# INVESTOR-STATE ARBITRATION AND DOMESTIC ENVIRONMENTAL PROTECTION

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## INTRODUCTION

There is a long-running debate between environmentalists and advocates of free trade.[1] Environmentalists generally argue that free trade leads to a "race to the bottom" and "pollution havens," wherein the countries with the worst environmental (or other) protections are rewarded.[2] Free trade advocates most often argue that such issues should simply stay out of trade agreements, sometimes adding that freer trade leads to economic gains and increased quality of life, followed by greater environmental and labor protections as citizen expectations change.[3] Both sides, however, are beginning to agree that disputes arising under

1. *See, e.g.*, David A. Gantz, *Labor Rights and Environmental Protection Under NAFTA and Other U.S. Free Trade Agreements*, 42 U. MIAMI INTER-AM. L. REV. 297 (2011); Annie Lowrey, *Obama and G.O.P. Facing Opposition to Trade Pacts*, N.Y. TIMES (January 30, 2014), http://www.nytimes.com/2014/01/31/business/reid-pushes-back-on-fast-track-trade-authority.html.

2. Linda J. Allen, *The North American Agreement on Environmental Cooperation: Has It Fulfilled Its Promises and Potential? An Empirical Study of Policy Effectiveness*, 23 COLO. J. INT'L ENVTL. L. & POL'Y 121, 125–26 (2012).

3. Chris Wold, *Taking Stock Trade's Environmental Scorecard After Twenty Years of "Trade and Environment"*, 45 WAKE FOREST L. REV. 319, 325 (2010).

international trade and investment agreements raise not only commercial issues, but also important questions of public policy.[4]

The above debate provides no clear solution; therefore, a more effective inquiry is to explore whether a country can improve its protections for the environment, given a particular provision of international investment law called Investor-State Dispute Settlement (ISDS). International investment is a distinct area of law from trade, but often overlaps both conceptually and practically.[5] Most criticism of investment agreements arises as one part of a critique implicating all international economic law and is most often framed as trade.[6] Thus, the language of that discourse is applicable here. At the heart of most such criticism is a concern that big corporate entities disproportionately control and benefit from international economic agreements[7] as corporations become larger[8] and more influential in global politics and trade

4. UNCTAD, Investor-State Dispute Settlement: UNCTAD Series on Issues in International Investment Agreements II, 13 (2014), *available at* http://unctad.org/en/PublicationsLibrary/diaeia2013d2_en.pdf.

5. Rudolf Dolzerand & Christoph Schreuer, *Nature, Evolution, and Context of International Investment Law*, *in* PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 2, 2 (1st ed. May 28, 2008) ("Today, it remains a matter of semantics whether it is appropriate to speak of the existence of a separate category of 'principles of foreign investment law', given their strong links to international economic law in general[, which includes trade law].") For example, international investment law can be rooted in a Bilateral Investment Treaty (BIT), which only deals with investment issues, or as a distinct chapter within a broader bilateral or multilateral trade agreements like Chapter 11 of the North American Free Trade Agreement, to be discussed in greater depth below.

6. For example, Public Citizen's criticism of investment law is within their "Global Trade Watch" division, *About Public Citizen's Global Trade Watch*, PUBLIC CITIZEN, http://www.citizen.org/Page.aspx?pid=3147 (last visited Oct. 16, 2014); Similarly, the Center for International Environmental Law's criticism of investment law is within their "Trade and Sustainable Development" Program, *Trade & Sustainable Development Program Homepage*, Center for International Environmental Law, http://www.ciel.org/Trade_Sustainable_Dev/index.html (last visited Oct. 16, 2014).

7. *See, e.g.*, Charles H. Brower II, *Investor-State Disputes Under NAFTA: The Empire Strikes Back*, 40 COLUM. J. TRANSNAT'L L., 73 (2002) (arguing that foreign corporate investors are able to unfairly avoid legal liability under the investment chapter of NAFTA, one of the most influential modern free trade agreements.); David A. Gantz, *Potential Conflicts Between Investor Rights and Environmental Regulation Under NAFTA's Chapter 11*, 33 GEO. WASH. INT'L L. REV. 651 (2001); Carlos G. Garcia, *All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration*, 16 FLA. J. INT'L L. 301 (2004); Sanford E. Gaines, *Protecting Investors, Protecting the Environment: the Unexpected Story of NAFTA Chapter 11*, *in* GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION 173 (David L. Markell & John H. Knox eds., 2003).

8. Some multinational corporations are becoming so large that their revenue is larger than many countries' GDPs. For example, Wal-Mart's revenue is larger than the GDP of 157 countries. Vincent Trivett, *25 US Mega Corporations: Where They Rank If They Were Countries*, BUS. INSIDER (June 27, 2011), http://www.businessinsider.com/25-corporations-bigger-tan-countries-2011-6?op=1.

negotiations.[9] This power dynamic is manifested in the implementation of ISDS provisions, which enable foreign investors to file claims against governments[10] in an international arbitration[11] forum, as long as the foreign investor is covered by an International Investment or Free Trade Agreement[12] between the investor's home country and the host country that includes ISDS provisions.

These questions are urgent, especially for those concerned about the environment, in the face of two realities. First, there are two trade agreements currently being negotiated that have the potential to transform the global economic landscape and are likely to include ISDS provisions: The Transatlantic Trade and Investment Partnership (T-TIP) between the European Union and United States,[13] and the Trans-Pacific Partnership (TPP) involving twelve nations of the Asia-Pacific region.[14] Second, there is near universal scientific consensus that climate change is caused in part by humans and that the global community is almost too late to prevent its extreme weather consequences.[15]

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9. *See, e.g.*, Eric Lipton & Danny Hakim, *Lobbying Bonanza as Firms Try to Influence European Union*, N.Y. TIMES, October 18, 2013, *available at* http://www.nytimes.com/2013/10/19/world/europe/lobbying-bonanza-as-firms-try-to-influence-european-union.html; CORP. EUR. OBSERVATORY, *Civil society groups say no to investor-state dispute settlement in EU-US trade deal* (2013), *available at* http://corporateeurope.org/trade/2013/12/civil-society-groups-say-no-investor-state-dispute-settlement-eu-us-trade-deal.

10. The top countries against which disputes are brought by investors are, in order: Argentina, Venezuela, Ecuador, Mexico, Czech Republic, Canada, Egypt, and United States. According to the UNCTAD, the first state-initiated dispute was raised in 2012. UNCTAD, IIA Issues Note: Recent Developments in Investor-State Dispute Settlement (ISDS) Updated for the Multilateral Dialogue on Investment 1, 4 (2013), *available at* http://unctad.org/en/PublicationsLibrary/ webdiaepcb2013d3_en.pdf (last visited Mar. 27, 2015) [hereinafter IIA Issues Note]. *See also* Inna Uchkunova, *ICSID: Curious Facts*, KLUWER ARBITRATION BLOG (Oct. 25 2012), http://kluwerarbitrationblog.com/blog/2012/10/25/icsid-curious-facts/ (last visited Jan 17, 2014).

11. Arbitration is "[a] method of dispute resolution involving one or more neutral third parties who are usu[ally] agreed to by the disputing parties and whose decision is binding." BLACK'S LAW DICTIONARY 119 (Bryan A. Garner ed., 9th ed. 2009).

12. Free Trade Agreements (FTAs), Regional Trade Agreements (RTAs) and Preferential Trade Agreements (PTAs) are technically distinct, but frequently used interchangeably. RAJ BHALA, INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE 641–42 (3d ed. 2008). Since the distinction is not essential to this Note, I will use the term Free Trade Agreement. For the sake of clarity, I will also not use the abbreviation.

13. USTR, *White House Fact Sheet: Transatlantic Trade and Investment Partnership* (T-TIP) (June 2013), *available at* http://www.ustr.gov/about-us/press-office/fact-sheets/2013/june/wh-ttip.

14. USTR, *Trans-Pacific Partnership (TPP)*, http://www.ustr.gov/tpp; William Mauldin, *Fast-Track Opponents Rally Support*, WASH. WIRE (Feb. 18, 2014), http://blogs.wsj.com/washwire/2014/02/04/fast-track-opponents-build-grassroots-opposition/?mg=blogs-wsj&url=http%253A%252F%252Fblogs.wsj.com%252Fwashwire%252F2014%252F02%252F04%252Ffast-track-opponents-build-grassroots-opposition.

15. Given the recent Intergovernmental Panel on Climate Change (IPCC) report and near uniform scientific consensus on climate change, the view that environmental protection and economic development are mutually exclusive interests is a very shortsighted take on economic prosperity.

