The zombie ISDS

Rebranded as ICS, rights for corporations to sue states refuse to die

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Published by Corporate Europe Observatory (CEO), Association Internationale de Techniciens, Experts et Chercheurs (AITEC), Attac Austria, Campact, ClientEarth, Ecologistas en acción, Forum Umwelt & Entwicklung, Instytut Globalnej Odpowiedzialności (IGO), PowerShift, Seattle to Brussels Network (S2B), Traidcraft, Transnational Institute (TNI), Umanotera, Védegylet, Vrijschrift, War on Want, 11.11.11.

February 2016

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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 public health or the environment – 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 public interests 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% of a record 150,000 participants rejected such corporate privileges in a public consultation. Criticism also mounted in EU member states and the European Parliament. 'ISDS' has become "the most toxic acronym in Europe", according to EU trade chief Cecilia Malmström.

In an attempt to get around the enormous opposition 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.

The analysis in this report shows that the proposed ICS does not put an end to ISDS. Quite the opposite, it 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 being paid out to big business. It could curtail desirable policymaking to protect people and the planet. And it threatens to lock EU member states forever into the injustices of the ISDS regime.

In a nutshell, the proposed 'new' ICS is ISDS back from the dead. It's the zombie ISDS.

Key findings:

1. **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.

2. **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 anti-smoking legislation, bans on toxic chemicals, anti-discrimination policies, financial stability measures, restrictions on dirty mining projects, and more. For example, 60% of the claims against EU member states concerned the environment. A lawyer defending countries in these cases has called their legal base, international investment agreements, "weapons of legal destruction".

3. **The EU's 'new' ISDS model (re-labelled ICS) is as dangerous for democracy, public interest law, and public money as the 'old' model enshrined in the EU-Canada trade agreement CETA.** With the exception of some procedural improvements – an enhanced selection process for arbitrators, stronger ethics rules, and the establishment of an appellate body – the rebranded version essentially contains the same investor privileges, often in wording identical to the CETA text.

4. **Investor claims against non-discriminatory and lawful measures to protect health, the environment, 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 (suing Uruguay over tobacco control measures) and TransCanada (which has announced it will sue the US for US$15 billion over the rejection of the controversial Keystone XL oil pipeline).

5. **Under the EU proposal, billions in taxpayers' money could be paid to corporations, including for future lost profits that they 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). Countries could also be ordered to pay compensation for new laws and regulations in the public interest. The EU's proposed formulations on the protection of the right to regulate would not shield governments from these potentially crippling costs.

6. **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. The clause is not part of the CETA between the EU and Canada, presumably because Canada rejected it as too risky.

7. **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, 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); and more than 47,000 companies would be newly empowered to sue (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).

8. **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. In the context of TTIP, this danger is particularly real given the US$3.5 trillion worth of US-held securities in the EU. There is hardly a 'European' company that does not have a 'US' investor who would have standing to bring a TTIP claim against the EU or its member states.

9. **The EU's investor rights proposal is a sure-fire way to bully decision-makers, potentially curtailing desirable policymaking.** 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.

10. **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, there is an incentive for the arbitrators (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.

11. **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.

12. **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 or CETA (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.

This report concludes with a call to action: to abolish all existing treaties that allow companies to sue governments in international tribunals if laws and regulations undercut their ability to make money; to prevent supplemental corporate bills of rights in proposed treaties such as TTIP and CETA; and to axe plans for a world supreme court exclusively for corporations and the rich.

Chapter 1
Introduction

"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 agreements, "a special privilege that many multinationals have abused", as the international business magazine put it.[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. And pipeline developer TransCanada has just announced its intent to sue the US for US$15 billion over the rejection of the controversial Keystone XL oil pipeline.

At the time of the publication of that article, there must have been some very nervous people in business and trade negotiators' circles. ISDS is the very cornerstone of many of today's trade talks. If one of the most influential pro-free trade media voices, *The Economist,* was failing to support it, ISDS must really have been in trouble. Indeed, due to massive citizen outcry, the obscure four letters 'ISDS' have become "the most toxic acronym in Europe", as EU trade chief Cecilia Malmström put it.[2]

If there ever was a one-sided dispute resolution mechanism that violates basic principles, this is it.

Nobel Prize-winning economist Professor Joseph Stiglitz on ISDS[3]

It came as little surprise then, that she no longer spoke of ISDS when, a year later in autumn 2015, Malmström released a revised proposal for the EU's ongoing and future investment negotiations, including the proposed EU-US trade deal TTIP. Instead of the 'old' ISDS system, Malmström 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 trade 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 this 'new' ICS really so different from the much-loathed 'old' ISDS regime? Does it shield environmental, health, and other public interest decisions from investor attacks? Does it set up a fair and independent system to solve disputes?

The analysis in this report shows that the rhetoric about the problems with the unpopular ISDS having been solved by the proposed ICS is nothing but a fairytale. The EU's latest investor rights approach does not put an end to ISDS. Quite the opposite: the proposal would still 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 still pave the way for billions in taxpayer money paid to big business. It could still curtail desirable policymaking to protect people and the planet. And it threatens to lock EU member states forever into the injustices of the ISDS regime, because it will be practically impossible to exit from it as a part of larger trade deals, let alone a multilateral investment court as is being put forward by the Commission.

When people say that ISDS is dead, it makes me think of a zombie movie because I can see ISDS walking around in these new proposals all over the place.

Professor Gus Van Harten, Osgoode Hall Law School[4]

In a nutshell, the proposed 'new' ICS is the politically untenable ISDS back from the dead. It's the zombie ISDS.

It is high time for citizens, journalists and policy-makers to realise that the EU has not resolved any of the deep-seated problems which triggered the massive public outcry against ISDS. Its latest investment protection proposal is as dangerous for taxpayers, policies in the public interest, and democracy as the 'old' ISDS-system – and is arguably even more threatening. It should therefore have no space in any of the EU's international agreements. In fact, it is the one proposal everyone should oppose.

