
# INVESTMENT COURT SYSTEM (ICS): THE WOLF IN SHEEP'S CLOTHING

## THE EU'S GREAT CORPORATE PRIVILEGE REBRAND

PSI PUBLIC SERVICES INTERNATIONAL


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**About the publisher:** Public Services International (PSI) is a global trade union federation representing 20 million working women and men who deliver vital public services in 154 countries. PSI champions human rights, advocates for social justice and promotes universal access to quality public services. PSI works with the United Nations system and in partnership with labour, civil society and other organisations [www.world-psi.org].

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# FOREWORD

Trade policy is fast becoming a mainstream issue across the globe.

Developing countries have long argued that trade agreements are imposed to boost western corporate profits. But increasingly workers and citizens in the developed world are asking whether these agreements are in their interests.

From the USA Presidential primaries to the streets of Uruguay and Berlin people are waking up to the long term economic effects of the neo-liberal agenda behind these trade agreements; increasing inequality, precarious work and rising unemployment.

People are also working out that the new wave of so called "trade agreements" no longer have much to do with trade. Trade is increasingly being used as a cover for agreements that create binding laws away from democratic parliamentary institutions to provide rights to foreign investors and the largest multinational corporations on the planet.

The Investor State Disputes Settlement (ISDS) system whilst not the only troubling aspect of these agreements has become an icon of the shameless extent to which governments have pandered to corporate interests by giving foreign corporations rights that citizens do not have. Rights which do not exist to protect labour, the environmental nor most human rights.

PSI has a direct interest in the ISDS debate as the punishing fines issued by these private tribunals bleed tax payer money away from

quality public services to boost corporate profits.

In 2003, the Czech Republic paid a corporation US$354 million, then the equivalent of the countries health budget. Ecuador has just started paying US$ 1.1 billion to a US based oil company – 90% of its social welfare expenses budget for 2015. While 94.5% of known awards go to companies with at least US$ 1 billion in annual revenue or to individuals with over US$100 million in net wealth.

It is not surprising then that when the European Commission (EC) opened its public consultation on ISDS a record 150,000 people responded with over 97% rejecting these corporate privileges. In the words of EU trade chief, Cecilia Malmström, ISDS had become "the most toxic acronym in Europe".

In an attempt to diffuse this unprecedented response, the EC released its new proposed Investment Court System in late 2015 - thus creating a new acronym (ICS).

The ICS has removed some of the worst excesses of ISDS. However, as this analysis reveals, it still leaves Europe desperately vulnerable to foreign corporate attacks. Currently only 1% of US based investment is covered. ICS in the Trans-Atlantic Trade and Investment Partnership (TTIP) would increase this exposure from 1% to 100% - enabling a flood of legal cases against European governments.

The study shows that ICS is not judicially independent nor would it protect governments from having to pay compensation to corporations for making lawful, non-discriminatory laws to protect workers, health or the environment. Worryingly collective bargaining agreements amongst social partners could become the target of law suits.

The EU is promoting the ICS proposal as a new global standard prompting questions from unions around the globe. This paper is therefore an important analysis not just for unions from Europe but for unions globally.

The ICS does not represent a great step towards just trade agreements. But it does remind us that our leaders are vulnerable to political pressure when unions and our allies are well informed and active.

It is now up to the global labour movement to ensure that we educate our members and our leaders, and armed with this information mobilise to end our governments complicity in this corporate grab.

Rosa Pavanelli
*General Secretary*
*Public Services International*

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# EXECUTIVE SUMMARY

For the past two years, an unprecedented Europe-wide public controversy about a once-unknown element in international trade agreements has kept citizens, politicians and the media on their toes. It's all been about the so-called investor-state dispute settlement system, in short, ISDS.

ISDS is included in thousands of international agreements. It allows companies to sue governments if policy changes – even ones to protect workers or public health – are deemed to affect their profits. These lawsuits bypass domestic courts and take place before an international tribunal of arbitrators, three private lawyers who decide whether private profits or people and the environment are more important. Across the world, investor-state tribunals have granted big business billions of dollars from taxpayers' pockets – often in compensation for public interest measures.

When the European Commission proposed to include this powerful legal regime for corporations in the trade deal under negotiation with the United States, the Transatlantic Trade and Investment Partnership TTIP, this triggered massive opposition: over 97 per cent of a record 150,000 participants rejected the corporate privileges in a public consultation. 'ISDS' has become "the most toxic acronym in Europe", according to EU trade chief Cecilia Malmström.

In an attempt to *get around the public anger that has been generated by ISDS*, the European Commission chose a different label when, in autumn 2015, it released a revised proposal for all the EU's ongoing and future investment negotiations, including TTIP. Instead of the 'old' ISDS system, the Commission promised a 'new' and allegedly independent system, supposed to protect governments' right to regulate: the Investment Court System or ICS.

This report shows that the proposed ICS does not end ISDS. Quite the opposite: ICS would empower thousands of companies to circumvent national legal systems and sue governments in parallel tribunals if laws and regulations undercut their ability to make money. It would pave the way for billions in taxpayer money paid to big business. It could curtail desirable policymaking to protect workers and the environment. And if it was included in major trade deals, it would massively expand the scope of the corporate privileges, subjecting states to an unprecedented increase in legal and financial liabilities.

In a nutshell, the proposed 'new' ICS is the dangerous ISDS in innocent-looking disguise. It is the ISDS wolf in sheep's clothing.

## KEY FINDINGS:

1. **Despite lack of evidence of its benefits to the wider society, ISDS gives exceptionally powerful and enforceable rights to corporations**, without any obligations. They get a status akin to states in the context of international affairs, in that they have the privilege to directly sue democratically-elected governments in investor-friendly tribunals. Binding and enforceable international rules to protect workers or the environment from corporate abuse, on the other hand, are non-existent.

2. **The number of investor-state cases, as well as the sum of money involved, has skyrocketed over the last two decades** from a total of three known treaty cases in 1995 to nearly 700 known investor-state claims by January 2016 and an absolute record high of 70 new investor lawsuits filed in 2015 alone. The amount of money has also expanded dramatically, with a compensation award against a country reaching the staggering sum of US$50 billion in one case. The main financial beneficiaries have been large corporations and rich individuals.

3. **The last two decades have seen billion-dollar investor lawsuits against the alleged damage to corporate profit of legislation and government measures in the public interest**. Countries on every continent have been challenged for financial stability measures, anti-smoking legislation, revoking tax breaks, anti-discrimination policies, environmental impact assessments, and more.

4. **The EU's 'new' ISDS model (re-labelled ICS) is as dangerous for democracy, public interest law, and public money as the 'old' model**. With the exception of some procedural improvements – an enhanced selection process for arbitrators, stronger ethics rules, and the establishment of an appellate body – the re-branded version essentially contains the same investor privileges as existing trade and investment agreements.

**5** **If the US-EU trade agreement TTIP included the proposed investor rights, liability and financial risks would multiply for EU member states** and far exceed those posed by any existing treaty signed by them: under TTIP, all 28 EU countries could directly be sued by US investors (compared to only 9 with an investment treaty with the US today); TTIP would cover 100 per cent of US-based investment in the EU (compared to only 1 per cent under existing treaties); and more than 51,000 US companies could directly sue the EU and its member states (compared to around 4,500 today). TTIP could invite the launch of nearly 900 US investor lawsuits against EU member states (compared to 9 claims under existing treaties). There are concerns that the EU is using misleading court language to give cover to this huge expansion of ISDS.

**6** **Investor claims against non-discriminatory and lawful measures to protect workers, health, and other public interests would be possible under the new EU proposal** as it includes the same far-reaching investor rights relied upon by companies like Philip Morris, for example, which is suing Uruguay over tobacco control measures. The EU's proposed formulations on the right to regulate would not shield governments from having to pay compensation when they regulate.

**7** **Under the EU proposal, labour regulations, collective bargaining and agreements between the social partners could become targets of investor claims** when the state is party to a collective agreement or transforms it into law. Investors could also claim that the lack of state action in the context of a collective agreement – or during a long-lasting strike – violates certain provisions in the EU proposal. Newly introduced obligations for worker participation in supervisory boards could be challenged, too.

**8** **Under the EU proposal, billions in taxpayers' money could be paid to corporations**, with the effect of squeezing coverage of universal public services, lowering their quality and increasing pressure to privatise. Awards could even include compensation for future lost profits that corporations hypothetically could have earned (like in one case against Libya which was ordered to pay US$905 million to a company which had only invested US$5 million).

**9** **The EU proposal increases the risk of costly lawsuits against public interest measures as it arguably grants investors even more rights than many existing investment treaties**, which have already led to hundreds of investor-state lawsuits around the world:

**a)** By protecting investors' "legitimate expectations" under the so-called "fair and equitable treatment" clause, the EU risks codifying a very expansive interpretation of the clause that would create the 'right' to a stable regulatory environment. This would give investors a powerful weapon to fight regulatory changes, even if implemented in light of new knowledge and democratic choice.

**b)** The type of dangerous umbrella clause proposed by the EU would lift all written contracts of a state with regards to an investment to the level of international law, multiplying the risk of costly lawsuits.

**10** **Under the EU proposal, transnational companies could even sue their own governments** – by structuring their investment through a subsidiary abroad or asking an abroad shareholder to sue. Parallel claims by parent companies and subsidiaries would also be possible as proposal does not prevent the phenomenon of 'treaty shopping'.

**11** **The EU's investor rights proposal is a sure-fire way to bully decision-makers, potentially curtailing desirable policy-making**. There is already evidence that proposed environmental and health protections have been abandoned, delayed or otherwise adapted to corporate wishes because of expensive claims or the threat of litigation. Canada and New Zealand, for example, have delayed anti-smoking policies because of looming investor lawsuits from Big Tobacco.

**12** **The dispute settlement process proposed by the EU is not judicially independent, but has a built- in, pro-investor bias**. Since only investors can sue and arbitrators are paid per case, there is an incentive for the arbitrators (misleadingly re-labelled 'judges' in the EU proposal) to side with them as this will bring more lawsuits, fees, and prestige in the future. Restrictive selection criteria, the lack of cooling off periods and loopholes

in the proposed ethics code for the arbitrators also give rise to concerns that tribunals will be staffed with the same private lawyers who have until now driven the boom in investment arbitration and grown their own business – by encouraging investors to sue and by interpreting investment law expansively to encourage more claims.

**13** **There are serious doubts about whether the investor rights proposal is compatible with EU law**, one reason for growing concerns amongst judges. The Commission's proposal sidelines European courts and is fundamentally discriminatory, granting special rights to foreign investors only. They could challenge court rulings as well as actions by governments and laws passed by Parliament, from the local to the European level.

**14** **Rather than putting an end to ISDS, the EU's investment protection agenda threatens to lock EU members into ISDS forever**. It will be practically impossible for them to exit from the investor privileges once those are enshrined in larger trade deals such as TTIP (because they would effectively have to leave the EU). The Commission's proposed multilateral investment court – essentially a world supreme court exclusively available to corporations – risks perpetuating an already gravely unjust system where one side, typically large companies or wealthy individuals, get exceptionally powerful and actionable rights while the other side, the people of a country, get only responsibilities.

The EU's attempt to massively expand and lock in the investment arbitration system comes at a time when more and more people from across the political spectrum are speaking out against the corporate legal straightjacket – and a growing number of governments are trying to exit from it.

At a time when corporate power has already greatly harmed our rights, economies and democracy, it is high time to dismantle the harmful ISDS system – under whatever name. It's time to promote trade policies that protect people and the planet – not corporations and the rich.


## CHAPTER 1

# INTRODUCTION

**In an old fable, a wolf dresses in sheepskin to deceive the shepherd who indeed locks the hungry wolf up with the sheep. In global trade policies, the equivalent of the wolf is called investor-state dispute settlement or ISDS, a special tool for multinational companies to bully and squeeze money out of governments. And in the current controversy about these provisions in EU trade deals, the European Commission is trying to disguise ISDS as sheep to hide its true wolfish nature.**

***Ultimately, ISDS is about increasing corporate power over our economies and limiting the ability of governments to regulate corporate behaviour.***

*US trade union federation AFL-CIO*[1]

ISDS provisions empower foreign companies to sue countries in which they invest, using specialised international tribunals that can grant billions of dollars in compensation. For example, energy giant Vattenfall is demanding €4.7 billion from Germany for its phaseout of nuclear energy. Another energy corporation, Mesa Power, is suing Canada over rules to

stimulate green jobs in the region of Ontario. And tobacco multinational Philip Morris has filed a multi-million claim against the small country of Uruguay because it introduced large-scale health warnings for cigarette packs.

When the EU proposed to include this powerful legal regime for corporations in the trade deal under negotiation with the United States, the Transatlantic Trade and Investment Partnership TTIP, this triggered massive opposition. Due to the citizen outcry, the obscure four letters 'ISDS' have now become "the most toxic acronym in Europe", as EU trade chief Cecilia Malmström put it.[2]

***ICS is mainly a re-branding exercise for ISDS.***

*Professor Gus Van Harten, Osgoode Hall Law School* [3]

It came as little surprise then that she no longer spoke of ISDS when, in autumn 2015, Malmström released a revised proposal for the EU's ongoing and future trade negotiations (including TTIP). Instead of the 'old' ISDS system, she promised a 'new' and supposedly independent system which, she claimed, would protect governments' right to regulate: the Investment Court System or ICS.