Part I of this Note provides a broad introduction to Free Trade Agreements, International Investment Agreements, ISDS provisions, and some ways trade and the environment intersect. Part II evaluates some of the available data regarding trends in free trade agreements and includes a brief discussion of nine specific ISDS disputes with environmental components.[16] Part III provides a number of suggestions for ways to better incorporate into ISDS decision-making more effective methods of evaluating the authenticity of, and ultimately protecting, domestic environmental laws.

## I. INTERNATIONAL AGREEMENTS AND GLOBAL ENVIRONMENTAL PROTECTION

### *A. World Trade and International Investment Agreements*

Modern international trade law was codified when twenty-three countries signed the General Agreements on Tariffs and Trade (GATT) on October 30, 1947.[17] GATT was the governing document for international trade from 1947 until December 15, 1993 when GATT contracting parties established the World Trade Organization (WTO), incorporating GATT.[18] Today GATT-WTO has 160 member countries.[19] GATT-WTO policies are based on economic theories that the reduction of trade barriers improves global living conditions.[20] To this end, GATT-WTO provides for

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Thomas Stocker, Qin Dahe & Gian-Kasper Plattner, WORKING GROUP I CONTRIBUTION TO THE IPCC FIFTH ASSESSMENT REPORT CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS (2013), http://www.climatechange2013.org/report/review-drafts/.

16. In this context, a dispute refers to any dispute brought under an ISDS or similar provision. As will be discussed in greater depth in Part II, not all cases have the same amount of information publicly available. Thus certain disputes were eliminated based not on the substance of the issues, but the amount of information available.

17. RAJ BHALA, *supra* note 12, at 7. The GATT was meant to be a temporary document to ensure that countries did not revert to protectionism in the years immediately following World War II until the Havana Charter was ratified, which would have established the International Trade Organization (ITO). US President Harry Truman did not even submit the treaty to Congress, however, knowing that it would not have been ratified given the number of international organizations and treaties the US had recently signed. *Id*.

18. *Id*. at 6–7.

19. WORLD TRADE ORG., UNDERSTANDING THE WTO: THE ORGANIZATION—MEMBERS AND OBSERVERS, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Sept. 4, 2014). The U.S. recognizes 195 independent states. U.S. DEP'T OF STATE, INDEPENDENT STATES IN THE WORLD, http://www.state.gov/s/inr/rls/4250.htm (last visited Aug. 24, 2014).

20. The GATT preamble states in part: "Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living . . . . Being desirous of contributing to these objectives by . . . substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce . . ." The General

uniform trade laws, aid in resolving trade disputes between nations, and facilitation of global trade through other mechanisms.[21] One essential requirement of GATT-WTO is that all members treat other members with "most favored nation" status, which means that the lowest tariff rate one WTO member gives any country is the tariff rate all WTO members must receive.[22]

There is, however, an exception to the most favored nation requirement that was written into the GATT-WTO regime from the very start. GATT Article XXIV states that, within certain limitations, "[T]he provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area . . ."[23] This Note focuses on the Free Trade Agreements that effectively allow for such preferential treatment among a small number of countries[24] and deals specifically with issues of foreign investment, called International Investment Agreements (IIAs).[25]

This is not a minor exception to GATT-WTO rules. As of June 15, 2014, 585 regional trade agreements had been reported to the WTO, with

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Agreement on Tariffs and Trade, Jan. 1, 1948, 55 U.N.T.S. 187. http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm (last visited Jan 12, 2014).

21. WORLD TRADE ORGANIZATION, UNDERSTANDING THE WTO: WHO WE ARE, http://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm. Despite the intention of the WTO to centralize global trade, around the time of its establishment the number of bilateral and plurilateral preferential trade agreements (PTAs), almost all Free Trade Agreements, exploded. IIA ISSUES NOTE, *supra* note 17, at 1–4.

Some Free Trade Agreements are regional, like the North America Free Trade Agreement (NAFTA) and Dominican Republic-Central American Free Trade Agreement (CAFTA). Many more are Bilateral Investment Treaties dealing exclusively with investment arrangements between two countries. Some are issue-based, such as the Energy Charter Treaty. Energy Charter Treaty (1994), *available at* http://www.encharter.org/index.php?id=28 (last visited Oct 27, 2013). Lastly, many of the multilateral trade agreements include side-deals regarding issues of particular interest to only a few of the signatories or on a topic about which no consensus could be found.

22. RAJ BHALA, *supra* note 12, at Chapter 11.

23. The General Agreement on Tariffs and Trade (GATT 1947), *supra* note 20, at XXIV:5.

24. *See generally* RAJ BHALA, *supra* note 12, at Part 6.

25. The most common type of IIA is a Bilateral Investment Treaty (BIT), but there are also regional investment treaties and investment provisions or chapters in bilateral and multilateral Free Trade Agreements that deal with many more issues. Chapters 11 and 10 respectively of the well-known North American Free Trade Agreement and Dominican Republic-Central American Free Trade Agreement ("CAFTA" or "CAFTA-DR") are examples of the third type of IIA. Howard Mann, *International Investment Agreements, Business and Human Rights: Key Issues and Opportunities*, INT'L INST. FOR SUSTAINABLE DEV. 3–5 (Feb. 2008), http://www.iisd.org/pdf/2008/iia_business_human_rights.pdf; UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II 18 n.1 (July 25, 2014) [hereinafter "UNCTAD Series II"].

379 in force.[26] As of 2012, there were nearly 3,200 Bilateral Investment Treaties (BITs).[27] The popularity of these agreements likely reflects the challenges inherent in consensus decision-making among 160 nations.[28] Over the last few decades, many of the multi-national free trade agreements have sparked major protests by activists concerned with labor rights, environmental sustainability, exploitation of developing nations, and other social issues.[29]

### *B. Investor-State Dispute Settlement (ISDS) Provisions*

The theory behind a trans-national system for dispute resolution is that it is better equipped to equitably resolve an investor's dispute with a state than the state's own domestic court system. Investors often fear political influence, incompetence, or "home town justice" in domestic court systems.[30] Much of this fear is based in reality. There are ineffective, inefficient, or corrupt domestic judicial systems that discourage foreign direct investment.[31] The predictability of trade rights and investment

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26. "[C]ounting goods, services and accessions separately . . ." Regional Trade Agreements Gateway, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/region_e/region_e.htm (last visited Oct. 28, 2013).

27. UNCTAD Series II, *supra* note 25, at 18; ICSID Database of BITs, *supra* note 10. "BITs give investors from each party the right to submit an investment dispute with the government of the other party to international arbitration. There is no requirement to use that country's domestic courts." Bilateral Investment Treaties, UNITED STATES TRADE REPRESENTATIVE, http://www.ustr.gov/trade-agreements/bilateral-investment-treaties (last visited Jan. 25, 2014).

28. Many are concerned that these smaller agreements are creating pockets of free trade, rather than increasing global free trade, resulting in a complex web of agreements that are difficult to enforce and result in a much more imbalanced trade system. It further limits the rights of small nations who feel pressure to engage in Free Trade Agreements but have little bargaining power in those negotiations. As James Gathi explains, "[t]he turn to regional [Free Trade Agreements] . . . makes it much easier to bully smaller groups of countries to commit to the objectives of the Washington Consensus or neoliberal economic restructuring than it would be through arduous multilateral trade negotiations at the WTO." James Thuo Gathii, *The Neoliberal Turn in Regional Trade Agreements*, 86 WASH. L. REV. 421, 426 (2011). However, some recognize the value in the shifting towards regional agreements given the stalemates that have repeatedly stalled multilateral efforts. Rafael Leal-Arcas, *Climate Change Mitigation from the Bottom up: Using Preferential Trade Agreements to Promote Climate Change Mitigation*, 7 CARBON CLIM. L. REV. 34 (2013).

29. *See, e.g.*, David L. Markell & John H. Knox, *The Innovative North American Commission for Environmental Cooperation*, in GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION, *supra* note 7, at 1; Sanford E. Gaines, *supra* note 7, at 174.

30. William Park & Guillermo Aguilar Alvarez, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT'L L. 365, 369 (2003). There are ineffective, inefficient, or corrupt domestic judicial systems that discourage foreign direct investment. However, there is also value and historical precedent for utilizing domestic judicial systems.

