

ISDS

VS

Women's Human Rights



What is the investor-state dispute settlement (ISDS)?

Investor-State Dispute Settlement or 'ISDS' is a commonly used clause found in trade and investment agreements - both in bilateral and plurilateral treaties as well as in project contracts or memorandum of understandings (MoUs) between government and multinational corporations. The clause sets up **a one-way dispute settlement mechanism that protects the investor's 'investment' from the partner government.** It gives foreign investors the privilege of suing the government and demanding financial compensation for any actions, laws, regulations and policies that threaten their investments - both real or perceived, as well as current and future profits. This has enabled corporations to sue the government in international and often secretive tribunals¹, for passing laws and policies that are supposed to protect human rights, labour rights and the environment. ISDS has become such a powerful weapon that even the threat of an **ISDS case can force a government to change laws and regulations in favour of foreign investors.**

1: The Secret Threat That Makes Corporations More Powerful Than Countries (2016). Retrieved from <https://www.buzzfeednews.com/article/chrishambly/the-billion-dollar-ultimatum>

Origin

ISDS is a legacy of colonialism, whereby European corporations, led by the chairman of Deutsche Bank, drafted what they called a 'Magna Carta for investors'². Introduced in the late 1950s, ISDS appeared in many treaties between former colonial governments and newly independent governments as a means to prevent the nationalisation of the multinational corporations' physical property following independence.

2: Standing, G. (2016). The Corruption of Capitalism: Why rentiers thrive and work does not pay. Biteback Publishing Ltd. Retrieved from https://books.google.com.my/books?id=qgX1DAAAQBAJ&printsec=copyright&source=gbs_pub_info_r#v=onepage&q&f=false



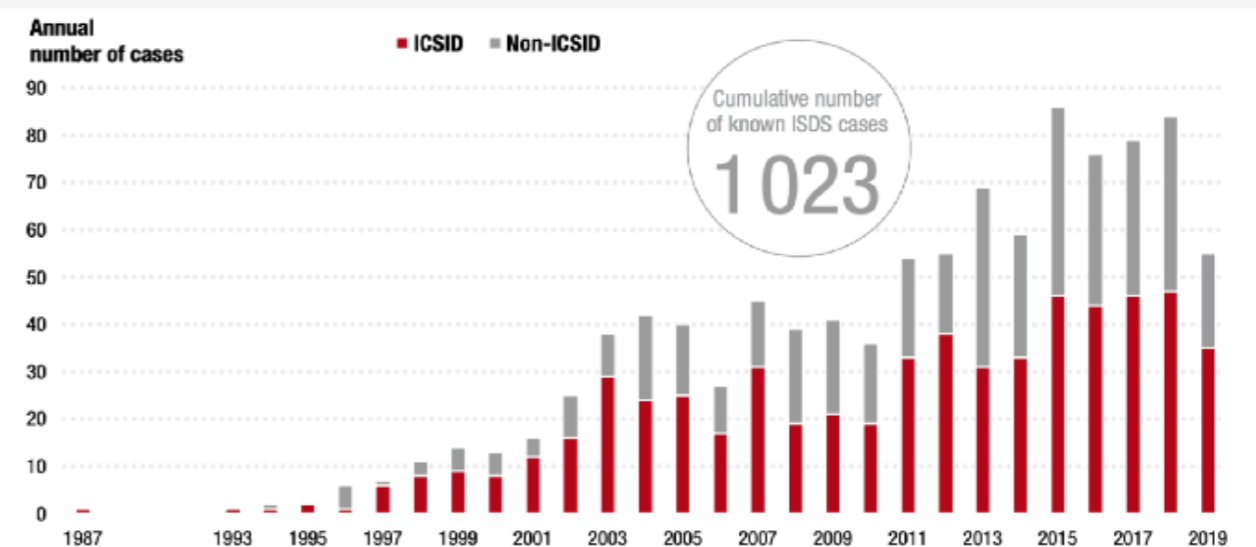
ISDS: A tool against human rights

In September 2015, the United Nations Human Rights Council's Independent Expert on International Order, Alfred de Zayas argued strongly that trade agreements should not include ISDS. In his report, he stated that **ISDS is incompatible with human rights principles** because it encroaches on the regulatory space of States and suffers from fundamental flaws including **lack of independence, transparency, accountability and predictability.** In April 2019, seven UN Human Rights Council's Special Procedures mandate holders issued an open letter identifying similar fundamental flaws in the ISDS system and arguing for a systemic change.

ISDS clauses have existed for half a century, and the available public data indicates that **corporations are using ISDS more and more across the world in recent years.** In 2018 alone, 71 cases were initiated worldwide, most of them against developing countries. Up until the end of 2019 cumulatively, there have been 1,023 known treaty-based ISDS cases. In Asia and the Pacific region, 142 cases have been filed, approximately 70 per cent of which were initiated from 2010 and onwards³.

