By Re_Generation

Business Ethics

3.5 Coercive Litigation

Description

There are many ways that corporations weaponize the law, and particularly processes of private adjudication, to intimidate and take advantage of weak governments and silence opposition. One way that multinational corporations use litigation to take advantage of weak governments, particularly in the Global South, is through the exploitation of **stabilization clauses** in bilateral investment treaties which allow them to sue host governments for lost profits associated with the passage of social or environmental regulations. Such lawsuits often take place through the use of **Investor-State Dispute Settlement** (ISDS) mechanisms, whereby foreign investors are **entitled to sue a national government** for both real and perceived financial damages. In a similar fashion, predatory investors known as '**vulture funds**' have made a practice of purchasing distressed sovereign debt from low-income nations on secondary markets and then using litigation to intimidate cash-strapped governments into paying the full face value. Companies also often strategically employ litigation to obstruct accountability and intimidate or silence critics, particularly community activists such as environmental or human rights defenders. These forms of judicial harassment are called '**strategic lawsuits against public participation**' (SLAPPs), and they have been **used to great effect**. To learn more about how to recognize and prevent abusive litigation practices, continue reading this PDF guide.

Acknowledgements

Written by Gareth Gransaull, Associate Director of Re_Generation, with review by some of Canada and North America's most influential sustainability leaders.

About Re_Generation

Re_Generation is a Canadian youth movement that seeks to build a regenerative, sustainable, and just economy. We aim to reimagine our schools, repurpose our careers, and remodel our companies to be aligned with regenerative principles. In particular, we provide resources for individuals to launch impact-driven careers and advocate for change within their companies and schools. We also aim to advance public policies that promote regenerative and sustainable business practices.

Our successful 'Our Future, Our Business' Manifesto campaign received the support of 65 youth organizations, 130 high-level executives, and 100 civil society organizations recognizing the need for reform in business education on sustainability. After three years of existence as the Canadian Business Youth Council for Sustainable Development, we have changed our name to Re_Generation to become more inclusive of all youth, not just business youth.

We believe that the ideal society is a **regenerative** one. Regeneration to us means putting human and ecological **well-being** at the centre of every decision. It means restoring relationships, both within nature and within society, while helping all communities to thrive. Read more about our history and vision at our **About Us** page.

Issue Summary

There are many ways that corporations weaponize the law, and particularly processes of private adjudication, to intimidate and take advantage of weak governments and silence opposition. The radical expansion of free trade agreements around the world over the last 30 years has disproportionately benefited the owners of multinational enterprises, who are the clear beneficiaries of trade regimes designed to benefit foreign investors over people and the environment.

One way that multinational corporations can use litigation to take advantage of weak governments, particularly in the Global South, is through the exploitation of **stabilization clauses** in bilateral investment treaties which allow them to sue host governments for lost profits associated with the passage of social or environmental regulations. This often has the effect of coercing governments into capitulating to the demands of corporations and investors, at the expense of people and the environment. Such lawsuits often take place through the use of **Investor-State Dispute Settlement** (ISDS) mechanisms, whereby foreign investors are **entitled to sue a national government** for both real and perceived financial damages. Complications arise when, for example, a government banning harmful chemicals, or restricting mineral extraction near vulnerable ecosystems may be seen as expropriating private capital. ISDS arbitration suits related to mining have rapidly increased in frequency since the late 1990s, and are often used by transnational corporations to **coerce poorer governments into allocating resource concessions**. Countries are often sued for sums that represent sizable portions of their annual GDP. In some cases, the threat of arbitration can pressure governments to reverse environmental protections, as was generally regarded to be the case when Indonesia **exempted several foreign investors** from a ban on open-pit mining in protected forests.

In much the same vein, companies often strategically employ litigation to obstruct accountability and intimidate or silence critics, particularly community activists such as environmental or human rights defenders. These forms of judicial harassment are called '**strategic lawsuits against public participation**' (SLAPPs), and they have been **used to great effect** from 2015 to 2018 by polluting firms seeking $904 million in damages from activist defendants as young as 15 years old.