Chapter 2
When corporations sue countries: a primer to investor-state dispute settlement (ISDS)

After the Fukushima nuclear disaster the German government decided to phase out nuclear energy. To discourage smoking, Uruguay introduced large-scale health warnings for tobacco packs. What do these political decisions have in common? They are both being legally challenged by companies that considered them harmful to their profits. However, the firms do not challenge the decisions in the respective countries' courts. Instead, they are suing the governments before a business-friendly international tribunal. In the past 20 years, these corporate pseudo-courts have granted big business dizzying sums in compensation – paid out of taxpayers' pockets and often for democratically made laws to protect the environment, public health, or social well-being.

The legal basis for these investor-state disputes are over 2,500 international trade and investment agreements in force between states.[5] These treaties give sweeping powers to foreign investors, including the peculiar privilege to directly file lawsuits against states at international tribunals, without going through the local courts first. Companies can claim compensation for 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 as well.

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

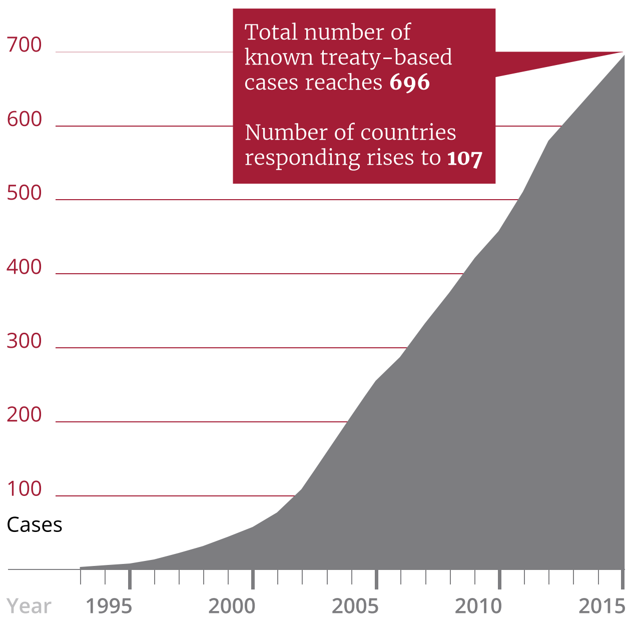
Alfred de Zayas, UN Expert on the Promotion of a Democratic and Equitable International Order[17]

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.[6] 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.[7]

Weapons of legal destruction

Since the late 1990s, the number of investor lawsuits against states has surged (see image 1) – and so has the money involved (see box 2 on page 14). 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, mining restrictions, anti-smoking legislation, anti-discrimination policies, environmental impact assessments and more (see box 1 on page 12). A lawyer who has defended many governments in these lawsuits has hence called investment treaties "weapons of legal destruction".[16]

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



Source: UNCTAD[18]

BOX 1

Warning bells: some worrying 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. 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.[8]

Corporations versus action on climate change – TransCanada v. the US: In January 2016, Canadian pipeline developer TransCanada announced its intend to sue the US on the basis of the North American Free Trade Agreement (NAFTA) for President Obama's rejection of the contested Keystone XL oil pipeline from Canada's tar sand fields to refineries in the US. The project, which, according to environmentalists would increase CO2 emissions by up to 110 million tons per year, had faced massive citizen opposition. TransCanada wants a stunning US$15 billion in damages.[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 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.[11]

Corporations versus the environment and community values – Bilcon vs. Canada: In 2008, US concrete manufacturer Bilcon sued Canada on the basis of NAFTA over the rejection of a proposed quarry, following an impact assessment warning of potential adverse social and environmental affects. In 2015, Canada lost the case. Two of the arbitrators ruling on the claim considered the impact assessment as arbitrary, frustrating Bilcon's expectations and therefore violating NAFTA. The third arbitrator disagreed strongly, calling the ruling a "significant intrusion into domestic jurisdiction" and warning that it "will create a chill on the operation of environmental review panels". How much compensation Canada will have to pay is yet to be decided, but it could climb as high as US$300 million even though the project never reached the construction stage.[12]

Corporations versus action against financial crises – investors v. Argentina: When Argentina froze utility rates (energy, water, etc.) and devalued its currency in response to its 2001-2002 financial crisis, it was hit by a flood of 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), Anglian Water (UK) and Aguas de Barcelona (Spain) 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.[13]

Corporations versus communities and the environment – Gabriel Resources v. Romania: In 2015, Canadian mining company Gabriel Resources sued Romania via two of the country's bilateral investment treaties. The lawsuit concerns Gabriel's planned open pit gold mine in the historic village of Rosia Montana. It was halted when Romanian courts annulled several permits and certificates required for the project, following strong community resistance against the mine's potentially disastrous environmental and social impacts. According to media statements, Gabriel could demand up to US$4 billion in compensation.[14]

Corporations against fracking moratoria – Lone Pine v. Canada: In 2011, the Government of the Canadian province of Quebec responded to concerns over water pollution by implementing a moratorium on the use of hydraulic fracturing ('fracking') for oil and gas exploration. In 2012, the Calgary-based Lone Pine Resources energy company filed a NAFTA-based investor-state lawsuit, challenging the moratorium. Lone Pine, which filed the case via an incorporation in the US tax haven Delaware, is seeking US$109.8 million plus interest in damages.[15]

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.[19] 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".[20]

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[21]

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.[22] 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.[23] 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.[24]

Investment arbitration in troubled waters

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. Concerns have also been raised about the glaring absence of investor obligations and the imprecise language of many treaties, opening the floodgates to expansive, pro-investor interpretations of corporate rights by private tribunals.[30]

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[33]

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."[31] 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".[32]

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 fundamental and most dangerous clauses in international investment law. So does India's new model investment treaty.[34] Indonesia, too, seems to be moving in a similar direction.[35] 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.[36]

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[37]

BOX 2

Telling figures from the world of investor-state dispute settlement (ISDS)[25]

- 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 also on the rise. For example, in 2015, **Western Europe was the world's most sued region.**[26]
- 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' only **40 per cent** of the time (even through there isn't anything states can win because only they ever get awards against them).
- **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 individuals: **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.[27]
- Legal costs average roughly US$4.5 million for each side per case[28], 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.[29] As legal costs are not always awarded to the winning party, states can end up footing the bill even if they don't lose.