This system includes a number of tribunals which would decide investor-state disputes under treaties such as TTIP and could eventually be replaced by a kind of world supreme court for corporations applicable to all trade treaties (a "multilateral investment court"), which Malmström has proposed to develop in the medium-term, in parallel to the EU's many bilateral negotiations.

But aside from having changed the 'toxic' acronym, is the 'new' ICS really so different from the much-loathed 'old' ISDS regime? Does it shield labour standards, health policies and other public interest rules from corporate attacks? Does it set up a fair and independent system that would protect our democratic institutions?

This report shows that this is nothing but deceptive propaganda. The EU's investor rights approach does not end ISDS. Quite the opposite: The proposal would empower thousands of companies to circumvent national legal systems and sue governments in parallel tribunals if laws and regulations undercut their ability to make money. It would pave the way for billions in taxpayer money paid to big business. It could curtail desirable policymaking to protect people and the planet. And if it was included in major trade deals, it would massively expand the scope of the corporate privileges, subjecting states to an unprecedented increase in legal and financial liabilities.

In short, the proposed ICS is the politically untenable ISDS in disguise. It's an innocent sheep on the outside, but a ravenous wolf on the inside.


## CHAPTER 2

# ALLOWING CORPORATIONS TO SUE COUNTRIES: AN INTRODUCTION TO INVESTOR-STATE DISPUTE SETTLEMENT (ISDS)

**"If you wanted to convince the public that international trade agreements are a way to let multinational companies get rich at the expense of ordinary people, this is what you would do: give foreign firms a special right to apply to a secretive tribunal of highly paid corporate lawyers for compensation whenever a government passes a law to, say, discourage smoking, protect the environment or prevent a nuclear catastrophe. Yet that is precisely what thousands**

**of trade and investment treaties over the past half century have done, through a process known as 'investor-state dispute settlement,' or ISDS."**

This is how, in autumn 2014, *The Economist* introduced its readers to a once-unknown element in international trade and investment agreements, "a special privilege that many multinationals have abused", as the business magazine put it.[4] Around the world, over 2,500 treaties are in force between states,[5] which give sweeping powers to foreign investors. This includes the peculiar privilege to directly sue states in international tribunals, without going through the local courts first. It also includes broad protections for investors, which are not balanced by the state's right to regulate, human rights or investor obligations. They allow companies to claim compensation for any actions by host governments that have allegedly damaged their investments, either directly through expropriation, for example, or indirectly through regulations of virtually any kind. And they can claim not just for the money that they actually invested, but for future anticipated earnings, too.

***ISDS gives unprecedented powers to unaccountable and often tax-dodging corporate investors to sue public authorities for vast sums of money for denting their profit-making abilities by legislating in the public interest.***

*UK trade union GMB*[6]

Investor-state claims are usually decided by a tribunal of three private lawyers, the arbitrators, who are chosen by the litigating investor and the state. Unlike judges, these for-profit arbitrators do not have a flat salary, but are paid per case. At the most often used tribunal, the International Center for Settlement of Investment Disputes (ICSID), arbitrators make US$3,000 a day.[7] In a one-sided system where only the investors can bring claims, this creates a strong incentive to side with them – because investor-friendly rulings pave the way for more lawsuits and more income in the future. Other conflicts of interest relate to the many different roles of the arbitrators, for example, when they act as arbitrator one day and as a lawyer for a party in another dispute the next, giving them another incentive to rule in favour of investors to encourage more cases and well-paid jobs.[8]

**BOX 1**

## SOME EMBLEMATIC INVESTOR-STATE LAWSUITS

**Corporations versus public health – Philip Morris v. Uruguay**: Since 2010, Philip Morris has been suing Uruguay on the basis of its bilateral investment treaty with Switzerland, a corporate tax haven. The tobacco giant challenges compulsory large-scale health warnings on cigarette packs and other tobacco control measures designed to reduce smoking, arguing that they prevent it from displaying its trademarks, causing substantial losses. Philip Morris demands US$25 million in compensation from Uruguay.[9]

**Corporations versus environmental protection – Vattenfall v. Germany I & II:** In 2009, Swedish energy multinational Vattenfall sued the German Government, seeking €1.4 billion in compensation for environmental restrictions imposed on one of its coal-fired power plants. The case, which was based on the Energy Charter Treaty (or ECT, an international agreement for cross-border co-operation in the energy industry), was settled after Germany agreed to weaken the environmental standards. In 2012, Vattenfall launched a second lawsuit via the ECT, seeking €4.7 billion for lost profits related to two of its nuclear power plants. The legal action came after Germany decided to phase out nuclear energy, following the Fukushima nuclear disaster.[10]

**Corporations versus action against financial crises – investors v. Argentina**: When, in response to its 2001-2002 economic crisis, Argentina devalued its currency and froze utility rates to secure people's access to basic services such as energy and water, it was hit by nearly 30 investor lawsuits and became the most-sued country in the world under investment arbitration. Big companies like Enron (US), Suez and Vivendi (France), and Anglian Water (UK) demanded multimillion compensation for revenue losses. So far, Argentina has been ordered to pay a total of US$900 million in compensation for its financial-crisis-related measures, with several cases still ongoing.[11]

**Corporations versus black empowerment – Piero Forsti and others v. South Africa**: In 2007, investors from Italy and Luxembourg sued South Africa over its Black Economic Empowerment Act, which aims to redress some of the injustices of the apartheid regime. It requires, for example, mining companies to transfer a portion of their shares into the hands of black investors. The dispute (under South Africa's bilateral investment treaties with Italy and Luxembourg) was closed in 2010, after the investors received new licenses, requiring a much lower divestment of shares.[12]

**Corporations against the minimum wage – Veolia v. Egypt**: Since 2012, French utility company Veolia has been suing Egypt based on its bilateral investment treaty with France for an alleged breach of a contract for waste disposal in the city of Alexandria. The city had refused to make changes to the contract which Veolia's subsidiary, Onyx Alexandria, wanted in order to meet higher costs – in part due to the introduction of a minimum wage. According to Veolia, the local police had also failed to prevent the massive theft of dustbins by the local population. Veolia reportedly wants at least €82 million in compensation.[13]

**Corporations against affordable access to water – United Utilities vs. Estonia**: In 2014, water company AS Tallinna Vesi together with its shareholder United Utilities B.V., a holding company registered in the Netherlands belonging to the UK's United Utilities group, sued Estonia based on the country's bilateral investment treaty with the Netherlands. The investors claim that Estonia breached its treaty obligations by refusing Tallinna Vesi's application to increase water rates. They are seeking compensation of over €90 million.[14]

**Corporations versus public health insurance – Achmea vs. the Slovak Republic:** In 2012, Dutch insurer Achmea (formerly Eureko) was awarded €22 million plus interest and legal fees in compensation from Slovakia. Achmea had sued Slovakia via its bilateral investment treaty with the Netherlands because, in 2006, the Slovak government had reversed the health privatisation policies of the previous administration and required health insurers to operate on a not-for-profit basis.[15]

**Corporations versus tax justice – Vodafone vs. India**: In 2014, British telecommunications giant Vodafone sued India through a Dutch subsidiary, on the basis of the country's investment treaty with the Netherlands. India's tax officials had ordered Vodafone to pay capital gains taxes for its acquisition of an Indian mobile phone company. Vodafone disagreed, arguing that the deal happened outside of India's jurisdiction. It had used several offshore firms for the acquisition.[16]

## MAKING GOVERNMENTS PAY FOR REGULATION

Since the late 1990s, the number of investor lawsuits against states has surged (see image 1 on page 19) – and so has the money involved (see box 2 on page 20). The last two decades have also seen a number of multimillion-dollar claims against the alleged damage to corporate profit of legislation and government measures in the public interest. Developed and developing countries on every continent have been challenged for financial stability measures, bans on toxic chemicals, revoking tax breaks, anti-smoking legislation, anti-discrimination policies, environmental impact assessments, and more (see box 1 on page 17).

***The investor-state dispute settlement puts companies' rights ahead of human rights. Its effects are devastating... – we must abolish it.***

*Alfred de Zayas, UN Expert on the Promotion of a Democratic and Equitable International Order*[17]

One crucial question for winning damages is whether these policies can be construed as 'equivalent to expropriation', even though an investor's assets – a factory or land, for example – were not physically taken. In international investment law, the definition of expropriation – once exclusively used for direct confiscation of property – has now been expanded to mean government action that damaged the earnings of corporations. According to an eye-opening article by journalist William Greider, enshrining this doctrine of 'indirect expropriation' into

trade pacts was part of "a long term strategy, carefully thought out by business" to re-define "public regulation as a government 'taking' of private property that requires compensation". The implications, according to Greider, are far-reaching – and that was exactly the intention: "Because any new regulation is bound to have some economic impact on private assets, this doctrine is a formula to shrink the reach of modern government and cripple the regulatory state – undermining long-established protections for social welfare and economic justice, environmental values and individual rights. Right-wing advocates frankly state that objective – restoring the primacy of property against society's broader claims."[18]

Research analysing over 650 investment disputes indeed shows that "most disputes today are not over direct takings, but over indirect expropriation. And most respondent-countries are not rent-seeking regimes with low rule-of-law, but stable democracies with independent judiciaries." The author concludes: "The greatest portion of legal challenges in the investment regime today seek compensation for regulatory measures implemented by democracies."[19]

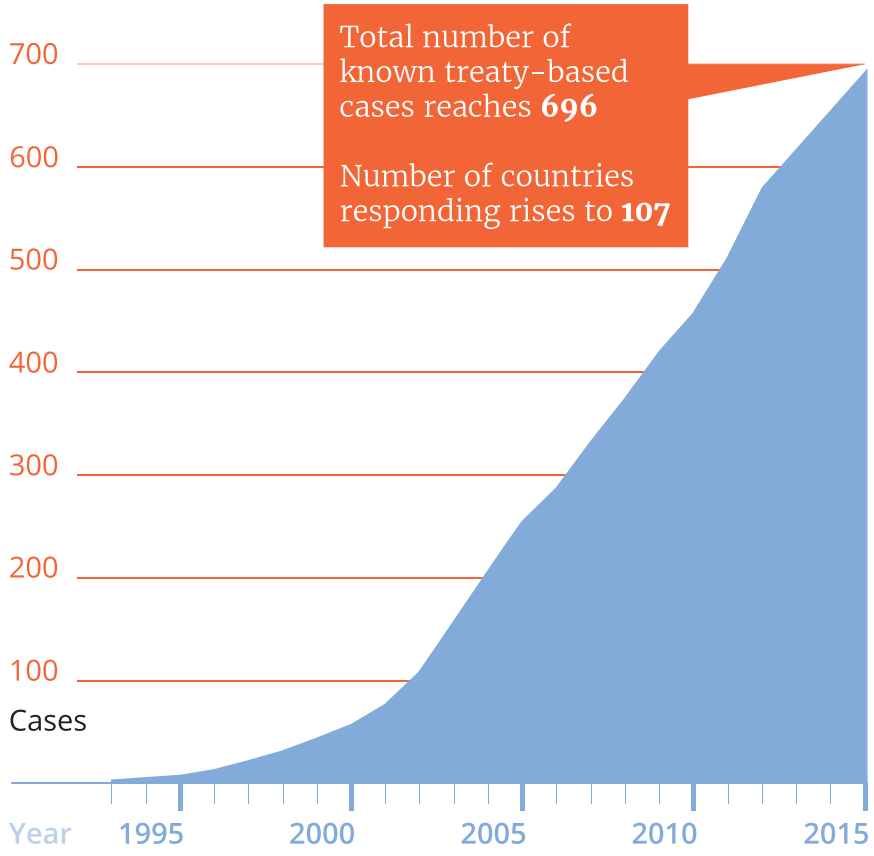



**Image 1: Deluge of disputes Cumulative number of cases**

Source: UNCTAD[20]

BOX 2

## INVESTOR-STATE DISPUTE SETTLEMENT (ISDS) IN FIGURES[21]

- Investor-state cases have mushroomed in the last two decades from a total of three known treaty cases in 1995 to a record high of over 50 new claims filed annually in the past five years. 2015 saw the absolute record high of 70 new ISDS cases.
- Globally, 696 investor-state disputes were counted as of 1 January 2016, against 107 countries, but due to the opacity of the system the actual figure could be much higher.
- 72 per cent of all known cases filed by the end of 2014 were against developing and transition countries.
- But lawsuits against developed economies are on the rise. In 2015, Western Europe was the world's most sued region.[22]
- Investors have triumphed in 60 per cent of investor-state cases where there has been an actual decision on the merits of the case, whereas states have 'won' xonly 40 per cent of the time (even through there isn't anything states can win because they only ever get awards against them).

