Effective, accountable and inclusive institutions?

An analysis of the Chevron v. Ecuador (II) investment arbitration and the Lago Agrio environmental justice movement

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ABSTRACT

The international investment agreement regime, one of the more obscure global institutions, has a significant impact upon how states, local governments and communities develop. Many investment agreements include investor-state dispute settlement (ISDS) mechanisms, which seek to protect investors from unjust expropriation by host states. Yet, the implications of such a mechanism for fulfilling the vision of the United Nation's Sustainable Development Goals (SDGs) have never been studied. This thesis examines the ISDS mechanism by conducting a case study of the Chevron v. Ecuador (II) [CvE2] investment arbitration.

The thesis analyses case documents such as hearing transcripts, decisions and submissions to identify the discourses at work within the arbitration; determine the implications of such discourses for processual developments; and explore how such processes influence the space afforded to those nongovernmental organisations and environmental justice groups affected by the arbitration. The research utilises an analytical framework informed by critical development theory and environmental justice theory, to demonstrate that the CvE2 arbitration is dominated by an exclusive discourse that prioritises a strict adherence to international investment law, to the exclusion of other principles such as those of international human rights law and environmental law. The dominance of such a discourse reduces the legitimacy of the institution and its rulings for many key stakeholders. The findings also reveal that marginalised stakeholders, such as environmental organisations representing indigenous communities, were refused access to the arbitrations though they were materially affected by the claims, and additionally, were denied consideration - whereby the material impact of the ruling upon the stakeholder group was deemed irrelevant to the proceedings. The findings provide evidence that ISDS, in its current form, is incompatible with the United Nation's goal for 'effective,

accountable and inclusive institutions' (United Nations Development Programme, 2016, p. 1).

This thesis contributes to the scholarship on environmental justice and environmental policy through its analysis of the implications of arbitration mechanisms embedded in international investment regimes for environmental justice claims and, more broadly, the goal of sustainable development. The thesis highlights the need for further research into investor-state investment arbitrations and provides evidence that significant reform is necessary in order for the institution to be reconciled with the SDGs.

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ABBREVIATIONS

CvE2	Chevron v. Ecuador (II) investment arbitration
CDT	Critical development theory
ERI	EarthRights International
EUSBIT	Ecuador-United States Bilateral Investment Treaty
EJG	Environmental justice group
EJM	Environmental justice movement
EJT	Environmental justice theory
FDI	Foreign direct investment
IISD	International Institute for Sustainable Development
IIA	International investment agreement
ISDS	Investor-state dispute settlement
SAP	Structural adjustment programme
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme

CHAPTER 1 Introduction

Introduction

International conventions, trade and investment agreements, and cooperative blocs all have tangible impacts upon the management of natural resources and how environmental risks are distributed throughout society, regardless of whether the political instrument deals explicitly with the environment (Conca, 1993). Conca (1993) proposes that the “policies and practices that most strongly shape environmental futures lie outside of those arenas that the dominant discourse or customary usage label as ‘environmental’” (p. 313). An example of one such grouping of political instruments is the international investment agreement (IIA) regime, which not only has an impact on resource use but also, most significantly, on questions of environmental justice. Despite the significance of such impacts, the link between investment regimes and environmental justice claims is only just starting to be explored (Pellow, 2001). This thesis aims to examine one of the more opaque global institutions, international investment arbitration, to see how it influences localised justice claims surrounding the management of natural resources.

This research is significant especially in the context of the recent adoption of the Sustainable Development Goals (SDGs) by the United Nations. Goal 16 of the SDGs is to “promote peaceful and inclusive societies, provide access to justice and build effective, accountable and inclusive institutions” (United Nations Development Programme [UNDP], 2016, p. 1). The goal is largely localised and focuses on capacity building at a national and community level (UNDP, 2016). As such, it lacks a consideration of global institutions such as ISDS and their influence upon states and citizens. Historically, investment agreements have been conducted in a vacuum, free from any reference to the environment or social justice considerations. However, over the past decade the United Nations has been encouraging states to make investment 'sustainable' (United Nations Conference on Trade and Development [UNCTAD], 2016). In its 2016 World Investment Report, the United Nations Conference on Trade and Development claims, "reform to bring the IIA regime in line with today's sustainable development imperative is well under way. Today, the question is not about whether to reform, but about the what, how and extent of such reform" (2016, p. 108).

A major component of the IIA regime is Investor-State Dispute Settlement (ISDS), an arbitration mechanism that allows foreign investors to sue host governments. ISDS has been critiqued and analysed from a variety of different academic disciplines. Most commonly, the institution is explored within the field of economics, attempting to establish a causal link between the growth or decline of foreign direct investment (FDI) and the proliferation of investment treaties containing ISDS provisions (Abbot, et al., 2014; Bonnitcha, 2014; Sachs & Sauvant 2009). Understandably, in light of the absence of comprehensive historical data, the economic literature is conflicted as to the magnitude and validity of these links. Additionally, the legal aspect of ISDS has been examined thoroughly (Faunce, 2015; Jaime, 2014; von Moltke & Mann, 2001; Reinisch, 2013; Rivkin et al, 2015; Yannaca-Small, 2006), with specific consideration given to balancing private rights with the public good, though the context is firmly grounded within the developed world.

Research Question and Discourse Analysis

In contrast to these approaches, this thesis employs contemporary critical theory to investigate the space afforded to the different stakeholders operating within ISDS. The specific research question is:

> How do discourses present within ISDS arbitrations influence the hearings' processual[1] development and what impact does this have on the space afforded to stakeholders to pursue various justice claims?

In order to explain the power relations and agency afforded to stakeholders within ISDS, this thesis will identify and critically analyse the discourses evident within the institution. Hajer & Versteeg (2005) define a discourse as "an ensemble of ideas, concepts and categories through which meaning is given to social and physical phenomena, and which is produced and reproduced through an identifiable set of practices" (p.175). Discourse analysis is common within the field of environmental policy analysis. Stevenson & Dryzek (2012), two major proponents for the use of discourse analysis in environmental policy, state that the underrepresentation of 'competing' discourses (or the absolute hegemony of a certain discourse) within an institution constrains the institution's capacity to identify and respond to problems. Therefore, by examining discourses researchers are able to explain both stakeholder action and inaction.

Additionally, this research project responds to a gap within environmental justice theory identified by Bustosa, Folchib and Fragkoua (2016), who have suggested that while there is an abundance of analysis aimed at identifying the participation of stakeholders within institutions or development projects, little academic attention is given to identifying which discourses dominate institutional processes.

Critical Development and Environmental Justice

[1] This study makes a distinction between the terms processual and procedural. Procedural refers to normalising regulations, such as the number of arbitrators and the way in which they are appointed, while processual refers to ad hoc developments that influence the way in which the arbitration is conducted.

The disputes arbitrated by Investor State Dispute Settlement (ISDS) panels are not solely economic and often times have significant social and environmental impacts, for example, dealing with issues such as water rights, fossil fuel extraction, intellectual property rights, access to public goods, public health legislation and nuclear material extraction (UNCTAD, 2016). As such, arbitrations often interact with social justice movements.

The growing role of corporations and global institutions in local decision-making presents new opportunities for analytical approaches. Pellow (2001) states that “there is a consistent assumption in the social movement literature that the political process is a strictly political - rather than a political economic - phenomenon” (p. 50). The traditional paradigm of interest groups, such as social movements, unions and corporations, vying for influence over the state is becoming obsolete. Pellow continues stating, “…the transformation of the political process in recent decades has been devastating to the sovereignty and policy-making capacity of nation-states” (Pellow, 2001, p. 65). The state monopoly over policy has been eroded and is increasingly influenced by international institutions and transnational corporations.

Therefore, in this globalised world, environmental justice claims are becoming progressively more complex, with stakeholders having to navigate local, national and international institutions. This research project proposes utilising environmental justice theory (EJT) in conjunction with critical development theory (CDT) as an analytical framework capable of explaining processual developments, power relations and stakeholder agency within the institution of ISDS. EJT is primarily concerned with how environmental risks and resources are distributed throughout society (Schlosberg, 2004) while CDT focuses on the power relations within institutions for development (McGregor, 2009). It is increasingly clear that current analysis of globalised institutions, such as ISDS, requires the implementation of multidisciplinary research methodologies that seek to explain cases in a holistic manner (Bhavnani et al., 2009).

The Case – Chevron v. Ecuador (II)

In order to address the broad research question this thesis investigates one specific prolonged interaction between an indigenous environmental justice movement from Ecuador, an arbitral panel convened under the Ecuador-United States Bilateral Investment Treaty, the Republic of Ecuador and Chevron Corporation. The case is referred to as Chevron v. Ecuador (II) or CvE2. Chevron, a transnational oil corporation, instigated CvE2 in an attempt to quash a local Ecuadorian court's ruling against the corporation[2]. After arbitration commenced, the Ecuadorian court ruled that Chevron should pay compensation of over 8 billion USD in order to remediate environmental devastation from oil extraction activities in the Amazon (District Court of The Hague [DCOTH], 2016). The arbitration has been widely publicised and has been running since 2009.

This thesis will attempt to explain processual development of CvE2 as a political struggle for hegemony (Laclau & Mouffe, 1985). Due to the historically ad hoc nature of ISDS, processual developments are largely at the whim of the arbitrators themselves (United Nations Commission on International Trade Law [UNCITRL], 1976). Therefore, characterising the institution's development as a political struggle allows for an analysis of the various discourses present within the arbitration and how they affect the space afforded to stakeholders.

A Brief Introduction to Investor-State Dispute Settlement

[2] More specifically, to prove that the ruling was obtained via fraud and is therefore unenforceable.

ISDS is intended to allow investors to bypass national judiciaries and pursue a claim against a state in a neutral setting. It is unique among international institutions in that it has arisen largely organically, without oversight and regulations (Abbott, Erixon & Ferracane, 2014). It is an institution which derives its authority from the consent of the parties involved (Lowe, 1999). States enter into investment treaties with one another in which they agree to consent to arbitration. Having signed investment treaties states commit "themselves to standards of treatment under international law, and agree[] that foreign investors could seek to hold them to those standards in international investor-state arbitration proceedings" (Alexandrov, 2005, pp. 21-22).

According to the United Nations Conference on Trade and Development (2016), there are currently over 2000 bilateral investment treaties (BITs) in force, along with over 300 other treaties that contain investment provisions. Generally, investment treaties are between countries at different stages of economic development, such as is the case of the Ecuador-United States Bilateral Investment Treaty (EUSBIT), and are intended to promote FDI, thus benefiting the investors and the host state by kick starting economic development (Neumayer & Spess, 2005). Investment treaties are the foundation of ISDS, without which the institution could not exist. For example, in the case of EUSBIT, the two states agree that "each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration" (U.S. Department of State [DOS], 1997, article IV, para. 4). Here an investment dispute is defined as a disagreement between a state party, and a citizen or corporation of a party concerning an investment (DOS, 1997). There are general guidelines in investment treaties, such as which default arbitration rules should be used and which organization should administer the arbitration, but should the parties agree otherwise they can conduct the process as they see fit (United Nations Commission on International Trade Law (UNCITRL), 1976). Some arbitration rules and administering bodies were established by other international institutions, such as the UN, but the majority operate independently (Abbot et al., 2014). Many arbitrators are vocal in their concerns that states might try to regulate the institution, arguing that it should remain free from ‘political gamesmanship’ to develop endogenously (Naón, 2005; Veeder, 2013).

Data collected from the United Nations Conference on Trade and Development database on ISDS arbitrations shows that arbitration outcomes tend to favour the more developed states (UNCTAD, 2016).

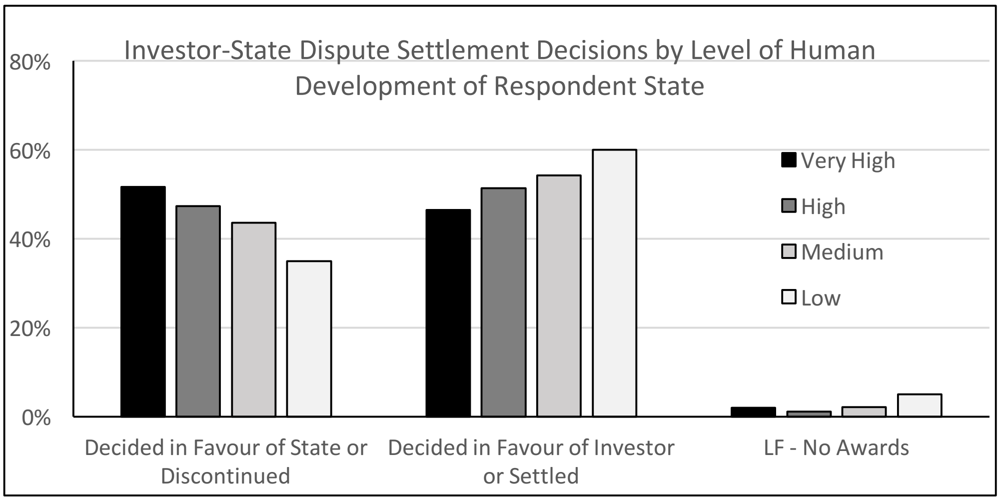

Figure 1: Case Rulings by Percentage against Level of Human Development of Respondent State

As a general rule, as demonstrated by Figure 1, the more developed a state the more likely it is to ‘win’ an arbitration[3]. At a casual glance this may be evidence for systemic bias within the institution, but the uneven nature of the disputes arbitrated makes it misleading to compare outcomes between states of different development levels with net investment flowing from developed economies to undeveloped economies (Neumayer & Spess, 2005). It is exceedingly rare for an investor from a developing economy to pursue a claim against a developed state such as Canada or the

[3] Data includes all publicly released arbitrations up to January 2016 collected from the United Nations Conference on Trade and Development database on ISDS arbitrations.

United States. Claims brought against larger economies are usually from investors based in similarly developed states (UNCTAD, 2015).

The Legitimacy of the International Judiciary

Legitimacy is a central issue for the institution and there is a persistent focus on ensuring or proving its legitimacy to the international community in general and to the separate publics which are effected by the arbitrations. A prevalent theme within ISDS is that it acts as a vanguard for a globalised system of human rights, protecting the individual from “regulatory acts tainted with some form of abuse, whether procedural or substantive” (Vicuña, 2003, p. 197).

However, this utopian vision of ISDS is not unanimously shared and within the institution, there is an acknowledgement of certain institutional flaws. The most relevant to this thesis is that outlined by Phillipe Sands (2002) who has served as an arbitrator on over 20 panels. Commenting on a particular case, he stated that:

> The Tribunal ruled that environmental protection objectives did not have any bearing on the matter, and that norms arising in the field of international environmental law were without effect on the application of established principles and methodologies of valuation based on identifying full and fair market value. In other words, for this tribunal, comprising a most distinguished group of individuals, the international rules for the protection of foreign investment took precedence over any rules of environmental protection - national or international (p. 203).

This points to two conflicting discourses within ISDS and how competing perspectives influence processual development.

Further, Mackenzie and Sands (2003) claim that the legitimacy of ISDS as an institution is at risk because of its lack of accountability, stating that “challenges to judicial process [in ISDS] based on an alleged lack of independence or impartiality are already being raised in international fora" (Mackenzie & Sands, 2003, p.

275). Indeed, one of the most common criticisms of international arbitration is that it is an extension of United States-led dominance (Stern, 2001). Further, the institution is often criticised for a perceived bias in the way arbitrators are selected. Mackenzie & Sands (2003) write that:

> In practice, the nomination and election of judges to international courts and tribunals are politicized processes, subject to little transparency, and to widely varying level nomination mechanisms at the national level" (pp. 277-278).

Under most current systems parties are essentially selecting the 'safest pair of hands' from a previously agreed pool of arbitrators; a notion which undoubtedly erodes public confidence in the independence of the panels.

A number of working groups and commissions are already investigating how to make the institution more transparent and reliable (UNCTAD, 2016). ISDS is potentially on the cusp of entering a new era of transparency and accountability with the adoption of the Mauritius Convention on Transparency (UNCITRAL, 2014), where as a general rule, arbitrations are required to be made public (parties can still apply for an exemption on a case-by-case basis). It is uncertain how effective these initiatives will be and how much support they will garner from states and the arbitral community.

Conversely, some arbitrators lament that forces entirely out of their control are undermining the institution's legitimacy. They point to the voluntary nature of arbitral awards, stating that there is an increasing trend for states to refuse to honour awards, that "the efficacy of the New York Convention[4] has faded" (Brower, 2003, p. 418) and claiming that local courts annulling arbitral awards further delegitimises the institution (Naón, 2005). As will be discussed in the case study, there is a prevalent theme within ISDS that if not for the

[4] One of the foundational treaties for the enforcement of arbitral awards.

interference of states and political gamesmanship the institution would operate more effectively.

The idea of the legitimacy of ISDS is especially relevant to the following discussions and analysis due to the proposition that whether an EJM decides to operate within the institution to pursue its justice claims or against the institution is primarily dependent upon the institution's perceived legitimacy.

Thesis Structure

The thesis will first present an overview of the critical theories and analytical framework (chapter 2), followed by a description of the research methodology (chapter 3). It will then present a case study of the Chevron v. Ecuador (II) arbitration and its interaction with an indigenous community's struggle to remediate the environmental, cultural and physical harm caused by oil extraction operations in the Oriente region of the Amazon Rainforest. Finally, the results will be analysed and discussed.

CHAPTER 2 Theory and Analytical Framework

Introduction

An effective analytical framework allows for a reflexive analysis of how competing dialectical strains of justice are employed by stakeholders when negotiating the distribution of risk and resources. It aims to 'understand relations between power, knowledge, cultural practices, and language' (Pal & Dutta, 2008, p. 177). Pal & Dutta write that an analytical framework[5]:

> … simultaneously interrogates the terrains of power within which discourse is articulated and rearticulated, and creates openings for the articulation of alternative possibilities through the engagement with voices that have traditionally been erased from the discursive space (p. 174).

In order to address the research question this thesis adopts an analytical framework grounded in environmental justice theory (EJT) and critical development theory (CDT) in order to study stakeholder interactions and discourses within ISDS arbitrations. This chapter will introduce these theories and explain how they will be employed to analyse the findings of this thesis.

Environmental Justice Theory – A Review of the Literature

Background

The modern form of the environmental justice movement, or global environmental justice, is the result of an intersection between two unique strands (Robbins, 2014; Schlosberg, 2013; Sikor & Newell, 2014). The first originated in the United States, often referred to as the next logical evolution of the civil rights movement (Martinez-Alier et al., 2016; Mohai et al., 2009). It focused primarily on identifying

[5] Specifically referring to critical modernism

injustices, such as trends in the placement of toxic waste dumping sites which disproportionately affected minority communities – namely African Americans, Hispanics, and Native Americans. The second strand came from the Global South (Olesen, 2004), a product of indigenous critiques and social movements such as the Chipko and Zapatista movements (Willow & Wylie, 2014). The primary focus of this strand was protecting a people's right to economic and social self-determination through the management of traditional natural resources. It is from this strand where a critique of the dominant mode of accumulation arises, where a group's right to self-determined economic viability can be undermined by globalised and increasingly deregulated markets (Martinez-Alier et al., 2016).

