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Case Studies: Investor-State Attacks on Public Interest Policies

The investor-state dispute settlement (ISDS) system, included in various "free trade" agreements (FTAs) and bilateral investment treaties (BITs), fundamentally shifts the balance of power among investors, States and the general public, creating an enforceable global governance regime that formally prioritizes corporate rights over the right of governments to regulate. ISDS provisions elevate individual multinational corporations and investors to the same status as sovereign governments, empowering them to privately enforce a public treaty by skirting domestic courts and directly "suing" signatory governments over public interest policies before extrajudicial tribunals.

The tribunals deciding these cases are composed of three corporate lawyers, unaccountable to any electorate. Some attorneys rotate between serving as "judges" and bringing cases for corporations against governments – such dual roles would be deemed unethical in most legal systems. Tribunals are not bound by precedent or the opinions of States, and their rulings cannot be appealed on the merits.

ISDS-enforced pacts provide foreign corporations broad substantive "rights" that even surpass the strong property rights afforded to domestic firms in nations such as the United States. This includes the "right" to a regulatory framework that conforms to foreign investors' "expectations," which ISDS tribunals have interpreted to mean that governments should not change regulatory policies once a foreign investment has been established.[1]

Claiming such expansive rights, foreign corporations have used ISDS to attack an increasingly wide array of 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.[2] In contrast, corporations launched at least 50 cases *each year* from 2011-2015, with a record 70 cases launched in 2015.[3]

If a tribunal rules against a challenged policy, there is no limit to the amount of taxpayer money that the tribunal can order the government to pay the foreign corporation. Such compensation orders are based on the "expected future profits" an ISDS tribunal surmises that an investor would have earned in the absence of the public policy it is attacking. Even when governments win cases, they are often ordered to pay for a share of the tribunal's costs. Given that the costs just for defending a challenged policy in an ISDS case total $8 million on average, the mere filing of a case can create a chilling effect on government policymaking, even if the government expects to win.[4]

Under U.S. FTAs alone, foreign firms have already pocketed more than $475 million in taxpayer money via investor-state cases. This includes attacks on natural resource policies, environmental protections, health and safety measures and more. Tribunals have ordered nearly $4.5 billion in compensation to investors under all U.S. BITs and FTAs. More than $54 billion remains in pending ISDS claims under these pacts, all of which relate to environmental, energy, financial regulation, public health, land use and transportation policies.[5] What follows is a sample of the many investor-state attacks on public interest policies to date.

Health: Medicines and Toxins

Ethyl v. Canada (ban of toxic fuel additive), *settled (investor paid $13 million, ban reversed)*

Ethyl Corporation, a U.S. chemical company, launched a NAFTA investor-state case in 1997 over a Canadian ban of MMT, a toxic gasoline additive used to improve engine performance.[6] MMT contains manganese − a known human neurotoxin.[7] Canadian legislators, concerned about MMT's public health and environmental risks, including its interference with emission-control systems, banned MMT's intra-provincial transport and importation in 1997.[8] Given that Canadian provinces have jurisdiction over most environmental matters, such actions are how a national ban of a substance could be enacted in Canada. When the law was being considered, Ethyl explicitly threatened that it would respond with a NAFTA challenge.[9] MMT is not used in most countries outside Canada. It is banned by the U.S. Environmental Protection Agency in reformulated gasoline.[10] Making good on its threat, Ethyl initiated a NAFTA claim against the toxics ban, arguing that it constituted a NAFTA-forbidden "indirect" expropriation of its assets.[11]

Though Canada argued that Ethyl did not have standing under NAFTA to bring the challenge, a NAFTA tribunal rejected Canada's objections in a June 1998 jurisdictional decision that paved the way for a ruling on the substance of the case.[12] Less than a month after losing the jurisdictional ruling, the Canadian government announced that it would settle with Ethyl. The terms of that settlement required the government to pay the firm $13 million in damages and legal fees, post advertising saying MMT was safe, and reverse the ban on MMT.[13] As a result, today Canada depends largely on voluntary restrictions to reduce the presence of MMT in gas.[14]

Eli Lilly v. Canada (medicine patents), *dismissed*

Indiana-based Eli Lilly, the fifth-largest U.S. pharmaceutical corporation, challenged Canada's patent standards after Canadian courts invalidated the company's patents for Strattera and Zyprexa. (These drugs are used to treat attention deficit hyperactivity disorder (ADHD), schizophrenia and bipolar disorder.) Canadian federal courts applied Canada's promise utility doctrine to rule that Eli Lilly had failed to demonstrate or soundly predict that the drugs would provide the benefits that the company promised when applying for the patents' monopoly protection rights. The resulting patent invalidations paved the way for the production of less expensive, generic versions of the drugs. Eli Lilly's notice argued that Canada's entire legal basis for determining a patent's validity – that a pharmaceutical corporation should be required to verify its promises of a drug's utility in order to obtain a patent – is "arbitrary, unfair, unjust, and discriminatory." The company alleged that Canada's legal standard violated the NAFTA guarantee of a "minimum standard of treatment" for foreign investors and resulted in a NAFTA-prohibited expropriation.

On March 16, 2017, after years of high-profile campaigning from access-to-medicines advocates, the tribunal dismissed the claim. However, the grounds on which it based its dismissal allowed the tribunal to refrain from commenting on many of the substantive issues raised in the case, meaning it avoided ruling on the merits of using the specific ISDS claims alleged in this case to attack a country's patent regime.

Instead, the tribunal focused on procedural matters unique to this filing. Namely, the tribunal noted that under NAFTA, cases must be filed within three years of an alleged "government action" that an investor claims violated its NAFTA rights. Thus, the "alleged breach" in this case was not the previous change in Canadian patent law itself, but the Canadian courts' enforcement of the law that resulted in Eli Lilly's patents being invalidated. The tribunal then concluded that such court enforcement did not constitute a “dramatic change” of the law. This fancy legal footwork allowed the tribunal to avoid having to weigh in on whether Canada’s patent law violated its intellectual property obligations and whether that would have constituted a violation of the NAFTA-guaranteed minimum standard of treatment for investors or also whether the law change would constitute an expropriation of Eli Lilly’s investment.

