NAFTA's Corporate Rights vs. People and Planet

How Corporations Use Trade Deals to Challenge Our Protections in Private Tribunals

Our planet, and all of us who live on it, are in trouble. Climate change threatens to destabilize world food supplies, undercut economic development, and threaten communities with extreme weather and sea level rise;[1] world fisheries are on the verge of collapse;[2] and widespread deforestation has accelerated rates of biodiversity loss and soil erosion.[3] As we move toward planetary tipping points, strong climate policies, ambitious environmental laws, and decisive governmental action are desperately needed.

Unfortunately, right when we need active policymaking most, outdated trade and investment deals, written under the advisement of polluting corporations, are undermining policies that protect people and planet. These deals, such as the North American Free Trade Agreement (NAFTA), give corporations expansive new rights to challenge our climate and environmental protections in unaccountable tribunals of corporate lawyers.

Corporate trade deals give foreign investors broad new rights that are fundamentally at odds with reining in the power of corporate polluters and transitioning to renewable energy. These corporate rights include a guaranteed "minimum standard of treatment,"[4] which has been interpreted as making governments liable for policy changes that do not conform to investors' "expectations" of a stable business environment.[5] If a corporation believes a policy change (e.g., a new restriction on fossil fuel extraction) violates its broad trade deal rights, it can use the deal's investor-state dispute settlement (ISDS) system to bypass domestic courts and sue the government in an unaccountable tribunal. The tribunals are composed of three private lawyers – typically corporate attorneys[6] – who can order the government to pay the corporation the profits it might have earned without the new policy.

Corporations are using trade and investment deals to go to private ISDS tribunals and challenge more and more of our democratically-enacted protections for our climate, air, water, and communities. To date, investors have launched more than 700 cases against more than 100 governments, more than half of them filed since 2010. More than one of every four new ISDS cases since 2010 has targeted policies affecting oil and gas extraction, mining, or fossil fuel power generation. More than half of concluded cases have resulted in the government either losing outright and having to pay for the challenged policy, or being forced to settle with the corporation, which can involve rolling back the policy.[7] Law firms specializing in ISDS are now explicitly advising corporations, including fossil fuel firms, to see ISDS as a "tool" to "prevent" unwanted policies, as threats of costly ISDS cases can chill policy proposals.[8]

Extreme Rights for Corporate Polluters

The corporate protections in status quo trade and investment deals such as NAFTA have become a significant threat to democratic governance, environmental protection, and public well-being. Below are some of the broad investor rights included in such deals that have allowed multinational corporations to attack critical public interest policies.

Investor-State Dispute Settlement: Corporations Challenging Policies before Corporate Lawyers

Status quo trade and investment deals empower foreign investors to bypass domestic courts and challenge environmental and other public interest policies in private ISDS tribunals.[9] The tribunals are not staffed by judges, but three lawyers. More than 60 percent of these lawyers have been full-time corporate attorneys in existing ISDS cases, and more than half have rotated between playing the part of "judges" in some cases and representing corporations in others.[10] The corporate lawyers on ISDS tribunals are not accountable to any system of legal precedent or meaningful requirements to be impartial. NAFTA, for example, includes no code of conduct to limit tribunalists' conflicts of interest.[11] The tribunalists are empowered to order governments to pay corporations compensation for what they deem to be violations of the broad foreign investor rights in trade and investment deals. There is no cap on the amount of taxpayer money that tribunals can order a government to pay,[12] and their rulings are not subject to appeal.[13]

Broad Definitions of "Investment" and "Investor"

The definition of "investment" in trade and investment deals goes far beyond ownership of real property and exposes governments to a wide range of cases not even related to actual investments. Several U.S. deals, for example, allow corporations to launch cases over any "asset" they have, even if they only own it indirectly, so long as it is associated with "the expectation of gain or profit."[14] Similarly broad definitions of "investor" even allow corporations to launch ISDS cases over investments that failed to materialize. Recent U.S. deals, for example, allow corporations to challenge policies if they inhibit their "attempts to make" an investment.[15]

Minimum Standard of Treatment: An Obligation to Not Frustrate Corporate Expectations

