

## Investor State Dispute Settlement

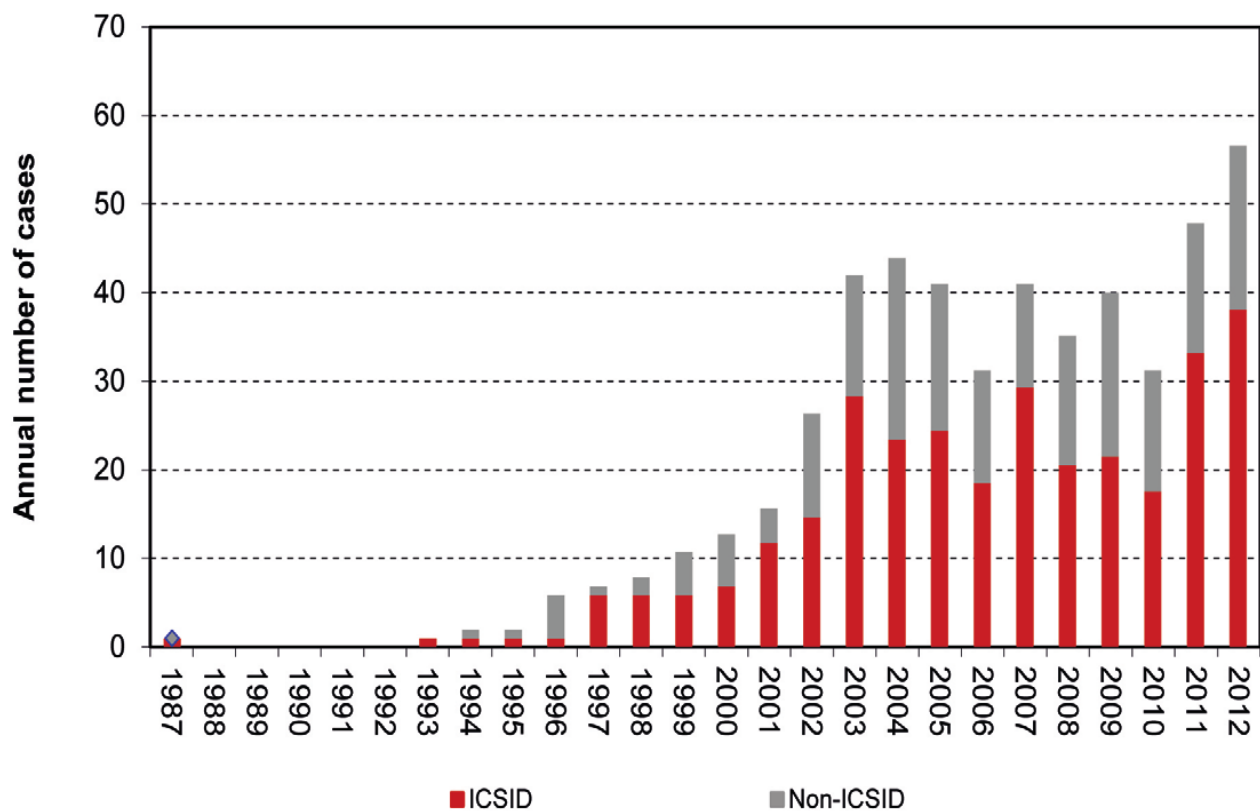
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Increasingly bilateral and multilateral trade agreements include provision for corporations to sue governments, using Investor State Dispute Settlement (ISDS) arrangements. These provisions enable foreign investors to challenge a government's health, environmental and other regulations and policies in international tribunals just because they interfere with investor expectation of future profits.

Arbitration clauses were originally included in treaties to deal with the nationalization of a company's assets. Now arbitrators hear claims for lost business or costs stemming from public-health laws and environmental regulation and financial policies, with billions of dollars at stake.<sup>1</sup>

Free trade agreements often give foreign investors "the 'right' to a regulatory framework that conforms to a corporation's 'expectations'. This 'right' has been interpreted to mean that governments should make no changes to regulatory policies once a foreign investment has been established." But as has been argued in one investor-state case, "if States were prohibited from regulating in any manner that frustrated expectations – or had to compensate for any diminution in profit – they would lose the power to regulate." Yet this seems to be what transnational investors want.<sup>2</sup>

### Escalating Investment Treaty Arbitrations (Known Cases)



Source: [IIA Issues Note on the Recent Developments in Investor-state Dispute Settlement](#), UN Conference on Trade and Development (UNCTAD), Geneva, September 2012.

