek outcomes that sustain or augment the power of their state vis-à-vis other states”.<sup>46</sup> Callinicos similarly suggests that state officials are interested in “maintaining and, if possible, expanding the internal and external power of the state”.<sup>47</sup> State officials therefore possess distinct interests and motivations by virtue of their structural position within the state, and can therefore be considered a relatively unified collective agent. It is nevertheless not particularly clear *why* state officials would seek to sustain or augment the power of their state, and it is certainly possible that state officials are motivated by quite different personal goals as opposed to such collective ‘state’ goals. A different perspective on what motivates state officials in the exercise of their agency will be considered further on. Some structural forms of Marxism similarly consider state officials to form a particular ‘social category’, but here state officials do not seek to expand the power of their state vis-à-vis others, but rather seek to further the long-term interests of the capitalist class, thereby acting as an “ideal collective capitalist”.<sup>48</sup> Finally, the state can be treated as a short-hand for “collectivities of officials” in the weaker sense evident in the influential call by Theda Scocpol and others to “bring the state back in”.<sup>49</sup> Here the potential influence of societal pressures is recognized, and there is no assumption that the state is *always* an agent, but state officials *may* come to acquire sufficient autonomy from such pressures to pursue distinct state projects that contrast with those of societal groups.<sup>50</sup> While this is certainly a possibility (with an important caveat provided below), this thesis

---

<sup>45</sup> Alex Callinicos, *Imperialism and Global Political Economy* (Cambridge: Polity Press, 2009), pp. 71-72; Alex Callinicos, ‘Does Capitalism Need the State System?’, *Cambridge Review of International Affairs*, 20:4 (2007), p. 539.

<sup>46</sup> David Harvey, ‘From Globalization to the New Imperialism’, in Richard Appelbaum and William Robinson (eds), *Critical Globalization Studies* (New York: Routledge, 2005), p. 91.

<sup>47</sup> Callinicos, *Imperialism and Global Political Economy*, p. 98; see also Robinson’s critique of the ‘new imperialism’, William Robinson, ‘Beyond the Theory of Imperialism: Global Capitalism and the Transnational State’, in Alexander Anievas (ed), *Marxism and World Politics: Contesting Global Capitalism* (Abingdon: Routledge, 2010), pp. 61-76.

<sup>48</sup> Poulantzas maintains that state officials “constitute a specific social category” with a “specific internal unity”, Nicos Poulantzas, ‘The Problem of the Capitalist State’, *New Left Review*, I/58 (November 1969), pp. 73-74; see also Bob Jessop, ‘Bringing the State Back in (Yet Again): Reviews, Revisions, Rejections, and Redirections’, *International Review of Sociology*, 11:2 (2001), p. 151.

<sup>49</sup> Peter Evans, Dietrich Rueschemeyer, et al (eds), *Bringing the State Back In* (Cambridge: Cambridge University Press, 1985).

<sup>50</sup> Theda Scocpol, ‘Bringing the State Back In: Strategies of Analysis in Current Research’, in Peter Evans, Dietrich Rueschemeyer, et al (eds), *Bringing the State Back In* (Cambridge: Cambridge University Press, 1985), pp. 3-43; Peter Evans, Dietrich Rueschemeyer, et al, ‘On the Road Toward a More Adequate Understanding of the State’, in Peter Evans, Dietrich Rueschemeyer, et al (eds), *Bringing the State Back In* (Cambridge: Cambridge University Press, 1985), p. 356.

contends that state officials have not acquired such autonomy in respect to international investment law.

In a fourth sense, the state is conceived as a structure vis-à-vis people within the state, but that structure becomes an agent at the international level.<sup>51</sup> Here the role of domestic political struggles in forming the ‘national interest’ of a state is explicitly recognized, but the state is seen to consolidate such struggles and to act as a unified agent internationally. Such an approach seems to be adopted by David Schneiderman, the one scholar of international investment law who provides an explicit definition of the state, and whose research is extensively drawn upon in this thesis. Schneiderman objects to the tendency of many critical scholars to “abandon states as the locus for securing change”, and he highlights how the state continues “to offer their citizens a site of collective agency with which to resist the hegemony of economic globalization”.<sup>52</sup> At the domestic level, Schneiderman appears to approach the state as a social structure that “reflect[s] the balance of class forces in society” and that forms a “terrain[...] of political struggle”.<sup>53</sup> At the international level, he nevertheless explicitly conceives of the state as an agent, and he places great emphasis on states as “critical agents” in the development of international investment law.<sup>54</sup> At times, he appears to do so in the first sense considered above; the state is a *legal* agent with the jurisdiction both to make and unmake international investment law.<sup>55</sup> At other times, he nevertheless appears to revert to state agency in a stronger sense. States are considered to be the “principal architects and authors” of the international investment regime, and often no authors or architects of the state’s own policy to promote such a regime are explicitly identified - indeed, the question of what political struggles the state reflects is sometimes explicitly outside the scope of his analysis.<sup>56</sup> As such, the *recognition* that the state is domestically a structure does not lead to a new research agenda on uncovering the social struggles that underpin international investment law.

---

<sup>51</sup> Colin Wight maintains that this is indicative of a particular approach to the levels-of-analysis problem, so that “what appears as a structure on one level becomes an agent on another”, Wight, *Agents, Structures and International Relations*, p. 107.

<sup>52</sup> David Schneiderman, *Resisting Economic Globalization: Critical Theory and International Investment Law* (Basingstoke: Palgrave Macmillan, 2013), p. 3; David Schneiderman, ‘Investment Rules and the New Constitutionalism’, *Law and Social Inquiry*, 25 (2000), p. 762.

<sup>53</sup> Schneiderman, ‘Investment Rules and the New Constitutionalism’, p. 761, 762.

<sup>54</sup> Schneiderman, *Resisting Economic Globalization*, p. 12.

<sup>55</sup> *Ibid.* p. 159.

<sup>56</sup> David Schneiderman, ‘Legitimacy and Reflexivity in International Investment Arbitration: A New Self-Restraint?’ *Oñati Socio-Legal Series*, 1:4 (2011), p. 8; Schneiderman, ‘Investment Rules and the New Constitutionalism’, p. 761, (“[i]t is not the object of the paper to explain the reasons for state complicity [...]”).

The difficulty with Schneiderman's approach is not only that social groups as collective agents are once more often sidelined, but that state agency in a stronger sense can also easily sneak back in. This appears to be the case when he turns to consider in what "locales might resistance be generated", or specifically, what *state* might "take the lead" in resistance to international investment law.<sup>57</sup> He considers the possibility for resistance in the U.S. and the EU, but dismisses that possibility on the basis that *American negotiators and decision-makers* and *the European Council* have hitherto not shown much signs of such resistance.<sup>58</sup> These, in turn, appear to be unproblematically deemed to represent the potential for resistance from the "national publics" of those states.<sup>59</sup> Interestingly, his own case studies refer both to the extent of corporate lobbying *and* to emerging social movement opposition,<sup>60</sup> but his recourse to state agency (used interchangeably throughout the chapter with state officials and "national publics") does not seem to allow for the possibility that the balance of power in social struggles within these states may change. As such, the recourse to state agency serves as blinkers towards understanding the *battle* for the state that his own definition of the state would seem to require. Some of Schneiderman's work is more attuned to such struggles, but the ease with which these lessons are forgotten suggests that the best way of remembering that the state is a social structure resting on political contestation is to consistently treat it as such, and not to revert to an emphasis on states as "critical agents" within international investment law.

In summary, the decision to treat the state as an agent – in whatever sense of the word – tends, to cite Colin Wight, to "place a sharp dividing line between domestic and international politics, with the domestic 'we' seemingly cohering into the singular 'I' at the boundaries of the international realm".<sup>61</sup> This, in turn, tends to "underplay[...] the amount of conflict and fragmentation that occurs in domestic politics".<sup>62</sup> In order to bring political struggles between social groups to the forefront of the analysis, this thesis will conceptualize the state as a social structure rather than an agent.

---

<sup>57</sup> Schneiderman, *Resisting Economic Globalization*, p. 161, 79, 89.

<sup>58</sup> *Ibid*, p. 71-90, 161.

<sup>59</sup> *Ibid*, p. 72.

<sup>60</sup> *Ibid*, p. 78-80, 84-85.

<sup>61</sup> Wight, *Agents, Structures and International Relations*, p. 191.

<sup>62</sup> *Ibid*, p. 191.

## *The State as a Structure*

The emphasis on state agency is sometimes designed to emphasize the state's continued importance in contemporary global politics. The state can nevertheless also be considered hugely important as a social structure "within which and through which social forces operate".<sup>63</sup> Within such a conceptualization, the state no longer engages in conscious action and it no longer holds intentions, thoughts, beliefs, desires or interests of its own.<sup>64</sup> It is nevertheless of great importance in so far as it constrains or enables the actions of human beings, including in the context of making or unmaking international investment law.

As a social structure, the state is the "material condensation",<sup>65</sup> the "crystallization",<sup>66</sup> or the "congealment"<sup>67</sup> of past social struggles in a set of political institutions. In so far as the state 'congeals' the outcomes of previous social struggles it has, to cite Bob Jessop, a "structurally inscribed strategic selectivity".<sup>68</sup> This strategic selectivity ensures that the state is not neutral in the context of current social struggles but that it privileges some actors and some strategies over others. To deny agency to the state itself is nevertheless not to deny agency to the state officials who take up positions within the "slots" of the state structure.<sup>69</sup> State officials are constrained in their agency by the state structure, but they also possess an element of agency within it – more in the case of some (the executive) than of others (lower level administrative officials). State officials exercise that agency in the context of a variety of structural pressures. To remain in their position, state officials may need to harness the private economic power of capitalists (upon which both the state's revenues and their personal electoral fortunes might depend) and the democratic power of citizens. State officials may also need to contend with the state's position within the international system, but this does not mean that sustaining and augmenting the power of their state is the overriding structural imperative that it sometimes appears to be

---

<sup>63</sup> Andreas Bieler & Adam David Morton, *Social Forces in the Making of the New Europe: The Restructuring of European Social Relations in the Global Political Economy* (Basingstoke: Palgrave, 2001), p. 18.

<sup>64</sup> For a critique of Panitch & Gindin's influential work in precisely these terms, see William Robinson, 'The Fetishism of Empire: A Critical Review of Panitch and Gindin's the Making of Global Capitalism', *Studies in Political Economy*, 93 (2014), pp. 147-165.

<sup>65</sup> Nicos Poulantzas, cited in Jonathan Joseph, *Marxism and Social Theory* (Basingstoke: Palgrave Macmillan, 2006), p. 79; see also Andreas Bieler & Adam David Morton, 'The Will-O'-The-Wisp of the Transnational State', *Journal of Australian Political Economy*, 72 (2013-2014), pp. 23-51.

<sup>66</sup> Bob Jessop, cited in Hay, 'Marxism and the State', p. 170.

<sup>67</sup> Robinson, 'Social Theory and Globalization', p. 165.

<sup>68</sup> Bob Jessop, *The Future of the Capitalist State* (Cambridge: Polity Press, 2002), p. 40.

<sup>69</sup> Roy Bhaskar's term, cited in Archer, *Realist Social Theory*, p. 152.

in Harvey's or Callinicos' work;<sup>70</sup> the relative international standing of the state may well seem of less immediate concern than the economic and electoral pressures that influence particular state officials' successes in the next election. State officials are also societal beings in their own right. Their position within society influences their personal aims and motivations, their social group belonging and family ties, and their consciousness and view of the world. State officials are therefore not separate from society – they are both societal beings in their own right and subject to societal pressures, and they exercise their agency in relation to, and as part of, wider social struggles.

This cautions against viewing state officials and social groups as distinct actors external to each other. State officials may indeed, as Theda Skocpol maintains, “pursue goals that are not simply reflective of the demands or interests of social groups, classes, or society”.<sup>71</sup> The risk is nevertheless that such an analysis can place too hard a boundary between the state and society, and may fail to notice how the state structure itself is the outcome of previous social struggles, and how state officials are themselves agents within such struggles.<sup>72</sup> The idea that the state and society are externally related to each other is evident in much of the international investment law literature. Kate Miles highlights “the *alignment* of home state interests with those of the investor”, but does not investigate how that alignment comes about.<sup>73</sup> Gus Van Harten, while astute in drawing attention to the role of corporations in the emergence of international investment law, concludes, “multinational firms and their lobbyists have been the major players, *other than states*, in the promotion and negotiation of investment treaties”.<sup>74</sup> If the state is viewed as a structure that ‘congeals’ previous social struggles and if state officials are considered societal beings in their own right, it becomes more difficult to conceive of the state and society as distinct and separate actors.

---

<sup>70</sup> Harvey, ‘From Globalization to the New Imperialism’, p. 91; Callinicos, *Imperialism and Global Political Economy*, p. 98.

<sup>71</sup> Theda Skocpol, ‘Bringing the State Back In’, p. 9.

<sup>72</sup> Jessop, ‘Bringing the State Back In (Yet Again)’, p. 155.

<sup>73</sup> Miles, *The Origins of International Investment Law*, p. 3

<sup>74</sup> Gus Van Harten, ‘Investment Treaty Arbitration and Public Law – A Return to the Gay Nineties?’ *Transnational Dispute Management*, 4:5 (September 2007), p. 38; see also, Gus Van Harten, ‘Private Authority and Transnational Governance: The Contours of the International System of Investor Protection’, *Review of International Political Economy*, 12:4 (October 2005), p. 612.

## *Social Groups as Collective Agents*

To establish that the state is ultimately not an agent in the emergence and evolution of international investment law does not, on its own, establish who is. For all the references to ‘great men’ in history, this thesis would suggest that human beings are often most influential when they act collectively. It is therefore important to highlight the role of social groups and social movements – against slavery, against colonialism, against patriarchy – that have transformed our world in important ways. It is nevertheless just as important to highlight, as does Laurence Cox and Alf Gunvald Nilsen, that “collective agency is not something that is resorted to by subaltern groups alone; in normal times, it is the powerful, the wealthy and the culturally privileged who are most capable of producing collective agency in a sustained and effective manner”.<sup>75</sup> When the history of the world is told as a story of collective agency from both ‘above’ and ‘below’ the transformative – and reproductive – potential of agency is revealed, and it is no longer perceived to be “simply a blip on the otherwise pacific surface of society”.<sup>76</sup>

Individual human beings can be said to form a social group to the extent that they are joined by a certain sense of unity or common purpose, even if differences within such groups will always remain. This thesis draws to a large extent on a Marxist and neo-Gramscian literature within International Relations, and this literature often refers to ‘social forces’ interchangeably with ‘social groups’. Social forces “engendered by the production process” are conceived to be the most important collective actors.<sup>77</sup> This thesis will nevertheless normally refer specifically to social groups, since the meaning of the term social forces is often unclear and scholars use it differently.<sup>78</sup> Social groups, in turn, often pursue their aims through organizations of different kinds. At various points, this thesis will refer to corporate lobbying groups, transnational corporations and NGOs ‘acting’ to advance ‘their’ interests. This should be understood distinctly as a form of short-hand for particular social groups, but since it treats organizations (which are social structures) as agents it raises the obvious question of why this does not replicate the problems that have just been identified in respect to state agency. Similar problems

---

<sup>75</sup> Cox & Nilsen, *We Make Our Own History*, p. 60.

<sup>76</sup> *Ibid*, p. 60.

<sup>77</sup> Bieler & Morton, *Social Forces in the Making of the New Europe*, p. 17; William Robinson, ‘Beyond the Theory of Imperialism: Global Capitalism and the Transnational State’, *Societies Without Borders*, 2 (2007), p. 13.

<sup>78</sup> E.g. Claire Cutler, ‘Toward a Radical Political Economy Critique of Transnational Economic Law’, in Susan Marks (ed), *International Law on the Left: Re-Examining Marxist Legacies* (Cambridge: Cambridge University Press, 2008), p. 202, 215-216 (law is considered a ‘social force’); Wight, *Agents, Structures and International Relations*, p. 129 (social forces as essentially social structures).

may indeed occur also in this context, but the difference is that it is clearer *who* the short-hand is for. The members of an NGO have joined the organization voluntarily with the express purpose to pursue particular aims, while the shareholders and managers who control a corporation similarly tend to have an important element of unity in their aims. In contrast, this is rarely the case with the state. It is not inconceivable that the state *could* act as a collective agent on behalf of a relatively unified ‘nation’, but this is an empirical claim that is highly disputable and that would need to be carefully made. It is nevertheless important to bear in mind that this is only a form of short-hand – for instance, corporations are “only vehicles for capitalists” and the disappearance or ill-fortune of particular organizations does not necessarily say much about the social group itself; if a corporation goes bankrupt, the capitalists will simply restructure their wealth elsewhere.<sup>79</sup>

In summary, this section has rejected the notion of state agency that serves as a foundation for much research in both international relations and international investment law. In contrast, the aim is to conceptualize the state as a social structure, which in turn, to cite William Robinson, allows for research to identify “the constellation of social forces in conflict and cooperation, their changing historical development, interests, and relations, as explanatory of state policies [and] ideologies”.<sup>80</sup>

### **Capitalism, States and Classes in Global Politics**

The above two sections have set out the conceptual and theoretical premises that informs this thesis, and the final section will turn to investigate the relevant historical context and the primary structures and agents within it. The section will first briefly explore the ‘macro structure’ of capitalism itself, and particularly of the role of the state specifically in capitalism.<sup>81</sup> The section will then turn to the ‘meso structure’ of global capitalism and globalization, and will highlight the emergence of a transnational capitalist class both objectively, as a “class in itself”, and subjectively, as a “class for itself” in global politics.<sup>82</sup>

---

<sup>79</sup> Gerard Greenfield, cited in Ellen Meiksins Wood, ‘Globalisation and the State: Where is the Power of Capital?’ in Alfredo Saad-Filho (ed), *Anti-Capitalism: A Marxist Introduction* (London: Pluto Press, 2003), p. 131-132.

<sup>80</sup> William Robinson, ‘Response to McMichael, Block, and Goldfrank’, *Theory and Society*, 30 (2001), p. 227.

<sup>81</sup> The terms macro and meso structure are drawn from Bieler & Morton, ‘The Gordian Knot of Agency-Structure’, p. 26.

<sup>82</sup> William Robinson & Jerry Harris, ‘Towards a Global Ruling Class? Globalization and the Transnational Capitalist Class’, *Science & Society*, 64:1 (Spring 2000), pp. 11-54.

## *Capitalism and the Question of the State*

This thesis is informed by a Marxist understanding of capitalism as a particular mode of production and surplus appropriation, and this places the social relations of production – the class structure – at the heart of the analysis. Ellen Meiksins Wood suggests that every society in which “one class appropriates the surplus labour of another” contains two ‘moments’ of exploitation: “the appropriation of surplus labour and the coercive power that enforces it”.<sup>83</sup> In feudal societies, these two moments were fused; the class that appropriates surplus labour is also the class that holds political and military power.<sup>84</sup> In contrast, in capitalism people are formally free and legal equals, but a market mechanism ensures that those who do not own the means of production will need to sell their labour power in exchange for a wage in order to survive, while those who do own the means of production appropriate this surplus labour as profit.<sup>85</sup> In capitalism, there is therefore a differentiation between the economic sphere of appropriation and the political sphere that enforces a particular social order based on private property.<sup>86</sup> The social structure of capitalism is not inevitable; it is itself the outcome of historic collective agency and social struggle, but it forms the social context within which agency is exercised today.

The fact that the economically dominant class does not directly control the political sphere of the state does not mean that the state is a neutral arbiter amongst social groups, as some liberals or pluralists may suggest.<sup>87</sup> But if the economy is formally separated from the political sphere, how does the capitalist class ensure that the state continues to support its interests and a social order that works to its advantage? Following the infamous debate between Ralph Miliband and Nicos Poulantzas in the 1960s and 1970s, there has been a tendency to distinguish between ‘instrumentalist’ and ‘structuralist’ reasons for why state officials tend to act in the interest of

---

<sup>83</sup> Wood, ‘Globalisation and the State’, p. 132-133

<sup>84</sup> Ellen Meiksins Wood, *Empire of Capital* (London: Verso, 2003), p. 9-11.

<sup>85</sup> Wood, *Empire of Capital*, p. 9-11; Justin Rosenberg, *The Follies of Globalization Theory* (London: Verso, 2000), p. 35.

<sup>86</sup> Leo Panitch & Sam Gindin, *The Making of Global Capitalism: The Political Economy of American Empire* (London: Verso, 2012), p. 3; Ellen Meiksins Wood, ‘Global Capital, National States’, in Mark Rupert & Hazel Smith (eds), *Historical Materialism and Globalization* (London: Routledge, 2002), p. 29; Stephen Gill, ‘Constitutionalizing Inequality and the Clash of Globalizations’, *International Studies Review*, 4:2 (2002), p. 59-61.

<sup>87</sup> Martin Smith, ‘Pluralism’, in Colin Hay, Michael Lister et al (eds) *The State: Theories and Issues* (Basingstoke: Palgrave Macmillan, 2006), pp. 21-38; Ralph Miliband, *The State in Capitalist Society* (London: Weidenfeld and Nicolson, 1969), p. 131-139.



a capitalist class.<sup>88</sup> These need not be contradictory, and their relative importance can be considered an empirical question.<sup>89</sup> The idea that state officials are subject to structural pressures is relatively uncontroversial. As long as the economy remains under ‘private’ as opposed to state control, capitalists are the ones to decide if and where to invest and in what form; decisions that inevitably affect both the state’s resources and the ability of state officials to achieve their aims, as well as the work prospects of those of their citizens who do not own the means of production.<sup>90</sup> As Wood observes, this means “most aspects of everyday life, those that come within the scope of the economy, fall outside the range of democratic accountability”.<sup>91</sup> Capitalists can therefore exercise their *economic* agency in such a way as to ensure *political* influence, and state officials will need to cooperate and to ‘attract’ investors with the promise of business-friendly policies.

The claim that a capitalist class is exercising *political* agency is rather more controversial, yet structural pressures alone do not necessarily lead to the outcome desired by a capitalist class.<sup>92</sup> Structural pressures constrain state officials in their actions, and they encourage them to act in particular ways, but there are a multitude of different ways in which state officials can respond to such structural pressures – including by resisting them or by responding in ways not conducive to capitalists. Nor is it always sufficient that state officials *respond* to structural pressures, but they may also be expected to proactively support capitalist interests by *advancing* (global) capitalism. While structural pressures are likely to make state officials wary of introducing regulations that will discourage capitalists from investing, such structural pressures may be less likely to prompt state officials to actively take the initiative to develop and to introduce business-friendly policies.<sup>93</sup> As such, it is not surprising that the direct political influence of corporations and corporate lobbying groups is evident in almost every sphere of public policy in many capitalist countries. Trade unions, environmental groups and consumer groups also send lobbyists to meet with state officials, but the latter tend to meet far more

---

<sup>88</sup> See Clyde W. Barrow, ‘The Miliband-Poulantzas Debate: An Intellectual History’, in Stanley Aronowitz and Peter Bratsis (eds), *Paradigm Lost: State Theory Reconsidered* (Minneapolis: University of Minnesota Press, 2002), pp. 3-52; Miliband, *The State in Capitalist Society*, pp. 67-78; Ralph Miliband, ‘The Capitalist State: Reply to Nicos Poulantzas’, *New Left Review*, I/59 (January-February 1970), pp. 53-60.

<sup>89</sup> They are only contradictory if one adopts the strong structuralism evident in Poulantzas reply, see Clyde Barrow, *Critical Theories of the State: Marxist, Neo-Marxist, Post-Marxist* (Madison: University of Wisconsin Press, 1993), p. 46.

<sup>90</sup> Fred Block, ‘Beyond Relative Autonomy: State Managers as Historical Subjects’, *The Socialist Register*, 17 (1980), p. 231; Barrow, *Critical Theories of the State*, pp. 58-59.

<sup>91</sup> Wood, *Empire of Capital*, p. 11.

<sup>92</sup> Barrow, *Critical Theories of the State*, p. 62-63.

<sup>93</sup> *Ibid*, p. 62-63.

frequently with corporate representatives.<sup>94</sup> Such lobbying often works; for instance, in the U.S. the corporations that lobby the most have been found to pay a significantly lower tax rate than those that lobby less.<sup>95</sup> At times, state officials have been found to copy legislative amendments verbatim from draft proposals provided to them by corporate lobbies, and the initiative for new pro-business policies can often be traced to business actors.<sup>96</sup> Corporate lobbying is often lent extra weight by campaign contributions, as well as through business influence on the media (via ownership or advertising revenue), both of which tend to influence the electoral fortunes of state officials.<sup>97</sup> Despite the formal differentiation of the economic and the political spheres, it is furthermore clear that the capitalist class does not only influence state officials, but permeates the state more directly. State officials often have a business background, and many will seek lucrative private sector jobs upon leaving political office.<sup>98</sup> Some hold onto their directorships of corporations throughout their political service.<sup>99</sup> As a general rule, elected high level state officials tend to be more privileged than the citizens they ostensibly serve – in the 2010 UK cabinet, 23 of the 29 ministers were estimated to be millionaires,<sup>100</sup> and such a socio-economic background is likely to influence their personal interests, the interests of their family and personal connections, as well as more subtly their values and beliefs.<sup>101</sup> There also seems to be an increasing tendency to employ business representatives either as outside consultants, or for business executives to be seconded into government.<sup>102</sup> Despite the differentiation of the

---

<sup>94</sup> For instance, research on lobbying in respect to the U.S. Dodd-Frank reforms found that federal regulators met banks 14 times more often than they met consumer groups, and in respect to TTIP negotiations 93% of the European Commission's meetings with 'stakeholders' were with large corporations and their lobby groups. The Economist, 'Grey Eminences' (22 February 2014), p. 14; Corporate Europe Observatory, 'European Commission Preparing for EU-US Trade Talks: 119 Meetings with Industry Lobbyists' (4 September 2013), available at {<http://corporateeurope.org/trade/2013/09/european-commission-preparing-eu-us-trade-talks-119-meetings-industry-lobbyists>} accessed 10 March 2015.

<sup>95</sup> The Economist, 'Grey Eminences', p. 14.

<sup>96</sup> For verbatim copying, see for example Derek Scally, 'Is Data Privacy in the EU Facing a Red Alert Situation: Industry Proposals have Found Their Way Verbatim into MEPs' Tabled Amendments', *Irish Times* (11 March 2015), available at {<http://www.irishtimes.com/business/technology/is-data-privacy-in-the-eu-facing-a-red-alert-situation-1.2134306>} accessed 17 March 2013.

<sup>97</sup> It is clear that corporations are prepared to withhold advertising revenue in order to secure favourable coverage, as HSBC recently did to the Guardian, and that this may influence reporting, as at the Telegraph, see John Plunkett & Ben Quinn, 'Telegraph's Peter Osborne Resigns, Saying HSBC Coverage a 'Fraud on Readers'', *The Guardian* (18 February 2015), p. 1; see also Block, 'Beyond Relative Autonomy', p. 231.

<sup>98</sup> For instance, a third of Tory MPs in the UK had been company directors or executives, compared to 0.2% of the general population. Jenny Russell, 'Politics Needs Mavericks, Not the Same Old Chumocracy', *The Guardian* (20 May 2013), p. 30; Miliband, *The State in Capitalist Society*, p. 53.

<sup>99</sup> James Ball & Leo Hickman, 'MPs Declare £7m Income from Other Jobs', *The Guardian* (27 May 2013), p. 4.

<sup>100</sup> Glen Owen, 'The Coalition of Millionaires: 23 of the 29 Member of the New Cabinet Are Worth More than £1m... and the Lib Dems are Just as Wealthy as the Tories', *The Daily Mail* (23 May 2010), available at {<http://www.dailymail.co.uk/news/election/article-1280554/The-coalition-millionaires-23-29-member-new-cabinet-worth-1m--Lib-Dems-just-wealthy-Tories.html>} accessed 10 March 2015.

<sup>101</sup> Miliband, *The State in Capitalist Society*, p. 54.

<sup>102</sup> For examples, see: Miles, 'International Investment Law', p. 38 (business representatives are increasingly given formal diplomatic status as part of commercial diplomacy efforts); Polly Toynbee, 'The Big Four are

economic and political spheres, Ralph Miliband therefore observes that “[u]nequal economic power, on the scale and of the kind encountered in advanced capitalist societies, inherently produces political inequality, on a more or less commensurate scale, whatever the constitution may say”.<sup>103</sup>

### ***Globalization and the Question of Agency***

If the macro structure that is necessary to understand the context for this thesis is capitalism, then the meso structure is globalization and global capitalism. The academic study on globalization can be said to have progressed through three phases – a structural phase, an agential phase, and one that tried to combine the two.<sup>104</sup> Globalization was from the outset conceived as a structural phenomenon in which “peoples everywhere are increasingly subject to the disciplines of the global marketplace”, and the capacities of states to determine their own course of action was deemed to have declined.<sup>105</sup> Other scholars noticed that there was very little agency in such accounts, and turned around to suggest that states were the “authors” of globalization and the state consequently came to be viewed “more like a *source* of continuing globalization than as its main *victim*”.<sup>106</sup> Dissatisfied with the excessive focus on either the structural pressures of globalization or the agential powers of states, scholars subsequently tried to reconcile the two and to find a ‘middle ground’.<sup>107</sup> As such, Philip Cerny suggests that “state actors have acted and reacted in feedback loop fashion” in creating and responding to globalization.<sup>108</sup>

---

Laughing All The Way to the Tax Office’ *The Guardian* (1 February 2013) (KPMG acted as a tax adviser to the government and subsequently promoted the tax loopholes it had advised on to its corporate clients); Ben Quinn, ‘Executives from Weapons Makers Seconded to MoD’, *The Guardian* (16 February 2015), p. 7.

<sup>103</sup> Miliband, *The State in Capitalist Society*, p. 237.

<sup>104</sup> The following three sets of scholars conceptualize the course of this debate kind of like this, each offering their own unique ‘middle way’: David Held & Anthony McGrew, et al, *Global Transformations: Politics, Economics, Culture* (Cambridge: Polity Press, 1999); Ian Clark, *Globalization and International Relations Theory* (Oxford: Oxford University Press, 2000); Ian Clark, ‘Beyond the Great Divide: Globalization and the Theory of International Relations’, *Review of International Studies*, 24 (1998), pp. 479-488; Jens Bartelson, ‘Three Concepts of Globalization’, *International Sociology*, 15 (2000), pp. 180-196.

<sup>105</sup> Held terms these ‘hyperglobalizers’; Clark ‘proponents of state redundancy’. Held & McGrew, et al. *Global Transformations*, p. 2; Clark, ‘Beyond the Great Divide’, p. 479.

<sup>106</sup> Leo Panitch, cited in Clark, *Globalization and International Relations*, p. 93; Bartelson, ‘Three Concepts of Globalization’, p. 186.

<sup>107</sup> Held & McGrew, et al, *Global Transformations*; Clark, ‘Beyond the Great Divide’, pp. 479-488; Bartelson, ‘Three Concepts of Globalization’, pp. 180-196.

<sup>108</sup> Philip Cerny, ‘Paradoxes of the Competition State: The Dynamics of Political Globalization’, *Governance and Opposition*, 32:2 (1997), p. 258.

The problem with the course of this debate was that globalization was presented as a structural phenomenon void of agency, and when scholars subsequently tried to bring agency back in, they turned to the only actor that the discipline of International Relations has traditionally afforded agency: the state. To cite Jens Bartelson's characterization of the agential position, "there is nothing irreversible or necessary about globalization, since globalization ultimately is the outcome of *agency*, however unintended. As Panitch [...] has argued, 'capitalist globalization is a process which also takes place in, through, and under the aegis of *states*; it is encoded by them and in important respects authored by them'".<sup>109</sup> The literature, like the above paragraph, often moves seamlessly from the argument that any given structure is ultimately the outcome of agency, to the argument that *states* need to be brought back into the analysis. The globalization-as-structure vs. state-as-agent representation of the debate therefore conceived of the puzzle in the traditional state-centric terms familiar to scholars of International Relations. Within these accounts, the role of a capitalist class was acknowledged, but only in terms of the "impersonal forces of the market" and the "global flows" that are viewed as defining features of globalization.<sup>110</sup> In contrast, and in line with the theoretical rejection of state agency made above, this section defends the claim that the primary agent behind globalization was a capitalist class in the process of transnationalizing.

The capitalist class exercised both economic and political agency in such a way as to be justifiably able to claim authorship of globalization. In economic terms, the very term globalization emerged as a concept within the corporate world in the 1960s, and it has been consciously pursued by the leading edge of a capitalist class.<sup>111</sup> The corporations that led the way did not do so under circumstances of their own choosing; they have a structural incentive to pursue capital accumulation, and such capital accumulation was increasingly restricted at the national level. The struggles that led to the emergence of a 'class compromise' in the form of the 'welfare state' in the West and 'developmental states' in the Third World, along with the increasing success of trade unions in negotiating better working conditions, had initially secured high growth rates but soon placed limits on such capital accumulation.<sup>112</sup> The decision to 'go global', to cite Robinson, "allowed capital to shake off the constraints that nation-state

---

<sup>109</sup> (My emphasis) Bartelson, 'Three Concepts of Globalization', p. 186.

<sup>110</sup> Susan Strange, cited in Held & McGrew, et al, *Global Transformations*, p. 3; David Held & Anthony McGrew, 'The End of the Old Order? Globalization and the Prospects for World Order', *Review of International Studies*, 24:5 (1998), p. 220.

<sup>111</sup> Appelbaum & Robinson, *Critical Globalization Studies*, p. xi.

<sup>112</sup> Cox & Nilsen, *We Make Our Own History*, pp. 128-136.

capitalism had placed on accumulation and to break free of the class compromises and concessions that had been imposed by working and popular classes and by national governments in the preceding epoch”.<sup>113</sup> Capitalists therefore acted under structural pressures of their own, but the way they responded to such structural pressures was not inevitable. As neo-Gramscian scholars such as Mark Rupert often remind us, globalization is not “somehow automatic or self-actualising”.<sup>114</sup>

Globalization did not occur in the economic sphere alone; in order to globalize, a capitalist class needed to change politics too. Globalization required the development of new international economic rules to support trade, investment and capital flows. It was also coupled with a push back against the welfare and developmental state structures and policies through the promotion of what has come to be known as neoliberalism. It was precisely in the 1970s that corporations first began to form and join associations on a larger scale, such as the Business Roundtable and the American Chamber of Commerce in the U.S.<sup>115</sup> This was sometimes quite explicitly done to counter the political gains that were being made by opposing societal groups. Phillips Petroleum posted an advertisement in Fortune Magazine in 1976 with the headline “It’s time American Industry took a stand for Free Enterprise” with the message to other corporations that “[i]t’s gone past the point where an isolated business is under attack. The system itself is in danger. And if we don’t stand up for it, who will?”<sup>116</sup> The “political project” of neoliberalism involved not only direct political pressure by the new associations that were formed in the period, but also a battle for ideas.<sup>117</sup> Susan George refers to the advocates of neoliberalism as “right-wing Gramscians”, precisely because they “truly believed in the power of ideas”.<sup>118</sup> These ideas were not just articulated by Milton Friedman and others, but were explicitly promoted through “public and private meetings, conferences, academic and more popular publications, lobbying of various types, feeding the media, assiduous contacts with the politically powerful (or soon to be powerful) and, with the exception of mass demonstrations,

---

<sup>113</sup> William Robinson, *Latin America and Global Capitalism: A Critical Globalization Perspective* (Baltimore: Johns Hopkins University Press, 2010), p. 15.

<sup>114</sup> Mark Rupert, ‘Reflections on Some Lessons Learned from a Decade of Globalisation Studies’, *New Political Economy*, 10:4 (2005), p. 459.

<sup>115</sup> Panitch & Gindin, *The Making of Global Capitalism*, p. 164.

<sup>116</sup> Ibid. p. 163.

<sup>117</sup> Stephen Gill, amongst others, conceive of it specifically as a political project. Gill, ‘Constitutionalizing Inequality and the Clash of Globalizations’, p. 48.

<sup>118</sup> Susan George, ‘If You Want To Be Relevant: Advice to the Academic from the Scholar-Activist’, in Richard Appelbaum & William Robinson (eds), *Critical Globalization Studies* (New York: Routledge, 2000), p. 6.

all the trappings that are the daily fare of social movement research”.<sup>119</sup> With more than adequate financial backing, Leslie Sklair observes that this is not a story of the power of ideas alone, but of how the adherents of such ideas “work[ed] away until the material forces beg[a]n to change in their direction”.<sup>120</sup> It is sometimes suggested that “globalization is what states have made of it”,<sup>121</sup> but this section has on the contrary suggested that globalization is rather what a capitalist class – exercising both economic and political forms of agency – have made of it.

### ***A Transnational Capitalist Class-In-Itself***

This thesis draws upon William Robinson’s argument that globalization constitutes a “new stage in the history of world capitalism”, which is distinguished by the transnationalization of production and, along with it, the transnationalization of the leading elements of the capitalist class.<sup>122</sup> The concept of a transnational capitalist class is contested within much of the Marxist and non-Marxist literature. Leo Panitch and Sam Gindin, in a prominent recent Marxist contribution to International Relations, reject the notion of a transnational capitalist class in a single sentence and thereafter distinguish between different “national capitals”, and, without specifying in any detail what makes capital a national of a particular country, proceed to suggest that different countries have ‘their own’ multinational corporations.<sup>123</sup> Different theoretical approaches reject the notion of a ‘transnational capitalist class’ from different starting points, and it is beyond the scope of this section to address each of them. It will nevertheless indirectly contribute to those debates by providing a positive, if inevitably tentative, account for why it makes sense to speak of a transnational capitalist class, and more importantly in demonstrating how such an understanding aids in the explanation of international investment law in subsequent chapters.

Drawing upon Marxist theory, this thesis defines ‘class’ as first and foremost an objective category that relates to how people are situated within a particular mode of production.<sup>124</sup> The

---

<sup>119</sup> In reference to Richard Cockett’s study. Leslie Sklair, ‘Social Movements for Global Capitalism: The Transnational Capitalist Class in Action’, *Review of International Political Economy*, 4:3 (1997), p. 516.

<sup>120</sup> Leslie Sklair, ‘Social Movements for Global Capitalism’, p. 516.

<sup>121</sup> Clark, *Globalization and International Relations Theory*, p. 169.

<sup>122</sup> William Robinson, ‘Gramsci and Globalisation: From Nation-State to Transnational Hegemony’, *Critical Review of International Social and Political Philosophy*, 8:4 (2005), p. 563; William Robinson, *A Theory of Global Capitalism: Production, Class, and State in a Transnational World* (Baltimore: Johns Hopkins University Press, 2004).

<sup>123</sup> Panitch & Gindin, *The Making of Global Capitalism*, p. 11, see also Robinson, ‘The Fetishism of Empire’, pp. 147-165.

<sup>124</sup> Robinson & Harris, ‘Towards A Global Ruling Class?’, pp. 11-54.

capitalist class is in this context understood to be the owners and managers of the means of production,<sup>125</sup> who share certain common interests by virtue of their position within the system irrespective of whether they recognize such interests or not – as such, they form a class ‘in itself’.<sup>126</sup> But what makes a *transnational* capitalist class? The evidence for the emergence of a transnational capitalist class can rest on a combination of three possible grounds: in respect to how the production process is organized, in respect to how corporations are organized, and in respect to how ownership is organized. On the basis of these indicators, it will be argued that it is increasingly difficult to distinguish between separate ‘national’ capitalist classes that are each embedded within particular states, and that a transnational capitalist class seems to have emerged.

Many scholars question the ‘newness’ of globalization; to cite Immanuel Wallerstein, “what is described as something new [...] has in fact been a cyclical occurrence throughout the history of the modern world-system”.<sup>127</sup> In particular, some scholars highlight the ‘first globalization’ that is said to have occurred in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries and which may even score more highly on certain indicators of international interconnectedness than the world today.<sup>128</sup> Robinson nevertheless distinguishes previous periods of internationalization from the contemporary transnationalization of the production process itself.<sup>129</sup> The emergence of global commodity chains ensures that, to cite Jan Aart Scholte, “the research centre, design unit, procurement office, fabrication plant, finishing point, assembly line, quality control operations, data processing office, advertising bureau and after-sales service could each be situated in different provinces, countries and regions”.<sup>130</sup> While sixty percent of international trade is estimated to occur within transnational corporations, there is also the common use of subcontracting, outsourcing, production-sharing arrangements, joint ventures, etc, and by the end, to cite Susan Strange, it is “impossible even to guess the ‘nationality’ of the whole

---

<sup>125</sup> There is considerable debate on whether the capitalist class today consists of the owners *or* the managers of the means of production, but this discussion will not be addressed here.

<sup>126</sup> Joshua Murray, ‘Evidence of a Transnational Capitalist Class-for-Itself: The Determinants of PAC Activity Among Foreign Firms in the Global Fortune 500, 2000-2006’, *Global Networks*, 14:2 (2014), p. 2.

<sup>127</sup> Immanuel Wallerstein, *World-Systems Analysis: An Introduction* (Duke University Press, 2004), p. 93; see also Robert Keohane & Joseph Nye, ‘Globalization: What’s New? What’s Not? (And So What?)’, *Foreign Policy*, 118 (2000), pp. 104-119.

<sup>128</sup> Callinicos, *Imperialism and Global Political Economy*, p. 52; Paul Hirst, ‘The Global Economy: Myth and Realities’, *International Affairs*, 73:3 (1997), p. 411.

<sup>129</sup> Robinson, *A Theory of Global Capitalism*, p. 9-16.

<sup>130</sup> Cited in Andreas Bieler, *The Struggle for a Social Europe: Trade Unions and EMU in Times of Global Restructuring* (Manchester: Manchester University Press, 2006), p. 49; see also Robinson, *A Theory of Global Capitalism*, p. 16-22.

network”.<sup>131</sup> The transnationalization of production ensures that irrespective of where particular capitalists are situated, their class interests hinges on transnational processes of production. As such, even if the governing board were to consist only of nationals of one country, as Jerry Harris observes, “the mental space occupied daily by corporate leadership is focused on global concerns”.<sup>132</sup>

Many of those who are sceptical about the emergence of a transnational capitalist class do not dispute the transnationalization of production, but look at how corporations are organized and maintain, in the words of Ellen Meiksins Wood, that “the most elementary point is that so-called ‘transnational’ corporations generally have a base, together with dominant shareholders and boards, in single nation states and depend on them in many fundamental ways”.<sup>133</sup> There is evidence that points towards the transnationalization of boardrooms, but adherents of the concept of a transnational capitalist class rarely conceive of this as the primary criteria.<sup>134</sup> In terms of how corporations are organized more generally, Wood’s statement raises the question of what it means to have a ‘base’ in a particular country. Indeed, the critical power of transnational corporations today seems to rest precisely on their ability to choose their ‘base’ on economic grounds and to “fly different flags on different occasions”.<sup>135</sup> Fiat, the ‘Italian’ firm, has recently moved its legal domicile to the Netherlands, its tax residence to the UK, and its main stock market listing to New York.<sup>136</sup> Not being too precise about where the corporation’s ‘base’ is located is especially important in terms of taxation, and almost all transnational corporations make use of tax havens in one way or another.<sup>137</sup> As a result, the British Virgin Islands is home to around 30,000 inhabitants and over 500,000 corporations, and the *Economist* remarks with irony that much of the world’s patents are “owned by outfits in such unlikely innovative hubs as Barbados, the Cayman Islands and Bermuda”.<sup>138</sup> In the end, one can try to force transnational corporations into an analytical framework based on the nation-

---

<sup>131</sup> Cited in Claire Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge: Cambridge University Press, 2003), p. 202.

<sup>132</sup> Jerry Harris, ‘Translateral Politics, Class Conflict, and the State’, *Globalizations*, 10:5 (2013), p. 735.

<sup>133</sup> Wood, ‘Globalisation and the State’, p. 135; see also Panitch & Gindin, *The Making of Global Capitalism*, p. 345 (footnote 26).

<sup>134</sup> Robinson, ‘The Fetishism of Empire’, pp. 150-151.

<sup>135</sup> Leslie Sklair, *The Transnational Capitalist Class* (Oxford: Blackwell, 2001), p. 104.

<sup>136</sup> The Economist, ‘Here, There and Everywhere’ (22 February 2014), p. 57.

<sup>137</sup> The Economist, ‘Wake Up and Smell the Coffee’ (15 December 2012), p. 64. See also, Anthony Van Fossen, ‘The Transnational Capitalist Class and Tax Havens’, in Georgina Murray & John Scott (eds), *Financial Elites and Transnational Business: Who Rules the World?* (Cheltenham: Edward Elgar, 2012), pp. 76-99.

<sup>138</sup> The Economist, ‘Going Overboard’ (29 March 2014), p. 59; The Economist, ‘Wake Up and Smell the Coffee’, p. 64.



state, but this obscures the way that their power lie precisely in not being too dependent on *any particular* state. To cite the president and CEO of Lenovo, “[i]n today’s world, assessing companies by their nation of origin misses the point”.<sup>139</sup>

Beyond the question of the production process and how corporations organize their affairs, who ultimately owns the corporations? Several studies reveal the extent to which the shares of the world’s transnational corporations are owned by financial institutions, normally U.S. ‘based’ ones such as Blackrock and Capital Group, but this begs the question of who owns the shares in those financial companies – it is clear that capitalists from elsewhere in the world hold at least some shares, but the full extent is almost impossible to determine.<sup>140</sup> To start at another end of the puzzle, research on how ‘high net worth individuals’ (the world’s rich) invest their assets suggest that they are not nationalists in their investment strategies. While North America’s wealthy invest only 24% of their assets beyond their own region, this rises to 36% of individuals from the Asia-Pacific region, 41% from Europe and 53% from Latin America.<sup>141</sup> Crucially, these figures do not include investments in ‘home’ transnational corporations that themselves have extensive investments outside their regions.<sup>142</sup>

None of these indicators provide definitive evidence of the formation of a transnational capitalist class, but each suggests that the insistence that capital is still ‘national’ in nature rests on increasingly shaky foundations. The transnationalization of production and of how corporations are organized suggests that attempting to identify a ‘home state’ for transnational corporations misses the very novelty in how they operate. This claim coheres with the worldview of capitalists themselves; the CEO of IBM maintains that the very term ‘multinational corporation’ suggests “how antiquated our thinking about it is”,<sup>143</sup> while the CEO of Siemens questioned the very concept of “offshoring” on the basis that the “home shore” for Siemens is “now as much China and India as it is Germany or America”.<sup>144</sup> Moreover, the owners of capital “anywhere in the world need no more than internet access to invest their

---

<sup>139</sup> Cited in Robinson, ‘Beyond the Theory of Imperialism’, p. 61.

<sup>140</sup> David Peetz, Georgina Murray et al., ‘The New Structuring of Corporate Ownership’, *Globalizations*, 10:5 (2013), pp. 711-730; Andy Coghlan & Debora MacKenzie, ‘Revealed – The Capitalist Network that Runs the World’, *The New Scientist* (24 October 2011), available at {[http://www.newscientist.com/article/mg21228354.500-revealed--the-capitalist-network-that-runs-the-world.html#\\_VP\\_TL2dyaAh](http://www.newscientist.com/article/mg21228354.500-revealed--the-capitalist-network-that-runs-the-world.html#_VP_TL2dyaAh)} accessed 11 March 2013.

<sup>141</sup> Van Fossen, ‘The Transnational Capitalist Class and Tax Havens’, pp. 82-84.

<sup>142</sup> *Ibid.*, p. 82.

<sup>143</sup> Cited in Robinson, *Latin America and Global Capitalism*, p. 27.

<sup>144</sup> The Economist may be paraphrasing the CEO of Siemens. The Economist, ‘Here, There and Everywhere’ (19 January 2013), p. 4.

money through globalized financial circuits”.<sup>145</sup> To conclude, the idea that capitalism is still organized around distinct ‘national capitalist classes’ or ‘national corporations’ obscures how capitalists increasingly rely on making innovative use of different states for different purposes; in contrast, this is a phenomena that the concept of a ‘transnational capitalist class’ immediately draws attention to.

### *A Transnational Capitalist Class-For-Itself*

The previous section has argued that a transnational capitalist class has emerged objectively as a class in itself, but this does not, of course, automatically mean that it is a collective actor in political life. The next chapter will nevertheless not only suggest that a transnational capitalist class is exercising its *economic* agency in such a way as to pressure states to advance international investment law, but that it is exercising *political* agency to achieve that goal. The idea of a transnational capitalist class as a collective agent sometimes tends to conjure up images of shady individuals in secret locations plotting to take over the world, but the present argument is more modest: there is a concerted effort by the leading edge of a capitalist class to promote a world of open global markets and business-friendly governance. Given that the ‘common sense’ of our contemporary society (understood in the Gramscian sense to be opposed to ‘good sense’) is that capitalism benefits everyone and that economic growth ‘lifts all boats’, the transnational capitalist class can do so openly through identifiable institutions. The argument is therefore, to cite Robert Cox, that a transnational capitalist class has acquired “its own ideology, strategy and institutions of collective action”, and that it has “attained a clearly distinctive class consciousness”.<sup>146</sup> The capitalist class is not only class conscious, but also “conscious of its transnationality” and its common interests in pursuing specifically *global* capitalism.<sup>147</sup>

It is sometimes suggested that the fierce economic competition between different corporations prevents the capitalist class from realizing its collective class interests and therefore of exercising collective agency but, to cite Clyde Barrow, “methodological decrees do not answer historical evidence”.<sup>148</sup> The historical evidence shows clearly that capitalists *are* able to put some of their competitive struggles aside to form associations and to pursue collective political

---

<sup>145</sup> Robinson, ‘The Fetishism of Empire’, p. 152.

<sup>146</sup> Cox, ‘Social Forces, States and World Order’, p. 147; Cox, *Production, Power and World Order*, p. 359.

<sup>147</sup> Robinson, ‘Social Theory and Globalization’, p. 175.

<sup>148</sup> Barrow, *Critical Theories of the State*, p. 47.

aims when their shared interests are at stake. In respect specifically to a transnational capitalist class, such collective agency can be more narrowly focused on changing or introducing particular policies, or it can be more widely aimed at developing, asserting and promoting new and existing agendas in support of global capitalism.<sup>149</sup>

In the narrower sense, corporations increasingly channel their lobbying efforts through business associations such as the Business Roundtable in Washington D.C. or BusinessEurope in Brussels, as well as a wide variety of sectoral groups.<sup>150</sup> These groups are often hugely influential on public policy issues both small and large; for instance, one study details the considerable influence of the European Round Table of Industrialists in the development of the European Union.<sup>151</sup> These lobbying groups can only with difficulty be said to represent particular ‘national’ or even ‘regional’ fractions of capital. Aside from the question of whether the transnational corporations themselves are truly ‘nationally based’, the lobbying groups often represent corporations that are headquartered elsewhere in the world.<sup>152</sup> The Business Roundtable that lobbies the U.S. government includes ‘German’ Siemens and ‘Anglo-Dutch’ Shell.<sup>153</sup> State-centric perspectives tend to “only account for [transnational corporations] by regarding them as several, unconnected actors in their individual domestic sphere”, but the tendency of transnational corporations to act within several states and international institutions simultaneously suggests the importance of viewing them as “transnational actors transgressing the line of separation between international and domestic politics”.<sup>154</sup>

In a wider sense, the transnational capitalist class also acts collectively beyond lobbying on specific issues. Recent decades have seen the emergence of powerful policy groups that seek to articulate the interests of a transnational capitalist class, to develop common ideas and agendas, and more widely to “translate class interests into state action”.<sup>155</sup> The above business

---

<sup>149</sup> See William Carroll, *The Making of a Transnational Capitalist Class: Corporate Power in the 21<sup>st</sup> Century* (London: Zed Books, 2010), p. 179-183.

<sup>150</sup> Clifford Staples, ‘The Business Roundtable and the Transnational Capitalist Class’, in Georgina Murray & John Scott (eds), *Financial Elites and Transnational Business: Who Rules the World?* (Cheltenham: Edward Elgar, 2012), pp. 100-123.

<sup>151</sup> Baastian Van Apeldoorn, ‘Transnational Class Agency and European Governance: The Case of the European Round Table of Industrialists’, *New Political Economy*, 5:2 (2000), p. 157-181.

<sup>152</sup> Staples, ‘The Business Roundtable and the Transnational Capitalist Class’, p. 104.

<sup>153</sup> List of members available at Business Roundtable, ‘Members’, available at {<http://businessroundtable.org/about/members>} accessed 11 March 2015.

<sup>154</sup> Bieler & Morton, *Social Forces in the Making of the New Europe*, p. 16.

<sup>155</sup> Joseph Peschek, cited in Carroll, *The Making of a Transnational Capitalist Class*, p. 39; see also William Carroll & Colin Carson, ‘The Network of Global Corporations and Elite Policy Groups: A Structure for Transnational Capitalist Class Formaton’, *Global Networks*, 3:1 (2003), pp. 29-57.

associations also contribute to this,<sup>156</sup> but particularly important in this respect are global policy groups such as the World Economic Forum, the International Chamber of Commerce, the Trilateral Commission, the Bilderberg Group, and the World Business Council for Sustainable Development.<sup>157</sup> These groups were often set up by business actors who continue to have a privileged position within them, but William Carroll observes that in their aim to mobilize “around visions and policies that enunciate the common interests of transnational capital”, these groups nevertheless also seek to “persuade state managers, journalists and others to see those interests as universal in scope”.<sup>158</sup> For example, only the CEOs of the largest transnational corporations are ‘members’ of the World Economic Forum, but selected ‘media leaders’, high-level politicians, NGOs and academics are invited to participate.<sup>159</sup> These actors help to further the ‘common sense’ of global capitalism, to secure the leadership of the capitalist class, and to construct what neo-Gramscian scholars often refer to as ‘hegemony’.<sup>160</sup>

This section has emphasized the political agency of a transnational capitalist class; to cite Leslie Sklair, “class hegemony does not simply happen as if by magic. The capitalist class expends much time, energy and resources to make it happen and to ensure that it keeps on happening”.<sup>161</sup> This does not mean that a transnational capitalist class is a unified agent at all times, but more modestly that transnational capitalists hold certain common class interests in the development and furtherance of a global economy, and that they act collectively, and relatively openly, to advance such interests through identifiable institutions.

## **Conclusion**

The aim of this thesis is to uncover the political struggles that underpin international investment law. It has been argued that the literature on the subject tends to adopt state-centric blinkers that serve to render such struggles invisible, and this chapter has proposed an alternative analytical framework that will serve as the foundation for the empirical investigation of international investment law that follows in the remainder of the thesis. That alternative framework does not

---

<sup>156</sup> Van Apeldoorn, ‘Transnational Class Agency and European Governance’, p. 165.

<sup>157</sup> Carroll & Carson, ‘The Network of Global Corporations and Elite Policy Groups’, pp. 29-57; Carroll, *The Making of a Transnational Capitalist Class*.

<sup>158</sup> Carroll, *The Making of a Transnational Capitalist Class*, p. 232.

<sup>159</sup> World Economic Forum, ‘World Economic Forum’, Institutional Brochure (2014), available at {<http://www.weforum.org/world-economic-forum>} accessed 11 March 2015.

<sup>160</sup> Robert Cox, ‘Gramsci, Hegemony and International Relations: An Essay in Method’, *Millennium – Journal of International Studies*, 12:2 (1983), pp. 162-175.

<sup>161</sup> Sklair, ‘Social Movements for Global Capitalism’, p. 520.

involve a rejection of the state, but the recognition that the state is a social structure that is both ‘strategically selective’ as a result of previous social struggles, and an arena within which contemporary social struggles are played out.

It is often difficult to remember that the world in which we live, with its imposing and seemingly inevitable social structures (capitalism, global institutions, the state, the law) is ultimately the outcome of human agency. Indeed, Marxism itself was long preoccupied with structural theorizing, yet such structural investigations are most valuable precisely “if they guide an understanding of the choices made, and the specific institutions created, by specific historical actors”.<sup>162</sup> The final section of this chapter has detailed the social structures that form the wider context within which political struggles in respect to international investment law are fought out, and it has sought to highlight the role of human agency in the creation of these social structures. Warren Buffett, one of the world’s richest men, famously remarked that “[t]here’s class warfare, all right, but it’s my class, the rich class, that’s making war, and we’re winning”.<sup>163</sup> Yet as an Occupy Wall Street poster remarked, “[t]hey don’t call it class warfare until we fight back”.<sup>164</sup> In contrast to the tendency to think of capital as only a structural force, this thesis will highlight how a transnational capitalist class has acted collectively to shape the world in which we live in important ways, and how it is currently busy shaping our future. Its success, however, will depend on what alternative collective agency it encounters along the way.

---

<sup>162</sup> Panitch & Gindin, *The Making of Global Capitalism*, p. 3.

<sup>163</sup> Cited in Carroll, *The Making of a Transnational Capitalist Class*, p. 1.

<sup>164</sup> Cited in *The Economist*, ‘Letters: From William Byars, Greenville, South Carolina’, (24 March 2014).

## Chapter 2

# The ‘Big Picture’: The History, Structure and Global Politics of International Investment Law

An ‘arbitration scorecard’ published by the *American Lawyer* describes international investment arbitration as a “secret world” made up of the “biggest cases you never heard of”.<sup>1</sup> The aim of this chapter is to delve into that secret world, in order to understand how it emerged, by whom, and for what purpose. If the wider aim of this thesis is to understand the political struggles that international investment law is implicated in, this chapter will consider the ‘big picture’ of how international investment law first emerged and its position in wider global politics. It therefore seeks to understand the *broader* political struggles in respect to international investment law as a whole, while subsequent chapters will analyse the role of Investor-State Dispute Settlement in the context of *particular* political struggles with opposing social groups that arise in different parts of the world today. This chapter is structured into three sections.

The first section will explore the historical trajectory of international investment law, and in line with the theoretical argument made in the previous chapter it will investigate the role of social groups – not states – as important agents in the history that unfolded. The legal protection of foreign investments has a long history, and it initially emerged in a period in which nationally embedded corporations were seeking global expansion through the support of their own ‘home states’. The framework for investment protection that emerged in this period contributed to the emergence of a transnational capitalist class, and this, in turn, is the class actor that more recently pursued the expansion of the international investment regime. The second section explains the institutional structure of international investment law today, and it suggests that while international investment law arose to support ‘national capital’ in its foreign ventures and initially reflected the close reliance of corporations on their ‘home states’, this field of law has more recently changed in subtle ways to support the interests of a distinctly transnational capitalist class. The third section will situate international investment law in wider global

---

<sup>1</sup> This is in respect to both investment treaty arbitration and international commercial arbitration. Michael Goldhaber, ‘Arbitration Scorecard 2011: The Biggest Cases You Never Heard Of’, *American Lawyer Magazine* (6 July 2011), available at <http://amlawdaily.typepad.com/amlawdaily/2011/07/arbscorecard2011.html> accessed 10 February 2013; Transnational Institute, *Legalised Profiteering? How Corporate Lawyers are Fuelling an Investment Arbitration Boom*, (TNI & CEO, 2011), p. 7, available at <http://www.tni.org/briefing/legalised-profiteering> accessed 1 May 2012.

politics in order to understand the role that it plays in contemporary political struggles. In order to do so, it draws upon William Robinson's concept of a 'transnational state', and shows how distinct (and apparently separate) national and supranational institutions *combine together* to support a transnational capitalist class.

### **The Historical Origins of International Investment Law**

The first section of this chapter investigates the emergence of international investment law, and in line with the theoretical approach set out in the previous chapter it seeks to move beyond the state-centric explanations that are normally provided. However, this is easier said than done; to theoretically conclude that the state is not an agent does not help with the empirical question of who is. The argument presented here is that the key actor in the formation of the international investment regime is a capitalist class. The previous chapter distinguished between two forms of capitalist agency: a capitalist class can exercise *economic* agency in such a way as to present state officials with structural incentives to support it, but a capitalist class can also exercise *political* agency in such a way as to more directly persuade state officials to adopt a particular course of action. An explanation of the history of international investment law requires that both forms of capitalist agency are accounted for.

#### ***The Colonial and Post-Colonial Period***

The origins of international investment law date back to the 19<sup>th</sup> century, and its early features were shaped by the times in which it emerged; a time when particular national capitalist classes were more strongly embedded within their particular 'home' states and acted through, or with the support of, those states in furthering their global ambitions. In large swathes of the world, foreign property remained under *de facto* protection because of colonialism or extraterritorial jurisdiction, but this period also witnessed the emergence of legal protections for foreign-owned property, both in the form of treaties as well as in customary international law.<sup>2</sup> The standard interpretation of the law of foreign investment was derived from the 1758 seminal legal treatise of Emerich de Vattel, *The Law of Nations*, which maintained that the property of foreigners

---

<sup>2</sup> Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Alphen aan den Rijn: Kluwer Law International, 2009), p. 11; Kenneth Vandeveld, 'A Brief History of International Investment Agreements,' *U.C. Davis Journal of International Law and Policy*, 12 (2005), p. 159; Peter Muchlinski, 'A Brief History of Business Regulation,' in Sol Picciotto & Ruth Mayne (eds), *Regulating International Business: Beyond Liberalization* (Basingstoke: Macmillan Press, 1999), p. 48.

abroad remained the wealth of their home nations.<sup>3</sup> In the event of a host state's interference with the property of foreign nationals the home state acquired the right (but not the obligation) to assume "the national's claim as its own" in demanding restitution from the offending state.<sup>4</sup> This was confirmed in the 1924 Permanent Court of International Justice ruling in the *Mavrommatis Palestine Concessions* case, in which a state's right to exercise diplomatic protection over its nationals abroad was deemed an "elementary principle of international law".<sup>5</sup> The legal protection of capital abroad was therefore contingent upon the support of the home state, and the enforcement of the law relied in the last instance on the threat of force by that home state.<sup>6</sup> Great Britain intervened militarily in Latin America at least forty times between 1820 and 1914 in defence of its nationals and, often, their property rights.<sup>7</sup> A particularly noteworthy episode involved a blockade of Venezuelan ports by a coalition of English, German and Italian forces to enforce the payment of contract debts owed to their nationals.<sup>8</sup> Such episodes highlight the close relationship between foreign investors abroad and their home states, and Marxist scholars at the time discussed such developments under the heading of 'imperialism'.<sup>9</sup>

From the mid-20<sup>th</sup> century, the laws on foreign investment became contested, first from within states in Latin America, and later with the onset of decolonization from within the newly independent states in the rest of the so-called Third World. Anti-colonial struggles had brought to power state leaders who came to view the continued dominance of the former colonial masters within the economic sphere as a form of 'neo-colonialism'.<sup>10</sup> The signing of the UN Charter prohibited the use of military force except in self-defence and increased the significance of the legal debate. In respect to nationalization and expropriation, Western states adhered to

---

<sup>3</sup> Vandeveldel, 'A Brief History of International Investment Agreements,' p. 160; Newcombe & Paradell, *Law and Practice of Investment Treaties*, p. 4.

<sup>4</sup> Vandeveldel, 'A Brief History of International Investment Agreements,' p. 160; Newcombe & Paradell, *Law and Practice of Investment Treaties*, p. 4.

<sup>5</sup> Newcombe & Paradell, *Law and Practice of Investment Treaties*, p. 5; Stephan Schill, *The Multilateralization of International Investment Law* (Cambridge: Cambridge University Press, 2009), p. 246.

<sup>6</sup> Newcombe & Paradell, *Law and Practice of Investment Treaties*, p. 8; Vandeveldel, 'A Brief History of International Investment Agreements,' p. 161.

<sup>7</sup> Newcombe & Paradell, *Law and Practice of Investment Treaties*, p. 9.

<sup>8</sup> Stephen Neff, 'A Short History of International Law,' in Malcolm Evans (ed), *International Law* (Oxford: Oxford University Press, 2003), pp. 46-47; Newcombe & Paradell, *Law and Practice of Investment Treaties*, p. 9.

<sup>9</sup> Vladimir Ilyich Lenin, *Imperialism, the Highest Stage of Capitalism* (original 1916), available at {<https://www.marxists.org/archive/lenin/works/1916/imp-hsc/>} accessed 27 March 2015; see Alex Callinicos, *Imperialism and Global Political Economy* (Cambridge: Polity Press, 2009), pp. 41-52.

<sup>10</sup> Kwame Nkrumah, *Neo-Colonialism, the Last Stage of Imperialism* (original 1965), available at {<https://www.marxists.org/subject/africa/nkrumah/neo-colonialism/introduction.htm>} accessed 27 March 2015.



what was known as the ‘Hull Rule’, namely that “no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment therefor”.<sup>11</sup> The newly independent states, along with the states of the Soviet bloc (that had themselves emerged from social struggles and represented a different constellation of social forces), began to use their newfound majority within the General Assembly to revise the strong property rights advocated by the West. By 1974, several General Assembly resolutions had emphasized “the permanent sovereignty over natural resources” and the right to nationalize property in accordance with domestic law.<sup>12</sup> It is this international legal uncertainty in respect to customary international law that prompted the negotiation of investment treaties.

After a failed attempt to negotiate a multilateral treaty in 1949, international investment law has expanded through the negotiation of bilateral investment treaties (BITs). The story of international investment law, as we know it today, often begins with the signature of the first BIT between West Germany and Pakistan in 1959, as well as the OECD model investment treaties in 1962 and 1967. The story nevertheless begins before this time – while it is often difficult to trace the role of a capitalist class in political developments, this is one area where the agency of a capitalist class is not concealed behind closed doors. The earliest proposals for investment treaties all “originated primarily from within the business communities that had the greatest interest in the protection of foreign investment, such as the oil industry or the banking sector that financed many foreign investment projects”.<sup>13</sup> An early actor in this regard was the International Chamber of Commerce, which issued a draft code on the treatment of foreign investments as early as 1949.<sup>14</sup> The most influential draft was nevertheless the Abs-Shawcross Draft Convention of 1959, which was itself a merger of two earlier draft treaties.<sup>15</sup> The first of these was a draft convention by a German business group under the name of the German Society to Advance the Protection of Foreign Investment, and it was inspired by the President of the Society, Hermann Abs.<sup>16</sup> Abs was the Director-General of the Deutsche Bank, the founding purpose of which was to “challenge the hegemony of British banks” in the provision of finance

---

<sup>11</sup> Andrew Guzman, ‘Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties,’ *Virginia Journal of International Law*, 38 (2008-2009), p. 645.

<sup>12</sup> Guzman, ‘Why LDCs Sign Treaties That Hurt Them’, pp. 648-650; Vandeveld, ‘A Brief History of International Investment Agreements,’ p. 164-168.

<sup>13</sup> Schill, *The Multilateralization of International Investment Law*, p. 35.

<sup>14</sup> Muchlinski, ‘A Brief History of Business Regulation,’ p. 50; Newcombe & Paradell, *Law and Practice of Investment Treaties*, p. 20.

<sup>15</sup> Muchlinski, ‘A Brief History of Business Regulation,’ p. 50-51.

<sup>16</sup> Newcombe & Paradell, *Law and Practice of Investment Treaties*, p. 22.

for foreign trade and investment.<sup>17</sup> The second was a draft code written by a group of European lawyers headed by Sir Hartley Shawcross, who is normally introduced in the literature as a former Attorney General of the UK,<sup>18</sup> but who was also at the time a director of Royal Dutch Shell.<sup>19</sup> Merged into a single draft convention in 1959, under the auspices of another group of businesses and international lawyers, the Abs-Shawcross Convention provided extensive treatment standards for foreign investments: beyond the expected requirement of compensation for expropriation or nationalization, it also included requirements to provide foreign investors with fair and equitable treatment, protection against discriminatory measures and observance of undertakings.<sup>20</sup> The first BIT between West Germany and Pakistan was subsequently based on this convention, and so was the 1962 and 1967 OECD Draft Conventions.<sup>21</sup> The first BIT therefore “closely resembled” the 1967 OECD Draft Convention, and while the latter was never adopted because of resistance from the less developed states within the OECD, it became a model for other bilateral treaties.<sup>22</sup> Bilateral investment treaties are negotiated separately between different pairings of states, but almost all BITs today are still “worded similarly or even identically”, and this is precisely “because the treaty texts derive from a uniform model treaty”.<sup>23</sup> The network of bilateral investment treaties that serve as a foundation for international investment law today can thus be traced directly back to a draft convention authored by members of the capitalist class and originally championed by organizations working on its behalf. To account for capital as only a structural influence is insufficient; the direction of politics and law can very often only be understood in reference to the creative agency of the capitalist class.

---

<sup>17</sup> Deutsche Bank, *Chronicle: From 1870 Until Today* (2012), available at

{[http://www.db.com/en/media/DB\\_geschichte\\_meilensteine\\_120dpi\\_en.pdf](http://www.db.com/en/media/DB_geschichte_meilensteine_120dpi_en.pdf)} accessed 1 May 2012.

<sup>18</sup> Newcombe & Paradell, *Law and Practice of Investment Treaties*, p. 21; Tillmann Braun, ‘Globalization: The Driving Force in International Investment Law’, in Michael Waibel, Asha Kaushal, et al (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Alphen aan den Rijn: Kluwer International Law, 2010), p. 493, Nathalie Bernasconi-Osterwalder & Aaron Cosbey, et al., *Investment Treaties and Why They Matter to Sustainable Development: Questions and Answers* (Winnipeg: International Institute for Sustainable Development, 2012), p. 9.

<sup>19</sup> Schill, *The Multilateralization of International Investment Law*, p. 35.

<sup>20</sup> Muchlinski, ‘A Brief History of Business Regulation,’ p. 50-51; Newcombe & Paradell, *Law and Practice of Investment Treaties*, p. 22.

<sup>21</sup> Schill, *The Multilateralization of International Investment Law*, p. 36-40; Muchlinski, ‘A Brief History of Business Regulation,’ p. 51; for particular clauses, see OECD, *International Investment Perspectives*, Chapter 7: Improving the System of Investor-State Dispute Settlement (2006) available at {<http://www.oecd.org/dataoecd/12/30/40079647.pdf>} accessed 1 May 2012.

<sup>22</sup> Schill, *The Multilateralization of International Investment Law*, p. 40; Muchlinski, ‘A Brief History of Business Regulation,’ p. 51.

<sup>23</sup> Schill, *The Multilateralization of International Investment Law*, p. 89.

If this explains the origins of the model investment treaties adopted by states in the West – and corporate lobbies also aided in ensuring their adoption<sup>24</sup> – it does not explain how Third World states came to accept them. The puzzle is that the first BITs were all signed just as the rejection of these same investment rules gained momentum in the General Assembly, and often the very same countries that supported the General Assembly resolutions would sign BITs with expansive treatment standards in one-to-one negotiations.<sup>25</sup> It has been suggested that this seeming contradiction can be accounted for by the logic of a prisoner’s dilemma, in which “it is optimal for them, as a group, to reject the Hull Rule, but in which each individual [less developed country] is better off ‘defecting’ from the group by signing a BIT that gives it an advantage over other [less developed countries] in the competition to attract foreign investors”.<sup>26</sup> While the political influence of the capitalist class was important in the West, it was therefore its structural economic power, and the need for states to ‘attract investment’, that ensured the acceptance of BITs in the Third World.<sup>27</sup> For the next couple of decades international investment law expanded slowly, and it was not until the 1990s that the international investment regime as we know it today began to take shape. Two major changes occurred during this period: there was a proliferation of BITs, and there was a second major push towards the conclusion of a multilateral agreement.

### ***The Recent History***

In the 40 years from the first bilateral investment treaty in 1959 until 1989, there were only 385 BITs signed, but in the 20 years leading up to 2010, this had increased to more than 2800.<sup>28</sup> There are few countries in the world today that stand fully outside the international investment regime, and there are more countries that have signed investment treaties than there are members of the WTO.<sup>29</sup> This growth in BITs was accompanied by the end of General Assembly

---

<sup>24</sup> Newcombe & Paradell, *Law and Practice of Investment Treaties*, p. 47; Vandevelde, ‘A Brief History of International Investment Agreements,’ p. 208, see also footnote 67.

<sup>25</sup> Guzman, ‘Why LDCs Sign Treaties That Hurt Them’.

<sup>26</sup> Ibid, pp. 666-667; see also Schill, *The Multilateralization of International Investment Law*, p. 53; Zackary Elkins & Andrew Guzman, et al, ‘Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000’, *International Organization*, 60 (2006), pp. 811-846.

<sup>27</sup> Of course, this assumes that state officials were even aware of the implications of such treaties, and there is evidence that they were not. See M. Sornarajah, *The International Law on Foreign Investment*, 3<sup>rd</sup> ed (Cambridge: Cambridge University Press, 2010), p. 173; Gus Van Harten, ‘Five Justifications for Investment Treaties: A Critical Discussion’, *Trade, Law and Development*, 2:1 (2010), p. 45-46.

<sup>28</sup> Luke Eric Peterson, *Human Rights and Bilateral Investment Treaties: Mapping the Role of Human Rights Law Within Investor-State Arbitration* (Quebec: Rights and Democracy, 2009), p. 11; UNCTAD, *World Investment Report: Non-Equity Modes of International Production* (Geneva: United Nations Publications, 2011), p. 100.

<sup>29</sup> José E. Alvarez, ‘The Return of the State’, *Minnesota Journal of International Law*, 20:2 (2011), p. 232.

resolutions to limit investment protection, and by the 1980s the enthusiasm for a New International Economic Order had dissipated. This historical evolution of international investment law mirrors wider historical trends, and reflects changes in the balance of social forces that have occurred under globalization. The transnationalization of capital amounted to an increase in its structural power and a consequent transformation of the global political landscape. In the Third World, the explanation for the growing acceptance of BITs can be explained by the debt crisis, which placed previously reluctant countries under economic pressure to earn foreign exchange for debt repayments.<sup>30</sup> There was also political pressure due to structural adjustment loans from the international financial institutions; the World Bank initiates and monitors negotiations on BITs, and there is anecdotal evidence to suggest loans are made conditional on the signature of investment treaties, as well as statistical evidence to show that states that seek IMF loans are more likely to sign BITs.<sup>31</sup> The debt crisis in the Third World furthermore strengthened social forces within these countries that benefited from global capitalism, as well as sectors of the government “with external linkages”, and in the process transformed these countries from within to support global capitalism.<sup>32</sup>

Howard Mann and Konrad von Moltke remark that “[i]t is striking that the single most important factor among the many economic drivers of globalization – investment – has no single institutional focal point”.<sup>33</sup> However, this is not for a lack of trying. The second major development during the 1990s was a push towards multilateral investment treaties. BITs were historically signed mainly between the ‘home states’ of corporations in the West and the ‘host states’ for foreign investment in the Third World, and as such in practice only imposed constraints on state measures taken by the latter. Many of the new multilateral agreements and draft agreements of the 1990s were designed to more fully advance the rights of corporations investing within the West. The largest of these proposed agreements was the Multilateral Agreement on Investment (MAI) that was negotiated within the OECD. The initial preparation for the MAI began in 1991, and while these negotiations drew upon the draft conventions of

---

<sup>30</sup> Vandevelde, ‘A Brief History of International Investment Agreements,’ pp. 177-178; see also William Robinson, ‘Social Theory and Globalization: The Rise of the Transnational State’, *Theory and Society*, 30:2 (2001), p. 184-185.

<sup>31</sup> Elkins & Guzman, et al, ‘Competing for Capital’, pp. 811-846; Sornarajah, *The International Law on Foreign Investment*, p. 173, 179; Efraim Chalamish, ‘The Future of Bilateral Investment Treaties: A De Facto Multilateral Agreement?’ *Brooklyn Journal of International Law*, 34:2 (2008/2009), p. 322.

<sup>32</sup> Robinson, ‘Social Theory and Globalization’, p. 185.

<sup>33</sup> Howard Mann & Konrad von Moltke, *A Southern Agenda on Investment?* (Winnipeg: International Institute for Sustainable Development, 2005), p. 8, available at {[http://ces.iisc.ernet.in/envis/sdev/investment\\_southern\\_agenda.pdf](http://ces.iisc.ernet.in/envis/sdev/investment_southern_agenda.pdf)} accessed 1 May 2012.

the 1960s – in themselves based upon earlier corporate drafts – the OECD also worked closely with the International Chamber of Commerce and other business organizations on the initial agenda and the drafting of preparatory documents for the MAI.<sup>34</sup> Despite the wholehearted support of transnationally oriented business lobbies, the MAI was nevertheless eventually stopped in its tracks. While business lobbies had access to the negotiations from the outset, other interested parties were not so lucky – the European Parliament condemned the fact that the negotiations had been conducted “in the utmost secrecy”.<sup>35</sup> Once a draft copy of the MAI was leaked to civil society organizations in 1997, it quickly encountered resistance; the OECD itself at the time lamented that the negotiations were at “the centre of heightened public scrutiny as part of a broader debate about the implications of globalisation”.<sup>36</sup> In parallel with more nationally oriented fractions of capital such as the French film industry, labour and environmental groups made hesitant gains (e.g. the introduction of a ‘right to regulate’ clause) and were gearing up for more.<sup>37</sup> The business community – sensing the outcome may not be the investor-friendly agreement it had desired – lost interest and the MAI negotiations were abandoned in 1998.<sup>38</sup> The civil society campaign was widely recognized as a resounding success and a key reason for the MAI’s eventual failure.<sup>39</sup> Several subsequent attempts were similarly abandoned, and there are only three significant multilateral agreements in place today: the Energy Charter Treaty, the North American Free Trade Agreement (NAFTA), and the Central American Free Trade Agreement (CAFTA-DR), the latter two of which contain specific investment chapters.<sup>40</sup> Corporate lobbying was important in the conclusion of each – in the run-up to NAFTA, the U.S. Chamber of Commerce called every member of Congress on a daily basis.<sup>41</sup>

---

<sup>34</sup> Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge: Cambridge University Press, 2013), p. 117; Nick Mabey, ‘Defending the Legacy of Rio: The Civil Society Campaign against MAI,’ in Sol Picciotto & Ruth Mayne, eds. *Regulating International Business: Beyond Liberalization* (Basingstoke: Macmillan Press, 1999), p. 62.

<sup>35</sup> Cited in Mabey, ‘Defending the Legacy of Rio’, p. 65.

<sup>36</sup> OECD, *Multilateral Agreement on Investment – Report to Ministers*, (28 April 1998), available at {[http://www.oecd.org/document/4/0,3746,en\\_2649\\_33783766\\_1933060\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/4/0,3746,en_2649_33783766_1933060_1_1_1_1,00.html)} accessed 2 July 2012. 560 NGOs signed a joint statement against the MAI, see Alternative Forum for Research in Mindanao, ANDEP, et al, ‘Joint NGO Statement on the Multilateral Agreement on Investment (MAI)’, *NGO/OECD Consultation on the MAI* (27 October 1997), available at {<http://www.gwb.com.au/gwb/news/mai/ngos1.html>} accessed 30 January 2015.

<sup>37</sup> Mabey, ‘Defending the Legacy of Rio’, p. 67.

<sup>38</sup> Vandavelde, ‘A Brief History of International Investment Agreements,’ pp. 191-192.

<sup>39</sup> Mabey, ‘Defending the Legacy of Rio’, p. 61; Schill, *The Multilateralization of International Investment Law*, pp. 55-56.

<sup>40</sup> Some other trade agreements relate to investment – notably GATS – but are not normally considered part of the investment regime due to significant differences with the treaties considered here and the system of arbitration.

<sup>41</sup> Leslie Sklair, *The Transnational Capitalist Class* (Oxford: Blackwell, 2001), p. 101.

The failure of negotiations for multilateral agreements coincided with the continued expansion of BITs, offering almost identical privileges to corporations as the multilateral agreements concurrently under attack.<sup>42</sup> In contrast to multilateral negotiations, BITs rarely made the headlines and were quietly concluded behind the scenes. It is only in the last few years that new multilateral investment treaty negotiations have commenced yet again. This latest attempt started with the negotiations for a Trans-Pacific Partnership agreement (TPP), a multilateral trade and investment agreement, which Lori Wallach of Public Citizen has described as “NAFTA on Steroids”.<sup>43</sup> The only publicly known details are based on leaked draft chapters, but these seem to adhere closely to the desires of business groups.<sup>44</sup> Indeed, while the U.S. government has refused to share its negotiating texts with the public, over 600 corporate representatives have full access to such documents as members of the government’s Industry Trade Advisory Committee.<sup>45</sup> Senator Ron Wyden, the chair of the Senate committee with jurisdiction over the TPP, contend that these “industry advisors sit in a far stronger position than virtually everyone in the Congress”.<sup>46</sup> Senator Wyden discovered that even he could only access negotiating texts in a secure location on a ‘read only’ basis – senior members of his staff with high security clearance were denied access – while “an industry advisor from the Motion Picture Association can sit at their desk with a laptop, enter their username and password, and see the negotiating text”.<sup>47</sup> Senator Wyden introduced a bill to improve democratic oversight

---

<sup>42</sup> Schill, *The Multilateralization of International Investment Law*, p. 12; Luke Eric Peterson, *All Roads Lead Out of Rome: Divergent Paths of Dispute Settlement in Bilateral Investment Treaties* (Nautilus Institute for Security and Sustainable Development, 2002), p. 6, available at {[http://www.iisd.org/pdf/2003/investment\\_nautilus.pdf](http://www.iisd.org/pdf/2003/investment_nautilus.pdf)} accessed 1 May 2012.

<sup>43</sup> Lori Wallach, ‘NAFTA on Steroids’, *The Nation* (27 June 2012), available at {<http://www.thenation.com/article/168627/nafta-steroids#>} accessed 11 February 2013.

<sup>44</sup> The U.S. has introduced a prohibition on the release of all negotiating proposals until four years *after* the conclusion of the agreement, see David Levine, Christopher Sprigman, et al., ‘Letter to Ambassador John Kirk from Legal Academics’, (9 May 2012), available at {<http://infojustice.org/archives/21137>} accessed 13 March 2015.

<sup>45</sup> Rosa DeLauro, ‘Letter from 133 Members of the House of Representatives to United States Trade Representative Ambassador Ron Kirk’ (27 June 2012) available at {[http://delauro.house.gov/index.php?option=com\\_content&view=article&id=997:&catid=2:2012-press-releases&Itemid=21](http://delauro.house.gov/index.php?option=com_content&view=article&id=997:&catid=2:2012-press-releases&Itemid=21)} accessed 11 February 2013. Of the trade advisers that have access to negotiators and draft agreements, 90% come from business and less than 9 percent from labour, environmental and other public advocacy groups, and the latter have a lower level of access and meets less frequently with the government. See Public Citizen, ‘Fact-Checking Froman: The Top 10 Myths Used by Obama’s Top Trade Official’ (19 February 2014), available at {<http://citizen.typepad.com/eyesontrade/tafta/>} accessed 13 March 2015.

<sup>46</sup> Ron Wyden, ‘Wyden Presses USTR Kirk for Sunshine on Trade Negotiations’, *Recording of Senate Finance Committee Meeting* (21 June 2012), available at {<http://www.wyden.senate.gov/news/video-and-audio/view/wyden-presses-ustr-kirk-for-sunshine-on-trade-negotiations>} accessed 11 February 2013.

<sup>47</sup> *Ibid*; Ron Wyden, ‘On Introduction of the ‘Congressional Oversight over Trade Negotiations Act’, *Statement for the Record, United States Senate* (23 May 2012), available at {<http://www.wyden.senate.gov/news/blog/post/iycmi-wyden-statement-introducing-congressional-oversight-over-trade-negotiations-act>} accessed 11 February 2013; Northwest Labor Press, ‘New Round of Trade Talks Keep Public in Dark, But Not Lobbyists’ (3 July 2012), available at {<http://nwlaborpress.org/2012/07/tpp/>} accessed 1 May 2012.

of the negotiations, and in his speech to the Senate justified this as necessary to “ensure that the representatives elected by the American people *are afforded the same level of influence over our nation’s policies* as the paid representatives of PhRMA, Halliburton and the Motion Picture Association”.<sup>48</sup> These examples reveal the political influence of a transnational capitalist class. These are all transnational corporations or representatives thereof – members of PhRMA include the ‘British’ corporation GlaxoSmithKline, ‘Japanese’ Daiichi Sankyo and ‘Swiss’ Novartis – and if these corporations are found to exercise greater influence over American investment negotiations than the country’s elected representatives, it is safe to say that the outcome is likely to favour a transnational capitalist class.<sup>49</sup> The TPP negotiations have expanded to now include twelve countries, and the U.S. government indicates that membership could eventually expand to include half of the world’s nations.<sup>50</sup>

The most recent chapter in the history of international investment law was opened with the negotiations for a Transatlantic Trade and Investment Partnership (TTIP) between the EU and the U.S., and a similar agreement between Canada and the EU (CETA). A distinguishing feature of the current negotiations is the extent to which corporate lobbying groups on both sides of the Atlantic have joined together to promote these agreements, through the Trans-Atlantic Business Council and more importantly through the production of sector-wide joint position papers on particular issues, and the European Commission has acknowledged that it is prioritizing business sectors that have done so within the negotiations because they “can count on the joint push by industry”.<sup>51</sup> The corporate lobbying has been intense – the vast majority of meetings between Commission officials and non-state actors have been with corporations and corporate lobbies, and even when the Commission initiated a ‘Civil Society Dialogue’, most of the participants turned out to be corporate representatives.<sup>52</sup> The European Roundtable of

---

<sup>48</sup> (My emphasis) Wyden, ‘On Introduction of the ‘Congressional Oversight Act’.

<sup>49</sup> PhRMA, ‘Member Companies’, available at {<http://www.phrma.org/about/member-companies>} accessed 1 May 2012.

<sup>50</sup> DeLauro, ‘Letter from 133 Members of the House of Representatives’; Office of the United States Trade Representative, ‘Factsheet: The United States in the Trans-Pacific Partnership’ (2011), available at {<http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/united-states-trans-pacific-partnership>} accessed 11 February 2013.

<sup>51</sup> Cited in, Kim Bizzarri, *A Brave New Transatlantic Partnership* (Seattle to Brussels Network, 2013), p. 7, available at {<http://www.s2bnetwork.org/cat/issues/eu-investment-policy/page/2/>} accessed 28 March 2015.

<sup>52</sup> Research by the Corporate Europe Observatory revealed that of 560 lobby encounters that the Commission had, 92% were with business. Corporate Europe Observatory, ‘Who Lobbies Most on TTIP?’ (8 July 2014), available at {<http://corporateeurope.org/international-trade/2014/07/who-lobbies-most-ttip>} accessed 28 March 2015; Friends of the Earth Europe, ‘EU-US Trade Talks: What Chance for Transparency?’ (20 January 2014), available at {<http://www.foeeurope.org/EU%E2%80%93US-trade-what-chance-transparency-20114>} accessed 28 March 2015.

Industrialists had initially hoped that the deal would pass “with as little noise as possible”, but growing civil society resistance has now dashed these hopes.<sup>53</sup> The European Commission has been forced to open civil society consultation, and in the meanwhile the investment chapter negotiations have been placed on hold.<sup>54</sup> The extent of the opposition has already changed the negotiating position of the EU. The U.S. and Canada have historically seen more opposition to international investment law due to its experiences from NAFTA arbitration, and these states have already been forced to revise certain clauses to protect the right to introduce public interest regulations. When TTIP and CETA negotiations first opened, some EU member state officials expressed concern that “NAFTA-contamination” would dilute the EU’s more distinctly corporate-friendly treaties, and early leaked negotiating drafts reveal that European Commission officials were pushing for much broader protections for corporations, but the extent of opposition has prompted it to change track and it is now promoting a treaty with similar provisions to NAFTA.<sup>55</sup>

In conclusion, the history of international investment law is one of political struggle, and the contestants in this struggle are not states but societal groups. In the early period, treaties tended to link ‘capital-exporting states’ in the West with ‘capital-importing states’ in the Third World. The first section of Chapter 1 detailed how the international investment law literature has explained this early history in reference to states acting to further their respective ‘national interests’, as given by their respective positions within the global economy, but this section has argued that this overlooks the agency of human beings and the struggles between them. To explain the investor-friendly policies of the ‘capital-exporting states’ without acknowledging the agency of the capitalist class – which drafted the first treaties upon which the whole edifice of international investment law now rests, and that have promoted them at every stage of the journey – is to miss an important part of the explanation. Similarly, the ‘capital-importing states’ were themselves the outcome of decolonial struggles, and it is difficult to explain the ‘neo-colonial’ objections towards investment law as voiced in the General Assembly without

---

<sup>53</sup> Cited in Corporate Europe Observatory, ‘Citizens Turn Up the Volume on Troubled TTIP Negotiations’ (19 March 2014), available at {<http://corporateeurope.org/trade/2014/03/citizens-turn-volume-troubled-ttip-negotiations>} accessed 28 March 2015.

<sup>54</sup> The EU Commission explicitly acknowledges that it introduced the public consultation “as a response to the growing public debate and increased concerns over ISDS”. European Commission, ‘European Commission Launches Public Online Consultation on Investor Protection in TTIP’, *Press Release* (Brussels, 27 March 2014), available at {[http://europa.eu/rapid/press-release\\_IP-14-292\\_en.htm](http://europa.eu/rapid/press-release_IP-14-292_en.htm)} accessed 28 March 2015.

<sup>55</sup> This includes a more restrictive FET clause and stronger environmental provisions. August Reinisch, ‘The Future Shape of EU Investment Agreements’, *ICSID Review*, 28:1 (2013), p. 185; Nathalie Bernasconi-Osterwalder, ‘The Draft Investment Chapter of the Canada-EU Comprehensive Economic and Trade Agreement: A Step Backwards for the EU and Canada?’, *Investment Treaty News*, 4:3 (June 2013), p. 10-13.



understanding the societal struggles from which those states emerged. The decision of Third World states to individually sign bilateral investment treaties in practice, while objecting to such treaties in principle, further testifies to the structural power of a capitalist class that holds the levers of economic power. The first section of Chapter 1 also detailed how the investment law literature explains the recent developments, especially in the revision of treaties to better protect the public interest, as a consequence of the “second thoughts” of Western states, who are now acting from behind a “veil of ignorance” in terms of their ‘national interests’.<sup>56</sup> This recent history should rather be understood in terms of struggles between a transnational capitalist class and other societal groups, where both sides seek to persuade states to support their interest. Recourse to the ‘state as an agent’ and ‘national interests’ obscures the existence of such conflicts, and how it is the contestation between opposing social groups that will determine the future of international investment law.

### **The Structure of International Investment Law**

Within the discipline of International Relations, it is sometimes implied that international law is not really ‘law’ – it is assumed that it lacks effective mechanisms of asserting and enforcing legal claims, and it therefore seems to be conceived more as a form of normative guidance. International investment law may well afford corporations substantive rights vis-à-vis states and the social groups who seek to accomplish their aims through those states – as will be demonstrated in the next chapters – but without effective mechanisms to assert and enforce such rights their significance would appear marginal. This section explains the institutional structure of international investment law, and how that institutional structure renders it a powerful mechanism for transnational corporations to uphold and enforce claims against states. Indeed, the nature of that institutional structure makes this field of law more closely attuned to the interests of a capitalist class than any domestic court systems.

This section furthermore returns to the question of the nature of the capitalist class whose interests international investment law ‘congeals’. Kate Miles maintains that international investment law still reflects its imperial origins, and her research highlights the “repetition of age-old patterns of engagement” and how “dynamics derived from its origins in imperialism

---

<sup>56</sup> Alvarez, ‘The Return of the State’, p. 235, 234; Karen Halverson Cross, ‘Converging Trends in Investment Treaty Practice’, *North Carolina Journal of International Law and Commercial Regulation*, 38 (2012), p.156.

appeared to have remained imbued within modern international investment law”.<sup>57</sup> In contrast, this section argues that there are significant discontinuities that are overlooked within such a representation. Miles suggests that the tendency of international investment law to promote corporate interests over those of host states is a historical relic from imperial times, and the challenge seems to be to muster the “cultural shift” required to bring international investment law in line with the contemporary world.<sup>58</sup> The above section has detailed the historical origins of international investment law, but this section reiterates that international investment law has subtly changed, so that it no longer reflects its historical origins in a world of national capitalist classes, but that it rather reflects the emergence of a transnational capitalist class. In doing so, the section also answers some possible criticisms from Marxist scholars of global politics. In respect to William Robinson’s argument that political institutions such as the WTO, the IMF and the World Bank support a transnational capitalist class, Giovanni Arrighi observes that “[s]ince all these institutions or their original nuclei were in place *before* the formation of the [transnational capitalist class] – a post-1960 phenomenon, by Robinson’s and Harris’ own account – their rise could not possibly be the expression of the class consciousness of a [transnational capitalist class]”.<sup>59</sup> This section argues that the historical agent behind, and beneficiary of, the investment regime was originally a national capitalist class, but with the transnationalization of this class international investment law was “not bypassed but instrumentalized and transformed”.<sup>60</sup> This section highlights how international investment law has subtly changed over time so that it now supports specifically a transnational capitalist class.

### ***Investment Arbitration and Investment Arbitrators***

International investment law emerged in a period where ‘national corporations’ expanded outwards with the support of their home states, and the previous section detailed how corporations relied on their home states to assert and enforce their legal rights, in the form of diplomatic protection. An important manifestation of the rise of a transnational capitalist class is that it has now acquired the ability, at its own initiative, to assert and enforce its own rights under international law. This is commonly referred to as the ‘depoliticisation’ of the international investment regime – the home state of the investor is no longer drawn into the

---

<sup>57</sup> Miles, *The Origins of International Investment Law*, p. 209-210, 6.

<sup>58</sup> *Ibid*, p. 388, 1-6, 347.

<sup>59</sup> Giovanni Arrighi, ‘Global Capitalism and the Persistence of the North-South Divide,’ *Science & Society*, 65:4 (Winter 2001-2002), p. 474.

<sup>60</sup> Robinson, ‘Social Theory and Globalization’, p. 179.

dispute – yet in line with the wider argument of this thesis, the elimination of state-to-state dynamics does not make the dispute less political.<sup>61</sup> The fact that transnational corporations have acquired the right to assert their own rights under international law is a unique development – even within the WTO (“the archetypical transnational institution of the new era” according to Robinson<sup>62</sup>) dispute settlement is still formally a state-to-state procedure. Indeed, outside of the European Union there is no other international regime under which private parties have acquired the direct right to seek and enforce damages due to it as a result of a state’s violation of international law.<sup>63</sup>

Transnational corporations assert and enforce their investment treaty claims through international arbitration. At times, this thesis follows civil society practice in referring to these legal challenges as ‘lawsuits’, but this is formally incorrect. Arbitration has normally been conceived as a more ‘consensual’ form of dispute settlement, and the mechanisms for asserting claims differs from formal litigation. While dispute settlement within the WTO is specifically designed for its particular purpose, international investment law “piggybacks on the existing structure of international commercial arbitration”, which was originally aimed at resolving private commercial conflicts, and this is reflected in its institutional design.<sup>64</sup> In private commercial arbitration, the parties to a dispute will have specifically consented to resolving disputes between them in arbitration, but international investment treaties contain the ‘general consent’ of states to permit any dispute with any corporation from the other state party to be resolved in arbitration.

There is no single institution that handles investment arbitration, and most investment treaties provide corporations with a choice of several possible institutional settings. As the institutions operate under different procedures, this enables investors to ‘rule-shop’ for the set of arbitral rules that is deemed most favourable to the particular investment dispute at hand.<sup>65</sup> The most prominent such institution is the International Center for Settlement of Investment Disputes (ICSID). ICSID was created in 1966 on the basis of a multilateral treaty drafted by the World

---

<sup>61</sup> ICSID, *Annual Report* (2011), p. 5, available at {<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnualReports>} accessed 2 July 2012.

<sup>62</sup> Robinson, ‘Social Theory and Globalization’, p. 180.

<sup>63</sup> Gus Van Harten & Martin Loughlin, ‘Investment Treaty Arbitration as a Species of Global Administrative Law’, *The European Journal of International Law*, 17:1 (2006), p. 131.

<sup>64</sup> Gus Van Harten, ‘Private Authority and Transnational Governance: The Contours of the International System of Investor Protection’, *Review of International Political Economy*, 12:4 (October 2005), p. 617.

<sup>65</sup> Peterson, *All Roads Lead Out of Rome*, p. 9.

Bank, and today has 147 member-states.<sup>66</sup> It is the only institution designed specifically with investor-state disputes in mind, as opposed to disputes between private parties. While ICSID was essentially dormant for its first few decades, since the mid-1990s it has witnessed an explosion of activity and has as of today registered 497 cases, many of which are still pending.<sup>67</sup> It is estimated to handle a majority of investor-state disputes, but since it is also the only institution with a public registry of claims this is difficult to ascertain.<sup>68</sup> The second most common form of arbitration is under UNCITRAL procedural rules, but UNCITRAL is not a supervising institution and unable to provide even an estimate of its number of claims. Other institutions often provided for in investment treaties are the Arbitration Institute of the Stockholm Chamber of Commerce, the London Court of International Arbitration, and the International Court of Arbitration of the International Chamber of Commerce (ICC).

These institutions do not conduct the arbitrations, but primarily act as facilitators. An arbitral tribunal is normally composed of three arbitrators; one chosen by the corporation, one chosen by the defending state, and one chosen either by the consensus of the parties or, increasingly, by the supervising institution.<sup>69</sup> Even where a presiding arbitrator is to be agreed by consensus, in the event of a lack of agreement the task of appointing one almost always falls on the supervising institution, a quite significant role since awards are decided on the basis of majority. If one of the parties asks for the annulment of an award, the supervising institution often appoints the annulment committee.<sup>70</sup> Despite their facilitatory role, the supervising institutions do in other words have some influence over the course of the proceedings, and it is therefore worth noting that most of them “have a decided slant in favour of the interests of capital-exporting states or international business”.<sup>71</sup> The World Bank’s predisposition towards transnational capital has been noted in Robinson’s work, but a more direct financial interest in the outcome of a case may also occur where the investor has received a loan from the World Bank’s International Finance Corporation or insurance from the World Bank’s Multilateral Investment Guarantee Agency – in such cases, a loss for the investor has financial implications

---

<sup>66</sup> ICSID, *Annual Report*, p. 5-6.

<sup>67</sup> ICSID, ‘The ICSID Caseload – Statistics’, (2015), p. 7, available at <https://icsid.worldbank.org/apps/ICSIDWEB/resources/Pages/ICSID-Caseload-Statistics.aspx> accessed 15 March 2015.

<sup>68</sup> UNCTAD suggests that 62% of disputes were brought under ICSID. UNCTAD, ‘Recent Developments in Investor-State Dispute Settlement (ISDS)’, *IIA Issues Note*, 1 (April 2014), p. 9.

<sup>69</sup> Thomas Wälde, ‘Investment Arbitration and Sustainable Development: Good Intentions – Or Effective Results?’ *International Environmental Agreements*, 6 (2006), p. 464.

<sup>70</sup> Van Harten, ‘Five Justifications for Investment Treaties’, p. 40.

<sup>71</sup> *Ibid*, p. 40.

for institutions linked to the World Bank itself.<sup>72</sup> A particularly noteworthy development is the use of arbitration under the ICC's International Court of Arbitration. Approximately 20 % of bilateral investment treaties allow investors the option of pursuing arbitration under the ICC, and in addition a majority of cases based on state-investor contracts are believed to be arbitrated under this institution.<sup>73</sup> The transnational capitalist class has therefore gained the right to take a sovereign state to a court that is instituted under its primary lobbying organization. The ICC considers itself "the world's only truly global business organization", representing corporations around the world that agree on its "fundamental objective" to "further the development of an open world economy".<sup>74</sup> The members of the ICC's court are appointed by the ICC World Council of Business on the recommendation of the ICC Executive Board.<sup>75</sup> It is difficult to escape the conclusion that the ICC's self-professed "assertive[ness] in expressing business views" might extend to its tasks in resolving disputes between corporations and states.<sup>76</sup>

While the influence of the supervising institutions should not be underestimated, it is the arbitrators themselves that are most influential. Investment arbitrators are chosen by the parties on a case-by-case basis, but they normally have a commercial law background and are often drawn from a close-knit community of specialists on investment arbitration, that some arbitrators contend is increasingly beginning to operate as a 'club'.<sup>77</sup> Over half of all known investment disputes have been decided by an elite group of only fifteen arbitrators, and according to the former Secretary General of the ICC "[e]veryone knows everyone in the arbitration world".<sup>78</sup> The interests of the community of professional arbitrators are intimately linked with the interests of the transnational capitalist class. Arbitrators are appointed on a case-

---

<sup>72</sup> Sarah Anderson & Sara Grusky, *Corporate Investor Rule: How the World Bank's Investment Court, Free Trade Agreements, and Bilateral Investment Treaties have Unleashed a New Era of Corporate Power and What to Do About It*, (Institute for Policy Studies & Food and Water Watch, 2007), p. 6, available at {[http://www.ipsdc.org/reports/challenging\\_corporate\\_investor\\_rule](http://www.ipsdc.org/reports/challenging_corporate_investor_rule)} accessed 13 February 2013.

<sup>73</sup> International Chamber of Commerce, 'Arbitration Involving States and State Entities under the ICC Rules of Arbitration' (2012), available at {[http://www.iccdri.com/CODE/LevelThree.asp?tocxml=ltoc\\_CommReportsAll.xml&page=Commission%20Reports&L1=Commission%20Reports&L2=&tocxml=DoubleToc.xml&contentxml=arbSingle.xml&Locator=9&contentxml=CR\\_0046.xml&AUTH=&nb=0](http://www.iccdri.com/CODE/LevelThree.asp?tocxml=ltoc_CommReportsAll.xml&page=Commission%20Reports&L1=Commission%20Reports&L2=&tocxml=DoubleToc.xml&contentxml=arbSingle.xml&Locator=9&contentxml=CR_0046.xml&AUTH=&nb=0)} accessed 13 February 2013; IAReporter, 'ICSID Sets a Caseload Record in 2011', *Investment Arbitration Reporter* (31 December 2011).

<sup>74</sup> International Chamber of Commerce, 'About ICC', available at {<http://www.iccwbo.org/id93/index.html>} accessed 8 April 2012; International Chamber of Commerce, 'ICC Constitution' (2012), available at {<http://www.iccwbo.org/constitution>} accessed 13 February 2013.

<sup>75</sup> Van Harten, 'Five Justifications for Investment Treaties', p. 40.

<sup>76</sup> International Chamber of Commerce, 'About ICC'.

<sup>77</sup> Van Harten, 'Five Justifications for Investment Treaties', pp. 37-38; Peterson, *All Roads Lead Out of Rome*, p. 6.

<sup>78</sup> Cited in, Corporate Europe Observatory, *Profiting From Injustice: How Law Firms, Arbitrators and Financiers are Fuelling an Investment Arbitration Boom* (2012), p. 8, 36, available at {<http://corporateeurope.org/publications/profitting-from-injustice>} accessed 10 February 2013.

by-case basis, and the security of tenure that exists as a safeguard of independence in public law is absent. While this is also the case in commercial arbitration between private parties, from which investor-state arbitration derives its institutional design, a crucial feature of the latter is that only the corporation has the power to trigger the system by bringing a claim against a state.<sup>79</sup> This gives arbitrators a financial incentive to support and to find in favour of transnational corporations. To cite Gus Van Harten and Martin Loughlin, “the greater the utility of investment arbitration to investors, the greater the number of claims will be filed, the greater the demand for arbitrators”.<sup>80</sup> The Chief Justice of Singapore has similarly observed that it is “in the interest of the entrepreneurial arbitrator to rule expansively on his own jurisdiction and then in favour of the investor on the merits because this increases the prospect of future claims and is thereby business generating”.<sup>81</sup> In carrying out their task of deciding on investment disputes, arbitrators will therefore be inclined to show “sufficient fidelity to the economic powers who must in the end find their services worth purchasing and deploying”.<sup>82</sup> As an elite group of highly remunerated private international lawyers, arbitrators hold a significant business interest in the expansion of investment arbitration. Indeed, many of the key state officials that have advocated and negotiated investment treaties – including the lead U.S. negotiator of the investment chapter of NAFTA – now advertise their services as arbitrators and as counsel for corporations in the investment disputes that they made possible while in political office.<sup>83</sup> Investment arbitrators have unsurprisingly been some of staunchest defenders of the investment regime, and have often opposed any attempt to ‘water down’ the treaties to give more regulatory powers back to states.<sup>84</sup> The high fees charged by international investment lawyers – both as counsel and as arbitrators – renders arbitration a costly system of dispute resolution for states. The cost of convening an arbitral tribunal is normally split between the parties, so even where a defending state prevails on the merits the legal costs alone amount to an average of USD 8 million dollars.<sup>85</sup> Indeed, it has been estimated that the costs of defending a case can alone consume up to half of the annual Justice Department budget of a large

---

<sup>79</sup> Van Harten, ‘Five Justifications for Investment Treaties’, p. 37.

<sup>80</sup> Van Harten & Loughlin, ‘Investment Treaty Arbitration as a Species of Global Administrative Law’, p. 148.

<sup>81</sup> Cited in, Corporate Europe Observatory, *Profiting From Injustice*, p. 48.

<sup>82</sup> Dezaley & Garth, cited in Van Harten, ‘Five Justifications for Investment Treaties’, p. 38.

<sup>83</sup> William Greider, ‘The Right and US Trade Law: Invalidating the 20<sup>th</sup> Century’, *the Nation* (17 November 2001), available at {<http://www.thenation.com/article/right-and-us-trade-law-invalidating-20th-century>} accessed 30 January 2015.

<sup>84</sup> Cecilia Olivet & Pia Eberhardt, ‘Arbitrators’ Role in the Recent Investment Arbitration Boom’, *Investment Treaty News*, 3:3 (March 2013), pp. 16-18.

<sup>85</sup> UNCTAD, *World Investment Report 2013, Global Value Chains: Investment and Trade for Development* (New York and Geneva: United Nations, 2013), p. 112.

developing country.<sup>86</sup> Of course, the cost of arbitrating a dispute is also costly to many smaller corporations, and a member of the U.S. Congress rightly observed that this makes international investment law “tailor-made for multinational corporations”.<sup>87</sup> For transnational corporations, the legal costs pale in significance compared with the possibility of several hundred million U.S. dollars in compensation.

The investment lawyers that serve as arbitrators can be conceived as members of a transnational capitalist class by virtue of their own position within the global economy, but there are also often close links between arbitrators and the transnational corporations that bring the disputes. For instance, Yves Fortier – once named the ‘world’s busiest arbitrator’ by a leading arbitration journal – presided over five cases involving the extractive industries while himself a director of mining giant Rio Tinto and chairman of Alcan.<sup>88</sup> At times, more direct financial links with the corporations have been flagged up in annulment tribunals. While serving as an arbitrator on *Vivendi v. Argentina*, Gabriella Kaufmann-Kohler was also a member of the Board of Directors of UBS, which was in turn the single largest shareholder of Vivendi.<sup>89</sup> Kaufmann-Kohler’s potential conflict-of-interest was not made known during the case, but when Argentina asked for an annulment of the award in favour of Vivendi the annulment committee – despite its critique of Kaufmann-Kohler’s lack of disclosure – allowed the award to stand.<sup>90</sup> Direct conflicts-of-interests may be rare, but at a more general level there is often a fine line between the transnational corporations that bring disputes to arbitration and the community of arbitrators that judge on them.