31. Initially, protection of investors in trade agreements intended to encourage foreign direct investment (FDI) with or in states where the judicial system could not be trusted to protect investments from other private interests or even the government itself. It does not seem like a stretch to compare

opportunities can also cause barriers to investment given that investors often work in many different countries and thus many different legal systems.[32]

There is, however, value and historical precedent for relying more heavily on domestic judicial systems than is the practice today.[33] Furthermore, there are numerous flaws in the international arbitration system that include its largely ad hoc structure, reliance on private firms and lawyers,[34] and failure to successfully consider non-investment factors even when the trade agreement provides for the protection of human rights at issue.[35]

ISDS provisions have grown more controversial over the last few years[36] as the number of disputes under ISDS have increased dramatically.[37] The number of disputes settled in favor of investors has also risen in recent years. As of the end of 2012, 244 disputes had been resolved through arbitration under various ISDS provisions with approximately 42% decided in favor of the state, 31% decided in favor of the investor, and 27% settled, typically on confidential terms.[38] In 2012,

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modern FDI between large corporations and small developing nations to the concession agreements of the early 20th century. Concession agreements required very little of the investors, and actually gave states less flexibility than today. Detlev F. Vagts et al., TRANSNATIONAL BUSINESS PROBLEMS 528–29 (4th ed. 2008).

32. Charles H. Brower II, *supra* note 7, at 48.

33. "Historically, an alien investor was required to exhaust local remedies before its state could espouse a claim before an international tribunal. Local courts were first entitled to remedy the alleged wrongdoing before recourse to an international forum was available. Under [Bilateral Investment Treaties], these rules have either been eliminated or modified." Carlos G. Garcia, *supra* note 7, at 313.

34. For example, large law firms have the incentive to encourage these disputes because they earn huge sums of money for participation in the prolonged and complex disputes. Furthermore, these same law firms often provide attorneys to serve as arbitrators on other cases. As a result, the whole process has the potential to be distorted. Pia Eberhardt & Cecilia Olivet, *Profiting From Injustice: How Law Firms, Arbitrators And Financiers Are Fuelling An Investment Arbitration Boom* at 19–23 (2012). Please note, this source has been incredibly helpful, as it has consolidated information on law firms that is difficult to find elsewhere. However, it is one of a few sources that I cite that has been compiled with a very evident bias. The information seems to be accurate and very well researched, but the angle is strong enough that its notice is important.

35. Susan L. Karamanian, *The Place of Human Rights In Investor-State Arbitration*, 17 LEWIS & CLARK L. REV. 423, 424 (2013).

36. *See, e.g.*, Nancy A. Welsh & Andrea Kupfer Schneider, *The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration*, HARV. NEGOTIATION L. REV. 71, 71 (2013) ("states and investors increasingly express concerns regarding the costs associated with the arbitration process, some states refuse to comply with arbitral awards, other states hesitate to sign new bilateral investment treaties, and citizens have begun to engage in popular unrest at the prospect of investment treaty arbitration."); UNCTAD, Investor-State Dispute Settlement: A sequel, UNCTAD Series on Issues in International Investment Agreements II at 13–17, 24–29 (July 2014), http://unctad.org/en/PublicationsLibrary/diaeia2013d2_en.pdf.

37. IIA Issues Note, *supra* note 10, at 2.

38. *Id.* at 5.

however, 12 out of 17 decisions, 71%, rendered on the merits accepted—in part or in full—the claims of the investors.[39]

Drafters of trade agreements and individual commercial contracts can choose to bring disputes under an ISDS in numerous forums.[40] The most commonly used forum is the International Centre for Settlement of Investment Disputes (ICSID), a non-profit arm of the World Bank.[41] The second most commonly used forum is the United Nations Commission on International Trade Law (UNCITRAL).[42] Each forum has its own set of rules, amendable by contract, but they generally follow the same pattern. Most arbitrations are an "ad hoc process" where the arbitrators "are private agents, typically practicing international lawyers, or professors of international law" selected and approved by the parties.[43] These individuals often represent clients as attorneys in other disputes at the same tribunals.[44]

The primary criticisms of ISDS provisions can be broken down into three categories. The first is that these provisions seem to give greater power to foreign investors than nations, by permitting investors to file claims against governments.[45] ISDS provisions usually provide a distinct forum in which foreign investors, not governments, can bring a dispute.[46] This power shift is also evident in how investors seek to avoid use of domestic courts for settling such disputes if at all possible, even in instances when the investment agreement requires utilization of the

39. *Id*.

40. These arbitration forums include the International Centre for Settlement of Investment Disputes (ICSID), the United Nations Commission on International Trade Law (UNCITRAL), the Stockholm Chamber of Commerce (SCC), the International Chamber of Commerce (ICC), the Cairo Regional Centre for International Commercial Arbitration (CRCICA), and the London Court of International Arbitration (LCIA). IIA Issues Note, *supra* note 10, at 2.

41. Of the 58 disputes filed in 2012, 39 were filed with ICSID, seven under UNCITRAL rules, five under the SCC, one each under the ICC, CRCICA, and an ad hoc arbitration, and five with unknown rules and venues. IIA Issues Note, *supra* note 10, at 2.

42. *Id.*

43. Carlos G. Garcia, *supra* note 7, at 313.

44. Lori Wallach, *"A Corporate Trojan Horse": Obama Pushes Secretive TPP Trade Pact*, WOULD REWRITE SWATH OF U.S. LAWS 22:28 (2013), http://www.democracynow.org/2013/10/4/a_corporate_trojan_horse_obama_pushes (last visited Oct. 5, 2013).

45. There may be a shift, however, in States' ability to bring claims. According to the UNCTAD, 2012 saw the first time in "treaty-based ISDS proceedings, [where] an arbitral tribunal affirmed its jurisdiction over a counterclaim that had been lodged by a respondent State against the investor." UNCTAD publishes its annual review of investor-State dispute settlement cases (Apr 2013), http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=453; *See also* IIA Issues Note, *supra* note 10.

46. Investor–State Disputes: Prevention and Alternatives to Arbitration at 10 (2010), http://unctad.org/en/docs/diaeia200911_en.pdf.

domestic system first.[47] Investors can challenge not only alleged violations of customary international law and investment contracts, but even domestic laws of the host State.[48] Thus, ISDS provisions allow for largely domestic issues to be brought in front of a non-judicial arbitration panel instead of in domestic courts, even though the case is ultimately ruling on how a domestic law relates to the trade agreement.

The second category that critics focus on is structural failures within the arbitration system. In 2012, the Corporate Europe Observatory and the Transnational Institute came out with a report that evaluated bias within the arbitration system and tried to explain an increasing trend of law firms pushing corporations to bring disputes under ISDS provisions.[49] The report claims,

> The alleged neutrality of arbitration is . . . a myth. A small group of elite arbitrators emerged promising to be neutral 'judges' in whom, as arbitrator William Park said, "people could entrust their wealth and welfare". But, instead, they have used their power and influence to secure government-hostile rules and a steady flow of multimilliondollar [sic] lawsuits.[50]

The report outlines the role of lawyers who profit financially from ISDS disputes in encouraging governments to sign agreements with ISDS provisions in the first place, encouraging investors to bring disputes under ISDS provisions, especially when governments are in crisis, and frequently publishing academic reporting on arbitration guiding the field.[51] The monetary cost, and profit, is often millions of dollars.[52]

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47. For example, during the most recent U.S. Supreme Court term the Court heard an appeal from UNCITRAL about whether the panel had authority to adjudicate a dispute that had not satisfied the pre-arbitration requirement that the investor litigate the dispute first in local courts. The D.C. Circuit court vacated UNCITRAL's ruling finding that it did not have authority to hear the dispute. *Republic of Argentina v. BG Group PLC*, 665 F.3d 1363, 1365–66 (D.C. Cir. 2012). The U.S. Supreme Court reversed that decision because treaties should be treated as normal contracts. As such, the local litigation requirement is "for the arbitrators [to decide], and courts must review their determinations with deference." BG Grp. PLC v. Republic of Argentina, 134 S. Ct. 1198, 1204 (2014); *See also* BG Group Plc. v. The Republic of Argentina, UNCITRAL (2013), www.italaw.com/cases/143.

48. UNCTAD Series II, *supra* note 25, at 39.

49. Pia Eberhardt & Cecilia Olivet, *Profiting From Injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom* (2012).

50. *Id*. at 71.

51. *Id*. at 8.