The tribunal ordered Eli Lilly to bear the US$750,000 cost of the arbitration (the hourly fees of the three tribunalists, venue, travel costs, etc.) as well as 75 percent of Canada’s legal fees. This means that this case that it “won” will cost Canada US$1.2 million in tax dollars to pay its lawyers as well as the opportunity costs of those lawyers not being able to do other work for almost four years.[15]

Environment: Climate Change

Vattenfall v. Germany I (coal-fired electric plant/climate change), *settled (environmental conditions rolled back)*

Vattenfall, a Swedish energy firm, launched a $1.9 billion investor-state claim against Germany in 2009 under the Energy Charter Treaty over permits delays for a coal-fired power plant in Hamburg.[16] According to Vattenfall, delays of required government permits started when the state’s environmental ministry established “very clear requirements” for the plant, due to “the reports of the Intergovernmental Panel on Climate Change having alerted the public to the impending climate change.”[17] Public opposition to the proposed plant focused on prospective carbon emissions and water pollution. Further delays, according to Vattenfall, occurred when the Green Party – which opposed the plant on environmental grounds – formed a coalition with the Christian Democrats after state elections in 2008. After Vattenfall litigated in domestic courts, the coalition government issued the permits to Vattenfall, but with additional requirements to protect the Elbe River.[18]

Rather than comply with these requirements, Vattenfall launched its investor-state claim against Germany, arguing that Hamburg’s environmental rules amounted to an expropriation and a violation of Germany’s obligation to afford foreign investors “fair and equitable treatment.”[19] In response, Michael Müller, then Germany’s deputy environment minister, stated, “It’s really unprecedented how we are being pilloried just for implementing German and European Union (EU) laws.”[20] To avoid the uncertainty of a prospective investor-state tribunal ruling ordering payment of a massive amount of compensation, the German government reached a settlement with Vattenfall in 2010. The settlement obliged the Hamburg government to drop its additional environmental requirements and issue the contested permits required for the plant to proceed. The settlement also waived Vattenfall’s earlier commitments to mitigate the coal plant’s impact on the Elbe River.[21] Any monetary payment extracted from German taxpayers in the settlement has not been disclosed. Vattenfall’s coal plant in Hamburg began operating in February 2014.[22]

TransCanada v. United States (Keystone XL crude oil pipeline), *arbitration never began*

In June 2016, the TransCanada Corporation launched an ISDS case under NAFTA demanding $15 billion in compensation because the corporation’s bid to build a pipeline was rejected by the U.S. government.[23] The $15 billion claim was five times more than the $3.1 billion that TransCanada said it already had invested in the pipeline project because the compensation demand included the future expected profits that TransCanada claimed it would have earned had the pipeline been allowed.[24]

The proposed 875-mile pipeline – called the Keystone XL – would transport to the U.S. Gulf Coast up to 830,000 barrels per day of highly-corrosive crude oil extracted from tar sands in Alberta, Canada. The pipeline would transport one of the dirtiest fossil fuels on the planet[25] across more than a thousand rivers, streams, lakes and wetlands[26] as it traverses six U.S. states.

Indigenous leaders, farmers, and ranchers in the path of the project stressed that a spill from the pipeline would threaten their lands and livelihoods.[27] Their concerns were bolstered by environmental and health experts who provided evidence during the course of various federal and state reviews of the project about how tar sands oil development in Alberta, Canada already has devastated the land and water of Canadian First Nations communities, released toxic chemicals that poisoned and sickened these communities[28] and threatened local species of fish and wildlife.[29]

The pipeline also raises significant concerns with respect to its climate impacts. If the pipeline were completed, it would create new demand for intensified carbon-intensive tar sands extraction and processing as the purpose of the pipeline was to transport the tar-sands oil to U.S. Gulf Coast refineries for processing so finished product could be exported into the global market.[30]

The November 2015 decision by the U.S. government not to approve the pipeline project came after tens of thousands of citizens in the states that would be affected and by environmental activists nationwide had worked for six years to demonstrate that the pipeline was not in the national interest and would pose serious health and environmental risks.

In January 2016, just two months after the U.S. government's decision to reject the pipeline, TransCanada filed notice of intent to start an ISDS case under NAFTA. It simultaneously filed a case in U.S. federal court, claiming that the decision to reject the pipeline was unconstitutional because only Congress, not the president, has authority to make such a decision.[31]

In its ISDS notice of arbitration, TransCanada claimed the United States had violated four different investor rights provided by NAFTA. First, it claimed that the U.S. government violated the "minimum standard of treatment" standard, arguing that the U.S. government led TransCanada to develop "reasonable expectations" that the Obama administration would approve the pipeline, only to ultimately reject it. The company noted that, while in 2010 the U.S. State Department was "inclined" to approve the project, subsequently "politicians and environmental activists ... continued to assert that the pipeline would have dire environmental consequences," which ultimately led the Obama administration to reject it for "symbolic reasons, not because of the merits."[32]

TransCanada also alleged that disapproval of the project violated the NAFTA investor protection against "indirect expropriation", arguing that the pipeline "substantially deprived" the company of its investment in the project." TransCanada also claimed violations of NAFTA's "national treatment" standard, claiming that the United States treated the Canadian firm worse than it treated U.S. firms, and of NAFTA's "most-favored nation" standard, claiming that the United States treated the Canadian firm worse than other international pipeline companies. These latter claims were lodged despite the fact that no other company would be permitted to build the pipeline.

In his first week as president in January 2017, Donald Trump signed an executive order inviting TransCanada to submit a new application for approval of the pipeline's construction. ISDS rules would have permitted TransCanada to continue to pursue compensation via ISDS for lost revenue it claims was caused by the project's delay even after receiving a permit. However, on February 28, 2017, the company suspended its case for 30 days, which coincided precisely with the time period by which the U.S. State Department was to make a final decision on the new permit application.[33]

During that 30 day period, on March 4, 2017, the White House clarified that a previous Trump executive order calling for pipelines to be constructed with American-made steel and pipe would not apply to the Keystone XL.[34] Shortly thereafter, the State Department issued the permit.[35] TransCanada then announced that it would discontinue its NAFTA ISDS case.[36] Various news outlets reported that close observers suspected that the quick permit approval and the Buy American steel/pipe waiver that blessed TransCanada's use of foreign steel and piping were likely the "settlement" price extracted from the Trump administration by TransCanada for dropping its NAFTA claim.