There is a widespread acknowledgement in the literature on investment law that arbitral tribunals over the last two decades have expanded the rights granted to investors through treaty interpretation.<sup>91</sup> This is corroborated by a statistical study of 140 investment treaty disputes, which suggests that arbitrators consistently adopt an expansive (and thereby investor-friendly)

---

<sup>86</sup> Javier Perez & Myriam Gistelich, et al, ‘Sleeping Lions: International Investment Treaties, State-Investor Disputes and Access to Food, Land and Water’, *Oxfam Discussion Papers* (2011), p. 13, available at {<http://www.oxfam.org/sites/www.oxfam.org/files/dp-sleeping-lions-260511-en.pdf>} accessed 2 July 2012.

<sup>87</sup> Benjamin Gilman, ‘Legislative Vacuum Exists in the Current System’ (2009), available at {<http://justinvestment.org/2009/10/join-our-serious-debate-for-real-change/>} accessed 10 February 2013.

<sup>88</sup> Transnational Institute, *Legalised Profiteering?* p. 5.

<sup>89</sup> Nathalie Bernasconi-Osterwalder & Lise Johnson (eds) *International Investment Law and Sustainable Development: Key Cases from 2000-2010* (International Institute for Sustainable Development, 2011), p. 160.

<sup>90</sup> *Ibid.*, p. 161.

<sup>91</sup> See Gus Van Harten, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (Oxford: Oxford University Press, 2013).

interpretation of various clauses.<sup>92</sup> The above discussion on the inclinations of the supervising institutions and the financial considerations of the arbitral industry may provide part of the explanation, but the significance of any partiality also lies in the nature of the treaties themselves. International investment treaties provide arbitral tribunals with considerable scope for interpretation. While ‘hard law’ in the sense that they enable tribunals to make binding and enforceable decisions that often require states to provide tens or even hundreds of millions of dollars in compensation to investors, the investment treaties are not drafted with the precision that would be expected of hard law.<sup>93</sup> Rather, one leading arbitrator describes the provisions of these treaties as “dazzlingly abstract” and “maddeningly imprecise”.<sup>94</sup> When treaties adopt such “deliberately vague” rights as ‘fair and equitable treatment’, it is left to tribunals to fill them with content.<sup>95</sup> While many arbitrators insist that “there is nothing alarming about this”, the outcome is a transfer of power from the state signatories of the treaty to the tribunals – the latter of which it has already been acknowledged has a vested interest in bolstering the party with the power to trigger the system, i.e. transnational corporations.<sup>96</sup> An important feature of international investment law is that there is no formal system of precedent. While awards are as a result often directly contradictory, there are nevertheless signs that a special jurisprudence is developing from leading awards.<sup>97</sup> Even in the absence of a strict obligation to follow the reasoning of previous awards, arbitrators regularly (if often selectively) draw upon them and these are in practice becoming one of the primary sources for treaty interpretation.<sup>98</sup> An important consequence of this combination of vaguely worded treaties and the potential to set an informal precedent, is that, to cite Jeswald Salacuse, “arbitrators do not merely settle disputes; they also make rules for the regime”.<sup>99</sup> A particularly interesting means of expanding investor rights through treaty interpretation is the so-called purposive or teleological method of treaty

---

<sup>92</sup> Gus Van Harten, ‘Pro-Investor or Pro-State Bias in Investment-Treaty Arbitration? Forthcoming Study Gives Cause for Concern’. *Investment Treaty News*, 3:2 (April 2012), pp. 8-10.

<sup>93</sup> Van Harten, ‘Private Authority and Transnational Governance’, p. 613.

<sup>94</sup> Cited in Peterson, *All Roads Lead Out of Rome*, p. 5.

<sup>95</sup> David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy’s Promise* (Cambridge: Cambridge University Press, 2008); see also, Schill, *The Multilateralization of International Investment Law*, p. 263 (many investment treaty standards are “impossible to narrow down by traditional means of interpretative syllogism”).

<sup>96</sup> Jan Paulsson, ‘Indirect Expropriation: Is the Right to Regulate at Risk?’ *Making the Most of International Investment Agreements: A Common Agenda*, Symposium Co-Organised by ICSID, OECD and UNCTAD (Paris, 12 December 2005), p. 2, available at: {<http://www.oecd.org/investment/internationalinvestmentagreements/36055332.pdf>} accessed 21 January 2011.

<sup>97</sup> Newcombe & Paradell, *Law and Practice of Investment Treaties*, p. 60.

<sup>98</sup> Indeed, the tribunal in *Chemtura* suggested that “unless there are compelling reasons to the contrary, it ought to follow solutions established in a series of consistent cases.” *Chemtura Corporation (formerly Crompton Corporation) v. Government of Canada*, *Award*, UNCITRAL Ad Hoc Arbitration (2 August 2010), para. 109.

<sup>99</sup> Schill, *The Multilateralization of International Investment Law*, p. 266; Sornarajah, *The International Law on Foreign Investment*, p. 17.



interpretation. Most investment treaties have as their stated objective the protection of foreign direct investment in the host state and the assurance of a predictable investment climate. In light of this overall purpose, the tribunal in *SGS v. Philippines* decided to “resolve uncertainties in interpretation so as to favour the protection of covered investments”, i.e. in favour of the corporation.<sup>100</sup> The tribunal in *Noble Ventures v. Romania* rejected this practice, but in doing so noted that “it is not permissible, *as is too often done regarding BITs*, to interpret clauses exclusively in favour of investors”.<sup>101</sup> The practice of interpreting treaties in favour of corporations thus appears to be fairly well-established. In various ways, investor-friendly arbitrators have used the scope provided by imprecise treaties to offer interpretations that have significantly bolstered investor rights over the years.

An important feature of the international investment regime is that arbitrators are not in any way bound by the interpretations of the states that are party to a particular treaty, and there is little these states can do to correct an investor-friendly interpretation. It is not uncommon that all of the state parties to a treaty submit legal interpretations on a particular aspect of an ongoing case, but that tribunals adopt the corporation’s interpretation.<sup>102</sup> Tribunals are not normally obligated to follow the interpretations offered by state parties, but under NAFTA the state parties do have the competence to issue binding interpretations via the Free Trade Commission.<sup>103</sup> However, even here tribunals appear determined to assert their independence. In *Pope and Talbot v. Canada*, the home state of the investor (the U.S.) and the host state (Canada) had both issued submissions to the tribunal that the ‘fair and equitable treatment’ standard did not indicate a higher standard of protection than that offered by customary international law, but the tribunal disagreed and opted for a more expansive view of the protections afforded to corporations.<sup>104</sup> In response, the state parties offered a binding interpretation via the Free Trade Commission in support of the original interpretation by the U.S. and Canada, but the tribunal proceeded to argue that even if the ‘fair and equitable treatment’ standard was indeed equivalent to customary international law, the latter had itself

---

<sup>100</sup> Cited in Schill, *The Multilateralization of International Investment Law*, p. 315; Charles Brower, ‘Corporations as Plaintiffs Under International Law: Three Narratives about Investment Treaties’, *Santa Clara Journal of International Law*, 9 (2011), p. 184, footnote 28; MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, *Award*, ICSID Case No. ARB/01/7 (25 May 2004), para. 104.

<sup>101</sup> (My emphasis), cited in Schill, *The Multilateralization of International Investment Law*, p. 318.

<sup>102</sup> For instance, in *GAMI v. Mexico* the tribunal was asked to determine the scope of protections afforded to minority shareholders, and proceeded to reject the submissions of both the investor’s home state (the U.S.) and the host state (Mexico) in favour of the more expansive interpretation favoured by the investor. See Van Harten, ‘Five Justifications for Investment Treaties’, p. 33.

<sup>103</sup> Schill, *The Multilateralization of International Investment Law*, p. 268.

<sup>104</sup> *Ibid.*, p. 270.

evolved to offer a broader standard of protection.<sup>105</sup> More recent NAFTA tribunals have followed this expansive interpretation, and have therefore “deprived the 2001 NAFTA Interpretative Statement of any practical effect”.<sup>106</sup> Both by right and in practice, tribunals have substantial leeway in offering their own interpretations of a treaty, and they have noticeably taken advantage of this to expand the protections offered to investors by this legal regime.

When a tribunal proceeds to expand the protections provided to investors by means of treaty interpretation, the losing state is left with few options. One of the cornerstones of international arbitration is that there is normally no right to appeal on substantial grounds. A defending state does have the opportunity to call for an annulment committee, but “[a]nnulment is different than appeal”.<sup>107</sup> Annulment can be made on the basis of arbitrator corruption, unacknowledged conflict of interests, or failure to state reasons, but not on the merits of the case.<sup>108</sup> This absence of a system of appeal further strengthens the independence of tribunals and their ability to unhindered advance the interests of transnational corporations. Arbitration based on vaguely worded treaties have in practice, to cite Stephan Schill, allowed arbitrators to “develop into legislators for the entire system of international investment law”.<sup>109</sup>

One of the key characteristics of investment arbitration has traditionally been the promise of confidentiality. This is listed as one of the regime’s key advantages by the International Chamber of Commerce, and can protect corporations from the unfavourable publicity that legal action to challenge government measures can otherwise engender.<sup>110</sup> The extent of confidentiality is nevertheless contingent upon both the investment treaty in question and the institutional rules under which arbitration is filed. In terms of investment treaties, NAFTA and

---

<sup>105</sup> Ibid, p. 270-273; Marcela Bronfman, ‘Fair and Equitable Treatment: An Evolving Standard,’ in Armin Von Bogdandy & Rudiger Wolfrum (eds), *Max Planck Yearbook of United Nations Law*, 10 (2006), pp. 651-655.

<sup>106</sup> Luke Eric Peterson, ‘Government Prevails in NAFTA Chapter 11 Arbitration; Claimant Weighing Options’, *Investment Arbitration Reporter* (9 April 2010), available at {[http://www.iareporter.com/articles/20100410\\_10](http://www.iareporter.com/articles/20100410_10)} accessed 16 August 2012; Porterfield, Matthew, ‘A Distinction Without a Difference? The Interpretation of Fair and Equitable Treatment Under Customary International Law by Investment Tribunals’, *Investment Treaty News*, 3:3 (March 2013), p. 3. UNCTAD, *Fair and Equitable Treatment: A Sequel*, UNCTAD Series of Issues in International Investment Agreements II (New York & Geneva: United Nations, 2012), p. 57.

<sup>107</sup> OECD, *International Investment Perspectives*, p. 186.

<sup>108</sup> The annulment committee in *CMS Gas v. Argentina* went as far as to admit that had it been a court of appeal it would have been inclined to reverse the decision in the case on the merits, but instead it was left to declare that it had no power to correct what it acknowledged was a manifest error of law. The annulment tribunal did, however, annul the award on the basis that the original tribunal had failed to state its reasoning in respect to its interpretation on the umbrella clause. Bernasconi-Osterwalder & Johnson (eds) *International Investment Law and Sustainable Development*, p. 44.

<sup>109</sup> Schill, *The Multilateralization of International Investment Law*, p. 277.

<sup>110</sup> International Chamber of Commerce, ‘ICC Arbitration’ (2012), available at {<http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/>} accessed 2 July 2012.

CAFTA-DR are some of the most transparent, and in terms of arbitral institutions, ICSID is the most transparent – the latter provides a list of all its cases, and either party to a dispute is permitted to make the final award public. There is nevertheless concern that as a consequence of the heightened civil society and academic scrutiny of ICSID awards, corporations may be “decamping for more obscure and opaque arbitral venues”.<sup>111</sup> Both arbitral proceedings and final arbitral awards under the alternative institutions – the Stockholm Chamber of Commerce, the International Chamber of Commerce, and UNCITRAL – have normally been confidential in the absence of the consent of both parties. This is currently changing within UNCITRAL – as a result of the so-called ‘backlash’ against international investment law UNCITRAL adopted new rules on transparency in 2014 – but these will only slowly begin to come into effect over the next decade or more.<sup>112</sup> For the foreseeable future, researchers and other interested parties continue to be forced to revert to “a variety of needle-in-a-haystack techniques” to learn of the very existence of many investment disputes, let alone their details.<sup>113</sup> In 2013, one estimate suggested that almost 40% of *known* investment awards were not in the public domain, and it is an open question how many cases are being concluded without public knowledge at all.<sup>114</sup> In the literature on international investment law there is a tendency to generalize from publicly available awards, but since the level of confidentiality is chosen by the corporation it is impossible to ascertain whether such awards are representative. To the contrary, controversial cases – cases where the legal right is stronger than the moral one – may be more likely to be raised in less transparent venues.

It has so far been argued that corporations have the ability to effectively assert their legal rights before investment tribunals that are closely attuned to the interests of investors, but how are any successful legal claims subsequently enforced? The insulation of the international investment regime from state-control during the arbitration stage is in many ways unprecedented, but its independence at the enforcement stage is equally striking. Despite the use of private arbitrators to interpret vague treaties and the lack of procedures for appeal, international investment law is a case of ‘hard law’; arbitral decisions are binding and enforceable.<sup>115</sup> The particular mechanism of enforcement nevertheless depends on the institution under which arbitration is

---

<sup>111</sup> Peterson, *All Roads Lead Out of Rome*, p. 11.

<sup>112</sup> The rules will not apply automatically to treaties concluded before 2014, and many of these treaties can remain in effect for a decade or two more.

<sup>113</sup> Peterson, *All Roads Lead Out of Rome*, p. 11.

<sup>114</sup> In 2013, ISDS tribunals rendered 37 known decisions, 23 of which are in the public domain. UNCTAD, ‘Recent Developments in Investor-State Dispute Settlement (ISDS)’, *IIA Issues Note*, 1 (April 2014), p. 1.

<sup>115</sup> Van Harten, ‘Private Authority and Transnational Governance’, p. 613.

undertaken. Most treaties give investors a choice of institutions under which to constitute an arbitral tribunal, and this choice is influenced by the means of enforcement. There are two principal ways of enforcing an arbitral award: awards under ICSID have their own enforcement mechanisms provided for by the treaty, and other awards are normally enforced under the New York Convention.

The enforcement mechanisms of ICSID are unparalleled under international law. ICSID arbitration is completely insulated from the control of national legal systems, and “the ICSID Convention provides the sole mechanism for recourse against an ICSID award”.<sup>116</sup> As we have seen, the annulment of an award cannot be made on the merits of the case and the Convention “was designed purposefully to confer a very limited scope of review”.<sup>117</sup> This bestows ICSID arbitration with a particularly strong level of finality – in contrast to dispute settlement within the WTO, not even the collective agreement of states can overturn an award.<sup>118</sup> Host states rarely refuse the payment of damages,<sup>119</sup> but even if a host state were to refuse to pay compensation, corporations are not necessarily inconvenienced. An ICSID award is enforceable against the assets of a losing state in any of the 147 state parties to the ICSID convention, and a corporation can thus enforce awards against the assets that a host state holds in, say, a bank account in New York or Geneva. ICSID awards are to be treated by national courts in all signatory states “as if it were a final judgment of a court in that State” – these national courts in the country in which an investor tries to enforce an award therefore have no right of review.<sup>120</sup> This makes ICSID arbitration unique within international law, and for example human rights treaties have a long way to go before permitting individual damages claims and an automatic enforcement of awards by domestic courts in any state party.<sup>121</sup>

Awards issued by arbitral tribunals convened under any other arbitral institution are normally enforced through the 1958 United Nations Convention on the Recognition and Enforcement of

---

<sup>116</sup> ICSID, *Annual Report*, p. 6.

<sup>117</sup> *Ibid.*, p. 30.

<sup>118</sup> Schill, *The Multilateralization of International Investment Law*, p. 254.

<sup>119</sup> In some cases, this may be because of the expectation that World Bank loans are contingent upon a host state’s compliance with ICSID awards. Allen & Overy LLP, ‘Investment Treaty Arbitration: Protecting and Promoting Foreign Investments’ (2011), p. 8, available at {<http://www.allenoverly.com/SiteCollectionDocuments/Investment%20Treaty%20Arbitration.pdf>} accessed 2 July 2012.

<sup>120</sup> ICSID, *ICSID Convention, Regulations and Rules* (2006), p. 27, available at {[http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR\\_English-final.pdf](http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf)} accessed 2 July 2012.

<sup>121</sup> Van Harten & Loughlin, ‘Investment Treaty Arbitration as a Species of Global Administrative Law’, p. 131-132.

Foreign Arbitral Awards, also known as the New York Convention. The initial draft of the New York Convention was produced by the International Chamber of Commerce, and former UN Secretary General Kofi Annan has duly acknowledged that it was indeed the “initiative of the ICC itself that prompted the United Nations to prepare an international treaty on arbitral awards”.<sup>122</sup> Despite being viewed as the lesser of the two methods of enforcement, it is a convention that has served transnational corporations well. Like ICSID, the New York Convention allows investors to enforce an arbitral award against host state assets in any of its 146 member states.<sup>123</sup> In contrast to ICSID it nevertheless allows for a right of review by national courts in the state in which enforcement is attempted on specific limited grounds, notably including public policy grounds. As observed by Robert Briner, then Chairman of the ICC’s International Court of Arbitration, enforcement is nevertheless “[b]y and large [...] considerably easier than the enforcement of judgements rendered by national courts”.<sup>124</sup>

The compliance with arbitral awards is normally a routine matter, but there have been some high-profile refusals to comply with judgements in recent years. However, these only tend to reveal the extraordinary lengths that states have to go through to escape payment; for instance, Venezuela has brought home gold reserves from foreign banks and is reportedly preparing to transfer cash reserves from European and U.S. banks to Russia, China and Brazil, presumably on the grounds that these would be less likely to enforce awards.<sup>125</sup> Difficulties of enforcement in certain cases shows that compliance is not guaranteed, but corporations are nevertheless provided with access to a novel and for the most part effective mechanism of enforcing awards against reluctant states.

---

<sup>122</sup> Kofi Annan, ‘Opening Address Commemorating the Successful Conclusion of the 1958 United Nations Conference on International Commercial Arbitration,’ in *Enforcing Arbitration Awards Under The New York Convention: Experience and Prospects* (UNCITRAL, 1999), p. 1, available at {<http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/NYCDay-e.pdf>} accessed 2 July 2012.

<sup>123</sup> UNCITRAL, Status: 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (2012), available at {[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html)} accessed 3 July 2012.

<sup>124</sup> Robert Briner, ‘Philosophy and Objectives of the Convention,’ in *Enforcing Arbitration Awards Under The New York Convention: Experience and Prospects* (UNCITRAL, 1999), p. 9, available at {<http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/NYCDay-e.pdf>} accessed 2 July 2012.

<sup>125</sup> Sergey Ripinsky, ‘Venezuela’s Withdrawal from ICSID: What it Does and Does Not Achieve’. *Investment Treaty News*, 3:2 (April 2012), p. 12.

## *Nationality and Transnationality in International Investment Law*

Ellen Meiksins Wood maintains that “[i]t hardly needs to be added that international agencies of capital, like the IMF, the World Bank, or the WTO, are above all agents of specific national capitals”.<sup>126</sup> This thesis disputes such claims. The previous sub-section suggested that international investment law provides corporations with a powerful means of asserting and enforcing their rights under investment treaties, and it also suggested that the institutional structure through which it does so today is very different from the institutional structure it originally had. In contrast with the historical reliance of corporations on their own home states to assert and enforce their rights, transnational corporations have acquired the right to assert and enforce their own rights under international law. This section further considers the question of corporate nationality in the context of international investment law, and therefore also provides support for the claim that this legal regime supports a distinctly transnational capitalist class.

International investment law may on the face of it appear to be an unlikely candidate to embed the interests of a transnational capitalist class. Unlike the other institutions that are often seen to fulfill that promise, such as the multilateral institutions of the WTO, the IMF, and the World Bank, international investment law is still predominantly based on some 2800 bilateral treaties. It could thus be easily assumed that this field of international law responds to bilateral rationales more supportive of theories that give prominence to particular national capitalist classes that advance their interests through their own national states. International investment law can thus be seen as a ‘hard case’ for theories that centre on transnational capital. Despite the fact that the international investment regime rests formally on a bilateral basis, it nevertheless increasingly resembles “a de facto multilateral agreement”.<sup>127</sup> ‘Most Favoured Nation’ (MFN) clauses have become standard fare in bilateral and regional investment treaties, and enable investors to latch onto protections offered in treaties with any other states. These MFN clauses serve to “disable States from entering into bilateral quid pro quo bargains that extend preferential treatment to certain States and exclude it with respect to others”, and has brought about “an order that is multilateral in substance but bilateral in form”.<sup>128</sup> This does not of course demonstrate that

---

<sup>126</sup> Ellen Meiksins Wood, ‘Global Capital, National States’, in Mark Rupert & Hazel Smith (eds), *Historical Materialism and Globalization* (London: Routledge, 2002), p. 25.

<sup>127</sup> Chalamish, ‘The Future of Bilateral Investment Treaties’, p. 303-353.

<sup>128</sup> Schill, *The Multilateralization of International Investment Law*, p. 122, 129.

national capitalist classes are not responsible for these developments – states might simply have sought to extend the advantages given to other national capitals to its own – but it does suggest that this formal bilateralism should not mask what is in fact an interlocking network of agreements that in many ways form an integrated global legal regime for the protection of foreign investment.<sup>129</sup>

A bilateral investment regime tied together with MFN clauses contain additional advantages to transnational corporations that a multilateral treaty could not offer. Despite the fact that bilateral treaties are often negotiated ‘as a package’ where provisions more favourable to investors are ‘out-weighted’ by provisions more favourable to the host state, MFN clauses allow investors to ‘cherry-pick’ more favourable provisions from a treaty that a host state has signed with a third country, without being bound by any less favourable provisions in that third country’s treaty.<sup>130</sup> The International Institute for Sustainable Development argues that this enables investors to design a “super treaty”, by means of “piecing together a patchwork of only the most favourable provisions” of a variety of agreements that a particular host state has negotiated separately with many different countries.<sup>131</sup> In doing so, MFN clauses “harmonize investment protection at the most elevated level available”.<sup>132</sup> Crucially, knowledge of this possibility allows a transnational capitalist class to focus its lobbying efforts at the negotiation or renegotiation stage of any particular treaty in the confidence that gains in one treaty are automatically extended across the board. An important consequence of MFN clauses is moreover that it slows down a state’s ability to withdraw rights previously given to corporations. Treaties are normally of a long duration and renegotiation occurs at set intervals, and in the event that new treaties shift the balance of rights towards host states, corporations bound by newer treaties can use MFN clauses to extract more favourable provisions from older treaties.<sup>133</sup> As such, Stephan Schill argues that

---

<sup>129</sup> The use the term ‘regime’ in this generic sense (as opposed to ‘regime theory’) is helpful to denote the interlocking network of both investment treaties and the institutional support structures through which those legal claims are asserted and enforced. For regime theory, see Jeswald Salacuse, ‘The Emerging Global Regime for Investment’, *Harvard International Law Journal*, 51:2 (2010), pp. 427-473.

<sup>130</sup> In *Siemens v. Argentina*, the investor invoked a German-Argentine BIT to proceed with arbitration but used an MFN clause to invoke a provision in an Argentine-Chile treaty to avoid the ‘waiting period’ required by the German treaty. Argentina unsuccessfully protested that if the investor could rely on the more favourable waiting period in the treaty with Chile, it should also be bound by that treaty’s less favourable requirement that an investor cannot pursue both domestic legal proceedings and international arbitration. Schill, *The Multilateralization of International Investment Law*, p. 156-159.

<sup>131</sup> Bernasconi-Osterwalder & Cosbey, et al., *Investment Treaties and Why They Matter*, p. 31.

<sup>132</sup> Schill, *The Multilateralization of International Investment Law*, p. 127, 142.

<sup>133</sup> Bernasconi-Osterwalder & Cosbey, et al., *Investment Treaties and Why They Matter*, p. 31.

MFN clauses serve to “lock States into the most favorable level of investment protection reached at one point of time and project this level into the future”.<sup>134</sup>

It can be countered that while a corporation is not reliant on its home state for diplomatic protection to assert and enforce its rights, nor for that home state to include particular treatment standards in their treaties, it nevertheless *is* reliant on that state to introduce an investment treaty that includes an MFN clause to begin with. It is indeed true that transnational corporations remain reliant on states to support their political interests, but the argument made here is that they are not reliant on *any particular home state*. It has become increasingly common for corporations to ‘migrate’ into another ‘home state’ in order to take advantage of a particular bilateral investment treaty. International law firms routinely advise corporate clients to structure investments in such a way as to come under the protection of an advantageous treaty, and some law firms lament that it “remain[s] a mystery” that all do not.<sup>135</sup> When Australia temporarily began to withdraw the right to ISDS from its investment treaties, the law firm White & Case advised its Australian clients that this “can be addressed by intelligent corporate restructuring”, while the law firm Clifford Chance suggested the Netherlands as “a very popular choice”.<sup>136</sup>

An early case that highlighted the potential for corporate restructuring is *Bechtel v. Bolivia*. The Bolivian-incorporated company Aguas del Tunari had signed a concession contract to operate water and sewage services in the city of Cochabamba. The majority shareholder of Aguas del Tunari was International Water, based in the Cayman Islands, which was in turn owned by the American corporation Bechtel.<sup>137</sup> Neither the Cayman Islands nor the U.S. had an investment treaty in force with Bolivia at the time.<sup>138</sup> Within a year of operating the concession, protests had erupted in Cochabamba in response to sharp hikes in water prices, and Bechtel – arguably in anticipation of a detrimental fallout – undertook a restructuring of the

---

<sup>134</sup> Schill, *The Multilateralization of International Investment Law*, p. 196.

<sup>135</sup> Peterson, *Human Rights and Bilateral Investment Treaties*, p. 11; Steptoe & Johnson LLP, ‘Managing Political Risk through Bilateral Investment Treaties’ (2012), available at {<http://www.steptoe.com/f-317.html>} accessed 3 July 2012.

<sup>136</sup> Cited in, Luke Eric Peterson, ‘In Policy Switch, Australia Disavows Need for Investor-State Arbitration Provisions in Trade and Investment Agreements’, *Investment Arbitration Reporter* (14 April 2011), available at {<http://www.iareporter.com/articles/20110414>} accessed 16 August 2012; Corporate Europe Observatory, *Profiting From Injustice*, p. 26.

<sup>137</sup> *Aguas del Tunari, S.A., v. Republic of Bolivia, Decision on Respondent’s Objections to Jurisdiction*, ICSID Case No. ARB/02/3 (21 October 2005), para. 71.

<sup>138</sup> The U.S.-Bolivia Investment Treaty only came into force in mid-2001.



investment.<sup>139</sup> There was a ‘migration’ of the company from the Cayman Islands to Luxembourg, and a holding company was imposed above it and situated in the Netherlands.<sup>140</sup> When the Bolivian government failed to curb the protests and was forced to take water back into state ownership, Bechtel launched arbitral proceedings against Bolivia on the basis of a Netherlands-Bolivia BIT.<sup>141</sup> Jurisdictional questions immediately came to the fore, and Bolivia contended that the purpose of investment treaties was to protect capital from one signatory state to another.<sup>142</sup> There had been no assets moved from the Netherlands to Bolivia, and the Dutch company was referred to as a ‘mere shell’ without effective control over the investment.<sup>143</sup> The tribunal sided with Bechtel, and countered that “it is not uncommon in practice, and [...] not illegal to locate one’s operations in a jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for example, of taxation or the substantive law of the jurisdiction, including the availability of a BIT”.<sup>144</sup> The tribunal further observed that “[a]lthough titled ‘bilateral’ investment treaties [...] such treaties *serve in many cases more broadly as portals*”, through which investments originating from different countries are structured.<sup>145</sup> The conclusion that the ‘actual’ nationality of a corporation is of little import has been mirrored in cases that have followed *Aguas del Tunari v. Bolivia*, and controversy normally only arises where corporate restructuring occurs *after* a dispute has arisen. For example, Exxon Mobil had invested in petroleum production in Venezuela through subsidiaries located in Delaware and the Bahamas, but when Venezuela increased tax rates and royalties for the industry, the company restructured its investment via a Dutch holding company. The tribunal declined to find jurisdiction for the pre-migration claims, but in doing so declared that the practice of nationality-planning to secure protection under an investment treaty was “a perfectly legitimate goal as far as it concerned future disputes”.<sup>146</sup>

---

<sup>139</sup> Sornarajah, *The International Law on Foreign Investment*, p. 326-327; *Aguas del Tunari, v. Bolivia, Decision on Respondent’s Objections to Jurisdiction*. Bechtel contends the restructuring was unrelated to the situation in Bolivia.

<sup>140</sup> *Aguas del Tunari, v. Bolivia, Decision on Respondent’s Objections to Jurisdiction*, para. 71; Sornarajah, *The International Law on Foreign Investment*, p. 225, 326.

<sup>141</sup> Perez & Gistelinch, et al, ‘Sleeping Lions’, p. 17.

<sup>142</sup> *Aguas del Tunari, v. Bolivia, Decision on Respondent’s Objections to Jurisdiction*; Sornarajah, *The International Law on Foreign Investment*, p. 327.

<sup>143</sup> *Aguas del Tunari, v. Bolivia, Decision on Respondent’s Objections to Jurisdiction*, para. 208; Sornarajah, *The International Law on Foreign Investment*, p. 327.

<sup>144</sup> *Aguas del Tunari, v. Bolivia, Decision on Respondent’s Objections to Jurisdiction*, para. 330.

<sup>145</sup> (My emphasis) *Ibid*, para. 332.

<sup>146</sup> Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holdings, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, LTD., & Mobil Venezolana de Petróleos, Inc. v Bolivarian Republic of Venezuela, *Decision on Jurisdiction*, ICSID Case No. ARB/07/27 (10 June 2010), para. 204; Luke Eric Peterson, ‘Tribunal to Hear Venezuela Nationalization Claim under BIT, But Tax and Royalty Disputes Excluded Due to Timing of Exxon Restructuring’, *Investment Arbitration Reporter* (16 June 2010), available at {[http://www.iareporter.com/articles/20100616\\_9](http://www.iareporter.com/articles/20100616_9)} accessed 16 August 2012; see also Luke Eric Peterson, ‘Panel

One of the more controversial aspect of nationality-planning nevertheless involves the use of so-called ‘shell’ or ‘mailbox companies’. In order to qualify as a corporate ‘national’ very little actual movement into foreign territory is normally required: “[n]o real offices or employees are necessary, and visiting the country is optional”.<sup>147</sup> Similar to *Aguas del Tunari v Bolivia*, the tribunal in *Saluka v. Czech Republic* explicitly discussed concerns about granting rights to mailbox companies, but concluded that by the wording of the treaty there was no opportunity to refuse such companies access to investment protection.<sup>148</sup> The Netherlands – a popular destination because of its extensive BIT network – has explicitly affirmed that its treaties are designed to protect mailbox companies.<sup>149</sup> In response to this practice, the U.S. and Canada have both started to introduce so-called ‘denial of benefits’ clauses into their investment treaties, and the first case to address such a ‘denial of benefits’ clause was *Pacific Rim v. El Salvador*. *Pacific Rim* is headquartered in Canada and had structured its investment into El Salvador via a holding company in the Cayman Islands. Neither Canada nor the Cayman Islands had an investment treaty with El Salvador, and as problems arose *Pacific Rim* restructured the investment through a holding company in the United States, with the aim of raising the dispute under CAFTA. In its decision to decline jurisdiction, the tribunal described the U.S. holding company as a ‘passive actor’ lacking ‘a board of directors, board minutes, a continuous physical presence and a bank account’, thereby indicating that some or all of the above may satisfy the requirement of being a ‘national’ under the treaty.<sup>150</sup> ‘Denial of benefits’ clauses are designed to ensure that only companies with ‘substantial business activity’ in a state can seek protection under its treaties, but ‘substantial’ is nowhere defined and the clause was explicitly formulated to ensure that genuine subsidiaries of transnational corporations could seek protection under the treaty.<sup>151</sup> A company sometimes perceived as quintessentially American – the tobacco giant

---

Differs as to What Investments are Arbitrable at ICSID; Stern, Schreuer, Reisman also Discuss Nationality-Planning’, *Investment Arbitration Reporter*, (2 July 2010), available at {[http://www.iareporter.com/articles/20100709\\_5](http://www.iareporter.com/articles/20100709_5)} accessed 16 August 2012.

<sup>147</sup> George Kahale, ‘The New Dutch Sandwich: The Issue of Treaty Abuse’, *Columbia FDI Perspectives*, No. 48 (10 October 2011), available at {<http://www.vcc.columbia.edu/content/new-dutch-sandwich-issue-treaty-abuse>} accessed 26 August 2012.

<sup>148</sup> Schill, *The Multilateralization of International Investment Law*, p. 227.

<sup>149</sup> Roeline Knottnerus & Roos van Os, ‘The Netherlands: A Gateway to ‘Treaty Shopping’ for Investment Protection’, *Investment Treaty News*, 2:2 (January 2012), p. 10.

<sup>150</sup> *Pac Rim Cayman LLC v. The Republic of El Salvador*, *Decision on the Respondent’s Jurisdictional Objections*, ICSID Case No. ARB/09/12 (1 June 2012), para. 4.72-4.73; Luke Eric Peterson, ‘ANALYSIS: In First Test of CAFTA ‘denial of benefits’ clause, arbitrators rule that U.S. ‘shell’ company not owed CAFTA protections for investments in El Salvador’, *Investment Arbitration Reporter* (4 June 2012), available at {[http://www.iareporter.com/articles/20120604\\_1](http://www.iareporter.com/articles/20120604_1)} accessed 16 August 2012.

<sup>151</sup> EarthJustice, Friends of the Earth, et al, *Investment Rules in Trade Agreements: Top 10 Changes to Build a Pro-Labor, Pro-Community and Pro-Environment Trans-Pacific Partnership*, (9 August 2010), p. 15-16, available at {[http://www.ips-dc.org/reports/investment\\_rules\\_in\\_trade\\_agreements\\_top\\_10](http://www.ips-dc.org/reports/investment_rules_in_trade_agreements_top_10)} accessed 11 February 2013; Sarah Anderson, et al, ‘The New U.S. Model Bilateral Investment Treaty: A Public Interest

Philip Morris – is concurrently taking legal action to challenge the cigarette packaging requirements of Uruguay as a national of Switzerland, and of Australia as a national of Hong Kong.<sup>152</sup> Neither treaty contains a ‘denial of benefits’ clause, but even had they done so the company would in all likelihood have passed the ‘substantial activities’ test.<sup>153</sup>

An interesting further twist on this phenomenon is the practice of ‘round-tripping’, in which capital from a particular state is moved to another and then brought back into the original state as a foreign investment protected by a bilateral investment treaty.<sup>154</sup> In one such case, ‘round-tripping was permitted on the basis that under the invoked treaty “neither corporate control, effective seat, nor origin of capital has any part of play in the ascertainment of nationality”’.<sup>155</sup> Under investment treaties, host states are required to provide foreign corporations with ‘national treatment’ that guarantees equality with domestic companies, and beyond this also substantial and procedural rights not granted to those domestic corporations. Foreign investors are as such consistently awarded higher standards of treatment than what developed and developing countries alike grant their own corporations, and the practice of round-tripping is therefore not a surprising development on corporate restructuring.<sup>156</sup> This suggests that international investment law does not simply *protect* capital irrespective of ‘home’ nationality, but that it may further *encourage* the transnationalization of capital by providing corporations from a particular state higher standards of treatment if they ‘round-trip’ through a subsidiary or holding company abroad.

---

Critique’ (Institute for Policy Studies, et al, 2012), p. 4, available at {[http://www.ips-dc.org/reports/the\\_new\\_us\\_model\\_bilateral\\_investment\\_treaty\\_a\\_public\\_interest\\_critique](http://www.ips-dc.org/reports/the_new_us_model_bilateral_investment_treaty_a_public_interest_critique)} accessed 13 February 2013.

<sup>152</sup> Philip Morris Asia Limited v. the Commonwealth of Australia, *Notice of Arbitration*, UNCITRAL Ad Hoc Arbitration (21 November 2011); FTR Holding S.A., Philip Morris Products S.A., & Abal Hermanos S.A. v. Oriental Republic of Uruguay, *Request for Arbitration*, ICSID Case No. ARB/10/7 (19 February 2010).

<sup>153</sup> That is, had PM Asia invested via its Hong Kong subsidiary in the first place - Australia is challenging jurisdiction on the basis that PM Asia only acquired the shares in PM Australia *after* the plain packaging requirements had been announced. Philip Morris Asia Limited v. The Commonwealth of Australia, *Response to the Notice of Arbitration*, UNCITRAL Ad Hoc Arbitration (21 December 2011), para. 6-7.a.

<sup>154</sup> In Tokios Tokeles v. Ukraine a company incorporated in Lithuania alleged violations of an investment treaty between Lithuania and the Ukraine. 99% of the shares in the Lithuanian company were owned by two Ukrainian nationals, and the company itself was managed by one of them. Ukraine objected that “find[ing] jurisdiction in this case would be tantamount to allowing Ukrainian nationals to pursue international arbitration against their own government”, but the tribunal refused to lift the corporate veil and countered that it was not relevant that no substantial activity took place in Lithuania. Sornarajah, *The International Law on Foreign Investment*, p. 325-329; Schill, *The Multilateralization of International Investment Law*, p. 230.

<sup>155</sup> Cited in UNCTAD, ‘Latest Developments in Investor-State Dispute Settlement’, *IIA Monitor*, 1 (2009), p. 5, available at {[http://unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20\(IIA\)/IIA-Monitor.aspx](http://unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20(IIA)/IIA-Monitor.aspx)} accessed 1 May 2012.

<sup>156</sup> Sornarajah, *The International Law on Foreign Investment*, p. 211.

A final example to highlight the opportunities available to a transnational capitalist class under a bilateral investment regime with an expansive understanding of nationality is *Lauder v. Czech Republic* and *CMS v. Czech Republic*. In response to regulatory measures that impacted on the investment of CMS, the Czech Republic was brought to arbitration first by its controlling shareholder, Ronald Lauder, on the basis of a United States-Czech Republic BIT, and six months later by the corporation itself under a Netherlands-Czech Republic BIT.<sup>157</sup> On the basis of essentially the same facts and substantially similar treaty provisions, the two arbitral tribunals issued diametrically opposite awards.<sup>158</sup> The tribunal in *Lauder v. the Czech Republic* dismissed all claims, while the tribunal in *CMS v. the Czech Republic* awarded the company \$353 million in damages, including compensation for lost profits.<sup>159</sup> In revealing that two tribunals can interpret the same facts in ways that lead to extremely divergent outcomes, this case is frequently taken as “the ultimate fiasco in investment arbitration”.<sup>160</sup> However, it also reveals how the ‘splitting’ of an investor’s nationality amongst several countries – or more narrowly the ability to choose whether to adopt the nationality of the controlling shareholder or the corporate seat, or both – can improve the chances for a favourable award. Despite the fact that one tribunal dismissed all claims on the basis of essentially the same facts that the other tribunal used to uphold the claims, the Czech Republic had to pay the damages awarded by the second tribunal in full.<sup>161</sup> The bilateral nature of the investment regime allows a transnational capitalist class to make creative use of its ability to adopt different nationalities, and provides investors with a myriad of options for careful assessment to ensure the best probability of a favourable award. In various ways, the bilateral investment treaty regime allows corporations to ‘play the nationality card’ to their advantage.

In discussing the idea of a ‘global state’, Neil Davidson maintains that national states are needed in order to enable particular national capitalist classes to compete against each other, and states will require territorial limits “to be able to distinguish between those capitals who will receive its protection and support, and those who will not”.<sup>162</sup> The prevalence of corporate migration

---

<sup>157</sup> Bernasconi-Osterwalder & Johnson (eds) *International Investment Law and Sustainable Development*, p. 35.

<sup>158</sup> Van Harten, ‘Private Authority and Transnational Governance’, p. 601; Bernasconi-Osterwalder & Johnson (eds) *International Investment Law and Sustainable Development*, pp. 36-41.

<sup>159</sup> Van Harten, ‘Private Authority and Transnational Governance’, p. 600-601.

<sup>160</sup> August Reinisch, ‘The Proliferation of International Dispute Settlement Mechanisms: The Threat of Fragmentation vs. the Promise of a More Effective System? Some Reflections From the Perspective of Investment Arbitration,’ in Isabelle Buffard & James Crawford, et al (eds) *International Law between Universalism and Fragmentation* (The Netherlands: Koninklijke Brill, 2008), p. 116.

<sup>161</sup> Van Harten, ‘Private Authority and Transnational Governance’, p. 601.

<sup>162</sup> Neil Davidson, ‘Many Capitals, Many States’, in Alexander Anievas (ed) *Marxism and World Politics: Contesting Global Capitalism* (Abingdon: Routledge, 2010), p. 88.

within the international investment treaty regime casts such notions in doubt. To refer to transnational corporations as nationals of particular states is to miss the point of how they operate to further their political interests. Beyond the benefits of corporate migration itself, investment disputes reveal the dizzying array of ‘nationalities’ through which transnational corporations structure their investments. One tribunal decided to helpfully include a diagram of the corporate structure and its various subsidiaries and jurisdictions as a visual aide “on the assumption that this lengthy chain might confuse readers of the award”.<sup>163</sup> Another tribunal struggled with the question of determining who the ultimate owner of the investment was in the first place, given that the investment in Bulgaria had been made through holding companies in a variety of secrecy jurisdictions and tax havens – via Cyprus, the Seychelles, the British Virgin Islands and the Bahamas – although the tribunal eventually determined that the ultimate owner was probably the French claimant in the case.<sup>164</sup> When the investor lost, the state could not enforce the reimbursement of some of its arbitral costs because the Cypriot company did not hold any funds to speak of.<sup>165</sup> The ways that corporate nationality operates in the context of international investment law serves as a microcosm of corporate nationality in global politics more widely, and makes the idea of ‘national capital’ increasingly difficult to sustain. Furthermore, contra Davidson, states do not seem particularly inclined to “distinguish between those capitals who will receive its protection and support, and those who will not” – most are content to allow their treaties to serve as “portals” through which corporations from around the world can bring legal challenges against states, and even those who have introduced ‘denial of benefits’ clauses do not seek to discourage genuine subsidiaries of transnational corporations, but only mailbox companies.

This section has demonstrated that corporations can effectively enforce and assert the rights afforded to them by international investment law through international arbitration. In respect to the WTO, the IMF and the World Bank, B.S. Chimni observes, “[t]he usual lament that international laws lack enforcement mechanisms does not apply to these institutions. They do

---

<sup>163</sup> Peterson’s interpretation of the tribunal’s intention, in respect to *Societe General v. Dominican Republic*, in Luke Eric Peterson, ‘Analysis 1: Multi-Layered Corporate Structure and \$2 Purchase Price Do Not Preclude Claim Against Dominican Republic’, *Investment Arbitration Reporter* (9 October 2008); see also the similarly complex chart in *Aguas del Tunari, v. Bolivia*, *Decision on Respondent’s Objections to Jurisdiction*, para. 71.

<sup>164</sup> *Plama Consortium Limited v. Republic of Bulgaria*, *Decision on Jurisdiction*, ICSID Case No. ARB/03/24 (8 February 2005).

<sup>165</sup> Luke Eric Peterson, ‘Analysis: Gov’ts Have No Success in Forcing Claimants to Post Security While Treaty Arbitrations Are Ongoing’, *Investment Arbitration Reporter* (10 February 2009).

not merely bark, they also bite.”<sup>166</sup> The same applies to international investment law. The very institutional set-up furthermore ensures that this legal regime is closely attuned to the needs of corporations and inherently unsympathetic towards the needs of states – or more accurately, the needs of social groups within those states. This section has also shown that the roots of international investment law in the pre-globalization period does not imply that the social forces that underpin this field of law have remained unchanged. The historic beneficiary and agent behind the international investment regime was a capitalist class embedded within and dependent upon its ‘home state’. The current beneficiary is a transnational capitalist class, which has subtly transformed this legal regime so that corporations do not require the direct support of their home states, and so that, to cite Schill, within this regime the “nationality [of a corporation] is becoming increasingly irrelevant”.<sup>167</sup>

### **The Global Politics of International Investment Law**

A recent book on the WTO, the IMF and the World Bank is aptly entitled ‘Unholy Trinity’,<sup>168</sup> duly capturing the view of many on the ‘alter-globalization’ left that these three institutions are the political pillars of an unjust global economic order. These three organizations also figure most prominently amongst the institutions highlighted by William Robinson as making up the supranational dimension of an emerging ‘transnational state’, that ‘congeals’ the interests of a transnational capitalist class.<sup>169</sup> The burgeoning international investment regime is rarely mentioned in this context, and this thesis seeks to illustrate that this is an unfortunate omission.<sup>170</sup> If the empirical argument put forward in the other chapters is accepted, then international investment law is an important pillar of a global order that supports a transnational capitalist class.

The aim of this section is to understand the role of international investment law vis-à-vis other global and national political structures and therefore to situate this field of law within that wider global order. In order to do so, it draws upon Robinson’s concept of a ‘transnational state’.

---

<sup>166</sup> B.S. Chimni, ‘International Institutions Today: An Imperial Global State in the Making’, *European Journal of International Law*, 15:1 (2004), p. 7.

<sup>167</sup> Schill, *The Multilateralization of International Investment Law*, p. 221.

<sup>168</sup> Richard Peet, *Unholy Trinity: The IMF, World Bank and WTO*, 2<sup>nd</sup> ed (London: Zed Books, 2009).

<sup>169</sup> William Robinson, *A Theory of Global Capitalism: Production, Class, and State in a Transnational World* (Baltimore: Johns Hopkins University Press, 2004); Robinson, ‘Social Theory and Globalization’, pp. 157-200.

<sup>170</sup> In addition the WTO, the IMF and the World Bank, Robinson mentions the Bank for International Settlements, the Group of 7, the UN, the OECD, the EU, NAFTA and ASEAN. Robinson, *A Theory of Global Capitalism*, p. 88.

Beyond Robinson's own work, the concept has not been developed further by other scholars – and it has encountered strong opposition from other Marxists<sup>171</sup> – but this section is based on a 'hunch' that this concept is helpful in allowing us to better understand contemporary global politics, and it seeks to articulate that hunch in more definite terms. The first sub-section will seek to understand Robinson's own definition of the concept, and it will thereafter propose certain adjustments to it. In contrast to certain expectations that the transnational state will acquire a more centralized and coherent institutional form, it is argued that different institutions *within* the transnational state are separated from each other in ways that are conducive to the transnational capitalist class. The subsequent three sub-sections will look at three important sets of 'boundaries' within world politics: the 'boundaries' between national states, the 'boundary' between the national and the supranational spheres, and the 'boundaries' between different supranational institutions. Each sub-section will situate international investment law within wider global politics and, in doing so, will offer certain tentative ideas on how different institutions within the transnational state relate to each other. The concluding section will explain why it may still be helpful to conceive of this fragmented and decentralized political structure as *one* transnational state.

### ***The Concept of a 'Transnational State'***

For the concept of a 'transnational state' to make sense, a particular concept of the 'state' itself is required. Robinson defines the state as "the congealment of a particular and historically determined constellation of class forces and relations" that is always "embodied in sets of political institutions".<sup>172</sup> This definition is consistent with the definition of the state as a social structure that was set out in the previous theoretical chapter, but there is no direct explanation in Robinson's own work as to what distinguishes a state from other social structures, aside from the fact that social forces are 'congealed' in *political* institutions. Robinson does not explicitly define 'political', but in line with other Marxist scholars he defines capitalism itself by the "separation of the economic from the political".<sup>173</sup> Other scholars further explain that in capitalism "politics is abstracted out of the relations of production, and order becomes the task

---

<sup>171</sup> E.g. Andreas Bieler & Adam David Morton, 'The Will-O'-The-Wisp of the Transnational State', *Journal of Australian Political Economy*, 72 (2013-2014), pp. 23-51; Paul Cammack, 'Forget the Transnational State', *Papers in the Politics of Global Competitiveness*, 3 (2007), available at {[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1526528](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1526528)} accessed 1 May 2012.

<sup>172</sup> Robinson, 'Social Theory and Globalization', p. 165.

<sup>173</sup> *Ibid*, p. 163.

of a specialised body – the state”, and observe that the political sphere involves a “moment of coercion”.<sup>174</sup> It would be theoretically consistent with Robinson’s argument to suggest that the state is distinguished from other social structures by its political task of maintaining and enforcing a particular social order that is advantageous to the social groups whose agency it ‘congeals’. The state, in Robinson’s work, is therefore from the outset defined neither by demarcated boundaries, by a monopoly on the legitimate use of violence, nor any of the other attributes that other theoretical approaches commonly ascribe to the state. The state is rather a political structure whose particular characteristics can vary widely from one period to another, as long as it serves to maintain and enforce a particular social order.

The character of a particular state is in turn defined a) by the particular constellation of social forces that have been ‘congealed’ and b) the particular set of political institutions that these are embodied in.<sup>175</sup> Robinson suggests that in the previous stage of capitalism the state was a) the ‘congealment’ of the interests of national capitalist classes and other subordinate groups in b) territorially defined nation-states. In contrast, the transnational state is defined a) by the ‘congealment’ of a transnational capitalist class and other subordinate social groups, in b) a much broader set of political institutions, including *both* transformed national states (which now support transnational rather than national capital) *as well as* supranational institutions.<sup>176</sup> This is not to suggest that a transnational capitalist class consciously set out to create a transnational state, but more narrowly that it has acted to further its political interests, and that over time its agency has subtly transformed different political institutions so that they increasingly congeal its interests, rather than the interests of other social groups. This ‘congealment’, in turn, ensures that when different social groups seek to act through the structures of the transnational state today, that structure is already ‘strategically selective’ in favour of projects and agents that support global capitalism.<sup>177</sup>

The explanatory emphasis of Robinson’s work tends to be on a) above, namely on how political institutions (both supranational and national) have been transformed so as to “maintain, defend

---

<sup>174</sup> Geoffrey Kay & James Mott, cited in Peter Burnham, ‘Class Struggle, States and Global Circuits of Capital’, in Mark Rupert & Hazel Smith (eds), *Historical Materialism and Globalization* (London: Routledge, 2002), p. 119; Wood, ‘Global Capital, National States’, p. 29.

<sup>175</sup> Robinson does explicitly break the state down into (a) and (b) to emphasize that the state is both in their unity, but for clarity I have reformulated (a) and (b) slightly here and hope it remains consistent with his theory. Robinson, *A Theory of Global Capitalism*, p. 99.

<sup>176</sup> Robinson, ‘Social Theory and Globalization’, p. 165.

<sup>177</sup> On the strategic selectivity of the state, see Bob Jessop, *The Future of the Capitalist State* (Cambridge: Polity Press, 2002), p. 40.



and advance the emergent hegemony” of a transnational capitalist class.<sup>178</sup> If the present argument that international investment law supports a transnational capitalist class is accepted, along with Robinson’s theory, then international investment law is by definition a component of a transnational state. Less explanatory emphasis has been placed on b) above, namely on how these become congealed in a *particular set* of political institutions. This is the question that will be addressed in this section: how do different political institutions relate to each other, and how do they form *one* transnational state? The starting point of the discussion is that while Robinson’s theory is not founded on the premise that the transnational state will necessarily come to adopt a more coherent or centralized institutional form, he nevertheless at times seems to hold the expectation that it will. For instance, he acknowledges that “[t]here is no clear chain of command and division of labor within the [transnational state] apparatus, nor anything resembling, *at this time*, the type of internal coherence of national states, *given the embryonic stage of the process*.”<sup>179</sup> If the transnational state lacks internal coherence as a consequence of “the embryonic stage of the process”, there is an expectation that it is moving towards a more coherent form. This is supported by remarks elsewhere that the transnational state “has *not yet* acquired any centralized institutional form”, and also that global institutions are “gradually supplanting national institutions”.<sup>180</sup> Robinson’s later work seems even less certain on this point – more recently he observes that “the network, moreover, has not yet (and may never) acquire any centralized form” – but it may be these tendencies in his own argument that lead critics to call the transnational state a “global-state-in-the-making”.<sup>181</sup>

The aim of this section is to understand the wider global political context and how international investment law is situated within it. The section supports the theory of a transnational state, but it also more directly raises the question of what institutional form that transnational state is inclined to take, and in doing so proposes certain adjustments to Robinson’s theory. Drawing upon international investment law, the section suggests that a transnational capitalist class is exercising its agency in such a way that we should expect the transnational state to take a particular institutional form. However, the institutional form that we should expect is *neither* the one implicit in Robinson’s own argument, *nor* the one advanced by some of his critics.

---

<sup>178</sup> Robinson, *A Theory of Global Capitalism*, p. 100.

<sup>179</sup> (My emphasis) Robinson, ‘Social Theory and Globalization’, p. 181.

<sup>180</sup> Robinson, *A Theory of Global Capitalism*, p. 88, 100; Robinson, ‘Social Theory and Globalization’, p. 166.

<sup>181</sup> William Robinson, *Latin America and Global Capitalism: A Critical Globalization Perspective* (Baltimore: Johns Hopkins University Press, 2010), p. 34; Robert Went, ‘Globalization: Towards a Transnational State? A Sceptical Note’, *Science & Society*, 65:4 (2001-2002), p. 489.

Robinson sometimes seems to expect the transnational state to take a more coherent and centralized institutional form, while some of his critics seem to suggest that the emergence of a transnational capitalist class has not changed the overall framework of inter-state politics. In contrast to these two approaches, this section suggests that the current seemingly fragmented and decentralized global order – distinguished by a multitude of different institutions operating at different levels – is not a stepping stone to a more centralized and coherent transnational state, but may already be indicative of the institutional form that the transnational state is disposed to take.

In his more recent work, Robinson sometimes describes the transnational state as currently composing a “loose network” of different political institutions,<sup>182</sup> but when he provides support for his theory the emphasis tends to be on the different institutions themselves – on what could be conceived as the ‘nodal points’ in the network. This section further suggests that the agency of a transnational capitalist class is not only congealed in the different institutions that make up the network, but also in the structure of the network itself. It suggests that different political institutions relate to each other in specific ways, and that the particular connections and apparent separations within the network are critical for the transnational state to continue to maintain a political order conducive to a transnational capitalist class. It will be argued that, internal to the transnational state, there are (for lack of a better word) ‘boundaries’ between its constituent parts – vertically between its national and supranational spheres, and horizontally within each – and that each of these three sets of boundaries supports a transnational capitalist class in particular ways.<sup>183</sup> The second sub-section below will consider the horizontal boundary between states (i.e. the existence of the nation-state system); the third sub-section will consider the vertical boundary between the national and supranational spheres; and the fourth sub-section will consider the horizontal boundaries between different institutions at the supranational level. These ‘boundaries’ predate the emergence of a transnational capitalist class, but just as specific institutions have been transformed through its collective agency to support its emerging class interests, so have the nature of the boundaries between them. The key to understanding global politics today lies in the nature of these boundaries. It is through the specific ways in which different political institutions are both connected and separated that the transnational state has come to maintain and to enforce the interests of a transnational capitalist class.

---

<sup>182</sup> Robinson, *Latin America and Global Capitalism*, p. 34.

<sup>183</sup> ‘Vertical’ and ‘horizontal’ are only intended as common imageries for helping to make sense of these ‘boundaries’.

### *The Inter-state System and Structural Power*

Marxist theory has frequently emphasized the importance of the first of these boundaries, namely between a multitude of territorial states within an inter-state system.<sup>184</sup> Robinson's theory does not go so far as to suggest that the emergence of a transnational state is leading to the disappearance of boundaries between national states; indeed, he argues that the "continued existence of the nation-state system is a central condition for the power of transnational capital".<sup>185</sup> In the previous stage of capitalism, the historical emergence of centralized, coherent national states that ruled over a demarcated territory had enabled people to engage in a struggle for democratic representation and to organize collectively for a redistribution of resources. National capitalist classes had therefore been "forced [...] to reach a historic compromise with working and popular classes", resulting in the 'welfare state' of the North and the 'developmental state' of the South.<sup>186</sup> The transnationalization of capital was as such in the first instance largely a response to the fact that the working classes of many countries were making strident gains against their own national capitalist classes.<sup>187</sup> The emergence of global capitalism has as such enhanced the structural power of the capitalist class vis-à-vis other social forces.

The horizontal fragmentation of territorial states allows a transnational capitalist class to utilize its newfound mobility in such a way as to play some states off against others and to exercise a competitive pressure on national states to adopt favourable policies. The threat by transnational capital to leave or not to enter a state can encourage a 'race to the bottom' amongst states in relation to the cost of labour, taxation, or regulations in the public interest.<sup>188</sup> The promise to enter a state in response to certain incentives can also induce a 'race to the top' in regulations

---

<sup>184</sup> E.g. Davidson, 'Many Capitals, Many States'; Ellen Meiksins Wood, *Empire of Capital* (London: Verso, 2003).

<sup>185</sup> Robinson, *Latin America and Global Capitalism*, p. 36; Robinson, 'Social Theory and Globalization', p. 169.

<sup>186</sup> Robinson, 'Social Theory and Globalization', p. 168.

<sup>187</sup> *Ibid.*, p. 169.

<sup>188</sup> The logic behind the 'race to the bottom' is compelling, but the empirical evidence is less certain. The evidence in respect to the cost of labour and taxation is more certain, while the effect on environmental or safety regulation is less certain. In terms of labour, research has found that lower wage rates were the main reason why 70% of surveyed companies were moving activities out of the U.S. See, The Economist, 'Special Report: Outsourcing and Offshoring' (19 January 2013), pp. 15-16; The Economist, 'Special Report: Companies and the State' (22 February 2014), pp. 5-15. On the environment and the difficulty of capturing the phenomenon of pollution havens even if it were to exist, see Jennifer Clapp, 'What the Pollution Havens Debate Overlooks', *Global Environmental Politics*, 2:2 (2002), pp. 11-19; Eric Neumayer, 'Do Countries Fail to Raise Environmental Standards? An Evaluation of Policy Options Addressing "Regulatory Chill"', *International Journal of Sustainable Development*, 4:3 (2001), pp. 231-244.

that favour transnational capital. In order for transnational capital to exert a competitive pressure on individual states to do its bidding, it is clear that a multiplicity of states is required, but this multiplicity of states simultaneously ensures that resistance to such competitive pressures is to a large extent contained within precisely the national states that are subject to such structural pressures. If a transnational state is designed to support a transnational capitalist class, it should therefore not be expected to take an institutional form that dismantles the very national boundaries that it relies on. Indeed, there is no indication that a transnational capitalist class is exercising its agency so as to make that happen; Sol Picciotto observes that transnational corporations “have been the staunchest defenders of the national state”.<sup>189</sup> The contention that the continued existence of boundaries between different territorial states supports a transnational capitalist class should be fairly uncontroversial, and this section will instead focus on the other two sets of boundaries previously identified.

### ***Supranational Institutions and the Limits to Democracy***

The second ‘boundary’ internal to the transnational state is the one between the national and the supranational spheres of politics. Robinson contends that national states are not external to the transnational state, but have been “transformed into proactive instruments for advancing the agenda” of a transnational capitalist class and are thereby “becoming incorporated into [the transnational state] as component parts”.<sup>190</sup> Robinson has therefore emphasized the resilience of national state institutions within global capitalism, but what accounts for the growing influence of supranational institutions? In a long critique of Robinson’s framework, Paul Cammack questions,

“[his] claim that ‘transnational blocs became hegemonic in the vast majority of countries and set out to thoroughly transform their countries, *using national state apparatuses* to advance globalization and to restructure and integrate them into the global economy’ [...] If so, it follows directly that *there is no need for a transnational state at all* [...] Robinson has been too absorbed by banging his head against the imaginary brick wall of ‘state centrism’ to notice that his own argument demolishes the case for a transnational state”.<sup>191</sup>

Cammack questions why supranational institutions are still required, if a transnational capitalist class has already captured and transformed national states so that these act in its interests.

---

<sup>189</sup> (Italics removed) Sol Picciotto, ‘The Internationalisation of the State’, *Capital & Class*, 15:1 (1991), p. 46.

<sup>190</sup> Robinson, ‘Social Theory and Globalization’, p. 173.

<sup>191</sup> (Emphasis in original) Cammack, ‘Forget the Transnational State’, p. 9.

Interestingly, this critique is not directly addressed in Robinson's reply, nor explicit in his other work.<sup>192</sup> Robinson argues that in certain respects supranational institutions are "gradually supplanting national institutions" and he allocates them a number of functions "traditionally associated with the national state".<sup>193</sup> This includes compensation for market failure, money creation, legal guarantees for property rights, and the provision of public goods.<sup>194</sup> However, he provides no explicit justification for why supranational institutions, rather than the transformed national states, have come to undertake these functions.

This sub-section suggests that supranational institutions have not only emerged to usurp the functions of national states – and that they are not simply designed to ensure coordination between them – but that an important reason for the growing influence of supranational institutions is the need to place legal and political constraints on what (democratic) national states can do. Cammack questions the need for a supranational element to the transnational state if a transnational capitalist class has already gained dominance within national states, but the missing element in his analysis is the question of change over time. National states, while successfully captured by a transnational capitalist class in the 1980s and 1990s, are inherently prone to being targets of resistance. The supranational institutions that they nurtured at that time subsequently serve to place durable legal and political constraints on what national states can do if captured by opposing social groups. Within the larger structure of a transnational state, the national state is therefore retained as a central battleground for different social forces, but the supranational dimension of the transnational state serves to limit the field of possibilities open to national states, or at least to raise the costs of deviance from the path charted by a transnational capitalist class.

This understanding combines Robinson's framework with the insights of Stephen Gill's work on 'new constitutionalism'.<sup>195</sup> Just as constitutionalism was about 'limited government', Gill argues that economic neoliberalism has in recent years been complemented by the emergence of political and juridical constitution-like constraints to "prevent *future* governments from

---

<sup>192</sup> William Robinson, 'Global Capitalism, Social Science, and Methods of Critique: Response to Cammack's 'Forget the Transnational State'', *Geopolitics, History, and International Relations*, 1:2 (2009), pp. 98-108

<sup>193</sup> Robinson, 'Social Theory and Globalization', p. 166, 181.

<sup>194</sup> Robinson, 'Social Theory and Globalization', p. 181.

<sup>195</sup> Stephen Gill, 'Constitutionalizing Inequality and the Clash of Globalizations', *International Studies Review*, 4:2 (2002), pp. 47-65; Stephen Gill, 'Globalisation, Market Civilisation, and Disciplinary Neoliberalism', *Millennium: Journal of International Studies*, 24:3 (1995), pp. 399-423; Stephen Gill, 'New Constitutionalism, Democratisation and Global Political Economy', *Global Change, Peace & Security*, 10:1 (1998), pp. 23-38.

undoing commitments to a disciplinary neoliberal pattern of accumulation”.<sup>196</sup> To incorporate Gill’s insights into Robinson’s framework as adjusted above, it can be said that the supranational element of the transnational state is designed to “lock[...] in future governments” through “a series of precommitment mechanisms”.<sup>197</sup> This vertical dual structure of the transnational state is designed to enable states that have been captured by transnational capital to impose constraints upon themselves that – policed through supranational institutions – will subsequently be difficult to change. A transnational capitalist class is thus utilizing national states to *advance* its interests, and the supranational dimension of the transnational state to *enforce* them in the event of subsequent resistance from below. It is in this sense that the transformed national states and supranational institutions have complementary functions within the larger structure of a transnational state.

For this argument in respect to the conducive separation between national states and supranational institutions to hold up, three conditions will need to be met. Firstly, there will need to be supranational ‘precommitment mechanisms’ that ‘lock in’ the interests of a transnational capitalist class in the event of a challenge by opposing social groups at the national level. Drawing upon Gill’s work, David Schneiderman argues that international investment law fulfils precisely this function - it “institutionalizes a legal incapacity to act” in ways that undermine the interests of transnational corporations.<sup>198</sup> The notion of ‘new constitutionalism’ coheres with how arbitrators themselves see the purpose of international investment law; to cite one arbitrator in *S.D. Myers v. Canada*, investment agreements “are comparable in many ways to [...] a country’s constitution. They restrict the ways in which governments can act and they are very hard to change”.<sup>199</sup> Investment treaties are by definition intended to pre-commit national states to treat corporations in a favourable manner, as will be discussed further in Chapter 3. Secondly, these precommitment mechanisms need to be backed by credible means of enforcement, or they could not be said to be ‘locked in’, and the previous section of this chapter has demonstrated that international investment law fulfils that requirement. Thirdly, the final requirement for the argument presented here to hold is that the precommitment

---

<sup>196</sup> (My emphasis) Gill, ‘Constitutionalizing Inequality and the Clash of Globalizations’, p. 47-48.

<sup>197</sup> Ibid, p. 47-48.

<sup>198</sup> Schneiderman, *Constitutionalizing Economic Globalization*, p. 17; see also, Iannos Glinavos, ‘Neoliberal Law: Unintended Consequences of Market-Friendly Law Reforms’, *Third World Quarterly*, 29:6 (2008), p. 1087-1099.

<sup>199</sup> *S.D. Myers, Inc. v. Government of Canada*, *Separate Opinion by Dr Bryan Schwartz*, UNCITRAL Ad Hoc Arbitration (12 November 2000), para. 34; David Schneiderman, ‘Legitimacy and Reflexivity in International Investment Arbitration: A New Self-Restraint? *Oñati Socio-Legal Series*, 1:4 (2011), p. 10.

mechanisms themselves should be fairly durable. It has already been shown in the previous section of this chapter that states cannot simply *break* international investment law to introduce policies that benefit other social groups, but an obvious alternative route to meeting their demands is to change or rescind the international investment treaties themselves. What is there to prevent a national state, that has come to represent a different set of societal interests, from simply withdrawing from the treaties it had previously agreed to?

Investment treaties were indeed initially concluded by states, but the critical point is that they were from the outset designed to place durable constraints on the state policies of subsequent governments. To quote a former Egyptian Finance Minister, the effect of a state signing an investment agreement is, “if anybody in the future wants to go backwards, they cannot”.<sup>200</sup> As stated by a former UK Trade Minister, investment agreements thereby “help lock in individual countries’ own investment reform efforts”.<sup>201</sup> Upon riding a wave of indigenous protests into the presidential office, Bolivian president Evo Morales quickly noted that the constraints imposed by the economic treaties signed by his predecessors made him “feel like a prisoner” despite occupying the highest political office in the country.<sup>202</sup> Along with other Latin American countries influenced by social movements from below, Bolivia has revolted against the international regime of investment protection. In response, UNCTAD published a report on the ability to terminate agreements that carried the sub-heading “not so fast”.<sup>203</sup> The essential trick of the game is precisely that states cannot immediately withdraw from investment treaties. Investment agreements can normally only be renegotiated or terminated after a minimum duration or at specific intervals, and furthermore normally contain ‘survival clauses’ that guarantee corporations with existing investments treaty protection after the termination of the treaty. The Energy Charter Treaty stipulates a 6-year minimum term before the treaty can be terminated, and another 20 years of treaty protection for existing investments at the date of

---

<sup>200</sup> This was said in reference to a US-Egyptian free trade and investment agreement. Yousef Boutros-Ghali, cited in Schneiderman, *Constitutionalizing Economic Globalization*, p. 5.

<sup>201</sup> This was said in reference to the failed attempt to introduce a Multilateral Agreement on Investment, but applies to investment agreements more generally. Baroness Symons, cited in Friends of the Earth, *Briefing: Investment and the WTO – Busting the Myths* (2003), p. 19 available at {[http://www.foe.co.uk/resource/briefings/investment\\_and\\_the\\_wto\\_bust.pdf](http://www.foe.co.uk/resource/briefings/investment_and_the_wto_bust.pdf)} accessed 1 May 2012.

<sup>202</sup> Paul Mason, ‘Evo Morales ‘Padlocked’ in Palace’, *BBC News* (5 April 2006), available at {<http://news.bbc.co.uk/1/hi/world/americas/4878466.stm>} accessed 15 February 2013; Anderson & Grusky, *Corporate Investor Rule*, p. 1.

<sup>203</sup> UNCTAD, ‘IIA Issues Note: Denunciation of the ICSID Convention and BITS: Impact on Investor-State Claims, 2 (December 2010), p. 3, available at {[http://unctad.org/en/docs/webdiaeia20106\\_en.pdf](http://unctad.org/en/docs/webdiaeia20106_en.pdf)} accessed 1 May 2012.

termination.<sup>204</sup> To take a current example, the recently negotiated bilateral investment treaty between Canada and China stipulates a 16-year minimum term, and adds another 15 years of treaty protection for existing investments.<sup>205</sup> Restrictive rules of termination, along with survival clauses, ensure that a state's decision to withdraw from a treaty is "of little immediate significance".<sup>206</sup> Schneiderman observes that the intended effect of investment agreements is "to slow down or paralyze certain political processes", and the rules on termination allows a transnational capitalist class many years – even decades – to reassert its power via the national state before the effect of resistance is felt.<sup>207</sup> If the Canada-China treaty is ratified, it will take social forces critical of global capitalism a total of 31 years to legally undo commitments made by governments acting on behalf of a transnational capitalist class today. During this time, the agreement remains in force and continues to constrain governments in their formulation of public policies.

In Gill's theory of 'new constitutionalism', no distinction is made between the constitution-like constraints that are introduced at the international and at the domestic level. There is nevertheless something quite distinctive about the international constraints that may be lost in drawing such a comparison. While domestic constraints will require a larger legislative majority and a more determined administrative effort to change, international constraints are beyond the state's legislative powers altogether. Non-governmental organizations that have come to oppose international investment law often appeal to sovereignty – the sovereignty of the state to introduce new public interest measures – but the transnational capitalist class is not seeking to undermine sovereignty.<sup>208</sup> Daniel Price, a prominent arbitrator, reiterates that the signature of

---

<sup>204</sup> Energy Charter Treaty (adopted 17 December 1994, entered into force 16 April 1998), art. 47, available at {<http://international.energycharter.org/iec/what-is-the-charter/>} accessed 25 March 2015.

<sup>205</sup> Canada – People's Republic of China, *Agreement for the Promotion and Protection of Investments* (finalized for signature in 2012), available at {<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/china-text-chine.aspx?lang=eng&view=d>} accessed 15 February 2013; Gus Van Harten, 'China Investment Treaty: Expert Sounds Alarms in Letter to Harper', *The Tyee* (16 October 2012), available at {<http://thetyee.ca/Opinion/2012/10/16/China-Investment-Treaty/>>} accessed 11 February 2013.

<sup>206</sup> UNCTAD, 'IIA Issues Note: Denunciation of the ICSID Convention', p. 3.

<sup>207</sup> David Schneiderman, 'Investment Rules and the Rule of Law', *Constellations*, 8:4 (2001), p. 522.

<sup>208</sup> For instance, Public Citizen, 'The Ten Year Track Record of the North American Free Trade Agreement: Undermining Sovereignty and Democracy', p. 1, available at {<http://www.citizen.org/publications/publicationredirect.cfm?ID=7295>} accessed 5 September 2013; Week of Action Against BITs and for an Alternative Investment Regime, *Call for An Alternative Investment Model: Final Declaration* (Brussels: 6 November 2011), available at {<http://www.s2bnetwork.org/issues/eu-investment-policy/>} accessed 23 March 2015; International Trade Union Confederation, Amigos de le Tierra América Latina y el Caribe, et al, 'Open Letter to World Bank Officials on Pacific Rim-El Salvador Case' (12 December 2011), available at {[http://www.ips-dc.org/open\\_letter\\_to\\_world\\_bank\\_officials\\_on\\_pacific\\_rim-el\\_salvador\\_case/](http://www.ips-dc.org/open_letter_to_world_bank_officials_on_pacific_rim-el_salvador_case/)} accessed 23 March 2015.



international investment agreements is to the contrary “an exercise of sovereignty”.<sup>209</sup> The strategy of a transnational capitalist class relies on the *present* sovereignty of the state to sign agreements that allow supranational institutions restrain its own *future* powers. A common objection to the very idea of a ‘supranational institution’ is that these institutions were initially created by states, and the assumption that follows is that they remain under state control. The point, however, is that once such supranational institutions have been created, they can acquire, temporally, a relatively independent existence and can thereby place constraints on the very states that created them. It is true that it is the national state – democratic or otherwise, and with or without public knowledge – that originally consents to an investment regime that protects transnational capital. It is nevertheless also true that, as Schneiderman observes, it is the supranational element that “bind[s] states far into the future, whatever political combinations develop at home to counteract it”.<sup>210</sup>

The introduction of this thesis indicated that international investment law involves a struggle for the future. For a transnational capitalist class, it is a struggle to place limits on the future; to cite Schneiderman, international investment law is “concerned with pinning states down [...] to the narrowest field of political possibilities”.<sup>211</sup> Within the wider framework of a transnational state, national states undoubtedly continue to provide a forum for subordinate classes to vent their grievances, but the supranational element of the transnational state imposes limits on what national states can do to meet their demands. This is not to suggest that the resistance of other social forces has become insignificant, but that the very structure of the transnational state is designed to undermine such resistance.

### ***The Supranational Sphere and Hidden Asymmetries***

The final set of boundaries considered here are those within the supranational sphere of politics, and more specifically the existence of a multitude of different supranational institutions for different purposes. This sub-section draws upon a parallel discussion on the ‘fragmentation’ of

---

<sup>209</sup> Daniel Price, ‘Chapter 11 – Private Party vs. Government, Investor-State Dispute Settlement: Frankenstein or Safety Valve?’, *Canada-United States Law Journal*, 26 (2000), p. 113; See also Charles Brower & Sadie Blanchard, ‘From “Dealing in Virtue” to “Profiting from Injustice”’: The Case Against “Re-Statification” of Investment Dispute Settlement’, *Harvard International Law Journal*, 55 (January 2014), pp. 45-59.

<sup>210</sup> Schneiderman, *Constitutionalizing Economic Globalization*, p. 6.

<sup>211</sup> Schneiderman, ‘Investment Rules and the Rule of Law’, p. 521.

international law.<sup>212</sup> The potential problems of fragmentation were highlighted by the President of the ICJ in three consecutive speeches to the UN General Assembly, and one concluded with the warning that “the proliferation of courts presents us with risks, the seriousness of which it would be unwise to underestimate”.<sup>213</sup> Lawyers have expressed concern that the proliferation of separate courts and tribunals can result in overlapping jurisdictions and a lack of overall coherence, which in turn detracts from the distinctly legal character of international law.<sup>214</sup> Bruno Simma, another ICJ judge, nevertheless observes that fears of fragmentation have in recent years given way to a more positive appreciation of the increasing ‘diversity’ of international law.<sup>215</sup> This sub-section draws upon this debate, but will not appraise the positive or negative effects of fragmentation on international law itself, but rather its effects on different social groups. By showing how international investment law is situated vis-à-vis other supranational institutions, it illustrates a few (distinctly non-exhaustive) ways in which the fragmentation of the supranational sphere into a wide variety of distinct institutions serves to empower a transnational capitalist class at the expense of other social groups.

International investment law is one of many such distinct legal regimes, and it is designed for the singular purpose of protecting corporations. This is not an accident; transnational corporate lobbies have worked hard to ensure that other legal rules that relate to foreign direct investment, but that are disadvantageous to corporations, are not included in these treaties. In respect to proposed investment treaty clauses to ensure that states do not lower regulations to attract foreign companies to invest, the U.S. Chamber of Commerce made clear, “BITs aren’t designed nor should they be used to achieve other important objectives such as raising labor and environmental standards, which are the ambit of other international institutions and agreements”.<sup>216</sup> The existence of self-contained and distinct institutions and legal regimes for

---

<sup>212</sup> See Martti Koskenniemi & Päivi Leino, ‘Fragmentation of International Law? Postmodern Anxieties’, *Leiden Journal of International Law*, 15 (2002), p. 553-579.

<sup>213</sup> Ibid, p. 553-554; Gilbert Guillaume, ‘The Proliferation of International Judicial Bodies: The Outlook for the International Legal Order’, *Speech by the President of the International Court of Justice to the Sixth Committee of the General Assembly of the United Nations* (27 October 2000), available at {<http://www.icj-cij.org/court/index.php?pr=85&pt=3&p1=1&p2=3&p3=1>} accessed 17 February 2013.

<sup>214</sup> Guillaume, ‘The Proliferation of International Judicial Bodies’; Koskenniemi & Leino, ‘Fragmentation of International Law?’, pp. 553-579.

<sup>215</sup> Bruno Simma, ‘Fragmentation in a Positive Light’, *Michigan Journal of International Law*, 25 (2004), p. 847; Martti Koskenniemi, as the chair of the UN International Law Commission study on the topic, has been instrumental in furthering this shift. See Koskenniemi & Leino, ‘Fragmentation of International Law?’, pp. 553-579; Eyal Benvenisti & George Downs, ‘The Empire’s New Clothes: Political Economy and the Fragmentation of International Law’, *Standard Law Review*, 60 (2007-2008), pp. 595-632.

<sup>216</sup> U.S. Department of State, ‘A Statement from Sean Heather, Executive Director, International Division, U.S. Chamber of Commerce’, *Report of the Subcommittee on Investment of the Advisory Committee on International*

different purposes allows a transnational capitalist class to demand strong rights within one institution, and to shuffle off rules that benefit other social groups to another institution, while simultaneously lobbying against strong standards in that other institution.<sup>217</sup> Similarly, UNCTAD rightly observes that business lobbies' strong advocacy for international rights to benefit them contrasts with their "aversion to binding legal standards governing corporate operations".<sup>218</sup> Over a decade after transnational corporations had acquired the right to unilaterally take sovereign states to international tribunals to demand compensation for the infringement of the extensive rights it holds under international investment law, the UN Secretary-General's Special Representative on Multinational Corporations and Human Rights (SGSR) still declared that corporations could not themselves be subject to binding codes of conduct because they lack international legal personality.<sup>219</sup> The SGSR had been subject to strong lobbying from corporations in the writing of the report, and subsequently noted that "[i]nternational business responded favorably" to its conclusions, while leading NGOs were strongly critical.<sup>220</sup> The fact that different issues are negotiated in different institutional settings allows a transnational capitalist class to avoid flaunting its simultaneous demands for extensive rights and minimal responsibilities, or its demands for strong protection for its foreign direct investments and weak protection for the environment that is adversely affected thereby. Institutional fragmentation prevents the political compromises that alternative social forces would conceivably try to force upon transnational corporations within a more centralized negotiating setting, within which competing interests were considered side-by-side.

The fragmentation of the supranational sphere also conceals the extent to which a transnational capitalist class has acquired benefits not extended to other social groups in similar circumstances. The most direct comparison can be drawn between investment law and human rights law, since both are designed "for the benefit of individual (or private) interests".<sup>221</sup> Yet

---

*Economic Policy Regarding the Model Bilateral Investment Treaty: Annexes* (30 September 2009), available at {<http://www.state.gov/e/eb/rls/othr/2009/131118.htm#4>} accessed 17 February 2013.

<sup>217</sup> As indeed is the case with the environment; Anil Agarwal observes that "corporations influence almost every negotiation on the environment that has taken place under the auspices of the UN", cited in B.S. Chimni, 'An Outline of a Marxist Course on Public International Law', *Leiden Journal of International Law*, 17 (2004), p. 24.

<sup>218</sup> Cited in Friends of the Earth, *Briefing: Investment and the WTO*, p. 22.

<sup>219</sup> Sornarajah, *The International Law on Foreign Investment*, p. 239.

<sup>220</sup> John Ruggie 'Business and Human Rights: The Evolving International Agenda', *American Journal of International Law*, 101 (2007), p. 838; International Chamber of Commerce & the International Organization of Employers, 'The Sub-Commission's Draft Norms, If Put Into Effect, Will Undermine Human Rights, The Business Sector of Society, and the Right to Development', (2004), available at {198.170.85.29/IOE-ICC-views-UN-norms-March-2004.doc} accessed 17 February 2013.

<sup>221</sup> Franklin Berman, 'Evolution or Revolution?', in Chester Brown & Kate Miles (eds), *Evolution in International Treaty Law and Arbitration* (Cambridge: Cambridge University Press, 2011), pp. 660-661.

despite their similarities, the level of protection offered by these two legal regimes differs widely. Firstly, investors have direct recourse to investor-state dispute settlement. This is rare in human rights law, and where it exists – such as under the European Court of Human Rights – it is always coupled with the more onerous requirement to exhaust domestic remedies.<sup>222</sup> Secondly, corporations who receive a favourable monetary award have unprecedented means of enforcing such a judgement against assets held by the state in any of around 150 countries around the world, while human rights courts normally rely on voluntary compliance. Finally, investment tribunals appear to offer stronger standards of substantial protection than human rights tribunals. This is of course difficult to determine, since investment law is designed to protect a person’s property, and human rights law to protect their well-being. However, two recent arbitral awards provide a more direct basis for comparison, and these indicate that investment tribunals may be inclined to offer not just a stronger standard of substantial protection for an investor’s property rights, but a stronger standard of protection for an investor’s *human* rights.<sup>223</sup> In one case, an investor approached an investment tribunal to seek compensation for Romania’s alleged denial of due process under both an investment treaty and the European Convention on Human Rights.<sup>224</sup> The tribunal did not reject the possibility that an investment tribunal could enforce an investor’s rights under a human rights convention, but instead argued that this question was “moot” because the investment treaty provided a “higher and more specific level of protection [...] compared to the more general protections offered to them by the human rights instruments referred above”.<sup>225</sup> The possibility that investment treaties might offer better protection against human rights violations than human rights instruments themselves has recently been confirmed in a case against Yemen. Whilst primarily a contract dispute, the tribunal also found that the host state had failed to protect the managers of the corporation from threats of violence, and that it had further detained them for several days without adequate reason. The tribunal recognized the Claimant’s “stress and anxiety of being harassed, threatened and detained by the Respondent as well as by armed tribes” and awarded moral damages for the “physical duress exerted on the executives”.<sup>226</sup> Charges of

---

<sup>222</sup> Van Harten & Loughlin, ‘Investment Treaty Arbitration as a Species of Global Administrative Law’, p. 132.

<sup>223</sup> This appears to be becoming a more frequent occurrence, but in other cases the tribunals have either found that no rights violation had occurred (*Plama v Bulgaria*), or the case was settled before it reached a decision on the merits (*Trinh Vinh Binh v Vietnam*).

<sup>224</sup> *Spyridon Roussalis v. Romania*, *Award*, ICSID Case No. ARB/06/1 (7 December 2011); Luke Eric Peterson, ‘Analysis: Novel Human Rights Arguments are Raised in Romania Arbitration at ICSID; Tribunal Views BIT Protections as More Protective than European Rights Convention Counterparts’, *Investment Arbitration Reporter* (15 December 2011), available at [http://www.iareporter.com/articles/20111216\\_2](http://www.iareporter.com/articles/20111216_2) accessed 16 August 2012.

<sup>225</sup> *Spyridon Roussalis v. Romania*, *Award*, para. 312.

<sup>226</sup> *Desert Line Project LLC. v. The Republic of Yemen*, *Award*, ICSID Case No. ARB/05/17 (6 February 2008), para. 286.

illegal detention and protection from threats of violence would normally be raised in human rights courts, yet here the claimant would need to exhaust domestic remedies and would not have been equipped with such strong means of enforcement. Most notably, the investment tribunal awarded \$1 million in moral damages, a sum that is exceedingly rare in human rights tribunals, “even for the most egregious of abuses including torture, disappearances, extra-judicial killings”.<sup>227</sup> This suggests that investors, simply by virtue of being members of a transnational capitalist class, can in certain circumstances bypass the more restrictive human rights regime and appeal to a stronger body of law for protection. Where the closest comparison can be made, investors have thereby acquired a higher standard of human rights protection than that granted to other people.

The above example indicates that the supranational sphere is imbalanced in favour of a transnational capitalist class, but it could plausibly be argued that it is better to fully protect the human rights of some (propertied) classes than of none at all. The investment activities of transnational corporations can nevertheless affect other social groups in a variety of ways, and it is where their interests clash that these asymmetries within the supranational sphere can favour a transnational capitalist class over opposing social groups. International investment treaties contain a dispute settlement mechanism *for* corporations, but this cannot be used by other social groups *against* corporations, and these are expected to resolve any disputes they may have with a transnational corporation within their national state structures.<sup>228</sup> In some circumstances, this raises the difficult question of whether states can actually hold transnational corporations to account. For instance, a transnational corporation can structure its investments abroad so that its subsidiaries hold only limited capital and, if an environmental accident strikes, it can be allowed to go bankrupt to shield the parent company from liability.<sup>229</sup> International investment tribunals tend to ignore the separate legal personality of subsidiaries where it *benefits* corporations, but other courts have been distinctly more reluctant to lift the corporate veil where it does not; for instance, when a gas leak from a Union Carbide factory in Bhopal, India killed some 28,000 people and left 150,000 with severe injuries, the U.S. court declined

---

<sup>227</sup> This figure includes ‘loss of reputation’, but this is not separately quantified and an emphasis is placed on the “physical duress” of the executives. *Desert Line v. Yemen*, *Award*, para. 290; Peterson, *Human Rights and Bilateral Investment Treaties*, p. 40.

<sup>228</sup> Mabey, ‘Defending the Legacy of Rio’, p. 72.

<sup>229</sup> See Global Witness, ‘Heavy Mittal? A State Within A State: The Inequitable Mineral Development Agreement Between the Government of Liberia and Mittal Steel Holdings NV’ (October 2006), p. 5, 8, available at: {<http://www.globalwitness.org/library/heavy-mittal>} accessed 15 December 2010; Ruggie ‘Business and Human Rights’, p. 824.

to hold the parent company responsible.<sup>230</sup> The cases detailed in this thesis furthermore involve civil society groups that have successfully argued within a *domestic* setting that an investment project infringes upon their rights to a healthy environment, but where the corporation counters in an *international* tribunal that if the civil society group's demands are met then that infringes upon their rights as foreign investors. As discussed in the previous sub-section, international investment awards act as a 'trump card' against state measures,<sup>231</sup> yet these tribunals do not have the jurisdiction to consider the rights of the social groups for whom such state measures may have been granted.

There is no supranational forum in which the arguments of the investor and the civil society groups can both be heard side-by-side, and where their concerns are given equal consideration. There are nevertheless several instances in which both a transnational corporation and social groups affected by its activities have simultaneously sought to have their claims resolved at the supranational level, in an investment tribunal and a human rights court respectively. For example, adverse health effects caused by pollution from a metals smelter in La Oroya, Peru, prompted civil society groups to bring a claim against Peru to the Inter-American Commission of Human Rights.<sup>232</sup> The smelter had been in operation for almost a century, and had made the town into one of the 10 most polluted places in the world, but the smelter was privatized in the 1990s for the specific purpose of bringing up its environmental standards.<sup>233</sup> Renco took over the smelter complex, but did not accomplish the contractually required environmental remediation and improvement within the designated timeframe.<sup>234</sup> Before the Inter-American Court, Peru had defended its environmental record on the basis that while an extension was provided to the company to come into compliance with its obligations, that extension was strictly limited and "requirements in addition to [the original ones] were established".<sup>235</sup> The

---

<sup>230</sup> Kate Miles, 'International Investment Law: Origins, Imperialism and Conceptualizing the Environment', *Colorado Journal of International Environmental Law and Policy*, 21:1 (2010), pp. 31-35.

<sup>231</sup> The term 'trump card' is from Andreas Kulick, *Global Public Interest in International Investment Law* (Cambridge: Cambridge University Press, 2014), p. 2.

<sup>232</sup> Inter-American Court of Human Rights, *Admissibility: Community of La Oroya, Peru*, Petition 1473-06, Report No. 76/09 (5 August 2009).

<sup>233</sup> Andres Schipani, 'Peru: La Oroya Sale Brings Back Bitter Memories', *Financial Times Blog* (29 October 2012), available at {<http://blogs.ft.com/beyond-brics/2012/10/29/peru-la-oroya-sale-brings-back-bitter-memories/>} accessed 26 March 2015; The Renco Group, Inc. v. The Republic of Peru, *Memorial on Liability*, UNCT/13/1 (20 February 2014).

<sup>234</sup> A company representative claimed that he had not "expect[ed] [the Ministry of Energy & Mines] to react negatively to our extension request" because he maintained that the Ministry understood that the initial requirements were "incomplete, underestimated the amount of work to be done and underestimated the cost involved". Renco v. Peru, *Memorial on Liability*, para. 157.

<sup>235</sup> Inter-American Court of Human Rights, *Admissibility: Community of La Oroya*, para. 42.

company responded by bringing a case against Peru to an investment tribunal, in which it maintained that Peru had acted in violation of the treaty in providing it with an inadequate extension of time and furthermore for making it contingent upon additional “onerous” environmental requirements.<sup>236</sup> Precisely the measures that Peru maintained brought it into compliance with human rights law are therefore challenged as a violation of international investment law. These cases have yet to be concluded, but neither court will be able to address the claims made in the other. In a similar case, when Burlington Resources sought to begin oil exploration in Ecuador, it quickly encountered strong opposition from the Sarayaku indigenous people, and this opposition halted its plans. The Sarayaku people approached the Inter-American Court of Human Rights to challenge Ecuador’s failure to protect it from the oil company, and the oil company approached an investment tribunal to challenge Ecuador’s failure to protect its exploratory activities from the Sarayaku people, yet neither of the two courts mentioned the other simultaneous international legal proceedings at all.<sup>237</sup>

In theory, it can be argued that such cases can unproblematically be heard in separate tribunals, because the rights of investors do not *actually* conflict with the rights of other social groups. Even if a corporation is successful in its claims, investment tribunals rarely require a state to directly rescind measures that had been taken to protect people from an investment project; it only requires the payment of compensation to the company. As such, even if the Inter-American Court were to determine that Ecuador should adopt stricter measures to address pollution from the smelter, the investment tribunal, were it to find in favour of the company, could simply require Peru to provide it with compensation for the economic impact of those stricter measures. In practice, this discrepancy between the strength of the respective legal regimes may more directly favour a transnational capitalist class against its opponents. Aside from the fact that any compensation in itself comes from taxes otherwise intended for other social purposes, Chapter 4 will also argue that the very threat of investment arbitration can dissuade states from adopting public interest regulations that would become subject to a potentially costly investment treaty challenge. The opposing social groups can, of course, also threaten to bring the case to a human rights court, but the asymmetries between these tribunals make such threats less credible: most people around the world do not have access to a supranational human rights

---

<sup>236</sup> Renco v. Peru, *Memorial on Liability*, 141-157.

<sup>237</sup> For further information about the case, see Chapter 4, Section 3. Burlington Resources Inc. v. Republic of Ecuador, *Decision on Jurisdiction*, ICSID Case No. ARB/08/5 (2 June 2010); Inter-American Court of Human Rights, ‘Case of Kichwa Indigenous People of Sarayaku v. Ecuador’, *Judgement: Merits and Reparations* (27 June 2012).

court in the first place, and where they do, recourse requires the exhaustion of domestic remedies. To paraphrase the investment tribunal in the Romanian case considered above, human rights instruments may furthermore offer ‘lower and less specific levels of protection’.<sup>238</sup> Most importantly, even if a human rights court were to find in favour of the civil society group, human rights law normally rests on voluntary compliance, while investment law is perhaps “the most effectively enforceable in the international system”.<sup>239</sup> It is here that the discrepancy between the powers of different institutions at the supranational level may be of critical importance: what would otherwise merely be an imbalance in the rights afforded to different social groups may in such circumstances ensure the protection of the rights of a transnational capitalist class *against* the rights of others.

In “surveying the disjointed development of [these] two different areas of international law”, Luke Eric Peterson argues that “one thing becomes abundantly clear: the global village could use a good town planner”.<sup>240</sup> The fragmentation of the supranational sphere aids in concealing the fact that these two distinct legal regimes belong to the same ‘village’ in the first place: they were initiated and negotiated separately, they develop separately over time, and they have at times split what is essentially the same dispute between a transnational corporation and other societal groups half-way down the middle, so that the rights of corporations cannot be considered side-by-side with the rights of other social groups. The fragmentation of the supranational sphere into a variety of apparently distinct institutions makes such asymmetries less obvious. To understand the implications of such fragmentation, an analogy can be drawn with the historical development of international investment law. At the same time that civil society groups from around the world had coalesced against and defeated the Multilateral Agreement on Investment, bilateral investment treaties offering essentially the same benefits to corporations were “multiply[ing] like fruit flies”.<sup>241</sup> Civil society groups have more recently begun to realize that the proliferation of separate investment agreements on a bilateral basis involves a “divide-and-rule” strategy that leads to “fragmented and isolated movements”.<sup>242</sup>

---

<sup>238</sup> Spyridon Roussalis v. Romania, *Award*, para. 312.

<sup>239</sup> José E. Alvarez, ‘The Internationalization of U.S. Law’, *Columbia Journal of Transnational Law*, 47:3 (2009), p. 565.

<sup>240</sup> Peterson, *Human Rights and Bilateral Investment Treaties*, p. 9.

<sup>241</sup> On MAI, see Section 2 of this chapter. Andreas F. Lowenfeld, ‘Investment Agreements and International Law’, *Columbia Journal of Transnational Law*, 42 (2003-2004), p. 123.

<sup>242</sup> Bilaterals.org, ‘Fighting FTAs Workshop’ (2006), available at {<http://www.bilaterals.org/spip.php?rubrique162>} accessed 17 February 2013; Bilaterals.org & GRAIN, *Strategic Learnings: Learnings from the Struggles* (December 2007), p. 97, available at {<http://www.bilaterals.org/IMG/pdf/fightingFTA-en-Hi-3-learnings-from-struggles.pdf>} accessed 17 February 2013.



The same lesson can be drawn in respect to the supranational sphere more generally: centralization and coherence empowers civil society groups, while fragmentation enables a transnational capitalist class to make use of the agility that its superior financial resources equips it with to pursue incremental reforms in a variety of negotiating settings. As such, within this fragmented supranational sphere, a transnational capitalist class has not only gained inordinate rights while evading responsibilities, but it has also acquired rights and legal avenues not extended to other social groups, as well as the ability to use these to its advantage in direct conflicts with those other groups.

### ***The Concept of a Transnational State Revisited***

This section has argued that world politics is currently organized around at least three sets of ‘boundaries’ that divide different spheres of political life from each other, and that are integral to how the interests of a transnational capitalist class are politically maintained, advanced and enforced. Many Marxists have stressed the first set of boundaries between territorial states, and how the transnational capitalist class depends on this multiplicity of states for its structural power, and this has not been analysed in further detail here. The second ‘boundary’ separates the national from the supranational sphere of politics, and drawing upon the theory of ‘new constitutionalism’ it has been argued that this enables a transnational capitalist class to pursue its political interests through either national or supranational political institutions at one point in time, but to thereafter have these enforced through supranational institutions in the event of subsequent resistance emanating from social groups within particular nation-states. The third set of ‘boundaries’ are those within the supranational sphere itself, and it has been argued that the fragmentation into different supranational institutions for different purposes allows a transnational capitalist class to use its superior lobbying power to strengthen particular institutions that are conducive towards its interests, while ensuring that gains made within such institutions are not passed on to institutions that are more conducive towards the interests of opposing social forces. The existence of a range of distinct and self-contained supranational institutions is decisive in hiding the type of asymmetries that benefits a transnational capitalist class, and it therefore deflects challenges from alternative social forces.

Each of these three sets of ‘boundaries’ sustain the political interests of a transnational capitalist class in different ways. This is not to suggest that a transnational capitalist class has alone designed this institutional form, or that it is alone in maintaining it. This institutional form is

the product of historical struggles between different social forces, and history cannot be reduced to the actions of one social group alone. What has been argued is rather that if a transnational capitalist class is accruing substantial benefits from global institutional fragmentation, it follows that we should not expect it to use its influence to dismantle the very ‘boundaries’ it relies upon. In contrast, the evidence suggests that it is actively seeking to police and sustain these boundaries, and to transform them in such a way that the global political system, as a whole, confers privileged rights to corporate groups at the expense of opposing social forces.

This section began with the argument that these ‘boundaries’ are *internal* to a ‘transnational state’, but if this transnational state is no longer even expected to adopt a more centralized and coherent institutional form, does it still deserve the label of a ‘state’? In so far as it remains the ‘congealment’ of a transnational capitalist class and other subordinate social forces in a set of political institutions, this is – by Robinson’s definition – still a state. However, this in turn begs the question of whether Robinson’s concept of the state is actually appropriate. In a characteristically dismissive critique of Robinson’s work, Paul Cammack exasperatedly notes:

“[W]hen Robinson finally tells us what he means by the ‘transnational state’ through which the global bourgeoisie rules, it turns out [...] [to be] a loose yet all-encompassing conglomeration of global institutions, nation states, and other agencies [...] Whatever else this is, it is not a state, transnational or otherwise”.<sup>243</sup>

Here Cammack is not criticising the concept of a transnational state for not adhering to Robinson’s *own* concept of a ‘state’, but for not adhering to another (unspecified and presumably better) concept of the state. Cammack is right to point out that Robinson seems to depart from the way that the concept of the state is used in everyday language, and given that concepts are designed to aid in communication, such a departure may seem to require further justification. Two questions will therefore tentatively be considered here: Firstly, does Robinson’s particular conception of the ‘state’ adhere to the way that the word is used in everyday language, and if not, why not? Secondly, is his concept actually helpful in allowing us to acquire a better understanding of the underlying reality the concept is grasping at?

Robinson’s concept of the state can easily be said not to adhere to ordinary conceptions thereof. In International Relations, the state is often conceptualized both “as a force within society and as a social actor in external relations with a larger world”, an understanding that largely adheres

---

<sup>243</sup> Cammack, ‘Forget the Transnational State’.

to everyday usages of the term.<sup>244</sup> Within the discipline of International Relations, the emphasis has normally been on the external dimension of the state rather than its internal function. The state is often immediately defined in its opposition to other states, and introductory textbooks may from the outset define a state as “a clear-cut and bordered territory, with a permanent population, under the jurisdiction of supreme government that is constitutionally independent of all foreign governments”.<sup>245</sup> Within such a definition, the ‘state’ is immediately distinguished by its territorial form in opposition to other territorial states, and the notion of a ‘transnational state’ would presumably become a contradiction in terms.

However, the external aspect of a state is only one part of everyday understandings of the term. While International Relations scholars tend to think of the state in relation to other states, in everyday interactions people also tend to refer to the state as much by its ‘internal’ aspect; as a political structure that regulates society and that maintains and enforces a particular social order. This, indeed, corresponds to the way that the concept of the state appears to be used in Marxist theory, with the caveat that the social order that is maintained and the way that society is regulated depends on the particular social groups whose agency it congeals – and in capitalism, this has primarily been the agency of a capitalist class. Robinson’s definition of the state departs from everyday understandings of the term in its ‘external’ aspect, but corresponds broadly to everyday ‘internal’ understandings of the term. The maintenance and enforcement of a particular social order was previously the ‘internal’ task of a national state that congealed the interests of a national capitalist class and subordinate social groups. In contrast, the particular social order that congeals the agency of a transnational capitalist class is maintained and enforced through an interlocking network of both supranational institutions and national states, which lacks an ‘external’ dimension. If the above analysis of global politics today is accurate, then a state cannot by definition be *both* a territorial unit opposed to other territorial units *and* the political structure that maintains and enforces the contemporary social order. It is therefore changes to the way that the political sphere itself is organized and whose interests it congeals that makes the above two dimensions of the state – the state in its ‘external’ and ‘internal’ aspects – difficult to reconcile. If the state can no longer, in their unity, be *both* a territorial unit in opposition to other such territorial units *and* the network of political institutions that maintain

---

<sup>244</sup> The point that it is not a social *actor* has already been pointed out in Chapter 1. John Hall & John Ikenberry, *The State* (Milton Keynes: Open University Press, 1989), p. 3.

<sup>245</sup> Robert Jackson & Georg Sorensen, *Introduction to International Relations: Theories and Approaches*, 3rd ed (Oxford: Oxford University Press, 2007), p. 2.

and enforce the contemporary social order, then the question is whether to retain the concept of a state for its ‘internal’ or ‘external’ usage. Given that territorial units are not disappearing, it could plausibly be argued that we should maintain the concept of the ‘state’ to describe these territorial units *even if* the concept thereby no longer encapsulates the wider political structure that governs us and that maintains and enforces the contemporary social order. Indeed, Robinson retains the concept of a state to describe those territorial units, but distinguishes between particular national states and the wider transnational state of which they form a part, and this thesis follows this practice.

Adopting the concept of a ‘state’ to describe what used to be the ‘internal’ dimension of a national state is helpful in enabling us to grasp how the global capitalist social order within which we live is politically maintained and enforced. There is often a distinct tendency to think of national states and supranational institutions in oppositional terms – if one is more powerful, the other must be less so, and vice versa. For example, Ellen Meiksins Wood reiterates that the national state is “the *only* noneconomic institution truly indispensable to capital” and that “no other institution, no transnational agency, has even begun to replace the nation state as the coercive guarantor of social order, property relations, stability or contractual predictability, or any of the other basic conditions required by capital”.<sup>246</sup> Wood often *contrasts* the relative power of supranational institutions and national states, and from that starting point it is easy to conclude that the former are of marginal importance. The advantage of the concept of a transnational state is that it enables us to see how supranational institutions and national states are not contradictory, but how – through the distinct tasks fulfilled by each – they together combine to support a transnational capitalist class. The national state can retain ‘its’ power, but the power of a transnational capitalist class vis-à-vis other social forces increases by virtue of how such national states are becoming incorporated into the wider political framework of the transnational state.

This section has drawn upon Robinson’s theory of a transnational state in order to situate international investment law within wider global politics. His own work has primarily focused on how the agency of a transnational capitalist class has become congealed within a variety of different political institutions that together compose a transnational state. This section has further argued that one of the distinct advantages of the concept itself is that it enables us to

---

<sup>246</sup> Wood, *Empire of Capital*, p. 139.

understand how a global capitalist world order is maintained and enforced not only through a variety of different national and supranational institutions, but crucially also *through the boundaries between them*. Robinson sometimes describes the transnational state as a ‘network’ of different supranational and national institutions, and this section has argued that the agency of a transnational capitalist class has not only become congealed in the ‘nodal points’ of that network, but also in the ‘net’ itself; in how the network is formed in the first place. The concept of a transnational state immediately draws our attention to how the political sphere *as a whole* is organized in favour of a transnational capitalist class, and how it avoids the critical scrutiny that a more centralized global political structure would be likely to bring.

### **Conclusion**

This chapter has provided the ‘big picture’ necessary to understand the particular investment disputes considered in subsequent chapters, and in doing so it has explained the wider political struggles that international investment law is implicated in. The emergence and evolution of international investment law is normally explained in reference to states – to their interests, thoughts and agency – and to the struggles between them. The first section of this chapter has demonstrated that such a perspective conceals the fact that these are ultimately struggles between social groups, acting *through* states. It conceals the agency of a transnational capitalist class in the making of international investment law, and it conceals the ways in which struggles between opposing social groups are currently determining its future. The agency of a transnational capitalist class has left a mark on the institutional structure through which international investment laws are asserted and enforced, and the second section showed that this is a remarkably powerful field of international law that hews closely to the needs of corporations. Despite its origins in a time when national capitalist classes were more strongly embedded within particular ‘home’ states, the second section has further argued that international investment law has subtly changed so as to ‘congeal’ the interests of a distinctly *transnational* capitalist class. This transformation is evident in how corporations no longer require their ‘home states’ to assert and enforce their rights in the form of diplomatic protection, and how it has acquired the ability to enforce any awards against assets held by a state in any of around 150 countries of the world. If capitalism was still dominated by nationally based capitalist classes acting through their own national states, as some Marxist scholars contend, it would furthermore be difficult to explain the emergence of an international investment regime in which, to cite Schill, “virtually any investor from virtually any country is capable of opting

into virtually any BIT regime”.<sup>247</sup> This increasingly elastic definition of nationality does not mean that transnational corporations escape the confines of national states altogether, but it supports William Robinson’s proposition a transnational capitalist class “may turn to *any* national state to gain competitive advantage as part of their corporate strategy”.<sup>248</sup> The final section of this chapter situated international investment law within wider global politics. It argued that the interests of a transnational capitalist class is not only congealed in a variety of national and supranational institutions, but that it is also congealed in the boundaries between them: in the particular ways in which different political institutions relate to each other. The transnational capitalist class has not exercised its agency so as to undermine the formal sovereignty of national states, but it has used this sovereignty to bring into being supranational institutions that restrain the subsequent ability of those states to adopt unfavourable policies in response to other societal groups. While transnational corporations have acquired significant supranational rights, the fragmentation of the supranational sphere itself ensures that it has not acquired corresponding obligations, nor that other social groups have acquired similar rights. The concept of a ‘transnational state’ has explanatory purchase precisely because it draws our attention to how the political sphere as a whole is interconnected – and separated – in such a way as to support a transnational capitalist class in its ongoing struggles with any opposing social groups.

---

<sup>247</sup> Schill, *The Multilateralization of International Investment Law*, p. 238.

<sup>248</sup>(My emphasis) William Robinson, ‘Gramsci and Globalisation: From Nation-State to Transnational Hegemony’, *Critical Review of International Social and Political Philosophy*, 8:4 (2005), p. 568.

## Investor-State Dispute Settlement: Protection from Environmental Regulations?

“Wrong!” is the simple answer provided by the European Commission to civil society claims that investor-state dispute settlement “gives too many rights to companies”.<sup>1</sup> In fact, the European Commission adds, “the rights which can be enforced under investor-state dispute settlement are limited”.<sup>2</sup> The previous chapter has argued that the institutional framework of investment arbitration is designed in such a way as to support the interests of transnational corporations, but this will indeed be of little consequence if the European Commission is correct in its claim that few substantive rights are actually granted to corporations by investment treaties. This chapter therefore aims to investigate what substantive benefits investment treaties actually provide to a transnational capitalist class.

It is uncontroversial to state that investment treaties are designed to protect and benefit corporations; the “promotion and protection of investments” is their stated purpose.<sup>3</sup> Investment treaties are normally narrowly focused on ensuring that states provide corporations with certain standards of “treatment”, or protection from certain state measures, and do not normally contain any corresponding obligations for corporations or any protections to host states from any detrimental corporate conduct.<sup>4</sup> In so far as corporations have also acquired the right to enforce their legal entitlements in international tribunals, the investment law regime “resembles the structure of rights protection found in the bills of rights of many national jurisdictions”, and critics frequently refer to investment treaties as Bills of Rights for corporations.<sup>5</sup> The question is therefore not whether investment treaties protect the rights of

---

<sup>1</sup> European Commission, ‘Incorrect Claims about Investor-State Dispute Settlement’ (3 October 2013), p. 1, available at: {[http://trade.ec.europa.eu/doclib/docs/2013/october/tradoc\\_151790.pdf](http://trade.ec.europa.eu/doclib/docs/2013/october/tradoc_151790.pdf)} accessed 17 June 2014.

