

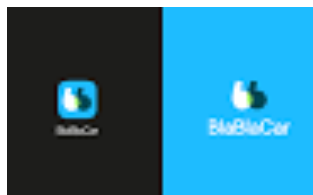
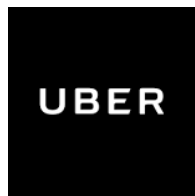
**THE SHARING ECONOMY, ISDS AND
FOREIGN TRADE AGREEMENTS IN
LATIN AMERICA**

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DEFINITION OF TERMS

Sharing economy can be defined loosely as an Internet mediated « economic model based on sharing, swapping, trading, or renting products and services, enabling access over ownership » (Botsman, 2013)

Symbolic examples:



AMBIGUITIES

Ambiguities:

Collaborative consumption, Collaborative economy, Sharing economy, Peer economy, Gig economy, The mesh, etc.

Advocates:

Botsman R. and Rogers R., (2011)

Gansky L., (2012)

Opponents

Baker D., (2012)

Morozov E., (2013)

Schor J., (2014)

Martin C. J., (2015)



CAPITALIST MARKET MODEL

- Language
- Ideas
- Meanings
- Structure



ALTRUISM AND CAPITALISM

The great paradox or irreconcilable differences

Factors driving collaborative consumption:

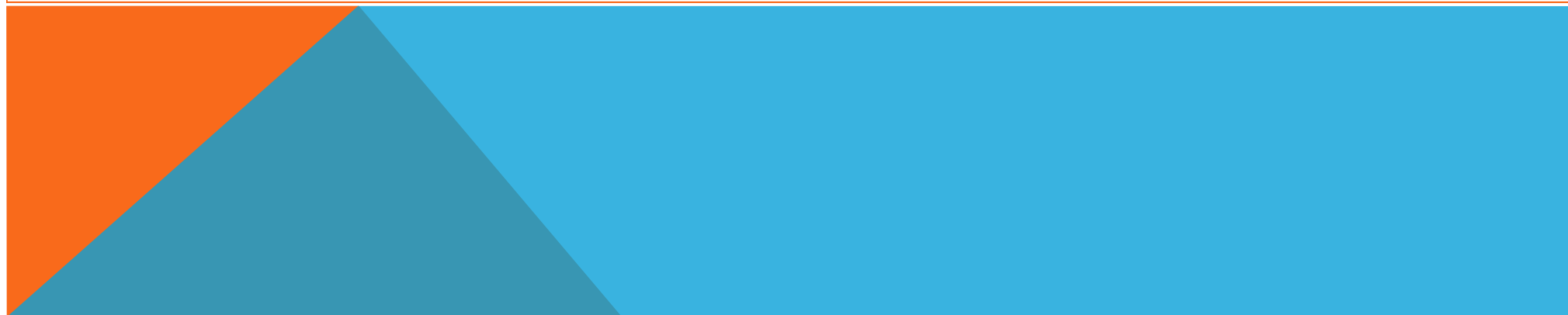
- **Most important**
 - Economic drivers
 - Technological drivers
 - Sociocultural drivers
- **Least important**
 - Environmental concerns
 - Sustainable development

(Barnes and Mattson 2016)