There are also ways that investment funds use coercive litigation to take advantage of distressed debt in developing nations. At a global level, a system of economic inequality is maintained through debt instruments and unfair trade rules that create a global extractive economy predicated on **patterns of unequal exchange between nations in the Global North and Global South**. Export-oriented growth policies, often imposed as loan conditionalities through **structural adjustment programs**, compel resource-rich nations to turn to extractive projects as a means to generate the foreign reserves to service debts owed to international creditors. In such '**debt traps**', governments are required to remove barriers to growth in an effort to attract the foreign direct investment that will generate funds to pay increasingly expensive interest payments. Such exploitative patterns are generated because lending institutions like the International Monetary Fund are **pursuing the interests of the international financial community**. The resulting 'Dutch disease' directly impedes local development in order to generate profit for transnational firms. These relationships are particularly evident today in Latin America as well as Africa, a continent where for every dollar of loan inflows **there are 80 cents of capital flight**. For more information about the neocolonial aspects of the international financial system, see materials from the **Bretton Woods Project**. Hedge funds or private equity firms known as '**vulture funds**' have made a practice of purchasing distressed sovereign debt on secondary markets, where it trades significantly below its face value, and then recover the full amount through litigation and legal intimidation. According to an IMF report on vulture funds, eleven heavily indebted poor countries (HIPCs) have been targeted so far in forty-six lawsuits, and the amounts demanded often represent a significant portion of the relevant

national gross domestic product (GDP). As such, such lawsuits represent a significant risk to social and environmental well-being given the public expenditures that they displace.

Key Considerations

The Business and Human Rights Resource Centre has identified ISDS lawsuits as a **threat to human rights**. The Danish Institute for Human Rights, in its **assessment tool on legal and governmental affairs**, maintains that stabilization clauses should not be used for "exemption from or compensation for compliance with improved social and environmental laws of general application, legislation enacted to reasonably implement the host state's international human rights obligations, or reasonably foreseeable changes in the law." There are three main types of stabilization clauses, which include:

- 'Full-freezing clauses': clauses that freeze the law of the host state with respect to the investment project over the life of the project;
- 'Economic equilibrium clauses': clauses that require that the investor complies with new laws but also require that the investor be compensated for the cost of complying with them;
- 'Hybrid clauses': clauses that require the state to restore the investor to the same position it had prior to changes in law. If used, it is essential that potential human rights implications of any stabilization clauses are carefully considered.

SLAPP lawsuits are used in similar ways to obstruct social and environmental reforms. The Business and Human Rights Resource Centre recorded **over 3,100 attacks worldwide** against community leaders, farmers, workers, unions, journalists, civil society groups and other defenders, of which 40% consisted of judicial harassment in the form of SLAPPs. The largest number of SLAPPs took place in Latin America (39%), followed by Asia and the Pacific (25%), Europe & Central Asia (18%), Africa (8.5%), and North America (9%).

The issue of commercial abuse of sovereign indebtedness for private gain is extremely problematic. Vulture funds operate with impunity, and impose significant costs on nations that are already facing fiscal crisis. Vulture funds prey on the desperation of highly indebted poor countries by **refusing to participate in debt structuring** designed to ease the burden on cash-strapped governments, and instead pursuing the full face value of the sovereign debt plus any additional interest and penalties through litigation. Vulture funds can earn anywhere from 300% to 2000% returns on their initial investments, and they are an example of neocolonial exploitation that should not be tolerated in any instance.

Tools

To find ongoing ISDS lawsuits, see the **ISDS database** provided by the UN Conference on Trade and Development, which can be navigated using their **advanced search tool**. The watchdog **Bilaterals.org** provides resources about the corporate abuse of free trade and investment agreements, and they have a **specific subsection** discussing the role of ISDS mechanisms. There is also a worldwide **Tax Treaties Explorer** that allows users to identify how investment treaties between countries permit corporations to take advantage of loose tax rules and undermine public investment.

