

CONTRIBUTOR BIO



GINGER JACOBS is a graduating Political Science major with a concentration in Global Politics. She has greatly enjoyed her time in San Luis Obispo and is grateful for the mentorship of the political science faculty. While at Cal Poly, she spent a quarter studying in Florence, Italy, and a summer interning in the Senate in Washington, D.C. After graduation, she is moving to Washington, D.C., to join the staff of United States Senator Brian Schatz. Eventually she hopes to pursue a career in international development or foreign relations.

EXAMINING CORPORATE POWER AT HOME AND ABROAD

Ginger Jacobs

Real World Observation

On March 25, 2015 Representative Mike Pompeo (R-KS) introduced the “Safe and Accurate Food Labeling Act.”¹ The act proposes a new government certification for foods free of genetically modified ingredients, or GMOs. This government-certified label would allow companies that want to advertise their foods as GMO-free to do so. The certification would be completely voluntary.² This proposal is an attempt by the agricultural biotechnology industry to head off recent efforts by states to make GMO labeling mandatory. If passed, Pompeo’s bill, would override legislation that has been passed in Maine, Connecticut, and Vermont that require mandatory GMO labeling. While the laws in Maine and Connecticut depend on similar laws being passed in neighboring states, the Vermont labeling law is set to go into

¹ U.S. Congress. Rep. Pompeo, Mike. H.R. 1599. *Safe and Accurate Food Labeling Act of 2015*. 114th Congress, (introduced March 25, 2015).

² The Associate Press, “Bill Would Create Organic-Type Labels for Nonmodified Foods,” *The New York Times*, March 24 2015.

effect on July 1, 2016.³ The industry, which supports Pompeo, is dominated globally by a handful of agrichemical and seed companies, including Monsanto Co., DuPont Pioneer, Dow AgroSciences, and Syngenta.⁴ These companies strongly oppose the individual state efforts to make GMO labeling mandatory, saying that labels would be misleading because GMOs are safe and labeling them would make consumers believe otherwise. They also claim that inconsistent state laws would be confusing and costly for consumers and for companies.⁵

Since the commercialization of the world's first genetically engineered crops in 1996, there has been an ongoing debate globally about the safety and effectiveness of GMOs.⁶ While the topic has always been controversial, concerns about GMOs in the United States have historically been a marginalized issue. However, in recent years this has changed. Concern regarding the safety of GMOs has completely exploded in the US, making GMOs a household term and a mainstream issue. Consumers have taken it upon themselves to fight for and implement GMO legislation, as can be seen in Maine, Connecticut, and Vermont. In fact, GMO labeling bills have been proposed in some 20 states showing that these concerns are not dissipating.⁷ Previously the agricultural biotechnology industry went relatively unnoticed by the American public, but now the industry has a lot to lose. The introduction of the "Safe and Accurate Food Labeling Act" demonstrates that the industry recognizes this, and it is their attempt to nationally undermine the legal efforts that individuals have taken in their states. They are fighting back, and they are winning. So far the corporations have been successful in fully protecting their interests by delaying or nullifying GMO-related legislation through lawsuits and now the proposal of this act, despite the fact that the people American people have already voted.

The "Safe and Accurate Food Labeling Act" represents a power struggle

³ *Ibid.*

⁴ Thompson Megan, "GMO seeds grow into big fight on Kauai," *PBS NEWHOUR*, December 23, 2013.

⁵ *Op. Cit.*, fn. 2

⁶ REUTERS, "Factbox: GMO Crops Have History of Controversy," *The New York Times*, October 29 2014.

⁷ Amy Harmon, "A Lonely Quest for Facts on Genetically Modified Crops," *The New York Times*, January 4, 2014.

between people and corporations, a power struggle that has a long tradition in the global political arena. Historically, sometimes the people's interests have prevailed, and sometimes the corporations' interests have prevailed. Resulting in a general equilibrium between the two groups' authority and influence. Corporations have always held power, but democratic institutions have traditionally been able to implement legislation that reflects the people's convictions and demands. However, as we can see, corporations are gaining power and influence both domestically and internationally. New trade laws of the 21st century dramatically increase the authority of international corporations. Such acts suggest a shift in the distribution of power between people's democratic capabilities and corporate prerogatives on a global scale. Leading me to ask the research question: How are corporations increasingly overriding democratic legislation at home and abroad?