Environmental justice theory (EJT) can be seen as a reflexive analysis of how competing dialectical strains of justice are employed by stakeholders when negotiating the distribution of risk and resources. However, as a theory, it has largely been developed in response to the observed phenomena of social and environmental justice movements (Schlosberg, 2004). Often there is a lag between the set of phenomena occurring and its theorization and description, which subsequently influences future praxis of the EJ movement in a cyclical nature (Banerjee, 2014). It is clear after examining the literature that within EJT there exists a progression past solely distributive justice, towards a discourse incorporating recognition and participation (Schlosberg, 2013). It is at this point that a split in the theory occurs, with one branch focusing on consensus building within the normative framework and the other focusing on the disruption and contestation of the normative framework itself (Velicu & Kaika, 2014).

With the aim of systemising the development of EJT, this review of the academic literature will be divided into three sections. The first will focus on the core and foundational distributive aspect of EJT, the next on consensus building theories of recognition and participation and finally the review will look at disruptive theories of

EJ which seek to challenge the normative framework within which discussions of justice take place.

Distribution

Foundational to EJT is distributive justice – specifically how society allocates risk across different social groups (Agyeman, 2002; Kütting, 2004; Mitchell et al., 1999; Robbins, 2014; Roberts & Toffolon-Weiss, 2001; Westerman, 2007). This could be environmental risks like pollution and ecosystem degradation but also risks we often would not traditionally attribute to the environment like housing conditions and access to public services. Schlosberg (2013) writes that “environmental justice advocates insisted on bringing attention to the environmental conditions in which people are immersed in their everyday lives” (p.39). In its early stages the environmental justice movement successfully expanded the definition of the environment from ‘the wilderness out there’ to incorporate our social spaces, our homes, our work places – any space where humans exist (Sandler & Pezzullo, 2007). EJT became an anthropocentric concept allowing for a much broader view of environmental issues like climate change and habitat preservation.

Distribution-focused studies generally arose from an American context (Agyeman, 2002; Mitchell et al., 1999; Roberts & Toffolon-Weiss, 2001; Westerman, 2007) and sought to document disparities in environmental risk exposure across ethnicities and marginalised social groups. Characteristic of this stage of EJ is a distinct hiatus between EJ activists and EJ theorists, with academics aiming to map the allocation of environmental risks while activists went further by championing normative causes of equity and the redistribution of risk (Schlosberg, 2004). What was lacking from academic analysis was an explanation of the movement’s justice claims and an assessment of the institutions and systemic conditions which determined the distribution of rights and natural resources and had the potential to produce marginalization and inequality (Mares & Alkon, 2011).

Consensus Building EJT - Beyond Distribution towards Recognition and Participation

Distributive justice is not the sole objective of the environmental justice movement; rather it is the heterogeneity of stakeholder identities that undergirds and preconditions any ideas of distributive justice (Banerjee, 2014; Robbins, 2004; Schlosberg, 2004; Sikor & Newell, 2014). It is important to note that ideas of recognition and participation form the consensus building strain of EJT. These corresponding concepts are based upon principles of a deliberative democratic process (Schlosberg, 2004), wherein stakeholders are included in the shaping of the ideological paradigm which determines policy outcomes – consensus through mutual compromise and constructive dialectic (Blaikie & Muldavin, 2014) (this is opposed to disruptive EJT where the normative framework is a site of contestation to be won and not constructed via compromise). Cantzler & Huynh (2016) explain the concept of recognition within EJT by presenting the case of the Native American community. Historically, the Native American community has suffered marginalisation due to a lack of recognition – a lack of recognition of their unique relationship to the state, of their beliefs about and connection to the environment and of their base of traditional knowledge. The authors state that without the recognition of a group's identity or their participation within the decision making process, an equitable distribution, whether of environmental risk or natural resources, is impossible (Cantzler & Huynh, 2016).

Global Environmental Justice

Critical to global environmental justice is the concept of injustice along the chain of accumulation (Robbins, 2014; Schlosberg, 2013; Sikor & Newell, 2014). Robbins (2014) writes that "by seeking and placing cases of inequity, injustice, and environmental injury along the chain of associations in which they are enmeshed, we are compelled to understand the relational nature of risk" (p. 234). Essentially environmental injustice is globalised when exploring its relationship to the chain of accumulation, the mode of production and the model of development. The global nature of environmental risks leads to what Willow and Wylie (2014) describe as "the transformative new parity" (p. 230) between the global north and the global south. Therefore, in accordance with environmental justice thought, a nation's trade policy should not be constructed out of self-interest but according to an ideal view of how the global community should be organised. Similarly, institutions for global development, such as investor-state dispute settlement, should be held to this same standard.

Recognition and Participation through Critical Pluralism

Essential to EJT is what Schlosberg (1999) labels 'a new critical pluralism', an evolution of liberal pluralist political philosophy. The concept draws inspiration from William James' (1912; 2012) theory of 'radical empiricism' where an individual's experiences of empirical events vary and one single explanation is insufficient to fully describe those experiences. Schlosberg describes environmental justice as a collection of 'multiple, integrated meanings' (2004, p. 536), the culmination of an assembly of different justice claims from unique ideological paradigms. Rather than viewing this as an erosion of purpose, where ideological fragmentation renders consensus impossible, he argues that the discursive strength of environmental justice is in its unity as opposed to uniformity (Schlosberg, 1999). Central to this plurality is recognition and participation.

Disruptive EJT – Contesting the Normative Framework

The most controversial iteration of EJT, disruptive EJT, seeks to make up for what it sees as deficiencies in the previous trivalent conception of environmental justice (Schlosberg, 2004). It sees a gap between current theory and the observed actions of contemporary environmental justice movements. It seeks to explain those movements, which while in pursuit of environmental justice, operate outside of the established political and institutional framework. Instead of seeking to build consensus within existing institutional settings, these movements act to disrupt them. Instead of shaping new institutions from within the social contract, they seek to rewrite and dictate the social contract. Theorists Velicu & Kaika (2014) write that:

> … the liberal foundational principles upon which this framework [environmental justice] is grounded and crystallised, with its focus on the principles of recognition, participation and redistribution, leaves it inadequate to understand and explain today's insurgent socio-environmental struggles that go beyond demands for recognition, participation and redistribution (p. 10).

Eisenberg (2015) makes the point that for some movements pursuing environmental justice claims there is simply not the legal channels necessary or the participative processes in place to facilitate consensus building. Were they to engage within the existing normative framework they fear their participation would simply create the conditions for tokenistic deliberative forums which are little more than exercises in legitimacy seeking (Bustos et al., 2014).

Instead, a movement can refuse to enter negotiations with the government or project providers and engage in a campaign of visibility, whereby it appeals to the broader public to uphold its environmental justice claims or to force administrators to provide a deliberative forum in which stakeholders are empowered to truly influence decisions (Velicu & Kaika, 2014). Velicu & Kaika (2014) demonstrate this point with reference to a situation where locals protesting a proposed mining project are publicly invited into negotiations with the government. The locals, after acknowledging the government's history of pro-corporate 'growth above all else' strategies, decide to refuse the offer and instead engage in a disruptive campaign of protest, activism and publicity in the pursuit of their environmental justice claims. Another example is presented by Eisenberg (2015) where movements and communities protesting fracking in America lack the legal channels necessary to challenge current operations and practices. A major theme the authors share is that consensus building EJT can be naïve in assuming such deliberative forums exist in which movements can constructively pursue environmental justice claims (Bustos et al., 2014; Eisenberg, 2015; Velicu & Kaika, 2014).

Gaps within the Literature

A number of authors acknowledge the limited attention EJT devotes exclusively to the environment (Agyeman, 2005; Sandler & Pezzullo, 2007; Schlosberg, 2013). They suggest that though socio-cultural considerations are of primary importance, EJT must align itself with conservationist movements and ideology in the aim of pursuing a 'holistic' environmental agenda. One of the main criticisms facing the environmental justice movement is that it cannot reconcile with causes such as the protection of biodiversity (Sandler & Pezzullo, 2007) because of its predominantly anthropocentric focus. Some authors (Schlosberg, 2013; Sikor & Newell, 2014) suggest that as EJT largely bases its justice claims on a rights-based approach, that researchers should seek to extend these rights to the environment. Another gap, which this thesis seeks to address, is the lack of sufficient analysis of international institutions and how they influence and shape environmental justice claims. A considerable amount of literature is dedicated to critiquing globalisation and the current model of development from the angle of how it erodes the viability of subsistence based cultures, but few sources analyse how EJMs operate within international institutions, interacting with other stakeholders where they potentially shape (and are shaped by) processual developments. The consensus building iteration of EJT provides the skeleton for analysing how EJMs operate within such institutions, while the disruptive EJT iteration is useful for explaining how they operate in opposition to such institutions.

Critical Development Theory – A Review of the Literature

Introduction

The second body of literature, CDT, complements EJT's actor-based approach by providing a critique of the institutional framework in which actors pursue their justice claims. Bhavnani et al. (2009) write that critical development as an analytical tool is:

> … a way to demonstrate how the articulation of the labor, cultures, and histories of women and men outside the mainstream frame of development offers more helpful insights to ameliorate injustice and inequality, the ultimate goal for all forms of development (p. 6).

Drawing from post-development theory, CDT is concerned with the power relations that determine the function of institutions of development, often cynically referred to as the development industry (McGregor, 2009). These institutions include organisations and conventions such as the United Nations, the United Nations Development Programme, the International Monetary Fund, the World Trade Organisation, the Universal Declaration on Human Rights and, of course, the Investor-State Dispute Settlement. CDT is aligned with post-colonialism – both of which seek to interrogate the structures of power present within development (Munshi & Kurian, 2005). It also draws from post-structuralism, presenting development as a discourse and analysing the power relations within that discourse (McGregor, 2009). The politics of language is central to the theory. McGregor (2009) writes that:

> … for post-development deconstruction focuses upon the languages of development; the knowledges, institutions and truth claims that development produces; the power relations

inherent in development encounters; and the corrupting geographic imaginaries perpetuated and promoted by development industries (p. 1689).

Similarly, according to Escobar (1995), the language of dichotomies in development is used to legitimise the transfer of knowledge, technologies and resources from developed societies to underdeveloped societies. Categorising countries as rich/poor, first world/third world or developed/underdeveloped provides a rationality for the superiority of one form of development, dictated by the developed states. Post-development theorists point out the historic tendency for development to be equated with industrialisation, modernisation and capitalism (De la Cuadra, 2015; McKinnon, 2007). CDT, however, redefines development. Where typically development has been seen as inevitable, CDT presents development as a political and economic project – a product of a specific discourse which post World War 2 became a global organising process (McGregor, 2009). This was a process with the aim of "[enabling] Third World countries to successfully participate in the global capitalist dynamics" (De la Cuadra, 2015, p. 25). CDT holds that historical development has been a homogenising, exogenously imposed force (McGregor, 2009).

Rist (2007) claims that the traditional and ambiguous portrayal of development as the pursuit of 'generalised happiness' (p. 488) renders it impervious to critique, and Escobar (1992), a CDT pioneer, points out the danger in normalising the power of some to disassemble and restructure the societies of others. Often states perpetrate gross injustices against their own citizens in the pursuit of development. Structural Adjustment Programmes (SAPs) progress unevenly leading to structural dualism, where one sector is viewed as developed and another underdeveloped (De la Cuadra, 2015). This is essentially a state undergoing internalised colonialism, whereby resources are extracted from one sector to fund the development of another sector. This may be the prioritising of certain industries at the expense of others or at the expense of social programmes. This leads to the common critique of SAPs driven by the IMF and World Bank, where development is pursued via the intentional underdevelopment of certain sectors of the state, for example, by cutting social programmes to fund economic progress (Saadatmand & Toma, 2008).

Criticisms of CDT

A common criticism of CDT is that it appears, on the one hand, to oppose dichotomies but then, on the other, to denounce the 'evil north' and deploy platitudes for the 'victimised south', without acknowledging the obvious benefits that the historical model of development has given to many peoples and societies (Kiely, 1999). However, as CDT has progressed, it has become clear that the theory is not about resurrecting the ivory tower idea of the noble savage, but rather about opening up the institutions and discourse of development to critical analysis (McGregor, 2009).

Another criticism is that CDT unfairly presents and diminishes the agency of some communities by portraying them as hapless victims to modernisation rather than as peoples capable of influencing the development process (McGregor, 2009). Further, it is criticised as a school of thought preoccupied with denouncing development as a failed project which cements power inequalities within and across societies, without offering realistic alternatives. However, McKinnon (2007) states that more recent writings on post-development theory stress the importance of partnering critical analysis with hopeful conceptions of alternative developments. McKinnon writes that post-development theory may potentially "[undermine] the certainty with which emancipatory actors are able to envision the end point of their interventions and the means by which to reach it" (p. 774). Rather than discarding the idea of development as a "ruin in the intellectual landscape" (Sachs, 1992, p. 1), theorists are beginning to explore how critical post-development arguments can be utilised to inform current development practices in a way which acknowledges the hegemonic consolidation of power inequalities and seeks to rectify these through the promotion of alternative constructions, individual agency and collective agency (McKinnon, 2007).

Imagining Alternatives to Traditional Development

Within the post-development literature, there exists a considerable number of advocates for discarding the idea of development entirely as a neo-colonial tool for the entrenchment of western ideals of modernisation, capitalism and industrialisation. However, for the purpose of being employed within an analytical framework, this study will utilise the theory's less puritan strain which can be characterised as a critical development which actively seeks alternative, endogenously arising projects of development (Sidaway, 2007). Dada (2016) argues that CDT seeks to abolish the *discourse* of development in its traditional post World War II iteration, as opposed to abolishing the processes by which local, national and international stakeholders cooperate to pursue constructive objectives.

Traditional Development	**Critical Development Alternatives**
Adopts the dichotomy of developed and underdeveloped states according to whether they possess certain characteristics such as being industrialised, modernised, capitalist and integrated into the global market.	Rejects the idea of development as a condition to be achieved by attaining certain criteria and instead presents development as a process with internally defined goals and methods which are grounded in localised values and knowledges.

A primary tenet of critical development alternatives is that the subjects of development are able to exercise agency to direct and inform the process of development (Dada, 2016). It is this focus on stakeholder agency which allows for CDT to be used in conjunction with EJT as an analytical tool. Environmental justice theory explains the justice claims and how they are constructed while critical development theory explains the context in which they are pursued. Essentially EJT describes the race car and CDT the race track.

Development as Politics

McKinnon (2007) argues that development must be treated as a hegemonic struggle, where ideologies compete to effect social structural change. This idea of hegemony was pioneered by Gramsci and his concept of the 'war of position' whereby, when a state's institutional structure is decoupled and exists independent of whether the state flourishes or falls, 'revolutionary strategy' must adopt the 'war of position' - the subtle transformation of civil society by a subaltern class to create a new society (Gramsci et al., 1971; Egan, 2015). Laclau and Mouffe (1985) took this idea of hegemony further, presenting it as an endless political struggle existing in every area of society where power-relations exist. McGregor (2009) writes that "recent [critical development] research attempts to emphasise the politics embedded in development interventions to create new spaces for alternative policies, imaginings and opportunities" (p. 1696). In relation to ISDS, treating development as politics provides new methodologies for characterising how arbitrators and stakeholders shape and are shaped by processual developments. Unique to the institution is its ad hoc nature that is subject to few procedural regulations. As such, processual developments can be analysed on a case-by-case basis by accounting for the various stakeholder perspectives and the power they possess.

Critiques of Development as Politics

Unique to Laclau and Mouffe's (1985) concept of hegemony is that there is no endpoint to the hegemonic struggle – that is the complete dominance of one ideology/movement at the expense of all others. This stands in stark contrast to the concept of traditional development which is defined by the foundational dichotomy of developed and underdeveloped states. However, the obvious limitation stemming from the lack of an endpoint is how can one measure the success of a typical development project? Or more specifically, in a multi-stakeholder development project whose measure of success is most legitimate? In practice, a large proportion of development projects rely upon external funding, whether from government departments, international institutions or charitable organisations. Without clear methods for measuring the success of a project how will development investors determine which projects to invest in? This is especially relevant in an environment of scarce resources where the efficient distribution of funds is of paramount importance. This reality then leads to the unnerving yet inevitable conclusion that when viewing development as politics money is power. Development investors, when interacting with other stakeholders are not required to abide by their measurements of project success and hence post-development succumbs to the very notion which it was formed to oppose – the imposition of values and knowledges by the developed world onto the underdeveloped. Further, viewing development as politics and removing the normative imperatives of development, might serve to justify this view of western ideological domination. Stepping back from more typical development projects and applying this principle to ISDS, it is clear that the stakeholder with the most resources, who retains the largest most effective legal team and who has the largest public relations budget, stands the most chance at driving the narrative.

The response to this critique is that development cannot be separated from the economic realities of the modern globalised world. Post-development alongside its critique of traditional development must include a critique of the current mode of accumulation. Cammack (2002) acknowledges this link between development and the mode of accumulation stating that essentially the global institutions for development such as the World Bank have succeeded in inextricably linking development with neoliberal capitalism. Such a project delegitimises diverse, local, small scale economies in favour of large, mechanised and modern economies. That is, the current economic paradigm favours the economies of developed states while suppressing the economies of underdeveloped states. The notion of the irresistible momentum of development is a fairy-tale. Instead, states struggle against the current as opposed to being swept along by the forces of economic progress. For the approach of development as politics to be viable, endogenously driven economic progress must be legitimised – the donor/recipient bond which characterises most development projects must be severed. In the instance of ISDS, where stakeholders must fund their own defence, it is hard to see how the bond would ever be severed without doing away with the current institution. However in light of this, the role that funding plays in influencing the politics of development should be analysed alongside the primarily ideological hegemonic struggle.

Sustainability, Post-Development and Environmental Protection

It can be argued that CDT should also be sensitive to principles of sustainable development. Kurian, Munshi and Bartlett (2014) write that “sustainability is simultaneously a norm, a concept, and a goal that animates the public sphere and implicitly or explicitly underpins much public policy” (p. 437). Sustainability is described by Connelly et al. to be an ‘essentially contested concept’ (Connelly et al., 2012, p. 74), although there does exist consensus on a number of key points. Generally, the main function of development is to meet a society’s needs and aspirations through the accumulation of resources and production (World Commission on Environment and Development, 1987); sustainable development merely takes it one step further, where, as a precondition to development, the inputs required and the outputs produced must remain viable when extended to future generations. This is an example of what Dryzek (2005) terms ‘ecological rationality’, where development is grounded within the limitations set by the environment in which it operates. However, it is often in open conflict with other forms of rationality within the institution that affect environmental outcomes. Both Bartlett (2005) and Dryzek (2005) recognise the difficulty this poses when pursuing structural change within institutions. The entrenchment of competing forms of rationality, for example economic and legal rationality, self-perpetuate and shape the dominant discourses, which in turn delegitimise the insurgent form of ecological rationality (Bartlett, 2005).

The ability to protect the environment is directly related to the power a group possesses – whether political, financial or cultural (Agarwal, 2010). It is also influenced at a local, regional and global level. Subsistence 'peasant' farmers can be dispossessed and disempowered by the rise of industrialised agriculture. Practices of 'dumping', or heavily subsidised food imports from industrialised countries can destroy the livelihood of subsistence based communities, forcing them to either endure poverty by exploiting the environment or forcing them to migrate to urban centres, leaving traditional lands behind. It is often easy to idealise conservation as an end all goal, without acknowledging the limitations and human cost. As pointed out by Agarwal (2010), when a woman is faced with the choice of cutting green branches for firewood or letting her child go hungry, it is obvious that the human need is greater than the environmental cost. The concept of food sovereignty seeks to empower subsistence based communities by allowing them to retain their means of food production (Willow & Wylie, 2010) and pursue sustainable methods of agriculture as opposed to high intensity industrialised agriculture. This comes full circle back to one of the main analytic functions shared by CDT and EJT which is to critique the dominant system of accumulation that determines the space available to people and communities to develop and pursue justice claims.