<sup>2</sup> Ibid.

<sup>3</sup> Many agreements contain this phrase in their titles, e.g. one BIT is entitled “Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ghana for the Promotion and Protection of Investments” (22 March 1989). The U.S. model investment treaty is titled “Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment”, see United States of America, *Model Bilateral Investment Treaty* (2012), available at: {<http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>} accessed 4 September 2014.

<sup>4</sup> Kyla Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (Cambridge: Cambridge University Press, 2009), p. 269.

<sup>5</sup> David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy’s Promise* (Cambridge: Cambridge University Press, 2008), p. 223.

corporations, but how far such rights extend and in what particular circumstances they can be invoked.

The most commonly invoked treaty standards require states to grant corporations ‘national treatment’ or ‘most favoured nation treatment’ (also commonly said to protect investors from ‘discrimination’), fair and equitable treatment, and finally the treaties include a prohibition on expropriation without compensation. At first glance these treaty standards do indeed seem fairly innocuous, and to lend support to the European Commission’s rejection of civil society claims that investment treaties grant too many rights to corporations. Karel De Gucht, the European Commissioner for Trade, maintains that “[t]here is nothing shocking in these rules – rather, they are basic principles of the rule of law”.<sup>6</sup> Yet if these treaty standards are so clearly “limited”, why is the government of Canada – a country not normally associated with repeated violations of ‘basic principles of the rule of law’ – the world’s sixth most frequent defendant state before investment tribunals?<sup>7</sup> This chapter suggests that while requirements to treat investors (or anyone) fairly and equitably and without discrimination may at first glance seem like innocent and uncontroversial propositions, there may be more to these treaty standards than immediately meets the eye. Far from such treaty standards being strictly “limited” and clearly restricted to basic principles of the rule of law, these standards are potentially very open-ended. Jeswald Salacuse, a prominent scholar and arbitrator, suggests that “for a lawyer trained only in the domestic law [...] the stated norms of the regime seem breathtaking in their generality, vagueness, and lack of specificity”.<sup>8</sup> An answer to the question of the extent to which investment law grants rights to corporations can therefore not be provided by reference to the text of the treaties alone – the question is how such vague and general treaty standards are interpreted in practice. The use of such open-ended standards are all the more significant given that there are few limitations in respect to what type of state conduct can be challenged before investment tribunals. International investment law can protect corporations from specific government measures, administrative decisions, or breaches of domestic law, but also from general legislation enacted by parliaments or supreme court decisions that are interpreted to be

---

<sup>6</sup> Karel De Gucht, ‘The Transatlantic Trade and Investment Partnership: The Real Debate’, *European Commission Speech No 14/406, Speech at the European Affairs Committee of the Bundesrat* (Berlin, 22 May 2014), available at: {[http://europa.eu/rapid/press-release\\_SPEECH-14-406\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-14-406_en.htm)} accessed 31 August 2014.

<sup>7</sup> UNCTAD, ‘Latest Developments in Investor-State Dispute Settlement’, *IIA Issues Note*, No 1 (April 2012), p. 17, available at: {[http://unctad.org/en/PublicationsLibrary/webdiaeia2012d10\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaeia2012d10_en.pdf)} accessed 1 September 2014.

<sup>8</sup> Jeswald Salacuse, ‘The Emerging Global Regime for Investment’, *Harvard International Law Journal*, 51:2 (2010), p. 453.



in breach of the above treaty standards.<sup>9</sup> Indeed, a global law firm suggests that what is so promising about international investment law is precisely the ability to challenge political decisions “usually considered to be immune” from legal challenge.<sup>10</sup>

The purpose of this chapter is to look beyond the innocuous but inherently vague standards articulated in investment treaties to understand what substantive protections this body of international law actually affords to corporations, and in what circumstances these treaties can be invoked for their benefit. This chapter therefore shows how corporations can use investor-state dispute settlement to protect themselves from *states*, while the next chapter illustrates how corporations are ultimately seeking to protect themselves from the political victories of *social groups* within those states. The first section will provide a justification for the environmental focus of this thesis and an explanation of the approach used to analyze the cases, and the subsequent four sections will each detail the specific ways in which corporations can challenge environmental regulations before investment tribunals.

### **The Environment in Investment Arbitration**

International investment law is designed to prevent certain government measures that challenge the contemporary global economic order, and it is not surprising that it expressly prohibits many of the developmental strategies used by countries in the past, such as the protection of domestic corporations or the nationalization of key industries. What is more surprising is that many of the first investment treaty disputes concerned not such policies, but rather measures introduced to protect the environment. One early study suggested that half of all known NAFTA disputes before 2000 concerned environmental regulations, and scholars suggest that measures taken to protect the environment remain one of the most common sources of investment disputes.<sup>11</sup> On

---

<sup>9</sup> Zoe Phillips Williams, ‘Risky Business or Risky Politics: What Explains Investor-State Disputes?’ *Investment Treaty News*, 3:5 (August 2014), p. 5.

<sup>10</sup> Wojciech Sadowski, ‘International Investment Treaties as a Possible Shield Against Government Cutbacks in Subsidies for the Green Energy Sector’, *International Arbitration Alert of K&L Gates* (10 January 2013), available at: {<http://www.klgates.com/international-investment-treaties-as-a-possible-shield-against-government-cutbacks-in-subsidies-for-the-green-energy-sector-01-10-2013/>} accessed 30 June 2014.

<sup>11</sup> Sanford Gaines, ‘Environmental Policy Implications of Investor-State Arbitration Under NAFTA Chapter 11’, *International Environmental Agreements*, 7 (2007), p. 173; Rahim Moloo & Justin Jacinto, ‘Environmental and Health Regulation: Assessing Liability under Investment Treaties’, *Berkeley Journal of International Law*, 29:1 (2011), p. 2; International Institute for Sustainable Development, *Private Rights, Public Problems: A Guide to NAFTA’s Controversial Chapter on Investor Rights* (2001), p. 16, available at: {[http://www.iisd.org/pdf/trade\\_citizensguide.pdf](http://www.iisd.org/pdf/trade_citizensguide.pdf)} accessed 1 May 2012 (this study nevertheless takes a wider view of ‘environmental’ than the one adopted here); M. Sornarajah, *The International Law on Foreign Investment*, 3<sup>rd</sup> ed (Cambridge: Cambridge University Press, 2010), p. 77.

the face of it, this is surprising – the treaties are not formally intended to protect corporations from environmental regulations, and indeed few would explicitly suggest that they should. Environmental regulations are after all in no way antithetical to the contemporary global economic order. While it can certainly be argued that states in the developing world should be allowed to protect their infant industries from competition from large transnational corporations, this is an argument that runs contrary to the global capitalist ideology prevalent today, and even most of the political left does not actively contest the logic of global competition and a global free market economy. In contrast, the idea that states should be allowed to take measures to protect their environments is one that most are willing to accept. Even for the most adamant adherents of global capitalism, environmental regulations are still potentially desirable in order to prevent ‘externalities’ from business operations, and the priority accorded to environmental protection has largely coincided with and evolved side-by-side with the emergence of global capitalism in the last few decades.

This thesis has chosen to focus on investment treaty disputes arising from measures taken to protect the environment for three reasons. Firstly, the focus on the environment is helpful as an illustration of the substantive rights that international investment law affords to transnational corporations. Rather than provide an abstract description of what investment law protects corporations against – and rather than focusing on all known cases, which would be an unmanageable task – the thesis explores this question through a detailed analysis of disputes emerging out of environmental protection measures. Investors have challenged environmental measures on the basis of most treaty standards – as discriminatory, as unfair and inequitable, and as tantamount to expropriation – and this makes the environment a particularly suitable lens through which to understand how corporations make use of international investment law. Given this focus, there are nevertheless also a few treaty standards that are not discussed in this chapter – perhaps most notably, investment treaties often prohibit states from restricting the transfer of capital, and in preventing capital controls investment treaties often deny states a potentially useful tool for preventing and mitigating financial crises.<sup>12</sup> It should therefore be kept in mind that the benefits provided to transnational corporations by the investment regime extend beyond the discussion provided in this chapter.

---

<sup>12</sup> Cecilia Olivet & Pia Eberhardt, *Profiting from Crisis: How Corporations and Lawyers are Scavenging Profits from Europe's Crisis Countries* (Amsterdam/Brussels: Transnational Institute & Corporate Europe Observatory, 2014), p. 13, available at: {<http://www.tni.org/briefing/profitting-injustice>} accessed 13 March 2014.

Secondly, environmental regulations are on the boundary – if not actually beyond the boundary – of what investment law is intended to protect corporations against. This makes it a very suitable focus for exploring precisely how far the protections afforded by investment treaties actually extend. This body of law could be institutionally strong (as described in the previous chapter) but if the substantive rights granted by the regime are weak then the benefits offered to transnational corporations would be negligible. An indicator of the weakness of such substantive provisions could be if they only protected corporations in very exceptional circumstances – for instance against outright nationalization without any compensation, which is extremely rare today, and which runs directly counter to the current global economic order. In contrast, the further these treaty standards extend into and delimit the ordinary workings of governments around the world, the stronger and more beneficial this regime can be said to be to the transnational capitalist class it supports. The almost universal support for environmental protection ensures that this is not what investment law is explicitly intended to protect corporations against, and yet the prevalence of precisely such disputes makes it a suitable focus for understanding where the boundary between permissible and impermissible government measures actually lies.

Thirdly, and to situate the environmental focus in the context of the wider thesis, it should be emphasized that in contrast to much of the academic literature on the subject this particular focus has *not* been chosen on the basis of a normative priority accorded to the environment *per se*. Much of the literature highlights a struggle between the protection of the environment and the protection of investment, and perceives the solution as involving the balancing of these two competing concerns. In contrast, the social forces approach adopted in this thesis lends itself to an understanding that the struggle is not between investment and the environment, but between different social groups – or to be more precise, between a transnational capitalist class and the social groups that contest it. The environment nevertheless provides an appropriate focus because environmental advocacy groups have been the investment treaty regime’s “most vociferous opponents”, and many other civil society critics view corporate challenges to environmental regulations as the clearest indicator of the wider malaise that investment law entails.<sup>13</sup> Investment treaty disputes arising out of environmental measures are therefore the

---

<sup>13</sup> Ray Jones, cited in: Charles Brower, ‘NAFTA’s Investment Chapter: Initial Thoughts about Second Generation Rights’, *Vanderbilt Journal of Transnational Law*, 37 (2003), p. 1553 (footnote 102); Howard Mann, *Investment Agreements and the Regulatory State: Can Exceptions Clauses Create a Safe Haven for Governments?* (International Institute for Sustainable Development & Centre on Asia and Globalisation, 2007), p. 8, available at: {[http://www.iisd.org/pdf/2007/inv\\_agreements\\_reg\\_state.pdf](http://www.iisd.org/pdf/2007/inv_agreements_reg_state.pdf)} accessed 20 August 2012.

ones that have engendered the most resistance, and this makes the environmental focus essential for understanding how investment law is implicated in struggles between opposing social classes or groups.

### *A Historical Overview*

A substantial academic literature on investment arbitration and the environment has emerged since the first investment treaty disputes that seemed to implicate environmental regulations. Within this literature, most scholars now suggest that the initial response to the early disputes were “unnecessarily alarmist” and that environmental protection measures are not, in fact, actually at risk from challenges before investment tribunals.<sup>14</sup> With the benefit of hindsight, Alessandra Asteriti claims that investment treaty disputes in respect to environmental regulations “caught the main actors and the public unprepared and engendered fears and anxieties that revealed themselves to be either exaggerated or misplaced”.<sup>15</sup> Sanford Gaines similarly suggests that recent history proves that “environmentalists have little ground for alarm”, while Thomas Wälde & Abba Kolo conclude that “legitimate environmental regulation is unlikely to be challengeable under the investment rules of modern [multilateral investment treaties] – irrespective of exaggerated claims made so far for advocacy purposes in arbitral litigation and equally exacerbated anxieties expressed by NGOs”.<sup>16</sup> While there were “early jitters” caused by the emergence of a number of controversial investment treaty challenges of environmental protection measures, as well as certain early cases where states were required to provide compensation to investors, the recent reassurances have been prompted by tribunals’ rejection of corporate claims in a number of more recent high profile cases.<sup>17</sup> The history of international investment law is therefore normally presented as one of the rise and fall of concerns about the risk posed to environmental regulations.

---

<sup>14</sup> Madeline Stone, ‘NAFTA Article 1110: Environmental Friend or Foe?’, *The Georgetown International Environmental Law Review*, 15 (2002-2003), p. 788.

<sup>15</sup> Alessandra Asteriti, ‘Metalclad, Methanex and Chemtura: 10 Years of Environmental Issues in NAFTA Investment Arbitrations’, *Transnational Dispute Management*, 9:3, (2012), p. 21, available at SSRN: {[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2021180](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2021180)} accessed 17 August 2012.

<sup>16</sup> Gaines, ‘Environmental Policy Implications of Investor-State Arbitration’, p. 171; Thomas Wälde & Abba Kolo, ‘Environmental Regulation, Investment Protection and Regulatory Taking in International Law’, *International and Comparative Law Quarterly*, 50 (2001), p. 814.

<sup>17</sup> The reference to ‘early jitters’ is by Julie Soloway & Jeremy Broadhurst, cited in: Brower, ‘NAFTA’s Investment Chapter’, p. 1556 (footnote 116).

In this thesis twelve concluded investment treaty cases have been identified as involving environmental protection measures, but in addition there are many others that were defeated on jurisdictional grounds, settled, withdrawn, or are still pending. All are listed in the appendix and many will be discussed in substance elsewhere in the chapter, but to understand the history of the academic debate a brief introduction to the key cases is required. The first investment dispute in respect to the environment was launched under NAFTA by Ethyl Corporation, a producer of a fuel additive known as MMT, against Canada in response to its introduction of the Manganese-Based Fuel Additives Act in 1996.<sup>18</sup> Several concerns had been raised in respect to MMT, most notably health effects and increased pollution as a result of MMT's tendency to interfere with pollution control devices in cars. For reasons to be discussed in more detail elsewhere, Canada settled the dispute with Ethyl and agreed to withdraw the legislation, to provide CAD 19.5 million in compensation for legal costs and lost profits, and finally to issue a statement confirming that there is no evidence MMT is harmful to human health.<sup>19</sup> An article in the *Toronto Star* concluded that this "is a bizarre episode in Canada's own history – a government bill approved by the Parliament of Canada has been vetoed by Ethyl Corp. of Virginia".<sup>20</sup> From the outset this case had been seized upon by the emerging protest movement against the Multilateral Agreement on Investment, and Ethyl's ultimate success was deemed to confirm that investment law really did present a risk to environmental and health regulations.<sup>21</sup>

Ethyl's successful recourse to investment arbitration was followed by three more cases concluded in 2000 – 2003 in which investors successfully challenged environmental measures taken by governments. Metalclad and Tecmed had both invested in hazardous waste treatment facilities in Mexico, but found their investments jeopardized by environmental protests that had emerged at least partly in response to the corporations' own conduct (the decision not to remediate unlawful pollution by previous owners of the facility in the case of Metalclad, and

---

<sup>18</sup> Ethyl Corporation v. Government of Canada, *Notice of Arbitration*, UNCITRAL Ad Hoc Arbitration (14 April 1997).

<sup>19</sup> Ken Traynor, 'How Canada Became a Shill for Ethyl Corp.: NAFTA and the Erosion of Federal Environmental Protection', *Intervenor* 23:3 (1998), available at: {<http://www.cela.ca/article/international-trade-agreements-commentary/how-canada-became-shill-ethyl-corp>} accessed 1 September 2014.

<sup>20</sup> Dalton Camp, 'You Can Thank Free Trade Agreement for MMT Travesty', *The Toronto Star* (29 July 1998), p. A15.

<sup>21</sup> For example, see: Third World Network, 'Ethyl Corp. Sues Canada Under NAFTA, Illustrating What Could Happen Later Under MAI Rules', *Third World Economics*, 163 (16-30 June 1997), available at: {<http://www.twinside.org.sg/title/eth-cn.htm>} accessed 2 September 2014; George Monbiot, 'Running on MMT: The Multilateral Agreement on Investments Will Force Governments to Poison their Citizens', *The Guardian* (13 August 1998), available at: {<http://www.monbiot.com/1998/08/13/running-on-mmt/>} accessed 17 March 2013.

violations of environmental regulations in the case of Tecmed).<sup>22</sup> The S.D. Myers case emerged from the corporation's unexpected success in lobbying the U.S. to open its side of the border to imports of hazardous PCB waste from Canada after a decade-long border closure, and the subsequent decision of Canada to introduce an interim ban on exports while it considered the environmental implications of the new situation.<sup>23</sup> The tribunals in *Metalclad v. Mexico*, *Tecmed v. Mexico* and *S.D. Myers v. Canada* were in some quarters deemed to have issued distinctly investor-friendly awards, requiring states to compensate investors affected by environmental protection measures, and along with *Ethyl v. Canada* these roused the attention of environmental groups.

What followed these investor-friendly awards was nevertheless a trio of investment awards in 2005 – 2010 that rejected the respective corporations' claims, and these were in contrast deemed to have proved the initial concerns unfounded. The pivotal case in this respect was the decision of Methanex Corporation to challenge the decision by California to phase out a gasoline additive called MTBE, which had caused widespread contamination of groundwater.<sup>24</sup> After years of what one scholar described as "arbitral warfare", the tribunal dismissed the case and commentators quickly labeled the U.S. victory "a major win for the environmental community" and "the harbinger of a new era" in investment arbitration.<sup>25</sup> The case had from the outset been deemed a 'textbook example' of the potential conflicts between investor rights and environmental protection, and a representative of Methanex publicly complained that it had been made "the poster child in Washington based on people's dislike of NAFTA".<sup>26</sup> Prominent scholars suggested that the tribunal's decision to finally dismiss Methanex' claims "alone goes a long way toward justifying the conclusion that investment arbitrations are not putting at risk the right to regulate", while the International Institute for Sustainable Development praised the award for its "crystal-clear statement that non-discriminatory regulations in the public interest

---

<sup>22</sup> *Metalclad Corporation v. The United Mexican States, Award*, ICSID Case No. ARB(AF)/97/1 (30 August 2000); *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States, Award*, ICSID Case No. ARB(AF)/00/2 (29 May 2003). These cases are discussed in more detail elsewhere.

<sup>23</sup> *S.D. Myers, Inc. v. Government of Canada, First Partial Award*, UNCITRAL Ad Hoc Arbitration (13 November 2000). This case is discussed in more detail elsewhere.

<sup>24</sup> *Methanex Corporation v. United States of America, Final Award of the Tribunal on Jurisdiction and Merits*, UNCITRAL Ad Hoc Arbitration (3 August 2005). This case is discussed in more detail elsewhere.

<sup>25</sup> Todd Weiler, 'Methanex Corp. v. U.S.A.: Turning the Page on NAFTA Chapter 11?', *Journal of World Investment and Trade*, 6 (2005), p. 903-904; Alberto Alvarez-Jimenez, cited in: Moloo & Jacinto, 'Environmental and Health Regulation', p. 47.

<sup>26</sup> David Gantz, 'Potential Conflicts Between Investor Rights and Environmental Regulation Under NAFTA Chapter 11', *George Washington International Law Review*, 33 (2000-2001), p. 657; Heather Scofield, 'Methanex Set to Sue Uncle Sam under NAFTA over Gas Additive', *The Globe and Mail* (3 November 1999), p. B7.

(such as environmental laws) will almost never be considered expropriation”.<sup>27</sup> The Methanex case was followed by two awards that were equally welcomed by the environmental community. Glamis Gold had challenged new legislation requiring the backfilling of open-pit mines in California, while Chemtura had challenged a Canadian ban on the use of the pesticide lindane.<sup>28</sup> In respect to the decision in Chemtura, scholars similarly suggested that “the tribunal’s unambiguous rejection of the claims confirms that investment treaty obligations do not significantly impede a state’s ability to engage in legitimate regulatory activities” and that “the (negative) hype [in respect to the environment] turned out to be exaggerated”.<sup>29</sup>

With the exception of *Tecmed v. Mexico*, that nevertheless challenged environmental measures in a NAFTA country, all of the above cases emerged within NAFTA, and these are indisputably the ones that have received most attention. While few critics were aware of the possible implications of the investment chapter in NAFTA at the time of the treaty negotiations, the agreement as a whole was negotiated with environmental protests in the background and it was consequently from the outset the ‘greenest’ trade agreement ever negotiated.<sup>30</sup> The history of opposition to NAFTA ensured that environmental advocacy groups were from the outset paying attention to any undesirable effects of the agreement, and quickly seized upon the investment disputes in respect to the environment that subsequently arose. As a result, the above disputes have received extensive publicity, while investment treaty disputes arising from other treaties have only received sustained attention by scholars within the specialist academic field of

---

<sup>27</sup> Jan Paulsson, ‘Indirect Expropriation: Is the Right to Regulate at Risk?’ *Making the Most of International Investment Agreements: A Common Agenda*, Symposium Co-Organised by ICSID, OECD and UNCTAD (Paris, 12 December 2005), p. 2, available at:

{<http://www.oecd.org/investment/internationalinvestmentagreements/36055332.pdf>} accessed 21 January 2011; International Institute for Sustainable Development, ‘Methanex v. USA’, available at:

{<http://www.iisd.org/investment/dispute/methanex.asp>} accessed 1 September 2014.

<sup>28</sup> *Glamis Gold, Ltd. v. United States of America*, Award, UNCITRAL Ad Hoc Arbitration (8 June 2009); *Chemtura Corporation (formerly Crompton Corporation) v. Government of Canada*, Award, UNCITRAL Ad Hoc Arbitration (2 August 2010). These cases are discussed in more detail elsewhere.

<sup>29</sup> Moloo & Jacinto, ‘Environmental and Health Regulation’, p. 65; Asteriti, ‘Metalclad, Methanex and Chemtura’, p. 21.

<sup>30</sup> Cited in: Wälde & Kolo, ‘Environmental Regulation, Investment Protection and Regulatory Taking’, p. 817; see also: Simon Baughen, ‘Expropriation and Environmental Regulation: The Lessons of NAFTA Chapter Eleven’, *Journal of Environmental Law* 18:2 (2006), p. 216; Åsa Romson, *Environmental Policy Space and International Investment Law* (Stockholm: Acta Universitatis Stockholmiensis, 2012), p. 288. In terms of the lack of attention to the environmental implications of the investment chapter, see: Howard Mann & Konrad von Moltke, *NAFTA’s Chapter 11 and the Environment: Addressing the Impact of the Investor-State Process on the Environment* (Winnipeg: International Institute for Sustainable Development, 1999), p. 3; the Bill Moyers documentary ‘Trading Democracy’ also reports that when NAFTA was negotiated the debate was about jobs, and the investment chapter was “too obscure to stir up controversy”, for a summary see: Tamara Straus, ‘Trading Democracy’, *Alternet* (14 January 2002), available at: {[http://www.alternet.org/story/12233/trading\\_democracy](http://www.alternet.org/story/12233/trading_democracy)} accessed 2 September 2014.

international investment law. Of the other concluded environmental cases, two involve awards against Costa Rica for expropriations of beachfront property in order to protect endangered wild cats and sea turtles respectively.<sup>31</sup> In both cases Costa Rica did not dispute the principle that the affected investors should receive compensation for their property, but only how much compensation should be provided. In *MTD v. Chile* the tribunal awarded the investor compensation for its ill-fated attempt to acquire the necessary permits to build a residential satellite town in Santiago's greenbelt.<sup>32</sup> Two further cases concerned the environment only as a side issue. In the *Maffezini* case the tribunal dismissed a chemical company's complaint in respect to the requirement for an environmental impact assessment, and decided that Spain did indeed have the right to fully enforce its domestic environmental laws and EU law.<sup>33</sup> In *Plama v. Bulgaria* the tribunal dismissed the investor's complaints in respect to the remediation requirements of a privatized oil refinery, and in any case also dismissed the case on jurisdictional grounds because the investor had committed fraud and made the investment "in flagrant violation" of Bulgarian law.<sup>34</sup> Finally, the most recent award emerged in 2013, when *Abengoa* won another dispute arising out of Mexico's conduct towards an investment in the waste treatment industry.<sup>35</sup>

In addition to the above concluded cases, there are also a range of others that were rejected on jurisdictional grounds. The largest known environmental claim ever made – a USD 57 billion claim (three times the country's GDP) by an oil company against Costa Rica's decision to withdraw rights to oil exploitation – was deemed inadmissible because the investment contract did not allow for arbitration, and the Central American Free Trade Agreement had not yet entered into force.<sup>36</sup> Dismissals on jurisdictional grounds are likely to become less frequent in

---

<sup>31</sup> *Compañía Del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica, Final Award*, ICSID Case No. ARB/96/1 (17 February 2000); *Marion Unglaube & Reinhard Unglaube v. Republic of Costa Rica, Award*, ICSID Case No. ARB/08/1 & ICSID Case No. ARB/09/20 (16 May 2012) (the two cases were subsequently consolidated). These cases are discussed in more detail elsewhere.

<sup>32</sup> *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, Award*, ICSID Case No. ARB/01/7 (25 May 2004). This case is discussed in more detail elsewhere.

<sup>33</sup> *Emilio Agustín Maffezini v. The Kingdom of Spain, Award*, ICSID Case No. ARB/97/7 (13 November 2000), para. 70-71; see also Tra Pham, 'International Investment Treaties and Arbitration as Imbalanced Instruments: A Re-Visit', *International Arbitration Law Review*, 13:3 (2010), p. 85-86; UNCTAD, *Investor-State Disputes Arising from Investment Treaties: A Review*, UNCTAD Series of International Investment Policies for Development (New York & Geneva: United Nations, 2005), p. 46.

<sup>34</sup> *Plama Consortium Limited v. Republic of Bulgaria, Award*, ICSID Case No. ARB/03/24 (27 August 2008), para. 134-135, 137, 143.

<sup>35</sup> *Abengoa, S.A. y COFIDES, S.A. v. United Mexican States, Award*, ICSID Case No. ARB(AF)/09/2 (18 April 2013) (in Spanish only).

<sup>36</sup> No publicly available legal documents are available in this case. The USD 57 billion figure was widely reported, but a lobbyist for the company was also reported to have suggested that the company would back down if compensated for the 10 million it had actually spent on initial oil exploration. The details of any settlement are



the future, as treaties have been in force for longer and as investors learn to structure their investments so as not to fall foul of the nationality requirements of treaties. At least another six cases have ended with settlements, and in others the investors have withdrawn the claims. Finally, while some scholars in the mid-2000s suggested that the early wave of environmental disputes had not been followed by a second wave, that second wave is now clearly here – at least another twelve environmental cases are currently pending, and many challenge high profile political decisions such as Germany’s phase-out of nuclear power and Quebec’s moratorium on the controversial natural gas extraction technique of ‘fracking’.<sup>37</sup> Environmental disputes therefore continue to emerge, and this chapter seeks to understand precisely how corporations can make use of investment treaties to challenge unfavourable environmental protection measures.

### ***Argument, Methods and Structure***

To summarise the argument that will be made in this chapter, corporations continue to have the ability to challenge environmental protection measures before investment tribunals, and under the right circumstances they still stand a good chance of winning. It is sometimes implied that in the wake of the environmentally friendly awards in *Methanex v. USA*, *Glamis Gold v. USA* and *Chemtura v. Canada*, the risk to the environment has diminished, and that these awards have superseded the previous investor-friendly awards. For instance, M. Sornarajah claims that in comparison to the decision in *Santa Elena v. Costa Rica*, the decision in *Methanex* in respect to expropriation “does change the law in the area significantly”.<sup>38</sup> However, in 2012 the tribunal in *Unglaube v. Costa Rica* repeated verbatim the original interpretation of the law on expropriation in *Santa Elena*, and proved that the original investor-friendly interpretation had

---

unknown. Kyla Tienhaara, ‘Regulatory Chill and the Threat of Arbitration: A View from Political Science’, in Chester Brown & Kate Miles (eds) *Evolution in Investment Treaty Law and Arbitration* (Cambridge, Cambridge University Press, 2011), p. 618 – 621; see also Giugi Carminati, ‘Is International Trade Really Making Developing Countries Dirtier and Developed Countries Richer?’ *UC Davis Business Law Journal*, 8 (2007-2008), p. 217.

<sup>37</sup> Gaines, ‘Environmental Policy Implications of Investor-State Arbitration’, p. 191; Nathalie Bernasconi-Osterwalder & Rhea Tamara Hoffmann, ‘The German Nuclear Phase-Out Put to the Test in International Investment Arbitration? Background to the New Dispute *Vattefall v. Germany (II)*’ *Briefing Note* (The International Institute for Sustainable Development, 2012), available at: { <http://www.iisd.org/publications/german-nuclear-phase-out-put-test-international-investment-arbitration-background-new>} accessed 24 August 2012; *Lone Pine Resources Inc. v. Government of Canada, Notice of Intent to Submit a Claim to Arbitration Under Chapter Eleven of the North American Free Trade Agreement*, UNCITRAL Ad Hoc Arbitration (8 November 2012).

<sup>38</sup> M. Sornarajah, ‘A Law for Need or a Law for Greed?: Restoring the Lost Law in the International Law of Foreign Investment’, *International Environmental Agreements*, 6 (2006), 343.

not been consigned to history.<sup>39</sup> Similarly, while *Tecmed v. Mexico* and *Metalclad v. Mexico* are often considered high points of investment protection, the investor-friendly principles espoused by the tribunals continue to be cited in more recent awards.<sup>40</sup> As such, many of the legal principles of earlier awards still stand and have even been confirmed in recent cases, and it would be too optimistic an assessment to suggest that the law itself has changed in an environmentally friendly direction as a result of arbitral re-interpretation. Indeed, given the lack of precedence in international law the law should not be expected to change in a linear direction, absent changes to the treaties themselves. As such, this chapter will highlight areas of legal disagreement, but it should not be assumed that the interpretation of the law that allows for more regulatory freedom for states is the one that will be drawn upon in any particular pending environmental dispute. The rejection of the argument that there is a linear historical development from more investor-friendly to state-friendly awards also allows for a thematic rather than chronological structure to this chapter.

Many who reject the proposition that environmental protection measures are at risk from investment arbitration would nevertheless not do so on the basis that the law has changed, but rather on the basis that the cases that were lost by states did not implicate genuine or legitimate environmental measures to begin with, while legal challenges to ‘proper’ environmental measures were rightly defeated. In this vein, Sanford Gaines suggests that the government actions in the early cases “were not truly environmental protection measures”, and Todd Weiler concurs that environmental protection was not actually “at the heart” of the early claims.<sup>41</sup> On this basis, Charles Brower and Stephan Schill conclude that “while investment treaties establish rights only for foreign investors, they do not abolish the host state's regulatory powers [...] [states] are not required to compensate foreign investors for the effects of bona fide, general regulations that further a legitimate purpose in a nondiscriminatory and proportionate way”.<sup>42</sup> This statement may well be true on its own terms, and a key aim behind this chapter is to investigate what understanding of the words ‘nondiscriminatory’, ‘proportionate’ and ‘legitimate’ underpins this claim. In doing so, it agrees that the distinction between the

---

<sup>39</sup> *Unglaube v. Costa Rica*, *Award*, para. 217.

<sup>40</sup> *MTD v. Chile*, *Award*, para. 114; Stephan Schill, *The Multilateralization of International Investment Law* (Cambridge: Cambridge University Press, 2009), p. 336.

<sup>41</sup> Gaines, ‘Environmental Policy Implications of Investor-State Arbitration’, p. 171; Todd Weiler, ‘A First Look at the Interim Merits Award in *S.D. Myers, Inc. v. Canada*: It is Possible to Balance Legitimate Environmental Concerns with Investment Protection’, *Hastings International and Comparative Law Review*, 24 (2000-2001), p. 174.

<sup>42</sup> Charles Brower & Stephan Schill, ‘Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?’, *Chicago Journal of International Law*, 9 (2008-2009), p. 484.

environmental cases where the companies won and lost lies primarily in the underlying characteristics of the cases themselves, as opposed to any significant changes in legal interpretation.

This chapter therefore seeks to investigate both how wide or narrow an understanding of ‘proportionate’ or ‘legitimate’ the proponents of investment arbitration are working with, as well as the claim that environmental defences simply act as an excuse for government measures actually taken for other reasons. Antony Crockett suggests that “a government may well use human rights or environmental laws in the manner of a ‘Trojan Horse’ – that is, in order to disguise measures that are harmful to an investment project but which lack genuine links to human rights or environmental concerns”.<sup>43</sup> Thomas Wälde and Abba Kolo similarly suggest that many investment disputes involve “mistreatment of unwary foreign investors, often blatant, but camouflaged in the much more palatable clothes of sacred environmental causes”.<sup>44</sup> This argument mirrors a concern within international trade law about “green protectionism”, or the possibility that trade restrictions may be justified with environmental arguments even where the true intention lies elsewhere.<sup>45</sup> In theory, this is not at all an implausible suggestion. Beyond protectionism in itself, it is often remarked upon that people on the left no longer possess an alternative economic logic with which to challenge global capitalism on ideological grounds (a position once held by socialism) and the language of environmental protection and human rights is one of the few languages people on the political left currently share. It would therefore not be surprising if wider objections to global capitalism were couched in terms of environmental protection. Furthermore, the protection of the environment or human rights constitute legitimate reasons for government measures even for those committed to a global capitalist world order, and since this includes most of the investment arbitrators that judge on these disputes governments are provided with an added incentive to dress up measures taken for other reasons in environmental clothing. The question of whether environmental language is merely used to justify government measures actually taken for other reasons is therefore a legitimate area of research – and indeed a question that will be considered in this and next chapter – but it should

---

<sup>43</sup> Antony Crockett, ‘Stabilisation Clauses and Sustainable Development: Drafting for the Future’, in Chester Brown & Kate Miles (eds) *Evolution in Investment Treaty Law and Arbitration* (Cambridge, Cambridge University Press, 2011), p. 530.

<sup>44</sup> Wälde & Kolo, ‘Environmental Regulation, Investment Protection and Regulatory Taking’, p. 820.

<sup>45</sup> Alessandra Asteriti, ‘Waiting for the Environmentalists: Environmental Language in Investment Treaties’, in Rainer Hofman & Christian Tams (eds), *International Investment Law and Its Others* (Nomos, 2012), p. 5, also available on: {[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2028405](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2028405)} accessed 19 August 2012; Bryan Schwartz, *Separate Opinion in S.D. Myers, Inc. v. Government of Canada*, UNCITRAL Ad Hoc Arbitration (12 November 2000), para. 88.

also be emphasized that any concealed ‘true reasons’ for a regulation are not necessarily by default illegitimate. For instance, in a current case a corporation seeking to develop offshore wind power suggests that internal government communications have revealed that a Canadian moratorium was not ‘really’ motivated by a lack of scientific knowledge about the environmental harms (the project would have been the first large freshwater offshore wind farm anywhere in the world) but rather by the fact that the project would be more expensive than onshore alternatives.<sup>46</sup> The corporation therefore implies that saving public money is a less legitimate reason for a government policy than environmental protection, or at least one on a less secure footing legally.

It should nevertheless be made clear that the focus on environmental regulations does not imply that transnational corporations are inherently against the environment, nor that opposing social groups are inherently in favour of more environmental regulations. A few recent cases, in which corporations have brought legal challenges against states for *not* maintaining environmental protection laws, has prompted Anatole Boute to lament that the investment treaty regime’s “potentially positive role for improved environmental protection [...] is only sporadically mentioned”.<sup>47</sup> Similarly, Avidan Kent complains that “critics overlook the possibility that this system can also support sustainable development goals”.<sup>48</sup> This may be a fair criticism against scholars who suggest that international investment law is inherently environmentally unfriendly, but this is not the argument pursued here. Corporations are concerned with their bottom-line, and in a world where environmental services and industries present profitable investment opportunities, corporations are also likely to seek recourse under investment treaties to protect such investments. The most prominent example of this is over 30 recent investment treaty challenges against Spain and the Czech Republic against changes, prompted by the financial crisis, that these countries have made to their often very generous subsidies for green energy.<sup>49</sup> To cite the CEO of Impax Asset Management, one of the investment funds that have recently sought compensation for Spain’s decision to cut subsidies for green energy:

---

<sup>46</sup> Windstream Energy LLC v. Government of Canada, *Amended Notice of Arbitration*, UNCITRAL Ad Hoc Arbitration (28 January 2013), para. 30.

<sup>47</sup> Anatole Boute, ‘The Potential Contribution of International Investment Protection Law to Combat Climate Change’, *Journal of Energy and Natural Resources Law*, 27:3, (2009), p. 336.

<sup>48</sup> Avidan Kent, ‘Criticizing the Field of International Investment Law: A Simple Story Made Complex’, in *Legal Frontiers: McGill’s Blog on International Law* (18 January 2012), available at {<http://www.legalfrontiers.ca/2012/01/criticizing-the-field-of-international-investment-law-a-simple-story-made-complex/>} accessed 7 July 2014.

<sup>49</sup> Olivet & Eberhardt, *Profiting from Crisis*, p. 26 – 35; Jarrod Hepburn, ‘Renewable Energy Arbitration Claims on Horizon, but States take Differing Approaches to Public Disclosure’, *Investment Arbitration Reporter* (7 September 2011).

“We don’t have an ethical mandate per se. [...] We are often attractive for ethical investors, because what we do fits their objectives, but we also manage funds for investors who would say they are agnostic on ethical investing, at best! They’re attracted by exposure to a high growth area... They ought to be able to make good, if not better, returns in the long term from this area than from anything else”.<sup>50</sup>

Contra Boute and Kent, the point is that the investment treaty regime does not “support sustainable development goals” any more than it directly threatens the environment – rather, it supports businesses, and their interests can lie either in states promoting or refraining from environmental regulations. In so far as green investments are a high growth area with high returns, we are likely to see more corporations challenge governmental measures that are negative towards the environment in the future, while in so far as corporations continue to find environmental regulations costly or cumbersome we are likely to see legal challenges against them. The argument here is therefore not that investment treaties place specifically environmental regulations at risk, but that corporations are striking down on any unfavourable government measures that are designed to support other social groups or social interests.

Given disagreements on whether environmentally related investment disputes are actually about the environment at all, a clarification is nevertheless needed in respect to the selection of cases in this thesis. The cases selected for more detailed analysis are not only ones that arise out of definitely ‘legitimate’ environmental measures (on a narrow reading of the term), but all cases where environmental protection is cited as a reason for a disputed government measure. Included are also cases that arise out of environmental policies, environmental protests or that otherwise relate to the environment. However, it should be made clear that the specific selection of cases is not particularly important for the analysis that follows. There is no attempt at providing a representative view of the state of investment arbitration in respect to the environment – in any case an impossible task given that confidentiality is likely to render many cases unknowable – and the purpose is solely to provide a basis for more detailed analysis of the particular circumstances in which corporations can successfully challenge environmental regulations. Finally, a thorough engagement with the secondary literature on environmental and non-environmental cases alike ensures that no legal issues have been overlooked as a result of the selection of cases.

---

<sup>50</sup> Olivet & Eberhardt, *Profiting from Crisis*, p. 29.

This chapter is not structured strictly according to the treatment standards found in the investment treaties themselves. This would be the conventional method for structuring work on this topic, and suitable for research concerned with legal interpretation of particular clauses. Treatment standards nevertheless often overlap. The ‘full protection and security’ standard has recently been interpreted to include legal security, and the tribunal in *Plama v. Bulgaria* rightly remarks that “[i]n this last respect, the standard becomes closely connected with the notion of fair and equitable treatment”.<sup>51</sup> Similarly, ‘fair and equitable treatment’ has often been interpreted to include a requirement of non-discrimination, and then the standard becomes very similar to the ‘national treatment’ and ‘most favoured nation treatment’ standards.<sup>52</sup> Furthermore, the treatment standards themselves do not necessarily accurately portray the gist of what investment treaties actually protect corporations from in practice. Investment treaties do not contain a treatment standard that explicitly protects corporations from a change of circumstances, but with the arbitral innovation of the requirement to respect an investor’s ‘legitimate expectations’, companies may be protected against certain types of change despite the lack of direct textual support for this proposition in most treaties.

This chapter is therefore not structured directly according to treatment standards, but rather in terms of four broad umbrella categories that better explain the actual substance of what investment law protects corporations from. The decision to structure the chapter in terms of what investment treaties offer corporations “protection from” can nevertheless also seem like an odd choice of words for a critical study of investment arbitration. Other critics of the investment regime suggest that corporations use investment treaties as a ‘sword’ rather than a ‘shield’ against government measures, and it would not be unreasonable to suggest “attack” as a more accurate description of how corporations make use of these treaties.<sup>53</sup> ‘Protection’, in contrast, is the word used by the proponents of the regime – indeed, it is also the term used in the investment treaties themselves, the titles of which formally call for “the promotion and protection of investments”.<sup>54</sup> From a critical standpoint it might therefore seem counterintuitive

---

<sup>51</sup> *Plama v. Bulgaria*, *Award*, para. 180.

<sup>52</sup> For instance, the tribunal in *S.D. Myers* determined that a breach of the national treatment standard in that case established a breach of fair and equitable treatment as well, although it did “not rule out the possibility that there could be circumstances in which a denial of national treatment provisions of the NAFTA would not necessarily offend the minimum standard provisions”. *S.D. Myers v. Canada*, *First Partial Award*, para. 266. Kenneth Vandeveldt similarly observes that tribunals have interpreted discrimination on the basis of nationality as a violation of fair and equitable treatment. Kenneth Vandeveldt, ‘A Unified Theory of Fair and Equitable Treatment’, *New York University Journal of International Law and Politics*, 43 (2010-2011), pp. 43-106.

<sup>53</sup> International Institute for Sustainable Development, *Private Rights, Public Problems*, p. 16.

<sup>54</sup> E.g. “Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ghana for the Promotion and Protection of Investments” (22 March 1989).

to follow the proponents of the investment regime in adopting the term ‘protection’, but this is precisely what follows from the wider argument of this thesis. The previous chapter suggested that the investment law regime formed part of an emerging ‘transnational state’, within which national and supranational political structures often fulfill different functions for a transnational capitalist class. While national states continue to be important in furthering global capitalism more generally and the interests of particular corporations specifically, supranational institutions are instrumental in ‘locking in’ favourable policies and measures in the event of resistance from within national states. A transnational capitalist class therefore advances its interests within national states – or with the support of governments in those states – but often maintain their positions through institutions at the supranational level. In this context, investment treaties are not primarily used to *further* the interests of transnational corporations, but to ‘protect’ them against subsequent changes often prompted by resistance from subordinate groups within states. Most of the government measures challenged before investment tribunals are *new* environmental protection measures. In the parlance of advocates of the investment treaty regime, investment law is designed precisely to protect corporations from ‘political risk’ – the risk of new and unfavourable political changes introduced by a state.<sup>55</sup> While corporations continue to commit their formidable lobbying powers to securing new business-friendly policies within national states as well as international institutions, investment treaties can help to ensure that changes occur in only one direction – new policies that are unfavourable to businesses can often be challenged before investment tribunals. This chapter therefore seeks to understand *what* investment treaties can protect corporations from. In contrast, the next chapter asks *who* such treaties offer protection from – new policies unfavourable to particular corporations have often been instigated by opposing social groups.

Of the four broad categories that the investment regime protects corporations from, the first three broadly overlap with particular treaty standards but also include other treaty standards within their remit. The first category is protection from ‘discrimination’ on the basis of corporate nationality – this is essential in supporting a distinctly transnational capitalist class, and is the requirement most non-experts associate with investment treaties. The second category is protection against expropriation – essentially the protection of property rights widely conceived, an important element of what the legal and political superstructure of capitalism is

---

<sup>55</sup> Paul Comeaux & Stephen Kinsella, ‘Reducing Political Risk in Developing Countries: Bilateral Investment Treaties, Stabilization Clauses, and MIGA and OPIC Investment Insurance’, *New York Law School Journal of International and Comparative Law*, 15:1 (1994), p. 4.

said to accomplish in Marxist theory. The third substantive area of protection is from ‘unfairness’ – a term that a top arbitrator suggests is “intentionally vague” and “designed to give adjudicators a quasi-legislative authority to articulate a variety of rules necessary to achieve the treaty’s object and purpose in particular disputes”.<sup>56</sup> In practice this encapsulates anything objectionable in light of most treaties’ singular purpose of promoting foreign investment, but which does not fit under any of the other headings. The fourth category is protection from change – as suggested above, unfavourable changes are precisely what investment law as a whole seeks to protect investors from, but it is here used to capture changes that are not necessarily expropriatory, discriminatory or obviously unfair in character. These are the four categories that will be discussed in this section, but a fifth category has been consigned to the next chapter – protection from protests. There is an increasing tendency of corporations to contend that states have failed to accord corporations “full protection and security” from political protests, and particularly protests motivated by environmental concerns. This category nevertheless overlaps with the resistance that investment treaty disputes often arise out of, and is therefore discussed in the next chapter. The final section of the chapter will consider the consequences of state failure to protect corporations from the above measures, and in particular the question of the generous measure of compensation required within this body of international law.

Each of the above sections will consider the relevant treaty standards and their legal interpretation, as well as their past applicability in investment disputes arising out of environmental protection measures. Some will also consider the utility of such protections in pending environmental disputes in order to further illustrate the circumstances under which investment treaties might benefit corporations. From the outset, it should finally be mentioned that each section considers only allegations relevant to that particular category. Most arbitral cases include several allegations that are legally independent of each other, and tribunals often award compensation to a corporation because a state has breached a particular standard, even if violations of the other treatment standards are not found. This chapter is therefore not structured case-by-case, but will deal with separate allegations under the appropriate headings.

---

<sup>56</sup> Charles Brower, ‘Structure, Legitimacy, and NAFTA’s Investment Chapter’, *Vanderbilt Journal of Transnational Law*, 36 (2003), p. 66 (footnote 163).



### **Protection from ‘Discrimination’**

When the Canadian parliament discussed proposals for cigarette plain packaging regulations in the late 1990s, one of the main U.S. negotiators of NAFTA appeared before a parliamentary committee on behalf of Philip Morris and RJR Reynolds in order to explain to surprised parliamentarians that NAFTA required more than simply equal treatment between US and Canadian tobacco corporations, and suggested that the plain packaging regulations under consideration may well fall foul of the other investment chapter requirements.<sup>57</sup> Those other requirements will be discussed in the next sections, but what is notable about this episode is that Members of Parliament – normally more informed than the general public – had associated the investment chapter of NAFTA specifically with the obligation to treat foreign corporations equally with national corporations, and *only* with that obligation. If this is the one requirement that is commonly associated with international investment law, the question raised in this section is what that obligation demands in practice, and how corporations can utilize this obligation to challenge environmental protection measures that are disadvantageous to their business operations.

Investment treaties almost all require states to offer corporations ‘national treatment’ and ‘most favoured nation treatment’. Some investment tribunals have suggested that ‘discrimination’ between investors of different nationalities is also a violation of the ‘fair and equitable treatment’ standard, and finally some scholars and tribunals suggest that national treatment is now a requirement under customary international law.<sup>58</sup> While investment treaties normally refer to ‘national treatment’ and ‘most favoured nation treatment’, investment tribunals as well as policy-makers and the academic literature normally speak of the above provisions as protecting corporations from ‘discrimination’. This is a normatively loaded term, and it is surprising that even critics of investment treaties have adopted this language. Given the affinity with human rights discourse, there is immediately a normative presumption against discrimination. The decision as to whether to offer foreign corporations ‘national treatment’ would normally be conceived of as a policy choice, but the common practice of couching the debate in terms of ‘protection from discrimination’ ensures that the policy is linguistically placed beyond normal

---

<sup>57</sup> Schneiderman, *Constitutionalizing Economic Globalization*, p. 128.

<sup>58</sup> S.D. Myers v. Canada, *First Partial Award*, para. 266. If the FET standard is part of the minimum standard of treatment, and national treatment is required of the FET standard, then national treatment is also required by customary international law.

policy-making – few government officials would feel comfortable advocating discrimination. Enabled by the use of this language, the requirement to treat foreign corporations equally with domestic corporations has become a well-established principle both within the investment treaty regime and beyond.

In practice this treaty requirement prohibits states from introducing policies that treat foreign corporations unfavourably in comparison with domestic corporations. Most obviously, this requirement would prohibit the protection of ‘infant industries’, which has been a hallmark of many development strategies adopted by countries in the past.<sup>59</sup> The effect of non-discrimination is therefore not necessarily equitable in practice – where transnational corporations are considerably larger than domestic corporations, equal treatment can lead to the preservation of such differentials. Furthermore, for all the talk about non-discrimination as a principle, the ‘protection from discrimination’ provided by investment treaties is decidedly one-sided – domestic corporations are often placed at a competitive disadvantage in comparison with foreign corporations, in that they are not entitled to recourse to arbitration or to any of the other treaty standards, such as fair and equitable treatment or protection from expropriation. Finally, some tribunals have determined that states have not only an obligation to refrain from discriminating against foreign corporations, but a positive obligation to engage in “proactive behavior” to “encourage and protect” foreign investors.<sup>60</sup> The combined effect of non-discrimination together with additional rights for foreign corporations is, to cite an UNCTAD report, “positive discrimination in favour of foreign investors against domestic investors”.<sup>61</sup> The attempt of many commentators to latch onto non-discrimination as a positive value with affinity to human rights discourse is therefore decidedly one-sided.

An environmental protection strategy that relied upon imposing more stringent environmental regulations on foreign corporations would be in obvious breach of the national treatment standard, even if this was to be justified in terms of the more advanced technology or access to resources that is often said to be the advantage of attracting foreign investment to developing countries. No such case has emerged, and given that the law on this topic is fairly clear, such a case would be unlikely to reach the stage of arbitration. The environmental cases in respect to

---

<sup>59</sup> Sornarajah, *The International Law on Foreign Investment*, p. 343.

<sup>60</sup> *Azurix Corp. v. the Argentine Republic, Award*, ICSID Case No. ARB/01/12 (14 July 2006), para. 372. For a similar analysis see also: *MTD v. Chile, Award*, para. 113.

<sup>61</sup> UNCTAD, *Fair and Equitable Treatment: A Sequel*, UNCTAD Series of Issues in International Investment Agreements II (New York & Geneva: United Nations, 2012), p. 12.

national treatment are rather ones in which the state claims that no discrimination has occurred, or where the state maintains that there are good environmental reasons for treating the foreign corporation differently and therefore that it is not in ‘like circumstances’ with the domestic comparator. Of the concluded environmental cases that serve as the basis for the analysis in this chapter, the one that most directly addresses this question is *S.D. Myers v. Canada*.

*S.D. Myers* is an Ohio-based corporation involved in the disposal of hazardous waste, including PCB waste. Due to the risk to human health and the environment, the production of PCBs has been prohibited in both the USA and Canada for several decades, and more recently under international environmental treaties, but an existing stock of PCBs is still in use.<sup>62</sup> In 1980 the U.S. closed its border with Canada to the import and export of PCBs. The investment chapter dispute arose after a long lobbying campaign by *S.D. Myers*, conducted within both countries, to have the border re-opened.<sup>63</sup> Canada had already explicitly informed *S.D. Myers* that its policy was to destroy PCB waste domestically, but in 1995 the company finally met with some success in the U.S.<sup>64</sup> The law prohibiting the import and export of PCBs remained in force, but instead the U.S. Environmental Protection Agency (potentially concerned about lobbying on behalf of *S.D. Myers* by politicians with influence over the agency’s budget) issued a so-called ‘enforcement discretion’ – imports of PCBs would remain in violation of U.S. law, but the Environmental Protection Agency committed itself not to enforce the ban.<sup>65</sup> Canada had not introduced its own import and export ban, but as a result of the U.S. ban PCB waste had not been exported abroad for 15 years. The investment tribunal that was subsequently instituted in the case “accepts that [Canada’s] ministers and their officials were taken by surprise” by the new developments, and observed that a “period of intensive activity followed” as Canada considered the implications of the sudden opening of the border.<sup>66</sup>

Canada’s response, and the measure that *S.D. Myers* alleged was in violation of investment law, was an ‘interim ban’ on PCB exports to allow time for a reconsideration of its own policy. Amongst others, Canada’s concerns included whether PCBs exported to the U.S. would be

---

<sup>62</sup> *S.D. Myers v. Canada, First Partial Award*, para. 98-101.

<sup>63</sup> *Ibid*, para. 113; see also Brian Hodges, ‘Where the Grass is Always Greener: Foreign Investor Actions Against Environmental Regulations Under NAFTA’s Chapter 11, *S.D. Myers, Inc. v. Canada*’, *The Georgetown International Environmental Law Review*, 14 (2001-2002), p. 378.

<sup>64</sup> *S.D. Myers, Inc. v. Government of Canada, Counter-Memorial of the Government of Canada, UNCITRAL Ad Hoc Arbitration* (13 November 2000), para. 123.

<sup>65</sup> *S.D. Myers v. Canada, First Partial Award*, para. 119; Hodges, ‘Where the Grass is Always Greener’, p. 378.

<sup>66</sup> *S.D. Myers v. Canada, First Partial Award*, para. 120-121.

disposed of in an environmentally safe manner (regulations differed between the two countries); whether the export of PCBs would be in compliance with the Basel Convention and its restrictions on the export of hazardous waste (the U.S. was not a party to the agreement); and whether the export of PCBs would influence the long-term financial viability of Canada's domestic capacity for PCB disposal.<sup>67</sup> By February 1997 Canada had nevertheless reached the conclusion that, with appropriate safeguards, the export of PCB waste could safely commence. The border nevertheless only remained open for a few months. Social and environmental NGOs had from the outset considered the enforcement discretion provided by the U.S. Environmental Protection Agency "legally dubious", and by July 1997 the U.S. again closed its side of the border in response to a lawsuit by an environmental group, the Sierra Club.<sup>68</sup> S.D. Myers brought the case to international arbitration, and the investment tribunal subsequently decided that Canada's 'interim ban' had breached the national treatment standard and that Canada had to compensate S.D. Myers for its lost profits during a 15-month period from November 1995 until the interim ban was lifted in February 1997.<sup>69</sup>

Within the investment law literature, the S.D. Myers case is often presented as a classic instance of an environmental justification being used as a 'Trojan horse' for the introduction of a protectionist measure.<sup>70</sup> This, indeed, was essentially the tribunal's own conclusion. The tribunal acknowledges that government motivation is often a "complex and multifaceted matter" and furthermore that "[u]ndoubtedly, there were legitimate concerns" that had motivated Canada in its introduction of the interim ban.<sup>71</sup> The tribunal nevertheless concludes that the primary reason had not been concerns about less stringent PCB disposal standards in the U.S. or concerns about being in breach of the Basel Convention, but rather that the "policy was shaped to a very great extent by the desire and intent to protect and promote the market share of enterprises that would carry out the destruction of PCBs in Canada and that were owned by Canadian nationals".<sup>72</sup> Even accepting the tribunal's assessment that this was the primary

---

<sup>67</sup> S.D. Myers v. Canada, *First Partial Award*, para. 121.

<sup>68</sup> Ibid, para. 128; Sierra Club of Canada, the Canadian Labour Congress, the Polaris Institute and the Council of Canadians, 'Submissions of the Canadian Alliance on Trade and Environment in the NAFTA Arbitration Under UNCITRAL Rules in S.D. Myers v. Government of Canada' (16 January 2000), para. 17-21, available at: {<http://www.sierraclub.ca/national/programs/sustainable-economy/trade-environment/federal-petition-sd-myers.html>} accessed 2 September 2014.

<sup>69</sup> S.D. Myers, Inc. v. Government of Canada, *Second Partial Award*, UNCITRAL Ad Hoc Arbitration (21 October 2002).

<sup>70</sup> E.g. Gaines, 'Environmental Policy Implications of Investor-State Arbitration', pp. 171-201; Wälde & Kolo, 'Environmental Regulation, Investment Protection and Regulatory Taking', p. 820.

<sup>71</sup> S.D. Myers v. Canada, *First Partial Award*, para. 161, 121.

<sup>72</sup> Ibid, para. 162.

objective, it is notable that Canada itself had essentially acknowledged the first part of that statement – the protection of the domestic PCB treatment facility was explicitly one of the five reasons for the interim ban – but justified it precisely on environmental grounds. Canada claimed to be concerned with the long-term viability of its only domestic PCB treatment facility, a previously state-owned facility that it was clear would very quickly find itself in financial difficulty if exposed to competition from U.S. firms.<sup>73</sup> Fearing a sudden U.S. closure of the border for imports of PCBs (as indeed happened in July 1997), Canada stressed the importance of ensuring that its only domestic treatment facility did not go out of business.

The tribunal maintains that “there was no legitimate environmental reason for introducing the ban”, but it does acknowledge that there was “an indirect environmental objective – to keep the Canadian industry strong in order to assure a continued disposal capability”.<sup>74</sup> The tribunal accepts that “[t]his was a legitimate goal, consistent with the policy objectives of the Basel Convention”.<sup>75</sup> It nevertheless concludes that this objective “could have been achieved by other measures” and that “where a state can achieve its chosen level of environmental protection through a variety of equally effective and reasonable means, it is obliged to adopt the alternative that is most consistent with open trade”.<sup>76</sup> The S.D. Myers case involves complex questions in respect to trade-related aspects of investment, but the equivalent in a non-trade-related investment dispute would be a requirement to assess the different policy measures that a state could conceivably take to address a particular (environmental) concern, and thereafter the obligation to choose the option that affects foreign investors least – a ‘least restrictive measures’ test. The tribunal in S.D. Myers acknowledged that the ultimate objective of ensuring domestic disposal capacity was legitimate, but decides that government subsidies would have accomplished the same objective with less adverse effects on S.D. Myers.<sup>77</sup> Environmental NGOs have objected to this line of reasoning, and contend that the tribunal “appears to have been totally unaware of, or indifferent to, the economic context within which sustainable waste management regimes must be established” and imply that public expense should be a legitimate consideration in the development of environmental policy.<sup>78</sup>

---

<sup>73</sup> Gaines, ‘Environmental Policy Implications of Investor-State Arbitration’, p. 190.

<sup>74</sup> S.D. Myers v. Canada, *First Partial Award*, para. 195.

<sup>75</sup> *Ibid*, para. 255.

<sup>76</sup> *Ibid*, para. 195, 221.

<sup>77</sup> *Ibid*, para. 225.

<sup>78</sup> Sierra Club of Canada, et al, ‘Submissions of the Canadian Alliance on Trade and Environment’, para. 8-10.

What is particularly interesting about the tribunal's conclusion is nevertheless the underlying premise of its decision vis-à-vis the underlying premise of the Basel Convention. Where the tribunal contends that Canada was "obliged to adopt the alternative that is most consistent with open trade", the Basel Convention is unique amongst international treaties in that it, on the contrary, *discourages* international trade in hazardous waste – it opens with the conviction that "hazardous wastes and other wastes should, as far as is compatible with environmentally sound and efficient management, be disposed of in the State where they were generated".<sup>79</sup> It is difficult to argue that the disposal of PCB waste in Canada would not be "compatible with environmentally sound and efficient management",<sup>80</sup> and therefore the basic premise of open trade espoused by the tribunal seems to conflict with the premise of avoidance of international trade in hazardous wastes that underpins the Basel Convention.

Throughout the arbitral proceedings Canada maintained that it was only concerned with ensuring domestic disposal capacity in the face of an uncertain situation on the border, and that S.D. Myers would have been welcome to establish disposal facilities in Canada itself. The tribunal nevertheless further supported its argument that Canada had been primarily motivated by a discriminatory intent by reference to certain statements by a senior politician involved in the decision to introduce an interim ban. The tribunal emphasized an answer provided by the Minister for the Environment in response to a parliamentary question: "[i]t is still the position of the government that the handling of PCBs should be done in Canada *by Canadians*", a statement that was repeated verbatim on a different occasion by the same Minister.<sup>81</sup> The tribunal, in interpreting these two statements, suggests that Canada's policy was not simply that PCB remediation should take place in Canada, but that it sought to protect the domestic corporation because it was Canadian. However, the tribunal itself cites the third occasion on which the same Minister uttered the controversial statement as follows: "We are meeting our obligations under the Basel Convention to dispose of our own PCBs [...] The handling of PCBs should be done in Canada by Canadians. *We have to take care of our own problems*".<sup>82</sup> Given the context of the remark, the colloquial phrase "in Canada by Canadians" seems primarily

---

<sup>79</sup> Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (adopted 22 March 1989, entered into force 5 May 1992), preamble, p. 12, available at: {<http://www.basel.int/TheConvention/Overview/TextoftheConvention/tabid/1275/Default.aspx>} accessed 2 September 2014; see also Sierra Club of Canada, et al, "Submissions of the Canadian Alliance on Trade and Environment", para. 13-14.

<sup>80</sup> Basel Convention, preamble, p. 12.

<sup>81</sup> S.D. Myers v. Canada, *First Partial Award*, para. 116, 171, 185.

<sup>82</sup> *Ibid*, para. 185.

intended to emphasize that Canadians should take care of their own problems and not to export them abroad – the very reason why the Basel Convention was first established – but to the investment tribunal this constitutes further evidence that the policy was illegitimately designed to protect the Canadian corporation. To scholars of international investment law, the case serves as evidence of the ‘blatant mistreatment’ that can befall foreign investors when state officials decide to “camouflage[...] [protectionism] in the much more palatable clothes of sacred environmental causes”.<sup>83</sup>

The S.D. Myers case is an interesting example of how an investment tribunal has assessed the illegitimacy of a measure that the state in question maintained was taken to protect the environment. Canada had maintained that S.D. Myers was not in ‘like circumstances’ with the Canadian competitor; only S.D. Myers would be engaged in cross-border trade of PCBs, and it is this practice that would have environmental implications. The tribunal at various points in the award acknowledges these concerns and does not contest that Canada should have acted to address them, but finds Canada at fault for not having chosen the policy option that was least restrictive for the foreign investor.<sup>84</sup> This conclusion may itself restrict the scope for environmental protection, but what deserves emphasis is also the fact that Canada, of course, had eventually come to precisely the decision to open the border of its own accord. The interim ban was lifted safely within the two years required by Canadian law, and exports of PCBs proceeded until the U.S. closed its side of the border. The measure that the investment tribunal found inconsistent with NAFTA was an *interim* ban designed to provide the breathing space required to assess the options and to put in place appropriate safeguards – safeguards that the tribunal itself acknowledges were necessary for the environment to be protected. The tribunal, in awarding S.D. Myers compensation for lost profits for the full period of the interim ban essentially concludes that Canada should have immediately assessed the options and adopted the right course of action. The tribunal’s decision that an environmental measure has to be not just reasonable in light of the environmental objective, but the measure to affect the investor least, as well as its lack of appreciation for the time needed to consider policy options required of a new situation, both suggest that states may have to walk a very fine line in their adoption of policies that affect foreign investors if they are to escape an investment treaty challenge.

---

<sup>83</sup> Wälde & Kolo, ‘Environmental Regulation, Investment Protection and Regulatory Taking’, p. 820.

<sup>84</sup> The tribunal describes the attempt to ensure domestic disposal capacity for the future as a ‘legitimate goal’, and it does not contest that the sudden opening of the border required Canada to take action – it merely disputes the action taken (temporary closure of the border) versus the ideal action (subsidies or alternative measures S.D. Myers v. Canada, *First Partial Award*, para. 255.

The prohibition on ‘discrimination’ is the one aspect of investment treaties that non-specialists seem to be aware of, but the actually existing cases reveal that the determination of what ‘discrimination’ involves in practice is far from straight-forward. The S.D. Myers case is the only concluded environmental case where the question of ‘discrimination’ has been central to the analysis,<sup>85</sup> but other cases have been lost on jurisdictional grounds or are still pending. For instance, Windstream Energy suggests that the decision of the Canadian province of Ontario to introduce a moratorium on *offshore* wind energy is discriminatory, because *onshore* wind energy has not been subject to a similar moratorium. Similarly, Pacific Rim and the Commerce Group have objected that El Salvador’s decision not to permit gold mining on environmental grounds is discriminatory because “other industries whose operations raise similar environmental concerns, such as power plants, dams, ports, and fishing operations”, have been permitted to continue.<sup>86</sup> In response to such allegations, states present explanations for any differential treatment that are, at least on the face of it, reasonable.<sup>87</sup> It remains to be seen whether such defences meet the more exacting standards of investment arbitrators, who tend to be very attentive to the first whiff of protectionism. The only concluded case suggests that companies have considerable leeway to challenge state measures, where alternative measures are available with a lesser impact on the investor or where unguarded political statements in any way implicate a company’s foreign origin.

---

<sup>85</sup> Methanex v. USA considered ‘national treatment’ in some detail, but it is less relevant in terms of the environment.

<sup>86</sup> Windstream v. Canada, *Amended Notice of Arbitration*, para. 46. Pac Rim Cayman LLC v. Republic of El Salvador, *Notice of Intent to Submit a Claim to Arbitration*, ICSID Case No. ARB/09/12 (9 December 2008), para. 35 (this claim may nevertheless have dropped out later in the arbitral proceedings); Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. Republic of El Salvador, *Notice of Intent to File Claim*, ICSID Case No. ARB/09/17 (16 March 2009), para. 22. Commerce Group compares the government’s decision not to permit mining with its decision to permit “for example, the operation of coffee *beneficios* which dump liquid residue directly into rivers and other activities which are more intrusive on the environment”. See also, William Ralph Clayton and others & Bilcon of Delaware v. Government of Canada, *Memorial of the Investors*, UNCITRAL Ad Hoc Arbitration (25 July 2011); The Renco Group, Inc. v. The Republic of Peru, *Memorial on Liability*, UNCT/13/1 (20 February 2014).

<sup>87</sup> For instance, in Renco v. Peru, involving the contractual remediation requirements of a privatized smelting and refining complex, the foreign owner contends that it was discriminated against because it received a less favourable extension of time to comply with its obligations than the state-owned company with whom it shared the obligations for remediating the complex. However, Peru responds that the state-owned company was contractually required to remediate the soil, while the foreign investor was under the obligation to introduce new technology to prevent further air pollution, and soil remediation would be “a futile investment [...] when the SO<sub>2</sub> emissions in the smelter have yet to be controlled”. Renco v. Peru, *Memorial on Liability*, para 102.



## Protection From Expropriation

If the ‘non-discrimination’ requirements are what many associate with investment treaties today, it is nevertheless the expropriation provision that was initially the main justification for the treaties. In the immediate post-colonial period from the 1950s–1970s, many newly independent countries in the developing world engaged in large-scale nationalizations of foreign-owned property, often as part of an economic strategy to address the continued dominance of the recently departed colonial masters and the effects of what Ghana’s President Kwame Nkrumah termed ‘neo-colonialism’.<sup>88</sup> As already explored in the previous chapter, this period also involved various UN initiatives by Third World countries to change the international laws in respect to expropriation towards a less demanding standard of compensation.<sup>89</sup> The first modern Bilateral Investment Treaties were drafted during this period, largely at the initiative of business actors, and sought to establish that full compensation was indeed due for expropriation.

Most provisions of investment treaties concern state measures that are deemed illegitimate and unlawful on their own terms – ‘discrimination’, unfair or inequitable treatment, lack of protection and security – and in this respect expropriations are the exception; they are not on their own either unlawful or illegitimate. Expropriations of property take place for all sorts of legitimate public purposes. To cite the tribunal in the non-environmental case *Azurix v. Argentina*, “the issue is not so much whether [a state measure that affects the property rights of an investor] is legitimate and serves a public purpose, but whether it is a measure that, being legitimate and serving a public purpose, should give rise to a compensation claim”.<sup>90</sup> If the government measure in question is found to constitute an expropriation, the answer is ‘yes’. To be lawful, an expropriation has to be *both* for a legitimate public purpose *and* accompanied with full compensation for the affected company.<sup>91</sup> Direct formal expropriations as part of large-scale nationalization programs are nevertheless rare today, and most current investment treaty disputes concern the question raised in the *Azurix* statement – how to distinguish between legitimate public interest measures that are compensable from those that are not. By the wording

---

<sup>88</sup> Kwame Nkrumah, *Neo-Colonialism, the Last Stage of Imperialism* (original 1965), available at {<https://www.marxists.org/subject/africa/nkrumah/neo-colonialism/introduction.htm>} accessed 27 March 2015.

<sup>89</sup> See Andrew Guzman, ‘Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties’, *Virginia Journal of International Law*, 38 (1997-1998), pp. 639-688.

<sup>90</sup> *Azurix v. Argentina*, *Award*, para. 310.

<sup>91</sup> For example, the relevant clause in NAFTA Chapter 11 reads “No Party may directly or indirectly nationalize or expropriate an investment [...] except (a) for a public purpose [...] *and* (d) on payment of compensation” (my emphasis). North American Free Trade Agreement (adopted 17 December 1992, entered into force 1 January 1994), Chapter 11, Article 1110.

of most investment treaties, expropriation includes not only formal dispossession of an investor's property, but also state measures deemed to 'indirectly' expropriate an investor's property – and then the question is how to distinguish between what are sometimes called 'regulatory takings' from non-compensable regulations. This section will first address the question of direct expropriations that have been undertaken for the purpose of environmental protection, before delving into the thorny question of how to distinguish between an expropriation and other state measures that adversely affect investors.

### ***Direct Expropriation***

Francisco Orrego Vicuña, a frequent arbitrator of investment disputes, suggests that disputes in respect to direct expropriations are now "quite exceptional".<sup>92</sup> It is significant that the only two environmental cases that concern a direct expropriation for an environmental purpose do not revolve around questions about whether compensation is required – or even the standard of compensation – but simply disputes about how much full compensation amounts to under the circumstances of each case. The first case, *Santa Elena v. Costa Rica*, arose from a 1978 expropriation decree of land adjacent to a national park on which the foreign investor had planned to develop a tourist resort.<sup>93</sup> Costa Rica maintained that the expansion of the national park was required to "maintain stable populations of large feline species such as pumas and jaguars", as well as for other environmental purposes.<sup>94</sup> The investor did not dispute the expropriation decree itself, but was dissatisfied with Costa Rica's assessment of the value of the property, and a 20-year long legal battle followed within Costa Rica's domestic courts.

The tribunal that was eventually instituted in the case accepts the legitimacy of the underlying environmental purpose and also explicitly refrains from taking a position on which party is at fault for the long delay in resolving the issue of compensation.<sup>95</sup> In proceeding to once and for all settle the issue, the award makes an important statement in respect to the relationship between the environmental purpose and the standard of compensation:

"While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the Property

---

<sup>92</sup> Francisco Orrego Vicuña, 'Regulatory Authority and Legitimate Expectations: Balancing the Rights of the State and the Individual Under International Law in a Global Society', *International Law FORUM Du Droit International*, 5 (2003), p. 190.

<sup>93</sup> *Santa Elena v. Costa Rica*, *Final Award*.

<sup>94</sup> *Ibid*, para. 18.

<sup>95</sup> *Ibid*, para. 20.

was taken for this reason *does not affect either the nature or the measure of the compensation to be paid for the taking* [...] The international source of the obligation to protect the environment makes no difference. [...] Expropriatory environmental measures—no matter how laudable and beneficial to society as a whole—are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state’s obligation to pay compensation remains”.<sup>96</sup>

While Costa Rica accepted that fair market value compensation was required, it had submitted detailed evidence on the environmental importance of the expropriation and its obligations under international environmental law – presumably on the expectation that this would reduce the compensation required – but the tribunal here explicitly rejected the relevance of environmental considerations for the measure of compensation.<sup>97</sup> This is indeed in line with the language of most investment treaties.

A particularly interesting aspect of this case is the question of payment of interest. The tribunal, despite refraining from making any judgement on which party is at fault for the long delays, decided against simple interest in favour of compound interest. This is where the tribunal would have had an element of discretion to take what it acknowledged was a legitimate environmental purpose into account. Indeed, the tribunal even acknowledged that had it followed standard practice the amount of compensation would have been reduced; the tribunal observed that there is “a tendency in international jurisprudence to award only simple interest” but noted that “compound interest certainly is not unknown or excluded in international law”.<sup>98</sup> Given the long legal battle that had taken place in Costa Rica’s own courts, this made a substantial difference in the compensation that Costa Rica had to provide to the investor – a property bought by the investor for a modest USD 395,000 in 1970 had, according to the tribunal, acquired the full market value of USD 4.2 million by the time of the expropriation in 1978 (a figure exactly half-way between the investor’s assessment and Costa Rica’s).<sup>99</sup> However, with

---

<sup>96</sup> (Emphasis added) *Santa Elena v. Costa Rica, Final Award*, para. 71-72.

<sup>97</sup> Jorge Viñuales, ‘Foreign Investment and the Environment in International Law: An Ambiguous Relationship’, Centre for International Environmental Studies Research Paper, No. 2 (forthcoming in *British Yearbook of International Law*, Vol. 80, 2010), p. 55.

<sup>98</sup> *Santa Elena v. Costa Rica, Final Award*, para. 103.

<sup>99</sup> *Ibid*, para. 93,95; Charles Brower & Jarrod Wong, ‘General Valuation Principles: The Case of Santa Elena’, in Todd Weiler, *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (London: Cameron May, 2005) p. 748.

compound interest Costa Rica eventually had to pay the investor a full USD 16 million to fulfill its goal of expanding the national park.<sup>100</sup>

The more recent case of *Unглаube v. Costa Rica* is very similar to the *Santa Elena* case.<sup>101</sup> The dispute stems from another expropriation of beachfront property, and the tribunal goes to great lengths to acknowledge what it clearly deems a laudable decision to protect “one of the world’s most important nesting sites for the highly endangered leatherback turtle”.<sup>102</sup> It nevertheless proceeds to cite verbatim the conclusion in *Santa Elena v. Costa Rica* that “[e]xpropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies,” namely that the measure of compensation is not affected by any environmental considerations.<sup>103</sup>

Most investment treaties make clear that an expropriation has to be both for a public purpose as well as accompanied by full compensation, but what is uncontroversial legally should perhaps not be so uncontroversial politically. Both of the above cases concerned relatively small tourism developments, and Costa Rica did not struggle with payment of the awards and is sufficiently concerned about environmental protection (upon which its tourism industry relies) to also be willing to pay the price. However, in other circumstances this legal provision can have a considerable impact on the possibility of states to expropriate property for environmental purposes, and it is surprising that even environmentally inclined civil society organizations like the International Institute for Sustainable Development so readily accepts the law in this respect.<sup>104</sup> The question of the assessment of compensation will be considered in the final section of this chapter, but two things should be reiterated here. Firstly, full market value compensation by definition includes a consideration of the profits the company could have made – it is not only designed to compensate the company for its direct losses.<sup>105</sup> Secondly, the assessment of the market value of a profitable or promising business venture can be enormous.

---

<sup>100</sup> *Santa Elena v. Costa Rica*, *Final Award*, para. 107.

<sup>101</sup> *Unглаube v. Costa Rica*, *Award*.

<sup>102</sup> *Ibid.*, para. 163.

<sup>103</sup> *Ibid.*, para. 217.

<sup>104</sup> *Methanex Corporation v. United States of America*, *Amicus Curiae Submission by the International Institute for Sustainable Development*, UNCITRAL Ad Hoc Arbitration (9 March 2004), para. 87. The IISD model investment treaty also provides for fair market value compensation, see: Howard Mann & Konrad von Moltke et al., *IISD Model International Agreement on Investment for Sustainable Development* (Winnipeg, International Institute for Sustainable Development: 2005), part 2, article 8.

<sup>105</sup> Michael Reisman & Robert Sloane, ‘Indirect Expropriation and Its Valuation in the BIT Generation’, *Yale Law School Faculty Scholarship Series*, Paper 1002 (2004), p. 139.

When Harken Energy reportedly sought \$57 billion from Costa Rica for what it alleged was an indirect expropriation of its oil concessions (ultimately unsuccessful on jurisdictional grounds), it was probably not kidding – it may well have put forward an over-optimistic assessment of the value of the concessions, but it was not an entirely unreasonable claim.<sup>106</sup> The market value of projects in the natural resources and oil sectors have often been found to range in the billions. To say that an expropriation has to be both for a public purpose *and* accompanied with full market value compensation – and that environmental considerations will not influence the measure of compensation in any respect – is plausibly a considerable disincentive against expropriating property for many states. No such case has emerged to date, but neither should one perhaps be expected to; if the law is fairly self-evident, then disputes would be more likely to be settled out of court, or avoided altogether as states refrain from introducing prohibitively expensive expropriatory measures to begin with.

### ***Indirect Expropriation***

The above two Costa Rican cases show that disputes in respect to direct expropriations continue to arise, but today companies are far more likely to challenge what are variously described as ‘indirect expropriations’, ‘measures tantamount to expropriation, or (borrowing from U.S. law) ‘regulatory takings’. The law in respect to direct expropriations is fairly clear, but the law in respect to indirect expropriations is, to cite a prominent arbitrator, on the contrary “clearly ambiguous”.<sup>107</sup> This difficulty stems in part from the fact that the definition of ‘property’ that can be expropriated is, to cite another prominent arbitrator and one of the main negotiators of NAFTA, “enormously broad”.<sup>108</sup> In the investment treaty context ‘property’ involves not only material possessions or land, but essentially all rights and interests that have monetary value, and the only real limit is the imagination of corporate lawyers.<sup>109</sup> Philip Morris, in a currently pending case, is alleging that Australia is “expropriating its valuable intellectual property” through its cigarette plain packaging legislation.<sup>110</sup> Ethyl Corporation maintained that a legislative debate in the Canadian Parliament – which had provided negative publicity of the health effects of the gasoline additive MMT – was an “expropriation of the goodwill” of the

---

<sup>106</sup> Tienhaara, ‘Regulatory Chill and the Threat of Arbitration’, p. 618 – 621.

<sup>107</sup> Yves Fortier & Stephen Drymer, ‘Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor’, *ICSID Review*, 19:2 (2004), p. 326.

<sup>108</sup> Daniel Price, ‘Chapter 11 – Private Party vs. Government, Investor-State Dispute Settlement: Frankenstein or Safety Valve?’, *Canada-United States Law Journal*, 26 (2000), p. 109.

<sup>109</sup> *Ibid*, p. 109.

<sup>110</sup> Philip Morris Asia Limited v. Australia, *Notice of Arbitration* (21 November 2011), para. 1.5.

company.<sup>111</sup> What a tribunal would have made of this is unclear, but the settlement agreement included a Canadian public statement that MMT is not harmful after all – presumably to restore the company’s ‘goodwill’ – in addition to monetary compensation.<sup>112</sup>

While the definition of ‘property’ is sufficiently open-ended as to invite many innovative legal interpretations, the thornier legal question is how to determine what kind of interference with such property rights constitutes an ‘indirect expropriation’. After all, governments take measures that affect property rights all the time – indeed, general taxation would fulfill that criteria, but is not normally deemed to constitute an expropriation. The investment law literature commonly distinguishes between three different approaches towards determining when a government measure amounts to expropriation.<sup>113</sup> Each approach has been adopted by different investment tribunals, and which approach is adopted is critical for understanding the extent to which corporations can challenge environmental regulations as expropriatory. Firstly, the ‘sole effects’ approach declares that any substantial interference with an investor’s property constitutes an expropriation, regardless of either the nature of the government measure or the purpose behind it. Secondly, the ‘police powers’ approach contends that government measures that fulfill certain criteria (notably in terms of public purpose and the nature of the measure) do not constitute an indirect expropriation even if the economic effect on the investor is considerable. Thirdly, the ‘proportionality’ approach takes both the effect of the measure as well as the nature or intent behind the measure into consideration, and seeks to assess whether the public benefits of a regulation is proportional to the economic impact on the company. Each approach has its advocates amongst investment tribunals, arbitrators and the investment law academic literature, and there is not yet a clear consensus on which approach is most suitable. Due to this legal uncertainty, and given that the choice of approach determines the extent to which states will be required to compensate investors for environmental regulations, each approach will be considered here in detail.

---

<sup>111</sup> Ethyl Corporation v. Government of Canada, *Notice of Intent to Submit a Claim to Arbitration* (10 September 1996), para. 22.

<sup>112</sup> Traynor, ‘How Canada Became a Shill for Ethyl Corp’.

<sup>113</sup> See for example, Fortier & Drymer, ‘Indirect Expropriation in the Law of International Investment’, pp. 293-397; Barnali Choudhury, ‘Recapturing Public Power: Is Investment Arbitration’s Engagement of the Public Interest Contributing to the Democratic Deficit?’, *Vanderbilt Journal of Transnational Law*, 41 (2008), pp. 775-832; Caroline Henckels, ‘Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration’, *Journal of International Economic Law*, 15:1 (2012), pp. 223-255; Maurizio Brunetti, ‘Indirect Expropriation in International Law’, *International Law FORUM Du Droit International* 5 (2003), pp. 150-154.

The first approach is the ‘sole effects’ approach. In recent debates on the Trans-Atlantic Trade and Investment Partnership the European Commission has expressed a noticeable annoyance with critics who suggest that companies can bring investment treaty challenges to seek compensation for profits lost as a result of government measures.<sup>114</sup> The European Commission insists that companies cannot “sue successfully just because their profits might be affected” and is indeed correct to point out that a violation of an investment treaty provision is required.<sup>115</sup> However, the European Commission’s further rejection of such claims as instances of “scaremongering” and “dystopian caricature” is to take the point too far.<sup>116</sup> While companies cannot sue *just* because their profits are affected, they *can* sue just because those profits are *sufficiently* affected – this is precisely what the ‘sole effects’ approach to the expropriation provision entails. The other investment treaty standards allow corporations to sue for lesser interferences with property, but only if they can be shown to be discriminatory, unfair, etc. In contrast, when the ‘sole effects’ approach is adopted the expropriation clause allows corporations to sue whenever profits are affected, but only if that effect is sufficiently substantial.

The ‘sole effects’ approach, a term coined by Rudolf Dolzer, has often been considered to be the dominant or ‘orthodox’ approach towards the determination of whether an indirect expropriation has occurred.<sup>117</sup> To cite Todd Weiler, according to this approach an expropriation includes “all measures that have the effect of substantially interfering with an investment”.<sup>118</sup> The distinguishing characteristic of the ‘sole effects’ approach is, to cite the Iran-US Claims Tribunal, that “[t]he intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact”.<sup>119</sup> In many ways, the ‘sole effects’ doctrine is the most logically consistent of the three approaches. Rosalyn Higgins, formerly a judge on the International Court of Justice, is widely cited in this respect: “Is not the State in both cases (that is, either by a taking for a public purpose, or by regulation) purporting to act in the common good? And in

---

<sup>114</sup> De Gucht, ‘The Transatlantic Trade and Investment Partnership: The Real Debate’; European Commission, ‘Incorrect Claims about Investor-State Dispute Settlement’, p. 2; Karel De Gucht, ‘Statement on TTIP’, *European Commission Speech/14/549, Speech at the European Parliament Plenary Debate* (Strasbourg, 15 July 2014), available at: {[http://europa.eu/rapid/press-release\\_SPEECH-14-549\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-14-549_en.htm)} accessed 22 August 2014.

<sup>115</sup> European Commission, ‘Incorrect Claims about Investor-State Dispute Settlement’, p. 2.

<sup>116</sup> De Gucht, ‘Statement by Commissioner’; De Gucht, ‘The Transatlantic Trade and Investment Partnership: The Real Debate’.

<sup>117</sup> Andrew Newcombe, ‘The Boundaries of Regulatory Expropriation in International Law’, *ICSID Review*, 20:1 (2005), p. 10; Schneiderman, *Constitutionalizing Economic Globalization*, p. 73.

<sup>118</sup> Weiler, ‘A First Look at the Interim Merits Award in S.D. Myers’, p. 186.

<sup>119</sup> Brunetti, ‘Indirect Expropriation in International Law’, p. 151.

each case has the owner of the property not suffered loss? Under international law standards, a regulation that amounted (by virtue of its scope and effect) to a taking, would need to be ‘for a public purpose’ [...] [a]nd just compensation would be due”.<sup>120</sup> In essence, a direct expropriation requires compensation *despite* the fact that it was taken for a public purpose, in a non-discriminatory manner, and in accordance with due process. Correspondingly, why would a regulatory measure that had the same effect on the investor be exempt from the compensation requirement just because it was taken for a public purpose, in a non-discriminatory manner and in accordance with due process?

A number of investment tribunals have expressed support for this proposition, but the only environmental case in this respect is *Metalclad v. Mexico*.<sup>121</sup> The tribunal in *Metalclad* maintained that expropriation includes not only “deliberate and acknowledged takings of property” but also “covert *or incidental* interference with the use of property which has *the effect* of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State”.<sup>122</sup> Two government measures were deemed to have individually both violated the expropriation provision: the municipality’s decision to deny a construction permit for the hazardous waste landfill; and the decision to make the entire area into an ecological preserve for rare species of cacti. The analysis of the first expropriatory act of denying a construction permit was largely based on the prior finding of a denial of ‘fair and equitable treatment’ and will be discussed elsewhere.<sup>123</sup> However, the legal analysis in respect to the second expropriatory measure is more significant in terms of the ‘sole effects’ approach, and was deemed ‘in and of itself’ to constitute an expropriation.<sup>124</sup> In introducing the ecological preserve, the municipality did not issue an expropriation decree for the investor’s landfill but simply regulations to protect the environment – most notably to forbid any potentially polluting activities – that would nevertheless most likely have made the hazardous waste landfill impossible to operate in the area.<sup>125</sup> In doing so, the tribunal maintained that it “need not decide or consider the motivation or intent of the adoption of the Ecological Decree” in order to

---

<sup>120</sup> Newcombe, ‘The Boundaries of Regulatory Expropriation in International Law’, p. 27.

<sup>121</sup> *Plama v Bulgaria* also adopted the ‘sole effects’ doctrine, but the expropriation claim in the award did not relate to the environmental issues of remediation. *Plama v. Bulgaria, Award*, para. 191-193.

<sup>122</sup> *Metalclad v. Mexico, Award*, para. 103.

<sup>123</sup> *Ibid*, para. 104-108;

<sup>124</sup> *Ibid*, para. 111.

<sup>125</sup> *Ibid*, para. 109-111.



determine that an expropriation had occurred.<sup>126</sup> Since this is the most clear-cut case where the ‘sole effects’ approach was adopted in an environmental case, the expropriation analysis raised concern amongst groups such as the International Institute of Sustainable Development (IISD). However, this was less because of the actual determination that an expropriation had occurred – the IISD implies that the nature of the measure was such that compensation should be due, and indeed the case bears similarities to the Costa Rican cases except for the lack of a formal expropriation decree and the offer of compensation.<sup>127</sup> The objection is rather that the legal analysis was deemed to set a dangerous precedent if applied in other circumstances.

If the ‘sole effects’ doctrine is adopted in another environmental case, it is clear, to cite Dolzer, that the exclusive focus on the effect of a given government measure in the ‘sole effects’ approach “leaves no room for an argument that the environmental purpose of a governmental action and the concern for the environmental value to be protected by the measure should enter into the legal process of deciding whether or not a taking has occurred”.<sup>128</sup> As such, if the ‘sole effects’ approach is adopted, the primary difficulty lies in identifying a threshold for an expropriation. The threshold issue did not emerge in *Metalclad*; the hazardous waste landfill could not operate at all within the ecological preserve, and the effect on the investment was absolute. The legal literature is nevertheless clear on the fact that the effect on a corporation’s property need not be total, yet it does need to be substantial, yet substantial is nowhere defined.

Addressing specifically the question of when an environmental regulation can amount to an indirect expropriation, Francisco Orrego Vicuña, one of the world’s most prominent and experienced arbitrators, suggests that a regulation ‘crosses the line’ to become an expropriation if the investment is no longer “capable of earning a reasonable return”.<sup>129</sup> It is therefore clear that an environmental regulation that wiped out the *profits* on a particular investment would constitute an expropriation according to the ‘sole effects’ approach. Orrego Vicuña thereafter suggests that environmental regulations would nevertheless rarely result in an expropriation,

---

<sup>126</sup> *Metalclad v. Mexico, Award*, para. 111. Had the tribunal considered the intent behind the measure, it would most likely have found it to be precisely the ‘Trojan horse’ that investment lawyers are concerned about, albeit for another environmental measure – while there is undoubtedly rare cacti in the region, the primary aim was likely to have been to prevent the hazardous waste landfill, which had raised controversy due to previous pollution.

<sup>127</sup> Mann, *Investment Agreements and the Regulatory State*, p. 6.

<sup>128</sup> Rudolf Dolzer, ‘Indirect Expropriations: New Developments’, *New York University Environmental Law Journal*, 11 (2002), p. 92.

<sup>129</sup> Orrego Vicuña cites this approvingly from domestic rulings of the U.S. Supreme Court, see Francisco Orrego Vicuña, ‘Keynote Address: Carlos Calvo, Honorary NAFTA Citizen’, *New York University Environmental Law Journal*, 11 (2002-2003), p. 28.

because the cost of complying with environmental regulations is normally fairly low – at most 1-3 % of the investment.<sup>130</sup> Vicuna concludes that “[n]o reasonable regulation with a one-to-three percent incidence would be subject to an international claim. It is another matter altogether where the incidence might reach high percentages of the investment, seriously diminish its returns, or wipe the investment out entirely”.<sup>131</sup> Of the concluded environmental cases, the tribunal in *Glamis Gold v. USA* directly addressed the question of the appropriate threshold. The tribunal did not adopt the ‘sole effects’ doctrine, but it nevertheless stated that the effect of the measure was the starting point regardless of the approach used – without a substantial effect no expropriation could have occurred.<sup>132</sup> The proposed investment involved the development of an open-pit gold mine in California, and the dispute concerned new regulations that required the backfilling of all open-pit mineral mines. Glamis Gold alleged that this made the project uneconomical and therefore constituted an indirect expropriation of its investment, but the tribunal engaged in a careful cost analysis and found that with the gold price at the time of the alleged expropriation the backfilling requirements would have involved a reduction of anticipated profits from USD 49 million to USD 28-29 million.<sup>133</sup> While a substantial reduction, the tribunal deemed this not to have reached the threshold for an expropriation – especially given the possibility of an even better return in the future with improved technology and increased gold prices (the gold price was already significantly higher by the time the tribunal issued its award).<sup>134</sup> This finding pleased some civil society organizations, and the International Institute of Sustainable Development noted that such a high threshold for a finding of expropriation was “extremely significant”.<sup>135</sup> However, it is still not clear precisely how much an investment’s anticipated profits would have to be reduced before an expropriation was found to have occurred – or if other tribunals will agree with the ‘high threshold’ of the Glamis Gold tribunal in this respect.

The indirect expropriation provision was initially the one that had raised most concerns in respect to the effect on environmental regulations, and particular concerns had been raised that a ‘sole effects’ interpretation thereof would be adopted in *Methanex v. USA* or *Chemtura v. Canada*, two cases that both concerned the prohibition of certain toxic or environmentally

---

<sup>130</sup> Francisco Orrego Vicuña, ‘Keynote Address: Carlos Calvo, Honorary NAFTA Citizen’, p. 31.

<sup>131</sup> *Ibid.*, p. 31.

<sup>132</sup> *Glamis Gold v. USA, Award*, para. 356-357.

<sup>133</sup> *Ibid.*, para. 535-536.

<sup>134</sup> *Ibid.*, para. 342, 471.

<sup>135</sup> Nathalie Bernasconi-Osterwalder & Lise Johnson (eds) *International Investment Law and Sustainable Development: Key Cases from 2000-2010* (International Institute for Sustainable Development, 2011) p. 63.

hazardous substances. Here the regulations prohibiting the substances in question did indeed wipe out the companies' investments in those substances, and according to the 'sole effects' approach the prohibitions would consequently have amounted to expropriations. To cite the International Institute for Sustainable Development, the expropriation clause would thereby turn "the 'polluter pays' principle of environmental management, established by the OECD in 1972, into a 'pay the polluter' principle".<sup>136</sup> However, tribunals have not yet adopted the 'sole effects' approach in the worst case scenarios where it was most feared that they would.

The second approach is the 'police powers' approach. That the right to regulate is within a state's 'police powers' is recognized also by the 'sole effects' doctrine, but within that approach a legitimate regulation is precisely one that involves only a lesser interference with foreign companies' profits. In contrast, scholars and arbitrators who adopt the 'police powers' approach contend that some regulatory measures are carved out from the definition of expropriation irrespective of the effect on the investment. To cite Yves Fortier and Stephen Drymer's description of this approach, "a legitimate public purpose may, in certain circumstances, in and of itself suffice to cast a measure as being in the nature of the normal exercise of police powers, and hence non-compensable, regardless of the magnitude of its effect on an investment".<sup>137</sup> This approach substantially limits the extent to which companies can challenge government measures taken to protect the environment – in addition to evidence of substantial interference with the investment, a company will also have to show that a measure is by its nature or intent not a legitimate public purpose regulation.

Howard Mann, of the International Institute of Sustainable Development, contends that this had been the conventional approach until it was "threatened [when] the notion of 'regulatory takings' from American jurisprudence was transposed onto Chapter 11 of NAFTA".<sup>138</sup> In doing so, Mann implies that customary international law had previously not recognized 'regulatory takings' as instances of expropriation, and that the 'sole effects' approach had only come into use with the emergence of a treaty-based body of international investment law. Within at least one such treaty negotiation, textual language to support the 'police powers' interpretation of expropriation had been explicitly considered in the form of a confirmation that states need not

---

<sup>136</sup> Methanex Corporation v. United States of America, *Petitioner's Final Submissions by the International Institute for Sustainable Development*, UNCITRAL Ad Hoc Arbitration (16 October 2000), para. 17.

<sup>137</sup> Fortier & Drymer, 'Indirect Expropriation in the Law of International Investment', p. 300.

<sup>138</sup> Mann, *Investment Agreements and the Regulatory State*, p. 6.

“pay compensation for losses which an investor or investment may incur through regulation, revenue raising and other normal activity in the public interest undertaken by governments”.<sup>139</sup> This statement was nevertheless not included in the treaty, presumably because it was deemed to unfavourable towards companies, but it would have captured the essence of the ‘police powers’ approach: the notion of an indirect expropriation still exists, but general regulations and “other normal activity in the public interest” is excluded from that definition.

The ‘police powers’ approach has been adopted in two high profile environmental cases under NAFTA. The classic case in this respect is *Methanex v. USA*, in which the company sought USD 970 million in compensation for California’s decision to phase out the gasoline additive MTBE.<sup>140</sup> This gasoline additive is highly soluble and easily contaminates groundwater, and while the health effects are contested, the water tastes like turpentine at even very low levels. MTBE contamination forced the closure of public drinking water wells in many parts of California; Santa Monica, for instance, lost almost half of its drinking water supply as a result of contamination.<sup>141</sup> The California Senate adopted a bill to investigate the matter and commissioned the University of California to compile a report, which subsequently formed the basis for the decision to phase out MTBE. In a classic statement, the tribunal that was constituted to hear *Methanex*’ complaints declared that “a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given”.<sup>142</sup> This is the essence of the ‘police powers’ approach, and a similar interpretation was found in *Chemtura v. Canada*. In this case the company challenged Canada’s decision to prohibit the pesticide lindane, which had been found to have significant occupational health risks for agricultural workers as well as other environmental risks.<sup>143</sup> The tribunal that was constituted in the case concluded that the environmental agency “took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment. A

---

<sup>139</sup> Gantz, ‘Potential Conflicts Between Investor Rights and Environmental Regulation’, p. 728-729.

<sup>140</sup> *Methanex Corporation v. United States of America, Notice of Arbitration*, UNCITRAL Ad Hoc Arbitration (3 December 1999), p. 9.

<sup>141</sup> *Methanex Corporation v. United States of America, Amended Statement of Defense*, UNCITRAL Ad Hoc Arbitration (5 December 2003), para. 44-47.

<sup>142</sup> *Methanex v. USA, Final Award of the Tribunal on Jurisdiction and Merits*, part IV, chapter D, para. 7.

<sup>143</sup> *Chemtura v. Government of Canada, Award*, para. 29-30.

measure adopted under such circumstances is a valid exercise of the State's police powers and, as a result, does not constitute an expropriation".<sup>144</sup>

The 'police powers' approach, where adopted by a tribunal, clearly restricts the extent to which a company can seek compensation for costly environmental regulations. However, even this approach presents certain hurdles for states engaging in environmental protection. A key feature of the 'police powers' approach is the emphasis on the nature of the regulation and the regulatory process – the regulation needs to be non-discriminatory, taken for a public purpose, and in accordance with due process. The prohibitions on MTBE and lindane had both passed these tests, but the tribunals' analyses in this respect suggest that such requirements can, in other circumstances, make environmental regulations susceptible to investment treaty challenges even under the 'police powers' approach. The tribunals in Methanex and Chemtura both took these criteria very seriously, engaged in a thorough assessment of the facts, and were clearly impressed by both the states' regulatory motives and the fairness of the regulatory processes. It has already been argued that the 'non-discrimination' requirement can affect environmental regulations, and the due process requirements will be considered in more detail in the next section, but it is striking that the tribunals in both Methanex and Chemtura are clearly sympathetic towards the regulatory intent behind the government measures, and at times seem visibly annoyed with the companies' decisions to challenge them. In Methanex, the tribunal devoted over 50 pages of the award to a discussion of the scientific evidence underlying the phase-out of MTBE.<sup>145</sup> While Methanex maintained that the measure constituted a "sham" or "pseudo" environmental measure, the tribunal concluded that the University of California report that underpinned the decision to phase out MTBE reflected "a serious, objective and scientific approach to a complex problem".<sup>146</sup> While Methanex had described the report as flawed and underfunded (it had a budget of USD 500,000 and involved more than 60 researchers), the tribunal was clearly impressed with the study itself and emphasized that the report was furthermore "subjected at the time to public hearings, testimony and peer-review" and had "emerge[d] as a serious scientific work from such an open and informed debate".<sup>147</sup> The tribunal acknowledged that "it is possible for other scientists and researchers to disagree in good

---

<sup>144</sup> Chemtura v. Government of Canada, *Award*, para. 266.

<sup>145</sup> Moloo & Jacinto, 'Environmental and Health Regulation', p.26; Methanex v. USA, *Final Award of the Tribunal on Jurisdiction and Merits*, part III, chapter A, pp. 1-52.

<sup>146</sup> Methanex v. USA, *Final Award of the Tribunal on Jurisdiction and Merits*, part III, chapter A, para. 41; part IV, chapter B, para. 26; part III, chapter A, para. 101.

<sup>147</sup> Methanex v. USA, *Notice of Arbitration*, p. 6; Methanex v. USA, *Final Award of the Tribunal on Jurisdiction and Merits*, part III, chapter A, para. 3; part III, chapter A, para. 101.

faith with certain of its methodologies, analyses and conclusions”, but this was not sufficient to invalidate the report and in any case the tribunal was “much impressed by the scientific expert witnesses presented by the USA and tested under cross-examination by Methanex [...] [and] accepts without reservation these experts’ conclusions”.<sup>148</sup> Similarly, in Chemtura the tribunal acknowledged that it could not “ignore the fact that lindane has raised increasingly serious concerns both in other countries and at the international level since the 1970s” and that “there is ample evidence that the use of lindane caused genuine concerns, both in Canada and abroad”.<sup>149</sup> It concluded that the prohibition on lindane met the ‘police powers’ test both in respect to the regulatory conduct and the validity of the underlying environmental motive.

Within the investment law literature, the tribunals in these two cases are widely praised for their sensitivity to environmental concerns, and scholars commend the arbitrators for their “capacity [...] for reasoned and informed analysis of technical and scientific issues”.<sup>150</sup> However, such a thorough engagement of the tribunals with the scientific basis for a government measure may also suggest a strong preference for environmental measures taken on solid scientific grounds. Indeed, David Gantz suggests that under the ‘police powers’ approach, tribunals face “[t]he most difficult task [...] [of] devising a methodology for determining whether the scientific justification for regulatory action is sufficient to bring the action within the ‘police power’ exception”.<sup>151</sup> The assessment of whether a scientific justification is ‘sufficient’ brings investment tribunals into thorny territory, and it is not yet certain how such questions will be resolved in cases where the scientific basis is less conclusive than in Methanex or Chemtura.

Two questions are likely to become especially important in this respect. Firstly, what level of scientific certainty is required? While it is implausible that tribunals will demand full certainty, the question is how strong the science will have to be. For instance, will tribunals be sympathetic towards environmental protection measures adopted on the basis of the ‘precautionary principle’? Secondly, in cases where the science is inconclusive, what kind of process will tribunals expect states to go through before adopting regulations? In Methanex, the tribunal seems less concerned with the science itself than with the process, and it is precisely the impressive effort of commissioning a University of California study that the tribunal pays

---

<sup>148</sup> Methanex v. USA, *Final Award of the Tribunal on Jurisdiction and Merits*, part III, chapter A, para. 101.

<sup>149</sup> Chemtura v. Government of Canada, *Award*, para. 135-136.

<sup>150</sup> Gaines, ‘Environmental Policy Implications of Investor-State Arbitration’, p. 196.

<sup>151</sup> Gantz, ‘Potential Conflicts Between Investor Rights and Environmental Regulation’, pp. 651-752.

most attention to. Such a thorough procedure might not be commonly applied in all countries as part of the regulatory process, and the question is whether investment tribunals will be less impressed by environmental measures introduced in the absence of such a scientific assessment. Indeed, similar cases within international trade law suggest that this is not an unfounded concern. The Beef Hormones case before the Dispute Settlement Body of the World Trade Organization, brought by the U.S. against the European Communities, concerns a prohibition on imports of beef from cattle raised with artificial growth hormones. The trade panel found that the European Communities' import prohibition was not based on an adequate assessment of the scientific risk, and stressed the fact that the preambles of the EU regulations did not invoke any scientific studies and that the panel had not been presented with evidence that such studies had "actually been taken into account" in introducing the import prohibition.<sup>152</sup> It also determined that the scientific studies invoked by the EU did not themselves conclude that the use of hormones was unsafe "if used in accordance with good practice", and therefore the EU regulations could not have been 'based on' these studies.<sup>153</sup> This case therefore contrasts directly with Methanex, in which the tribunal concluded that the phase-out of MTBE had been directly based on the conclusions of the University of California report.<sup>154</sup> The Beef Hormones case is clearly not directly applicable here – the relevant trade law provisions do not exist in investment treaties – but it does reveal some of the difficulties that can emerge if investment tribunals were to similarly question not just the validity of the science itself, but also whether environmental regulations were actually based on that science. Assessments of the alleged scientific basis behind possibly expropriatory measures are likely to re-emerge in future cases. Indeed, such claims are already raised in pending arbitrations – for example, in the Philip Morris case the tobacco company contends that Australia lacks sufficient scientific evidence that plain cigarette packaging reduces the incidence of smoking.<sup>155</sup>

The two cases where the 'police powers' approach to expropriation have been applied are both ones where the tribunals were clearly sympathetic to the regulatory measures under

---

<sup>152</sup> WTO Appellate Body, 'EC Measures Concerning Meat and Meat Products (Hormones)', Complaint by the United States, *Report of the Panel*, WT/DS26/R/USA (18 August 1997), para. 8.113-8.159 ; see also: Martin Wagner, 'The WTO's Interpretation of the SPS Agreement Has Undermined the Right of Governments to Establish Appropriate Levels of Protection Against Risk', in *Law and Policy in International Business*, 31: 3 (2000)

<sup>153</sup> WTO Appellate Body, 'EC Measures Concerning Meat', para. 8.137.

<sup>154</sup> The California Governor had to make a decision as to whether to prohibit MTBE or not on the basis of the UC report, and the tribunal determined that the conclusions of the UC report made such a prohibition the only 'rational' alternative. *Methanex v. USA, Final Award of the Tribunal on Jurisdiction and Merits*, part IV, chapter E, para. 21.

<sup>155</sup> *Philip Morris v. Australia, Notice of Arbitration*, para. 6.4.

consideration. Indeed, they are also cases where the tribunals appear decidedly *unsympathetic* towards the investors. Weiler observes that Methanex had “apparently vexed” the tribunal throughout the arbitral proceedings and that the tribunal was “clearly upset” by some of its conduct.<sup>156</sup> The tribunal in Chemtura similarly dismisses some of the company’s arguments as “obviously unfounded” and criticizes its “elusive behaviour”, finally concluding that Canada’s conduct did not “even come close” to breaching investment treaty standards.<sup>157</sup> The previous chapter nevertheless argued that arbitrators have both a financial incentive to favour investors, as well as the commercial law background that would in any case make them prone to investor-friendly findings, and it should perhaps be expected that the public purpose invoked would need to be fairly convincing to trump the inherent tendency to favour investor rights. While the ‘police powers’ approach therefore clearly allows more scope for the introduction of new environmental regulations than the ‘sole effects’ doctrine, it includes potentially restrictive criteria that will continue to enable corporations to challenge environmental measures as expropriatory.

The ‘police powers’ approach in Methanex and Chemtura has been well received in environmental advocacy circles, but it has found critics within international investment law. Barnali Choudhury contends that “the Methanex line of reasoning broadens the scope of the police-powers exception beyond the texts of most investment treaties”,<sup>158</sup> and Todd Weiler similarly claims that the Methanex tribunal “staked a position that will have undoubtedly delighted the NGOs [...] while confounding most experts on the customary international law of expropriation [...] [the legal text] simply cannot be reconciled with the Tribunal's finding”.<sup>159</sup> The expropriation provision in most treaties define the term as including both direct and indirect expropriation, and then specifies that an expropriation *of either kind* of has to be of a certain nature (non-discriminatory and in accordance with due process) and of a certain motive (public purpose), *and* in addition also accompanied with compensation. Within the ‘police powers’ approach some regulations are not deemed to constitute expropriations to begin with and therefore compensation is not due, but what precisely is it that excludes some regulations from the definition of expropriation on the basis of their character and purpose, while other

---

<sup>156</sup> Weiler, ‘Methanex Corp. v. U.S.A.: Turning the Page on NAFTA Chapter 11?’, p. 920.

<sup>157</sup> Chemtura v. Government of Canada, *Award*, para. 192, 236. The term ‘even come close’ refers to the FET standard, but seems applicable to the tribunal’s conclusions overall. See also, “there is *no doubt in the Tribunal’s mind* that the REN [the review of lindane] was not a biased exercise” (emphasis added), para. 162.