3: United Nations Conference on Trade and Development, UNCTAD (2020). Fact Sheet on Investor-State Dispute Settlement Cases in 2019. International Investment Agreements (IIA) Issues Note (2). Retrieved from <https://unctad.org/en/PublicationsLibrary/diaepcbinf2020d6.pdf>

Figure 1. Trends in known treaty-based ISDS cases, 1987-2019




ISDS: Corporate Attacks on Women's Human Rights

ISDS has become a proven and powerful weapon for foreign corporations to force a government to change laws and regulations in their favour, with significant adverse impacts on women's human rights.


ISDS vs Public Services - Women tend to be more dependent on public social services, especially with the burden of unpaid care work falling disproportionately on women. For instance, in Asia, women spend four times more in unpaid care work than men⁴. Cleaning, cooking and looking after dependent family members – children, elderly people and people with disabilities – are still 'women's affairs'. Domestic workers, a vast majority of whom are women, are commonly underpaid and the work is performed under precarious working conditions. Improving and ensuring access to public services has the potential of lessening inequality in society, and countering social and economic policies that favour the private sector and widen the gap between the rich and the poor classes in society. Yet, the governments have been sued by corporations using ISDS for taking back or regulating failed privatisation of public services, even when these were carried out to protect peoples' fundamental human rights. Since 2000, there have been at least 20 ISDS cases filed by corporations as a result of the governments' decisions to reverse the privatisation of public services.



 **Case of Argentina⁵:** While reeling from the massive financial crisis in 2001-2002, Argentina froze the payment rates for the use of privatised services to lessen the burden on the people, trying to ensure that at least some of its citizens' basic human rights and needs would be met amidst rising inflation and unemployment. The government was subsequently hit by over 40 ISDS lawsuits by foreign investors. In one of the cases, the city of Buenos Aires cancelled a contract with energy and water giant Suez due to its repeated service failures, including providing water with excessive levels of nitrate. Consequently, the government of Argentina was sued and had to pay 383 million USD. In its ruling, the World Bank's International Center for Settlement of Investment Disputes rejected the notion that the right to water should be given the priority over investor's interests.

4: International Labour Organization, ILO (2018). Care work and care jobs for the future of decent work. Ginebra: OIT. Retrieved from https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_633135.pdf

5: Investigating the impact of corporate courts on the ground-the truth is out there. Retrieved from https://www.globaljustice.org.uk/sites/default/files/files/resources/isds_files_anglian_water_web.pdf

 **Philip Morris vs. Australia⁷:** When Australia introduced plain packaging for all tobacco products in 2011 to discourage smoking and reduce the risk of numerous health conditions, Philip Morris sued Australia before an arbitral tribunal. Since Philip Morris Australia was owned by Philip Morris International (based in Switzerland), and Australia did not have an investment treaty with Switzerland, Philip Morris Asia purchased shares in Australia specifically to take advantage of the ISDS mechanism included in the Australia-Hong Kong investment treaty. In its December 2015 decision, the tribunal confirmed that the main reason that Philip Morris Asia acquired assets in 2011 was to bring a legal claim, using a Hong Kong-based entity. The tribunal also rejected the company's claim that plain packaging was not reasonably foreseeable. Therefore, the case was dismissed, albeit on legal grounds only. Yet, Australia still spent 24 million Australian dollars in legal costs while Philip Morris only paid half, leaving the Australian taxpayers to pay the other half.

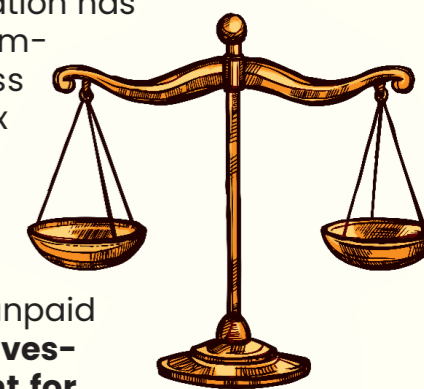
ISDS vs Affirmative Actions - Governments are encouraged and required to use affirmative actions or temporary special measures under the CEDAW⁶ to end discrimination against women and promote women's human rights. However, **ISDS has been used to challenge affirmative action policies when they are seen to be detrimental to investment or future profits.**

ISDS vs Tax Justice - The redistribution of wealth through taxation has the potential to address systemic and intersectional discrimination women experience based on their gender and class among others. When multinational corporations abuse tax policies and get big tax breaks from governments, women are likely to be more severely affected. Public services from health to education, water, and transportation, when funded by the government, have the potential of empowering women, and reducing inequalities, violence against women and women's unpaid care work. **However, under ISDS, corporations that have an investor agreement with a government can sue the government for changing tax laws, reducing tax breaks, or increasing corporate income tax and other forms of taxes.** At least 24 countries including India and Romania have been sued under ISDS on tax-related disputes.