52. Disputes take many years to complete and cost massive amounts of money. "[L]egal and arbitration costs for the parties in recent ISDS cases have averaged over USD 8 million with costs exceeding USD 30 million in some cases." ORG. FOR ECON. CO-OPERATION & DEV., INVESTOR-STATE DISPUTE SETTLEMENT PUBLIC CONSULTATION 18 (May 16–July 9, 2012), http://www.oecd.org/

In addition, the make-up of decision-makers is not representative of the parties. Sixty-eight percent of the arbitrators, conciliators, and ad hoc committee members that judge the tribunal cases are from North America and Western Europe, while their home countries represent only 6% of all state respondents in ICSID cases.[53] The small number of unrepresentative attorneys who function as arbitrators and lawyers in ISDS disputes is not a unique challenge, even in the international economic legal community.[54] The World Trade Organization has also been criticized for choosing insiders as appellate panelists.[55]

The third category of criticism is the ultimate consequences of these provisions on the rights of individual citizens or the environment. For example, grassroots organizing in El Salvador and activists world-wide have been fighting Pacific Rim Mining Corporation's 2009 ISDS claim to try and prevent Pacific Rim from mining in El Salvador.[56] Summarizing all three criticisms, one trade activist group described the anticipated impact of an ISDS provision in the Trans-Pacific Partnership as follows: "This regime empowers corporations to skirt national courts and sue our governments before tribunals of private sector lawyers operating under UN and World Bank rules to demand taxpayer compensation for domestic regulatory policies that investors believe diminish their 'expected future profits.'"[57]

### *C. International Environmental Protection Measures*

There are major concerns associated with using trade to establish or enforce social priorities on a global scale.[58] While somewhat unusual with regard to the inherent multi-national nature of certain environmental

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investment/internationalinvestmentagreements/50291642.pdf; *See also* Investor–State Disputes: Prevention and Alternatives To Arbitration, 16–18 (2010), http://unctad.org/en/docs/diaeia200911_en.pdf; William Park & Guillermo Aguilar Alvarez, *supra* note 30.

53. The ICSID Caseload—Statistics, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES 11, 18 (2013), *available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English 41.

54. RAJ BHALA, *supra* note 12, at 167.

55. *Id.*

56. *See, e.g.*, *Empowering People and Protecting Rights in El Salvador: Resistance to Pacific Rim Mining Company*, CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW (Summer 2014), http://www.ciel.org/HR_Envir/PacRim_Home.html. For more discussion of this case, *see infra* note 91.

57. *TPP's Investment Rules Harm The Environment*, PUBLIC CITIZEN http://www.citizen.org/documents/fact-sheet-tpp-and-environment.pdf (last visited Oct. 31, 2014).

58. RAJ BHALA, *supra* note 12.

challenges such as air or water pollution and climate change, debate around the environmental impact and incorporation of environmental concerns into trade agreements largely tracks other social issues. For example, many ISDS disputes are related to mining rights in developing nations that are often rejected by communities due to environmental and public health concerns.[59] General arguments against free trade tend to similarly focus on the disparate impact on developing nations rooted in the trade structure.[60] For example, environmental deterioration will disproportionately impact the poor and citizens of developing nations. This is due to the presence of harmful extractive industries (like mining), as well as insufficient resources to effectively adapt to climate changes, which will only become more severe as time goes on.[61]

There are thousands of international agreements that establish some form of environmental protection, and these agreements are beginning to build a consensus on what qualifies as environmental protection. In fact, most Free Trade Agreements include explicit language protecting the environment within the trade agreement itself[62] or in side agreements

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59. *See, e.g.*, Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12 (2014), https://icsid.worldbank.org/ICSID/FrontServlet (search "Case No. ARB/09/12"). See *infra* note 88 and associated text for discussion of the case.

60. An alternative that some propose is Fair Trade:

> Fair Trade goods are just that. Fair. From far-away farms to your shopping cart, products that bear our logo come from farmers and workers who are justly compensated. We help farmers in developing countries build sustainable businesses that positively influence their communities. We're a nonprofit, but we don't do charity. Instead, we teach disadvantaged communities how to use the free market to their advantage. With Fair Trade USA, the money you spend on day-to-day goods can improve an entire community's day-to-day lives.

*What is Fair Trade?*, FAIR TRADE USA, http://fairtradeusa.org/what-is-fair-trade (last visited Sept. 10, 2014).

61. This concern is variously referred to as Environmental Justice, Environmental Equity, and Environmental Racism. There has been a significant amount of research conducted on disparities both domestically and internationally about the ability to prevent environmental harm as well as ability to respond and protect the health of citizens in various regions. *Environmental Justice and Equity*, XIII SUSTAIN. DEV. LAW POLICY 1 (2012); Robert R. Kuehn, *A Taxonomy of Environmental Justice*, ENVIRON. LAW REPORT 10681 (2000).

62. CAFTA's investment chapter (Chapter 10) incorporated a slightly stronger provision than just "protecting the environment," but is still viewed by environmentalists to be insufficient. Earthjustice, Friends of the Earth, Conservation Voters, National Environmental Trust, National Wildlife Federation, Sierra Club, & U.S. Public Interest Research Group, *U.S. Groups Oppose the Central American Free Trade Agreement: The CAFTA Signed Today Falls Short on the Environment*, PUBLIC CITIZEN (May 28, 2004), www.citizen.org/documents/CAFTA_Fact_Sheet_Enviro.pdf. In 2011, the Organization for Economic Cooperation and Development published a survey of environmental considerations within 1,623 trade agreements. Two of the findings: (1) The first time environmental language was included in international investment agreements is in the 1985 China-Singapore Bilateral Investment Treaty. (2) Sixteen treaties include provisions allowing environmental experts to consult ISDS panels for environmental disputes. Kathryn Gordon & Joachim Pohl, *Environmental Concerns in International Investment Agreements: A Survey*, OECD Working Papers

following a pattern.[63] The International Environmental Agreements Database Project has 3,085 binding agreements,[64] 519 non-binding agreements,[65] and 133 of 1,623 international investment agreements include references to environmental concerns.[66]

There are prominent examples of international agreements that have effectively dealt with an environmental challenge and those that have been either ineffective or simply unused. A common comparison is the Montreal Protocol on Substances that Deplete the Ozone Layer signed in 1987, and the Kyoto Protocol to the United Nations Framework Convention on Climate Change signed in 1997.[67] The Montreal Protocol is considered a huge success.[68] The Kyoto Protocol, on the other hand, which was negotiated as a part of the United Nations Framework Convention on Climate Change (UNFCCC) annual meeting of party nations on Climate Change, has been ratified by fewer nations. Moreover, many of the signees are not even complying with their obligations.[69]

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on International Investment, No. 2011/1, OECD Investment Division (2011), at 7–8, 11, www.oecd.org/daf/inv/investment-policy/48083618.pdf.

63. At the same time NAFTA was signed, the same signatory countries established the North American Agreement on Environmental Cooperation (NAAEC) which in turn established the Commission for Environmental Cooperation (CEC) in order "to support cooperation among the NAFTA partners to address environmental issues of continental concern, including the environmental challenges and opportunities presented by continent-wide free trade." About the CEC, COMMISSION FOR ENVIRONMENTAL COOPERATION, http://www.cec.org/Page.asp?PageID=1226&SiteNodeID=310&BL_ExpandID=154 (last visited Oct. 27, 2013).

64. 1,598 Bilateral Environmental Agreements, 1,241 Multilateral Environmental Agreements, and 246 Other. Ronald B. Mitchell, International Environmental Agreements (IEA) Database Project (2002–2014), http://iea.uoregon.edu/page.php?query=home-contents.php (last visited Sept. 28, 2014).

65. *Id*. 206 Bilateral Environmental Non-binding Instruments, 215 Multilateral Environmental Non-binding Instruments, and 98 Other.

66. Kathryn Gordon & Joachim Pohl, *supra* note 62, at 7. This large number indicates that a much larger number of international agreements, with focuses other than the environment, likely attempt to incorporate environmental protections. *Id*. at 22.

67. *See generally* Cass R. Sunstein, *Of Montreal And Kyoto: A Tale Of Two Protocols*, 31 HARV. ENVTL. L. REV. 1 (2007); *see also* Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, S. Treaty Doc. No. 100-10 (1987), 1522 U.N.T.S. 3 [hereinafter "Montreal Protocol"]; Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10 1977, 37 I.L.M. 22, *available at* http://unfccc.int/essential_background/kyoto_protocol/items/1678.php [hereinafter "Kyoto Protocol"].

68. Elizabeth R. DeSombre, *The Experience of the Montreal Protocol: Particularly Remarkable, and Remarkably Particular*, 19 UCLA J. ENVT'L L. & POL'Y 49, 49 (2000/2001) ("By most accounts, the treaty process for addressing ozone depletion is an unqualified success. It has achieved near universal participation, with 170 states party to the Montreal Protocol, and a substantial fraction of those party to the London, Copenhagen, and Montreal Amendments to the Protocol. It has fundamentally changed the way certain industries conduct their business, already creating in some countries a complete phaseout of certain classes of chemicals." (internal citations omitted).