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). 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 1990's, we signed a lot of treaties not knowing sometimes what we were committing ourselves to.*
>
> Former Chilean negotiator[38]

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[39] 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".[40] 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".[41] They only understood it many years later when they became the target of a lawsuit.

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".[43] 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).[44]

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.[45] Qualitative research suggests that the treaties are not a decisive factor in whether investors go abroad.[46] 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.[47]

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."[48]

This has also been the experience in many other countries: Brazil is receiving the largest amount of FDI in Latin America[49] – even though it has never ratified a treaty allowing for investor-state dispute settlement. Similarly, Hungary is one of two EU member states in Central and Eastern Europe without an investment treaty with the US – but has nonetheless been one of the biggest recipients of US FDI in the region for the past ten years.[50] 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 (see box 4 on page 19).

More importantly, it is now widely acknowledged, that while FDI *may* contribute to much needed development, the benefits are not automatic.[52] Regulations are needed to avoid the risks that FDI can pose to the environment, 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."[53]

> *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[51]

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[42]

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,[54] which threaten to massively expand the ISDS regime, subjecting states to an unprecedented increase in liability.

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.[55] 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 environmental, health, and other public safeguards in international tribunals by a factor of eleven (see box 4 on page 19).

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[56]

Chapter 3

ISDS by another name: ICS, the new EU proposal for investor rights in trade agreements

What does investor-state dispute settlement (ISDS) have in common with one of world's dirtiest oil corporations (British Petroleum) and an infamous security firm (Blackwater)? All three have been rebranded to shed negative images of the past: in 2001, British Petroleum was renamed simply BP, the initials now supposed to reference their new slogan, "Beyond Petroleum", in order to boost its green image. Blackwater, which was forced out of Iraq after a shooting incident in which civilians were killed, changed its name several times to be able to do business in the country again. And now, in the wake of massive public concern over ISDS the European Commission is using a new acronym – ICS or the investment court system – to rebrand and give cover to a massive expansion of the same much-loathed regime.

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% 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, elected representatives, academics, trade unions and other public interest groups.[57] Even more people, over 3.3 million Europeans, have signed a petition against TTIP and the already concluded EU-Canada agreement CETA "because they include several critical issues such as investor-state dispute settlement… that pose a threat to democracy and the rule of law".[58] CETA, for which ratification is likely to start in 2016, could set dangerous precedents for TTIP as it already contains many of its controversial elements, including the investor rights.

It's rare for 3 million Europeans to come together and pronounce themselves on investment and trade policy, with a single voice. It is even less common to see nearly 150,000 Europeans fill in a European Commission consultation and elaborate opinions on investment protection. All of them stood against ISDS.

Virginia López Calvo, campaign group WeMove.EU[59]

Criticism had also mounted in EU member states and the European Parliament. Parliaments in the Netherlands, France, and Austria, for example, had adopted resolutions raising serious concerns about investment arbitration in TTIP.[60] The economics and trade ministers of France and Germany had argued that "ISDS as it stands cannot be the standard for dispute resolution" and proposed alternatives[61] "to restore balance between states and businesses", as French Trade Secretary Matthias Fekl said.[62] And in summer 2015, a TTIP vote in the European Parliament nearly failed because of the political quagmire over ISDS. The four letters had indeed become a toxic acronym.

The great rebranding

So when, in autumn 2015, the European Commission presented a revised proposal for all of its ongoing and future investment negotiations (including TTIP), it went for a new label. 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 European Commission Vice President Timmermans claimed.[63]

Parts of the media helped to pump out the Commission's line. According to German daily *Frankfurter Allgemeine Zeitung*, the Commission's proposal proved that it took people's concerns about the investor rights seriously – because it would prevent claims against environmental, health and consumer protection rules. "Abuse of the investment protection system is therefore factually impossible", the newspaper assured its readers. It further suggested that critics should now shut up.[64] Austrian daily *Der Standard* also celebrated the Commission's "reform proposal" as a "success of the critics" as it "could indeed correct many flaws of the existing investment protection system".[65]

Some MEPs also fell into the re-branding trap. The Socialists and Democrats (S&D) in the European Parliament "welcomed the new tool" as "a radical change of course driven by the strong pressure of citizens and the European Parliament". Bernd Lange, German S&D MEP and chair of the European Parliament's trade committee, praised the proposal as "the only way forward... and the last nail in the coffin for ISDS".[67] In a letter to Malmström, he expressed his "support for the new approach of the Commission... for TTIP and all other trade and investment agreements we expect to receive in the European Parliament" and wished the Trade Commissioner "all the best in convincing our trading partners of this new approach". Only twenty months earlier, Lange had stated for the S&D group: "We don't want the Commission to improve investor-state dispute settlement in the TTIP negotiations, but we request that the Commission drops ISDS within TTIP altogether."[68]

The EU's Investment Court System... is a mere rebranding exercise of Investor-State Dispute Settlement (ISDS)... This cosmetic exercise will resolve none of the fundamental concerns about granting special privileges for foreign investors, undermining national laws and bypassing domestic courts.

Environmental NGO Transport & Environment[66]

Governments, too, joined the Commission's re-labelling scam. In a press release entitled "no more private tribunals", the German Government celebrated the Commission's proposal as a "cornerstone for an... investment protection system that has nothing to do with the arbitration proceedings of the past".[69] French Trade Minister Matthias Fekl agreed. "The investment arbitration mechanism has had its day," he said.[70] For Dutch trade minister Lilianne Ploumen ISDS was "dead and buried".[71]

The problem is, when you examine ICS it looks like ISDS has risen from the grave.

