

# TPP investor-state dispute settlement clauses allow corporations to sue governments

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The Obama administration's ongoing push for the Trans-Pacific Partnership (TPP)—a trade bloc of 12 countries—seeks to enshrine US economic dominance over the Asia-Pacific in binding agreements.

Among the TPP's central mechanisms for establishing the untrammelled hegemony of the major US corporations and financial institutions are the treaty's reported investor-state dispute settlement (ISDS) clauses.

The terms of the TPP remain shrouded in secrecy, known only to government leaders and corporate lobbyists. According to documents published by WikiLeaks, however, the ISDS provisions would permit companies to by-pass local courts to sue foreign governments in closed-door tribunals on the grounds that state measures and regulations hinder investment and business operations.

Such clauses have been inserted into a series of trade deals in recent decades, but are coming into increasing prominence.

One US giant, Philip Morris, one of the world's largest tobacco companies, is currently suing the Australian government over the adoption of "plain packaging" legislation that placed prominent health warnings on tobacco products. The case, which has already cost the Australian government \$50 million, was instigated by the company's Hong Kong subsidiary, citing ISDS provisions in an Australia-Hong Kong trade treaty.

ISDS clauses have also been invoked in disputes between major US corporations and governments over infrastructure projects. In 2012, Railroad Development Corporation (RDC), a private US firm, was awarded around \$12 million against the Guatemalan government under ISDS clauses in a Central American trade deal.

RDC had secured a contract to run Guatemala's state railway in 1997. In the ensuing years, the American company denounced the government's failure to evict squatters from around rail lines. In 2006, the Guatemalan

government declared that RDC's use of state-owned rolling stock and railway equipment was "harmful to the state" and demanded a renegotiation of the contract—which RDC refused.

According to an article on the Australian Broadcasting Corporation's *Drum* web site by Deborah Gleeson, a public health lecturer at La Trobe University and Kyla Tienhaara, an Australian National University research fellow, just ten known legal cases arose under ISDS provisions in 1994, compared with 608 cases in 2014.

A UN trade and development report in February this year showed that US corporations have launched the most cases under ISDS provisions. The statistics underscore the role ISDS agreements have played as a beachhead for corporations, particularly in the most oppressed countries. About 60 percent of cases in 2014 were brought against "developing and transition economies."

The list of the most frequent respondents to ISDS cases featured austerity-ravaged Spain, Costa Rica, the Czech Republic, India, Romania, Ukraine and Venezuela. The countries that faced their first ISDS cases last year included Italy, Sudan and Mozambique.

ISDS cases are often conducted in complete secrecy, and generally heard before an international tribunal invested with the power to overrule national laws and regulations. One judge on such a tribunal, quoted in the *Guardian*, pointed to the anti-democratic character of the proceedings.

"Three private individuals are entrusted with the power to review, without any restriction or appeal procedure, all actions of the government, all decisions of the courts, and all laws and regulations emanating from parliament," the judge commented.

Publicly known ISDS cases often centre on environmental and health regulations. Some of the more notorious instances include a \$315 million suit by a major Canadian mining company after El Salvador's

government refused to allow a gold mine that threatened to contaminate water supplies.

In a similar case, Gabriel Resources, another Canadian company, is suing the Romanian government after it blocked a mining development that risked contaminating inhabited areas with cyanide used in the mining process.

The Canadian government itself is facing a \$215 million suit over a moratorium on fracking in Quebec. More than 20 publicly known cases have been brought against Canadian authorities, often over environmental regulations, since ISDS provisions were included in the North American Free Trade Agreement (NAFTA), spearheaded by the US in 1994.

The ISDS provisions in the TPP have become a focal point of public opposition to the trade deal. Seeking to placate the concern, Australian Trade Minister Andrew Robb said last week that the Abbott government would seek a “modified version” of the ISDS clauses, with “a carve-out for public policy on health and the environment.” With the breakdown of the ministerial talks in Hawaii last weekend, the fate of that request remains unknown.

Australia’s opposition Labor Party and trade unions have criticised the TPP’s ISDS clauses in protectionist terms aimed at whipping up nationalism, and expressing the concerns of sections of the Australian capitalist class that the TPP will undermine their position vis-a-vis major American corporations. Labor leader Bill Shorten tweeted last week: “ISDS trade clauses damage our economy, are undemocratic ceding control of some policy to foreign corporations.”

In reality, the ISDS provisions are a naked expression of a universal process in the global capitalist economy—the domination of the largest corporations and financial institutions over every aspect of social life and government policy.



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