69. Cass R. Sunstein, *supra* note 67, at 4.

One example of an unused international environmental agreement is the dispute resolution provision under the North American Agreement on Environmental Cooperation (NAAEC), negotiated and signed as a part of The North American Free Trade Agreement (NAFTA).[70] The "state-to-state consultation and dispute resolution process" was meant to be the "teeth" of NAAEC, wherein "one country [could] submit a claim against another for a persistent pattern of failure to effectively enforce its domestic environmental laws" in a way that affected trade between the two nations;[71] however, the consultation and dispute resolution process has never been used even though disputes implicating environmental issues have arisen under NAFTA.[72]

In addition, there are multi-national organizations aggressively seeking to build international consensus on climate action.[73] Most prominent is the UNFCCC, which gathers delegates from 190 nations in addition to non-governmental observers for the annual meeting called Conference of the Parties (COP).[74] These meetings work towards creating and enforcing a binding agreement on how responsibility to mitigate and adapt to climate change will be distributed among participating nations.[75] The Kyoto Protocol, for example, was adopted at COP 3.[76] The last few years have been building up to the 21st COP in 2015 at which a major, binding agreement is anticipated.[77]

Finally, the Intergovernmental Panel on Climate Change (IPCC) is a "scientific body under the auspices of the United Nations" that aims to

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70. Linda J. Allen, *supra* note 2, at 123, 144.

71. *Id*. at 137, 144.

72. *Id*. *See, e.g.*, S.D. Myers, Inc. v. Government of Canada, *infra* note 98.

73. As an example of the frustration felt by environmental activists at the slow pace of an international response to climate change, environment and development non-governmental organizations and other activists walked out of this year's UN Conference on Climate Change (COP 19). Director of Oxfam International, Winnie Byanyima, explained: "We are walking out of these talks because governments need to know that enough is enough. . . . The stakes are too high to allow governments to make a mockery of these talks". Many who chose not to join the walk out share the frustrations of the protesters. John Vidal & Fiona Harvey, *Green groups walk out of UN climate talks Environment and development groups protest at slow speed and lack of ambition at Warsaw negotiations*, THE GUARDIAN (Nov. 21, 2013), http://www.theguardian.com/environment/2013/nov/21/mass-walk-out-un-climate-talks-warsaw.

74. UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://unfccc.int/2860.php (last visited Aug 24, 2014); N.Y. Times Editorial Board, *Running Out of Time*, N.Y. TIMES (Apr.20, 2014), *available at* http://nytimes.com/2014/04/21/opinion/running-out-of-time.html?_r=1&referrer=.

75. *UN Climate Change Newsroom*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://newsroom.unfccc.int (last visited Aug. 24, 2014); U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, *UNFCC Handbook* (1996) [hereinafter UNFCCC Handbook].

76. *UNFCC Handbook*, *supra* note 75, at 18.

77. N.Y. Times Editorial Board, *supra* note 74.

provide the public with a comprehensive overview of the "current state of knowledge in climate change."[78] Participating scientists and member governments periodically publish reports about the state and causes of climate change based on a comprehensive review of scientific, technical, and socio-economic literature.[79] The IPCC published its most recent report, composed of three working group publications, in 2013 and 2014.[80] Whereas UNFCCC intends to bring parties together for action, the IPCC creates reports to guide that action.[81]

## II. THE CHALLENGE OF IMPLEMENTING INTERNATIONAL ENVIRONMENTAL POLICIES THROUGH DISCONNECTED MECHANISMS

Over the last few decades it has become increasingly clear that non-commercial issues are an integral part of investment agreements, both in the development and implementation stages.[82] As more industries and interests realize the power of these large financial structures, more issues that are not purely economic are written into such agreements. For example, the most controversial trade deal currently being negotiated, the Trans-Pacific Partnership (TPP), has over 600 official corporate "trade advisors" but remains hidden from the public. Until very recently, it was even hidden from members of the U.S. Congress who are required to make the agreement binding in the U.S.[83]

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78. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, Organization, http://www.ipcc.ch/organization/organization.shtml (Aug. 24, 2014).

79. *Id*.

80. Reports, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, http://www.ipcc.ch/publications_and_data/publications_and_data_reports.shtml (last visited Oct. 1, 2014).

81. "The Intergovernmental Panel on Climate Change (IPCC) is the leading international body for the assessment of climate change. It was established by the United Nations Environment Programme (UNEP) and the World Meteorological Organization (WMO) in 1988 to provide the world with a clear scientific view on the current state of knowledge in climate change and its potential environmental and socio-economic impacts. In the same year, the UN General Assembly endorsed the action by WMO and UNEP in jointly establishing the IPCC." *Id*.

82. UNCTAD ISDS Report, *supra* note 4.

83. Elizabeth Palmberg, The Insider List, SOJOURNERS, http://sojo.net/blogs/2012/06/29/insider-list (June 29, 2012); Zach Carter, *Alan Grayson On Trans-Pacific Partnership: Obama Secrecy Hides 'Assault On Democratic Government'*, HUFFINGTON POST, http://www.huffingtonpost.com/2013/06/18/alan-grayson-trans-pacific-partnership_n_3456167.html (June 18, 2013); Larry Catá Backer, *The Trans-Pacific Partnership: Japan, China, the U.S., and the Emerging Shape of the New WorldTrade Regulatory Order*, 13 WASH. U. GLOB. STUD. L. REV. 049 (2014), *available at* http://digitalcommons.law.wustl.edu/globalstudies/vol13/iss1/6.

### *A. Survey of Arbitration Cases with Environmental Issues*

Even when human rights defenses are raised in the context of an ISDS dispute, the arguments are infrequently noted, let alone a factor, in arbitrators' decisions.[84] This appears to be true of environmental defenses as well. There are many possible reasons why human rights and environmental issues are not often successfully raised as defenses in ISDS arbitrations. It could be that such defenses were raised but there is insufficient public documentation for a researcher to determine either way. It also could be that investors usually only bring disputes when the government action should not be defensible based on the language of the agreement; however, given the number of disputes, it is likely that at least some of the cases should be decided for the state based on the spirit of environmental chapters, but those protections lack the necessary teeth to provide a useful defense.

Given the problems with taking investor-state disputes outside of domestic courts, and the distortions within the arbitration system itself, it is not surprising that the record shows environmental laws frequently struck down as violations of some trade agreement. The UN Center on Trade and Development (UNCTAD) maintains a database of disputes arbitrated under ISDS provisions for all Free Trade Agreements it has on record. This includes regional agreements such NAFTA and CAFTA, as well as Bilateral Investment Treaties between two countries, and issue-specific treaties like the Energy Charter Treaty.[85] In total, the database includes 561 disputes.[86] Documentation and reporting is inconsistent as it is "primarily built on information provided by governments on a voluntary basis."[87] The database does include a substantial amount of information

84. Susan L. Karamanian, *The Place Of Human Rights In Investor-State Arbitration*, 17 LEWIS & CLARK L. REV. 423, 426–28 (2013).

85. IIA Databases, United Nations Conference on Trade and Development, http://unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20(IIA)/IIA-Tools.aspx. Initially I tried searching the database for environment-related disputes using the "Nature of Claim" category. However, a significant number (possibly a majority) or cases have no description in this column. Instead, I copied the database into an excel spreadsheet and looked through all the information provided to flag the ones the looked the most promising based primarily on the nature of the claim, the treaty it was under (for example, I looked more carefully at a dispute that arose under the Energy Charter Treaty), if the investor was a mining company or other common offender, and finally whether the case was mentioned in any of my other research. Lastly, I eliminated the cases for which there was insufficient documents (either on the UNCTAD database or elsewhere) to evaluate the nature of the arguments.

86. IIA Databases, *supra* note 85.

87. As is common with arbitration generally and commercial arbitration specifically, much of the procedure is confidential. Sanford E. Gaines, *supra* note 7, at 177.

when available, including: the nature of the argument, legal issues, the controlling treaty, venue for arbitration, the decision and the final award.[88]

Based on the available information and research conducted by outside groups, there are forty-six relevant cases for environmental disputes.[89] Of those cases, seven were awarded in favor of the investor, four in favor of the state, twenty-five were settled, twenty-four are pending, and three are unknown.[90] The following nine cases are examples of the types of controversies at issue (listed in reverse chronological order): Pacific Rim Mining Co. v. El Salvador (pending);[91] Lone Pine Resources Inc. v. Canada (pending);[92] Commerce Group v. El Salvador;[93] Chevron Corp. v.