> ***Claimants may gain even when they lose a challenge, if litigation can temper governments' regulatory ambitions.***
>
> *Professor Krzysztof Pelc,*
>
> *McGill University*[23]

- A quarter of launched ISDS cases end in settlement, most likely involving payments or changes in laws and regulations to appease disgruntled investors.
- Award figures may reach up to 10 digits. The highest known damages to date, US$50 billion, were ordered against Russia, to the former majority owners of oil and gas company Yukos.
- The main financial beneficiaries have been large corporations and rich tycoons: 94.5 per cent of the known awards went to companies with at least US$1 billion in annual revenue or to individuals with over US$100 million in net wealth.[24]

**94.5%** ***of the known awards went to companies with at least US$1 billion in annual revenue or to individuals with over US$100 million in net wealth.***

- Legal costs average roughly US$4.5 million for each side per case,[25] but can be much higher. In the case against Russia, Yukos' lawyers alone billed US$74 million and the tribunal's three arbitrators took US$ 7.4 million for themselves.[26] As legal costs are not always awarded to the winning party, states can end up footing the bill even if they don't lose.

## CRIPPLING COSTS FOR PUBLIC BUDGETS

Countries have indeed been asked to pay huge sums of money to companies under investor-state disputes – money which could have gone to the funding of hospitals, schools and other basic services for the population. In 2003, the Czech Republic paid a corporation US$354 million, then the equivalent of the country's health budget.[27] Ecuador has just started paying one of the highest known awards to date, US$1.1 billion to a US-based oil company.[28] This is one per cent of the country's GDP and 90 per cent of its social welfare expenses budgeted for 2015.[29] The legal fees for investor-state lawsuits alone can drain the public purse. According to media reports, the Philippine government has spent US$58 million on its defence against two lawsuits brought by the airport operator Fraport – money with which they could have paid 12,500 schoolteachers, vaccination for 3.8 million children against diseases such as TB, diphtheria, tetanus and polio or simply have built two new airports.[31]

***It's a lobbying tool in the sense that you can go in and say, 'Ok, if you do this, we will be suing you for compensation'. It does change behaviour in certain cases.***

*Peter Kirby of law firm Fasken Martineau about investor-state dispute settlement*[30]

## REGULATORY CHILL

Sometimes, the threat of an expensive dispute has been enough to freeze or delay government action, making policymakers realise they would have to pay to regulate. Canada and New Zealand, for example, delayed anti-smoking policies because of threatened or actually filed investor lawsuits from Big Tobacco.[32] Five years after NAFTA's foreign investor rights came into force, a former Canadian government official told a journalist: "I've seen the letters from the New York and DC law firms coming up to the Canadian government on virtually every new environmental regulation and proposition in the last five years. They involved dry-cleaning chemicals, pharmaceuticals, pesticides, patent law. Virtually all of the new initiatives were targeted and most of them never saw the light of day".[33]

As the number of investor-state disputes has grown, investment arbitration has become a money-making machine in its own right. Today, there are a number of law firms and arbitrators whose business model depends on companies suing states. Hence they are constantly encouraging their corporate clients to sue – for example, when a country adopts measures to fight an economic crisis.[34]

***Why do foreign investors have recourse to enforceable international law to assert their rights, whereas virtually no one else does?***

*Simon Lester, US right wing think tank Cato Institute* [36]

Meanwhile, sitting as arbitrators, investment lawyers have been found to adopt investor-friendly interpretations of the corporate rights in trade and investment deals, paving the way for more lawsuits against states in the future, increasing governments' liability risk.[35] Speculative investment funds, which have recently started helping fund investor-state disputes in exchange for a share in any granted award or settlement, are likely to even further fuel the boom in arbitration.[37]

## INVESTMENT ARBITRATION IN DIRE STRAIGHTS

The growing number of corporate lawsuits has raised a global storm of objection to investment treaties and arbitration. Public interest groups, trade unions, small and medium enterprises, and academics have called on governments to oppose investor-state arbitration, claiming it fails basic standards of judicial independence and fairness and threatens states' responsibility to act in the interest of their people, economic and social development and environmental sustainability.[38] Trade unions in particular have raised concerns about the glaring absence of investor obligations and the striking mismatch between highly powerful and enforceable corporate rights in international trade and investment agreements on the one hand and vague, non-enforceable feel-good language about labour and human rights on the other.

***ISDS affords large corporations a status akin to states in the context of international affairs, in that they have the privilege to directly sue democratically-elected governments in largely unaccountable adjudication processes. This can be usefully contrasted with the extremely limited (some would say absent) protections that are given to workers under those agreements.***

*Canadian Labour Congress* [39]

Proponents of free markets and trade, such as the right wing US think tank Cato Institute, too, have joined the opponents' camp criticising that "the ISDS approach of providing... protections *only for foreign investors*... is akin to saying in a domestic constitution that the only rights we will protect are those of wealthy property owners."[40] Remarkably, Germany's largest association of judges and public prosecutors (with 15.000 members of a total of 25.000 judges and prosecutors in the country) has recently raised similar concerns about granting exclusive rights and pseudo-courts to foreign investors, calling on legislators to "significantly curb recourse

to arbitration in the context of the protection of international investors".[41]

Some governments, too, have realised the injustices of investment arbitration and are trying to get out of the system. South Africa, Indonesia, Bolivia, Ecuador, and Venezuela have terminated several bilateral investment treaties (BITs). South Africa has developed a domestic bill that does away with some of the most dangerous clauses in international investment law. So does India's new model investment treaty.[43] Indonesia, too, is moving in a similar direction.[44] And in Europe, Italy has withdrawn from the Energy Charter Treaty (ECT) – a multilateral treaty created after the Cold War to integrate the energy sector of the former Soviet Union into Western markets – notably after having been hit and threatened with ECT-based claims in the renewables sector.[45]

***Our perspective on BITs has changed... It seems very much in favor of the investor. Our number one problem is ISDS.***

*Abdulkadir Jaelani, Indonesian ministry of Foreign Affairs*[42]

## WHY DID STATES SIGN INVESTMENT TREATIES?

This raises a compelling puzzle. Why did states sign investment treaties in the first place, significantly constraining their sovereignty? Why did they give private lawyers the exceptional power to review all their actions, to award expensive damages and restrict public regulation? The answer is complex and involves a mix of interests, wrong expectations, and lack of awareness. First, capital-exporting countries arguably have an interest in increasing the leverage of 'their' companies abroad. Second, above all developing countries expected that the treaties would bring more foreign investment – even though that belief was never backed by any clear evidence and remained mostly unfulfilled in practice (see box 3 on page 25). Third, in many governments around the world, there was – and arguably still is – a lack of awareness of the political and economic risks of investment treaties. In fact, governments often entirely misunderstood them – until they were hit by a claim.

***Like most countries in the 1990s, we signed a lot of treaties not knowing sometimes what we were committing ourselves to.***

*Former Chilean negotiator*[46]

There is a fascinating account of the lack of awareness of investment treaties' implications from political scientist Lauge Poulsen, who travelled the world to ask government officials why they signed. The astonished reader of his book[47] will learn that, in the past, negotiations for an investment treaty often lasted only a couple of hours. Sometimes not even lawyers, let alone officials from ministries of

justice, were involved. Occasionally, the main reason to sign a treaty was "during visits of high level delegations to provide for photo opportunities".[48] When Pakistan was first sued in 2001, based on a bilateral treaty with Switzerland from 1995, no one in the government could find the text and had to ask Switzerland for a copy. Poulsen concludes that "the majority of developing countries... signed up to one of the most potent international legal regimes underwriting economic globalization without even realizing it at the time".[49] They only understood it many years later when they became the target of a lawsuit.

***I have heard several representatives who have actually been active in this Treaty-making process... say that, 'We had no idea this would have real consequences in the real world'.***

*Arbitrator Christoph Schreuer* [50]

## ISDS AT A CROSSROADS

At a time when both the number of supersized investor lawsuits and the types of policies being attacked are surging, and more and more governments are trying to change or exit from the investment arbitration system, an even bigger threat looms on the horizon. A number of mega-regional treaties involving close to 90 countries are currently under negotiation,[51] which threaten to massively expand the ISDS regime, subjecting states to an unprecedented increase in liability.

**BOX 3**

## BUSTING THE MYTH THAT INVESTMENT TREATIES DO BRING INVESTMENT

Proponents of investment protection treaties regularly claim that they help to attract investment. In its factsheet on the issue, the European Commission, for example, argues that "by giving each other's investors more certainty when they do invest", the investment chapter of the proposed EU-US trade deal TTIP will create "more investment opportunities in the EU and the US".[52] Business lobby groups such as the International Chamber of Commerce (ICC) also routinely declare that "strong investment protection standards should be a policy priority for all governments in order to promote new waves of prosperity-enhancing FDI" (foreign direct investment).[53]

But the problem is that there is no clear evidence that investment agreements do attract investors. While some econometric studies find that the treaties do attract investment, others find no effect at all – or even a negative impact.[54] Qualitative research suggests that the treaties are not a decisive factor in whether investors go abroad.[55] In a response to a Parliamentary question, EU Trade Commissioner Cecilia Malmström also admitted that "the Commission is aware that most studies do not establish a direct and exclusive causal link" between the treaties and investment.[56]

Governments have also begun to realise that the promise of foreign investment has not been fulfilled. After South Africa cancelled some of its bilateral investment treaties (BITs) with EU member states from the 1990s, a government official explained: "South Africa does not receive significant inflows of FDI from many partners with whom we have BITs, and at the same time, continues to receive investment from jurisdictions with which we have no BITs. In short, BITs have not been decisive in attracting investment to South Africa."[57]

This has also been the experience in other countries: Brazil is receiving the largest amount of FDI in Latin America[58] – even though it has never ratified a treaty allowing for investor-state dispute settlement. Hungary is one of two EU member states in Central and Eastern Europe without an investment treaty with the US – but has nonetheless been amongst the biggest recipients of US FDI in the region for the past ten years.[59] The nine EU members with a treaty with the US, on the other hand, hold only one per cent of all US-originated investment in the EU.

> ***BITs are not magic wands, the wave of which produces, with a poof and a cloud of smoke, a foreigner with pockets stuffed with cash.... If developing countries wish to attract foreign investment, they probably need to do something other than sign and ratify BITs.***
>
> *Professor Jason Yacke, University Wisconsin Law School* [60]

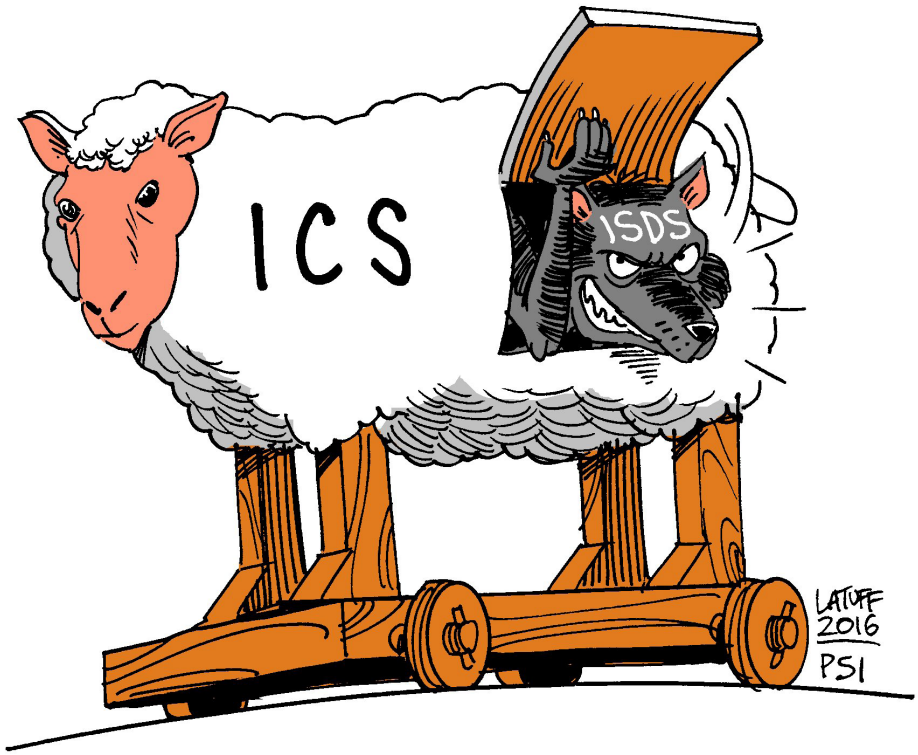
More importantly, it is now widely acknowledged that while FDI *may* contribute to much needed development, the benefits are not automatic.[61] Regulations are needed to avoid the risks that FDI can pose to the environment, labour standards, local communities, a country's balance of payments etc. And in general, investment agreements "are not designed to address such issues, as their overriding focus is to protect foreign investment," as an official of the Government of South Africa put it. He explained: "In fact, (international investment agreements) are structured in a manner that primarily imposes legal obligations on governments to provide wide-ranging rights protection to investment by the countries that are party to the treaty. This pro-investor imbalance can constrain the ability of governments to regulate in the public interest."[62]

***While the system is in the state it's in right now, signing any new treaty is a very serious mistake. You have to weigh the benefits against the burdens. Somebody at some point might be able to explain to me where all the benefits are, but I certainly haven't seen any.***

*George Kahale III, lawyer who has defended countries in ISDS claims*[63]

These treaties include the Trans-Pacific Partnership (TPP), which was concluded in 2015 between 12 Pacific countries including the US and Japan; the Regional Comprehensive Economic Partnership (RCEP) under negotiation by 16 Asia and Pacific economies; the Tripartite Free Trade Agreement (TFTA) which is being negotiated by 23 African economies; a number of bilateral deals, including the US-China and the EU-China investment treaties, and the proposed Transatlantic Trade and Investment Partnership (TTIP) between the EU and the US.