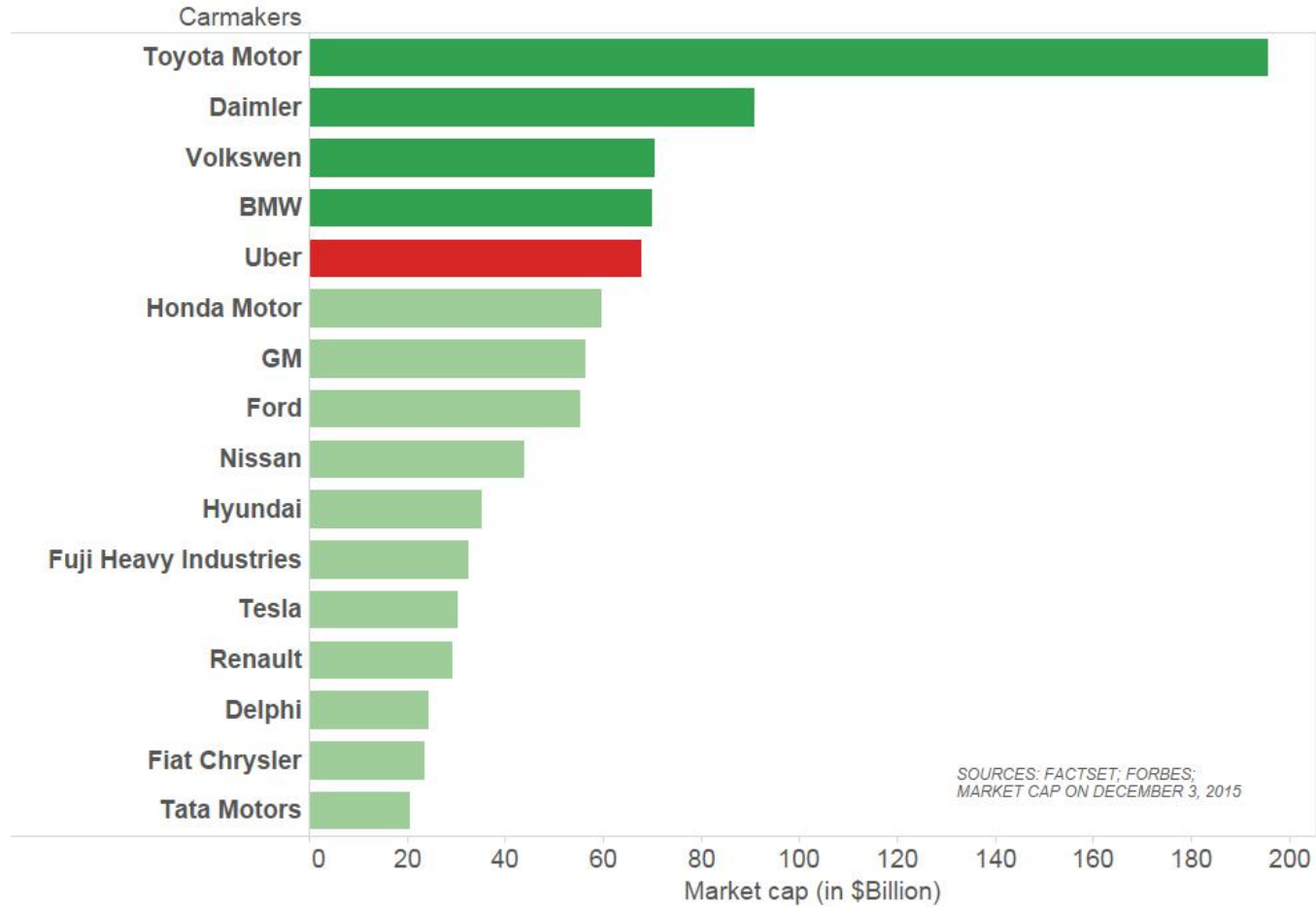


MARKET CAPITALIZATION OF THE NEW 'SHARING' CORPORATIONS

Companies	Market capitalization (US\$billions)	Equivalent to	But a lot less jobs
Uber (transportation)	41.2 (68 now)	France Télécom	1500 against 165 500
Netflix (media)	25.2	Saint-Gobain	2200 against 187 000
Airbnb (real estate renting)	13	Peugeot	600 against 190 000
Le Bon Coin (classified ads website)	2	Vilmorin	300 against 6 500
Adapted from <i>L'Express</i> , <i>Uber, Airbnb, BlablaCar... L'invasion des babares</i> , F. Dedieu and B. Mathieu, 1 June 2015			



At \$68 Billion Valuation, Uber Will Be Bigger Than GM, Ford, And Honda



SHARING AS A NEW STAGE OF CAPITALIST IDEOLOGY

The recreation of the old system

- The Lords and the Serfs
- Owners-investors (Giant corporations) v. users (the new landless/property-less peasants?)

The wages of the labor force and that of the users

- A new generation of 'uberized', underpaid, unprotected but seemingly free and independent contractors and employers

Gigs/zero hour contracts: liberating or enslaving?

- The generation X, Y and no future generation?

Internet credibility : Individual personality/corporate branding:
Orwellian Nightmare?

A subscription economy?