ICS: the not-so-dead ISDS walking

The problem with these positive claims about ICS are that what the EU is proposing simply copies in many ways the arbitration proceedings of the past. For example, investor-state lawsuits under TTIP would still operate under the usual ISDS arbitration rules.[72] And the so-called 'judges' deciding the cases would be paid according to the most common schedule of fees used in ISDS proceedings – with a lucrative US$3,000 per day.[73] 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" because "ISDS is alive in the ... (European Commission's recent) proposals".[74] "When people say that ISDS is dead, it makes me think of a zombie movie because I can see ISDS walking around in these new proposals all over the place," van Harten has stated.[75]

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 statement published in February 2016. "Against this background, the ICS appears not as an international court, but rather as a permanent court of arbitration."[76]

ICS & ISDS: equally dangerous twins

Indeed, with the exception of some procedural improvements – an enhanced selection process of arbitrators (re-labelled 'judges') and the establishment of an appellate chamber – the 'new' ICS essentially equals the 'old' ISDS system which can be found in existing investment treaties and the current text of the proposed EU-Canada CETA (see table 1 on page 32). The ICS proposal contains the same far-reaching investor rights that multinationals have used when demanding multi-billion Euros in compensation for

BOX 4

What difference would TTIP make for the EU?[85]

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.[86] These treaties cover a mere **1 per cent** of US investment in the EU. The investor rights proposed for TTIP 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, 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 TTIP could invite the launch of **nearly 900** US investor lawsuits against EU member states.

Image 2: **TTIP investor rights: more legal & financial risks for the EU**

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

public health and environmental policies. As a result, it contains the same serious risks for taxpayers, public interest policies, and democracy as the 'old' ISDS-system.

While the ICS proposal does improve the selection process of arbitrators, it is substantially the same system.

Laurens Ankersmit, lawyer with ClientEarth[77]

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

The European Commission's latest proposal for investment protection, which applies to all of its ongoing and future trade negotiations, 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[78] – whenever they think that state actions violate the far-reaching 'substantive' investor rights that the EU proposes.

The European Commission proposal would massively expand the extrajudicial tribunal system – open only to foreign investors not domestic citizens – that formally prioritises corporate rights over the right of governments to regulate on behalf of citizens.

Transatlantic Consumer Dialogue[81]

In the context of TTIP alone, tens of thousands of companies would be potential claimants. According to research by US-consumer group Public Citizen, a total of 80,000 companies operating on both sides of the Atlantic could launch investor-state attacks if the EU proposal was to be included in TTIP.[79] This danger is even more real given that EU and US businesses are the world's most aggressive users of investment arbitration: they account for 75% of all investor-state disputes known globally.[80] So, the EU proposal would significantly expand the reach of the current ISDS system (see box 4 on page 19).

Transnational companies could even sue their *own* governments – by structuring their investment through a subsidiary on the other side of the Atlantic.[82] 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".[83] Many companies wouldn't even have to get engaged in this exercise. They could just ask one of their shareholders to sue. With trillions of dollars worth of US-held securities in the EU, there's hardly a 'European' company that wouldn't be able to litigate via one of its investors from abroad.

With 3.5 trillion dollars worth of US-held EU securities – in shares, bonds and public debt combined – there is hardly a 'European' company that does not have a 'US' investor who has standing to bring a case.

Professor Harm Schepel, Kent Law School[84]

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, the environment, economic stability, and other public interests (see the annex on page 36). For example:

- The EU proposes that investors should be protected against ***direct and 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.[87] Contrast this broad take on 'indirect expropriation' with the fact that, in most of the world's jurisdictions only *direct* expropriations – such as 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".[88]

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[89]

Compared to many of the existing investment treaties, which have already lead to hundreds of investor-state lawsuits around the world, the EU proposal for investment protection in all of its ongoing and future negotiations 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 that 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 all problems between the investor and the city would need to be solved between the two of them in domestic courts. The umbrella clause is not part of the CETA agreement, presumably because it was rejected by Canada, whose other investment treaties do not feature such a clause.

This doesn't change anything because the standards on the basis of which judgements are rendered remain the same.

Nigel Blackaby arbitration lawyer with Freshfields on the EU's ICS proposal[90]

While supporters of the investment protection system regularly pretend that it only protects against discrimination, the above listed rights show that the EU's proposals go 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 22). Having voted for measures such as bans on dangerous chemicals, labour laws, or measures to limit pollution, citizens could then finds themselves on the hook to pay millions in compensation to investors. And the list of potential liabilities goes on and on.

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.[91] 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".[92] Put differently: 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.

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[93]

BOX 5

Case study of Keystone XL: under ICS, could Big Oil sue EU member states over a rejected oil pipeline?

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.[94] Let's look at one such lawsuit – the announced claim under NAFTA by TransCanada against President Obama's denial of a permit for the controversial Keystone XL oil pipeline (see box 1 on page 12)[95] – and assess whether the pipeline developer could develop the same case on the basis of the Commission's new proposal for a rebranded ISDS.[96]

TransCanada argues that the US breached NAFTA's **fair and equitable treatment** standard because of "delaying the processing of the application for an extraordinarily long period" (using "arbitrary and contrived" excuses) and because of "applying new and arbitrary criteria in deciding to deny the application".[98] According to the company, the denial was "not based on the merits of Keystone's application", but "politically-driven":[99] while "the State Department, itself, concluded on multiple occasions that the pipeline would not raise any significant safety, public health, and environmental concerns that could not be mitigated", it wanted to appease those with the "erroneous perception" that the pipeline was bad for the environment to "demonstrate U.S. leadership on climate change".[100] Doesn't that sound like an argument that Big Oil could get away with under an EU investment treaty which would grant "fair and equitable treatment", including against measures that constitute "manifest arbitrariness" and "fundamental breach of due process... in administrative proceedings" (section 2, article 3.2 of the EU proposal)?

If we're gonna prevent large parts of this Earth from becoming not only inhospitable but uninhabitable in our lifetimes, we're gonna have to keep some fossil fuels in the ground rather than burn them and release more dangerous pollution into the sky.