A recent analysis estimated that while all existing investment agreements cover only 15-20 per cent of the global investment flows, these new treaties would increase this coverage to approximately 80 per cent, multiplying the risk of governments being sued as a result of public policy measures.[64] TTIP alone would dwarf all of the existing treaties allowing for investor-state dispute settlement. For example, in one fell swoop, it could multiply the number of US-based corporations that could challenge European labour, health, and other public safeguards in international tribunals by a factor of eleven (see box 4 on page 30).




## CHAPTER 3

# THE CORPORATE TROJAN HORSE: ICS, THE EU PROPOSAL FOR INVESTOR PRIVILEGES IN TRADE AGREEMENTS

**In Greek mythology, the Greeks win the war against the city of Troy with a trick. After a fruitless siege, they pretend to desert the war, but instead hide some of their warriors in a huge hollow wooden horse. They manage to convince the Trojans to pull the horse into their city. But at night, the Greek forces creep out, open the gate for the rest of their army and destroy the city. Like in this ancient story, after three years of massive public concern over ISDS, the European Commission has now also built a deceptive Trojan Horse. The Commission's proposed Investment Court System or ICS is to give cover to a massive expansion and lock in of the same much-loathed ISDS regime.**

***The TUC is strongly opposed to ISDS. We believe that it is unacceptable in principle for foreign investors to have privileged access to a separate dispute resolution system from everyone else.***

*Trade Union Congress in the UK in its contribution to the Commission's ISDS consultation*[65]

The extent of the opposition to the once-arcane ISDS became clear in early 2015, when the Commission published the results of a public consultation on the rights for foreign investors in the EU-US trade deal TTIP currently under negotiation: over 97 per cent of the record 150,000 participants had rejected the corporate privileges. The outcry came from a broad and diverse camp, including businesses, local and regional governments, academics, trade unions, and other public interest groups.[66] Even more people, over 3.3 million Europeans, have signed a petition against TTIP and the already concluded EU-Canada deal CETA "because they include several critical issues such as investor-state dispute settlement... that pose a threat to democracy and the rule of law".[67]

*To get around the public anger that has been generated by ISDS*, the European Commission went for a new label when it presented a revised proposal for all ongoing and future EU trade negotiations in autumn 2015. Instead of "the old, traditional form of dispute resolution" which "suffers from a fundamental lack of trust", Trade Commissioner Malmström promised "a new system built around the elements that make citizens trust domestic or international courts". The new talk in town was 'ICS': the 'Investment Court System' – a system that allegedly would "protect the governments' right to regulate, and ensure that investment disputes will be adjudicated in full accordance with the rule of law," as Commission Vice President Timmermans claimed.[69]

***Improving the international investment protection system requires a new start instead of relying on reforms of the current system.***

*European Trade Union Confederation (ETUC) contribution to the EU's 2014 consultation on ISDS*[68]

## THE GREAT REBRANDING

The problem with these positive claims are that what the EU is proposing simply copies in many ways the investment arbitration proceedings of the past. For example, investor-state lawsuits under future EU treaties would still operate under the usual ISDS arbitration rules.[70] This is why, according to international investment law expert Gus van Harten from Osgoode Hall Law School in Canada, "ICS is mainly a re-branding exercise for ISDS".[71]

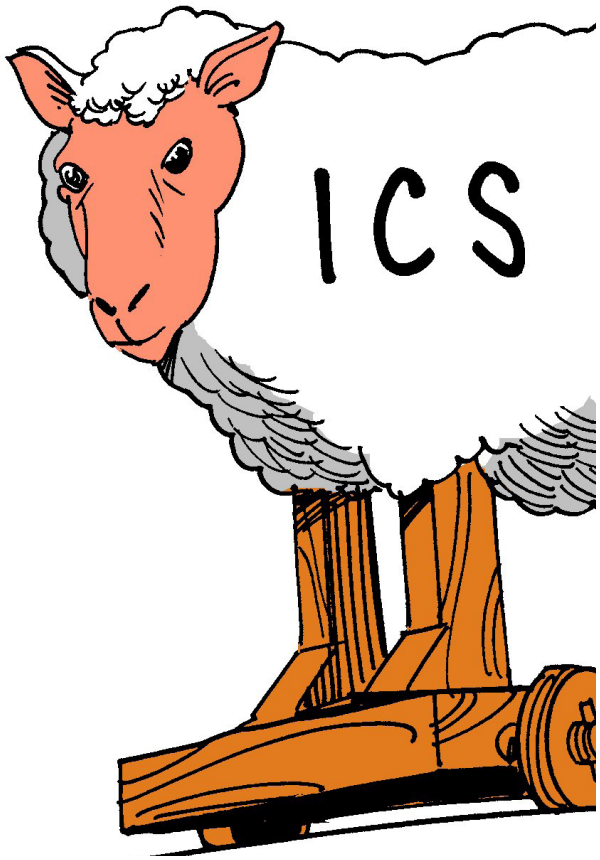
Van Harten has also warned that the EU's use of court language could distract from the fact that an inclusion of ISDS in trade deals such as TTIP would massively expand the scope of foreign investor

protection. He writes: "If the TTIP is concluded, it would roughly triple the scope of the foreign investor protection system beyond all existing ISDS treaties. It would also expand greatly the exposure of the United States and Western European governments to ISDS." In addition, there would be a lock-in effect as the inclusion of ISDS in large trade deals on which economies can become dependent over time "would make it practically impossible for countries to withdraw from ISDS by terminating the hundreds of bilateral investment treaties that allow for ISDS".[73]

***I worry that the European Commission is using the language of an international investment court to give cover for a huge expansion of ISDS.***

*Professor Gus Van Harten, Osgoode Hall Law School*[72]

Under TTIP, more than 47,000 companies would indeed be newly empowered to sue (compared to around 4,500 today); 19 more EU countries could directly be sued by US investors (compared to only 9 with an investment treaty with the US today); TTIP would cover 99 per cent more US-based investment in the EU (up from only 1 per cent under existing treaties). Based on the existing treaties, US investors have sued EU member states at least 9 times. If the number of cases is taken as proportional to the treaty-covered investment flows, this case record suggests that TTIP could invite the launch of nearly 900 US investor lawsuits against EU member states.[74]



**BOX 4**

## WHAT WOULD THE ICS MEAN IN TTIP?[75]

The Transatlantic Trade and Investment Partnership or TTIP currently under negotiation by the EU and the US is set to become the biggest trade deal ever. If TTIP included the far-reaching investor rights proposed by the EU, it would massively expand the investment arbitration system. The liability and financial risks for EU member states would multiply and would far exceed those posed under any existing treaty signed by them.

- So far, only 9 EU member states, all of them Eastern European, have a bilateral investment treaty with the US.[76] These treaties cover a mere 1 per cent of US investment in the EU. The ICS proposal would bring that coverage to 100 per cent of US investment in the EU, as it would cover and make liable all 28 member states.
- Of the 51,495 US-owned subsidiaries currently operating in the EU, more than 47,000 would be newly empowered to launch attacks on European policies in international tribunals. So, the ICS in TTIP would increase the number of potentially litigating US investors by a factor of eleven.
- Based on the existing treaties (covering just 1 per cent of US-based investment in the EU), US investors have sued EU member states at least 9 times. If the number of cases is taken as proportional to the treaty-covered investment flows, this case record suggests that the ICS in TTIP could invite the launch of nearly 900 US investor lawsuits against EU member states.

**28 EU countries could be sued directly**
compared to only **9** today

**100% of US investment in the EU covered**
compared to only **1%** today


**51,495 companies could sue directly**
compared to **4,500** today

**Nearly 900 investor lawsuits could hit EU countries**
compared to **9** known claims today

## THE GREAT COURT SWINDLE

Citing flaws in the proposed appointment procedure for the so called 'judges' and doubts about their financial independence, Germany's largest association of judges and public prosecutors has also questioned the EU's rebranding of ISDS as a 'court system'. "Neither the proposed procedure for the appointment of judges of the ICS nor their position meet the international requirements for the independence of courts", the judges wrote in a February 2016 statement. "Against this background, the ICS appears not as an international court, but rather as a permanent court of arbitration."[78]

***Of course, this does not go the whole way to creating a permanent investment court, with permanent judges who would have no temptation to think about future business opportunities.***

*European Trade Commissioner Cecilia Malmström*[77]

In fact, one cannot even find a court in the "Investment Court System" proposal. What it foresees for the resolution of investor-state claims is a "tribunal" with fifteen so called "judges". To ensure their availability, they would get a retainer fee of €2,000 per month. On top of that they would be paid per case – with lucrative US$3,000 per day.[79] On which the European Association of Judges commented: "As the judges do not have to expect a proper salary, their financial independence is in danger".[80] Put differently: the EU proposes that investor lawsuits against governments would be decided by 'judges' under a strong incentive to interpret the law in favour of the investor – as that would make it easier for investors to bring and win claims in the future and mean more cases and income for the 'judges'.

***Neither the proposed procedure for the appointment of judges of the ICS nor their position meet the international requirements for the independence of courts.***

*Deutscher Richterbund, Germany's largest association of judges and public prosecutors*[81]

European Trade Commissioner Malmström seems to be well aware of the glaring absence of an independent 'court' in her proposal. When she outlined the Commission's thinking six months before the formal proposal was published, she told the European Parliament: "Of course, this does not go the whole way to creating a permanent investment court, with permanent judges who would have no temptation to think about future business opportunities."[82]

## ICS & ISDS: EQUALLY DANGEROUS TWINS

So, what is in the EU proposal if not a court? What is inside the ICS Trojan Horse? With the exception of some procedural improvements – an enhanced selection process of arbitrators (misleadingly re-labelled 'judges') and the establishment of an appellate chamber – the EU's 'new' ICS essentially equals the 'old' ISDS system which can be found in existing investment treaties (for a detailed comparison of key features see Annex 1 on page 49). The ICS proposal contains the same far-reaching investor rights that multinationals have used when demanding multi-billion Euros in compensation for policies that protected people and the planet. As a result, it contains the same serious risks for taxpayers, public interest policies, and democracy as the 'old' ISDS-system.

### DANGER #1: the EU proposal would empower tens of thousands of companies to sue

***The Commission proposal does not prevent the phenomenon of treaty shopping. Parallel claims by parent companies and subsidiaries are possible.***

*Professor Markus Krajewski & Rhea Tamara Hoffmann, University of Erlangen-Nürnberg*[84]

The European Commission proposal for investment protection would allow foreign investors operating in the EU and EU-based investors operating abroad to circumvent national legal systems and file lawsuits in international tribunals[83] – whenever they think that state actions violate the far-reaching 'substantive' investor rights that the EU proposes.