Energy and Public Safety

Vattenfall v. Germany II (nuclear energy), *pending*

In May 2012, Vattenfall launched a second investor-state claim under the Energy Charter Treaty against Germany, demanding a reported $5 billion in taxpayer compensation for Germany's decision to phase out nuclear power.[37] The government made that decision in response to widespread German public opposition to nuclear power generation in the wake of Japan's 2011 Fukushima nuclear power disaster. The German Parliament amended the Atomic Energy Act to roll back a 2010 extension of the lifespan of nuclear plants, and to abandon the use of nuclear energy by 2022.[38]

Vattenfall claims Germany's policy change violates its obligations to foreign investors under the Energy Charter Treaty. Press reports and inquiries from the German Parliament indicate that the corporation is demanding about 4.7 billion euros (more than $5 billion) from German taxpayers for claimed losses relating to two Vattenfall nuclear plants affected by the phase-out.[39] Though Germany attempted to halt Vattenfall's claim as one "manifestly without merit," the investor-state tribunal decided in 2013 to allow the claim to proceed.[40] It is pending.

Lone Pine v. Canada (fracking), *pending*

In September 2013, Lone Pine Resources, a U.S.-based oil and gas exploration and production company, launched a $241 million challenge against Canada under NAFTA to challenge Quebec's suspension of oil and gas exploration permits for deposits under the St. Lawrence River as part of a wider moratorium on the controversial practice of hydraulic fracturing, or fracking.[41] The provincial government had declared a moratorium in 2011 so as to conduct an environmental impact assessment of the extraction method widely known for leaching chemicals and gases into groundwater and the air.[42]

Lone Pine had plans and permits to engage in fracking on over 30,000 acres of land directly beneath the St. Lawrence Seaway – the province's largest waterway.[43] According to Lone Pine, the moratorium contravened NAFTA's protection against expropriation and guarantee of a "minimum standard of treatment."[44] The case is pending.

Occidental Petroleum v. Ecuador (oil concession), *investor win (awarded $2.3 billion; reduced to $1.4 billion after partial annulment)*

In 2006, Occidental Petroleum Corporation (Oxy) launched a claim against Ecuador under the U.S.-Ecuador BIT after the government terminated an oil concession due to the U.S. oil corporation's breach of the contract and Ecuadorian law.[45] Oxy illegally sold 40 percent of its production rights to another firm without government approval, despite a provision in the concession contract stating that sale of Oxy's production rights without government pre-approval would terminate the contract.[46] The contract explicitly enforced Ecuador's hydrocarbons law, which protects the government's prerogative to vet companies seeking to produce oil in its territory – a particular concern in the environmentally sensitive Amazon region where Oxy was operating.[47] Oxy launched its BIT claim two days after the Ecuadorian government terminated the oil concession, claiming that the government's enforcement of the contract terms and hydrocarbons law violated its BIT commitments, including the obligation to provide the firm "fair and equitable treatment."[48]

The tribunal acknowledged that Oxy had broken the law,[49] that the response of the Ecuadorian government (forfeiture of the firm's investment) was lawful, and that Oxy should have expected that response.[50] But the tribunal then concocted a new obligation for the government (one not specified by the BIT itself) to respond proportionally to Oxy's legal breach as part of the "fair and equitable treatment" requirement. Deeming themselves the arbiters of proportionality, the tribunal determined that Ecuador had violated the novel investor-state obligation.[51]

The tribunal majority ordered Ecuador to pay Oxy $2.3 billion (including compound interest) – one of the largest investor-state awards to date.[52] To calculate this penalty, the tribunal estimated the amount of future profits that Oxy would have received from full exploitation of the oil reserves it had forfeited due to its legal breach, including profits from not-yet-discovered reserves.[53] Using logic that a dissenting tribunalist described as "egregious," the tribunal determined that the damages should be based on the entire value of Oxy's original contract even though the firm had sold a 40 percent share – because the sale violated Ecuadorian law and therefore could not be recognized in determining the values in the case.[54] The tribunal also arbitrarily concluded that Ecuador was 75 percent responsible for the conflict and thus should pay 75 percent of the projected losses to Oxy.[55] Ecuador filed a request for annulment of the award, raising four different arguments regarding why the tribunal's decision to grant jurisdiction over the case in the first instance – and thus the entire $2.3 billion award - should be annulled.[56] In 2015, an annulment committee rejected all four of Ecuador's arguments.[57] However, based on the logic of the dissenting tribunalist that it was outrageous to order Ecuador to pay Oxy damages for the 40 percent share of the investment that it had sold away, the annulment committee partially annulled the award – reducing the damages that had been based on the 40 percent share that had been sold. The committee's ruling means that the original award of $2.3 billion (including compound interest) was reduced to $1.4 billion – still an enormous amount for Ecuador to pay Oxy over a conflict arose from Oxy selling unauthorized rights under a contract that explicitly stipulated that doing so could cause forfeiture of Oxy's investment.

Environment: Toxic Pollution

Chevron v. Ecuador (Amazonian oil pollution), *pending*

In 2009, Chevron Corporation – one of the largest U.S. oil corporations – launched a case against Ecuador under the U.S.-Ecuador BIT seeking to evade payment of a multi-billion dollar court ruling against the company for widespread pollution of the Amazon rainforest.[58] For 26 years, Texaco, later acquired by Chevron, performed oil operations in Ecuador. Ecuadorian courts have found that during that period the company dumped billions of gallons of toxic water and dug hundreds of open-air oil sludge pits in Ecuador's Amazon,[59] poisoning the communities of some 30,000 Amazon residents, including the entire populations of six indigenous groups (one of which is now extinct).[60] After a legal battle spanning two decades and two countries, in November 2013 Ecuador's highest court upheld prior rulings against Chevron for contaminating a large section of Ecuador's Amazon and ordered the corporation to pay $9.5 billion to provide desperately needed clean-up and health care to afflicted indigenous communities.[61]