Trade and investment deals typically guarantee foreign investors a "minimum standard of treatment" and "fair and equitable treatment." A number of ISDS tribunals have interpreted these vague obligations as requiring governments to ensure "the stability of the legal and business framework,"[16] and avoid policy changes that investors could see as "arbitrary."[17] This means that a government could face costly ISDS challenges for changing its policies to better protect the climate, the environment, or its citizens, if doing so frustrates the expectations that multinational corporations held when they made their investments. Such broad interpretations of investors' right to a "minimum standard of treatment" help explain why this obligation has been the basis for three out of every four ISDS rulings under U.S. deals in which the government has lost.[18]

Indirect Expropriation: A Right to Compensation for Policies that Reduce an Investment's Value

Status quo trade and investment deals obligate governments to compensate foreign investors for "indirect" expropriation. ISDS tribunals have interpreted this broad obligation as allowing multinational corporations to demand compensation for government policies or actions that have the effect of merely reducing the value of an investment.[19] By contrast, in most domestic legal systems, governments typically are not required to provide compensation unless they actually seize private property, or completely and permanently destroy its value.[20] This expansive foreign investor right allows corporations, for example, to challenge new environmental regulations if they diminish the value of their polluting projects.

Corporate Tribunal Cases against Climate and Environmental Protections

These are not hypothetical dangers. ISDS cases against environmental, health, and other public interest policies are increasing in frequency, while the scope of policies being challenged is widening. These are just a few ISDS cases that exemplify how investment rules can limit a government's ability to mitigate climate disruption, protect the environment, and ensure the safety of its people:

Denial of a Quarry Mine in Nova Scotia

In 2007, the government of Nova Scotia in Canada rejected a proposal by Bilcon of Delaware, a U.S. mining company, to use invasive "blasting" methods to extract rock near the Bay of Fundy and ship it to the United States.[21] The government acted in response to an environmental impact assessment, which found that the project could harm endangered species, including the North Atlantic right whale and Inner Bay of Fundy salmon.[22] The assessment also highlighted concerns by commercial fishers, indigenous communities, and local residents about threats to the local landscape, diverse wildlife, and community, leading the Novia Scotia and Canadian governments to agree that the mining project threatened "core values that reflect [the local community's] sense of place, their desire for self-reliance, and the need to respect and sustain their surrounding environment."[23]

In response to the government's rejection of the project, Bilcon launched an ISDS case against Canada under NAFTA, arguing that its right to a "minimum standard of treatment" (among others) had been violated.[24] In 2015, two of the three lawyers on the ISDS tribunal ruled against Canada, arguing that the environmental impact assessment frustrated Bilcon's expectations, and thus violated Bilcon's right to a "minimum standard of treatment," because it took into consideration the local community's values, including their concerns about the environment.[25] The dissenting tribunalist warned that the decision would be seen as "a remarkable step backwards in environmental protection," and predicted that "a chill will be imposed on environmental review panels."[26] Bilcon is demanding at least $300 million in compensation from Canadian taxpayers.[27]

A Fracking Moratorium in Quebec

In September 2013, Lone Pine Resources, a U.S. oil and gas firm, launched an ISDS case against Canada under NAFTA in response to a moratorium enacted by Quebec on shale gas exploration and development, including fracking, under the St. Lawrence River.[28] A Quebec government review has concluded that fracking in the area could pollute the air and water and have "major impacts" on local communities.[29] In launching its ISDS case, Lone Pine claimed the Quebec government acted "with no cognizable public purpose," and violated the firm's "valuable right to mine for oil and gas under the St. Lawrence River."[30] Lone Pine argued that Quebec's fracking moratorium violated NAFTA's guarantee of a "minimum standard of treatment" for foreign investors because it "violated Lone Pine's legitimate expectation of a stable business and legal environment."[31] Lone Pine also called the fracking moratorium a NAFTA-prohibited "indirect expropriation."[32] The firm is demanding $119 million from Canadian taxpayers as compensation, in addition to asking Canada to cover Lone Pine's legal fees.[33]

Coal-Fired Power Plant Standards and Nuclear Energy Phase-Out in Germany

In 2007, the government of Hamburg, Germany, granted Swedish energy firm Vattenfall a permit to begin construction of a new coal-fired power plant.[34] In an attempt to allay strong concerns from policymakers and the public that the plant would contribute to climate disruption and could pollute the adjacent Elbe River,[35] the government of Hamburg required Vattenfall to comply with environmental requirements to protect the river.[36] Instead of meeting those requirements, however, Vattenfall launched a $1.5-billion ISDS case against Germany

under the Energy Charter Treaty,[37] claiming that the environmental rules constituted an expropriation of its investment and a violation of its right to "fair and equitable treatment."[38] To avoid a potentially costly case, the German government reached a settlement with Vattenfall in 2010 that required Hamburg to abandon its environmental conditions for the coal-fired plant (even ones Vattenfall had already agreed to) and allow the plant to be built.[39] Hamburg complied, and Vattenfall's coal plant there began operating in 2014.[40]

