INVESTMENT COURT SYSTEM: ISDS IN DISGUISE

TEN REASONS WHY THE EU'S PROPOSAL DOESN'T FIX A FUNDAMENTALLY FLAWED SYSTEM

INTRODUCTION

The European Commission has proposed a new 'Investment Court System' to replace the current investor to state dispute settlement mechanism (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP) and other future investment deals. The proposed new mechanism does not resolve the biggest problems with ISDS and would expand the reach of the system, increasing the risk of claims against the European Union (EU)[1].

The Commission's proposal follows a public consultation on ISDS in which 97% of the 150,000 respondents rejected the mechanism. Three million people have signed a petition objecting to the TTIP agreement and the ISDS proposal.[2]

We have identified 10 key problems with the new proposals, which reflect how the rights of corporate investors are still privileged over citizens, enhancing the power of foreign investors in relation to sovereign states. There are still no convincing arguments to include any form of ISDS in TTIP – including the misleadingly renamed 'Investment Court System'.

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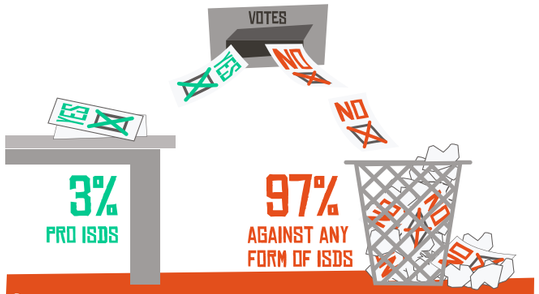


#1 THE PROPOSAL IGNORES THE FINDINGS OF THE PUBLIC CONSULTATION ON ISDS

Following public opposition to ISDS, the European Commission organised a public consultation, based on the proposed reforms in the EU-Canada trade agreement (CETA). An overwhelming 97% of respondents rejected ISDS.[3] The Commission's proposal ignores the concerns raised by the public as it retains special rights for investors.

#2 ISDS GIVES A MASSIVE BOOST TO COMPANIES TO SUE EU GOVERNMENTS

The new proposal disguises the fact that an Investment Court System would drastically expand the rights of investors[4] as it would provide protection for all US investments in the EU. Currently just eight per cent of US firms operating in the EU are protected by ISDS (through bilateral treaties). This tiny proportion of US investors has already claimed more than 30 billion euro in compensation from EU member states through ISDS.[5] The proposal would vastly increase the chances of EU governments being sued.

#3 VIP RIGHTS FOR FOREIGN INVESTORS WITHOUT OBLIGATIONS

The proposed 'Investment Court System' still prioritises the rights of foreign investors over the public interest without imposing any obligations, such as respect for environmental, social, health and safety or other standards. Foreign investors would still be allowed to circumvent domestic courts and sue states directly through international tribunals. This still discriminates against domestic investors.

#4 NO RIGHTS FOR THE PUBLIC OR THOSE ABUSED BY INVESTORS

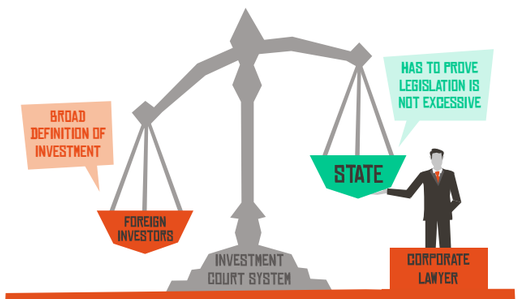
The 'Investment Court System' is a one-way mechanism, only available to foreign investors. Citizens who suffer due to the activities of mining companies, banks, food multinationals or chemical producers do not have access to the international tribunals in cases where multinational companies are responsible for human rights violations or environmental degradation. At the same time, EU member states and the Commission are undermining proposals at the UN level to establish mechanisms that could give citizens access to international courts when their rights are violated by investors.[6]

#5 NO PROTECTION FOR THE RIGHT TO REGULATE

The European Commission claims to have introduced language to protect national governments' right to regulate. However the mechanism does not provide adequate safeguards, with governments only permitted to take the "measures necessary" to achieve "legitimate" objectives. This again leaves it up to arbitrators to decide what is allowed and what is not.