Instead of abiding by the rulings, Chevron asked an investor-state tribunal to challenge the decision produced by Ecuador's domestic legal system. Chevron has asked the tribunal to order Ecuador's taxpayers to hand over to the corporation any of the billions in damages it might be required to pay to clean up the still-devastated Amazon, plus all the legal fees incurred by the corporation in its investor-state pursuit.[62] In its investor-state claim, Chevron is seeking to re-litigate key aspects of the lengthy domestic court case, including whether the effected communities even had a right to sue the corporation. Chevron is claiming that its special foreign investor rights under the BIT have been violated.[63] This, despite the fact that Texaco's investment in Ecuador ended in 1992,[64] the BIT did not take effect until 1997,[65] and the BIT is not supposed to apply retroactively to cover past investments.[66]

The investor-state tribunal in this case has granted several of Chevron's requests. It has ordered Ecuador's government to violate its own Constitution and block enforcement of a ruling upheld on appeal in its independent court system.[67] And in a decision in September 2013, the tribunal took it upon itself to offer an interpretation of the Ecuadorian Constitution, which conflicted with that of Ecuador's own high court, and declare that rights granted by Ecuadorian law do not actually exist.[68] The tribunal has not yet concluded its findings, and a final decision is pending.

Renco v. Peru (metal smelter pollution), ***dismissed with new case pending***

Renco Group, a corporation owned by one of the wealthiest people in the United States, Ira Rennert, demanded $800 million from the government of Peru. The corporation claimed that the Peruvian government violated the U.S.-Peru FTA by not granting an extension on the firm's overdue commitment to clean up environmental contamination. Doe Run Peru, Renco's Peruvian subsidiary, failed to meet its environmental clean-up commitments under the terms of a 1997 privatization of a metal smelting operation in La Oroya, Peru – one of the world's most polluted sites. The Peruvian government granted two extensions past the 2007 date by which Doe Run was to have built a sulfur oxide treatment facility – a commitment that the corporation repeatedly failed to fulfill.

In 2007 and 2008, Doe Run was challenged in class action lawsuits filed in Missouri courts, the firm's state of incorporation. The suits demanded compensation and medical assistance for La Oroyan children that had been injured by toxic emissions from the smelter since its acquisition by Renco.[69] In 2010, the company launched an $800 million investor-state claim against Peru under the FTA. The company claimed a violation of fair and equitable treatment, blamed Peru for not granting a *third* extension to comply with its unfulfilled 1997 environmental commitments, and demanded that Peru, not Renco, should have assumed liability for the Missouri cases.

Some analysts believed that Renco used the investor-state claim to derail the Missouri-based lawsuit seeking compensation for La Oroya's children. Renco previously had tried three times to remove the case to federal court from the Missouri courts, where the jury pool was likely to be skeptical of the company after highly publicized incidents of pollution in Missouri. Renco had failed each time. But one week after launching its investor-state claim, Renco tried a fourth time to remove the case to federal courts and succeeded. The same judge that had denied the previous requests now granted it, citing the ISDS claim under the Peru FTA as the reason given federal legislation on arbitration would newly apply because of the ISDS claim.

In July 2016, after six years of costly litigation with the three ISDS tribunalists charging hundreds of dollars per hour in addition to Peru paying for its defense lawyers, the tribunal dismissed Renco's claim. Oddly, it did so based on a jurisdictional issue it could have decided years earlier. The tribunal determined that it did not have jurisdiction over the case because the company had failed to comply fully with an FTA requirement that it had to waive certain domestic litigation rights to proceed with an ISDS claim.[70]

However, the tribunal ruled that the Peruvian government and the corporation must split the costs of arbitration as well as each bearing its own legal costs. This means a $8.39 million bill for Peru despite the case being dismissed and the grounds for dismissal being that the corporation failed to meet the technical rules for pursuing an ISDS claim.[71]

At the time of the decision, Renco stated that "the Tribunal's decision is an insignificant victory for Peru," immediately threatening to refile the same claims after resolving the technicality upon which the case was dismissed.[72]

In August 2016, Renco made good on its threat and filed a new Notice of Intent to restart an ISDS case on the same matters.[73]

Metalclad v. Mexico (toxic waste), ***investor win (awarded $16.2 million)***

In 1997 Metalclad Corporation, a U.S. waste management firm, launched a NAFTA investor-state dispute against Mexico over the decision of Guadalcazar,[74] a Mexican municipality, not to grant a construction permit for expansion of a toxic waste facility amid concerns of water contamination and other environmental and health hazards.[75] Studies indicated that the site's soils were very unstable, which could permit toxic waste to infiltrate the subsoil and carry contamination via deeper water sources.[76] The local government had already denied similar permits to the Mexican firm from which Metalclad acquired the facility.[77] Metalclad argued that the decision to deny a permit to it, as a foreign investor operating under NAFTA's investor rights, amounted to expropriation without compensation, and a denial of NAFTA's guarantee of "fair and equitable treatment."[78]

The tribunal ruled in favor of the firm, ordering Mexico to compensate Metalclad for the diminution of its investment's value.[79] The order to compensate for a "regulatory taking" was premised on the tribunal's finding that the denial of the construction permit unless and until the site was remediated amounted to an "indirect" expropriation.[80] The tribunal also ruled that Mexico violated NAFTA's obligation to provide foreign investors "fair and equitable treatment,"[81] because the firm was not granted a "transparent and predictable" regulatory environment.[82] The decision has been described as creating a duty under NAFTA for the Mexican government to walk a foreign investor through the complexities of municipal, state and federal law and to ensure that officials at different levels never give different advice.[83] After a Canadian court slightly modified the compensation amount ordered by the investor-state tribunal,[84] Mexico was required to pay Metalclad more than $16 million.