US President Barak Obama explaining his 'no' to the Keystone XL oil pipeline[97]

TransCanada further argues that the US "**unjustifiably discriminated**" against Keystone because it "has previously approved pipelines from other investors, including from the United States and Mexico, based on factors that, if applied to Keystone's application, would have resulted in approval of the application." In addition, the pipeline developer argues that "the United States had also approved those other applications in a significantly shorter period of time".[101] Both points could be made on the basis of the EU proposal which guarantees "investors of the other Party... treatment no less favourable than the treatment it accords, in like situations, to its own investors" (**national treatment,** section 1, article 2-3) and to investors of a third party (**most-favoured-nation treatment,** section 1, article 2-4).

According to TransCanada, the US administration's review and denial of the pipeline was also "**expropriatory**" because "the State Department delayed its decision for seven years, with full knowledge that TransCanada was continuing to invest billions of dollars in the pipeline", which "substantially deprived" the company of the value of its would-be investment.[102] 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 TransCanada's expropriation point meaningless? Not necessarily. First, according to the company, the handling of its application was discriminatory (see above). Second, it questions that the US government's decision was driven by a legitimate public policy objective, because it was "directly contrary to the findings of the Administration's own studies" that "the pipeline would not have a significant impact on climate change".[103] What if a tribunal over such a claim against an EU member state agreed?

The EU also wants to protect an investor's "**legitimate expectation**". Again, TransCanada is arguing along these lines, claiming that its "reasonable expectation" that the US would process its application "fairly and consistently with past actions" was "not met".[104] The company gives five causes why it "had every reason to expect that it's application would be granted... in a reasonable period of time": first, it met the same criteria guiding the approval of previous pipelines; second, the US administration concluded repeatedly that Keystone XL would not have a significant impact on climate change; third, the relevant executive rules suggest approval unless there are environmental, health and safety concerns; fourth, the company worked intensely with the administration to address concerns; and fifth, similar pipelines had previously been approved within roughly two years.[105] Don't some of 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)?

TransCanada's claim is not about US soldiers showing up with guns at a pipeline and declaring ownership; it's about a reasonable political choice to protect the planet's climate. In the company's view, however, making a choice they don't like constitutes a theft.

Jim Shultz, The Democracy Center[106]

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 Keystone's? Not really. While the US government might have considered the Keystone XL denial necessary to demonstrate leadership on climate change, TransCanada is questioning this necessity, claiming that the decision was "directly contrary to the findings of the Administration's own studies" that the pipeline would not have a significant impact on climate change.[107] What if a tribunal over a similar claim against an EU member state agreed?

TransCanada is seeking "**damages** of over US$15 billion from the United States' breach of its NAFTA obligations".[108] The vast majority is based on **missed future profits** the company hypothetically could have earned – because it has only invested US$2.4 billion so far.[109] Claims for lost expected future profits would also be possible under the EU proposal.[110] Damage claims could go into billions.

Finally, TransCanada's NAFTA arbitration is happening in tandem with a challenge in a US federal court in Texas over whether the rejection of Keystone XL is constitutional.[111] While it looks like the EU tries to prevent such **parallel claims** where an investor challenges the constitutionality of a decision and demands its annulment in the courts of an EU member state , while at the same time seeking compensation in an international investment arbitration (section 2, sub-section 5, article 14), commentators have argued that the EU's attempt might not work in practice.[112] So, a TransCanada-like situation of a parallel claim could well be possible.

Moreover, TransCanada's arbitration is happening without the company being required to go to domestic courts first. The Commission proposal, too, does not require the **exhaustion of domestic remedies** – otherwise one of the basic rules in international law.

We cannot know how a potential future TransCanada-like claim against the EU or an EU member state would be decided (the company would only need to win one of its arguments for a tribunal to order compensation from the US). But it is pretty clear that the investor rights as proposed by the European Commission would not prevent such a case from being filed.

We have a good legal system in this country and those who don't like the U.S. government's decision should go into court.

Sander Levin, Democratic Member of the US House of Representatives[113]

This is also the case for other extreme investor-state claims, such as Vattenfall's challenge of environmental restrictions for a coal-fired power plant, Philip Morris' suit against anti-smoking measures in Uruguay, Lone Pine's case against a fracking moratorium in Canada and the case which Bilcon recently won against Canada over the rejection of a quarry (see box 1 on page 12).[114] All grounds relied upon by these companies can be found in the EU proposal.

Danger #3: the EU proposal paves the way for billions of taxpayers' money paid to corporations

Once an investment tribunal finds that a state has violated the investors' super 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 wreak havoc with public budgets, and can be enforced by seizing state property in many countries around the world.

One of the highest known awards to date, US$1.06 billion plus interest, was made against Ecuador.[116] This is one percent of the country's entire GDP. In 2003, the Czech Republic had to pay a media corporation US$354 million – reportedly the equivalent of the country's national health budget at the time.[117] 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 14).

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.[118]

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[120]

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).[119]

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 potentially cost them billions in taxpayer money. 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.[121]

In a parliamentary democracy, shouldn't voters be able to change the government, and the government to change the policies, without facing impossibly costly obligations that were locked in by an earlier government?

Professor Gus Van Harten, Osgoode Hall Law School[122]

Danger #4: 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 public health, social well-being, privacy, and the environment if those are opposed by big business.

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."[123] And if there is, they might think twice.

It may be easily imagined that in certain cases a mere threat of significant compensation payable to a foreign investor may induce the Host State to reconsider its anticipated actions.

Lawyers from legal firm Linklaters[124]

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 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 12) and the delayed implementation of anti-smoking rules in Canada and New Zealand, following lawsuit threats and actual claims by Big Tobacco.[125]

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[126]

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.[127] Specialised arbitration law firms, on the other hand, constantly encourage their multinational clients to use the ISDS weapon to scare governments into submission.

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]

Scholars such as David Schneiderman from the University of Toronto, Canada, have therefore aptly described the anti-democratic character of international investment treaties as: "an emerging form of supraconstitution... designed to insulate economic policy from majoritarian politics".[129] 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."[130]

Danger #5: the EU proposal would enable backdoor investor attacks on court decisions

The EU proposal would allow foreign corporations to challenge 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.[131]

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 separation 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.[132]

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[133]

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.[134]

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.[135]

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 (now 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.[136] So, they would earn more fees as more foreign investor claims were brought.