<sup>158</sup> (Italics removed) Choudhury, ‘Recapturing Public Power’, p. 796.

<sup>159</sup> Weiler, ‘Methanex Corp. v. U.S.A.: Turning the Page on NAFTA Chapter 11?’, p. 918.



regulations nevertheless constitute expropriations despite meeting the same criteria of legitimate nature and intent? It is clear that a tension remains within the police powers approach. On this basis, Weiler concludes that while the Methanex tribunal's findings "may cheer anti-globalization groups [...] their lack of any solid doctrinal footing and their *obiter* status will likely blunt any future impact".<sup>160</sup>

Finally, the third approach is the 'proportionality' approach. Along similar lines to Choudhury and Weiler, the tribunal in *Azurix v. Argentina* critiques the 'police powers' approach as "somehow contradictory". It finds that "[t]he public purpose criterion as an additional criterion to the effect of the measures under consideration needs to be complemented".<sup>161</sup> The tribunal in *Azurix* determined this complementary criterion to be proportionality. In response to what are sometimes viewed as two extreme positions, the investment law literature and arbitral practice may be moving in the direction of adopting proportionality analysis to assess whether an indirect expropriation has occurred. To cite Fortier and Drymer, this approach involves "weighing both the purpose *and* effect of a measure in a sort of regulation/expropriation balance".<sup>162</sup> As such, "[t]he higher the purpose of a measure and the greater its practical benefit to the public welfare, the greater is the level of investment interference that must be demonstrated in order to tip the scales toward a characterization of the measure as an expropriation".<sup>163</sup>

The environmental case that is often viewed as a classic instance of the 'proportionality' approach is *Tecmed v. Mexico*. The dispute concerned the development of a landfill for hazardous waste, and subsequent public opposition to it on environmental grounds. The company had on several occasions been found to have breached various environmental regulations, and when the permit to operate the landfill came up for renewal the relevant environmental agency decided not to renew the permit.<sup>164</sup> *Tecmed* alleged that the non-renewal of the permit constituted an indirect expropriation, and the investment tribunal's analysis began with an analysis of the effect of the measure; given that the company could no longer operate the landfill, the investor's loss was total. However, the tribunal then finds it "appropriate to examine [...] whether the Resolution, due to its characteristics and considering not only its

---

<sup>160</sup> Weiler, 'Methanex Corp. v. U.S.A', p. 921.

<sup>161</sup> *Azurix v. Argentina*, *Award*, para. 311.

<sup>162</sup> Fortier & Drymer, 'Indirect Expropriation in the Law of International Investment', p. 300.

<sup>163</sup> *Ibid*, p. 300.

<sup>164</sup> *Tecmed v. Mexico*, *Award*.

effects, is an expropriatory decision” and “whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account the significance of such impact has a key role upon deciding the proportionality”.<sup>165</sup> In a clear adoption of ‘proportionality’ analysis, the tribunal concludes that “[t]here must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure”.<sup>166</sup>

To assess proportionality, the tribunal commenced its analysis with an assessment of the public purpose behind the measure. The stated justification for the non-renewal of the permit was infringements of a number of environmental regulations, for which the company had already been issued fines and warnings, and the non-compliance with the conditions of the previous permit.<sup>167</sup> The fact that the company breached a number of the conditions under which the permit had been issued is undisputed, but the tribunal points out that these breaches were “remediable or remediated or subject to minor penalties” and castigates Mexico for its “literal or strict interpretation of the conditions under which the Permit was granted”.<sup>168</sup> It concludes that “it is irrefutable that there were factors other than compliance or non-compliance by Cytrar with the Permit’s conditions or the Mexican environmental protection laws and that such factors had a decisive effect in the decision to deny the Permit’s renewal”.<sup>169</sup> These other factors were precisely the environmental and community protests that had emerged against the landfill, which eventually led the municipal authorities to oppose the landfill as well. The tribunal maintains that the environmental agency had not made its decision to reject the renewal of the permit on the basis of its own assessments of the environmental risks involved with the non-compliance with the previous permit; indeed, while fines or warnings were issued for breaches of environmental regulations, these were not at the time found to have entailed a “significant effect on public health or [to] generate an ecological imbalance”.<sup>170</sup> The company’s transportation of waste to the site in violation of applicable environmental regulations had been found to “pose or may pose a risk to the environment or to health”, but transportation of waste

---

<sup>165</sup> *Tecmed v. Mexico, Award*, para. 118, 122.

<sup>166</sup> *Ibid.*, para. 122.

<sup>167</sup> *Ibid.*, para. 43; 50; 99-105; 148; see also, David Schneiderman, ‘Investing in Democracy? Political Process and International Investment Law’, *University of Toronto Law Journal*, 60 (2010), p. 916.

<sup>168</sup> *Tecmed v. Mexico, Award*, para. 148-149.

<sup>169</sup> *Ibid.*, para. 127.

<sup>170</sup> *Ibid.*, para. 100.

was conducted under a permit from another agency.<sup>171</sup> Rather, the environmental agency had been swayed by growing public opposition, and subsequently local government opposition, to the landfill. For instance, the tribunal points out that when the company had proceeded to expand the landfill without the required authorizations, the director of the environmental agency was primarily concerned that “the company had not helped me create trust among local authorities as it expanded the cells without any authorization”.<sup>172</sup>

Interestingly, the tribunal did not end the proportionality analysis here – rather, it decided that since the environmental agency had in actual fact taken its decision on the basis of the public opposition, the tribunal should “consider whether community pressure and its consequences [...] were so great as to lead to a serious emergency situation, social crisis or public unrest”, since such “factors must be weighed when trying to assess the proportionality of the action adopted with respect to the purpose pursued by such measure”.<sup>173</sup> The tribunal nevertheless found that while the protests “amount[ed] to significant pressure on the Mexican authorities, [they did not] constitute a real crisis or disaster of great proportions”.<sup>174</sup> The tribunal therefore assessed proportionality against two possible motivations – the environmental agency’s stated motive in respect to breaches of the environmental conditions attached to the initial permit, and the agency’s ‘real’ motive in addressing the situation engendered by the public opposition – and found neither motive to be proportionate to the effect on the investor. What the tribunal did *not* do, was to assess the proportionality between the effect on the investor and the public purpose invoked by the environmental protestors themselves, or for that matter its own assessment of the environmental risks of the landfill. The protestors had a more acute sense of concern about the breaches that had been identified by the environmental agency, some of which had indeed only been identified as a result of inspections demanded by the protestors themselves.<sup>175</sup> This question will be discussed in more detail in the next chapter, but for the current analysis it suffices to say that the adoption of a ‘proportionality’ approach led to a finding of expropriation,

---

<sup>171</sup> *Tecmed v. Mexico*, *Award*, para. 107.

<sup>172</sup> *Ibid.*, para. 130.

<sup>173</sup> *Ibid.*, para. 133.

<sup>174</sup> *Ibid.*, para. 144.

<sup>175</sup> The local community was also concerned about the landfill not only because of the infringements of environmental conditions at the landfill itself, but also because of the transportation of waste to the landfill and the more serious breaches that had been identified by the environmental agency in this respect. Of course, because separate licences were provided to the company for the landfill and the transportation, the environmental concerns raised by the transportation could not be formally used to deny a renewal of the license for the landfill. The local community understandably did not make this distinction, and distrusted the company and given its history also the very idea of having a landfill so close to the city.

and Tecmed was provided with compensation for costs associated with the landfill as well as a measure of lost profits.

Andreas Kulick suggests that proportionality analysis requires a consideration of three elements.<sup>176</sup> Firstly, the government measure needs to serve a public purpose and be generally suitable for that purpose – as previously indicated, this element is also crucial within the ‘police powers’ approach. Secondly, the government measure needs to be ‘necessary’ to achieve the public benefits invoked – a least restrictive measures test can also be invoked under the ‘police powers’ approach, but it might be more central to the present analysis given the stated objective of achieving an appropriate balance between investor rights and public interest measures.<sup>177</sup> The full range of possible government measures to achieve a legitimate public purpose objective will therefore need to be considered, and the one that has the minimum influence on the investor will need to be chosen. This is where Canada encountered problems in the S.D. Myers case – the decision to close the border (albeit temporarily) could not be shown to have been necessary to achieve the objective of maintaining domestic disposal capacity for PCBs, since government subsidies would have achieved the same result.

Finally, the third element – not found within the ‘police powers’ approach – is proportionality *stricto sensu*, and this assessment of proportionality raises questions of its own.<sup>178</sup> Most obviously, how will tribunals assess whether “the burden on the investor [is] excessive in light of the public benefits”?<sup>179</sup> The proportionality approach explicitly requires a tribunal to ‘weight’ the effect on the investor against the public benefits, and the immediate question is what kind of scale to use. Some scholars suggest that the scale currently adopted is heavily biased in favour of investors – David Schneiderman remarks that “on the few occasions where tribunals move to a proportionality analysis, there remains a heavy burden on states to dislodge the presumption against measures that run afoul of investment disciplines”.<sup>180</sup> Part of the reason for this presumption might lay in the tendency of arbitrators to favour investors in general, as discussed in Chapter 2, but an important reason may also be found in some of the basic premises that

---

<sup>176</sup> Andreas Kulick, *Global Public Interest in International Investment Law* (Cambridge: Cambridge University Press, 2012), p. 186.

<sup>177</sup> Kulick, *Global Public Interest in International Investment Law*, p. 186-187.

<sup>178</sup> *Ibid*, p. 188.

<sup>179</sup> Nathalie Bernasconi-Osterwalder & Aaron Cosbey, et al., *Investment Treaties and Why They Matter to Sustainable Development: Questions and Answers* (Winnipeg: International Institute for Sustainable Development, 2012), p. 21, available at: {<http://www.iisd.org/publications/pub.aspx?pno=1534>} accessed 10 February 2013.

<sup>180</sup> Schneiderman, *Constitutionalizing Economic Globalization*, p. 73.

often underlie ‘proportionality’ in the investment context, namely that companies should not have to make ‘a special sacrifice’ for the sake of general benefits for the wider community. The tribunals in *Azurix v. Argentina* and *Tecmed v. Mexico* both cite in support of their expropriation analysis a European Court of Human Rights ruling that a government measure is disproportionate if “the person concerned has had to bear ‘an individual and excessive burden’”.<sup>181</sup> Thomas Wälde and Abba Kolo, two prominent scholars and arbitrators, similarly conclude that “if individuals are required by regulation to make a special sacrifice in terms of their proprietary rights for the benefit of the society at large”, then compensation has to be provided.<sup>182</sup> Finally, Jan Paulsson and Zachary Douglas, another two prominent arbitrators, in the same way suggest that “international law does not allow the Host State to place such a high individual burden on an investor for the pursuit of a regulatory objective for the benefit of the community at large without the payment of compensation”.<sup>183</sup> A notable feature of the above arguments is that each refers to the investor as an ‘individual’ who should not have to make ‘a special sacrifice’ for the interests of the wider community.<sup>184</sup> Of course, the ‘individual’ in most investment treaty disputes is a company, and very often one of the world’s largest transnational corporations whose revenues exceed the GDPs of the countries in which they operate. Once this is recognized, the claim that large corporations should not have to make a ‘special sacrifice’ to support the environmental interests of the wider community becomes a much more questionable proposition. Indeed, under the ‘polluter pays’ principle it might be reasonable to make the corporation in question bear the special sacrifice of adhering to environmental regulations designed to prevent the undesirable consequences of their operations.

To further support the presumption that the rights of investors weigh more heavily, several investment tribunals have also found that foreign companies should not have to bear an excessive burden from new environmental measures because they are ‘non-nationals’ – to quote the *Tecmed* tribunal, “the foreign investor has a reduced or nil participation in the taking of the decisions that affect it, partly because the investors are not entitled [*sic*] to exercise political rights reserved to the nationals of the State, such as voting”.<sup>185</sup> Given the extent of lobbying by

---

<sup>181</sup> Schneiderman, *Constitutionalizing Economic Globalization*, para. 122; *Azurix v. Argentina*, *Award*, para. 311.

<sup>182</sup> Wälde & Kolo, ‘Environmental Regulation, Investment Protection and Regulatory Taking’, p. 846.

<sup>183</sup> Cited in, Moloo & Jacinto, ‘Environmental and Health Regulation’, p. 21.

<sup>184</sup> See also, Orrego Vicuña, ‘Regulatory Authority and Legitimate Expectations: Balancing the Rights of the State and the Individual Under International Law in a Global Society’. Despite the reference to the ‘individual’ in the title, the focus is on corporations.

<sup>185</sup> *Tecmed v. Mexico*, *Award*, para. 122.

corporations in the states in which they operate, the proposition that foreign companies do not participate in the taking of decisions that affect them is questionable. Foreign companies nevertheless do lack the *formal* right to participate in the political decision-making processes, and tribunals conclude that there may be “legitimate reason for requiring nationals to bear a greater burden in the public interest”.<sup>186</sup> The defining characteristics of foreign corporations as ‘individuals’ vis-à-vis the larger community, and as ‘non-nationals’ vis-à-vis citizens, have therefore both led tribunals to tip the scales used in proportionality analysis in favour of the companies.

In contrast to the more restrictive ‘police powers’ approach, the ‘proportionality’ approach opens up new avenues for corporations to challenge state measures deemed to be disproportionate to their objectives. While a ‘middle way’ of considering both the effect on the company and the justification behind the public interest measure can seem intuitively appropriate, a lot depends on the scales that are used. In non-environmental and environmental cases to date, Schneiderman nevertheless observes that “the balancing is decidedly tilted in favor of investor protection”.<sup>187</sup> Proportionality analysis can therefore often lead in the same direction as the ‘sole effects’ approach. This is nevertheless unlikely to be the case under the new U.S. and Canadian treaties. In response to the controversy over ‘indirect expropriation’ and the civil society protests it has engendered, the U.S. and Canada have included an interpretative clause in their more recent treaties that adopts a proportionality approach but could still serve to tip the scales in favour of the state: “[e]xcept in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives [...] do not constitute indirect expropriations”.<sup>188</sup> Environmental activists and scholars nevertheless object that the ‘except in rare circumstances’ still “opens loopholes” that did not exist in the Methanex approach.<sup>189</sup> Finally, if a government measure is deemed to have been disproportionate, it is notable that no proportionality assessment will be undertaken in the consideration of compensation – the full market value of the investment, the measure of which includes a consideration of lost profits, will have to be provided to the affected company.

---

<sup>186</sup> *Tecmed v. Mexico*, *Award*, para. 122.

<sup>187</sup> Schneiderman, *Constitutionalizing Economic Globalization*, p. 107.

<sup>188</sup> United States of America, *Model Bilateral Investment Treaty*.

<sup>189</sup> Howard Mann, *The Final Decision in Methanex v. United States: Some New Wine in Some New Bottles* (Winnipeg, International Institute for Sustainable Development, 2005), p. 9, available at: {[http://www.iisd.org/pdf/2005/commentary\\_methanex.pdf](http://www.iisd.org/pdf/2005/commentary_methanex.pdf)} accessed 24 August 2012.

### *Concluding Remarks on Expropriation*

The question of how to determine whether an ‘indirect expropriation’ has occurred has proved to be one of the most intractable within international investment law – indeed, one of the world’s most prominent arbitrators resigned himself to the fact that the best explanation he could muster was “I know it when I see it”.<sup>190</sup> In the context of the article that bears this title, this was intended to be reassuring – the jury might be out on how to logically defend the finding of an expropriation, but arbitrators do ‘know it when they see it’ – but given that the previous chapter has already shown that arbitrators have a tendency and financial incentive to favour investors this conclusion is anything but reassuring. The ‘sole effects’, ‘police powers’ and ‘proportionality’ approaches are all intended to provide a more logically coherent way of assessing whether an ‘indirect expropriation’ has occurred, but each raises a number of questions of their own. The ‘sole effects’ doctrine, to cite Simon Baughen, would risk reversing the ‘polluter pays’ principle into “no regulation without compensation”.<sup>191</sup> The ‘police powers’ approach would raise difficult questions in respect to the scientific foundations and process required to introduce environmental regulations. The ‘proportionality’ approach tends, to cite Schneiderman, to be “disproportionately applied against state objectives”.<sup>192</sup> Whichever approach is chosen by a given tribunal, it seems that the protection afforded against indirect expropriation now go well beyond that found within many national legal systems.<sup>193</sup> Finally, while the criteria for the finding of an indirect expropriation is “clearly ambiguous”, the criteria for a direct expropriation is clearly not. There is remarkably little debate on the requirement that full compensation, that well exceeds the actual costs incurred by corporations in developing an investment project, should be provided even for expropriations designed to achieve indisputably legitimate environmental purposes such as the protection of endangered sea turtles or jaguars.

---

<sup>190</sup> Fortier & Drymer, ‘Indirect Expropriation in the Law of International Investment’.

<sup>191</sup> Baughen, ‘Expropriation and Environmental Regulation’, p. 215.

<sup>192</sup> Schneiderman, *Constitutionalizing Economic Globalization*, p. 73.

<sup>193</sup> M. Sornarajah, ‘The Clash of Globalisations and the International Law of Foreign Investment’, Simon Reisman Lecture in International Trade Policy, Norman Patterson School of International Affairs (12 September 2002), p. 10-11; Barry Appleton, ‘Regulatory Takings: The International Law Perspective’, *New York University Environmental Law Journal*, 11 (2002-2003), 35-36; Mann, *Investment Agreements and the Regulatory State*, p. 6; Schneiderman, *Constitutionalizing Economic Globalization*, p. 119.

## Protection from ‘Unfairness’

The concepts of discrimination and expropriation may be difficult in practice, but they are fairly clear in principle – one involves the differential treatment of investors from different countries, the other a sufficiently substantial reduction of the economic value of a company’s investment. In contrast, the concept of ‘fairness’ is vague in both principle *and* practice, yet investment treaties require countries to provide investors with ‘fair and equitable treatment’ (FET) without providing tribunals with much guidance on how to interpret such terms. A number of commentators and tribunals note that ever since Methanex and similar awards made appeals to ‘indirect expropriation’ less certain to succeed, there has been a ‘migration’ of legal challenges from the indirect expropriation clause towards the ‘fair and equitable treatment’ clause.<sup>194</sup> Dolzer observes that “hardly any lawsuit based on an international investment treaty is filed these days without invocation of the relevant treaty clause requiring fair and equitable treatment”, and an UNCTAD report concludes that the FET provision “has emerged as the most relied upon and successful basis for [international investment agreement] claims by investors”.<sup>195</sup>

The key function of the ‘fair and equitable treatment’ clause is often said to be its ability to fill the gaps between other treaty provisions, and to ensure that investment treaties protect investors in circumstances where a state has not violated other, more specific, treaty obligations but has nevertheless acted to the disadvantage of a company. To cite the prominent arbitrator Charles Brower, the FET clause is “designed to give adjudicators a quasi-legislative authority to articulate a variety of rules necessary to achieve the treaty’s object and purpose in particular disputes”.<sup>196</sup> Similarly, while an UNCTAD report cautions that “the vague and broad wording of the obligation carries a risk of an overreach in its application”, the tribunal in *Rumeli Telekom v. Kazakhstan* maintained that the clause was “intentionally vague” precisely in order to “give tribunals the possibility to articulate the range of principles to achieve the treaty’s purpose in particular disputes”.<sup>197</sup> The treaty’s purpose, of course, is the protection of

---

<sup>194</sup> Asteriti, ‘Metalclad, Methanex and Chemtura’, p. 4; Bernasconi-Osterwalder & Johnson (eds) *International Investment Law and Sustainable Development*, p. 19; David Schneiderman, ‘Legitimacy and Reflexivity in International Investment Arbitration: A New Self-Restraint?’ *Oñati Socio-Legal Series*, 1:4 (2011), p. 12.

<sup>195</sup> UNCTAD, *Fair and Equitable Treatment*, p. 1; Rudolf Dolzer, ‘Fair and Equitable Treatment: A Key Standard in Investment Treaties’, *The International Lawyers*, 39:1 (2005), p. 87.

<sup>196</sup> UNCTAD, *Fair and Equitable Treatment*, p. 62.

<sup>197</sup> *Ibid*, p. 1; Mahnaz Malik, *Fair and Equitable Treatment*, Best Practice Advisory Bulletins No 3 (Winnipeg: International Institute for Sustainable Development, 2011), p. 14.



investments.<sup>198</sup> It is acknowledged that the FET clause provides what one tribunal describes as “much latitude” in interpretation, but this is viewed as the provision’s strength rather than its weakness.<sup>199</sup> To cite Dolzer, such a lack of specificity nevertheless also ensures that the clause has “the potential to reach further into the traditional *domaine réservé* of the host state than any one of the other rules of the treaties”.<sup>200</sup>

One of the most disputed questions before arbitral tribunals is the threshold required for the finding of an FET breach – how unfair does a government measure have to be to constitute a violation of ‘fair and equitable treatment’? Investment tribunals have offered a variety of different answers to that question, and despite certain attempts to revise treaties to require a higher threshold, investment tribunals continue to offer interpretations that lower the threshold required for the finding of an FET breach.<sup>201</sup> Even under the most restrictive interpretation of the clause, it is nevertheless clear that there is no requirement that states have to act in bad faith or that they have to intend to act unfairly.<sup>202</sup> In this respect, two cases involving measures taken by Argentina in response to its financial crisis in 2001 are instructive. The tribunal in *Enron v. Argentina* concluded that “[e]ven assuming that [Argentina] was guided by the best of intentions, *which the Tribunal has no reason to doubt*, there is here an objective breach of [...] fair and equitable treatment”.<sup>203</sup> If government measures based on the ‘best of intentions’ can be found to be unfair, so does government conduct based on reasoned judgement – to cite the tribunal in *LG&E v. Argentina*, “[e]ven though the measures adopted by Argentina may not have been the best, they were not taken lightly, without due consideration [...] though unfair

---

<sup>198</sup> This is the singular purpose of investment treaties, although some specify the signatories desire such objectives to be achieved “in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights”. See for example, United States of America, *Model Bilateral Investment Treaty*, preamble.

<sup>199</sup> *Biwater Gauff Ltd. v. United Republic of Tanzania, Award*, ICSID Case No. ARB/05/22 (24 July 2008), para. 593.

<sup>200</sup> Cited in Romson, *Environmental Policy Space and International Investment Law*, p. 166.

<sup>201</sup> If the treaty text requires the FET clause to be interpreted as part of the minimum standard of customary international law, the tribunal can still turn around to say that customary international law has itself evolved to require ‘fair and equitable treatment’ in the literal (and less restrictive) sense of the term. See Matthew Porterfield, ‘A Distinction Without a Difference? The Interpretation of Fair and Equitable Treatment Under Customary International Law by Investment Tribunals’, *Investment Treaty News*, 3:3 (March 2013), pp. 3-5; Suzanne Spears, ‘The Quest for Policy Space in a New Generation of International Investment Agreements’, *Journal of International Economic Law*, 13:4 (2010), p. 1054; Michele Potestà, ‘Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept’, *ICSID Review*, 28:1 (2013), p. 90; UNCTAD, *Fair and Equitable Treatment*, p. 57.

<sup>202</sup> This is acknowledged in the *Glamis* award, though how a state could engage in shocking or blatantly unfair conduct without acting in bad faith is not clear. *Glamis Gold v. USA, Award*, para. 22.

<sup>203</sup> Cited in UNCTAD, *Fair and Equitable Treatment*, p. 66.

and inequitable, [they] were the result of reasoned judgment”.<sup>204</sup> Beyond the intentions of the state, it should also be emphasized that there is no requirement that states be in breach of domestic laws or administrative practices. Indeed, for good measure the tribunal in Tecmed adds that a state’s conduct can violate the ‘fair and equitable treatment’ provision even if, under its own laws, “the State was actually bound to act that way”.<sup>205</sup> States can therefore find that they have acted unfairly even when they act in accordance with ‘the best of intentions’, ‘reasoned judgement’, and in accordance with its own laws.

Beyond the threshold required, what kind of conduct constitutes a violation of ‘fair and equitable treatment’ in practice? The “perhaps [...] most widely cited and accepted” definition of the clause is found in the Tecmed v. Mexico award,<sup>206</sup> which:

“requires [states] to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives”.<sup>207</sup>

In its requirement that states act “in a consistent manner, *free* from ambiguity, and *totally* transparently”, Zachary Douglas suggests that “[t]he Tecmed ‘standard’ is actually not a standard at all; it is rather a description of perfect public regulation in a perfect world, to which all states should aspire but very few (if any) will ever attain”.<sup>208</sup> Lawyers representing the government of Chile in an investment dispute similarly complained that the standard entailed an “extreme” “programme for good governance”.<sup>209</sup> The Tecmed standard has nevertheless been directly supported by many other tribunals, and similar interpretations also occur in other

---

<sup>204</sup> LG&E Energy Corp., LG&E Capital Corp. & LG&E International Inc. v. The Argentine Republic, *Decision on Liability*, ICSID Case No. ARB/02/1 (3 October 2006), para. 162.

<sup>205</sup> Citing James Crawford, Tecmed v. Mexico, *Award*, para. 120.

<sup>206</sup> Separate Opinion of Henri Alvarez in Total v. Argentina, cited in Luke Eric Peterson, ‘Co-Arbitrators in Total v. Argentina Case Take Widely-Divergent Views of Argentina’s Fair and Equitable Treatment Obligations Under Investment Treaty’, *Investment Arbitration Reporter* (30 March 2011), available at: {[http://www.iareporter.com/articles/20110331\\_2](http://www.iareporter.com/articles/20110331_2)} accessed 22 March 2012.

<sup>207</sup> Tecmed v. Mexico, *Award*, para. 154.

<sup>208</sup> Cited in Nick Gallus, ‘The ‘Fair and Equitable Treatment’ Standard and the Circumstances of the Host State’, in Chester Brown & Kate Miles (eds) *Evolution in Investment Treaty Law and Arbitration* (Cambridge, Cambridge University Press, 2011), p. 239; see also Saverio Di Benedetto, *International Investment Law and the Environment* (Cheltenham: Edward Elgar, 2013), p. 109.

<sup>209</sup> MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile, *Decision on Annulment*, ICSID Case No. ARB/01/7 (21 March 2007), para. 66.

investment awards.<sup>210</sup> The requirements of the FET standard has led some scholars and international bodies to conclude that investment treaties form a body of ‘global administrative law’ or that it amounts to a requirement for ‘good governance’.<sup>211</sup>

Given that the aim behind the ‘fair and equitable treatment’ standard is to cover any gaps between the other treaty standards, and given that the standard is inherently subjective, in principle any allegation of unfairness can be invoked as an FET breach. Clearly revealing the subjective nature of many claims, Philip Morris justifies its fair and equitable treatment allegation on the basis that “[cigarette] packages definitely need health warnings, but they’ve got to be a reasonable size [...] We thought 50 percent was reasonable. Once you take it up to 80 percent, there’s no space for trademarks to be shown. We thought that was going too far”.<sup>212</sup> While it is in principle possible to determine a government measure to be unfair without further legal analysis of what ‘unfairness’ actually entails – and while some tribunals have adopted that approach – in practice certain types of government measures tend to fall foul of the FET standard more frequently than others. The aim of this section is to assess a few of the most common requirements that tribunals have associated with the FET clause in the past – the requirements for consistency, for transparency, for adherence to domestic law, and for judicial fairness – and the extent to which corporations can challenge environmental regulations on this basis. Each of these sub-elements seems laudable in principle, but can significantly broaden the scope for corporate challenges to environmental regulations in practice.

### ***Consistency***

The term consistency appears in different forms within arbitral awards and the academic literature. Some scholars have identified a requirement for consistency across time – an obligation that the state does not renege on assurances once made to an investor – and this will be discussed in the section on ‘protection from change’ below. What will be discussed here is

---

<sup>210</sup> In *LG&E v. Argentina* the tribunal maintained that the FET provision requires “the host State’s consistent and transparent behavior, free of ambiguity that involves the obligation to grant and maintain a stable and predictable legal framework necessary to fulfill the justified expectations of the foreign investor”. *LG&E v. Argentina, Decision on Liability*, para. 131.

<sup>211</sup> See Benedict Kingsbury & Stephan Schill, ‘Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law’, Institute for International Law and Justice, Working Paper 6 (2009), pp. 1-53.

<sup>212</sup> Peter Nixon, vice president and spokesman for Philip Morris International, cited in Duff Wilson, ‘Cigarette Giants in Global Fight on Tighter Rules’, *New York Times* (13 November 2010), available at: {[http://www.nytimes.com/2010/11/14/business/global/14smoke.html?\\_r=4&scp=5&sq=uruguay&st=cse&](http://www.nytimes.com/2010/11/14/business/global/14smoke.html?_r=4&scp=5&sq=uruguay&st=cse&)} accessed 5 September 2014.

rather inconsistency at a particular point in time; when different agencies or levels of the state appear, from the investor's point of view, to act in a contradictory fashion. In such cases the problem is often that one agency of the state, or one level of government, acts in such a way as to give hope to an investor that a project will succeed, only to find that the requirements of another part of the state makes the investment unfeasible.

In *MTD v. Chile*, the company had sought to build a 'self-sufficient satellite city' outside Santiago. The investor was from the outset aware that the site selected for the proposed development formed part of Santiago's greenbelt and was zoned for agricultural use only, but had been told by the prospective private seller of the land that the site could be easily re-zoned.<sup>213</sup> The Chilean agency responsible for the inflow of foreign investment funds is the Foreign Investment Commission (FIC), and MTD sought and received a standard FIC contract for its investment.<sup>214</sup> The investor purchased the land, and subsequently began the process of seeking a modification to the site's agricultural zoning from the relevant government agencies. This nevertheless proved more difficult than the investor had anticipated, and on the basis of Santiago's urban development policy the relevant planning authorities eventually decided not to approve the zoning modification that was required for the project to proceed.<sup>215</sup> MTD brought the case to investment arbitration, and alleged that the denial of a zoning modification amounted to a breach of fair and equitable treatment.

As a preliminary matter, it was not alleged that Chile had ever provided any positive assurances to the investor that a change in zoning would be forthcoming or easily achieved. Furthermore, the tribunal that was instituted in the case readily agreed with Chile that MTD had exposed itself to significant business risk in failing to condition the purchase of the land upon receiving permission to re-zone, and furthermore for failing to seek any professional advice on the matter and for relying on the advice of the seller of the land (who it points out had a financial incentive to deceive the investor).<sup>216</sup> The case rather concerns the allegation that, given that the FIC contract contained a brief description of the project and its proposed location, it was unfair for the FIC to approve the investment if the company did not subsequently receive the zoning modifications required for the project to proceed. Chile strongly objected to the implication that

---

<sup>213</sup> *MTD v. Chile*, *Award*, para. 42.

<sup>214</sup> *Ibid*, para. 52-55.

<sup>215</sup> *Ibid*, para. 80.

<sup>216</sup> *Ibid*, para. 176-177; 242.

the FIC was a “one-stop window” for project approval, and stressed that while the FIC contract ensured that the foreign investor would be granted national treatment, “[j]ust as a domestic investor cannot obtain a waiver of the (zoning regulation) by executive fiat, neither could MTD”.<sup>217</sup> In assessing these claims, the tribunal duly acknowledges that the FIC contract makes perfectly clear that the investor is *not* exempt from seeking other required permits, approvals and authorizations. On this basis, the tribunal determined that the investor was not automatically entitled to a zoning modification by virtue of the FIC contract.<sup>218</sup>

While the tribunal did not find a violation of the terms of the FIC contract, where it did find a breach of fair and equitable treatment is precisely in Chile’s “inconsistency of action between two arms of the same Government *vis-à-vis* the same investor”.<sup>219</sup> The basic premise behind the tribunal’s analysis is that whatever the domestic composition of the Chilean state, under international law the state of Chile needs to be considered “as a unit”.<sup>220</sup> Based on this premise, it was unfair for the state (embodied in the FIC) to approve an investment that was “against the policy of the State itself” (namely the urban development policies of other agencies).<sup>221</sup> The tribunal’s analysis in respect to what ‘policy’ this refers to is rather unclear – after all, the investor was well aware that the reason for the current agricultural zoning for the land was precisely because of the government’s current policy to maintain Santiago’s greenbelt. In seeking to clear up the confusion, the annulment tribunal established that the ‘policy’ referred to is nevertheless not the *current* policy of the state as embodied in the agricultural zoning, but rather a policy *against changing* the current zoning.<sup>222</sup> Chile strongly objected to this notion of a “meta-policy” not to change the zoning in the future – there was only the existing policy and the investor’s right to seek a modification of that policy.<sup>223</sup> The annulment tribunal nevertheless implies that had the Chilean planning agency been open-minded towards a zoning modification Chile would have subsequently had the right to decide not to change it, but on the basis of various statements by ministers and agency officials from the planning authorities that a change would be ‘unfeasible’ the tribunal instead determined that within the relevant planning agencies

---

<sup>217</sup> MTD v. Chile, *Award*, para. 119; 121; 184.

<sup>218</sup> *Ibid*, para. 119; 188.

<sup>219</sup> *Ibid*, para. 163.

<sup>220</sup> *Ibid*, para. 165.

<sup>221</sup> *Ibid*, para. 214.

<sup>222</sup> MTD v. Chile, *Decision on Annulment*, para. 84-85

<sup>223</sup> *Ibid*, para. 86.

there had existed a policy against changing the current policy, and the FIC should have denied the investment on that basis.<sup>224</sup>

Irrespective of the existence or otherwise of a ‘meta-policy’ not to change the current policy, the award is premised on the “considerable emphasis” that is placed on the “unity of the state”.<sup>225</sup> Chile strongly objected to this emphasis on the basis that the Foreign Investment Commission did not have the legal authority to carry out evaluations in respect to zoning modifications or planning policy – this is precisely why the FIC contract specifically stated that it was without prejudice to the requirement to seek other approvals.<sup>226</sup> Chile maintained that the tribunal’s analysis “ignores the law of the host State and the necessary separation of powers which is the basis for the rule of law. Organs of the State can have different mandates and concerns: inconsistency of policy between them does not necessarily entail any breach of international law”.<sup>227</sup> The annulment tribunals nevertheless maintained that “what could do with improvement [...] was co-ordination at the level of the FIC” – which would amount precisely to making the FIC into more of the “one-stop window” than Chile maintained it was ever intended to be.<sup>228</sup> In the failure of the state to act “as a monolith”, Chile had breached the FET standard and was asked to compensate the investor.<sup>229</sup>

All states are composed of different ministries and agencies and levels of government, with some sort of division of labour between them, yet the tribunal’s emphasis in this case is on the obligation of the state to act “as a unit, as a monolith”.<sup>230</sup> Past and current cases suggest that investors can appeal to ‘consistency’ in two different ways. The first is where the state’s way of organizing itself is on its own deemed in breach of the FET standard, irrespective of whether it is in breach of domestic law. In *MTD v. Chile*, the tribunal did not find that the actions of the two different agencies amounted to a breach of the FIC contract, and while it did suggest that

---

<sup>224</sup> The basis of the tribunal’s analysis is various statements by politicians that a change to the current permit would be unfeasible, but the annulment tribunal does not address the objection that while politicians and agency officials may have held such a view the investor remained entitled to seek a change of the modification, and it was only on that basis that the planning agencies could then formally decide not to provide one. *MTD v. Chile, Decision on Annulment*, para. 86.

<sup>225</sup> *MTD v. Chile, Decision on Annulment*, para. 87.

<sup>226</sup> *MTD v. Chile, Award*, para. 121-122.

<sup>227</sup> *MTD v. Chile, Decision on Annulment*, para. 88.

<sup>228</sup> *Ibid*, para. 108.

<sup>229</sup> On the basis of “ample material” to suggest that the company had failed to protect itself from regulatory risk and to complete due diligence, Chile nevertheless only had to compensate the investor for half its losses. *MTD v. Chile, Award*, para. 166; 243; 163;

<sup>230</sup> *Ibid*, para. 166.

there was scope within Chilean law for the FIC to exercise more of a coordinating function within its current mandate, it did not determine that the FIC had actually acted in breach of domestic laws in not exercising a sufficient coordinating function.<sup>231</sup> As such, there was no breach of domestic administrative regulations or laws. The second is where there is genuine disagreement on where the authority of one agency ends and another begins, and where under domestic law one or the other agency has overstepped its authority. This may have been the case in *Metalclad v. Mexico*, where the federal government is alleged to have informed the investor that only federal authorizations for the investment were needed, while the municipal government maintained that certain municipal permits were also required.<sup>232</sup> In so far as inconsistency between different parts of a government is a common occurrence in many domestic legal systems, the FET standard can be a potent weapon against otherwise legitimate environmental regulations in circumstances that nevertheless reveal an imperfect division of labour between different agencies of a state.

### ***Transparency***

A second dimension of fair and equitable treatment that has been invoked by tribunals and commentators alike involves ‘transparency’ in respect to the domestic rules and regulations that will govern an investment, and the primary environmental example is *Metalclad v. Mexico*.<sup>233</sup> This case concerned the development of a hazardous waste landfill, and also involves issues of ‘consistency’ between different levels of government, as discussed above. In this case, the federal government was favourable towards the project, but due to local environmental concerns the municipal government was not, and it eventually rejected the investor’s application for a municipal construction permit for the landfill. The investor brought the case to arbitration, and alleged that it had been given conflicting messages from the two levels of government as to whether a municipal construction permit was required in the first place, and if so, on what grounds such a permit could be denied. The investment tribunal made two assessments in respect to the permit. Firstly, it decided that according to Mexican law a

---

<sup>231</sup> *MTD v. Chile*, *Award*, para. 119; 188. Indeed, the annulment tribunal only laments that coordination at the level of the FIC “could do with improvement”, not that the lack of such was contrary to domestic regulations. *MTD v. Chile*, *Decision on Annulment*, para. 108.

<sup>232</sup> *Metalclad v. Mexico*, *Award*, para. 88.

<sup>233</sup> The transparency part of the award was set aside by the Supreme Court of British Columbia (the investment tribunal was seated in Vancouver, and was under the treaty permitted to review the award), but the decision to set aside the transparency part of the award is, to cite Kenneth Vandeveld, “not consistent with the body of arbitral awards” – it is now more widely acknowledged that transparency is indeed required as part of fair and equitable treatment. See Vandeveld, ‘A Unified Theory of Fair and Equitable Treatment’, p. 88.

municipal permit could not be denied on the environmental grounds invoked but only on more limited grounds, and that the municipality had therefore acted outside of its authority in denying the permit.<sup>234</sup> Secondly, and perhaps in anticipation of objections that an international investment tribunal might not be in the best position to interpret domestic Mexican administrative law, the tribunal furthermore declared that the difficulty involved in determining whether a municipal permit was required on its own entailed a lack of transparency.<sup>235</sup>

The tribunal decided that the transparency obligation entailed that “all relevant legal requirements for the purpose of initiating, completing and successfully operating investments [...] should be capable of being readily known to all affected investors”, adding for good measure that “[t]here should be no room for doubt or uncertainty on such matters”.<sup>236</sup> Mexico was therefore found in breach of the transparency requirement of the FET standard because of the “absence of a clear rule as to the requirement or not of a municipal construction permit”.<sup>237</sup> That such a transparency breach was found to have occurred in the context of this case is interesting, because Metalclad was from the outset aware that such a municipal permit either *was* required, or that the Mexican law in this respect was unclear. Before purchasing the company that operated the landfill, Metalclad found out that it had previously been denied a municipal construction permit to construct a hazardous waste landfill on two previous occasions.<sup>238</sup> It therefore initially conditioned the purchase of the property on either receiving a municipal permit, or on receiving a judgement from the Mexican courts that such a municipal permit was not required.<sup>239</sup> Neither of these two conditions were met, but Metalclad contends that it nevertheless proceeded with the investment on the basis of ‘oral assurances’ by federal government officials. Mexico exasperatedly notes that there is “no contemporaneous documentary evidence of such alleged oral assurances”, but for reasons that are unclear from the award the tribunal seems to have accepted Metalclad’s word on this matter.<sup>240</sup> Whatever the

---

<sup>234</sup> Metalclad v. Mexico, *Award*, para. 86.

<sup>235</sup> *Ibid*, para. 88. Indeed, Schneiderman makes precisely this complaint, see Schneiderman, *Constitutionalizing Economic Globalization*, p. 85.

<sup>236</sup> Metalclad v. Mexico, *Award*, para. 76.

<sup>237</sup> *Ibid*, para. 88.

<sup>238</sup> Metalclad Corporation v. The United Mexican States, *Respondent’s Post-Hearing Submissions*, ICSID Case No. ARB(AF)/97/1 (9 November 1999), para. 50; Schneiderman, *Constitutionalizing Economic Globalization*, p. 84.

<sup>239</sup> J.C. Thomas, ‘Responses: A Reply to Professor Brower’, *Columbia Journal of Transnational Law*, 40 (2001-2002), p. 440.

<sup>240</sup> Metalclad v. Mexico, *Respondent’s Post-Hearing Submissions*, para. 74. The British Columbia Supreme Court, that reviewed the award, noted that the “[t]ribunal appeared to have implicitly accepted” Metalclad’s position in respect to the assurances, thereby also expressing puzzlement over the basis for its decision. The



true situation in respect to the ‘oral assurances’ allegedly provided, the interesting aspect of the transparency analysis is that Metalclad was from the outset aware that the law was unclear, and it was also fully aware that the municipality itself maintained its right to deny such permits. Metalclad’s decision to invest despite an uncertain legal situation can therefore only be interpreted as a calculated business risk, and when its gamble failed the investment tribunal decided that the lack of a clear legal situation that had been at the heart of that gamble was itself a violation of international investment law.

The transparency requirement is not on its own unreasonable, but in the context of investor-state dispute settlement it can provide ammunition for corporations to target environmental regulations. The possibility for conflicting or difficult to interpret regulations and administrative requirements exist within most legal systems. In cases such as Metalclad, domestic and foreign companies alike can normally request authoritative interpretations from domestic courts. In contrast, the tribunal in Metalclad determined that the “absence of a clear rule” was on its own a violation of transparency. This provides an added incentive for investors to refrain from seeking a (possibly unfavourable) domestic legal interpretation of the law and rather to gamble on a favourable interpretation, and subsequently to seek compensation from investment tribunals if such gambles fail.

### ***Adherence to Domestic Laws and Procedures***

While breaches of ‘fair and equitable treatment’ have often been found in cases where there is no corresponding breach of domestic laws, FET claims are nevertheless also often made on the basis of violations of domestic laws or administrative procedures. A number of such cases concern attempts by states to take measures to protect the environment in ways that did not strictly adhere to domestic procedures.

The primary case in this respect is *Ethyl v. Canada*. This case does not invoke the FET clause per se (quite likely because the case emerged before the potency of this clause had been recognized) but non-adherence to domestic rules played a large part in its outcome. The case concerns the Manganese-based Fuel Additives Act introduced by the Canadian parliament. The parliament had sought to ban the fuel additive MMT on the basis of potential but uncertain

---

United Mexican States v. Metalclad Corporation, *Reasons for the Judgment*, Supreme Court of British Columbia 664 (2001), para. 28.

health risks, as well as crucially because MMT had been found to interfere with emissions control devices in vehicles and therefore caused increased pollution.<sup>241</sup> However, this legislative attempt was hampered by Canada's own structures of decision-making. While MMT is hazardous in high doses, the Department of Health had found that "current levels of [MMT] to which the population in large urban centres are exposed are below the benchmark air level at which no adverse health risks are expected".<sup>242</sup> The health effects were therefore too uncertain for the parliament to have the authority to introduce the ban as health or environmental legislation.<sup>243</sup> While the evidence on interference with pollution control devices in cars was more certain, the federal parliament did not have the authority to introduce legislation on this basis either; fuel standards were under provincial jurisdiction, and the environmental and health effects of increased pollution were too indirect to qualify for federal legislation.<sup>244</sup> So the federal parliament adopted a strategy that it had successfully adopted in other circumstances in the past to circumvent such constraints – it introduced a ban on the international and interprovincial trade in MMT, on the basis that it would be uneconomical to produce MMT on an intraprovincial basis and the parliament would accomplish indirectly what it could not accomplish directly, namely the phase out of MMT.<sup>245</sup> At the same time that Ethyl was pursuing its case in investment arbitration, the province of Alberta challenged the parliamentary act on the basis of the Agreement on Internal Trade (AIT). The latter domestic panel found the parliamentary act in violation of the agreement on the basis that trade restrictions should not be used to achieve non-trade related objectives such as environmental or health protection.<sup>246</sup> In response to this finding, Canada settled the investment treaty dispute with Ethyl.

A dissenting judge in the AIT panel observed that the Canadian federal government had been "faced with a genuine dilemma" – the environmental objective was legitimate, but the character of the risks in combination with divisions between federal and provincial jurisdiction made it

---

<sup>241</sup> Ethyl Corporation v. Government of Canada, *Statement of Defence*, UNCITRAL Ad Hoc Arbitration (27 October 1997), para. 58-67; Martin Wagner, 'International Investment, Expropriation and Environmental Protection', *Golden Gate University Law Review*, 29 (1999), pp. 490-496.

<sup>242</sup> Ethyl v. Canada, *Statement of Defence*, para. 60.

<sup>243</sup> Juli Abouchar & Richard King, 'Environmental Laws as Expropriation Under NAFTA', *Review of European Community and International Environmental Law (RECIEL)*, 8:2 (1999), p. 210-211; Ethyl v. Canada, *Notice of Intent*, para 6. Wagner, 'International Investment, Expropriation and Environmental Protection', pp. 490-496.

<sup>244</sup> Ethyl v. Canada, *Statement of Defence*, para. 70; Agreement on Internal Trade Panel, 'Report of the Article 1704 Panel Concerning the Dispute Between Alberta and Canada Regarding the Manganese-Based Fuel Additives Act', Dissenting Opinion (12 June 1998), p. 14.

<sup>245</sup> Ethyl v. Canada, *Statement of Defence*, para. 79.

<sup>246</sup> Agreement on Internal Trade Panel, 'Report'.

difficult for the parliament to prohibit the substance.<sup>247</sup> The *Globe and Mail* reported at the time that “the MMT debacle provides a textbook case in how not to enact health and environmental regulation”.<sup>248</sup> Some commentators complain that critics of the Ethyl settlement do not recognize that the MMT legislation had already been defeated before the AIT panel, but what is interesting about this case is nevertheless what Ethyl could achieve on the basis of investor-state arbitration, which it may not have achieved on the basis of a breach of domestic law alone.<sup>249</sup> Firstly, the AIT panel findings were non-binding and advisory, so there is no guarantee that Canada would have rescinded the parliamentary act on this basis alone.<sup>250</sup> Secondly, even if it had, the AIT panel findings would not have required Canada to provide Ethyl with CAD 19.5 million in compensation for lost profits, nor a government statement that there was not sufficient evidence that MMT was harmful (a statement that the company used for advertising purposes to deny any health effects of MMT) – these additional benefits were provided on the basis of the investment treaty dispute.<sup>251</sup>

In a number of similar pending cases companies are challenging state conduct as contrary to the domestic laws or administrative procedures of the state itself. In *Bilcon v. Canada*, the company claims that Canada breached domestic administrative requirements, firstly, in subjecting its proposed basalt quarry to a more onerous form of environmental assessment (including public consultation) than is normally applied to projects of its kind; and secondly, for subsequently denying a permit on the basis that the project would be contrary to ‘community core values’, a notion that Canada maintains is included under the stated criteria of ‘socio-economic effects’ but that the company maintains is beyond the scope of environmental impact assessments.<sup>252</sup> In the Ethyl case, the parliament presumably knew that such a round-about way of introducing environmental and health legislation was not fully in adherence to domestic procedure, but in many of the current cases, including *Bilcon*, the states concerned do not share the investor’s assessment of the domestic law requirements. In such cases, there remains the

---

<sup>247</sup> Agreement on Internal Trade Panel, ‘Report of the Article 1704 Panel Concerning the Dispute Between Alberta and Canada Regarding the Manganese-Based Fuel Additives Act’, *Dissenting Opinion* (12 June 1998), p. 13-14.

<sup>248</sup> Shawn McCarthy, ‘Gas War – The Fall and Rise of MMT: When the Car and Oil Firms Went to Battle, Ottawa Lost’, *The Globe and Mail* (24 July 1998), p. A1.

<sup>249</sup> For example, David Haigh, ‘Chapter 11 – Private Party vs. Governments, Investor-State Dispute Settlement: Frankenstein or Safety Valve’, *Canada-United States Law Journal*, 26 (2000), p. 133.

<sup>250</sup> Schneiderman, *Constitutionalizing Economic Globalization*, p. 113.

<sup>251</sup> Traynor, ‘How Canada Became a Shill for Ethyl Corp’.

<sup>252</sup> William Ralph Clayton and others & *Bilcon of Delaware v. Government of Canada*, *Notice of Arbitration*, UNCITRAL Ad Hoc Arbitration (26 May 2008), para. 27, 34; Clayton & *Bilcon v. Canada*, *Memorial of the Investors*, para. 474.

possibility that genuine environmental regulations will be struck down by tribunals as violations of domestic procedure even if they had not been interpreted as such by the states themselves. If such a determination is made, this will amplify the negative consequences to the state beyond those that a domestic breach alone would entail under domestic law.

### ***Judicial Fairness***

A breach of fair and equitable treatment can also emerge through judicial unfairness.<sup>253</sup> This is normally regarded as one of the least controversial requirements of international investment law, but it can have potentially problematic consequences in practice. There are no concluded environmental cases in this respect, but the pending arbitration in *Chevron v. Ecuador* highlights some of the potential risks. This arbitration arises from an underlying conflict with a long history between indigenous groups and Texaco, now a subsidiary of Chevron. In the 1970s and 1980s Texaco was the operator of a consortium formed to extract oil in the rainforests of northern Ecuador, and in the process it is alleged to have disposed of 18 billion gallons of toxic waste into open unlined pits and rivers in the rainforest, causing severe environmental degradation and related illnesses.<sup>254</sup> For almost two decades affected communities from Lago Agrio have pursued a legal case against Texaco to secure remediation of the environment and compensation for the consequences.

The legal journey of the Lago Agrio communities began with a class action lawsuit brought in the U.S., but Texaco objected to U.S. jurisdiction and argued that the case should be heard in Ecuador.<sup>255</sup> The Lago Agrio plaintiffs had chosen the U.S. venue partly because collective

---

<sup>253</sup> Either in respect to ‘denial of justice’ or in respect to the unavailability of ‘effective means’ to assert and enforce rights’. Tribunals have found breaches of the ‘effective means’ provision at lower thresholds of judicial unfairness than under the more demanding category of ‘denial of justice’. Jarrod Hepburn & Luke Eric Peterson, ‘Analysis: Tribunal’s Reading of ‘Effective Means’ Obligation May Ensnare States that Otherwise Pass Treaty Muster’, *Investment Arbitration Reporter* (4 March 2012).

<sup>254</sup> BBC, ‘*Ecuador Appeals Court Rules Against Chevron in Oil Case*’, (4 January 2012), available at: {<http://www.bbc.co.uk/news/world-latin-america-16404268>} accessed 1 May 2012; William Langewiesche, ‘Jungle Law’, *Vanity Fair*, (May 2007), available at: {<http://www.vanityfair.com/politics/features/2007/05/texaco200705>} accessed 1 May 2012; Megan Chapman, ‘Seeking Justice in Lago Agrio and Beyond: An Argument for Joint Responsibility of Host States and Foreign Investors before the Regional Human Rights Systems’, *Human Rights Brief*, 18:1 (2010), pp: 6-13. Available at: {<http://digitalcommons.wcl.american.edu/hrbrief/vol18/iss1/2/>} accessed 1 May 2012; Chevron Corporation & Texaco Petroleum Company v. Republic of Ecuador, *Track 2 Counter-Memorial on the Merits*, PCA Case No 2009-23 (18 February 2013), para. 35-52.

<sup>255</sup> Maria Aguinda, et al. & Gabriel Ashanga Yota et al. v. Texaco Inc., *Texaco Inc.’s Memorandum of Law in Support of its Renewed Motions to Dismiss Based on Forum Non Conveniens and International Comity*, U.S. District Court, Southern District of New York, 93 CIV. 7527 & 94 CIV. 9266 (11 January 1999), part D, available at: {[http://www.texaco.com/sitelets/ecuador/docs/motions\\_to\\_dismiss.pdf](http://www.texaco.com/sitelets/ecuador/docs/motions_to_dismiss.pdf)} accessed 1 May 2012.

lawsuits were more difficult under Ecuadorian law, partly because they feared Texaco would not submit to Ecuadorian jurisdiction, and partly – ironically in hindsight – because they believed the Ecuadorian courts to be unfair, prone to corruption, and susceptible to political influence (the government at the time was favourably disposed towards Texaco; the government today is favourable towards the Lago Agrio plaintiffs).<sup>256</sup> The U.S. court eventually agreed to dismiss the case, but it did so explicitly in light of repeated assurances by Texaco that it would accept any legal judgement arrived at in Ecuador.<sup>257</sup> After the Lago Agrio plaintiffs refiled their case in Ecuador, Chevron nevertheless brought an investment treaty claim to escape the consequences of an unfavourable Ecuadorian court judgement. In addition to contesting the substance of the underlying environmental liability claim, Chevron also argues that the Ecuadorian judicial process has been unfair and that it has not been provided with the opportunity for a fair trial. The investment treaty claim is ongoing, but the Ecuadorian court has now rendered an unprecedented USD 18 billion judgement against Chevron.<sup>258</sup> The company is asking the investment tribunal to either invalidate the Ecuadorian judgement and to render it internationally unenforceable, or otherwise to require Ecuador to compensate it for the costs of compliance with the judgement.<sup>259</sup> If the investment tribunal were to take the first option to invalidate the Ecuadorian judgement on the grounds that the judicial process had been unfair, then the third party plaintiffs would have nowhere left to pursue their claims.<sup>260</sup> As such, the avoidance of a ‘denial of justice’ for Chevron would amount to a ‘denial of justice’ for the indigenous people. Pending a final award, the arbitral tribunal has already commanded Ecuador to “take all measures necessary to suspend or cause to be suspended the enforcement and recognition within and without Ecuador of the judgements”.<sup>261</sup> Civil society groups have

---

<sup>256</sup> Maria Aguinda, et al. & Gabriel Ashanga Yota et al. v. Texaco Inc., *Opinion and Order*, U.S. District Court, Southern District of New York, 93 CIV. 7527 & 94 CIV. 9266 (30 May 2001), para 4-8. The court observes that the plaintiffs had initially raised the objection that the courts in Ecuador were “subject to corrupting influences and outside pressures, especially from the military, that rendered them inadequate to dispense independent, impartial justice in these cases”. These claims had for unknown reasons subsequently been abandoned, but this is likely to have been for legal reasons rather than a sudden confidence in Ecuador’s courts.

<sup>257</sup> Aguinda, et al. v. Texaco, *Opinion and Order*, para. 3; Aguinda, et al. v. Texaco, *Texaco Inc. ’s Memorandum of Law*, part D; see also Chevron Corporation & Texaco Petroleum Company v. Republic of Ecuador, *Submission of Amici: Fundación Pachamama & International Institute of Sustainable Development*, PCA Case No 2009-23 (5 November 2010), para. 4.2.

<sup>258</sup> The original judgement was 9 billion, but was doubled in the absence of an apology by Chevron for what the court deemed were procedural abuses. The apology would not entail an admission of responsibility for the underlying environmental harm or liability. Chevron v. Ecuador, *Track 2 Counter-Memorial on the Merits*, para. 177, 192.

<sup>259</sup> Chevron Corporation & Texaco Petroleum Company v. Republic of Ecuador, *Memorial on the Merits*, PCA Case No 2009-23 (6 September 2010), para. 547(1-8).

<sup>260</sup> Chevron would have had the case dismissed from both the U.S. and Ecuador, and there is no international court that can hear such claims.

<sup>261</sup> Chevron Corporation & Texaco Petroleum Company v. Republic of Ecuador, *Second Interim Award on Interim Measures* (16 February 2012), para. 3(i).

expressed concern that this already requires the executive of the government to interfere with the judicial branch, and with the rights of the victorious third party claimants to enforce a judgement that is legal according to the laws of their country.<sup>262</sup>

Chevron's denial of justice and 'effective means' claims rest on several independent allegations. Some of these allegations implicate the American contingency fee lawyers representing the plaintiffs, who are accused of fraud and 'colluding' with the court.<sup>263</sup> If these claims are successful, then the lawyers representing the plaintiffs will share responsibility for any arbitral decision to leave the plaintiffs without access to a forum that can provide a fair hearing for the underlying environmental concerns. Several of the allegations nevertheless concern more general forms of judicial unfairness. In terms of the quality of the judgement itself, Chevron is probably correct that it contains considerable flaws – while the underlying environmental claims are supported by plausible evidence, the actual measure of compensation does seem widely inflated.<sup>264</sup> Chevron nevertheless also raises various process-related complaints related to a failure by Ecuador to “follow its own laws, rules, and procedures during the litigation”.<sup>265</sup> This raises wider questions of the ability of developing country judicial systems to provide fair trials. Other cases are instructive; in *White Industries v. India* a tribunal found that India had failed to provide a fair judicial process in the context of judicial delays that are generally common within the Indian judicial system.<sup>266</sup> Findings of process-related forms of unfairness can also encourage large corporations to use their superior resources to orchestrate judicial problems simply by putting strain on the system. A U.S. court in an unrelated case once castigated Chevron for seeking to “bombard this Court with distracting and irrelevant documents”, and such a strategy would be all the more potent in a developing world context – indeed, in *Chevron v. Ecuador* the company is accused of “[s]wamping the court with largely irrelevant paper” and “filing multiple end-of-day motions in rapid-fire mode” in such a way that “[e]ven a sophisticated court with ample technical and personnel support would have difficulty in handling this deluge”.<sup>267</sup> Ecuador contends that the “endless cycle of motion-

---

<sup>262</sup> Lise Johnson, 'Case Note: How Chevron v. Ecuador is Pushing the Boundaries of Arbitral Authority', *Investment Treaty News*, 3:2 (April 2012), pp. 16-17; *Chevron v. Ecuador*, *Submission of Amici: Fundación Pachamama & International Institute of Sustainable Development*.

<sup>263</sup> *Chevron v. Ecuador*, *Track 2 Counter-Memorial on the Merits*'.

<sup>264</sup> *Chevron v. Ecuador*, *Supplemental Memorial on the Merits*, para. 66.

<sup>265</sup> *Ibid*, para. 197-198.

<sup>266</sup> This was based on the 'effective means' provision. Hepburn & Peterson, 'Analysis: Tribunal's Reading of 'Effective Means' Obligation'.

<sup>267</sup> U.S. Court document cited by Ecuador. See *Chevron v. Ecuador*, *Track 2 Counter-Memorial on the Merits*', p. 70 footnote 298; para. 148, 153.

denial-appeal” was “a Chevron routine” played out to create problems, delays, recusal of judges unable to keep up, and ultimately “to create a record of purported due process violations by the court”. If process-related judicial unfairness were to be found sufficient to invalidate a domestic judgement, then corporations can be encouraged to contribute to any judicial overload that can cause such unfairness.

If tribunals decide to invalidate domestic law judgements on the basis of denials of justice or effective means, communities in many parts of the world may find themselves without access to a judicial forum to hold transnational corporations accountable. If the threshold of sufficient judicial unfairness is low enough that many developing world states struggle to meet it, then this could also encourage corporations to take less care in avoiding lawsuits, for instance in applying less stringent environmental protection measures to their operations. It could also encourage companies to avoid out of court settlements on the basis of a twin legal strategy where if the domestic liability claim fails, then the investment treaty denial of justice claim may succeed. Some tribunals have nevertheless refrained from invalidating judgements in the context of judicial unfairness, and have instead “step[ped] into the shoes and mindset” of domestic courts and judges to decide what a fair resolution of the case would have entailed.<sup>268</sup> This can seem suitable in certain cases, but would be difficult in a case like Chevron; the tribunal would not be able to assess the underlying environmental claims of the third parties that cannot be heard before the tribunal, and then it would have to decide whether to let Chevron off the hook for what may be genuine environmental harm simply on the basis that the trial itself was inadequate.<sup>269</sup> It is this possibility that would raise the prospect that the unfair domestic legal systems that exist in many countries around the world can make it difficult to hold corporations accountable anywhere.

### ***Concluding Remarks on ‘Unfairness’***

Fair and equitable treatment claims are an “almost ubiquitous presence” in recent investment treaty litigation, and a wide range of environmental measures are alleged to be in breach of this

---

<sup>268</sup> This is in a separate tax-related claim by Chevron against Ecuador. Luke Eric Peterson, ‘Chevron Decision Analysis: Tribunal Steps into Ecuadorian Judicial Robes to Resolve Underlying Dispute’, *Investment Arbitration Reporter* (7 May 2010).

<sup>269</sup> The present case also concerns the question of whether Chevron is contractually exempt from environmental liability claims from third parties, and these could more easily be resolved by an investment tribunal.

treatment standard.<sup>270</sup> Many of the currently pending FET cases are based on general claims that particular environmental measures are unfair, arbitrary, unreasonable or disproportionate, and it is difficult to know in advance how tribunals will address such claims. For instance, the energy company Vattenfall brought a lawsuit to challenge Hamburg's decision to 'arbitrarily' increase, from one to two years, the monitoring phase for the efficiency of a 'fish stair' designed to allow fish to swim upriver to breed, which the company was required to construct to mitigate the environmental effects of its power plant.<sup>271</sup> To the chagrin of environmental groups, Germany decided to settle the case rather than face the prospect of a potentially costly arbitration, and it acquiesced to reducing the monitoring period for the 'fish stair' back to one year and further reduced the requirements of fish monitoring generally.<sup>272</sup> In a currently pending case, Bilcon contends that certain Nova Scotian restrictions on test blasting to develop quarries – a practice potentially harmful to fish and whales – are “unnecessary and arbitrary”.<sup>273</sup> In another pending case, the Renco Group maintains that Peru has acted unfairly in failing to provide the company with a more generous extension of time to bring its smelting and refining complex into compliance with environmental regulations – despite the fact that it was the only mining or smelting facility to have received an extension at all, and indeed, Peru even had to change its legislation to grant one since the initial legal framework did not allow for extensions.<sup>274</sup> Whatever else may or may not be required by the FET standard, there is within the academic literature and arbitral awards a certain recognition that inconsistency, lack of transparency, failure to adhere to domestic legal requirements or procedures, and judicial unfairness can constitute a breach of the FET provision. At face value such requirements may appear uncontroversial, but this section has shown that in practice these can have implications for the ability of states to introduce measures to protect the environment.

The discrimination and expropriation standards discussed previously are ones that can be disagreed with as a matter of principle – should (developing world) states not be allowed to

---

<sup>270</sup> Dolzer, 'Fair and Equitable Treatment: A Key Standard in Investment Treaties', p. 87.

<sup>271</sup> Vattenfall AB, Vattenfall Europe AG and others v. The Federal Republic of Germany, *Request for Arbitration*, ICSID Case No. ARB/09/6 (30 March 2009), para. 39.

<sup>272</sup> Roda Verheyen, 'The Coal-Fired Power Plant Hamburg-Moorburg, ICSID Proceedings by Vattenfall Under the Energy Charter Treaty and the Result For Environmental Standards', *Briefing Note for Greenpeace* (11 April 2012), p. 9, available at:

{[http://www.greenpeace.de/sites/www.greenpeace.de/files/publications/icsid\\_case\\_regarding\\_the\\_vattenfall\\_coal-fired\\_power\\_plant\\_hamburg-moorburg.pdf](http://www.greenpeace.de/sites/www.greenpeace.de/files/publications/icsid_case_regarding_the_vattenfall_coal-fired_power_plant_hamburg-moorburg.pdf)} accessed 22 March 2014.

<sup>273</sup> Clayton & Bilcon v. Canada, *Memorial of the Investors*, para. 13a.

<sup>274</sup> Renco v. Peru, *Memorial on Liability*, para 132-164, 113-131. The company also argues that while it had not addressed SO2 emissions as required, it had identified and addressed other environmental concerns, and seeks to justify not having addressed the original obligations on this basis.



impose more stringent environmental requirements on multinational corporations than on their smaller domestic counterparts? Should states not be allowed to expropriate property for a legitimate environmental purpose without having to provide possibly inhibiting full market value compensation? In contrast, the fair and equitable treatment clause is difficult to disagree with as a matter of principle – the requirement for ‘fairness’ is difficult to dispute on a normative plane. In practice, two possible risks nevertheless emerge. Firstly, how is ‘fairness’ itself defined? Was it really unfair for Hamburg to increase the monitoring period for its ‘fish stair’, or for different agencies of Chile to stick to their own areas of competency and for the state itself thereby to fail to act as a monolithic unit? Secondly, even if there is agreement in principle that a particular type of government conduct or measure is unfair, are the consequences themselves fair? In *Ethyl*, the Canadian parliament had presumably acted in good faith to address environmental concerns – should it have really had to compensate the company for its lost profits, or issue a statement that a controversial gasoline additive is safe? In *Metalclad v. Mexico*, might corporations that encounter an unclear rule be encouraged to gamble on a favourable interpretation of it, with a view to bringing a ‘transparency’ case against a state were the gamble to fail and the state to insist upon the less favourable interpretation of the rule?

The primary risk in terms of the FET clause is nevertheless that states are not perfect. This alone provides an opening for corporations to challenge government conduct as unfair. Whether they succeed depends both on the particular threshold adopted by a tribunal, as well as the circumstances of the case. Countries in the developed world have, for the most part, been successful at fending off FET challenges, but even here there are certainly exceptions. For instance, in the non-environmental case of *Pope & Talbot v. Canada*, the tribunal found that an administrative agency of Canada had violated the FET clause through the rather brusque manner in which it sought to audit a company to verify its export quota for softwood lumber.<sup>275</sup> In particular, the tribunal was not impressed by the agency’s refusal to travel to Oregon to audit the company, and its requirement that the company send the required documents to its head office in Canada – several truckloads full of them. The tribunal dismissed the agency’s claim that it was not authorized to conduct verification outside Canada, and concluded that the agency’s “imperious insistence on having its way” was in breach of fair and equitable

---

<sup>275</sup> *Pope & Talbot Inc. v. The Government of Canada, Award on the Merits of Phase 2*, UNCITRAL Ad Hoc Arbitration (10 April 2001), para. 156-181.

treatment.<sup>276</sup> A domestic Canadian court, had it ever had the chance, may have agreed that the agency had acted unfairly. However, if the Canadian administrative agency was found not to have met the international law requirement of providing an investor with fair and equitable treatment, it is reasonable to assume that the administrative agencies of Cambodia or Cameroon are unlikely to pass the test even in the best of circumstances.<sup>277</sup> While it may in principle be desirable for states to meet the challenge and to ensure good standards of domestic governance, in practice the present consequences of such requirements are more likely to be large compensation claims from corporations dissatisfied with measures taken to protect the environment.

### **Protection from Change**

Jeswald Salacuse, a prominent scholar of international investment law, maintains that the original purpose behind investment treaties was to “restrain host country action against the interests of investors – in other words, to enable the form of legal commitments made to investors *to resist the forces of change often demanded by the political and economic life in host countries*”.<sup>278</sup> Most advocates of investment treaties would support this proposition: the purpose is to protect corporations from ‘the forces of change’ that characterize politics within states, or to use the preferred term in the investment treaty context, to protect corporations from ‘political risk’. The term ‘political risk’ is inherently forward-looking; to cite Paul Comeaux and Stephan Kinsella, “[p]olitical risk is the risk that the laws of a country will *unexpectedly change* to the investor’s detriment after the investor has invested capital in the country. [...] Put simply, political risk is the risk of government intervention”.<sup>279</sup> In providing examples of ‘political risk’, Comeaux and Kinsella list government interventions to “raise import or export duties, increase taxes, *impose further regulations*, or nationalize or expropriate the assets of the investor”.<sup>280</sup> Investment treaties are not designed to prevent all forms of ‘political risk’ – this

---

<sup>276</sup> Pope & Talbot v. Canada, *Award on the Merits of Phase 2*, para. 173; see also Gantz, ‘Potential Conflicts Between Investor Rights and Environmental Regulation’, pp. 651-752.

<sup>277</sup> It can sometimes be debated whether the standard of fairness differs between countries depending on their level of development, but such a claim cannot be made here. The tribunal determined that Canada had failed to meet the minimum standard of international law, which is by definition a floor below which no country is allowed to fall. Pope & Talbot v. Canada, *Award on the Merits of Phase 2*, para. 173; Pope & Talbot Inc. v. The Government of Canada, *Award in Respect of Damages*, UNCITRAL Ad Hoc Arbitration (31 May 2002), para. 67-69.

<sup>278</sup> (My emphasis) Jeswald Salacuse, ‘The Treatification of International Investment Law’, *Law and Business Review of the Americas*, 13 (2007), p. 156.

<sup>279</sup> (My emphasis) Comeaux & Kinsella, ‘Reducing Political Risk in Developing Countries’, p. 4.

<sup>280</sup> (My emphasis) *Ibid*, p. 4.

would disable government intervention that affects corporations altogether – but they are, to cite a prominent international law firm, nevertheless “powerful tools for managing and mitigating political risk”.<sup>281</sup> The challenge, of course, is that most of the government interventions that constitute the corporations’ ‘political risk’ is undertaken for a variety of public purposes, and an UNCTAD report notes with concern that “the borderline between protection from political risk and undue interference with legitimate domestic policies is becoming increasingly blurred”.<sup>282</sup>

This entire chapter essentially details the types of ‘political risk’ that corporations can expect protection from. While companies sometimes do challenge government measures or policies that existed at the time of their investment, most disputes at least ostensibly concern *new* and allegedly unexpected forms of government intervention. Investment treaties allow companies to challenge such government interventions on the basis that they are discriminatory, tantamount to an expropriation, or in one way or another ‘unfair’. However, sometimes companies challenge government regulations on the basis that the change of circumstances itself is unfair – not because the measure is discriminatory, expropriatory or unjust on its own terms, but because the company had legitimately expected that such a government measure would not be adopted. This is the question considered here: in what circumstances can corporations be protected from change itself? Since new environmental regulations by definition constitute a form of ‘political risk’ for corporations, understanding where the boundary lies between permissible changes and changes that breach an investor’s legitimate expectations is critical to answering the question of the extent to which corporations can challenge environmental protection measures.

Investment treaties do not contain a treatment standard that would explicitly protect companies from ‘change’, yet such protection has nevertheless largely made it into arbitral awards via the concept of ‘legitimate expectations’. Tribunals have often taken the view, to cite a prominent arbitrator, that “businesses should have the opportunity to identify their rights with clarity before committing resources to cross-border transactions. Thereafter, competing social policies

---

<sup>281</sup> Freshfields Bruckhaus Deringer, ‘Bilateral Investment Treaties: Managing the Risk of Government Intervention’, available at:

{<http://www.freshfields.com/uploadedFiles/SiteWide/Knowledge/Bilateral%20investment%20treaties%20Managing%20the%20risk%20of%20government%20intervention.pdf>} accessed 20 June 2014.

<sup>282</sup> UNCTAD, *Investment Policy Framework for Sustainable Development* (United Nations, 2012), p. 40.

will rarely justify the disturbance of settled expectations”.<sup>283</sup> The notion of ‘legitimate expectations’ implies that states should not introduce government policies that frustrate the reasonable expectations that an investor based its investment decision upon. Arbitrators observe that the concept of ‘legitimate expectations’ has today been “stretched to the point of meaning anything and everything at once”, and companies routinely allege that new government measures breach their expectations in one way or another.<sup>284</sup> The concept of ‘legitimate expectations’ is nevertheless not actually present in investment treaties either, and the concept was initially invented by investment tribunals themselves.<sup>285</sup> At first the concept of ‘legitimate expectations’ appeared in interpretations of the ‘fair and equitable treatment’ standard; an inherently open-ended standard that allows for such arbitral innovation. One prominent arbitrator has protested that “[t]he assertion that fair and equitable treatment includes an obligation to satisfy or not to frustrate the legitimate expectations of the investor at the time of his/her investment does not correspond, in any language, to the ordinary meaning to be given to the terms”, but investment tribunals have on the whole been content to find that a breach of legitimate expectations is ‘unfair’.<sup>286</sup> Thomas Wälde observes that there has furthermore been a significant growth in the centrality placed on the concept of ‘legitimate expectations’ over recent years, “from an earlier function as a subsidiary interpretative principle [...] to its current role as a self-standing subcategory and independent basis for a claim under the ‘fair and equitable standard’”.<sup>287</sup> Today, tribunals tend to take the view that protection of a company’s legitimate expectations is either the “dominant element” of the fair and equitable treatment standard, or at least “one of the major components”.<sup>288</sup> Furthermore, ‘legitimate expectations’ has also more recently emerged in international investment law via a different route: treaty revisions of the expropriation clause. New U.S. and Canadian investment treaties suggest that one of the three factors to be considered in the assessment of an expropriation is, alongside the economic effect and the character of the measure, “the extent to which the government action interferes with distinct, reasonable investment-backed expectations”.<sup>289</sup> Tribunals are therefore

---

<sup>283</sup> Charles Brower, ‘Corporations as Plaintiffs Under International Law: Three Narratives about Investment Treaties’, *Santa Clara Journal of International Law*, 9 (2011), p. 186.

<sup>284</sup> Yves Fortier, ‘Expectations of Governments and Investors vs. Practice: A View from the Bench’, *ICSID Review*, 24:2 (2009), p. 359.

<sup>285</sup> UNCTAD, *Fair and Equitable Treatment*, p. 9.

<sup>286</sup> *Suez, Sociedad General de Aguas de Barcelona, S.A. & Vivendi Universal, S.A. v. Argentine Republic*, *Separate Opinion of Arbitrator Pedro Nikken*, ICSID Case No. ARB/03/19 (30 July 2010), para. 3.

<sup>287</sup> Cited in Potestà, ‘Legitimate Expectations in Investment Treaty Law’, p. 99.

<sup>288</sup> ‘Dominant element’ is from *Saluka Investments v. Czech Republic*; ‘one of its major components’ is from *EDF Limited v. Romania*, both cited in Potestà, ‘Legitimate Expectations in Investment Treaty Law’, p. 100.

<sup>289</sup> For example, United States of America, *Model Bilateral Investment Treaty*, Annex B, 4(a).

correct to point out that there is now an “overwhelming trend” in support of the notion that investors’ legitimate expectations enjoy protection under investment treaties.<sup>290</sup>

To say that investment treaties offer protection for an investor’s ‘legitimate expectations’ does nevertheless not say anything about how such *legitimate* expectations arise in the first place. Indeed, an UNCTAD report observes that the investment treaty claims of many corporations – and the rulings of many tribunals – “ignores the fact that investors should legitimately expect regulations to change over time as an aspect of the normal operation of legal and policy processes of the economy they operate in”.<sup>291</sup> Michele Potestà observes that the concept of ‘legitimate expectations’ arise in three different senses within the investment treaty context. In the first sense of the term (the broadest and also the most controversial sense), corporations contend that they had legitimately expected government intervention not to occur on the basis of the *general regulatory framework* present when they invested, and that the company was subsequently denied a ‘stable and predictable’ regulatory framework. In the second sense, corporations allege that certain government measures are in breach of *specific representations or assurances* to the investor that such regulatory change would not occur. In the third sense (the narrowest and least controversial), corporations argue that they had legitimately expected the state to abide by the terms of a *contract or agreement* that it had concluded with the investor.<sup>292</sup> In practice, concluded arbitral awards reveal significant overlap between the three categories. This section will first consider the two broader senses in which the term occurs, where the state had not contractually agreed not to change its policies, and will then consider government intervention in breach of contract.

### ***‘Legitimate Expectations’***

In a first sense, Potestà maintains that tribunals have found that the investors’ expectations “were grounded in the general legislative and regulatory framework in force when they made their investment”, and the alleged investment treaty breach is in the subsequent unexpected change of that general framework.<sup>293</sup> This first approach is in line with the ideological desire of many commentators to ensure as wide a protection as possible from ‘political risk’, and many

---

<sup>290</sup> El Paso v. Argentine Republic, cited in Potestà, ‘Legitimate Expectations in Investment Treaty Law’, p. 99.

<sup>291</sup> UNCTAD, *Fair and Equitable Treatment*, p. 67.

<sup>292</sup> Potestà, ‘Legitimate Expectations in Investment Treaty Law’, p. 89-90.

<sup>293</sup> *Ibid*, p. 110.

tribunals have evoked the need to ensure stability and predictability for investors. For instance, *CMS v. Argentina* maintained that “there can be no doubt [...] that a stable legal and business environment is an essential element of fair and equitable treatment”, while *Occidental v. Ecuador* concluded that “there is certainly an obligation not to alter the legal and business environment in which the investment has been made”.<sup>294</sup> The tribunal in *Tecmed* similarly maintains that states should act in such a way that investors “may know beforehand any and all rules and regulations that will govern its investments”.<sup>295</sup> Despite the tendency of tribunals to require states to provide stability and predictability in principle, in practice tribunals have been reluctant to find a state in breach of its investment treaty obligations on the basis of a failure to do so alone. Most of the concluded arbitral awards that Potestà draws upon, or that seem to espouse such principles, have in practice tended to either invoke other FET breaches as well (arbitrariness, lack of consistency or transparency, etc), or otherwise more specific representations or contractual obligations provided towards the state in line with the second or third sense in which the term is used. For instance, while the tribunals in the cases arising out of the Argentine financial crisis seem to invoke stability and predictability on their own terms as essential elements of fair and equitable treatment, in practice they have been strongly influenced by the fact that further more specific guarantees had been made towards specific investors.

There are no concluded environmental cases that centre on a breach of legitimate expectations arising out of the general framework that existed at the time of the investment,<sup>296</sup> but a non-environmental example is *Micula v. Romania*.<sup>297</sup> The companies concerned had invested in food and beverage production facilities in a disadvantaged region in Romania, and the dispute concerned a tax incentives scheme to encourage investments in such regions and the subsequent

---

<sup>294</sup> *CMS Gas Transmission Company v. The Argentine Republic, Award*, ICSID Case No. ARB/01/8 (12 May 2005), para. 274; *Occidental v. Ecuador* is cited in Crockett, ‘Stabilisation Clauses and Sustainable Development’, p. 523.

<sup>295</sup> The *Tecmed* tribunal requires states to “provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, *so that* it may know beforehand any and all rules and regulations that will govern its investments”. This is in a sense an odd statement; a state acting consistently, unambiguously and transparently can still introduce unexpected laws and regulations, so it does not follow that the investor may consequently “know beforehand any and all rules and regulations that will govern its investments”. The *Tecmed* statement nevertheless reveals that same ideological affinity towards stability and predictability as the Argentine awards. *Tecmed v. Mexico, Award*, para. 154.

<sup>296</sup> *Tecmed* was primarily a breach of other elements of the FET, which in turn resulted in a breach of legitimate expectations.

<sup>297</sup> *Ioan Micula, Viorel Micula, S.C. European Food S.A., and others v. Romania, Award*, ICSID Case No. ARB/05/20 (11 December 2013).

decision to terminate the scheme. The tribunal acknowledged that Romania had strongly preferred to maintain the scheme, but that the European Commission had made its termination a condition for becoming part of the EU.<sup>298</sup> The tribunal appreciated the “quandary” that this placed Romania in, and readily acknowledged that the decision had been made in good faith and was reasonable in light of the priority accorded to EU accession.<sup>299</sup> The investors nevertheless maintained that they had legitimately expected the law to remain in force for 10 years. The law itself did not specify a minimum duration, but the legislation was applicable to disadvantaged regions and the region it had invested in had been designated as such in other legislation for a period of 10 years.<sup>300</sup> The tribunal first undertook an investigation into whether Romania had breached its domestic legal obligations in prematurely terminating the scheme, and found that there was not sufficient evidence that it had.<sup>301</sup> The question before the tribunal was thus specifically whether a government measure that was not found to be unlawful under Romanian law nevertheless breached the investor’s legitimate expectations. Romania strongly objected that the investors could have no expectations that a piece of general legislation would remain unchanged; that the government had unilaterally introduced the law and that it was within its sovereign prerogatives to unilaterally change it. The tribunal nevertheless concluded that the investor had legitimately expected the scheme to be maintained for 10 years, and that “[i]t is irrelevant whether the state in fact wished to commit itself; it is sufficient that it acted in a manner that would reasonably be understood to create such an appearance”.<sup>302</sup> Despite the evident lawfulness of its actions under domestic law, and the reasonable policy reasons behind the termination of the scheme, the tribunal therefore found Romania in breach of the investment treaty and liable for USD 250 million in compensation for the companies’ lost profits and interest.<sup>303</sup>

This case arose out of generally applicable legislation and would therefore be an example of the first sense in which the term ‘legitimate expectations’ is used within Potestà’s framework, but even here it is notable that the tribunal placed emphasis on the fact that requirements

---

<sup>298</sup> The tribunal notes that Romania had done “all it could to preserve the incentives regime through its accession negotiations”, and the European Commission appeared before the tribunal to confirm it would not have allowed it. *Ibid.*, para. 688.

<sup>299</sup> *Ibid.*, para. 864.

<sup>300</sup> *Ibid.*, para. 425.

<sup>301</sup> *Ibid.*, para. 459.

<sup>302</sup> *Ibid.*, para. 669.

<sup>303</sup> King & Spalding, ‘Case News: King and Spalding Wins \$250 Million Arbitration Award for Micula Against Government of Romania’ (17 December 2013), available at: {[http://www.kslaw.com/News-and-Insights/NewsDetail?us\\_nsc\\_id=7103](http://www.kslaw.com/News-and-Insights/NewsDetail?us_nsc_id=7103)} accessed 6 September 2014.

associated with the legislation had given the specific investor certain assurances. The benefits from the tax incentives scheme were only granted to investors who had received a certificate from the state confirming their eligibility for the scheme, and the acquisition of such a certificate is deemed to have given rise to a more individual sense of entitlement for the investors concerned.<sup>304</sup> Furthermore, the investor did not allege that it had expected ‘stability’ and ‘predictability’ as such, but rather that the legislation itself implicitly suggested that a 10-year duration could be expected. In contrast, in the first scenario cases cited by Potestà (such as the Argentine cases) the tribunals imply that general regulatory changes were in themselves problematic, but in the end it appears that additional more individualized guarantees were instrumental in the actual finding of a violation of the treaty. The extent to which ‘legitimate expectations’ based on the general regulatory framework – absent other forms of ‘unfairness’ – are protected by investment treaties is therefore questionable, but where more specific representations have been made it is clear that they are; this is the second sense of the term within Potestà’s framework. In such instances, it is furthermore clear that “[e]ven a reasonable change in policy is prohibited if the investor reasonably relies on promises or assurances that such a shift will not occur”.<sup>305</sup> This is reiterated in the Methanex award, where the tribunal specifies that an environmental regulation can still be deemed an expropriation if “specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation”.<sup>306</sup>

‘Legitimate expectations’ in Potestà’s second sense does not require any contractual guarantees by the state, and then several thorny questions emerge. Firstly, the question is what qualifies to make a state liable for compensation for a change of policy – an ‘assurance’, a ‘specific commitment’, a ‘promise’, a ‘representation’? In reference to current treaty negotiations the European Commission has reassured civil society groups that “a breach of legitimate expectations is limited to situations where the investment took place only because of a promise made by the States that was subsequently not honoured”.<sup>307</sup> However, the International Institute for Sustainable Development has pointed out that leaked drafts refer not to a “promise” but to a “specific representation”, and its lawyers contend that this is a significantly more open-ended

---

<sup>304</sup> Micula v. Romania, *Award*, para. 422, 431.

<sup>305</sup> Vandevelde, ‘A Unified Theory of Fair and Equitable Treatment’, p. 104.

<sup>306</sup> Methanex v. USA, *Final Award of the Tribunal on Jurisdiction and Merits*, part IV, chapter D, para. 7.

<sup>307</sup> Nathalie Bernasconi-Osterwalder & Howard Mann, ‘A Response to the European Commission’s December 2013 Document ‘Investment Provisions in the EU-Canada Free Trade Agreement (CETA),’ *IISD Report* (February 2014), p. 5, available at: { <http://www.iisd.org/publications/response-european-commissions-december-2013-document-investment-provisions-eu-canada> } accessed 23 May 2014.



term, and further one that contrasts directly with the more restrictive term “specific written obligation” that the EU has used in other contexts.<sup>308</sup> Secondly, this lack of specificity also raises the question of intent – do states only become liable for breaches of consciously made promises, or is *Micula v. Romania* right to suggest that “[i]t is irrelevant whether the state in fact wished to commit itself; it is sufficient that it acted in a manner that would reasonably be understood to create such an appearance”.<sup>309</sup> Thirdly, it raises the question of who can make representations on behalf of the state, and in what circumstances their word counts as a representation – some current cases concern representations by administrative staff and public officials, and indeed at least one case concerns a president allegedly making a promise towards a company in private while simultaneously committing himself to the opposite policy in public electoral campaigning.<sup>310</sup> A concluded environmental case in this respect is *Metalclad v. Mexico*, and while this concerns a number of different issues, a breach of the investor’s legitimate expectations is indicated in so far as federal government officials had provided assurances that a municipal construction permit that was subsequently denied was a mere formality. The *Metalclad* case highlights some of the difficulties with the concept – the alleged assurances were not made in writing or otherwise formalized, it was from the outset clear that the municipality did not agree with the assurances provided by the federal officials, and furthermore the tribunal never considered the evidence provided by Mexico that the implicated federal official had received bribes by the company to facilitate the investment project.<sup>311</sup>

An interesting example of the difficulties involved with the notion of ‘specific representations’ in the environmental context is found in *Vattenfall v. Germany*. This case was not concluded on the merits, but Germany is reported to have settled the case on terms favourable towards the investor – including by withdrawing some of the contested environmental requirements – and the alleged breach of the company’s ‘legitimate expectations’ seems to have been central to the case. The dispute arose from the construction of a new coal-fired power plant in the city of Hamburg, and concerns requirements associated with an immission control permit and a water use permit. The water use permit was required to extract cooling water from the Elbe river and

---

<sup>308</sup> Bernasconi-Osterwalder & Mann, ‘A Response to the European Commission’, p. 5-7.

<sup>309</sup> *Micula, Award*, para. 669.

<sup>310</sup> *Pac Rim Cayman LLC v. Republic of El Salvador, Memorial on the Merits and Quantum*, ICSID Case No. ARB/09/12 (29 March 2013), para. 390; *Pac Rim Cayman LLC v. Republic of El Salvador, Application for Permission to Proceed as Amici Curiae by Mesa Nacional Frente a la Minería Metálica de El Salvador*, ICSID Case No. ARB/09/12 (2 March 2011), p. 16.

<sup>311</sup> *Metalclad v. Mexico, Respondent’s Post-Hearing Submissions*, para. 74; *Metalclad v. Mexico, Award*; Kulick, *Global Public Interest in International Investment Law*, p. 239. Thomas, ‘Responses: A Reply to Professor Brower’, p. 448.

to return water of a higher temperature back to the river, and Vattenfall was from the outset aware that the relevant authorities were concerned that the proposed increase in the water temperature “would cause serious harm to the ecology of the river”.<sup>312</sup> Vattenfall was keen to proceed with its investment as soon as possible, and it consequently sought a preliminary construction permit that would enable it to begin operations before the final immissions control and water use permits had been granted. Germany’s legal position in the case is not publicly known, but according to Vattenfall’s request for arbitration the company had negotiated and reached an agreement with the city authorities on environmental requirements of the project, and that it was subsequently issued the requested preliminary start permit.<sup>313</sup> Vattenfall’s request for arbitration is very unspecific about the nature of the underlying agreement, but the company does not indicate it was legally binding, and more importantly it contends that this formed the basis for the preliminary start permit, which it cites as follows:

“A decision in favour of the applicant *can be expected* in immission protection proceedings. *According to a provisional assessment* of the immission control application there are no obstacles that cannot be removed by covenants that stand in the way of approval. Assessment of the submitted application documents has revealed that *from the current point of view it is highly probable* that the provisions of [relevant regulations] in relation to the proposed plant are met”.<sup>314</sup>

The company cites the above statement in support of its claim that it had legitimately expected the final environmental permits to be issued in line with whatever agreement it had previously reached with the city authorities. However, the above citation itself casts doubt on the company’s claims – the use of formulations such as “can be expected”, “according to a provisional assessment”, “from the current point of view it is highly probable” suggests the final permits were still subject to change from whatever Vattenfall might have negotiated with the city. Indeed, it would probably be legally dubious to guarantee environmental permits based on certain conditions before the full assessments associated with the allocation of the final permits had been undertaken, a process that would take several months and that the company was unwilling to wait for before starting construction.<sup>315</sup>

Vattenfall did eventually receive the immissions control and water use permits, but the investment treaty dispute was based on its objection that both “were coupled with restrictions”,

---

<sup>312</sup> (My emphasis) Vattenfall v. Germany, *Request for Arbitration*, para. 17.

<sup>313</sup> Ibid, para. 20-23.

<sup>314</sup> Ibid, para. 23.

<sup>315</sup> Ibid, para. 20.

in the latter case “extremely severe” restrictions, that “clearly deviate [...] from what the Vattenfall Group was entitled to expect”.<sup>316</sup> The restrictions included stricter criteria on extraction of water from the river as well as the temperature of returned cooling water, as well as what it considers an ‘arbitrary’ extension of the monitoring period for the ‘fish stair’ it was obliged to construct.<sup>317</sup> The company contended that the changes were ‘politically motivated’; the restrictions are attributed to changes in the political composition of the local government following a strong electoral performance of the Green Party in local elections.<sup>318</sup> In contrast, the city authorities maintained that the restrictions were justified on environmental grounds and required under the EU’s Water Framework Directive.<sup>319</sup> The company initiated arbitration on the basis that the new environmental restrictions significantly reduced the capacity of the plant and made it uneconomical, and thereby asked for EUR 1.4 billion in compensation, presumably in substantial part for lost profits.<sup>320</sup> In order to avoid arbitration, Germany settled the case and offered a number of environmental concessions to the company, including more favourable water use requirements and a reduction of the requirements for fish monitoring.<sup>321</sup> As such, a Greenpeace lawyers concludes that the investment treaty dispute “lead to settlement involving reduced environmental standards which was probably not necessary under German law and might not have come about without the [investment treaty] case”.<sup>322</sup>

Scholars suggest that the concept of ‘legitimate expectations’ is an “extremely flexible tool” to enable tribunals to find government measures in breach of the treaty where no more specific breaches have been found, and few environmental cases are launched today without a reference to the investor’s legitimate expectations.<sup>323</sup> Sometimes references are made to expectations based upon the general regulatory framework applicable at the time of the investment, but arbitral awards suggest such claims are unlikely to be successful in the absence of other contributory factors, either in terms of other violations (such as lack of transparency) or of ‘specific representations’. What is clear is nevertheless that tribunals are unlikely to look kindly

---

<sup>316</sup> Vattenfall v. Germany, *Request for Arbitration*, para. 36.

<sup>317</sup> *Ibid*, para. 37-39.

<sup>318</sup> *Ibid*, para. 53(i), 27, 29-32.

<sup>319</sup> Nathalie Bernasconi, ‘Background Paper on Vattenfall v. Germany Arbitration’ (Winnipeg: International Institute for Sustainable Development, July 2009), p. 1.

<sup>320</sup> Vattenfall v. Germany, *Request for Arbitration*, para. 79(ii).

<sup>321</sup> Roda Verheyen, ‘The Coal-Fired Power Plant Hamburg-Moorburg’, p. 8-9.

<sup>322</sup> Vattenfall simultaneously pursued its legal claims in a domestic administrative court and international arbitration, but Greenpeace suggests the city could “have awaited a [domestic] court judgement calmly” without significant fear for the consequences of an unfavourable decision. Roda Verheyen, ‘The Coal-Fired Power Plant Hamburg-Moorburg’, p. 8, 12.

<sup>323</sup> Potestà, ‘Legitimate Expectations in Investment Treaty Law’, p. 122.

upon environmental regulations enacted contrary to ‘specific representations’ made to particular companies, and *Vattenfall v. Germany* shows what consequences such legal obligations can have in practice. While this case was settled before a tribunal had assessed the claims, the finding in *Micula v. Romania* that reasonable policies adopted in good faith can constitute a violation of an investor’s expectations even where a state has not intended to commit itself to a particular conduct causes grounds for concern. Such concern is further amplified by the nature of the concept itself, which involves “looking at the issues at hand from the perspective of the investor only” and therefore “runs the risk that the true purpose of the [fair and equitable treatment provision] will be lost under the weight of investor concerns alone”.<sup>324</sup>

### ***Contractual Expectations***

If there is contestation in respect to how far companies can legitimately expect political and regulatory change not to take place on the basis of the general legislative framework or specific representations, there is more agreement that contractual or semi-contractual obligations are very often protected by investment treaties. In its broadest sense such protection can be achieved through reference to the fair and equitable treatment or indirect expropriation provisions alone, but roughly 40% of treaties also contain a so-called ‘umbrella clause’.<sup>325</sup> The umbrella clause requires states to uphold any obligations they have entered into with investors, and thus provide further protection from contractual breaches. Finally, while contractual breaches often operate within the investment treaty framework, many contracts allow corporations to proceed directly to international arbitration, with or without an investment treaty. Such contractual disputes are often raised in less transparent venues, such as the court of the International Chamber of Commerce, and often little is known about the cases. Adherence to contractual obligations may at first glance appear to be relatively uncontroversial – unlike the cases above, here the state clearly agreed to be bound by certain obligations. What is less controversial legally is nevertheless equally problematic politically; there are circumstances in which states may seek to breach contracts in order to protect their citizens. This sub-section will first investigate how contractual obligations become a straight-jacket in times of crisis, and

---

<sup>324</sup> UNCTAD, *Fair and Equitable Treatment*, p. 9.

<sup>325</sup> OECD, *International Investment Perspectives*, (Paris: OECD Publishing, 2006), p. 207-213; Bernasconi-Osterwalder & Cosbey, et al., *Investment Treaties and Why They Matter*, p. 37.

thereafter look at how the requirement to observe contractual obligations can prevent states from protecting the environment.

As a consequence of a 2001 financial crisis that the *Economist* likened to the ‘Great Depression’, Argentina has become the most sued country in the world under the international investment regime.<sup>326</sup> Over 50 investment treaty challenges have been brought in response to measures the government had taken to address the financial crisis.<sup>327</sup> In most cases, companies have alleged that Argentina’s decision to break currency convertibility between the peso and the dollar was in breach of semi-contractual guarantees provided by government decree to foreign companies, particularly in privatized public utilities. The companies maintained that they had invested on the basis of generous guaranteed rates of return calculated in U.S. dollars, and that the devaluation of the peso and the changes to the tariff regimes breached their legitimate expectations.<sup>328</sup> There is little dispute that currency convertibility had become a problem; indeed, the IMF determined that Argentina had waited too long to break convertibility and the tribunal in *Enron v. Argentina* acknowledged that it had “no reason to doubt” that Argentina was “guided by the best of intentions” in the decisions it had taken to address the financial crisis.<sup>329</sup>

The question nevertheless remained whether Argentina’s actions were in breach of its investment treaties. On the basis of a long-dormant ‘necessity’ clause in most investment treaties, Argentina maintained that the magnitude of the financial crisis allowed it to breach the semi-contractual guarantees it had provided; that it could not afford to continue paying foreign investors in public utilities in pre-agreed rates convertible to the dollar; and that its actions ensured that “all participants in the economy would share the necessary burden collectively”.<sup>330</sup> Tribunals have reached divergent conclusions in respect to the Argentine financial crisis, but many have found precisely that foreign investors were contractually protected from sharing in

---

<sup>326</sup> David Schneiderman, ‘Transnational Legality and the Immobilization of Local Agency’, *Annual Review of Law and Social Science*, 2 (2006), p. 395; UNCTAD, ‘Recent Developments in Investor-State Dispute Settlement (ISDS)’, *IIA Issues Note*, 1 (April 2014), p. 8.

<sup>327</sup> UNCTAD, ‘Recent Developments in Investor-State Dispute Settlement’, p. 8.

<sup>328</sup> Schneiderman, ‘Transnational Legality and the Immobilization of Local Agency’, p. 395-366; Vandevelde, ‘A Unified Theory of Fair and Equitable Treatment’, p. 75.

<sup>329</sup> Robert Ziff, ‘The Sovereign Debtor’s Prison: Analysis of the Argentine Crisis Arbitrations and the Implications for Investment Treaty Law’, *Richmond Journal of Global Law and Business*, 10:3 (2010-2011), p. 376; Cited in UNCTAD, *Fair and Equitable Treatment*, p. 66.

<sup>330</sup> William Burke-White, ‘The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System’, *The Asian Journal of WTO and International Health Law and Policy*, 3 (2008), pp. 199-234; Schneiderman, ‘Transnational Legality and the Immobilization of Local Agency’, p. 397.

that necessary burden. Beyond any other case, the Argentine cases reveal the extent to which tribunals would require states to abide by contractual obligations. Despite the fact that income per capita more than halved in a matter of weeks; that half the Argentine population was living below the poverty line within a year's time; and that the country at one point saw a succession of five presidents take office in a period of ten days; tribunals nevertheless maintained that contractual obligations remained because the financial crisis did not amount to "total economic and social collapse".<sup>331</sup> Many of the tribunals have maintained that the foreign investors deserved "stability and predictability", notwithstanding the fact that Argentine economic and political life at the time was anything but stable and predictable.<sup>332</sup> While the high returns expected by investors before the financial crisis indicate awareness of certain political and economic risks, many of the investment tribunals viewed contractual guarantees initially offered in completely different circumstances as virtually sacred.<sup>333</sup>

The strong preference for contractual stability evidenced in the Argentine cases can enable corporations to challenge environmental protection measures that are deemed in breach of contractual guarantees. Many kinds of contracts can have environmental consequences of one kind or another, but the focus here is on contracts concluded between foreign companies and host governments in respect to larger investments. Very often such contracts create a "special legal regime" for particular investment projects that can deviate significantly from the general legal framework of the country.<sup>334</sup> To cite Global Witness, what such contracts often do is "essentially to create a state within a state".<sup>335</sup> Developed countries rarely conclude contracts that derogate significantly from generally applicable law or that exempt investors from future legislative changes – indeed, it would often cause constitutional difficulties were they to do so – but this is common practice in the developing world, including in respect to investment projects with involvement from international financial institutions such as the World Bank.<sup>336</sup>

---

<sup>331</sup> Burke-White, 'The Argentine Financial Crisis', p. 203; CMS v. Argentina, cited in Schneiderman, *Constitutionalizing Economic Globalization*, p. 100.

<sup>332</sup> CMS v. Argentina, *Award*, para. 274; LG&E v. Argentina, *Decision on Liability*, para. 131.

<sup>333</sup> Ziff, 'The Sovereign Debtor's Prison', p. 361, 376.

<sup>334</sup> Sheldon Leader, 'Human Rights, Risks and New Strategies for Global Investment', *Journal of International Economic Law*, 9:3 (2006), p. 660.

<sup>335</sup> Global Witness, 'Heavy Mittal? A State Within A State: The Inequitable Mineral Development Agreement Between the Government of Liberia and Mittal Steel Holdings NV' (October 2006), available at: {<http://www.globalwitness.org/library/heavy-mittal>} accessed 15 December 2010.

<sup>336</sup> Leader, 'Human Rights, Risks and New Strategies for Global Investment', p. 659; Thomas Wälde & George Ndi, 'Stabilizing International Investment Commitments: International Law Versus Contract Interpretation', *Texas International Law Journal*, 31 (1996), p. 221; The state-investor contracts that have attracted most attention from civil society groups – the BTC pipeline project and the Chad-Cameroon pipeline – both had World Bank involvement.

The effect of investment contracts on the ability of states to subsequently introduce more stringent environmental regulations is two-fold. Firstly, many contracts include specific provisions that relate to the environment. For instance, a concession contract with Mozambique entitles the company “to drill for and have the free use of water and impound surface waters”; a contract concluded with Bangladesh specifically permits the company to engage in the environmentally destructive practice of ‘flaring’ natural gas; and a contract with Liberia allows the company free use of timber with no requirement that it be sustainably harvested in line with its forestry law.<sup>337</sup> These clauses all place certain specific environmental protection measures beyond the scope of future regulation by the states concerned. If Bangladesh were to prohibit the practice of ‘flaring’ natural gas or Mozambique to restrict the use of water, the states would be in breach of the respective contracts they had concluded with the companies concerned. In these cases, the states specifically agreed to be bound by such limits on its future regulatory powers in respect to specific environmental protection measures.

Beyond such specific contractual obligations that implicate the environment, there is nevertheless also a second and much broader sense in which companies can invoke contracts to restrain states in their introduction of new environmental protection measures. This is through the use of ‘stabilization clauses’, in contracts sometimes referred to as ‘Change of Law’ clauses.<sup>338</sup> Piero Bernardini, the Vice-President of the arbitration court of the International Chamber of Commerce, maintains that stabilization clauses are “[t]he most important of the contractual guarantees”.<sup>339</sup> These clauses are essentially designed to provide investors with legal and regulatory stability, and they accomplish this objective by either exempting a company from compliance with any subsequent laws or regulations that the state may introduce (so-called ‘freezing clauses’), or by requiring states to compensate the company for additional

---

<sup>337</sup> Kyla Tienhaara, ‘Foreign Investment Contracts in the Oil and Gas Sector: A Survey of Environmentally Relevant Clauses’, *Investment Treaty News*, 1:2 (October 2011), p. 13; Global Witness, ‘Heavy Mittal?’ p.49.

<sup>338</sup> The contract for the Baku-Tbilisi-Ceyhan pipeline project terms its stabilization clause a ‘Change of Law’ clause.

<sup>339</sup> Piero Bernardini, ‘Investment Protection Under Bilateral Investment Treaties and Investment Contracts’, *The Journal of World Investment*, 2 (2001), p. 241. There is nevertheless some dispute in respect to whether arbitral tribunals would actually consider such clauses legally binding, especially if companies were to challenge otherwise legitimate environmental regulations that only had a lesser effect on the company’s profits. Stabilization clauses are clearly drafted with the intention to be legally binding, but it is unclear whether tribunals would accept that states possess the sovereign power to tie its own hands in respect to environmental regulations in the first place. See, Gaëtan Verhoosel, ‘Foreign Direct Investment and Legal Constraints on Domestic Environmental Policies: Striking a ‘Reasonable’ Balance Between Stability and Change’, *Law and Policy in International Business*, 29 (1997-1998), p. 456; Lorenzo Cotula, ‘Reconciling Regulatory Stability and Evolution of Environmental Standards in Investment Contracts: Towards a Rethink of Stabilization Clauses’, *Journal of World Energy Law and Business*, 1:2 (2008), p. 164.

costs incurred as a result of compliance with such laws or regulations (termed ‘economic equilibrium clauses’).<sup>340</sup> In so far as ‘freezing clauses’, as the term implies, ‘freeze’ environmental regulations at a given point in time, these are normally perceived as more restrictive on the regulatory ability of states. In contrast, ‘economic equilibrium clauses’ are perceived as more enabling – they do allow states to enact new environmental regulations and to apply them to the foreign company – but in requiring compensation to be provided for costs incurred such clauses can still place a substantial financial strain on the resources of countries in the developing world, and this provides an economic disincentive towards introducing new environmental regulations. The provision of compensation for compliance with environmental regulations also undermines the ‘polluter pays’ principle. Stabilization clauses normally ‘stabilize’ the legal framework of an investment at the date of the conclusion of the contract, and some contracts specifically clarify that companies are protected from already concluded laws that have not yet entered into force, or from already anticipated changes in law (in one instance, foreseeable changes to labour laws as a result of EU candidacy).<sup>341</sup> Stabilization clauses may also further clarify that corporations are not only protected from legal changes introduced at the initiative of domestic actors, but also from laws required for compliance with international obligations or treaties, such as international environmental treaties.<sup>342</sup> Finally, stabilization clauses can be either full or partial. Full stabilization clauses apply to all new laws and regulations, including those pertaining to environmental regulations, and approximately 60 % of investor-state contracts in the developing world are estimated to contain full stabilization clauses.<sup>343</sup> In contrast, partial stabilization clauses normally only protect companies from changes to fiscal or tax conditions. While such partial stabilization clauses clearly impose less restrictions on the regulatory powers of states, they too can impact on environmental regulations – perhaps ironically, market-based mechanisms for environmental protection, such as carbon taxes or environmental levies, are likely to be prohibited by such partial stabilization clauses.<sup>344</sup>

---

<sup>340</sup> Andrea Shemberg, *Stabilization Clauses and Human Rights: A Research Project Conducted for IFC and the United Nations Special Representative of the Secretary-General on Business and Human Rights* (27 May 2009), p. 17-31, available at:

{<http://www.ifc.org/wps/wcm/connect/9feb5b00488555eab8c4fa6a6515bb18/Stabilization%2BPaper.pdf?MOD=AJPERES>} accessed 14 December 2010; Cotula, ‘Reconciling Regulatory Stability and Evolution’, pp. 160-161.

<sup>341</sup> Shemberg, *Stabilization Clauses and Human Rights*, para. 77, 99-100.

<sup>342</sup> Crockett, ‘Stabilisation Clauses and Sustainable Development’, p. 52.

<sup>343</sup> Shemberg, *Stabilization Clauses and Human Rights*, para. 111.

<sup>344</sup> Verhoosel, ‘Foreign Direct Investment and Legal Constraints on Domestic Environmental Policies’, p. 456-457; Lorenzo Cotula, ‘Pushing the Boundaries vs Striking a Balance: The Scope and Interpretation of Stabilization Clauses in Light of the *Duke v. Peru Award*’, *The Journal of World Investment and Trade*, 11 (2010), p. 31.



A major recent report on behalf of a World Bank and a UN agency concludes that “the practice of using stabilization clauses of some kind is widely established across industries and regions of the world”.<sup>345</sup> The knowledge of the specifics of stabilization clauses and investor-state contracts generally is nevertheless severely hampered by confidentiality, and as such the full extent of the contractual obligations of states towards companies is unknown. There are no known arbitral disputes in respect to stabilization clauses that concern environmental or other generally applicable public interest regulations, though in a currently pending dispute Veolia maintains that Egypt had breached a stabilization clause by virtue of changes to local labour laws, including an increase in the minimum wage.<sup>346</sup> It is unclear whether the apparent absence of arbitral disputes in this respect is due to voluntary compliance by states with its contractual obligations not to introduce such regulations or whether it is due to companies’ unwillingness to invoke contractual guarantees against public interest regulations, or finally, whether it may be due to the fact that contract-based disputes are often heard in confidential tribunals. Antony Crockett concludes that “[f]rom a legal standpoint, the argument that stabilisation clauses may have a ‘chilling effect’ on environmental regulation or human rights standards in host States is well made [but] it has not been proven that stabilisation clauses have had this effect in practice”.<sup>347</sup>

Stabilization clauses are both prevalent and potentially powerful legal tools to protect corporations from changes to the legal and regulatory frameworks of the states in which they operate – in contrast to other forms of protection offered by international investment law, there is no need to show that the economic costs of the environmental regulations rise to a certain threshold or that they are in any way unfair or discriminatory. If such clauses are powerful in the wide scope of their potential impact, they are furthermore powerful in the long duration of their validity. Investment contracts are normally in force for between 10 – 25 years, and some are valid for much longer.<sup>348</sup> Several World Bank funded projects have stabilization clauses valid for more than 30 years.<sup>349</sup> The Shemberg study identified one contract that froze all laws and regulations applicable to a metals’ smelter for an initial period of 50 years, renewable at

---

<sup>345</sup> Shemberg, *Stabilization Clauses and Human Rights*, para. 16.