S.D. Myers v. Canada (toxic waste), ***investor win (awarded $5.6 million)***

In 1998 S.D. Myers, a U.S. waste treatment company, launched a NAFTA investor-state challenge against a temporary Canadian ban on the export of a hazardous waste called polychlorinated biphenyls (PCB).[85] Canada banned exports of toxic waste to the United States absent explicit permission from the U.S. Environmental Protection Agency. And, as a signatory to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Canadian policy generally limited exports of toxic waste.[86] Meanwhile, the U.S. Toxic Substances Control Act banned imports of hazardous waste, with limited exceptions such as waste from U.S. military bases.[87] The U.S. Environmental Protection Agency has determined that PCBs are harmful to humans and toxic to the environment.[88] However, in 1995 the U.S. Environmental Protection Agency decided to allow S.D. Myers and nine other companies to import PCBs into the United States for processing and disposal.[89] Canada issued a temporary ban on PCB shipment, seeking to review the conflicting laws and regulations and its obligations under the Basel Convention.[90] S.D. Myers argued that the Canadian ban constituted “disguised discrimination,” was “tantamount to an expropriation” and violated NAFTA’s prohibition of performance requirements and obligation to afford a “minimum standard of treatment.”[91]

A tribunal upheld S.D. Myers’ claims of discrimination and found the export ban to violate NAFTA’s “minimum standard of treatment” obligation because it limited the firm’s plan to treat the waste in Ohio.[92] The panel also stated that a foreign firm’s “market share” in another country could be considered a NAFTA-protected investment and eschewed Canada’s argument that S.D. Meyers had no real investment in Canada.[93] The tribunal ordered Canada to pay the company $5.6 million.

Abengoa v. Mexico (toxic waste), *investor win (awarded $40 million plus interest)*

In December 2009, Abengoa, a Spanish technology firm, filed a claim against Mexico under the Spain-Mexico BIT for preventing the company from operating a waste management facility that the local community of Zimapan strongly opposed on environmental grounds.[94] The plant was to be built on a geological fault line across from a dam and the Sierra Gorda biosphere reserve – an UNESCO World Heritage site and home to Nanhu and Otomi indigenous communities. The region was already contaminated with arsenic from previous mining operations. The community contended that building a waste facility on a fault line, by a dam, in an area contaminated with arsenic, near indigenous communities and an environmental reserve posed a significant environmental threat.[95]

As a result of substantial public opposition, Abengoa’s land use permit was not renewed in December 2007, although construction continued anyway. In April 2009, clashes broke out between a group of people from Zimapan and the Mexican federal police over the plant. As a result, the company’s operating license was revoked several days later. Despite this, the situation escalated as Mexican federal police were accused of abuses against the indigenous population and federal government officials declared the plant could open without municipal authority. In March 2010, the municipality of Zimapan declared that the operating license was invalid because it was not collectively issued by the city council and did not comply with the public interest.[96]

Abengoa alleged that the government actions impeding the operation of its waste plant violated its BIT-protected investor rights.[97] In April 2013 a tribunal ruled in favor of Abengoa, deciding that the denial of an operating license for the controversial hazardous waste facility amounted to an indirect expropriation of Abengoa’s investment and that the local government’s actions violated the corporation’s guarantee of a “minimum standard of treatment.”[98] The tribunal ordered Mexico to pay Abengoa more than $40 million, plus interest, as compensation for its expected future profits from the waste plant and to cover half of the corporation’s own tribunal and legal costs.[99]

Environment: Mining

Bilcon v. Canada (quarry mining), *investor win (award amount pending)*

In May 2008, members of the U.S.-based Clayton family – the owners of a concrete company – and their U.S. subsidiary, Bilcon of Delaware, launched a NAFTA challenge against Canadian environmental requirements affecting their plans to open a basalt quarry and a marine terminal in Nova Scotia.[100] The investors planned to blast, extract and ship out large quantities of basalt from the proposed 152-hectare project,[101] located in a key habitat for several endangered species, including one of the world’s most endangered large whale species.[102] Canada’s Department of Fisheries and Oceans determined that blasting and shipping activity in this sensitive area required a rigorous assessment given environmental risks and socioeconomic concerns raised by many members of the local communities.[103] A government-convened expert review panel concluded that the project would threaten the local communities' "core values that reflect their sense of place, their desire for self-reliance, and the need to respect and sustain their surrounding environment."[104] On the recommendation of the panel, the government of Canada rejected the project.[105] The Clayton family argued that the assessment and resulting decision was arbitrary, discriminatory and unfair, and thus a breach of NAFTA's "minimum standard of treatment," national treatment and most favored nation obligations.[106]

In a March 2015 ruling, two of the three ISDS tribunalists decided that the environmental assessment's concern for "community core values" was "arbitrary" and frustrated the expectations of the foreign investors. This, they asserted, violated a broad interpretation of the "minimum standard of treatment" obligation, which they imported from another ISDS tribunal (*Waste Management*).[107] The tribunal majority also declared a national treatment violation.[108] The tribunal has yet to determine the final amount it will order Canadian taxpayers to pay to the quarry investors, who are seeking $300 million.[109]

The dissenting tribunalist explicitly warned of the chilling effect the decision would have: "Once again, a chill will be imposed on environmental review panels which will be concerned not to give too much weight to socio-economic considerations or other considerations of the human environment in case the result is a claim for damages under NAFTA Chapter 11. In this respect, the decision of the majority will be seen as a remarkable step backwards in environmental protection."[110]

Cosigo Resources, Ltd. et al. v. Colombia, (gold mining), *pending*

U.S. corporation Tobie Mining and Energy, and the Canadian investors Cosigo and Cosigo Resources claimed that the Colombian government violated the FTA when it decided to create a nature reserve to protect Amazon rainforest land and prohibit mining within its borders. In 2008, the companies were granted interests in a gold mining concession by the Alvaro Uribe administration in the Taraira region of Colombia, near the Brazilian border, but before a final agreement could be reached, a national park was created, blocking the mine.[111]

The investors claim creating the national park was "fraudulent" and that denying their concession due to the park constitutes an expropriation of their investment. Thus, the companies are asking a private tribunal to order Colombia either to return their concession to allow them to mine in the Amazon, or to pay $16.5 billion – over 25 percent of Colombia's national budget – to the corporation. Despite admitting having spent only $11 million in mining-related preparations, Tobie justifies the $16.5 billion demand by claiming that is what the corporation hypothetically could have earned if allowed to extract all the gold and iron believed to lie beneath the rainforest land.[112]