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[137]

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.[138]

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, as a local community living on land claimed by an investor.[139]

ISDS chapters are anomalous in that they provide protection for investors but not for States or for the population. They allow investors to sue States but not vice-versa.

Open letter of ten independent UN experts and special rapporteurs[140]

There are other flaws which make the EU proposal prone to bias. For example, there are no cooling-off periods for the 15 pre-agreed arbitrators who would decide future investor-state claims. They could go straight from lawyer to judge, and back again. In other words, 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[141] – 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.

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).[142] 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, 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.[143]

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[144]

Re-labelling the ISDS system a 'court system' and the new 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 taking into account environmental protection, human rights or other non-corporate considerations that a regular judge usually has to balance.

Danger #7: 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 page 13). But while many existing treaties could be terminated at any time,[148] 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

BOX 6:

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, foreign 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 many 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.[145] Treaty termination is also an option for the bilateral investment treaties of Eastern European EU members with Canada and the US.

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 page 15).

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 rights violations across the globe underlines the broader 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.[146] Unfortunately, the EU and its member states are effectively undermining this UN Treaty process, standing up for corporate interests instead of human rights.[147]

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.[149] 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"[150] of developing a multilateral investment court, in parallel to its ongoing bilateral negotiations, and has in particular raised the issue with some Asian countries. 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".[151] While there are no further details available yet about how this tribunal 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[152]

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.

Chapter 4:
TTIP, CETA, ISDS, ICS: different names, but the same corporate agenda

For the past two years, an unprecedented European-wide public controversy about the once-arcane investor-state dispute settlement or ISDS has kept citizens, governments, parliamentarians, and the media on their toes. But the real battle over the extreme investor rights regime is only beginning.

For the first time in two years, ISDS will be back on the negotiation agenda for the EU-US Trade and Investment Partnership (TTIP) in 2016, after massive citizen opposition had forced negotiators to temporarily halt the issue. Other draft trade agreements already include the sweeping privileges for investors and await ratification in 2016 and 2017: the EU-Singapore free trade agreement (finalised in 2014), the EU-Canada Comprehensive Economic and Trade Agreement (CETA, also from 2014) and the EU-Vietnam free trade agreement (finalised in 2015). While the latter builds on the EU's 'new' investment protection proposal (misleadingly re-labelled 'investment court system' or ICS), CETA and the EU-Singapore deal follow the 'old' ISDS model.

If ratified, these agreements would be the first treaties which, at one stroke, would empower foreign companies from *all* economic sectors to directly file high-stakes compensation claims against the EU and *all* its member states in business-friendly international tribunals. So far, only the Energy Charter Treaty (ECT), a multilateral treaty created after the fall of the Iron Curtain, allows for such claims against the EU, but is limited to the energy sector. The many bilateral investment treaties (BITs) signed by EU member states, on the other hand, have a much smaller geographic reach. Nonetheless, this existing treaty network has become increasingly controversial as foreign investor lawsuits against EU member states have exploded (see box 2 on page 14). EU member states have paid at least €3.5 billion in taxpayers' money due to these claims and 60% of the claims initiated concern environmentally relevant sectors.[153]

ISDS is the thorn in the flesh of CETA.

Sorin Moisa, CETA rapporteur for the European Parliament's S&D group[155]

Unsurprisingly, ISDS is a controversial issue for all new trade deals proposed by the EU – and a potential stumbling bloc for ratification, in particular for the CETA with Canada. Members of the European Parliament's second-largest group, the Socialists and Democrats (S&D), have already threatened that "without substantial changes" to the investment part of the text, "we will not ratify CETA".[154] The 1,500-page deal needs to win the approval of EU member states in the Council and a yes vote in the European Parliament, plus, most likely also in national parliaments of all 28 EU member states. In several negotiation areas, CETA is considered a blueprint for the even more controversial proposed agreement with the US, TTIP.

A Trojan horse treaty

Trade unions and public interest groups oppose CETA over a number of concerns, ranging from higher drug costs, to threats to public services, to the lack of enforceable rules to protect workers.[156] CETA's investment protection chapter in particular has raised concerns on both sides of the Atlantic. It arguably grants even greater rights to foreign corporations than existing treaties like the North American Free Trade Agreement (NAFTA), under which Canada has already been sued 39 times, has lost or settled several claims, and has paid compensation totalling over C$190 million. For example, CETA would give foreign investors more rights to challenge financial regulations and contains provisions that could be interpreted as a "right" to a stable regulatory environment, giving investors a powerful weapon to fight regulatory changes.[157] CETA also acts as a Trojan horse for US-based multinationals which could launch suits against European policies via their Canadian subsidiaries, if they structure their investment accordingly. Even if such far-reaching investor rights were never included in TTIP, 81 per cent of US-owned firms operating in the EU – or 41,811 out of 51,495 companies – could launch investor-attacks against the EU and its member states with CETA alone.[158]

Image 3: **CETA: a Trojan horse treaty**

These are just some of the 41,811 US-based companies that could sue the EU via CETA if they structure their investment accordingly

If the CETA is signed and ratified with ISDS intact, Canadian and European democracy will suffer while corporations gain new tools to frustrate any number of policies designed to protect the environment, public health, public services, resource conservation and, crucially, to make our social-economies more sustainable and equitable.

Statement by over 100 civil society groups in Canada and Europe[159]

However, in light of public opposition, CETA's investment chapter is currently being re-negotiated. In January 2016, Canadian media reported that the EU had "quietly approached" the Canadian Trudeau Government "with a request to revisit the controversial investment protection clause", apparently out of fear of "a humiliating defeat" in the European Parliament ratification vote and with the aim that "a compromise can be reached to appease moderate opponents."[160]

Are MEPs fooled by the big ISDS rebranding?

