END CORPORATE COURTS NOW!

How Investor-to-State Dispute Settlement Threatens Public Welfare and Undermines Democracy

WHAT IS ISDS?

Many international trade and investment agreements give individuals and corporations who invest in other countries access to a special legal procedure that can challenge domestic policy decisions in private tribunals. Investors–meaning anyone who buys property in a foreign country, from a hectare of land to stocks and bonds–can use "investor-to-state dispute settlement" (ISDS) to sue governments over laws, regulations and even domestic court decisions that affect current or future profits. You can think of ISDS as establishing special "corporate courts" that have their own rules and that a country's own citizens cannot use.

ISDS is designed to allow foreign investors to skip all the domestic processes citizens or domestic businesses must use to fight laws and decisions they do not like, such as national courts, administrative procedures and municipal hearings. Instead, foreign investors bring claims directly to international arbitration panels. The panelists are private arbitrators empowered to decide the case and potentially award vast sums of taxpayer money in compensation.

WHY IS THIS A PROBLEM?

Systems of justice should be public, democratic and available to all in a society on an equal basis. ISDS simply does not meet this standard. Foreign investors can use these "corporate courts" to challenge anything that affects their bottom line–from requirements that cigarettes be sold in plain packaging to increases in the minimum wage. This seriously constrains governments' ability to respond to public needs and set priorities that advance the public welfare.

ISDS decisions do not, by themselves, "overturn" the law, regulation or decision that was challenged, but when a government loses, it may have to pay a substantial penalty to the investor that brought the case, sometimes far beyond what the investor put into the country in the first place. Even if the country wins, the cost to defend the case can be very expensive–$8 million per case, on average. The potential risks are enormous. Just threatening to bring a case sometimes is enough to get a proposed law or regulation withdrawn: knowing that Occidental Petroleum won a $2.3 billion judgment against Ecuador, for example, could lead a lawmaker to think twice about proceeding with an action after an ISDS case has been threatened.

Private arbitrators hired to sit on these panels have an interest in maintaining and expanding the system so they can get more jobs. Decisions that make it easier for corporations to bring or win claims mean more cases and more income for arbitrators. Investor rights in trade agreements are so broad that an entire legal industry has developed around it. Many law firms specialize in scouring the world for new laws to see whether there is a foreign investor interested in challenging the law. This practice can generate massive legal fees for law firms and potentially massive payouts for taxpayers. The conflict of interest rules for arbitrators are weak at best, and there are very few opportunities to reverse a decision–even when the arbitrators make a clear legal error. Many arbitrators rotate between deciding cases and representing companies bringing claims, enhancing the risks of biased decision making. The result is that panels are skewed in favor of corporations and the wealthy, but against workers and communities.

Ultimately, ISDS is about increasing corporate power over our economies and limiting the ability of governments to regulate corporate behavior.

CAN THIS REALLY BE TRUE? CAN YOU GIVE ME SOME EXAMPLES?

It's true. Here are just a few of hundreds of cases.

Mobil and Murphy Oil v. Canada: The two oil companies challenged guidelines issued by the Canada-Newfoundland Offshore Petroleum Board. The guidelines required the companies to support local economic development through expenditures on provincial research, development and training programs. Even though the guidelines merely updated existing obligations, Canada lost. The companies first tried to overturn the guidelines in the Canadian courts and lost, but won in the ISDS "corporate court," essentially getting a second bite at the apple–a bite a domestic company could not get.

Occidental Petroleum v. Ecuador: Ecuador terminated a contract with Occidental after the U.S. oil company violated the terms of a contract with the government. With interest, the company won $2.3 billion dollars–even though Occidental admitted violating the contract!

Metalclad v. Mexico: A U.S. corporation sued Mexico after a local government refused to grant a building permit for a toxic waste facility. Local citizens, afraid the facility would pollute their water supply, had petitioned their government to deny the permit. Metalclad won more than $15 million. Imagine a foreign investor demanding the right to process toxic waste near your drinking water supply!

Veolia v. Egypt: French multinational Veolia recently brought a case against the government of Egypt for at least 82 million Euros, challenging the decision to raise the monthly minimum wage and make other labor reforms. If Veolia wins, will your state government think twice before raising wages?

Renco v. Peru: The Renco Group, owned by one of the wealthiest people in the United States, is suing the Peruvian government to avoid responsibility for cleaning up toxic waste caused by a smelter it owns in La Oroya, Peru. La Oroya's residents have suffered serious health consequences from the pollution, but rather than address the role its smelter has played, Renco is demanding $800 million from the Peruvian government. The pollution in La Oroya has yet to be remediated.

Eureko v. Poland: Eureko BV, a Dutch insurer, sued Poland when it failed to proceed with an initial public offering to further privatize its public insurance unit, PZU. Eureko won on the merits, and to avoid a possible order to pay as much as $12 billion, Poland settled with Eureko for $1.6 billion. Decisions regarding whether or not to privatize government programs are best left to elected representatives, not to corporations with a profit interest.

ISDS simply is one more tool in the global corporations' toolbox to enhance their power over our economy and prevent national, state and local governments from regulating their behavior. We already know what massive corporate power has done to our political and economic system: extreme inequality, widespread union busting, an out-of-control campaign finance system, and gridlock that thwarts the closing of even the most egregious corporate subsidies and tax loopholes.

These extreme corporate rights must end! We can start by ending corporate courts. Foreign investors should not have the ability to target laws designed to promote public health, financial stability, environmental protections and worker rights. Matters of broad public interest should not be viewed through the narrow lens of trade and investment at all, let alone decided by private arbitrators who are not accountable to the public. ISDS hinders governments' ability to respond to the needs and priorities of their citizens and threatens the democratic process as a whole. It is time to dismantle this harmful system and instead promote trade policies that protect people and the planet.

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AFL-CIO