

The Impact of Investor State Dispute Settlement Provisions in Trade Agreements

Communications Workers of America

Expanding Corporate Rights and Reducing the Rights of Workers, Consumers and Governments

1. Investor State Dispute Settlement (ISDS) grants foreign corporations the right to go before private international trade tribunals to directly challenge government policies and actions that they allege would reduce the value of their investments.
2. Even if a new governmental policy applies equally to domestic and foreign investors, ISDS allows foreign corporations to demand compensation if any government law, rule or regulation results in an alleged reduction in the corporation's "expected future profits" or represents a change from their "expectation of a stable regulatory environment."
3. These challenges are heard before private international arbitration tribunals – unanswerable to any democratic process and outside a nation's domestic court system.
4. This represents a double blow to the public interest:
 - a. Workers, environmental organizations and NGOs are not afforded the same rights to challenge governmental actions that devalue workers or consumer rights or the environment.
 - b. Governments – when they act in the public interest – can be challenged by corporations and penalized heavily by private undemocratic tribunals.

ISDS forces governments to use taxpayer funds to compensate corporations for public health, environmental, labor and other public interest policies and government actions

1. Corporations are increasingly using ISDS to attack governments for such non-traditional trade issues as clean energy, mining, land use, health, labor, and other public interest policies.
2. There are \$14 billion in ISDS claims filed by corporations against sovereign governments based only on U.S. trade agreements. All these claims relate to environmental, energy, financial regulation, public health, land use and transportation policies - not traditional trade issues.
3. In recent years, the use of ISDS to challenge a diverse array of government policies has expanded dramatically. Inclusion of ISDS in free trade agreements and bilateral investment treaties has allowed corporations to file over 500 cases against 95 governments.

Examples of how ISDS enables Corporations to Undermine Public Interest Laws

Here are just a few examples of how corporations have used ISDS to attack public interest laws.

1. Undermining the right of countries to determine energy policy – Vattenfall vs Germany. In May 2012 the Swedish energy company Vattenfall filed a request for arbitration against Germany because of Germany's decision to phase out nuclear energy. Vattenfall is using the ISDS terms of the Energy Charter Treaty, an international trade and investment agreement in the energy sector. Vattenfall claims

over €3,7 billion in compensation in response to the closure of the nuclear power plants Krümmel and Brunsbüttel.

2. Undermining the ability of governments to determine health policy – Philip Morris vs Australia and Philip Morris vs Uruguay. Phillip Morris used ISDS to challenge anti-smoking laws in Australia and Uruguay after failing to undermine the health laws in domestic courts. Philip Morris is using the ISDS provisions of investment treaties to not only ask for billions of dollars in compensation but also for the suspension of the democratically passed laws. Even if Philip Morris loses these cases, it will cost its taxpayers millions of dollars.
3. Undermining the right of countries to determine labor standards – Veolia vs Egypt. A French firm, Veolia, is using ISDS to challenge Egypt’s minimum wage. No public documentation of this challenge has been released
4. Undermining the right of countries to determine land use – Occidental vs Ecuador. A U.S. firm, Occidental Petroleum sued Ecuador because the country terminated an oil concession after Occidental sold 40 percent of its production rights to another firm without government approval. The arbitration panel ruled in favor of Occidental despite a provision in the concession contract stating that sale of Occidental’s production rights without government pre-approval would terminate the contract. Occidental was awarded \$2.4 billion in penalties plus interest – this is equal to to 11% of all goods exported by Ecuador.

ISDS undermines democratic decision-making

1. ISDS grants foreign corporations the right to directly challenge government policies and actions in private international tribunals, bypassing domestic courts and creating a new legal system that is exclusively available to foreign investors and multinational corporations.
2. ISDS also offers corporations a venue through which to challenge domestic court decisions, further undermining domestic decision-making.
3. Cases are heard by private sector attorneys, unaccountable to any electorate, many of whom rotate between being “judges” and bringing cases for corporations against governments.
 - a. Very limited conflict of interest rule in terms of who can serve as an arbitrator.
 - b. Arbitrators are paid by the hour with a standard fee of \$3,000 per day which is split between the corporation and the government.
 - c. There are no appeals on the merits of tribunal
4. In short, ISDS is a one-way street by which corporations can challenge government policies, but neither governments nor individuals are granted any comparable rights to hold corporations accountable.

Initial Opposition to ISDS Must be Stepped Up

1. Initial Steps

- a. **The ITUC, AFL-CIO and 175** other organizations representing environment, consumers, good government, etc. have already sent a letter to EU Trade Commissioner De Gucht

and his US counterpart Froman in December 2013.

- b. **EU Trade Commissioner De Gucht calls for public consultation.** Under significant pressure from the public, De Gucht has announced that he will “consult the “public on the investment provisions of a future U.S.-EU trade deal.” Obviously, this is not enough.

2. **Recommendations for Further Action**

- a. ITUC Conference statement opposing ISDS and a call to action
- b. Fall Mobilization Day against the Multi-National Corporate attack against national sovereignty and public interest policies.