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FACT Checking the DFAT TPP11 Myth buster sheet.

MYTH or FACT: Investor-State Dispute Settlement (ISDS) provisions allow foreign companies to sue the Australian Government for loss of expected profits?

DFAT Claim - "*Investors cannot sue under ISDS for a mere loss of profits where a government has decided to change its policies or regulations. Instead, investors need to show that the government has broken a TPP-11 investment rule – for example, by nationalising an investment without compensation, or by denying the investor due process in a local court*"

REALITY: Investment deals are a powerful tool for corporations to challenge legitimate and non-discriminatory legislation to protect public health or the environment.

Evidence
Protection standards in investment agreements are not limited to extreme sovereign abuse or discrimination. The vague wording of these investor rights has paved the way for claims challenging all kinds of legitimate and non-discriminatory legislation and regulatory measures.

Philip Morris' investor-State challenge of Australia's plain tobacco packaging law is a good example to show that investment treaties are not harmless. The law applies to all tobacco producers, therefore it is non-discriminatory. It was upheld by Australia's High Court, which did not consider it an expropriation of property (expropriation is one of the bases for awarding damages in investment arbitration). The law is based on extensive research and is supported by leading public health experts as a means to reduce the appeal of smoking. In other words, Philip Morris used an investor-State claim to attack a public health legislation that is non-discriminatory, does not result in the expropriation of property, is in line with Australia's constitution, and is backed by scientific evidence. If the grounds for investor-State arbitration were as narrowly defined as industry lobbyists claim, Philip Morris would not have been able to launch this lawsuit. While the case was dismissed by the arbitration panel, investors are still able to use ISDS to initiate cases that cannot be considered as sovereign abuse. The Philip Morris case is not an isolated example. Foreign investors have initiated lawsuits challenging many other government legislation that are far from 'extreme sovereign abuse':

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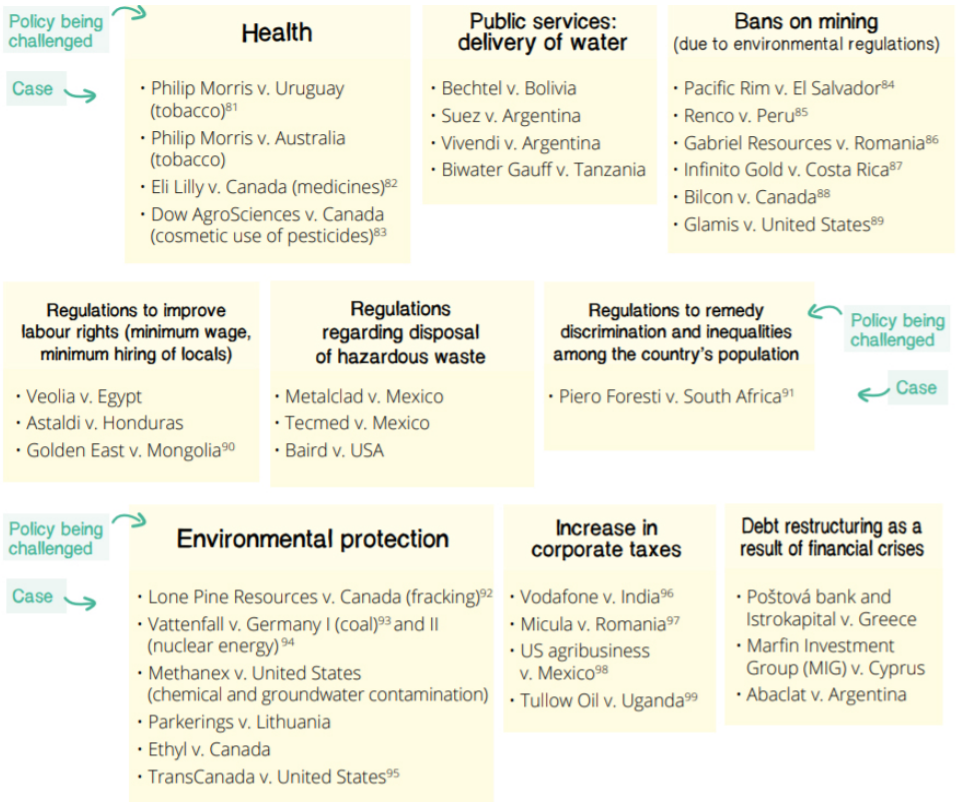

DFAT Claim: *“TPP-11 investment rules help protect Australian investments and ensure Australian businesses are given a fair go – for example, by being given due process in local courts overseas. “*

Reality: Investors have numerous options to protect their investment. However, only investment arbitration gives them the opportunity to challenge government public interest measures.