CONTROL THROUGH REGULATION

Outlawing or restricting the profit maximization aspect

Imposing the collaborative principle

Advocacy organizations:

Ouishare (France), Peers and sharable (USA), The People Who Share (UK),
Collaborative Consumption (Australia)

National associations for best practice

- Shareco in the UK

Compare

Uber, Airbnb, Lyft, Blablacar,

Netflix, Huffington Post, Ebay, Craigslist

to

Freecycle, Couchsurfing, Wikipedia, etc.



BRIEF HISTORY OF THE ISDS CLAUSE IN FTAS

- Dates back to the Middle Ages
 - Venetian merchants in the 10th century negotiated agreements with mainly with Byzantine sovereigns to avoid port duties
- 17th-18th centuries: the emergence of nation states
- 1778: U.S. first agreement with France
- 1794: The Treaty of Amity, Commerce and Navigation (The Jay Treaty) between the U.S. and the U.K.
- Main objective: investment protection in unstable and risky countries
- Latest development: NAFTA, NAFTA 2, TPP, CETA, TTIP:
 - Multiplication of FTAs and expansion of ISDS to developed economies



SCOPE AND SIZE OF THE NEW AGREEMENTS

TransPacific Partnership Free Trade Agreement (TPP)

Transatlantic Trade and Investment Partnership (TTIP)

Difference from former agreements: Scope and size

TTIP as an example:

- 34.5% of world GDP 25.3% of world exports
- 29.2% of world imports 56.8% of world FDI inward stock
- 70.2% world FDI outward stock 55.2% of world mergers and acquisitions
“sales”
- 18.7% of world mergers and acquisitions “purchases “

TPP and TTIP cover over 70% of world commerce and over a billion people

(D.S. Hamilton & J.P. Quinlan 2016)



ISDS CASES AGAINST COUNTRIES

- By 2012, over 500 cases were launched by corporations against 95 states
- Between 1990 and 2014, investors have sued at least 120 different countries more than 650 times.
- Most of these cases were by wealthy corporations against developing nations.
- Increasingly, new cases are being initiated against developed nations notably since ISDS inclusion in NAFTA.



LATIN AMERICA AND ISDS

BURFORD CAPITAL V. ARGENTINA

The nationalization of Aerolineas argentinas (Argentina's national airline)

Burford Capital investment: **\$13 million** on behalf of the original Spanish investors

- Award share: **\$140 million**

Zombie litigations by rich investors speculating on ISDS lawsuits for profits

- Investors have bought companies in order to sue governments under the ISDS clause

60% of ISDS cases sought or obtained third party funding before lodging their cases.

« As of January 2017, of the 767 ISDS cases initiated in the United Nations Conference on Trade and Development (UNCTAD) at least 59 were brought against Argentina » Making the country the most targeted country by ISDS tribunals.

Since 2002, Argentina has paid \$980 million in ISDS awards and spent millions of taxpayer money on ISDS litigation. (Dayen 2017)



LATIN AMERICA

- More than a quarter (**27%**) of all known ISDS cases were against Latin American countries
 - the region with the highest cases of ISDS (Titi & Fach Gómez 2016)
- Out of **232** ISDS cases brought against countries in the region, Corporations won in **230** of them. (Bolivia's Foreign Ministry)

The above are stellar examples of the lopsided nature of the ISDS system in favor of corporate interests.



EU: ARGUMENTS FOR THE ISDS CLAUSES

EU Commission's Directorate General for Trade:

- Lack of proper protection for investors from expropriation especially in the US and EU Member-states

Lowen v. United States

Mondev v. United States

The Havana Club Case (Pernod Ricard)

- An investor may prefer not to litigate against the host country
- Investors might not be able to access the local courts in the host country
- Countries may not incorporate the rules they sign up to in an investment agreement into their national laws



U.S.: ARGUMENTS FOR THE ISDS CLAUSES

- *T ISDS creates a fair and transparent process, grounded in established legal principles, for resolving individual investment disputes between investors and states*
- “Provide basic legal protections for American companies abroad that are based on the same assurances the United States provides at home.
- Protect the right of governments to regulate in the public interest.
- Do not impinge on the ability of federal, state, and local governments to maintain (or adopt) any measure that they deem necessary.
- Do not expose state or local government to new liabilities.
- Provide no legal basis to challenge laws just because they hurt a company’s profits.
- Include strong safeguards to deter frivolous challenges to legitimate public interest measures.
- Ensure fair, unbiased, and transparent legal processes.
- Ensure independent and impartial arbitration.”