88. IIA Databases, *supra* note 85.

89. The disputes that I have included in this sample do not always include complete documents about the substantive legal dispute or nature of the investment at issue due to secrecy and lack of a formal centralized process for managing this information. As a result, I have included cases based on the type of investment described in the database without more information. Descriptions that were sufficient for inclusion include most commonly mining, oil and gas, electric power generation, landfill, and coal exploration.

I chose to include these cases because often times the actual legal issue is secondary. Environmentalists are ultimately concerned about ensuring the effective implementation of domestic laws when the spirit and purpose are technically in violation of a trade law.

90. UNCTAD Database of ISDS Cases, *supra* note 85.

91. Pacific Rim Cayman, a U.S.-based a gold mining corporation, submitted a claim to arbitration against the Republic of El Salvador under CAFTA Chapter 10 in ICSID regarding a mining permit in El Salvador. The dispute is ongoing. Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12 (2008), http://www.italaw.com/cases/783. Pacific Rim Cayman LLC v. The Republic of El Salvador, Notice of Intent, 1–2 (2008). *See also* Marcos Orellana, Amicus Brief Highlights the Environmental and Human Rights Impacts of Mining in $77 Million Investment Arbitration Case, THE CTR. FOR INT'L ENVTL. LAW (Mar. 4, 2011), http://www.ciel.org/HR_Envir/PAC_RIM_4Mar11.html; Inter-Faith Committee on Latin America, El Salvador Environmental Defense Bulletin, ST. LOUIS INTERFAITH COMMITTEE ON LATIN AMERICA (2013), http://www.ifcla.net/site2/?p=14129.

92. U.S. Lone Pine, an American company, launched a $250 million investor-state case against Canada in 2012 for its moratorium on hydraulic fracturing (also known as "fracking"). This case was brought under NAFTA in UNCITRAL and is pending. Lone Pine Resources Inc. v. The Government of Canada, Notice of Intent to Submit a Claim to Arbitration Under Chapter 11 of NAFTA (Pending), (2013), www.italaw.com/cases/documents/1607; TPP'S INVESTMENT RULES HARM THE ENVIRONMENT, *supra* note 57.

Supporters of fracking say that it is a way for countries to access natural gas, create jobs, and increase domestic sources of energy. Opponents argue that the risk of chemicals contaminating water and soil, as well as potential increases in earthquakes, make the process very risky. David Biello, *Fracking Can Be Done Safely, but Will It Be?*, SCIENTIFIC AMERICAN (May 17, 2013), http://www.scientificamerican.com/article.cfm?id=can-fracking-be-done-without-impacting-water.

93. Starting in 1987, the Commerce Group and San Sebastian Mining were granted various exploitation cessions from the government of El Salvador to explore potential mining sites and mining permits. Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. The Republic of El Salvador, ICSID Case No. ARB/09/17, 18–20, NOTICE OF ARBITRATION 2 para. 7 (2013), http://www.italaw.com/cases/296. In 2006, the El Salvador Ministry of Environment and Natural Resources revoked claimant's licenses. Claimants challenged this revocation in Salvadorian courts. *Id.* at 4 para. 22. In 2009, prior to a decision in Salvadorian courts, claimants filed Notice of Arbitration in ICSID under Articles 10.16.3 and 10.16.4 of CAFTA. *Id.* at 4 para. 24. *See also* Douglas González, *El Salvador*

Ecuador;[94] LG&E Energy Corp. v. Argentine Republic;[95] MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile;[96] Methanex Corp. v. United States;[97] S.D. Myers Inc. v. Canada;[98] Metalclad v. United Mexican States;[99] and Ethyl Corp v. Canada.[100]

As with most litigation, the mere act of bringing (or threatening to bring) a case influences behavior given the investment of time, money, and reputation ISDS arbitration demands. In international arbitration, the monetary cost is often millions of dollars.[101] For most of the countries

*won case with Commerce Group!*, ST. LOUIS INTERFAITH COMMITTEE ON LATIN AMERICA (2013), http://www.ifcla.net/site2/?p=14198.

94. This dispute was brought in UNCITRAL under the Ecuador-United States Bilateral Investment Treaty. Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador, UNCITRAL, PCA Case No. 2009-23 (2013), http://italaw.com/cases/257. The controversy continues to be controversial given the massive judgment against Chevron and pending related cases in the U.S. *See, e.g.*, Bill Hamilton, *David v. Goliath: An Update on the $19 Billion Judgment in Ecuador Against Chevron,* CSR WIRE (2013), www.csrwire.com/press_releases/35602-David-v-Goliath-An-Update-on-the-19-Billion-Judgment-in-Ecuador-Against-Chevron; Sally Burch, *Ecuador's Campaign: "The Dirty Hand of Chevron,"* TRUTHOUT (Sept. 25, 2013), truth-out.org/opinion/item/19016-ecuadors-campaign-the-dirty-hand-of-chevron.

95. The dispute was brought in ICSID under the Argentina-United States BIT. LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic, Decision on Liability (2008), http://italaw.com/cases/documents/623.

96. This dispute was brought in ICSID under the Chile-Malaysia Bilateral Investment Treaty. MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, (2007), http://www.italaw.com/cases/717 (last visited Feb. 18, 2014).

97. The dispute was brought in UNCITRAL under NAFTA. Methanex Corporation v. United States of America, (2005), http://italaw.com/cases/683; Sanford E. Gaines, *supra* note 7, at 183–84.

98. S.D. Meyers remediates polychlorinated biphenyl contamination through incineration. In order to gain access to the Canadian market, it had to lobby the U.S. Environmental Protection Agency to relax its ban on the movement of such chemicals. The dispute was brought in UNCITRAL under NAFTA. Ultimately, Canada's export ban on PCD waste was found to have more of a protectionist purpose, rather than a bona fide environmental regulation. The burden is especially high on governments to prove the legitimacy of their environmental regulation when one firm, in this case S.D. Meyers, is impacted. Sanford E. Gaines, *supra* note 7, at 180–82; S.D. Myers, Inc. v. Government of Canada, Second Partial Award (2004), http://italaw.com/cases/documents/977.

99. "In Metalclad, local authorities in Guadalcazar, Mexico denied a construction permit for the investor's hazardous waste facility, even though the competent federal authorities had already granted all necessary environmental approvals. In reaching their decision, the local authorities gave the investor no notice, provided no opportunity to be heard, and identified no construction defects in the facility. Later, the outgoing governor of the State of San Luis Potosi decreed the site to be part of an ecological preserve. The tribunal unanimously held that these two actions permanently barred operation of the facility and, therefore, constituted an indirect expropriation and a measure tantamount to expropriation, respectively." Charles H. Brower II, *supra* note 7, at 48.

100. The dispute was brought in UNCITRAL under NAFTA. Ethyl Corporation v. The Government of Canada, 182–83 (1998), http://www.italaw.com/cases/409.

101. Disputes take many years to complete and cost massive amounts of money. "[L]egal and arbitration costs for the parties in recent ISDS cases have averaged over USD 8 million with costs exceeding USD 30 million in some cases." INVESTOR-STATE DISPUTE SETTLEMENT PUBLIC CONSULTATION, 18 (May 16–July 9, 2012). http://www.oecd.org/investment/international investmentagreements/50291642.pdf; Investor–State Disputes: Prevention and Alternatives to Arbitration, 16–18 (2010), http://unctad.org/en/docs/diaeia200911_en.pdf; William Park & Guillermo

defending their decisions in an international tribunal, that amount of money can have a significant impact on the countries' ability to provide basic government services for its people.[102] There is a strong incentive for states to settle, even when they are likely to or should win, in order to avoid such lengthy litigation with foreign investors that have the resources to fund multi-year, multi-million dollar disputes.[103]

### *B. The Trans-Pacific Partnership*

The respective rights of investors and States are of particular importance right now as 12 countries[104] near the conclusion of the massive and highly controversial Trans-Pacific Partnership (TPP) negotiations.[105] The TPP is a major regional Free Trade Agreement that is being heralded by supporters as an effective way to boost global trade by bringing together countries that produce over 40% of the world's gross domestic product (GDP).[106] Furthermore, this trade agreement would fit into the Obama Administration's "pivot to Asia" by increasing connectivity.[107] Opponents of the TPP have reacted to the size by ominously referring to it as "NAFTA on steroids" with regards to its potential impact on labor, the environment, and other such issues.[108]

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Aguilar Alvarez, *supra* note 30, at 367, 380, 382. Recently, an investor was awarded $50 billion in a dispute against Russia. *UPDATE 7-Court orders Russia to pay $50 bln for seizing Yukos assets*, REUTERS (July 28, 2014), http://www.reuters.com/article/2014/07/28/russia-yukos-idUSL6N0Q30QX20140728.

