



THE SENATE  
SENATE FOREIGN AFFAIRS, DEFENCE AND TRADE  
REFERENCES COMMITTEE

**Inquiry into the proposed Comprehensive and Progressive Agreement for  
Trans-Pacific Partnership (TPP-11)  
Public Hearing –Monday, 30 July 2018  
Questions Taken on Notice  
ActionAid Australia**

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*1* HANSARD, pp. 20–21

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**Senator PATRICK:** There have been claims made about environmental downsides and restrictions on perhaps changing legislation in relation to environmental protections. Do you see anything that stands out in relation to gender that would cause issues?

**Ms Higelin:** Yes, and I guess this relates specifically to the ISDS mechanisms and the potential for this to counter advancements, particularly in areas where governments choose to adopt affirmative action policy or legislative measures that are designed to improve things such as equal pay for women. If those kinds of things come into effect after the signing of this, it could result in those things being seen as unprofitable to corporations and creating a challenge around ISDS mechanisms. So I guess that's where we're saying that there is that potential, particularly for there to be gender impacts.

**Senator PATRICK:** Do you see those as high potentials or remote?

**Ms Higelin:** No, I think there is an existing case on record. I have to say I don't actually have that with me here in the submission we've made, but we could provide that to the Senate inquiry where there has been one specific instance where affirmative action policies have been challenged through an ISDS mechanism.

**Senator PATRICK:** Was it successful?

**Ms Higelin:** For that part, I believe it was, yes.

**Senator KITCHING:** Which country?

**Ms Higelin:** I have to say I don't have that piece of information with me, but I could share it with the inquiry if I could email that through to you.

**Senator KITCHING:** Thanks very much.

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**ANSWER**

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**Example of ISDS impacting affirmative action - South Africa**

The Investor-State Dispute Mechanism (ISDS) has been used by corporations to challenge governments seeking to introduce affirmative action policies. The South African government, for example, was sued in 2007 by Italian investors who claimed that the introduction of Black Economic Empowerment legislation, which required 50 per cent of mining shares to

be sold to black South Africans, was unfairly discriminatory. The ISDS tribunal required the South African government to reduce the obligation to 26 per cent.<sup>1</sup> This subsequently led to a South African government review of its investment treaties in 2010 that recommended the renegotiate or withdrawal from trade agreements that limited the government's ability to legislate for affirmative action policies. The South African government subsequently terminated bilateral free trade agreements with Belgium, Luxembourg, Germany, Switzerland and the Netherlands.<sup>2</sup> These agreements are set to be replaced by the Promotion and Protection of Investment Act which is rooted in South Africa's human-rights based constitution rather than corporate and foreign country priorities. The removal of the ISDS clause will also limit burdensome international arbitration costs brought on the South African government by foreign-owned corporations that seek to restrict public policies that address the social and economic needs of its citizens.<sup>3</sup>

This case shows not only the real harms of including ISDS clauses in trade agreements, but also the potential for a national government to remain open to foreign investment while maintaining its sovereign right to pursue its policy objectives.

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<sup>1</sup> Kate Lappin (2018) Free Trade or Women's Rights, Indonesian Journal of Leadership, Policy and World Affairs <http://www.sr-indonesia.com/in-the-journal/view/free-trade-or-women-s-rights>

<sup>2</sup> GIZ (2015) Developing countries and the future of the international investment regime', p23 [https://www.die-gdi.de/uploads/media/giz2015-en-Study\\_Developing\\_countries\\_and\\_the\\_future\\_of\\_the\\_international\\_investment\\_regime.pdf](https://www.die-gdi.de/uploads/media/giz2015-en-Study_Developing_countries_and_the_future_of_the_international_investment_regime.pdf)

<sup>3</sup> Mills Soko & Mzukisi Qobo (2017) Economic, trade and development relations between South Africa and the European Union: The end of a strategic partnership? A South African perspective, South African Journal of International Affairs, 24:2, 137-157, DOI: 10.1080/10220461.2017.1338162