

The case against corporate courts



FIGHTING GLOBAL POVERTY

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Imagine a world where transnational corporations don't have to follow the same laws as everyone else, but instead have their own corporate courts, where the law is tailored to their interests. Not courts where the companies are put on trial, but where corporations sue governments for huge sums of money and bully countries to get their own way.

It sounds like dystopian science fiction, but corporate courts are real. Formally known as Investor-State Dispute Settlement (ISDS), these special privileges are granted to transnational companies by rules in trade and investment deals.

ISDS has enabled corporations to sue countries for doing almost anything they don't like – environmental protection, regulating finance, renationalising public services, anti-smoking policies, you name it:

- Infinito Gold is suing Costa Rica over the introduction of a ban on open-cast mining for metals.
- Cargill sued Mexico when it first introduced tax on sugary drinks.
- Ethyl sued Canada over a ban on the chemical MMT in petrol, which is suspected of causing nerve damage.

- Vattenfall is suing Germany for deciding to phase out nuclear power following the Fukushima nuclear disaster.
- Lone Pine sued Quebec when it introduced a fracking moratorium.
- Veolia sued Egypt over the introduction of a minimum wage.

ISDS is an unjust mechanism that should have no place in the UK's trade and investment policy.

How do corporate courts operate?

When a corporation brings an ISDS claim, a private arbitration tribunal is set up. ISDS can only be used by foreign investors – which effectively means transnational corporations. Domestic companies and governments cannot bring claims.

Three arbitrators are selected for the tribunal, one by the corporation, one by the government and one jointly. The arbitrators are private lawyers paid by the case, not judges. It is also common for them to act as arbitrators in one case and then represent a client in another. They are specialists in investment arbitration law and are often unfamiliar with other areas of international law.

This is because corporate courts do not consider the obligations of a government to uphold human rights law or international environmental law. Such arguments have been rejected as being outside the scope of a case, as have references to national law. Nor do they try to balance public and private interest. The tribunal is only concerned with the obligations to investors created in the trade or investment deal. The concept that human rights law should come above investment law has been dismissed by tribunals.

Cases are usually held in secret, and it may not even be known that a case is taking place. As a result of public pressure, some tribunals have started to be a bit more open, but usually any information released about a case is sparse.

Typically, a case will take several years which is costly and creates uncertainty.

If the corporation wins, the tribunal will set an 'award' – the amount that the government has to pay the corporation. Should the government refuse to pay, the award can be enforced through national courts elsewhere by seizing the country's assets. The supposed 'debt' the award creates can even be sold to 'vulture funds' who can aggressively sue the country concerned, making vast profits if they win.

High stakes

The amounts at stake in corporate courts are astronomical. At the moment the average award is US\$522 million¹ and the largest award so far is US\$50 billion to Yukos against Russia in 2014. And the trend is upward. A 2015 survey found increasing numbers asking for more than US\$1 billion.²

Corporations can claim not just for money they have spent or the existing value of their investment, but also for future expectations of profit. The UK registered company, Gabriel Resources, was refused an environmental permit for a gold mine in Romania. It is currently suing not just for the money it had already spent, but also for everything it optimistically anticipates it could have made over the planned lifetime of the mine – a total of US\$4 billion.³

The chance of making money from an ISDS case has itself become a profitable asset. Infinito Gold is suing Costa Rica over a planned gold mine. However, six months after initiating the case, the company restructured. It now has no operations and cannot really be called a mining company. Its only asset is the ISDS case and its only aim is to win the money.⁴ No wonder that financiers are starting to see ISDS as a derivative and there is a growing market in third party funding for cases – paying the costs in exchange for a cut of the winnings.⁵

Governments can never really win from an ISDS case – even if the judgement is in their favour they usually have to pay their own legal costs. On average these are US\$8 million for each case but can be far more.⁶ Australia had to spend US\$39 million defending its introduction of plain packaging for cigarettes against tobacco giant Philip Morris.⁷

The expense also means that this is a system that is mainly only open to the largest corporations (unless you can get third party finance). The winners from ISDS have also been the richest – over 95% of all compensation awarded in ISDS cases has gone to companies with over US\$1 billion in annual revenue and super-rich individuals with over US\$100 million in wealth.⁸

Bespoke legal system for corporations

Corporate courts give corporations their own custom-made legal system that no one else can use, and which only looks at issues from their point of view. If a company has a legitimate grievance against the state, it should seek legal redress through national courts, just like everyone else. The idea that everyone should have the same access to justice is fundamental, even though the realities of power and influence mean that corporations are already at an advantage. Yet corporations want more.

Corporations explicitly use ISDS to bypass national courts so that they can use arguments that would not stand up there. When Lone Pine started suing Canada over fracking, their lawyer openly said they would find the case harder to make in the national courts because of the way the Canadian constitution handles property rights.⁹ So they used corporate courts to get around the constitution.