102. In this report, the authors provide context for the real impact of government money being spent on frivolous arbitration rather than services. For example: "In the case of Plama Consortium v Bulgaria, . . . [the claim] was ultimately found to be fraudulent. . . . [but Bulgaria was] forced to pay . . . US$6,243,357 [in legal fees]. At that time Bulgaria was grappling with a healthcare crisis due to a shortage of nurses—the money could have paid the salaries of more than 1,796 Bulgarian nurses." Pia Eberhardt & Cecilia Olivet, *supra* note 49, at 15.

103. *Id*.

104. Currently, Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam have committed to the TPP negotiations. Trans-Pacific Partnership Leaders Statement, Office of the United States Trade Representative, http://www.ustr.gov/about-us/press-office/press-releases/2013/october/tpp-leaders-statement (last visited Oct 28, 2013). Some predict that China will eventually join the TPP as well. Wellington, *China unlikely to join TPP trade talks anytime soon—NZ trade minister*, REUTERS (Oct. 15, 2013), http://www.reuters.com/article/2013/10/15/newzealand-china-tpp-idUSL3N0I542F20131015 (last visited Oct 28, 2013).

105. *See, generally* Larry Catá Backer, *supra* note 83.

106. *Free trade in the Pacific: A small reason to be cheerful*, THE ECONOMIST, (November 19, 2011), http://www.economist.com/node/21538758 (last visited Oct, 28, 2013).

107. Matt Schiavenzaapr, *What Exactly Does It Mean That the U.S. Is Pivoting to Asia? And will it last?*, THE ATLANTIC (Apr. 15 2013), http://www.theatlantic.com/china/archive/2013/04/what-exactly-does-it-mean-that-the-us-is-pivoting-to-asia/274936/.

108. Lori Wallach, *supra* note 44. On Jan. 15, 2014, the Environmental Chapter of TPP was

TPP negotiations have been conducted in private, so concerns about the agreement are based on that privacy, the parties which are known to have been at the negotiating table, and chapters that have been leaked to the public. The negotiations have been so secretive that even members of the U.S. Congress, who are required to approve by two-thirds for any treaty to be ratified in the U.S.,[109] had been kept totally in the dark until recently when certain members of congress made a lot of noise and were granted limited viewing rights;[110] however, it has been reported that more than 600 corporate advisors, including Halliburton and Monsanto, have had access to the agreement all along.[111]

Three essential chapters were leaked in the past two years: The Intellectual Property,[112] Investment,[113] and Environmental[114] Chapters. Organizations like the American Civil Liberties Union, not normally

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leaked to the public by WikiLeaks. Secret TPP Treaty: Environmental Chapter for all 12 nations, WIKILEAKS (Nov. 24, 2013). The chapter is much like other environmental treaties: aggressively advocating for environmental protection while providing almost no mechanisms for actual enforcement of the ideas within it.

Lori Wallach, *supra* note 44, at 14:54 ("'This is not mainly about trade,' says Lori Wallach, director of Public Citizen's Global Trade Watch. 'It is a corporate Trojan horse. The agreement has 29 chapters, and only five of them have to do with trade. The other 24 chapters either handcuff our domestic governments, limiting food safety, environmental standards, financial regulation, energy and climate policy, or establishing new powers for corporations.'").

109. According to the US Trade Representative, Fast Track or Trade Promotion Authority legislation has been enacted by Congress since 1974 in order to grant the president the authority needed to negotiate on equal footing with global leaders. Trade Promotion Authority, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, http://www.ustr.gov/trade-topics/trade-promotion-authority (last visited Oct. 28, 2013). To supporters, it is "absolutely critical." David Cay Johnston, *Fast track stopped, but is it dead?*, AL JAZEERA AMERICA, http://america.aljazeera.com/opinions/2014/1/harry-reid-fast-tracktradeagreements.html (last visited Feb. 18, 2014). To critics, however, it hinders public debate and the checks and balances envisioned by the framers of the U.S. Constitution when they decided the president would sign treaties with the consent of two-thirds of Congress. *Id*. On January 9, 2014, a bill was introduced in the U.S. Senate to grant the White House fast-track authority. That bill was rejected by the senate. *Id*.

110. Carter, *supra* note 83.

111. "More than 600 representatives of corporations are able to view draft versions of the deal because of their positions on government advisory boards, while only a handful of nonprofit groups have the same privilege. Members of such boards are not permitted to share information about the documents with the public. Staff members from both Republican and Democratic congressional offices have also been denied access to the documents." Zach Carter, *Trans-Pacific Partnership Talks: Senators Demand Access To Controversial Documents After Leak Huffington Post (1920)*, http://www.huffingtonpost.com/2012/06/25/trans-pacific-partnership-documents-sherrod-brown-jeff-merkley-ron-wyden-robert-menendez_n_1624956.html (last visited Jan 11, 2014); Lori Wallach, *supra* note 44.

112. Secret Trans-Pacific Partnership Agreement (TPP)—IP Chapter (2013), *available at* https://wikileaks.org/tpp/.

113. TPP Investment Chapter (leaked) (2012), *available at* http://www.citizenstrade.org/ctc/wp-content/uploads/2012/06/tppinvestment.pdf; More Power to Corporations to Attack Nations.

114. TPP Environment Chapter (leaked) (2014), https://wikileaks.org/tpp-enviro/.

focused on trade agreements, have sounded the alarm about the Intellectual Property chapter in the TPP as potentially limiting free speech and access to the Internet in the U.S.[115]

The leaked investment chapter shows a text substantially similar to the now-common ISDS provisions in International Investment Agreements, much like NAFTA's Chapter 11, but also shows the beginnings of internal disagreement regarding the inclusion of ISDS provisions.[116] There is a footnote that states: "[ISDS provisions do] not apply to Australia or an investor of Australia."[117] Australia is currently the only TPP partner that is refusing to sign on to ISDS provisions in the TPP.[118]

The leaked Environmental Chapter is most notable for its lack of teeth.[119] Since 2007, Congress has effectively ensured that bilateral trade agreements include robust, enforceable environmental chapters, similar to labor- and agriculture-specific provisions.[120] The leaked chapter seems to reflect both a retreat from that strong environmental position, and perhaps the challenge of negotiating with 12 nations in varying economic and environmental positions.[121]

## III. CHOOSING A STANDARD: EMPOWERING OR REQUIRING ARBITRATORS TO CONSIDER INTERNATIONAL AGREEMENTS ON ENVIRONMENTAL PROTECTION

Trade is a powerful mechanism for creating systems that incentivize certain behavior because governments and citizens alike value economic

115. *The Biggest Threat to Free Speech and Intellectual Property That You've Never Heard Of*, AMERICAN CIVIL LIBERTIES UNION, https://www.aclu.org/blog/free-speech-technology-and-liberty-national-security/biggest-threat-free-speech-and (last visited Feb. 14, 2014); *Interview with the ACLU: TPP is a Major Threat to Free Speech, Privacy, and Due Process*, ELEC. FRONTIER FOUND., https://www.eff.org/deeplinks/2012/09/aclu-joins-TPP-debate (last visited Feb. 14, 2014).

116. TPP Investment Chapter (leaked), *supra* note 113.

117. *Id*. at 18.

118. Amy Schwebel, *TPP: The fight over investment rights*, THE INTERPRETER (2013), http://www.lowyinterpreter.org/post/2013/08/01/TPP-The-investment-chapter-fight.aspx; Kyla Tienhaara & Patricia Ranald, *Australia's rejection of Investor-State Dispute Settlement: Four potential contributing factors*, Investment Treaty News (2011), http://www.iisd.org/itn/2011/07/12/australias-rejection-of-investor-state-dispute-settlement-four-potential-contributing-factors/ (last visited Oct. 19, 2013).

119. Coral Davenport, *Administration Is Seen as Retreating on Environment in Talks on Pacific Trade*, N.Y. TIMES (Jan. 15, 2014), http://www.nytimes.com/2014/01/15/us/politics/ administration-is-seen-as-retreating-on-environment-in-talks-on-pacific-trade.html (last visited Feb. 15, 2014) ("As of now, the draft environmental chapter does not require the nations to follow legally binding environmental provisions or other global environmental treaties. The text notes only, for example, that pollution controls could vary depending on a country's 'domestic circumstances and capabilities.'").

