

Stop corporate courts

Questions and answers

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Protest against Chevron for environmental devastation in the Amazon. Chevron brought an ISDS case against the Ecuadorian government and won in September 2018, leaving affected communities without justice.

Don't governments sometimes win against corporations, so the system can't be that bad?

According to the UN, 37 per cent of all known cases were decided in favour of the state, 28 per cent in favour of the investor and 23 per cent settled (the rest were discontinued).¹

Although these statistics may look as though governments do quite well out of these cases, settled cases often involve payments or concessions to the investor. For example, Germany settled its first dispute with Swedish energy company, Vattenfall by agreeing to reduce environmental standards imposed on one of the Vattenfall coal-fired power plants. Also, of the cases that were resolved in favour of the state,

half were dismissed on technical grounds (lack of jurisdiction) and so if these are excluded, about 60% were decided in favour of the investor and 40% in favour of the state.²

These statistics also do not fully reflect situations where no case was filed but that a threat of a lawsuit alone was sufficient to win concessions from a government.

But the big problem here is that governments can never really 'win'. These lawsuits can only be initiated by investors - and even when a tribunal decides on behalf of a government, there are still hefty legal bills for defending a case. This has an impact on public budgets, as that money could have been used for education, health or public services. So the only question for a government is how badly it will lose.

Isn't it a good thing to have these complicated cases heard by specialists and not clog up the courts at huge public expense?

Investor-State Dispute Settlement (ISDS) cases are heard by three arbitrators, one selected by the corporation, one by the government and one jointly. These 'specialists' are usually private corporate lawyers and though they may be experts in investment arbitration law, they are unfamiliar with other aspects of the law. Under the corporate court system, there is also no requirement for these arbitrators to weigh up and balance other legal considerations such as human rights and environmental law. Instead, investment law based on investment treaties take precedence over human rights and environment law.

These 'specialists' are not impartial. They are paid by the case and so they have a built-in financial interest in ensuring that corporations win cases to keep the business flowing. Unlike judges, there are no guarantees around their independence and impartiality. Arbitrators in one case can act as a corporate lawyer on behalf of a company in another case - so there are also serious problems of conflicts of interest.

Aren't corporate courts needed to provide investors with protection from corrupt governments or countries with weak judicial systems?

The lack of judicial independence in a few countries cannot be used as an excuse to entrench a system of corporate privilege globally. In fact, if a country does have a weak judicial system, the corporate court system is even more 'elitist' because it gives foreign investors access to legal redress when other members of society have no access to justice at all.

The chance of ordinary people getting redress against corporate malpractice or violations of human rights is virtually zero.

Actually, most ISDS cases are not brought in such countries, but in democratic countries with a strong rule of law. If investors have a legitimate grievance, they can seek legal redress through the national court system - the same way that individuals and domestic companies do. What's more, when investing in a country, it's important for businesses to recognise the risks they're taking on.

Investors should assess and approach the political risk of investing in a country in the same way that they would assess other business risks. There are insurance and contract options that can help mitigate these.

But ultimately, there's a question as to whether investors should be operating in countries with no rule of law. There's a much greater risk that such investments are simply going to be exploitative - benefitting investors and a rich elite, by extracting wealth and resources from a very poor society. When we bear in mind that many corporations which take ISDS cases are extractive businesses, it becomes more obvious that this is simply a private form of law for the already super powerful.

After the public outcry about ISDS in TTIP and CETA, reforms to the system have been proposed. Do these reforms make ISDS fairer?

The public mobilisation against TTIP (the proposed US-EU trade deal) have forced the EU to propose changes to the ISDS system. The EU-Canada deal, CETA, includes a revised version of ISDS, known as the Investment Court System (ICS), although this section is currently facing a legal challenge. The EU wants to entrench this system 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.

Making changes to the way corporate courts work might get rid of some of their most attention-grabbing problems, but does not address the fundamental problem that they're still corporate courts. Transnational corporations should not have their own special legal system to challenge democratic decisions in the first place. Some of the most controversial ISDS cases could have happened just as easily under these other courts. 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.

Can't governments just refuse to pay investors if they feel the decision was unjust? How are these decisions enforced?

The legality of corporate courts and the binding nature of their decisions are based on the investment treaty signed between two countries. This gives them the weight of law.

After a case, if a government refuses to pay compensation awarded to an investor by a corporate court, the award can be enforced through national courts by seizing the country's assets.

So, if states do not pay up after the decision, their assets are subject to seizure in almost every country in the world (the company can apply to local courts for an enforcement order). The supposed 'debt' the award creates can even be sold to 'vulture funds' who can buy the 'debt' for a fraction of its face value and then aggressively sue the country concerned, making vast profits if they win. The country can also be effectively prevented from borrowing in international markets, and treated as a pariah by the international community.

Argentina is a prime case of a country which was unable to pay its ISDS awards, and some of these awards were sold to vulture funds.³

Corporate courts are needed to help countries, especially in the global south, to attract foreign investment. Isn't this a good thing?