Evidence

The lack of judicial independence in a few countries cannot be the excuse to promote investment arbitration worldwide. It is important to note that most ISDS lawsuits are brought against democratic countries with a strong rule of law. A 2014 study found that from the mid-nineties onwards, most ‘investment arbitrations have been filed against governments exhibiting, on average, a relatively high level of democratic development and rule of law’. [i]

This statement from DFAT illustrates what investment arbitration is really about: granting multinationals more generous property rights than domestic firms, communities, and individuals are granted by domestic law, and providing them with a parallel, exclusive legal system to claim these superior rights. If investors want to have further ‘insurances’, they can recourse to:

* Private political risk insurance: These cover both assets and contracts. Asset coverage may include risks such as confiscation, nationalization, and expropriation. The coverage of the contract may include losses due to repudiation of the contract, currency inconvertibility, and cancellation of the contract due to political violence. The policy of confiscation, nationalization and expropriation of insurance can usually be extended to cover cancellations of licenses, trade embargoes, strikes, riots, loss of income following expropriation and other types of political risk. One thing to keep in mind is that for private political risk insurance, the existence of BITs is not relevant in assessing the risk of investment projects.

* The Multilateral Investment Guarantee Agency (MIGA) of the World Bank provides guarantees subsidized by states investors against losses caused by risks such as expropriation, currency inconvertibility, currency transfers, civil war or riots.

MYTH or FACT: The Government negotiated the deal in secret?

DFAT claims *"The outline of the legal instrument and suspension request as agreed by the TPP-11 Ministers in Da Nang has been on the DFAT website since 11 November 2017. The market access schedules of TPP-11 countries have been on the DFAT website since November 2015.The TPP-11 retains most of the concluded TPP-12 agreement."*

REALITY Current trade treaty making processes in Australia are not transparent

The TPP11 deal text much like the original TPP deal was **only made public after they were agreed** to.

TPP11 and Trade negotiations are confidential, and texts could only be seen by cabinet ministers and public officials from the Department of Foreign Affairs and Trade (DFAT) and other departments negotiating the deal. Neither Parliamentarians, civil society stakeholders nor the general public are able to access draft negotiating texts or know their content.

As Knowledge Ecology International notes, negotiating the text in secrecy creates "risks of both intended and unintended harms to the public."

A full and transparent process would include debate on the treaty in parliament and a vote from both houses. Transparency in trade agreements would include an independent review of the cost benefit analysis of these agreements. A transparent process would not include the drafting and advising of chapters of these agreements by large multinational corporations without input from civil society. For example many other international agreements including the Paris climate Accord had a great deal of transparency for various stakeholders and civil society.

DFAT CLAIM ***"****The TPP-12, DFAT received 83 written submissions from stakeholders, and consulted with 485 organisations and individuals (not including State/Territory governments). Additional consultations and engagement occurred in relation to TPP-12's provisions that will be suspended in the TPP-11.*

The text of the TPP-11 Agreement was released publicly on 21 February 2018. Once signed, the TPP-11 text will be tabled in the Australian Parliament. The Agreement will then be reviewed by the Joint Standing Committee on Treaties (JSCOT) with a National Interest Analysis (NIA)."

REALITY: Current trade treaty making processes in Australia offer little meaningful space for public participation and democratic oversight

DFAT does conduct consultations on free trade agreements (FTAs) "with a wide range of stakeholders", such as State and Territory governments, industry bodies, companies, academics, individuals, trade unions, consumer groups, and other civil society organisations. However, DFAT's raison d'être for these consultations is that they "help to identify commercially significant impediments to increasing Australia's trade and investment in potential FTA partner countries". In other words, they are oriented towards business-interests rather than civil society concerns. During the TPP talks, DFAT held many briefing sessions to provide updates and receive input and feedback **but many unions and civil society groups criticized this process as a smoke screen lacking any meaningful public participation.**

DFAT also accepts written submissions from stakeholders on proposed FTAs – but there is no clarity about how these submissions are taken on board, and stakeholders can choose for their input to remain confidential.

Decisions about negotiating, signing or becoming party to a treaty are taken by the executive and do not need to be approved or debated in Parliament. Decisions to pass implementing legislation (as treaty commitments are not automatically incorporated into Australian law) are, however, made by Parliament.

MYTH or FACT: The TPP will limit Australia's sovereignty?

DFAT Claim: The TPP-11 clearly recognises the right to regulate to protect public welfare, including in the areas of health and the environment.

REALITY The investment chapters in the TPP as well as those being negotiated with other countries threaten governments' right to regulate

Evidence
The general and weak wording on the 'right to regulate' will not prevent investors from claiming compensation from governments. Countries may regulate, but if their regulations violate the commitments they have made in TPP11 they can be ordered to pay billions in compensation. The prospect of potential multi-billion compensation orders endangers this right, as governments might avoid formulating regulations out of fear of being sued. The 'right to regulate' language does not change that.

Furthermore, the proposal for investment protection contains the same wide-ranging 'substantive' rights for foreign investors as existing international treaties, which have been the legal basis for hundreds of investor lawsuits against states, targeting regulations to protect health, the environment, and other public interests.