Apparently, these 'moderate opponents' are demanding an update of CETA's 'old-style' ISDS chapter towards the EU's more recent model. In the S&D group, for example, the CETA rapporteur Sorin Moisa, together with the Parliament's President Martin Schulz and the chair of the trade committee, Bernd Lange, have all pushed for the inclusion of the so-called Investment Court System or ICS into CETA.[161] "We should try our utmost to have the ICS in CETA," Lange said in November 2015.[162] When the EU concluded negotiations for its trade deal with Vietnam which contains most elements of the ICS proposal, Lange called for amendments to CETA following the "model" of Vietnam.[163] According to sources inside the Parliament, the liberal ALDE group seems to have a similar position. The group's spokesperson on trade, Dutch MEP Marietje Schaake, considers the ICS proposal "dramatically reformed"[164] and has called on the Commission to "engage China and Canada to work towards an international court because negotiations on bilateral agreements are ongoing with these countries".[165]

In other words, a significant number of European Parliamentarians currently seem to believe that the EU's 'new' ISDS proposal (misleadingly re-packaged in court terminology by the Commission) deserves more support than CETA's 'old' ISDS system which many of them fervently opposed.

The Commission's proposal fails to address the fundamental concerns that the Transatlantic Consumer Dialogue and others have raised. Rather, the proposal suggest some changes on the margins.

Transatlantic Consumer Dialogue[166]

That might be surprising to the reader of the previous chapter, which showed that the EU's 'new' ISDS model is dangerous for democracy, public interest law, and public money. With the exception of some procedural improvements – an enhanced selection process of arbitrators, stronger ethics rules, and the establishment of an appellate chamber – the 'new' ISDS essentially equals the CETA's investor rights chapter. The rebranded version contains the same corporate privileges that multinationals rely on when they demand multi-billion Euros in compensation for environmental or public health decisions – often in wording identical to CETA. Table 1 (see page 32) illustrates the similarity of the systems with regards to the most fundamental concerns with ISDS as they have been raised for years by public interest groups, trade unions, small and medium enterprises and academics alike.

Putting lipstick on a pig

All of them have lambasted the Commission's attempt to hide the much-loathed ISDS system under the shiny gloss of a 'court' rhetoric. The day the Commission published its 'new' ISDS proposal, campaigners slammed it as a thinly guised attempt to "put lipstick on a pig" and "essentially a PR exercise to get around the enormous controversy and opposition that has been generated by ISDS".[167] In the meantime, more substantial analyses and position papers have been published suggesting that civil society on both sides of the Atlantic has not been fooled by the ISDS-ICS name change and will continue to build popular opposition to special privileges for foreign investors under whatever label.[168]

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[169]

Meanwhile new groups have joined the ranks of the critics. Most notably, Germany's largest association of judges and public prosecutors has firmly rejected the Commission's proposed 'investment court system', citing numerous concerns ranging from its lack of financial independence to the sidelining of European courts. The judges also categorically rejected the idea of a special court for only certain groups in society as "the wrong way forward", arguing that "it is for the Member States to ensure access to justice for all and to ensure feasible access for foreign investors, by providing the courts with the relevant resources".[170]

Industry crying wolf

Corporate lobby groups have attacked the Commission's new investor rights proposal from a different angle. As soon as it was out, industry started 'crying wolf', complaining that investor protection would be eroded. According to the European Services Forum, for example, a lobby outfit banding together service players such as Deutsche Bank, IBM, and Vodafone, "the Commission Proposal is establishing a 'government protection', to the detriment of what used to be the protection of the investments done by business."[172] The chief trade lobbyist of Europe's most powerful corporate lobby group, European employer federation BusinessEurope, went as far to claim that "in reality it won't be possible for any investor to be compensated".[173]

The political situation is convenient for the EU Commission. Interest groups from all sides are criticising its reform agenda. So, the Commission can claim to have responded to the public criticism and presented a balanced proposal.

Max Bank, lobby watchdog group Lobbycontrol[174]

This is obviously a clever move by the industry, because

TABLE 1:
More of the same corporate privileges

Concerns with ISDS	Does the EU address the concerns in its latest ISDS proposals?	'OLD' ISDS IN CETA	'NEW' ISDS (ICS) IN TTIP
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 health, the environment and other public interests would be perfectly possible under both the 'old' and the 'new' ISDS system (see, for example, box 5 on page 22). And as in the infamous Bilcon quarry case against Canada (see box 1 on page 12), investors could very well win these lawsuits.[171]		
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.		
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.		

Concerns with ISDS	Does the EU address the concerns in its latest ISDS proposals?	'OLD' ISDS IN CETA	'NEW' ISDS (ICS) IN TTIP
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 proceedings (though neither generally from lawyering on the side nor from making money as arbitrators in other ISDS proceedings and there is no cooling-off period to limit potential conflicts of interests before and after their appointment). 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 CETA 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.		

it suggests that the Commission's proposal falls somewhere in the middle between investor-friendly demands by the business sector and public-interest driven positions by civil society groups. This makes it easy for the Commission to sell its proposal as a compromise that is maybe not yet as far as critics want it to be, but on the right track.

Behind the scene, however, ISDS proponents seem well aware that the Commission's proposal "doesn't change anything" because the far-reaching rights for investors essentially "remain the same", as an investment lawyer who makes money when companies sue states has put it.[175] Other investment lawyers have called the investor rights proposed by the Commission "a very good obligation (for states) to work with" – "from the perspective of the greedy, avaricious lawyer."[176]

The German industry federation BDI, one of the most important pro-ISDS lobby groups in the EU-debate of the past years, has also largely welcomed the Commission proposal, praising in particular the proposed substantive investor rights, the definition of investment, the umbrella clause, the appeal procedure, and the Commission's long-term goal of establishing a multilateral investment court. Notably, the BDI also applauds the fact that the Commission proposal "does foresee investor-state dispute settlement"[177]. In other words: ISDS.

From the perspective of the BDI, many of the Commission's proposals deserve support.