Applying the Analytical Framework

The underlying assumption of this analytical framework is that institutional development is a political process, whereby stakeholders engage in a discursive struggle to shape processual outcomes. Figure 2 demonstrates the multilevel approach to analysing the institution of ISDS where EJT primarily informs the stakeholder level, CDT the institutional level and a multidisciplinary approach informs the contextual level.

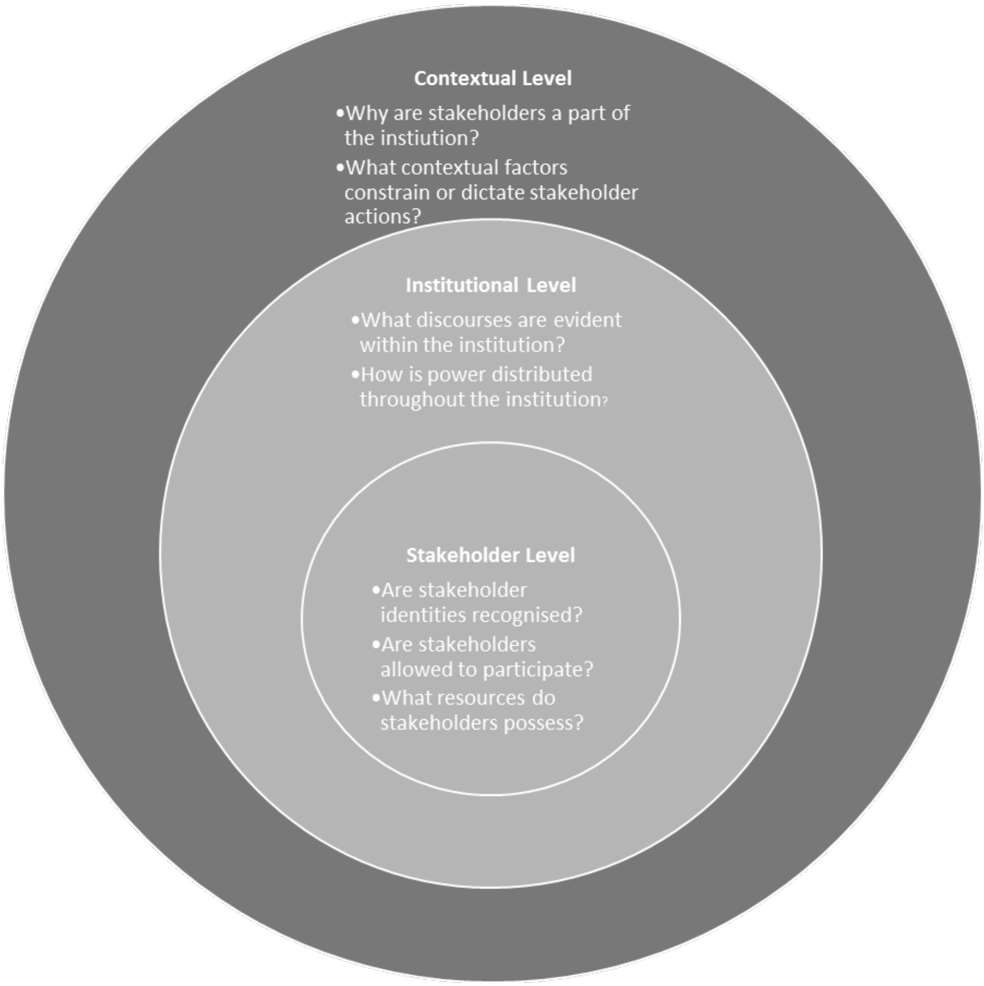

Figure 2: Applying the analytical framework to investment arbitrations

The analysis will seek to provide evidence for relationships between stakeholder perspectives and processual developments within the institution. The strength and validity of claims will be evaluated by considering the depth and reliability of the evidence used and by exploring alternate explanations for the phenomena. In accordance with CDT, the institution will be characterised as a project perpetuating a specific conception of development, while EJT will be used to explain how stakeholders interact with and seek to shape the project – whether by consensus building EJT or disruptive EJT. Perhaps the more novel aspect of the analysis is that every stakeholder will be characterised as making legitimate justice claims – arbitrators, states, environmental justice movements and corporations. This is in keeping with the aim of reflecting the nature of EJT which does not seek to characterise justice claims as legitimate or illegitimate, but seeks to interrogate and identify justice claims that are marginalised by the contexts or institutional settings in which they are pursued (Schlosberg, 2004).

CHAPTER 3 Research Design and Methodology

Introduction and Research question

This thesis presents a qualitative study of the institution of ISDS that is grounded in critical-modernism and employs critical interpretative analysis, in order to explore the research question of:

> How do discourses present within ISDS arbitrations influence the hearings' processual development and what impact does this have on the space afforded to stakeholders to pursue various justice claims?

To help shed light on the institution as a whole, this research will investigate one of its basic units, by conducting an instrumental case study of the Chevron v. Ecuador (II) investment arbitration.

Type of case study

ISDS arbitrations are highly complex, with a diversity of stakeholder values, aims and contexts and a multitude of unique spaces in which they occur. Yin (2013) states that case studies are the preferred method of inquiry to 'evaluate highly broad and complex initiatives; for example, systems reforms, service delivery integration, community and economic development projects, and international development' (p. 322). Acknowledging this, to address the research question, an instrumental case study (Stake, 1995) will be employed to examine how participant's views on ISDS influence the Chevron v. Ecuador (II) arbitral proceedings. Cousin (2005) notes that while an intrinsic case study aims to make generalisations within the scope of the specific case, the instrumental case study aims to make generalisations beyond the case. Therefore, the results from this case study is utilised to make inferences and draw conclusions about the discourses surrounding ISDS and their impact upon the processual function and outcomes of ISDS arbitrations in general. More precisely, the case study draws conclusions about the entire institution of ISDS by examining one of its basic units. Though it is true that conducting a collective study with multiple cases would maximise any claims of causation this study might make (Mookherji & LaFond, 2013), there is only one case studied here in order to thoroughly investigate it within the parameters of this thesis. To maximise the generalisability of the case each stakeholder group will be analysed as an 'imbedded unit' (Yin, 2013). Baxter and Jack (2008) states that:

> The ability to look at sub-units that are situated within a larger case is powerful when you consider that data can be analyzed within the subunits separately (within case analysis), between the different subunits (between case analysis), or across all of the subunits (cross-case analysis) (p. 550).

It is also worth noting that although there are numerous arbitrations that could have been selected, Chevron v. Ecuador (II) was chosen because of the abundance of publicly released material; its potential impact upon natural resource management; and the complexity of the environmental and indigenous justice claims surrounding it.

Case Study Data

The data consists of 35 case documents, 14 days of hearing transcripts, 20 blog posts and press releases, 10 news articles and 19 academic articles authored by the arbitrators. Due to the magnitude of the case documents and transcripts, NVivo qualitative analytical software was employed to aid with data coding and analysis.

Case Documents and Transcripts

The case documents consist of all available, publicly released documents relating to the Chevron v. Ecuador (II) arbitration. The primary method of collection was by utilising the investment dispute database italaw, provided by Canada's University of Victoria, Law Faculty. Additional released case documents were found from the stakeholders' own websites or from the UNCTAD investment policy hub. The breadth of the case documents is extensive with some being hundreds of pages in length, summarising the arguments, objections and views of Chevron Corporation, The Republic of Ecuador and the arbitrators themselves. The perspectives of Environmental Justice Groups are limited to the amicus curiae submissions and response. Notably the case documents represent an exhaustive collection of what is publicly available, relating directly to the CvE2 arbitration. Many more primary sources exist concerning the surrounding Lago Agrio Litigation and Chevron's assorted lawsuits but they were left out as the primary concern of this thesis is analysing the arbitration and not the numerous judiciaries which have dealt with the Lago Agrio case.

There are a number of limitations with the data. The nature of ISDS under UNCITRAL rules is such that case documents may only be released with the agreement of all parties However, in the case of Chevron v. Ecuador (II) it appears as if every major award has been included on italaw and the UNCTAD database though it is unclear what supporting documents may have been left out. Another limitation is that a number of documents and some of the transcripts have been redacted, though it is a relatively small proportion.

All case documents and data were published between 2009 and 2016.

Blog Posts and Press Releases

Seven blog posts were collected from Chevron Corporation's blog 'The Amazon Post' which was created in 2009 to present their views on the Lago Agrio Case, while eleven posts were collected from various Environmental Justice Groups including Amazon Watch, The International Institute for Sustainable Development, Chevron Toxico and the Chevron Pit. The posts range in length from hundreds of words to thousands. Three of the blogs were set up especially to deal with the Lago Agrio Case (The Amazon Post, Chevron Toxico and The Chevron Pit) and deal primarily with the surrounding litigation. Blog posts were therefore selected according to whether they commented on the CvE2 arbitration and demonstrated enough 'perspective' to be worth analysing. Posts merely commenting on arbitration developments were excluded.

The obvious limitations with the data is that much of it is highly biased and emotive, and must be analysed in light of this. All the posts have been formulated with social media in mind, Chevron using cover pictures of people with 'FRAUD' stamped across their faces (The Amazon Post, 2012) and Environmental groups using headlines such as "These Three Men Think They Have Power to Kill The Ecuadorians' Judgment Against Chevron" (The Chevron Pit, 2012).

All blog posts collected were published between 2009 and 2016.

News Articles

The news articles were selected according to their ability to present stakeholder views and not merely relay the developments of the case. They ranged in length from just over a thousand words to nearly ten thousand words. Again, the majority of the articles displayed a clear bias, with 'liberal' outlets such as The Guardian and The New Yorker taking critical stances on Chevron's involvement and seeking to present the indigenous peoples perspectives while 'business' outlets such as Fortune and Bloomberg were primarily critical of the Lago Agrio Plaintiffs.

All news articles collected were from between 2009 and 2016.

Academic Articles Authored by Panellists

All three arbitrators are relatively prolific academic authors in the international arbitration community. Their work has appeared in *The Cambridge Law Journal*, *Arbitration Internationa*l, the *Journal of International Dispute Settlement* and many more. Utilising various databases, 19 articles from the arbitrators were selected. All articles which dealt with international arbitration were included. There were certain limitations with the data – all the works of Veeder and Lowe were readily available, but two works of Naón that looked especially relevant, 'ICC arbitration and developing countries' and 'The evolution of international commercial arbitration', were unavailable.

The articles collected were published between 1991 and 2013.

Study propositions

Laclau and Mouffe's (1985) conception of the hegemonic struggle of discourses or ideologies will be applied to the institution of ISDS to investigate how opposing and often overlapping views about ISDS shape the institution's processual arrangements and outcomes. The broad proposition of the study is that discourses within ISDS influence the arbitral process and the space afforded to stakeholders. More specifically, the study will identify what discourses are operating within the CvE2 arbitration and explore how discourses shape the exercise of agency and power within the arbitration.

It is important to make the distinction between identifying conflicts of interests within the institution of ISDS and identifying competing ideological paradigms. The aim of the study is not to examine whether the actions of participants within ISDS are influenced by personal gain or external influence, but whether their perspectives of the function of ISDS impacts their participation and shapes how the institution is administered[6].

[6] A lot of journalistic investigation of ISDS centres around exposing conflicts of interest.

Unit of analysis and case study boundaries

The unit of analysis is the Chevron v. Ecuador (II) (CvE2) arbitration presided over by Horacio A. Grigera Naón, Professor Vaughan Lowe QC, and V.V. Veeder QC (President). Though the study will attempt to present a comprehensive overview of the context surrounding the case, the actual analysis is limited to legal documents, hearing transcripts, press releases, news articles and blog posts directly relating to CvE2. The exception to this is when identifying the discourses that best characterise a stakeholder's perspective which are informed by sources beyond the case (Table 1).

Analysing the Data

In line with the previous discussions of CDT and EJT, this study will employ an analytical framework grounded in these theories. Data will be analysed according to the primary aim of this thesis, which is to assess the space that the institution of ISDS affords to stakeholders.

In a paper on international arbitration, CvE2 arbitral chair Veeder (1999) writes that "arbitration evolves continuously" (p. 229), further noting that its procedures are still in the process of developing. Acknowledging this fact, this study relies upon using the data to identify two key elements. The first is the processual developments in CvE2, which is relatively straight forward and can be found in the case documents. The second is identifying the four stakeholders' perspectives on:

1. Whether arbitral processual developments are the result of strictly legal factors or are the result of a political struggle for hegemony between the various stakeholder's wants and beliefs,
2. Whether arbitral processual developments should be top-down, inclusive or participative,

3. And further, whether environmental justice claims, indigenous justice claims and social justice claims should impact the processual development of an arbitration.

This involves identifying the discourses that reflect the stakeholder's values and beliefs surrounding ISDS.

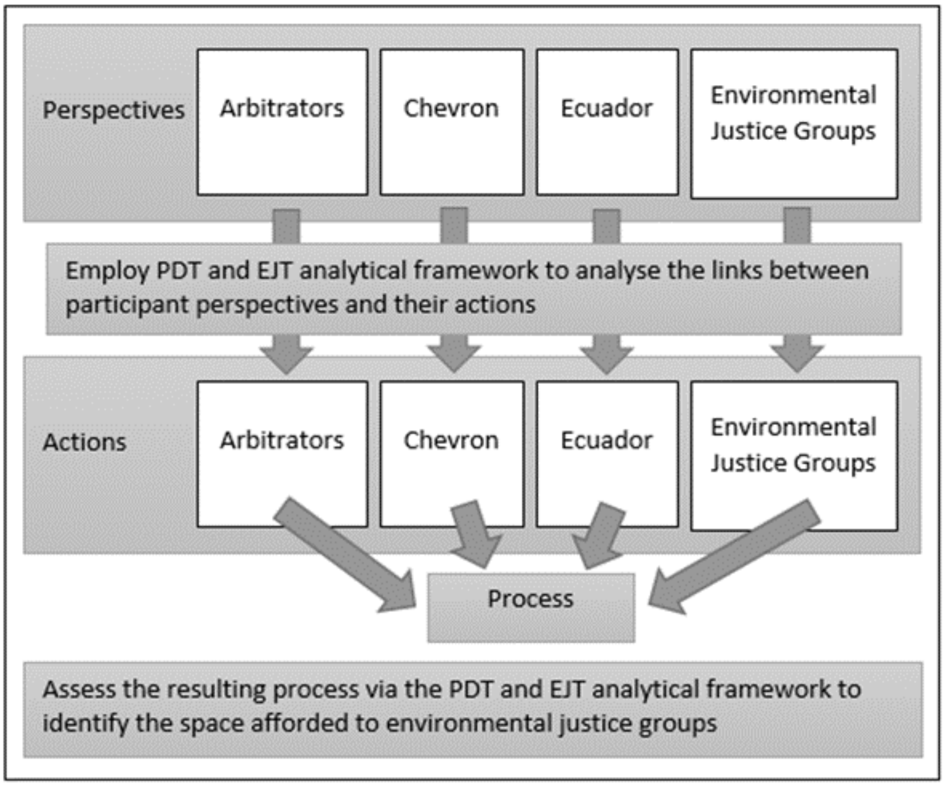

Figure 3: Diagram demonstrating the role of the analytical framework when analysing data

The analytic framework will be used to help build an explanation of the processual development of the CvE2 arbitration. Yin (2009) writes that "to 'explain' a phenomenon is to stipulate a presumed set of causal links about it, or 'how' or 'why' something happened. The causal links may be complex and difficult to measure in any precise manner" (p. 141). Therefore, the study will focus on exploring relationships between the ideological stances of participants and the actions they take to influence the processual function of the ISDS arbitration. Within the study processual and procedural are distinct terms, as discussed in Footnote 1 in chapter 1. Procedural refers to normalising regulations, such as the number of arbitrators and the way in which they are appointed, while processual refers to ad hoc developments that influence the way in which the arbitration is conducted. For example, arbitral decisions, awards or orders released by the panel that shape the space afforded to stakeholders, such as deciding on whether to include non-disputing third parties in the arbitration.

Linking data to propositions

The primary strategy for analysing the case study data will be by employing Yin's (2009) technique of linking the data to the propositions. In order to link the data to propositions the discourses present within the CvE2 arbitration and each stakeholder's position must be demarcated. In the case of CvE2, the stakeholder groups involved in the dispute are Chevron Corporation, Ecuador, the arbitrators and environmental justice groups (EJGs). Table 1 details each stakeholder group's composition and the data that is used to formulate a definition of their perspective on the function of ISDS and to help identify the discourses present within the arbitration.

Stakeholder Group	The Arbitral Panel	Chevron Corporation (the Claimants)	The Republic of Ecuador (the Respondent)	Environmental Justice Groups
Comprised of:	Dr. Horacio A. Grigera Naón (appointed by claimant) Professor Vaughan Lowe QC (appointed by respondent) V.V. Veeder QC (president appointed by arbitrators).	Chevron Corporation Texaco Petroleum Company Represented by: King & Spalding LLP Three Crowns LLP	The Ecuadorian Government Represented by: Winston & Strawn LLP Dechert LLP	The Lago Agrio Litigants EarthRights International Fundación Pachamama International Institute for Sustainable Development
Primary data used to identify discourses and identify actions	CvE2 legal documents Hearing transcripts Authored academic articles	CvE2 legal documents Hearing transcripts	CvE2 legal documents Hearing transcripts	CvE2 legal documents

Secondary data used to supplement description of discourses		Shareholder and outlook reports Press releases Blog posts News articles	Press releases Internal memos and emails	Press releases Blog posts News articles

Table 1: Stakeholders of the Chevron v. Ecuador (II) Arbitration and the case study data available

After identifying the discourses and each participant's perspective (including identifying the extent the participant subscribes to that view and the depth of evidence behind assuming their perspective) the participant's actions will be discussed - an action being defined as when a participant attempts to influence the proceedings in a substantive way.

Primary Areas of Analysis

A number of processual developments are present within the CvE2 arbitration (Table 2); however, due to the word limit of this thesis, this research will examine two areas – the decision on jurisdiction and the decision on amici curiae (non-disputing parties). The analysis will seek to determine links between each stakeholder's normative perspective and the ways in which they sought to influence the specific processual development.

Key Processual Development in CvE2	
The Decision on Jurisdiction	The decision on jurisdiction is the most complex procedural development in CvE2. Stakeholders not only acted within the arbitration to influence the procedural outcome but also acted externally to the arbitration – petitioning other courts to halt the arbitration, releasing statements to shape the public's perception of the arbitration, protesting physically, protesting on social media and obtaining expert opinions.
The Decision on Amici Curiae	The decision not to include two environmental NGOs as non-disputing parties to the arbitration. Stakeholders largely acted within the arbitration to influence the process.
Other Processual Developments in CvE2	

The Interim Orders issued Prior to the Decision on Jurisdiction	The Arbitral Panel released a number of orders upon the request of Chevron prior to deciding upon its jurisdiction, requiring Ecuador to take certain actions which would negatively impact the Lago Agrio Plaintiffs.
Denial of Ecuador's Request that the Arbitral Panel be Recused	Both the panellists and the Secretary-General of the Permanent Court of Arbitration refuse Ecuador's request to have the arbitral panel reconstituted.
Decision to visit the Site of the Environmental Damage	After external and internal pressures the panel decides to visit the Lago Agrio site, more than five years after the arbitration commenced.