Because of the open ended meaning of the terms 'investor' and 'investment', transnational companies could even sue their *own* governments – by structuring their investment through a subsidiary abroad. A recent analysis of the EU proposal finds: "If a parent company has structured its investment in the host country through one or several holding companies in other countries, each of these holdings can sue (even in the case of minority shareholders) if the respective countries have an investment treaty with the host state".[85] As corporations' global reach has expanded, big business and its corporate lawyers are actively engaged in this practice called "corporate structuring for investor protection". According to law firm Freshfields it "now takes place alongside tax planning as investments are made" and existing investments are "audited for risk optimisation".[86]

## DANGER #2: the EU proposal would allow for lawsuits against public interest measures

The EU's proposal contains the same wide-ranging so-called 'substantive' rights for investors as existing treaties, which have been the legal basis for investor attacks against perfectly legitimate and non-discriminatory government policies to protect health, access to essential services, economic stability, and other public interests. For example:

***I actually think, from the perspective of the greedy, avaricious lawyer, that's a very good obligation to work with.***

*Jonathan Kallmer of law firm Crowell Moring on the EU's fair & equitable treatment formulation*[87]

- The EU proposes that investors should be protected against ***indirect expropriation*** (section 2, article 5). From an investor-friendly view, almost any law or regulation can be considered an indirect 'expropriation' when it has the effect of reducing profits. For example, in one claim on the basis of the North American Free Trade Agreement (NAFTA), the arbitrators ruled that Mexico had expropriated US-investor Metalclad and ordered the country to pay US$16.2 million in compensation – because the denial of a permit for a toxic waste disposal facility and a law converting the site's area into a nature reserve significantly interfered with the company's property. The arbitrators explicitly argued that the impact of the decisions was enough to determine the existence of expropriation, and that the objectives of the Mexican authorities didn't matter.[88] Contrast this with the fact that, in most of the world's jurisdictions only *direct* expropriations – like a government taking your land or factory – create a right to compensation.
- The EU proposes that investors should be treated in a ***fair and equitable*** way (section 2, article 3). This catch-all clause has proven most dangerous for taxpayers and regulators as arbitrators have interpreted it in a way that it is nearly impossible for states to fulfil and de facto requires them to pay compensation when they change the law. For example, in another NAFTA case against Mexico, where the environmental agency had refused to re-license a hazardous waste landfill, the arbitrators found that Mexico had breached the fair and equitable treatment standard because different authorities had not always acted "free from ambiguity and totally transparent" and had affected "the basic expectations that were taken into account by the foreign investor to make the investment".[89]

***Previous attempts to regulate public services have already been targets of ISDS claims by private providers, and CETA threatens to continue this trend – rendering sectors including education, water, health, social welfare and pensions vulnerable to all kinds of investor attacks.***

*European Public Services Union EPSU on ICS in the EU-Canada trade deal CETA*[90]

Compared to many of the existing investment treaties, which have already lead to hundreds of investor-state lawsuits around the world, the EU proposal would arguably broaden the rights of foreign investors, increasing the risks of costly lawsuits against desirable policies. For example:

- Past investment tribunals have interpreted fair and equitable treatment as requiring governments to pay investors for policy changes that do not conform to their 'expectations'. By writing the protection of investors' ***legitimate expectations*** explicitly into the clause (section 2, article 3.4), the EU risks codifying this extremely broad interpretation of the standard as a 'right' to a stable regulatory environment. This would give investors a powerful weapon to fight regulatory changes, even if implemented in light of new knowledge or democratic choice. Explicit protections of investors' legitimate expectations are generally not part of existing treaties.
- The EU also proposes a type of the dangerous ***umbrella clause*** (section 2, article 7). This would lift all private contracts of a state and its entities with regards to an investment to the level of international law, multiplying the risk of costly lawsuits. Imagine, for example, a contract between a city and a foreign investor operating its water system. If the investor felt that the municipality breached any of the rights it was given in the contract, the umbrella clause would empower the investor to sue the state in an international investment tribunal – even if the contract required that problems between the investor and the city would need to be solved in domestic courts. The umbrella clause is not part of the CETA agreement between Canada and the EU. It was rejected by Canada, whose treaties do not feature such a clause.

***ISDS may also have an indirect effect on labour regulations based on collective agreements.***

*Professor Markus Krajewski, University of Erlangen-Nürnberg*[91]

While investment arbitration supporters regularly claim that it only protects against discrimination, the above listed rights show that the EU proposal goes much further. With these extreme corporate rights, many past and ongoing egregious investor challenges against measures to protect people and the planet could still take

place (see, for example, box 5 on page 36). Having voted for measures such as bans on dangerous chemicals, a minimum wage, or measures to limit pollution, citizens could then find themselves on the hook to pay millions in compensation to investors.

***It is particularly problematic that there is a possibility that investors challenge long lasting strikes because they consider them a threat to the security of their investment.***

*German trade union confederation DGB*[92]

Investors could even sue states for actions in line with their constitution and laws – like tobacco giant Philip Morris which continues its investor-state claim against Uruguay even though the country's highest court has found its anti-smoking policy lawful.[93] This is possible, because, as environmental law group ClientEarth explains, foreign investor rights such as those proposed by the EU "are explicitly created to give... foreign investors an additional remedy and additional individual rights against the state irrespective of the legality of the measure under domestic law".[94] In other words: the investor rights are a backdoor for aggrieved multinationals to opt-out of domestic courts and seek more advantageous outcomes from parallel corporate pseudo-courts tilted in their favour.

## DANGER #3: Labour regulations, collective bargaining and agreements between the social partners could become targets of investor claims under the EU proposal.

While agreements between private parties could not be challenged directly (as the EU's investor rights only apply to activities or inactivity of the state), this changes once the state becomes party to a collective agreement or transforms it into law. An investor could also claim that the lack of state action in the context of a collective agreement violates certain provisions in the EU proposal.[95]

***It seems to me that we have given foreign investors an opportunity to challenge just about any government behaviour that they do not like.***

*Simon Lester, US right wing think tank the Cato Institute*[96]

Similarly, an investor could argue that the inactivity of a state in a long-lasting strike violated its right to full protection and security, another provision in the EU proposal. Newly introduced obligations for worker participation in supervisory boards could be challenged, too, as an investor could claim that the blockade of certain company decisions through labour representatives constitutes an indirect expropriation.[97]

**BOX 5**

## CASE STUDY OF PHILIP MORRIS VS. URUGUAY: UNDER ICS, COULD BIG TOBACCO SUE EU MEMBER STATES OVER ANTI-SMOKING LEGISLATION?

Some EU and member state officials have claimed that investor attacks against decisions to protect public health and the environment would no longer be possible under the EU's 'reformed' investor rights regime, the so called Investment Court System or ICS.[98] Let's look at one such lawsuit – Philip Morris International's (PMI) claim against tobacco control policies in Uruguay[99] – and assess whether the tobacco giant could develop the same case on the basis of the Commission's new proposal for a rebranded ISDS.[100]

PMI claims that the anti-smoking legislation enacted by the Uruguayan government, in particular the ban on selling more than one type of cigarettes under a single brand name and the requirement that graphic warnings about the risks of smoking cover at least 80 per cent of the cigarette pack, "go far beyond any legitimate public health goal"[101] and deprive PMI's trademark from its commercial value. PMI demands US$25 million in compensation.[102]

> ***Something is fundamentally wrong in this world when a corporation can challenge government policies introduced to protect the public from a product that kills.***
>
> *Dr Margaret Chan, General Secretary of the World Health Organization (WHO)*[103]

Among PMI's key claims is that Uruguay breached **the fair and equitable treatment** standard in the country's investment treaty with Switzerland because the anti-smoking laws were "excessive", "unreasonable" and "arbitrary", bearing "no rational relationship to the Government's public health policy".[104] According to PMI much less shocking or smaller images, for example, would have been enough to warn people of the health effects of smoking. It is difficult to see why this would not be an argument that Big Tobacco could get away with under an EU treaty which would grant "fair and equitable treatment", including against measures that constitute "manifest arbitrariness" (section 2, article 3.2 of the EU proposal)?

According to PMI, Uruguay's tobacco control measures also had an effect **equivalent to expropriation** of its registered trademarks – it robbed the company from its intellectual property rights and "destroy(ed) the goodwill associated with the... trademarks, thereby depriving them of their commercial value".[105] The same point could be made under a future EU treaty requiring compensation for "measures having an effect equivalent to... expropriation", including "for a public purpose" (section 2, article 5.1).

But **in annex I** of the EU's ICS proposal, it clarifies that "non-discriminatory measures... designed and applied to protect legitimate policy objectives, such as the protection of public health, safety, environment or public morals... **do not constitute indirect expropriations**". Would that render PMI's expropriation point meaningless? Not necessarily. PMI questions that Uruguay's anti-smoking laws were driven by a legitimate public policy objective, arguing that they were "excessive" and "do not bear any rational relationship to a legitimate governmental policy".[106] Ultimately, it would be up to the tribunal to interpret these claims and assess the company's arguments, leaving the door open for the lawsuit to be successful.

***Foreign investors should not have the ability to target laws designed to promote public health, financial stability, environmental protections and worker rights. Matters of broad public interest should not be viewed through the narrow lens of trade and investment at all.***

*US trade union federation AFL-CIO* [107]

The EU also wants to protect an investor's "**legitimate expectation**". Again, PMI is arguing along those lines. The company claims that Uruguay "failed to maintain a stable and predictable regulatory framework consistent with Philip Morris legitimate expectations".[108] According to PMI, Uruguay has actively "encouraged" the company to continue investing over the past 30 years, and "to expand its operations by granting Abal (PMI's local subsidiary) a generous package of tax exemptions and credits in furtherance of Abal's plan to make capital investment in the Uruguayan factory to upgrade the machinery".[109] Arguably these points sound like an investor could consider them "specific representations" by a state, which "created a legitimate expectation... upon which the investor relied in deciding to make or maintain" an investment and which the state "subsequently frustrated", as the EU proposal reads (section 2, article 3.4)?

But what about the EU's proposed **formulation on the right to regulate**? It states that the investor rights "shall not affect the right of the Parties to regulate within their territories through measures *necessary* to achieve legitimate public policy objectives" (section 2, article 2.1). Wouldn't this prevent an investor lawsuit such as PMI's? Not really. While the Uruguayan government might have considered its tobacco control measures *necessary* to reduce smoking and protect public health, PMI is questioning this necessity, arguing that "the same policy objective could have been achieved with a narrower and more appropriately tailored measure", for example, smaller or less shocking health warnings. PMI also claims that "many of these pictograms are not designed to warn of the actual health effects of smoking; rather they are highly shocking images that are designed specifically to invoke emotions of repulsion and disgust, even horror".[110] Given the concerns about the lack of judicial independence how confident can we be that a similar claim against an EU member state would not be upheld?

***This hardly generates any meaningful constraint on the power of investment lawyers and tribunals.***

*Professor David Schneiderman, University of Toronto, on the EU's right to regulate formulation* [111]

PMI demands that Uruguay suspends the legislation and that it pays "**compensation for loss of revenue and profit**".[112] The first demand would not be possible under an investment treaty as proposed by the Commission, under which an arbitral tribunal "may not order the repeal, cessation or modification of the treatment concerned" (section 3, article 28.1). But Big Tobacco could demand compensation – including for alleged lost future profits. The damages could go into billions. While the Commission explicitly excludes that possibility for decisions around subsidies (section 2, article 2.4), it does not shield "measures necessary to achieve legitimate policy objectives" (section 2, article 2.1) from crippling compensation awards. [113]

We cannot know how a potential future PMI-like claim against the EU or a member state would be decided (the company would only need to win one of its arguments for a tribunal to order compensation). And we don't know what kind of chilling effect it would have on anti-smoking legislation around the world (as the case against Uruguay and a similar claim against Australia already did [114]). But it is pretty clear that the investor rights as proposed by the European Commission would not prevent such a case from being filed.

## DANGER #4: the EU proposal paves the way for billions of taxpayers' money paid to corporations

***The Commission proposal does not rule out that regulatory measures in the public interest such as labour, social and environmental protection laws can lead to financial liabilities.***

*Professor Markus Krajewski & Rhea Tamara Hoffmann, University of Erlangen-Nürnberg*[116]

Once an investment tribunal finds that a state has violated the investors' rights – and being found to be in breach of just one of them is enough – based on the EU proposal, it could order vast amounts of public money paid to compensate the investor.[115] As there is nothing in the text that puts limits on how much a company can sue for, the multi-million and billion lawsuits already on the table around the world are set to continue. They can be enforced by seizing state property in many countries and can drain public finances, with the effect of squeezing coverage of universal public services, lowering their quality and increasing pressure to privatise.

***Even in a case where the arbitrators find there was a violation by the state, the state is sovereign and does not have to change law or regulation. Although of course it might have to pay compensation.***

*Stuart Eizenstat, law firm Covington & Burling and former US ambassador to the EU*[119]

One of the highest known awards to date, US$1.06 billion plus interest, was made against Ecuador.[117] This is one per cent of the country's entire GDP and 90 per cent of the money for social welfare in Ecuador's 2015 budget.[118] In 2003, the Czech Republic had to pay a corporation US$354 million – reportedly the equivalent of the country's national health budget at the time.[120] Not to mention the highest known damages to date, US$50 billion, which were ordered against Russia to the former majority owners of oil and gas company Yukos. To date, this public money has overwhelmingly gone to super-rich corporations and individuals (see box 2 on page 20).

Tribunals often order compensation for expected future profits, as with a case against Libya which was ordered to pay US$900 million for "lost profits" from "real and certain lost opportunities" of a tourism project, even though the investor had only invested US$5 million and construction had never started.[121]

Nothing in the EU's proposal would prevent these potentially crippling costs. And nothing would stop tribunals from ordering compensation for new laws and regulations in the public interest. Quite the contrary: while the EU text on the right to regulate states that

countries cannot be ordered to compensate investors for withdrawing subsidies (section 2, article 2.4), it does not rule out such orders for "measures necessary to achieve legitimate policy objectives" and "change(s) in the legal and regulatory framework" (section 2, articles 2.1 and 2.2).[122]

***Faced with billions of dollar ISDS lawsuits, especially in these times of crisis and austerity, many states will simply feel they have no other choice but not to regulate in the public interest so as to avoid the wrath of corporate giants.***

*UK trade union GMB*[123]

In other words, the EU, its member states and its trading partners will be free to regulate how they want – but somewhere down the road any law or regulation could cost them billions. This puts a "huge price tag" on political decisions as investment law expert Gus van Harten has put it – and makes it potentially very costly for politicians to change course if things go badly or voters want change.[124]

## DANGER #5: the EU proposal could curtail desirable policymaking

Under the new EU proposal, investment tribunals could not order governments to reverse or rewrite a law (section 3, article 28.1). But it doesn't take much to imagine how, by empowering multinationals to claim eye-watering sums in compensation for public decisions, the investor rights could make politicians reluctant to enact desirable safeguards for workers, public health, and the environment if those are opposed by big business.