German industry federation BDI on the ICS proposal[178]

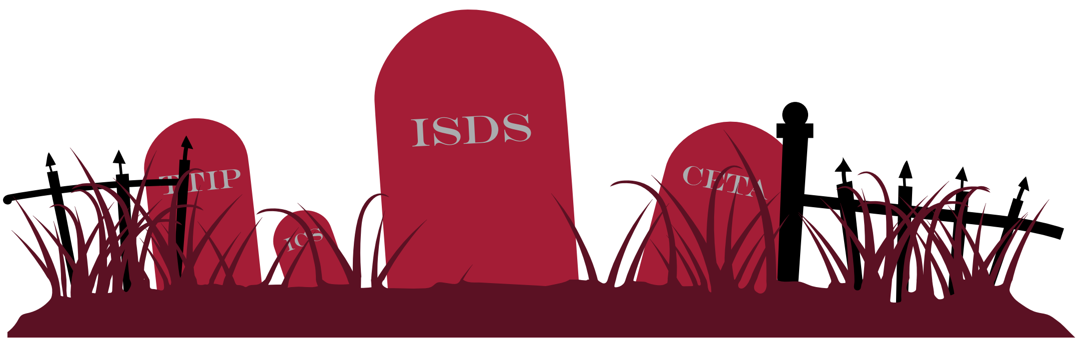
Don't rebrand ISDS, reject it

But all is not lost. While some MEPs have seemingly been fooled by the Commission's PR exercise, others have not. Commenting on the potential revision of the CETA investment chapter in the direction of the investment court system, French MEP Yannick Jadot, for example, has declared: "European citizens do not just want a change at the margin of the arbitration, but removal of the provision."[179] The European Parliament's Left group is equally dismayed. And concerns are also spreading in other groups. In an open letter, Belgian MEPs from the Greens, the Social Democrats and the conservative EPP, for example, have recently criticised the Commission proposal as pure window-dressing and insisted that "ISDS and possible upgraded versions remain unacceptable because of their nature and the threats they pose to our democracies."[180]

In the end, the battle over the extreme investor rights will be decided in EU member states and the European Parliament. And as more and more people are learning about how the ISDS system in all its different guises works, there is a good chance that it might in the end help galvanise the broad-based public pressure needed to stop lawmakers from approving agreements such as CETA and TTIP.

We won't be fooled by a rebranding. We are against any privileged access to justice, whatever it may be called.

Judith Kirton-Darling, UK MEP from the S&D Group[181]



Chapter 5
Conclusion: 7 reasons to oppose and abolish the corporate privileges

In the fairytale of Little Red Riding Hood, the wolf pulls all kinds of tricks to get Red Riding Hood to trust him. Pretending to be her grandmother, the wolf puts on the old woman's clothes, imitates a high voice, leaps into bed and covers itself with her blanket. Red Riding Hood falls for the disguise and almost gets eaten. In the current controversy about corporate rights in EU trade deals, the Big Bad Wolf is called investor-state dispute settlement or ISDS. And the European Commission is using the so called 'investment court system' or ICS, as 'grandma's blanket', to hide the true nature of the wolf beneath.

Unlike Red Riding Hood, people in Europe and in countries to whom the EU is currently proposing the ICS shouldn't be fooled. The ICS is as dangerous for taxpayers, policies in the public interest and democracy as the 'old' and much-loathed ISDS-system. It is arguably even more threatening – because it could forever lock EU member states into a legal regime where private profits trump the public interest and democracy.

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

Reason #1: the ICS would empower tens of thousands of corporations to sue governments over measures to protect the environment, health, workers and other public interests

Reason #2: under the ICS, billions in taxpayer money could be paid to compensate corporations, including for missed future profits that they hypothetically could have earned

Reason #3: the ICS is a sure-fire way to bully decision-makers, potentially curtailing desirable policymaking, for example, to tackle climate change, social injustice or economic crises

Reason #4: the ICS would give exceptionally powerful rights and privileges to foreign investors, without any obligations and without any evidence of wider benefits to society

Reason #5: 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 #6: there are severe doubts that the ICS is compatible with EU law as it sidelines European courts and is fundamentally discriminatory, granting special rights to foreign investors only

Reason #7: the ICS risks forever locking us into a legal straightjacket, as it will be practically impossible to exit from the investor privileges as a part of larger trade deals, let alone a multilateral investment court

In a nutshell, the system is fundamentally ill-suited to deal with the key challenges of our current historical moment and of the future. In a time when all attention should be focused on averting a global climate catastrophe and the next economic crisis, there is simply no space for agreements that would make many solutions to these problems illegal.[182]

Existing treaties that allow private companies to sue governments over laws that impinge on their profits – from tough antipollution regulations to stricter rules for banks – should be abolished. Plans for supplemental corporate bills of rights in proposed treaties such as TTIP and CETA should be axed. And so should be the proposal for a world supreme court exclusively for corporations. They are all wildly dangerous for democracy as we know it.

ANNEX:

The devil is in the ISDS detail

Investment lingo: what the EU wants to negotiate in TTIP and all future investment agreements[183]	**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.
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 of the EU and its trading partners to incalculable legal risks (see box 4 on page 19).
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 (see box 1 on page 12), 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).[184] Such an argument could without difficulty be used on grounds of "manifest arbitrariness" in the EU text.

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. In the Quebec case where community opposition led to a moratorium on fracking (see box 1 on page 12), Lone Pine argues that the revocation of its gas exploration permits violated its "legitimate expectation of a stable business and legal environment."[185] 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 investors 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.
Investment and regulatory measures II: "The provisions of this section shall not affect the right of the Parties to regulate within their territories trough 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.
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)	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, environmental, 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.

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)	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).[186] 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.
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.[187]
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"[188] 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,[189] and an Australian investor to challenge India with Kuwait-India rights.[190] 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).
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.
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.
The tribunal deciding the cases: Investor claims will be decided by a "tribunal" of three chosen from a pool of 15 "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[191] – with a strong incentive to decide in favour of the one party that can bring claims in the future: the investor.
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.[192] In 2003, the Czech Republic paid a corporation US$354 million, then the equivalent of the country's health budget.[193] 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.[194]

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 (see box 1 on page 12) and the delayed implementation of anti-smoking rules in Canada and New Zealand, following lawsuit threats by Big Tobacco.[195] 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.	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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“When people say that ISDS is dead, it makes me think of a zombie movie because I can see ISDS walking around in these new proposals all over the place”

Professor Gus Van Harten, Osgoode Hall Law School