Over 500 investor-state disputes have been launched, 90% of them since 2000, and the numbers are likely to balloon once agreements currently being negotiated, such as the

Trans-Pacific Partnership (TPP) agreement, are finalised. "Investors won 70 percent of known cases [in 2012], according to the UN. Since 1987, states have won 42 percent of the time, and investors 31 percent, with the rest settled."<sup>3</sup>

ISDS provisions in trade agreements have resulted in over \$3 billion dollars being paid by governments to corporations in investor-state disputes under U.S. trade and investment agreements – "over 85 percent of this related to oil, mining, gas, and other environmental and natural resource disputes". There are another \$15 billion in claims pending, mostly relating to environmental, public health and transport policies rather than strictly trade policies.<sup>4</sup>

the regime has birthed an entire industry of lawyers, tribunalists and specialized equity funds that finance what has proved to be a very lucrative business of raiding government treasuries.<sup>5</sup>

Even the threat of a lawsuit can have a chilling effect on a government (prompting it not to fight the case but give in to investor demands) because of the large sums involved in defending a case. The tribunal panel gets paid by the hour and has little incentive to expedite the cases. It costs, on average, \$8 million to defend a case and has been up to \$50 million. If a government loses the case, there is no limit on the amount the tribunal can order it to pay.<sup>6</sup>

## **TRIBUNALS**

Comprised of three private attorneys, the extrajudicial tribunals are authorized to order unlimited sums of taxpayer compensation for health, environmental, financial and other public interest policies seen as undermining the corporations' "expected future profits." There is no outside appeal. Many of these attorneys rotate between acting as tribunal "judges" and as the lawyers launching cases against the government on behalf of the corporations. Under this system, foreign corporations are provided greater rights than domestic firms.<sup>7</sup>

The tribunals are usually conducted under the auspices of the International Center for Settlement of Investment Disputes (ICSID - affiliated with the World Bank) or the United Nations Commission on International Trade Law. Each side chooses one panel member and the two chosen, in turn choose a third who acts as chair. Panel members are almost always private sector investment. They can be paid over \$3000 a day plus expenses.<sup>8</sup>

In this "club" of international investment arbitrators, there are fifteen lawyers who have been involved in 55 percent of the total international investment cases known today. The tribunals operate behind closed doors, and there are no meaningful conflict of interest rules with respect to arbitrators' relationships with, or investments in, the corporations whose cases they are deciding.<sup>9</sup>

## **CASE STUDIES**

Many of the ISDS cases have been brought by mining, oil and gas companies against nations which are trying to protect their environments. For example Canadian mining

company Pacific Rim is suing El Salvador: "The company's United States subsidiary has alleged that the Salvadoran government's refusal to issue key permits to mine for gold in the northern province of Cabañas violated investor protections under the Central America Free Trade Agreement. Arbitration is ongoing." The company was planning to use cyanide ore processing but never completed the feasibility study necessary to obtain the permit.<sup>10</sup>

When the US-based Renco Group bought a metal smelter in La Oroya, Peru it agreed to install sulphur removal plants by 2007. Peru gave the company two extensions to that date but when it refused a third extension Renco threatened to sue Peru for \$800 million under the terms of the US-Peru Free Trade Agreement. This threat was enough to pressure the Peruvian government to allow Renco to recommence operations despite its lack of environmental compliance. The Notice of Intent to take legal action in the international sphere also enabled Renco to stop a US state court action against Renco on behalf of La Oroya children with severe lead poisoning.<sup>11</sup>

After Chevron "dumped more than 16 billion gallons of toxic water into streams and rivers used by local inhabitants for drinking water" in the Amazon, an Ecuadorian court ordered Chevron to pay \$18 billion for clean up and damages to the 30,000 indigenous people who had been harmed. This decision was affirmed in an appeals court in 2012. Nevertheless "an ad hoc 'investor-state' tribunal" under the U.S.-Ecuador Bilateral Investment Treaty ordered Ecuador not to enforce the ruling. This was even though the Treaty came into effect years after the pollution occurred and Chevron had left Ecuador.<sup>12</sup>