<sup>346</sup> Luke Eric Peterson, ‘French Company, Veolia, Launches Claim Against Egypt Over Terminated Waste Contract and Labor Wage Stabilization Promises’, *Investment Arbitration Reporter* (27 June 2012).

<sup>347</sup> Crockett, ‘Stabilisation Clauses and Sustainable Development’, p. 529.

<sup>348</sup> Shemberg, *Stabilization Clauses and Human Rights*, para. 45.

<sup>349</sup> Amnesty International, *Contracting Out of Human Rights: The Chad-Cameroon Pipeline Project* (London: Amnesty International, 2005), p. 20; Amnesty International, *Human Rights on the Line: The Baku-Tbilisi-Ceyhan Pipeline Project* (London: Amnesty International, 2003), p. 10.

the company's choice for an additional 50 years beyond that.<sup>350</sup> If the last few decades provide any indication of changes that are yet to come, then environmental regulations frozen at today's standards for particular foreign investment projects are soon likely to be significantly lower than those prevalent for other parts of the economy. Furthermore, since most such contracts are concluded with states in the developing world, laws and regulations are likely to be 'frozen' at a level below that which is already prevalent in much of the developed world. Some long-term investor-state contracts do allow for evolution of environmental standards by invoking international standards of various kinds, but even these are rarely adequate substitutes for state regulations. For instance, contracts in the energy sector frequently specify that companies are obliged to operate in accordance with "the standards and practices generally prevailing in the international petroleum pipeline industry for comparable projects".<sup>351</sup> While these requirements do allow for an evolution of applicable environmental standards over time, it is not clear what 'practices' or 'standards' are actually referred to, and in any case it would not take a cynic to suggest that the 2010 Deepwater Horizon accident has cast doubt on the utility of whatever standards and practices are 'generally accepted' within this particular industry itself.<sup>352</sup>

Prominent scholars suggest that stabilization clauses are re-emerging "in the most extensive form ever seen", and this is likely to provide companies with significant opportunities to challenge new environmental regulations.<sup>353</sup> The prevailing secrecy that surrounds investor-state contracts nevertheless ensures that neither scholars nor citizens know the full extent of the legal guarantees provided to investors. Despite the fact that investment contracts enable states to tie their hands in respect to public interest regulations pertaining to an investment for decades or even a century, there is no need for the people of the state to offer their consent to the future limitations this involves. Most investor-state contracts are negotiated and concluded in secret.<sup>354</sup>

---

<sup>350</sup> Shemberg, *Stabilization Clauses and Human Rights*, para. 57.

<sup>351</sup> Amnesty International, *Human Rights on the Line*, p. 10-11; Amnesty International, *Contracting Out of Human Rights*, p. 24; Cotula, 'Reconciling Regulatory Stability and Evolution of Environmental Standards', p. 177.

<sup>352</sup> Amnesty International, *Human Rights on the Line*, p. 10-11; Leader, 'Human Rights, Risks and New Strategies for Global Investment', p. 682-683; Lorenzo Cotula & Kyla Tienhaara, 'Reconfiguring Investment Contracts to Promote Sustainable Development', in Karl Sauvant (ed) *Yearbook on International Investment Law and Policy 2011-2012* (Oxford, Oxford University Press: 2013), p. 305; Deepwater Horizon Study Group, *Final Report on the Investigation of the Macondo Well Blowout* (Center for Catastrophic Risk Management & the University of California at Berkeley, 2011), available at {[http://ccrm.berkeley.edu/deepwaterhorizonstudygroup/dhsg\\_reportsandtestimony.shtml](http://ccrm.berkeley.edu/deepwaterhorizonstudygroup/dhsg_reportsandtestimony.shtml)} accessed 14 March 2015.

<sup>353</sup> Wälde & Ndi, 'Stabilizing International Investment Commitments', p. 218.

<sup>354</sup> Robert Howse, 'Freezing Government Policy: Stabilization Clauses in Investment Contracts', *Investment Treaty News*, 3:1 (April 2011), p. 5; Tienhaara, *The Expropriation of Environmental Governance*, p. 114-115. Even where contracts are placed before parliament for consideration, this does not necessarily involve informed

Once contracts are signed, they may also be protected by ‘commercial confidentiality’ and are in many developing countries not publicly disclosed.<sup>355</sup> Finally, secrecy often prevails also when disputes arise – if corporations challenge environmental regulations on the basis of contractual guarantees, such disputes are more frequently addressed in confidential tribunals than other investment law disputes.<sup>356</sup>

### ***Concluding Remarks on Change***

Arbitral practice and the investment law literature are both predisposed towards supporting the protection of the ‘legitimate expectations’ of corporations against legal and regulatory changes that take place after an investment has been made, and conceives of this in terms of protection from ‘political risk’. The particular forms of regulatory change that companies can legitimately expect to be protected against, in the absence of conduct that is discriminatory, unfair or tantamount to expropriation, nevertheless remains unclear. Irrespective of whether companies are deemed to deserve protection from general regulatory changes, or only for breaches of ‘specific assurances’ or contracts, this provides corporations with important avenues for challenging newly enacted environmental policies or measures. While the desire of corporations to ensure protection from ‘political risk’ is understandable (and has long been achieved through both public and private political risk insurance) such protection through investment arbitration can significantly interfere with the normal operations of any state. After all, politics is far from static – on the basis of new knowledge or new appreciations of certain risks or a new sense of priorities, people and the governments that represent them change their minds. Yet current investment treaty disputes refer to any unfavourable ‘change of mind’ as a repudiation of a company’s legitimate expectations. Given the inclusion of ‘legitimate expectations’ and contractual stability in investment law the arguments they make are legally plausible. In a current dispute, Vattenfall (the same company that successfully challenged Hamburg’s environmental restrictions on its power plant) is bringing Germany to arbitration for its decision to phase out nuclear energy.<sup>357</sup> There is a long history of public and legislative debate in respect

---

consent – a contract between Mittal Steel and Liberia had received parliamentary ratification, but civil society organizations contend that this ratification was based only on an ‘unbalanced’ summary of the contract with no access by parliamentarians to the contract itself, see Global Witness, ‘Heavy Mittal?’ pp. 41-42.

<sup>355</sup> Cotula & Tienhaara, ‘Reconfiguring Investment Contracts to Promote Sustainable Development’, p. 286.

<sup>356</sup> Dominic Ayine, Hernán Blanco, et al., ‘Lifting the Lid on Foreign Investment Contracts: The Real Deal for Sustainable Development’, *Sustainable Markets Briefing Paper of the International Institute for Environment and Development*, 1 (September 2005), p. 1-4.

<sup>357</sup> Bernasconi-Osterwalder & Hoffman, ‘The German Nuclear Phase-Out Put to the Test’.

to nuclear energy in Germany. In 2002 the parliament had decided to phase out nuclear power, but by 2010 it had nevertheless decided to extend the life of the country's nuclear plants.<sup>358</sup> Within a year the Fukushima nuclear disaster in Japan resulted in nation-wide protests, and the parliament decided to close a number of nuclear plants as part of a policy that “represents a 180-degree reversal of the administration's previous policy”.<sup>359</sup> There is no doubt that Vattenfall has evidence to suggest that it had legitimately expected a life-time extension of its power plants as provided in 2010 legislation, and the very use of the German term ‘energiewende’ in public discourse to indicate the u-turn this decision involves is likely to support the company's investment treaty allegations.<sup>360</sup> But such is also the nature of politics, and neither companies, citizens nor legislatures can anticipate the type of changes that might occur.

### **Compensation**

This chapter has detailed the myriad ways in which corporations can challenge national environmental regulations in investment tribunals, but what happens if they win? Proponents of investment treaty arbitration often seek to reassure concerned civil society groups that in contrast to the dispute settlement panels of the World Trade Organization, investment tribunals normally do not ask states to withdraw legislation.<sup>361</sup> The normal consequence of an investment treaty violation is the payment of compensation to the company.<sup>362</sup> As such, the European Commission emphasizes that even the success of lawsuits by corporations “does not prevent governments from passing laws, nor does it lead to laws being repealed. At most, it can lead to compensation being paid”.<sup>363</sup> The argument here is nevertheless that “at most” is not so little; the compensation requirement should not be dismissed lightly. While Thomas Wälde describes compensation as the “least sovereignty-intrusive remedy”, states faced with multi-billion dollar

---

<sup>358</sup> David Gordon Smith, ‘The World From Berlin: Nuclear Phaseout Is An ‘Historic Moment’’, *Spiegel International* (30 May 2011), available at: {<http://www.spiegel.de/international/germany/the-world-from-berlin-nuclear-phaseout-is-an-historic-moment-a-765681.html>} accessed 22 March 2014.

<sup>359</sup> Smith, ‘The World From Berlin: Nuclear Phaseout Is An ‘Historic Moment’’.

<sup>360</sup> The Economist, ‘Germany's Energy Giants: Don't Mention the Atom’ (23 June 2012), available at: {<http://www.economist.com/node/21557363>} accessed 22 March 2014.

<sup>361</sup> European Commission, ‘Incorrect Claims about Investor-State Dispute Settlement’ (3 October 2013), p. 2, available at: {[http://trade.ec.europa.eu/doclib/docs/2013/october/tradoc\\_151790.pdf](http://trade.ec.europa.eu/doclib/docs/2013/october/tradoc_151790.pdf)} accessed 17 June 2014.

<sup>362</sup> Investment treaties nevertheless rarely specify the consequences of the breach of a treaty, and companies do increasingly ask tribunals to order governments to take or to refrain from taking certain actions. Salacuse, ‘The Emerging Global Regime for Investment’, pp. 445-446; Bernasconi-Osterwalder & Cosbey, et al., *Investment Treaties and Why They Matter*, p. 46.

<sup>363</sup> European Commission, ‘The Transatlantic Trade and Investment Partnership: Questions and Answers’, available at: {<http://ec.europa.eu/trade/policy/in-focus/ttip/questions-and-answers/>} accessed 29 August 2013.

lawsuits for the introduction of environmental protection measures are unlikely to feel that their regulatory powers are entirely unfettered.<sup>364</sup>

In line with the emphasis of the European Commission, a corporate lawyer explained to listeners of the Canadian radio station CBC that investment tribunals cannot force states to withdraw environmental protection measures such as a moratorium on mining; “all these tribunals can do is to... is to compensate the company for its economic losses”.<sup>365</sup> This statement is not only misleading in terms of the notion that compensation is an unproblematic requirement, but also because terms such as ‘economic losses’ probably has a different meaning to ordinary listeners of the CBC from the meaning attributed to the term in investment treaty arbitration. For the most part, the calculation of a company’s ‘economic losses’ in investment arbitration includes also a consideration of its ‘lost profits’. The standard of compensation required depends on the nature of the government measure – a lawful expropriation in accordance with the terms of the treaty requires fair market value compensation, while any breach of the treaty requires restitutionary damages. In the latter respect, tribunals often cite the Permanent Court of International Justice in the *Chorzów Factory* case that compensation must “wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed”.<sup>366</sup> The compensation required for violations of investment treaty provisions therefore clearly includes reasonably ascertainable lost profits. In practice, this is nevertheless not much different from the measure of compensation required for lawful expropriations (such as the expansion of a national park to protect endangered species), because the fair market value of an investment in itself already includes an assessment of lost profits.<sup>367</sup> The requirement that corporations be compensated for lost profits is therefore well established in international investment law.

The magnitude of investment projects in today’s world, in combination with the requirement for ‘lost profits’, means that companies are often asking for billions of dollars in compensation for any treaty breaches. Current environmental cases are no exception – Vattenfall is seeking

---

<sup>364</sup> Thomas Wälde, ‘Remedies and Compensation in International Investment Law’, *Transnational Dispute Management*, 2:5 (2005). Citation to be verified.

<sup>365</sup> Robert Wisner, on Anna Maria Tremonti, ‘Gold: Why A Mining Company is Suing El Salvador’, *The Current on CBC Radio*, available at: {<http://www.cbc.ca/thecurrent/episode/2014/04/16/gold-why-a-mining-company-is-suing-el-salvador/>} accessed 16 April 2014.

<sup>366</sup> Cited in Reisman & Sloane, ‘Indirect Expropriation and Its Valuation in the BIT Generation’, p. 133.

<sup>367</sup> Reisman & Sloane, ‘Indirect Expropriation and Its Valuation in the BIT Generation’, p. 137-139; Anthony Charlton, ‘Discounted Cash Flows – Part 2, Valuation and the Financial Crisis’, *Kluwer Arbitration Blog* (26 January 2012).

EUR 3.5 billion for the effect of Germany's decision to phase out nuclear energy, while the Renco Group is reportedly seeking USD 800 million from Peru for allegedly unfair conduct in respect to environmental regulations.<sup>368</sup> Many proponents of investment treaty arbitration nevertheless emphasize that such large figures are irrelevant, and that while “[e]nvironmentalists and scholars fret over the extremely large amounts claimed in lawsuits [...] they fail to look at the concrete results”.<sup>369</sup> Indeed, the concrete results do suggest that the compensation claimed is substantially more than that finally awarded by tribunals – a frequently cited study by Susan Franck reveals that investors claimed an average of USD 343 million in compensation but only eventually received an average of USD 10 million.<sup>370</sup> However, dismissing large compensation claims on this basis is premature – more substantial awards do exist, and many were awarded after the Franck study was concluded. The largest award to date is the high profile USD 50 billion ruling against Russia in the Yukos case.<sup>371</sup> The second largest is the USD 2.3 billion award against Ecuador in favour of Occidental Petroleum, and is reportedly equivalent to Ecuador's entire annual education budget.<sup>372</sup> Both of these cases nevertheless involved expropriations of considerable assets, and in the latter case Ecuador had already offered over USD 400 million in compensation to Occidental Petroleum.<sup>373</sup> This does not alleviate the substantial financial strain imposed on governments by compensation requirements of such magnitude, but these awards at least implicate in substantial part actual losses that would need to be borne by either the state or the company. A more interesting case is therefore *Al Kharafi v. Libya*, a dispute that concerned a proposed tourism development,

---

<sup>368</sup> DW, ‘Vattenfall Seeks Recompense for German Nuclear Phaseout’ (21 December 2012), available at: {<http://www.dw.de/vattenfall-seeks-recompense-for-german-nuclear-phaseout/a-16473507>} accessed 22 March 2014; Metalbulletin, ‘Renco Begins \$800m Arbitration Against Peru on Doe Run Perú case’ (15 April 2011), available at: {<http://www.metalbulletin.com/Article/2808895/Renco-begins-800m-arbitration-against-Peru-on-Doe-Run-Per-case.html#axzz3Cd08xo1M>} accessed 17 April 2014.

<sup>369</sup> Carminati, ‘Is International Trade Really Making Developing Countries Dirtier’, p. 219.

<sup>370</sup> Susan Franck, ‘International Investment Arbitration: Winning, Losing and Why’, in Karl Sauvant, Lisa Sachs, et al. (eds), *FDI Perspectives: Issues in International Investment* (Vale Columbia Center on International Investment, 2011), p. 84.

<sup>371</sup> Martin Dietrich Brauch, ‘Yukos v. Russia: Issues and Legal Reasoning Behind US\$50 Billion Awards’, *Investment Treaty News* (September 2014).

<sup>372</sup> Tai-Heng Cheng & Lucas Bento, ‘ICSID's Largest Award in History: A Overview of Occidental Petroleum Corporation v the Republic of Ecuador’, *Kluwer Arbitration Blog* (19 December 2012), available at: {<http://kluwerarbitrationblog.com/blog/2012/12/19/icsids-largest-award-in-history-an-overview-of-occidental-petroleum-corporation-v-the-republic-of-ecuador/>} accessed 7 September 2014; Abdul Ahad, ‘Ecuador to Appeal Against \$1.8 Bn Ruling in Oil Dispute’, *Business Recorder* (7 October 2012), available at: {<http://www.brecorder.com/markets/energy/america/84191-ecuador-to-appeal-against-18-bn-ruling-in-oil-dispute-.html>} accessed 7 September 2014.

<sup>373</sup> Eduardo Garcia, ‘Ecuador Ordered to Pay Occidental \$1.77 Billion in Damages’, *Reuters* (5 October 2012), available at {<http://www.reuters.com/article/2012/10/06/us-ecuador-occidental-ruling-idUSBRE89500O20121006>} accessed 14 March 2015.

which had received the required permits and approvals but soon ran into difficulties.<sup>374</sup> The permits were withdrawn and construction never commenced. An otherwise unremarkable case, what is remarkable is the measure of compensation awarded for lost profits. In addition to compensation for the USD 5 million that the company had actually spent on the initial development of the project, the tribunal required Libya to pay a further 900 million to the company in compensation for its anticipated lost profits over a period of 83 years.<sup>375</sup> While companies routinely request several hundred million dollars in lost profits beyond the actual losses incurred as a result of government measures, the USD 900 million difference in *Al Kharafi v. Libya* between costs actually incurred and compensation awarded suggests such claims are not merely empty threats.

Some advocates of investment arbitration dismiss large compensation claims for public interest measures in respect to the environment, public health or human rights on the basis that companies that have been awarded compensation at all have normally only been awarded a few million, “a pittance when compared with the hundreds of millions originally claimed”.<sup>376</sup> Awards in the seven environmental cases that have been concluded on the merits in favour of the company have indeed not exceeded USD 50 million. The fact that only a ‘pittance’ has been granted in comparison with the claims made should nevertheless not give the impression that the awards are not generous under the circumstances of the case. In *Tecmed v. Mexico*, the tribunal noted that the “considerable difference” between the tender price and the actual investment into the landfill (USD 4,5 million) and the compensation sought by the company (USD 52 million) was “likely to be inconsistent with the legitimate and genuine estimates on return on the Claimant’s investment at the time of making the investment”.<sup>377</sup> On this basis, the tribunal awarded compensation for the tender price and subsequent investments into the site, and a further \$1 million in compensation for lost profits.<sup>378</sup> Similarly, in *S.D. Myers v. Canada*,

---

<sup>374</sup> Diana Rosert, ‘Libya Ordered to Pay US\$935 Million to Kuwaiti Company for Cancelled Investment Project; Jurisdiction Established Under Unified Agreement for the Investment of Arab Capital’, *Investment Treaty News*, 1:5 (19 January 2014), p. 13-15

<sup>375</sup> The USD 900 million is for “the certain profits (minimum value) that it should have realized from investing in the project’s 14 resorts and facilities throughout a period of 83 years”. Mohamed Abdulmohsen Al Kharafi & Sons Co. v. the Government of the State of Libya, *Final Arbitral Award*, Ad Hoc Arbitration (22 March 2013), p. 385-386; Rosert, ‘Libya Ordered to Pay US\$935 Million to Kuwaiti Company’, p. 14.

<sup>376</sup> Cassels Brock Lawyers, ‘NAFTA Investment Disputes – Where Are We?’ (28 June 2011), available at: {[http://www.casselsbrock.com/CBNewsletter/NAFTA\\_Investment\\_Disputes\\_\\_\\_Where\\_Are\\_We\\_](http://www.casselsbrock.com/CBNewsletter/NAFTA_Investment_Disputes___Where_Are_We_)} accessed 25 March 2015.

<sup>377</sup> *Tecmed v. Mexico*, *Award*, para. 186.

<sup>378</sup> Compensation was only awarded for a further two years, since the company had already agreed to build a new landfill at the end of the two year period. *Tecmed v. Mexico*, *Award*, para. 186, 195.

a case that concerned lost profits during a 15-month period in which the border was closed to hazardous PCB exports, the tribunal dismissed the CAD 70 million claim as unrealistic but granted CAD 6 million almost entirely in lost profits.<sup>379</sup> Widely inflated compensation claims for lost profits continue to emerge in investment arbitration for environmental cases – in a case brought by V.G. Gallo, Canada objected that the lost profits claim of CAD 250 million in comparison to the costs incurred amounted to an anticipated return of nearly 20,000 % on the investment.<sup>380</sup> It has already been argued that non-environmental cases reveal that the risk for substantial awards remain, but beyond that risk it should also be recognized that the actual awards granted in investment disputes can be generous given the circumstances of the cases, even if they do not approximate the optimistic claims of the companies.

This chapter has sought to show that companies do not only receive compensation for clearly unfair government conduct, but that investment treaty provisions can also be violated in circumstances where states have in good faith pursued valuable public purposes. It has further been shown that market value compensation is also required for lawful expropriations motivated by environmental protection goals deemed ‘laudable’ by the tribunals themselves. In light of this, the standard of compensation required by investment treaties is very favourable to the companies concerned. Compensation for ‘lost profits’ is required without consideration for either the financial impact on the state, or for the often considerable profits the company had already made from its investment in the host state.<sup>381</sup> While tribunals are increasingly addressing public interest considerations at the merits stage of the arbitration – and are adopting ‘proportionality’ approaches that balance the regulatory needs against the impact on investors – such public interest considerations or balancing is rarely deemed relevant in determining the compensation to be provided.<sup>382</sup> Once a breach of a treaty has been found, an assessment is exclusively based on the market value of the investment or the investor’s situation in the absence of the unfavourable government measure.

---

<sup>379</sup> S.D. Myers, Inc. v. Canada, *Second Partial Award*.

<sup>380</sup> Vito G. Gallo v. Government of Canada, *Statement of Defence*, UNCITRAL Ad Hoc Arbitration (15 September 2008), para. 258.

<sup>381</sup> The tribunal in *Funnekotter et al v. Zimbabwe*, assessments of compensation proceeds “independently of the origin and past success of their investment”. See Luke Eric Peterson, ‘ICSID Tribunal Holds That Market Value Compensation is Owed to Evicted Dutch Farmers – Not a Lesser Amount’, *Investment Arbitration Reporter* (23 April 2009); Sornarajah, *The International Law on Foreign Investment*, p. 444.

<sup>382</sup> Margaret Devaney, ‘Remedies in Investor-State Arbitration: A Public Interest Perspective’, *Investment Treaty News*, 3:3 (March 2013), p. 11.



Beyond elemental questions of fairness, this raises serious questions about the practical implications. So far investment disputes in respect to environmental regulations have not resulted in awards that are unaffordable to the states concerned, but a number of disputes concerning large natural resources projects in the developing world highlight the risks. What happens if a small developing country decides to protect a rainforest in which a transnational corporation had already received exploration rights for oil or minerals, and where such oil or minerals had been located in large quantities? Fair market value compensation for interference with investments with large anticipated profits would inevitably be prohibitively expensive. Similarly, wider environmental protection measures that affect investors across an entire sector can be equally costly. In response to measures taken to address the financial crisis, Argentina faced more than fifty investor-state disputes, and Spain is currently facing more than thirty disputes as a result of its decision not to maintain its very generous tariff regime for solar energy – the collective costs of these lawsuits, if successful, would amount to several billion euros.<sup>383</sup> Tribunals in concluded cases have not accepted any lower standard of compensation in such cases, and ‘lost profits’ remains the norm. Finally, the very principle of compensation for environmental protection measures raises concerns in respect to the ‘polluter pays’ principle – the costs of protecting the environment is shifted from the foreign investment project that causes the environmental degradation to the taxpayer.<sup>384</sup> Despite this, even the otherwise more balanced model investment treaty of the International Institute of Sustainable Development maintains the conventional standards of compensation.<sup>385</sup> Given such risks in respect to the standard of compensation required, it is remarkable that there are hardly any proposals to change this.

### **Conclusion**

In its promotion of major trade and investment treaties currently being negotiated with Canada and the United States, the European Commission maintains that only a ‘limited’ set of protections are afforded to corporations by investment treaties.<sup>386</sup> Indeed, on the face of it, the treatment standards in investment treaties may appear limited to only protecting corporations from state conduct that is in any case unreasonable or at least antithetical to a global capitalist

---

<sup>383</sup> Olivet & Eberhardt, *Profiting from Crisis*, pp. 25-35.

<sup>384</sup> *Methanex v. USA, Petitioner’s Final Submissions by IISD*, para. 17; Wagner, ‘International Investment, Expropriation and Environmental Protection’, p. 470.

<sup>385</sup> Mann & Moltke et al., *IISD Model International Agreement on Investment*, part 2, article 8(B).

<sup>386</sup> European Commission, ‘Incorrect Claims about Investor-State Dispute Settlement’, p. 1.

order that few governments in today's world seek to challenge. This chapter has nevertheless sought to show that transnational corporations do not only perceive investment treaties as protection against such measures, but more broadly as "a valuable safeguard against possible policy choices" made by the states in which they operate.<sup>387</sup> While the previous chapter demonstrated that the institutional set-up of international arbitration made the international investment regime a powerful tool for challenging state measures, this chapter has revealed that such challenges are successful against a wide range of government measures taken by states in their pursuit of public purposes.

The focus of this chapter has been on corporate challenges to state measures designed to protect the environment. Sanford Gaines suggests that the early environmental cases that initially raised concerns amongst civil society groups were not followed by a 'second wave', but that second wave is now clearly here; at least ten environmental cases are currently pending, several of which concern high profile public policy decisions such as Quebec's moratorium on 'fracking' and Germany's phase-out of nuclear energy.<sup>388</sup> This chapter has shown that there are a myriad of ways in which companies can challenge environmental protection measures precisely because the terms of investment treaties are so open-ended. The 'limited' treatment standards found in investment treaties – national treatment, most favoured nation treatment, protection from expropriation, fair and equitable treatment, 'legitimate expectations' – conceal a much broader set of government conduct that is susceptible to challenge by corporations. The term 'discrimination' does not only apply to intentionally protectionist measures by states, but also to differential treatment justified on environmental grounds (such as ensuring domestic disposal capacity for hazardous waste) if the state has not chosen the policy option that has the least impact on the foreign investor.<sup>389</sup> The term 'expropriation' relates not only to direct state appropriation of property but also to measures 'tantamount to' expropriation, and depending on the approach adopted this can be assessed solely on the basis of the economic impact of a measure (the 'sole effects' approach), on the basis of proportionality (based on a scale that it has been argued is heavily tilted in favour of corporations), or in respect to the state's 'police powers' (but even in this most environmentally friendly approach, states may still need to show that a state measure is based on a thorough scientific assessment and a range of other potential criteria). Furthermore, while the European Commission suggests that investment treaties only

---

<sup>387</sup> Kingsbury & Schill, 'Investor-State Arbitration as Governance', p. 4.

<sup>388</sup> Gaines, 'Environmental Policy Implications of Investor-State Arbitration', p. 191.

<sup>389</sup> S.D. Myers v. Canada, *First Partial Award*.

afford corporations “[p]rotection against expropriation which is not for a public policy purpose and not fairly compensated”, such a claim is directly misleading in so far as it implied that expropriation for a public purpose would not require compensation.<sup>390</sup> There is no dispute that a measure that amounted to an expropriation (say, the expansion of a national park to protect endangered species) requires full market value compensation, that includes a consideration of a company’s lost profits, even where the tribunal itself praises the ‘laudable’ public purpose behind it.<sup>391</sup> The term ‘fair and equitable treatment’ is sufficiently wide to ensure that state environmental measures “guided by the best of intentions” and based on “reasoned judgement” can still violate the treaty.<sup>392</sup> This standard allows investment tribunals to act as “pre-agreed review agencies” of state actions and to “set standards for States in their internal administrative processes”.<sup>393</sup> Corporate challenges to environmental protection measures based on ‘fair and equitable treatment’ reveal that states have to be very careful in their regulatory or administrative conduct towards foreign companies so as not to breach this standard. Finally, through arbitral innovation the term ‘legitimate expectations’ has become one of the most potent requirements of investment treaties. Given that it is “irrelevant whether the state in fact wished to commit itself” to a certain conduct towards the investor, states can end up surprised by what companies expect from them, and a number of current cases revolve around moratoriums or denials of permits for investment projects in the very early stages of development, where a state (and its people) have only just begun to appreciate the environmental risks of a project.<sup>394</sup> Even in cases where the state did explicitly agree to commit itself not to change the regulatory framework – such as in providing contractual guarantees to freeze environmental regulations applicable to an investment project for decades to come – it is not implausible to suggest that subsequent governments may thoroughly come to regret such a promise. Investment treaty standards enable corporations to challenge any kind of government measure in a myriad of different ways, and expansive interpretations of such clauses ensure that

---

<sup>390</sup> European Commission, ‘Factsheet: Investment Protection and Investor-to-State Dispute Settlement in EU Agreements’ (November 2013), p. 4, available at: {[http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc\\_151916.pdf](http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf)} accessed 1 May 2014.

<sup>391</sup> Santa Elena v. Costa Rica, *Final Award*.

<sup>392</sup> Enron v. Argentina, cited in UNCTAD, *Fair and Equitable Treatment*, p. 66; LG&E v. Argentina, *Decision on Liability*, para. 162.

<sup>393</sup> Benedict Kingsbury & Stephan Schill, ‘Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law’, Institute for International Law and Justice, Working Paper 6 (2009), p. 1.

<sup>394</sup> Micula, *Award*, para. 669. Pending environmental cases that revolve around projects that raised controversy in the early stages of development include: Lone Pine Resources v. Canada, *Notice of Intent*; Pac Rim v. El Salvador, *Notice of Intent*; Clayton & Bilcon v. Canada, *Memorial of the Investors*; Windstream v. Canada, *Amended Notice of Arbitration*.

they stand a good chance of winning. Where a breach of an investment treaty is found, the company is entitled to full compensation, including a measure of lost profits that may well exceed the sums a company spent on the investment in the first place.

Proponents of investment arbitration adopt a number of rhetorical strategies to ensure criticism is kept at bay. Describing investment protection in terms with distinctly positive connotations – protection from ‘discrimination’ and ‘unfair and inequitable treatment’ – ensures that it becomes impossible to disagree with investment treaty provisions as a matter of principle; who would advocate that anyone be discriminated against or treated unfairly? Similarly, the European Commission’s rhetorical strategy in current investment treaty negotiations is to couch the treaties in terms of only requiring adherence to “basic principles of the rule of law”.<sup>395</sup> Sornarajah suggests that this provides investment treaties “legitimacy by transference” in so far as “no one can quarrel with the rule of law”.<sup>396</sup> This chapter has sought to counter such rhetorical strategies by demonstrating that investment treaty provisions entail more than immediately meets the eye. Investment tribunals do not primarily deal with outrageous cases – for the most part, investment awards go into minute detail to understand the domestic administrative processes of states or spend over 50 pages on a close analysis of the scientific assessment that underlies a state measure. The knowledge that tribunals will closely analyze any indication of wrongdoing may have further encouraged corporations to file investment treaty disputes in the hope that the document discovery process itself (such as access to internal government e-mails) allows for what Canada in one case complained amounted to “an extensive fishing expedition” for evidence of any kind of administrative irregularities or private conversations of politicians or administrative staff revealing any discriminatory intent, broadly conceived.<sup>397</sup>

In the light of the dismissals of the claims in *Methanex* (California’s prohibition of a gasoline additive that had polluted groundwater), *Glamis Gold* (California’s requirement for backfilling of open-pit mines), and *Chemtura* (Canada’s prohibition of a pesticide that is being phased out internationally), many have suggested that ‘genuine’ environmental measures were after all not

---

<sup>395</sup> De Gucht, ‘The Transatlantic Trade and Investment Partnership: The Real Debate’.

<sup>396</sup> M. Sornarajah, ‘Mutations of Neoliberalism in International Investment Law’, *Trade, Law & Development*, 3:1 (2011), p. 218

<sup>397</sup> William Ralph Clayton and others & Bilcon of Delaware v. Government of Canada, *Counter-Memorial*, UNCITRAL Ad Hoc Arbitration (9 December 2011), para. 482.

under threat.<sup>398</sup> However, even in such cases that concern very reasonable environmental measures, the U.S. and Canada had to spend many years defending themselves before international tribunals, and in two of the cases were still left several million dollars out of pocket due to legal fees and arbitral costs.<sup>399</sup> While developed countries with considerable experience of litigious corporations in domestic courts have a fairly good track record of meeting such international investment treaty challenges, this should not be expected in many of the current cases in the developing world. To cite Sornarajah, “[w]hat is frightening to developing countries is that the experience gained in the litigation between the United States and Canada, both of which have the resources to meet such arguments through armies of lawyers will be transported onto the litigation involving developing countries without such resources”.<sup>400</sup> In some circumstances states may be able to walk a very fine line in their adoption of policies that affect foreign investors and thereby escape investment treaty challenges, and to meet such challenges head on with ‘armies of lawyers’ when disputes arise, but there is likely to be other circumstances where otherwise genuine environmental measures are found to breach one or another of the investment treaty provisions.

International investment law is believed to be the fastest growing area of international law today.<sup>401</sup> This is not surprising; it provides corporations with avenues to challenge unfavourable government conduct in a myriad of ways, and to do so before investment tribunals with none of the protections against judicial bias that are found in domestic or formal international courts. The speed at which the investment arbitration system has developed in recent years is largely attributable to the promise of a generous measure of compensation to the corporation in the case of a win, and only a few millions in legal costs when they lose. In contrast, for states the risks of a lawsuit are high; a few million in legal costs when they win, and possibly the payment of hundreds of millions of dollars in lost profits alone to a company when they lose. The incentives towards an out-of-court settlement (possibly by withdrawing environmental regulations) are therefore strong. Investment treaty scholars often remark that the direct recourse of corporations to an international court to protect international rights makes this “one of the most important

---

<sup>398</sup> Asteriti, ‘Metalclad, Methanex and Chemtura’, pp. 1-21; Gaines, ‘Environmental Policy Implications of Investor-State Arbitration’, pp. 171-201; Wälde & Kolo, ‘Environmental Regulation, Investment Protection and Regulatory Taking’, pp. 811-848; Stone, ‘NAFTA Article 1110: Environmental Friend or Foe?’, pp. 763-798.

<sup>399</sup> *Glamis Gold v. USA, Award*; *Chemtura v. Government of Canada, Award*.

<sup>400</sup> Sornarajah, ‘The Clash of Globalisations’, p. 14.

<sup>401</sup> Brower & Schill, ‘Is Arbitration a Threat or a Boon’, p. 472.

progressive developments in the procedure of international law in all its history”.<sup>402</sup> In contrast, even moderate critics like José Alvarez suggests that the investment treaty regime amounts to “the most bizarre human rights treaty ever conceived” – in essence a “human rights treaty for a special-interest group”, or what is in this thesis termed a ‘transnational capitalist class’.<sup>403</sup>

---

<sup>402</sup> Stephen Schwebel, ‘The Overwhelming Merits of Bilateral Investment Treaties’, *Suffolk Transnational Law Review*, 32 (2008-2009), p. 267.

<sup>403</sup> Cited in Brower, ‘Corporations as Plaintiffs Under International Law’, p. 197.

## Investor-‘State’ Dispute Settlement: Protection from Social Movements?

Scholarly analysis of what is formally known as ‘Investor-State Dispute Settlement’ normally proceeds on the assumption that investment arbitration is simply about resolving disputes between investors and states, as indeed the term implies. In contrast, this chapter seeks to illustrate how investment disputes are ultimately *not* disputes between the two parties that formally confront each other before the investment tribunal. These disputes do indeed originate from investors (normally transnational corporations), but their ultimate opponents are often particular societal groups (such as local community groups or social movements) that have come to oppose certain corporate plans or practices. Each of these non-state actors have normally sought to make use of state institutions in their struggles with each other, and it is when these social movements or civil society groups have been victorious in domestic political debates that the corporation seeks to challenge the state in investment arbitration. The corporation’s ultimate adversary is normally not present within the arbitral setting, but even where it is, it is only permitted to appear as a ‘non-party’ or ‘third party’ within the limited remit of making an *amicus curiae* (‘friend of the court’) submission. Crucially, these social movements and civil society groups also remain conspicuously absent within the primarily legal scholarly literature on the subject, which follows legal practice in its conception of the dispute as one between investors and states and which insists on referring to social movements as ‘third parties’.<sup>1</sup>

The aim of this chapter is to provide a better understanding of the *politics* of international investment law. In order to do so, it draws upon the theoretical approach developed in Chapter 1 to develop an alternative perspective on the political struggles that underpin investor-state dispute settlement; a perspective in which civil society groups or social movements are not

---

<sup>1</sup> There has been little interest in non-governmental organizations or social movements in the context of investment law, but the one exception is in consideration of their role as *amici curiae*. In these circumstances they are specifically conceived of as ‘third parties’ or ‘non-parties’ to the dispute. E.g. Olivia Benaïm-Selvi, ‘Third Parties in International Investment Arbitrations’, *The Journal of World Investment and Trade*, 6 (2005), pp. 773-807; Eugenia Levine, ‘Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation’, *Berkeley Journal of International Law*, 29:1 (2011), pp. 200-224; Katia Fach Gómez, ‘Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw The Line Favourably for the Public Interest’, *Fordham International Law Journal*, 35 (2012), pp. 510-564; Kyla Tienhaara, ‘Third Party Participation in Investment-Environment Disputes: Recent Developments’, *RECIEL*, 16:2 (2007), pp. 230-242.

relegated to ‘third party’ status (let alone disappear altogether) but where they are placed in direct opposition to the corporation that brings the investment treaty lawsuit. The focus remains on investment disputes about the environment, and the chapter is structured into three substantial sections, according to the alternative chronology of the investment disputes themselves. The first section considers who investment disputes are actually between, and explores the original conflicts between transnational corporations and their civil society opponents. The second section considers how the non-state dispute becomes an investor-state dispute, and investigates how the state eventually responds to such societal struggles and comes out in support of one or the other of these two groups. The third section considers the political implications of investor-state arbitration for the underlying social struggle between the transnational corporation and its civil society adversary.

The first section of this chapter begins with the question of *who* investment disputes are actually between. The previous chapter has already detailed how investment treaties allow corporations to challenge measures that states around the world take to prohibit dangerous substances;<sup>2</sup> to regulate the environmental impact of corporate activities (ranging from the use of cooling water by power plants to the backfilling of open-pit mines);<sup>3</sup> or to deny permits or licenses to investments deemed harmful or excessively risky (from polluting landfills to ‘fracking’ for shale gas).<sup>4</sup> This section proceeds to look at the societal actors – local community groups, environmental movements, or non-governmental organizations – who were often the ones to take the initiative for such state measures in the first place. It is argued that the underlying political contestation between opposing social groups – transnational corporate actors and their adversaries – is often misrepresented or rendered invisible within the discipline of international investment law.

---

<sup>2</sup> E.g. Ethyl Corporation v. Government of Canada, *Notice of Arbitration*, UNCITRAL Ad Hoc Arbitration (14 April 1997); Methanex Corporation v. United States of America, *Final Award of the Tribunal on Jurisdiction and Merits*, UNCITRAL Ad Hoc Arbitration (3 August 2005); Chemtura Corporation (formerly Crompton Corporation) v. Government of Canada, *Award*, UNCITRAL Ad Hoc Arbitration (2 August 2010); Dow Agrosciences LLC v. Government of Canada, *Notice of Arbitration*, UNCITRAL Ad Hoc Arbitration (31 March 2009).

<sup>3</sup> E.g. Vattenfall AB, Vattenfall Europe AG and others v. The Federal Republic of Germany, *Request for Arbitration*, ICSID Case No. ARB/09/6 (30 March 2009); Glamis Gold, Ltd. v. United States of America, *Award*, UNCITRAL Ad Hoc Arbitration (8 June 2009);

<sup>4</sup> E.g. Metalclad Corporation v. The United Mexican States, *Award*, ICSID Case No. ARB(AF)/97/1 (30 August 2000); Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States, *Award*, ICSID Case No. ARB(AF)/00/2 (29 May 2003); Abengoa, S.A. y COFIDES, S.A. v. United Mexican States, *Award*, ICSID Case No. ARB(AF)/09/2 (18 April 2013); Lone Pine Resources Inc. v. Government of Canada, *Notice of Intent to Submit a Claim to Arbitration*, UNCITRAL Ad Hoc Arbitration (8 November 2012).



Such a research agenda requires an unpacking of ‘the state’. The territorial state is formally the respondent before the investment tribunal, but the second section of this chapter maintains that in order to understand the social struggles that underpin investment treaty disputes a particular understanding of the state is required. It will not suffice to conceive of the state as an independent agent in its own right – let alone to treat it as a ‘black box’ – since this easily conceals the underlying disputes between transnational corporations and opposing social groups and often leads to unfounded assumptions about why states act. It is rather necessary to disaggregate the state, and to explore how state institutions and state officials relate to societal struggles. This section therefore explores how in the course of struggles with each other, both transnational corporations and opposing social groups seek to sway state officials and state institutions to act in support of their cause. The battle for the state can be likened to a ‘tug-of-war’ between these opposing non-state groups, and investor-state disputes often emerge precisely when the transnational corporation’s civil society adversaries win such a tug-of-war and the state comes out in support of its environmental agenda.

The third section of this chapter investigates the role that international investment law plays in these underlying social struggles between corporations and their civil society opponents. The most obvious political implication of investment law is that struggles between transnational corporations and opposing social groups do not end with a victory in favour of one or the other in domestic political debates. To cite a network of civil society organizations, “even when we succeed in getting governments on our side, a higher authority lurks in the background that can overrule people and overrule governments to give corporations what they want”.<sup>5</sup> That higher authority is the global investment regime and its enforcement through investor-state dispute settlement. As a component of an emerging ‘transnational state’, the primary utility of international investment law lies in its ability to trump any domestic political decision or any domestic legislation that is found to be inconsistent with the corporate rights discussed in the previous chapter. The role of international investment law in social struggles is nevertheless not limited to cases in which social movement victories in domestic political debates have turned costlier than anticipated as a result of a corporate victory in investment arbitration; rather, the third section also suggests that the latent possibility of investment arbitration plays a role at every stage of the social struggle and consequently that the consequences of the global

---

<sup>5</sup> The Network for Justice in Global Investment, *Global Investment Rules: How They Threaten Communities and the Environment, and How We Can Change Them*, p. 1, available at: {<http://justinvestment.org/reports-analysis/global-investment-rules/>} accessed 30 August 2012.

investment treaty regime for social struggles around the world extend far beyond the few environmental cases that have been concluded to date.

### **Social Groups in Investment Disputes**

The problem with adopting a state-centric perspective is, to cite William Robinson, “what we *don't* see when we *do* see nation-states”.<sup>6</sup> The wider argument of this thesis is that the state-centrism inherent in much analysis of the global investment treaty regime conceals how the historical origins, current role, and future evolution of this regime is shaped by particular social groups that cannot be reducible to states. This chapter maintains that the same lesson applies to the particular investment disputes themselves. Here the role of one non-state actor (the company) is indeed rendered visible, but what conventional analysis of ‘investor-state disputes’ often does not make apparent is how these disputes often arise directly out of civil society protests or campaigns against particular corporations or corporate practices, and how arbitral proceedings are directly implicated in such social struggles.

It may nevertheless seem an overstatement to suggest that civil society groups are ‘rendered invisible’ within the investment law literature. This is the case for some disputes, but in other disputes scholars routinely mention protests or objections from civil society groups – for instance, much legal analysis of *Glamis Gold v. USA* acknowledge that the Quechan Indian Nation had strongly opposed the development of a gold mine in an area of spiritual significance.<sup>7</sup> What is rendered invisible is not always the civil society opposition itself, but their agency in disputes that are ultimately between them and the corporation concerned. Where civil society protests are acknowledged, they are often only briefly mentioned as background or contextual factors behind the ‘investor-state dispute’ rather than conceived of as agents in the dispute in their own right. In a sense, this is unsurprising. As a specialized and fairly obscure area of academic research, the discipline of international investment law is populated by legal scholars whose concern is understandably not with the political origins of investment disputes but with the legal arguments of the two parties that formally confront each other before the

---

<sup>6</sup> Robinson, William, ‘Global Capitalism and Nation-State-Centric Thinking – What We *Don't* See When We *Do* See Nation-States: Response to Critics,’ *Science & Society*, 65:4 (2001-2002), p. 500.

<sup>7</sup> E.g. Jordan C. Kahn, ‘Striking NAFTA Gold: Glamis Advances Investor-State Arbitration’, *Fordham International Law Journal*, 33 (2009-2010), pp. 104-105; Alison Ochs, ‘Glamis Gold Ltd. – A Foreign United States Citizen?: NAFTA and its Potential Effect on Environmental Regulations and the Mining Law of 1872’, *Colorado Journal of International Environmental Law and Policy*, 16 (2005), pp. 500-501.

investment tribunal, and the investment tribunal's analysis of their respective legal claims. This priority accorded to the legal dispute is often made explicit in work on investment law and the environment, which is the topical focus of this thesis. Jorge Viñuales' recent book specifies that his work "does not seek to provide an analysis of the investment-environment equation from an economic or political perspective", while Åsa Romson's treatment of the same subject "aims at a 'legal' answer to its questions, rather than a 'political' or 'sociological' answer".<sup>8</sup> Given this legal focus, it is not surprising that such scholars approach the dispute as one between the investor and the state who formally appear before the investment tribunal. In contrast, while political research on the global investment regime exists, there tends to be a division of labour where political research is focused on the evolution or impact of the global investment regime as a whole while the task of analyzing particular investment disputes is left for the lawyers.

In contrast, the critical literature on international investment law is explicitly political, and does consider the investment disputes themselves.<sup>9</sup> Most notably, both David Schneiderman and the doctoral thesis of Kyla Tienhaara explicitly draw on critical international theory in general and Stephen Gill's theory of 'new constitutionalism' in particular. In doing so, their work could be expected to contribute to the research agenda suggested here. However, neither appear to foreground social groups as the ultimate agents in the context of particular investment disputes. Schneiderman tends to focus on how international investment law constrains the state itself, and it is the agency of the state that he refers to in speaking of the "immobilization of local agency".<sup>10</sup> In contrast, this chapter reiterates that the state is not an agent, and the agency that is immobilized is ultimately that of particular groups of people. Schneiderman does investigate civil society resistance in his book-length treatment of constitutionalism and investment law, but he does so in reference to the possibilities for 'citizenship' rather than in reference to actual investment disputes that arise from social struggles around the world.<sup>11</sup> While his work strongly informs the approach adopted in this thesis, it does not accomplish what is intended in this chapter.

---

<sup>8</sup> Jorge Viñuales, *Foreign Investment and the Environment in International Law* (Cambridge, Cambridge University Press, 2012), p. 2; Åsa Romson, *Environmental Policy Space and International Investment Law* (Stockholm: Acta Universitatis Stockholmiensis, 2012), p. 30.

<sup>9</sup> E.g. Tienhaara seeks to provide a "distinctly *political* dimension to a topic that often remains within the purview of legal studies". Kyla Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (Cambridge: Cambridge University Press, 2009), p. 4.

<sup>10</sup> David Schneiderman, 'Transnational Legality and the Immobilization of Local Agency', *Annual Review of Law and Social Science*, 2 (2006), p.387.

<sup>11</sup> David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge: Cambridge University Press, 2008), Part III.

Kyla Tienhaara's doctoral thesis adopts a neo-Gramscian theoretical framework and an empirical focus on investment law and the environment, and her research is at first glance very similar to that conducted here. She explicitly seeks to move beyond a conceptualization of the state "as a unit" and towards an understanding of how "domestic politics factor into government responses",<sup>12</sup> but her approach does nevertheless not appear to impact on her case analysis in the way suggested in this chapter. Protests from opposing social groups are normally relegated to the 'background' sections of her case studies while the 'dispute' is explicitly between the investor and the state, and she follows conventional practice in referring to civil society organizations presenting *amicus curiae* briefs as 'third parties' or 'non-parties' to the dispute.<sup>13</sup> This makes perfect sense from the perspective of the investor-state dispute settlement process itself, but conceals the ultimate nature of the conflict as one between social groups acting through states and other social structures. This does not detract from her objective; rather than investigating the implications of investment law for social struggle, as does this project, her thesis seeks to investigate the implications "for environmental governance" and "public policy".<sup>14</sup> It is nevertheless not entirely clear why she would need the neo-Gramscian framework adopted to do so. Indeed, in turning the doctoral thesis into a book all references to neo-Gramscianism and new constitutionalism were removed, with no apparent effect on her analysis of the environmental investment disputes themselves.<sup>15</sup> The book remains an important analysis of the implications of investment law for environmental governance, but it does not shift our perceptions away from an understanding that investment disputes are between investors and states towards an investigation of the underlying struggles between opposing social groups.

The scholarly analysis that most closely approximates the aim of this chapter is offered in two journal articles by Ibrónke Odumosu, who adopts a Third World Approaches to International Law (TWAIL) perspective.<sup>16</sup> While it was argued in Chapter 1 that there is sometimes a tendency in the TWAIL literature to adopt a state-centric perspective, Odumosu is directly

---

<sup>12</sup> Kyla Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy*, PhD Thesis (Vrije Universiteit, 4 September 2008), p. 395.

<sup>13</sup> E.g. Tienhaara, *The Expropriation of Environmental Governance*, p. 131; 166-168.

<sup>14</sup> *Ibid.*

<sup>15</sup> Compare Tienhaara, *The Expropriation of Environmental Governance*, PhD Thesis, with Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (Cambridge: Cambridge University Press, 2009).

<sup>16</sup> Ibrónke Odumosu, 'The Law and Politics of Engaging Resistance in Investment Dispute Settlement,' *Pennsylvania State International Law Review*, 26 (2007-2008), pp. 251-287; Ibrónke Odumosu, 'Locating Third World Resistance in the International Law on Foreign Investment', *International Community Law Review*, 9 (2007), pp. 427-444.

concerned with examining “the law and politics of investment dispute settlement from the praxis of Third World *communities*’ engagement with foreign investment and tribunals’ responses to such engagement”.<sup>17</sup> She observes that “peoples’ concerns were largely ignored and written out of the history and the picture of investment dispute settlement”, and concludes that investment arbitration “is not the most hospitable place for Third World resistance”.<sup>18</sup> Odumosu’s argument is well made and this chapter adopts a similar approach to understanding investment disputes themselves (while broadening it out beyond the Third World), but her lack of an overall framework for understanding *why* people are written out of the history of investment law detracts from the analysis. She admonishes tribunals for not considering Third World ‘voices’, and concludes that “[t]ribunals have an even greater responsibility to interpret the law in a manner that directly incorporates the interests of peoples in investment dispute settlement”.<sup>19</sup> In contrast, this thesis has argued that the very purpose for which investment law was founded is precisely to support a transnational capitalist class in its struggle with other social groups (or ‘peoples’). The composition and institutional set-up of tribunals reflects this, and her aim of encouraging “lawyers and tribunals to follow this path” of giving voice to resistance movements is to appeal to the wrong party, and the law itself is furthermore often formulated in such a way as to discourage any sympathetic arbitrators from following her path.<sup>20</sup> An investment law that ‘incorporates the interests of peoples’ is not impossible, but the present approach is distinguished from Odumosu’s in that such an outcome would not be expected in the absence of a successful counter-struggle by precisely the social groups that are finding their victories against corporations undermined in investment tribunals.

### ***The Origins of Investment Disputes***

In contrast to the existing mainstream and critical international law literature, the aim of this chapter is to promote a new research agenda that places the underlying conflicts between transnational corporations and opposing social groups at the centre of the analysis. The argument is not that all investor-state disputes stem *directly and immediately* from *active* conflicts between social groups, but that in order to render visible the disputes that do, we need a particular conception of the national state. It is, after all, the state that is formally the

---

<sup>17</sup> (My emphasis) Odumosu, ‘The Law and Politics of Engaging Resistance’, p. 257.

<sup>18</sup> Ibid, p. 286.

<sup>19</sup> Ibid, p. 287.

<sup>20</sup> Ibid, p. 287; see chapter 2 for further information about the political leanings of investment arbitrators and tribunals.

respondent before investment tribunals. The theoretical premise that informs the analysis is that states are important *social structures* within which struggle takes place, but only people – often acting collectively – are *agents* in that struggle. The state is not conceived of as an actor in its own right (let alone a ‘black box’) but as a ‘strategically selective’ arena for struggle, and the real political agents behind all investment disputes are ultimately social groups.<sup>21</sup> Within the approach adopted in this thesis, investment disputes can emerge in three different ways, each of which emphasizes the social origin of the state or state action.

The first – and probably most unusual – way in which investment disputes can emerge is from the pre-existing legal or institutional structure of the state itself. An example could possibly be *MTD v. Chile*, discussed in the previous chapter, that seemed to arise out of the institutional structure of the Chilean state and what the tribunal determined was a lack of coordination between different arms of that state.<sup>22</sup> In that case, it could be argued that the agency of particular actors was less important as a cause of the investment dispute than the institutional set-up and associated practices of the Chilean state itself. A social forces approach to the state would acknowledge its importance as a social structure, but remind the reader that the state is precisely a *social* structure. While an analysis of the rise of the state system and the emergence of particular states is beyond the scope of this thesis, it nevertheless needs to be kept in mind that the state itself and the particular institutional set-up of that state is ultimately the outcome of the agency of particular social groups, and the ‘congealment’ of historical struggles between them.<sup>23</sup>

Most investment disputes nevertheless do not originate from the existing state structure itself but from political change, which in turn originates from the actions of state officials – the politicians or administrative staff who hold particular positions within the social structure of the state. It is normally only when state officials make particular decisions (such as to deny an environmental permit or to introduce environmental legislation) that corporations bring a lawsuit. The second way in which investment disputes can emerge is from state officials acting upon their own initiative, without any obvious connection to existing civil society protests or

---

<sup>21</sup> Bob Jessop, *The Future of the Capitalist State* (Cambridge: Polity Press, 2002), p. 40; Andreas Bieler & Adam David Morton, *Social Forces in the Making of the New Europe: The Restructuring of European Social Relations in the Global Political Economy* (Basingstoke: Palgrave, 2001), p. 18.

<sup>22</sup> *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, Award*, ICSID Case No. ARB/01/7 (25 May 2004); see the section on ‘consistency’ in Chapter 3.

<sup>23</sup> William Robinson, *Social Theory and Globalization: The Rise of a Transnational State*, *Theory and Society*, 30:2 (2001), p. 165; Jonathan Joseph, *Marxism and Social Theory* (Basingstoke: Palgrave Macmillan, 2006).

campaigns. The approach adopted here would nevertheless caution against assuming that state officials are distinct from the society in which they live, and would rather conceive of them as societal beings whose social background will influence the actions they undertake as state officials.<sup>24</sup> The question of why state officials are motivated to exercise their agency in support of particular social or class groups will be considered in the next section of this chapter.

Thirdly, while almost all investment disputes formally arise out of the agency of state officials (themselves conceived as embedded within the society in which they live), this chapter distinguishes between those that emerge at their own initiative from those that seem to arise when state officials react and respond to the protests or campaigns of civil society groups. It is in such circumstances that the form of legal analysis prevalent within the discipline of international investment law, preoccupied as it is with the two parties facing each other before the investment tribunal, tends to render invisible the company's ultimate adversary within civil society. The aim behind this section is to bring attention to the underlying disputes between transnational corporations and civil society groups. Of the 44 concluded, settled, discontinued or pending investment disputes relating to environmental protection measures identified in this thesis, at least 28 are likely to have arisen in substantial part in response to civil society campaigns or protests.<sup>25</sup> This amounts to 64% of the disputes considered in this thesis, and in many other disputes civil society pressure may have been important without leaving enough of an evidence trail. In a surprising number of the cases, civil society pressure appears to have been the primary factor behind the decisions of state officials to introduce environmental protection measures.

To provide an overview of investment disputes for which there is evidence that civil society protests or campaigns have influenced the decisions of state officials to protect the environment, a table of such cases is included below. The table below does not include investment disputes emerging as a result of the structure of the state or measures taken primarily at the initiative of state officials. Neither does it include disputes where the origins are uncertain. As such, despite the similarity in the nature of the two cases *Un glaube v. Costa Rica* and *Santa Elena v. Costa Rica* (both concern expropriations to expand national parks), the table includes the former but

---

<sup>24</sup> See Chapter 1 on states and state officials.

<sup>25</sup> For a full list of environmental cases, see the appendix at the end of the thesis. This figure does not include *Allard v. Barbados* and the solar energy cases against Spain – the 'pro-environment' cases discussed in the introductory section of Chapter 3 – but only those that arose from environmental protection measures.

not the latter, since this chapter has identified evidence that civil society protests or campaigns were significant in the former case but not in the latter.<sup>26</sup>

As illustrated in the table, the civil society protests from which investment disputes emerge can take one of two different forms. Firstly, disputes can arise as a result of civil society pressure for general legislative or regulatory changes with only an incidental effect on the particular corporation that subsequently seeks recourse to arbitration. For instance, Canadian state officials attributed the decision to phase out a particular lawn pesticide to pressure from environmental groups, and German state officials are likely to have taken the decision to phase out nuclear power at least in part due to the major protests that followed the Fukushima nuclear accident, and in neither case were any particular nuclear power company or producer of lawn pesticide directly targeted by the civil society actors.<sup>27</sup> Secondly, disputes can arise as a result of civil society protests or campaigns that are at least in part targeted against the specific corporation that ultimately brings the lawsuit; most of the investment disputes considered here fall into this category. For instance, while civil society groups in Costa Rica have been active in pushing for a more environmentally friendly approach to its natural resources in general, Infinito Gold's mining proposals also engendered protests and legal challenges against the company's specific project.<sup>28</sup> To clarify, the categorization of particular cases in the table below is based on what is interpreted to be the target of the civil society protests themselves; not the specific form in which the state environmental protection measure is taken. Where environmental protests target a specific corporation but results in general legislative changes (e.g. a moratorium on all mining of a particular kind), the case appears in the second category,

---

<sup>26</sup> In *Unглаube v. Costa Rica*, non-governmental environmental organizations had brought legal challenges against the state of Costa Rica for not taking sufficient action to protect the nesting sites of leatherback turtles, and these legal challenges were instrumental in prompting Costa Rica to take the measures that were subsequently challenged by Unглаube before the investment tribunal. In contrast, this thesis has not identified any evidence of involvement by environmental groups in the Santa Elena case, but this does of course not mean that such involvement did not exist. Marion Unглаube & Reinhard Unглаube v. Republic of Costa Rica, *Award*, ICSID Case No. ARB/08/1 & ICSID Case No. ARB/09/20 (16 May 2012), para. 78-79, 184, 259-260; see also, Fernando Cabrera Diaz, 'German Investor Launches ICSID Case against Costa Rica over Alleged Expropriation of Land near Endangered Turtle Habitat', *Investment Treaty News* (6 December 2009), p. 2.

<sup>27</sup> Internal government documents identify 'disappointment of environmental groups' as a motivation for not removing a Quebec ban on the lawn pesticide, see *Dow v. Canada*, *Notice of Arbitration*, para. 22; for *Vattenfall II v. Germany* see Nathalie Bernasconi-Osterwalder & Rhea Tamara Hoffman, 'The German Nuclear Phase-Out Put to the Test in International Investment Arbitration? Background to the New Dispute *Vattenfall v. Germany (II)*', *Briefing Note* (June 2012), available at: {[http://www.iisd.org/pdf/2012/german\\_nuclear\\_phase\\_out.pdf](http://www.iisd.org/pdf/2012/german_nuclear_phase_out.pdf)} accessed 24 August 2012; Helen Pidd, 'Germany to Shut All Nuclear Reactors: Move Prompted by Mass Protests Against Nuclear Power Following Japan's Nuclear Disaster', *The Guardian* (30 May 2011), available at {<http://www.theguardian.com/world/2011/may/30/germany-to-shut-nuclear-reactors>} accessed 30 August 2012.

<sup>28</sup> *Infinito Gold Ltd v. Republic of Costa Rica*, *Petition for Amicus Curiae Status by Asociación Preservacionista de Flora y Fauna Silvestre*, ICSID Case No. ARB/14/5 (15 September 2014), section 4-6.



not the first. The footnotes provide a brief explanation for why the particular case is determined to have arisen specifically in response to civil society campaigns or protests.

<b>Environmental investment disputes caused primarily or in substantial part by <i>general</i> civil society campaigns or protests.</b>	
Chemtura v. Canada	Opposition by the World Wildlife Fund against the pesticide lindane. <sup>29</sup>
Dow Agrosciences v. Canada	Opposition by environmental organizations in Quebec to a lawn pesticide. <sup>30</sup>
John Andre v. Canada	Petitioning by aboriginal groups and their representatives for continued right to hunt caribou. <sup>31</sup>
Vattenfall v. Germany (II)	Nation-wide demonstrations against nuclear power in response to the Fukushima nuclear accident. <sup>32</sup>
Sun Belt v. Canada	Public opposition to large-scale exports of water on conservation grounds. <sup>33</sup>

<sup>29</sup> The company maintains that the state acted in violation of investment law in prohibiting the pesticide lindane, and the main initiative for this appears to have come from an industry group to which the investor itself belongs. The World Wildlife Fund nevertheless also seems to have been critical in putting pressure on both the government and the industry group. For instance, one industry leader suggested that he had, after the decision on the voluntary withdrawal of lindane had been taken, phoned the World Wildlife Fund to ask them to leave him alone. The World Wildlife Fund had also lobbied the government to prohibit the pesticide. *Chemtura v. Canada, Award*, para. 169, 173; see also World Wildlife Fund Canada, ‘Press Release: Toxic Pesticide Should Be Banned’ (24 November 1999), available at {<http://www.foodsafety.ksu.edu/en/news-details.php?a=3&c=29&sc=220&id=33272>} accessed 3 March 2014.

<sup>30</sup> The company maintains that the state acted in violation of investment law in its prohibition on a lawn pesticide, and internal government documents noted “disappointment of environmental groups” as a reason for maintaining the prohibition, revealing their prior campaigning on the issue. *Dow v. Canada, Notice of Arbitration*, para. 22.

<sup>31</sup> The company maintains that the state acted in violation of investment law in its withdrawal and subsequent elimination of quotas for the hunting of caribou, following a sharp decline in caribou numbers. Representatives of aboriginal groups appear to have been active in making their concerns heard and ensuring that they would be entitled to continue with subsistence hunting. This led the investor, involved in hunting tourism, to challenge the allocation of quotas as discriminatory. John R. Andre v. Government of Canada, *Notice of Intent* (19 March 2010); Bob Weber, ‘Aboriginal Hunters Fight for Right to Hunt; Way of Life’, *The Daily Gleaner* (8 February 2010), p. A7.

<sup>32</sup> The company maintains that the state acted in violation of investment law in its phase-out of nuclear power, and this followed – and is likely to be at least partly a response to – decades of environmental campaigning as well as large protests immediately after the Fukushima accident against nuclear power. Pidd, ‘Germany to Shut All Nuclear Reactors’; Bernasconi-Osterwalder & Hoffman, ‘The German Nuclear Phase-Out Put to the Test’.

<sup>33</sup> The company maintains that the state acted unlawfully in its prohibition on bulk water exports, and Wagner suggests that public opposition on conservation grounds prompted the prohibition. Martin Wagner, ‘International Investment, Expropriation and Environmental Protection’, *Golden Gate University Law Review*, 29 (1999), p. 488.

<b>Environmental investment disputes caused primarily or in substantial part by civil society protests against specific corporations or investment projects:</b>	
Abengoa v. Mexico	Local community opposition to hazardous waste landfill. <sup>34</sup>
Bear Creek v. Peru	Large protests by indigenous groups and local community groups against proposed silver mine. <sup>35</sup>
BDC v. Philippines	Protests by fishermen and conservation groups in respect to dredging and rehabilitation of lake. <sup>36</sup>
Bilcon v. Canada	Local community opposition to large basalt quarry. <sup>37</sup>
Burlington Resources v. Ecuador	Opposition by indigenous people to environmental effects of proposed oil extraction. <sup>38</sup>
Chevron v. Ecuador	Environmental liability lawsuit by indigenous communities in respect to pollution from oil exploitation. <sup>39</sup>

<sup>34</sup> The company maintains that the state acted in violation of investment law in the municipal government's decision to deny the company an operating permit for its hazardous waste landfill. That decision was a direct response to public protests and the campaigning activities of a group known as 'We Are All Zimapán', the leader of which was elected municipal governor with a mandate to close the landfill. *Abengoa v. Mexico*, *Award*, para. 581-607. See also, Katia Fach Gómez, 'ICSID Claim by Spanish Companies against Mexico over the Center for the Integral Management of Industrial Resources' (28 June 2010), pp. 1-26, available at {[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1631835](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1631835)} accessed 10 April 2014; Xinhua General News Service, 'Police, Civilians Clash in Rural Mexico Over Chemical Waste' (9 April 2009).

<sup>35</sup> The company maintains that the state acted in violation of investment law in cancelling permits for the company's proposed silver mine. It is widely acknowledged that the decision was taken in response to major protests. Bear Creek Mining, 'Bear Creek Reports Peruvian Government Resolution Which Potentially Further Delays Santa Ana Esia', *News Release* (1 June 2011), available at {<http://www.bearcreekmining.com/s/news.asp?ReportID=605737>} accessed 7 January 2015; The Globe and Mail, 'Peru Protest Turns Deadly, Bear Creek Project Halted' (24 June 2011), available at {<http://www.theglobeandmail.com/globe-investor/peru-protest-turns-deadly-bear-creek-project-halted/article2074903/>} accessed 12 June 2014; Dow Jones, 'Peru to End Bear Creek Silver Mine Project', *MarketWatch* (25 June 2011), available at {<http://www.marketwatch.com/story/peru-to-end-bear-creek-silver-mine-project-2011-06-25>} accessed 12 June 2014.

<sup>36</sup> The company maintains that the state acted in violation of investment law in cancelling a contract for the dredging of a large lake. The contract was awarded by the previous government in a 'midnight deal', and the termination took place in the shadow of major protests by conservation groups and fishing advocates. Luke Eric Peterson, 'ICSID Claims Round-Up: Cases Against Turkey, Turkmenistan, The Philippines, and Guinea (Conakry) Are Registered', *Investment Arbitration Reporter* (14 November 2011), available at {[http://www.iareporter.com/articles/20111114\\_1](http://www.iareporter.com/articles/20111114_1)} accessed 16 August 2012.

<sup>37</sup> The company maintains that the state acted in violation of investment law in denying an environmental permit for its basalt quarry. This decision was made in response to a public consultation process, which had highlighted public opposition to the project within the local community. William Ralph Clayton and others & Bilcon of Delaware v. Government of Canada, *Memorial of the Investors*, UNCITRAL Ad Hoc Arbitration (25 July 2011); William Ralph Clayton and others & Bilcon of Delaware v. Government of Canada, *Government of Canada Counter-Memorial*, UNCITRAL Ad Hoc Arbitration (9 December 2011).

<sup>38</sup> The company maintains that the state acted in violation of investment law in not acting forcefully enough to allow the oil project to proceed in the face of opposition from indigenous communities. Burlington Resources Inc. v. Republic of Ecuador, *Decision on Jurisdiction*, ICSID Case No. ARB/08/5 (2 June 2010), para. 26-37, 216; 250-340.

<sup>39</sup> The company maintains that the state acted in violation of investment law in the decision of a domestic court to hold the company liable for compensation to the community surrounding its oil exploitation project, or alternatively for not itself stepping in to compensate the local community. The dispute arose because of local communities seeking compensation through US courts and subsequently Ecuadoran courts. Chevron Corporation & Texaco Petroleum Company v. Republic of Ecuador, *First Partial Award*, PCA Case No 2009-23; Chevron

Commerce Group v. El Salvador	Social movement opposition to gold mining in general, as well as the company's specific gold mine. Most probably arose as part of opposition to Pacific Rim's proposed project. <sup>40</sup>
Copper Mesa v. Ecuador	Protests by indigenous groups concerned about the environmental effects of oil exploitation. <sup>41</sup>
Enron and others v. India	Opposition by local community groups and national organizations to major power plant, in part due to environmental effects. <sup>42</sup>
Glamis Gold v. USA	Opposition by Native Americans to the environmental and spiritual impact of proposed open pit gold mine in sacred area. <sup>43</sup>
Harken v. Costa Rica	Opposition by environmental groups to mining and oil extraction by the company, as well as in environmentally sensitive areas in general. <sup>44</sup>
Infinito Gold v. Costa Rica	Opposition by environmental groups to mining and oil extraction by the company, as well as in environmentally sensitive areas in general. <sup>45</sup>

Corporation & Texaco Petroleum Company v. Republic of Ecuador, *Submission of Amici: Fundación Pachamama & International Institute of Sustainable Development*, PCA Case No 2009-23 (5 November 2010).

<sup>40</sup> The company maintains that the state acted in violation of investment law in its revocation of environmental permits for mining. This is likely to have come about as a result of anti-mining protests that initially targeted the gold mine proposed by Pacific Rim, but the social movement increasingly used environmental degradation from the Commerce Group mine as evidence of the risks of the larger Pacific Rim mine. The wider anti-mining protests in El Salvador are discussed in more detail below.

<sup>41</sup> Little information is available on the case, but the company is believed to object to actions taken in respect to its mining concessions. The project had been confronted with major protests by indigenous groups, but it is not clear whether these were the cause of the state's actions. Luke Eric Peterson, 'Copper Miner Files Its Statement of Claim in Previously-Unannounced Ad-Hoc Arbitration Against Ecuador', *Investment Arbitration Reporter* (1 March 2012), available at {<http://www.iareporter.com/articles/20120302>} accessed 16 August 2012.

<sup>42</sup> Enron, Bechtel and other investors in the Dabhol Power Plant maintains that the state, deeming the project not worth the costs, acted in violation of investment law in its decision to stop it. Major public protests had developed against the project on the perception that the initial agreements were based on corruption, but also involved local community protests on environmental grounds. Gus Van Harten, 'TWAIL and the Dabhol Arbitration', *Trade Law and Development*, 3:1 (2011), p. 137-141, 155; Tai-Heng Cheng, 'Developing Narratives in International Investment Law', *Santa Clara Journal of International Law*, 9 (2011), p. 221.

<sup>43</sup> The company maintains that the state acted in violation of investment law in California's decision to introduce a backfilling requirement for open-pit mines, a decision taken in large part in response to opposition by the Quechan Indian Nation and later other civil society groups. The Quechan Indian Nation had also been involved in the legislative process that resulted in the impugned measures. *Glamis Gold v. USA, Award*. Glamis Gold, Ltd. v. United States of America, *Application of the Quechan Indian Nation to File Amicus Curiae Submission* (19 August 2005); *Glamis Gold, Ltd. v. United States of America, Amicus Curiae Submission of the Quechan Indian Nation* (16 October 2006).

<sup>44</sup> The company maintains that the state acted in violation of investment law in its revocation of permits for oil exploitation, and domestic legal proceedings initiated by environmental groups and environmental campaigns appear to have been instrumental in that revocation. Kyla Tienhaara, 'Regulatory Chill and the Threat of Arbitration: A View from Political Science', in Chester Brown & Kate Miles (eds) *Evolution in Investment Treaty Law and Arbitration* (Cambridge, Cambridge University Press, 2011), p. 618 – 621.

<sup>45</sup> The company maintains that the state acted in violation of investment law in the Supreme Court's decision to cancel a number of permits for the company's proposed gold mine. The Supreme Court decision was taken directly in response to legal proceedings commenced by environmental groups opposed to the project, and the company itself acknowledges that its problems arise from environmental non-governmental organizations. *Infinito Gold v. Costa Rica, Petition for Amicus Curiae Status by Asociación Preservacionista de Flora y Fauna Silvestre*, section 4-6; *Infinito Gold Ltd. V. Republic of Costa Rica, Request for Arbitration*, ICSID Case No.

Lone Pine Resources v. Canada	Environmental protests in respect to the risks of ‘fracking’ for shale gas under the St Lawrence river. <sup>46</sup>
Metalclad v. Mexico	Local community opposition to a hazardous waste landfill on environmental grounds. <sup>47</sup>
Oak Investments v. El Salvador	Protests by local community groups and environmental groups in respect to pollution from batteries recycling facility. <sup>48</sup>
Pacific Rim v. El Salvador	Local community opposition to proposed gold mine, later forming into a nation-wide movement. <sup>49</sup>
Renco v. Peru	Local protests in respect to health effects of pollution from a metals smelting and refining complex, and environmental liability lawsuit by affected people. <sup>50</sup>
St Mary’s v. Canada	Local opposition to proposed aggregate quarry in rural community. <sup>51</sup>

ARB/14/5 (6 February 2014), para. 76, 89. Anthony Vaccaro, ‘Elusive Green Macaw Stops Infinito For Now’, *The Northern Miner*, 94:37 (2-9 November 2008). The company was previously known as Vanessa Ventures, and environmental groups have been actively opposing its project and bringing legal injunctions since the earliest proposals in 2002, see Tienhaara, ‘Regulatory Chill and the Threat of Arbitration’, p. 622-626.

<sup>46</sup> The company maintains that the state acted in violation of investment law in cancelling permits for fracking for shale gas before the environmental assessment process was complete, and the company itself maintains that the state actions arose “in response to these pressures” from interest groups. Lone Pine Resources Inc. v. Government of Canada, *Notice of Arbitration*, UNCITRAL Ad Hoc Arbitration (6 September 2013), para. 39-40.

<sup>47</sup> The company maintains that the state acted in violation of investment law in the municipal government’s denial of a construction permit for a hazardous waste landfill, and the governor remarked that the strength of opposition was such that it would have been a ‘political Molotov cocktail’ to allow the project to proceed. The tribunal itself remarks that the “opposition of the local population” may have been one of the reasons for the denial of the municipal permit. This case is discussed in detail below. Metalclad v. Mexico, *Award*, para. 92.

<sup>48</sup> Little information is available on the case, but the company is believed to object to the decision to shut down its batteries recycling facility for breaches to environmental law. It is reported that the decision was made in the shadow of protests by the local community and environmental groups. Luke Eric Peterson, ‘Shareholders in Shuttered Battery Recycling Plant Put El Salvador on Notice of Claims for Treaty Breach’, *Investment Arbitration Reporter* (19 September 2009), available at {[http://www.iareporter.com/articles/20091008\\_17](http://www.iareporter.com/articles/20091008_17)} accessed 16 August 2012.

<sup>49</sup> The company maintains that the state acted in violation of investment law in not providing it with the permits required to move from exploration to exploitation of its gold deposits. That decision is likely to have been prompted by a major anti-mining movement that had developed in El Salvador, and that is discussed in more detail below.

<sup>50</sup> The company maintains that the state acted in violation of investment law in not stepping in to compensate citizens who had brought a liability suit for the health consequences of living close to the company’s metals smelter, which was previously a state-owned smelter. The company also maintains that the state acted unlawfully when it sought an extension to complete the environmental remediation required by the privatization contract. Peru granted the extension, but only on the condition of further remediation obligations. The Peruvian decision on the extension was made in the shadow of civil society criticisms of pollution both before domestic courts and the Inter-American Court of Human Rights. Indeed, Peru cites its imposition of additional requirements before the Inter-American Court as evidence that it had responded to the concerns of the local community. The Renco Group, Inc. v. The Republic of Peru, *Memorial on Liability*, UNCT/13/1 (20 February 2014); Inter-American Court of Human Rights, ‘Admissibility: Community of La Oroya, Peru’, Petition 1473-06, Report No. 76/09 (5 August 2009), para. 1-2; 30-31; 42.

<sup>51</sup> The company maintains that the state acted in violation of investment law in denying permits for a proposed aggregate quarry. The quarry had engendered extensive local community opposition, and the investor itself indicates that the influence of these groups were instrumental in prompting the state measures. The headline on the local community group website is now “Together We Will Did Succeed”, suggesting they do believe their opposition was instrumental in the state action that led to investment arbitration. St Mary’s VCNA, LLC. v. the

Tecmed v. Mexico	Local community opposition to hazardous waste landfill on environmental grounds. <sup>52</sup>
Unглаube v. Costa Rica	Campaigns by environmental organizations to protect the nesting grounds of leatherback turtles in the vicinity of the investor’s tourist resort. <sup>53</sup>
Vattenfall v. Germany (I)	Primarily local opposition to environmental effects and climate impact of proposed large coal-fired power plant. <sup>54</sup>
V.G. Gallo v. Canada	Opposition by aboriginal and other nearby communities to environmental effects of plans to turn a man-made lake into a landfill. <sup>55</sup>
Windstream Energy v. Canada	Opposition to offshore wind turbines in the Great Lakes. <sup>56</sup>

The above table suggests that most of the disputes considered here arise from civil society protests or campaigns in respect to specific corporations as opposed to more general campaigns. There are many possible reasons for this, but two are worth mentioning here. Firstly, the above table only includes investment disputes for which *there is evidence* that civil society protests or

---

Government of Canada, *Notice of Arbitration*, UNCITRAL Ad Hoc Arbitration (14 September 2011), para. 12, 16, 25, 33-56; see also the website of the local community group, Friends of Rural Communities and the Environment (FORCE), available at {<http://www.stopthequarry.ca/>} accessed 28 March 2014.

<sup>52</sup> The company maintains that the state acted in violation of investment law in its decision not to renew the permits required for the company to operate its hazardous waste landfill. The tribunal itself maintains that the decision had been made in response to public protests, and all evidence points in that direction. Tecmed v. Mexico, *Award*; see also Anna O’Leary, ‘Women and Environmental Protest in a Northern Mexican City,’ *The Arizona Report*, 6:1 (Spring 2002), pp. 1, 4-5.

<sup>53</sup> The company maintains that the state acted in violation of investment law in expanding a national park so as to expropriate its property, and some of the state measures had been taken directly in response to domestic legal challenges by non-governmental organizations. Unглаube v. Costa Rica, *Award*, para. 78-79, 184, 259-260; see also, Diaz, ‘German Investor Launches ICSID Case against Costa Rica’, p. 2.

<sup>54</sup> The company maintains that the state acted in violation of investment law in imposing delays and introducing stricter environmental requirements on a proposed power plant. The investor itself acknowledges that public opposition and a Green Party victory in a local election was what prompted these additional delays and environmental requirements. Vattenfall v. Germany, *Request for Arbitration*, para. 27 – 30, 54; see also, Nathalie Bernasconi, ‘Background Paper on Vattenfall v. Germany Arbitration’ (Winnipeg: International Institute for Sustainable Development, July 2009), p. 1; Sebastian Knauer, ‘Vattenfall vs. Germany: Power Plant Battle Goes to International Arbitration’, *Spiegel International* (15 July 2009).

<sup>55</sup> The company maintains that the state acted in violation of investment law in not allowing the company’s proposed project to proceed. In this case there is evidence of public opposition and opposition from indigenous groups – some of which is noted by Canada in its statement of defence – but it is not known to what extent the actions of the state can be interpreted as a response to such civil society opposition. Vito G. Gallo v. Government of Canada, *Statement of Defence*, UNCITRAL Ad Hoc Arbitration (15 September 2008), para. 2, 46, 63-70.

<sup>56</sup> The company maintains that the state acted in violation of investment law in introducing a moratorium on offshore wind energy. A public consultation process, that had evidenced growing concerns about offshore wind, is cited as an important factor by Canada for its decision to introduce a moratorium; indeed, one section of its memorial is entitled “Public and Scientific Concerns Lead to a Decision to Defer Offshore Wind Developments Until a Comprehensive Regulatory Framework Can Be Established”. The company likewise maintains that “anti-wind opponents” were an important influence on the politicians taking the decision to introduce the moratorium. Windstream Energy LLC v. Government of Canada, *Amended Response to the Notice of Arbitration*, UNCITRAL Ad Hoc Arbitration (26 April 2013), para. 39-40; Windstream Energy LLC v. Government of Canada, *Amended Notice of Arbitration*, UNCITRAL Ad Hoc Arbitration (11 May 2013), para. 29.

campaigns played a part in the decision of state officials to introduce the impugned environmental measure, and it may simply be easier to identify a connection between the activities of civil society groups and the actions of state officials in investment disputes that emerge from protests against specific corporations. Secondly, protests that are not targeted at specific corporations may be more likely to result in general regulatory changes, and following *Methanex v. USA* and similar high-profile cases such general regulatory changes may be perceived to be less susceptible to challenge within investment arbitration than state measures that target particular corporations.

Finally, while most of the environmental disputes considered here arise when state officials react and respond to civil society groups, it is also perfectly feasible that the non-state groups to which state officials respond are other corporations. If so, then the ultimate origins of an investment dispute is a struggle between two different corporations or corporate fractions that seek to use the institutions and officials of the state in their battle with each other. A few of the environmental disputes considered here could be characterized as inter-capitalist in origin. For example, *Ethyl v. Canada* arose when parliament introduced a prohibition on the use of MMT in gasoline to prevent interference with pollution control devices in cars, but was summarized by the *Globe and Mail* at the time as featuring “a battle between Big Auto and Big Oil over the costs of pollution abatement”.<sup>57</sup> The domestic Canadian decision to prohibit MMT could be perceived as a victory of Big Auto over Big Oil, but given the outcome of the investment arbitration that followed, the newspaper concluded that “[w]hen the car and oil firms went to battle, Ottawa lost”.<sup>58</sup> It is similarly possible to interpret two pending disputes – *Chevron v. Ecuador* and *Renco v. Peru* – that both in part originate from local residents bringing liability suits on the basis of environmental harm as, in fact, ultimately involving conflicts between different fractions of capital. Without the international contingency-fee lawyers representing them the local residents are unlikely to have been able to bring the liability suits that are at issue before the investment tribunals, but in the event of success the lawyers too are likely to make a substantial profit.<sup>59</sup> Finally, many scholars suggest that environmental regulations are mere

---

<sup>57</sup> Shawn McCarthy, ‘Gas War: The Fall and Rise of MMT – When the Car And Oil Firms Went to Battle, Ottawa Lost’, *The Globe and Mail* (24 July 1998), p. A1.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Chevron* specifically refers to the ‘contingency-fee lawyers’ in its Notice of Arbitration, and in *Renco v. Peru* there is evidence that U.S.-based lawyers were active in distributing fliers to find enough plaintiffs for a class-action suit in the U.S. *Chevron Corporation & Texaco Petroleum Company v. Republic of Ecuador*, *Notice of Arbitration*, PCA Case No 2009-23 (23 September 2009), para. 3; *The Renco Group, Inc. v. The Republic of Peru*, *Notice of Arbitration and Statement of Claim*, UNCT/13/1 (9 August 2011), para. 35.

pretexts for protectionism,<sup>60</sup> but protectionism – in so far as it occurs – should be interpreted precisely as a victory by a national corporation or sector against transnational capital. The majority of the investment disputes concerning the environment that serve as the focus for this thesis have nevertheless been interpreted as originating from conflicts between corporations and local community groups or environmental movements.

### ***The Real Parties to the Conflict***

It has already been argued that the investment law literature interprets investment disputes precisely as investor-state disputes, but what are the consequences of this for the civil society actors from whose protests or campaigns the dispute ultimately arose? In many cases, that civil society opposition is rendered invisible or only mentioned in passing as a contextual or background factor. In other cases, the focus on the investor-state dispute leads to an actual misrepresentation of the social movements with which the dispute originates. Both lead to an oversight of the social struggles that underpin investment law, a problematic understanding of the disputes themselves, and consequently a lack of attention to the political consequences of investment law for social movements around the world.

An example of how social movements are not only neglected but also misrepresented is *Metalclad v. Mexico*, the first NAFTA dispute to be concluded on the merits in 2000. The tribunal itself refrained from any consideration of the local community protests that had emerged against the company's hazardous waste landfill, but these protests were acknowledged as a cause of the conflict by both the investor and the state in their legal representations to the tribunal.<sup>61</sup> What is interesting about this case is that both the company and the state of Mexico characterized the local community protesters in the same way, and in providing background context for the case the investment law literature on the topic has followed the two formal parties to the 'investor-state dispute' in their portrayal of the local community. The then President of Metalclad contended that "[b]elieve me, the natural and expected opposition to a

---

<sup>60</sup> Thomas Wälde & Abba Kolo, 'Environmental Regulation, Investment Protection and Regulatory Taking in International Law', *International and Comparative Law Quarterly*, 50 (2001), pp. 811-848.

<sup>61</sup> Metalclad nevertheless contests the extent of the opposition, and suggests it is by a vocal minority. President of Metalclad, interviewed in the film 'Bill Moyers Reports: Trading Democracy', Films for the Humanities and Sciences (first broadcast 5 February 2002 on PSB), min. 24.45; *Metalclad Corporation v. The United Mexican States, Reply*, ICSID Case No. ARB(AF)/97/1 (21 August 1998), Chapter 3, para 33-35; Chapter 6, para. 222; *Metalclad Corporation v. The United Mexican States, Respondent's Post-Hearing Submission*, ICSID Case No. ARB(AF)/97/1 (undated), para. 46, 159, 173.

landfill in your backyard is no different in Mexico than it is in the United States”, and Mexico – observing that the tribunal had been provided with “extensive evidence as to the universal phenomenon of the NIMBY (the ‘Not In My Back Yard’) factor” – simply agrees with the company that this “is illustrated perfectly here”.<sup>62</sup> The legal literature has directly followed the investor and the state in understanding local community protesters as ‘NIMBY’. For example, Sanford Gaines highlights protests “from local citizens acting in classic NIMBY [...] fashion”, and even Alessandra Asteriti, a scholar otherwise concerned with the environmental consequences of investment law, observes that the landfill was plagued by “the usual *nimbyism* associated with controversial hazardous waste disposal projects”.<sup>63</sup> This representation of the local community has implications for how the legal literature understands the case itself, and critical to that understanding is the fact that the term ‘NIMBY’ is inevitably unflattering. Like Gains and Asteriti, David Gantz maintains that Metalclad “presents the classic ‘NIMBY’ [...] problem that plagues the establishment of landfill and hazardous waste disposal facilities”, namely that the “need for such facilities is recognized, but no one wants to live near one”.<sup>64</sup> It is this last sentence that captures the meaning of ‘NIMBY’ in a nutshell. The key characteristic of a ‘NIMBY’ protestor is political opposition motivated not by a universal ideal or a sense of right or justice, but rather by self-interested lobbying to have the facility in question placed in somebody else’s backyard instead. In this case the investment law literature directly follows the two official parties to the ‘investor-state dispute’ in their portrayal of the civil society protesters, but a critical aspect of the case is that these two parties were originally on the same side in what was ultimately a struggle between the company and civil society groups. The federal government had, after all, supported Metalclad’s pursuit to develop a hazardous waste landfill against the civil society protesters. So how accurate is the representation of the local community groups in characterizing them as ‘NIMBY’?

This conflict originates in the decision of a Mexican corporation, COTERIN, to establish a transfer station for hazardous waste at a rural location known as La Pedrera. Within a year, the company had, in violation of its environmental permit, buried or otherwise disposed of an

---

<sup>62</sup> Interviewed in the film ‘Bill Moyers Reports: Trading Democracy’, min. 24.45; *Metalclad v. Mexico, Respondent’s Post-Hearing Submission*, para. 159.

<sup>63</sup> Sanford Gaines, ‘Environmental Policy Implications of Investor-State Arbitration Under NAFTA Chapter 11’, *International Environmental Agreements*, 7 (2007), p. 181; Alessandra Asteriti, ‘Metalclad, Methanex and Chemtura: 10 Years of Environmental Issues in NAFTA Investment Arbitrations’, *Transnational Dispute Management*, 9:3, (2012), p. 10, available at SSRN: {[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2021180](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2021180)} accessed 17 August 2012.

<sup>64</sup> David Gantz, ‘Potential Conflicts Between Investor Rights and Environmental Regulation Under NAFTA Chapter 11’, *George Washington International Law Review*, 33 (2000-2001), para. 667.



estimated 20,000 tons of hazardous waste at the site without treatment or separation.<sup>65</sup> The contamination at the site leached into the wider environment, and local residents soon complained of livestock dying as a result of contaminated water.<sup>66</sup> A local newspaper at the time reported that people complained about hair loss, serious skin irritation, and vomiting, while later reports note concerns about what were believed to be unusually high incidences of cancer and birth defects.<sup>67</sup> There is no independent verification of the health problems nor any clear evidence that any medical problems that did exist were in fact caused by contamination from the site, but the contamination itself as well as the illegal activities of COTERIN are undisputed.<sup>68</sup> Metalclad itself admitted a “great risk to the inhabitants, flora, fauna of the area” as a result of the contamination.<sup>69</sup>

Local community protests soon developed, and federal agencies ordered COTERIN to cease operations. Despite the official closure, trucks continued to unload hazardous waste at the site, and when the authorities failed to act local residents took the situation into their own hands and blockaded the site.<sup>70</sup> Within a couple of years, and against the advice of a board member concerned with the pre-existing contamination, Metalclad nevertheless began to express an interest in the development of a hazardous waste landfill at the site.<sup>71</sup> In 1993, despite the fact that COTERIN had not made any attempt to remediate the site and against the wishes of local community groups, the federal government authorized the site to re-open, and Metalclad acquired 94% of the shares of COTERIN.<sup>72</sup> Before the investment tribunal, Metalclad maintained that “much of the opposition and apprehension engendered by the site stems from

---

<sup>65</sup> Metalclad refers only to “environmental infractions”. The United Mexican States v. Metalclad Corporation, *Reasons for the Judgment*, Supreme Court of British Columbia 664 (2001), para. 5; Metalclad v. Mexico, *Reply*, Chapter 3, para 36; Metalclad v. Mexico, *Respondent’s Post-Hearing Submission*, para. 45-46, 172; Businessweek, ‘Nafta to the Rescue?’ (3 August 1997), available at {<http://www.businessweek.com/stories/1997-08-03/nafta-to-the-rescue-intl-edition>} accessed 8 February 2014; Juli Abouchar & Richard King, ‘Environmental Laws as Expropriation Under NAFTA’, *Review of European Community and International Environmental Law (RECIEL)*, 8:2 (1999), p. 212.

<sup>66</sup> Andrew Wheat, ‘Toxic Shock in a Mexican Village’, *Multinational Monitor*, 16:10 (October 1995), available at {[http://www.multinationalmonitor.org/hyper/issues/1995/10/mm1095\\_07.html](http://www.multinationalmonitor.org/hyper/issues/1995/10/mm1095_07.html)} accessed 8 February 2014.

<sup>67</sup> ‘Bill Moyers Reports: Trading Democracy’, min. 23.15; Metalclad v. Mexico, *Respondent’s Post-Hearing Submission*, para. 175-176.

<sup>68</sup> Metalclad itself accepts, but potentially downplays, the illegalities of the previous owners and the pollution at the site. Metalclad v. Mexico, *Reply*, Chapter 3, para 36, 94.

<sup>69</sup> Contemporaneous Metalclad document cited in: Metalclad v. Mexico, *Respondent’s Post-Hearing Submission*, para. 177. Before the tribunal it did not address the public health risks of the contamination, but admitted that “the former owners of COTERIN were not in compliance with the law and that the tangible result of their activities was a site in need of remediation”.

<sup>70</sup> Wheat, ‘Toxic Shock in a Mexican Village’; Gaines, ‘Environmental Policy Implications of Investor-State Arbitration’, p. 178.

<sup>71</sup> Metalclad v. Mexico, *Respondent’s Post-Hearing Submission*, para. 50.

<sup>72</sup> Metalclad v. Mexico, *Award*, para. 29-30; Wheat, ‘Toxic Shock in a Mexican Village’.

the pre-Metalclad period”, but would further insist on the need to distinguish between its own ownership of the site and the conduct of the former owners.<sup>73</sup> While it remarks that the “federal authorities in particular were greatly influenced by the change in ownership”, the local community and the national environmental groups that subsequently became involved were not persuaded that a landfill at the site was a good idea.<sup>74</sup>

Given its geo-physical conditions, the site itself was not ideal for a hazardous waste landfill; an independent study revealed that an aquifer beneath the site supplied water to the area, and an advisory committee set up by Metalclad was tasked to investigate precisely whether “the engineering project could *remediate the natural disadvantages* of the physical surroundings of the site”.<sup>75</sup> A measure of trust would therefore have been required in Metalclad’s ability and inclination to construct a sufficiently safe landfill. Fernando Bejarano Gonzales, coordinator for the Campaign on the Hazardous Waste Program of Greenpeace Mexico, maintained that “[m]ost of the Mexican environmental standards governing site selection for a toxic landfill have been violated by this project” and further questioned why “a North American company [would] select a site that already has problems and select, as well, a partner that has demonstrated grave irresponsibility?”<sup>76</sup> Concerns in respect to the site itself and the conduct of the previous owners were further amplified by the refusal of Metalclad to immediately remediate the contamination the company had incurred under previous owners.<sup>77</sup> It had reached an agreement with the federal authorities that remediation would occur concurrently with operations of the landfill, presumably in order to cover the costs with incomes from the new operations.<sup>78</sup> The local community would therefore have had to accept the disposal of new hazardous waste at the site before it would have the opportunity to see for itself that Metalclad intended to remediate the old contamination, and the protests that followed – including another blockade of the facility when it was intended to open – suggests that the measure of trust that this arrangement would have required was not present in the local community.<sup>79</sup>

---

<sup>73</sup> Metalclad v. Mexico, *Reply*, Chapter 3, para. 35.

<sup>74</sup> *Ibid*, Chapter 3, para. 95

<sup>75</sup> (Emphasis added) Metalclad v. Mexico, *Reply*, Chapter 3, para. 43.

<sup>76</sup> Wheat, ‘Toxic Shock in a Mexican Village’. Metalclad also hired a former Mexican state official to liaison with the municipality and the local community, but that state official was also involved in opening the landfill under its previous owners and associated with the contamination that then occurred, making it further less likely that the local community and Greenpeace would distinguish between the old and new owners. Metalclad v. Mexico, *Respondent’s Post-Hearing Submission*, para. 187.

<sup>77</sup> Metalclad v. Mexico, *Reply*, Chapter 6, para 195.

<sup>78</sup> Metalclad v. Mexico, *Reply*, Chapter 3, para 26.

<sup>79</sup> Metalclad v. Mexico, *Award*, para. 46.

Whatever the ultimate trustworthiness of Metalclad, is it fair to characterize the local community opposition as acting in a ‘classic NIMBY fashion’? Given the history of documented illegal contamination at the site; associated environmental and health hazards acknowledged even by the company itself; the decision of Metalclad to postpone remediation of pre-existing pollution; and finally the natural geo-physical disadvantages of the site; is it fair to suggest that the landfill faced “the kind of opposition common to most landfill projects”? The notion of ‘NIMBY’ implies a recognition that a landfill has to be located somewhere, but a desire to have it relocated in somebody else’s backyard instead. There is little indication that the local community groups would have thought a landfill with the above characteristics acceptable anywhere, and under such circumstances the ‘NIMBY’ label appears designed to discredit any genuine environmental concerns such groups may have.

Most investment law scholars tend to rely for their analysis on the legal documents submitted in a particular case, and the *Metalclad v. Mexico* case highlights some of the implications this may have for the portrayal of the civil society groups with which a particular dispute originates. The two parties to this dispute are ultimately COTERIN and Metalclad on the one hand, and members of the local community and national environmental groups on the other, both of whom were vying for the attention and support of any political institutions at their disposal. The local community succeeded in gaining the support of the municipal government; the Governor remarked that the extent of the opposition ensured that to do otherwise would have been a “political Molotov cocktail”.<sup>80</sup> In contrast, Bejarano Gonzales from Greenpeace Mexico maintains that the federal government “sacrificed the community’s interest by caving into Metalclad’s politic pressures” and in providing Metalclad with (many of) the permits required to re-open the landfill.<sup>81</sup> It was this conflict between the municipal and the federal government (reflected in federal government assurances that the municipality would not have a basis for denying a construction permit for the landfill, and the municipality’s subsequent denial of precisely such a permit) that led to the tribunal’s determination that Mexico had violated the investment treaty.<sup>82</sup> What the notion of investor-state arbitration often obscures is precisely the fact that the (federal) government of a state can often have been a willing accomplice of the

---

<sup>80</sup> Cited in, ‘Bill Moyers Reports: Trading Democracy’, min. 25.30.

<sup>81</sup> *Metalclad Corporation v. The United Mexican States*, *Witness Statement of Fernando Bejarano Gonzales*, ICSID Case No. ARB(AF)/97/1, para. 16, in documents related to the documentary ‘Trading Democracy’, National Security Archive Electronic Briefing Book No. 65 (undated, posted 5 February 2002, available at {<http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB65/>} accessed 7 January 2015).

<sup>82</sup> See the section on protection from ‘unfairness’ in Chapter 3.

corporation to begin with. This should render both the state's and the investor's portrayal of their local community opposition suspect, yet legal scholars on the topic appear to have taken their interpretation of the protesters at face value. In doing so, they may therefore have contributed to a problematic and potentially inaccurate representation of the local community protesters as 'NIMBY'. In turn, such a characterization does not take the particular environmental concerns of the local community in respect to the landfill into consideration as an important dimension of the story that unfolded and of the underlying dispute itself.

*Metalclad v. Mexico* reveals the importance of understanding civil society groups as parties to the investment disputes, but who then are these civil society groups? Despite the emphasis on a transnational capitalist class as one of the primary agents in the investment law context, it does not follow that its civil society adversary is organized along (working) class lines. In contrast, of the investment disputes that relate to environmental protection measures that serve as the focus for this thesis, very few are class-based groups: most are local community movements, broader social movements, or non-governmental organizations of various kinds who emphasize the protection of the environment as a key concern. There is sometimes a distinction drawn between 'old' class-based social movements and 'new' social movements that are defined by identity (gender, ethnicity, etc) or "supra-class" concerns such as the environment, but neither are these social movements necessarily "supra-class".<sup>83</sup> Many disputes emerge when corporations engage or seek to engage in environmentally destructive activities that in turn affect people's livelihoods. For example, *Pacific Rim v. El Salvador* initially emerged after local farmers discovered that the river they used for irrigation had dried up already at the exploratory stages of the company's gold mining project.<sup>84</sup> *Bilcon v. Canada* arose in part because of concerns about the impact of a large quarry and marine terminal for shipping on whales were raised by local people who made a living from eco-tourism and whale-watching trips.<sup>85</sup> *Burlington Resources v. Ecuador* arose when indigenous groups found the rainforest they depended on inaccessible due to explosives used in oil exploration.<sup>86</sup> Many

---

<sup>83</sup> Martin Shaw, 'Civil Society and Global Politics: Beyond a Social Movements Approach', *Millennium – Journal of International Relations*, 23:3 (1994), p. 652.

<sup>84</sup> *Pacific Rim* claims that it used water from the river only temporarily, and after protests had emerged it committed not to use river water directly but to collect it through rainfall. Randal C. Archibold, 'First a Gold Rush, Then the Lawyers', *New York Times* (25 June 2011), available at {[http://www.nytimes.com/2011/06/26/world/americas/26mine.html?pagewanted=all&\\_r=2&](http://www.nytimes.com/2011/06/26/world/americas/26mine.html?pagewanted=all&_r=2&)} accessed 15 March 2015.

<sup>85</sup> Robert Fournier, Jill Grant & Gunter Muecke, 'Environmental Assessment of the Whites Point Quarry and Marine Terminal Project', *Joint Review Panel Report* (October 2007), p. 75-78.

<sup>86</sup> Inter-American Court of Human Rights, 'Case of Kichwa Indigenous People of Sarayaku v. Ecuador', *Judgement: Merits and Reparations* (27 June 2012).

investment disputes arise from civil society groups who occupy a disadvantaged position within a global capitalist economy – even if they are not working class – though in some others the middle/upper class background of the company’s adversary is critical to their success. *St. Mary’s v. Canada* was prompted by a very successful struggle within a relatively wealthy rural community against a large quarry, and the organizers raised almost one million Canadian dollars by framing contributions “as a kind of insurance against ensuing property devaluation”.<sup>87</sup> Many other investment disputes in respect to the environment are nevertheless indeed ‘supra-class’ in so far as they emerge from concern about life itself – from the health risks of pesticides, hazardous waste landfills, or nuclear power. Investment disputes always by definition emerge on the one hand from corporations, but there is no set rule about what kind of societal groups oppose them or the particular practices they are involved in.

Corporations, and sometimes states, are often inclined to distinguish between local community opposition to an investment project on the one hand, and national civil society groups or more widespread social movements on the other. This often places the company’s adversaries in a no-win situation. For instance, in *Metalclad v. Mexico* the local community opposition is dismissed as ‘NIMBY’ while opponents from further afield, often more organized civil society groups that campaign on specific issues (in this case primarily Greenpeace), are dismissed as “radical and inflexible”.<sup>88</sup> Similarly, *Pacific Rim* describes the civil society opposition from beyond the local area as “extremist”; its press releases refer to “rogue” civil society organizations and even Oxfam is accused of having “factions” that are “very anti-development”.<sup>89</sup> Despite the tendency to distinguish between local and outside opposition, it is very often out of solidarity with local struggles or out of concern with setting a dangerous precedent that wider campaigns arise. In *Metalclad v. Mexico* the local community had taken the initiative to approach Greenpeace for support, while in *Enron v. India* national groups became involved in a local struggle that was conceived as “symbolic and important”.<sup>90</sup> In many

---

<sup>87</sup> Jeff Mahoney, ‘Quarry Foes Set to Celebrate Holding Their Ground’, *Hamilton Spectator* (24 April 2013), available at {<http://www.stopthequarry.ca/news/latestnews/>} accessed 28 March 2014.

<sup>88</sup> *Metalclad v. Mexico*, *Reply*, Chapter 6, para. 222, 216.

<sup>89</sup> *Pac Rim Cayman LLC v. Republic of El Salvador*, *Memorial on the Merits and Quantum*, ICSID Case No. ARB/09/12 (29 March 2013), para. 331; Pacific Rim Mining, ‘Pacific Rim Provides a Progress Report on Activities in El Salvador and Nevada,’ *News Release* (30 April 2012), available at {<http://www.pacrim-mining.com/s/News.asp?ReportID=522141>} accessed 7 January 2013; Mining Watch, *Debunking Eight Falsehoods By Pacific Rim Mining / OceanaGold in El Salvador*, (March 2014), p. 6.

<sup>90</sup> *Metalclad v. Mexico*, *Witness Statement of Fernando Bejarano Gonzales*, para. 3-5; Medha Patkar, ‘Against Globalization – And For Power to the People: An Interview with Medha Patkar’, *Multinational Monitor*, 18:11 (November 1997), available at {<http://www.multinationalmonitor.org/hyper/mml197.07.html>} accessed 11 July 2014.

cases local or national groups also reach out to international civil society organizations that can amplify their message.<sup>91</sup>

There is no assumption that people – whatever their structural position within a global economy – will rise up to oppose foreign corporations, but these investment disputes arise when a sub-section of the people do. But what about other sub-sections within that community or society? Many of the investment disputes considered here involve not only the corporations and their civil society opponents, but also other societal groups that may support either of the initial parties to the dispute, and many investment disputes initially involve polarizing intra-community struggles. These struggles often raise difficult questions about the priority accorded to the jobs promised by the investment project vis-à-vis environmental concerns or other priorities. In *Renco v. Peru*, a dispute over pollution from a metals smelter, workers at the smelter castigated civil society organizations concerned with its health effects as ‘Anti-Labor’ and pelted researchers aspiring to take blood samples to assess lead levels with stones and eggs.<sup>92</sup> A neurologist at the local hospital, who claimed to have received death threats for issuing warnings about the health effects of pollution from the smelter, lamented that “[p]eople here have to choose between two alternatives that aren’t really alternatives... do you want life, or do you want work?”<sup>93</sup> Such dilemmas recur in several other cases; in the context of local community opposition to Bilcon’s quarry in a rural and increasingly jobless region of Canada, a placard at a rally in favour of the quarry simply asked “who will feed my children?”<sup>94</sup>

The next section will argue that the corporation is party to these intra-*state* struggles in so far as they too seek to influence domestic state institutions, but they are also party to the intra-*community* struggles. The corporations are often actively involved in these struggles from the very beginning, in attempting to persuade certain sections of the population while directly opposing the unpersuadable. The tools at their disposal include the provision of positive information about the anticipated benefits of the investment (especially work opportunities), as well as directly attacking any negative portrayals of the project – Infinito Gold went so far as

---

<sup>91</sup> For instance, Greenpeace Mexico requested the support of Greenpeace United States to organize a protest before Metalclad’s headquarters in California, and the El Salvadoran social movement has worked closely with solidarity groups in the U.S. *Metalclad v. Mexico*, *Witness Statement of Fernando Bejarano Gonzales*, para. 13; International Allies Against Mining in El Salvador, ‘About Us’, available at {<http://www.stopesmining.org/j25/index.php/who-we-are2>} accessed 9 January 2015.

<sup>92</sup> Jon Miller, ‘Peru: Life Under a Toxic Cloud’, *Frontline World* (1 March 2007), available at {<http://www.pbs.org/frontlineworld/blog/2007/03/peru.html>} 17 April 2014.

<sup>93</sup> *Ibid.*

<sup>94</sup> Cited in, Clayton & Bilcon v. Canada, *Memorial of the Investors*, para. 259.

to demand to vet the content of a University of Costa Rica course on mining and brought several, so far unsuccessful, defamation suits against opponents of its project.<sup>95</sup> In this context, the charitable contributions that companies often detail in submissions to the investment tribunal as evidence of their ‘corporate social responsibility’ are also far from politically innocent. Charitable contributions are unsurprisingly used to win over local community support and as a consequence to undermine any opposition, and given this role in the social struggle these can become very controversial – protesters against Pacific Rim’s gold mine in El Salvador went so far as to blockade an eye exam clinic sponsored by the company, presumably on the grounds that it was used to buy support for the project.<sup>96</sup> Some forms of corporate social responsibility also have more subtle effects on the underlying social struggles. For instance, in its memorial to the investment tribunal, Renco provides extensive details on measures it had taken to help the local community, including house visits to train people in hand washing, bathing and cleaning the house so as to limit exposure to lead.<sup>97</sup> One local resident nevertheless observed that mothers had come to feel personally responsible for their children’s lead poisoning after the company had stressed their “bad hygienic habits”, and the company’s house visits to train people in cleanliness may therefore have contributed to reducing opposition to the smelter itself as the cause of the lead contamination of the area.<sup>98</sup>

The investment projects considered in this thesis often have hugely divisive effects on inter- and intra-community relations, and the companies’ tactics often play a considerable part in nurturing such conflicts, either as an unintended consequence or as part of a divide-and-rule strategy to ensure the projects’ acceptance. For instance, the underlying dispute behind *Burlington Resources v. Ecuador* emerged from the opposition of the Sarayaku indigenous people to oil exploration and exploitation in their ancestral lands. The Sarayaku people have their own authority structure that is recognized by law in Ecuador, along with legal title to the land, and the company initially sought to work through these governance structures.<sup>99</sup> The Sarayaku people nevertheless decided not to accept the project in anticipation of the

---

<sup>95</sup> Mining Watch Canada, Council of Canadians, et al, *Civil Society Letter to CEO of Infnito Gold* (16 April 2013), p. 2, available at {<http://www.miningwatch.ca/news/groups-warn-infnito-gold-re-continued-threats-against-costa-rica-over-crucitas-gold-project>} accessed 9 January 2014.