***In considering whether to bring a claim... investors should bear in mind that around 30 to 40 per cent of investment disputes typically settle before a final award is issued. Commencing a claim can create leverage to help the investor reach a satisfactory result.***

*Law firm Dentons' "practical tips" for foreign investors*[125]

When it gets costly to be sued, any government would try to minimise the legal risk. An investment lawyer and arbitrator explains: "No state wants to be brought under a treaty to an international process. It has an impact upon diplomatic relations, it may have an impact upon a state's credit standing and it may have a direct impact deterring future foreign investment. As a practitioner, I can tell you that there are states who are now seeking advice from counsel in advance of promulgating particular policies in order to know whether or not there is a risk of an investor-state claim."[126] And if there is, they might think twice.

Indeed, there is already evidence that proposed and adopted laws on health and environmental protection have been abandoned, delayed or otherwise adapted to the wishes of big business because of expensive corporate claims or the threat of litigation. Examples of such

***These protections can be used as a basis for preventing wrongful state conduct in the first place. As such, they may be a highly important tool for foreign investors and industry associations in advocating against legislative changes.***

*Law firm Steptoe & Johnson about foreign investor protection*[128]

regulatory chill include the downscaling of environmental controls for a coal-fired power plant when Germany settled a claim by Swedish energy company Vattenfall (see box 1 on page 15) and the delayed implementation of anti-smoking rules in Canada and New Zealand, following lawsuit threats and actual claims by Big Tobacco.[127]

It is commonly held that the threats of expensive lawsuits against governments have become more important and occur more frequently than actual claims. Behind closed doors, multinationals openly admit that, for them "ISDS is important as it acts as a deterrent" for decisions they dislike, as lobbyists of US oil giant Chevron framed it in a meeting with EU negotiators in spring 2014.[129] Specialised arbitration law firms, on the other hand, constantly encourage their multinational clients to use the ISDS weapon to scare governments into submission.

***Some of the biggest improvements in population health come through legislation such as minimum drinking ages, compulsory seat belts, un-leaded petrol and minimum living wages... ISDS will mean that governments are less likely to legislate for change for fear of being sued in areas where such legislation might affect the profits of big business. We cannot support this... we oppose ISDS.***

*Open letter of nurses, midwives and healthcare workers*[131]

Scholars such as David Schneiderman from the University of Toronto have aptly described the anti-democratic character of international investment treaties as: "an emerging form of supraconstitution... designed to insulate economic policy from majoritarian politics".[130] Others have called the international investment regime an oversized "public insurance program for foreign investors against the risks that come from democracy, politics and judicial decision-making in countries all over the world."[132]

## DANGER #6: the EU's proposed dispute resolution process is slanted in favour of investors and commercial interests

The dispute settlement process proposed by the EU is not judicially independent, but has a built-in, pro-investor bias. Lawsuits would be decided by a tribunal of three for-profit arbitrators (misleadingly re-labelled 'judges' by the EU) with vested interests. Unlike judges, they would not have a fixed salary, but be paid per case – with lucrative US$3,000 per day, on top of a monthly retainer fee of

€2,000 per month.[133] So, they would earn more fees as more foreign investor claims were brought.

In a one-sided system where only the investors can sue, this creates a strong systemic incentive to side with them – because as long as the system pays out for investors, more claims and more money will be coming to the arbitrators. An empirical study of 140 investment treaty cases until May 2010 indeed reveals that arbitrators have vastly extended foreign investors' rights through expansive interpretations of the law.[135]

***The provisions for the election, time of office and remuneration for the judges of the Investment Court System do not meet the minimum standards for... the independence of judges.***

*European Association of Judges*[134]

The investor bias would remain if the EU and its trading partners eventually introduced a regular salary for the arbitrators. Even without a financial incentive adjudicators would be under a strong incentive to favour those able to bring claims – because in a one-sided legal system claimant-friendly decisions secure a steady flow of cases, power and authority for them. So, the problem lies in the one-sidedness of the investor rights: one side, typically large companies or wealthy individuals, get exceptionally powerful and actionable rights while the other side, the people of a country, get only responsibilities. Under the EU proposal, the latter would not even have the right to legal standing, to be able to participate equally in proceedings if those affected them directly – for example, a trade union engaged in a long-lasting strike challenged by an investor.[137]

***ISDS chapters are anomalous in that they provide protection for investors but not for States or for the population.***

*Open letter of ten independent UN experts and special rapporteurs*[136]

There are other flaws which make the EU proposal prone to bias. For example, there are no cooling-off periods for the pre-agreed arbitrators who would decide future investor-state claims. They could go straight from lawyer to judge, and back again. So, the very same private lawyers who have until now driven the boom in investment arbitration and grown their own business – by encouraging investors to sue and by interpreting investment law expansively to encourage more claims[138] – could simply walk through the revolving door and become the EU's new 'super-arbitrators', potentially deciding cases with the interests of previous clients and the arbitration industry in mind. After their term as super-arbitrators, they could directly go back into private practice, and use their past legal interpretations for private gain, including for the benefit of future employers.

***Too many flawed elements of ISDS remain – including elements that give rise to unacceptable appearances of bias among ICS "judges" – to use terms like court and judge without being misleading to the uninitiated.***

*Professor Gus Van Harten, Osgoode Hall Law School*[140]

Also, during their time on the EU's pre-selected list, these super-arbitrators could still earn handsome fees as arbitrators in other cases and work for private law firms (even though they are banned from acting as counsel in other investment protection disputes).[139] These many roles open a Pandora's box of conflicts of interest that could call into question their independence. Finally, the selection criteria also suggest that the EU's pre-agreed arbitrators would come from the inner circle of investment lawyers who have behaved so adventurously in cases to date, excluding expertise in other legal areas, which are less dominated by commercial interests, but might be relevant for their decisions, such as national administrative, labour, or environmental law.[141]

***When I wake up at night and think about arbitration, it never ceases to amaze me that sovereign states have agreed to investment arbitration at all.... Three private individuals are entrusted with the power to review, without any restriction or appeal procedure, all actions of the government, all decisions of the courts, and all laws and regulations emanating from parliament.... Politicians have never given such authority to a national court, and no state has given an international court nearly as much power.***

*Juan Fernández-Armesto, arbitrator from Spain*[142]

Re-labelling the ISDS system a 'court system' and the arbitrators 'judges' as the European Commission is doing is a serious misnomer. It can never be a true court as long as foreign investors are the only ones who can file lawsuits and as long as the tribunals will not be considering human and labour rights or other non-corporate considerations that a regular judge usually has to balance.

## Danger #7: the EU proposal undermines the power of courts

The EU proposal would allow foreign corporations to challenge almost everything that sovereign nations can do: laws passed by Parliaments, actions by governments and court rulings that allegedly harm their investments – from the local to the federal and even European level.[143]

Court rulings are already being second-guessed by arbitration tribunals: US oil giant Chevron is currently using an investor-state lawsuit to avoid paying US$9.5 billion to indigenous groups to clean up vast oil-drilling related contamination in the Amazonian rainforest, as ordered by Ecuadorian courts. So far, the three-person tribunal hearing the case has sided with Chevron, ordering Ecuador to block the enforcement of the ruling. But as such a move would violate the separa-

**BOX 6:**

## FOREIGN INVESTOR PRIVILEGES: NO SOLUTION FOR UNRELIABLE DOMESTIC COURTS

One traditional argument for investor-state arbitration is that it protects investors in countries where democracy and the rule of law are weak or non-existent. But even where legitimate concerns exist about non-functional, biased or corrupt courts, investor-state arbitration is highly questionable.

> ***For treaties with countries with less developed legal systems the primary goal should be to enhance these systems to establish comparable protection levels for investors, but also for the population.***
>
> *German trade union confederation DGB*[144]

- By granting foreign investors an extra way to protect their interests, investment arbitration privileges them over everybody else – from domestic firms to citizens. This discrimination is irreconcilable with key democratic and rule of law principles such as equality before the law.
- Investment arbitration and the proposed Investment Court System have been criticised for their lack of judicial independence and pro-investor bias. A biased system can hardly be a convincing alternative for allegedly biased courts.
- By granting foreign investors the exclusive privilege to turn their back on domestic legal systems you take away the incentives that this relatively well-resourced group can provide to improve a country's judicial system.
- Particularly in nascent democracies where laws in all thinkable areas still need to be developed, democratic development can be undermined when future policy changes can be challenged by deep-pocketed foreign investors in case their investment is impacted.[145]

> ***Corporate interests claim that ISDS is necessary to protect property rights where the rule of law and credible courts are lacking. But instead of reforms to improve the judiciary's performance and reputation, ISDS will expose Malaysia to new risks and liabilities.***
>
> *Malaysian Trades Union Congress*[146]

- Investment arbitration works like a hidden public subsidy: it reduces certain risks for foreign investors, but not for others. Economists have argued that this can lead to productivity losses as efficient domestic producers are displaced by less efficient, but better protected foreign firms.[147]
- Treaties with undemocratic regimes are often corrupt or against the interests of the people in these countries. The effective enforcement of corrupt and anti-democratic treaties is a double injustice. Binding future democratic governments to enforcing such treaties, is neither morally justifiable nor helpful for fledgling democracies.

tion of powers enshrined in Ecuador's constitution, the government has not followed the tribunal's order. Now, Chevron is arguing that this decision is violating its right to fair and equitable treatment in the US-Ecuador investment treaty and is demanding compensation. In this egregious misuse of investment arbitration to evade justice, Ecuadorians themselves might have to pay for the poisoning of their ecosystem – rather than the polluter that caused it.[148]

In another ongoing investor-state case, pharmaceutical company Eli Lilly is challenging decisions by the Canadian Federal Court to invalidate the company's patents for two drugs (Strattera to treat ADHD and Zyprexa to treat schizophrenia). Canadian courts did so after finding that Eli Lilly had presented insufficient evidence to show that the drugs would deliver the promised long-term benefits. Strattera, for example, had only been tested in a short 3-week long study involving 21 patients. Eli Lilly is demanding C$500 million in compensation.[149]

***ISDS destabilises the domestic judicial system because public measures can be subject to two diverging legal assessments.***

*European Trade Union Confederation ETUC*[150]

In a nutshell, the EU proposal would establish a supreme pseudo-court that would trump all courts of EU member states and the European Court of Justice. But this pseudo-court would be exclusively accessible to foreign investors and its only purpose would be to protect their investments and profit expectations.

This sidelining of courts has also raised concerns amongst judges. In February 2016, Germany's largest association of judges and public prosecutors firmly rejected the European Commission's proposal, arguing that the suggested investment court system would deprive EU member states' courts and the European Court of Justice of essential powers over the preservation of EU law. The judges also denied that there was any legal base for the Commission to bring about such fundamental change to the existing judicial system.[151] The European Association of Judges has echoed these "serious reservations" about the Commission's proposal.[152]

## DANGER #8: the EU proposal risks to eternalise ISDS

Several countries around the world are currently getting out of investment agreements, which have proven too costly for them (see box 7 on page 46). But while many existing treaties could be terminated at any time,[153] it will be practically impossible to exit from the extra rights for foreign investors once they are enshrined in a larger trade pact as proposed by the European Commission.

For example, it would simply not be possible for an EU member

state to just opt out of the investor rights in a wider agreement such as TTIP. It would have to renounce the whole agreement – and be forced to leave the EU, because international agreements concluded by the EU become part of its legal order.[154] Alternatively, the EU as a whole could terminate the full agreement. Both are a highly unlikely scenarios.

The European Commission has also flagged the "medium-term objective"[155] of developing a multilateral investment court, in parallel to its ongoing bilateral negotiations. The recently concluded EU-Vietnam free trade agreement already includes a section on "multilateral dispute settlement mechanisms" stating that Vietnam and the EU "shall enter into negotiations for an international agreement providing for a multilateral investment tribunal".[157] The Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada also states that both "shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes."[158] While there are no further details available yet about how these tribunals could look, it is clear that a world supreme court exclusively available to corporations would further formalise rights for foreign corporations that domestic investors would not have.

***The creation of special courts for certain groups of litigants is the wrong way forward.***

*Deutscher Richterbund, Germany's largest association of judges and public prosecutors*[156]

So, rather than putting an end to the ISDS-system as we know it, the EU's investment protection agenda threatens to forever lock EU member states into a legal regime where private profits trump the public interest and democracy.