Conventional Wisdom

The conventional wisdom holds that many people believe that corporations enjoy too much power. According to a *Gallup* survey from January 2013, 70% of Democrats were very or somewhat dissatisfied with the size and influence of major corporations, and 51% of Republicans were very or somewhat dissatisfied with the size and influence of major corporations.⁸ A similar poll by *Pew Research Center* shows there is public agreement that the U.S. economic system unfairly favors powerful interests, and even more Americans believe that large corporations in this country are too powerful. The study showed that 78% of people think too much power is concentrated in the hands of a few large companies. An additional study showed that 67% of people say government policies have helped large corporations at least a fair amount.⁹

Based on these non-partisan public opinion polls, the conventional wisdom on corporate power is incomplete. My research question challenges conventional wisdom because while the layman's view does think that corporations hold too much power, it does not take into account the bigger picture of how these corporations are gaining so much legal authority in democratic societies. The fact of the matter is that even with growing corporations, most

⁸ Saad, Lydia, "Americans Decry Power of Lobbyists, Corporations, Banks, Feds," *Gallup*, April 11 2011.

⁹ "Fairness of the Economic System, Views of the Poor and the Social Safety Net," *Pew Research Center U.S. Politics & Policy*, June 26 2014.

people tend to think of states as the primary actors. However, states are increasingly handing over authority to corporations, giving them power to challenge domestic law. For example, corporations are receiving increasing authority through new trade laws in the 21st century. This is in the state's interest in part because it takes responsibility out of state's hands. For example if Monsanto wins a lawsuit against a county or farmer, American politicians can say they did everything in their power but that the case was simply not in their control. The public has yet to realize the extent of power that corporations hold today, and how it is affecting the democratic process., Finally, the public is largely unaware of the state's active participation in the process.

Methodology

I utilize qualitative methodology in order to examine my research question. I use three case studies to explain how corporations are gaining authority at home and abroad. The first case study addresses the role of corporations domestically, with GMO movements in Hawaii and California. My second case study looks at the role of corporations through international trade agreements, specifically the Investor State Dispute Settlement by examining the role of tobacco industry leader Philip Morris in it's current legal dispute with Australia and Uruguay. My third and final case addresses corporation's relationships with states and the WTO, through the WTO Tuna Dispute: Mexico v United States. My research findings are based on primary sources such as nonpartisan public polls, hearing transcripts, and state and federal documents. I also use a wide range of secondary sources including articles from the New York Times, the Wall Street Journal, Forbes, and more.

Theoretical Paradigms

The theoretical paradigm of Marxism best frames and explains the answer to my research question. Founded by Karl Marx, Marxism states that society is based upon the material exchange of capital. Marxism's primary assumption is that capitalism is exploitative. This assumption helps to explain the actions taken by corporations in my research findings. Marx argued that change has to be system-driven, providing an explanation for why people's attempts at combating corporate power, as can be seen in my research, is relatively unsuccessful.

Leo Panitch's concept of a non-territorial empire provides an additional ideology to further frame and explain my research. Panitch, like Marx, focuses

on the spread of capitalism. He sees globalization as a form of informal imperialism by capitalist states. He argues that the process of globalization is being led specifically by America through organizations such as the Federal Reserve and the World Bank. Panitch says that this non-territorial empire was consciously planned and managed by states, and furthermore that multinational corporations have power in the world order because that power is given to them by capitalist states.¹⁰

GMO Cases in Hawaii and California

Large biotech companies like Syngenta, Monsanto, Pioneer, Dow and BASF have long been experimenting with GMO crops and seeds in Hawaii. These companies use Hawaii to produce genetically engineered seed for mainland farmers as well as conduct research on new strains. While it may seem odd for a place blossoming with exotic fruits to focus on plant a mostly associated with America's Midwest, without seasonal interruptions, research can be accelerated by three or four fold. Mark Phillipson, who works for Syngenta, and is the president of Hawaii's seed trade group, recently reiterated this. He said "Something that would take— ten-to-12 years to develop, we can do here in three-to-four years."¹¹

Today, the seed industry is now the state's largest in the agriculture sector, reaching a value of \$243 million, double of what it was six or seven years ago and worth more than triple the second-largest commodity, sugar. Currently operations exist on Maui, Kauai, Oahu and Molokai. The industry employs 1,397 people in the state. In 2010, these companies, which own or lease 25,000 acres, exported 9.7 million pounds of seed from the islands, almost all of it corn. Corn is used for many purposes in the US, including in the production of high-fructose corn syrup and cattle feed.¹² Corn makes up 95 percent of the seed produced in Hawaii.¹³ In total, Hawaii has received more permits for field trials, with 2,996, than any other state, making it one of

¹⁰ Leo Panitch, "The New Imperial State," (accessed Jun 9, 2015).

¹¹ *Op. Cit.*, fn. 4

¹² Tom Callis, "GMO: \$243 million seed industry largest in state's ag sector," *West Hawaii Today*, June 9, 2013.

