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Conflict of Interest and Corporate Bias in Offshore, Investor State Tribunals

Trade agreements increasingly include an Investor-State Dispute Settlement (ISDS) Chapter which details the right of foreign corporations with investments in the host country to sue the government if they feel they are being unfairly restrained. The problem is not the right of corporations to sue governments. It's that these lawsuits take place in offshore tribunals where the Canadian justice system counts for nothing.

The original justification for introducing Investment-State offshore tribunals was to protect corporations from expropriation attempts by biased or corrupt courts in some developing countries. The ISDS process was also meant to reassure global corporations investing in a country that they would receive the same treatment as national companies. Ironically, the offshore tribunals themselves very quickly became riddled with conflict of interest and biased in favour of global corporations. For more detailed information we recommend you read the 2012 Corporate Europe Observatory report, *Profiting from Injustice*. Below is a summary of their main points.

Conflict of Interest: Three top law firms—Freshfields (UK), White & Case (US) and King & Spalding (US)—claim to have been involved in 130 investment treaty cases in 2011 alone. Just 15 arbitrators have decided 55% of all known investment-treaty disputes. The elite group of business lawyers appointed to each offshore tribunal are not accountable to any elected body. Nor are they neutral or unbiased. Many of them alternate between serving as judges and bringing cases for corporate clients against governments. Several prominent arbitrators have also been members of the board of major multinational corporations which have filed cases against nation states. Both the potential and the reality of conflict of interest in the ISDS process is rarely criticized by law societies.

The Revolving Door between Arbitration Law Firms and Government Arbitrators: The elite arbitrators and lawyers in the Investor-State Dispute Settlement process move effortlessly from defending

corporations to defending governments and back again. This revolving door allows arbitration law firms, as well as elite arbitrators, to: a) use positions of influence to actively lobby against any reforms to the international investment regime and, b) aggressively promote investment arbitration in trade agreements as a necessary condition for the attraction of foreign investment, despite evidence to the contrary. Risks to states of acceding to Investor-State arbitration are downplayed or dismissed.

Bias towards the Corporate Sector: Statistical study based on 140 investment-treaty cases shows that arbitrators consistently adopt an expansive (claimant-friendly) interpretation of various clauses with respect to what constitutes an investment. For example offshore tribunals have accepted the argument of corporate claimants that expropriation of property should extend to import permits, drilling rights, patent rulings, etc. That's far removed from the supposed original intention of the Investor-State Dispute mechanism. Furthermore, corporations have become so confident of the corporate bias in these tribunals that they are increasingly hitching their Investor-State claim, not to national treatment expectations, but rather to the best deal anywhere in the world. The recent $430 million Eli Lilly lawsuit against Canada is an example.

Meanwhile arbitration lawyers have taken a restrictive approach in international law when it comes to environmental protection and human and social or democratic rights.

Profiting from Speculation: Investment funds are eager to help fund Investor-State disputes in exchange for a share (typically between 20-50%) in any granted award or settlement. This financialisation of investment arbitration has even extended to proposals to sell packages of lawsuits to third parties, in the vein of the disastrous credit default swaps behind the global financial crisis.

An Explosion of Lawsuits: Investment lawyers have become the new international 'ambulance chasers', in a similar way to lawyers who chase ambulances to the emergency room in search of legal clients. The result is an

explosion in Investor-State lawsuits. In 1996 there were only 38 Investor-State cases worldwide. In 2011 there were 450 ongoing cases. As for dollar claims, in 2009/2010 alone, 151 corporations were each demanding, at least, US $100 million from states. Canada currently faces $5 billion claims under NAFTA.

Given all of the above, why would any government with a strong, fair, competent judiciary consent to moving lawsuits into these offshore tribunals, where even the judges aren't real judges? And yet, the Canadian government not only consented to it, it was our government that initially persuaded a reluctant European Union to move the Investor-State lawsuits offshore. Whose interest is our government serving?

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Executive Summary (Page 7) from *Profiting from Injustice*

"The arbitration industry is far from a passive beneficiary of international investment law. They are, rather, highly active players, many with strong personal and commercial ties to multinational companies and prominent roles in academia, who vigorously defend the international investment regime. They not only seek every opportunity to sue governments, but also have campaigned forcefully and successfully against any reforms to the international investment regime.

"Rather than acting as fair and neutral intermediaries between governments and corporations, it has become clear that the arbitration industry has a vested interest in perpetuating an investment regime that prioritizes the rights of investors at the expense of democratically elected national governments and sovereign states. They have built a multimillion-dollar, self-serving industry dominated by a narrow, exclusive elite of law firms and lawyers whose interconnectedness and multiple financial interests raise serious concerns about their commitment to deliver fair and independent judgments.