

Foreign companies could sue our governments!



AFTINET
Australian Fair Trade &
Investment Network Ltd

Investor-State Dispute Settlement, or ISDS, is an insidious clause appearing in more and more trade agreements which allows foreign investors to sue governments if the investor can allege that a law or policy 'harms' their investment, even if the law or policy is in the public interest.

Essentially, ISDS gives foreign companies power to sue governments in international tribunals for millions of dollars over democratic legislation which aims to protect public health or the environment. Just the threat of an ISDS case could prevent governments from regulating democratically in response to community concerns.

Investor rights to sue governments undermine democracy and should not be included in any trade agreement. However, the current Australian government has already agreed to include ISDS in a trade agreement with Korea, and is currently negotiating its inclusion in the Trans-Pacific Partnership (TPP), a trade agreement led by the US and involving 12 Pacific Rim countries.

ISDS: A corporate power grab?

The United States promotes ISDS in its free trade agreements to protect the interests of its corporations investing in foreign countries. US-based companies are the most frequent users of ISDS against health, environmental and other legislation.

ISDS provisions give special rights only to foreign companies, not local companies. Only large corporations are able to use the provisions, since an OECD study has found the average legal cost of an ISDS case is between US\$8-\$30 million.

The cases are heard by tribunals of investment arbitrators 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.

In Australia, ISDS is widely opposed by the community. The Howard government refused to include it in the Australia-US Free Trade Agreement in 2004. The Productivity Commission's 2010 Report on Regional and Bilateral Trade Agreements opposed ISDS after it found no evidence of economic benefits, and the previous Labor government adopted a policy against it. However, the current Coalition government is prepared to negotiate ISDS in the TPP and other trade agreements.

Opposition to ISDS worldwide is growing as more and more cases are launched. Just some examples are:

Philip Morris vs Australia

Philip Morris tobacco company is suing Australia over its plain packaging cigarette laws

Lone Pine vs Quebec

Lone Pine mining company is suing the Canadian Quebec government after they imposed a moratorium on shale gas mining in order to conduct an environmental study

Pacific Rim vs El Salvador

Pacific Rim mining company is suing the government of El Salvador because of their refusal to issue a mining permit based on environmental concerns and community opposition

Renco vs Peru

After the US Renco lead mining was required to clean up its lead pollution, it launched a case against the Peruvian government.

Veolia vs Egypt

When Egyptian workers won a rise in the minimum wage in 2011, French multinational Veolia launched a case against Egypt.

Metalclad vs Guadalcazar (Mexico)

The US Metalclad Company successfully sued a Mexican local government for \$16.2 million because it refused to grant a waste dump permit



Threatening environmental regulation of mining

The threat of an ISDS case can prevent governments from legislating in the interest of the environment or in response to community concerns about mining. The US Lone Pine energy company is using ISDS in NAFTA to sue the provincial government of Quebec for \$250 million because it suspended shale gas mining to conduct an environmental study in response to community concerns.

The NSW government has also responded to community concern and introduced some environmental regulation of coal seam gas mining. Further regulation may be needed, but this could be undermined if ISDS is included in the TPP and other trade agreements.



TAKE ACTION!

We need to ensure that ISDS is not included in the Trans-Pacific Partnership (TPP) or any other trade agreement. The TPP negotiations could conclude this year - we must act now. You can:

- Send a message to the Trade Minister via aftinet.org.au
- Write to your local MP or Senator
- Join AFTINET
- Stay informed - find us on Facebook and Twitter

ISDS threatens public health legislation

Australia's democratic parliament and court system is already being undermined by an ISDS provision in an obscure 1993 Hong Kong-Australia investment treaty. After a group of tobacco companies tried and failed to get compensation through the Australian High Court over the plain packaging legislation, US-based tobacco company Philip Morris moved some of its investments to Hong-Kong so it could use ISDS to sue the Australian Government. Philip Morris clearly believes that an international investment tribunal will give it a more favourable decision. Even if the government wins the case, it will cost millions in legal fees.

Patents give companies the right to charge high prices for new medicines for 20 years, but only if they are more medically effective. The US Eli Lilly pharmaceutical company is using ISDS in the North American Free Trade Agreement to sue the Canadian National government because a Canadian court refused a patent on a medicine which it found was no more effective than existing medicines.

"Safeguards" do not work

It is claimed that "safeguards" in more recent agreements protect areas like public welfare, health and the environment, however these have proven ineffective in other trade agreements. Just one example of this is the US Renco lead mining company suing the Peruvian government after it was required to clean up its own lead pollution, despite "safeguards" for environmental legislation in the US-Peru Free Trade Agreement.



128 Chalmers Street, Surry Hills NSW 2010
campaign@aftinet.org.au | 02 9699 3686

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

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