Table 2: Processual Developments within the Chevron v. Ecuador (II) Arbitration

Problems with Identifying Stakeholder Perspectives

Identifying the perspectives of Chevron Corporation and The Republic of Ecuador is problematic. Whereas the arbitrators and the environmental justice groups are more clearly defined stakeholder groups with unified beliefs and goals, Ecuador and Chevron are fragmented. While Ecuador's lawyers may argue for the rights of indigenous peoples within the CvE2 arbitration, they then might directly oppose indigenous groups in a different context such as when they protest state-led oil operations. The same can be said for Chevron, where in its public statements, such as the situation and outlook report, it lauds its commitment to operating in an environmentally responsible way, Chevron's lawyers will then argue that the company was not obligated to act in an environmentally responsible way due to a lack of regulation in Ecuador during the period in which Texaco (Chevron) operated the oil concession (Mendes, 2014). Therefore, when identifying which discourse influences their perspective of ISDS, it is tempting to assume that Chevron simply operates in whatever way most benefits the corporation, irrespective of how inconsistent and hypocritical that might be. However, though this might possibly be true, for the purpose of this case study their perspectives will be presented strictly in relation to this specific case. More precisely, the perspective presented does not represent a fixed stakeholder's perspective but the subset of the stakeholder which is directly involved in the arbitration. So when “Ecuador’s” perspective is discussed, it is more specifically a subset of Ecuador participating in the arbitration that is being discussed, not the entire state.

Rival Explanations

Throughout the analysis, rival explanations for the phenomenon are explored. The most obvious rival explanation is that various discourses within the arbitration have no effect and do not shape the institution’s processual function. Another rival explanation might be that the arbitration rules are the primary factor in orientating the arbitral process and consequently the space afforded within the institution to environmental justice groups.

CHAPTER 4 A Case Study of the Chevron v. Ecuador (II) Arbitration

Introduction

The following overview of the CvE2 arbitration demonstrates the complexity of ISDS arbitrations. It summarises the key events and developments, introduces the diverse array of stakeholders to the arbitration and explains the contextual factors.

Overview of the Chevron v. Ecuador (II) Arbitration

Introduction

On 23 September 2009, Chevron Corporation initiated an investment arbitration against the Republic of Ecuador (CvE2). Chevron sought to pre-empt the judgement of a local Ecuadorian court that was deciding upon whether the indigenous peoples of the Oriente region of Ecuador were entitled to compensation for the environmental devastation caused by historic oil extraction operations. The suit had been brought by 47 named plaintiffs (the Lago Agrio Plaintiffs) on behalf of some 30,000 indigenous residents of the Oriente and was originally pursued in America but was reconvened after Chevron agreed to defend it in Ecuador (Ecuador, 2014).

Environmental Devastation and the Indigenous Peoples of the Oriente

Preceding the CvE2 arbitration, there were three main indigenous tribes inhabiting the Oriente region of the Amazon who were most affected by oil extraction - the Cofan, Siona-Secoya, and Huaorani (Kimerling, 1994; Lerner & Meldrum, 1992). Their culture, independence, health and environment was devastated by the oil rush that started in 1967 (Jochnick & Rabaeus, 2010). According to the Ecuadorian Government (2014), around 344 wells were drilled in the region and the toxic by-product, a mixture of water, oil and heavy metals, was disposed of in over 1000 unlined pits, with farmers in the region still uncovering new pits to this day[7]. The standard practice is to reinject the by-product into the wells, but this is expensive and so the waste was disposed of in open pits to save money (Keefe, 2012). The resulting contamination caused by leaching was catastrophic. Local streams were polluted, fish stocks depleted and prey became scarce; the indigenous people's traditional way of life, dependent upon hunting and foraging, existing within the limits of their environment and inhabiting traditional lands became increasingly less viable (Jochnick & Rabaeus, 2010; Kimerling, 1994; Lerner &Meldrum, 1992). In a petition to the Inter-American Commission on Human Rights the Lago Agrio Plaintiffs (2012) wrote that ""[w]ater is life" in this region of Ecuador, and the Afectados [plaintiffs] have already been forced to drink contaminated water for decades in violation of their fundamental rights" (para. 2).

The indigenous peoples of the Oriente have a long history of opposing oil extraction, felling trees to block oil roads and staging protests against oil operations (Keefe, 2012) and their claim has spanned decades. In 2015, Humberto Piaguaje, a community leader and spokesman for the plaintiffs stated that "while this long fight goes on, the Secoya people in our territory continue dying. Our struggle for justice has gone for 21 years and 6 months now; this has been very costly for us" (Amazon Watch, para. 8). Of course, their struggle has not being without criticism. In response to accusations that they were merely trying to 'shake down' Chevron Corporation, Donald Moncayo, a resident tour-guide in the Oriente, replied that:

> None of us is going to get a check. The damages will be used for environmental repair, not individual indemnifications. We have discussed this all in our Assembly of Affected People. The money will be used to genuinely clean up the piscinas

[7] Chevron is accused of knowing the precise number of pits in the region and refusing to release the information (Ecuador, 2014).

> [waste sites] and to set up a proper hospital to treat our cancer patients (North, 2015, para. 24).

It is important to note that successive Ecuadorian governments have been complicit in much of the injustices perpetrated against the indigenous peoples of the Oriente[8]. Lerner & Meldrum (1992) write that the native peoples “battle national and international forces that threaten their use and habitation of traditional lands by encouraging exploitation of the lands to service Ecuador's foreign debt and to supply the developed world with natural resources” (p. 175). The state owned oil company PetroEcuador was part of the consortium which drilled wells in the Oriente region. Additionally when oil production commenced and with infrastructure being built to service the oil operations, there occurred an influx of people fleeing Ecuador’s poverty stricken cities further contributing to unsustainable land-use within the Oriente’s fragile rainforest ecosystem (Lerner & Meldrum, 1992). Throughout the entire period there was a lack of consultation with the indigenous peoples, with the government and associated corporations being accused of colonising the Oriente for a second time (Kimerling, 1994; Lerner & Meldrum, 1992).

Initiation of Arbitration – 23 September 2009

Prior to any Lago Agrio judgement, Chevron submitted its notice of arbitration to the Permanent Court of Arbitration (PCA) and the Republic of Ecuador (King & Spalding, 2009, p. 1). Within the notice, Chevron’s lawyers claimed that under the 1994 Memorandum of Understanding and the 1995 Settlement Agreement Texaco (now a subsidiary of Chevron) was released from all liability for environmental damage in the Oriente rainforest. They also claimed that “Ecuador… refused to notify the Lago Agrio court that TexPet and its affiliated companies [had] been fully released from any liability

[8] However, the current president, Rafael Correa, is considered a champion for their cause.

for environmental impact resulting from the former Consortium's operations" (King & Spalding, 2009, p. 15). In short, Chevron argued that since it had concluded a settlement agreement with the Ecuadorian government, the Lago Agrio plaintiffs should never have been able to sue Chevron for the harm they incurred from Texaco and PetroEcuador's oil operations. They then accused the government of Ecuador of "openly campaigning for a decision against Chevron" (King & Spalding, 2009, p. 15), colluding with the plaintiffs and interfering with the supposedly independent Ecuadorian judiciary, thereby denying Chevron fair and equitable treatment which the corporation was guaranteed to as investors under EUSBIT (U.S. Department of State, 1997).

As to whether Chevron/Texaco was in fact a party to the BIT, considering they exited Ecuador in 1992 while the BIT entered into force in 1997, Chevron's lawyers pointed to Article I (1) (a) (iii) of the BIT which broadly defines an investment as "a claim to money or a claim to performance having economic value, and associated with an investment" (U.S. Department of State, 1997, p. 1). Therefore, the ongoing Lago Agrio litigation represented a potential economic liability to Chevron and the legal team argued that Chevron was a current investor, though the corporation never operated or owned assets in Ecuador during the period when the BIT entered into force.

To conclude their notice of arbitration the claimants appointed Dr. Horacio A. Grigera Naón as their arbitrator and requested the tribunal make a number of awards. Most notably, Chevron requested that the tribunal declare that Chevron "[had] no liability… for environmental impact, including… for impact to human health, the ecosystem, indigenous cultures, the infrastructure, or… for unlawful profits" (King & Spalding, 2009, p. 17).

The Lago Agrio Plaintiff's attempted injunction against the Chevron v. Ecuador (II) arbitration - March 10, 2010

Upon learning that Chevron had initiated an investment arbitration to bypass the Lago Agrio litigation Jonathan Abady, representing the Lago Agrio Plaintiffs and being heard by Judge Leonard Sand in the New York Southern District Court, sought an injunction against Chevron from pursuing the arbitration against Ecuador. The Plaintiffs' representation claimed that "the defendants [Chevron] [were] purporting to adjudicate the plaintiff's claims in a forum where the plaintiffs [could not] participate; [constituting a] fundamental massive due process violation" (Southern District Reporters, 2010, p. 4). Further Abady stated that:

> No U.S. Court has ever permitted a party to do what the defendants are seeking to do here. That is extinguish almost two decades of litigation by referring the matter to an arbitration where the plaintiffs can't be present (Southern District Reporters, 2010, p. 6).

However, the judge, who pointed out that the plaintiffs could *request* to be included in the arbitration by submitting an amicus brief to the arbitral panel, dismissed this concern. It should be noted that being a party to the arbitration, as the former is merely allowed to offer an opinion on the proceedings by leave of the panel (Veeder et al., 2011b).

Before delivering his verdict Judge Sands commented that "the Court will assume for purposes of this argument that the Court has the power to stay an arbitration under certain circumstances" while "recognizing that there is a split between the judges of this Court whether it has the power to stay an arbitration event" (Southern District Reporters, 2010, p. 16). Such ambiguity surrounding who had authority over who is a major feature of the subsequent CvE2 arbitration. He then ruled that "a stay of arbitration is inappropriate and is hereby denied, and it is for the arbitrable [sic] panel to decide which claims are properly before it and which claims for relief are properly before it" (Southern District Reporters, 2010, p. 17). In summary, Judge Sands ruled that the arbitral panel would decide upon its own legitimacy, an exercise that would end up taking years[9].

The Lago Agrio Judgement

When Chevron acquired Texaco in 2000[10] it was warned that "Texaco comes with a lot of assets, and one huge liability [the ongoing Lago Agrio litigation]" (Keefe, 2012, para. 23) and on February 14, 2011, after litigation spanning almost 20 years[11], Judge Nicolás Zambrano ruled in favour of the group of Ecuadorian citizens seeking compensation for the environmental degradation[12] wrought by the consortium's operations (Keefe, 2012). Chevron was ordered to pay the citizens 8.6 billion US dollars in damages and an extra 8.6 billion US dollars in punitive damages if Texpet did not issue a formal apology to the claimants within 15 days (DCOTH, 2016). Chevron/Texpet did not issue an apology stating that "doing so might be mischaracterized as an admission of liability and would be contrary to facts and evidence submitted at trial" (Chevron, 2015, p. 51), claiming that "Texaco's operations were completely in line with the standards of the day" (Mendes, 2014, p.183). Chevron was also ordered to cover the full costs of proceedings which amounted to 10% of 8.6 billion US dollars (DCOTH, 2016). Upon appeal in Ecuador the 17 billion US dollar award was upheld but was reduced back to 8.6 billion US dollars. While the sums of money may seem exceedingly large, it is worth noting that BP has spent over 20 billion

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[9] Interestingly, according to his 2009 Financial Disclosure Report, Judge Sands owned hundreds of thousands of U. S. dollars' worth of stock in an assortment of oil corporations (Judicial Watch, 2013). This fact apparently did not diminish his suitability to rule on a matter which could potentially catastrophically harm the reputation of the entire industry.

[10] The acquisition was completed in 2001 (DCOTH, 2016).

[11] The litigation was first pursued in New York, but after securing promises from Chevron/Texaco to submit to Ecuadorian courts the litigation was dropped and taken up in Ecuador in 2003 (Keefe, 2012).

[12] Environmentalists referred to the area as a 'rainforest Chernobyl'

US dollars remediating the Gulf of Mexico oil spill and faces up to 13.7 billion US dollars in extra fines (Reuters, 2015).

Following the judgement, knowing that the arbitral panel was seeking to suspend the enforcement of the award, the Lago Agrio Plaintiffs pursued another injunction against the Chevron v. Ecuador (II) arbitration, which like the first failed.

Nearly a year after the first Lago Agrio Judgement, the award was affirmed on appeal by Ecuador's Provincial Court of Sucumbíos and soon after the Secretariat of the National Court of Justice issued the plaintiffs a certificate declaring that the Lago Judgement was enforceable. The day after the appellate court's decision, in an email to the panel dated January 4, 2012, Chevron accused Ecuador of defying the panel's interim orders, stating that:

> …through its actions and inactions to date, Ecuador has failed fully to comply with the Tribunal's directive that it use all measures at its disposal to suspend or cause to be suspended the enforcement or recognition of the Lago Agrio Judgment pending further order or award from this Tribunal (Bishop, 2012, p. 7).

Chevron then further argued that Ecuador should not be able to avoid its international obligations by refusing to circumvent its judiciary and suspend the Lago Agrio award (Bishop, 2012). In response to Chevron's accusations, the Republic of Ecuador replied that it had taken all measures at its disposal, but that its constitution prevents any interference with the independence of its judiciary. Ecuador also asked that the arbitral panel to "give more weight to the reasoned conclusions of the Ecuadorian Court of Appeals than to the Claimants' exaggerated and unsubstantiated accusations" (Grijalva, 2012, p. 14).

Primary Areas of Analysis and Chronological Timeline

Following a description of the contextual factors and stakeholders of CvE2, the discussion section will explore a number of key events which occurred following the initial arbitral proceedings and the Lago Agrio judgment – specifically the 18 April, 2011 decision not to allow the environmental NGOs to participate in the arbitration and the 27 February, 2012 decision on jurisdiction. The following timeline (Table 4) demonstrates when the primary areas of analysis occur in the proceedings.

Timeline of Key Events	
September 23, 2009	Initiation of arbitration by Chevron. Chevron appoints Dr. Horacio A. Grigera Naón as their arbitrator.
December 4, 2009	Ecuador appoints Professor Vaughan Lowe QC as their arbitrator.
February 25, 2010	Secretary-General of the Permanent Court of Arbitration appoints V.V. Veeder QC as the president of the arbitral panel.
March 10, 2010	The Lago Agrio Plaintiffs seek an injunction against the Chevron v. Ecuador (II) arbitration.
April 1, 2010	Chevron submits a request for interim measures via email.
May 10-11, 2010	Meeting on interim measures and procedural considerations held in London.
May 14, 2010	Panel issues Order on Interim Measures ordering that - neither party exacerbate the situation - neither party should attempt to influence the ongoing Lago Agrio Litigation - Ecuador should request that the court in the Lago Agrio Litigation inform the tribunal of its intended decision date The order was made preceding a decision on the jurisdiction and legitimacy of the arbitral panel.
October 22, 2010	Fundación Pachamama and The International Institute for Sustainable Development (IISD) request access to the arbitration.
January 14, 2011	Claimant requests revised interim measures
January 26, 2011	Panel issues Order for Interim Measures providing for a hearing at The Hague, Netherlands.
February 6, 2011	Oral hearing at The Hague in which parties made oral submissions to the tribunal.
February 9, 2011	In an Order for Interim Measures the tribunal relays that it has still not decided upon objections to its jurisdiction. It also orders the Respondent to actively oppose the enforcement of the impending Lago Agrio Award.
February 14, 2011*	Ecuadorian court rules in favour of the Lago Agrio Plaintiffs
March 17, 2011	The Lago Agrio Plaintiffs again seek an injunction to halt the Chevron v. Ecuador (II) arbitration, which likewise fails.

April 18, 2011	Panel issues Procedural Order No. 8 deciding not to allow the two NGOs to participate in the arbitration. The panel again reiterates that it has not decided upon jurisdictional objections.
January 3, 2012	Ecuador's Provincial Court of Sucumbíos affirms on appeal the judgement in favour of the Lago Agrio Plaintiffs.
January 25, 2012	Panel issues its First Award on Interim Measures stressing the fact that Ecuador must actively seek to suspend the enforcement of the Lago Agrio Judgement against Chevron, both within and without Ecuador
February 16, 2012	Panel issues its Second Award on Interim Measures.
February 27, 2012	The Panel issues its Third Interim Award on Jurisdiction and Admissibility, determining that it does indeed have jurisdiction to consider the merits of the case. The decision comes two years and five months after the arbitration was initiated.
April 9, 2012	Panel issues Procedural Order No. 10 informing the parties how the case will proceed and dividing the case into two parts – Track 1 and Track 2.
May 30, 2012*	The Lago Agrio Plaintiffs seek to enforce the Lago Agrio Award against Chevron in Canada, but the court decides against hearing the case.
June 27, 2012	The Lago Agrio Plaintiffs seeks recognition of the Lago Agrio Award against Chevron in Brazil.
February 7, 2013	Panel issues its Fourth Interim Award on Interim Measures finding that Ecuador has breached its obligations to make all efforts to suspend enforcement of the Lago Agrio Award, which is being pursued by the Plaintiffs in Canada, Brazil and Argentina.
September 17, 2013	Panel issues its First Partial Award on Track 1, discussing the 1995 Settlement Agreement and the 1998 Final Release Agreement between Ecuador and Texpet
November 26 – 28, 2013	Oral hearings on Track 1
March 4, 2014*	Judge Lewis A. Kaplan of the United States District Court rules that the Lago Agrio decision against Chevron was obtained by fraud and should not be enforced.
September 19, 2014	Ecuador requests that all three arbitrators recuse themselves from the arbitration.
September 30, 2014	All three members of the panel refuse to step down.
November 21, 2014	PCA Secretary-General refuses an additional request from Ecuador to have all three members of the panel step down.
March 12, 2015	Panel issues its Decision on Track 1B finding that the Lago Agrio Claim was not barred by the 1995 Settlement Agreement.
March 12, 2015	Dr. Horacio A. Grigera Naón, the arbitrator appointed by Chevron, dissents.
April 21 - May 8, 2015	Oral hearings on Track 2
June 7 – June 9, 2015	The arbitrators visit the Lago Agrio site to examine the effects of oil extraction

September 4, 2015*	On appeal the Supreme Court of Canada rules that the Lago Agrio Plaintiffs can pursue their claim against Chevron in the Ontario Courts.
January 20, 2016*	The District Court of the Hague rejects the Republic of Ecuador's request to have the arbitration stopped and its interim awards overturned.
August 29, 2016	Panel issues Procedural Order No. 45 admitting new evidence into the case.

Table 3: Chronological Timeline of the Chevron v. Ecuador (II) Arbitration

Stakeholders and Contextual Factors

In order to understand the CvE2 case, it is necessary to present the relevant stakeholders and the contextual factors that influenced the arbitration.