¹³ *Op. Cit.*, fn. 4

the major centers for genetic research.¹⁴ There's nowhere in the world like it, given its combination of climate and familiar laws, said Cindy Goldstein, the outreach manager for Pioneer Hi-Bred International, the seed firm owned by Dupont Co., which has operated in the state since 1968. The familiar laws, Goldstein mentions is partially in reference to patent laws.¹⁵ Working in the U.S., instead of a warm place in another country, allows companies to develop seeds under strong U.S. patent law protections.¹⁶

Along with the rest of the country, the people of Hawaii have become more and more aware of the presence of GMOs, and because of Hawaii's importance to the GMO industry, the islands have become the center of this battle. In the past few years, not just one, but three Hawaiian counties have proposed anti-GMO legislation. The latest initiative has been passed by Maui. The initiative was originally introduced by the Sustainable Hawaiian Agriculture for the Keiki and the Aina movement, or SHAKA, who successfully gathered 18,000 signatures for the initiatives introduction on the ballot.¹⁷

In the course of the intense campaign, corporate giants outspent supporters by a ratio of 87 to 1. In support of the bill the total amount raised from Committees or PACS was \$64,780, with the top donors being individual Hawaii residents. SHAKA also raised \$70,000 through a crowd funding campaign online. In opposition, the Citizens Against the Maui County Farming Ban, raised \$7,896,164. The top three donors were Monsanto, Dow Agro Sciences, and the Council for Biotechnology information.¹⁸ The money raised is along the lines of how much seed companies have been spending to battle GMO-related ballot initiatives across the country, but is unheard-of in Hawaii politics. The amount of money that was raised by these corporations comes out to more than \$90 per registered voter in Maui County, which has a population of just 160,000. Reports filed with the Federal Communications Commission show that corporations had contracts for more

¹⁴ *Op. Cit.*, fn. 12

¹⁵ Paul Voosen, "King Corn Takes Root in Hawaii," *The New York Times*, August 22, 2011.

¹⁶ Robynne Boyd, "Genetically Modified Hawaii," *Scientific American*, December 8, 2008.

¹⁷ Audrey, McAvoy, "Maui Votes To Temporarily Ban Growing of GMO Crops," *The Huffington Post*, November 4, 2014.

¹⁸ "Maui County Genetically Modified Organism Moratorium Initiative (November 2014)", BALLOTPEIDIA.

than \$1.3 million worth of TV spots. That makes the Maui County initiative among the top 20 most expensive ballot measures in the nation for spending on TV advertising, according to an analysis of statewide ballot initiatives by the Center for Public Integrity.¹⁹ One of the group's TV spots features a senior citizens' club president warning of hundreds of job losses. Another shows a former county councilwoman discussing the financial burden the county would shoulder to enforce any moratorium.

Despite, the massive campaigning and spending by these corporations, the citizens of Hawaii celebrated a huge victory when the GMO initiative was passed by 51.9%, with 23,082 votes voting in favor of the initiative and 22,005 votes against the initiative.²⁰ The initiative temporarily bans the farming of GMO crops in Maui County until the county conducts an analysis of the health effects of genetically modified farming and foods. Under this law, the moratorium would be lifted only after a vote by the Maui County Council. The law, which doesn't apply to crops in mid-growth cycle, was supposed to go into effect when officials certified the election results.

Recently, Kauai and Hawaii county councils passed similar GMO bans, however shortly after the bans passed the same agricultural biotech corporations sued the perspective counties, and consequently a federal judge, Judge Barry Kurren, overturned them both. Having carefully studied this, the SHAKA Movement – along with the five citizens – immediately filed legal action. The SHAKA Movement's legal council asked the State judge to order Maui County officials to proceed forward in properly implementing the GMO Moratorium Bill.²¹ “The people of Maui passed this law through the proper ballot initiative power; the county attorneys, as public servants, have a duty to defend it,” said George Kimbrell, attorney with Center for Food Safety, in a press release. The following day, as predicted, Monsanto Co. and a Dow Chemical Co. filed a lawsuit in federal court in Honolulu, asking a judge to immediately prevent the law from taking effect and to invalidate the measure. “This local referendum interferes with and conflicts

¹⁹ Liz Whyte, “Corporations, Advocacy Groups Spend Big on Ballot Measures,” Center for Public Integrity, October 23, 2014.

²⁰ Hawaii Secretary of State. Final Summary Report. “General Election 2014-State of Hawaii-County of Maui”.

