Trade Deals Give Corporations the Power to Sue

by Brent Patterson

The Trans-Pacific Partnership contains the controversial investor-state dispute settlement (ISDS) provision.

In short, ISDS gives corporations the power to sue national governments for lost future profits related to public interest legislation, most commonly related to the protection of the environment. This provision is known as Chapter 11 in the North American Free Trade Agreement (NAFTA). It is in the yet-to-be ratified Canada-European Union Comprehensive Economic and Trade Agreement (CETA) and in the recently signed Trans-Pacific Partnership (TPP), and it is the subject of debate and reform proposals in the United States-European Union Transatlantic Trade and Investment Partnership (TTIP).

The Trudeau government is defending this provision in the TPP. Global Affairs Canada (Prime Minister Trudeau's department of foreign affairs and international trade) says, "With respect to ISDS, the TPP will not impair the ability of Canada or its partners to regulate and legislate in areas such as the environment, culture, safety, health and conservation. Our experience under NAFTA demonstrates that neither our investment protection rules nor the ISDS mechanism constrain any level of government from regulating in the public interest."

In fact, Canada's experience under NAFTA has been the complete opposite of that. Since NAFTA came into force on January 1, 1994, Canada has been subject to 35 NAFTA investor-state claims. Sixty-three per cent of those claims have involved challenges to environmental protection or resource management measures. A notable example includes the Delaware-registered, Calgary-based Lone Pine Resources' $250-million Chapter 11 challenge against Canada over Quebec's moratorium on fracking for oil and gas underneath the St. Lawrence River.

Toronto Star columnist Thomas Walkom has cautioned, "Ottawa says the TPP does not remove the right of governments to 'legislate and regulate in the public interest.' That's what was said about NAFTA originally. But those claims proved to be false. With the TPP, as with NAFTA, all will depend on how the final text is worded and how the dispute settlement panels interpret this wording. In the end, the new Trans-Pacific deal is essentially a renegotiated NAFTA with Japan and a couple of cheap-labour countries (Vietnam, Malaysia) thrown in."

The ISDS provision threatens both climate policy and Indigenous rights.

As Friends of the Earth highlights, "The ISDS mechanism included in the TPP investment chapter grants foreign investors access to a secret tribunal if they believe actions taken by a government will affect their future profits. This provision is a ticking time-bomb for climate policy because many government policies needed to address global warming are subject to suits brought before international investment tribunals. ... Other TPP chapters, like the one covering trade in goods, can be the basis for state-to-state suits challenging climate policies."

Council of Canadians National Chairperson Maude Barlow has called for a provision in global climate agreements that would protect government measures reducing greenhouse gas emissions from ISDS challenges. She stated, "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." United Nations Special Rapporteur for Indigenous Rights Victoria Tauli-Corpuz has warned that "the clause of non-discrimination between a local and an international investor ... grants more rights to transnational firms, often at the expense of indigenous rights." She says this is a crucial issue because most remaining natural resources are located on Indigenous lands.

In a January 2016 op-ed published in the *Winnipeg Free Press*, Council of Canadians Regional Organizer Brigette DePape and Winnipeg chapter activist Jobb Arnold wrote "[The ISDS provision] could affect the First Nations on Lelu Island, B.C. ... There, the battle is against Petronas, a company that wants to exploit liquefied natural gas. It's not just the land and water, but also the fishing economy at stake for future generations. Under the TPP, Petronas, a Malaysian company, could sue the Canadian government if it were to limit LNG exploitation on the island. In this way, the TPP gives multinational corporations more power and grassroots land-defenders less."

The Trans-Pacific Partnership includes the 12 countries that produce nearly 40 per cent of the monetary value of all the finished goods and services in the world. There is a mixture of countries within it, including G7 "major advanced economies" (the United States, Canada and Japan), G20 "major economies" (Australia and Mexico), relatively smaller economies (New Zealand and Singapore), and "developing economies" (Brunei, Chile, Malaysia, Peru and Vietnam).

Giving the transnational corporations that operate in these countries the power to sue government over public interest legislation is the wrong way to go.

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