Corporate courts do not necessarily lead to increased investment by multinational corporations and qualitative research shows that they are not a factor in investment decisions. Instead, decisions on investment are 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.

Many governments have found that the promise of increased investment has not materialised after signing a bilateral investment treaty. For example:⁴

- South Africa reported that it has not had significant inflows of investment from other countries with which it signed an investment deal, and conversely has received investments from countries where it does not have a deal.
- Brazil has never ratified an investment deal with corporate courts and yet it attracts the most inward investment across the region.
- Hungary is one of the only two Central and Eastern EU countries without an investment deal with the US and yet it has been one of the biggest recipients of US foreign direct investment in the region.
- Ecuador reported that most of its foreign direct investment comes from countries where it has not signed investment deals.

It's also worth remembering that the benefits of foreign direct investment to local communities are not automatic.

Investment in over-inflated housing markets, or investment in mining where most profits are simply repatriated, only make life worse for ordinary people in that country.

Instead, governments should be able to regulate in the public interest to mitigate the risks that foreign investments can bring to the environment, workers rights and local communities.

Yet ISDS is being used to bully governments and undermine their ability to regulate and make democratic decisions. In this way, ISDS actually helps ensure investment is less likely to create a fair and sustainable society.

If there is such a risk to governments of being sued by big business under ISDS then why are politicians signing up to ISDS in trade and investment deals?

Politicians sign up to these investment treaties based in the belief that strengthening investor rights will help to attract foreign direct investment and spur economic growth.

The idea that unregulated investment will improve economic development has been widely discredited. Governments need to be able to take decisions and implement policies that protect communities and the environment. Signing up to an investment treaty does not automatically lead to increased investment (see previous question).

Recent research shows some governments signed up to investment treaties over the past few decades with a complete lack of awareness of the implications for their ability to regulate and make democratic decisions.

In recent years, the proliferation of cases and the large sums that have been awarded to companies has meant that governments are increasingly becoming aware of the impact of ISDS on public policy making. And so governments such as South Africa, Ecuador and Indonesia have withdrawn from investment treaties which contain ISDS.

Our new campaign, in solidarity with the global and European campaigns, will expose the problems of ISDS and help to put pressure on governments to say no to ISDS in trade and investment deals.

Aren't there some good examples of ISDS being used - for example by renewable companies fighting against unfair tariffs and energy reforms that unfairly impinge on the renewable energy sector?

ISDS has been used in recent years by 'renewable energy investors' to sue governments for cutting back on subsidies for renewable energy - there have been 40 lawsuits launched against Spain alone since 2011.⁵

Spain has lost two of these cases and has been ordered to pay €128 million to London-based private equity fund Eiser,⁶ and €53.3 million to Luxembourgish fund Novenergia.⁷ Similar cases have been filed against the Czech Republic, Italy and Bulgaria.

However these renewable energy cases do not prove there is a role for ISDS to help in the transition to green energy technologies. Instead these cases show the increasing role of speculative funds cashing in on the ISDS bonanza.

In 88 per cent of the lawsuits against Spain, the claimant is not a renewable energy company but a private equity fund or other type of financial investor,⁷ often with links to coal, gas and nuclear industries. In fact, several of the funds only invested when some changes to the support schemes had already been made (which the funds later argued undermined their profit expectations). ISDS is no longer just an 'insurance policy' for corporations but a source of speculative profit.

Rather than supporting renewables, ISDS has been used extensively as a way to challenge governments taking action on a wide range of environmental issues, from fracking to pollution.

1 UNCTAD, 'World Investment Report 2018; Investment and New Industrial Policies' https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf

2 *ibid.*

3 Lavarez, G., 'Assignment of arbitral awards' Thomson Reuters, <http://arbitrationblog.practicallaw.com/assignment-of-arbitral-awards>

4 TNI, Friends of the Earth International, CEO, 'Winning the debate against pro-ISDS voices' <https://www.tni.org/files/9837452346812786.pdf>

5 UNCTAD, Investment policy hub, 'Spain As Respondent State' <https://investmentpolicyhub.unctad.org/ISDS/CountryCases/197?partyRole=2>

6 UNCTAD investment policy hub, 'Eiser & Energy Solar v. Spain' <https://investmentpolicyhub.unctad.org/ISDS/Details/535>

7 UNCTAD Investment policy hub, 'Novenergia v Spain' <https://investmentpolicyhub.unctad.org/ISDS/Details/782>

8 CEO, TNI, 'One treaty to rule them all', July 2018, https://www.tni.org/files/publication-downloads/one_treaty_to_ruled_them_all.pdf

Take action

To find out how you can help tackle corporate power and become part of a movement for real change visit globaljustice.org.uk or call 020 7820 4900.



Global Justice Now campaigns for a world where resources are controlled by the many, not the few. With thousands of members around the UK, we work in solidarity with global social movements to fight inequality and injustice.

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