Bullying governments

Corporate courts provide transnational corporations with a turbo-charged method of challenging laws, policies and other government actions. The amounts at stake intimidate governments into backing down – the sums can be overwhelming, especially for countries in the global south. In 2012, Ecuador lost a case against Occidental Petroleum. Ecuador had terminated a contract with the company and even though the tribunal acknowledged that Occidental had broken Ecuadorean law, it ordered Ecuador to pay US\$1.8 billion.¹⁰ This was the largest known award at the time and is roughly equivalent to the country's entire annual health budget.

Ending corporate impunity – the ‘Binding Treaty’

Corporate courts enforce corporate privilege under investment law, but there is no way to enforce corporations’ duties under international law. Law enforcement is still primarily national, and often transnational corporations operating across borders can evade responsibility for their actions.

There is now a negotiating process underway at the United Nations for a legally binding UN Treaty on Transnational Corporations. If successful, this could provide a means of holding corporations to account.

The Treaty will only be able to achieve this if it is ambitious. We need to push for a treaty that:

- Is enforceable and requires governments to act
- Recognises the primacy of human rights law
- Allows people whose rights are violated to access justice.

The threat of a case can be enough to cause a country to either reverse a decision or simply step back from making it in the first place. This chilling effect is also evident among other countries which see what is happening and decide not to risk the same themselves. Australia and New Zealand started looking at plain packaging on cigarettes at around the same time, but when Australia was challenged by Philip Morris, New Zealand held back from implementing its own plans.¹¹

Unravelling civil society victories

There is a pattern where years of struggle and protest by grassroots campaigners eventually leads to government action. At which point, a corporation slaps down an ISDS case.

The ban on open-cast mining for metals introduced by Costa Rica, which put an end to Infinito Gold’s plans for a gold mine, didn’t come out of nowhere. It came from years of campaigning around problems with mining such as contamination, pollution and deforestation. A cyanide spill at another gold mine caused a scandal, especially when it was found that the earth movements that caused the spill had been noticed months earlier

but the mine kept operating nonetheless. There were street protests about the issue and at the time the ban was decreed, a survey showed 85% of people opposed the Infinito Gold mine.¹² But Infinito brought an ISDS case regardless.

ISDS can make listening to its citizens extremely difficult and expensive for governments.

What do the defenders of ISDS say?

Proponents of ISDS say it is needed to encourage investment and provides protection to reassure potential investors. Yet the evidence is against this.¹³

Companies actually decide to invest based on things like closeness to market, availability of skilled labour, levels of infrastructure and access to inputs. Few investors are even aware of ISDS. Brazil has never signed up to ISDS, which hasn’t affected its ability to attract investment.

When investors are worried about risks, there are established ways they can deal with this, through investment contracts or political risk insurance. For disputes, there are the normal courts. ISDS is unnecessary.

The excuse is also put forward that in some countries courts are corrupt and the national legal system cannot be relied upon. If this is the case, the solution is not to give transnational corporations a get-out while leaving the rest of us to face corrupt justice; it is to support reform.

Papering over the cracks

Public pressure, particularly from the movement against TTIP (the proposed US-EU trade deal which would have included ISDS and was defeated), has forced the EU to make changes. However, their efforts are just tinkering around the edges, hoping that will be enough.

The EU-Canada deal, CETA, includes a revamped version, known as the Investment Court System (ICS), although this section is currently on hold while facing a legal challenge. The EU wants to entrench this by setting up a Multilateral Investment Court. In this new version the cases would be public, heard by judges paid by salary not by the case, and there would be a right to appeal.

However, this doesn’t address the essential problem that transnational corporations have their own special legal system to challenge democratic decisions. Some of the most controversial ISDS cases could have happened just as easily under these other courts.¹⁴ Currently, the UK government is unconvinced by ICS, and would prefer to continue using ISDS.

We don’t need to reform ISDS, we need to get rid of it.

Join the global fightback

Corporate courts should not exist. And right now, we have a chance to get rid of them. The system is vulnerable, now that the movement against TTIP and CETA has exposed its illegitimacy.

Across the world, countries have been rejecting ISDS: South Africa, India, Ecuador, Tanzania, Indonesia and New Zealand have all taken steps to review, limit or terminate existing ISDS deals and refuse to sign new ones. At the same time, campaigners across Europe are gearing up to create unstoppable momentum for

change. We're at a tipping point, and if enough of us come together we could bring ISDS down altogether.

As the UK reassesses its trade and investment policy in the context of Brexit, we have an opportunity to ensure that ISDS has no place in it:

- No ISDS in new and replacement trade deals
- Removal of ISDS in existing investment deals

Join the global fightback. Find out more and get involved in the campaign:

www.waronwant.org/stop-isds

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