<sup>96</sup> *Pac Rim v. El Salvador*, *Memorial on the Merits and Quantum*, p. 162, footnote 610.

<sup>97</sup> *Renco v. Peru*, *Memorial on Liability*, para. 124; *The Renco Group, Inc. v. The Republic of Peru*, *Amended Notice of Arbitration and Statement of Claim*, UNCT/13/1 (9 August 2011), para. 34.

<sup>98</sup> Cited in FIDH (International Federation for Human Rights), *Peru: Metallurgical Complex of La Oroya: When Investors’ Protection Threaten Human Rights* (December 2012), p. 15, available at {<https://www.fidh.org/International-Federation-for-Human-Rights/americas/Peru,565/report-on-the-situation-in-la-oroya-when-investor-protection-threatens-13241>} accessed 17 April 2014.

<sup>99</sup> Inter-American Court of Human Rights, ‘Case of Kichwa Indigenous People’, para. 51-57, 61, 149.

environmental consequences and the impact on their way of life, and rejected the charitable contributions offered by the company. In response, the company set up the ‘Independent Communities of Sarayaku’ and provided charitable contributions conditional on the acceptance of the investment to these communities instead.<sup>100</sup> The Inter-American Court of Human Rights was later to observe that this “failed to respect the internal and external structures of authority and representation within and outside the communities”, and the company’s decision to circumvent these authority structures served to “fragment the communities” and “led to conflicts between the communities [...] and affected intercommunity relations”.<sup>101</sup> Similar concerns have been raised in respect to other cases; in respect to the intra-community conflict that emerged from Pacific Rim’s proposals a local resident remarked that “[n]ow in our communities, you don’t trust people you’ve trusted your entire life”.<sup>102</sup>

### ***Concluding Remarks on Social Groups in Investment Disputes***

Many investment disputes originate directly from conflicts between transnational corporations and local communities or environmental groups or movements. Some of these involve petitions, letter-writing campaigns or demonstrations.<sup>103</sup> Others involve direct action tactics or more significant societal upheavals – for instance, several of the Mexican campaigns against particular hazardous waste landfills involve human chains and blockades around the sites;<sup>104</sup> *Bear Creek v. Peru* involved major road blockades;<sup>105</sup> *Tecmed v. Mexico* featured a 192-day sit-in of the municipal town hall;<sup>106</sup> and the Sarayaku uprooted themselves from their villages

---

<sup>100</sup> Inter-American Court of Human Rights, ‘Case of Kichwa Indigenous People’, para. 82.

<sup>101</sup> *Ibid.*, para. 194-195, 203, 210.

<sup>102</sup> Cited in Robin Broad & John Cavanagh, ‘Like Water for Gold in El Salvador’, *The Nation* (1-3 August 2011).

<sup>103</sup> The dispute that led to *Vattenfall (I) v. Germany* involved a petition by 12,000 people in Hamburg not to proceed with the coal-fired power plant; in *Metalclad* over 100 civil society organizations had signed a letter against the hazardous waste landfill to the federal Mexican government; and Enron’s Dabhol project saw local community demonstrations that were according to Human Rights Watch met with “brutal human rights violations”. Bernasconi, ‘Background Paper on *Vattenfall v. Germany* Arbitration’, p. 1; *Metalclad v. Mexico, Witness Statement of Fernando Bejarano Gonzales*, para. 11; Human Rights Watch, *The Enron Corporation: Corporate Complicity in Human Rights Violations* (1999), summary of report available at {<http://www.hrw.org/reports/1999/enron/index.htm>} accessed 11 July 2014.

<sup>104</sup> On *Metalclad v. Mexico*, see *Metalclad v. Mexico, Award*, para. 46; Wheat, ‘Toxic Shock in a Mexican Village’; Gaines, ‘Environmental Policy Implications of Investor-State Arbitration’, p. 178. On *Tecmed v. Mexico*, see *Tecmed v. Mexico, Award*, para. 108. On *Abengoa v. Mexico*, see Fach Gómez, ‘ICSID Claim by Spanish Companies against Mexico’, p. 9.

<sup>105</sup> Nick Magel, ‘Peru’s Indigenous Communities Make a Business Case for FPIC’, *Earthworks Blog* (5 July 2011), available at {[http://www.earthworkSACTION.org/earthblog/detail/peru\\_s\\_indigenous\\_communities\\_make\\_a\\_business\\_case\\_for\\_fpic#.VLFi82dyaM8](http://www.earthworkSACTION.org/earthblog/detail/peru_s_indigenous_communities_make_a_business_case_for_fpic#.VLFi82dyaM8)} accessed 10 January 2015.

<sup>106</sup> *Tecmed v. Mexico, Award*, para. 108.



and set up ‘Peace and Life camps’ throughout the rainforest to oppose Burlington Resources.<sup>107</sup> The non-environmental case of Bechtel v. Bolivia originated from what has come to be known as the Cochabamba ‘water war’.<sup>108</sup> Several of the disputes between corporations and their opponents have resulted in injuries or even deaths – police beat up local residents who protested Enron’s power plant;<sup>109</sup> six protesters were killed and more than thirty injured in region-wide protests that appear to have initially emerged from protests against Bear Creek’s proposed silver mine;<sup>110</sup> at least four anti-mining campaigners protesting Pacific Rim’s gold mine were murdered and several others received death threats.<sup>111</sup> Despite the fact that these disputes often involve major conflicts between transnational corporations and their civil society opponents, academic research on the topic nevertheless continues to perceive investment disputes as simply ‘investor-state disputes’ and pay scant attention to the civil society groups from which the disputes originate, and the social struggles that investment arbitration arises from.

It could plausibly be argued that there is no reason for investment law scholars to preoccupy themselves with such questions. After all, foreign investment projects all around the world face opposition from local communities and environmental groups, and there is little that sets the above struggles apart aside from the fact that they will be resolved in international investor-state arbitration. The disputed actions are furthermore, whatever their origins, formally taken by ‘states’. There are nevertheless two important reasons why the underlying origins of the

---

<sup>107</sup> Inter-American Court of Human Rights, ‘Case of Kichwa Indigenous People’, para. 100.

<sup>108</sup> Amy Goodman, ‘The Cochabamba Water Wars: Marcela Olivera Reflects on the Tenth Anniversary of the Popular Uprising Against Bechtel and the Privatization of the City’s Water Supply’, *DemocracyNow!* (19 April 2010), available at {[http://www.democracynow.org/2010/4/19/the\\_cochabamba\\_water\\_wars\\_marcella\\_olivera](http://www.democracynow.org/2010/4/19/the_cochabamba_water_wars_marcella_olivera)} accessed 10 January 2015; The Economist, ‘Water War in Bolivia’ (10 February 2000), available at {<http://www.economist.com/node/280871>} accessed 10 January 2015; Aguas del Tunari, S.A. v. Republic of Bolivia, *Decision on the Respondent’s Objections to Jurisdiction*, ICSID Case No. ARB/02/3 (21 October 2005).

<sup>109</sup> Human Rights Watch contends that demonstrations were met with “brutal human rights violations”. Human Rights Watch, ‘The Enron Corporation’.

<sup>110</sup> While the protests emerged after the cancellations of Bear Creek’s permits and were focused on large mining and infrastructure projects in general, the Bear Creek project appears to have been the catalyst for such wider projects. CBC News, ‘Bear Creek Fights Back in Peru Mine Dispute’ (27 June 2011), available at {<http://www.cbc.ca/news/business/bear-creek-fights-back-in-peru-mine-dispute-1.1126798>} accessed 12 June 2014; The Globe and Mail, ‘Peru Protest Turns Deadly’.

<sup>111</sup> Pac Rim Cayman LLC v. Republic of El Salvador, *Application for Permission to Proceed as Amici Curiae by Mesa Nacional Frente a la Minería Metálica de El Salvador*, ICSID Case No. ARB/09/12 (2 March 2011), p. 10-11; Amnesty International, ‘Death Threats for Activists Demanding Justice’, *Urgent Action 223/09* (27 August 2009); Richard Steiner, ‘El Salvador: Gold, Guns, and Choice: The El Dorado Gold Mine, Violence in Cabanas, CAFTA Claims, and the National Effort to Ban Mining,’ *International Union for the Conservation of Nature & Commission on Environmental, Economic and Social Policy* (February 2010), p. 12-15, available at {<http://www.stopesmining.org/j25/index.php/background-on-mining/126-el-salvador-guns-gold-and-choice>} accessed 3 April 2014; The Council of Canadians, ‘Murder in El Salvador Calls Canadian Mining Interests Into Question’, *Media Release* (20 June 2011), available at {<http://www.canadians.org/fr/node/333>} accessed 10 January 2015.

disputes deserve further attention by scholars of international investment law. Firstly, from a legal point of view, it is often the very nature of the state as an institution responsive to societal struggles that renders it vulnerable to investment arbitration in the first place, as will be discussed further in section 3 of this chapter, and an adequate understanding of the legal dispute therefore requires an understanding of how and why the state responded to societal pressures. Secondly, and from a political point of view, an understanding of the struggles between transnational corporations and their civil society opponents is required to understand the particular role that international investment law plays in global politics today. As the next step in the analysis, the achievement of an alternative understanding nevertheless requires an adequate conception of the ‘state’.

### **The Battle for the State**

The first section of this chapter has illustrated how the underlying struggles that prompt investment disputes are often ultimately between corporations and their opponents amongst local communities or environmental movements. For an investment dispute to emerge, that underlying struggle nevertheless needs to be transformed into an investor-state dispute. The aim of this second section is to demonstrate how a dispute between opposing non-state groups evolves into a dispute between an investor and a state.

Given the nature of the state as an institution for the governance of society, Ralph Miliband observes that it is ultimately “for the state’s attention, or for its control, that men compete; and it is against the state that beat the waves of social conflict. It is to an ever greater degree the state which men encounter as they confront other men”.<sup>112</sup> In the context of investment disputes, the struggle for the state can be likened to a ‘tug-of-war’ where two opposing societal groups each seeks to pull the state towards their cause, and corporations very often win such struggles. Sometimes the company’s opponents are nevertheless victorious in their battle for the state, and this is when companies have acquired the right to seek recourse to investor-state arbitration. This section will first provide an illustration of how such a tug-of-war for a particular state (El Salvador) has played out in practice, and will thereafter discuss the tools that different societal groups have at their disposal in that tug-of-war and consequently the reasons why states have come out in support of one or another societal group.

---

<sup>112</sup> Ralph Miliband, *The State in Capitalist Society* (London: Weidenfeld and Nicolson, 1969), p. 3.

The investment dispute *Pacific Rim v. El Salvador* evolved from an underlying dispute between the company and local community groups, and later a broader social movement against mining. The first signs of conflict emerged during the company's exploratory work in search of gold in the province of Cabañas, and were triggered by distinctly local concerns – farmers were concerned that the cause of water shortages in wells and the local river were due to the company's pumping of water for its exploratory work, and other local residents maintained that the company had trespassed on their property in order to drill exploratory bore holes.<sup>113</sup> The opposition intensified during the public consultation period, which was required to convert the company's exploration licence into one for exploitation, and new local community groups, such as the Environmental Committee of Cabañas, were formed to oppose the project.<sup>114</sup> The Cabañas-based Association for Economic and Social Development (ADES) commissioned an independent report on the company's environmental impact assessment (EIA) from an American hydro-geologist, which concluded that the EIA had failed to address the significant environmental concerns of cyanide-leach gold mining and “would not be acceptable to regulatory agencies in most developed countries”.<sup>115</sup> The use of two tons of cyanide a day raised concerns about spills and the adequacy of the company's plans for water treatment, as well as the sheer scale of the company's requirement for water: Pacific Rim would have used as much water in a single day as a Salvadoran family living near the mine used for household consumption in twenty years.<sup>116</sup> Environmental concerns were further amplified by severe acid mine drainage from an existing gold mine in a nearby province operated by the Commerce Group, which was later also to bring a now discontinued investment dispute against El Salvador.<sup>117</sup> Such local concerns gave rise to a broader social movement against mining, prompted in part by concerns about the risk of Pacific Rim's operations to the Río Lempa River, which provides over half the country's population with its drinking water.<sup>118</sup> The National Roundtable on Mining (colloquially known as La Mesa), an umbrella organization of local

---

<sup>113</sup> Broad & Cavanagh, ‘Like Water for Gold in El Salvador’; *Pac Rim v. El Salvador, Application for Permission to Proceed as Amici Curiae*, p. 5.

<sup>114</sup> *Pac Rim v. El Salvador, Application for Permission to Proceed as Amici Curiae*, p. 6.

<sup>115</sup> Robert E. Moran, ‘Technical Review of the El Dorado Mine Project Environmental Impact Assessment (EIA), El Salvador’ (October 2005), p. v.

<sup>116</sup> *Ibid*; Council on Hemispheric Affairs, ‘Pacific Rim v. El Salvador and the Perils of Free Trade in the Americas’ (30 July 2010), available at {<http://www.coha.org/pacific-rim-v-el-salvador-and-the-perils-of-free-trade-in-the-americas/>} accessed 10 January 2015; *Pac Rim v. El Salvador, Application for Permission to Proceed as Amici Curiae*, p. 8.

<sup>117</sup> John Cavanagh & Robin Broad, ‘Mining for Gold: A ‘Pact With The Devil’?’, *Yes! Magazine* (28 August 2012), available at {<http://www.yesmagazine.org/blogs/john-cavanagh-and-robin-broad/gold-mining-a-pact-with-the-devil>} accessed 11 January 2015; Steiner, ‘El Salvador: Gold, Guns, and Choice’, p. 20-21.

<sup>118</sup> *Pac Rim v. El Salvador, Application for Permission to Proceed as Amici Curiae*, p. 8.

community groups and national environmental organizations, was formed in 2006. The influential Conference of Bishops of the Catholic Church of El Salvador issued a statement in opposition to mining in 2007, which concluded that “[n]o material advantage can be compared with the value of human life”.<sup>119</sup> An opinion poll in the same year found that 62.5% of people in El Salvador opposed mining.<sup>120</sup>

While there was substantial opposition to mining, such opposition was by no means unanimous and the government of El Salvador observes that the local community “had become highly polarized for and against mining”.<sup>121</sup> Pacific Rim presents itself as “an environmentally and socially responsible mining company”,<sup>122</sup> and maintains that cyanide-leach gold mining in the Salvadoran context would have “a negligible impact on the local environment”.<sup>123</sup> The company worked hard to sway the local opinion, and presented opponents to the project as “anti-development” and ignorant of the realities of modern mining.<sup>124</sup> The company had also funded social projects in the region, and its promise of work to a rural region with few job opportunities contributed to the support it received; indeed, one local resident resigned himself to supporting the project “because I need work, but I’d do it knowing there’d be consequences tomorrow”.<sup>125</sup> As part of the intra-community struggles that developed for and against mining, four environmental activists were murdered and several others have received death threats for their involvement in anti-mining protests,<sup>126</sup> to the extent that the Inter-American Court of Human Rights issued precautionary measures in 2009 to protect members of one of the civil society groups as well as reporters of a radio station critical of mining.<sup>127</sup> Even if Pacific Rim is not directly responsible for the murders, it is clear that the wider debate on mining prompted

---

<sup>119</sup> Pac Rim v. El Salvador, *Application for Permission to Proceed as Amici Curiae*, p. 6.

<sup>120</sup> Ibid, p. 6.

<sup>121</sup> Pac Rim Cayman LLC v. Republic of El Salvador, *Counter-Memorial on the Merits*, ICSID Case No. ARB/09/12 (10 January 2014), para. 241.

<sup>122</sup> Ibid, para. 2.

<sup>123</sup> In update to shareholders, Pacific Rim, ‘Pacific Rim Provides a Progress Report on Activities in El Salvador and Nevada’, *Market Wired* (30 April 2012), available at {<http://www.marketwired.com/press-release/pacific-rim-provides-a-progress-report-on-activities-in-el-salvador-and-nevada-tsx-pmu-1650150.htm>} accessed 8 October 2014.

<sup>124</sup> Pacific Rim Mining, ‘Pacific Rim Provides a Progress Report’; Mining Watch, *Debunking Eight Falsehoods*, p. 5; Whitney Eulich, ‘Mining Is No Savior For El Salvador, Says Catholic Church’, *The Christian Science Monitor* (10 September 2013), available at {<http://www.csmonitor.com/World/Americas/2013/0910/Mining-is-no-savior-for-El-Salvador-says-Catholic-Church>} accessed 11 January 2015.

<sup>125</sup> Ibid.

<sup>126</sup> Pac Rim v. El Salvador, *Application for Permission to Proceed as Amici Curiae*, p. 10-11; Amnesty International, ‘Death Threats for Activists Demanding Justice’; Steiner, ‘El Salvador: Gold, Guns, and Choice’, p. 12-15; Council of Canadians, ‘Murder in El Salvador’.

<sup>127</sup> Inter-American Commission on Human Rights, ‘Héctor Antonio García Berríos and Others, El Salvador’, *PM239/09* (7 October 2009).

by its proposal has provoked significant intra-community tensions. In some areas, the conflict over mining appears to have even reignited hostilities from the Salvadoran civil war, which ended with a peace agreement in 1992. Two environmental NGOs issued a “Declaration of Independence” from mining licences granted by the government, on the basis that the lands were the “fruits of the peace accords”, and the body of one of the murdered activists showed signs of torture consistent with Death Squad tactics from the civil war.<sup>128</sup> So how did this dispute between the mining company and its local supporters on the one hand, and other parts of the local community and environmental groups on the other, evolve into an investor-state dispute?

Within the investment law literature there is a tendency to expect the state to behave as a unitary actor, but this case study illustrates how that expectation contradicts the very nature of the state as an institution responsive to societal pressures. The investment disputes considered in this chapter very often reveal conflicting pressures on state officials, and in particular pressures stemming from the public by virtue of the democratic structure of many states and from business actors by virtue of the capitalist structure of the global economy. Within the present investment dispute against El Salvador, the institutional structure of the state as well as the state officials occupying positions within the state were from the outset favourably inclined towards mining investments in general and Pacific Rim’s proposals in particular. Before the arbitral tribunal, the company goes to great lengths to prove that the state was supportive in the initial stages of the development of the project, in order to set up the argument that its ‘legitimate expectations’ were breached in subsequently not permitting the project to proceed.<sup>129</sup> Pacific Rim points out that when it had initially begun to develop its mining plans, El Salvador ranked 11<sup>th</sup> globally in the Heritage Foundation’s Index of Economic Freedom, a testament to its adoption of a neoliberal economic strategy in general. It furthermore maintains that high level politicians had “consistently assured” the company that they were “supportive” of the company’s own gold mining proposals.<sup>130</sup> While the investment law literature often assumes that the investor is unrepresented within the state due to its status as a foreigner without formal rights of participation, the company in this case does not appear to have felt fettered by its

---

<sup>128</sup> Denis Collins, ‘The Failure of Socially Responsible Gold Mining MNC in El Salvador: Ramifications of NGO Mistrust’, *Journal of Business Ethics*, 88 (2009), p. 257-258; Steiner, ‘El Salvador: Gold, Guns, and Choice’, p. 13.

<sup>129</sup> Pac Rim v. El Salvador, *Memorial on the Merits and Quantum*, para. 3-5, 10, 201-203.

<sup>130</sup> The company proceeds from this to suggest that state had ‘induced’ the investment, but provided that there is a distinction between being ‘supportive of’ and ‘inducing’ it does not present evidence in this respect. Pac Rim v. El Salvador, *Memorial on the Merits and Quantum*, para. 5, 124.

foreign status. The company is explicit that its lobbying measures often bore fruit; in praising the 2001 reform of El Salvador's mining laws to the mining companies' advantage, the company also candidly admits that these were laws that "we, as a matter of fact, had a hand in helping the government draft".<sup>131</sup> It was only when civil society opposition emerged that it found the state less responsive towards its requests, and even then the tug-of-war for the state was ongoing for several years until the state's support seems to have shifted decisively towards the company's opponents.

In 2006-2007, as opposition towards mining was gaining ground and the company was finding it more difficult than anticipated to secure the conversion of the exploration permit to an exploitation permit,<sup>132</sup> each of the two non-state adversaries lobbied for a bill before the legislative assembly. La Mesa lobbied in favour of a law to prohibit mining, but it did not achieve the required legislative support.<sup>133</sup> Pacific Rim in contrast helped to draft and lobbied in favour of a law to make it easier for companies to gain mining permits; the proposed law would have removed the requirement that land owners authorize mining under their land (many local landowners opposed mining and were not inclined to provide such permission), and would also have changed the permitting process to make it easier to proceed from exploration to exploitation.<sup>134</sup> Revealing the pressures that state officials perceived themselves to be under from the company's opponents, Pacific Rim's internal e-mails from the time note that it had been informed that the governing party, ARENA, had decided to postpone the introduction of the company's bill to the legislative assembly until after the elections "for reasons of election strategy, to not stir up opposition to the reform project".<sup>135</sup> The company further maintained that resistance to the pro-mining law was not "on the part of the government" but related to

---

<sup>131</sup> This remark relates to the reform of the mining law in 2001, which for example extended the period permitted for exploratory work. *Pac Rim v. El Salvador, Memorial on the Merits and Quantum*, para. 78.

<sup>132</sup> Before the investment tribunal, El Salvador argues that the company does not meet many of the requirements for receiving an exploitation permit. For instance, the environmental permit is not a mere 'formality', the company has not submitted a proper feasibility study, and it lacks the consent of the landowners. The company argues that it should not require consent from the landowners in the first place, that the 'pre-feasibility study' is in fact a proper feasibility study, that it was entitled to an environmental permit, and crucially that these are all side-issues precisely because the main reason for a lack of progress is a *de facto* ban on mining. *Pac Rim v. El Salvador, Memorial on the Merits and Quantum*; *Pac Rim v. El Salvador, Counter-Memorial on the Merits*.

<sup>133</sup> *Pac Rim v. El Salvador, Memorial on the Merits and Quantum*, para. 314; La Mesa (National Roundtable on Metallic Mining), 'La Mesa to Introduce New Mining Legislation', *Press Release* (22 September 2013), available at {<http://www.stopesmining.org/j25/index.php/salvadoran-mining-ban/82-mesa-releases/251-press-release-la-mesa-to-introduce-new-mining-legislation>} accessed 27 January 2015.

<sup>134</sup> *Pac Rim v. El Salvador, Memorial on the Merits and Quantum*, section F.1.b. & G.2; see also *Pac Rim v. El Salvador, Counter-Memorial on the Merits*.

<sup>135</sup> *Pac Rim v. El Salvador, Memorial on the Merits and Quantum*, p. 150, footnote 565.

“electoral concerns”.<sup>136</sup> In other internal e-mails the company is explicit about its success in lobbying the government; “we have sought and obtained the commitment of support for the project from the PCN (one of the moderate parties – their vote along with ARENA will ensure that the reform passes)” and the e-mail concludes, “[w]ith a great deal of satisfaction, I can inform you that we are ready in the legislative area”.<sup>137</sup>

The company did nevertheless not manage to replicate its earlier successes in drafting the country’s mining laws and the bill did not pass, but this reveals the conflicting pressures that state officials were under from the company on the one hand, and civil society groups opposed to mining on the other. It also reveals that the governing right-wing ARENA party was from the outset favourable towards mining; the company describes how even after it had publicly “ceased all official communication” with the company, high-level politicians met privately to offer personal assurances, and US embassy officials suggest that the administration had provided a “wink and a nod” that permits would eventually be approved.<sup>138</sup> As late as 2007 the president, Antonio Saca, had requested participation in a pro-mining documentary, but by the following year he had adopted a more cautious stance and pronounced that “[w]e want to generate a space to reflect on the benefits or disadvantages of mining”, and that once “we’re shown proof that green mining exists [then] a law must be made to make everything very clear”.<sup>139</sup> By 2009, in the run-up to an election in which the opposition FMLN party campaigned against mining, and faced also with the possibility of an international investment dispute with the company, Saca conclusively pronounced that he would “not grant a single permit” for mining.<sup>140</sup> By that stage he appears to have decided it more prudent to face the wrath of the company before an international investment tribunal than the wrath of the anti-mining groups and a population increasingly sceptical of mining in the run-up to an election.

Before the arbitral tribunal, the company goes to great lengths to show how the state initially supported the company, and appears baffled – even “astonished” – that state officials were to

---

<sup>136</sup> Pac Rim v. El Salvador, *Memorial on the Merits and Quantum*, p. 150, footnote 565.

<sup>137</sup> Ibid, p. 150, footnote 565.

<sup>138</sup> Pac Rim v. El Salvador, *Application for Permission to Proceed as Amici Curiae*, p. 16; Steiner, ‘El Salvador: Gold, Guns, and Choice’, p. 8.

<sup>139</sup> Pac Rim v. El Salvador, *Memorial on the Merits and Quantum*, para. 383; Pac Rim Cayman LLC v. Republic of El Salvador, *Decision on the Respondent’s Preliminary Objections Under CAFTA Articles 10.20.4 and 10.20.5*, ICSID Case No. ARB/09/12 (2 August 2010), para. 77

<sup>140</sup> Pac Rim v. El Salvador, *Decision on the Respondent’s Preliminary Objections*, para. 79.

respond to the civil society opposition by introducing a moratorium on mining.<sup>141</sup> The company repeatedly remarks that El Salvador’s decision is “politically motivated”, and by implication illegitimate, and that it has breached the company’s ‘legitimate expectations’.<sup>142</sup> La Mesa, the umbrella organization for the local community and environmental groups that opposed mining and whose activism prompted the conflict, is not a party to the investment dispute – the underlying dispute has now evolved into an investor-state dispute – but the tribunal permitted it to submit an *amicus curiae* brief. That brief is unique amongst *amicus curiae* briefs in investment disputes. Rather than simply detailing the public interest implications of a particular state policy – and despite the fact that *amicus curiae* are formally non-parties to the dispute – La Mesa directly maintains that it, and not El Salvador, is the company’s true adversary in the investment proceedings. La Mesa maintains that “[t]he government of El Salvador was not the source of Pacific Rim’s problem”, and that the Saca administration’s turn against mining was simply an attempt “to mirror popular opposition genuinely rooted elsewhere”.<sup>143</sup> La Mesa objects that “the real political controversy is between the investor and La Mesa”, and challenges the way that the dispute “has been taken to a forum where La Mesa cannot participate in equal footing”.<sup>144</sup> It is this insight that serves as the foundation for understanding the role that international investment law plays in global political struggles today.

In order to understand how investment disputes are ultimately disputes between non-state groups – as illustrated in the above dispute between Pacific Rim and La Mesa – it is imperative to understand the nature of the state itself and what ultimately leads the state to support one or another societal group in the struggle between them. Investment disputes formally arise only when a state ultimately adopts a new measure that impacts unfavourably on a particular corporation. To treat the state as an agent in its own right is to conceal the above struggles, but state officials – as human beings – do possess agency, and they are the ones who have the formal authority to make decisions on behalf of the state. As discussed in Chapter 1, the theoretical premise of this thesis is that it should not be assumed that state officials act in the ‘national interest’ or by virtue of their position within the structure of the state itself. Rather, state officials act in response to various structural pressures and on the basis of their own interests and ideas

---

<sup>141</sup> Pac Rim Cayman LLC v. Republic of El Salvador, *Response to Respondent’s Preliminary Objections*, ICSID Case No. ARB/09/12 (26 February 2010), para. 55.

<sup>142</sup> *Ibid.*, para. 53, 138.

<sup>143</sup> Pac Rim v. El Salvador, *Application for Permission to Proceed as Amici Curiae*, p. 19.

<sup>144</sup> *Ibid.*, p. 17.



as societal beings. The aim of this section is to analyse why a state, via its state officials, would take a particular side in the societal struggles considered here.

Crucially, it is important to understand that *both* corporations *and* their civil society opponents have different tools at their disposal in their tug-of-war with each other for the support of the state. This argument directly contradicts what appear to be some foundational assumptions within the investment law literature. While it is not uncommon that civil society groups that oppose particular corporations also directly oppose ‘complicit’ state officials, the investment law literature in contrast often implies that the dispute is an investor-state dispute precisely because the foreign investor is not already represented within or by the state, while the citizens of a state by definition are.<sup>145</sup> The tribunal in both *Tecmed v. Mexico* and *Azurix v. Argentina* cite a European Court of Human Rights ruling that “non-nationals” (in this context foreign investors) are “vulnerable to domestic legislation” because they “will generally have played no part in the election or designation of its authors nor have been consulted on its adoption”.<sup>146</sup> On the basis of this observation, both tribunals proceed to suggest that the citizens of a state may therefore have to “bear a greater burden” than foreign companies in the introduction of public interest measures, and by implication to compensate transnational corporations where such measures are excessively costly.<sup>147</sup> The tribunal in *Tecmed v. Mexico* elaborates that “the foreign investor has a reduced or nil participation in the taking of the decisions that affect it, partly because the investors are not entitled [*sic*] to exercise political rights reserved to the nationals of the State, such as voting for the authorities that will issue the decisions that affect such investors”.<sup>148</sup> This section will argue that while it may be true that some non-nationals (such as immigrants or refugees) lack participation and are not “consulted” in the decisions that affect them, it would be excessively formalistic to assume that this observation applies to transnational corporations.<sup>149</sup> Indeed, in the above illustrative case, *Pacific Rim* candidly admitted that it had “had a hand in helping the government draft” the “very friendly mining laws” by which it operated, an admission that is not consistent with the claim that foreign

---

<sup>145</sup> See David Schneiderman, ‘Investing in Democracy? Political Process and International Investment Law’, *University of Toronto Law Journal*, 60 (2010), pp. 910-940.

<sup>146</sup> *Azurix Corp. v. the Argentine Republic, Award*, ICSID Case No. ARB/01/12 (14 July 2006), para. 311; *Tecmed v. Mexico, Award*, para. 122.

<sup>147</sup> The tribunals’ proportionality analysis is discussed further in the section on expropriation in Chapter 3. *Azurix v. Argentina, Award*, para. 311; *Tecmed v. Mexico, Award*, para. 122.

<sup>148</sup> *Tecmed v. Mexico, Award*, para. 122.

<sup>149</sup> David Schneiderman, ‘Investing in Democracy? Political Process and International Investment Law’, *University of Toronto Law Journal*, 60 (2010), pp. 909-940.

companies have “nil participation in the taking of the decisions that affect it”.<sup>150</sup> Academic commentators frequently follow tribunals in their premise that foreign corporations lack influence on the decisions of state officials. Andrew Newcombe, for instance, suggests that transnational corporations lack a “voice” in host state policy-making because it “typically lacks representation in the political process and may not have any input into decisions that significantly affect its investment”.<sup>151</sup> In the investment disputes considered in this thesis, there is extensive evidence of corporate lobbying and also of the success of such corporate lobbying, even if the investment disputes often emerge because the state ultimately sided with the corporation’s civil society adversaries. In order to support the argument that corporations and civil society groups engage in a tug-of-war for the state, this section investigates the powerful tools that corporations can wield to lend force to their arguments and to persuade state officials to support them. It therefore seeks to illustrate why corporations are powerful enough to have “voice” in policy decisions within states even in the absence of formal representation and the right to vote. This does not mean that civil society groups lack such voice, but that the question of how a particular state relates to a particular struggle between a transnational corporation and its civil society adversary is far from the foregone conclusion implied within the investment law literature.

This chapter will look at three reasons why state officials might act the way they do in response to societal struggles. Firstly, state officials are motivated to exercise their agency in particular ways by virtue of the structure of the state itself and its position vis-à-vis other social structures. To take the most obvious examples, the structure of many states as democratic ensures that state officials need to consider the wishes of those who can vote, and the structural differentiation of the state from the economy ensures that state officials need to consider the wishes of those who control the economy. Secondly, state officials are themselves both agents in their own right with personal interests and beliefs, as well as societal beings, and their position within that society will influence their ideology, their sense of personal belonging, their loyalties, and the personal incentives they have to support one or the another adversary to the investment dispute. Thirdly, state officials are also under pressure from outside the country itself – from other states or international organizations – but these pressures themselves stem ultimately from particular (and perhaps ‘foreign’) societal groups.

---

<sup>150</sup> *Pac Rim v. El Salvador, Memorial on the Merits and Quantum*, para. 78.

<sup>151</sup> Andrew Newcombe, ‘The Boundaries of Regulatory Expropriation in International Law’, *ICSID Review*, 20:1 (2005), p. 46-47.

## *State Officials and Structural Pressures*

In describing the struggle for the state that underpins the investment disputes as a tug-of-war between the corporation and its opponents, the intention is nevertheless *not* to imply that it is only the contemporary strength of each side that determines the outcome of the struggle. Each side also has the victories or defeats of historic struggles to contend with, as these have become “congealed” in the very institutional and legal fabric of the state.<sup>152</sup> It is the structure of the state, as the congealment of historical agency, which provides the ‘strategically selective’ context within which today’s struggles take place.<sup>153</sup> State officials are important actors by virtue of their position within the structure of the state, but these positions also limit their authority and their agency can only be exercised within the parameters set by the structure of the state itself. In some circumstances the institutional structure of the state or the legal framework is so precise as to leave state officials with little room to exercise any agency at all in respect to which social group to support in a particular battle. The focus of this section is nevertheless on cases in which state officials do have a choice in how to act, but where the structural context of the state nevertheless provides them with certain incentives and disincentives to support one societal group over another.

By virtue of historic agency, the state has a particular institutional structure as well as a framework of existing laws, that in a myriad of ways can influence how state officials act in the context of new societal conflicts. The investment disputes considered here reveal that a wide variety of such pre-existing institutional features or laws or procedures, as components of the state structure, can exert pressure on state officials to support either the investor or its adversary. For instance, *Glamis Gold v. USA* concerns the proposed development of an open-pit gold mine along an ancient trail network, which the Quechan indigenous people compare in spiritual significance to Jerusalem or Mecca.<sup>154</sup> State officials emphasized a domestic legal “obligation to consult” with Native Americans and acknowledged the “exceedingly strong” objections of the Quechan people in respect to the gold mine, and this exercise of consultation may have increased the pressure that state officials felt themselves to be under to adopt the restrictions on mining that were opposed by the investor but desired by the indigenous groups.<sup>155</sup> In turn, the

---

<sup>152</sup> Robinson, *Social Theory and Globalization*, p. 165.

<sup>153</sup> Jessop, *The Future of the Capitalist State*, p. 40; Andreas Bieler & Adam David Morton, ‘The Will-O’-The-Wisp of the Transnational State’, *Journal of Australian Political Economy*, 72 (2013-2014), pp. 23-51.

<sup>154</sup> *Glamis Gold v. USA, Award*, para. 111.

<sup>155</sup> *Ibid*, para. 673-676.

existence of this ‘obligation to consult’ reflects long struggles by Native Americans to protect their rights to their historic lands. However, these state officials also confronted other structural and legal constraints that supported the investor. From the Gold Rush onwards the US has had liberal mining laws, and in this case US federal law did not allow state authorities to deny the company a mining permit altogether; it only permitted the authorities to make such a permit contingent on mitigation or reclamation requirements.<sup>156</sup> The state measure challenged before the investment tribunal was therefore not a prohibition of Glamis’ mine – as such would have been unlawful – but a new Californian requirement to backfill mines. This had the intended effect of reducing the anticipated profit margin of the gold mine sufficiently to dissuade the company from pursuing the project,<sup>157</sup> and the investment tribunal found such a backfilling requirement to be permitted by the investment treaty – but with increasing gold prices or decreasing technology costs the same battle between the company and indigenous people may arise yet again in the future. Marxist scholars contend that, in general, the state is ‘strategically selective’ in favour of a capitalist class.<sup>158</sup>

Amongst the variety of structural constraints that provide the context within which state officials make their decisions to support one or another social group, there are two that explain more directly why state officials, when given the choice, would support either the company or its opposition – the nature of many states as democratic, and the nature of the economy as ‘private’ and external to state control. It is true, as investment tribunals and the accompanying investment law literature have indicated, that citizens have power over the state through democratic influence. It is nevertheless also true that business actors, holding the levers of control of an economy that is differentiated from the state, also exercise power over state officials. This sub-section will first consider capitalism and its structural separation of the state from the economy, for this is the reason why state officials often initially support business actors, and will thereafter consider the democratic nature of the state, for this is the reason why state officials are sometimes forced to shift sides when social uprisings against particular businesses or business practices occur.

---

<sup>156</sup> Glamis Gold, Ltd. v. United States of America, *Memorial*, UNCITRAL Ad Hoc Arbitration (5 May 2006), section II.B.3; Glamis Gold v. USA, *Award*.

<sup>157</sup> Glamis Gold. v. USA, *Memorial*, section Section V.C.

<sup>158</sup> Clyde Barrow, *Critical Theories of the State: Marxist, Neo-Marxist, Post-Marxist* (Madison: University of Wisconsin Press, 1993); Jessop, *The Future of the Capitalist State*.

A distinctive characteristic of capitalism as a mode of production is the formal differentiation between the sphere of politics and the sphere of economics.<sup>159</sup> The territorial state exists alongside a (global) economy, where it is corporations and the capitalists that control them that choose where and how and if to make their investments. This implies, to cite Ellen Meiksins Wood, that “[m]any social functions are removed from the sphere of political control or communal deliberation and put under the direct control of capital”.<sup>160</sup> This compels state officials, who do not directly control the economy and who do not themselves make economic decisions, but who nevertheless depend on the economy in various ways, to strive to ‘attract’ investment and to persuade corporations to make beneficial business decisions.<sup>161</sup> In *Bilcon v. Canada*, the company points out that the promotional slogan of the provincial government is “Nova Scotia is open for business”, and within investment arbitration proceedings companies often support their claims of breaches of ‘legitimate expectations’ with evidence that the governments had initially been favourably disposed towards foreign investment in general and their investments in particular.<sup>162</sup> There is a wide-ranging debate on whether the global mobility of corporations leads state officials to reduce or refrain from increasing environmental regulations in order to attract investment.<sup>163</sup> While research on the topic appears to be hampered by the difficulty of devising methods that would actually capture the phenomenon if it did exist,<sup>164</sup> it is nevertheless clear from the investment disputes considered here that state officials are concerned to attract investments and often do seem initially prepared to accept environmental or other negative social consequences in order to do so.<sup>165</sup> As long as the

---

<sup>159</sup> Ellen Meiksins Wood, ‘The Separation of the Economic and the Political in Capitalism’, *New Left Review*, 1/127 (May-June 1981), pp. 66-95.

<sup>160</sup> Ellen Meiksins Wood, *Empire of Capital* (London: Verso, 2003), p. 11.

<sup>161</sup> Fred Block, ‘Beyond Relative Autonomy: State Managers as Historical Subjects’, *The Socialist Register*, 17 (1980), p. 231; Barrow, *Critical Theories of the State*, pp. 58-59.

<sup>162</sup> *Clayton & Bilcon v. Canada*, *Memorial of the Investors*, para. 51; see also *Pac Rim v. El Salvador*, *Memorial on the Merits and Quantum*, para 3; section II.A.

<sup>163</sup> The question is often framed in terms of whether global capital mobility causes ‘pollution havens’, a ‘race to the bottom’, or ‘regulatory chill’. Jennifer Clapp & Peter Dauvergne, *Paths to a Green World: The Political Economy of the Global Environment* (Cambridge: MIT Press, 2005), pp. 161-169.

<sup>164</sup> This literature tends to dismiss qualitative studies that support the theory as anecdotal, while relying on statistical studies that fail to support the theory. However, given that the locational decisions of corporations are normally not based on one factor alone (e.g. the strength of environmental regulations) and that, in the case of regulatory chill, the question is essentially one of a counter-factual, quantitative research may by its very research design fail to identify any structural pressures on state officials to attract investment at the cost of the environment. Jennifer Clapp, ‘What the Pollution Havens Debate Overlooks’, *Global Environmental Politics*, 2:2 (2002), pp. 11-19; Eric Neumayer, ‘Do Countries Fail to Raise Environmental Standards? An Evaluation of Policy Options Addressing ‘Regulatory Chill’’, *International Journal of Sustainable Development*, 4:3 (2001), pp. 231-244.

<sup>165</sup> This is certainly the case with many mining or oil projects. For instance, state officials in Romania would have been well aware that permitting a large open-cast gold mine would by definition have environmental and social consequences (the project involved shaving off several mountain peaks and resettling a town), but may have thought the investment worth the environmental costs in providing the initial approvals. Corruption is

economy is under 'private' as opposed to state or communal control, businesses will possess the power to make economic decisions that affect people's livelihoods and welfare, as well as the state's resources and state officials' ability to achieve their aims, and this lends credibility to their lobbying efforts and state officials will have strong incentives to cooperate. Companies' possession of private economic power can nevertheless also be put to more direct use to achieve their aims. Corporations often provide funding to think tanks and other institutions that can help to set an agenda that state officials will find it difficult to depart from, and the private ownership of many media organizations may make them business-friendly and lead state officials to fear taking action that may lead them to be portrayed in an unfavourable light to potential voters. Finally, in a number of investment disputes companies appear to have more directly used their private economic power to persuade state officials to support them. In one environmental case, *Lucchetti v. Peru*, the company's USD 3 million bribe to a high state official, Vladimiro Montesinos, to secure a favourable judicial outcome that would permit the building of a pasta factory adjacent to protected wetlands, became part wider a congressional inquiry and political scandal.<sup>166</sup> Of the environmental cases, bribery may also have played a part in *Enron v. India* and *Infito Gold v. Costa Rica*, and the private economic power of business actors thereby lends them a source of power that their civil society opponents often do not possess.<sup>167</sup>

In contrast, while the corporations' civil society opponents do not have the economic power to pressure state officials, they often have the democratic right to decide whether to re-elect them, and even in non-democratic countries state officials do seem worried that public opposition could grow strong enough to unseat them. The potential power of democracy or popular majorities is therefore substantial, but in practice it is rarely used against corporations - given

---

nevertheless an alternative explanation. Luke Dale-Harris, 'Romania's Powder Keg: Mine Project Launches Protest Movement', *Spiegel International* (20 September 2013), available at {<http://www.spiegel.de/international/europe/romanian-mining-plan-sparks-mass-national-protests-a-923625.html>} accessed 13 January 2015.

<sup>166</sup> Kathrine Schmidt, 'Montesinos Convicted In Lucchetti Case', *The Santiago Times* (6 December 2005), available at {<http://santiagotimes.cl/montesinos-convicted-in-luchetti-case/>} accessed 13 January 2015; Victor Henriquez, 'Lucchetti Case In Peru Prompts International Conflict', *The Santiago Times* (17 December 2002), available at {<http://santiagotimes.cl/luchetti-case-in-peru-prompts-international-conflict/>} accessed 5 March 2014; 'Gonzalo Baeza, 'Lucchetti Begins Peruvian Assets Sale', *UPI* (23 January 2003), available at {[http://www.upi.com/Business\\_News/2003/01/23/Lucchetti-begins-Peruvian-assets-sale/UPI-79151043358608/](http://www.upi.com/Business_News/2003/01/23/Lucchetti-begins-Peruvian-assets-sale/UPI-79151043358608/)} accessed 5 March 2014.

<sup>167</sup> In *Infito Gold v. Costa Rica*, a number of state officials are under investigation by the General Prosecutor of Costa Rica for alleged corruption in the granting of permits for the mine, and the former Minister of the Environment has already been indicted. In *Enron v. India*, this is assumed to be the case from the disadvantageous nature of the contract and from allegations made at the time, but are not verified. *Infito Gold v. Costa Rica*, *Petition for Amicus Curiae Status by Asociación Preservacionista de Flora y Fauna Silvestre*, p. 4; Sandip Roy, 'Enron in India: The Giant's First Fall', *Alternet* (7 February 2002), available at {[http://www.alternet.org/story/12375/enron\\_in\\_india%3A\\_the\\_giant's\\_first\\_fall](http://www.alternet.org/story/12375/enron_in_india%3A_the_giant's_first_fall)} accessed 11 July 2014.

that the economy and society's wealth is in private ownership and beyond direct democratic control, people too are dependent on businesses to make decisions to invest and provide employment in their country. The investment disputes considered here nevertheless often emerge where certain groups of people – perhaps locked in an intra-community battle with other groups who prioritize the employment opportunities businesses can provide – decide that the protection of the environment is a stronger priority and gain sufficient public support to convince state officials to support them. It is in such circumstances that a Bolivia-based civil society organization is right to describe international investment law as a “defence system against democracy”.<sup>168</sup>

The investment disputes considered in this thesis are replete with examples of state officials, subject to significant public pressure, making decisions to adopt environmental protection measures that lead affected corporations to bring investment lawsuits. In many cases, the investment disputes between the corporations and the social groups seem to become subject to significant electoral debate and campaigning. Disputes in respect to particular investment projects seem to have been an important factor in the outcome of local or municipal elections, and some investment disputes have even impacted on national elections. In the El Salvadoran and two of the Costa Rican cases (Infinito Gold and Harken), the underlying public opposition to the companies' respective natural resource extraction plans grew so strong as to persuade *all* main parties in national elections to support the anti-mining social movements.<sup>169</sup> In some cases, social movements have seen their own leaders win elections and thereby themselves become state officials; the investment dispute in *Abengoa v. Mexico* emerged from the opposition of a group called We Are All Zimapán to the investor's hazardous waste landfill, and when the group's leader won the elections for municipal president he promptly proceeded to try to cancel the licences for the landfill.<sup>170</sup> The fact that elections often form a turning point, in which a state that had previously supported the company shifts its support to its opponents instead, is testament to the power of democracy in struggles between societal groups.

---

<sup>168</sup> Thomas McDonagh, *Unfair, Unsustainable, and Under The Radar: How Corporations Use Global Investment Rules to Undermine a Sustainable Future* (Democracy Center, 2013), p. 6.

<sup>169</sup> In the 2009 election in El Salvador, the previously mining-friendly right-wing ARENA party joined the left-wing FMLN in its opposition to mining. In the 2002 Costa Rican election all three main presidential candidates opposed mining, and the eventual winner proclaimed that the company's mining plans would only proceed “over [his] dead body”. *Pac Rim v. El Salvador*, *Memorial on the Merits and Quantum*, para. 386, 390; Rose J. Spalding, ‘El Salvador: Horizontalism and the Anti-Mining Movement’, in Richard Stahler-Sholk, Harry E. Vanden, et al (eds), *Rethinking Latin American Social Movements: Radical Action from Below* (London: Rowman & Littlefield, 2014), p. 322. Tienhaara, ‘Regulatory Chill and the Threat of Arbitration’, p. 620.

<sup>170</sup> *Abengoa v. Mexico*, *Award*, para. 588-591.

## *State Officials as Societal Beings*

While state officials are subject to structural pressures to support one or another societal group, they are also societal beings in their own right and subject to the social conditioning that this brings. Their position within society is likely to affect their beliefs and ideology, their understanding of how the world works, their sense of personal belonging, as well as the personal reasons or interests they may have to support one or another group in societal struggles.

Given the social situatedness of most high level state officials, it is not surprising that state officials tend to promote business-friendly policies. While the class composition of state officials differs from country to country and from one political party to another, people with a personal or family background in business or within the upper classes tend to be over-represented, and it is not unusual that state officials have held directorships with companies or practiced with private law firms.<sup>171</sup> This provides such state officials with a particular position in society and influences who their acquaintances are and which social groups they associate with. Ralph Miliband observes that it is “much easier for businessmen, where required, to divest themselves of stocks and shares as a kind of *rite de passage* into government service than to divest themselves of a particular view of the world, and of the place of business within it”.<sup>172</sup> Because business actors control the economy, it is not surprising that there is also a ‘revolving door’ between government and the corporate sector and state officials seeking to secure employment after leaving government may be inclined to maintain a business-friendly appearance within it. In several investment disputes, state officials who have supported particular investment projects have subsequently secured employment with those same companies afterwards. For instance, the federal state official that sought to secure the re-opening of Metalclad’s landfill was, to cite the company’s director, subsequently granted a job “interface[ing] with all the government people down there [in Mexico] for us”,<sup>173</sup> while the El

---

<sup>171</sup> Miliband, *The State in Capitalist Society*; Jenny Russell, ‘Politics Needs Mavericks, Not the Same Old Chumocracy’, *The Guardian* (20 May 2013), p. 30 (a third of Tory MPs in the UK had been company directors or executives, compared to 0.2% of the general population); Glen Owen, ‘The Coalition of Millionaires: 23 of the 29 Member of the New Cabinet Are Worth More than £1m... and the Lib Dems are Just as Wealthy as the Tories’, *The Daily Mail* (23 May 2010), available at {<http://www.dailymail.co.uk/news/election/article-1280554/The-coalition-millionaires-23-29-member-new-cabinet-worth-1m--Lib-Dems-just-wealthy-Tories.html>} accessed 10 March 2015 (in the 2010 UK cabinet, 23 of the 29 ministers were estimated to be millionaires).

<sup>172</sup> Miliband, *The State in Capitalist Society*, p. 54.

<sup>173</sup> Wheat, ‘Toxic Shock in a Mexican Village’; Declaration of Humberto C. Rodarte Ramon in *Metalclad v. Mexico*, available in document archive for ‘Trading Democracy’, National Security Archive Electronic Briefing



Salvadoran environmental agency official who worked to push through Pacific Rim's environmental permit application was subsequently given a position as Director of Sustainability for the company.<sup>174</sup>

While state officials tend to belong to or be closely linked to the capitalist class, the social situatedness of state officials can also work in favour of other societal groups. In Bilcon's claim against Canada, the company details opposition by state officials at various levels of government. One of them (a Member of the Legislative Assembly of Nova Scotia for the region in which the investor sought to develop its controversial quarry) maintained that he had won the election precisely because of his opposition to the quarry, but his background as a lobster fisherman, given the opposition of many fishermen to the quarry, is also likely to have influenced his decision-making in respect to the company's investment.<sup>175</sup>

### ***State Officials and External Pressures***

Finally, in many investment disputes state officials may respond not to domestic societal pressures or the social conditioning that results from their own position within that society, but to pressures from other states or international organizations, or to structural pressures stemming from international agreements. For instance, in a dispute with Chemtura in respect to a prohibition on a pesticide, Canada's signature of the Aarhus Protocol on Persistent Organic Pollutants appears to have played an important role in determining the conduct of state officials.<sup>176</sup> A state official further remarked that "[e]verybody was pressuring. I mean, my goodness, countries that had already banned lindane very much wanted other countries that were still using it to stop".<sup>177</sup> Here there may be a temptation to perceive states as agents, as does the state official in the above statement, but it should be kept in mind that such pressures also ultimately stem from society and struggles between societal groups. In many cases, the pressure imposed by other states may stem directly from the corporation itself – it is not uncommon that foreign companies seek to persuade their 'home states' to pressure the host

---

Book No. 65 (undated, posted 5 February 2002), available at {<http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB65/>} accessed 7 January 2015.

<sup>174</sup> Pac Rim Cayman LLC v. Republic of El Salvador, *Claimant's Reply on the Merits and Quantum*, ICSID Case No. ARB/09/12 (29 March 2013), para. 20.

<sup>175</sup> Clayton & Bilcon v. Canada, *Memorial of the Investors*, para. 10, 517.

<sup>176</sup> The treaty required a reconsideration of lindane within two years of entry into force. Chemtura v. Canada, *Award*, para. 139.

<sup>177</sup> Chemtura v. Canada, *Award*, para. 139.

state in which it operates, and here the ‘revolving door’ between business and the home state is often particularly evident. In *Gabriel Resources v. Romania* – a threatened investment dispute concerning the environmental implications of a large gold and silver mine – the Canadian ambassador that pressured Romania on behalf of the company subsequently joined its Board of Directors,<sup>178</sup> while in *Enron v. India* the U.S. ambassador who pressured the Indian government on behalf of the company subsequently joined the Board of Directors of an Enron subsidiary.<sup>179</sup>

### ***Concluding Remarks on the Battle for the State***

It will not be possible to determine conclusively what motivated state officials to side with either the corporation or its opponents in any particular struggle, but the point is that both have tools at their disposal and favourable conditions to persuade the state. State officials are furthermore not detached from society or wider societal struggles, but are agents within such struggles. This is perhaps uncontentious as an empirical observation, but the argument made here is that this observation has implications for our understanding of investment disputes. There is a tendency within the investment law literature to perceive the investor as external to the state in which it operates and to struggles within that state; the premise is that foreign corporations lack “voice” and participation in the decision-making process of host states.<sup>180</sup> This is true on a formal level – the company will not have the right to vote for state officials, a privilege afforded only to the company’s opponents – but it is misleading as a factual statement. The investment disputes considered here reveal that corporations engage in significant lobbying efforts within host states to secure their aims.<sup>181</sup> Such corporate lobbying is credible not only because the company’s arguments are backed by the threat to take their investment elsewhere, but also through incentives for state officials, from promises of future work in the corporate sector to outright bribery, and disincentives, such as the threat of funding efforts to delegitimize them in the eyes of voters. State officials, many of whom are furthermore socially conditioned to be favourably disposed towards business, do consult with corporations and listen to their concerns. Given that companies sometimes go so far as to acknowledge their role in co-drafting

---

<sup>178</sup> Council of Canadians, Earthworks, et al., ‘Open Letter to Minister of Foreign Affairs and MP Re: Destructive Mining Abroad’ (5 December 2013), available at {<http://canadians.org/blog/canadian-and-romanian-groups-denounce-rosia-montana-mine>} accessed 20 January 2015.

<sup>179</sup> Cheng, ‘Developing Narratives in International Investment Law’, p. 221.

<sup>180</sup> Newcombe, ‘The Boundaries of Regulatory Expropriation’, p. 46-47; *Azurix v. Argentina*, *Award*, para. 311; *Tecmed v. Mexico*, *Award*, para. 122.

<sup>181</sup> See also Rodolphe Desbordes & Julien Vauday, ‘The Political Influence of Foreign Firms in Developing Countries’, *Economics & Politics*, 19:3 (November 2007), pp. 421-451.

favourable legislation, it is implausible to suggest that companies lack “voice” within the domestic policy process or have “nil participation in the taking of the decisions that affect it”.<sup>182</sup> The conventional representation of investor-state disputes as involving two distinct and oppositional agents – investors and states, where the former is unrepresented within the latter – therefore serves to conceal the underlying struggles between corporations and their civil society opponents and how both are engaged in a tug-of-war for the support of the state.

If the investment law literature portrays the investor as external to the policy-making process of the host state and as powerless in the face of electoral pressures, this may be a consequence of the fact that investor-state disputes do emerge precisely in those cases where the company’s opponents are victorious in the tug-of-war for the state. In a sense, this characteristic of investor-state disputes renders an analysis of the underlying social struggles encouraging for social movements and civil society activists around the world. The state is certainly a defender of the interests of a capitalist class – and there is certainly a recognition within many civil society organizations and social movements that state officials are favourably inclined towards their corporate opponents – but the investment disputes considered here serve as testament to the fact that state officials sometimes do switch sides despite an initial reluctance to do so. Indeed, in cases such as the ones against El Salvador and Costa Rica, social movements have even been sufficiently successful to persuade *all* main political parties before an election to back their aims.<sup>183</sup> Similarly, the Peruvian president, who had previously maintained that the environmental concerns of mining “is an issue of the past century [since] today mines live alongside cities without any problems” – and had further accused indigenous groups of being ‘dogs in the manger’ (after Aesop’s fable) for preventing the development of mining – did respond, if reluctantly, to major social protests by imposing a suspension on Bear Creek’s controversial silver mine; Bear Creek lamented that it was “the wrong reaction to a political situation”.<sup>184</sup>

---

<sup>182</sup> As does Newcombe, ‘The Boundaries of Regulatory Expropriation’, para. 122.

<sup>183</sup> *Pac Rim v. El Salvador*, *Memorial on the Merits and Quantum*, para. 386, 390; Spalding, ‘El Salvador: Horizontalism and the Anti-Mining Movement’, p. 322; Tienhaara, ‘Regulatory Chill and the Threat of Arbitration’, p. 620.

<sup>184</sup> Alan García Pérez, ‘The Dog in the Manger’, *Peruvian Times* (republished, 30 October 2007), available at {<http://www.peruviantimes.com/30/president-alan-garcias-policy-doctrinethe-dog-in-the-manger-syndrome/2860/>} accessed 20 January 2015; Brenda Bouw, ‘Canadian Mining Firm Threatens Legal Action Against Peru’, *The Globe and Mail* (26 June 2011), available at {<http://www.theglobeandmail.com/globe-investor/canadian-mining-firm-threatens-legal-action-against-peru/article585641/>} accessed 19 September 2014.

The Network for Justice in Global Investment observes that “[a]cross the world, citizens and social movements are mounting strong and effective campaigns to fight the environmental and social abuses of transnational corporations”.<sup>185</sup> The underlying struggles considered in this chapter are the ones where such civil society groups have actually won; they are testament to the major victories that do, albeit perhaps rarely, occur at the domestic level. But as the Network for Justice further observes, “corporations and their political allies have assembled a powerful arsenal of legal weapons in their defense”.<sup>186</sup> This is the context in which the corporate recourse to investment arbitration needs to be understood. The utility of the global investment protection regime for corporations is precisely its placing of another hoop that any victorious civil society groups (now represented by the state) have to jump through in order to achieve their environmental aims.

### **International Investment Law in Social Struggle**

The two previous sections of this chapter have established that ‘investor-state disputes’ are ultimately not really between investors and states at all. The first section explored how investment disputes are often directly between corporations and their civil society adversaries, while the second section considered how both have often fought long battles to ensure that state institutions and state officials supported them. The nature of the state in a capitalist world order is such that corporations are very often successful in persuading the state to support their interests in such struggles. International investment disputes nevertheless demonstrate that the adversaries of corporations can sometimes win such domestic public policy debates, to the detriment of the corporations who then approach investment tribunals for compensation. This unpacking of ‘investor-state disputes’ is in turn imperative for understanding the role that international investment law plays in social struggles around the world today, and understanding that role is the aim of this third, and final, section of the chapter.

The Democracy Center, a Bolivian-based NGO involved in reporting on the Cochabamba Water War that sparked an investment dispute between Bechtel and Bolivia, refers to investor-state dispute settlement as a corporate “counter-strategy” in the event that people “win [such

---

<sup>185</sup> Network for Justice in Global Investment, the Democracy Center, et al, ‘Dangerous Weapons: How International Investment Rules Undermine Social And Environmental Justice’, (2012), p.2, available at {<http://justinvest.org/2012/08/educational-brochure-dangerous-weapons-how-international-investment-rules-undermine-social-and-environmental-justice/>} accessed 27 August 2012.

<sup>186</sup> Ibid, p.2.

domestic political debates] and get the law on our side”.<sup>187</sup> The argument made in this section is that this understanding – that investment law is a response to civil society *victories* – only captures one (albeit perhaps the most important one) of the roles that investment law plays in social struggles around the world. In contrast, this third section of this chapter will detail *four* roles that investment law plays in such social struggles, in reverse order from the chronology of the social struggle itself.

Firstly, there is indeed the one identified by the Democracy Center and increasingly other non-governmental organizations and social movements around the world: corporations can win investment disputes, and while states are not required to actually withdraw the state measure that the corporation’s civil society adversary had fought for, this legal regime does compel the state to reallocate funds designed for other social purposes to the payment of compensation. This first sub-section will not unduly repeat the argument made in the previous chapter about how corporations can win such disputes, but it will rather explore how it is often the very nature of the state, as a social structure inherently responsive to societal struggles, that leads to the state’s defeat in the first place. Secondly, investment law can nevertheless also play an important role in social struggles around the world *before* the company wins an investor-state dispute, and often even before it has formally filed such a dispute in the first place. The second sub-section will consider how the very possibility of an investment dispute can shift the balance of power in a domestic struggle to give the corporation the upper edge, even in the absence of a legal award in its favour. This phenomenon is commonly referred to as ‘regulatory chill’, and there is considerable evidence to suggest that corporations often win these kinds of underlying public policy debates precisely because they are fought ‘in the shadow of’ a looming investment treaty claim.<sup>188</sup> Thirdly, investment law can nevertheless also play a hitherto unrecognized role, not only in lending force to the corporation’s argument in an ongoing tug-of-war for the state, but also in influencing the ability of its civil society adversaries to form opposition in the first place. The third sub-section will consider how corporations are increasingly approaching investment law as a means of protecting them from the civil society protesters themselves, and in particular to prevent direct action protests from emerging against their operations. Fourthly, investment law can also play a part in social struggle by influencing the corporation’s own

---

<sup>187</sup> Jim Shultz, ‘Getting Action: More Powerful Than Governments: How Corporations Use Global Investment Rules to Get Around Democracy’, (6 December 2011), available at {<http://democracyctr.org/corporate/getting-action-more-powerful-than-governments/>}\_accessed 4 September 2012.

<sup>188</sup> Tienhaara, *The Expropriation of Environmental Governance*.

behaviour either in the context of social struggles or before such struggles have even emerged. The fourth sub-section will consider how investment law provides corporations with protection from ‘political risk’ and in doing so can engender a sense of corporate invulnerability towards societal opposition. This, in turn, can influence how careful they are in their corporate conduct and the extent to which they take precautionary measures to prevent opposition from arising in the first place. The last three of these four sub-sections therefore indicate that undivided attention to the disputes that have actually been resolved in investor-state arbitration will only capture the tip of the iceberg as far as the political implications of investment law are concerned.

### ***The Role of International Investment Law in Social Movement Victories***

In response to the proposal of Gabriel Resources to develop Europe’s largest gold deposit, through an opencast cyanide-leach mining project that would involve shaving off four mountain tops and resettling the town of Rosia Montana, an activist of the growing Save Rosia Montana movement remarked that “[i]f the project goes ahead, it must be stronger than democracy”.<sup>189</sup> To cite David Schneiderman, what international investment law does is precisely to “establish thresholds of tolerable democratic behaviour”.<sup>190</sup> International investment law has arisen as part of a wider political strategy of a transnational capitalist class to place limits on what states can do, through enforceable constraints that Stephen Gill refers to as a ‘new constitutionalism’.<sup>191</sup> Corporations often approach international investment tribunals precisely when democracy intervenes in their plans. The previous chapter has already detailed how arbitral tribunals have interpreted each of the investment protection standards to mean far more than immediately meets the eye, and that this consequently ensures that states have a high threshold to cross if they are to introduce new environmental or public interest regulations in response to public pressure. Should a state measure not meet that threshold, compensation will be required to wipe out any negative consequences for the investor, including for a loss of anticipated profits. Prompted by a major social movement to save Rosia Montana, the government and parliament of Romania has begun to question Gabriel Resources’ plans and the company is now reported to be preparing a notice of intent to commence arbitration in case Romania decides not to allow

---

<sup>189</sup> Dale-Harris, ‘Romania’s Powder Keg’.

<sup>190</sup> Schneiderman, ‘Investing in Democracy?’, p. 910.

<sup>191</sup> Stephen Gill, ‘Constitutionalizing Inequality and the Clash of Globalizations’, *International Studies Review*, 4:2 (2002), pp. 47-65; Stephen Gill, ‘Globalisation, Market Civilisation, and Disciplinary Neoliberalism’, *Millennium: Journal of International Studies*, 24:3 (1995), pp. 399-423; Stephen Gill, ‘New Constitutionalism, Democratisation and Global Political Economy’, *Global Change, Peace & Security*, 10:1 (1998), pp. 23-38.

the project to proceed.<sup>192</sup> International investment law cannot force Romania to permit the project to proceed, but it can – if the investor wins – force it to make an unpalatable choice between doing so and paying the company up to USD 4 billion in compensation for putting an end to its plans.<sup>193</sup> Such costs will be borne by the citizens of Romania in the form of higher taxes or, more probably, reduced public spending. As a result, any domestic political victory by the Save Rosia Montana movement may not feel like quite as much of a victory after all.

As discussed in the previous chapter, investment treaties can in various ways protect corporations from state measures adopted for environmental purposes. Such state measures can be deemed discriminatory, expropriatory, unfair and inequitable, or as involving impermissible political change in breach of a corporation's 'legitimate expectations'. This sub-section will not repeat the argument made in the previous chapter, but it will rather draw attention to the fact that it is often the very responsiveness of the state to societal pressure that leads it to lose investment treaty challenges in the first place. The investment law literature treats the state as an agent in its own right and refrains from any consideration of the social struggles through which a state measure has emerged. As Odumusu observes, this leads tribunals to construct the state "as an abstract, artificial entity separate from and divorced from its population".<sup>194</sup> This sub-section will argue that it is precisely the fact that the state is not the rational and unitary actor divorced from its population that investment law expects it to be that causes it to lose investor-state disputes. Firstly, it will consider how investment law expects the state to behave as a *rational actor* that itself weighs the pros and cons of a particular policy or measure, and will contrast this to the actual nature of the state as a social structure that cannot easily stand aloof from societal struggles. Secondly, it will consider how investment tribunals expect the state to behave as a *unitary actor*, and will contrast this with the actual nature of the state as a social structure that changes over time and that also consists of different institutions at any given point in time.

The expectation in the legal literature and arbitral awards that the state ought to behave as a rational actor has resulted in a proliferation of corporate challenges against 'politically motivated' state conduct. 'Legitimate' public interest measures based on state initiative and the

---

<sup>192</sup> Eric Reguly, 'Gabriel May Seek Billions in Arbitration over Stalled Romanian Mine', *The Globe and Mail* (30 April 2014), available at {<http://www.theglobeandmail.com/report-on-business/gabriel-may-seek-billions-in-arbitration-over-stalled-romanian-mine/article18341095/>} accessed 20 January 2015.

<sup>193</sup> *Ibid.*

<sup>194</sup> Odumusu, 'The Law and Politics of Engaging Resistance', p. 257.

state's own 'rational' assessment of the situation (preferably grounded in the conclusions of a thorough scientific assessment) are increasingly contrasted with 'illegitimate' public interest measures that are introduced in response to public pressure. Odumosu remarks that there is an assumption that any public interest measure that is not taken at the state's own initiative is "arbitrary or unreasonable because it was adopted in response to public demand".<sup>195</sup> This is often framed in terms of 'political motivation'; in *Inmaris v. Ukraine* the tribunal casually remarked that a breach of the fair and equitable treatment standard would be found if a state measure was "undertaken for political reasons or other improper motives".<sup>196</sup> Such awards that highlight the illegitimacy of politics are sometimes contrasted with *AES v. Hungary*, which determined, contra the investor's allegation of 'political motivation', that "the fact that an issue becomes a political matter, such as the excessive profits of the [energy] generators [...] does not mean that the existence of a rational policy is erased. In fact, it is normal and common that a public policy matter becomes a political issue; that is the arena where such matters are discussed and made public".<sup>197</sup> However, even if the approach of the AES tribunal was to win the day, the conclusion is simply that a rational state policy is not *erased* by any wider political pressure on the state, and the existence or otherwise of a rational policy on behalf of the state itself, absent public pressure, will continue to be a subject of investigation.

The notion of 'political motivation' raised by corporations to challenge state measures can be understood in a stronger and a weaker sense of the term. In a weaker sense, state officials are alleged to be simply responding to public pressure as opposed to undertaking their own rational assessment; in the stronger sense, state officials are alleged to be undertaking measures detrimental to corporations in order to position themselves in public policy debates for electoral gain.

*Biwater v. Tanzania* involves 'political motivation' in the stronger sense. The dispute arose from a failed privatization project for the water services of Dar es Salaam; the company quickly found itself in financial difficulty – probably because it had underbid to win the contract – and unable to meet its commitments to maintain and improve water services.<sup>198</sup> Even the World

---

<sup>195</sup> Odumosu, 'The Law and Politics of Engaging Resistance', p. 273.

<sup>196</sup> *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, *Excerpts of Award*, ICSID Case No. ARB/08/8 (1 March 2012), para. 265.

<sup>197</sup> *AES Summit Generation Limited & AES-Tisza Eromu Kft v. Republic of Hungary*, *Award*, ICSID Case No. ARB/07/22 (23 September 2010), para. 10.3.22-20.3.24.

<sup>198</sup> *Biwater Gauff Ltd. v. United Republic of Tanzania*, *Amicus Curia Submission of The Lawyers' Environmental Action Team et al*, ICSID Case No. ARB/05/22 (26 March 2007), para. 79-90.



Bank observed that “[t]he primary assumption on the part of almost all involved [...] was that it would be very hard, if not impossible, for the private operator to perform worse than [the previous state-owned operator]. But that is what happened”.<sup>199</sup> After a few years Tanzania decided to terminate the contract, and the tribunal acknowledged that the crisis engendered by the company’s performance “could have threatened a vital public service and the situation therefore had to be resolved one way or the other in the near future”.<sup>200</sup> The tribunal nevertheless determined that Tanzania had acted unlawfully during the termination process itself, and one of several unlawful acts involved the public pronouncements of a politician, who the company maintained was in “populist campaign mode”.<sup>201</sup> The tribunal determined that his public pronouncements to announce the termination of the contract “exceeded the bounds of normal information [and] included severe criticisms of [Biwater] which were at least in part clearly motivated by political considerations”.<sup>202</sup> There is no suggestion that the politician made any harsher judgement than castigating the company for its “poor performance”, but he did so publicly and repeatedly and the tribunal suggests that this “inflamed the situation, and polarised public opinion still further”.<sup>203</sup> The tribunal does not challenge Tanzania’s right to cancel the contract under the circumstances of the company’s contractual performance, but objected to public statements that were “undermining [Biwater] in the general public’s eye”.<sup>204</sup>

In the context of Tanzanian politics, the pronouncements of the state official were nevertheless not surprising; this was a “very public and widely reported issue” and it is in the nature of politics that politicians will seek to present themselves in a positive light to voters.<sup>205</sup> In this case, the politician may have wanted to be seen to act decisively in response to an important public issue, and would certainly have wanted to avoid blame being laid at his doorstep. Luke Peterson of Investment Arbitration Reporter concludes that the award puts “elected officials on notice that they must tread delicately with respect to their public pronouncements in the context of quarrels over foreign owned investments”.<sup>206</sup> However, given that such delicate action can

---

<sup>199</sup> Xan Rice, ‘The Water Margin’, *The Guardian* (16 August 2007), available at {<http://www.guardian.co.uk/business/2007/aug/16/imf.internationalaidanddevelopment>} accessed 14 July 2014.

<sup>200</sup> *Biwater Gauff Limited v. United Republic of Tanzania*, Award, ICSID Case No. ARB/05/22 (24 July 2008), para. 654.

<sup>201</sup> *Ibid.*, para. 406.

<sup>202</sup> *Ibid.*, para. 696.

<sup>203</sup> *Ibid.*, para. 551-552, 624, 627.

<sup>204</sup> *Ibid.*, para. 498.

<sup>205</sup> *Biwater v. Tanzania*, Award, para. 367; see also David Schneiderman, *Resisting Economic Globalization: Critical Theory and International Investment Law* (Basingstoke: Palgrave Macmillan, 2013), pp. 63-64.

<sup>206</sup> Luke Eric Peterson, ‘In-Depth: Other Treaty Breaches, Including of Fair and Equitable Treatment Standard, Upheld in *Biwater v. Tanzania*’, *Investment Arbitration Reporter* (28 July 2008).

cost a politician votes, it may rather be that the pressure on state officials to position themselves in social struggles and public policy debates subsequently leads states to lose investor-state disputes.

In a weaker sense, state officials are not taking the initiative to situate themselves politically in respect to a public issue, but may be more passively responding to public pressure with the introduction of new regulations or policies. The environmental cases discussed in the previous chapter reveals that states are more likely to win investment disputes if they can show that they had introduced environmental protection measures at their own initiative and in response to thorough scientific assessments, as in *Methanex v. USA* and *Chemtura v. Canada*.<sup>207</sup> Both tribunals extensively considered the scientific assessments in response to which the environment protection measures had been introduced. In contrast, where states have lost, as in *Metalclad v. Mexico* and *Tecmed v. Mexico*, scholars have tended to conclude that the state measures “were not truly environmental protection measures” but were rather “pretextual” and in fact “motivated by local political [...] considerations”, despite the fact that the local political debates themselves directly arose from the environmental concerns of the local populations.<sup>208</sup>

In *Tecmed v. Mexico*, the tribunal draws a sharp distinction between the state’s own assessment of the environmental situation and the environmental concerns of the community, where it could have legitimately acted on the basis of the former but not the latter.<sup>209</sup> In respect to the state’s own assessment, the environmental agency had found that the company had breached environmental regulations on several different occasions, but at the time responded by issuing the company with a series of fines and formal warnings.<sup>210</sup> When a different government agency subsequently denied the company a renewal of its operating permit on the basis of such environmental infringements, the tribunal castigated it for taking a “literal and strict interpretation of the conditions under which the Permit was granted” that could not be explained in reference to its own assessment of the environmental dangers, but only by the ongoing public protests.<sup>211</sup> *Tecmed v. Mexico* reveals that investment tribunals will not look kindly upon the

---

<sup>207</sup> See the discussion on expropriation in Chapter 3.

<sup>208</sup> Gaines, ‘Environmental Policy Implications of Investor-State Arbitration’, p. 171; Charles Brower & Sadie Blanchard, ‘From “Dealing in Virtue” to “Profiting from Injustice”’: The Case Against “Re-Statification” of Investment Dispute Settlement’, *Harvard International Law Journal*, 55 (January 2014), p. 55; Wälde & Kolo, ‘Environmental Regulation, Investment Protection and Regulatory Taking’.

<sup>209</sup> *Tecmed v. Mexico*, *Award*, para. 123-132.

<sup>210</sup> *Ibid*, para. 99-100, 107.

<sup>211</sup> *Ibid*, para. 149.

decision of a government to respond to public concern in the absence of its own assessment that the public concerns are serious enough to warrant action. In this case, the environmental agencies involved had been reluctant to act in the first place, and it was only upon the request of the protest movement that it had investigated and discovered the environmental hazards in the first place, and it subsequently retained a considerably higher level of tolerance for such breaches of the applicable regulations than the community in the surrounding area.<sup>212</sup> The tribunal, having determined that Mexico's decision to deny a new permit was disproportional to its own assessment of the environmental risks, did not proceed to assess whether the decision was proportional to the surrounding community's assessment of the environmental risks but rather considered what kind of 'risk' the protesters posed to the state itself and social order. The tribunal acknowledges that the public protests were "intense, aggressive and sustained" and "amount[ed] to significant pressure on the Mexican authorities", but given that they were not "so great as to lead to a serious emergency situation, social crisis or public unrest", Mexico was deemed to have acted unlawfully in its decision to respond to the protests by declining to offer a renewed permit for the landfill.<sup>213</sup>

Gus Van Harten observes that investment tribunals have in the past appeared "suspicious of electoral decision-making and public involvement", and this tendency to "scrutinize decisions more intensively as a result of [their] electoral political origins" has ensure that the question of the 'political motivation' behind state action has become an increasingly contested issue before arbitral tribunals.<sup>214</sup> In *Vattenfall v. Germany*, the company objected to the "politically motivated delay" in issuing permits for a large coal-fired power plant in Hamburg, and furthermore the "politically motivated" decision to impose additional environmental conditions on the project.<sup>215</sup> Both of these were, as the investor acknowledges, directly due to a Green Party victory in local elections and its desire to act upon its electoral promises against the power plant.<sup>216</sup> Faced with a possibly costly investment treaty challenge, the German federal government finally intervened in the Hamburg dispute and acquiesced to removing such additional environmental requirements and waving the project through the permitting

---

<sup>212</sup> *Tecmed v. Mexico*, *Award*, para. 107.

<sup>213</sup> See the discussion on expropriation in Chapter 3. *Ibid*, para. 144, 133.

<sup>214</sup> Gus Van Harten, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (Oxford: Oxford University Press, 2013), p. 72, 16.

<sup>215</sup> *Vattenfall v. Germany*, *Request for Arbitration*, para. 54(1), 54(iv).

<sup>216</sup> *Ibid*, para. 27-32.

process.<sup>217</sup> In pending disputes, ‘political motivation’ has become a favourite accusation of companies. In *Bear Creek v. Peru*, arising from protests against the company’s proposed silver mine, the company objects that Peru’s decision to temporarily suspend the project is “politically motivated” and illegitimate because it is “based upon recent regional protests as opposed to the technical merits or procedures relating to its [environmental impact assessment]”.<sup>218</sup> In a pending dispute over Quebec’s decision to annul permits for the controversial fracking of shale gas, *Lone Pine Resources* objects that “there exists no valid public purpose” for annulling the permits before a scientific assessment has been completed, and it places great weight on a statement of the Quebec Deputy Premier that the decision was a “political decision”.<sup>219</sup> The argument that the state is acting on the basis of ‘political motivation’ and in response to political protests is often directly juxtaposed to the notion that the state should act as a rational actor that has itself duly weighed the scientific pros and cons of a particular environmental measure and is acting objectively without regard to public pressure.

In the *Pacific Rim v. El Salvador* case considered above, the social movement with which the dispute originates is explicitly seeking to counter the current trend within the legal debate on the subject. In response to the accusation by *Pacific Rim* that El Salvador’s decision not to award a mining permit is “politically motivated”,<sup>220</sup> the social movement retorts that the establishment of a nation-wide movement against mining and the state’s responsiveness to its concerns “are not ‘inconvenient’ facts that the Republic [of El Salvador] must ‘explain away;’ nor are they a basis for *Pacific Rim* to pin liability on the Republic. The communities do not and need not apologize for standing up in defense of their own rights, lives and livelihoods”.<sup>221</sup> In contrast to the present tendency of assuming that states should act upon their own rational assessment rather than in response to political struggles, the social movement objects that “[t]his ‘political’ character of the public policy dialogue, particularly over issues of such importance

---

<sup>217</sup> Roda Verheyen, ‘The Coal-Fired Power Plant Hamburg-Moorburg, ICSID Proceedings by Vattenfall Under the Energy Charter Treaty and the Result For Environmental Standards’, *Briefing Note for Greenpeace* (11 April 2012), available at:

{[http://www.greenpeace.de/sites/www.greenpeace.de/files/publications/icsid\\_case\\_regarding\\_the\\_vattenfall\\_coal-fired\\_power\\_plant\\_hamburg-moorburg.pdf](http://www.greenpeace.de/sites/www.greenpeace.de/files/publications/icsid_case_regarding_the_vattenfall_coal-fired_power_plant_hamburg-moorburg.pdf)} accessed 22 March 2014.

<sup>218</sup> *Bear Creek Mining*, ‘Bear Creek Reports Peruvian Government Resolution Which Potentially Further Delays Santa Ana ESIA’; *The Globe and Mail*, ‘Bear Creek Files Suit Against Peru’ (13 July 2011), available at {<http://www.theglobeandmail.com/globe-investor/bear-creek-files-suit-against-peru/article2095770/>} accessed 12 June 2014.

<sup>219</sup> *Lone Pine Resources v. Canada*, *Notice of Arbitration*, para. 50, 13, 45.

<sup>220</sup> *Pac Rim Cayman LLC v. Republic of El Salvador*, *Notice of Intent to Submit a Claim to Arbitration*, ICSID Case No. ARB/09/12 (9 December 2008), p. 1.

<sup>221</sup> *Pac Rim v. El Salvador*, *Application for Permission to Proceed as Amici Curiae*, p. 10.

as the use of natural resources, is neither wrong, dirty, nor in breach of international law, as the investor would like to present it”.<sup>222</sup> This, nevertheless, is how international investment tribunals have tended to interpret any political considerations in the past, and any failure on behalf of a state to distance itself from societal struggles may well constitute a breach of international investment law.

Tribunals do not only expect the state to act as a rational actor divorced from its population, but furthermore expect it to act as a *unitary actor* vis-à-vis corporations both across time, and at a given point in time. It is the reality of the nature of the state as a social structure that both changes over time in response to social struggles, and that reflects contestation between opposing social groups at any given point, that frequently leads to the state’s failure to act as a unitary actor and consequently to a state’s loss in investor-state arbitration.

Firstly, tribunals expect the state to act as a unitary actor *across* time. Investment law was conceived as a means of protecting corporations from ‘political risk’, or unfavourable change over time.<sup>223</sup> Corporations consequently often go to great lengths in arbitral proceedings to show how the state was initially supportive of an investment project, but how the state subsequently changed ‘its’ mind and undertook detrimental measures towards it. Despite often revealing a clear awareness that the state was subject to significant public pressure, companies can nevertheless claim to be ‘astonished’ that the state changed ‘its’ mind in response to such pressure.<sup>224</sup> Tribunals directly follow the corporations in expecting the state to be an actor capable of making assurances that will hold into the future, whatever domestic opposition develops against it doing so. As discussed in detail in the previous chapter, states are in a narrower sense expected to adhere to contracts and formal agreements signed by predecessor governments, which can include stabilization clauses that freeze environmental and other public interest regulations for periods of up to 100 years.<sup>225</sup> In a more expansive sense, future governments are also expected not to act contrary to any ‘legitimate expectations’ that a corporation may have developed as a result of public statements or informal assurances or

---

<sup>222</sup> Pac Rim v. El Salvador, *Application for Permission to Proceed as Amici Curiae*, p. 14.

<sup>223</sup> See the section on ‘protection from change’ in Chapter 3.

<sup>224</sup> Pac Rim Cayman LLC v. Republic of El Salvador, *Notice of Arbitration*, ICSID Case No. ARB/09/12 (30 April 2009), para. 76.

<sup>225</sup> See the section on ‘protection from change’ in Chapter 3. Andrea Shemberg, *Stabilization Clauses and Human Rights: A Research Project Conducted for IFC and the United Nations Special Representative of the Secretary-General on Business and Human Rights* (27 May 2009), available at: {<http://www.ifc.org/wps/wcm/connect/9feb5b00488555eab8c4fa6a6515bb18/Stabilization%2BPaper.pdf?MOD=AJPERES>} accessed 14 December 2010.

promises by particular state officials in the past.<sup>226</sup> Viewed from the domestic angle, the state is a social structure that would normally be both permitted and expected to change over time through the introduction of new policies and regulations, but viewed from the international angle, arbitral tribunals declare that states are obliged to ensure that corporations “may know beforehand any and all rules and regulations that will govern its investment”.<sup>227</sup> Because the state is conceptualized as a unitary actor, when a new government changes the state’s policies and acts differently from predecessor governments such action is often framed as “contradictory”, as opposed to merely different.<sup>228</sup> In so far as rules, regulations and policies change in response to political struggles within states, it can be the very nature of the state, as a social structure that changes over time, that leads to a loss in investment disputes.

Secondly, investment tribunals also expect states to act as unitary actors *at any particular point in time*. To cite the tribunal in *MTD v. Chile*, the state should act like “a unit” or a “monolith” towards foreign investors – which Chile in this case failed to do, when the Santiago planning authorities denied a zoning modification required for a project that the foreign investment agency had already approved (despite Chile’s protestations that the foreign investment agency was not a “one-stop window” for project approval).<sup>229</sup> A failure to behave as a unitary actor can often arise precisely due to an ongoing tug-of-war for the state between opposing societal groups, where different societal groups gain support in particular levels of government, particular agencies within the state, or from particular politicians. For instance, several of the investment treaty cases considered in the previous chapter – including *Metalclad v. Mexico* considered above – emerged when local community opponents won municipal elections, and took action against the corporation which in turn were different from assurances that had been provided by a federal government that was more favourably disposed towards the company.<sup>230</sup> In other cases, state officials have been torn between which societal group to support in an ongoing dispute, and it is their failure to act decisively in favour of one or the other that may have led to either inconsistent action or no action at all. For instance, in *Pacific Rim v. El Salvador*, the state at one point may have delayed beyond the statutory period a response to the

---

<sup>226</sup> See the section on ‘protection from change’ in Chapter 3.

<sup>227</sup> *Tecmed v. Mexico, Award*, p. 154.

<sup>228</sup> For instance, the tribunal in *Abengoa v. Mexico* described the municipal government’s decision to cancel the permits for a hazardous waste landfill as “arbitrary and totally contradictory to the positions previously taken by the competent municipal, state and federal authorities”. The new municipal government had won the election as the leader of a movement against the landfill, and it is safe to say that he was not acting contrary to his own previous positions. *Abengoa v. Mexico, Award*, para. 651.

<sup>229</sup> *MTD v. Chile, Award*, para. 166, 108. See the discussion on the FET standard in Chapter 3.

<sup>230</sup> *Metalclad v. Mexico, Award; Abengoa v. Mexico, Award*.

company's environmental permit application; the government at the time was favourably disposed towards the project and perhaps reluctant to deny a permit, but perhaps also reluctant to approve one in the face of mounting social movement opposition (an alternative interpretation of the same event is given in the below paragraph).<sup>231</sup> The state therefore often fails to act as a unitary actor when ongoing social struggles cause different state agencies or state officials to end up acting at cross-purposes as far as a particular investment project is concerned, or when the same state officials act inconsistently in light of opposing societal pressures.

A failure of the state to act as a unitary actor at a particular point in time can nevertheless also arise when state officials have been 'won over' to support a corporation's opponents, but where the institutional or legal structure of the state makes it difficult for state officials to act accordingly. In several pending cases, the state structure itself appears to congeal corporate interests. If the investors are correct in their interpretations of domestic law, the state officials had been coming up against the pre-existing legal framework of the state itself in trying to support the corporations' opponents. For instance, Bilcon suggests that Canada, by its own domestic laws, did not under the circumstances of the case have any authority to stop its controversial quarry from going ahead. Bilcon asserts that by Canadian law quarry permits are "routinely granted [...] with either no environmental assessment or with the minimal environmental assessment", and that Canada had already acted unlawfully in "arbitrarily and unfairly forc[ing] [it] into the most expansive, expensive and time-consuming environmental assessment".<sup>232</sup> Canada is further alleged to have breached domestic law in allowing local community opposition during the public consultation process to derail the quarry proposals, where by domestic law local community input was "limited to scientific analysis and interpretation".<sup>233</sup> By the investor's own account, there was significant opposition against the quarry, to the extent that virtually every level of government and ministry engaged in collusion to arrive at a "predetermined outcome" against the proposed quarry.<sup>234</sup> Yet according to the investor, "this project is a legal project and there is nothing in law to prevent this project from

---

<sup>231</sup> Pac Rim v. El Salvador, *Memorial on the Merits and Quantum*, para. 167.

<sup>232</sup> Clayton & Bilcon v. Canada, *Memorial of the Investors*, para. 14; William Ralph Clayton and others & Bilcon of Delaware v. Government of Canada, *Notice of Arbitration*, UNCITRAL Ad Hoc Arbitration (26 May 2008), para. 27.

<sup>233</sup> Clayton & Bilcon v. Canada, *Memorial of the Investors*, para. 88, 91, 445(a-b), 474.

<sup>234</sup> Ibid, para. 2. For a list of agencies culpable (specific individuals are listed throughout), see William Ralph Clayton and others & Bilcon of Delaware v. Government of Canada, *Statement of Claim*, UNCITRAL Ad Hoc Arbitration (30 January 2009), para. 26-27.

going ahead”.<sup>235</sup> If the company is correct, state officials – who are in this case uniformly against the quarry, in large part due to public opposition – are nevertheless confronted with a pre-existing legal framework in which there are no lawful means to prevent it from going ahead.

A similar scenario is encountered in *Pacific Rim v. El Salvador*. The company maintains that the Environmental Agency had “minimal (if any) discretion to deny the concession” and describes the environmental impact assessment process as a “formality”.<sup>236</sup> If the investor is correct, El Salvador, by virtue of its own pre-existing legal framework (which the company openly acknowledges that it had a hand in drafting, and which emerged at time of neoliberal adjustment and World Bank involvement) was not legally permitted to stop the project on the basis of environmental concerns.<sup>237</sup> The state’s domestic authority was limited to mitigation measures,<sup>238</sup> yet such measures were not sufficient for the social movement – the investor itself describes the environmental agency as overworked, understaffed and inexperienced, and the local community severely doubted its ability to properly regulate a major mining project with potentially devastating consequences should something go wrong.<sup>239</sup>

It remains to be seen whether the investors in the two cases are correct in their interpretations of domestic law, but the fact that this is a distinct possibility is revealed in *Glamis Gold v. USA*, where a domestic legal opinion found that the state could not lawfully prohibit the controversial gold mine against which the Quechan Indian Nation protested.<sup>240</sup> As a result, state officials had to revert to indirect means – in this case mitigation measures known to be costly – to derail the proposed project.<sup>241</sup> In these kinds of circumstances, state officials may well be persuaded to act outside the scope of authority that they possess by virtue of the (constraining) domestic legal framework. In doing so it is possible that they end up breaching also domestic laws or institutional procedures, but the domestic consequences of such a breach may well be significantly less severe than the consequences of losing an investment dispute. International investment law therefore locks into the future a domestic legal framework that is itself the outcome of previous social struggles. As we see in the above cases, such a domestic legal

---

<sup>235</sup> Cited in *Clayton & Bilcon v. Canada*, *Counter-Memorial*, para. 206.

<sup>236</sup> *Pac Rim v. El Salvador*, *Memorial on the Merits and Quantum*, para. 450, 454, 219.

<sup>237</sup> *Ibid*, para. 78; Chris Van Der Borgh, ‘The Politics of Neoliberalism in Postwar El Salvador’, *International Journal of Political Economy*, 30:1 (2000), pp 36-54.

<sup>238</sup> *Pac Rim v. El Salvador*, *Memorial on the Merits and Quantum*, para. 541-542.

<sup>239</sup> *Ibid*, para. 9, 231; Broad & Cavanagh, ‘Like Water for Gold in El Salvador’.

<sup>240</sup> *Glamis Gold. v. USA*, *Memorial*, section II.B.3; *Glamis Gold v. USA*, *Award*.

<sup>241</sup> *Ibid*, Section V.C.



framework may be advantageous to the corporation but less advantageous to the local communities that find themselves deprived of any legal means to prevent the projects from going ahead.

From a corporate perspective, the primary novelty and utility of international investment law lies in the right to bring a legal challenge against state measures that have often emerged through a victory by its opponents in domestic public policy debates. Such state measures can be challenged on a wide variety of different grounds, as considered in the previous chapter. Some of these ways of challenging a state measure are unrelated to any social struggle from which it may have emerged; for instance, it is unlawful for Costa Rica to expropriate land in order to expand a national park designed to protect endangered jaguars or sea turtles, without the provision of the generous standard of full market value compensation, irrespective of how the policy measure arose.<sup>242</sup> This sub-section has nevertheless further argued that it is often the very responsiveness of the state to social struggle that leads to its loss in investment disputes. There is a growing academic literature on the effect of investment law on the ability of states to introduce public interest regulations, but this literature often concludes that states have not lost investment disputes because of the public interest regulation per se, but because of how or why it was introduced.<sup>243</sup> It is sometimes implied that if the state had acted as it should – as a rational and unitary actor vis-à-vis the corporation – then it would have been permitted to introduce the public interest regulations at stake, or more likely it would not have sought to do so in the first place. It is the fact that the state acted on the basis of ‘political motivation’ or in ‘contradictory’ ways that led to its loss in the investment dispute. This section has argued that such state action only appears ‘irrational’ or ‘contradictory’ because of the starting expectation that the state should behave like an agent in its own right in spite of the fact that it is, in actual fact, a social structure. The state is not detached and independent of society, but a social structure that is inherently responsive to social struggles between non-state groups, and it is this feature of the state that leads it to ‘politically motivated’ conduct or an inability to behave as a unitary agent. It is therefore often the very nature of the state that leads to the state’s loss in investment disputes.

---

<sup>242</sup> See the discussion on expropriation in Chapter 3.

<sup>243</sup> Charles Brower & Sadie Blanchard, ‘From “Dealing in Virtue” to “Profiting from Injustice”: The Case Against “Re-Statification” of Investment Dispute Settlement’, *Harvard International Law Journal*, 55 (January 2014), pp. 45-59; Gaines, ‘Environmental Policy Implications of Investor-State Arbitration’, pp. 171-201; Wälde & Kolo, ‘Environmental Regulation, Investment Protection and Regulatory Taking’, p. 811-848.

## *The Role of International Investment Law in Domestic Political Struggles*

This thesis has primarily focused on how international investment law creates an additional hurdle for social movements to cross in order to ensure that their states protect them from detrimental corporate conduct, and vice versa how corporations can successfully invoke international investment agreements to protect their business interests from domestic public policy *victories* by their civil society opponents. This was elaborated on in the above subsection, but investment law does not only play a role after social struggle has culminated in state action, but it also influences what action a state takes in the first place. This second subsection will consider the role that international investment law plays in domestic politics well before a judgement is reached in an international tribunal, and often without such a judgement being reached at all. The very threat of an investment treaty challenge can shift the balance in the tug-of-war for the state in favour of the corporation.

Within the investment law literature, this phenomenon is often discussed in reference to the notion of ‘regulatory chill’ – the prospect of an investor-state dispute has a chilling effect on the enthusiasm of state officials to introduce what they come to perceive as a potentially costly public policy measure.<sup>244</sup> There are several instances in which states have withdrawn legislation or state measures subsequent to the threat of a lawsuit, and it is furthermore estimated that 27 % of investment disputes are formally settled after arbitration has commenced but before the tribunal has issued an award, and many of these involve some form of concession towards the company to persuade it to withdraw the legal challenge.<sup>245</sup> Many scholars nevertheless dismiss the possibility of regulatory chill; for instance, Giugi Carminati resolutely declares that “critics have no evidence of this chilling effect”.<sup>246</sup> However, Carminati also conceives of the phenomena itself as occurring when the threat of arbitration causes the state to refrain from regulating “regardless of the merits” of the lawsuit, and the actual instances in which regulations have been withdrawn or cases settled may therefore be interpreted not as regulatory chill but as instances of the state’s dawning recognition that the contested state measure was, in fact, unfair

---

<sup>244</sup> Tienhaara, *The Expropriation of Environmental Governance*; Tienhaara, ‘Regulatory Chill and the Threat of Arbitration’, pp. 606-627; Kyla Tienhaara, ‘What You Don’t Know Can Hurt You: Investor-State Disputes and the Protection of the Environment in Developing Countries’, *Global Environmental Politics*, 6:4 (2006), pp. 73-100; Lyuba Zarsky (2006) ‘From Regulatory Chill to Deepfreeze? In Response to the paper by Kyla Tienhaara, Mineral Investment and the Regulation of the Environment in the Developing Countries: Lessons from Ghana’, *International Environmental Agreements*, 6 (2006) pp. 395-399.

<sup>245</sup> UNCTAD, ‘Recent Developments in Investor-State Dispute Settlement’, *IIA Issues Note*, 1 (May 2013), p. 1.

<sup>246</sup> Giugi Carminati, ‘Is International Trade Really Making Developing Countries Dirtier and Developed Countries Richer?’, *UC Davis Business Law Journal*, 8 (2007-2008), p. 219.

towards the investor or in breach of investment law.<sup>247</sup> On the other hand, Charles Brower and Stephan Schill dismiss concerns about regulatory chill as ‘distorted’ because investment treaties “do not abolish the host state’s regulatory powers” in the first place.<sup>248</sup> Other scholars highlight rather the possibility that regulatory chill may occur because state officials *perceive* that a lawsuit is credible, irrespective of whether it actually is, and furthermore maintain that regulatory chill may occur precisely because investment law is in a state of flux and because the merits of a case are often uncertain.

From the perspective of this thesis, the interesting question is not so much whether state officials would withdraw environmental policy measures in response to a lawsuit with dubious merit. Given that the previous chapter has already argued that environmental protection measures can fall foul of investment treaties in various ways (and given that the previous sub-section has further argued that this often occurs because of the state’s responsiveness to societal struggles) the point is rather that international investment law has an impact on social struggles well before an investment tribunal issues its award. As such, the existing awards reflect the tip of an investment iceberg as far as the political implications are concerned. In the context of a ‘tug-of-war’ for the state, the threat of an investment treaty challenge will provide states with an added incentive to support the corporation by increasing the cost and risk involved in supporting its opponents. There are three forms of evidence to support the proposition that the threat of a lawsuit can serve to give corporations the upper hand in an underlying social struggle.

Firstly, the notion of ‘regulatory chill’ is a logically strong proposition. The International Institute for Sustainable Development describes investment treaty threats as a “routine lobbying instrument” by disaffected corporations, and one of its researchers adds, “They’re real explicit. You know, this will be a breach of Chapter Eleven [of NAFTA] and we’re gonna sue you for x hundred million dollars”.<sup>249</sup> It is not surprising that corporations pursue such a strategy; for them, the risks of a lawsuit are low (the payment of a few million in legal costs if they lose) but the potential gains are high (at times several hundred million dollars). Nor is it surprising if

---

<sup>247</sup> Giugi Carminati, ‘Is International Trade Really Making Developing Countries Dirtier and Developed Countries Richer?’, *UC Davis Business Law Journal*, 8 (2007-2008), p. 219.

<sup>248</sup> Charles Brower & Stephan Schill, ‘Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?’, *Chicago Journal of International Law*, 9 (2008-2009) p. 484.

<sup>249</sup> International Institute for Sustainable Development, *Private Rights, Public Problems: A Guide to NAFTA’s Controversial Chapter on Investor Rights* (2001), p. 16, available at: {[http://www.iisd.org/pdf/trade\\_citizensguide.pdf](http://www.iisd.org/pdf/trade_citizensguide.pdf)} accessed 1 May 2012; ‘Bill Moyers Reports: Trading Democracy’, min. 17.00.

state officials were to reconsider a disputed measure in response to such a threat; for them, the risks associated with investment arbitration are high (the payment of a few million in legal costs when they win, and the payment of up to several hundred million dollars when they lose). Only an imprudent or very determined state official would dismiss such a threat without a second glance. Even if the risk of losing an investment dispute is perceived to be small, the high stakes involved ensures that the potential cost of such a loss would still mandate caution. Prudent state officials are more likely to take the prospect of an investment treaty lawsuit into consideration and to proceed regardless only if they are certain of their legal case (and the previous chapters have detailed how arbitral innovation has thrown this field of law into a state of uncertainty) or if they have strong incentive to proceed with the state measures regardless. What further supports such a corporate strategy is the fact that many investment treaties require a six-month negotiation period between the investor and the state, and Jeswald Salacuse observes that “it is safe to say that virtually all such disputes go through a period of negotiation before reaching settlement or advancing to formal investor-State arbitration”.<sup>250</sup> This is normally perceived as unproblematic and indeed positive if it averts further conflict, but the aim of such negotiations is specifically a resolution to the conflict between the corporation and the *state*, in negotiations that are conducted behind closed doors without the participation of the social movements from which the controversial state measure often originally arose. This process itself therefore favours the corporation in a tug-of-war for the state. Finally, beyond the potential direct cost of losing investment arbitration, the lawsuit itself (well before an award is issued) has been shown to lead to a loss in foreign direct investment and can quickly cancel out any economic benefits a state may have had from signing an investment treaty in the first place.<sup>251</sup> This provides state officials with a further incentive to settle a dispute quickly and without attracting attention from the business world.

Secondly, that ‘regulatory chill’ sometimes occurs is supported by the claims of state officials and corporations alike. After NAFTA came into force, one Canadian official maintained that he had “seen the letters from the New York and DC law firms coming up to the Canadian government on virtually every new environmental regulation [...] Virtually all of the initiatives

---

<sup>250</sup> Jeswald Salacuse, ‘The Emerging Global Regime for Investment’, *Harvard International Law Journal*, 51:2 (2010), p. 458.

<sup>251</sup> Todd Allee & Clint Peinhardt, ‘Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment’, *International Organization*, 65:3 (2011), pp. 401-432.

were targeted and most of them never saw the light of day”.<sup>252</sup> In public, state officials may often be reluctant to admit to having backed down to such investment treaty threats, but in some cases the impact of the legal challenge is openly acknowledged. For example, New Zealand has explicitly put its own tobacco plain packaging regulations on hold in light of Philip Morris’ pending investment treaty challenge against Australian regulations. The Associate Minister of Health observed that the government “will need to manage some legal risks” and therefore “Cabinet has decided that the Government will wait and see what happens with Australia’s legal cases, making it a possibility that if necessary, enactment of New Zealand legislation and/or regulations could be delayed pending those outcomes”.<sup>253</sup> If state officials should be expected to be reluctant to admit to acting under corporate pressure, the corporations themselves openly acknowledge the impact of recourse to ISDS on forcing governments back to the negotiating table. The Vice President of a Chevron division observed that “[o]ne of the important, though rarely discussed, benefits of investor-state dispute resolution is the incentive it creates for parties to negotiate”, and further remarked that “Chevron has successfully concluded such negotiations in countries which have high quality investment treaties”.<sup>254</sup> The investment treaty threat is therefore understood to have convinced state officials to take a decision different from the one that they would have taken in the absence of the threat of a lawsuit. Similarly, law firms commonly advise their corporate clients that investment treaties “can be used as leverage to compel the host state to enter into a favourable negotiated settlement”, and arbitrators favourable towards ISDS suggest that the impact of investment law is “less in its actual use, as in its implicit threat”.<sup>255</sup> Beyond such statements, corporations in their choice of timing also often reveal that investment arbitration is not simply a response to a disadvantageous decision but part of a strategy to influence the political process itself. Ethyl issued its notice of intent to bring a lawsuit before the legislation it disagreed with had been passed, and while it was still being discussed by the Canadian parliament; the aim at that stage was presumably not to seek

---

<sup>252</sup> Cited in William Greider, ‘The Right and US Trade Law: Invalidating the 20<sup>th</sup> Century’, *The Nation* (17 November 2001), available at {<http://www.thenation.com/article/right-and-us-trade-law-invalidating-20th-century>} accessed 30 January 2015.

<sup>253</sup> International Institute for Sustainable Development, ‘News in Brief: New Zealand Is Keen To Introduce Cigarette Branding Regulations, But Awaits Outcome of Legal Cases Against Australia’, *Investment Treaty News*, 3:3 (March 2013), p. 20.

<sup>254</sup> Edward B. Scott, ‘The Current Arbitration System Plays a Fair and Effective Role Helping Mitigate the Risks Inherent in International Investment’, *Commentaries for the Democracy Center and the Institute for Policy Studies* (22 October 2009), available at {<http://justinvestment.org/2009/10/join-our-serious-debate-for-real-change/>} accessed 26 April 2014.

<sup>255</sup> Freshfields Bruckhaus Deringer, ‘Investment Treaty Protection’, available at {[http://www.freshfields.com/en/global/what\\_we\\_do/our\\_services/Investment\\_treaty\\_protection/](http://www.freshfields.com/en/global/what_we_do/our_services/Investment_treaty_protection/)} accessed 23 January 2015; Thomas Wälde (who adds ‘to both parties’, presumably due to the high costs of litigation), cited in Tienhaara, ‘What You Don’t Know Can Hurt You’, p. 86.

compensation, but to dissuade Canadian parliamentarians from passing the Bill in the first place.<sup>256</sup>

Finally, the threat of arbitration also appears to be the best explanation for the outcome of many actual disputes between corporations and their civil society adversaries. For instance, *Vattenfall (I) v. Germany* initially pitted the investor in a proposed coal-fired power plant in Hamburg against environmental groups opposed to the project. Over 12,000 people signed a petition against it, and public opposition to the project appears to have been significant in the strong showing of the Green Party in local elections.<sup>257</sup> In coalition talks with the governing Christian Democrats, the Green Party in turn demanded the introduction of new environmental requirements on the power plant, and Vattenfall justified its lawsuit on the basis that such environmental requirements were ‘politically motivated’ and unduly expensive.<sup>258</sup> In this case, the lawsuit did not necessarily sway the opinions of the Hamburg politicians – and certainly not those of the Green Party – but it ensured that other state officials became involved in a way that favoured the investor. Investment disputes are the responsibility of the federal government, and the Ministry of the Economy settled the case by withdrawing some of the contested environmental requirements.<sup>259</sup> A Greenpeace investigation concludes that Germany/Hamburg would quite likely not have removed the environmental requirements in the absence of an investment treaty challenge, and the threat of the lawsuit is therefore the best explanation for the company’s success in the underlying dispute.<sup>260</sup> Kyla Tienhaara details several other cases in which the possibility of an investment challenge seems to have swayed state officials in the direction of the company; for instance, in an Indonesian case involving a prohibition on open-cast mining in certain protected rainforests, the threat of arbitration from several mining companies was mentioned in parliament and appears from the circumstances of the case to have been instrumental in the decision to provide many mining companies with rights to continue mining.<sup>261</sup>

The influence of investment arbitration is also evident in several new environmental cases. In *Infinito Gold v. Costa Rica* and *Gabriel Resources v. Romania*, the state has fluctuated between

---

<sup>256</sup> This, indeed, appears to be the investment tribunal’s conclusion. *Ethyl Corporation v. Government of Canada, Award on Jurisdiction*, UNCITRAL Ad Hoc Arbitration (24 June 1998), para. 86-87.

<sup>257</sup> Bernasconi, ‘Background Paper on Vattenfall v. Germany Arbitration’, p. 1.

<sup>258</sup> *Vattenfall v. Germany, Request for Arbitration*, para. 27-32, 36-39, 54(1), 54(iv).

<sup>259</sup> Verheyen, ‘The Coal-Fired Power Plant Hamburg-Moorburg’, p. 11.

<sup>260</sup> *Ibid.*, p. 10-12.

<sup>261</sup> Tienhaara, ‘What You Don’t Know Can Hurt You’, p. 94-96.

supporting the corporation and supporting its opponents, and the threat of arbitration seems to have coincided with a change of position in favour of the company. In *Infito Gold*, the disputed measure involved the annulment of a mining permit in response to public opposition and domestic lawsuits brought by environmental groups and the CEO of the company candidly admitted that “[t]his kind of pressure [from submitting a notice of intent to commence arbitration] helped [the agencies involved] resolve the issue”.<sup>262</sup> A few years later, when public pressure once more put the annulment of the mining concession on the agenda, a government-commissioned study directly considered the costs of doing so in light of what was then a near-certain investment treaty dispute – estimated at up to \$1.7 billion in compensation for the company’s lost profits – and this may have accounted for why it took no further action at the time.<sup>263</sup> Now environmental groups appear to have once more had their way, this time in bringing a successful domestic legal challenge to the Supreme Court that has resulted in the annulment of the concession, and it remains to be seen whether the arbitration runs its course this time.<sup>264</sup> In *Gabriel Resources*, the company was under opaque circumstances awarded the initial approvals to engage in gold and silver mining in Rosia Montana, but public opposition on environmental grounds forced the pro-mining government to announce a procedure that would have cancelled the approvals.<sup>265</sup> When the company threatened arbitration, the Romanian government quickly replaced the procedure to cancel the concession with a ‘special draft law’ that would have allowed it to proceed, but in light of mounting public opposition the parliament did not pass the law and the company is now reported to be preparing its legal case.<sup>266</sup> Finally, in respect to Enron’s power plant in India the CEO explicitly acknowledged that the fact that its investment contract allowed for arbitration was critical in ensuring the project was pushed through for longer, although it was ultimately cancelled and India provided compensation to the companies.<sup>267</sup>

This sub-section has indicated that investment law does not only play an important role in social struggles around the world in so far as it allows corporations to challenge a disadvantageous

---

<sup>262</sup> This was when the company was still known as Vanessa Ventures. Cited in Tienhaara, ‘Regulatory Chill and the Threat of Arbitration’, pp. 623-624.