Two years after successfully using ISDS to roll back German restrictions on its coal-fired power plant, Vattenfall decided to launch an ISDS case against German restrictions on nuclear power. Following Japan's Fukushima Daiichi nuclear disaster of 2011, and in the midst of significant public pressure, the German Parliament decided to phase out nuclear power and shift toward cleaner renewable energy sources.[41] In response, Vattenfall, which had investments in German nuclear energy, launched an ISDS case against Germany under the Energy Charter Treaty.[42] Vattenfall is now seeking more than $5 billion from German taxpayers for losses that it may sustain during the nuclear phase-out.[43]

Oil Drilling Restrictions in Ecuador

In 1999, Occidental Petroleum Corporation signed a 20-year contract with Ecuador for oil exploration and production rights in the Amazon rainforest.[44] In accordance with Ecuador's laws on oil production, the agreement explicitly prohibited Occidental from selling its oil production rights without government approval.[45] This legal requirement provided the government the opportunity to evaluate any companies seeking to produce oil within Ecuador's national boundaries. The country had good reason to exercise caution: For nearly three decades, Texaco, which Chevron later acquired in 2001, dumped billions of gallons of toxic water into Ecuador's Amazon region while drilling for oil.[46] Just one year after signing its contract, Occidental violated it (and Ecuadorian law) when the corporation sold 40 percent of its production rights to Alberta Energy Company without formally informing, or seeking authorization from, the Ecuadorian government.[47] In response, Ecuador terminated Occidental's contract and investment, which prompted Occidental to launch an ISDS case against Ecuador under the U.S.-Ecuador Bilateral Investment Treaty.

Although the ISDS tribunal agreed that Occidental broke the law and that Ecuador was within its legal rights to terminate the contract and investment,[48] the tribunal used a broad interpretation of Occidental's right to "fair and equitable treatment" to rule against Ecuador.[49] The tribunalists ordered Ecuador to pay more than $2 billion to Occidental[50] — the largest ISDS penalty at the time, and equivalent to what the Ecuadorian government spends each year on healthcare for half of its population.[51] A later, partial annulment of the decision left the ruling largely intact and left Ecuador with a penalty of more than $1 billion.[52]

Conclusion

To address our environmental and climate crises, governments must act quickly and decisively. Now, more than ever, governments need to have at their disposal a wide array of policy tools for promoting renewable energy, moving beyond fossil fuels, and protecting our air, water, and ecosystems. But the corporate protections in status quo trade and investment deals like NAFTA threaten to undermine current environmental safeguards and constrain future climate action. By creating a system that privileges corporate profits over the well-being of communities and the environment, these deals have allowed multinational corporations to attack democratically-enacted protections on which we depend. We urgently need a new model of trade and investment that supports rather than undermines government action to safeguard our environment, protect our communities, and tackle climate change.

ENDNOTES

[1] Potsdam Institute for Climate Impact Research and Climate Analytics. "Turn down the heat: Why a 4^0C warmer world must be avoided." *A Report for the World Bank*, November, 2012. Accessible at: http://climatechange.worldbank.org/sites/default/files/Turn_Down_the_Heat_Executive_Summary_English.pdf

[2] Vince, Gaia. "How the world's oceans could be running out of fish." *BBC News*, September 21, 2012. Accessible at: http://www.bbc.com/future/story/20120920-are-we-running-out-of-fish

[3] "Forest Loss." *Environmental Investigation Agency.* Accessible at: http://www.eia-international.org/our-work/ecosystems-and-biodiversity/forest-loss

[4] See, for example, Article 1105 of NAFTA, https://www.nafta-sec-alena.org/Home/Texts-of-the-Agreement/North-American-Free-Trade-Agreement?mvid=1&secid=539c50ef-51c1-489b-808b-9e20c9872d25.