²¹ *Op. Cit.*, fn. 18

with long-established state and federal laws that support both the safety and lawful cultivation of GMO plants” Jon Purcell, Monsanto Hawaii’s business and technology lead, said in a statement.²²

The federal judge assigned to the case, U.S. District Court Chief Judge Susan Mollway, granted the corporations a preliminary injunction, preventing the GMO initiative from taking effect until the court considers its legal merits further. The injunction was originally supposed to be lifted on March 31. Mollway then pushed back the next hearing of the motions of the case to June 15, 2015. Mollway based her decision to further delaying the implementation of the moratorium on two bills introduced in the legislature this session that sought to block counties from regulating agriculture. Both bills are effectively dead this year but she noted that the issue could still resurface. The SHAKA Movement and the people of Hawaii are outraged.²³

Despite Kauai, Hawaii, and Maui County passing legislation to ban GMOs in their counties in the last few years, none of them have been implemented. In each case as soon as the county passed the bill, the biotech industry leaders sued each county, and the cases got sent to federal court. County councils passed the Kauai and Hawaii county cases, but the Maui initiative was put on the ballot by the people, and voted by people despite massive campaigns from the corporations. Yet, so far there is nothing to show for the people’s votes. Through lawsuits these corporations have managed to delay or nullify the legislation despite the fact that people have clearly expressed their opinion on the matter. In fact, the majority of the country sides with the people of Hawaii, in a 2013 New York Times poll, three-quarters of Americans surveyed expressed concern about G.M.O.s in their food.²⁴ As one of the center of GMO experiments in the world, they are worried about the wellbeing of their health and environment. Additionally, they are frustrated that exercising the correct democratic processes has yet to successfully challenge the massive corporate presence on their islands. While hopefully on June 15 Mollway decides to uphold the people’s wishes, given the history of the Judges decision in the Kauai and Hawaii cases it seems highly unlikely.

²² *Ibid.*

²³ *Op. Cit.*, fn. 7

²⁴ Amy Harmon, “A Lonely Quest for Facts on Genetically Modified Crops,” *The New York Times*, January 4, 2014.

Most likely, the legal system will handover another win to the agricultural biotech industry.

However, the fact that people of Maui were able to unite against the large corporations and even pass the initiative is an accomplishment in its own right. GMO labeling legislation that was proposed in California, Colorado, Oregon, and Washington were all defeated due to massive outspending by corporations on campaigns. Prop 37 in California was relatively close but the initiative was beat with 51.4% of people voting against it. There were 6,442,371 votes against the proposition, and 6,088,714 votes for it. As of November 3, 2012, about \$45.6 million had been donated to the “No on 37” campaign effort. The top three donors for the “no campaign” were Monsanto donating \$8,112,867, Dupont donating \$5,400,00, and Pepsico Inc. donating \$2,145,400.²⁵ Other donors included the Grocery Manufacturers Association, Dow, Bayer, and more.

Jayson L. Lusk and Brandon R. McFadden from Oklahoma State University conducted a survey in 2012 of 822 likely voters of which 76.8% intended to vote in favor of Proposition 37. The study found that the possible increases in food prices slightly diminished support.²⁶ Additionally, the study measured the effect of advertisements used in media campaigns by supporters and opponents of the proposition and found that the opponent’s advertisement was more effective in swaying likely voters. Another poll by USC Dornsife and the Los Angeles Times showed similar results. According to the study, just from October to September, there was a 17-point drop in support of the proposition.²⁷

Monsanto and its allies have fought the labeling of genetically modified vigorously since 1992, when the industry managed to persuade the Food and Drug Administration that the new crops were “substantially equivalent” to the old and so they did not need to be labeled, much less regulated. This represented a breathtaking exercise of both political power (the F.D.A. policy was co-written by a lawyer whose former firm worked for Monsanto) and

²⁵ California Proposition 37, Mandatory Labeling of Genetically Engineered Food (2012), BALLOTPEIDIA.

²⁶ *Ibid.*

²⁷ Suzanne Wu, “Support Slips for Ballot Measure to Require Labeling of Genetically Modified Foods,” *USCDornsife*, October 25, 2012.

product positioning. These new crops were revolutionary enough to deserve patent protection and government support, yet at the same time the food made from them was no different than it ever was, so did not need to be labeled. It is worth noting that ours was one of only a very few governments ever sold on this convenient reasoning: more than 60 other countries have seen fit to label genetically modified food, including those in the European Union, Japan, Russia and China.²⁸ This time was no different. The corporation won again in California, and they didn't even have to file lawsuits as they did in Hawaii, because their money altered the vote before people even cast their ballots.

Philip Morris v. Australia and Uruguay

Australia became the first nation in the world to require "plain packaging" for tobacco. The new laws require cigarettes to be sold in olive green packs without trademarks and with graphic health warnings. They were set to be introduced in December 2011, but were put on hold after the major tobacco companies including British American Tobacco, Philip Morris, Imperial Tobacco and Japan Tobacco challenged the new plain packaging legislation in Australia's domestic court. The companies argued the government was trying to acquire their intellectual property, including trademarks, without proper compensation.²⁹ However, the government argued that it was only trying to regulate what appears on the boxes, after studies by the World Health Organization showed that plain packaging discourages smoking, especially in adolescents.³⁰ On August 15, 2012 Australia's High Court ruled that the plain packaging law did not result in an unconstitutional acquisition of property and was justified as a public health measure. The court even ordered that the Tobacco companies pay for Australia's legal costs. Attorney General Nicola Roxon said in a statement addressing the Australian victory, "The message to the rest of the world is big tobacco can be taken on and beaten." Australia has been lauded by the World Health Organization as a leading public health example for other countries to follow. *The New*

²⁸ Michael Pollan, "Vote for the Dinner Party," *The New York Times Magazine*, October 10, 2012.

