

# Climate injustice

## How corporate courts block climate action

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Gary/knight

Imagine a world where fossil fuel giants and other transnational corporations don't have to follow the same laws as everyone else, but instead have their own corporate courts, where the law is tailored to their interests. Not courts where the companies are put on trial, but where corporations sue governments for huge sums of money and bully countries to get their own way.

It sounds like dystopian science fiction, but corporate courts are real. Also known as Investor-State Dispute Settlement (ISDS), these special privileges are granted to transnational companies by rules in trade and investment deals.

Corporate courts have enabled corporations to sue countries for doing almost anything they don't like – banning toxic chemicals, introducing a sugary drinks tax, anti-smoking policies, capping water rates, raising the minimum wage - you name it. They have long been used to oppose environmental protections. Now that we are finally seeing more governments around the world begin to take long

needed action to tackle the climate crisis, we are seeing more and more corporate court cases challenging those actions:

- RWE, an energy company, is suing the Netherlands over the phase out of coal-fired power stations, while another energy company, Uniper, is threatening to do the same.
- Ascent Resources, a UK fossil fuel company, is about to sue Slovenia for requiring an environmental impact assessment on fracking plans.
- Rockhopper, a UK fossil fuel company, is suing Italy over a ban on offshore oil drilling close to the coast.
- Lone Pine, a fossil fuel company, is suing Canada over the introduction of a fracking moratorium in Quebec.
- Westmoreland, a mining company, is suing Canada over a phase out of coal-fired power stations in Alberta

**Corporate courts are an unjust mechanism that can block climate action. The UK should reject them.**

## How do corporate courts operate?

When a corporation is able to use a trade or investment deal to bring an ISDS claim, a private arbitration tribunal is set up. ISDS can only be used by foreign investors – which effectively means transnational corporations. Domestic companies and governments cannot bring claims.

Three arbitrators are selected for the tribunal, one by the corporation, one by the government and one jointly. The arbitrators are private lawyers, who are specialists in investment arbitration law and are often unfamiliar with other areas of international law.

This is because corporate courts do not consider the obligations of a government to uphold human rights law or international environmental law. Such arguments have been rejected as being outside the scope of a case, as have references to national law. Nor do they try to balance public and private interest. The tribunal is only concerned with the obligations to investors created in the trade or investment deal. The concept that environmental or human rights law should come above investment law has been dismissed by tribunals.

Cases are usually held in secret, and it may not even be known that a case is taking place. As a result of public pressure, some tribunals have started to be a bit more open, but usually any information released about a case is sparse. Typically, a case will take several years which is costly and creates uncertainty.

If the corporation wins, the tribunal will set an 'award' – the amount that the government has to pay the corporation. Should the government refuse to pay, the award can be enforced through national courts elsewhere by seizing the country's assets. The supposed 'debt' the award creates can even be sold to 'vulture funds' who can aggressively sue the country concerned, making vast profits if they win.

## High stakes

The amounts at stake in corporate courts are astronomical. The largest award so far is US\$40 billion over fossil fuel company Yukos against Russia in 2014 with eight other known cases over a billion.<sup>1</sup> Recently, in 2019, a mining company Tethyan Copper won almost US\$6bn<sup>2</sup> against Pakistan - double the country's health budget and negating the US\$6bn bailout loan the country had just been given by the IMF.<sup>3</sup> Now energy company RWE wants US\$2.4bn from the Netherlands over its coal phase out.

Corporations can claim not just for money they have spent or the existing value of their investment,

but also for future expectations of profit. Tethyan Copper never even built a mine in Pakistan, but it claimed based on what it optimistically thought it would have made if it had run the mine for 50 years on the terms it wanted - and the tribunal agreed.<sup>4</sup>

The chance of making money from an ISDS case has itself become a profitable asset. Infinito Gold is suing Costa Rica over a planned gold mine. However, six months after initiating the case, the company restructured. It now has no operations and cannot really be called a mining company. Its only asset is the ISDS case and its only aim is to win the money.<sup>5</sup> No wonder that financiers are starting to see ISDS as a derivative and there is a growing market in third party funding for cases – paying the costs in exchange for a cut of the winnings.<sup>6</sup>

Governments can never really win from an ISDS case – even if the judgement is in their favour they usually have to pay their own legal costs. Australia had to spend US\$39 million defending its introduction of plain packaging for cigarettes against tobacco giant Philip Morris.<sup>7</sup>

The expense also means that this is a system that is mainly only open to the largest corporations (unless you can get third party finance). The winners from ISDS have also been the richest – over 95% of all compensation awarded in ISDS cases has gone to companies with over US\$1 billion in annual revenue and super-rich individuals.<sup>8</sup>

## Bespoke legal system for corporations

Corporate courts give corporations their own custom-made legal system that no one else can use, and which only looks at issues from their point of view. If a company has a legitimate grievance against a government, it should seek legal redress through national courts, just like everyone else. The idea that everyone should have the same access to justice is fundamental, even though the realities of power and influence mean that corporations are already at an advantage. Yet corporations want more.

Corporations explicitly use ISDS to bypass national courts so that they can use arguments that would not stand up there. When Lone Pine started suing Canada over fracking, their lawyer openly said they would find the case harder to make in the national courts because of the way the Canadian constitution handles property rights.<sup>9</sup> So they used corporate courts to get around the constitution.