An investor-state tribunal ordered Canada to pay US waste treatment company, S.D. Myers, due to a temporary ban Canada placed on PCB exports, although that ban "complied with a multilateral environmental treaty on toxic-waste trade".<sup>13</sup>

Australia's 'plain' cigarette packaging laws have been challenged by tobacco company Philip Morris under a little-known 1993 investment treaty between Hong Kong and Australia. After losing its case against plain packaging in the Australian High Court, Philip Morris moved some of its assets to Hong Kong so it could bring the case as a Hong Kong investor outside of Australia's legal jurisdiction.<sup>14</sup>

Nevertheless the Australian government has expressed its willingness to agree to ISDS provisions in the Trans-Pacific Partnership (TPP) agreement it is currently negotiating, in return for US market access to agricultural products, particularly sugar.<sup>15</sup>

## **NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA) CASES**

In 2013 Lone Pine, a US-chartered mining company, sued the Canadian government \$250 million for a ban on fracking in Quebec on the St. Lawrence River. It claimed the ban was "arbitrary, capricious and illegal revocation of the [company's] valuable right to mine for oil and gas". The government claimed the ban was in response to an environmental assessment that showed the fracking was dangerous as well as public concern.<sup>16</sup>

NSW regulations preventing coal seam gas recovery near residential areas could also be subject to lawsuits if the TPP goes ahead with investor state dispute settlement provisions.

US-based Ethyl sued Canada for \$250 million for banning MMT, a toxic petrol additive. The ban was based on the public health and environmental risks posed by MMT, which is not used in most other countries and even banned in the US in reformulated petrol. The case was settled for a lesser sum and Canada withdrew its ban on MMT.<sup>17</sup>

Mexico was ordered to pay the U.S. Metalclad Corporation \$15.6 million after a Mexican municipality refused to grant the firm a construction permit for a toxic waste facility unless it cleaned up existing toxic waste problems. The facility had been closed when it was owned by a Mexican firm, from which Metalclad acquired the facility in a transaction that specifically noted the clean up condition for obtaining a permit.<sup>18</sup>

Eli Lilly is suing the Canadian government for \$100 million for invalidating its patent for Strattera, a drug used to treat attention deficit hyperactivity disorder (ADHD), after a federal court found the company had failed to demonstrate the drug would deliver the benefits promised in the patent application. Eli Lilly claimed this was an expropriation of property and that it was not given the minimum standard of treatment guaranteed to foreign investors by NAFTA.<sup>19</sup>

It challenged Canada's whole system of patent validation and if successful would enable it and other companies to bring many more investor-state cases against Canada for other invalidated patents: "It presumes to declare what Canada's standard of patentability policy should be – that Canada must issue a patent and allow a drug firm to charge monopoly prices if an invention simply claims utility without demonstrating it."<sup>20</sup>

## CONCLUSION

The government claims that the TPP will contain “explicit safeguards make clear that government's capacity to pass laws and regulations in the public interest in areas like health and the environment is not diminished” but aren't all Australian government laws and regulations made in the public interest? So why allow foreign companies to sue the Australian government?

More recent treaties have “safeguards” to protect government regulation in the public interest but they are vaguely worded and ISDS cases are heard by tribunals of three private investment lawyers whose decisions, although they trump all national courts, are beyond appeal. These tribunals tend to be concerned with assessing potential damage to investments rather than protection of public interest.

No country, however reliable its legal and political systems, is immune from ISDS suits and even where cases are won by governments, it can cost millions of dollars to defend them.

It is time that free trade treaties were themselves subject to the public interest test, rather than being negotiated in secret by trade ministers and their business advisors, to promote selective business interests. If this were the case it would be clear that the public interest is not served by trading away government sovereignty and the rule of democracy, as ISDS provisions do, in return for better market access for Australian beef and sugar.

