

AFTINET preliminary analysis, final TPP text on ISDS

Cosmetic “safeguards” will not prevent foreign investors from suing governments over domestic laws

Australia has agreed to the inclusion of rights for foreign investors to sue governments for millions of dollars in international tribunals if they can argue that a change in domestic law or policy at national, state or local level will ‘harm’ their investment, known as Investor-State Dispute Settlement (ISDS). The tribunals consist of investment lawyers who are not independent judges but can continue to be practising advocates, with obvious conflicts of interest. [Increasing numbers of cases](#) against [health, environment](#) and even [minimum wage](#) laws show that ISDS can undermine democratic and sovereign rights to regulate.

One key general “safeguard” claimed by the Australian government refers to laws or policies which can be seen by investors as “indirect expropriation” This is similar to clauses in other recent agreements, which have not been effective. The clause reads:

“Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances” (Annex 9-B 3b).

This leaves huge loopholes, as it does not prevent companies from launching cases in which they can argue that the measures are not legitimate, and that the circumstances are rare.

Thanks to campaigning from public health groups, governments have agreed to exclude future tobacco control laws from ISDS cases (Article 29.5). This is an important win, has angered the [tobacco lobby](#), and should prevent future cases like the ongoing Phillip Morris tobacco company case against Australia’s plain packaging law.

But it also begs the question of how effective are the general “safeguards”. If tobacco regulation needs a specific exclusion, it is clear that the general “safeguards” do not prevent cases from being lodged against other public interest laws.

Other claimed “safeguards” include the mention of governments’ right to adopt public interest measures but these must be “consistent with the provisions” of the chapter and so do not prevent them from being sued. (Article 9.15). Actions by governments inconsistent with investor expectations alone do not breach the requirement to give “fair and equitable treatment” to investors (Article 9.6.4). But this requirement is open to a wide range of interpretation by tribunals, as shown in the recent [Bilcon v Canada](#) case, which found that the US Bilcon mining company did not receive fair treatment when it was refused permission to expand a quarry for environmental reasons.

The issue of arbitrators’ conflict-of-interest is not effectively addressed by a commitment to “provide guidance” on a future voluntary code of conduct for arbitrators (Article 9.21.6).

Corporations are only “encouraged” to voluntarily accept socially responsible standards of behaviour with no legal obligation or enforcement (Article 9.16). This contrasts with the legally binding obligations on governments and the corporate rights to sue governments.

None of these “safeguards’ address the [fundamental flaws](#) of an unfair ISDS tribunal system which has been criticised by Australia’s High Court [Chief Justice](#) and other [legal experts](#) because it has no independent judiciary, no precedents and no appeals.