The Claimant – Chevron Corporation

The instigating stakeholder in CvE2 is Chevron, a transnational corporation (TNC) that operates in over 180 countries and is headquartered in San Ramon, California (Olson & Mendoza, 2015). Chevron is an industry leader in the development of large natural gas and oil fields, geothermal energy production and off shore drilling[13]. In 2008, the year preceding Chevron v. Ecuador (II), Chevron's sales and operating revenue was approximately 265 billion US dollars[14] (Chevron, 2008); this was more than quadruple Ecuador's GDP at the time of just under 62 billion US dollars (World Bank, 2016).

Texaco in Ecuador 1967 – 1990

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[13] Chevron currently holds three exploration permits for oil deposits in New Zealand waters, covering an area of roughly 6.4 million acres (Chevron, n.d.).

[14] This decreased during the global financial crisis to approximately 167 billion US dollars. After a period of recovery from 2010 – 2014 Chevron's 2015 revenue is down to approximately 130 billion US dollars - the company still reported a profit of approximately 4.5 billion US Dollars compared to 19 billion US dollars the year before (Chevron, 2015).

In its 2015 Corporate Responsibility Report Chevron stated that:

> For more than 135 years, Chevron has proudly developed the energy that people and businesses depend on — helping to spur economic growth and improve the quality of life for communities worldwide (Chevron, 2015, p. 2)

However, this claim stands in stark contrast to the experience of the indigenous peoples of Ecuador, with Humberto Piaguaje, a member of Secoya Tribe, stating that:

> We're poor. There are no animals to eat. We don't have our traditional medicines from plants. We don't have clean water. Chevron left us in poverty (Keefe, 2012, para 23).

Chevron never operated in Ecuador but upon acquiring Texaco Incorporated, which operated in Ecuador from 1967 until 1992, it assumed all assets and associated liabilities (Joseph, 2012).

After the discovery of oil in the Amazon region in 1964 (Jochnick & Rabaeus, 2010), Texaco Petroleum Company (Texpet), a wholly owned subsidiary of Texaco, established an oil operation in Lago Agrio, near the city of Nueva Loja, as part of a consortium with Gulf Oil (Joseph, 2012). In 1972, upon the completion of a 313 mile long pipeline from the remote Amazon region to the Pacific coast, oil exports commenced (Kimerling, 2013). In 1976[15] Gulf Oil's share in the consortium was bought out by Petroecuador, one of Ecuador's state owned oil companies[16] (Joseph, 2012). The two companies continued to operate the concession, Texpet with a minority stake of 37.5%, until 1990 when Texaco transferred management in full to Petroecuador with the concession set to expire on 6 June, 1992 (Jochnick & Rabaeus, 2010). Throughout the period of 1976 to 1990 Texpet retained primary responsibility for operations with negligible

[15] 1977 in some accounts
[16] Petroecuador joined the consortium in 1971 (Joseph, 2012).

government oversight (District Court of The Hague, 2016; Joseph, 2012). Since 1990 Petroecuador has been the sole operator of the concession with Texaco exiting Ecuador in 1992 (Chevron, 2015).

The Respondent – The Republic of Ecuador

Ecuador, the respondent to CvE2 is a reluctant party to the arbitration. Numerous factors encourage states to enter into such investment agreements as EUSBIT that can potentially put the livelihoods and futures of their citizens at risk. Ecuador is a relatively small nation in South America, characterised by a constant tension between the competing pressures of economic growth, largely driven by the exploitation of the state's substantial oil reserves; the conservation of its immense wealth of biodiversity; and the protection of the rights of its many indigenous communities (Escribano, 2013). Historically, due to high levels of debt, Ecuador has borrowed from the International Monetary Fund (IMF) and the World Bank, implementing austerity measures and liberalising tariff schedules in exchange for debt-reduction packages (Lerner & Meldrum, 1992). Currently the economy of Ecuador is largely dependent upon commodity exports, especially oil exports, producing 557,000 barrels of crude oil per day with over 8 billion barrels worth of proven reserves (Organization of the Petroleum Exporting Countries, 2015). As of 2015 the value of petroleum exports to Ecuador's economy is 11.4 billion USD (OPEC, 2015). In addition to oil, Ecuador also exports bananas, coffee, cut flowers, shrimp and fish (World Bank, 2016). From 2006 to 2014 Ecuador sustained an annual GDP growth of 4.6%, which the World Bank (2016) attributes to a 'robust oil prices and important external financing flows' (p. 1). Recently, with the low price of oil and in the wake of a magnitude 7.8 earth-quake in April 2016, the economy has been struggling and is likely to contract (Focus-Economics, 2016).

Presently, and at the time of Chevron v. Ecuador (II), President Rafael Vicente Correa Delgado, an economist, holds office. He was elected in 2007 on promises to combat inequality, reduce poverty, reform the oil industry and enact ‘postneoliberal’ policies (Radcliffe, 2012). In his first two years in office, health care spending doubled, social spending increased from 5.4% of GDP to 8.3% of GDP, and in 2008 during the financial crisis he successfully completed a buyback campaign of defaulted government bonds at 35 cents on the dollar clearing a third of Ecuador’s foreign debt (Weisbrot & Sandoval, 2009). Radcliffe (2012) claims that a new critical development is emerging under President Correa’s administration, with the state seeking to move beyond “mainstream development [which is]… characterised by a colonialist perspective and poor results, leading to an exclusionary ‘monoculture’” (p. 241).

Ecuador and Structural Adjustment Programmes

Some credit Ecuador’s ‘fetishized’ focus on oil exports to the influence of international institutions such as the International Monetary Fund (IMF) and World Bank, whose lending and structural adjustment programmes (SAPs)[17] have partially dictated the Republic’s model of development (Lerner & Meldrum, 1992). SAPs within Ecuador have been widely criticised for ignoring the distribution of benefits across the most vulnerable demographics of Ecuador’s population. In fact, one study found that between 1987 and 2003, “the disbursement, repayment, and servicing of IMF loans adversely affected school enrolment and labour force participation of females in Ecuador” (Saadatmand & Toma, 2008, p. 189). Bates (2007) argues that SAPs and austerity created a ‘migrant mentality’ within Ecuador’s rural population, whereby small-scale subsistence farming was no longer feasible and workers resorted to supporting their families with remittances – a practice that has “divided rural families, fuelled land inflation, and left individuals vulnerable as

[17] In 1990 Ecuador failed to comply fully with IMF and World Bank austerity measures, hence that round of loans never materialised (Lerner & Meldrum, 1992)

undocumented foreign workers in Europe and the United States" (pp. 108-109). SAPs also led to widespread riots and protests (Lerner & Meldrum, 1992), with an Ecuadorian delegation of human rights activists, woman's rights activists and trade union representatives appealing to the World Bank in 2000 to hold off on offering new loans due to the perceived economic and social hardships they would cause the people of Ecuador (Saadatmand & Toma, 2008).

A Shift in Development Strategy

In response to this, Ecuador's new 2008 constitution aims for development to be equitable, inclusive of cultures existing outside of typical relations to the neoliberal economic model and sensitive to the environment which is vital to Ecuadorian's existence (Preamble to 2008 Ecuador Constitution). It can be argued that this discursive shift in development is partially responsible for the growing discontent expressed by Ecuadorians at international courts of arbitration.

Over half of the government's fiscal revenue comes from the oil sector (Escribano, 2013). Hence social programmes are often rationalised by the global price of oil; when oil is strong the government will increase state control of the industry and pursue redistributive policies focusing on combating poverty, but when oil is weak, the government tends to retreat, passing austerity measures by partially privatising state assets, turning to the private sector for production and reviewing regulatory frameworks. It is for this reason that the Republic claims it is seeking to diversify, decreasing its reliance upon fossil fuel exports (Escribano, 2013). In a public address to the United Nations in 2007, President Correa stated regarding climate change that:

> … the present model of growth, based on the intensive use of fossil fuel and in the over consumption, it is an untenable model whose benefits reach to a "privileged" minority of the

modern society, but that enormously harms all of us (Correa, 2007).

This commitment to finding a less intensive model of development is not just restricted to the aspirations of the governing party. While some states incorporate anthropocentric considerations for the environment into their constitution, in 2008 Ecuador became the first state to go beyond this and grant inalienable, substantive rights to nature upon ratifying a number of constitutional amendments (Whittemore, 2011).

Environmental Protection in the Oriente

Though it is undisputable that the Republic of Ecuador holds to ideals of environmentally benign and equitable development as espoused by President Correa, in practice this is not the case. Oil extraction has left a legacy of environmental devastation and if deforestation continues at its present rate Ecuador’s Amazonian jungle, the Oriente, will be entirely lost within 40 years (Lyon, 2004). Additionally, enforcing the rights of the environment as endowed by the Constitution is difficult with environmental advocates lacking either the political power or the necessary will and succumbing to the ambiguities resulting from the absence of legal precedent (Whittemore, 2011).

The role that private firms have played in polluting the Oriente has long been acknowledged (Kimerling, 2013). However, what is clear is that neither privately owned nor state owned oil firms can claim to have a better environmental record. Throughout the 1980s and 1990s (when Texaco operated in Ecuador), the government relied upon a predominantly market-driven approach to the development of oil production capacity. But recently, under the Correa administration, the government has adopted a more state-led strategy, strengthening its state owned enterprises (SOEs) Petroecuador and Petroamazonas and renegotiating contracts with the multinationals who remain in Ecuador (Escribano, 2013). Even with increased state control, a constitutional obligation to the environment and a shifting model of development, there is still a patent contradiction between the reality of Ecuador's practices and its stated aims of conservation and less reliance on fossil fuel exports. As of 2013:

> Ecuador has increased its oil exploration and production; preferred national oil companies show no better environmental record than their foreign private counterparts; renewables remain marginal, with the only exception of hydroelectricity, which entails its own environmental contradictions; there is no significant transition towards less damaging fossil sources such as natural gas; and energy efficiency measures are absent and difficult to implement due to fuel subsidies and poor demand management (Escribano, 2013, p. 156).

It is important to acknowledge the role that government corruption plays in creating this disconnect between policy strategy and practice (Lyon, 2004). Ecuador has consistently rated poorly in Transparency International's (2015) Corruption Perceptions Index and there is an abundance of anecdotal evidence of corruption available throughout Ecuador's history (Joseph, 2012; Kimerling, 2013; Lyon, 2004).

Ecuadorian Perspectives on Foreign Direct Investment and Investment Treaties

In addition to the proposed changes in development and oil production strategies, the Correa administration has changed how it views investment treaties such as EUSBIT and further how it views the process of Investor-State Dispute Settlement in general. Prior to President Correa coming into office, Ecuador adhered to the long held belief that BITs promote FDI and FDI in turn promotes development (Neumayer & Spess, 2005). Lyon (2004) describes the state at the time Texpet (now owned by Chevron) operated oil concessions in the Oriente as a "complicit Republic of Ecuador desperate for direct foreign investment" (p. 710). It is this dependence on FDI that often leaves developing countries beholden to foreign investors to develop productive capacity and encourages the signing of agreements such as EUSBIT which forces states to sacrifice "sovereignty for credibility" (Elkins et al., 2004, p. 4, as cited in Neumayer & Spess, 2005).

Contrary to a common criticism of EUSBIT, FDI did increase upon EUSBIT being signed and subsequently entering into force, but as demonstrated by Figure 4, FDI into Ecuador appears to be primarily constrained by the relative strength and stability of Ecuador's economy to the global economy. When Ecuador's economy is weak, as in 2000, FDI plummets; conversely, when the global economy is weak, FDI spikes.

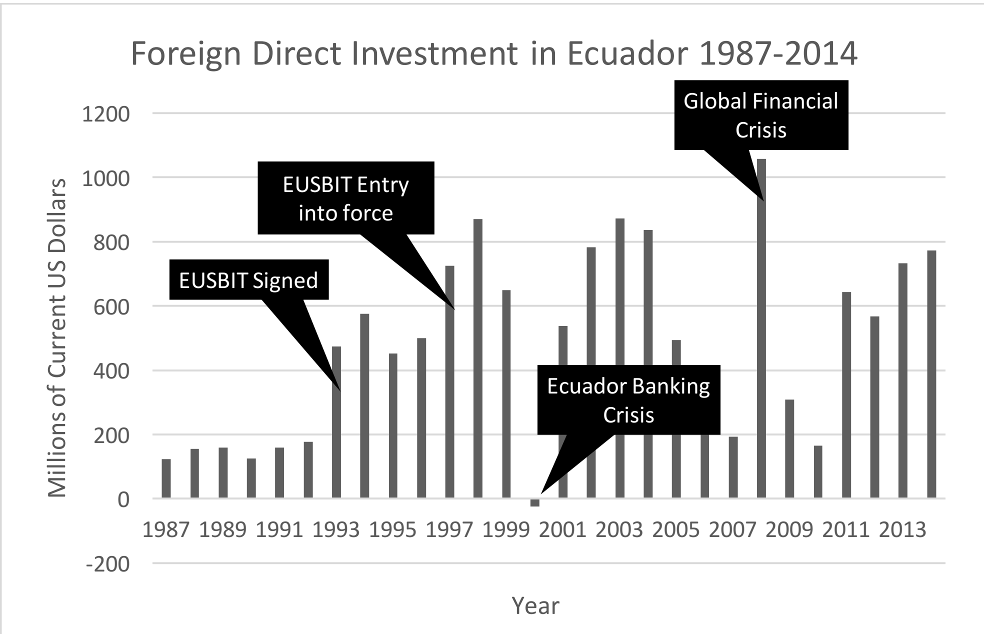

Figure 4: Net flows of Foreign Direct Investment before and after EUSBIT (Data from World Bank, 2016)

Though there are many caveats to be explored regarding the claim that BITs increase FDI, it is apparent that after the signing of EUSBIT, FDI became the largest component of overseas capital flows, exceeding overseas development assistance (ODA), which has remained essentially stagnant in Ecuador since 1987 as shown by Figure 5. When faced with this stagnating ODA, a horrendous credit rating, an impoverished tax base and an inefficient tax gathering system, it is easy to see how a developing country such as Ecuador is attracted to FDI as a means to fund development.

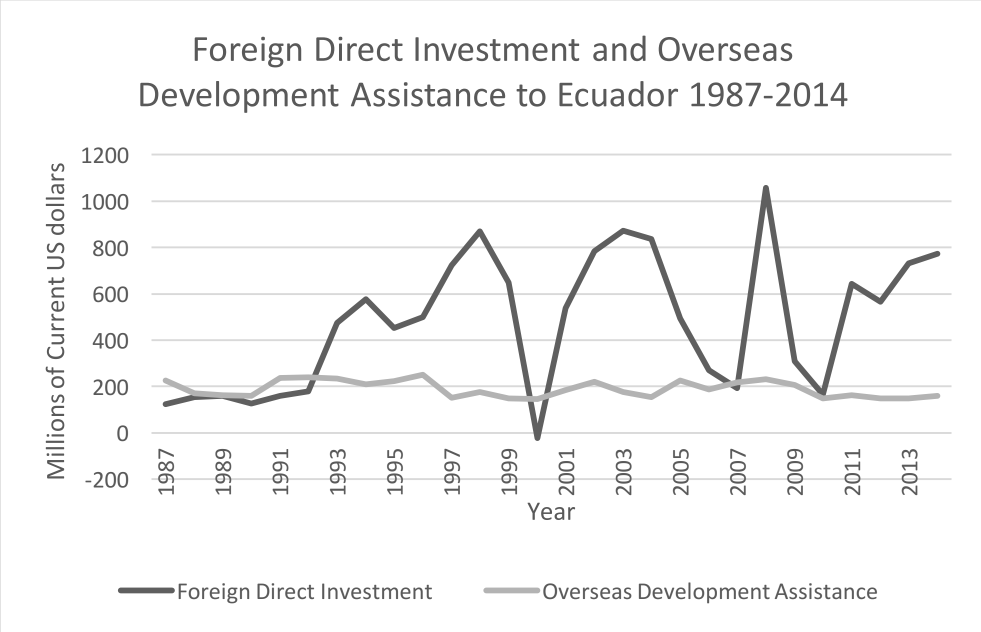

Figure 5: Foreign Direct Investment and Overseas Development Assistance (Data from World Bank, 2016)

Enter China

In line with Ecuador's gradual shift to a postneoliberal model of development, the state has reduced its focus upon FDI, which is seen to privilege private firms. Instead, it increasingly relies upon Chinese loans as a source of capital to develop oil reserves and fund increased expenditure[18] (Escribano, 2013). Most recently, according to Reuters, as of 18 April 2016, Ecuador has signed off on a $2 billion loan from the China Development Bank, for 'public development' (Valencia, 2016). The loan is the latest in a series from China and was conducted alongside a future oil purchase deal between SOEs Petroecuador and Petrochina. It is a common criticism of Correa's administration that he has relied upon Chinese loans to 'prop up' public spending; it is an arrangement which comes

[18] Government expenditure increased from 10.9% of GDP in 2007 to 14% of GDP in 2014 (World Bank, 2016).

attached with an obligation to further develop oil reserves to cater to China's growing demand (Gill, 2013).

Figure 6 demonstrates this change in strategy. From 2011, after the debt buyback, where previously Ecuador was loath to take on extra debt to fund development, government debt increases faster than ever before in the past 30 years. This sharp increase in debt occurs over the years prior to the 2016 earthquake, contradicting the view that Ecuador is simply borrowing to remediate the fallout and supporting the view that Ecuador has changed its strategy for securing foreign capital to fund economic development, where previously it relied more upon FDI facilitated by investment treaties such as EUSBIT.

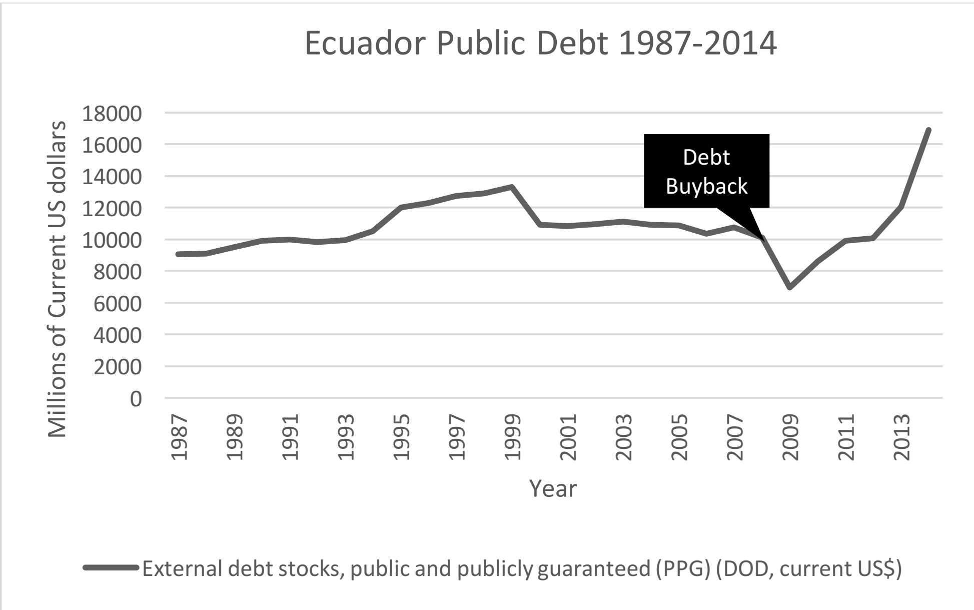

Figure 6: Public Debt of Ecuador in Current US dollars (Data from World Bank, 2016)

Though it is still engaged in a number of ongoing international arbitrations[19], changes in Ecuador's Constitution in 2008 make it unconstitutional for the state to ratify agreements that defer sovereignty to international courts of arbitration (Economist Intelligence Unit Ltd, 2011). Ecuador's Constitution reads that,

[19] Ten publicly released arbitrations are pending against Ecuador as of 1 January 2016 (UNCTAD, 2016)

"treaties or international instruments where the Ecuadorian State yields its sovereign jurisdiction to international arbitration entities in disputes involving contracts or trade between the State and natural persons or legal entities cannot be entered into" (Republic of Ecuador, 2008, Article 422). In 2010, Ecuador, along with Bolivia in 2007 and Venezuela in 2012, withdrew from the International Centre for Settlement of Investment Disputes (Hutchinson, 2013).