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- <sup>1</sup> Andrew Martin, 'Coup d'Etat to Trade Seen in Billionaire Toxic Lead Fight', Bloomberg, 10 May 2013, <http://www.bloomberg.com/news/print/2013-05-09/rennert-800-million-toxic-lead-fight-rolls-global-trade.html>.
  - <sup>2</sup> 'U.S. Pharmaceutical Corporation Uses NAFTA Foreign Investor Privileges Regime to Attack Canada's Patent Policy, Demand \$100 Million for Invalidation of a Patent', Public Citizen, March 2013, <http://www.bloomberg.com/news/print/2013-05-09/rennert-800-million-toxic-lead-fight-rolls-global-trade.html>.
  - <sup>3</sup> 'Investor-State Attacks: Empowering Foreign Corporations to Bypass our Courts, Challenge Basic Protections', Public Citizen, <http://www.citizen.org/investorcases>, accessed February 2014, p. 2; Martin, 'Treaty Disputes Roiled by Bias Charges', note 1.
  - <sup>4</sup> 'TPP's Investment Rules Harm the Environments', Public Citizen, 2013, <http://www.citizen.org/documents/fact-sheet-tpp-and-environment.pdf>; 'U.S. Pharmaceutical Corporation Uses NAFTA', note 2.
  - <sup>5</sup> 'U.S. Pharmaceutical Corporation Uses NAFTA', note 2.
  - <sup>6</sup> Ibid.
  - <sup>7</sup> 'Investor-State Attacks', note 3.
  - <sup>8</sup> Cole Stangler 'Mining Company Sues Canada Over Fracking Ban in Quebec', *In These Times*, 7 November 2013, [http://inthesetimes.com/article/print/15847/mining\\_company\\_sues\\_canada\\_over\\_fracking\\_ban\\_in\\_quebec/](http://inthesetimes.com/article/print/15847/mining_company_sues_canada_over_fracking_ban_in_quebec/); 'Free Trade Agreement could prevent regulation in the public interest', AFTINET, 9 September 2013, <http://aftinet.org.au/cms/sites/default/files/ISDS%20FactSheet%20090913.pdf>; Martin, 'Treaty Disputes Roiled by Bias Charges', note 1.
  - <sup>9</sup> 'U.S. Pharmaceutical Corporation Uses NAFTA', note 2.
  - <sup>10</sup> Stangler, note 8; 'CAFTA Investor-State Cases', Public Citizen, accessed February 2014.
  - <sup>11</sup> 'TPP's Investment Rules Harm the Environments', note 4, p. 2.
  - <sup>12</sup> Ibid., p. 2; Eduardo Garcia, 'Ecuador seeks to end investment protection treaty with U.S.', Reuters, 12 March 2013, <http://uk.reuters.com/article/2013/03/12/ecuador-us-treaty-idUKL1N0C401C20130312>.
  - <sup>13</sup> 'TPP's Investment Rules Harm the Environments', note 4, p. 4.
  - <sup>14</sup> 'Free Trade Agreement could prevent regulation in the public interest', note 8
  - <sup>15</sup> Peter Martin, 'Leaked memo shows steep concessions for trade', *The Age*, 10 December 2013, p. 8.
  - <sup>16</sup> Stangler note 8.
  - <sup>17</sup> 'Table of Foreign Investor-State Cases and Claims under NAFTA and other US "Trade" Deals', Public Citizen, August 2013, <http://www.citizen.org/documents/investor-state-chart.pdf>, pp. 10-11.
  - <sup>18</sup> 'TPP's Investment Rules Harm the Environments', note 4, p. 3.
  - <sup>19</sup> 'U.S. Corporations Launch Wave of NAFTA Attacks on Canada's Energy, Fracking, and Medicines Policies', Public Citizen, 14 December 2012, <http://citizen.typepad.com/eyesontrade/2012/12/us-corporations-laun...afta-attacks-on-canadas-energy-fracking-and-medicines-policies.html>.
  - <sup>20</sup> 'U.S. Pharmaceutical Corporation Uses NAFTA Foreign Investor Privileges Regime to Attack Canada's Patent Policy, Demand \$100 Million for Invalidation of a Patent', Public Citizen, March 2013, <http://www.citizen.org/eli-lilly-investor-state-factsheet>.