<sup>263</sup> Tienhaara, ‘Regulatory Chill and the Threat of Arbitration’, p. 624.

<sup>264</sup> *Infito Gold v. Costa Rica, Request for Arbitration*.

<sup>265</sup> Council of Canadians, Earthworks, et al., ‘Open Letter to Minister of Foreign Affairs’; Dale-Harris, ‘Romania’s Powder Keg’.

<sup>266</sup> Dale-Harris, ‘Romania’s Powder Keg’.

<sup>267</sup> BusinessWeek, ‘Enron’s Rebecca Mark: You Have to Be Pushy and Aggressive’ (23 February 1997), available at {<http://www.businessweek.com/stories/1997-02-23/enrons-rebecca-mark-you-have-to-be-pushy-and-aggressive-intl-edition>} accessed 23 January 2015.

state measure, but that it also influences whether state officials will decide to adopt such a measure in the first place. The threat or anticipation of an investment dispute does not force a determined government to change ‘its’ mind, but neither is it a factor that will be ignored in the decision-making process. Exclusive attention to concluded cases will therefore fail to capture the full political implications of investment law. The full implications are nevertheless impossible to determine; state officials may well refrain from a course of action in response to an investment treaty challenge that has never been made public.

### ***The Role of International Investment Law in Political Protests***

The previous two sub-sections have argued that international investment law plays an important role in social struggles around the world in two different ways – a victory in investment arbitration by a corporation can undermine a social movement victory in domestic public policy debates, and the very prospect of investment arbitration can furthermore determine who wins such a domestic public policy debate in the first place. Both of these possibilities are implicit within the legal literature on the subject, and the emphasis in the above sections has been to offer a non-state-centric account that brings social movements back in. What has not been recognized in any form is how international investment law not only influences who *wins* such a social struggle, but how it can also influence the ability of social movements to organize opposition in the first place. While corporations primarily approach investment law to prevent governments from introducing unfavourable regulations or policies that may be demanded by civil society groups, this third sub-section will explore how corporations are increasingly approaching investment law to persuade governments to take active measures to protect them from the civil society opposition itself, by clamping down on their protest activities. Corporations have not yet won a legal claim in this respect, but this section suggests that the political implications for protesters may well precede any legal consequences.

International investment law can interfere with political protest in two different ways. Firstly, contracts concluded directly between corporations and states can have implications for the possibility for protest. In analysing an investor-state contract between Chad and a consortium of transnational oil companies, Sheldon Leader argues that the contract would compel Chad to take action to prevent both direct action protests as well as industrial action from interfering



with the company's operations.<sup>268</sup> The confidentiality of most investor-state contracts and the commercial arbitration process itself (and the fact that states also do take measures to break up protests of their own accord) makes it near impossible to know the extent of the implications for political protest. The focus here will instead be on investment treaties themselves, and in particular on the 'full protection and security' standard in such treaties. The investment law literature has shown interest in the full protection and security clause in recent years, but that interest is to a large extent in the novel use of the standard to ensure *legal* security for corporations.<sup>269</sup> The standard was nevertheless traditionally intended to provide *physical* security, and while this aspect is treated as relatively uncontroversial within the academic literature it may have unappreciated consequences for political protest. In at least five recent cases, corporations have brought legal claims against states for their alleged failures to afford corporations 'full protection and security' from adverse social demonstrations and direct action protests that have targeted their operations. In each of these five cases, the corporations were ultimately unsuccessful in their claims. This sub-section will nevertheless contend that the potential for such a victory remains, and therefore also the political implications.

In some of the available cases, the companies do allege that the protesters had engaged in destruction of company property or intimidation, or even violence, against company officials or employees. However, it is important to note that such allegations are presented as independent from the wider claims that the states had failed to protect the companies' *operations* from interference by the direct action protests. In two cases, *Noble Ventures v. Romania* and *Plama v. Bulgaria*, the corporations maintained that the states had failed to afford them 'full protection and security' from their own workers.<sup>270</sup> The companies had run into financial difficulties, and both were several months overdue on the payment of their employees' wages.<sup>271</sup> This had sparked protests, strikes and (allegedly) occupations or blockades of the workplaces.<sup>272</sup> *Plama* further alleged that the workers had used violence to evict the company director from the facility, and *Noble Ventures* alleged that the workers had engaged in sabotage

---

<sup>268</sup> Sheldon Leader, 'Human Rights, Risks and New Strategies for Global Investment', *Journal of International Economic Law*, 9:3 (2006), p. 697-698.

<sup>269</sup> Christoph Schreuer, 'Full Protection and Security', *Journal of International Dispute Settlement*, 1:2 (2010), pp. 353-369; Mahnaz Malik, 'The Full Protection and Security Standard Comes of Age: Yet Another Challenge For States in Investment Treaty Arbitration?' Best Practice Series of the International Institute for Sustainable Development (2011), pp. 1-14.

<sup>270</sup> *Noble Ventures, Inc. v. Romania, Award*, ICSID Case No. ARB/01/11 (12 October 2005), section C.II.1.iv; *Plama Consortium Limited v. Republic of Bulgaria, Award*, ICSID Case No. ARB/03/24 (27 August 2008), para. 236.

<sup>271</sup> *Noble Ventures v. Romania, Award*, para. 10.5, 150.2, 153; *Plama v. Bulgaria, Award*, para. 245.

<sup>272</sup> *Noble Ventures v. Romania, Award*, para. 9.17; *Plama v. Bulgaria, Award*, para. 236.

of equipment and in one case of beating a company officials, though such allegations were not proven within the investment proceedings.<sup>273</sup> The very act of protesting at the sites were nevertheless themselves also presented as unlawful, and Plama maintains that the worker's protests "paralyzed production" at the facility while Noble Ventures complains of "a significant impairment of [...] production".<sup>274</sup> In each case, the states are alleged to have failed in their responsibility to "restore order".<sup>275</sup> In two of the other cases, Tecmed v. Mexico and Abengoa v. Mexico, the companies maintained that the state had failed to protect their hazardous waste landfills from local community protests concerned with the environment, and in particular from human chains and road blockades to prevent more hazardous waste from being deposited at the sites.<sup>276</sup> Tecmed specifically alleged that Mexican authorities "did not act as quickly, efficiently and thoroughly as they should have to *avoid, prevent or put an end* to the adverse social demonstrations expressed through disturbances in the operation of the Landfill or access thereto".<sup>277</sup> In the final case, Burlington Resources v. Ecuador, which will be discussed further below, the company maintains that the state had failed to protect its oil extraction operations from opposition by the Sarayaku indigenous people, on whose land the oil extraction was intended to take place.<sup>278</sup> In each of these five cases, central to the companies' claims is that the states should have ensured that the direct action protests did not interfere with their ability to engage in their normal commercial operations, which is of course precisely what the protesters had aspired to.

The fact that the allegations within each of these five cases were dismissed by the investment tribunals may at first glance seem to dissuade any further concerns, but a closer look at the tribunals' reasoning suggest that the claims themselves remain legally plausible and that the dismissals were rather due to the particular characteristics of the cases themselves. In Plama v. Bulgaria the tribunal simply concluded that it had been "unable to form any firm view as to what really transpired", and conflicting evidence emerged as an issue also in other cases.<sup>279</sup> More importantly, several of the claims failed because the company could not show that the

---

<sup>273</sup> Plama v. Bulgaria, *Award*, para. 236; Noble Ventures v. Romania, *Award*, para. 9.17.

<sup>274</sup> Plama v. Bulgaria, *Award*, para. 236; Noble Ventures v. Romania, *Award*, para. 162.

<sup>275</sup> Cited from Plama, but the implication of the argument in Noble Ventures is the same. Plama v. Bulgaria, *Award*, para. 236.

<sup>276</sup> Tecmed v. Mexico, *Award*, para. 108, 175; Abengoa v. Mexico, *Award*, para. 631, 653-656. The Abengoa award is available only in Spanish, and has been translated using online translation tools. Any quotations are formally translated by a Spanish speaker.

<sup>277</sup> Tecmed v. Mexico, *Award*, para. 175.

<sup>278</sup> Burlington Resources v Ecuador, *Decision on Jurisdiction*, para. 216.

<sup>279</sup> Plama v. Bulgaria, *Award*, para. 249.

state had actually failed in its duty to protect it from the protesters. What is truly striking about these cases is that the states had often already gone to great lengths to support the companies and to protect their operations from the protesters. While the Tecmed tribunal held that there was “not sufficient evidence supporting the allegation that the Mexican authorities [...] ha[d] not reacted reasonably, in accordance with the parameters inherent in a democratic state, to the direct action movements conducted by those who were against the Landfill”, this determination was made in a context in which Mexico had already sent in over 100 police officers to evict and arrest protesters in order to ensure access to the landfill.<sup>280</sup> In *Abengoa*, the tribunal went so far as to praise Mexico, which had sent in 800 police officers to deal with the protests and to stop the road blockades, for “the enormous effort by the authorities” to “restore public order and ensure access to the Plant”.<sup>281</sup> In *Burlington Resources*, the state had even sent in the military to protect the corporation’s activities, in an operation that a government press release at the time termed an ‘invasion’ of Sarayaku territory.<sup>282</sup> In the above cases the states were not found to be in breach of the full protection and security standard, but in no case does the tribunal suggest that the legal reasoning itself was unsound. The full protection and security standard does probably not impose absolute liability on the state, but it is clear that the state is required to exercise ‘due diligence’ and to “take active measures to protect [investments] from adverse effects”.<sup>283</sup> The only question is how far they have to go to discharge that duty. It is still an open question whether investment tribunals would have found the states in the above cases guilty of violating the investment treaty had the states been a little less inclined to support the company in the first place.

If a company were to win such a legal case, the political implications would be the same as for the cases considered in the first sub-section – compensation would have to be provided for any loss in production as a result of the protests. However, the political implications of the full protection and security clause may extend well beyond such compensation. The second sub-section above suggested that there is ample evidence that even the mere threat of investment arbitration can sometimes dissuade states from introducing whatever measure that a company objects to, and indeed corporations and their legal advisers suggest that the primary utility of

---

<sup>280</sup> *Tecmed v. Mexico, Award*, para. 177; *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States, Statement of Defence*, ICSID Case No. ARB(AF)/00/2 (11 February 2002), para. 457 (Spanish only).

<sup>281</sup> *Abengoa v. Mexico, Award*, para. 656 (Spanish only). The *Abengoa* award is available only in Spanish, and has been translated using online translation tools. Any quotations are formally translated by a Spanish speaker.

<sup>282</sup> Inter-American Court of Human Rights, ‘Case of Kichwa Indigenous People’, p. 59, footnote 262.

<sup>283</sup> Schreuer, ‘Full Protection and Security’, p. 353.

investment law is that it can be used as “leverage” to get states to do what they want.<sup>284</sup> The equivalent in respect to the full protection and security clause is that states may be inclined to clamp down on protest in order to avoid a lawsuit. The potential consequences for social movements are well illustrated in the Burlington Resources case.

Burlington Resources claimed that Ecuador had failed to provide the company with full protection and security from the Sarayaku indigenous people, who were strongly opposed to the company’s plans to engage in oil exploration and exploitation within its territory, due to the effects on the environment and their way of life.<sup>285</sup> Burlington maintains that the Sarayaku had engaged in sabotage of the company’s property and its seismic exploration base, and on one occasion members of the Sarayaku had apparently taken several company employees hostage, evidently in order to force a suspension of the company’s prospecting activities.<sup>286</sup> Beyond such strategies, the Sarayaku had also engaged in a variety of peaceful protests, including uprooting themselves from their villages and setting up ‘Peace and Life’ camps along the parameters of their territory to keep the oil companies out. In addition to protection for its property and personnel, Burlington also maintained that Ecuador should have taken action to ensure that the company could proceed with its exploratory work in spite of the indigenous opposition.<sup>287</sup> What is particularly interesting here is the reasoning behind the tribunal’s dismissal of the case. The tribunal was presented with extensive evidence that Ecuador and Burlington had in fact “worked jointly” (to use a phrase that kept recurring in company letters from the time) to ensure that the project could proceed despite the indigenous opposition.<sup>288</sup> Indeed, the Minister of Energy and Mines had unequivocally told reporters that “the State must use all the State’s security forces to protect the companies that wish to work in Ecuador” and if “the presence of the police or the Armed Forces is necessary, the government will take the necessary steps in line with its commitment to honor the contract”.<sup>289</sup> While there was clear evidence of collaboration between the company and the state for the most part, there were nevertheless also circumstances in respect to one of the blocks where the company had already at the time

---

<sup>284</sup> Freshfields Bruckhaus Deringer, ‘Investment Treaty Protection’.

<sup>285</sup> Burlington Resources v Ecuador, *Decision on Jurisdiction*, para. 26, 216.

<sup>286</sup> Ibid, para. 35-36; Karyn Butcher, ‘Not In My Backyard! The Sarayaku’s Fight Against Oil Development in the Ecuadorian Amazon’, *ICE Case Studies*, 170 (May 2006), available at {<http://www1.american.edu/ted/ice/sarayacu.htm>} accessed 11 March 2014; Inter-American Court of Human Rights, ‘Case of Kichwa Indigenous People’, para. 96.

<sup>287</sup> Inter-American Court of Human Rights, ‘Case of Kichwa Indigenous People’, para. 100; Burlington Resources v Ecuador, *Decision on Jurisdiction*.

<sup>288</sup> Burlington Resources v Ecuador, *Decision on Jurisdiction*, para. 295; in general see section 2.3.1.C.

<sup>289</sup> Inter-American Court of Human Rights, ‘Case of Kichwa Indigenous People’, p. 27, footnote 258; p. 58-59, footnote 262.

indicated it was dissatisfied with the level of support it had received.<sup>290</sup> The tribunal nevertheless dismissed the case, but it did so on the basis that the company had not made clear such dissatisfaction amounted, from its perspective, to a failure to provide full protection and security and consequently a violation of investment law.<sup>291</sup> As such, the tribunal informed the company in no uncertain terms that it *should* have threatened arbitration, in order to give the state an opportunity to redress the problem before arbitration was filed. So what would have been the consequences of Burlington doing so for the Sarayaku people?

It seems probable that the prospect of investment arbitration would have provided Ecuador with further incentive to support the company against the indigenous opposition, and the danger of providing the state with such a further incentive is aptly highlighted in this case. While Burlington maintained that Ecuador had failed to protect it from the indigenous opposition, the Sarayaku people likewise maintained that Ecuador had failed to protect their personal safety and way of life from both the company itself and the military that had been sent in to support it. The Sarayaku approached the Inter-American Court of Human Rights (an institution of the Organization of American States or OAS) for protection.<sup>292</sup> In part, just as the company asked for protection for its seismic prospecting operation, the Sarayaku asked for protection against it. The Inter-American Court was later to determine that the burying of high-powered explosives throughout the territory prevented the Sarayaku from safe access for hunting and other traditional activities, and the explosions themselves further destroyed water sources, forests and sacred sites.<sup>293</sup> The Court concluded that Ecuador was responsible for “for having gravely put at risk the rights to life and physical integrity of the Sarayaku People”.<sup>294</sup> Beyond the risks associated with the company’s operations, the indigenous people furthermore objected to the “militarization” of its territory as well as a range of human rights abuses allegedly committed by both the military as well as the company itself, ranging from an armed attack on one of the ‘Peace and Life’ camps through to abductions, violence, and torture of community leaders.<sup>295</sup> The Inter-American Commission issued precautionary measures to protect the Sarayaku, in response to which the Minister for Energy and Mines retorted, “the OAS does not give orders

---

<sup>290</sup> Burlington Resources v Ecuador, *Decision on Jurisdiction*, para. 319-331.

<sup>291</sup> Ibid, para. 335.

<sup>292</sup> Inter-American Court of Human Rights, *Order: Provisional Measures Regarding Ecuador: Matter of Pueblo Indígena Sarayaku* (6 July 2004); Inter-American Court of Human Rights, ‘Case of Kichwa Indigenous People’. The Sarayaku identifies CGC as the oil company – this was indeed the operator of the block, while Burlington held a 50% ownership interest.

<sup>293</sup> Inter-American Court of Human Rights, ‘Case of Kichwa Indigenous People’, para. 217-220, 229, 233,

<sup>294</sup> Ibid, para. 248-249.

<sup>295</sup> Ibid, para. 127; Inter-American Court of Human Rights, *Order: Provisional Measures*, para. 2.e-2.g.

here”.<sup>296</sup> Most of the allegations remain unproven, but the Inter-American Court did implicitly question the military’s practice of handing over captured Sarayaku leaders to the oil company itself for interrogation, a further testament to the close cooperation between the state and the company.<sup>297</sup> Amnesty International also issued a number of Urgent Actions to protect the Sarayaku and the environmental groups that supported them from death threats, and declared that “[c]oncerns for the safety of the environmental and Indigenous activists in Ecuador’s oil zones are well founded” and specifically highlighted how the security services had been involved in human rights abuses against the civilian population.<sup>298</sup> It is into such volatile situations that the threat of an investment treaty challenge could have further encouraged Ecuador, and the military forces that were in charge of protecting the company, to strike down on the indigenous protests and thereby to exacerbate an already dangerous situation for the Sarayaku people.

The full protection and security standard is unique within international investment law, in that companies invoke it not to protect themselves from government action motivated by domestic political pressure, but to protect them directly from protests that affect their personnel, property and – crucially – their very operations and productive activities, which is often precisely what direct action protests aim to do. This particular aspect of international investment law therefore has the potential to more directly interfere with the political activities of social movements.

### ***The Role of International Investment Law in Corporate Conduct***

The above three sub-sections have explored the role of international investment law in social struggles in light of their impact on social movements: in undermining social movement victories in domestic political struggles, in undermining their possibilities for victory in the first place where such struggles are fought in the shadow of investment arbitration, and in undermining their ability to engage in direct action protests. This fourth and final sub-section will further argue that international investment law also affects the conduct of the corporations themselves in the context, or in anticipation, of such social struggles. International investment

---

<sup>296</sup> Cited in, Amnesty International, ‘Our Work: Chevron Corp’, available at {<http://www.amnestyusa.org/our-work/issues/business-and-human-rights/oil-gas-and-mining-industries/chevron-corp>} accessed 11 March 2014.

<sup>297</sup> Inter-American Court of Human Rights, ‘Case of Kichwa Indigenous People’, para. 252-253.

<sup>298</sup> Amnesty International, ‘Our Work: Chevron Corp’.

law is often said to protect corporations from ‘political risk’.<sup>299</sup> Political risk can involve geopolitical risks or the risk of political violence or government instability, but it also includes “shifting legal and regulatory frameworks” and the broader risk of political decisions that are disadvantageous to an investment.<sup>300</sup> In so far as it does so, that immunity towards political risk can plausibly affect how corporations choose to act. Robert Ziff suggests that international investment law may involve ‘moral hazard’ in so far as it increases the “possibility that you will take less care to prevent an accident if you are insured against it”.<sup>301</sup> In the context of the social struggles considered here, this has two possible implications. Firstly, international investment law can encourage corporations to make politically risky investments. A corporation may be more inclined to get involved in a project that is likely to provoke societal opposition if it believes itself to be insulated from any political changes that may plausibly occur, further down the line, as a result of such opposition. Secondly, international investment law can encourage corporations, after they have invested, to subsequently act in politically risky ways. A corporation that believes itself to be insulated from political changes may be less careful in its corporate conduct and may be less inclined to take precautionary action to prevent societal opposition from emerging.

Chevron advocates international investment treaties as a means of “mitigat[ing] the risks associated with large-scale, capital intensive, and long term projects”, and specifically gives the example of “developing shale gas”.<sup>302</sup> That example is, not incidentally, one that has engendered widespread environmental protests and at least one moratorium on the practice to date.<sup>303</sup> When Lone Pine Resources brought an investment claim against Quebec’s decision to

---

<sup>299</sup> Paul Comeaux & Stephen Kinsella, ‘Reducing Political Risk in Developing Countries: Bilateral Investment Treaties, Stabilization Clauses, and MIGA and OPIC Investment Insurance’, *New York Law School Journal of International and Comparative Law*, 15:1 (1994), pp. 1-48; Stephan Schill, *The Multilateralization of International Investment Law*, (Cambridge: Cambridge University Press, 2009), p. 3, 364; Freshfields Bruckhaus Deringer, ‘Bilateral Investment Treaties: Managing the Risk of Government Intervention’, available at: {<http://www.freshfields.com/uploadedFiles/SiteWide/Knowledge/Bilateral%20investment%20treaties%20Managing%20the%20risk%20of%20government%20intervention.pdf>} accessed 20 June 2014; UNCTAD, *Investment Policy Framework for Sustainable Development* (United Nations, 2012), p. 40.

<sup>300</sup> Matthew Shinkman, ‘The Investors’ View: Economic Opportunities Versus Political Risks in 2007-11’, in The Economist Intelligence Unit & Columbia Program on International Investment, *World Investment Prospects to 2011: Foreign Direct Investment and the Challenge of Political Risk* (2007), pp. 84-94.

<sup>301</sup> Citing Krugman, in Robert Ziff, ‘The Sovereign Debtor’s Prison: Analysis of the Argentine Crisis Arbitrations and the Implications for Investment Treaty Law’, *Richmond Journal of Global Law and Business*, 10:3 (2010-2011), p. 377.

<sup>302</sup> Chevron Corporation, ‘Comments on Proposed Transatlantic Trade and Investment Partnership’, Letter to the Office of the United States Trade Representative (7 May 2013), available at {<http://www.greenpeace.org/austria/de/News/blog-at/us-fracking-lobby-ist-europische-rechtstaatli/blog/48298/>} accessed 22 January 2015.

<sup>303</sup> The Canadian Press, ‘Quebec Fracking Ban Would Impose 5-Year Moratorium in St. Lawrence River Valley’, *Huffington Post* (15 May 2013), available at {<http://www.huffingtonpost.ca/2013/05/16/quebec->

withdraw permits for shale gas extraction in response to public protests, the Council for Canadians questioned “[w]hy are we, the public, paying the price for sober second thoughts about fracking?”<sup>304</sup> In so far as investment law provides corporations with a form of insurance from political risk, it can encourage corporations to disregard the potential for such political risk in the making of its investment decisions – in other words, it encourages investments in projects that can be expected to provoke societal resistance. Rather than avoiding politically risky investments, corporations may rather seek to encourage states to provide it with expressions of support, permits or contracts at the initial stages of an investment project, so that it will be able to invoke its ‘legitimate expectations’ that the project would be allowed to proceed if the state were to subsequently pursue a different policy. In order to do so, a minimum of publicity or even secrecy will be helpful – the longer it takes for societal opposition to develop, the more likely the corporation is to have acquired ‘legitimate expectations’ that will legally protect it from any future policy changes that a state may adopt in response.

One way to ensure protection from future political change is through contracts, and the common use of confidentiality within the contracting process is helpful for corporations in ensuring that societal opposition does not emerge before the contract is signed. *Gabriel Resources v. Romania* and *Enron v. India* both concern confidential contracts – Enron later defended the practice of confidentiality, but acknowledged that a country “as yet unused to the phenomenon of privatization” might find the concept difficult to understand.<sup>305</sup> By the time such contracts become publicly known, its effects are irreversible. The confidentiality of contracts is not limited to the developing world; the opposition Labour Party in the UK has recently discovered the government’s use of privatization contracts that guarantee company profits for ten years in the event of cancellation, but by the time the Labour Party discovery had been made the contracts were signed and final and any reversal of the privatization would incur considerable cost.<sup>306</sup>

---

fracking-ban\_n\_3282024.html} accessed 27 January 2015; Nicolas Van Praet, ‘Quebec Ban Leaves Shale Gas Drillers Staggering’, *Financial Post* (1 July 2011), available at {[http://business.financialpost.com/2011/07/01/quebec-moratorium-leaves-shale-gas-drillers-staggering/?\\_\\_lsa=7dd7-3993](http://business.financialpost.com/2011/07/01/quebec-moratorium-leaves-shale-gas-drillers-staggering/?__lsa=7dd7-3993)} accessed 27 January 2015.

<sup>304</sup> *Lone Pine Resources v. Canada*, *Notice of Intent*; Council for Canadians, ‘NAFTA Lawsuit Against Quebec Fracking Moratorium Proves Environmental Threat of China, EU Investment Deals’, *Media Release* (16 November 2012), available at {<http://canadians.org/media/trade/2012/16-Nov-12.html>} accessed 18 April 2014.

<sup>305</sup> Dale-Harris, ‘Romania’s Powder Keg’; Cited in Tony Allison, ‘Enron’s Eight-Year Power Struggle in India’, *Asia Times* (18 January 2001), available at {<http://www.atimes.com/reports/CA13Ai01.html>} accessed 27 January 2015.

<sup>306</sup> Alan Travis & Rajeev Syal, ‘Poison Pill’ Privatization Contracts Could Cost £300m-£400m to Cancel’, *The Guardian* (11 September 2014).



Beyond contracts, international investment law also provides corporations with an incentive to ensure that the regular permitting process is as far underway as possible before societal opposition emerges, and keeping publicity to the minimum can be helpful in that respect. In *Abengoa v. Mexico*, the company was under the obligation to inform the local community of its plans to construct a hazardous waste landfill, but it chose not to do so until construction was well under way and even then appears to have specifically avoided the term ‘hazardous waste’.<sup>307</sup> The local community opposition that subsequently emerged accused the company of concealing the true nature of its plans, and this may have contributed to the distrust of the company.<sup>308</sup> The lack of public information ensured that local community opposition arose only after the facility was almost complete, and by the time that the municipality responded to the protests by closing the landfill the company had already commenced its operations. Had the company been more forthcoming about its plans, the local opposition is likely to have emerged sooner and the authorities may have thought twice about permitting the project to proceed in the first place. In the absence of international investment law, it would be prudent for the investor to only proceed with such a project if it would be fairly certain that local community opposition would not derail the project within a few years, and open communication would be in its own interest. International investment law changes that calculation. In this case, the investment tribunal observed that Abengoa had, notwithstanding its failure to inform the local community, received the applicable permits and had completed the construction of the facility, and that it had therefore legitimately expected to operate the landfill as planned.<sup>309</sup> It ordered Mexico to provide the company with USD \$38 million in compensation for costs incurred and lost profits calculated over a period of 30 years.<sup>310</sup> As such, the company directly benefitted from its decision to keep a low profile and not to inform the local community before the project was well under way.

International investment law can also influence corporate behaviour after an investment has already been made. To cite Robert Howse, “[k]nowing it is insulated against regulatory changes the firm may decide not to take precautions against the occurrence of events that, because of

---

<sup>307</sup> *Abengoa v. Mexico, Award*, para. 445-446, 660-662. The Abengoa award is available only in Spanish, and has been translated using online translation tools. Any quotations are formally translated by a Spanish speaker.

<sup>308</sup> Xinhua, ‘Police, Civilians Clash in Rural Mexico Over Chemical Waste’; Fach Gómez, ‘ICSID Claim by Spanish Companies against Mexico’, pp. 1-26.

<sup>309</sup> *Abengoa v. Mexico, Award*, para. 659-673.

<sup>310</sup> Legal Monitor Worldwide, ‘Mexico Says It Won’t Appeal Arbitration Award for Spain’s Abengoa’ (2 August 2013); *Abengoa v. Mexico, Award*, para. 796, 722-726.

their social costs, may predictably trigger regulatory responses that are costly to the firm”.<sup>311</sup> This point was made specifically in reference to stabilization clauses in contracts that freeze the (environmental) regulatory framework at a given point in time, but in so far as international investment law in general protects corporations against political risk the danger is that corporations may begin to feel invulnerable towards societal opposition and may therefore exercise less caution to prevent it from occurring. This is a distinct possibility in countries with fairly lenient environmental regulations, but where corporations would otherwise feel inclined to go beyond such regulations in order not to provoke local opposition. For example in the Mexican cases, Tecmed was only in slight breach of environmental law (it incurred small fines and formal warnings) while Metalclad negotiated an agreement with the government that would exempt it from immediately remediating illegal contamination accrued by the previous owners,<sup>312</sup> yet in doing so their approach to the environment provoked local community opposition that might otherwise have been prevented. The promise of compensation afforded by investment treaties ensures that corporations only have to do the minimum required by law, and do not have to take care to avoid societal opposition. Furthermore, international investment law can encourage corporations to continue investing well beyond the point at which the political situation might have otherwise suggested it made sense to do so; for instance, a study on the investment disputes that have emerged from Spain’s cuts to solar subsidies reveals that most of the companies had continued to increase their portfolios after it had already become evident that solar subsidies were likely to be reduced, and were indeed “still buying assets whilst actually preparing their [...] lawsuit”.<sup>313</sup>

The investment law literature tends to perceive protection from political risk in positive terms; the economic risk is legitimately to be borne by the company, and the political risk by the state. However, such immunity towards political change influences how corporations act in the context of societal struggles. While the evidence is inconclusive – and given the inherent difficulty of researching the topic, is likely to remain so – it is plausible to suggest that a corporation that is insured against the costs of political risk would be less inclined to take caution to avoid such risks. A sense of immunity towards detrimental political change can

---

<sup>311</sup> Robert Howse, ‘Freezing Government Policy: Stabilization Clauses in Investment Contracts’, *Investment Treaty News*, 3:1 (April 2011), p. 5.

<sup>312</sup> Tecmed v. Mexico, *Award*, para. 99-100, 107; Metalclad v. Mexico, *Reply*, Chapter 6, para 195.

<sup>313</sup> Cecilia Olivet & Pia Eberhardt, *Profiting from Crisis: How Corporations and Lawyers are Scavenging Profits from Europe’s Crisis Countries* (Amsterdam/Brussels: Transnational Institute & Corporate Europe Observatory, 2014), p. 30.

encourage corporations to make investments that are likely to be politically risky and that can be expected to provoke societal opposition and political change further down the line. It can furthermore influence the extent to which corporations take care to prevent societal opposition from occurring after an investment has already been made. This fourth sub-section has therefore suggested that international investment law can influence not only the outcome of a social struggle, but can also change how corporations appreciate their own position vis-à-vis domestic politics and the citizens of the state in which it operates. As such, it can also plausibly increase the risk that disputes between the corporation and social groups affected by their operations develop in the first place.

### **Conclusion**

Investment treaties are formally known as treaties for the “promotion and protection” of investments, and scholarly commentary and state negotiators similarly very often refer to investment law as offering precisely ‘protection’ for corporations.<sup>314</sup> The previous chapter asked the question: protection from what? It explored how corporations were protected from a wide range of government measures, and argued that the broad interpretation given to the investment treaty standards ensured that even state measures designed to protect the environment could be found to violate investment treaties. This chapter has moved beyond the question of *what* corporations are protected from in order to ask: protection from whom?

The international investment law literature, as well as practitioners within the field, adopt the perspective of the dispute settlement process itself. Investor-State Dispute Settlement is perceived to be about resolving disputes between investors and states, and more specifically, investors seek protection from states. In contrast, this chapter has argued that the associated practice of conceiving the state as an actor in its own right immediately serves to render analytically irrelevant the domestic struggles through which investment disputes often emerge, as well as the corporations’ ultimate adversaries in civil society. The first section of this chapter has offered an alternative perspective on investment disputes, a perspective that de-centres the state and that seeks to bring the real agents in the political struggle to the forefront. As such,

---

<sup>314</sup> E.g. “Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ghana for the Promotion and Protection of Investments” (22 March 1989); European Commission, ‘Factsheet: Investment Protection and Investor-to-State Dispute Settlement in EU Agreements’ (November 2013), p. 4, available at: {[http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc\\_151916.pdf](http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf)} accessed 1 May 2014.

corporations seek protection from people *within* states who have collectively organized to accomplish their goals through the structures of the state. The use of the word ‘protection’ in this context is nevertheless not to suggest that the corporations have been subject to an unprovoked attack that they deserve protection from; in contrast, people often have good reason to oppose corporations that have breached environmental regulations, that seek to engage in environmentally destructive mining activities, that produce chemicals or pesticides that harm people or the environment, or that otherwise expose people to environmental risks that they are unwilling to bear. At the precise juncture at which an investment dispute is filed, it is nevertheless the corporation that is on the backfoot in the underlying social struggle, and it is appropriate to refer to international investment law as offering corporations ‘protection’ from its civil society opponents. What enables this alternative perspective is a particular conception of the state, and the second section has argued that the state is most helpfully conceived not as an agent, but as a social structure that is the reflection and ‘congealment’ of wider societal struggles over the future of the society we are to live in.

The third section of this chapter has explored what difference this alternative perspective makes for our understanding of the politics of international investment law, and maintains that it is only through this perspective that we can truly appreciate the underlying political struggles that this field of law is implicated in. Such a perspective reveals how international investment law has become a potent weapon wielded by corporations in ongoing disputes where their ultimate adversaries are not states, but particular groups of people within states. Most obviously, we see how corporations use investment law to protect themselves from the consequences of civil society *victories* in domestic political debates – this is when the corporation seeks recourse to international arbitration. International investment law nevertheless plays an important role at every stage of the social struggle, and not only when a victory in domestic politics has already been reached. The threat of arbitration can provide states with an incentive to support the corporation in such domestic political debates in the first place, a phenomenon that is sometimes referred to as ‘regulatory chill’. The threat of arbitration based on the ‘full protection and security’ standard can further encourage states to strike down on political protests, and therefore affects the ability of civil society actors to organize opposition in the first place. Finally, the knowledge that international investment law offers protection from ‘political risk’, and by implication the political consequences of societal opposition, can also influence the corporation’s own behaviour, and the extent to which it exercises caution to prevent such opposition from emerging in the first place.

The perspective put forward in this chapter contrasts directly with that put forward in the mainstream literature on the subject of international investment law, as well as that of most practitioners. In contrast, the perspective offered here coheres with the understanding of international investment law that seems to be increasingly prevalent both within the social movements that are finding their domestic political victories questioned in investment arbitration, as well as within wider civil society criticisms of ISDS. This is most evident in how the El Salvadoran social movement against mining objects that Pacific Rim has taken the underlying domestic political dispute “to a forum where its principal opponent-in-interest cannot appear” and where only the state is represented.<sup>315</sup> The aim of this chapter has been to articulate this nascent civil society perspective in more definite terms, and to contrast it with the perspective found in the literature on the subject and in wider investment law practice. The argument made here is not that this alternative perspective is desired for its own sake. Rather, it is only through this perspective – that brings non-state actors to the forefront of the analysis – that we can truly appreciate the political struggles that underpin international investment law, and thereby the role that this field of law plays in social struggles around the world today.

---

<sup>315</sup> Pac Rim v. El Salvador, *Application for Permission to Proceed as Amici Curiae*, p. 20.

## Conclusion

Karl-Heinz Böckstiegel, an experienced arbitrator in investment disputes, suggests that Investor-State Dispute Settlement (ISDS) resembles the rising of David against Goliath; the rising of the little investor against the mighty state.<sup>1</sup> Such a perspective, albeit not always articulated in such stark terms, permeates the discipline of international investment law. The liberal ideology that informs both investment arbitration and related scholarship encourages the perception that international investment law is about protecting the ‘individual’ (the corporation) against abuses by the sovereign state, and the implicit aim is to limit the state’s power.<sup>2</sup> From such a starting point, it has become increasingly common to compare international investment law with human rights law; after all, both seek to protect the individual from the state.<sup>3</sup> Böckstiegel acknowledges that the David vs. Goliath analogy might suffer certain limitations, for “some of these private claimants, as large multinational corporations, may well have more resources available than a rather small state being a respondent”.<sup>4</sup> What has been challenged in this thesis is nevertheless not the utility of this analogy in respect to the relative power of the corporation and the state, but the explanatory – and the political – implications of framing the dispute as one between the corporation and the state in the first place. This thesis has argued that international investment law is implicated in political struggles that are ultimately between opposing societal groups, both of whom seek to use the structures and personnel of the state in their struggles with each other. Once it becomes clear that the corporation is not confronting the state but local community groups, non-governmental organizations and social movements, the parallels drawn with David vs. Goliath appear ever more questionable.

In order to explain the politics of international investment law, this thesis has put forward two arguments: one theoretical, the other empirical. The theoretical argument is that the state is not

---

<sup>1</sup> Karl-Heinz Böckstiegel, ‘Enterprise v. State: the New David and Goliath? – The Clayton Utz Lecture’, *Arbitration International*, 23:1 (2007), pp. 93-104.

<sup>2</sup> It is conventional to refer to the corporation as an ‘individual’, especially in the context that the ‘individual’ should not have to make a special sacrifice for the wider community; e.g. Thomas Wälde & Abba Kolo, ‘Environmental Regulation, Investment Protection and Regulatory Taking in International Law’, *International and Comparative Law Quarterly*, 50, 2001, p. 846; *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States, Award*, ICSID Case No. ARB(AF)/00/2 (29 May 2003), para. 122; *Azurix Corp. v. the Argentine Republic, Award*, ICSID Case No. ARB/01/12 (14 July 2006), para. 311.

<sup>3</sup> Franklin Berman, ‘Evolution or Revolution?’, in Chester Brown & Kate Miles (eds), *Evolution in International Treaty Law and Arbitration* (Cambridge: Cambridge University Press, 2011), pp. 658-672; Bruno Simma, ‘Foreign Investment Arbitration: A Place for Human Rights?’, *International and Comparative Law Quarterly*, 60 (2011), p. 576 (“the ultimate concern at the basis of both areas of international law is one and the same: the protection of the individual against the power of the State”).

<sup>4</sup> Böckstiegel, ‘Enterprise v. State: the New David and Goliath?’, p. 95.

an agent. The state is a social *structure* that ‘congeals’ past political struggles and that serves as a ‘strategically selective’ arena for contemporary political struggles, and the real *agents* in those political struggles are human beings, often acting collectively to achieve their aims. This theoretical argument enables the development of a new empirical understanding of international investment law. If the politics of international investment law cannot be explained in reference to the agency of states and ‘their’ respective interests, then who are these struggles between, and what are they about?

In a narrower sense, this thesis is about many different political struggles around the world, within which ISDS has come to play a part. These political struggles arise when local community groups, non-governmental organizations or wider social movements come to oppose certain corporate projects or practices, and where they have sought to act through the state to achieve their aims. Contrary to the assumptions prevalent within the investment law literature, the corporation does not stand outside these struggles as an innocent bystander that lacks “voice” in the domestic politics of the host state: they too are deeply involved in the intra-community struggles as well as the struggle for the support of the state.<sup>5</sup> La Mesa, the social movement in El Salvador that arose against Pacific Rim’s gold mining proposals, points out that the company and the social movement had been locked in a domestic political battle for several years, and the company had a track record of success in high level lobbying.<sup>6</sup> As La Mesa reiterates, “[o]nly now that it perceives it has lost that *political* debate” does the company bring a *legal* dispute to arbitration.<sup>7</sup> Pacific Rim is therefore asking the tribunal “to effectively reverse the results of that [political] process in this [arbitral] forum”.<sup>8</sup>

This thesis has argued that international investment law forms a powerful tool for corporations to challenge state measures introduced to protect other societal groups. To cite Juan Fernández-Armesto, an investment arbitrator:

“When I wake up at night and think about arbitration, it never ceases to amaze me that sovereign states have agreed to investment arbitration at all [...] Three private individuals are entrusted with the power to review, without any restriction or appeal

---

<sup>5</sup> Andrew Newcombe, ‘The Boundaries of Regulatory Expropriation in International Law’, *ICSID Review*, 20:1 (2005), p. 46-47; *Tecmed v. Mexico, Award*, para. 122.

<sup>6</sup> See Chapter 4 for details about the case.

<sup>7</sup> *Pac Rim Cayman LLC v. Republic of El Salvador, Amicus Curiae Submission by Member Organizations of La Mesa Nacional Frente a la Minería Metálica de El Salvador*, ICSID Case No. ARB/09/12 (20 May 2011), p. 1.

<sup>8</sup> *Ibid*, p. 13.

procedure, all actions of the government, all decisions of the courts, and all laws and regulations emanating from parliament”.<sup>9</sup>

Corporations have acquired the right to at their own initiative bring a legal claim against a state to an international tribunal that is, by virtue of its institutional structure, closely attuned to the interests of a transnational capitalist class. The European Commissioner for Trade maintains that this is uncontroversial because such tribunals only uphold “basic principles of the rule of law”, but this thesis has argued that, in practice, each of the seemingly innocent investment treaty rules mean far more than immediately meets the eye.<sup>10</sup> On the basis of a close analysis of corporate challenges against environmental regulations, which should in principle be beyond the boundary of what investment law is intended to protect corporations from, the thesis has shown that states have a high threshold to cross if they are to introduce measures that negatively affect transnational corporations. Furthermore, the very fact that these disputes often emerge when states respond to public pressure is itself likely to increase the state’s probability of losing such a dispute; to cite Ibrionke Odumosu, “[i]nvestment law privileges some rationales for adopting regulatory measures over others” and “public demand seems to be at the bottom of the ladder of acceptable rationales”.<sup>11</sup> Pacific Rim may or may not win its particular case, but ISDS provided the company with a second chance to challenge state measures when its political strategy failed, and if it does win, international investment law is backed by unprecedented means of enforcing such a monetary award.

To investigate only the legal cases where a corporation has actually won an investment dispute would only reveal the tip of the iceberg, as far as the political implications for social struggles are concerned. This thesis has detailed a number of different ways in which investment law influences such struggles, and most importantly, the threat of investment arbitration has itself been shown to influence the outcome of the underlying political struggle for the state – unsurprisingly, upon being informed that a particular state measure will lead to a lawsuit of hundreds of millions of U.S. dollars, state officials are inclined to think twice about introducing

---

<sup>9</sup> Cited in Gus Van Harten, ‘China Investment Treaty: Expert Sounds Alarms in Letter to Harter’, *The Tyee* (16 October 2012), available at {<http://theyee.ca/Opinion/2012/10/16/China-Investment-Treaty/>} accessed 19 March 2015.

<sup>10</sup> Karel De Gucht, ‘The Transatlantic Trade and Investment Partnership: The Real Debate’, *European Commission Speech No 14/406, Speech at the European Affairs Committee of the Bundesrat* (Berlin, 22 May 2014), available at: {[http://europa.eu/rapid/press-release\\_SPEECH-14-406\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-14-406_en.htm)} accessed 31 August 2014;

<sup>11</sup> Ibrionke Odumosu, ‘Locating Third World Resistance in the International Law on Foreign Investment’, *International Community Law Review*, 9 (2007), p. 436; see also Gus Van Harten, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (Oxford: Oxford University Press, 2013), p. 68-73.



it in the first place. Given that such threats are made discreetly behind closed doors to particular state officials, it is impossible to know the full extent of the role that international investment law plays in social struggles around the world today. This is nevertheless estimated to be the “fastest growing area of international law today”, and this thesis suggests that it deserves closer and more sustained scrutiny from critical scholars of global politics than it has so far been granted.<sup>12</sup>

In a wider sense, the international investment regime did not appear out of nowhere, and this thesis has also explored the political struggles through which it has emerged and evolved. To imply that the investment regime emerged in the context of political struggle may nevertheless seem counter-intuitive, since bilateral investment treaty negotiations have witnessed very little in the way of struggle. These have been negotiated with little fanfare and expanded around the world, literally, “BIT by BIT”.<sup>13</sup> However, the agency of a transnationalizing capitalist class has been imperative in the making of the international investment regime, and it has exercised that agency in the context of wider political struggles; more specifically, it sought to undermine the agency of other social groups (whether anti-colonial movements in the Third World or environmental movements in the West), who were using national state structures to promote their interests. International investment law is now embedded within a wider network of supranational institutions and national state structures that make up what William Robinson describes as a ‘transnational state’.<sup>14</sup> The thesis has argued that the significance of conceptualizing this as *one* transnational state is because the past and present agency of a transnational capitalist class is not only ‘congealed’ and exercised within the nodal points of the network (in the various political and legal institutions themselves), but in how the network is formed in the first place. It is precisely the enforced ‘boundaries’ and helpful interconnections between a variety of national and supranational political institutions that ensures that the transnational state, as a whole, supports this class. The agency of a transnational capitalist class is therefore not only ‘congealed’ in and exercised through the international investment regime itself, but also in the particular ways in which it is situated vis-à-vis other political and legal

---

<sup>12</sup> UNCTAD ‘Latest Developments in Investor-State Dispute Settlement’, *IIA Monitor*, 1 (2009), p. 2, available at {[http://unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20\(IIA\)/IIA-Monitor.aspx](http://unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20(IIA)/IIA-Monitor.aspx)} accessed 1 May 2012; Charles Brower & Stephan Schill, ‘Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?’, *Chicago Journal of International Law*, 9 (2008-2009), p. 472.

<sup>13</sup> Jeswald Salacuse, ‘BIT by BIT: The Growth of Bilateral Investment Treaties and their Impact on Foreign Investment in Developing Countries’, *International Lawyer*, 24 (1990), pp. 655-675.

<sup>14</sup> William Robinson, *A Theory of Global Capitalism: Production, Class, and State in a Transnational World* (Baltimore: Johns Hopkins University Press, 2004).

institutions. International investment law serves as a “trump card” against national state power without challenging the sovereignty of the state to sign investment treaties in the first place.<sup>15</sup> The fragmentation of the supranational sphere further ensures that a transnational capitalist class has acquired extensive supranational rights in comparison with other social groups, and that no other global court can challenge an investment tribunal’s judgement should the rights of those respective groups come into conflict. As such, by virtue of the way in which international investment law is situated vis-à-vis other institutions, it serves as a global supreme court to settle the concerns of transnational corporations.

The political struggles over international investment law do not end where this thesis does; indeed, they have only just begun. It is customary to suggest that the international investment regime has recently, as corporations enthusiastically began to challenge public interest regulations and this field of law was exposed to the daylight, experienced a ‘backlash’.<sup>16</sup> That backlash has arrived from a wide variety of different directions. *Methanex v. USA* and similar cases engendered widespread anxieties about the risk posed to public interest regulations in the NAFTA context, and various non-governmental organizations, media figures and state officials began to suggest that international investment law had ‘gone too far’ in the direction of protecting corporations. One of the most prominent critics is the International Institute for Sustainable Development (IISD), an active player in changing the course of international investment law. The IISD does not challenge global capitalism as such, and it maintains that foreign investment “is an essential component of a sound global strategy for sustainable development”.<sup>17</sup> It has nevertheless gone to great lengths to pursue changes to treaties so as to ‘balance’ the rights and obligations of both investors and states, and it has met with some success in that respect.<sup>18</sup> Stronger criticism has emerged from a variety of NGOs that perceive the international investment regime to be beyond rescue, and who maintain it is, to cite Public Citizen, nothing but a “corporate power tool”.<sup>19</sup> In the same way that corporations increasingly pursue their political aims through wider business networks and lobbies, so are many of these NGOs acting as part of wider ‘transnational advocacy networks’ that coordinate opposition to

---

<sup>15</sup> The term ‘trump card’ is from Andreas Kulick, *Global Public Interest in International Investment Law* (Cambridge: Cambridge University Press, 2014), p. 2.

<sup>16</sup> Michael Waibel & Asha Kaushal et al (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Alphen aan den Rijn: Kluwer Law International, 2010).

<sup>17</sup> Howard Mann & Konrad von Moltke, et al, *IISD Model International Agreement on Investment for Sustainable Development: Negotiator’s Handbook*, 2<sup>nd</sup> ed (Winnipeg: IISD, 2006), p. x.

<sup>18</sup> *Ibid*, p. 2.

<sup>19</sup> Public Citizen, ‘TPP: Corporate Power Tool’, *Flyer* (2013), available at {<http://www.citizen.org/TPP>} accessed 23 March 2015.

international investment law.<sup>20</sup> These NGOs have had some success in halting new investment treaty negotiations, but the only countries that have begun to withdraw from the investment regime are South Africa and a few Latin American states, the latter as part of the popular reaction against neoliberalism and the ‘Pink Tide’ that brought left-wing parties to power.<sup>21</sup>

In the face of the ‘backlash’, many corporate lobbying groups have dug in their heels to defend investor-friendly versions of investment treaties and many arbitrators have publicly opposed even modest change; for instance, Stephen Schwebel has dismissed the criticisms as “nonsense” and has railed against what he terms the “regressive” development of international law.<sup>22</sup> Those arbitrators who do advocate change rarely do it out of conviction; to cite Yves Fortier, the rising opposition simply “cannot be ignored, lest we truly imperil the system” and the unpalatable choice is “Change or Decline”.<sup>23</sup> Other arbitrators similarly consider ISDS reform the “price” that will have to be paid to maintain the international investment regime, and transnational corporate lobbying groups are beginning to arrive at the same conclusion.<sup>24</sup> This does nevertheless not mean that *any* changes are welcome; Charles Brower, a top arbitrator, reiterates

---

<sup>20</sup> Margaret Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (New York: Cornell University Press, 1998); Network for Justice in Global Investment, About the Project, available at {<http://justinvestment.org/about/>}; Seattle to Brussels Network, *About Us*, available at {<http://www.s2bnetwork.org/about-us/>} accessed 20 March 2015.

<sup>21</sup> Civil society pressure was critical in the abandonment of MAI negotiations, and it has recently forced the European Commission to halt the investment chapter negotiations of TTIP; see Chapter 2. Luke Eric Peterson, ‘Venezuelan Exit from ICSID Raises Questions Both Legal and Financial’, *Investment Arbitration Reporter* (31 January 2012), available at {[http://www.iareporter.com/articles/20120131\\_3](http://www.iareporter.com/articles/20120131_3)} accessed 21 August 2012; UNCTAD, *World Investment Report, Global Value Chains: Investment and Trade for Development* (New York: United Nations, 2013), p. 108.

<sup>22</sup> For instance, within the recent consultation on the U.S. Model BIT corporate lobbies strongly advocated a return to the treaty language before the 2004 revisions took place. See, U.S. Department of State, ‘Report of the Subcommittee on Investment of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty: Annexes’, (30 September 2009), available at {<http://www.state.gov/e/eb/rls/othr/2009/131118.htm>} accessed 20 March 2015. Stephen Schwebel, ‘A Critical Assessment of the U.S. Model BIT’, Keynote Address, *British Institute of International & Comparative Law, Twelfth IFT Public Conference* (London, 15 May 2009) p. 12; Stephen Schwebel, ‘The Overwhelming Merits of Bilateral Investment Treaties’, *Suffolk Transnational Law Review*, 32 (2008-2009), p. 269. investor-friendly treaties of the past. See model BIT negs and request to go back to 2004 treaty.

<sup>23</sup> Yves Fortier, ‘Investment Protection and the Rule of Law: Change or Decline’, Speech, *British Institute of International and Comparative Law 50<sup>th</sup> Anniversary Event Series* (London: 17 March 2009), p. 12.

<sup>24</sup> Bernard Honatiau, cited in Cecilia Olivet & Pia Eberhardt, *Profiting from Crisis: How Corporations and Lawyers are Scavenging Profits from Europe’s Crisis Countries* (Amsterdam/Brussels: Transnational Institute & Corporate Europe Observatory, 2014), p. 49, available at: {<http://www.tni.org/briefing/profitting-injustice>} accessed 13 March 2014; William Park, another top arbitrator, also expresses concern that if nothing is done then ISDS may “fall prey to public pressure arising from a backlash against investor victories.” Guillermo Aguilar Alvarez & William W. Park, ‘The New Face of Investment Arbitration: NAFTA Chapter 11’, *The Yale Journal of International Law*, 28 (2003), p. 399. Finally, as stated by BusinessEurope, “[b]eing aware of the criticism ISDS is currently receiving, [BusinessEurope] is ready to discuss solutions”. BusinessEurope, ‘Speaking Points on Investment Protection and ISDS’, *TTIP Stakeholder Event* (12 March 2014), p. 2, available at {<http://www.esf.be/new/wp-content/uploads/2014/03/TTIP-Stakeholder-Presentations-Event-12-March-2014-Luisa-Santos-BusinessEurope-on-ISDS.pdf>} accessed 20 March 2015.

in no uncertain terms, “any proposal that alters any of the fundamental elements of international arbitration” is “unacceptable”.<sup>25</sup>

Drawing upon a neo-Gramscian literature, the approach of the transnational capitalist class and its supporters can be conceptualized as a strategy of co-optation that Gramsci called ‘trasformismo’ – dominant social groups seek to maintain the investment regime by means of offering concessions to certain (less radical) groups and by means of “restricting democratic participation to safely channelled areas”.<sup>26</sup> The management of opposition is evident in the recent push towards encouraging NGOs to work within the system by submitting *amicus curiae* briefs, which investment tribunals have in the past accepted specifically because they are deemed to “support the process in general”.<sup>27</sup> The attempt to channel opposition into safe areas is also evident in the way that the European Commission approached the consultation process with civil society, which it was forced to undertake as a result of growing opposition to TTIP negotiations.<sup>28</sup> In response to concerns from corporate lobbies that such public consultation should not become a ‘referendum’ on whether or not to include the investment chapter, the European Commission duly made clear that “[t]he terms of this debate should not be: ISDS or not ISDS [...] [t]he core question is: what sort of ISDS do we want”.<sup>29</sup> In response to growing opposition, the beneficiaries and supporters of the investment regime have acquiesced to certain permissible criticisms while seeking to undermine systemic challenges. This strategy has prompted the drafting of what UNCTAD refers to as a ‘new generation’ of investment treaties,

---

<sup>25</sup> Cited in Cecilia Olivet & Pia Eberhardt, ‘Arbitrators’ Role in the Recent Investment Arbitration Boom’, *Investment Treaty News*, 3:3 (March 2013), p. 16.

<sup>26</sup> Stephen Gill, ‘New Constitutionalism, Democratisation and Global Political Economy’, *Global Change, Peace & Security*, 10:1 (1998), p. 27; William Robinson, ‘Gramsci and Globalisation: From Nation-State to Transnational Hegemony’, *Critical Review of International Social and Political Philosophy*, 8:4 (2005), p. 572.

<sup>27</sup> Methanex Corporation v. United States of America, *Decision of the Tribunal on Petitions from Third Persons to Intervene as ‘Amici Curiae’*, UNCITRAL Ad Hoc Arbitration (15 January 2001), para. 49.

<sup>28</sup> The European Commission itself states that it “felt it was necessary to launch this particular public consultation as a response to the growing public debate and increased concerns over ISDS within TTIP”, see European Commission, ‘European Commission Launches Public Online Consultation on Investor Protection in TTIP’ (27 March 2014), available at {<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1052>} accessed 20 March 2015.

<sup>29</sup> BusinessEurope had expressed concerns that “[i]t is important to us that this [EU] public consultation is not a referendum on ISDS”, and beyond the above statement the European Commission also carefully phrased all the question so that only suggestions for improvements *in* the system could be raised, while criticism *of* the system could not. Shawn Donnan & Stefan Wagstyl, ‘Transatlantic Trade Talks Hit German Snag’, *Financial Times* (14 March 2014), available at {<http://www.ft.com/cms/s/0/cc5c4860-ab9d-11e3-90af-00144feab7de.html#axzz2zkMLADkB>} accessed 5 May 2014; Karel De Gucht, ‘Statement on TTIP’, *European Commission Speech/14/549, Speech at the European Parliament Plenary Debate* (Strasbourg, 15 July 2014), available at: {[http://europa.eu/rapid/press-release\\_SPEECH-14-549\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-14-549_en.htm)} accessed 22 August 2014; European Commission, ‘Report on Online Public Consultation on Investment Protection and ISDS in the TTIP Agreement’, *Commission Staff Working Document* (Brussels: 13 January 2015), available at {[http://trade.ec.europa.eu/consultations/index.cfm?consul\\_id=179](http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179)} accessed 20 March 2015.

so far adopted primarily in North America, where opposition has been most significant.<sup>30</sup> Some of the changes may turn out to be moderately effective – for instance, tribunals confronted with the new North American treaties may have less leeway to adopt the most expansive interpretations of expropriation and fair and equitable treatment.<sup>31</sup> The effectiveness of other changes may be more questionable – there has been a large increase in environmental clauses, but the new preambular clauses tend to be only selectively considered and some environmental clauses have, upon closer examination, been found to be “absolute oxymorons” with no legal effect whatsoever.<sup>32</sup> Most importantly, these changes are designed to address Methanex-style cases, in which the corporation was deemed to have challenged non-discriminatory regulations, adopted according to an admirable administrative and scientific process, in a context where the investor could not pretend to have legitimately expected such regulations not to emerge. Despite current changes, many state measures are unlikely to meet the high standards expected by investment tribunals, and corporations will continue to find ways to challenge state measures taken to further the interests of other societal groups.

Stephan Schill, a strong proponent of international investment law, is assured that current changes involve “a process of recalibration or fine-tuning of investment treaty obligations” but no “fundamental contestation”.<sup>33</sup> The supporters of the international investment regime have enabled it to evolve by addressing the most immediate criticisms through modest changes – and have in doing so averted a larger and more cohesive force from emerging against it – while ignoring calls for action that would undermine the utility of the regime for transnational corporations. Paradoxically, at the same time that commentators have lamented a ‘backlash’ against ISDS, major new treaty negotiations have gained momentum, that would more fully

---

<sup>30</sup> UNCTAD, *Investment Policy Framework for Sustainable Development* (United Nations, 2013), p. iii.

<sup>31</sup> Vinuales suggests that the exceptions to specific investment treaty protection clauses are likely to be more effective than more broadly formulated clauses, see Jorge Viñuales, ‘Foreign Investment and the Environment in International Law: An Ambiguous Relationship’, Centre for International Environmental Studies Research Paper, No. 2 (forthcoming in *British Yearbook of International Law*, Vol. 80, 2010), p. 52.

<sup>32</sup> Kathryn Gordon & Joachim Pohl, ‘Environmental Concerns in International Investment Agreements: A Survey’, *OECD Working Papers on International Investment*, 1 (May 2011), p. 7 (almost 50% of newly negotiated treaties include environmental clauses); *Methanex Corporation v. United States of America, Petitioner’s Final Submissions by the International Institute for Sustainable Development*, UNCITRAL Ad Hoc Arbitration (16 October 2000), para. 12-14; Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment*, 3<sup>rd</sup> ed (Cambridge: Cambridge University Press, 2010), p. 274; Howard Mann, ‘Investment Agreements and the Regulatory State: Can Exceptions Clauses Create a Safe Haven for Governments’, Issues in International Investment Law, Background Papers for the Developing Country Investment Negotiators’ Forum, (Singapore: 1-2 October 2007) p. 8 (the ‘deceptive’ clause is one that specifies that states can introduce any measure to protect the environment that is “otherwise consistent with this Chapter”).

<sup>33</sup> Stephan Schill, ‘W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law’, *The European Journal of International Law*, 22:3 (2011), p. 896.

than before connect some of the world's largest economies: the U.S., the EU, Canada, China and Japan.<sup>34</sup> The future of the international investment regime is therefore far from predetermined, and it will depend on a battle between opposing social groups that is being waged today.

What, then, is ultimately at stake in this battle? This thesis opened with the suggestion that the struggle over international investment law is a struggle for the future. In a sense, all of the different struggles detailed in this thesis are struggles for the future – the future of the sea turtles of Costa Rica; the future of nuclear power in Germany; the future of indigenous peoples' way of life in Ecuador; the future of fracking in Quebec; the future of the children with lead poisoning in La Oroya, Peru. It is nevertheless also a struggle for the future in a wider sense – a struggle over the very possibility for a different future. A transnational capitalist class is fighting for political closure and a future without 'political risk'; for social movements, it will be a struggle to re-open the very possibility for change.

This thesis has drawn upon Stephen Gill's theory of 'new constitutionalism' and David Schneiderman's application of that theory to international investment law, in order to demonstrate how a transnational capitalist class approaches the international investment regime as a means of 'locking in' favourable conditions in the present into the future. There is no aspiration to 'lock in' the present as such – the transnational capitalist class is still using its formidable lobbying powers to expand its power, and not only to maintain it – but this field of law is designed to 'lock out' political changes that negatively affect corporations. In doing so, it is designed to restrain the opposing social groups that might bring such political change about. International investment law is, to cite Gill, part of a "conscious strategy to constrain the democratisation process that has involves struggles for popular representation for several centuries".<sup>35</sup> It is part of a much wider political struggle that can be traced at least as far back as to the fight by dominant groups against universal suffrage, which was at the time prompted by the fear that poor people would use their right to vote to the detriment of the rich. Ha-Joon Chang observes that when dominant groups lost that struggle against universal suffrage, "they

---

<sup>34</sup> These include the Trans-Pacific Partnership Agreement, the Trans-Atlantic Trade and Investment Partnership, the Comprehensive Economic and Trade Agreement (EU-Canada), and various bilateral investment treaty negotiations between Canada and China, the U.S. and China, and the EU and China.

<sup>35</sup> Gill, 'New Constitutionalism, Democratisation and Global Political Economy', p. 37.

could not openly oppose democracy [so] they started criticising ‘politics’ in general”.<sup>36</sup> It is abundantly clear that the emergence of international investment law involves a fight against ‘politics’. Corporations often challenge state measures on the basis that they were ‘politically motivated’, and Gus Van Harten observes that tribunals share this “suspicio[n] of electoral decision-making and public involvement”.<sup>37</sup> Indeed, the stated aim of investment treaties is to protect corporations from “political risk”, and tribunals have determined that adherence to investment law requires states to afford corporations certainty, predictability and stability – even, or especially, where social movements have emerged to challenge the *status quo*. International investment law is designed to contribute to a wider class project, to use Ioannis Glinavos’ phrase, to “decommission the political arms of the state” and to ensure that the future is closed to political change.<sup>38</sup> In line with this aim, the recent ‘backlash’ has not only brought about modest changes to investment agreements in order to keep criticism at bay, but also seems to have evoked a more insidious response: while a state that comes to represent a different constellation of social forces can escape the strictures of NAFTA in six months, the equivalent for the newly negotiated CETA (the Canada-EU agreement) and the China-Canada BIT is 20 years and 31 years respectively.<sup>39</sup> The response to the ‘backlash’ has hitherto not been to cease the negotiation of new treaties, but to lock such new treaties as far into the future as possible.

The theoretical insights of ‘new constitutionalism’ coheres with the understanding of international investment law that is becoming increasingly prevalent within the social movements that are fighting against it. While a transnational capitalist class has sought to disable ‘politics’ – a concept that it has sought to imbue with negative connotations – social movements have come to recognize that this is actually a synonym for ‘democracy’. The Democracy Centre observes that investment agreements seek to “keep activist democracy out

---

<sup>36</sup> This is actually said in reference to ‘free-market economists’, but these were articulating the needs of dominant groups. Ha-Joon Chang, ‘Smith, Marx, the IMF: They Are All After You, George’, *The Guardian* (8 May 2013), p. 30.

<sup>37</sup> Van Harten, *Sovereign Choices and Sovereign Constraints*, p. 72-73.

<sup>38</sup> Ioannis Glinavos, ‘Neoliberal Law: Unintended Consequences of Market-Friendly Law Reforms’, *Third World Quarterly*, 29:6 (2008), p. 1095.

<sup>39</sup> However, early BITs are often 20 years in duration; a closer study would be needed to know whether NAFTA was exceptional or whether treaty durations are getting longer. United States of America, *Treaty Between the Government of the USA and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment (Model BIT)*, (2004), art. 22; European Union-Canada, *Consolidated CETA Text* (26 September 2014; not yet signed), chapter 34, art. X.08; Canada – People’s Republic of China, *Agreement for the Promotion and Reciprocal Protection of Investments* (finalized for signature in 2012), art. 35, available at {<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/china-text-chine.aspx?lang=eng&view=d>} accessed 15 February 2013.

of some of the most important decisions of our time”.<sup>40</sup> War on Want warns that the new investment agreements spell the “end to democracy”, while no-TTIP protesters in London unfurled a 26m long banner with the title “Hands off Democracy”.<sup>41</sup> The defence of democracy has, interestingly, come to involve a defence of ‘sovereignty’ too. Public Citizen objects that international investment law constitutes “a Trojan Horse attack on sovereignty and democracy”; a Seattle to Brussels network petition laments that investment treaties “undermine the sovereignty and constitutions of both developed and developing countries, democratic governance and peoples’ interests”, and a letter by 240 NGOs from around the world against Pacific Rim’s lawsuit calls for El Salvador’s “domestic governance processes and national sovereignty be respected [...] We stand on the side of democracy”.<sup>42</sup> The concept of sovereignty, and the state structures to which it relates, has not always had positive connotations within either the practical or (especially) the theoretical left-wing, yet for all its faults it seems to be regaining some of its emancipatory connotations as enabling of democracy. In line with some of the social movements, Schneiderman argues that states “remain salient locales for resistance”.<sup>43</sup> For social movements around the world, the struggle over international investment law ultimately involves a struggle for the future; to regain the democratic right, “as a people, to write the rules that determines what their futures are, and the futures for their children”.<sup>44</sup> This struggle is not foreordained – it depends on how the transnational capitalist class exercises its agency, and how social movements exercise theirs. To cite War on Want, the

---

<sup>40</sup> Jim Shultz, foreword in Thomas McDonagh, *Unfair, Unsustainable, and Under The Radar: How Corporations Use Global Investment Rules to Undermine a Sustainable Future* (Democracy Center, 2013), p. iii.

<sup>41</sup> John Hilary, *The Transatlantic Trade and Investment Partnership: A Charter for Deregulation, an Attack on Jobs, an End to Democracy* (War on Want, 2015); #NoTTIP, ‘DropTTIP Banner Campaign’ (23 March 2015), available at {<http://www.nottip.org.uk/dropttip-banner-campaign/>} accessed 23 March 2015; see also Stop TTIP, ‘European Citizens’ Initiative Against TTIP and CETA: Petition’, available at {<https://stop-ttip.org/sign/>} accessed 23 March 2015 (a ‘threat to democracy’).

<sup>42</sup> Public Citizen, ‘The Ten Year Track Record of the North American Free Trade Agreement: Undermining Sovereignty and Democracy’, p. 1, available at {<http://www.citizen.org/publications/publicationredirect.cfm?ID=7295>} accessed 5 September 2013; Week of Action Against BITs and for an Alternative Investment Regime, *Call for An Alternative Investment Model: Final Declaration* (Brussels: 6 November 2011), available at {<http://www.s2bnetwork.org/issues/eu-investment-policy/>} accessed 23 March 2015; International Trade Union Confederation, Amigos de le Tierra América Latina y el Caribe, et al, ‘Open Letter to World Bank Officials on Pacific Rim-El Salvador Case’ (12 December 2011), available at {[http://www.ips-dc.org/open\\_letter\\_to\\_world\\_bank\\_officials\\_on\\_pacific\\_rim-el\\_salvador\\_case/](http://www.ips-dc.org/open_letter_to_world_bank_officials_on_pacific_rim-el_salvador_case/)} accessed 23 March 2015.

<sup>43</sup> David Schneiderman, *Resisting Economic Globalization: Critical Theory and International Investment Law* (Basingstoke: Palgrave Macmillan, 2013), p. 3.

<sup>44</sup> Jim Shultz, Director of the Democracy Centre, Network for Justice in Global Investment, *Global Investment Rules: Threat to Democracy and the Environment*, video (November 2011), min: 7.40, available at {<http://justinvestment.org/2011/12/video-global-investment-rules-threat-to-democracy-and-the-environment/>} accessed 13 February 2015.



outcome of this struggle “will decide what type of future we bequeath to future generations, and to the planet we share”.<sup>45</sup> The stakes could not be higher.

It is conventional to end a critical thesis on international investment law with a set of recommendations. Kyla Tienhaara, for instance, advises states to incorporate sustainable development goals into investment treaties, to remove stabilization clauses from investment contracts, to engage in institutional reform, to increase transparency and participation, or even to omit investor-state dispute settlement altogether.<sup>46</sup> Given the theoretical argument developed here, this thesis cannot conclude by offering recommendations to *states*. There is only one recommendation that is consistent with the argument in this thesis, and it is addressed to the human beings who possess the agency to make history:

Fight Back.

---

<sup>45</sup> Said in respect to TTIP and other ‘free trade deals’, John Hilary, *The Transatlantic Trade and Investment Partnership: A Charter for Deregulation, an Attack on Jobs, an End to Democracy* (War on Want, 2015), p. 17.

<sup>46</sup> Kyla Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy*, PhD Thesis (Vrije Universiteit, 4 September 2008), pp. 381-386.

## Appendix

### Investor-State Disputes in Respect to the Environment

THE LEGAL PARTIES	THE LAW & THE DISPUTE	ARBITRAL HISTORY
<p><b>Abengoa v. Mexico</b> (<i>Abengoa, S.A. y COFIDES, S.A. v. United Mexican States</i>)</p>	<p>Institution: ICSID Case No. ARB(AF)/09/2 Treaty: Spain-Mexico BIT ➤ Dispute in respect to a hazardous waste landfill.</p>	<p>Request for Arbitration: 2009 Final Award: 2013</p>
<p><b>Allard v. Barbados</b> (<i>Peter A. Allard v. The Government of Barbados</i>)</p>	<p>Treaty: Canada-Barbados BIT ➤ Dispute in respect to eco-tourism project.</p>	<p>Request for Arbitration: 2009 Status: Unknown</p>
<p><b>Andre v. Canada</b> (<i>John R. Andre v. Government of Canada</i>)</p>	<p>Treaty: NAFTA Chapter 11 ➤ Dispute in respect to the allocation of caribou quotas.</p>	<p>Request for Arbitration: 2010 Status: Withdrawn or Inactive</p>
<p><b>Baird v. USA</b> (<i>James Russell Baird v. United States of America</i>)</p>	<p>Treaty: NAFTA Chapter 11 ➤ Dispute in respect to proposed sub-seabed disposal of radioactive waste.</p>	<p>Request for Arbitration: 2002 Status: Withdrawn</p>
<p><b>BDC v. Philippines</b> (<i>Baggerwerken Decloedt En Zoon NV v. Republic of the Philippines</i>)</p>	<p>Institution: ICSID Case No. ARB/11/27 Treaty: Belgium-Luxembourg-Philippines BIT ➤ Dispute in respect to the dredging of a lake.</p>	<p>Request for Arbitration: 2011 Status: Pending</p>
<p><b>Bear Creek v. Peru</b> (<i>Bear Creek Mining v. Republic of Peru</i>)</p>	<p>Treaty: Canada-Peru FTA ➤ Dispute in respect to a proposed silver mine.</p>	<p>Request for Arbitration: 2014 Status: Pending</p>

<p><b>Bilcon v. Canada</b> <i>(William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada)</i></p>	<p>Institution: PCA Case No. 2009-04 Treaty: NAFTA Chapter 11 ➤ Dispute in respect to the construction of a basalt quarry.</p>	<p>Request for Arbitration: 2008 Status: Pending</p>
<p><b>Bishop v. Canada</b> <i>(David Bishop v. Government of Canada)</i></p>	<p>Treaty: NAFTA Chapter 11 ➤ Dispute in respect to the allocation of fishing quotas.</p>	<p>Request for Arbitration: 2008 Status: Inactive</p>
<p><b>Burlington v. Ecuador</b> <i>(Burlington Resources Inc v. Republic of Ecuador)</i></p>	<p>Institution: ICSID Case No. ARB/08/5 Treaty: USA-Ecuador BIT ➤ Dispute in respect to oil production.</p>	<p>Request for Arbitration: 2008 Award on Jurisdiction: 2010 Final Award: 2012</p>
<p><b>Chemtura v. Canada</b> <i>(Chemtura Corporation (formerly Crompton Corporation) v. Government of Canada)</i></p>	<p>Institution: UNCITRAL Arbitration Rules Treaty: NAFTA Chapter 11 ➤ Dispute in respect to the pesticide lindane.</p>	<p>Request for Arbitration: 2001 Final Award: 2010</p>
<p><b>Chevron v. Ecuador</b> <i>(Chevron Corporation &amp; Texaco Petroleum Company v. Republic of Ecuador)</i></p>	<p>Institution: PCA Case No 2009-23 Treaty: USA-Ecuador BIT ➤ Dispute in respect to oil exploration.</p>	<p>Request for Arbitration: 2009 Status: Pending</p>
<p><b>Commerce Group v. El Salvador</b> <i>(Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. The Republic of El Salvador)</i></p>	<p>Institution: ICSID Case No. ARB/09/17 Treaty: CAFTA-DR Chapter 10 ➤ Dispute in respect to gold mining.</p>	<p>Request for Arbitration: 2009 Final Award on Jurisdiction: 2011</p>
<p><b>Connelly v. Canada</b> <i>(Albert Connolly &amp; Brownfields Holding, Inc. v. Government of Canada)</i></p>	<p>Treaty: NAFTA Chapter 11 ➤ Dispute in respect to the development of a marble quarry.</p>	<p>Request for Arbitration: 2004 Status: Withdrawn</p>

<p><b>Copper Mesa v. Ecuador</b> <i>(Copper Mesa v. Republic of Ecuador)</i></p>	<p>Treaty: Canada-Ecuador BIT ➤ Dispute in respect to copper mining.</p>	<p>Request for Arbitration: 2009 Status: Unknown</p>
<p><b>Dow v. Canada</b> <i>(Dow AgroSciences LLC v. Government of Canada)</i></p>	<p>Institution: UNCITRAL Arbitration Rules Treaty: NAFTA Chapter 11 ➤ Dispute in respect to a lawn pesticide.</p>	<p>Request for Arbitration: 2008 Settled: 2011</p>
<p><b>Enron v. India</b> <i>(Case 1: Enron v. India – details unknown)</i> <i>(Case 2: Capital India Power Mauritius I &amp; Energy Enterprises (Mauritius) Company v. Maharashtra Power Development Corporation Limited, Maharashtra State Electricity Board &amp; the State of Maharashtra)</i> <i>(Case 3: Bechtel &amp; General Electric v. India – details unknown)</i></p>	<p><i>Case 1 (Enron v. India)</i> Institution: UNCITRAL Arbitral Rules Treaty: None; contractual arbitration. <i>Case 2 (minority shareholder Bechtel v. India)</i> Institution: ICC Case No. 12913/MS Treaty: None; contractual arbitration. <i>Case 3 (minority shareholders Bechtel &amp; General Electric)</i> Treaty: Mauritius-India BIT; Netherlands-India BIT. ➤ Dispute in respect to the construction of a major power plant.</p>	<p><i>Case 1:</i> Request for Arbitration: 1995 Settled: 1996 <i>Case 2:</i> Request for Arbitration: 2003 Final Award: 2005 <i>Case 3:</i> Request for Arbitration: Unknown Settled: 2005</p>
<p><b>Ethyl v. Canada</b> <i>(Ethyl Corporation v. Government of Canada)</i></p>	<p>Institution: UNCITRAL Arbitration Rules Treaty: NAFTA Chapter 11 ➤ Dispute in respect to the gasoline additive MMT.</p>	<p>Request for Arbitration: 1996 Award on Jurisdiction: 1998 Settled: 1998</p>
<p><b>Gallo v. Canada</b> <i>(Vito G. Gallo v. The Government of Canada)</i></p>	<p>Institution: UNCITRAL Arbitral Rules Treaty: NAFTA Chapter 11 ➤ Dispute in respect to a proposed landfill.</p>	<p>Request for Arbitration: 2006 Final Award on Jurisdiction: 2011</p>

<p><b>Glamis Gold v. USA</b> <i>(Glamis Gold, Ltd. v. United States of America)</i></p>	<p>Institution: UNCITRAL Arbitration Rules Treaty: NAFTA Chapter 11 ➤ Dispute in respect to a proposed gold mine.</p>	<p>Request for Arbitration: 2003 Final Award: 2009</p>
<p><b>Greiner v. Canada</b> <i>(William Jay Greiner &amp; Malbaie River Outfitters Inc. v. Government of Canada)</i></p>	<p>Institution: UNCITRAL Arbitration Rules Treaty: NAFTA Chapter 11 ➤ Dispute in respect to the allocation of fishing quotas.</p>	<p>Request for Arbitration: 2008 Status: Withdrawn in 2011</p>
<p><b>Harken v. Costa Rica</b> <i>(Harken Energy &amp; Harken Costa Rica Holdings v. The Republic of Costa Rica)</i></p>	<p>Institution: ICSID (not registered) Treaty: None (concession contract without arbitration clause) ➤ Dispute in respect to oil production.</p>	<p>Request for Arbitration: 2003 Status: Costa Rica did not consent to arbitration; case withdrawn.</p>
<p><b>Infinito Gold v. Costa Rica</b> <i>(Infinito Gold LTD v. Republic of Costa Rica)</i></p>	<p>Institution: ICSID Case No. ARB/14/5 Treaty: Canada-Costa Rica BIT ➤ Dispute in respect to gold mining.</p>	<p>Request for Arbitration: 2013 Status: Pending</p>
<p><b>Lone Pine v. Canada</b> <i>(Lone Pine Resources Inc. v. The Government of Canada)</i></p>	<p>Institution: UNCITRAL Arbitral Rules Treaty: NAFTA Chapter 11 ➤ Dispute in respect to ‘fracking’ for shale gas.</p>	<p>Request for Arbitration: 2012 Status: Pending</p>
<p><b>Lucchetti v. Peru</b> <i>(Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. Republic of Peru)</i></p>	<p>Institution: ICSID Case No. ARB/03/4 Treaty: Chile-Peru BIT ➤ Dispute in respect to a pasta factory.</p>	<p>Request for Arbitration: 2002 Final Award: 2005 Decision on Annulment: 2007</p>

<p><b>Maffezini v. Spain</b> <i>(Emilio Agustín Maffezini v. The Kingdom of Spain)</i></p>	<p>Institution: ICSID Case No. ARB/97/7 Treaty: Argentina-Spain BIT ➤ Dispute in respect to the construction of a chemical production facility.</p>	<p>Request for Arbitration: 1997 Final Award: 2000</p>
<p><b>Metalclad v. Mexico</b> <i>(Metalclad Corporation v. The United Mexican States)</i></p>	<p>Institution: ICSID Case No. ARB(AF)/97/1 Treaty: NAFTA Chapter 11 ➤ Dispute in respect to a hazardous waste landfill.</p>	<p>Request for Arbitration: 1997 Final Award: 2000</p>
<p><b>Methanex v. USA</b> <i>(Methanex Corporation v. United States of America)</i></p>	<p>Institution: UNCITRAL Arbitration Rules Treaty: NAFTA Chapter 11 ➤ Dispute in respect to the gasoline additive MTBE.</p>	<p>Request for Arbitration: 1999 Partial Award: 2002 Final Award: 2004</p>
<p><b>Mesa Power v. Canada</b> <i>(Mesa Power Group, LLC v Government of Canada)</i></p>	<p>Institution: PCA Case No. 2012-17 Treaty: NAFTA Chapter 11 ➤ Dispute in respect to renewable energy contracts.</p>	<p>Request for Arbitration: 2011 Status: Pending</p>
<p><b>MTD v. Chile</b> <i>(MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile)</i></p>	<p>Institution: ICSID Case No. ARB/01/7 Treaty: Malaysia-Chile BIT ➤ Dispute in respect to the construction of a large planned community.</p>	<p>Request for Arbitration: 2001 Final Award: 2004 Decision on Annulment: 2007</p>
<p><b>Nepolsky v. Czech Republic</b> <i>(Georg Nepolsky v. Czech Republic)</i></p>	<p>Institution: UNCITRAL Arbitration Rules Treaty: Germany-Czech Republic BIT ➤ Dispute in respect to licence for underground water extraction.</p>	<p>Request for Arbitration: 2008 Status: Withdrawn in 2010</p>

<p><b>Oak Investments v. El Salvador</b> <i>(Oak Investments and BAES v. Republic of El Salvador)</i></p>	<p>Treaty: CAFTA-DR Chapter 10; UK – El Salvador BIT ➤ Dispute in respect to a battery manufacturing and recycling plant.</p>	<p>Request for Arbitration: 2009 Status: Unknown</p>
<p><b>Pacific Rim v. El Salvador</b> <i>(Pac Rim Cayman LLC v. The Republic of El Salvador)</i> <i>(Now by OceanaGold)</i></p>	<p>Institution: ICSID Case No. ARB/09/12 Treaty: CAFTA-DR Chapter 10; Domestic Investment Law ➤ Dispute in respect to a proposed gold mine.</p>	<p>Request for Arbitration: 2009 Status: Pending</p>
<p><b>Plama v. Bulgaria</b> <i>(Plama Consortium Limited v. Republic of Bulgaria)</i></p>	<p>Institution: ICSID Case No. ARB/03/24 Treaty: Energy Charter Treaty ➤ Dispute in respect to a privatized oil refinery.</p>	<p>Request for Arbitration: 2002 Final Award: 2008</p>
<p><b>Renco v. Peru</b> <i>(The Renco Group, Inc v. The Republic of Peru)</i></p>	<p>Institution: ICSID Case No. UNCT/13/1 Treaty: USA-Peru FTA ➤ Dispute in respect to a privatized metals smelter.</p>	<p>Request for Arbitration: 2010 Status: Pending</p>
<p><b>Santa Elena v. Costa Rica</b> <i>(Compañía Del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica)</i></p>	<p>Institution: ICSID Case No. ARB/96/1 Treaty: The arbitration was based on customary international law, and prompted by U.S. pressure via the Helms Amendment. ➤ Dispute in respect to the expansion of a national park.</p>	<p>Request for Arbitration: 1995 Final Award: 2000</p>
<p><b>S.D. Myers v. Canada</b> <i>(S.D. Myers, Inc. v. Government of Canada)</i></p>	<p>Institution: UNCITRAL Arbitration Rules Treaty: NAFTA Chapter 11 ➤ Dispute in respect to the international trade of hazardous PCB waste.</p>	<p>Request for Arbitration: 1998 Award on the Merits: 2000 Awards on Quantum: 2002</p>

<p><b>Solar Investors v. Spain &amp; the Czech Republic</b>  <i>(Various – 22 investors have brought arbitration against Spain; 3 against Czech Republic)</i></p>	<p><i>These will not be listed individually; at least 25 different investors have brought arbitration against the two countries. Most are private equity funds.</i></p> <p>Institution: UNCITRAL Arbitral Rules; Stockholm Chamber of Commerce; ICSID.</p> <p>Treaty: Energy Charter Treaty; various intra-EU BITs.</p> <p>➤ Disputes in respect to solar energy subsidies.</p>	<p>Request for Arbitration: 2011-2014.  Status: Pending</p>
<p><b>St. Marys v. Canada</b>  <i>(St. Marys VCNA, LLC v. Government of Canada)</i></p>	<p>Institution: UNCITRAL Arbitration Rules</p> <p>Treaty: NAFTA Chapter 11</p> <p>➤ Dispute in respect to a proposed aggregate quarry.</p>	<p>Request for Arbitration: 2011  Settled: 2013  Award (based on settlement): 2013</p>
<p><b>Sun Belt v. Canada</b>  <i>(Sun Belt Water, Inc. v. Canada)</i></p>	<p>Treaty: NAFTA Chapter 11; USA-Canada FTA; GATT</p> <p>➤ Dispute in respect to licenses for bulk water exports.</p>	<p>Request for Arbitration: 1998  Status: Withdrawn</p>
<p><b>Tamimi v. Oman</b>  <i>(Adel A Hamad I Al Tamimi v. Sultanate of Oman)</i></p>	<p>Institution: ICSID Case No. ARB/11/33</p> <p>Treaty: USA-Oman FTA</p> <p>➤ Dispute in respect to a proposed limestone quarry.</p>	<p>Request for Arbitration: 2011  Status: Pending</p>
<p><b>Tecmed v. Mexico</b>  <i>(Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States)</i></p>	<p>Institution: ICSID Case No. ARB(AF)/00/2</p> <p>Treaty: Spain-Mexico BIT</p> <p>➤ Dispute in respect to a hazardous waste landfill.</p>	<p>Request for Arbitration: 2000  Final Award: 2003</p>



<p><b>Unglaube v. Costa Rica</b> <i>(Marion Unglaube &amp; Reinhard Unglaube v. Republic of Costa Rica)</i></p>	<p>Institution: ICSID Case No. ARB/08/1; ICSID Case No. ARB/09/20 (two cases subsequently consolidated) Treaty: Germany-Costa Rica BIT ➤ Dispute in respect to the expansion of a national park.</p>	<p>Request for Arbitration: 2008 Final Award: 2012</p>
<p><b>Vattenfall v. Germany (1)</b> <i>(Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG &amp; Co. KG v. The Federal Republic of Germany)</i></p>	<p>Institution: ICSID Case No. ARB/09/6 Treaty: Energy Charter Treaty ➤ Dispute in respect to the construction of a coal-fired power plant.</p>	<p>Request for Arbitration: 2009 Settled: 2010 Award (based on settlement): 2011</p>
<p><b>Vattenfall v. Germany (2)</b> <i>(Vattenfall AB and others v. Federal Republic of Germany)</i></p>	<p>Institution: ICSID Case No. ARB/12/12 Treaty: Energy Charter Treaty ➤ Dispute in respect to nuclear energy.</p>	<p>Request for Arbitration: 2012 Status: Pending</p>
<p><b>Vieira v. Chile</b> <i>(Sociedad Anónima Eduardo Vieira v. Republic of Chile)</i></p>	<p>Institution: ICSID Case No. ARB/04/7 Treaty: Spain-Chile BIT ➤ Dispute in respect to the allocation of fishing quotas.</p>	<p>Request for Arbitration: 2004 Final Award: 2007 Decision on Annulment: 2010</p>
<p><b>Windstream Energy v. Canada</b> <i>(Windstream Energy LLC v. Government of Canada)</i></p>	<p>Institution: UNCITRAL Arbitral Rules Treaty: NAFTA Chapter 11 ➤ Dispute in respect to offshore wind energy.</p>	<p>Request for Arbitration: 2012 Status: Pending</p>

## Bibliography

- Abengoa, S.A. y COFIDES, S.A. v. United Mexican States, *Award*, ICSID Case No. ARB(AF)/09/2 (18 April 2013).
- Abouchar, Juli & King, Richard, 'Environmental Laws as Expropriation Under NAFTA', *Review of European Community and International Environmental Law (RECIEL)*, 8:2 (1999), pp. 209-214.
- AES Summit Generation Limited & AES-Tisza Eromu Kft v. Republic of Hungary, *Award*, ICSID Case No. ARB/07/22 (23 September 2010).
- Agreement on Internal Trade Panel, 'Report of the Article 1704 Panel Concerning the Dispute Between Alberta and Canada Regarding the Manganese-Based Fuel Additives Act', *Dissenting Opinion* (12 June 1998).
- Aguas del Tunari, S.A., v. Republic of Bolivia, *Decision on Respondent's Objections to Jurisdiction*, ICSID Case No. ARB/02/3 (21 October 2005).
- Aguilar Alvarez, Guillermo & Park, William W., 'The New Face of Investment Arbitration: NAFTA Chapter 11', *The Yale Journal of International Law*, 28 (2003), pp. 365-407.
- Aguinda, Maria & Yota, Gabriel Ashanga, et al. v. Texaco Inc., *Opinion and Order*, U.S. District Court, Southern District of New York, 93 CIV. 7527 & 94 CIV. 9266 (30 May 2001).
- Aguinda, Maria & Yota, Gabriel Ashanga, et al. v. Texaco Inc., *Texaco Inc.'s Memorandum of Law in Support of its Renewed Motions to Dismiss Based on Forum Non Conveniens and International Comity*, U.S. District Court, Southern District of New York, 93 CIV. 7527 & 94 CIV. 9266 (11 January 1999), available at: {[http://www.texaco.com/sitelets/ecuador/docs/motions\\_to\\_dismiss.pdf](http://www.texaco.com/sitelets/ecuador/docs/motions_to_dismiss.pdf)} accessed 1 May 2012.
- Ahad, Abdul, 'Ecuador to Appeal Against \$1.8 Bn Ruling in Oil Dispute', *Business Recorder* (7 October 2012), available at: {<http://www.brecorder.com/markets/energy/america/84191-ecuador-to-appeal-against-18-bn-ruling-in-oil-dispute.html>} accessed 7 September 2014.
- Al Kharafi, Mohamed Abdulmohsen & Sons Co. v. the Government of the State of Libya, *Final Arbitral Award*, Ad Hoc Arbitration (22 March 2013).
- Al Tamimi, Adel A. Hamadi v. Sultanate of Oman, *Request for Arbitration*, ICSID Case No. ARB/11/33 (5 December 2011).
- Allard, Peter A. v. The Government of Barbados, *Notice of Dispute Under Canada-Barbados BIT* (8 September 2009).
- Allee, Todd & Peinhardt, Clint, 'Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment', *International Organization*, 65:3 (2011), pp. 401-432.
- Allen & Overy LLP, 'Investment Treaty Arbitration: Protecting and Promoting Foreign Investments' (2011), available at {<http://www.allenoverly.com/SiteCollectionDocuments/Investment%20Treaty%20Arbitration.pdf>} accessed 2 July 2012.
- Allison, Tony, 'Enron's Eight-Year Power Struggle in India', *Asia Times* (18 January 2001), available at {<http://www.atimes.com/reports/CA13Ai01.html>} accessed 27 January 2015.
- Alternative Forum for Research in Mindanao, ANDEP, et al, 'Joint NGO Statement on the Multilateral Agreement on Investment (MAI)', *NGO/OECD Consultation on the MAI* (27 October 1997), available at {<http://www.gwb.com.au/gwb/news/mai/ngos1.html>} accessed 30 January 2015.

Alvarez, José E., 'The Return of the State', *Minnesota Journal of International Law*, 20:2 (2011), pp. 224-263.

Alvarez, José E., *The Public International Law Regime Governing International Investment* (Nijhoff: Brill, Pocketbooks of the Hague Academy of International Law, 2011).

Alvarez, José E., 'The Internationalization of U.S. Law', *Columbia Journal of Transnational Law*, 47:3 (2009), pp. 537-575.

Amnesty International, 'Our Work: Chevron Corp', available at {<http://www.amnestyusa.org/our-work/issues/business-and-human-rights/oil-gas-and-mining-industries/chevron-corp>} accessed 11 March 2014.

Amnesty International, 'Death Threats for Activists Demanding Justice', *Urgent Action 223/09* (27 August 2009).

Amnesty International, *Contracting Out of Human Rights: The Chad-Cameroon Pipeline Project* (London: Amnesty International, 2005).

Amnesty International, *Human Rights on the Line: The Baku-Tbilisi-Ceyhan Pipeline Project* (London: Amnesty International, 2003).

Anderson, Sarah & Grusky, Sara, 'Corporate Investor Rule: How the World Bank's Investment Court, Free Trade Agreements, and Bilateral Investment Treaties have Unleashed a New Era of Corporate Power and What to Do About It', (Institute for Policy Studies & Food and Water Watch, 2007), available at {[http://www.ips-dc.org/reports/challenging\\_corporate\\_investor\\_rule](http://www.ips-dc.org/reports/challenging_corporate_investor_rule)} accessed 13 February 2013.

Anderson, Sarah, et al, *The New U.S. Model Bilateral Investment Treaty: A Public Interest Critique* (Institute for Policy Studies, et al, 2012), available at {[http://www.ips-dc.org/reports/the\\_new\\_us\\_model\\_bilateral\\_investment\\_treaty\\_a\\_public\\_interest\\_critique](http://www.ips-dc.org/reports/the_new_us_model_bilateral_investment_treaty_a_public_interest_critique)} accessed 13 February 2013.

Andre, John R. v. Government of Canada, *Notice of Intent to Submit Claim to Arbitration Pursuant to Chapter Eleven of NAFTA* (19 March 2010).

Annan, Kofi, 'Opening Address Commemorating the Successful Conclusion of the 1958 United Nations Conference on International Commercial Arbitration,' in *Enforcing Arbitration Awards Under The New York Convention: Experience and Prospects* (UNCITRAL, 1999), available at {<http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/NYCDay-e.pdf>} accessed 2 July 2012.

Appelbaum, Richard & Robinson, William (eds), *Critical Globalization Studies* (New York: Routledge, 2000).

Appleton, Barry, 'Regulatory Takings: The International Law Perspective', *New York University Environmental Law Journal*, 11 (2002-2003), pp. 35-48.

Archer, Margaret S., *Realist Social Theory: The Morphogenetic Approach* (Cambridge: Cambridge University Press, 1995).

Archibold, Randal C., 'First a Gold Rush, Then the Lawyers', *New York Times* (25 June 2011), available at {[http://www.nytimes.com/2011/06/26/world/americas/26mine.html?pagewanted=all&\\_r=1&](http://www.nytimes.com/2011/06/26/world/americas/26mine.html?pagewanted=all&_r=1&)} accessed 3 February 2015.

Arrighi, Giovanni, 'Global Capitalism and the Persistence of the North-South Divide,' *Science & Society*, 65:4 (Winter 2001-2002), pp. 469-476.

- Asteriti, Alessandra ‘Metalclad, Methanex and Chemtura: 10 Years of Environmental Issues in NAFTA Investment Arbitrations’, *Transnational Dispute Management*, 9:3, (2012), available at SSRN: {[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2021180](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2021180)} accessed 17 August 2012.
- Asteriti, Alessandra, ‘Waiting for the Environmentalists: Environmental Language in Investment Treaties’, in Rainer Hofman & Christian Tams (eds), *International Investment Law and Its Others* (Nomos, 2012), also available on: {[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2028405](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2028405)} accessed 19 August 2012.
- Ayine, Dominic & Blanco, Hernán et al., ‘Lifting the Lid on Foreign Investment Contracts: The Real Deal for Sustainable Development’, *Sustainable Markets Briefing Paper of the International Institute for Environment and Development*, 1 (September 2005).
- Azurix Corp. v. the Argentine Republic, *Award*, ICSID Case No. ARB/01/12 (14 July 2006).
- Baeza, Gonzalo, ‘Lucchetti Begins Peruvian Assets Sale’, *UPI* (23 January 2003), available at {[http://www.upi.com/Business\\_News/2003/01/23/Lucchetti-begins-Peruvian-assets-sale/UPI-79151043358608/](http://www.upi.com/Business_News/2003/01/23/Lucchetti-begins-Peruvian-assets-sale/UPI-79151043358608/)} accessed 5 March 2014.
- Baird, James Russell v. United States of America, *Notice of Intent to Submit a Claim to Arbitration Under NAFTA* (15 March 2002).
- Ball, James & Hickman, Leo, ‘MPs Declare £7m Income from Other Jobs’, *The Guardian* (27 May 2013), p. 4.
- Barrow, Clyde W., ‘The Miliband-Poulantzas Debate: An Intellectual History’, in Stanley Aronowitz and Peter Bratsis (eds), *Paradigm Lost: State Theory Reconsidered* (Minneapolis: University of Minnesota Press, 2002), pp. 33-52.
- Barrow, Clyde W., *Critical Theories of the State: Marxist, Neo-Marxist, Post-Marxist* (Madison: University of Wisconsin Press, 1993).
- Bartelson, Jens, ‘Three Concepts of Globalization’, *International Sociology*, 15 (2000), pp. 180-196.
- Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (adopted 22 March 1989, entered into force 5 May 1992), *preamble*, available at: {<http://www.basel.int/TheConvention/Overview/TextoftheConvention/tabid/1275/Default.aspx>} accessed 2 September 2014.
- Baughen, Simon, ‘Expropriation and Environmental Regulation: The Lessons of NAFTA Chapter Eleven’, *Journal of Environmental Law* 18:2 (2006), pp. 207-228.
- BBC, ‘Ecuador Appeals Court Rules Against Chevron in Oil Case’, (4 January 2012), available at: {<http://www.bbc.co.uk/news/world-latin-america-16404268>} accessed 1 May 2012.
- Bear Creek Mining Corporation, ‘Bear Creek Announces its Intent to Commence an Arbitration Against Peru – Santa Ana Dispute’, *News Release* (12 August 2014), available at {<http://www.bearcreekmining.com/s/news.asp?ReportID=676144>} accessed 4 February 2015.
- Bear Creek Mining Corporation, ‘Bear Creek Reports Peruvian Government Resolution Which Potentially Further Delays Santa Ana Esia’, *News Release* (1 June 2011), available at {<http://www.bearcreekmining.com/s/news.asp?ReportID=605737>} accessed 7 January 2015.
- Bennaim-Selvi, Olivia, ‘Third Parties in International Investment Arbitrations’, *The Journal of World Investment and Trade*, 6 (2005), pp. 773-807.
- Benvenisti, Eyal & Downs, George, ‘The Empire’s New Clothes: Political Economy and the Fragmentation of International Law’, *Standord Law Review*, 60 (2007-2008), pp. 595-632.

Berman, Franklin, 'Evolution or Revolution?', in Chester Brown & Kate Miles (eds), *Evolution in International Treaty Law and Arbitration* (Cambridge: Cambridge University Press, 2011), pp. 658-672.

Bernardini, Piero, 'Investment Protection Under Bilateral Investment Treaties and Investment Contracts', *The Journal of World Investment*, 2 (2001), pp. 235-247.

Bernasconi, Nathalie, *Background Paper on Vattenfall v. Germany Arbitration* (Winnipeg: International Institute for Sustainable Development, July 2009).

Bernasconi-Osterwalder, Nathalie, 'The Draft Investment Chapter of the Canada-EU Comprehensive Economic and Trade Agreement: A Step Backwards for the EU and Canada?', *Investment Treaty News*, 4:3 (June 2013), p. 10-13.

Bernasconi-Osterwalder, Nathalie & Cosbey, Aaron, et al., *Investment Treaties and Why They Matter to Sustainable Development: Questions and Answers* (Winnipeg: International Institute for Sustainable Development, 2012), available at: {<http://www.iisd.org/publications/pub.aspx?pno=1534>} accessed 10 February 2013.

Bernasconi-Osterwalder, Nathalie & Hoffman, Rhea Tamara, 'The German Nuclear Phase-Out Put to the Test in International Investment Arbitration? Background to the New Dispute Vattenfall v. Germany (II)', *Briefing Note* (June 2012), available at: {[http://www.iisd.org/pdf/2012/german\\_nuclear\\_phase\\_out.pdf](http://www.iisd.org/pdf/2012/german_nuclear_phase_out.pdf)} accessed 24 August 2012.

Bernasconi-Osterwalder, Nathalie & Johnson, Lise (eds) *International Investment Law and Sustainable Development: Key Cases from 2000-2010* (International Institute for Sustainable Development, 2011).

Bernasconi-Osterwalder, Nathalie & Mann, Howard, 'A Response to the European Commission's December 2013 Document 'Investment Provisions in the EU-Canada Free Trade Agreement (CETA)', *IISD Report* (February 2014), available at: {<http://www.iisd.org/publications/response-european-commissions-december-2013-document-investment-provisions-eu-canada>} accessed 23 May 2014.

Bieler, Andreas, *The Struggle for a Social Europe: Trade Unions and EMU in Times of Global Restructuring* (Manchester: Manchester University Press, 2006).

Bieler, Andreas, 'Class Struggle over the EU Model of Capitalism: Neo-Gramscian Perspectives and the Analysis of European Integration', *Critical Review of International Social and Political Philosophy*, 8:4 (2005), pp. 513-526.

Bieler, Andreas & Morton, Adam David, 'The Will-O'-The-Wisp of the Transnational State', *Journal of Australian Political Economy*, 72 (2013-2014), pp. 23-51.

Bieler, Andreas & Morton, Adam David, *Social Forces in the Making of the New Europe: The Restructuring of European Social Relations in the Global Political Economy* (Basingstoke: Palgrave, 2001).

Bieler, Andreas & Morton, Adam David, 'The Gordian Knot of Agency-Structure in International Relations: A Neo-Gramscian Perspective', *European Journal of International Relations*, 7:5 (2001), pp. 5-35.

Bilaterals.org & GRAIN, *Strategic Learnings: Learnings from the Struggles* (December 2007), p. 97, available at {<http://www.bilaterals.org/IMG/pdf/fightingFTA-en-Hi-3-learnings-from-struggles.pdf>} accessed 17 February 2013.

Bilaterals.org, 'Fighting FTAs Workshop' (2006), available at {<http://www.bilaterals.org/spip.php?rubrique162>} accessed 17 February 2013.

- Bishop, David v. Government of Canada, *Notice of Intent* (8 October 2008).
- Biwater Gauff Ltd. v. United Republic of Tanzania, *Award*, ICSID Case No. ARB/05/22 (24 July 2008).
- Biwater Gauff Ltd. v. United Republic of Tanzania, *Amicus Curiae Submission of The Lawyers' Environmental Action Team et al*, ICSID Case No. ARB/05/22 (26 March 2007).
- Bizzarri, Kim, *A Brave New Transatlantic Partnership* (Seattle to Brussels Network, 2013), available at {<http://www.s2bnetwork.org/cat/issues/eu-investment-policy/page/2/>} accessed 28 March 2015.
- Block, Fred, 'Beyond Relative Autonomy: State Managers as Historical Subjects', *The Socialist Register*, 17 (1980), pp. 227-241.
- Böckstiegel, Karl-Heinz, 'Enterprise v. State: the New David and Goliath? – The Clayton Utz Lecture', *Arbitration International*, 23:1 (2007), pp. 93-104.
- Borgh, Chris Van Der, 'The Politics of Neoliberalism in Postwar El Salvador', *International Journal of Political Economy*, 30:1 (2000), pp 36-54.
- Boute, Anatole, 'The Potential Contribution of International Investment Protection Law to Combat Climate Change', *Journal of Energy and Natural Resources Law*, 27:3, (2009), pp. 333-376.
- Bouw, Brenda, 'Canadian Mining Firm Threatens Legal Action Against Peru', *The Globe and Mail* (26 June 2011), available at {<http://www.theglobeandmail.com/globe-investor/canadian-mining-firm-threatens-legal-action-against-peru/article585641/>} accessed 19 September 2014.
- Brauch, Martin Dietrich, 'Yukos v. Russia: Issues and Legal Reasoning Behind US\$50 Billion Awards', *Investment Treaty News* (September 2014).
- Braun, Tillmann, 'Globalization: The Driving Force in International Investment Law', in Michael Waibel, Asha Kaushal, et al (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Alphen aan den Rijn: Kluwer International Law, 2010), pp. 491-505.
- Briner, Robert, 'Philosophy and Objectives of the Convention,' in *Enforcing Arbitration Awards Under The New York Convention: Experience and Prospects* (UNCITRAL, 1999), available at {<http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/NYCDay-e.pdf>} accessed 2 July 2012.
- Broad, Robin & Cavanagh, John. 'The Global Fight Against Corporate Rule', *The Nation* (14 January 2014), available at {<http://www.thenation.com/article/177930/global-fight-against-corporate-rule#>} accessed 3 February 2015.
- Broad, Robin & Cavanagh, John, 'Like Water for Gold in El Salvador', *The Nation* (1-3 August 2011), available at {<http://www.thenation.com/article/162009/water-gold-el-salvador?page=0,1>} accessed 3 February 2015.
- Bronfman, Marcela, 'Fair and Equitable Treatment: An Evolving Standard,' in Armin Von Bogdandy & Rudiger Wolfrum (eds), *Max Planck Yearbook of United Nations Law*, 10 (2006), pp. 609-680.
- Brower, Charles, 'Corporations as Plaintiffs Under International Law: Three Narratives about Investment Treaties', *Santa Clara Journal of International Law*, 9 (2011), pp. 179-214.
- Brower, Charles, 'NAFTA's Investment Chapter: Initial Thoughts about Second Generation Rights', *Vanderbilt Journal of Transnational Law*, 37 (2003), pp. 1533-1566.
- Brower, Charles, 'Structure, Legitimacy, and NAFTA's Investment Chapter', *Vanderbilt Journal of Transnational Law*, 36 (2003), pp. 37-94.

- Brower, Charles & Blanchard, Sadie, 'From "Dealing in Virtue" to "Profiting from Injustice": The Case Against "Re-Statification" of Investment Dispute Settlement', *Harvard International Law Journal*, 55 (January 2014), pp. 45-59.
- Brower, Charles & Schill, Stephan 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?', *Chicago Journal of International Law*, 9 (2008-2009), pp. 471-498.
- Brower, Charles & Wong, Jarrod, 'General Valuation Principles: The Case of Santa Elena', in Todd Weiler, *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (London: Cameron May, 2005).
- Brunetti, Maurizio, 'Indirect Expropriation in International Law', *International Law FORUM Du Droit International* 5 (2003), pp. 150-154.
- Burke-White, William, 'The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System', *The Asian Journal of WTO and International Health Law and Policy*, 3 (2008), pp. 199-234.
- Burlington Resources Inc. v. Republic of Ecuador, *Decision on Jurisdiction*, ICSID Case No. ARB/08/5 (2 June 2010).
- Burnham, Peter, 'Class Struggle, States and Global Circuits of Capital', in Mark Rupert & Hazel Smith (eds), *Historical Materialism and Globalization* (London: Routledge, 2002), pp. 113-128.
- Busch, Michael, 'El Salvador's Gold Fight', *Foreign Policy in Focus* (16 July 2009), available at {[http://fpif.org/el\\_salvadors\\_gold\\_fight/](http://fpif.org/el_salvadors_gold_fight/)} accessed 4 February 2015.
- Business Roundtable, 'Members', available at {<http://businessroundtable.org/about/members>} accessed 11 March 2015.
- BusinessEurope, 'Speaking Points on Investment Protection and ISDS', *TTIP Stakeholder Event* (12 March 2014), available at {<http://www.esf.be/new/wp-content/uploads/2014/03/TTIP-Stakeholder-Presentations-Event-12-March-2014-Luisa-Santos-BusinessEurope-on-ISDS.pdf>} accessed 20 March 2015.
- BusinessWeek, 'Enron's Rebecca Mark: You Have to Be Pushy and Aggressive' (23 February 1997), available at {<http://www.businessweek.com/stories/1997-02-23/enrons-rebecca-mark-you-have-to-be-pushy-and-aggressive-intl-edition>} accessed 23 January 2015.
- BusinessWeek, 'Nafta to the Rescue?' (3 August 1997), available at {<http://www.businessweek.com/stories/1997-08-03/nafta-to-the-rescue-intl-edition>} accessed 8 February 2014.
- Butcher, Karyn, 'Not In My Backyard! The Sarayaku's Fight Against Oil Development in the Ecuadorian Amazon', *ICE Case Studies*, 170 (May 2006), available at {<http://www1.american.edu/ted/ice/sarayacu.htm>} accessed 11 March 2014.
- Cabrera Diaz, Fernando, 'German Investor Launches ICSID Case against Costa Rica over Alleged Expropriation of Land near Endangered Turtle Habitat', *Investment Treaty News* (6 December 2009).
- Callinicos, Alex, *Imperialism and Global Political Economy* (Cambridge: Polity Press, 2009).
- Callinicos, Alex, 'Does Capitalism Need the State System?', *Cambridge Review of International Affairs*, 20:4 (2007), pp. 533-549.
- Cammack, Paul, 'Forget the Transnational State', *Papers in the Politics of Global Competitiveness*, 3 (2007), available at {[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1526528](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1526528)} accessed 1 May 2012.