The TPP11 retains the "Minimum Standard of Treatment" and "Indirect Expropriation" language. The only substantial expectation is to exclude tobacco regulation from the TPP11 through an ISDS carve out. It is important to note that Government believed ISDS was dangerous enough to require a carve out but why was there not such a carve out included for the environment when a more than a third of the current eight hundred some ISDS cases are related to environmental matters?

DFAT Claim: Australia will continue to write its own laws and Australian courts will continue to rule on matters of Australian law. ISDS tribunals will only be able to rule on whether a TPP investment rule has been broken. They will not be able to overturn an Australian court's decision or force Australia to change its laws.

REALITY: By putting enormous pressure on public budgets, ISDS claims can push governments to think twice about regulatory measures, postpone them, or even weaken regulation

Evidence
A research study by Professor Gus van Harten, based on 162 publicly available investment treaty cases up to 2013, shows that in 44 per cent of the cases, investors have challenged a judicial decision, and in 37 per cent of the cases they have challenged a legislative measure – a shocking finding considering that measures taken by the judiciary and the legislative can never be branded as 'extreme sovereign abuse.

While it is true that arbitration tribunals tend to not order the government to repeal a policy measure, tribunals can order governments to pay millions of US dollars in compensation. The amounts demanded

by investors in treaty cases have been on the increase. A recent survey reports that between 2013 and 2014 there were "59 treaty disputes […] with an amount in controversy of at least US$1 billion—including 10 cases with stakes of at least US$15 billion"[ii].

ISDS can reduce the regulatory space for decision-makers and Australian Sovereignty

Firstly, there is evidence[iii] that the mere threat of a multi-million claim can put pressure on governments to stay away from a regulation that they know investors will consider as violating their rights. Reflecting on NAFTA, a former Canadian official acknowledged: "I've seen the letters from the New York and DC law firms coming up to the Canadian government on virtually every new environmental regulation […]. Virtually all of the new initiatives were targeted and most of them never saw the light of day".[iv]

Secondly, 'regulatory chill' can also happen as a result of filed investor-state claims. For example, the City of Hamburg agreed to lower environmental requirements as a result of a claim initiated by energy giant Vattenfall[v]; Canada reversed a ban on toxic chemical MMT and agreed on a US$ 13 million payment as a result of a claim initiated by Ethyl[vi]; and the government of Indonesia granted mining company Newmont an exemption to a law that requested companies to process raw materials domestically before export, which aimed to strengthen industrialization.[vii]

Further Reports by Friends of the Earth Australia on ISDS and the TPP

Fracking the Planet with the TPP
https://d3n8a8pro7vhmx.cloudfront.net/friendsofearthmelbourne/pages/953/attachments/original/1438224374/foe-fracking-tpp-reportWEB_(2).pdf?1438224374

The Case For Banning Investment State Dispute Settlement in Australia
https://d3n8a8pro7vhmx.cloudfront.net/foe/pages/780/attachments/original/1525233713/foe-australia-isds-briefingWEB_%282%29.pdf?1525233713

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[i] Thomas Schultz and Cedric G. Dupont, "Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study (February 20, 2014)". European Journal of International Law, 2014, Forthcoming; King's College London Law School Research Paper No. 2014-16. http://ssrn.com/abstract=2399179

[ii] Michael D. Goldhaber, "Deciding the world's biggest disputes", The American Lawyer, 2015 http://www.curtis.com/siteFiles/News/2015-06-30%20American%20Lawyer%20-%202015%20Arbitration%20Scorecard.pdf

[iii] Kyla Tienhaara, "Regulatory Chill and the Threat of Arbitration: A View from Political Science", 28 October 28 2010, published in Evolution in Investment Treaty Law and Aribtration, Chester Brown, Kate Miles, eds., Cambridge University Press, 2011, http://ssrn.com/abstract=2065706

[iv] Willima Greider, "The Right and US Trade Law: Invalidating the 20th Century", The Nation, 17 November 2001, http://www.thenation.com/article/right-and-us-trade-law-invalidating-20th-century/?page=0,5

[v] Nathalie Bernasconi-Osterwalder & Rhea Tamara Hoffmann, "Nuclear Phase-Out put to the test - Background to the new dispute Vattenfall v. Germany (II)", published by Transnational Institute, Powershift, and SOMO, 2013, https://www.tni.org/en/briefing/nuclear-phase-out-put-test

[vi] Public Citizen, "Ethyl Corporation v.s. Government of Canada: Now Investors Can Use NAFTA to Challenge Environmental Safeguards", Briefing on Ethyl case, http://www.citizen.org/trade/article_redirect.cfm?ID=6221

[vii] Transnational Institute, Briefing, "Netherlands-Indonesia BIT rolls back implementation of new Indonesian Mining Law", 12 November 2014, https://www.tni.org/en/briefing/netherlands-indonesia-bit-rolls-back-implementation-new-indonesian-mining-law