THE QUESTION OF SECRECY:

EXCLUSION OF ELECTED OFFICIALS AND THE GENERAL PUBLIC

Molly Scott Cato of the Green Party of England and Wales Member of European Parliament (MEP):

- 92% of groups involved in the negotiation consultations were corporations
- 520 of the 560 lobby encounters between the EU and stakeholders were with corporate lobbies
- Only 26 encounters (4.6%) with public interest groups
- A corporate discussion not a democratic one

Robert Smith (NPR) and the view from Washington

- A total lack of transparency



Major Corporate Lobbies

BusinessEurope: the European employers' federation and one of the most powerful lobby groups in the EU.

Transatlantic Business Council: listed as a corporate lobby group that represents more than 70 EU and US-based corporations.

ACEA: a European car lobby group lobbying on behalf of big US and EU manufacturers such as Ford, Renault, BMW, and so on.

CEFIC (the European Chemical Industry Council): lobbies on behalf of big corporations on both sides of the Atlantic such as Dow chemicals, Bayer, BASF and so on.

European Services Forum: represents large services companies and federations notably Deutsche Bank, Telefonica, and TheCityUK.

Source: Corporate Europe Observatory, 2017



MAJOR CORPORATE LOBBIES

EFPIA: Europe's largest pharmaceutical industry association representing GlaxoSmithkline, Pfizer, Eli Lilly, Astra Zeneca, Novartis, Sanofi, and Roche.

FoodDrinkEurope: EU's largest lobby group in the food industry

US Chamber of Commerce: the wealthiest of all US corporate lobbies.

Digital Europe: which lobbies on behalf of ICT corporations like Apple, Blackberry, IBM, and Microsoft.

Source: Corporate Europe Observatory, 2017



7 REASONS TO EXCLUDE ISDS FROM FREE TRADE AGREEMENTS

1. “It would empower corporations to sue governments over measures to protect the environment, health and workers.
2. It means that billions in taxpayer money could be paid to compensate corporations, including for missed future profits.
3. It is a sure-fire way to bully decision-makers, potentially curtailing desirable policymaking.
4. It would give powerful rights and privileges to foreign investors, without any obligations.
5. Since only investors can sue, there is an incentive for arbitrators to side with them to bring more lawsuits and fees.
6. It is likely to be incompatible with EU law, as it sidelines European courts and is fundamentally discriminatory.
7. It risks locking us into a legal straightjacket, as it will be practically impossible to remove investor privileges from larger trade deals.”

(Source: Corporate Europe Observatory)



OTHER CASE EXAMPLES

Lone Pine Resources sued **Canada** in 2012 for US\$250 million in damages over the moratorium on shale gas exploration and development under the St. Lawrence River.

Mobil (ExxonMobil) and Murphy Oil sued the **Canadian** government over fees required by the Canadian government to fund research and development in Newfoundland and Labrador. An ICSID tribunal granted the companies USD \$13 million plus interests.

Clayton and its subsidiary Bilcon sued the **Canadian** government for USD \$300 million over Canada's Department of Fisheries and Ocean report that found that the activities of the company in basalt mining might be dangerous for the environment notably for some most endangered species in the region. An ISDS/ICS tribunal ruled in favor of the company in March 2015.

Ethyl brought a case against the **Canadian** government over the government's ban of the use of MMT a toxic gasoline additive. Canada settled the case for US \$13 million.



OTHER CASE EXAMPLES

AbitibiBowater, a Delaware incorporated company with headquarters in **Canada** successfully challenged the Newfoundland and Labrador government's decision to confiscate the company's assets after the latter closed a paper mill in Newfoundland making 800 workers redundant. The Canadian government settled the case for US \$122 million.

TransCanada Corporation is suing the US government for US \$15 billion over the Obama administration's refusal to approve the Keystone XL pipeline project citing environmental concerns.

Vatenfall, a Swedish energy firm is suing the **German government** through ICSID for damages including lost profits amounting to US \$4.6 billion due to the German government's decision to phase out nuclear powered reactors and embrace renewable energy sources.



CONCLUSION

- Difficulty for countries and governments to protect themselves against ISDS litigations
- More research on ISDS and its impacts
- Mobilization of Civil Society

Thanks for your attention

Спасибо за внимание

Gracias

