

Protecting a Multilateral Agreement on Climate Change from the Threat of Corporate Trade Challenges

by Maude Barlow

A foreword to An ISDS Carve-out to Support Action on Climate Change, by Gus Van Harten

In December 2015, the world gathered in Paris, France for COP 21, the United Nations Conference on Climate Change. This historic gathering was an important moment for the nations of the world to truly and meaningfully come to an agreement to seriously reduce greenhouse gas emissions. Expectations were high.

In the lead-up up to COP 21 there were some signs of hope that governments were serious about tackling climate change. In June 2015, the leaders of the G7 countries agreed to cut greenhouse gases by phasing out the use of fossil fuels by the end of the century. Germany's Chancellor Angela Merkel – who is pushing for a 2050 deadline and committed to immediate binding emission targets – spoke of the need to “decarbonize the global economy in the course of this century.”

That same month, China – the world's top greenhouse gas emitter – pledged to cap rising emissions by 2030, a first for a nation whose policies have favoured unlimited industrial growth. In August 2015, U.S. President Barack Obama, perhaps mindful of his legacy, unveiled the first nationwide standards to end the limitless dumping of carbon pollution from U.S. power plants.

World leaders did make some progress in Paris. The 190 governments came to an agreement, albeit non-binding, to cut emissions to keep the global temperature increase to two degrees or less. World leaders also set in motion a process for more discussions on climate change, which will carry on until COP22 in Marrakech, Morocco in November 2016.

World opinion is shifting dramatically as fewer and fewer people question the overwhelming scientific evidence of human-induced climate change. A July 2015 Pew Research Center survey found that climate change is seen as a top global threat. The hope for a real and meaningful multilateral agreement on climate change keeps growing. Marrakech provides another opportunity for a binding agreement.

But there is a problem that needs to be addressed if any agreement or treaty reached is to be realized in the home countries of the parties. The central problem is that many of the same countries pledging to take serious action on climate change are also party to, or are aggressively negotiating, trade and investment deals that contain a mechanism that gives large corporations the right to challenge any changes to the current rules under which they operate.

Protecting a Multilateral Agreement on Climate Change from the Threat of Corporate Trade Challenges

The mechanism in these trade deals is called investor-state dispute settlement (ISDS). It gives foreign corporations the right to directly sue governments for financial compensation if those governments introduce new laws or practices – be they environmental, health or human rights – that negatively affect corporations’ bottom line. ISDS essentially grants corporations equal status to governments in these negotiations and privatizes the dispute settlement system between nations.

According to the United Nations Conference on Trade and Development, there are now over 3,200 ISDS agreements (mostly bilateral) in the world, with one concluded every other week. These corporate rights are deeply entrenched in the North American Free Trade Agreement (NAFTA), as well as in all new regional deals, including the Canada-European Union Comprehensive Economic and Trade Agreement (CETA), the Transatlantic Trade and Investment Partnership (TTIP) agreement between Europe and the U.S., and the Trans-Pacific Partnership (TPP), a massive deal between 12 Pacific-aligned countries.

Corporations have used ISDS to challenge governments over 600 times, and in numerous cases these challenges are clearly related to health or environmental decisions by governments.

Canada, for instance is facing \$2.6 billion in challenges from American corporations under NAFTA. Current and past challenges include bans against environmental harmful additives to gasoline, exports of hazardous PCBs and lawn pesticides, as well as moratoriums on fracking.

ISDS also threatens the fight against environmental racism, and this in turn makes it harder to combat the inequitable impacts of climate change on Indigenous peoples and the poor. In June 2015, 10 UN rapporteurs on human rights issued a statement drawing attention to “the potential detrimental impact” that treaties such as TTIP and TPP “may have on the enjoyment of human rights as enshrined in legally binding UN instruments,” including “a clean environment.”

The experts noted that investor-state rules provide protection for investors, but not for states or their populations. In looking at the history of ISDS settlements, the UN human rights experts concluded that “the regulatory function of many states, and their ability to legislate in the public interest, have been put at risk.”

So the stage is set for a conflict. For any meaningful agreement on climate change to be successful, each country will have to take the promises home to their own legislatures and change laws and practices accordingly. Yet the ISDS “rights” of foreign corporations to challenge any changes that might negatively impact their profits are strongly entrenched in international trade law. In other words, the power of corporations to use ISDS could strongly undermine any agreement if corporations decide to fight the necessary resulting regulatory changes.

The report, *An ISDS Carve-Out to Support Action on Climate Change*, is offered to governments and negotiators as a way to resolve this conflict. In it, Gus Van Harten, Osgoode Hall professor, legal scholar and internationally recognized authority on investment law, outlines how a multi-lateral agreement on climate change could include a safeguard against the risk of ISDS lawsuits that target climate change action by governments.

Without such a carve-out, Van Harten argues, governments face an incentive to avoid climate change action in order to limit potential liability due to actual or anticipated ISDS claims. Drawing on the language of the UN Framework Convention on Climate Change, Van Harten proposes wording for a safeguard that allows governments to introduce the measures needed to stabilize greenhouse gas emissions and truly deal with the growing threat of climate change.

This report, which was originally published in the lead-up to the Paris negotiations, contains an idea that is gaining momentum. The European Parliament made an ISDS carve-out its position going into the Paris climate talks. COP 21 was one step on our path to address climate change. COP 22 in Marrakech is yet another opportunity for the climate and trade justice communities to adopt the demand that the threat of ISDS must be part of any meaningful climate change negotiations.

Read the full report at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2663504

About Maude Barlow

Maude Barlow is a social justice and environmental activist and author. She is the National Chairperson of the Council of Canadians, Canada's leading social action organization.

Protecting a Multilateral Agreement on Climate Change from the Threat of Corporate Trade Challenges

March 2016