²⁹ "High Court rejects plain packaging challenge," *ABC NEWS*, August 14, 2012.

³⁰ "Australia's plain packaging laws successful, studies show," *ABC NEWS* March 18, 2015.

York Times reports the plain packaging law is popular, with 59 percent of Australians approving.³¹ Meanwhile, a Hong Kong subsidiary of Philip Morris launched an investor-state case under the 1993 Australia-Hong Kong BIT.³² This is the first investor-state dispute that has ever been brought against Australia. Phillip-Morris has not yet specified the amount of compensation it is demanding from the government, but Philip Morris spokeswoman, Anne Edwards said, “we would anticipate that the compensation would amount to billions.”³³ In the lawsuit, Phillip Morris is arguing that plain packaging constitutes an expropriation of its Australian investments, that Australia is in breach of its commitment to accord fair and equitable treatment to Philip Morris, and that plain packaging constitutes an unreasonable and discriminatory measure. Furthermore Philip Morris Asia claims that its investments have been deprived of the full protection and security that the Hong Kong Agreement is supposed to ensure them. In response, the Australian government denied that the plain packaging proposal breaks any laws and said it would not back down.³⁴

The arbitration is being conducted under the United Nations Commission on International Trade Law (UNCITRAL). UNCITRAL formulates and regulates international trade in cooperation with the World Trade Organization. The tribunal hearing the case is composed of three arbitrators, one appointed by Australia, one by Philip Morris, and one by the Secretary-General of the Permanent Court of Arbitration, this arbitrator acts as the presiding arbitrator.³⁵ The tribunal was created on May 15, 2012. At Philip Morris’s request, the ongoing proceedings will be largely non-transparent, with public hearings prohibited and the public release of most documents left up to the discretion of each party. While Australia had argued for open hearings and transparent filings, Philip Morris refused, arguing that even releasing documents after

³¹ Matt Siegel, “Tobacco Companies Fight Australian Cigarette Bill,” June 27, 2011.

³² Australia Attorney-General. Notice of Arbitration. Australia/Hong Kong Agreement for the Promotion and Protection of Investments. Investor:Phillip Morris Asia Limited.

³³ Associated Press, “Philip Morris sues over Australian plans to ban logos from cigarette packets,” June 27, 2011.

³⁴ Australian Government. Attorney-General’s Department. *Tobacco plain packaging-investor-state arbitration*.

³⁵ Procedural Order No.1 6. Philip Morris Asia Limited and The Commonwealth of Australia. February 23, 2015.

the conclusion of the arbitration “would be a time-consuming process with minimal gains for the public interest.”³⁶ The case is currently pending.

However, Australia is not Philip Morris’ only investor dispute case at the moment. A Swiss subsidiary of Philip Morris International launched a similar case against Uruguay in February 2010 under the Switzerland-Uruguay BIT from 1991.³⁷ Uruguay also implemented a slate of antismoking measures that featured a requirement that packaging for tobacco products include large, graphic public health warnings. Currently, tobacco companies in Uruguay are required to cover 80% of the area of both faces with graphic warnings and 100% of one side panel with text warnings. The graphic pictures include, decaying teeth, premature babies and gruesome hospital scenes. Uruguay also said you couldn’t have any variation of a single brand sold in any store. You could have Marlboro, but you couldn’t have Marlboro Light or Marlboro Gold. They said terms, like “light” and “gold,” deceive consumers into thinking that those types are healthier than the average cigarette. In the end, Philip Morris had to take seven of its 12 products off the shelves.³⁸

In the investor case, Philip Morris is saying that the percentage of warning labels that are required on cigarette packs in Uruguay goes beyond what is reasonable to protect people from the harmful effects of smoking. The company says that the warning labels leave no space for legally protected trademarks and intellectual property, and the corporation is seeking compensation for lost profits. The corporation is seeking \$25 million from the tiny country of 3 million people.³⁹ Keep in mind, Uruguay’s GDP in 2013 was about \$55.7 billion, while Philip Morris’ revenues the same year totaled around \$80.2 billion.⁴⁰

Unlike Philip Morris, the people of Uruguay have reacted favorably to the Government’s aggressive anti-tobacco campaign and strong regulation in recent years. Uruguay’s University of the Republic, in collaboration with

³⁶ “Case Studies: Investor-State Attacks on Public Interest Policies,” Public Citizen.