## Treaties that threaten the climate

As the UK starts its independent trade policy it should be leaving corporate courts behind. Instead it wants to set them in stone.

### Energy Charter Treaty

The Energy Charter Treaty is an investment deal between more than 50 countries specifically on the energy sector, which includes corporate courts.

Italy has pulled out of the Energy Charter Treaty, and several other European countries are also considering exiting. So far the UK wants to stay put, but if we can ramp up the pressure that could change.

### UK-Canada trade deal

The UK has signed a trade agreement with Canada. It has corporate courts in it, but the

clauses are currently suspended until they've been reviewed. We have a few months – if enough of us speak out in that review we could force corporate courts to be dropped from the deal.

Canada is a hub for fossil fuel companies – nearly three quarters of mining companies globally are headquartered in Canada, and nearly half of all investment in mining goes through the Toronto Stock Exchange. Canadian mining and energy companies are active in corporate courts, suing governments for action on climate change.

### Trans-Pacific Partnership (CPTPP)

The UK wants to join the Trans-Pacific Partnership, a trade deal between eleven countries around the Pacific rim which Joseph Stiglitz called 'the worst trade deal in the world', and which includes corporate courts.

## Bullying governments

Corporate courts provide transnational corporations with a turbo-charged method of challenging laws, policies and other government actions. The amounts at stake intimidate governments into backing down – the sums can be overwhelming, especially for countries in the global south. In 2012, Ecuador lost a case against Occidental Petroleum. Ecuador had terminated a contract with the company and even though the tribunal acknowledged that Occidental had broken Ecuadorean law, it ordered Ecuador to pay US\$1.8 billion.<sup>10</sup> This was the largest known award at the time and is roughly equivalent to the country's entire annual health budget.

The threat of a case can be enough to cause a country to either reverse a decision or simply step back from making it in the first place. This chilling effect is also evident among other countries which see what is happening and decide not to risk the same themselves. Australia and New Zealand started looking at plain packaging on cigarettes at around the same time, but when Australia was challenged by Philip Morris, New Zealand held back from implementing its own plans.<sup>11</sup>

## Unravelling civil society victories

There is a pattern where years of struggle and protest by grassroots campaigners eventually leads to government action. At which point, a corporation slaps down an ISDS case.

It was a ban on open-cast mining for metals introduced by Costa Rica, which put an end to Infinito Gold's plans for a gold mine. That didn't come out of nowhere. It came from years of campaigning around problems with mining such as contamination, pollution and deforestation. A cyanide spill at another gold mine caused a scandal, especially when it was found that the earth movements that caused the spill had been noticed months earlier but the mine kept operating nonetheless. There were street protests about the issue and at the time the ban was decreed, a survey showed 85% of people opposed the Infinito Gold mine.<sup>12</sup> But Infinito brought an ISDS case regardless.

Corporate courts can make listening to its citizens extremely difficult and expensive for governments.

## What do the defenders of ISDS say?

Proponents of ISDS say it is needed to encourage investment and provides protection to reassure potential investors. Yet the evidence is against this.<sup>13</sup>

Companies actually decide to invest 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. Brazil has never signed up to ISDS, which hasn't affected its ability to attract investment.

When investors are worried about risks, there are established ways they can deal with this, through investment contracts or political risk insurance. For disputes, there are the normal courts. ISDS is unnecessary.

The excuse is also put forward that in some countries courts are corrupt and the national legal system cannot be relied upon. If this is the case, the solution is not to give transnational corporations a get-out while leaving the rest of us to face corrupt justice; it is to support efforts to improve national justice systems.

## Global fightback

In the past decade a fightback against corporate courts has begun. Campaigners have exposed its illegitimacy, including as part of campaigns against toxic trade deals such as the failed EU-US deal, TTIP, the EU-Canada deal CETA and the Trans-Pacific Partnership or TPP.

Across the world, countries have been rejecting ISDS: South Africa, India, Ecuador, Tanzania, Indonesia and New Zealand have all taken steps to review, limit or terminate existing ISDS deals and refuse to sign new ones.

The corporate court system is vulnerable.

## Papering over the cracks

In response to public pressure some governments are trying to reform corporate courts. However, their efforts are just tinkering around the edges, hoping that will be enough.

The EU is trying a revamped version of ISDS, known as the Investment Court System (ICS), and it wants to persuade others to join it by setting up a Multilateral Investment Court (MIC). 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.

However, this doesn't address the essential problem that transnational corporations have their own special legal system to challenge democratic decisions. Some of the most controversial ISDS cases could have happened just as easily under these other versions.<sup>14</sup>

We don't need to reform corporate courts, we need to get rid of them.

## Take action

Corporate courts give fossil fuel companies the power to sue governments for taking action on the climate emergency. They are an obstacle to a clean energy transition and to achieving climate justice.

Including corporate courts in new trade deals that the UK is trying to do could set them in stone for the future - like in the trade deal with Canada and the Trans-Pacific Partnership. Meanwhile existing bad corporate court deals, like the Energy Charter Treaty, are rearing their heads.

We need to call on the UK government to:

- Drop corporate courts in the UK-Canada trade deal
- Exit the Energy Charter Treaty
- Stop joining the Trans-Pacific Partnership (CPTPP)

**Find out more and get involved in the campaign:**

[globaljustice.org.uk/trade](https://globaljustice.org.uk/trade)

## 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](https://globaljustice.org.uk) or call 020 7820 4900.



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