[5] A recent review of ISDS rulings by ISDS expert Gus Van Harten finds that in 83 percent of cases, tribunals used a broad interpretation of the "minimum standard of treatment" that went "beyond the customary meaning of the minimum standard and thus enlarging foreign investors' entitlements to compensation in the face of democratic and regulatory decision-making by countries." This includes repeated tribunal interpretations of the "minimum standard of treatment" as requiring policies to conform to a foreign investor's expectations of a stable regulatory environment. Due in part to such broad interpretations, "minimum standard of treatment" violations have been the basis for three out of every four government losses in ISDS cases brought under U.S. trade and investment pacts. Gus Van Harten, "Foreign Investor Protection and Climate Action: A New Price Tag for Urgent Policies," Osgoode Hall Law School Research Paper No. 66, 11:14, November 26, 2015, at 3, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2697555. Lori Wallach, "'Fair and Equitable Treatment' and Investors' Reasonable Expectations: Rulings in U.S. FTAs and BITs Demonstrate FET Definition Must be Narrowed," Public Citizen, September 5, 2012, http://www.citizen.org/documents/MST-Memo.pdf. http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf. U.S. Model Bilateral Investment Treaty, U.S. Department of State, 2012, at Article 5, http://www.state.gov/documents/organization/188371.pdf.

[6] A recent study of ISDS cases brought under the rules of the International Centre for Settlement of Investment Disputes (ICSID – the rules system used for a majority of ISDS cases) finds that 63 percent of tribunalists in existing cases have been full-time private lawyers. Michael Waibel and Yanhui Wu, "Are Arbitrators Political?" University of Bonn, 2012, at 27, http://www.unisg.ch/~/media/internet/content/dateien/unisg/schools/seps/political%20science/pwdresearchseminarwaibelare%20arbitrators%20political20150506.pdf.

[7] According to United Nations data, 104 of the 400 publicly-available ISDS cases launched from 2010 through 2016 stemmed from investments in mining, oil and gas extraction, or fossil fuel power generation. For this and all preceding statistics in this paragraph, see: United Nations Conference on Trade and Development, "Investment Dispute Settlement Navigator," accessed March 2017.

[8] Matthew Coleman, et al., "Foreign Investors' Options to Deal with Regulatory Changes in the Renewable Energy Sector," Steptoe and Johnson LLP, September 23, 2014, http://www.steptoe.com/publications-9867.html.

[9] See, for example, Chapter 11, Section B of NAFTA, https://www.nafta-sec-alena.org/Home/Texts-of-the-Agreement/North-American-Free-Trade-Agreement.

[10] A recent study of ISDS cases brought under the rules of the International Centre for Settlement of Investment Disputes (ICSID – the rules system used for a majority of ISDS cases) finds that 53 percent of tribunalists have served as counsel for the investor in other ISDS cases brought under ICSID rules. Among tribunalists chosen by investors, 73 percent have served as lawyers for investors in other ISDS cases under ICSID rules. Michael Waibel and Yanhui Wu, "Are Arbitrators Political?" University of Bonn, 2012, at 27-29, https://www.wipol.uni-bonn.de/lehrveranstaltungen-1/lawecon-workshop/archive/dateien/waibelwinter11-12.

[11] Chapter 11 of NAFTA, https://www.nafta-sec-alena.org/Home/Texts-of-the-Agreement/North-American-Free-Trade-Agreement.

[12] See, for example, Article 1135 of NAFTA, https://www.nafta-sec-alena.org/Home/Texts-of-the-Agreement/North-American-Free-Trade-Agreement?mvid=1&secid=539c50ef-51c1-489b-808b-9e20c9872d25.

[13] Tribunal decisions could only be "annulled" on narrow grounds such as "corruption" by a tribunal member or "departure from a fundamental rule of procedure." International Centre for Settlement of Investment Disputes, Convention on the Settlement of Investment Disputes between States and Nationals of Other States, at Article 52, https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.

[14] See, for example, the definition of "investment" in Article 11.28 of the U.S.-Korea Free Trade Agreement, https://ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file587_12710.pdf.

[15] See, for example, the definition of "investor of a Party," in Article 11.28 of the U.S.-Korea Free Trade Agreement, https://ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file587_12710.pdf.

[16] *Occidental Exploration and Production Company v. The Republic of Ecuador*, UNCITRAL, LCIA Case No. UN3467, Final Award, July 1, 2004, at para. 183, http://italaw.com/sites/default/files/case-documents/ita0571.pdf.

[17] In March 2015, for example, an ISDS tribunal ruled against Canada for denying a mining project that was rejected by an environmental review panel, arguing that Canada's decision violated the foreign investor's right under NAFTA to a "minimum standard of treatment," in part, because it was "arbitrary." *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015, at para. 591, http://www.italaw.com/sites/default/files/case-documents/italaw4212.pdf.