The Canadian investors are listed in the notice of intent, despite Canada not being a party to the U.S. treaty with Colombia.[113] The lawyer representing the claim has suggested that more claims against Colombia related to the nature reserve will be forthcoming.[114]

Infinito Gold v. Costa Rica (gold mining), *pending*

In February 2014 Infinito Gold, a Canadian mining firm, filed a $94 million claim against Costa Rica under the Costa Rica-Canada BIT for a Costa Rican court decision to revoke Infinito's Las Crucitas open-pit gold mining concession on environmental grounds.[115] The mining license was secured in 2008 from then-President Oscar Arias and his environment minister. The Costa Rican Administrative Appeals Court later ordered a criminal investigation of Arias for having signed off on the project while environmental studies were still incomplete.[116] The concession raised significant environmental concerns, including deforestation of 153 acres of pristine tropical rainforest. It also posed a significant health concern related to the leaching of chemicals used in the mining process that could contaminate drinking water near the San Juan river system.[117]

A Costa Rican court revoked the concession in 2010 on the basis of environmental damage caused by the project.[118] Polls indicated that more than 75 percent of the Costa Rican population opposed the proposed mine, due in part to environmental concerns.[119] Several weeks before the court ruling revoking Infinito's concession, the Costa Rican legislature voted unanimously to ban new open-pit metal mines.[120] Infinito appealed to Costa Rica's Supreme Court, which upheld the lower court ruling against the firm in 2011.[121] In its investor-state claim, Infinito asks a three-person tribunal to second-guess the rulings of Costa Rica's courts and rule that Costa Rica's prohibitions on new open-pit mining permits are an "unlawful expropriation" of Infinito's investment and a violation of the firm's BIT-protected right to "fair and equitable treatment." "As a result of the new ban on open-pit mining, Industrias Infinito cannot apply for any new mining rights over the project area," the firm noted in its brief.[122] The case is pending.

Financial Stability

Saluka v. Czech Republic (bank bailout)*, investor win (awarded $236 million)*

Saluka Investments, a Netherlands investment company, filed an investor-state claim in 2001 under the Netherlands-Czech Republic BIT against the Czech government for not bailing out a private bank, in which the company had a stake, in the same way that the government bailed out banks in which the government had a major stake.[123] The bailouts came in response to a widespread bank debt crisis.[124] Investicni a Postovni Banka (IPB), the first large bank to be fully privatized in the Czech Republic,[125] along with three large banks in which the government retained significant ownership, had been suffering from significant debt and borderline insolvency, threatening the Czech banking sector.[126] Consequently, the government placed IPB into forced administration in 2000 and then sold the bank for one crown to another bank.[127]

Saluka, a minority shareholder in IPB,[128] claimed the Czech government violated the BIT's "fair and equitable treatment" provisions because the government did not give IPB the same degree of assistance as it gave to the banks in which the government possessed a large stake.[129] The government argued that rectifying IPB's debt problems was the responsibility of private shareholders, while the problems of the large banks in which the government had a major shareholding interest were the government's responsibility.[130]

The investor-state tribunal decided that the Czech Republic had violated the BIT's "fair and equitable" treatment obligation and acted discriminatorily by giving greater government aid to banks in which the government was a major stakeholder.[131] The tribunal ordered the government to pay Saluka $236 million.[132]

CMS Gas v. Argentina (emergency stability measures), *investor win (awarded $133 million plus interest)*

In July 2001, CMS Gas Transmission Company, a U.S. energy firm, filed a claim against Argentina under the U.S.-Argentina BIT for financial rebalancing policies enacted in response to a 2001 economic meltdown spurring social and political unrest.[133] The case particularly targeted the government's limitations on gas utility rate increases – an effort, as part of Argentina's Economic Emergency Law, to stem runaway inflation.[134]

While utility rates were frozen, the international value of the Argentine peso, which had been pegged to the dollar, dropped precipitously. CMS claimed large revenue losses, argued that the freezing of consumers' rates violated the BIT's expropriation and "fair and equitable treatment" obligations, and demanded taxpayer compensation.[135] The Argentine government contended that the reforms were non-discriminatory and that domestic investors also had to face economic losses as a result of the emergency measures.[136]

Argentina further argued that the measures were necessary, given that it faced a national emergency.[137] The U.S.-Argentina BIT states, "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests."[138] But the tribunal decided that that the economic crisis in Argentina was not sufficiently severe for Argentina to be able to use this defense. It ruled that the government had denied CMS "fair and equitable treatment" and that Argentina's taxpayers owed the company $133 million, plus interest.[139] A year and a half later, a tribunal in another investor-state case came to a different conclusion, accepting Argentina's "necessity defense" for the same economic crisis.[140] In that case, also brought under the U.S.-Argentina BIT, three U.S. energy companies known collectively as LG&E challenged Argentina's emergency measures, alleging the same BIT violations that CMS alleged. But in contrast to the tribunal in the *CMS* case, the *LG&E* tribunal concluded that Argentina's actions were permissible under the BIT's "necessity defense" because Argentina "faced an extremely serious threat to its existence, its political and economic survival, to the possibility of maintaining its essential services in operation, and to the preservation of its internal peace."[141]

In response to the tribunal's contrasting decision in the *CMS* case, Argentina's Minister of Justice Horacio Rosatti noted that it was obvious to every Argentine citizen that consumer rates for public utility services should not be decided by a foreign tribunal.[142] CMS eventually sold the "financial claim" resulting from its investor-state award to a "vulture fund" subsidiary of Bank of America.[143] The bank subsidiary, Blue Ridge Investment, purchased from CMS the rights to collect on the investor-state tribunal's award and has since sought to enforce the award in U.S. courts.[144]

Eureko v. Poland (insurance privatization), *settled (investor obtained $1.6 billion)*

In 2003, Eureko, a Netherlands-based company, filed a claim against Poland under the Netherlands-Poland BIT for prohibiting it from taking a controlling stake in PZU, Poland's first and largest insurance company.[145] Facing significant public and political opposition to a previous administration's decision to sell a controlling share of Poland's public insurance firm to a foreign corporation, the Polish government reversed its privatization plans.[146]