Ecuador's Judiciary

Central to the CvE2 arbitration is the claim that the Lago Agrio judgement was acquired by fraud due to Ecuador's compromised judiciary. According to Article 168 of its 2008 Constitution Ecuador's judiciary is wholly independent from the other branches of government (Republic of Ecuador, 2008). However, it is constrained by a legacy of corruption, influence pedalling, politically motivated restructuring and inefficiency (Basabe-Serrano, 2012). Even after a programme of judicial reform undertaken by the Correa administration in 2011, Human Rights Watch (2013) pinpoints political influence in the appointment of judges as a major concern. Also of concern is the misuse of antiterrorism legislation to prosecute environmental activists (Human Rights Watch, 2013). In the case of Chevron v. Ecuador (II), it is the decision of Judge Nicolás Zambrano that Chevron is seeking the arbitral panel to annul. Therefore, the notion of judicial independence is important in that for Ecuador to comply with the arbitral panel's interim orders (Veeder et al., 2012) to suspend the judgement, Ecuador would have to violate its own constitution.

Summary

In summary, Ecuador at the time of Chevron v. Ecuador (II) (2009 – present) can be characterised as a developing country of high social and environmental ideals locked into a pragmatic, if not destructive model of oil-driven development. Historically, it has been beholden to private firms (foreign direct investment) to drive the expansion of its oil industry, but recently, due to a discursive shift and stagnant flows of overseas development assistance, it has turned to Chinese loans to remedy budget deficits, develop oil capacity and fund social programmes. Ecuador's experience with ISDS is an example of the uneven nature of development, with some communities benefiting from development and others being negatively affected.

The Arbitral Panel

By February 25, 2010, the arbitral panel was finalised with Professor Vaughan Lowe QC being appointed by Ecuador and V.V. Veeder QC being appointed as the panel president by the Secretary-General of the Permanent Court of Arbitration. The arbitrators played a central role in deciding upon processual developments and allocating space to stakeholders.

Dr. Horacio Grigera Naón – Arbitrator Appointed by Claimant

An Argentine, Grigera Naón is the arbitrator appointed by the claimant's (Chevron's) council, law firm King & Spalding (UNCTAD, 2009). Naón started his law career as In-house Counsel to the Bridas Group of companies, a family-owned Oil Corporation which has become the second largest fossil fuel producer in Argentina (WCL, 2009). He then completed his post-graduate legal studies at Harvard Law School, graduating in 1985 with a Master of Laws and Doctor of Juridical Science. He progressed from Senior Counsel at the International Finance Corporation to hold the post of Secretary General of the International Court of Arbitration. He has published an extensive body of academic literature on international arbitration in multiple languages (WCL, 2009).

Year	Claimant	Representation of Claimant	Respondent State	Sector

2007	City Oriente Limited	King & Spalding Limited Liability Partnership (LLP)	Ecuador	Oil, Natural Gas and Mining
2007	S&T Oil	King & Spalding LLP	Romania	Oil, Natural Gas and Mining
2008	Murphy Exploratio n	King & Spalding LLP	Ecuador	Oil, Natural Gas and Mining
2009	Chevron	King & Spalding LLP	Ecuador	Oil, Natural Gas and Mining
2009	Repsol YPF Ecuador, S.A. and others	Freshfields Bruckhaus Deringer LLP	Ecuador	Oil, Natural Gas and Mining

Table 4: Publicly Released Arbitrations Presided Over by Horacio Grigera Naón on Appointment by Claimant

From October 2001 to December 2004 Naón was employed as Special Counsel to international law firm White & Case (WCL, 2009). Subsequently, in 2012 Naón was appointed by White & Case, while the firm was acting as respondent's counsel to the Republic of Peru, to act as an arbitrator in the case Isolux Corsán Concesiones S.A. v. Republic of Peru (World Bank, 2012) - essentially appointing a former employee to act as judge.

Table 3 demonstrates a pattern emerging in the three years leading up to the initiation of the Chevron v. Ecuador (II) arbitration, whereby, King & Spalding would consistently appoint him to act as arbitrator in cases against the Republic of Ecuador which concerned oil, natural gas and mining. Naón has been accused of abandoning impartiality and developing a 'working relationship' with such law firms as King & Spalding (CSRwire, 2012). In 2007 he was appointed by King & Spalding, acting on behalf of City Oriente Limited, to act as arbitrator in the case 'City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)' (World Bank, 2006). Also In 2007 he was appointed to act as arbitrator by S&T Oil Equipment & Machinery Ltd in the case 'S&T Oil Equipment & Machinery Ltd. v. Romania' (World Bank, 2007); S&T Oil was represented by King & Spalding. The following year in 2008 he was appointed to act as arbitrator by Murphy Exploration and Production Company International, an oil prospecting firm being represented by King & Spalding in the case 'Murphy v. Ecuador (I)' (UNCTAD, 2008). And finally in 2009, for the fourth time in three consecutive years, Naón was appointed by King & Spalding who were representing Chevron in their case against the Republic of Ecuador (UNCTAD, 2009). The analogous situation to this would be if civil lawyers were able to appoint their own judges thereby creating in the judges a dependency upon the lawyers for work, an arrangement which would be blatantly partial and corrupt.

Professor Vaughan Lowe QC – Arbitrator Appointed by Respondent

A citizen of the United Kingdom, Professor Vaughan Lowe is the Emeritus Chichele Professor of Public International Law at the University of Oxford. He has published an extensive array of articles and books dealing with international law, appointed Queen's Counsel in 2008, served as an arbitrator in over 20 international investment disputes, and acted as an advisor to governments and corporations in a variety of matters related to international law (Essex Court Chambers, 2015).

Lowe has a pragmatic approach to ISDS arbitration, vocalizing the shortcomings and problems facing the system. His views on regulation, corporations as individuals and the inconsistency of international arbitrations go a long way in explaining why the Republic of Ecuador appointed him as their arbitrator. In a piece for the Italian Yearbook of International Law (Lowe, 2004) he presents the example of two arbitrations initiated by the same investor, dealing with the same claim, under two separate BITs; the first under the US-

Czech Republic BIT and the second under the Netherlands-Czech Republic BIT[20]. The arbitration under the Dutch BIT failed while the American action was decided in favour of the investor. Lowe (2004) comments on this outcome that "radical inconsistency of this kind is highly undesirable in any legal system" (p. 36), even going so far as to say that "the system is a mess"[21] (p. 36). Lowe writes of how the lack of an effective legal classification for multinational corporations leads to perverse results stating that "even in cases where the corporation acts in a manner that is inconsistent with international human rights norms, there is no direct legal redress against the corporation under international law for individuals who suffer as a result" (Lowe, 2004, p. 30). It is interesting to note that he almost appears resigned to the inadequacy of the system he operates in, writing that without an 'overarching legal regime', a legislature which can correct 'wrong' decisions or a more formalized appeals process, international dispute settlement is destined to remain problematic, ad hoc and arbitrary (Lowe, 2012). In light of his critical approach to ISDS arbitrations it is no wonder that he has never been appointed by the claimant and has only served as either the chair arbitrator or the arbitrator appointed by the respondent (UNCTAD, 2016).

V. V. Veeder QC – Chair Appointed by Arbitrators

Veeder is also a United Kingdom national. He joined the English bar in 1972, specialising in the areas of commercial and international law and was made Queen's Counsel in 1986 (Prime Finance, n.d.).

Within Veeder's published works there is evidence to suggest that he views the ISDS process as flawed though not irreparably so. In one article he stated that international investment arbitration may

[20] BITs typically allow for the protection of both direct and indirect investors which can lead to multiple cases dealing with the same allegations (Lowe, 2004).
[21] This is in reference to the specific instance of multiple claims, not necessarily to the system of ISDS in general.

well “fail as a legitimate procedure for dispute resolution in the 21st century” (Veeder, 2013, p. 403). Similar to Lowe, he appears to be resigned to the limitations of the institution in which he operates, stating that though ISDS is flawed it is still preferable to any of the alternatives[22] (Veeder, 2010). Veeder (2013), while delivering the Inaugural Charles N. Brower Lecture on International Dispute Resolution, refers to statistics demonstrating that “no known case exists, in the field of investment arbitration, in which a party-appointed arbitrator has ever dissented against the interests of his or her appointing party” (p. 387).

The Treaty and Arbitration Rules

Ecuador - United States of America BIT (1993)

The CvE2 Arbitration was convened under an investment agreement between the United States and Ecuador. Formally titled the ‘Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment’, the Ecuador–US bilateral investment treaty was signed on August 27, 1993, and entered into force on May 11, 1997 under President Clinton of the United States and President Ballén of Ecuador (U.S. Department of State, 1997). It was the second BIT between the United States and a South American country, the first being with Argentina in 1991. EUSBIT is not a free trade agreement and does not deal with tariff schedules or quotas. The treaty was to remain in force for 10 years after which it could be terminated with one year written notice and then for a period of ten years after termination of the agreement, provisions would still apply to

[22] Such as a system whereby a governing body appoints arbitrators on a case-by-case basis from a roster as in the recently concluded EU-Canada Comprehensive Economic and Trade Agreement (CETA), where ISDS has been replaced by an independent investment court system (European Commission, 2015)

investments made or acquired prior to the date of termination (DOS, 1997).

The section of the treaty most relevant to this thesis is Article VI which deals with Investor-State Dispute Settlement. It contains a number of general provisions directing that in the case that an investment dispute "cannot be settled amicably" (Article VI, 2) then the dispute should be submitted to the International Centre for the Settlement of Investment Disputes or any other mutually agreed upon arbitral institution (DOS, 1997). In the case of the CvE2 arbitration, the dispute was administered by the Permanent Court of Arbitration in The Hague.

The Dispute Rules – UNCITRAL (1976) and the New York Convention

The CvE2 arbitration was conducted according to the UNCITRAL (1976) rules. The United Nations Commission on International Trade Law was created on 17 December 1966 by resolution 2205 (XXI) of the United Nations General Assembly (United Nations Commission on International Trade Law, 2013). The general mandate of the Commission was to prepare and promote wider participation in international trade conventions (UNCITRAL, 2013). The UNCITRAL rules have recently gone through a number of changes such as revisions in 2010 and the development of the Mauritius Convention on Transparency. However, the nature of investment agreements is such that only sets of rules and conventions ratified prior to the signing of an agreement hold legal authority (UNCITRAL, 2013), which in the case of the Ecuador v. Chevron (II) arbitration is the first iteration of the UNCITRAL rules developed in 1976.

Regardless of whether such rules exist, a state is not obligated to honour an arbitral decision simply because it is a member of the United Nations. A party must have ratified the Convention on the Recognition and Enforcement of Foreign Arbitral

Awards also called the New York Convention (UNCITRAL, 1958) or a similar convention. Veeder, chair of the Chevron v. Ecuador (II) arbitration, writes in the *Journal of International Dispute Settlement* that “the New York Convention is the lubricating super-oil for the complex machinery which has made the explosion of global trade possible over the past 50 years” (Veeder, 2010, p. 500). Irrespective of the validity of this statement it is accurate that the New York Convention has been instrumental in the rise of private international arbitrations over the past sixty years, for without it the arbitral decisions would hold no legal legitimacy (UNCITRAL, 1958). Currently the convention has 156 parties with Ecuador having ratified the convention in 1962 and the United States in 1970 (UNCITRAL, 2013).

The UNCITRAL 1976 rules, like most international governing texts relies upon the consent of the parties and therefore almost all of the rules are able to be altered providing both parties agree (UNCITRAL, 1976). The rules cover the appointment of arbitrators, arbitral procedure and how the eventual award should be structured.

Summary

Now that the stakeholders, contextual factors and key events have been described and discussed, the following chapter will identify the discourses present within the arbitration and explore how they might affect processual developments.

CHAPTER 5 Discussion, Results and Analysis

Introduction

This chapter will attempt to explain the processual developments within CvE2 by exploring the role of discourses within the investment arbitrations. Firstly, the discourses will be presented, along with evidence for their formulation drawn from primary and secondary sources (chapter 3). Then two processual developments will be identified, along with an explanation of how each stakeholder interacted with the arbitral panel. Finally, the chapter will discuss how the discourses present interact with the processual development of CvE2 and what this means for EJT and environmental policy.

Discourses Evident within the Chevron v. Ecuador (II) Investment Arbitration

Introduction

The case study data was utilised to identify a set of discourses that reflected stakeholder beliefs and values concerning the institution of ISDS. After analysing CvE2, it became evident that there were two primary discourses and one peripheral discourse at work within the arbitration. I have labelled these as the exclusive, inclusive and participative discourses. The initial categorisations were inspired by Philippe Sands, a law professor at University College London (UCL), who has served on over 20 ISDS arbitral panels. At a colloquium on expropriation, he identified two perspectives of ISDS, stating that:

> The first view holds that international law is (or should be) a set of self-contained regimes, in which the ICSID and other foreign investment protection rules exist in hermetic isolation from other sets of societal values. The other view holds that

international law should be considered holistically and systemically so as to accommodate different, and sometimes competing, sets of values (Sands, 2002, p. 202).

The first discourse therefore is an ‘exclusive’ perspective predicated solely upon international investment law while the second is an inclusive perspective, sensitive to a variety of stakeholder values and other international legal principles such as those contained in international human rights conventions and international environmental law. In the CvE2 case, it was necessary to add another category, the participative discourse, to explain the beliefs and values of the environmental justice groups. The following figure explains the method used to develop the categorisations further.

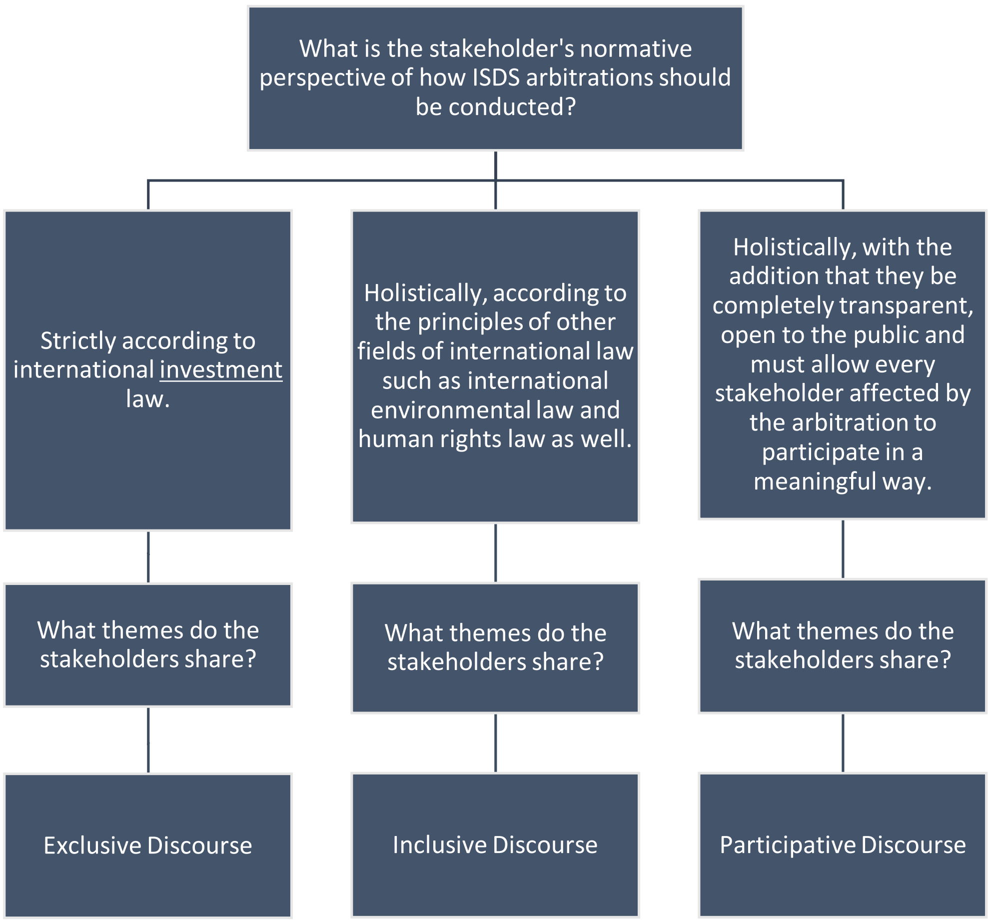

Figure 7: Method of identifying discourses in the CvE2 arbitration

The Exclusive Discourse

The exclusive discourse prioritises strictly legal principles derived from international investment law when conducting arbitrations. Within CvE2, the two clearest subscribers to the exclusive discourse are the panel president V. V. Veeder and the arbitrator appointed by Chevron Corporation, Horacio Grigera Naón. There are three key themes characteristic of the exclusive discourse.The first is a strict adherence to international investment law to guide arbitrations, the second is a deep concern for the integrity and legitimacy of the institution of ISDS, and the third is a belief in the emancipatory potential of the institution.

Maintaining the Independence and Self-Regulation of ISDS

The exclusive discourse is highly critical of exogenous attempts to restructure or alter the institution of ISDS – whether by NGOs, states or international institutions. When arguing against revising the New York Convention (the foundational treaty for international arbitration) Arbitrator Veeder warns that "certain well-known States and every insane NGO, often a pleonasm at UNCITRAL, would add its own mad ideas and hare-brained schemes [to the revised convention]" (Veeder. 2010, p. 504). He then states that the UN's working group on investment arbitration "is now the classic example of an institution where the inmates have taken over the lunatic asylum" (Veeder, 2010, p. 504). This aversion to external regulation is shared by his fellow arbitrator Horacio Grigera Naón. Naón takes it one step further and is a persistent advocate for the development of laws and conventions that are conducive to unregulated international arbitration – essentially that states should regulate to protect the independence of the institution of ISDS. In fact, Naón often rails against anti-arbitration attitudes labelling them as "autistic" (2005, p. 175), "parochial" (p. 158), "unsympathetic" (p. 174) and "antagonistic" (1991, p. 236), while describing pro-arbitration attitudes as "mature" (2005 p. 173) and "modern" (1991, p.

241). To Naón, respecting the institution is of global importance; he writes:

> If the anti-arbitration trend noticeable in some countries of the region [South America] persists, it will soon negatively affect, not only the growth of arbitration in those countries, but also the respect for and advancement of the rule of law, domestic or international (2005, p. 174).