See also *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, June 29, 2012, at para. 219, http://www.italaw.com/sites/default/files/case-documents/ita1051.pdf.

[18] Lori Wallach, "'Fair and Equitable Treatment' and Investors' Reasonable Expectations: Rulings in U.S. FTAs & BITs Demonstrate FET Definition Must be Narrowed," Public Citizen, September 5, 2012, http://www.citizen.org/documents/MST-Memo.pdf.

[19] The tribunal in *Metalclad Corporation v. Mexico*, for example, concluded, "expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour [sic] of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole *or in significant part*, of the use or reasonably-to-be-expected economic benefit of property, even if not necessarily to the obvious benefit of the host State" (emphasis added). *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB (AF)/97/1, Award, August 30, 2000, at para. 103.

[20] "…[T]he distinction between police-power regulation of property and eminent-domain expropriation of property is fundamental to all [constitutional] property clauses, because only the latter is compensated as a rule. Normally, the will be no provision for compensation for deprivations or losses caused by police-power regulation of property." A.J. Van der Walt, Constitutional Property Clauses: A Comparative Analysis (Kluwer Law International, 1999), at 17. United States law is an exception to this general rule, but compensation for claims of "regulatory takings" under the Fifth Amendment of the U.S. Constitution is still only available in specific instances. Supreme Court rulings indicate that these include when a government measure results in "permanent physical invasion" of a property, causes a complete and permanent destruction of a property's value, constitutes a land-use exaction "so onerous that, outside the exactions context, they would be deemed *per se* physical takings," or is otherwise "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537-540, 547-548 (2005).

[21] "News Release: Minister Rejects Whites Point Proposal," Nova Scotia Department of Environment and Labour, November 20, 2007, http://novascotia.ca/news/release/?id=20071120003. For a summary of the case, see "Corporate Rights in Trade Agreements," The Sierra Club, 2015, https://www.sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/0999_Trade_Bilcon_Factsheet_04_low.pdf.

[22] "Environmental Assessment of the White Point Quarry and Marine Terminal Project," Joint Review Panel, October 2007, at 57, 102-103, http://www.novascotia.ca/nse/ea/whitespointquarry/WhitesPointQuarryFinalReport.pdf.

[23] "The Government of Canada's Response to the Environmental Assessment Report of the Joint Review Panel on the Whites Point Quarry and Marine Terminal Project," Fisheries and Oceans Canada, December 17, 2007, http://www.dfo-mpo.gc.ca/reports-rapports/quarry/gr-quarry-eng.htm.

[24] *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Notice of Arbitration, May 26, 2008, at paras. 33-37, http://www.italaw.com/sites/default/files/case-documents/italaw1143.pdf.

[25] *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015, at 124-179, http://www.italaw.com/sites/default/files/case-documents/italaw4212.pdf.

[26] *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Dissenting Opinion of Professor Donald McRae, March 10, 2015, at para. 51, http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/clayton-13.pdf.

[27] Paul Withers, "Nova Scotia Taxpayers May Be on Hook for NAFTA," *CBC News Canada*, March 24, 2015, http://www.cbc.ca/news/canada/nova-scotia/nova-scotia-taxpayers-may-be-on-hook-for-nafta-defeat-1.3006319.

[28] *Lone Pine Resources Inc. v. The Government of Canada*, ICSID Case No. UNCT/15/2, Notice of Arbitration, September 6, 2013, http://www.italaw.com/sites/default/files/case-documents/italaw1596.pdf. For a summary of the case, see Ilana Solomon, "Fracking Causes Friction between Trade and Environment," *Huff Post Green*, November 16, 2012, http://www.huffingtonpost.com/ilana-solomon/fracking-causes-friction-_b_2146939.html.

[29] Geoffrey Vendeville, "Fracking Provides Few Benefits to Quebec, Environmental Review Says," *Montreal Gazette*, December 15, 2014, http://montrealgazette.com/news/quebec/fracking-provides-few-benefits-to-quebec-environmental-review-says.

[30] *Lone Pine Resources Inc. v. The Government of Canada*, ICSID Case No. UNCT/15/2, Notice of Arbitration, September 6, 2013, at para. 11, http://www.italaw.com/sites/default/files/case-documents/italaw1596.pdf.