6: Convention on the Elimination of All Forms of Discrimination against Women. New York, 18 December 1979. Retrieved from <https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx>

7: <https://www.foei.org/wp-content/uploads/2016/12/The-hidden-costs-of-RCEP-and-corporate-trade-deals-in-Asia-FoEI.pdf>

8: Provost Claire (2016). Taxes on trial: How trade deals threaten tax justice. Retrieved from <https://www.globaljustice.org.uk/sites/default/files/files/resources/taxes-on-trial-how-trade-deals-threaten-tax-justice-global-justice-now.pdf>





Vodafone vs India⁹: Vodafone took over much of India's major telecommunication companies using a series of offshore holdings registered in the Cayman Islands. When India gave them a 2 billion USD tax bill, Vodafone brought an ISDS lawsuit against India to avoid paying the capital gains tax bill it was presented with. If successful, it will deny Indians billion dollars in revenue.

ISDS vs Climate Justice - Women disproportionately bear the brunt of climate change impacts. Women are more likely to become casualties of extreme climate events, be trafficked and experience violence after a climate disaster while their lives are more affected by drought, floods, crop and livestock loss and lack of access to water. **The current climate crisis has highlighted once again the need for rapid, urgent and just transitions in land, energy, industry, buildings, transport and cities. Yet, governments have been sued for introducing laws and policies intended to tackle and address the climate crisis and to protect the environment.** Statistically, 36 per cent of cases against Regional Comprehensive Economic Partnership (RCEP) countries¹⁰ concern environmentally relevant sectors.



Churchill Mining vs Indonesia: In 2012, Churchill Mining initiated an arbitration claim against Indonesia over the revocation of mining licenses that were deemed forged by the country. The companies demanded 1.3 billion USD in compensation although they had only invested 40 million USD. In December 2016, the tribunal confirmed that the documents presented by the company were forged. In April 2017, Churchill Mining called for the annulment of the decision, but the proceedings were dismissed by the tribunal in March 2019. The costs of the arbitration that the government of Indonesia has to bear are estimated to have reached over 10 million USD.

9: Government opposes the merger of Vodafone Group's two arbitrations. Retrieved from <https://isds.bilaterals.org/?government-opposes-merger-of>

10: RCEP countries include Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, Vietnam, China, Japan, South Korea, Australia and New Zealand.



ISDS vs Women's Labour Rights - On average, women in Asia and the Pacific earn between 80 - 90 per cent of what men earn. Women remain disproportionately concentrated in the informal, precarious and unprotected labour sectors and therefore, more likely to hold low-wage jobs compared to men. Any kind of increase in the minimum wage would directly benefit a large proportion of women. While the gender wage gap can only be closed through the implementation of fiscal and labour policies on the part of governments¹¹, **the ISDS clause makes it impossible for some governments to introduce new laws intended to lessen the gender gap in terms of wage payments.** Governments have been sued under ISDS for introducing new laws for raising minimum wages in the country.



Veolia vs Egypt: In 2012, Veolia sued Egypt demanding compensation for the increase in the country's minimum wage under the new labour laws, arguing that their investments had been damaged. While the case has now been dismissed, it is an example of how, despite winning the case, the Egyptian government still lost millions of dollars in arbitrations and legal fees over six years of the case.



ISDS vs Funding for Women's Human Rights - ISDS cases are known to cost up to billions of US dollars in legal costs as well as damages. Legal costs for an ISDS case averages around 8 million USD per case and can go up to 30 million USD in some cases. At the same time, lawyers handling these cases are paid an average of 1,000 USD per lawyer, per hour with each case usually being handled by a whole team of lawyers. **These costs are paid by taxpayers and taken out of domestic resources that could have been used to finance public services and advance women's human rights.** The damages often demanded by the corporation using ISDS are so enormous that it is equivalent to a major portion of the country's GDP and lead the country to incur debt or rely on a third party to support the legal costs.



Tethyan vs Pakistan: In 2019, an ISDS award was given to a corporation against a government in the case of Tethyan vs the government of Pakistan. The award, 5.8 billion USD is almost equivalent to the 6 billion USD bailouts that the government of Pakistan had just taken from the International Monetary Fund (IMF). This amount is also more than double the amount of Pakistan's entire public spending on health care for 200 million people¹², in a country where 7 per cent of children die before their fifth birthday¹³. This award will have damaging consequences on the country's already grave economic, social, and political situation, and presents a death sentence for many people in Pakistan.

11: Rubery, J., & Koukiadaki, A. (2016). Closing the gender pay gap: a review of the issues, policy mechanisms and international evidence. ILO, Geneva.

12: World Health Organization Global Health Expenditure database. Retrieved from <https://data.worldbank.org/indicator/SH.XPD.CHEX.GD.ZS>

13: UNICEF Data: Monitoring the situation of children and women. Retrieved from <https://data.unicef.org/country/pak/>



What is our demand? End ISDS NOW!

ISDS is fundamentally in violation of the principles of human rights, justice, equality, accountability and peoples' sovereignty. It is an illegitimate protection mechanism the colonial power enjoyed for way too long at the cost of the life and wellbeing of people and the planet, especially in the global south. To date, unsurprisingly, there is no counter legal mechanism to hold corporations accountable for their human rights violations, especially the multinational and foreign investors primarily due to the coordinated efforts to protect the status quo of power.



Asia Pacific Forum on Women, Law and Development (APWLD)
Over 30 years of advocacy, activism and movement building to advance women's human rights and Development Justice in Asia and the Pacific.

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