He is also fiercely defensive against states interfering with arbitrations. For example, he writes that “clearly, an arbitral tribunal is not a component of the judicial structure of a state and thus should not be subject to rules destined to resolve competence or jurisdictional problems involving courts of law” (Naón, 2005, p. 156). He then goes further, writing that he hopes that “the rights of arbitrators to decide on their own jurisdiction will remain free of the negative consequences derived from a misunderstanding of the interaction between arbitral and court proceedings” (2005, p 158).

What is evident is a narrative within the exclusive discourse where the institution is seen as constantly under threat from the tyranny of states, while leaving it fully independent would benefit the world. This elevation of the institution to a “saviour-like” standard is humorously summed up by Veeder, when he likens the New York Convention to the Ten Commandments (Veeder, 2010, p. 505).

The Exclusive Discourse and Institutional Reform.

Far from adhering to a rose-tinted view of ISDS, the arbitrators acknowledge that the institution does indeed have flaws and is in need of reform. Veeder somewhat flippantly asks its critics “why not trust the arbitral process?” (Veeder in Schwebel et al., 2004, p. 36). He claims that ISDS will deliver results “however low our expectation of international investment arbitration, however much international arbitration remains susceptible to improvement” (p. 36). Yet, Veeder is an incrementalist when it comes to reforming the institution of

ISDS, warning against altering established arbitrator appointment procedures, saying:

> We should be wary of abandoning a well-established tradition without good cause. Arbitral reform remains desirable, after reflection and consensus, but it is certainly not a necessary solution to switch now to a new, untested, controversial, and radically different system (Veeder, 2013, p. 401).

What is clear is that, for those adhering to this discourse, any reform should come from within the institution as opposed to being thrust upon it. In 2014 Veeder called upon the international arbitration community to self-regulate and become more transparent, warning that if they failed to do so they would suffer irreparable reputational damage and be subjected to stricter regulation from external governing bodies (Franck, Freda, Lavin, Lehmann, & van Aaken, 2015). This anticipated the impending release of a diversity audit which showed that 82.4% of arbitrators were men, their mean age was 54.4 and 82.4% of arbitrators were from an OECD country - leading some commentators to refer to the ‘invisible college’ of international arbitration as ‘pale, male, and stale’ (Franck et al., 2015). Similarly, arbitrator Naón stresses the importance of including more arbitrators from developing states within the institution (1991). Another argument Veeder offers against reform is that with such a change “the great French contribution to international arbitration would be reduced to the lowest common denominator (Veeder, 2010, p. 505)”; a tragedy which one can assume would be keenly felt by the developing states and NGOs.

In summary, the essence of the exclusive discourse is that by maintaining the institution’s independence the “respect for and advancement of the rule of law” (Naón, 2005, p. 174) will flourish throughout the world, which will be to the benefit of the global community.

A State-Centric Variant of the Exclusive Discourse

The key distinguishing feature between the exclusive discourse and the state-centric variant is the idea that arbitral panels should be sensitive to the intent of the contracting parties (the two states under whose authority the arbitration is convened).

As previously discussed, Ecuador's attitude to ISDS arbitrations and FDI in general has changed dramatically under the Correa administration and could now be described as openly hostile. However, the analysis that follows was informed primarily by case documents authored by Ecuador's legal team in the CvE2 arbitration, which was led by the Republic's Procurador General (attorney general) Dr. Diego García Carrión. The rationale for this limited scope is that treating the Ecuadorian State as a homogenous stakeholder is problematic given the diversity and contradictions that exist within the state. Hence, the specific branch of the state which is directly involved in the arbitration will be the focus of this case study analysis.

The Capture of ISDS by Transnational Corporations

The position of Ecuador on the development of the institution of ISDS is that transnational corporations (TNCs) are the primary drivers of procedural development. In its Memorial on Jurisdictional Objections Ecuador points to "a novel canon of treaty interpretation" (Republic of Ecuador, 2010, p. 1) which interprets too broadly certain clauses in the favour of investors. This view, that BITs are construed to favour investors rights is acknowledged in the academic literature on ISDS, most notably with arbitrator Lowe stating that "[in] response to the criticism that BITs are unbalanced, pro-investor instruments that are inherently biased against governments. That is true, but misleading" (Lowe in Dolzer et al. 2006, p. 73). He elaborates by stating that:

> Rich and powerful as multinational corporations may be, in the game of creating and maintaining legal rights and duties

> around a foreign investment the government holds most of the high cards. BITs, plainly favoring the investors' interests, do something to redress the balance (p. 74).

Ecuador, however, warns against this sentiment, whereby ISDS plainly favours the rights of investors so as to level the playing field. The Republic states that this favouritism leads to a "burgeoning jurisprudence of conflicting decisions… and increasing scepticism about the long-term value and viability of the State's commitment to an investment treaty program" (Ecuador, 2010, p. 2).

Further, within the CvE2 arbitration, Ecuador accuses the panel of allowing the investor (Chevron) to largely "[drive] the arbitral process" (World Wide Reporting, LLP, 2015, p. 178) and, interestingly, accuses the investor of appealing to the panel's own "sense of justice" (p. 179) as opposed to relying on "principles of international law" (p. 179). This sentiment expressed by the Ecuadorian legal team sheds light on the emerging theme that some participants in ISDS acknowledge how conceptions of justice are highly contextualized and therefore seek to have 'values' and 'beliefs' excluded from legal decisions. This can be seen as a tactic to avoid the hegemonic dominance of the institution by one specific discourse – a tactic which a country from the global south would obviously subscribe to.

The Intent of the Contracting Parties

Ecuador advocates that ISDS should be more responsive to the intent of the States that created the BITs from which ISDS and the arbitral panel draws their authority. Mr. Bloom, a member of Ecuador's legal team, says that:

> If this system of BITs is to flourish and I would submit even to survive, the law must be applied in accordance with the intent of the Contracting Parties, here the Republic of Ecuador and the United States; otherwise, the credibility of the BIT system

itself is damaged because, frankly, we lose the buy-in, the confidence of the respective States (WWR, 2015, p. 181).

In essence, Ecuador is arguing for top-down, state-focused development on the grounds that, without being responsive to the consenting states' intent, they will simply back out of the investment treaties and the entire system will collapse. It is an important point to note, that a BIT is signed by two states and is premised entirely upon their consent (Lowe, 1992). Ecuador's position, therefore, is akin to 'don't bite the hand that feeds you'. Nothing within the data suggests that Ecuador views ISDS as an open forum through which stakeholders can pursue justice. Rather, it considers ISDS more as a tool created by states and hence subject to states.

The Inclusive Discourse

Similar to the exclusive discourse, the inclusive discourse makes the claim that international law in general is "an instrument to advance towards a just, peaceful, stable and prosperous society"[23] (Lowe, 2012, p. 211). Far from being the polar opposite to the exclusive discourse, the defining characteristic of the inclusive discourse is that it acknowledges an arbitral panel's obligation to provide a forum in which all their stakeholders can pursue their justice claims. This entails not simply conducting arbitrations according international investment law but also according to principles of international environmental law and human rights law (Lowe, 2002).

Inclusion through Exclusion?

[23] Lowe distinguishes between society and community where community is a group sharing certain values while society is more heterogeneous, incorporating often conflicting beliefs and goals (Lowe, 2012).

The inclusive discourse claims that ISDS should develop in such a way that it provides a neutral forum through which every group of society can exercise agency and pursue justice.

Arbitrator Vaughan Lowe (2012) writes that "*the function of law is to simplify*: and in simplifying it lays bare the basic principles, the ribs of the social architecture that the courts uphold" (p. 212). He then argues that an international court or panel need not consider the 'redistributive' consequences of a party's actions. It must simply address the question of 'did you commit the crime?' (Lowe, 2012).

Though these two positions at first appear to be in conflict, that of considering the public good, while myopically adhering to 'basic principles', Lowe reconciles them by saying, "I think that the idea of an international community based upon shared global values is a myth; and an unhelpful myth at that. The purpose of international law is not to express, let alone to enforce, a homogenous set of universal values" (p. 221). Essentially he claims that by removing values from the process and strictly adhering to legal principles it allows for the incorporation of different groups of society, while avoiding the hegemonic domination of the forum by a particular discourse which would function to favour some stakeholders. This sentiment is also shared by the Republic of Ecuador and the EJGs.

The Public Interest

The public interest is a peripheral theme within the inclusive discourse. Arbitrator Lowe (2000) writes that "it is not enough to be interesting and clever. Lawyers should make a difference" (p. 232). Regarding the mandate of ISDS panels to act in the public interest, he writes that:

> A bolder soul might advance the principle that a tribunal adjusting conflicts between the rights of litigants should have an authority derived from its rootedness in the community from which the litigants come, and from the tribunal's ability to

> credibly assert that its decisions are implementations of - or at least consistent with - a broad conception of the public interest and of public order. I hesitate to make such a claim; but the respect in which judges in national courts are held certainly makes it easier for them to take a clear and principled line in dealing with challenges to exercises of governmental power (Lowe, 2002, p. 464).

Here Lowe is identifying a major obstacle to the legitimacy of the institution of ISDS. When a national court challenges a state it is legitimised by its 'rootedness in the community'; however, ISDS arbitral panels are comprised of independent lawyers, who in part are chosen because they are unaffiliated with the 'public'. Lowe, therefore, tentatively flirts with the idea that arbitral panels should be obliged to consider the public good aspect of an arbitration.

The Participative Discourse

The participative discourse is solely demonstrated by the environmental justice groups who interact with the arbitration. The discourse is shared by a diversity of actors but is united by some key principles. The first is simple – whenever a court, panel or commission is to decide on issues that impact substantively on the rights of a group that group should be able to participate in the process and have its interests fairly represented. In its amicus brief to the panel EarthRights International (2010), on behalf of Fundación Pachamama and The International Institute for Sustainable Development (IISD), criticise the arbitration for hearing a case concerning the rights of indigenous people who "cannot meaningfully participate in [the] process (p.11)". The brief further stresses this point where it states:

> International law thus emphasizes the importance of ensuring that citizens in general, and indigenous peoples specifically, in terms of both their individual and collective rights, have access

to justice to protect their rights and seek remedies for violations[24] (ERI, 2010, p. 16).

In the Lago Agrio Plaintiffs' request for precautionary measures to the Inter-American Commission on Human Rights, they repeatedly criticise the arbitration for not allowing the public and the affected indigenous people to attend the arbitral hearings (Lago Agrio Plaintiffs, 2012).

A second core theme within the participative discourse is that each party's and arbitrator's sense of justice should be subordinated to established principles of international law. The Lago Agrio Plaintiffs (2011) write regarding CvE2 that the "very core of the international legal order" (p. 5) is at stake. In a similar sentiment to that showed by Ecuador's legal team, ERI (2010) writes that arbitral decisions "should not be grounded in the creativity of Claimants and their counsel in drafting claims, but rather in principled assessments based on appropriately grounded legal standards that incorporate the ability to respond to newly fashioned types of claims" (p. 37). They also state that by adhering to these 'appropriately grounded legal principles, "judicial and arbitral decision-makers safeguard their credibility and legitimacy, as well as the credibility and legitimacy of the other, appropriate, levels of jurisdiction" (ERI, 2010, p. 32). It is surprising that Ecuador, arbitrator Lowe and the EJGs demonstrate this aversion to the utilization of stakeholder's, especially the arbitrators', conceptions of justice. One would expect the opposite, due to the highly charged nature of the case dealing with the devastation of a people's environment, wellbeing and way of life.

However, there could be a number of contributing factors to this attitude. Firstly, it is widely acknowledged that ISDS lacks diversity within practising arbitrators (Franck et al., 2015). In the CvE2 arbitration two of the arbitrators are from the United Kingdom,

[24] Also referring to the fact that Chevron initiated the arbitration to pre-empt the Lago Agrio Judgement so as to block the indigenous peoples from pursuing their civil claim.

while one is from Argentina[25]. Of course, this is not to say that the arbitrators are prejudiced in a racial sense, but that this imbalance could point to an overrepresentation of ‘western’ values within the institution and hence any stakeholder from a developing country would be wary of appealing to those sentiments. The second possible factor is again that presented by arbitrator Lowe, where historically the institution’s development has been driven by countries in the Global North leading to a similar over representation of such values. As ERI (2010) points out modern international law has become much more sympathetic to the plight of indigenous peoples. ISDS, however, could be considered as lagging behind.

Wider EJG Perspective

The wider EJG perspective is informed by actors who do not directly engage with the arbitration but comment extensively upon it and seek to shape the public narrative surrounding it. It shows little concern for how the institution of ISDS actively develops, instead focusing on the institution’s limitations and lack of legitimacy. Various environmental groups such as Amazon Watch and The Amazon Defence Coalition (ADC) are highly critical of the institution’s perceived ignorance as to these limits. The ADC (2012) accuses the CvE2 arbitrators of “acting outside the scope of their authority” (para. 5). Other environmental justice groups label the arbitration as a “secret panel of private lawyers” (Amazon Watch, 2012a, para. 1), a “chummy club with everybody rubbing everybody's back” (AW, 2012b, para. 3) and a “kangaroo court” (para. 11). Similarly, they accuse the arbitral panels of being “pro-corporate” (AW, 2015, para. 4), calling the arbitrations “nothing more than opportunities for the

[25] No observer would make the case that Arbitrator Naón favours the plaintiffs or represents their values. He has been accused multiple times of unfairly favouring Chevron and of developing a ‘working relationship’ with the corporation (ADC, 2012).

secret "Club" members to make millions in fees" (AW, 2012a, para. 6).

Though it does not provide any evidence of pro-corporate bias, this widespread accusation does raise the issue of perverse incentives within the institution of ISDS. There is no question that commercial arbitration is a lucrative business, with arbitrators and lawyers engaged in cases which span many years, all the while charging substantial fees (European Commission, 2015). However, cases are generally only instigated by investors against states (Lowe, 2002). In order for ISDS cases to proliferate it is vital that investors feel they stand a good chance of winning. Additionally, the second perverse incentive is that panels are expected to exclusively rule upon their own jurisdiction – i.e. whether they should take the case. From the perspective of an arbitrator, should they decline jurisdiction they forgo a considerable amount of money. Every case an arbitrator rules is under the panel's jurisdiction is another opportunity to earn more fees. This might help explain the accusations of 'creative claims' to jurisdiction throughout CvE2 (ERI, 2010). However, at the end of the day it would be a hard task to prove that arbitral awards and rulings on jurisdiction are impacted by these incentives.

In summary, the participative discourse, like the inclusive, argues for the inclusion of broader principles of international law and mandates that stakeholders play an active role in the arbitrations.

Summary of Stakeholder Perspectives and Discourses Present within CvE2

Stakeholder	Normative Perspective (how should it develop?)
V. V. Veeder (Chair)	Exclusive discourse
Vaughan Lowe (Arbitrator appointed by Ecuador)	Inclusive discourse
Horacio A. Grigera Naón (Arbitrator	Exclusive discourse

appointed by Chevron)	
Panel as a whole	Leaning towards exclusive discourse
The Republic of Ecuador	(Exclusive discourse) state-centric variant
Chevron Corporation	Exclusive discourse
Environmental Justice Groups	Participative discourse (or refuses to acknowledge the legitimacy of the institution)

Table 5: Stakeholder Perspectives on the Institutional Development of International Arbitration

Discourse	Description
Exclusive Discourse	• Strictly according to international investment law.
Inclusive Discourse	• Holistically, according to the principals of other fields of international law such as international environmental law and human rights law as well.
Participative Discourse	• Holistically, with the addition that arbitrations be completely transparent, open to the public and must allow every stakeholder affected by the arbitration to participate in a meaningful way.
Exclusive Discourse (state-centric variant)	• Strictly according to international investment law (interpreted in light of the intent of the contracting parties).

Table 6: Summary of Discourses Present within the Chevron v. Ecuador (II) Investment Arbitration

Processual Developments

Introduction

Processual developments in ISDS arbitrations are largely subject to the discretion of the members of the arbitration themselves. Article 15 of the UNCITRAL 1976 Arbitration Rules reads that “Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case”. This is, in essence, the premise of this thesis, which asks the question ‘how do discourses within ISDS affect processual developments within the arbitration?’ The way the arbitrations develop is up to the stakeholders themselves (to varying degrees) and as such, this research project proposes that discourse plays an integral role in the direction the institution develops.

The Decision on Amici Curiae

The first area of analysis is the panel’s decision on amici curiae. The ad hoc nature of CvE2 is highlighted by the fact that within the Ecuador-United States BIT and the 1976 UNCITRAL Arbitration Rules there is no mention of what procedure should be followed when non-disputing third parties request access to the arbitration to participate as amici curiae. Under current ISDS practices, it is generally accepted that such applications will be decided on by each panel on a case-by-case basis (Bastin, 2013). In recent ISDS arbitrations where panels have granted Amici access to the dispute, the panel’s reasoning has been that the award will affect the public interest and said amici will be able to contribute to the dispute by clarifying just how the public will be impacted (Mourre, 2006). Mourre (2006) notes that amicus curiae, in ISDS disputes, often end up occupying the role of the public’s advocate. Conversely, when amici are refused access, it is generally on the grounds that the panel does not think they can contribute anything more to the dispute or that there is not a public interest aspect to the dispute (Bastin, 2013). It is important to note that not all ISDS arbitrations are sufficiently transparent enough for potential amici to formulate a request which demonstrates their value to the case. Case documents are generally only released with the agreement of both parties, which is the case in CvE2 (UNCTAD, 2016)

Background

The Decision on amici curiae is an important processual development to analyse in CvE2 as it involves all four stakeholder groups directly engaging to shape the arbitration's process. On October 22, 2010, EarthRights International (ERI) filed a Petition for Participation as Non-Disputing Parties on behalf of Fundación Pachamama and The International Institute for Sustainable Development (IISD) (ERI, 2010). In the petition the NGOs requested three things: (1) that they might file an already prepared written submission with the panel; (2) that they might attend the oral hearings to present their submission (or just to simply observe); and (3) that they may have access to the key arbitration documents (ERI, 2010). The petition made the case that even the jurisdictional stage of the arbitration will affect the public interest, stating that:

> This arbitration raises a number of issues of vital concern to specific indigenous communities and peoples in Ecuador, and other indigenous communities and individuals living in areas potentially affected by foreign investments in Ecuador and elsewhere (ERI, 2010, p.3).
>
> And again that:
>
> The issues raised [in this petition] reflect both a concrete interest in the public impact of this arbitration on the underlying litigation in Ecuador, and the broader interest of the public in the ability of other communities to pursue domestic legal remedies relating to alleged damages by foreign investors (ERI, 2010, p.7).

Prior to this, Mr. Marco Simons of ERI had to contact the Permanent Court of Arbitration (the administrating body of the case) and enquire as to the protocol for requesting access to CvE2 (Veeder et al., 2011b).

Chevron's Initial Response to the Petition

Unfortunately, the exchange between the panel and the parties is not available, but Procedural Order No. 8 includes a number of comments from the parties. In a letter to the panel on 11 November 2010, Chevron (as quoted in Veeder et al., 2011b) wrote that they "oppose the intervention of the Amici Curiae at the jurisdictional phase of this arbitration, and in particular, object to their attendance at, and participation in, the jurisdictional hearing" (p.4). Their arguments against the EJGs participation were firstly that they would be unable to add to the legal arguments surrounding the jurisdiction of the tribunal, secondly that "both Fundación Pachamama and EarthRights International have a longstanding record of asserting baseless claims against Chevron" (as quoted in Veeder et al., 2011b, p. 4), and thirdly that there was not enough time before the hearings to alter the process. After presenting their objections, Chevron stated that they did not consent to the NGOs attending the hearings. The final issue of consent is important as under the 1976 UNCITRAL rules "hearings shall be held *in camera* [private] unless the parties agree otherwise" (UNCITRAL, 1976, Article 25-4). Essentially, this is Chevron exercising its veto power to block the NGOs from attending the hearing on jurisdiction. Soon after, the panel informed the NGOs that they would not be allowed to attend the hearings.