Camp, Dalton, 'You Can Thank Free Trade Agreement for MMT Travesty', *The Toronto Star* (29 July 1998), p. A15.

Canada – People's Republic of China, *Agreement for the Promotion and Protection of Investments* (finalized for signature in 2012), available at {<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/china-text-chine.aspx?lang=eng&view=d>} accessed 15 February 2013.

Canadian Press, 'Quebec Fracking Ban Would Impose 5-Year Moratorium in St. Lawrence River Valley', *Huffington Post* (15 May 2013), available at {[http://www.huffingtonpost.ca/2013/05/16/quebec-fracking-ban\\_n\\_3282024.html](http://www.huffingtonpost.ca/2013/05/16/quebec-fracking-ban_n_3282024.html)} accessed 27 January 2015.

Carminati, Giugi, 'Is International Trade Really Making Developing Countries Dirtier and Developed Countries Richer?' *UC Davis Business Law Journal*, 8 (2007-2008), pp. 205-233.

Carroll, William, *The Making of a Transnational Capitalist Class: Corporate Power in the 21<sup>st</sup> Century* (London: Zed Books, 2010).

Carroll, William & Carson, Colin, 'The Network of Global Corporations and Elite Policy Groups: A Structure for Transnational Capitalist Class Formation', *Global Networks*, 3:1 (2003), pp. 29-57.

Cassels Brock Lawyers, 'NAFTA Investment Disputes – Where Are We?' (28 June 2011), available at {[http://www.casselsbrock.com/CBNewsletter/NAFTA\\_Investment\\_Disputes\\_\\_\\_Where\\_Are\\_We\\_](http://www.casselsbrock.com/CBNewsletter/NAFTA_Investment_Disputes___Where_Are_We_)} accessed 21 March 2015.

Cavanagh, John & Broad, Robin, 'Mining for Gold: A 'Pact With The Devil'?', *Yes! Magazine* (28 August 2012), available at {<http://www.yesmagazine.org/blogs/john-cavanagh-and-robin-broad/gold-mining-a-pact-with-the-devil>} accessed 11 January 2015.

CBC News, 'Bear Creek Fights Back in Peru Mine Dispute' (27 June 2011), available at {<http://www.cbc.ca/news/business/bear-creek-fights-back-in-peru-mine-dispute-1.1126798>} accessed 12 June 2014.

Cerny, Philip, 'Paradoxes of the Competition State: The Dynamics of Political Globalization', *Governance and Opposition*, 32:2 (1997), pp. 251-274.

Chalamish, Efraim, 'The Future of Bilateral Investment Treaties: A De Facto Multilateral Agreement?' *Brooklyn Journal of International Law*, 34:2 (2008/2009), pp. 303-353.

Chang, Ha-Joon, 'Smith, Marx, the IMF: They Are All After You, George', *The Guardian* (8 May 2013), p. 30.

Chapman, Megan, 'Seeking Justice in Lago Agrio and Beyond: An Argument for Joint Responsibility of Host States and Foreign Investors before the Regional Human Rights Systems', *Human Rights Brief*, 18:1 (2010), pp. 6-13, available at {<http://digitalcommons.wcl.american.edu/hrbrief/vol18/iss1/2/>} accessed 1 May 2012.

Charlton, Anthony, 'Discounted Cash Flows – Part 2, Valuation and the Financial Crisis', *Kluwer Arbitration Blog* (26 January 2012).

Chemtura Corporation (formerly Crompton Corporation) v. Government of Canada, *Award*, UNCITRAL Ad Hoc Arbitration (2 August 2010).



Cheng, Tai-Heng & Bento, Lucas, 'ICSID's Largest Award in History: A Overview of Occidental Petroleum Corporation v the Republic of Ecuador', *Kluwer Arbitration Blog* (19 December 2012), available at: {<http://kluwerarbitrationblog.com/blog/2012/12/19/icsids-largest-award-in-history-an-overview-of-occidental-petroleum-corporation-v-the-republic-of-ecuador/>} accessed 7 September 2014.

Cheng, Tai-Heng, 'Developing Narratives in International Investment Law', *Santa Clara Journal of International Law*, 9 (2011), pp. 215-226.

Chevron Corporation & Texaco Petroleum Company v. Republic of Ecuador, *First Partial Award*, PCA Case No 2009-23 (17 September 2013).

Chevron Corporation & Texaco Petroleum Company v. Republic of Ecuador, *Track 2 Counter-Memorial on the Merits*, PCA Case No 2009-23 (18 February 2013).

Chevron Corporation & Texaco Petroleum Company v. Republic of Ecuador, *Supplemental Memorial on the Merits*, PCA Case No 2009-23 (20 March 2012).

Chevron Corporation & Texaco Petroleum Company v. Republic of Ecuador, *Second Interim Award on Interim Measures* (16 February 2012).

Chevron Corporation & Texaco Petroleum Company v. Republic of Ecuador, *Submission of Amici: Fundación Pachamama & International Institute of Sustainable Development*, PCA Case No 2009-23 (5 November 2010).

Chevron Corporation & Texaco Petroleum Company v. Republic of Ecuador, *Notice of Arbitration*, PCA Case No 2009-23 (23 September 2009).

Chevron Corporation, 'Comments on Proposed Transatlantic Trade and Investment Partnership', Letter to the Office of the United States Trade Representative (7 May 2013), available at {<http://www.greenpeace.org/austria/de/News/blog-at/us-fracking-lobby-ist-europische-rechtstaatli/blog/48298/>} accessed 22 January 2015.

Chimni, B.S., 'An Outline of a Marxist Course on Public International Law', *Leiden Journal of International Law*, 17 (2004), pp. 1-30.

Chimni, B.S., 'International Institutions Today: An Imperial Global State in the Making', *European Journal of International Law*, 15:1 (2004), pp. 1-37.

Choudhury, Barnali, 'Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?', *Vanderbilt Journal of Transnational Law*, 41 (2008), pp. 775-832.

Clapp, Jennifer, 'What the Pollution Havens Debate Overlooks', *Global Environmental Politics*, 2:2 (2002), pp. 11-19.

Clapp, Jennifer & Dauvergne, Peter, *Paths to a Green World: The Political Economy of the Global Environment* (Cambridge: MIT Press, 2005).

Clark, Ian, *Globalization and International Relations Theory* (Oxford: Oxford University Press, 2000).

Clark, Ian, 'Beyond the Great Divide: Globalization and the Theory of International Relations', *Review of International Studies*, 24 (1998), pp. 479-488.

Clayton, William Ralph and others & Bilcon of Delaware v. Government of Canada, *Counter-Memorial*, UNCITRAL Ad Hoc Arbitration (9 December 2011).

Clayton, William Ralph and others & Bilcon of Delaware v. Government of Canada, *Memorial of the Investors*, UNCITRAL Ad Hoc Arbitration (25 July 2011).

Clayton, William Ralph and others & Bilcon of Delaware v. Government of Canada, *Statement of Claim*, UNCITRAL Ad Hoc Arbitration (30 January 2009).

Clayton, William Ralph and others & Bilcon of Delaware v. Government of Canada, *Notice of Arbitration*, UNCITRAL Ad Hoc Arbitration (26 May 2008).

CMS Gas Transmission Company v. The Argentine Republic, *Award*, ICSID Case No. ARB/01/8 (12 May 2005).

Coghlan, Andy & MacKenzie, Debora, 'Revealed – The Capitalist Network that Runs the World', *The New Scientist* (24 October 2011), available at {[http://www.newscientist.com/article/mg21228354.500-revealed--the-capitalist-network-that-runs-the-world.html#.VP\\_TL2dyaAh](http://www.newscientist.com/article/mg21228354.500-revealed--the-capitalist-network-that-runs-the-world.html#.VP_TL2dyaAh)} accessed 11 March 2013.

Collins, Denis, 'The Failure of Socially Responsible Gold Mining MNC in El Salvador: Ramifications of NGO Mistrust', *Journal of Business Ethics*, 88 (2009), pp. 245-268.

Comeaux, Paul & Kinsella, Stephen, 'Reducing Political Risk in Developing Countries: Bilateral Investment Treaties, Stabilization Clauses, and MIGA and OPIC Investment Insurance', *New York Law School Journal of International and Comparative Law*, 15:1 (1994), pp. 1-48.

Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. Republic of El Salvador, *Notice of Intent to File Claim*, ICSID Case No. ARB/09/17 (16 March 2009).

Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. Republic of El Salvador, *El Salvador's Preliminary Objections Under Article 10.20.5 of CAFTA*, ICSID Case No. ARB/09/7 (16 August 2010).

Compañía Del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica, *Final Award*, ICSID Case No. ARB/96/1 (17 February 2000).

Constain, Silvia, 'ISDS Growing Pains and Responsible Adulthood', *Transnational Dispute Management*, 11:1 (2014), pp. 1-3.

Connolly, Albert v. Government of Canada, *Notice of Intent to Submit a Claim to Arbitration Under NAFTA Chapter 11* (19 January 2004).

Corporate Europe Observatory, 'Citizens Turn Up the Volume on Troubled TTIP Negotiations' (19 March 2014), available at {<http://corporateeurope.org/trade/2014/03/citizens-turn-volume-troubled-ttip-negotiations>} accessed 28 March 2015.

Corporate Europe Observatory, 'Who Lobbies Most on TTIP?' (8 July 2014), available at {<http://corporateeurope.org/international-trade/2014/07/who-lobbies-most-ttip>} accessed 28 March 2015.

Corporate Europe Observatory, 'European Commission Preparing for EU-US Trade Talks: 119 Meetings with Industry Lobbyists' (4 September 2013), available at {<http://corporateeurope.org/trade/2013/09/european-commission-preparing-eu-us-trade-talks-119-meetings-industry-lobbyists>} accessed 10 March 2015.

Corporate Europe Observatory, *Profiting From Injustice: How Law Firms, Arbitrators and Financiers are Fuelling an Investment Arbitration Boom* (2012), available at {<http://corporateeurope.org/publications/profitting-from-injustice>} accessed 10 February 2013.

Cotula, Lorenzo & Tienhaara, Kyla, 'Reconfiguring Investment Contracts to Promote Sustainable Development', in Karl Sauvant (ed) *Yearbook on International Investment Law and Policy 2011-2012* (Oxford, Oxford University Press: 2013), pp. 281-310.

- Cotula, Lorenzo, 'Pushing the Boundaries vs Striking a Balance: The Scope and Interpretation of Stabilization Clauses in Light of the *Duke v. Peru Award*', *The Journal of World Investment and Trade*, 11 (2010), pp. 27-43.
- Cotula, Lorenzo, 'Reconciling Regulatory Stability and Evolution of Environmental Standards in Investment Contracts: Towards a Rethink of Stabilization Clauses?', *Journal of World Energy Law and Business*, 1:2 (2008), pp. 158-179.
- Council for Canadians, 'NAFTA Lawsuit Against Quebec Fracking Moratorium Proves Environmental Threat of China, EU Investment Deals', *Media Release* (16 November 2012), available at {<http://canadians.org/media/trade/2012/16-Nov-12.html>} accessed 18 April 2014.
- Council of Canadians, 'Murder in El Salvador Calls Canadian Mining Interests Into Question', *Media Release* (20 June 2011), available at {<http://www.canadians.org/fr/node/333>} accessed 10 January 2015.
- Council of Canadians, Earthworks, et al., 'Open Letter to minister of Foreign Affairs and MP Re: Destructive Mining Abroad' (5 December 2013), available at {<http://canadians.org/blog/canadian-and-romanian-groups-denounce-rosia-montana-mine>} accessed 20 January 2015.
- Council on Hemispheric Affairs, 'Pacific Rim v. El Salvador and the Perils of Free Trade in the Americas' (30 July 2010), available at {<http://www.coha.org/pacific-rim-v-el-salvador-and-the-perils-of-free-trade-in-the-americas/>} accessed 10 January 2015.
- Cox, Laurence & Nilsen, Alf Gunvald, *We Make Our Own History: Marxism and Social Movements in the Twilight of Neoliberalism* (London: Pluto Press, 2014).
- Cox, Robert, 'Gramsci, Hegemony and International Relations: An Essay in Method', *Millennium – Journal of International Studies*, 12:2 (1983), pp. 162-175.
- Cox, Robert, 'Social Forces, States and World Order: Beyond International Relations Theory', *Millennium: Journal of International Studies*, 10:2 (1981), pp. 126-155.
- Crockett, Antony, 'Stabilisation Clauses and Sustainable Development: Drafting for the Future', in Chester Brown & Kate Miles (eds) *Evolution in Investment Treaty Law and Arbitration* (Cambridge, Cambridge University Press, 2011), pp. 516-538.
- Cutler, Claire, 'Toward a Radical Political Economy Critique of Transnational Economic Law', in Susan Marks (ed), *International Law on the Left: Re-Examining Marxist Legacies* (Cambridge: Cambridge University Press, 2008), pp. 199-220.
- Cutler, Claire, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge: Cambridge University Press, 2003).
- Dale-Harris, Luke, 'Romania's Powder Keg: Mine Project Launches Protest Movement', *Spiegel International* (20 September 2013), available at {<http://www.spiegel.de/international/europe/romanian-mining-plan-sparks-mass-national-protests-a-923625.html>} accessed 13 January 2015.
- Davidson, Neil, 'Many Capitals, Many States', in Alexander Anievas (ed) *Marxism and World Politics: Contesting Global Capitalism* (Abingdon: Routledge, 2010), pp. 77-93.
- De Gucht, Karel, 'Statement on TTIP', *European Commission Speech/14/549, Speech at the European Parliament Plenary Debate* (Strasbourg, 15 July 2014), available at: {[http://europa.eu/rapid/press-release\\_SPEECH-14-549\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-14-549_en.htm)} accessed 22 August 2014.

De Gucht, Karel, 'The Transatlantic Trade and Investment Partnership: The Real Debate', *European Commission Speech No 14/406, Speech at the European Affairs Committee of the Bundesrat* (Berlin, 22 May 2014), available at: {[http://europa.eu/rapid/press-release\\_SPEECH-14-406\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-14-406_en.htm)} accessed 31 August 2014.

Deepwater Horizon Study Group, *Final Report on the Investigation of the Macondo Well Blowout* (Center for Catastrophic Risk Management & the University of California at Berkeley, 2011), available at {[http://ccrm.berkeley.edu/deepwaterhorizonstudygroup/dhsg\\_reportsandtestimony.shtml](http://ccrm.berkeley.edu/deepwaterhorizonstudygroup/dhsg_reportsandtestimony.shtml)} accessed 14 March 2015.

DeLauro, Rosa, 'Letter from 133 Members of the House of Representatives to United States Trade Representative Ambassador Ron Kirk' (27 June 2012) available at {[http://delauro.house.gov/index.php?option=com\\_content&view=article&id=997:&catid=2:2012-press-releases&Itemid=21](http://delauro.house.gov/index.php?option=com_content&view=article&id=997:&catid=2:2012-press-releases&Itemid=21)} accessed 11 February 2013.

Desbordes, Rodolphe & Vauday, Julien, 'The Political Influence of Foreign Firms in Developing Countries', *Economics & Politics*, 19:3 (November 2007), pp. 421-451.

Desert Line Project LLC. v. The Republic of Yemen, *Award*, ICSID Case No. ARB/05/17 (6 February 2008).

Deutsche Bank, *Chronicle: From 1870 Until Today* (2012), available at {[http://www.db.com/en/media/DB\\_geschichte\\_meilensteine\\_120dpi\\_en.pdf](http://www.db.com/en/media/DB_geschichte_meilensteine_120dpi_en.pdf)} accessed 1 May 2012.

Devaney, Margaret, 'Remedies in Investor-State Arbitration: A Public Interest Perspective', *Investment Treaty News*, 3:3 (March 2013), pp. 11-13.

Di Benedetto, Saverio, *International Investment Law and the Environment* (Cheltenham: Edward Elgar, 2013).

Dolzer, Rudolf & Schreuer, Christoph, *Principles of International Investment Law* (Oxford: Oxford University Press, 2008).

Dolzer, Rudolf, 'Fair and Equitable Treatment: A Key Standard in Investment Treaties', *The International Lawyer*, 39:1 (2005), pp. 87-106.

Dolzer, Rudolf, 'Indirect Expropriations: New Developments', *New York University Environmental Law Journal*, 11 (2002), pp. 64-93.

Donnan, Shawn & Wagstyl, Stefan, 'Transatlantic Trade Talks Hit German Snag', *Financial Times* (14 March 2014), available at {<http://www.ft.com/cms/s/0/cc5c4860-ab9d-11e3-90af-00144feab7de.html#axzz2zkMLADkB>} accessed 5 May 2014.

Dow Agrosciences LLC v. Government of Canada, *Notice of Arbitration*, UNCITRAL Ad Hoc Arbitration (31 March 2009).

DW, 'Vattenfall Seeks Recompense for German Nuclear Phaseout' (21 December 2012), available at: {<http://www.dw.de/vattenfall-seeks-recompense-for-german-nuclear-phaseout/a-16473507>} accessed 22 March 2014.

Eagles, Munroe, *Politics: An Introduction to Democratic Government*, 3<sup>rd</sup> ed (Plymouth: Broadview Press, 2008).

EarthJustice, Friends of the Earth, et al, *Investment Rules in Trade Agreements: Top 10 Changes to Build a Pro-Labor, Pro-Community and Pro-Environment Trans-Pacific Partnership*, (9 August 2010), available at {[http://www.ips-dc.org/reports/investment\\_rules\\_in\\_trade\\_agreements\\_top\\_10](http://www.ips-dc.org/reports/investment_rules_in_trade_agreements_top_10)} accessed 11 February 2013.

Economist, 'Going Overboard' (29 March 2014), p. 59.

Economist, 'Letters: From William Byars, Greenville, South Carolina', (24 March 2014).

Economist, 'Grey Eminences' (22 February 2014), p. 14.

Economist, 'Here, There and Everywhere' (22 February 2014), p. 57.

Economist, 'Special Report: Companies and the State' (22 February 2014), pp. 5-15.

Economist, 'Special Report: Outsourcing and Offshoring' (19 January 2013), pp. 15-16.

Economist, 'Here, There and Everywhere' (19 January 2013), p. 4.

Economist, 'Wake Up and Smell the Coffee' (15 December 2012), p. 64.

Economist, 'Germany's Energy Giants: Don't Mention the Atom' (23 June 2012), available at: {<http://www.economist.com/node/21557363>} accessed 22 March 2014.

Economist, 'Water War in Bolivia' (10 February 2000), available at {<http://www.economist.com/node/280871>} accessed 10 January 2015.

Elkins, Zackary & Guzman, Andrew, et al, 'Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000', *International Organization*, 60 (2006), pp. 811-846.

Empresas Lucchetti, S.A. and Lucchetti Peru, S.A., v. Republic of Peru, *Award*, ICSID Case No. ARB/03/4 (7 February 2005).

Energy Charter Treaty (adopted 17 December 1994, entered into force 16 April 1998), available at {<http://international.energycharter.org/iec/what-is-the-charter/>} accessed 25 March 2015.

Ethyl Corporation v. Government of Canada, *Award on Jurisdiction*, UNCITRAL Ad Hoc Arbitration (24 June 1998).

Ethyl Corporation v. Government of Canada, *Statement of Defence*, UNCITRAL Ad Hoc Arbitration (27 October 1997).

Ethyl Corporation v. Government of Canada, *Notice of Arbitration*, UNCITRAL Ad Hoc Arbitration (14 April 1997).

Ethyl Corporation v. Government of Canada, *Notice of Intent to Submit a Claim to Arbitration* (10 September 1996).

Eulich, Whitney, 'Mining Is No Savior For El Salvador, Says Catholic Church', *The Christian Science Monitor* (10 September 2013), available at {<http://www.csmonitor.com/World/Americas/2013/0910/Mining-is-no-savior-for-El-Salvador-says-Catholic-Church>} accessed 11 January 2015.

European Commission, 'Report on Online Public Consultation on Investment Protection and ISDS in the TTIP Agreement', *Commission Staff Working Document* (Brussels: 13 January 2015), available at {[http://trade.ec.europa.eu/consultations/index.cfm?consul\\_id=179](http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179)} accessed 20 March 2015.

European Commission, 'European Commission Launches Public Online Consultation on Investor Protection in TTIP', *Press Release* (Brussels, 27 March 2014), available at {[http://europa.eu/rapid/press-release\\_IP-14-292\\_en.htm](http://europa.eu/rapid/press-release_IP-14-292_en.htm)} accessed 28 March 2015.

European Commission, 'Factsheet: Investment Protection and Investor-to-State Dispute Settlement in EU Agreements' (November 2013), available at: {[http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc\\_151916.pdf](http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf)} accessed 1 May 2014.

European Commission, 'Incorrect Claims about Investor-State Dispute Settlement' (3 October 2013), available at: [[http://trade.ec.europa.eu/doclib/docs/2013/october/tradoc\\_151790.pdf](http://trade.ec.europa.eu/doclib/docs/2013/october/tradoc_151790.pdf)] accessed 17 June 2014

European Commission, 'The Transatlantic Trade and Investment Partnership: Questions and Answers', available at: [<http://ec.europa.eu/trade/policy/in-focus/ttip/questions-and-answers/>] accessed 29 August 2013.

European Union-Canada, *Consolidated CETA Text* (26 September 2014; not yet signed), available at [<http://ec.europa.eu/trade/policy/in-focus/ceta/>] accessed 25 March 2015.

Evans, Peter & Rueschemeyer, Dietrich, et al (eds), *Bringing the State Back In* (Cambridge: Cambridge University Press, 1985).

Evans, Peter & Rueschemeyer, Dietrich, et al, 'On the Road Toward a More Adequate Understanding of the State', in Peter Evans, Dietrich Rueschemeyer, et al (eds), *Bringing the State Back In* (Cambridge: Cambridge University Press, 1985).

Fach Gómez, Katia, 'Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw The Line Favourably for the Public Interest', *Fordham International Law Journal*, 35 (2012), pp. 510-564.

Fach Gómez, Katia, 'ICSID Claim by Spanish Companies against Mexico over the Center for the Integral Management of Industrial Resources' (28 June 2010), pp. 1-26, available at [[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1631835](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1631835)] accessed 10 April 2014.

FIDH (International Federation for Human Rights), *Peru: Metallurgical Complex of La Oroya: When Investors' Protection Threaten Human Rights* (December 2012), available at [<https://www.fidh.org/International-Federation-for-Human-Rights/americas/Peru,565/report-on-the-situation-in-la-oroya-when-investor-protection-threatens-13241>] accessed 17 April 2014.

Fortier, Yves & Drymer, Stephen, 'Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor', *ICSID Review*, 19:2 (2004), pp. 293-397.

Fortier, Yves, 'Investment Protection and the Rule of Law: Change or Decline?', *The British Institute of International and Comparative Law 50<sup>th</sup> Anniversary Event Series*, (2009).

Fortier, Yves, 'Expectations of Governments and Investors vs. Practice: A View from the Bench', *ICSID Review*, 24:2 (2009), pp. 350-362.

Fortier, Yves, 'Investment Protection and the Rule of Law: Change or Decline', Speech, *British Institute of International and Comparative Law 50<sup>th</sup> Anniversary Event Series* (London: 17 March 2009).

Fossen, Anthony Van, 'The Transnational Capitalist Class and Tax Havens', in Georgina Murray & John Scott (eds), *Financial Elites and Transnational Business: Who Rules the World?* (Cheltenham: Edward Elgar, 2012), pp. 76-99.

Fournier, Robert & Grant, Jill et al, 'Environmental Assessment of the Whites Point Quarry and Marine Terminal Project', *Joint Review Panel Report* (October 2007).

Franck, Susan D., 'International Investment Arbitration: Winning, Losing and Why', in Karl Sauvant, Lisa Sachs, et al. (eds), *FDI Perspectives: Issues in International Investment* (Vale Columbia Center on International Investment, 2011), pp. 83-85.

Franck, Susan D., 'Empirically Evaluating Claims About Investment Treaty Arbitration', *North Carolina Law Review*, 86 (2007-2008), pp. 1-88.

Franck, Susan D., 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions', *Fordham Law Review*, 73 (2004-2005), pp. 1521-1625.

Freshfields Bruckhaus Deringer, 'Investment Treaty Protection', available at {[http://www.freshfields.com/en/global/what\\_we\\_do/our\\_services/Investment\\_treaty\\_protection/](http://www.freshfields.com/en/global/what_we_do/our_services/Investment_treaty_protection/)} accessed 23 January 2015.

Freshfields Bruckhaus Deringer, 'Bilateral Investment Treaties: Managing the Risk of Government Intervention', available at: {<http://www.freshfields.com/uploadedFiles/SiteWide/Knowledge/Bilateral%20investment%20treaties%20Managing%20the%20risk%20of%20government%20intervention.pdf>} accessed 20 June 2014.

Friends of Rural Communities and the Environment (FORCE), available at {<http://www.stopthequarry.ca/>} accessed 28 March 2014.

Friends of the Earth Europe, 'EU-US Trade Talks: What Chance for Transparency?' (20 January 2014), available at {<http://www.foeurope.org/EU%E2%80%93US-trade-what-chance-transparency-200114>} accessed 28 March 2015.

Friends of the Earth, *Briefing: Investment and the WTO – Busting the Myths* (2003), available at {[http://www.foe.co.uk/resource/briefings/investment\\_and\\_the\\_wto\\_bust.pdf](http://www.foe.co.uk/resource/briefings/investment_and_the_wto_bust.pdf)} accessed 1 May 2012.

FTR Holding S.A., Philip Morris Products S.A., & Abal Hermanos S.A. v. Oriental Republic of Uruguay, *Request for Arbitration*, ICSID Case No. ARB/10/7 (19 February 2010).

Fuller, Lisa, 'El Salvador and Gold Mining: International Resistance to Transnational Attacks', *Left Turn* (1 June 2010), available at {<http://www.leftturn.org/El-Salvador-Gold-Mining>} accessed 3 February 2015.

Gaines, Sanford, 'Environmental Policy Implications of Investor-State Arbitration Under NAFTA Chapter 11', *International Environmental Agreements*, 7 (2007), pp. 171-201.

Gallo, Vito G. v. Government of Canada, *Statement of Defence*, UNCITRAL Ad Hoc Arbitration (15 September 2008).

Gallus, Nick, 'The 'Fair and Equitable Treatment' Standard and the Circumstances of the Host State', in Chester Brown & Kate Miles (eds) *Evolution in Investment Treaty Law and Arbitration* (Cambridge, Cambridge University Press, 2011), pp. 223-245.

Gantz, David, 'Potential Conflicts Between Investor Rights and Environmental Regulation Under NAFTA Chapter 11', *George Washington International Law Review*, 33 (2000-2001), pp. 651-752.

Garcia, Eduardo, 'Ecuador Ordered to Pay Occidental \$1.77 Billion in Damages', *Reuters* (5 October 2012), available at {<http://www.reuters.com/article/2012/10/06/us-ecuador-occidental-ruling-idUSBRE89500O20121006>} accessed 14 March 2015.

Garner, Robert, et al, *Introduction to Politics*, 2<sup>nd</sup> ed (Oxford: Oxford University Press, 2012).

Gathii, James Thuo, 'TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography', *Trade Law and Development*, 3:1 (2011), pp. 25-64.

George, Susan, 'If You Want To Be Relevant: Advice to the Academic from the Scholar-Activist', in Richard Appelbaum & William Robinson (eds), *Critical Globalization Studies* (New York: Routledge, 2000), pp. 3-10.

Gill, Stephen, 'Constitutionalizing Inequality and the Clash of Globalizations', *International Studies Review*, 4:2 (2002), pp. 47-65.

- Gill, Stephen, 'New Constitutionalism, Democratisation and Global Political Economy', *Global Change, Peace & Security*, 10:1 (1998), pp. 23-38.
- Gill, Stephen, 'Globalisation, Market Civilisation, and Disciplinary Neoliberalism', *Millennium: Journal of International Studies*, 24:3 (1995), pp. 399-423.
- Gilman, Benjamin, 'Legislative Vacuum Exists in the Current System' (2009), available at {<http://justinvestment.org/2009/10/join-our-serious-debate-for-real-change/>} accessed 10 February 2013.
- Glamis Gold, Ltd. v. United States of America, *Award*, UNCITRAL Ad Hoc Arbitration (8 June 2009).
- Glamis Gold, Ltd. v. United States of America, *Amicus Curiae Submission of the Quechan Indian Nation*, UNCITRAL Ad Hoc Arbitration (16 October 2006).
- Glamis Gold, Ltd. v. United States of America, *Memorial*, UNCITRAL Ad Hoc Arbitration (5 May 2006).
- Glamis Gold, Ltd. v. United States of America, *Application of the Quechan Indian Nation to File Amicus Curiae Submission*, UNCITRAL Ad Hoc Arbitration (19 August 2005).
- Glinavos, Iannos, 'Neoliberal Law: Unintended Consequences of Market-Friendly Law Reforms', *Third World Quarterly*, 29:6 (2008), p. 1087-1099.
- Global Witness, 'Heavy Mittal? A State Within A State: The Inequitable Mineral Development Agreement Between the Government of Liberia and Mittal Steel Holdings NV' (October 2006), available at: {<http://www.globalwitness.org/library/heavy-mittal>} accessed 15 December 2010.
- Globe and Mail, 'Bear Creek Files Suit Against Peru' (13 July 2011), available at {<http://www.theglobeandmail.com/globe-investor/bear-creek-files-suit-against-peru/article2095770/>} accessed 12 June 2014.
- Globe and Mail, 'Peru Protest Turns Deadly, Bear Creek Project Halted' (24 June 2011), available at {<http://www.theglobeandmail.com/globe-investor/peru-protest-turns-deadly-bear-creek-project-halted/article600192/>} accessed 12 June 2014.
- Goldhaber, Michael, 'Arbitration Scorecard 2011: The Biggest Cases You Never Heard Of', *American Lawyer Magazine* (6 July 2011), available at {<http://amlawdaily.typepad.com/amlawdaily/2011/07/arb-scorecard2011.html>} accessed 10 February 2013.
- Goodman, Amy, 'The Cochabamba Water Wars: Marcela Olivera Reflects on the Tenth Anniversary of the Popular Uprising Against Bechtel and the Privatization of the City's Water Supply', *DemocracyNow!* (19 April 2010), available at {[http://www.democracynow.org/2010/4/19/the\\_cochabamba\\_water\\_wars\\_marcella\\_olivera](http://www.democracynow.org/2010/4/19/the_cochabamba_water_wars_marcella_olivera)} accessed 10 January 2015.
- Gordon, Kathryn & Pohl, Joachim, 'Environmental Concerns in International Investment Agreements: A Survey', *OECD Working Papers on International Investment*, 1 (May 2011).
- Greider, William, 'The Right and US Trade Law: Invalidating the 20<sup>th</sup> Century', *The Nation* (17 November 2001), available at {<http://www.thenation.com/article/right-and-us-trade-law-invalidating-20th-century>} accessed 30 January 2015.
- Greiner, William Jay & Malabaie River Outfitters Inc. v. Government of Canada, *Notice of Arbitration*, UNCITRAL Arbitration (2 November 2010).



Grigera Naón, Horacio, 'The Settlement of Investment Disputes Between States and Private Parties: An Overview from the Perspective of the ICC', *Journal of World Investment*, 1 (2000), pp. 59-102.

Guillaume, Gilbert, 'The Proliferation of International Judicial Bodies: The Outlook for the International Legal Order', *Speech by the President of the International Court of Justice to the Sixth Committee of the General Assembly of the United Nations* (27 October 2000), available at {<http://www.icj-cij.org/court/index.php?pr=85&pt=3&p1=1&p2=3&p3=1>} accessed 17 February 2013

Guzman, Andrew, 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties,' *Virginia Journal of International Law*, 38 (2008-2009), pp: 639-688.

Haigh, David, 'Chapter 11 – Private Party vs. Governments, Investor-State Dispute Settlement: Frankenstein or Safety Valve', *Canada-United States Law Journal*, 26 (2000), pp. 115-134.

Hall, John & Ikenberry, John, *The State* (Milton Keynes: Open University Press, 1989).

Halverson Cross, Karen, 'Converging Trends in Investment Treaty Practice', *North Carolina Journal of International Law and Commercial Regulation*, 38 (2012), pp. 152-231.

Harris, Jerry, 'Translateral Politics, Class Conflict, and the State', *Globalizations*, 10:5 (2013), pp. 731-746.

Harvey, David, 'From Globalization to the New Imperialism', in Richard Appelbaum and William Robinson (eds), *Critical Globalization Studies* (New York: Routledge, 2005).

Hay, Colin, 'Marxism and the State', in Andrew Gamble et al (eds) *Marxism and Social Science* (Basingstoke: Macmillan Press, 1999), pp. 152-174.

Held, David, & McGrew, Anthony, et al, *Global Transformations: Politics, Economics, Culture* (Cambridge: Polity Press, 1999).

Held, David, & McGrew, Anthony, 'The End of the Old Order? Globalization and the Prospects for World Order', *Review of International Studies*, 24:5 (1998), pp. 219-243.

Henckels, Caroline, 'Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration', *Journal of International Economic Law*, 15:1 (2012), pp. 223-255.

Henriquez, Victor, 'Lucchetti Case In Peru Prompts International Conflict', *The Santiago Times* (17 December 2002), available at {<http://santiagotimes.cl/lucchetti-case-in-peru-prompts-international-conflict/>} accessed 5 March 2014.

Hepburn, Jarrod & Peterson, Luke Erik, 'Analysis: Tribunal's Reading of 'Effective Means' Obligation May Ensnare States that Otherwise Pass Treaty Muster', *Investment Arbitration Reporter* (4 March 2012).

Hepburn, Jarrod, 'Renewable Energy Arbitration Claims on Horizon, but States take Differing Approaches to Public Disclosure', *Investment Arbitration Reporter* (7 September 2011).

Hilary, John, *The Transatlantic Trade and Investment Partnership: A Charter for Deregulation, an Attack on Jobs, an End to Democracy* (War on Want, 2015).

Hirst, Paul, 'The Global Economy: Myth and Realities', *International Affairs*, 73:3 (1997), pp. 409-425.

Hodges, Brian, 'Where the Grass is Always Greener: Foreign Investor Actions Against Environmental Regulations Under NAFTA's Chapter 11, S.D. Myers, Inc. v. Canada', *The Georgetown International Environmental Law Review*, 14 (2001-2002), pp. 367-408.

Howse, Robert, 'Freezing Government Policy: Stabilization Clauses in Investment Contracts', *Investment Treaty News*, 3:1 (April 2011), pp. 3-5.

Human Rights Watch, *The Enron Corporation: Corporate Complicity in Human Rights Violations* (1999), summary of report available at {<http://www.hrw.org/reports/1999/enron/index.htm>} accessed 11 July 2014.

ICSID, 'The ICSID Caseload – Statistics' (2015), available at {<https://icsid.worldbank.org/apps/ICSIDWEB/resources/Pages/ICSID-Caseload-Statistics.aspx>} accessed 15 March 2015.

ICSID, *Annual Report* (2011), available at {<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnualReports>} accessed 2 July 2012.

ICSID, *ICSID Convention, Regulations and Rules* (2006), available at {[http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR\\_English-final.pdf](http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf)} accessed 2 July 2012.

Infinito Gold Ltd v. Republic of Costa Rica, *Petition for Amicus Curiae Status by Asociación Preservacionista de Flora y Fauna Silvestre*, ICSID Case No. ARB/14/5 (15 September 2014).

Infinito Gold Ltd. V. Republic of Costa Rica, *Request for Arbitration*, ICSID Case No. ARB/14/5 (6 February 2014).

Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine, *Excerpts of Award*, ICSID Case No. ARB/08/8 (1 March 2012).

Inter-American Commission on Human Rights, 'Héctor Antonio García Berríos and Others, El Salvador', *PM239/09* (7 October 2009).

Inter-American Court of Human Rights, 'Case of Kichwa Indigenous People of Sarayaku v. Ecuador', *Judgement: Merits and Reparations* (27 June 2012).

Inter-American Court of Human Rights, 'Admissibility: Community of La Oroya, Peru', *Petition 1473-06*, Report No. 76/09 (5 August 2009).

Inter-American Court of Human Rights, *Order: Provisional Measures Regarding Ecuador: Matter of Pueblo Indígena Sarayaku* (6 July 2004).

International Allies Against Mining in El Salvador, 'About Us', available at {<http://www.stopesmining.org/j25/index.php/who-we-are2>} accessed 9 January 2015.

International Chamber of Commerce & the International Organization of Employers, 'The Sub-Commission's Draft Norms, If Put Into Effect, Will Undermine Human Rights, The Business Sector of Society, and the Right to Development' (2004), available at {[198.170.85.29/IOE-ICC-views-UN-norms-March-2004.doc](http://198.170.85.29/IOE-ICC-views-UN-norms-March-2004.doc)} accessed 17 February 2013.

International Chamber of Commerce, 'About ICC', available at {<http://www.iccwbo.org/id93/index.html>} accessed 8 April 2012.

International Chamber of Commerce, 'Arbitration Involving States and State Entities under the ICC Rules of Arbitration' (2012), available at {[http://www.iccdri.com/CODE/LevelThree.asp?tocxml=ltoc\\_CommReportsAll.xml&page=Commission%20Reports&L1=Commission%20Reports&L2=&tocxml=DoubleToc.xml&contentxml=arbSingle.xml&Locator=9&contentxml=CR\\_0046.xml&AUTH=&nb=0](http://www.iccdri.com/CODE/LevelThree.asp?tocxml=ltoc_CommReportsAll.xml&page=Commission%20Reports&L1=Commission%20Reports&L2=&tocxml=DoubleToc.xml&contentxml=arbSingle.xml&Locator=9&contentxml=CR_0046.xml&AUTH=&nb=0)} accessed 13 February 2013.

International Chamber of Commerce, 'ICC Arbitration' (2012), available at {<http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/>} accessed 2 July 2012.

- International Chamber of Commerce, 'ICC Constitution' (2012), available at {<http://www.iccwbo.org/constitution>} accessed 13 February 2013.
- International Institute for Sustainable Development, 'Methanex v. USA', available at: {<http://www.iisd.org/investment/dispute/methanex.asp>} accessed 1 September 2014.
- International Institute for Sustainable Development, 'News in Brief: New Zealand Is Keen To Introduce Cigarette Branding Regulations, But Awaits Outcome of Legal Cases Against Australia', *Investment Treaty News*, 3:3 (March 2013), p. 20.
- International Institute for Sustainable Development, *Private Rights, Public Problems: A Guide to NAFTA's Controversial Chapter on Investor Rights* (2001), available at: {[http://www.iisd.org/pdf/trade\\_citizensguide.pdf](http://www.iisd.org/pdf/trade_citizensguide.pdf)} accessed 1 May 2012.
- International Trade Union Confederation, Amigos de le Tierra América Latina y el Caribe, et al, 'Open Letter to World Bank Officials on Pacific Rim-El Salvador Case' (12 December 2011), available at {[http://www.ips-dc.org/open\\_letter\\_to\\_world\\_bank\\_officials\\_on\\_pacific\\_rim-el\\_salvador\\_case/](http://www.ips-dc.org/open_letter_to_world_bank_officials_on_pacific_rim-el_salvador_case/)} accessed 23 March 2015.
- Investment Arbitration Reporter, 'ICSID Sets a Caseload Record in 2011' (31 December 2011).
- Jackson, Robert & Sorensen, Georg, *Introduction to International Relations: Theories and Approaches*, 3rd ed (Oxford: Oxford University Press, 2007).
- Jessop, Bob, *The Future of the Capitalist State* (Cambridge: Polity Press, 2002).
- Jessop, Bob, 'Bringing the State Back in (Yet Again): Reviews, Revisions, Rejections, and Redirections', *International Review of Sociology*, 11:2 (2001), pp. 149-173.
- Johnson, Lise, 'Case Note: How Chevron v. Ecuador is Pushing the Boundaries of Arbitral Authority', *Investment Treaty News*, 3:2 (April 2012), pp. 16-17.
- Jones, Dow, 'Peru to End Bear Creek Silver Mine Project', *MarketWatch* (25 June 2011), available at {<http://www.marketwatch.com/story/peru-to-end-bear-creek-silver-mine-project-2011-06-25>} accessed 12 June 2014.
- Joseph, Jonathan, 'Hegemony and the Structure-Agency Problem in International Relations: A Scientific Realist Contribution', *Review of International Studies*, 34 (2008), pp. 109-128.
- Joseph, Jonathan, *Marxism and Social Theory* (Basingstoke: Palgrave Macmillan, 2006).
- Kahale, George, 'The New Dutch Sandwich: The Issue of Treaty Abuse', *Columbia FDI Perspectives*, No. 48 (10 October 2011), available at {<http://www.vcc.columbia.edu/content/new-dutch-sandwich-issue-treaty-abuse>} accessed 26 August 2012.
- Kahn, Jordan C., 'Striking NAFTA Gold: Glamis Advances Investor-State Arbitration', *Fordham International Law Journal*, 33 (2009-2010), pp. 101-155.
- Karunanathan, Meera, 'Blog Post: El Salvador Mining Ban Could Establish a Vital Water Security Precedent', *The Guardian* (10 June 2013), available at {<http://www.theguardian.com/global-development/poverty-matters/2013/jun/10/el-salvador-mining-ban-water-security>} accessed 3 February 2015.
- Kaushal, Asha, 'Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime', *Harvard International Law Journal*, 50:2 (2009), pp. 491-538.
- Keck, Margaret & Sikkink, Kathryn, *Activists Beyond Borders: Advocacy Networks in International Politics* (New York: Cornell University Press, 1998).

- Kent, Avidan, 'Criticizing the Field of International Investment Law: A Simple Story Made Complex', in *Legal Frontiers: McGill's Blog on International Law* (18 January 2012), available at {<http://www.legalfrontiers.ca/2012/01/criticizing-the-field-of-international-investment-law-a-simple-story-made-complex/>} accessed 7 July 2014.
- Keohane, Robert & Nye, Joseph, 'Globalization: What's New? What's Not? (And So What?)', *Foreign Policy*, 118 (2000), pp. 104-119.
- Khor, Martin, 'The Emerging Crisis of Investment Treaties', *South Bulletin*, 69 (21 November 2012).
- King & Spalding, 'Case News: King and Spalding Wins \$250 Million Arbitration Award for Micula Against Government of Romania' (17 December 2013), available at: {[http://www.kslaw.com/News-and-Insights/NewsDetail?us\\_nsc\\_id=7103](http://www.kslaw.com/News-and-Insights/NewsDetail?us_nsc_id=7103)} accessed 6 September 2014.
- Kingsbury, Benedict & Schill, Stephan, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law', Institute for International Law and Justice, Working Paper 6 (2009), pp. 1-53.
- Knauer, Sebastian, 'Vattenfall vs. Germany: Power Plant Battle Goes to International Arbitration', *Spiegel International* (15 July 2009).
- Knottnerus, Roeline & van Os, Roos, 'The Netherlands: A Gateway to 'Treaty Shopping' for Investment Protection', *Investment Treaty News*, 2:2 (January 2012), pp. 10-11.
- Koskenniemi, Martti & Leino, Päivi, 'Fragmentation of International Law? Postmodern Anxieties', *Leiden Journal of International Law*, 15 (2002), pp. 553-579.
- Kulick, Andreas, *Global Public Interest in International Investment Law* (Cambridge: Cambridge University Press, 2012).
- La Mesa (National Roundtable on Metallic Mining), 'La Mesa to Introduce New Mining Legislation', *Press Release* (22 September 2013), available at {<http://www.stopesmining.org/j25/index.php/salvadoran-mining-ban/82-mesa-releases/251-press-release-la-mesa-to-introduce-new-mining-legislation>} accessed 27 January 2015.
- Langewiesche, William, 'Jungle Law', *Vanity Fair*, (May 2007), available at: {<http://www.vanityfair.com/politics/features/2007/05/texaco200705>} accessed 1 May 2012.
- Lasswell, Harold, *Politics, Who Gets What, When, How* (New York: Peter Smith, 1950).
- Leader, Sheldon, 'Human Rights, Risks and New Strategies for Global Investment', *Journal of International Economic Law*, 9:3 (2006), pp. 657-705.
- Legal Monitor Worldwide, 'Mexico Says It Won't Appeal Arbitration Award for Spain's Abengoa' (2 August 2013).
- Lenin, Vladimir Ilyich, *Imperialism, the Highest Stage of Capitalism* (original 1916), available at {<https://www.marxists.org/archive/lenin/works/1916/imp-hsc/>} accessed 27 March 2015.
- Levine, David & Sprigman, Christopher, et al., 'Letter to Ambassador John Kirk from Legal Academics', (9 May 2012), available at {<http://infojustice.org/archives/21137>} accessed 13 March 2015.
- Levine, Eugenia, 'Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation', *Berkeley Journal of International Law*, 29:1 (2011), pp. 200-224.
- LG&E Energy Corp., LG&E Capital Corp. & LG&E International Inc. v. The Argentine Republic, *Decision on Liability*, ICSID Case No. ARB/02/1 (3 October 2006).

Lone Pine Resources Inc. v. Government of Canada, *Notice of Arbitration*, UNCITRAL Ad Hoc Arbitration (6 September 2013).

Lone Pine Resources Inc. v. Government of Canada, *Notice of Intent to Submit a Claim to Arbitration Under Chapter Eleven of the North American Free Trade Agreement*, UNCITRAL Ad Hoc Arbitration (8 November 2012).

Lowenfeld, Andreas F., 'Investment Agreements and International Law', *Columbia Journal of Transnational Law*, 42 (2003-2004), pp. 123-130.

Mabey, Nick, 'Defending the Legacy of Rio: The Civil Society Campaign against MAI,' in Sol Picciotto & Ruth Mayne, eds. *Regulating International Business: Beyond Liberalization* (Basingstoke: Macmillan Press, 1999), pp. 47-59.

Maffezini, Emilio Agustín v. The Kingdom of Spain, *Award*, ICSID Case No. ARB/97/7 (13 November 2000).

Magel, Nick, 'Peru's Indigenous Communities Make a Business Case for FPIC', *Earthworks Blog* (5 July 2011), available at {[http://www.earthworksaction.org/earthblog/detail/peru\\_s\\_indigenous\\_communities\\_make\\_a\\_business\\_case\\_for\\_fpic#.VLFi82dyaM8](http://www.earthworksaction.org/earthblog/detail/peru_s_indigenous_communities_make_a_business_case_for_fpic#.VLFi82dyaM8)} accessed 10 January 2015.

Mahoney, Jeff, 'Quarry Foes Set to Celebrate Holding Their Ground', *Hamilton Spectator* (24 April 2013), available at {<http://www.stopthequarry.ca/news/latestnews/>} accessed 28 March 2014.

Malik, Mahnaz, 'The Full Protection and Security Standard Comes of Age: Yet Another Challenge For States in Investment Treaty Arbitration?' *Best Practice Series of the International Institute for Sustainable Development* (2011), pp. 1-14.

Malik, Mahnaz, *Fair and Equitable Treatment*, Best Practice Advisory Bulletins No 3 (Winnipeg: International Institute for Sustainable Development, 2011).

Mann, Howard & von Moltke, Konrad, *A Southern Agenda on Investment?* (Winnipeg: International Institute for Sustainable Development, 2005), available at {[http://ces.iisc.ernet.in/envis/sdev/investment\\_southern\\_agenda.pdf](http://ces.iisc.ernet.in/envis/sdev/investment_southern_agenda.pdf)} accessed 1 May 2012.

Mann, Howard & von Moltke, Konrad, et al., *IISD Model International Agreement on Investment for Sustainable Development* (Winnipeg, International Institute for Sustainable Development: 2005).

Mann, Howard, & von Moltke, Konrad, *NAFTA's Chapter 11 and the Environment: Addressing the Impact of the Investor-State Process on the Environment* (Winnipeg: International Institute for Sustainable Development, 1999).

Mann, Howard, 'Investment Agreements and the Regulatory State: Can Exceptions Clauses Create a Safe Haven for Governments', Background Papers for the Developing Country Investment Negotiators' Forum (Singapore: 1-2 October 2007), available at: {[http://www.iisd.org/pdf/2007/inv\\_agreements\\_reg\\_state.pdf](http://www.iisd.org/pdf/2007/inv_agreements_reg_state.pdf)} accessed 20 August 2012.

Mann, Howard, *The Final Decision in Methanex v. United States: Some New Wine in Some New Bottles* (Winnipeg, International Institute for Sustainable Development, 2005), available at: {[http://www.iisd.org/pdf/2005/commentary\\_methanex.pdf](http://www.iisd.org/pdf/2005/commentary_methanex.pdf)} accessed 24 August 2012.

Marx, Karl, *The Eighteenth Brumaire of Louis Bonaparte*, available at: {<https://www.marxists.org/archive/marx/works/1852/18th-brumaire/ch01.htm>} accessed 6 March 2015.

Mason, Paul, 'Evo Morales 'Padlocked' in Palace', *BBC News* (5 April 2006), available at {<http://news.bbc.co.uk/1/hi/world/americas/4878466.stm>} accessed 15 February 2013.

- McCarthy, Shawn, 'Gas War – The Fall and Rise of MMT: When the Car and Oil Firms Went to Battle, Ottawa Lost', *The Globe and Mail* (24 July 1998), p. A1.
- McDonagh, Thomas, *Unfair, Unsustainable, and Under The Radar: How Corporations Use Global Investment Rules to Undermine a Sustainable Future* (Democracy Center, 2013).
- Mesa Power Group, LLC, v. Government of Canada, *Notice of Arbitration*, PCA Case No. 2012-17 (4 October 2011).
- Metalbulletin, 'Renco Begins \$800m Arbitration Against Peru on Doe Run Perú case' (15 April 2011), available at: {<http://www.metalbulletin.com/Article/2808895/Renco-begins-800m-arbitration-against-Peru-on-Doe-Run-Per-case.html#axzz3Cd08xo1M>} accessed 17 April 2014.
- Metalclad Corporation v. The United Mexican States, *Award*, ICSID Case No. ARB(AF)/97/1 (30 August 2000).
- Metalclad Corporation v. The United Mexican States, *Declaration of Humberto C. Rodarte Ramon*, ICSID Case No. ARB(AF)/97/1, available in document archive for 'Trading Democracy', National Security Archive Electronic Briefing Book No. 65 (undated, posted 5 February 2002), available at {<http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB65/>} accessed 7 January 2015.
- Metalclad Corporation v. The United Mexican States, *Respondent's Post-Hearing Submissions*, ICSID Case No. ARB(AF)/97/1 (9 November 1999).
- Metalclad Corporation v. The United Mexican States, *Reply*, ICSID Case No. ARB(AF)/97/1 (21 August 1998).
- Metalclad Corporation v. The United Mexican States, *Witness Statement of Fernando Bejarano Gonzales*, ICSID Case No. ARB(AF)/97/1, documents related to the documentary 'Trading Democracy', National Security Archive Electronic Briefing Book No. 65 (undated, posted 5 February 2002), available at {<http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB65/>} accessed 7 January 2015.
- Methanex Corporation v. United States of America, *Final Award of the Tribunal on Jurisdiction and Merits*, UNCITRAL Ad Hoc Arbitration (3 August 2005).
- Methanex Corporation v. United States of America, *Amicus Curiae Submission by the International Institute for Sustainable Development*, UNCITRAL Ad Hoc Arbitration (9 March 2004).
- Methanex Corporation v. United States of America, *Amended Statement of Defense*, UNCITRAL Ad Hoc Arbitration (5 December 2003).
- Methanex Corporation v. United States of America, *Decision of the Tribunal on Petitions from Third Persons to Intervene as 'Amici Curiae'*, UNCITRAL Ad Hoc Arbitration (15 January 2001).
- Methanex Corporation v. United States of America, *Petitioner's Final Submissions by the International Institute for Sustainable Development*, UNCITRAL Ad Hoc Arbitration (16 October 2000).
- Methanex Corporation v. United States of America, *Notice of Arbitration*, UNCITRAL Ad Hoc Arbitration (3 December 1999).
- Micula, Ioan, & Micula, Viorel, & S.C. European Food S.A., and others v. Romania, *Award*, ICSID Case No. ARB/05/20 (11 December 2013).
- Miles, Kate, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge: Cambridge University Press, 2013).

Miles, Kate, 'International Investment Law: Origins, Imperialism and Conceptualizing the Environment', *Colorado Journal of International Environmental Law and Policy*, 21:1 (2010), pp. 1-47.

Miliband, Ralph, 'The Capitalist State: Reply to Nicos Poulantzas', *New Left Review*, I/59 (January-February 1970), pp. 53-60.

Miliband, Ralph, *The State in Capitalist Society* (London: Weidenfeld and Nicolson, 1969).

Miller, Jon, 'Peru: Life Under a Toxic Cloud', *Frontline World* (1 March 2007), available at {<http://www.pbs.org/frontlineworld/blog/2007/03/peru.html>} accessed 17 April 2014.

Mining Watch Canada, Council of Canadians, et al, *Civil Society Letter to CEO of Infinito Gold* (16 April 2013), available at {<http://www.miningwatch.ca/news/groups-warn-infinito-gold-re-continued-threats-against-costa-rica-over-crucitas-gold-project>} accessed 9 January 2014.

Mining Watch, *Debunking Eight Falsehoods By Pacific Rim Mining / OceanaGold in El Salvador*, (March 2014).

Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holdings, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, LTD., & Mobil Venezolana de Petróleos, Inc. v Bolivarian Republic of Venezuela, *Decision on Jurisdiction*, ICSID Case No. ARB/07/27 (10 June 2010),

Moloo, Rahim & Jacinto, Justin, 'Environmental and Health Regulation: Assessing Liability under Investment Treaties', *Berkeley Journal of International Law*, 29:1 (2011), pp. 1-65.

Monbiot, George, 'Running on MMT: The Multilateral Agreement on Investments Will Force Governments to Poison their Citizens', *The Guardian* (13 August 1998), available at: {<http://www.monbiot.com/1998/08/13/running-on-mmt/>} accessed 17 March 2013.

Montevideo Convention on Rights and Duties of States (26 December 1933), available at {<http://www.oas.org/juridico/english/treaties/a-40.html>} accessed 7 March 2014.

Moran, Robert E., *Technical Review of the El Dorado Mine Project Environmental Impact Assessment (EIA)*, El Salvador (October 2005).

Moyers, Bill, *Bill Moyers Reports: Trading Democracy* (Films for the Humanities and Sciences, 2002), first broadcast 5 February 2002 on PSB.

MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile, *Decision on Annulment*, ICSID Case No. ARB/01/7 (21 March 2007).

MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, *Award*, ICSID Case No. ARB/01/7 (25 May 2004).

Muchlinski, Peter, 'A Brief History of Business Regulation,' in Sol Picciotto & Ruth Mayne (eds), *Regulating International Business: Beyond Liberalization* (Basingstoke: Macmillan Press, 1999), pp. 47-59.

Murray, Joshua, 'Evidence of a Transnational Capitalist Class-for-Itself: The Determinants of PAC Activity Among Foreign Firms in the Global Fortune 500, 2000-2006', *Global Networks*, 14:2 (2014), pp. 1-21.

Neff, Stephen, 'A Short History of International Law,' in Malcolm Evans (ed), *International Law* (Oxford: Oxford University Press, 2003), pp. 31-58.

Network for Justice in Global Investment, 'About the Project', available at {<http://justinvestment.org/about/>} accessed 20 March 2015.

- Network for Justice in Global Investment, the Democracy Center, et al, 'Dangerous Weapons: How International Investment Rules Undermine Social And Environmental Justice', (2012), available at {<http://justinvestment.org/2012/08/educational-brochure-dangerous-weapons-how-international-investment-rules-undermine-social-and-environmental-justice/>} accessed 27 August 2012.
- Network for Justice in Global Investment, *Global Investment Rules: How They Threaten Communities and the Environment, and How We Can Change Them*, available at: {<http://justinvestment.org/reports-analysis/global-investment-rules/>} accessed 30 August 2012.
- Network for Justice in Global Investment, *Global Investment Rules: Threat to Democracy and the Environment*, video (November 2011), available at {<http://justinvestment.org/2011/12/video-global-investment-rules-threat-to-democracy-and-the-environment/>} accessed 13 February 2015.
- Neumayer, Eric, 'Do Countries Fail to Raise Environmental Standards? An Evaluation of Policy Options Addressing "Regulatory Chill"', *International Journal of Sustainable Development*, 4:3 (2001), pp. 231-244.
- Newcombe, Andrew & Paradell, Lluís, *Law and Practice of Investment Treaties: Standards of Treatment* (Alphen aan den Rijn: Kluwer Law International, 2009).
- Newcombe, Andrew, 'The Boundaries of Regulatory Expropriation in International Law', *ICSID Review*, 20:1 (2005), pp. 2-57.
- Nkrumah, Kwame, *Neo-Colonialism, the Last Stage of Imperialism* (original 1965), available at {<https://www.marxists.org/subject/africa/nkrumah/neo-colonialism/introduction.htm>} accessed 27 March 2015.
- Noble Ventures, Inc. v. Romania, *Award*, ICSID Case No. ARB/01/11 (12 October 2005).
- North American Free Trade Agreement (adopted 17 December 1992, entered into force 1 January 1994), Chapter 11, available at: {<https://www.nafta-sec-alena.org/Default.aspx?tabid=97&ctl=SectionView&mid=1588&sid=539c50ef-51c1-489b-808b-9e20c9872d25&language=en-US>} accessed 21 March 2015.
- Northwest Labor Press, 'New Round of Trade Talks Keep Public in Dark, But Not Lobbyists' (3 July 2012), available at {<http://nwlaborpress.org/2012/07/tpp/>} accessed 1 May 2012.
- NoTTIP, 'DropTTIP Banner Campaign' (23 March 2015), available at {<http://www.nottip.org.uk/dropttip-banner-campaign/>} accessed 23 March 2015.
- O'Leary, Anna, 'Women and Environmental Protest in a Northern Mexican City,' *The Arizona Report*, 6:1 (Spring 2002), pp. 1, 4-5.
- Ochs, Alison, 'Glamis Gold Ltd. – A Foreign United States Citizen?: NAFTA and its Potential Effect on Environmental Regulations and the Mining Law of 1872', *Colorado Journal of International Environmental Law and Policy*, 16 (2005), pp. 495-526.
- Odumosu, Ibrinke, 'The Law and Politics of Engaging Resistance in Investment Dispute Settlement,' *Pennsylvania State International Law Review*, 26 (2007-2008), pp. 251-287.
- Odumosu, Ibrinke, 'Locating Third World Resistance in the International Law on Foreign Investment', *International Community Law Review*, 9 (2007), pp. 427-444.
- OECD, *International Investment Perspectives*, (Paris: OECD Publishing, 2006), available at {<http://www.oecd.org/dataoecd/12/30/40079647.pdf>} accessed 1 May 2012.
- OECD, *Multilateral Agreement on Investment – Report to Ministers*, (28 April 1998), available at {[http://www.oecd.org/document/4/0,3746,en\\_2649\\_33783766\\_1933060\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/4/0,3746,en_2649_33783766_1933060_1_1_1_1,00.html)} accessed 2 July 2012.



Office of the United States Trade Representative, 'Factsheet: The United States in the Trans-Pacific Partnership' (2011), available at {<http://www.ustr.gov/about-us/press-office/factsheets/2011/november/united-states-trans-pacific-partnership>} accessed 11 February 2013.

Olivet, Cecilia & Eberhardt, Pia, *Profiting from Crisis: How Corporations and Lawyers are Scavenging Profits from Europe's Crisis Countries* (Amsterdam/Brussels: Transnational Institute & Corporate Europe Observatory, 2014), available at: {<http://www.tni.org/briefing/profitting-injustice>} accessed 13 March 2014.

Olivet, Cecilia & Eberhardt, Pia, 'Arbitrators' Role in the Recent Investment Arbitration Boom', *Investment Treaty News*, 3:3 (March 2013), pp. 16-18.

Orrego Vicuña, Francisco, 'Regulatory Authority and Legitimate Expectations: Balancing the Rights of the State and the Individual Under International Law in a Global Society', *International Law FORUM Du Droit International*, 5 (2003), pp. 188-197.

Orrego Vicuña, Francisco, 'Keynote Address: Carlos Calvo, Honorary NAFTA Citizen', *New York University Environmental Law Journal*, 11 (2002-2003), pp. 19-34.

Owen, Glen 'The Coalition of Millionaires: 23 of the 29 Members of the New Cabinet Are Worth More than £1m... and the Lib Dems are Just as Wealthy as the Tories', *The Daily Mail* (23 May 2010), available at {<http://www.dailymail.co.uk/news/election/article-1280554/The-coalition-millionaires-23-29-member-new-cabinet-worth-1m--Lib-Dems-just-wealthy-Tories.html>} accessed 8 March 2015.

Pac Rim Cayman LLC v. Republic of El Salvador, *Amicus Curiae Submission by Member Organizations of La Mesa Nacional Frente a la Minería Metálica de El Salvador*, ICSID Case No. ARB/09/12 (20 May 2011).

Pac Rim Cayman LLC v. Republic of El Salvador, *Application for Permission to Proceed as Amici Curiae by Mesa Nacional Frente a la Minería Metálica de El Salvador*, ICSID Case No. ARB/09/12 (2 March 2011).

Pac Rim Cayman LLC v. Republic of El Salvador, *Claimant's Reply on the Merits and Quantum*, ICSID Case No. ARB/09/12 (29 March 2013).

Pac Rim Cayman LLC v. Republic of El Salvador, *Counter-Memorial on the Merits*, ICSID Case No. ARB/09/12 (10 January 2014).

Pac Rim Cayman LLC v. Republic of El Salvador, *Decision on the Respondent's Preliminary Objections Under CAFTA Articles 10.20.4 and 10.20.5*, ICSID Case No. ARB/09/12 (2 August 2010).

Pac Rim Cayman LLC v. Republic of El Salvador, *Memorial on the Merits and Quantum*, ICSID Case No. ARB/09/12 (29 March 2013).

Pac Rim Cayman LLC v. Republic of El Salvador, *Notice of Arbitration*, ICSID Case No. ARB/09/12 (30 April 2009).

Pac Rim Cayman LLC v. Republic of El Salvador, *Notice of Intent to Submit a Claim to Arbitration*, ICSID Case No. ARB/09/12 (9 December 2008).

Pac Rim Cayman LLC v. Republic of El Salvador, *Response to Respondent's Preliminary Objections*, ICSID Case No. ARB/09/12 (26 February 2010).

Pac Rim Cayman LLC v. The Republic of El Salvador, *Decision on the Respondent's Jurisdictional Objections*, ICSID Case No. ARB/09/12 (1 June 2012).

Pacific Rim Mining, 'Pacific Rim Provides a Progress Report on Activities in El Salvador and Nevada,' *News Release* (30 April 2012), available at {<http://www.pacrim-mining.com/s/News.asp?ReportID=522141>} accessed 7 January 2013, also available at {<http://www.newsfilecorp.com/release/2032/Pacific-Rim-Provides-a-Progress-Report-on-Activities-in-El-Salvador-and-Nevada#.VND-umdyYeF>} accessed 3 February 2015.

Panitch, Leo & Gindin, Sam, *The Making of Global Capitalism: The Political Economy of American Empire* (London: Verso, 2012).

Patkar, Medha, 'Against Globalization – And For Power to the People: An Interview with Medha Patkar', *Multinational Monitor*, 18:11 (November 1997), available at {<http://www.multinationalmonitor.org/hyper/mm1197.07.html>} accessed 11 July 2014.

Paulsson, Jan, 'Indirect Expropriation: Is the Right to Regulate at Risk?' *Making the Most of International Investment Agreements: A Common Agenda*, Symposium Co-Organised by ICSID, OECD and UNCTAD (Paris, 12 December 2005), available at {<http://www.oecd.org/investment/internationalinvestmentagreements/36055332.pdf>} accessed 21 January 2011.

Peet, Richard, *Unholy Trinity: The IMF, World Bank and WTO*, 2<sup>nd</sup> ed (London: Zed Books, 2009).

Peetz, David & Murray, Georgina, et al., 'The New Structuring of Corporate Ownership', *Globalizations*, 10:5 (2013), pp. 711-730.

Pérez, Alan García, 'The Dog in the Manger', *Peruvian Times* (republished, 30 October 2007), available at {<http://www.peruviantimes.com/30/president-alan-garcias-policy-doctrinethe-dog-in-the-manger-syndrome/2860/>} accessed 20 January 2015.

Perez, Javier & Gistelinch, Myriam, et al, 'Sleeping Lions: International Investment Treaties, State-Investor Disputes and Access to Food, Land and Water', *Oxfam Discussion Papers* (2011), available at {<http://www.oxfam.org/sites/www.oxfam.org/files/dp-sleeping-lions-260511-en.pdf>} accessed 2 July 2012.

Peterson, Luke Eric, 'French Company, Veolia, Launches Claim Against Egypt Over Terminated Waste Contract and Labor Wage Stabilization Promises', *Investment Arbitration Reporter* (27 June 2012).

Peterson, Luke Eric, 'Analysis: In First Test of CAFTA 'denial of benefits' clause, arbitrators rule that U.S. 'shell' company not owed CAFTA protections for investments in El Salvador', *Investment Arbitration Reporter* (4 June 2012), available at {[http://www.iareporter.com/articles/20120604\\_1](http://www.iareporter.com/articles/20120604_1)} accessed 16 August 2012.

Peterson, Luke Eric, 'Copper Miner Files Its Statement of Claim in Previously-Unannounced Ad-Hoc Arbitration Against Ecuador', *Investment Arbitration Reporter* (1 March 2012), available at {<http://www.iareporter.com/articles/20120302>} accessed 16 August 2012.

Peterson, Luke Eric, 'Venezuelan Exit from ICSID Raises Questions Both Legal and Financial', *Investment Arbitration Reporter* (31 January 2012), available at {[http://www.iareporter.com/articles/20120131\\_3](http://www.iareporter.com/articles/20120131_3)} accessed 21 August 2012.

Peterson, Luke Eric, 'Analysis: Novel Human Rights Arguments are Raised in Romania Arbitration at ICSID; Tribunal Views BIT Protections as More Protective than European Rights Convention Counterparts', *Investment Arbitration Reporter* (15 December 2011), available at {[http://www.iareporter.com/articles/20111216\\_2](http://www.iareporter.com/articles/20111216_2)} accessed 16 August 2012.

Peterson, Luke Eric, 'ICSID Claims Round-Up: Cases Against Turkey, Turkmenistan, The Philippines, and Guinea (Conakry) Are Registered', *Investment Arbitration Reporter* (14 November 2011), available at {[http://www.iareporter.com/articles/20111114\\_1](http://www.iareporter.com/articles/20111114_1)} accessed 16 August 2012.

Peterson, Luke Eric, 'In Policy Switch, Australia Disavows Need for Investor-State Arbitration Provisions in Trade and Investment Agreements', *Investment Arbitration Reporter* (14 April 2011), available at {<http://www.iareporter.com/articles/20110414>} accessed 16 August 2012.

Peterson, Luke Eric, 'Co-Arbitrators in Total v. Argentina Case Take Widely-Divergent Views of Argentina's Fair and Equitable Treatment Obligations Under Investment Treaty', *Investment Arbitration Reporter* (30 March 2011), available at: {[http://www.iareporter.com/articles/20110331\\_2](http://www.iareporter.com/articles/20110331_2)} accessed 22 March 2012.

Peterson, Luke Eric, 'Panel Differs as to What Investments are Arbitrable at ICSID; Stern, Schreuer, Reisman also Discuss Nationality-Planning', *Investment Arbitration Reporter*, (2 July 2010), available at {[http://www.iareporter.com/articles/20100709\\_5](http://www.iareporter.com/articles/20100709_5)} accessed 16 August 2012.

Peterson, Luke Eric, 'Tribunal to Hear Venezuela Nationalization Claim under BIT, But Tax and Royalty Disputes Excluded Due to Timing of Exxon Restructuring', *Investment Arbitration Reporter* (16 June 2010), available at {[http://www.iareporter.com/articles/20100616\\_9](http://www.iareporter.com/articles/20100616_9)} accessed 16 August 2012.

Peterson, Luke Eric, 'Chevron Decision Analysis: Tribunal Steps into Ecuadorian Judicial Robes to Resolve Underlying Dispute', *Investment Arbitration Reporter* (7 May 2010).

Peterson, Luke Eric, 'Government Prevails in NAFTA Chapter 11 Arbitration; Claimant Weighing Options', *Investment Arbitration Reporter* (9 April 2010), available at {[http://www.iareporter.com/articles/20100410\\_10](http://www.iareporter.com/articles/20100410_10)} accessed 16 August 2012.

Peterson, Luke Eric, *Human Rights and Bilateral Investment Treaties: Mapping the Role of Human Rights Law Within Investor-State Arbitration* (Quebec: Rights and Democracy, 2009).

Peterson, Luke Eric, 'Shareholders in Shuttered Battery Recycling Plant Put El Salvador on Notice of Claims for Treaty Breach', *Investment Arbitration Reporter* (19 September 2009), available at {[http://www.iareporter.com/articles/20091008\\_17](http://www.iareporter.com/articles/20091008_17)} accessed 16 August 2012.

Peterson, Luke Eric, 'ICSID Tribunal Holds That Market Value Compensation is Owed to Evicted Dutch Farmers – Not a Lesser Amount', *Investment Arbitration Reporter* (23 April 2009).

Peterson, Luke Eric, 'Analysis: Gov'ts Have No Success in Forcing Claimants to Post Security While Treaty Arbitrations Are Ongoing', *Investment Arbitration Reporter* (10 February 2009).

Peterson, Luke Eric, 'Analysis 1: Multi-Layered Corporate Structure and \$2 Purchase Price Do Not Preclude Claim Against Dominican Republic', *Investment Arbitration Reporter* (9 October 2008).

Peterson, Luke Eric, 'In-Depth: Other Treaty Breaches, Including of Fair and Equitable Treatment Standard, Upheld in Biwater v. Tanzania', *Investment Arbitration Reporter* (28 July 2008).

Peterson, Luke Eric, *All Roads Lead Out of Rome: Divergent Paths of Dispute Settlement in Bilateral Investment Treaties* (Nautilus Institute for Security and Sustainable Development & International Institute for Sustainable Development, et al., 2002), available at {[http://www.iisd.org/pdf/2003/investment\\_nautilus.pdf](http://www.iisd.org/pdf/2003/investment_nautilus.pdf)} accessed 1 May 2012.

Pham, Tra, 'International Investment Treaties and Arbitration as Imbalanced Instruments: A Re-Visit', *International Arbitration Law Review*, 13:3 (2010), pp. 81-95.

Philip Morris Asia Limited v. The Commonwealth of Australia, *Response to the Notice of Arbitration*, UNCITRAL Ad Hoc Arbitration (21 December 2011).

Philip Morris Asia Limited v. the Commonwealth of Australia, *Notice of Arbitration*, UNCITRAL Ad Hoc Arbitration (21 November 2011).

Phillips Williams, Zoe, 'Risky Business or Risky Politics: What Explains Investor-State Disputes?' *Investment Treaty News*, 3:5 (August 2014), pp. 3-5.

PhRMA, 'Member Companies', available at {<http://www.phrma.org/about/member-companies>} accessed 1 May 2012.

Picciotto, Sol, 'The Internationalisation of the State', *Capital & Class*, 15:1 (1991), pp. 43-63.

Pidd, Helen, 'Germany to Shut All Nuclear Reactors: Move Prompted by Mass Protests Against Nuclear Power Following Japan's Nuclear Disaster', *The Guardian* (30 May 2011), available at {<http://www.theguardian.com/world/2011/may/30/germany-to-shut-nuclear-reactors>} accessed 30 August 2012.

Plama Consortium Limited v. Republic of Bulgaria, *Award*, ICSID Case No. ARB/03/24 (27 August 2008).

Plama Consortium Limited v. Republic of Bulgaria, *Decision on Jurisdiction*, ICSID Case No. ARB/03/24 (8 February 2005).

Plunkett, John & Quinn, Ben, 'Telegraph's Peter Osborne Resigns, Saying HSBC Coverage a 'Fraud on Readers'', *The Guardian* (18 February 2015), p. 1.

Pope & Talbot Inc. v. The Government of Canada, *Award in Respect of Damages*, UNCITRAL Ad Hoc Arbitration (31 May 2002).

Pope & Talbot Inc. v. The Government of Canada, *Award on the Merits of Phase 2*, UNCITRAL Ad Hoc Arbitration (10 April 2001).

Porterfield, Matthew, 'A Distinction Without a Difference? The Interpretation of Fair and Equitable Treatment Under Customary International Law by Investment Tribunals', *Investment Treaty News*, 3:3 (March 2013), pp. 3-5.

Potestà, Michele, 'Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept', *ICSID Review*, 28:1 (2013), pp. 88-122.

Poulantzas, Nicos, 'The Problem of the Capitalist State', *New Left Review*, I/58 (November 1969), pp. 67-78.

Price, Daniel, 'Chapter 11 – Private Party vs. Government, Investor-State Dispute Settlement: Frankenstein or Safety Valve?', *Canada-United States Law Journal*, 26 (2000), pp. 107-114.

Public Citizen, 'Fact-Checking Froman: The Top 10 Myths Used by Obama's Top Trade Official' (19 February 2014), available at {<http://citizen.typepad.com/eyesontrade/tafta/>} accessed 13 March 2015.

Public Citizen, 'The Ten Year Track Record of the North American Free Trade Agreement: Undermining Sovereignty and Democracy', available at {<http://www.citizen.org/publications/publicationredirect.cfm?ID=7295>} accessed 5 September 2013.

Public Citizen, 'TPP: Corporate Power Tool', *Flyer* (2013), available at {<http://www.citizen.org/TPP>} accessed 23 March 2015.

Quinn, Ben, 'Executives from Weapons Makers Seconded to MoD', *The Guardian* (16 February 2015), p. 7.

Reguly, Eric, 'Gabriel May Seek Billions in Arbitration over Stalled Romanian Mine', *The Globe and Mail* (30 April 2014), available at {<http://www.theglobeandmail.com/report-on-business/gabriel-may-seek-billions-in-arbitration-over-stalled-romanian-mine/article18341095/>} accessed 20 January 2015.

- Reinisch, August, 'The Future Shape of EU Investment Agreements', *ICSID Review*, 28:1 (2013), 179-196.
- Reinisch, August, 'The Proliferation of International Dispute Settlement Mechanisms: The Threat of Fragmentation vs. the Promise of a More Effective System? Some Reflections From the Perspective of Investment Arbitration,' in Isabelle Buffard & James Crawford, et al (eds) *International Law between Universalism and Fragmentation* (The Netherlands: Koninklijke Brill, 2008), pp. 107-126.
- Reisman, Michael, & Sloane, Robert, 'Indirect Expropriation and Its Valuation in the BIT Generation', *Yale Law School Faculty Scholarship Series*, Paper 1002 (2004), pp. 115-150.
- Renco Group, Inc. v. The Republic of Peru, *Memorial on Liability*, UNCT/13/1 (20 February 2014).
- Renco Group, Inc. v. The Republic of Peru, *Amended Notice of Arbitration and Statement of Claim*, UNCT/13/1 (9 August 2011).
- Renco Group, Inc. v. The Republic of Peru, *Notice of Arbitration and Statement of Claim*, UNCT/13/1 (9 August 2011).
- Rice, Xan, 'The Water Margin', *The Guardian* (16 August 2007), available at {<http://www.guardian.co.uk/business/2007/aug/16/imf.internationalaidanddevelopment>} accessed 14 July 2014.
- Ripinsky, Sergey, 'Venezuela's Withdrawal from ICSID: What it Does and Does Not Achieve'. *Investment Treaty News*, 3:2 (April 2012), pp. 11-12.
- Robinson, William & Harris, Jerry, 'Towards A Global Ruling Class? Globalization and the Transnational Capitalist Class', *Science and Society*, 64:1 (2000), pp. 11-54.
- Robinson, William, 'The Fetishism of Empire: A Critical Review of Panitch and Gindin's the Making of Global Capitalism', *Studies in Political Economy*, 93 (2014), pp. 147-165.
- Robinson, William, *Latin America and Global Capitalism: A Critical Globalization Perspective* (Baltimore: Johns Hopkins University Press, 2010).
- Robinson, William, 'Beyond the Theory of Imperialism: Global Capitalism and the Transnational State', in Alexander Anievas (ed), *Marxism and World Politics: Contesting Global Capitalism* (Abingdon: Routledge, 2010), pp. 61-76.
- Robinson, William, 'Global Capitalism, Social Science, and Methods of Critique: Response to Cammack's 'Forget the Transnational State'', *Geopolitics, History, and International Relations*, 1:2 (2009), pp. 98-108.
- Robinson, William, 'Beyond the Theory of Imperialism: Global Capitalism and the Transnational State', *Societies Without Borders*, 2 (2007), pp. 5-26.
- Robinson, William, 'Gramsci and Globalisation: From Nation-State to Transnational Hegemony', *Critical Review of International Social and Political Philosophy*, 8:4 (2005), pp. 559-574.
- Robinson, William, *A Theory of Global Capitalism: Production, Class, and State in a Transnational World* (Baltimore: Johns Hopkins University Press, 2004).
- Robinson, William, 'Global Capitalism and Nation-State-Centric Thinking – What We *Don't* See When We *Do* See Nation-States: Response to Critics,' *Science & Society*, 65:4 (2001-2002), pp. 500-508.
- Robinson, William, 'Response to McMichael, Block, and Goldfrank', *Theory and Society*, 30 (2001), pp. 223-236.

- Robinson, William, 'Social Theory and Globalization: The Rise of the Transnational State', *Theory and Society*, 30:2 (2001), pp. 157-200.
- Romson, Åsa, *Environmental Policy Space and International Investment Law* (Stockholm: Acta Universitatis Stockholmiensis, 2012).
- Rosenberg, Justin, *The Follies of Globalization Theory* (London: Verso, 2000).
- Rosert, Diana, 'Libya Ordered to Pay US\$935 Million to Kuwaiti Company for Cancelled Investment Project; Jurisdiction Established Under Unified Agreement for the Investment of Arab Capital', *Investment Treaty News*, 1:5 (19 January 2014), p. 13-15.
- Rowley, William, 'ICSID At A Crossroads', *Global Arbitration Review*, 1:1 (2006), pp. 1-2.
- Roy, Sandip, 'Enron in India: The Giant's First Fall', *Alternet* (7 February 2002), available at {[http://www.alternet.org/story/12375/enron\\_in\\_india%3A\\_the\\_giant's\\_first\\_fall](http://www.alternet.org/story/12375/enron_in_india%3A_the_giant's_first_fall)} accessed 11 July 2014.
- Ruggie, John, 'Business and Human Rights: The Evolving International Agenda', *American Journal of International Law*, 101 (2007), pp. 819-840.
- Rupert, Mark, 'Reflections on Some Lessons Learned from a Decade of Globalisation Studies', *New Political Economy*, 10:4 (2005), pp. 457-478.
- Russell, Jenny, 'Politics Needs Mavericks, Not the Same Old Chumocracy', *The Guardian* (20 May 2013), p. 30.
- S.D. Myers, Inc. v. Government of Canada, *Second Partial Award*, UNCITRAL Ad Hoc Arbitration (21 October 2002).
- S.D. Myers, Inc. v. Government of Canada, *Counter-Memorial of the Government of Canada*, UNCITRAL Ad Hoc Arbitration (13 November 2000).
- S.D. Myers, Inc. v. Government of Canada, *First Partial Award*, UNCITRAL Ad Hoc Arbitration (13 November 2000).
- S.D. Myers, Inc. v. Government of Canada, *Separate Opinion by Dr Bryan Schwartz*, UNCITRAL Ad Hoc Arbitration (12 November 2000).
- Sadowski, Wojciech, 'International Investment Treaties as a Possible Shield Against Government Cutbacks in Subsidies for the Green Energy Sector', *International Arbitration Alert of K&L Gates* (10 January 2013), available at: {<http://www.klgates.com/international-investment-treaties-as-a-possible-shield-against-government-cutbacks-in-subsidies-for-the-green-energy-sector-01-10-2013/>} accessed 30 June 2014.
- Salacuse, Jeswald, 'BIT by BIT: The Growth of Bilateral Investment Treaties and their Impact on Foreign Investment in Developing Countries', *International Lawyer*, 24 (1990), pp. 655-675.
- Salacuse, Jeswald, 'The Emerging Global Regime for Investment', *Harvard International Law Journal*, 51:2 (2010), pp. 427-473.
- Salacuse, Jeswald, 'The Treatification of International Investment Law', *Law and Business Review of the Americas*, 13 (2007), pp. 155-166.
- Schill, Stephan, 'W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law', *The European Journal of International Law*, 22:3 (2011), pp. 875-908.
- Schill, Stephan, *The Multilateralization of International Investment Law* (Cambridge: Cambridge University Press, 2009).

Schipani, Andres, 'Peru: La Oroya Sale Brings Back Bitter Memories', *Financial Times Blog* (29 October 2012), available at {<http://blogs.ft.com/beyond-brics/2012/10/29/peru-la-oroya-sale-brings-back-bitter-memories/>} accessed 26 March 2015.

Schmidt, Kathrine, 'Montesinos Convicted In Lucchetti Case', *The Santiago Times* (6 December 2005), available at {<http://santiagotimes.cl/montesinos-convicted-in-luchetti-case/>} accessed 13 January 2015.

Schneiderman, David, *Resisting Economic Globalization: Critical Theory and International Investment Law* (Basingstoke: Palgrave Macmillan, 2013).

Schneiderman, David, 'Legitimacy and Reflexivity in International Investment Arbitration: A New Self-Restraint?' *Oñati Socio-Legal Series*, 1:4 (2011), pp. 1-26.

Schneiderman, David, 'Investing in Democracy? Political Process and International Investment Law', *University of Toronto Law Journal*, 60 (2010), pp. 909-940.

Schneiderman, David, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge: Cambridge University Press, 2008).

Schneiderman, David, 'Transnational Legality and the Immobilization of Local Agency', *Annual Review of Law and Social Science*, 2 (2006), pp. 387-408.

Schneiderman, David, 'Investment Rules and the New Constitutionalism', *Law and Social Inquiry*, 25 (2000), pp. 757-787.

Schreuer, Christoph, 'Full Protection and Security', *Journal of International Dispute Settlement*, 1:2 (2010), pp. 353-369.

Schwebel, Stephen, 'A Critical Assessment of the U.S. Model BIT', *Keynote Address at the British Institute of International & Comparative Law Conference*, London (15 May 2009), available at {[www.biicl.org/files/4253\\_schwebel-biicl15may2009speech\\_cor2.pdf](http://www.biicl.org/files/4253_schwebel-biicl15may2009speech_cor2.pdf)} accessed 10 February 2015.

Schwebel, Stephen, 'The Overwhelming Merits of Bilateral Investment Treaties', *Suffolk Transnational Law Review*, 32 (2008-2009), pp. 263-269.

Scopol, Theda, 'Bringing the State Back In: Strategies of Analysis in Current Research', in Peter Evans, Dietrich Rueschemeyer, et al (eds), *Bringing the State Back In* (Cambridge: Cambridge University Press, 1985), pp. 3-43.

Scofield, Heather, 'Methanex Set to Sue Uncle Sam under NAFTA over Gas Additive', *The Globe and Mail* (3 November 1999), p. B7.

Scott, Edward B., 'The Current Arbitration System Plays a Fair and Effective Role Helping Mitigate the Risks Inherent in International Investment', *Commentaries for the Democracy Center and the Institute for Policy Studies* (22 October 2009), available at {<http://justinvestment.org/2009/10/join-our-serious-debate-for-real-change/>} accessed 26 April 2014.

Seattle to Brussels Network, 'About Us', available at {<http://www.s2bnetwork.org/about-us/>} accessed 20 March 2015.

Shaw, Martin, 'Civil Society and Global Politics: Beyond a Social Movements Approach', *Millennium – Journal of International Relations*, 23:3 (1994), pp. 647-667.

Shemberg, Andrea, *Stabilization Clauses and Human Rights: A Research Project Conducted for IFC and the United Nations Special Representative of the Secretary-General on Business and Human Rights* (27 May 2009), available at: {<http://www.ifc.org/wps/wcm/connect/9feb5b0048855eab8c4fa6a6515bb18/Stabilization%2BPaper.pdf?MOD=AJPERES>} accessed 14 December 2010.

Shinkman, Matthew, 'The Investors' View: Economic Opportunities Versus Political Risks in 2007-11', in The Economist Intelligence Unit & Columbia Program on International Investment, *World Investment Prospects to 2011: Foreign Direct Investment and the Challenge of Political Risk* (2007), pp. 84-94.

Shultz, Jim, 'Getting Action: More Powerful Than Governments: How Corporations Use Global Investment Rules to Get Around Democracy', *The Democracy Center Blog* (6 December 2011), available at {<http://democracyctr.org/corporate/getting-action-more-powerful-than-governments/>} accessed 4 September 2012.

Sierra Club of Canada, the Canadian Labour Congress, the Polaris Institute and the Council of Canadians, 'Submissions of the Canadian Alliance on Trade and Environment in the NAFTA Arbitration Under UNCITRAL Rules in S.D. Myers v. Government of Canada' (16 January 2000), available at: {<http://www.sierraclub.ca/national/programs/sustainable-economy/trade-environment/federal-petition-sd-myers.html>} accessed 2 September 2014.

Simma, Bruno, 'Foreign Investment Arbitration: A Place for Human Rights?', *International and Comparative Law Quarterly*, 60 (2011), pp. 573-596.

Simma, Bruno, 'Fragmentation in a Positive Light', *Michigan Journal of International Law*, 25 (2004), pp. 845-847.

Sklair, Leslie, *The Transnational Capitalist Class* (Oxford: Blackwell, 2001).

Sklair, Leslie, 'Social Movements for Global Capitalism: The Transnational Capitalist Class in Action', *Review of International Political Economy*, 4:3 (1997), pp. 514-538.

Smith, David Gordon, 'The World From Berlin: Nuclear Phaseout Is An 'Historic Moment'', *Spiegel International* (30 May 2011), available at: {<http://www.spiegel.de/international/germany/the-world-from-berlin-nuclear-phaseout-is-an-historic-moment-a-765681.html>} accessed 22 March 2014.

Smith, Martin, 'Pluralism', in Colin Hay, Michael Lister et al (eds) *The State: Theories and Issues* (Basingstoke: Palgrave Macmillan, 2006), pp. 21-38.

Sornarajah, M., 'Mutations of Neoliberalism in International Investment Law', *Trade, Law & Development*, 3:1 (2011), pp. 203-232.

Sornarajah, M., 'Evolution or Revolution in International Investment Arbitration? The Descent Into Normlessness', in Chester Brown & Kate Miles (eds) *Evolution in Investment Treaty Law and Arbitration* (Cambridge, Cambridge University Press, 2011).

Sornarajah, M., *The International Law on Foreign Investment*, 3<sup>rd</sup> ed (Cambridge: Cambridge University Press, 2010).

Sornarajah, M., 'A Law for Need or a Law for Greed?: Restoring the Lost Law in the International Law of Foreign Investment', *International Environmental Agreements*, 6 (2006), pp. 329-357.

Sornarajah, M., 'The Clash of Globalisations and the International Law of Foreign Investment', Simon Reisman Lecture in International Trade Policy, Norman Patterson School of International Affairs (12 September 2002).

Spalding, Rose J., 'El Salvador: Horizontalism and the Anti-Mining Movement', in Richard Stahler-Sholk, Harry E. Vanden, et al (eds), *Rethinking Latin American Social Movements: Radical Action from Below* (London: Rowman & Littlefield, 2014).

Spears, Suzanne, 'The Quest for Policy Space in a New Generation of International Investment Agreements', *Journal of International Economic Law*, 13:4 (2010), pp. 1037-1075.

Spyridon Roussalis v. Romania, *Award*, ICSID Case No. ARB/06/1 (7 December 2011).



St Mary's VCNA, LLC. v. the Government of Canada, *Notice of Arbitration*, UNCITRAL Ad Hoc Arbitration (14 September 2011).

Staples, Clifford, 'The Business Roundtable and the Transnational Capitalist Class', in Georgina Murray & John Scott (eds), *Financial Elites and Transnational Business: Who Rules the World?* (Cheltenham: Edward Elgar, 2012), pp. 100-123.

Steiner, Richard, *El Salvador: Gold, Guns, and Choice: The El Dorado Gold Mine, Violence in Cabanas, CAFTA Claims, and the National Effort to Ban Mining* (International Union for the Conservation of Nature & Commission on Environmental, Economic and Social Policy, February 2010), available at {<http://www.stopesmining.org/j25/index.php/background-on-mining/126-el-salvador-guns-gold-and-choice>} accessed 3 April 2014.

Stephoe & Johnson LLP, 'Managing Political Risk through Bilateral Investment Treaties' (2012), available at {<http://www.stephoe.com/f-317.html>} accessed 3 July 2012.

Stone, Madeline, 'NAFTA Article 1110: Environmental Friend or Foe?', *The Georgetown International Environmental Law Review*, 15 (2002-2003), pp. 763-798.

Stop TTIP, 'European Citizens' Initiative Against TTIP and CETA: Petition', available at {<https://stop-ttip.org/sign/>} accessed 23 March 2015.

Straus, Tamara, 'Trading Democracy', *Alternet* (14 January 2002), available at: {[http://www.alternet.org/story/12233/trading\\_democracy](http://www.alternet.org/story/12233/trading_democracy)} accessed 2 September 2014.

Suez, Sociedad General de Aguas de Barcelona, S.A. & Vivendi Universal, S.A. v. Argentine Republic, *Separate Opinion of Arbitrator Pedro Nikken*, ICSID Case No. ARB/03/19 (30 July 2010).

Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States, *Award*, ICSID Case No. ARB(AF)/00/2 (29 May 2003).

Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States, *Statement of Defence*, ICSID Case No. ARB(AF)/00/2 (11 February 2002).

Third World Network, 'Ethyl Corp. Sues Canada Under NAFTA, Illustrating What Could Happen Later Under MAI Rules', *Third World Economics*, 163 (16-30 June 1997), available at: {<http://www.twinside.org.sg/title/eth-cn.htm>} accessed 2 September 2014.

Thomas, J.C., 'Responses: A Reply to Professor Brower', *Columbia Journal of Transnational Law*, 40 (2001-2002), pp. 433-463.

Tienhaara, Kyla, 'Foreign Investment Contracts in the Oil and Gas Sector: A Survey of Environmentally Relevant Clauses', *Investment Treaty News*, 1:2 (October 2011), pp. 12-15.

Tienhaara, Kyla, 'Regulatory Chill and the Threat of Arbitration: A View from Political Science', in Chester Brown & Kate Miles (eds) *Evolution in Investment Treaty Law and Arbitration* (Cambridge, Cambridge University Press, 2011), pp. 606-627.

Tienhaara, Kyla, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (Cambridge: Cambridge University Press, 2009).

Tienhaara, Kyla, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy*, PhD Thesis (Vrije Universiteit, 4 September 2008).

Tienhaara, Kyla, 'Third Party Participation in Investment-Environment Disputes: Recent Developments', *RECIEL*, 16:2 (2007), pp. 230-242.

Tienhaara, Kyla, 'What You Don't Know Can Hurt You: Investor-State Disputes and the Protection of the Environment in Developing Countries', *Global Environmental Politics*, 6:4 (2006), pp. 73-100.

Toynbee, Polly, 'The Big Four are Laughing All The Way to the Tax Office', *The Guardian* (1 February 2013).

Transnational Institute, *Legalised Profiteering? How Corporate Lawyers are Fuelling an Investment Arbitration Boom*, (TNI & CEO, 2011), p. 7, available at {<http://www.tni.org/briefing/legalised-profiteering>} accessed 1 May 2012.

Travis, Alan & Syal, Rajeev, ''Poison Pill' Privatization Contracts Could Cost £300m-£400m to Cancel', *The Guardian* (11 September 2014).

Traynor, Ken, 'How Canada Became a Shill for Ethyl Corp.: NAFTA and the Erosion of Federal Environmental Protection', *Intervenor* 23:3 (1998), available at: {<http://www.cela.ca/article/international-trade-agreements-commentary/how-canada-became-shill-ethyl-corp>} accessed 1 September 2014.

Tremonti, Anna Maria, 'Gold: Why A Mining Company is Suing El Salvador', *The Current on CBC Radio*, available at: {<http://www.cbc.ca/thecurrent/episode/2014/04/16/gold-why-a-mining-company-is-suing-el-salvador/>} accessed 16 April 2014.

U.S. Department of State, 'Report of the Subcommittee on Investment of the Advisory Committee on International Economic Policy Regarding th Model Bilateral Investment Treaty: Annexes', (30 September 2009), available at {<http://www.state.gov/e/eb/rls/othr/2009/131118.htm>} accessed 17 February 2013.

UNCITRAL, *Status: 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (2012), available at {[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html)} accessed 3 July 2012.

UNCTAD, 'Recent Developments in Investor-State Dispute Settlement', *IIA Issues Note*, 1 (April 2014).

UNCTAD, *World Investment Report 2013, Global Value Chains: Investment and Trade for Development* (New York and Geneva: United Nations, 2013).

UNCTAD, 'Recent Developments in Investor-State Dispute Settlement', *IIA Issues Note*, 1 (May 2013).

UNCTAD, 'Latest Developments in Investor-State Dispute Settlement', *IIA Issues Note*, 1 (April 2012).

UNCTAD, *Fair and Equitable Treatment: A Sequel*, UNCTAD Series of Issues in International Investment Agreements II (New York & Geneva: United Nations, 2012).

UNCTAD, *Investment Policy Framework for Sustainable Development* (New York: United Nations, 2012).

UNCTAD, *World Investment Report: Non-Equity Modes of International Production* (Geneva: United Nations Publications, 2011).

UNCTAD, 'IIA Issues Note: Denunciation of the ICSID Convention and BITS: Impact on Investor-State Claims', 2 (December 2010).

UNCTAD 'Latest Developments in Investor-State Dispute Settlement', *IIA Monitor*, 1 (2009), available at {[http://unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20\(IIA\)/IIA-Monitor.aspx](http://unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20(IIA)/IIA-Monitor.aspx)} accessed 1 May 2012.

- UNCTAD, *Investor-State Disputes Arising from Investment Treaties: A Review*, UNCTAD Series of International Investment Policies for Development (New York & Geneva: United Nations, 2005).
- Unglaube, Marion & Unglaube, Reinhard v. Republic of Costa Rica, *Award*, ICSID Case No. ARB/08/1 & ICSID Case No. ARB/09/20 (16 May 2012).
- United Kingdom of Great Britain and Northern Ireland & Republic of Ghana, ‘Agreement for the Promotion and Protection of Investments’, (22 March 1989).
- United Mexican States v. Metalclad Corporation, *Reasons for the Judgment*, Supreme Court of British Columbia 664 (2001).
- United States of America, *Model Bilateral Investment Treaty* (2012), Annex B, 4(b), available at: {<http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>} accessed 4 September 2014.
- United States of America, *Treaty Between the Government of the USA and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment (Model BIT)*, (2004).
- Vaccaro, Anthony, ‘Elusive Green Macaw Stops Infinito For Now’, *The Northern Miner*, 94:37 (2-9 November 2008).
- Van Apeldoorn, Baastian, ‘Transnational Class Agency and European Governance: The Case of the European Round Table of Industrialists’, *New Political Economy*, 5:2 (2000), pp. 157-181.
- Van Harten, Gus & Loughlin, Martin, ‘Investment Treaty Arbitration as a Species of Global Administrative Law’, *The European Journal of International Law*, 17:1 (2006), 121-150.
- Van Harten, Gus, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (Oxford: Oxford University Press, 2013).
- Van Harten, Gus, ‘Pro-Investor or Pro-State Bias in Investment-Treaty Arbitration? Forthcoming Study Gives Cause for Concern’. *Investment Treaty News*, 3:2 (April 2012), pp. 8-10.
- Van Harten, Gus, ‘China Investment Treaty: Expert Sounds Alarms in Letter to Harper’, *The Tye* (16 October 2012), available at {<http://thetye.ca/Opinion/2012/10/16/China-Investment-Treaty/>>} accessed 11 February 2013.
- Van Harten, Gus, ‘TWAAIL and the Dabhol Arbitration’, *Trade Law and Development*, 3:1 (2011), pp. 131-163.
- Van Harten, Gus, ‘Five Justifications for Investment Treaties: A Critical Discussion’, *Trade, Law and Development*, 2:1 (2010), pp: 19-58.
- Van Harten, Gus, ‘Investment Treaty Arbitration and Public Law – A Return to the Gay Nineties?’ *Transnational Dispute Management*, 4:5 (September 2007), pp. 12-44.
- Van Harten, Gus, ‘Private Authority and Transnational Governance: The Contours of the International System of Investor Protection’, *Review of International Political Economy*, 12:4 (October 2005), pp. 600-623.
- Van Praet, Nicolas, ‘Quebec Ban Leaves Shale Gas Drillers Staggering’, *Financial Post* (1 July 2011), available at {[http://business.financialpost.com/2011/07/01/quebec-moratorium-leaves-shale-gas-drillers-staggering/?\\_\\_lsa=7dd7-3993](http://business.financialpost.com/2011/07/01/quebec-moratorium-leaves-shale-gas-drillers-staggering/?__lsa=7dd7-3993)} accessed 27 January 2015.
- Vandeveld, Kenneth, ‘A Unified Theory of Fair and Equitable Treatment’, *New York University Journal of International Law and Politics*, 43 (2010-2011), pp. 43-106.

Vandeveld, Kenneth, 'A Brief History of International Investment Agreements,' *U.C. Davis Journal of International Law and Policy*, 12 (2005), pp. 157-194.

Vattenfall AB, Vattenfall Europe AG and others v. The Federal Republic of Germany, *Request for Arbitration*, ICSID Case No. ARB/09/6 (30 March 2009).

Verheyen, Roda, 'The Coal-Fired Power Plant Hamburg-Moorburg, ICSID Proceedings by Vattenfall Under the Energy Charter Treaty and the Result For Environmental Standards', *Briefing Note for Greenpeace* (11 April 2012), available at: {[http://www.greenpeace.de/sites/www.greenpeace.de/files/publications/icsid\\_case\\_regarding\\_the\\_vattenfall\\_coal-fired\\_power\\_plant\\_hamburg-moorburg.pdf](http://www.greenpeace.de/sites/www.greenpeace.de/files/publications/icsid_case_regarding_the_vattenfall_coal-fired_power_plant_hamburg-moorburg.pdf)} accessed 22 March 2014.

Verhoosel, Gaëtan, 'Foreign Direct Investment and Legal Constraints on Domestic Environmental Policies: Striking a 'Reasonable' Balance Between Stability and Change', *Law and Policy in International Business*, 29 (1997-1998), pp. 451-479.

Viñuales, Jorge, *Foreign Investment and the Environment in International Law* (Cambridge, Cambridge University Press, 2012).

Viñuales, Jorge, 'Foreign Investment and the Environment in International Law: An Ambiguous Relationship', Centre for International Environmental Studies Research Paper, No. 2 (forthcoming in *British Yearbook of International Law*, Vol. 80, 2010).

Wagner, Martin, 'The WTO's Interpretation of the SPS Agreement Has Undermined the Right of Governments to Establish Appropriate Levels of Protection Against Risk', *Law and Policy in International Business*, 31: 3 (2000), pp. 855-859.

Wagner, Martin, 'International Investment, Expropriation and Environmental Protection', *Golden Gate University Law Review*, 29 (1999), pp. 465-538.

Waibel, Michael & Kaushal, Asha, et al (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Alphen aan den Rijn: Kluwer Law International, 2010).

Wälde, Thomas & Kolo, Abba, 'Environmental Regulation, Investment Protection and Regulatory Taking in International Law', *International and Comparative Law Quarterly*, 50 (2001), pp. 811-848.

Wälde, Thomas & Ndi, George, 'Stabilizing International Investment Commitments: International Law Versus Contract Interpretation', *Texas International Law Journal*, 31 (1996), pp. 215-268.

Wälde, Thomas, 'Investment Arbitration and Sustainable Development: Good Intentions – Or Effective Results?' *International Environmental Agreements*, 6 (2006), pp. 459-466.

Wallach, Lori, 'NAFTA on Steroids', *The Nation* (27 June 2012), available at {<http://www.thenation.com/article/168627/nafta-steroids#>} accessed 11 February 2013.

Wallerstein, Immanuel, *World-Systems Analysis: An Introduction* (Duke University Press, 2004).

Weber, Bob, 'Aboriginal Hunters Fight for Right to Hunt; Way of Life', *The Daily Gleaner* (8 February 2010), p. A7.

Week of Action Against BITs and for an Alternative Investment Regime, *Call for An Alternative Investment Model: Final Declaration* (Brussels: 6 November 2011), available at {<http://www.s2bnetwork.org/issues/eu-investment-policy/>} accessed 23 March 2015.

Weiler, Todd, 'Methanex Corp. v. U.S.A.: Turning the Page on NAFTA Chapter 11?', *Journal of World Investment and Trade*, 6 (2005), pp. 903-921.

Weiler, Todd, 'A First Look at the Interim Merits Award in *S.D. Myers, Inc. v. Canada: It is Possible to Balance Legitimate Environmental Concerns with Investment Protection*', *Hastings International and Comparative Law Review*, 24 (2000-2001), pp. 173-188.

Wendt, Alexander 'The State as Person in International Theory', *Review of International Studies*, 30:2 (2004), pp. 289-316.

Went, Robert, 'Globalization: Towards a Transnational State? A Sceptical Note', *Science & Society*, 65:4 (2001-2002), pp. 484-491.

Werksman, Jacob, 'Commentary: In Response to the Paper by Konrad von Moltke and Howard Mann, Misappropriation of Institutions: Some Lessons from the Environmental Dimension of the NAFTA Investor-State Dispute Settlement Process', *International Environmental Agreements: Politics, Law and Economics*, 1 (2001), pp. 121-123.

Wheat, Andrew, 'Toxic Shock in a Mexican Village', *Multinational Monitor*, 16:10 (October 1995), available at {[http://www.multinationalmonitor.org/hyper/issues/1995/10/mm1095\\_07.html](http://www.multinationalmonitor.org/hyper/issues/1995/10/mm1095_07.html)} accessed 8 February 2014.

Wight, Colin, *Agents, Structures and International Relations: Politics as Ontology* (Cambridge: Cambridge University Press, 2006).

Wight, Colin, 'State Agency: Social Action without Human Activity?' *Review of International Studies*, 30 (2004), pp. 269-280.

Wilson, Duff, 'Cigarette Giants in Global Fight on Tighter Rules', *New York Times* (13 November 2010), available at: {[http://www.nytimes.com/2010/11/14/business/global/14smoke.html?\\_r=4&scp=5&sq=uruguay&st=cse&](http://www.nytimes.com/2010/11/14/business/global/14smoke.html?_r=4&scp=5&sq=uruguay&st=cse&)} accessed 5 September 2014.

Windstream Energy LLC v. Government of Canada, *Amended Response to the Notice of Arbitration*, UNCITRAL Ad Hoc Arbitration (26 April 2013).

Windstream Energy LLC v. Government of Canada, *Amended Notice of Arbitration*, UNCITRAL Ad Hoc Arbitration (28 January 2013).

Wood, Ellen Meiksins, *Empire of Capital* (London: Verso, 2003).

Wood, Ellen Meiksins, 'Globalisation and the State: Where is the Power of Capital?' in Alfredo Saad-Filho (ed), *Anti-Capitalism: A Marxist Introduction* (London: Pluto Press, 2003).

Wood, Ellen Meiksins, 'Global Capital, National States', in Mark Rupert & Hazel Smith (eds), *Historical Materialism and Globalization* (London: Routledge, 2002).

Wood, Ellen Meiksins, 'The Separation of the Economic and the Political in Capitalism', *New Left Review*, I/127 (May-June 1981), pp. 66-95.

World Economic Forum, 'World Economic Forum', Institutional Brochure (2014), available at {<http://www.weforum.org/world-economic-forum>} accessed 11 March 2015.

World Wildlife Fund Canada, 'Press Release: Toxic Pesticide Should Be Banned' (24 November 1999), available at {<http://www.foodsafety.ksu.edu/en/news-details.php?a=3&c=29&sc=220&id=33272>} accessed 3 March 2014.

WTO Appellate Body, 'EC Measures Concerning Meat and Meat Products (Hormones)', Complaint by the United States, *Report of the Panel*, WT/DS26/R/USA (18 August 1997).

Wyden, Ron, 'Wyden Presses USTR Kirk for Sunshine on Trade Negotiations', *Recording of Senate Finance Committee Meeting* (21 June 2012), available at {<http://www.wyden.senate.gov/news/video-and-audio/view/wyden-presses-ustr-kirk-for-sunshine-on-trade-negotiations>} accessed 11 February 2013.

Wyden, Ron, 'On Introduction of the 'Congressional Oversight over Trade Negotiations Act'', *Statement for the Record, United States Senate* (23 May 2012), available at {<http://www.wyden.senate.gov/news/blog/post/iyemi-wyden-statement-introducing-congressional-oversight-over-trade-negotiations-act>} accessed 11 February 2013.

Xinhua General News Service, 'Police, Civilians Clash in Rural Mexico Over Chemical Waste' (9 April 2009).

Zarsky, Lyuba, 'From Regulatory Chill to Deepfreeze? In Response to the paper by Kyla Tienhaara, Mineral Investment and the Regulation of the Environment in the Developing Countries: Lessons from Ghana', *International Environmental Agreements*, 6 (2006), pp. 395-399.

Ziff, Robert, 'The Sovereign Debtor's Prison: Analysis of the Argentine Crisis Arbitrations and the Implications for Investment Treaty Law', *Richmond Journal of Global Law and Business*, 10:3 (2010-2011), pp. 348-386.