³⁷ *Ibid.*

³⁸ “Phillip Morris Sues Uruguay Over Graphic Cigarette Packaging,” *NPR*, September 15, 2014.

³⁹ *Ibid.*

⁴⁰ Leon Kaye, “Philip Morris Sues Uruguay Over Anti-Smoking Campaign,” *TriplePundit*, April 13, 2015.

a professor from Massachusetts Institute of Technology, did a study that showed between 2005 and 2011 smoking has reduced at the rate of 4.3% annually. Fewer pregnant women are smoking and the birth rate is reported to have gone up as a consequence. By 2012, this reduction meant that less than 20% of the population smoked. However, those who do smoke are doing so more intensely. Between 2005 and 2009, the average number of cigarettes smoked per day per smoker in Uruguay went up by three cigarettes a day. The increasing population is also favoring the expansion of the cigarette market in the country.⁴¹

This adds to the sense of urgency for Phillip Morris with respect to the Uruguayan cigarette market. While sales stagnate for tobacco companies in developed countries, they must expand their business abroad. The result is that the World Health Organization estimates that 70 percent of the 8.4 million deaths that will be attributed to tobacco use in 2020 will occur in developing countries. Additionally, Philip Morris likely saw Uruguay as an easy target.⁴² They wanted to make an example out of Uruguay and send a message to the world that it is not worth the legal costs to enact stricter tobacco laws. “The costs of defending these cases are enormous, so tobacco companies are trying to pick off lower-income countries that can’t spend the money and political capital to defend themselves against industry,” Ellen R. Shaffer, co-director of the Center for Policy Analysis.⁴³ The case is expected to cost Uruguay up to \$8 million in legal fees alone. Instead of scaring Uruguay into backing down, this lawsuit has drawn the attention of major players in global health, civil society and philanthropy circles. This includes, former New York City Mayor Michael Bloomberg, whose group Bloomberg Philanthropies has donated large amounts of money to Uruguay to help pay its legal fees.⁴⁴ The International Center for Settlement of Investment Disputes (ICSID), under the trade agreement between two countries, will settle the lawsuit by binding arbitration. In July 2013, the investor-state tribunal in this case ruled that it had jurisdiction over the case and it is now

⁴¹ *Op. Cit.*, fn. 35

⁴² *Op. Cit.*, fn. 37

⁴³ Carey Biron, “Worldwide, Tobacco Regulators Monitoring Philip Morris Lawsuit Against Uruguay,” November 24, 2014.

⁴⁴ *Op. Cit.*, fn. 35

weighing the merits of the tobacco corporation's arguments. The Uruguayan government filed its formal defense, which reportedly runs to 500 pages but is not yet publicly available.

Regardless of the final outcomes in these cases, already the investor-state system has had a chilling effect on tobacco control policies. A host of developing countries, are scared of being dragged into painful and expensive international arbitration, and are in a state of 'policy freeze'. Additionally, in February 2013, New Zealand's Ministry of Health announced that the government planned to introduce its own plain packaging legislation, but that it would wait until the investor-state case against Australia and Uruguay is resolved. The United Kingdom also slowed down its plain packaging laws to see how these dispute plays out.⁴⁵

The tobacco giant's lawsuits against Australia and Uruguay are key examples of the growing trend of multinational companies using trade agreements as mechanisms to circumvent national legislation, even legislation supported by the people and meant to protect public health. The investor-state dispute settlement (ISDS) system fundamentally shifts the balance of power among investors, states, and the general public, creating an enforceable global regime that formally prioritizes corporate rights over the right of governments to regulate (pc). Under, ISDS foreign corporations and investors have the same status as sovereign governments. These corporations are empowered to go around domestic courts and directly sue countries when they disagree with their policies. These cases are seen before tribunals, but the tribunals deciding are composed of three private attorneys, not only are they unaccountable to any electorate, but they are also paid a lot. Using these expansive rights, foreign corporations have increasingly used ISDS to attack a wide array of tobacco, climate, financial, mining, medicine, energy, pollution, water, labor, toxins, development and other non-trade domestic policies. The number of such cases has been soaring. While treaties with ISDS provisions have existed since the 1960s, just 50 known ISDS cases were launched in the regime's first three decades combined. In contrast, corporations have launched more than 50 ISDS claims in each of the last three years. And unlike the victory for the citizens of Australia in domestic court, many governments have lost these suits and have already paid corporations billions of dollars. There is

⁴⁵ *Op. Cit.*, fn. 34

no limit to the amount of taxpayer money that the tribunal can order the government to pay the foreign corporation. Ecuador was ordered to pay Occidental Petroleum \$2.3 billion.⁴⁶ Additionally, There is a trend of these corporations picking on developing countries. In total, over the past years at least 89 governments have responded to one or more investment treaty arbitration: 55 developing countries, 18 developed countries and 16 countries with economies in transition.⁴⁷ The pending cases in Australia and Uruguay have mass amounts of public support against the corporations because they deal with the highly politicized issue of smoking and it's dangers. Because of this, it is likely that the tribunals will act in favor of the countries, but this won't always be the case. This level of corporate power needs to be addressed and questioned. Especially as ISDS provisions have recently been proposed in many international trade deals, including the suggested Trans-Pacific Partnership.