Eureko argued that the government's actions amounted to a violation of its BIT-mandated obligation to provide "fair and equitable treatment." While divided, the majority of the tribunal held in a 2005 decision that Poland indeed violated that obligation, in addition to the prohibition against uncompensated expropriation.[147] The tribunal also decided that the government's actions had violated a private contract with Eureko, and that this alleged contractual violation itself constituted a violation of the BIT. The tribunal determined that it was able to use the BIT to enforce the terms of a private contract through what is known as an 'umbrella clause' – a BIT provision that empowers foreign investors to elevate contractual disputes to BIT investor-state cases.[148] The dissenting tribunal member noted that empowering a firm to transform a contractual dispute into a BIT case "created a potentially dangerous precedent."[149]

Poland also took issue with the appointment by Eureko of the arbitrator Judge Stephen Schwebel, who had a working relationship with a law firm that was launching other investor-state cases against Poland. After Poland's attempt to challenge the appointment of Schwebel failed, the arbitration was expected to proceed to the damages phase, when a settlement was reached instead.[150] Under the settlement, Eureko obtained a reported $1.6 billion for Poland's decision to maintain domestic control of the country's largest insurance firm.[151]

Essential Services

Azurix v. Argentina (water)*, investor win (awarded $165 million plus interest)*

U.S. water company Azurix Corp. (an Enron subsidiary) filed a claim against Argentina under the U.S.-Argentina BIT in 2001 over a dispute related to its controversial water services contract in the province of Buenos Aires.[152] During a 1999 water privatization deal, the company won a 30-year concession to provide water and sewage treatment to 2.5 million people.[153] Within a few months, residents complained of foul odors coming from the water. Local governments advised against drinking or paying for tap water and street protests against the water service were held.[154] After the problem was identified as algae contamination of a reservoir, Azurix alleged the algae was the government's responsibility and demanded compensation for associated costs.[155] The government argued that Azurix had a contractual responsibility to ensure clean drinking water.[156] In the following year, residents experienced a series of water outages and were repeatedly over-billed by Azurix for water, resulting in government fines.[157] Azurix withdrew from its contract in 2001.[158]

Azurix then launched its claim under the BIT, claiming that the government had expropriated its investment and denied the firm "fair and equitable treatment" by not allowing rate increases and not investing sufficient public funds in the water infrastructure.[159] In its deliberations, the tribunal weighed whether legitimate public interest policies could constitute BIT violations. The three tribunalists decided, "the issue is not so much whether the measure concerned is legitimate and serves a public purpose, but whether it is a measure that, *being legitimate and serving a public purpose, should give rise to a compensation claim.*"[emphasis added][160] The Tribunal ruled that Argentina violated Azurix's right to "fair and equitable treatment," among other breaches, and ordered the government to pay the Enron subsidiary $165 million plus interest, in addition to covering almost all of the tribunal's costs.[161]

RDC v. Guatemala (transportation)*, investor win (awarded $18.6 million)*

U.S.-based Railroad Development Corporation (RDC) launched an investor-state claim in 2007 under the U.S.-Central America Free Trade Agreement (CAFTA) after the government of Guatemala initiated a legal process to consider revoking a disputed railroad contract with the firm.[162] RDC was engaged in the domestic legal process but still alleged that it had been denied fair and equitable treatment.

Guatemala privatized its railroad system in 1997. RDC's contract in that privatization provided for rehabilitation of the entire railway network in five phases and significant investment in rolling stock and rail lines. After its first eight years of operation, RDC had only completed the first phase.[163] The Guatemalan government initiated a review of an RDC contract in a process that could result in its termination, after multiple assessments concluded that it did not comply with Guatemalan law.[164] This process, called *lesivo*, provided RDC the opportunity to present its case before an administrative court, and then appeal the resulting decision to the country's Supreme Court.[165] Most *lesivo* actions taken by the Guatemalan government pertained to domestic firms.

While taking advantage of this domestic due process and continuing to earn money from its investment, RDC launched its CAFTA claim. It alleged that the *lesivo* itself was an indirect expropriation and a violation of CAFTA's national treatment and "minimum standard of treatment" rules.[166] The tribunal not only allowed the ISDS claim to move forward despite the unresolved domestic process, but opined that in such instances of parallel ISDS claims, investors should be allowed to access extrajudicial investor-state proceedings *before* the conclusion of domestic legal processes.[167]

In 2012 the tribunal ruled in favor of RDC, ordering the government to pay the firm $18.6 million. The tribunal upheld the allegation that Guatemala's initiation of the *lesivo* process had failed to afford RDC a "minimum standard of treatment."[168] In doing so, the tribunal ignored the definition of that standard found in a CAFTA Annex that was ostensibly designed to limit tribunalist discretion. CAFTA governments had inserted the annex after a series of investor-state had interpreted the "minimum standard of treatment" obligation to mean that investors must be guaranteed a stable regulatory framework *that does not frustrate the expectations* they held at the time they established their investment.[169] In defending itself against an investor-state challenge that tried to invoke this sweeping interpretation, the U.S. government stated, "if States were prohibited from regulating in any manner that frustrated expectations – or had to compensate for any diminution in profit – they would lose the power to regulate."[170] By defining "minimum standard of treatment" in the CAFTA Annex as derived from customary international law that "results from a general and consistent practice of States that they follow from a sense of legal obligation," the U.S. and other CAFTA governments attempted to constrain "minimum standard of treatment" to an obligation to afford such basic rights as due process and police protection.[171] But the *RDC* tribunal ignored the annex and rejected the official submissions of four CAFTA governments, including the U.S. government, arguing that the foreign investor right was limited.[172] Instead, the tribunal borrowed a broad interpretation of "minimum standard of treatment," one that included protection of investors' expectations, from another investor-state tribunal and used it to rule against Guatemala.[173]

TCW v. Dominican Republic (electricity), *settled (investor paid $26.5 million)*

In 2007 TCW Group, a U.S. investment management corporation that jointly owned with the government one of the Dominican Republic's three electricity distribution firms, claimed that the government violated CAFTA by failing to raise electricity rates and failing to prevent electricity theft by poor residents.[174] The French multinational Société Générale (SG), which owned the TCW Group, filed a parallel claim under the France-Dominican Republic BIT.[175]

TCW launched its claim two weeks after CAFTA's enactment, arguing that decisions taken before the treaty's implementation violated the treaty.[176] TCW took issue with the government's unwillingness to raise electricity rates, a decision undertaken in response to a nationwide energy crisis. TCW also protested that the government did not subsidize electricity rates, which would have diminished electricity theft by poor residents. The *New York Times* noted that such subsidization was not feasible for the government after having just spent large sums to rectify a banking crisis.[177] TCW alleged expropriation and violation of CAFTA's guarantee of fair and equitable treatment.