#6 RISK OF REGULATORY CHILL REMAINS

By allowing investors the right to still claim large sums of money from governments that introduce new regulations, the risk of regulatory chill remains – governments concerned about potential claims will refrain from action or will already adapt new rules to the wishes of those investors. This undermines democratic decision-making.

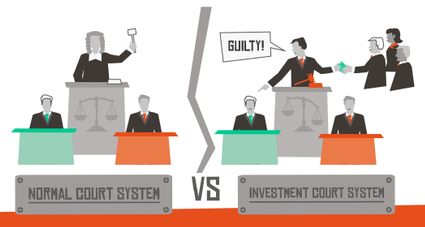


#7 PROTECTION WEIGHTED TOWARDS INVESTORS

The broad definition of investment in the proposal allows foreign investors to claim compensation from the state under a wide range of circumstances. The European Commission claims to have limited protection for investors, but investors are still given the right to claim "indirect expropriation" (loss of profits) as a result of any new legislation introduced in the public interest (eg health warnings on cigarettes) if it has a "manifestly excessive" effect on their operations. It will be up to the state to show the effects of their legislation were not excessive.

#8 NO INDEPENDENT JUDGES

"Judges" sitting in the Commission's proposed 'Investment Court System' will not be independent. They will not be required to be serving judges, but will only need to be legally qualified as a judge, or be jurists of recognised competence. Current private arbitrators will be able to be appointed as "judges" in the proposed Investment Court. There are also flaws in the proposed ethics requirements, with no cooling-off period either before or after serving on the roster, no clear definition of conflict of interests, and no explicit ban on being paid for related work while sitting as an arbitrator.



#9 INVESTMENT COURT SYSTEM IS STILL ARBITRATION

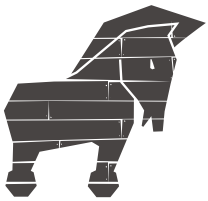
The term investment court is misleading as the system is not a court system. Judges do not have a fixed tenure, with a fixed salary. They are paid by the day, so have a financial incentive to rule in favour of investors to attract more claims. Fundamental safeguards for an independent legal system are missing. This proposal is still an arbitration system with cosmetic changes.

#10 NO CONVINCING REASON FOR ISDS

The insistence on including investment protection in TTIP contradicts the economic reality. There are already high levels of transatlantic investment, with the EU and the US being each other's main trading partner. ISDS is clearly not a precondition for attracting foreign direct investment, and so there is no need for additional protection. The US has previously signed a free-trade agreement with Australia that does not include ISDS – so there is no reason why it cannot sign an agreement without ISDS with the EU. Both the EU and US have well-functioning judicial systems and foreign investors can rely on those, just like domestic investors have to.

AND WHAT ABOUT CANADA?

The proposed 'Investment Court System' will not apply to the almost finalised EU-Canada Trade Agreement (CETA). Civil society organisations, academics and officials in Member States and the European Parliament have highlighted important loopholes in the ISDS proposed in CETA.[7] The European Commission's failure to close these loopholes, while not applying the 'Investment Court System' to CETA, shows that the fundamental problems remain. This is another reason why CETA should not be signed.



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More information at: www.foeeurope.org/EU-US-trade-deal

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ENDNOTES

1 http://www.s2bnetwork.org/isds-courting-foreign-investors/

2 https://stop-ttip.org/

3 http://www.foeeurope.org/eu-commission-deaf-opposition-investor-privileges-130115

4 http://ec.europa.eu/commission/2014-2019/malmstrom/blog/proposing-investment-court-system_en

5 http://foeeurope.org/hidden-cost-eu-trade-deals

6 In the context of the UN Human Rights Council discussions on a proposed Treaty on business and human rights. EU member states have voted against this proposal and are boycotting the negotiations.

7 http://www.foeeurope.org/trading-away-democracy-cetas-investor-protection-rules-threaten-public-good-191114; http://www.euractiv.com/sections/trade-society/france-may-block-eu-canada-trade-deal-over-isds-315911