**BOX 7:**

## THERE ARE ALTERNATIVES TO ISDS

For governments, there are a number of alternatives to the excessive corporate rights: not to grant them in the first place is one. Neither the US-Australia free trade agreement (in force since 2005) nor the Japan-Australia deal (in force since 2015), for example, allow for investor-state arbitration. In case of a problem, investors have to go to domestic courts – just like everyone else.

Countries with investment agreements that have proven dangerous can follow the example of South Africa, Indonesia, Bolivia, Ecuador, and Venezuela and terminate them. This is also an option for the bilateral investment agreements, which EU member states have signed between themselves (so called intra-EU BITs). They account for a growing number of lawsuits that EU member states are battling: 99 in total, so around 16 per cent of all known disputes globally by the end of 2014.[159] Treaty termination is also an option for the bilateral investment treaties of Eastern European EU members with Canada and the US.

> ***Multinational corporations are the last to need new and special rights.***
>
> *Rosa Pavanelli, General Secretary of Public Services International (PSI)*[160]

Countries can also follow the example of South Africa and update their national investment laws if they wish to clarify or change the protections for foreign investors (see box 3 on page 25).

Investors going abroad can insure their investment against political risks by purchasing private insurance. They can also sign an investment contract with the host state.

Finally, the fact that corporations continue to commit grave human and labour rights violations across the globe underlines the need to break with a system that has enshrined ever increasing rights and privileges for global corporations without corresponding responsibilities. Initiatives such as the Treaty Alliance aim to establish a binding international instrument to address human rights abuses by corporations at the UN.[161] Unfortunately, the EU and its member states are effectively undermining this UN Treaty process, standing up for corporate interests instead of human rights.[162]

## CHAPTER 4

# CONCLUSION: 10 REASONS TO END THE CORPORATE SUPER RIGHTS

**Asked about the EU's proposed Investment Court System or ICS, Germany's former minister of justice, Herta Däubler-Gmelin, commented: "The proposal is dangerous because it operates with concepts, which make people think of ordinary jurisdiction with independent courts – but that is not what's in the proposal."[163] Under the disguise of a court, the EU proposal would give corporations exceptionally powerful new rights to bully governments and force them to pay when they regulate.**

> ***We will be building popular opposition to special rights for foreign investors, whether they're called ISDS or not.***
>
> *Owen Tudor, Trade Union Congress in the UK*[164]

People in Europe and in countries to whom the EU is proposing the ICS shouldn't be fooled. The ICS is as dangerous for working people, the environment and our political system as the 'old' and much-loathed ISDS regime. ICS is arguably even more threatening – because it could forever lock states into a legal order where private profits trump the public interest and democracy.

As a run through, here are ten key reasons why:

**REASON #1**:the ICS would empower tens of thousands of corporations to bypass courts and sue governments in business friendly international tribunals where billions in taxpayer money could be paid to compensate corporations, including for missed future profits that they hypothetically could have earned

**REASON #2:** the ICS would allow investor attacks against legitimate measures to protect workers, health, economic stability, and other public interests

**REASON #3:** Labour regulations, collective bargaining and agreements between the social partners could become targets of investor claims under the ICS

**REASON #4:** the ICS is a sure-fire way to bully decision-makers, potentially curtailing desirable policymaking, for example, to tackle social injustice, economic crises or climate change

**REASON #5:** the ICS would give exceptionally powerful rights and privileges to foreign investors, without any obligations and without any evidence of wider benefits to society

***It is a fundamental problem that investors' rights get strengthened through additional international rights and procedures, while the solution of other problems should be the top priority: the better enforcement of labour rights, for example.***

*German trade union confederation DGB*[165]

**REASON #6:** since only investors can sue under the ICS system, there is an incentive for the arbitrators to side with them as this will bring more lawsuits, fees and prestige in the future

**REASON #7:** the ICS weakens the power of our courts and could even allow for backdoor corporate attacks on court decisions

**REASON #8:** ICS is fundamentally discriminatory, granting special rights to foreign investors only, thereby tilting the balance of power in society further in favour of capital owners

**REASON #9:** enshrined in major trade deals, the ICS would massively expand the corporate rights regime, subjecting states to an unprecedented increase in legal and financial liabilities.

**REASON #10:** in the EU's own public consultation, the special privileges for foreign investors were overwhelmingly rejected

There are many examples of where corporate power has already harmed our rights, economies and democracy. We know income inequalities are extreme and growing. Union busting and precarious work are widespread. Many states have either deregulated or not enforced labour laws to appear 'investor-friendly'. Their push for privatisation has undermined access to vital services such as health care and education. And multinationals have again and again escaped their responsibilities through a labyrinth of sub-contractors. It's time to dismantle this harmful system. It's time to promote trade policies that protect people and the planet.

## ANNEX 1

# MORE OF THE SAME PRIVILEGES FOR CORPORATIONS: A COMPARISON OF ISDS AND ICS

| CONCERNS WITH ISDS | DOES THE EU ADDRESS THE CONCERNS IN ITS ISDS PROPOSALS? | 'OLD' ISDS (E.G. IN EU-SINGAPORE) | 'NEW' ISDS (ICS) |
|---|---|---|---|
| ISDS privileges foreign investors | ***Not addressed.*** Both, the 'old' and the 'new' ISDS give foreign investors greater – substantive and procedural – rights than anyone else. Only foreign investors can bypass domestic courts and sue states directly in parallel tribunals that can order states to pay compensation for measures that would not be compensable under many legal systems. Domestic firms and common people do not have this privilege. | 👎 | 👎 |
| Corporations use ISDS to attack measures to protect the environment, health and other public interests | ***Not addressed.*** Investor claims against legitimate, non-discriminatory and lawful decisions to protect workers, public health, and other public interests would be perfectly possible under both the 'old' and the 'new' ISDS system (see, for example, box 5 on page 31). And investors could very well win these lawsuits. | 👎 | 👎 |
| ISDS tribunals can order states to pay compensation without financial limits | ***Not addressed.*** Under both the 'old' and the 'new' ISDS, countries could be asked to pay vast amounts of public money to compensate foreign investors, including for non-discriminatory and constitutional laws and regulations in the public interest and for lost hypothetical future profits. These damages awards can wreak havoc with public budgets. | 👎 | 👎 |
| Corporations use ISDS claims and threats to delay, weaken and kill much needed policies | ***Not addressed.*** The EU's ISDS proposals grant exceptionally powerful rights to investors, which can be used to bully policy-makers. Nothing in the proposals would stop governments from "voluntarily" delaying, cancelling or watering down desirable policies when a deep-pocketed company files or threatens an ISDS lawsuit. | 👎 | 👎 |
| ISDS is gravely imbalanced as it gives powerful rights to foreign investors, without any obligations | ***Not addressed.*** The EU's ISDS proposals grant powerful and highly-enforceable rights, but no actionable responsibilities, to foreign investors. The system cannot be used by a host state, trade unions or local communities to hold investors accountable for the violation of human or labour rights, environmental destruction and other errant behaviour. | 👎 | 👎 |

| CONCERNS WITH ISDS | DOES THE EU ADDRESS THE CONCERNS IN ITS ISDS PROPOSALS? | 'OLD' ISDS (E.G. IN EU-SINGAPORE) | 'NEW' ISDS (ICS) |
|---|---|---|---|
| ISDS proceedings are often secret with little or no information released to the public | ***Addressed.*** With open hearings and most documents available to the public, ISDS proceedings would be more transparent (as with US and Canadian treaties which started providing more openness over a decade ago). However, exceptions for confidential information and tribunals' power to limit public access to hearings could still limit transparency. More critically, behind-the-scene settlements entailing public money and regulatory chill would not have to be published. | 👍 | 👍 |
| Disputes are decided by party-appointed for-profit arbitrators with a strong incentive to side with the investor and numerous conflicts of interest | ***Not addressed in the 'old', partially addressed in the 'new' ISDS.*** The EU's 'new' ISDS proposal takes a few positive steps towards independence: arbitrators *(re-labelled 'judges')* would no longer be chosen by the disputing parties, but be assigned randomly from a *pre-determined list.* They would be blocked from working as counsel in other investment disputes (though neither generally from lawyering on the side nor from making money as arbitrators in other ISDS proceedings; neither is there a cooling-off period to limit potential conflicts of interests before and after their appointment).<br>However, the main pro-investor bias remains: under both ISDS systems, claims will not be decided by independent judges with a fixed salary. Rather, rulings will come from for-profit arbitrators who are paid by the case with a strong incentive to decide in favour of the one party that can bring claims in the future: the investor. | 👎 | 👍 |
| ISDS decisions are not reviewable | ***Not addressed in the 'old', addressed in the 'new' ISDS.*** While the proposed EU-Singapore agreement, for example, contains only a vague intention to potentially establish an appellate mechanism in the future, the EU's 'new' ISDS text includes an appeal tribunal with permanent members. This could potentially contribute to more coherent decisions but does not fix any of the fundamental problems mentioned above (privileging of foreign investors, not fully independent tribunals, one-sidedness of the system...etc). | 👎 | 👍 |
| ISDS might not be compatible with EU law | ***Not addressed.*** Both ISDS mechanisms allow foreign investors to sideline – and thereby undermine the powers of – national courts and the European Court of Justice when suing governments over decisions based on EU law. Also, both the 'old' and the 'new' ISDS are fundamentally discriminatory, because they are not available to EU citizens, communities, and investors. This is deeply unfair, and undermines the proper functioning of the EU and its internal market. | 👎 | 👎 |


## ANNEX 2: UNCOVERING THE WOLF

# LEGAL ANNEX TO THE ANALYSIS OF THE EU'S PROPOSED INVESTMENT COURT SYSTEM (ICS)

**In autumn 2015, the European Commission published a proposal for far-reaching rights for foreign investors to be included in all future EU trade agreements: the "Investment Court System" or ICS. According to the Commission, this 'new' and supposedly independent system would protect governments' right to regulate and replace the 'old' investor-state dispute settlement (ISDS) system, which had caused egregious investor lawsuits against public interest policies around the world.**

Since the publication of the Commission proposal, several judges associations have questioned the asserted independence of the proposed 'court system'.[166] Academics, trade unions, and civil society groups have argued that underneath the misleading court language, the EU proposal would give corporations exceptionally powerful new rights to bully governments and force them to pay when they regulate to protect workers, public health or the environment.[167]

> ***ICS is mainly a re-branding exercise for ISDS.***
>
> *Professor Gus Van Harten, Osgoode Hall Law School* [168]

The EU's ICS proposal indeed contains several serious risks, which are outlined at length in Chapters 1-4.

> ***Under ICS, investors will still be granted special rights over other groups in society to sue governments for policies that threaten their profits.***
>
> *European Federation of Public Service Unions (EPSU)* [169]

Locating these dangers in the EU's actual text proposal requires a bit of decoding work. The following table is a good start:

| INVESTMENT LINGO: WHAT THE EU WANTS TO NEGOTIATE[170] | TRANSLATION: WHAT IT MEANS IN PRACTICE |
|---|---|
| **INVESTOR RIGHTS WITH UNLIMITED SCOPE** | |
| **Definition of investment:** "'investment' means every kind of asset which has the characteristic of an investment which includes a certain duration and other characteristics...". Then follows a long, non-exhaustive list of "forms that an investment may take" ranging from shares to debt instruments and intellectual property rights. Investments covered by the chapter must be "owned, directly, or indirectly, or controlled, directly or indirectly, by investors of one Party in the territory of the other Party". (chapter 2, articles x1 and x2) | The definition of 'investment' is very important because it determines which foreign capital is protected. The extraordinarily broad – and open-ended – definition we see in the EU's proposal not only covers actual enterprises in the host state, but a vast universe ranging from holiday homes and short-term speculative investment to sovereign debt. This allows for firms that have made no real investment to launch a case and exposes states to unpredictable legal risks.[171]<br>***The Commission proposal does not prevent the phenomenon of treaty shopping. Parallel claims by parent companies and subsidiaries are possible.***<br>*Professor Markus Krajewski & Rhea Tamara Hoffmann, University of Erlangen-Nürnberg*[172] |
| **Definition of investor:** "an 'investor' means a natural person or a juridical person of a Party that seeks to make, is making or has already made an investment in the territory of the other Party." For juridical persons, it is specified that they are "engaged in substantive business operations". (chapter 1, Article 1-1 (c) and (q)) | The definition of 'investor' is important as it determines who is protected. The Commission's proposal is likely to prevent blatant treaty abuse through mailbox companies (such as a US firm suing the US via a shell construction in the Netherlands). But it will still empower tens of thousands of investors to sue governments, exposing the EU and its trading partners to incalculable legal risks. |
| **Definition of measure:** "a 'measure' means any measure by a Party, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form". (chapter 1, article 1-1 (n)) | Everything that an EU member state, the EU or its trading partner does can be challenged by a foreign investor. The measures range from local to European laws enacted by parliaments, executive decisions, and even court verdicts. |
| **SUBSTANTIVE INVESTOR PRIVILEGES** | |
| **Fair and equitable treatment (FET):** "Each Party shall accord in its territory to covered investments of the other Party and investors with respect to their covered investments fair and equitable treatment". Then follows a list of examples which would constitute a breach of this obligation: "denial of justice", "fundamental breach of due process", "manifest arbitrariness", "targeted discrimination" and "harassment, coercion, abuse of power or similar bad faith conduct" (chapter 2, section 2, article 3.2) | This potentially catch-all clause is the most dangerous for taxpayers and regulators: it is used most often and successfully by investors when attacking public interest measures. For example, in its case against Uruguay, Philip Morris argues that the country violated the clause when it 'arbitrarily' adopted its tobacco control policy even though other measures to reduce smoking without a negative effect on Philip Morris were available (smaller health warnings, less shocking images, etc).[173] Such an argument could without difficulty be used on grounds of "manifest arbitrariness" in the EU text.<br>***I actually think, from the perspective of the greedy, avaricious lawyer, that's a very good obligation to work with.***<br>*Jonathan Kallmer of law firm Crowell Moring on the EU's fair & equitable treatment formulation*[174] |