Ecuador's Initial Response to the Petition

Ecuador informed the panel that it did not object to the NGOs attending the hearing, but the Republic did not see how they would contribute to the legal issues of jurisdiction (Veeder et al., 2011b).

The Tribunal's Decision

Having already declined one of the petitioner's requests, the panel relayed its final decision in Procedural Order No. 8 that:

> … having considered the Amicus Petitions in all the circumstances currently prevailing in these arbitration proceedings, the Tribunal decides to exercise its discretion (inter alia) under Article 15(1) of the UNCITRAL Arbitration Rules not to permit the participation of the Petitioners as amici curiae at this stage of the arbitration (Veeder et al., 2011b, p.5).

The panel reasoned that the arguments to be decided on during the jurisdictional phase were primarily legal and therefore the petitioners will be of no further help to the panel[26].

Summary

The NGOs made three requests, two of which were denied (Table 7).

Request made by NGOs:	File a written submission to be considered by the panel	Attend the oral hearings	Access to key arbitration documents
Granted/denied:	Denied	Denied	Granted
Reason for decision:	Panel, Chevron and Ecuador believed that the NGOs could not contribute to the legal aspect of the case.	Initial veto by Chevron corporation	Parties had already agreed to make non-confidential documents public.

Table 7: Summary of Requests to Arbitral Panel by NGOs

Discussion

Ignoring the Public Good

[26] The panel specifically confined its consideration to the jurisdictional phase of the arbitration.

Central to the NGOs' petition is the consideration of the public dimension of the case. They write:

> Collectively, the Petitioners bring the necessary experience and perspectives to address the various public concerns and legal issues implicated when private parties – particularly, indigenous groups – seek to invoke domestic judicial systems over environmental and human rights claims arising out of the activities of international investors (ERI, 2010, p. 4).

However, in Procedural Order No. 8, where the panel explains its decision to decline the NGOs' request, the panel never addresses this aspect. Instead, the sole reasoning for declining the request is that "the issues to be decided are primarily legal and have already been extensively addressed by the Parties' submissions" (Veeder et al., 2011b, p. 5). This is unsurprising considering arbitrator Lowe is the only member of the panel to entertain the idea that arbitrations should be mindful of the public.

Neither Ecuador, nor Chevron discussed the public interest aspect of the petition. The absence of any consideration of the public interest from Ecuador at first appears peculiar when a state's supposed function is to promote and protect the public interest. However, when considered in light of their previously demarcated perspective on the institution's processual development their actions become more understandable. Ecuador's primary desire for processual development is not that it is sensitive to the public good but that it is sensitive to the contracting parties' intent. And again, Ecuador's insistence that the panel focus on legal issues as opposed to more subjective issues such as the public good is a reflection of the distrust which stakeholders from non-western countries have for certain conceptions of justice. Whose conception of the public good would be given the most weight in the arguments? Chevron consistently argues that it is for the good of the global public that their claims be upheld. The EJG stakeholders argue for the public good in relation to the indigenous peoples of the Oriente. The two conceptions are potentially mutually exclusive and irreconcilable, so which one will be preferred by the panel? This is one of the limitations to the concept of the public good that is consistently reiterated throughout CvE2.

Chevron's stance on the NGOs petition is at first glance far more understandable than Ecuador's. As noted, Chevron adheres to an exclusive perspective of the institution of ISDS. A notable characteristic of their perspective is that they consistently and emotively play to a certain conception of justice. That is, the idea of an international law which protects the rights of investors from the predations of states. Cynically one could infer that should the NGOs be included in the arbitration then Chevron's monopoly on victimhood would be eroded. Thus, their blanket refusal of the NGOs' request to attend the oral hearings is understandable.

Characterising the NGOs as the 'Other'

Chevron's accusation that the NGOs are "not genuine 'friends-of-the-court'" (Chevron as quoted in Veeder et al., 2011b, p. 4) shows Chevron's intent to characterize the NGOs as the 'other' and as unsuitable to participate in the legal arena of CvE2. Indeed, this is a sentiment shared by the arbitrators, Chevron and Ecuador that the NGOs could not possibly contribute to the legal issues, as if the mere fact that they are NGOs precludes them from commenting on legal issues. This idea that NGOs and EJGs are not qualified to comment on international legal issues is one of the biggest obstacles to effectively pursuing their environmental justice claims (Velicu & Kaika, 2014). Environmental justice groups, as demonstrated by CvE2 are consistently characterized as qualitatively different from 'legitimate disputing parties', eroding their agency and suffocating their EJ claims. One question is whether EJGs must adapt to become more 'legitimate' or whether the institution of ISDS needs to be altered; most likely it is a combination of the two. As one indigenous plaintiff is quoted as saying “It's a search for justice. How can we do that without lawyers?" (Keefe, 2012, para 97).

Refusal to Set Precedent

No dispute panel prior to the NGOs petition had admitted amici in the jurisdictional phase (Bastin, 2013). However, ultimately the decision was entirely up to the arbitrators and explaining their decision arguing it abided by the principle of precedent (or lack of it) is weak at best. ISDS arbitrations are constantly setting precedent due to the novelty of the claims arbitrated. Further, as arbitrator Lowe points out, the doctrine of precedent is almost irrelevant in international law as there is no obligation to abide by it (Lowe, 1992).

Therefore, their decision to exclusively privilege the legal issues of the arbitration and deny the NGOs access could be explained by the interaction of the stakeholders’ perspectives on ISDS’ processual development. The panel’s decision, it can be argued, is not dictated by exogenous influences such as former arbitral decisions and arbitral rules, but is informed primarily endogenously. The prevalence of the exclusive discourse thus precluded a sympathetic consideration of the NGO’s request.

Is there Evidence that the Discourses Influenced Processual Developments?

There is no evidence that discourse played a role in the panel’s decision to deny the NGOs access to the oral hearings. The panel, in accordance with the arbitration rules did not have a choice due to Chevron’s power of veto. Chevron’s decision to block the NGOs from attending is better explained by self-interest than the influence of discourse. Allowing a party access to the arbitration which would clearly pit itself against Chevron would not be in the corporations best interest. Chevron would find itself fighting on two fronts, against Ecuador and against the NGOs.

Also, there is not enough evidence within the data to determine conclusively what was the major driver of the decision to make the case files of CvE2 public.

However, there is evidence to support the claim that discourse influenced the panel's decision not to allow the NGOs to file a brief. The pervasiveness of the exclusive discourse within the arbitration explains the panel's refusal to consider the public aspect of the jurisdictional phase, its refusal to set precedent by allowing them to file a brief and its myopic focus upon whether the NGOs could add to the legal aspect of the arbitration.

Summary

Chevron's rapid veto set the tone for the panel's response to the NGOs' petition. Regarding the request to file a brief, there is a collection of evidence to suggest that the decision was informed by the interaction of stakeholder perspectives and discourse (as opposed to legal precedent and principles).

The Decision on Jurisdiction

Introduction

On February 22, 2012, two years and five months after the arbitration was initiated the panel came to a decision as to whether it had jurisdiction over the case. Each stakeholder employed various techniques to plead their case, Ecuador claiming that the panel had no jurisdiction and Chevron that it did. As already discussed, the EJGs were barred from participating directly in the jurisdictional phase of the arbitration. However, during the period leading up to the decision the Lago Agrio Plaintiffs, who were not interested in participating in the arbitration (which will be discussed) sought an injunction against the arbitration initially from Judge Leonard Sand in the New York Southern District Court, then on appeal from the United States Court of Appeals for the Second Circuit.

Ecuador and Chevron employed many legal arguments to sway the panel, such as Res Judicata, The Prima Facie Standard and Fork in the Road (Veeder et al, 2012c). However, in order to stay within the focus of this thesis, only arguments surrounding participation and the rights of the Lago Agrio Plaintiffs will be analysed.

Ecuador's Position on Determining the Rights of Third Parties

One of the arguments Ecuador offered against the panel's jurisdiction is that the panel should not decide upon issues which concern the rights of groups who are not party to the arbitration, in this case the Lago Agrio Plaintiffs. Ecuador's legal team, in its Memorial on Jurisdictional Objections, writes that "it is well-established that an international tribunal should refuse to exercise its jurisdiction over a dispute if the very subject matter of the decision would determine the legal rights of a non-party to the proceeding" (Ecuador, 2010, p. 75). This is referred to as the Monetary Gold principle whereby the authority of an international panel is derived from the consent of the *states* whose rights are being affected. It is generally accepted that this is the foundation for international law. However, it must be noted that it is debatable whether the principle can be extended to citizens of states (Palchetti, 2015) as pointed out by Chevron's council and the panel. In spite of this Ecuador continued to maintain that the general principle was indeed applicable (Veeder et al. 2012c), that the panel should refuse to adjudicate a case which would decide on the rights of a third-party – whether they be a state or an indigenous community[27].

[27] At first glance this contradicts the top-down state driven perspective of ISDS attributed to Ecuador within this case study. However, the Republic never argues that the indigenous communities be made party to the arbitration, but simply that the panel lacked jurisdiction.

Chevron's Position on Determining the Rights of Third Parties

Chevron, in reply to Ecuador's objection to jurisdiction, contended that the panel "adjudicating [the dispute] between Claimants and Ecuador [would] not affect any legitimate third parties" (Chevron, 2010, p. 124) and that the Lago Agrio Plaintiffs "[did] not have separate rights that could be affected[28]" (p. 124) by the arbitration. Chevron then accused Ecuador of using the Lago Agrio Plaintiffs as a way to "evade its international obligations to the claimant" (Veeder et al., 2012c, part III, p. 71).

Interestingly there is a disagreement between the parties as to whether Ecuador should be obliged to represent the interests of the Lago Agrio Plaintiffs. Veeder et al. (2012c) note that:

> The Respondent [Ecuador] further rejects the Claimant's [Chevron's] suggestion that the rights of the Lago Agrio plaintiffs would be adequately protected by the Respondent in this arbitration, noting that the Claimants cite no case where a State respondent has represented the interests of third parties in an investment arbitration (part III, p. 53).

Conversely the panel notes that:

> The Claimants [Chevron] contend that the Respondent [Ecuador] represented and released the same rights that the Lago Agrio plaintiffs now assert; and, since the Lago Agrio plaintiffs are asserting the interests of the Ecuadorian community to live in a clean environment, the Ecuadorian Constitution expressly obliges the Ecuadorian State to represent those interests (part III, p. 70.

In summary Ecuador believes that it cannot adequately represent the interests of the indigenous communities while Chevron claims the republic is constitutionally obliged to represent the

[28] Chevron did not mean no rights in a general sense.

indigenous communities. Such a situation is an example where inclusion and representation is employed as a tactic to marginalise and exclude a stakeholder group - a catalyst for disruptive environmental justice movements (Velicu & Kaika, 2014).

The EJG's Position on Determining the Rights of Third Parties (Not considered by panel)

The petitioners argue that if the panel decides it does have jurisdiction over the case "such an action could weaken the ability of indigenous peoples and other marginalized communities to access Ecuadorian courts over claims that arise out of the activities of foreign investors" (ERI, 2010, p.7). The petitioners further argue that this would set a dangerous precedent, affecting environmental justice claims around the world, where investors could simply bypass local appellate courts to avoid liability by invoking international arbitration.

The Panel's Decision on Determining the Rights of Third Parties

The panel in its reasoning regarding the rights of third parties and the Monetary Gold principle that:

> Most obviously, it [Monetary Gold] gives effect to the principle that no international tribunal may exercise jurisdiction over a State without the consent of that State; and, by analogy, no arbitration tribunal has jurisdiction over any person unless they have consented. That may be called the 'consent' principle, and it goes to the question of the tribunal's jurisdiction (Veeder et al. 2012c, part IV, p. 19).

Following this, the panel acknowledged that it had no jurisdiction over the Lago Agrio Plaintiffs and hence has no authority to order the Plaintiffs to do anything. The panel then states that:

> …it is possible that even though the Lago Agrio plaintiffs may not be indispensable third parties to this arbitration, a decision by this Tribunal may nonetheless have a significant effect

> upon their legal rights and interests. The question therefore arises of the extent to which the principle of due process, in relation to the Lago Agrio plaintiffs, may be brought to bear in this context by the Respondent in this arbitration (part IV, p. 21).

The panel then concludes that should the plaintiffs be deprived of "rights under Ecuadorian Law that they might otherwise have enjoyed, that would be a matter between them and the Respondent, and not a matter for this Tribunal" (part IV, p. 22). Thus, we see the issue of participation neatly sidestepped, whereby instead of the arbitration requiring the participation of the plaintiffs whose rights and livelihoods are at stake, the panel determines that it is in no way obligated to consider how their ruling might affect the Lago Agrio Plaintiffs. Ecuador, a government who historically has demonstrated it does not always have its indigenous community's best interests at heart, is assumed to be their stalwart defender. Subsequently the panel rejects Ecuador's objection and moves on, finally ruling that it does indeed have jurisdiction to hear the case.

Is there Evidence that the Discourses Influenced Processual Developments?

The way in which the panel conducted its reasoning is typical of the exclusive discourse. In order to demonstrate that discourse did not play a role in the processual development a specific rule or regulation would have to be elucidated which constrained their actions. The panel however, only refers to *principles* of international investment law, which as pointed out by arbitrator Lowe (2002) are in no way binding to arbitral panels. Therefore, by this reasoning there is a link between the pervasiveness of the exclusive discourse and the processual development which led to the further marginalisation of the EJGs. First the EJGs were refused direct access to the arbitration and then they were refused consideration within the arbitration.

Summary

The fact that the possibility of actively seeking to include the Lago Agrio Plaintiffs in the arbitration was never even entertained by the three stakeholder groups reflects the hegemony of the exclusive discourse. As pointed out by P. Sands (2002), the privileging of certain international legal principles to the exclusion of others, such as international human rights law and international environmental law, often leads to similarly short-sighted decisions. As demonstrated, narrowing the scope of the discourses which inform a decision, can lead to exclusion and marginalisation.

CHAPTER 6 Conclusion

This thesis sought to identify the discourses present within ISDS and explore how they influenced processual developments and the agency of stakeholders to pursue various justice claims. In order to achieve this, this analysis examined the Chevron v. Ecuador (II) investment arbitration, looking specifically at the arbitral panel's decision on the request by EJGs to serve as amicus curiae and the decision on whether the arbitral panel had jurisdiction to decide Chevron's claim. The case study demonstrated the complexity of investor-state arbitrations and the considerable implications that the arbitrations have for communities, states and international society. CvE2 shows that while a process may be 'legal' it is not necessarily just.

The central finding of this thesis is that the dominant exclusive discourse within CvE2 was instrumental in excluding the EJGs from the arbitration and narrowing its scope in such a way that delegitimised any insurgent marginalised discourse. After examining the CvE2 investment arbitration, it is clear that the fortunes of the indigenous peoples of the Amazon have been materially impacted by the Ecuador-United States Bilateral Investment treaty. However, this thesis has attempted to demonstrate a broader concern – that our institutions for global and local development might operate in such a way that they exclude insurgent discourses, constraining the agency of groups whose beliefs and values are not in line with the hegemonic discourse. In other words, the principles and practices that underpin our global institutions are so narrow that they are impervious to the multitude of cultures, beliefs and value systems of the societies that they operate in.

Regarding the research question of this thesis, the CvE2 Case demonstrates a number of ways in which peripheral stakeholders were excluded from the arbitration due to a prevailing normative perspective within the institution that sees it operating in isolation from other value systems. Though the institution draws its authority from the public and its rulings materially affect the public, its processual developments demonstrate little to no consideration for the public good. On another level, CvE2 shows how the institution of ISDS not only ignores the values of its peripheral stakeholders, but it also ignores the principles of other areas of international law such as international environmental law.

Further Findings

Beyond the research question, a number of interesting findings arose from the CvE2 case that help to explain the increasingly complex obstacles facing EJGs when pursuing justice claims, the terrains in which they operate and the tactics they employ to overcome obstacles.

The first is that, 'outsider' stakeholders such as the EJGs hesitate to appeal to an ISDS panel's sense of justice and would prefer that arbitrations adhere to strictly legal considerations. The caveat being that they wish arbitrations to incorporate international legal traditions beyond international investment law - such as international human rights law and environmental law. This finding was the opposite of what I had expected, which was to have justice considerations as central to the appeal.

Ironically, the second finding is that the most prevalent reason for denying the environmental justice groups access to the arbitration is that the proceedings are strictly legal and therefore the EJGs participation is deemed unnecessary. This raises the question of whether EJGs who lack technical capacity should seek to enhance it in order to be seen as a welcome addition to arbitrations or whether the arbitrations should simply become more open to peripheral stakeholders.

A third finding is that often states cannot adequately represent the interests of their own citizens and, further, to assume that they will (or should) do so can be a tool to exclude and delegitimise environmental justice groups as is the case in CvE2. This is similar to assuming that the New Zealand government will represent Maori interests when negotiating investment agreements such as the Trans-Pacific Partnership.

The final finding is that, in line with the emerging concept of disruptive EJT (Bustos et al., 2014), it appeared that the EJGs were increasingly pushed to pursue their justice claims outside of the institution due to the dominance of the exclusive discourse. This was briefly explored within this thesis and is an area where future research and analysis is needed. What this thesis' findings did demonstrate is the limitations of more traditional forms of EJT that assume stakeholders are willing to act, and are capable of acting, within an institution (Velicu & Kaika, 2014).

Significance of the Results

The most useful aspect of these results is that they help to identify a prevailing discourse that is incompatible with UNCTAD's goal of reconciling the international investment agreement regime with sustainable development - ISDS is shown to be a global institution that ignores the fundamental contradictions between unbridled accumulation and sustainability (Pellow, 2001). The analysis highlights a number of areas within the institution that need to be altered in order for the institution to be reconciled with the United Nation's goal of creating 'effective, accountable and inclusive institutions" (UNDP, 2016, p. 1).

The Analytical Framework

The analytical framework, informed by EJT and CDT, was effective in critically examining how the stakeholders interacted with the institution of ISDS. What was lacking was a means of characterising the Republic of Ecuador and Chevron Corporation within CvE2. Explaining the actions and perspectives of an actor that is so varied and does not always act in a unified manner proved problematic. Future social scientific research into ISDS would have to place more emphasis upon the role of states and corporations within the institution.

Limitations of the Research and Possibilities for Future Research

The primary limitation of this research is its generalisability. Though the case study yielded evidence that discourse played a role in influencing the processual developments in the CvE2 arbitration, further study would be required to determine whether the findings could be extended to other ISDS arbitrations. In order to enhance its generalisability further case studies would need to be conducted. It is unlikely that a quantitative analysis of all publicly released ISDS arbitrations would be appropriate considering the number of arbitrations that are confidential or have unreleased rulings - insuring that the sample accurately reflected the population would be difficult.

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