

260208 Reminder 13.02.26 NfWW No.106 How secretive tribunals curb climate ambitions

Recently we wrote about political and media pushback against countries' net zero targets. These are policies which, in order to tackle climate change, aim to make countries carbon neutral by a certain date, commonly by 2050: by that date not to emit more carbon than is removed – 'captured' – from the atmosphere by, for example, tree planting.

This article looks at another front on which countries are being pushed in the wrong direction, and here I want to introduce you to the world of 'Investor-State Dispute Settlement' (ISDS). Bear with me.

ISDS is an international legal mechanism which allows foreign investors to sue countries for actions which they consider harm their investments. The system was designed originally to protect foreign companies from nationalisation.

Countries sign up to ISDS treaties because they want to create a climate where investment is welcomed. ISDS agreements are made between countries bilaterally or multilaterally. There are now more than 3000 of them.

Cases are heard in international tribunals, rather than in-country courts. Their purpose is to provide neutral, binding rulings to resolve investor-state disputes.

Typically, tribunals consist of three arbitrators appointed for specific cases. They operate with limited transparency, which is one reason why they are heavily criticised.

Now many countries are re-evaluating or even exiting ISDS agreements because of high costs, threats to their regulatory sovereignty (especially concerning environmental and health policies), and their increasing use by fossil fuel corporations to challenge climate policies.

To illustrate, consider Glencore, a giant multinational mining company registered in Switzerland with a revenue in 2024 of \$231bn. In 2021 Glencore sued the government of Colombia via ISDS for \$489m damages. They did this over limits the government, backed by the country's High Court, placed on Glencore's expansion of a massive opencast coalmine out of concerns for indigenous land rights and environmental damage.

While six years later the case is ongoing, with both sides submitting more filings, it serves to show the lengths to which large companies, especially those with interests in fossil fuel extraction and deep pockets, are prepared to go to win.

And this power is having a chilling effect on some countries' efforts to meet ambitious net zero targets. For example, Denmark's decision to set its phase out date for oil and gas at 2050, instead of an earlier more ambitious target of 2045, appears to have been influenced by concerns about exposure to ISDS claims from existing fossil fuel investors.

One of the latest ISDS cases centres on the West Cumbria Coalmine whose prior planning approval was quashed by the UK High Court in 2024. The Australian company behind the mine, which is registered in Singapore, and other investors have taken the UK government to an ISDS tribunal for an undisclosed sum.

This may take years to resolve. Meanwhile the case sends a warning to governments worldwide about the legal risks of acting decisively on climate change.

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