

Free Trade Agreement could prevent regulation of Coal Seam Gas mining



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The Australian government is currently participating in trade negotiations led by the US and involving 12 countries in the Pacific. Called the 'Trans-Pacific Partnership Agreement,' the scope of the deal goes beyond what many of us understand as a 'free trade' agreement, and could threaten the ability of our governments to regulate in the interests of the public and the environment.

The United States wishes to include a proposal which would allow foreign companies to sue governments for damages if they adopt laws or policies that could 'harm' their investment, even if the laws or policies are in the public interest. The proposal, called 'Investor-State Dispute Settlement,' or ISDS, would essentially give foreign corporations power to sue governments over laws affecting essential areas of public interest at local, state and national level.

If approved, ISDS would reduce the ability of governments to regulate the activities of foreign companies even if the companies' activities have a negative impact on health and the environment. **This would prevent governments from responding to community concerns about Coal Seam Gas mining (CSG).**

Investor rights to sue threaten regulation of CSG

The United States tries to include Investor-State Dispute Settlement (ISDS) provisions in its free trade agreements to protect the interests of its corporations investing in foreign countries.

When ISDS is included in trade agreements, a single foreign investor can sue a government for millions of dollars of damages if the government adopts policies which could reduce the value of its investment.

The cases are heard by tribunals of international investment lawyers which give more consideration to whether the investment was harmed, rather than whether the law or policy was in the public interest. They also lack the independence of national courts. Arbitrators can also be advocates, the hearings are secret, and there is no system of appeals or precedents, resulting in inconsistent decisions.

ISDS is already being used to undermine Australian democratic legislation and the decisions made by the Australian High Court. The Philip Morris tobacco company is trying to use an obscure 1993 Australia-Hong Kong investment agreement to sue the government for damages in an international tribunal over the tobacco plain packaging legislation.

Philip Morris has persisted with this case despite the fact that the Australian High Court found that the law was a public health measure and the tobacco companies had no right under Australia law to damages for the legislation. The company believes the ISDS tribunal will give them a more favourable decision.

In the 2004 Australia-United States Free Trade Agreement, the Howard Coalition government rejected the US proposal for ISDS because of widespread public opposition to it. This means US companies cannot use this agreement to sue governments. Philip Morris, a US company, had to move some assets to Hong Kong and claim to be a Hong Kong investor in order to sue.

However, if Australia agrees to include ISDS in the Trans-Pacific Partnership Agreement, we will see more cases like this.

ISDS threatens the ability of our government to legislate democratically in response to community concerns about CSG mining and other issues that directly affect them.

US company sues Quebec for regulating shale gas mining

The 1994 North American Free Trade Agreement involving the US, Canada and Mexico, does include ISDS. There have been over 60 cases of governments being sued, many because they implemented legislation to protect public health or the environment. Currently, the US Lone Pine energy company is suing the provincial government of Quebec for \$250 million because it suspended shale gas mining pending an environmental study. The Quebec government acted in response to public pressure from the community to examine health and environmental impacts.

In a similar way, farmers and members of communities in NSW and Victoria influenced their state governments to also adopt moratoriums to examine the impact of coal seam gas mining on land use and the environment.

Following an independent study in NSW, a number of new regulations were adopted restricting coal seam gas activity close to residential suburbs and rural industries. Corporations have claimed they will lose billions because of these new rules. If Australia was subject to ISDS rules, foreign companies could sue state governments for damages over this regulation.

More Information

The Australian Fair Trade and Investment Network website: www.aftinet.org.au

'Ottawa faces \$250-million suit over Quebec environmental stance', by Les Whittington, *The Star* http://www.thestar.com/news/canada/2012/11/15/ottawa_faces_250million_suit_over_quebec_environmental_stance.html

'Free trade is fracking with our future' See: <http://www.canadians.org/sites/default/files/publications/Fracking-Freetrade-1.pdf>

'Why the Philip Morris case raises the alarm for rural health and wider public health concerns,' by Patricia Ranauld, *Crikey* <http://blogs.crikey.com.au/croakey/2013/01/25/the-philip-morris-case-illustrates-some-wider-dangers-for-public-health-from-global-trade-agreements/>

'Companies set to lose billions over coal seam gas rules,' by Ben Cubby & Sean Nicholls, *Sydney Morning Herald* <http://www.smh.com.au/environment/energy-smart/companies-set-to-lose-billions-over-coal-seam-gas-rules-20130219-2eoj3.html>

'Victoria bars new coal-seam gas projects,' by Sophie Gosper, *The Australian* <http://www.theaustralian.com.au/national-affairs/victoria-bars-new-coal-seam-gas-projects/story-fn59niix-1226457459198>

'Excess investor rights in trade deals an election issue,' by Thomas Faunce, *The Canberra Times* <http://www.canberratimes.com.au/comment/excess-investor-rights-in-trade-deals-an-election-issue-20130806-2rd8x.html>

Have your say against ISDS before the election

With the Trans-Pacific Partnership Agreement negotiations set to conclude this year, it is important that we speak now to ensure the government does not agree to ISDS provisions.

The Trans-Pacific Partnership Agreement has bipartisan support. But the major parties have different approaches to including ISDS in the negotiations. The current Labor government has said that they will not agree to proposals which give foreign corporations the right to sue governments.

However, Liberal-National Coalition trade spokesperson Julie Bishop said in an interview with the *Australian Financial Review* on April 2, 2013 that she would be willing to negotiate on a case-by-case basis on this issue.

In the lead up to the election it is vital that we let our local MPs and candidates know that we want our governments to keep the right to regulate in areas like coal seam gas mining and that they should oppose ISDS in all trade agreements.

Australian Fair Trade and Investment Network (AFTINET)

128 Chalmers Street, Surry Hills NSW 2010

www.aftinet.org.au | email: campaign@aftinet.org.au | phone: 02 9699 3686