WTO Tuna Dispute: Mexico v United States

If one looks at almost any can of tuna sold in the U.S. he or she will find a tiny stamp. For more than 20 years, that stamp has certified that no dolphins were harmed or killed when the tuna was caught. For nearly that long, Mexico and the U.S. have been fighting over that label. In the 1990s, the U.S. declared Mexico's tuna, dolphin-unsafe. As many as 100,000 dolphins a year were dying due to Mexico's large net fishing tactics that encircles the dolphin pods to get to the huge schools of tuna swimming below. But over the years, those numbers have dropped significantly. Fishermen now use techniques so the mammals can escape. They've banned night fishing. And all boats in Mexico's tuna fleet have independent observers onboard. Mexico says it's made great strides protecting dolphins and that the U.S. now unfairly blocks Mexican tuna from its markets.⁴⁸ Specifically, Mexico contends that the way the US defines "dolphin safe" tuna unfairly restricts trade.

The United States definition of dolphin safe tuna requires the fish are caught without using a huge net, known as a purse seine net, to encircle

⁴⁶ *Op. Cit.*, fn. 34

⁴⁷ "Latest Developments in Investor-State Dispute Settlement," United Nations Conference on Trade and Development. N. 1 April 2012.

⁴⁸ Carrie Kahn, "Trade Dispute With Mexico Over 'Dolphin-Safe' Tuna Heats Up," *NPR* October 3, 2013.

dolphins and that no dolphins are killed or seriously injured in the process. That is more restrictive than the internationally accepted definition, which does not mention the use of purse seine nets. The Mexico Fishing industry is the largest users of purse seine nets. Mexican officials want the U.S. government to broaden its dolphin-safe rules to embrace Mexico's long-standing fishing technique of chasing dolphins that swim above tuna in the eastern tropical Pacific Ocean and capturing the tuna in large encircling nets.⁴⁹

Mexicans are not the only ones who say they're being judged more harshly than other fishermen in the world. The World Trade Organization agrees. It ruled the U.S. discriminates against Mexico and must open its markets to Mexican tuna, or face possible retaliatory trade sanctions.⁵⁰ However, the U.S. still refuses to allow Mexican tuna with a dolphin safe label on store shelves. Mexico is prepared to retaliate with trade sanctions on U.S. imports.

The California-based Earth Island Institute, which monitors the tuna industry to ensure it follows U.S. dolphin-safe practices, disputes the eco-friendliness of Mexico's fishing methods. Even if no dolphins are killed during the actual chasing and netting, some are wounded and later die from shark predation, says Mark Palmer, associate director of the institute's International Marine Mammal Project. He says Mexico should be treated differently than other fishermen since they refuse to give up a fishing practice that chases, harasses and kills more than a thousand dolphins every year.⁵¹ Over the last decade, the Earth Island Institute has become a de facto global regulator of the \$2 billion-a-year canned-tuna industry. Its 14 monitors track tuna fishermen worldwide for "dolphin safe" practices, and those who are caught with so much as one dolphin in their nets get taken off the Earth Island list of "certified" companies. Getting taken off the list can kill a tuna business.

Meanwhile in Mexico, several canneries have gone out of business and more than a third of the fishing fleet has been sold off due to not being considered "dolphin safe". Jose Carranza, owner of Mexico's biggest tuna processor, Pescados Industrializados S.A., in the Pacific coast city of Mazatlan, says

⁴⁹ Tom Miles, "WTO Rules For Mexico in Tuna Dispute," *BanderasNEWS*, May 17, 2012.

⁵⁰ United States – Measures Concerning the Importation and Sale of Tuna and Tuna Products. World Trade Organization. Dispute DS381.