The UN Office of the High Commissioner for Human Rights has developed a **list of principles for corporations to pursue in the negotiation of contracts** with states which ensure that human rights provisions be respected throughout the execution of all proposed projects. These principles include that:

1. The parties should be adequately prepared and have the capacity to properly address the human rights implications of projects during negotiations;
2. Responsibilities for preventing and mitigating human rights risks associated with the project and its activities should be clarified and agreed before the contract is finalized;
3. The laws, regulations and standards governing the execution of the project should facilitate the prevention, mitigation and remedy of any negative human rights impact throughout the life cycle of the project;
4. Contractual stabilization clauses, if used, should be carefully drafted so that any protections for investors against future changes in law do not interfere with the State's bona fide efforts to implement laws, regulations or policies, in a non-discriminatory manner, in order to meet its human rights obligations;
5. If the contract envisages that investors will provide additional services beyond the scope of the project, this should be carried out in a manner compatible with the State's human rights obligations and the investor's human rights responsibilities;
6. Physical security for the project's facilities, installations or personnel should be provided in a manner consistent with human rights principles and standards;
7. The project should have an effective community engagement plan through its life cycle, starting at the earliest stages of the project;
8. The State should be able to monitor the project's compliance with relevant standards to protect human rights, while providing the necessary assurances to business investors against arbitrary interference in the project;
9. Individuals and communities that are affected by project activities, but not party to the contract, should have access to an effective non-judicial grievance mechanism;
10. The contract's terms should be disclosed, and the scope and duration of exceptions to such disclosure should be based on compelling justifications.

The Business and Human Rights Resources Centre also hosts a **database of ongoing SLAPP cases**, as well as materials about **legal defences against SLAPP lawsuits**. Companies should not abuse SLAPP lawsuits to silence their critics, and must commit to redressing grievances of communities and affected stakeholders wherever appropriate.

The United Nations Human Rights Council has **adopted a resolution** to oppose the activities of vulture funds. For more information about vulture fund activity, see **this report** by the Committee for the Abolition of Illegitimate Debt, as well as **this handbook** on how to stop vulture fund lawsuits from the UK Commonwealth Secretariat.

Case Studies

The case of Vancouver-based Eco Oro Minerals suing the state of Colombia over a protected wetland is a salient example of **this kind of predatory behaviour**. For several years, Eco Oro has planned to mine for copper and gold in Colombia's Santurban Paramos, a high-altitude wetland which provides the drinking water for two million people in the surrounding area. The World Bank's private finance arm divested from Eco Oro in 2016 due to ongoing opposition from the local community, led by groups such as the Committee in Defense of the Water and Paramos of Santurban. Despite the ecological and social risks posed by the project, Eco Oro has sued the state of Colombia through an investor-state dispute mechanism in the bilateral Canada-Colombia Trade Agreement, claiming damages of $750 million USD. This arbitration is funded by Tenor Capital, a financial firm aiming to turn a profit from the **compensa-**

tory payments for perceived lost profits. All companies, particularly in the extractives sector, have a responsibility to use stabilization clauses in non-coercive ways, and make sure that social and environmental consequences are considered in all state-investor relations.

Organizations/Initiatives

For more information about ISDS mechanisms, SLAPP lawsuits, and other forms of corporate weaponization of the law, see the following organizations:

- Bilaterals.org
- UNCTAD - Investment Dispute Settlement Navigator
- Tax Treaties Explorer
- World Bank - Database of Bilateral Investment Treaties
- Business and Human Rights Resources Centre

For information related to odious debt, underdevelopment, and global economic justice, see the following organizations:

- Global Action for Debt Cancellation
- Asian Peoples' Movement on Debt and Development
- Jubilee South
- Jubilee Debt Campaign
- Committee for the Abolition of Illegitimate Debt
- Global Justice Now
- African Forum and Network on Debt and Development
- Latin American Network for Economic and Social Justice
- The Bretton Woods Project
- The Third World Network
- The South Centre