[31] *Lone Pine Resources Inc. v. The Government of Canada*, ICSID Case No. UNCT/15/2, Notice of Arbitration, September 6, 2013, at para. 55, http://www.italaw.com/sites/default/files/case-documents/italaw1596.pdf.

[32] *Lone Pine Resources Inc. v. The Government of Canada*, ICSID Case No. UNCT/15/2, Claimant's Memorial, April 10, 2015, at para. 221, http://www.italaw.com/sites/default/files/case-documents/italaw4259.pdf.

[33] *Lone Pine Resources Inc. v. The Government of Canada*, ICSID Case No. UNCT/15/2, Claimant's Memorial, April 10, 2015, at para. 408, http://www.italaw.com/sites/default/files/case-documents/italaw4259.pdf.

[34] *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany*, ICSID Case No. ARB/09/6 , Request for Arbitration, March 30, 2009, at para. 23, http://www.italaw.com/sites/default/files/case-documents/ita0889.pdf.

[35] *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany*, ICSID Case No. ARB/09/6, Request for Arbitration, March 30, 2009, at paras. 16, 27-40, http://italaw.com/documents/VattenfallRequestforArbitration.pdf.

[36] *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany*, ICSID Case No. ARB/09/6, Request for Arbitration, March 30, 2009, at paras. 27-40, http://italaw.com/documents/VattenfallRequestforArbitration.pdf.

[37] *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany*, ICSID Case No. ARB/09/6 , Request for Arbitration, March 30, 2009, at para. 79, http://www.italaw.com/sites/default/files/case-documents/ita0889.pdf.

[38] *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany*, ICSID Case No. ARB/09/6, Request for Arbitration, March 30, 2009, at paras. 52-54, http://www.italaw.com/sites/default/files/case-documents/ita0889.pdf.

[39] *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany*, ICSID Case No. ARB/09/6, Award, March 11, 2011, at 17, http://italaw.com/sites/default/files/case-documents/ita0890.pdf.

[40] Vattenfall, "Moorburg Power Plant Starts Generating Electricity," February 28, 2014, http://corporate.vattenfall.com/news-and-media/news/2014/moorburg/.

[41] Nathalie Bernasconi-Osterwalder and Rhea Tamara Hoffman, "The German Nuclear Phase-Out Put to the Test in International Investment Arbitration? Background to the new dispute Vattenfall v. Germany (II)," International Institute for Sustainable Development, June 2012, at 2-3, http://www.iisd.org/sites/default/files/pdf/2012/german_nuclear_phase_out.pdf.

[42] "Germany Is Sued at ICSID by Swedish Energy Company in Bid for Compensation for Losses Arising out of Nuclear Phase-out," *Investment Arbitration Reporter*, June 1, 2012, http://www.iareporter.com/articles/germany-is-sued-at-icsid-by-swedish-energy-company-in-bid-for-compensation-for-losses-arising-out-of-nuclear-phase-out/.

[43] A German government response to a parliamentary inquiry states the amount of Vattenfall's claim as €4.675 billion. "Reply from the Federal Government: Vattenfall versus the Federal Government of Germany," German Bundestag, 18/3721, January 13, 2015, http://dip21.bundestag.de/dip21/btd/18/037/1803721.pdf.

[44] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, October 5, 2012, at paras. 112, 115, http://www.italaw.com/sites/default/files/case-documents/italaw1094.pdf. For more details on the case, see Lori Wallach and Ben Beachy, "Occidental v. Ecuador Award Spotlights Perils of Investor-State System," Public Citizen, November 21, 2012, http://www.citizen.org/documents/oxy-v-ecuador-memo.pdf.

[45] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, October 5, 2012, at para. 120, http://www.italaw.com/sites/default/files/case-documents/italaw1094.pdf.

[46] *Aguinda v. ChevronTexaco*, No. 2003-0002, Ecuadorian Superior Court of Nueva Loja, 2011, at 173, http://chevrontoxico.com/assets/docs/2011-02-14-Aguinda-v-ChevronTexaco-judgement-English.pdf.

[47] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, October 5, 2012, at paras. 128-129, and 147-160, http://www.italaw.com/sites/default/files/case-documents/italaw1094.pdf.

[48] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, October 5, 2012, at paras. 381-383, http://www.italaw.com/sites/default/files/case-documents/italaw1094.pdf.

[49] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, October 5, 2012, at para. 416, http://www.italaw.com/sites/default/files/case-documents/italaw1094.pdf.

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