⁵¹ Tim Carman, "Tuna, meat labeling disputes highlight WTO control," *The Washington Post*, January 10, 2012.

yearly sales to Europe have fallen from 90,000 tons in the late 1980s to less than 10,000 tons today because the buyers are afraid of Earth Island. Others see a more dire force at work. "Earth Island is an arm of StarKist to control the markets," says Carlos Hussong, president of Mexico's fishing-industry group. "This is a protection of the U.S. industry." StarKist and Earth Island say that's nonsense and write it off as a conspiracy theory.⁵²

Even a change in U.S. trade policy will not alter the buying practices of the tuna industry, because the U.S. government is not the final authority here. "None of our companies would buy from anybody not on the Earth Island list," says David Burney, head of the U.S. Tuna Association. "We don't want any problems. Earth Island is powerful." Gavin Gibbons, spokesman for the National Fisheries Institute's Tuna Council, which represents three processors (Bumble Bee, StarKist and Chicken of the Sea) that collectively sell more than 80 percent of the canned and pouched tuna on the U.S. market, says that it American companies still would not buy Mexican Tuna even if it is deemed safe. Gibbons says, the companies these days buy mostly skipjack tuna, whose populations remain healthy, not the yellowfin caught by Mexican fleets in the eastern tropical Pacific. The other question facing the U.S. tuna industry is whether it would continue using the dolphin-safe label if it were revised to include the chasing-and-netting techniques.

US consumer rights group "Public Citizen" said the WTO decision dealt a major blow to consumers' ability to make informed decisions about their food". This latest ruling makes truth-in-labeling the latest casualty of so-called 'trade pacts,' which are more about pushing deregulation than actual trade," Todd Tucker, research director for Public Citizen's Global Trade Watch, said in a statement. "Members of Congress and the public should be very concerned that even voluntary standards can be deemed trade barriers." The Earth Island Institute reiterated this sentiment and said the WTO put trade above the environment with this decision.

On June 5, 2015 the WTO said it received notice from U.S. of an appeal on the WTO decision. The United States said it thought the WTO panel report in the case was based on an incorrect legal interpretation.⁵³ Thus the

⁵² Newsweek Staff, "The Earth Island Rules," *Newsweek*, May 5, 2002.

⁵³ REUTERS, "U.S. appeals part of WTO ruling on dolphin-safe tuna labels," June 5, 2015.

debate continues. While the debate on whether the U.S. is discriminating against Mexico, and the debate on Mexican fishing techniques, are both fascinating within themselves, it is not the most significant aspect of this WTO dispute. The significance of this dispute is that this is not a dispute between the U.S. and Mexico. This dispute between the U.S. tuna industry and the Mexican tuna industry, and like all industries their interests. While a portion may lie in dolphin safety, more so lie in profit. The safe dolphin label promotes sales for the U.S. tuna industry, and including Mexican tuna in those sales would take away profit. The Mexican tuna industry is tired of being iced out by the big U.S. tuna companies and Earth Island. The bottom line is that even a dispute that appears to be a trade issue between states that is being arbitrated through an international organization, is yet another instance of industries discovering new avenues in which they can further their interests. In this case, the states are acting on behalf of the industries because a higher profit for the industry means a stimulated economy for the state. This case of industry and states working together to further their interests further examines the shift in power distribution today and the increased opportunity that industries have to achieve power and authority through international trade agreements.

So What?

The massive shift in power from people to corporations has alarming ramifications for world politics. Corporations ability to sue not only counties, but also countries, when the people's positions do not align with their corporate profit models has the ability to severely compromise democracy and sovereignty. Traditionally, it was the people who were placed with power within a democratic society. Each of my case studies had to do with a concern of public health: GMOs, tobacco, and tuna regulation. Each of these items are things that affect people. People consume them and experience the health ramifications of them, yet in each of my case studies people had no control over these issues despite their best efforts to advocate their opinions and beliefs. Monsanto and the agricultural biotechnology companies found ways to delay or nullify legislation, either through massive campaign spending, lawsuits, or the proposal of new acts. Philip Morris has managed to battle plain packaging legislation by utilizing BITs signed years ago by Australia and Uruguay. By signing those trade agreements, these states handed over

this investor's right to Philip Morris, whether they realized it or not. The tuna industry in Mexico utilized both its state and the WTO to advance its agenda. Not only are people losing power and corporations gaining them, but states are often assisting the process.

Joseph Stiglitz of Columbia University describes this as 'the secret corporate takeover' of trade agreements. He continues by saying "In the future, if we discover that some other product causes health problems rather than facing lawsuits for the costs imposed on *us*, the manufacturer could sue governments for restraining them from killing more people."⁵⁴ The truth is that this future is not far away. While this increase of lawsuits by corporations is a relatively new trend today, I worry, like Stiglitz, about the possibilities and opportunities that this opens up for corporations going forward, especially with the multitude of trade agreements that are currently being considered globally. The world is currently engaged in a great debate about corporate power and we stand at a unique moment in time where states can decide to continue to empower these corporations, or they can decide to reign them in and give the people back their voice.

⁵⁴ Joseph Stiglitz, "The Secret Corporate Takeover," *Project Syndicate*, May 13, 2015.