TCW demanded $606 million from the government for the alleged CAFTA violations, despite having spent just $2 to purchase the business from another U.S. investor.[178] The company also admitted to having "not independently committed additional capital" to the electricity distribution firm after its $2 purchase in 2004.[179] After a tribunal constituted under the France-Dominican Republic BIT issued a jurisdictional ruling in favor of SG, allowing the case to move forward, the government decided to settle with SG and TCW. The government paid the foreign firms $26.5 million to drop the cases, reasoning that it was cheaper than continuing to pay legal fees.[180]

Labor Rights

Veolia v. Egypt (minimum wage), *pending*

Veolia Propreté, a French multinational corporation, launched an investor-state claim against Egypt in 2012, demanding at least $110 million under the France-Egypt BIT over disputes relating to a 15-year contract for waste management in the city of Alexandria.[181] The corporation claims that having to comply with changes to Egyptian laws of general application violated the government's contractual commitments to keep payments to Veolia aligned with cost increases.[182]

Among its claims, Veolia argues that changes to Egypt's labor laws – including increases to minimum wages – have negatively affected the company's investment, and that Egypt has violated its contract and the BIT's investor protections by not helping the corporation offset such costs.[183] An investor-state tribunal was established in 2013 and the case is pending.[184]

Development and Industrial Policy

ExxonMobil and Murphy Oil v. Canada (research and development), *investor win (awarded $13.2 million plus interest, additional claims pending)*

In 2007 Mobil Investments Canada, owned by U.S. oil giant ExxonMobil, and U.S.-based Murphy Oil Corporation used NAFTA to launch an ISDS case against a Canadian province's policies relating oil exploration contracts.[185] The "Canada-Newfoundland Offshore Petroleum Board's Guidelines for Research and Development Expenditures" require oil extraction firms to pay fees to support research and development in one of Canada's poorest provinces, Newfoundland and Labrador. The guidelines apply to domestic and foreign concession holders alike. [186] Offshore oil fields in the region, developed after significant infusions of public and private funds, were discovered to be far larger than anticipated, prompting a variety of new government measures that applied to all concession holders.[187]

In their NAFTA claim, the oil corporations argued that the new guidelines violated NAFTA's prohibition on performance requirements. In 2012, a tribunal majority ruled in favor of Mobil and Murphy Oil, deeming the requirement to use larger-than-expected oil revenue to fund research and development as a NAFTA-barred performance requirement. That the policy applied to both domestic and foreign investors was irrelevant. NAFTA's investment chapter, like those of most ISDS-enforced agreements, includes among the substantive rights it guarantees investors a flat ban on signatory nations' establishment or maintenance of various requirements that investors must meet.

The tribunal's order for Canada to pay $13.2 million plus interest for damages incurred until 2012 was made public in February 2015.[188] The Canadian government attempted to have the award "set aside", arguing that the tribunal had exceeded its jurisdiction in making the award — but that application was denied.[189] Furthermore, in its ruling, the tribunal determined that, as long as the Offshore Petroleum Board's guidelines remained in place, Canada would be in "continuing breach" of its NAFTA obligations "resulting in ongoing damage"[190] to the oil company's interest, so Mobile launched another case demanding even more damages since 2012, so Canada may end up having to pay much more.[191]

Hedge Funds Speculating in Sovereign Debt

Gramercy v. Peru, (land bond repayment), *pending*

In the late 1960s, Peru's then-military government seized agricultural land as part of an aggressive redistributive land reform policy, compensating landowners with agrarian bonds. In the early 1980s, Peru suffered an economic crisis and defaulted on this debt. The bonds were practically worthless until a 2001 decision from Peru's constitutional court ordered the bonds be repaid, though the court did not specify how.[192] The U.S. hedge fund Gramercy Funds Management began buying Peruvian land bonds while their status was still uncertain, which allowed Gramercy to pay what experts surmise was only 20 percent of their face value.[193] In 2013, Peru's highest court ordered the government to establish a plan for repaying the debt.[194] The government was tasked with assessing the current value of the bonds, given that in the 40 years since the bonds were issued, Peru had suffered armed conflict, changed currencies twice, experienced hyperinflation and, more recently, a period of economic growth.

Unsatisfied with the government's payment plan, in 2016, Gramercy took action in the Peruvian court system to compel Peru to repay the bonds at a rate Gramercy deemed appropriate. Instead of waiting to see that case through, Gramercy also launched an ISDS case against Peru under the U.S.-Peru FTA, even though the pact did not go into effect until three years after Gramercy started buying the bonds.

Gramercy, which has been involved in several ISDS cases, claims that the Peruvian government's payment plan violates its investor rights under the Peru FTA by paying "as little as a few million dollars."[195] Gramercy is demanding $1.6 billion, a sum they claim is the contemporary equivalent of the value the bonds had when they were issued. This amount also equals a quarter of what the Peruvian government spent on education in 2014, or more than half of its infrastructure budget for 2016.[196] The hedge fund claims that the Peruvian government has violated the Peru FTA standards of expropriation, fair and equitable treatment, national treatment, and most favored nation.[197]

The Peruvian government counters that Gramercy purchased this public debt at "deeply discounted" rates and that Gramercy's risky investment had no productive value in Peru. The government also counters that the firm acquired the bonds before the FTA was in effect, has refused to participate with other creditors in the debt restructuring, and is violating the terms of the FTA by simultaneously pursuing a claim in Peruvian courts.[198] The government also charges that Gramercy is waging what Peru calls "a desperate smear campaign," which is impermissible under the tribunal's rules, and which threatens the country's international status and credit rating.[199]

ENDNOTES

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