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“Safeguards” for investor rights to sue governments in Korea FTA text will not work

“The Abbott Government has agreed to include Investor-State Dispute Settlement (ISDS) in the Korea Australia FTA text which was released today. ISDS enables foreign investors to sue national, state or local governments for hundreds of millions of dollars of damages if they can allege a domestic law or policy “harms” their investment. The disputes are heard in international tribunals without the legal protections of national legal systems: arbitrators can be practising advocates and there are no precedents or appeals,” Dr Patricia Ranald, Convenor of the Australian Fair Trade and Investment Network, said today.

“The Trade Minister claims that there are “safeguards” which will prevent foreign investors from suing governments over laws which deal with public welfare, health and the environment. But these same “safeguards” have been included in other recent trade agreements, including the Central American Free Trade Agreement and the Peru-US Free Trade Agreement. The key substantial safeguard clauses in the Korea FTA are the same as in these two agreements, and they have not worked to prevent governments being sued,” said Dr Ranald.

“These agreements seek to limit the definition of “indirect expropriation”, which enables foreign investors to sue governments over domestic laws. But the sentence to exempt public health, safety and the environment begins with the words “except in rare circumstances.” This leaves a huge loophole which recent cases have used to advantage. Another “safeguard” is a more limited definition of “fair and equitable treatment” for foreign investors. But tribunals have ignored these limitations and applied the previous higher standard,” explained Dr Ranald.

“These “safeguards” have not prevented cases against environmental regulation. The Government of El Salvador has been sued by Pacific Rim Mining Corporation under the Central American Free Trade agreement, over a ban on mining to protect the nation’s limited groundwater resources. The US Renco mining company is using ISDS in the Peru-US Agreement to contest a local court decision that it was responsible for pollution from its lead mine. Both cases are ongoing and may take several years,” said Dr Ranald.

“Even if governments win these cases, they will have taken years and cost millions of dollars in legal fees. There will be no guarantee that the “safeguards” will work in future cases, because the arbitrators do not have to base their decisions on previous precedents meaning that the outcomes of future cases are unpredictable,” said Dr Ranald.

“The inclusion of ISDS in any trade agreement, even with “safeguards” exposes Australia to being sued for hundreds of millions of dollars over health and environment legislation,” said Dr Ranald.

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