| INVESTMENT LINGO: WHAT THE EU WANTS TO NEGOTIATE[170] | TRANSLATION: WHAT IT MEANS IN PRACTICE |
|---|---|
| **SUBSTANTIVE INVESTOR PRIVILEGES** | |
| **Protection of investors' legitimate expectations**: "When applying the above fair and equitable treatment obligation, a tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated." (chapter 2, section 2, article 3.4) | Tribunals have interpreted 'fair and equitable treatment' (FET) as protecting investors' "legitimate expectations" – even if the term is generally not part of existing treaties. They have also considered it as creating a right to a stable regulatory context – binding governments to not alter laws or other measures, even in light of new knowledge or democratic choices. Philip Morris, for example, argues that Uruguay "failed to maintain a stable and predictable regulatory framework consistent with Philip Morris legitimate expectations" when it enacted anti-smoking legislation to protect public health.[175] The EU text seems to codify such expansive interpretations of FET, widening the concept's scope and giving investors a powerful tool to fight tighter rules. It is especially troubling that the EU does not define what type of "specific representation" by a state would create a "legitimate expectation." |
| **Investment and regulatory measures:** "For greater certainty, the provisions of this section shall not be interpreted as a commitment from a Party that it will not change the legal and regulatory framework, including in a manner that may negatively affect the operation of covered investments or the investor's expectations of profits." (chapter 2, section 2, article 2.2) | A closer look at this paragraph shows that it provides false comfort. Unlike in article 2.4 which clearly prohibits any requirement for states to compensate in`vestors when eliminating subsidies, article 2.2 does not exclude compensation orders when states change laws and regulations. In other words: states may change the law, but can then be ordered to pay billions in damages if a tribunal finds the changes violate the substantive investor rights.<br>***The European Commission is pretending to protect the right to regulate, while leaving catches in the text that return us to the usual concerns about ISDS. The text on this point is a good case study for how legal language can be written in ways that may give a false impression of security to the uninitiated.***<br>*Professor Gus Van Harten, Osgoode Hall Law School*[176] |
| **Investment and regulatory measures II:** "The provisions of this section shall not affect the right of the Parties to regulate within their territories through measures necessary to achieve legitimate policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity." (chapter 2, section 2, article 2.1) | Another false comfort paragraph. Reading it against article 2.4 makes clear that the EU does not want to shield public policy measures from compensation orders. So, states will be able to regulate, but can still be forced to pay billions in compensation. In addition, the right to regulate is linked to a necessity test where for-profit arbitrators would decide whether a measure was "necessary" to achieve a certain objective and whether that objective was "legitimate". This is an easy hurdle to clear for arbitrators intent on getting public compensation for an investor. |

| INVESTMENT LINGO: WHAT THE EU WANTS TO NEGOTIATE[170] | TRANSLATION: WHAT IT MEANS IN PRACTICE |
|---|---|
| **SUBSTANTIVE INVESTOR PRIVILEGES** | |
| **Expropriation**: "Neither Party shall nationalize or expropriate a covered investment either directly, or indirectly through measures having an effect equivalent to nationalisation or expropriation..., except: a) for a public purpose; b) under due process of law; c) in a non-discriminatory manner; and d) against payment of prompt, adequate and effective compensation." (chapter 2, section 2, article 5.1)<br><br>**Annex I on expropriation**: "For greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection and promotion and protection of cultural diversity do not constitute indirect expropriation." (chapter 2, section 2, annex I.3) | From a certain, investor-friendly view, almost any law or regulatory measure can be considered an indirect "expropriation" when it has the effect of lowering profits, including legitimate health, workers, and other public safeguards. Would the EU's annex on legitimate policy objectives prevent this? Not necessarily. A state would have to prove that a measure was "designed and applied to protect legitimate policy objectives". As in Philip Morris vs. Uruguay, investors could question this (arguing, for example, that health warnings on cigarette packs were "not designed to warn of the actual health effects of smoking", but "to invoke emotions of repulsion and disgust, even horror" with the "effective function" to "destroy the good will" of the company's trademark).[177] According to the EU text, in a "rare circumstance" a measure could still be considered an expropriation, for which taxpayers would have to pay damages. It would be up to a tribunal of for-profit arbitrators to decide.<br><br>***While there is language in trade deals that purports to protect governments' right to regulate, many arbitration panels have ignored or narrowly interpreted these provisions, making them practically useless.***<br><br>*Dr. David R. Boyd, professor at Simon Fraser University*[178] |
| **National Treatment:** "Each Party shall accord to investors of the other Party and to their investments... treatment no less favourable than the treatment it accords, in like situations to its own investors and to their investments." (chapter 2, section 1, article 2-3.2) | Foreign investors have to be treated at least as favourably as domestic ones. This has been interpreted as a prohibition of anything that de facto disadvantages foreigners – even if not on purpose. For example, a Canadian ban on the export of toxic waste (applying to all investors and in line with an international treaty) was found to favour Canadian firms which could continue their business while a US competitor could not ship waste to the US to treat it there.[179] |
| **Most-Favoured-Nation (MFN) Treatment:** "Each party shall accord to investors of the other Party and to their investments... treatment no less favourable than the treatment it accords, in like situations, to investors and investments of any non-Party." The EU proposal clarifies that this "does not include investor-to-state dispute settlement procedures" in other deals and that the "substantive obligations of such agreements... do not in themselves constitute 'treatment'... absent measures adopted pursuant to such provisions." (chapter 2, section 1, article 2-4.4) | Arbitrators have used MFN provisions like a "magic wand"[180] which allows investors from country x to sue country y based on a treaty between both countries, but refer to more investor-friendly provisions in any other treaty country y has signed. Arbitrators have allowed an Argentine investor to challenge Spain with rights from a Chile-Spain treaty,[181] and an Australian investor to challenge India with Kuwait-India rights.[182] This multiplies the risks of successful attacks against public policy. The EU's wording somewhat addresses this cherry-picking, but remains ambiguous and open to interpretation by arbitrators. Why does the EU not clearly bar the "import" of substantive obligations from other treaties? It does so only in the absence of "measures... pursuant to such obligations" and the term "measure" is defined extremely broadly (see above). |

| INVESTMENT LINGO: WHAT THE EU WANTS TO NEGOTIATE[170] | TRANSLATION: WHAT IT MEANS IN PRACTICE |
|---|---|
| **SUBSTANTIVE INVESTOR PRIVILEGES** | |
| **Free transfer of capital:** "Each Party shall permit all transfers relating to a covered investment to be made... without restriction or delay..." Then follows a list of examples of types of transfers, including profits, interest and payments made under a contract. (chapter 2, section 1, article 6.1) | This provision would allow the investor to always withdraw all investment-related monies, reducing the ability of countries to deal with sudden and massive out- and inflows of capital, balance of payment and other macroeconomic crises. This is a de facto ban on capital controls and financial transaction taxes.<br>***Countries should be cautious about entering into bilateral investment treaties... that may severely constrain their ability to reregulate capital flows.***<br>*United Nations Conference on Trade and Development (UNCTAD)*[183] |
| **A type of umbrella clause:** "Where a Party has entered into any contractual written commitment with investors of the other Party or with their covered investments, that Party shall not... breach the said commitment through the exercise of governmental authority." (chapter 2, section 1, article 7) | This would lift all written contracts of a state with regards to an investment to the level of international law, multiplying the risk of costly lawsuits. This would, for example, empower an investor to file an ISDS claim over the alleged breach of a contract with a municipality – even if the contract required recourse to domestic courts. |
| **A DISPUTE SETTLEMENT PROCESS SLANTED IN FAVOUR OF FOREIGN INVESTORS** | |
| **Consent to arbitration:** "The respondent consents to the submission of a claim under this section." Claims may be submitted under the usual investor-state arbitration rules such as the ICSID convention and the UNCITRAL rules. (chapter 2, section 3, article 6.2 and article 7.1) There is **no requirement to first exhaust local remedies**. | This is where the EU in effect says: our courts are not good enough for foreign investors. Unlike domestic firms and ordinary people, foreign investors will have the exclusive right to bypass domestic legal systems and sue the EU and its member states directly at international tribunals, which will judge whether policies are right or wrong and can order vast sums of taxpayer money to be paid as compensation.<br>***The creation of special courts for certain groups of litigants is the wrong way forward.***<br>*Deutscher Richterbund, Germany's largest association of judges and public prosecutors*[184] |
| **The tribunal deciding the cases:** Investor claims will be decided by a "tribunal" of three chosen from a pool of fifteen "judges" appointed by the EU and its trading partner. They will receive a "retainer fee" of around €2,000 per month, but will otherwise be paid according to the "Administrative and Financial Regulations of the ICSID Convention". (chapter 2, section 3, article 9) | Investor-state disputes will not be decided by independent judges with a fixed salary. Rather, rulings will come from for-profit arbitrators who are paid by the case – with lucrative US$ 3,000 per day according to the ICSID schedule of fees and on top of a monthly retainer fee of around 2,000€[185] – with a strong incentive to decide in favour of the one party that can bring claims in the future: the investor.<br>***As the judges do not have to expect a proper salary, their financial independence is in danger.***<br>*European Association of Judges*[186] |

| INVESTMENT LINGO: WHAT THE EU WANTS TO NEGOTIATE[170] | TRANSLATION: WHAT IT MEANS IN PRACTICE |
|---|---|
| **A DISPUTE SETTLEMENT PROCESS SLANTED IN FAVOUR OF FOREIGN INVESTORS** | |
| **Ethics**: The so-called 'judges' "shall be chosen from persons whose independence is beyond doubt." They shall follow a code of conduct and "shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment protection dispute". (chapter 2, section 3, article 11.1) | This falls short of real institutional safeguards to ensure arbitrator independence and impartiality, such as fixed salaries. It is particularly worrying that the so called 'judges' will neither be banned from sitting as arbitrators in other cases nor from private lawyering (though not as counsel in other investment claims) and that there is no cooling-off period before or after their appointment. So, they could be part of the small club of investment arbitrators who have so far decided the majority of investor disputes, have encouraged claims and grown their business with expansive, investor-friendly interpretations of the law. |
| **Compensation award:** When a tribunal finds that a state violated the investor rights proposed by the EU, it may award "(a) monetary damages and any applicable interest; (b) restitution of property." "Monetary damages shall not be greater than the loss suffered by the claimant". (chapter 2, section 3, article 28.1 and 2) | Damages awards can amount to serious raids on public budgets, and can be enforced by seizing state property around the world. One of the highest known awards, US$1.1 billion or one percent of the country's GDP, was made against Ecuador.[187] In 2003, the Czech Republic paid a corporation US$354 million, then the equivalent of the country's health budget.[188] Tribunals often order compensation for expected future profits as part of the loss suffered by the investor, like in a case against Libya which had to pay US$900 million for "lost profits" from "real and certain lost opportunities" of a tourism project, even though the investor had only invested US$5 million and construction never started.[189] |
| **Compensation award**: A tribunal can award "only" monetary damages or restitution of property (chapter 2, section 3, article 28.1). According to the EU this means that an order of a tribunal cannot lead to the repeal of a measure adopted by Parliaments in the EU and its partner countries. | This won't stop governments from "voluntarily" repealing measures when a major lawsuit has been filed or threatened by a deep-pocketed company. Examples of such regulatory chill include the watering down of environmental controls for a coal-fired power plant when Germany settled a claim by Swedish energy company Vattenfall and the delayed implementation of anti-smoking rules in Canada and New Zealand, following lawsuit threats by Big Tobacco.[190] This chilling effect on government regulation is arguably the main function of the global investment regime. |
| There is no mention of **investor obligations** anywhere in the text.<br>***The EU approach contains no provisions on obligations of investors or the promotion of human rights, labour rights and environmental standards. This is regrettable.***<br>*European Trade Union Confederation ETUC*[191] | The EU proposes to establish powerful and highly-enforceable rights, but no actionable responsibilities, for foreign investors. The system cannot be used by a host country or affected third parties such as a trade union or local community to hold investors accountable if they violate human rights, labour, environmental or other standards and domestic institutions do not offer an effective remedy. |

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