120. *Id.*

121. *Id.*

prosperity.[122] Many parties, including governments, multinational corporations, non-profit organizations, or power individuals, have thus tried to use trade agreements to further their interests. Furthermore, citizens groups, politicians, and negotiators have largely been unable to develop international agreements outside of trade to effectively confront issues such as climate change because of their inability to reach consensus on the equitable dispersion of burden. This is partially due to normal collective action problems, but also due to the role that pollution played in much of the developed worlds' industrialization process as well as technical challenges more unique to environmental solutions.[123]

The following four suggestions touch on issues caused by ISDS generally and environmental concerns in particular. The first is to include a truly enforceable clause in Free Trade Agreements that allows for any environmental policy to take precedent if consistent with the findings and recommendations of an international body such as the Intergovernmental Panel on Climate Change (IPCC), agreements made during the United Nations Framework Convention on Climate Change Conference of the Parties (COP), or any of the many previously cited to environmental agreements on non-Climate Change issues.

Investors are worried that governments will create trade barriers for the purpose of protecting a domestic market and claim it is for environmental purposes.[124] If there is an agreement at COP 21 in 2015, there will be a

122. *See, e.g.*, PEW RESEARCH, CTR. FOR THE PEOPLE AND THE PRESS, FOR VOTERS IT'S STILL THE ECONOMY (2012), http://www.people-press.org/2012/09/24/for-voters-its-still-the-economy/ (last visited Feb. 17, 2014).

123. For one proposed solution see Mathias Risse, *Who Should Shoulder the Burden? Global Climate Change and Common Ownership of the Earth*, JOHN F KENNEDY SCH. GOV. HARV. UNIV. (2008) ("Philosophically [the] most plausible understanding of collective ownership of the earth does not support an equal-per-capita principle, not does it support certain versions of a principle of accountability for past emissions. Instead, we end up with a combination of 'polluter pays' and 'ability to pay' principles").

124. One of the most prominent World Trade Organization (WTO) cases, Import Prohibition of Certain Shrimp and Shrimp Products (commonly known as "Shrimp-Turtle"), involves environmental issues and epitomizes this fear. In Shrimp-Turtle, a group of Asia countries challenged a U.S. law that required shrimp sold in the U.S. to have been caught on boats using certain technology that allowed endangered sea turtles to escape if caught in fishing nets. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 46 (Oct. 12, 1998) [hereinafter "Shrimp-Turtle"]; The General Agreement on Tariffs and Trade (GATT 1947), *supra* note 20, Art. XX(g). The U.S. argued this rule was permitted under Article XX(g) because it was "relating to the conservation of exhaustible natural resources." Peter Morici, ECON. STRATEGY INST., RECONCILING TRADE AND THE ENVIRONMENT IN THE WORLD TRADE ORGANIZATION 78–83 (2002). The Appellate Body, however, found that the measure was an "unjustifiable discrimination among trading partners." *See* Shrimp-Turtle, *supra*. This case is emblematic because the U.S. claimed to be protecting endangered sea turtles, but to the countries that brought the dispute and the WTO Appellate

well-developed, heavily negotiated rubric for arbitrators to use in determining whether or not an environmental policy is an unjustifiable trade barrier or a necessary action to protect an essential domestic policy. Furthermore, since one of the most popular arbitration forums is a branch of the UN, it would be reasonable for the institution to recognize an agreement facilitated by another branch as a valid baseline for determining the authenticity of environmental protection. If no agreement is made at COP 21, the arbitrators can still utilize non-binding agreements or the extensive reporting put out by the Intergovernmental Panel on Climate Change, for example, to determine whether the state's actions are reasonably consistent with the international consensus on actions that are needed on the state level.

The second suggestion is to include greater expertise on the panel of arbitrators. Arbitration panels already include a rotating set of judges who are active legal practitioners. If either party is making an environmental claim, one of the three judges should have expertise in the area based on a previously agreed upon set of criteria, perhaps determined by the international body selected for the previous suggestion.[125] This model could also apply to other contentious issues surrounding ISDS such as labor rights and food policy, although the scientific expertise may prove more essential to disputes based in environmental laws and policies.

A third suggestion is that we return to a system that requires the use of domestic judiciaries or require more rigorous proof that said system would be unfair.[126] A positive side effect of relying more on domestic courts rather than international arbitration is that countries interested in attracting industry would be incentivized to improve their domestic judicial systems, which could positively impact other rights that can be protected through litigation.

The final suggestion is to rethink the entire method of dispute resolution given the lack of trust the current method has engendered. Arbitration is meant to be a cheaper, faster, and a less procedural dispute

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Body, it was a trade barrier with an insufficient environmental purpose to trigger an exception to GATT-WTO rules.

125. Some Bilateral Investment Treaties and other Free Trade Agreements, including NAFTA, already allow for an expert to be consulted. Kathryn Gordon & Joachim Pohl, *supra* note 62, at 22. I had difficulty determining how often this was actually utilized. However, I would encourage going a step further. There should be an environmental expert in a position of more authority than simply consulting, perhaps one of the arbitrators, as a party can always request that an expert file an *amicus brief*. Furthermore, it has the potential to give the proceedings more credibility with those primarily concerned about the environment (or health or safety). I suggest much more widespread use and standardization of this expert arbitrator.

126. *See supra* note 47.

resolution mechanism; however, in the international commercial setting, this is no longer the case.[127] Furthermore, activist activity against the results of these disputes and government hesitance to continue signing trade agreements that include ISDS provisions at the very least indicate a lack of trust in the system. There is a growing interest within the dispute resolution legal community to extend theories of Procedural Justice to international contexts.[128] The idea is that a more equitable process should result in more equitable outcomes.

## CONCLUSION

As we move into an era of expanding trade "partnerships"[129] with larger regions of the world and wealthier companies that transcend national boundaries (and sometimes nationalism), the international structures become ever more important. International dispute resolution is likely to continue to be more common and, therefore, more powerful. The current trajectory is unsustainable in terms of cost in time, money, and preservation of state sovereignty. Transparency goes a long way to ensure accountability for judicial systems, but the systems themselves need to be sound.

The environmental protections built into the current international mechanisms reflect, in large part, the interests that have a strong voice at the table when those agreements are negotiated and established. Trade and environmental protection are independently complicated and controversial policy issues. Environmental protection involves balancing scientific understanding of urgency, cost, and feasibility with the need to ensure that regulatory burdens are distributed equitably among relevant impacted

127. *See supra* note 52.

128. Procedural justice is the idea that the procedure is integral, or at least not incidental, to the parties' sense of justice, regardless of the outcome of a dispute. There have been numerous studies done that indicate if a person feels like their concerns have truly been heard, the will feel like justice had been done even if they *knew* their input had no impact on the proceedings or outcome. *See* Part III for a discussion of procedural justice specifically in the context of international arbitration. Nancy A. Welsh & Andrea Kupfer Schneider, *The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration*, HARV. NEGOTIATION L. REV. 71, 95–96 (2013) ("If parties perceive a dispute resolution or decision-making process as procedurally fair, they are more likely to perceive the outcome as substantively fair even if it is adverse to them, comply with that outcome, and perceive the institution that provides or sponsors the process as legitimate.").

129. The TPP and another Free Trade Agreement currently being negotiated between Europe and the U.S., the Transatlantic Trade and Investment Partnership (T-TIP), have elected to include the term "partnership" in the name rather than "free trade" even though they are Free Trade Agreements. It seems to be reflecting the souring of public opinions of free trade. However, it also feels like a semantic method of distinguishing between the last two decades of trade with a new model going forward.

groups. Trade agreements require similar practical and equitable considerations but with regards to opportunity for economic growth and necessary levels of protection. For there to be an effective and binding international commitment to protect the environment and mitigate climate change, the above mentioned protections need to be created and implemented by those who understand the complexity of both environmental and international economic law. Furthermore, the protections need to be woven into the legal structures, and not simply a chapter that has little impact on parties' behavior and the resolution of disputes.

This Note demonstrates to readers and policy makers that even an environmental chapter is often not a sufficient device for environmental protection, or any other important public right, when that chapter is not enforceable. Instead, there needs to be an outside measuring stick by which arbitrators can consider the environmental objective in decision making and determine whether a state's action is authentic or an unjustifiable trade barrier. There are many organizations and people working on creating documents and agreements that reflect such a consensus. As awareness of the TPP and T-TIP grow among citizens and influence politicians and the effects of climate change become more severe, the need to incorporate the efforts of governments and private entities seeking an environmental and climate changes consensus into international economic law and dispute resolution will become more urgent.

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