Germany, Uruguay and El Salvador: Private Investors Challenged their "Right to Regulate"

Vattenfall AB, et al v. Germany (ICSID Case No. ARB/12/12). In the wake of the 2011 Fukushima nuclear disaster, Germany decided to accelerate its process of fully phasing out nuclear power, invoking its obligation to protect public health and the environment.[1] This resulted in the immediate shutdown of two reactors owned by the Swedish company Vattenfall, which subsequently brought an international arbitration against Germany seeking billions of euros in damages under the Energy Charter Treaty, a 1994 multilateral investment treaty.[2] Vattenfall's claims are still being considered five years after it filed its claims, generating millions of euros in legal fees on both sides.[3] While Germany is able to firmly defend its choice, other countries may be less able to cover attorneys' fees or may be less likely to have the political will to stand up to large and powerful corporations.

Philip Morris Brands Sàrl, et al v. Uruguay (ICSID Case No. ARB/10/7). In 2008 and 2009, Uruguay introduced tobacco packaging measures designed to combat consumers' misperceptions regarding the health risks of smoking cigarettes. Philip Morris brought an international arbitration against Uruguay under the 1988 Switzerland-Uruguay bilateral investment treaty, requesting that the tribunal order Uruguay to rescind its public health measures or order Uruguay to pay millions of dollars in damages. Moreover, over the course of the dispute, Uruguay's lawyers uncovered evidence demonstrating that Philip Morris hoped its claim against Uruguay would discourage other countries from enacting similar regulations to promote public health. Uruguay was ultimately successful in defeating Philip Morris's claim and in defending its right to regulate for public health, but only after a protracted six-year legal battle and with financial assistance from Bloomberg Philanthropies and the Bill and Melinda Gates Foundation. Recognizing the predatory nature of these lawsuit, the tribunal ordered Philip Morris to compensate Uruguay $7 million in legal fees.

Pac Rim Cayman LLC v. El Salvador (ICSID Case No. 09/12). In 2009, Pac Rim brought a claim against El Salvador under the 2004 Central America Free Trade Agreement seeking compensation for El Salvador's decision to deny Pac Rim a gold mining license and to suspend gold mining in the country over fears about the environmental harm it could cause, especially on the small country's fragile water resources. After seven years of litigation, El Salvador was successful in defending its right to protect the environment and public health. Like the Philip Morris case, Pac Rim was ordered to pay $8 million to cover El Salvador's legal fees. El Salvador has had to begin enforcement proceedings since Pac Rim is yet to comply with the Tribunal's order.

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[1] L.Y. Zielinski, *"Legitimate Expectations" in the Vattenfall Case: At the Heart of the Debate over ISDS*, Kluwer Arbitration Blog (Jan. 10, 2017), *available at* http://kluwerarbitrationblog.com/2017/01/10/legitimate-expectations-in-the-vattenfall-case-at-the-heart-of-the-debate-over-isds/.

[2] N. Bernasconi-Osterwalder & M.D. Brauch, *The State of Play in* Vattenfall v. Germany II: Leaving the German public in the dark, IISD Briefing Note (Dec. 2014), p. 2, *available at* https://www.iisd.org/sites/default/files/publications/state-of-play-vattenfall-vs-germany-II-leaving-german-public-dark-en.pdf.

[3] *Id*.