

ISDS at a dangerous crossroads



S2B position on the European Commission proposal for a multilateral investor-state dispute settlement (ISDS) mechanism

Globalisation is at a dangerous crossroads. One path leads to stronger protection for human rights and the environment and to regained policy-space for governments to address climate change, inequality and other pressing issues of our times. The other leads to more rights for corporations to bully decision-makers and make them pay when they regulate in the interest of the many, not just the few. The European Commission proposal for a multilateral mechanism to settle investor-state disputes (ISDS) – publicly branded as a Multilateral Investment Court – would take us down that second path. It threatens to forever lock-in the highly controversial ISDS system that only benefits corporations.

When in November 2015 the European Commission released its negotiation proposal for foreign investor rights in the Transatlantic Trade and Investment Partnership (TTIP) with the US, it announced that “it will start work, together with other countries, on setting up a permanent International Investment Court”, which “would lead to the full replacement of the ‘old ISDS’ [investor-state dispute settlement] mechanism with a modern, efficient, transparent and impartial system for international investment dispute resolution”.¹

It was – and continues to be – a thinly disguised attempt to re-legitimise the controversial investor rights in TTIP and other trade deals with some limited procedural reforms, which make investor-state lawsuits more transparent, appealable and less prone to conflicts of interest, but do not address the fundamental flaws of the investor privileges.² Public outcry had forced the European Commission to halt negotiations over TTIP’s investment chapter and conduct a public consultation on the issue. A record 150,000 people participated and over 97% of them rejected the corporate privileges. The opposition came from a broad and diverse camp, including businesses, local and regional governments, academics, trade unions, and other public interest groups.³ Even more, over 3.5 million citizens, have signed a petition against TTIP and the EU-Canada CETA (Comprehensive and Economic Trade Agreement) “because they include several critical issues such as investor-state dispute settlement... that pose a threat to democracy and the rule of law”.⁴

Since the European Commission’s 2015 TTIP proposal, its goal of establishing a multilateral investor-state dispute resolution mechanism has been included in CETA and the EU trade agreement with Vietnam;⁵ the Commission has approached other countries and stakeholders on the issue;⁶ it has published several papers to steer the discussion (some of them backed by Canada);⁷ and has launched a public consultation on the proposal⁸ – a first step towards the Commission’s declared goal of receiving a mandate from EU member states to negotiate a convention to establish a multilateral mechanism for investor-state dispute settlement in 2017.⁹

Against this background the Seattle to Brussels Network (S2B)¹⁰ has developed the following position:

1- THERE IS AN URGENT NEED FOR FUNDAMENTAL CHANGE

The past twenty years have revealed the dangers of the far-reaching privileges for foreign investors, which can be found in thousands of international trade and investment treaties today: transnational corporations (TNCs) and their lawyers have used the threat of expensive investor-state lawsuits to halt or roll back legitimate public-interest laws;¹¹ governments have been ordered to pay hundreds of millions in compensation for attempts to protect citizens and the environment, including for non-discriminatory measures in line with national or European law;¹² and some

companies have even used investor-state lawsuits to escape punishment after they were accused or convicted of crimes such as environmental pollution and corruption.¹³ In other words: today's international investment regime is detrimental to public budgets, regulations in the public interest, democracy and the rule of law. And it is a powerful and highly enforceable part of an architecture of impunity for the operations of TNCs – including for crimes committed by them.

On the other hand, the current regime does nothing to protect the rights of people affected by foreign investment. There are no binding international obligations for TNCs on human and labour rights as well as environmental protection and affected individuals and communities have no recourse to international justice when TNCs violate their rights. Internationally, the regulation of TNCs is limited to self-regulation in the form of voluntary codes of conduct, and essentially non-enforceable recommendations by the international community.¹⁴

As a result, we are faced with an appalling regulatory asymmetry where TNCs receive supreme protection through international 'hard law' via the powerful ISDS enforcement mechanism, while human rights and the environment are only protected through non-enforceable 'soft law'.

THE EUROPEAN COMMISSION'S PROPOSAL IN BRIEF¹⁵

The first point to clarify is that the Commission's initiative will not alter the substantive investment rules found in Bilateral Investment Treaties (BITs) and other international investment agreements that already exist or are being negotiated. The Commission is not proposing a multilateral investment treaty with foreign investor protection rights. They made it clear that "the multilateral investment dispute settlement system would have to be available for disputes arising under existing and future agreements" and that "this would also imply that the substantive law being applied by the mechanism would be that found in the underlying agreements".¹⁶

A second important clarification is that the Commission is not proposing to amend *all* existing international investment treaties in order to refer *all* disputes to the proposed multilateral ISDS mechanism, but instead have a convention that any country could sign so that "the multilateral system would apply to disputes under an agreement between countries A and B when both countries have ratified the instrument establishing the multilateral system".¹⁷

It is still unclear whether the proposed mechanism would become a new stand-alone institution or be docked into an existing international organisation (such as World Trade Organisation, the Permanent Court of Arbitration or the International Court of Justice).

The Commission is proposing to establish both a first instance and an appeal tribunal with full-time members.

Regarding the members of the investor-state dispute settlement body, the Commission so far proposes:

- to have full time members;
- they should be appointed by states;
- they should have qualifications such as "qualified to hold the judicial office in their country or be recognised jurists" and "have previous experience in investment law";¹⁸
- that members comply with an ethical code, though the Commission does not clarify which one;
- remuneration will, in principle, come from the parties to the convention establishing the multilateral system. However, the Commission leaves open the possibility that "Party contributions could be topped with user fees, so that investors bringing a dispute against a host state would need to cover (at least some) of the expenses incurred by such dispute".¹⁹

Regarding the enforcement of awards, the Commission proposes to create an enforcement system comparable to the International Centre for Settlement of Disputes (ICSID) to prevent review at the domestic level and thereby "political interference on the application of investment agreement provisions".²⁰

More and more governments, particularly from the Global South and backed by civil society, are trying to address that asymmetry: by changing or exiting from the international investment regime;²¹ and by pushing for a binding UN Treaty, an international legally binding instrument on TNCs and other business enterprises with respect to human rights.²² Such a treaty would include binding obligations for corporations and an enforcement mechanism, and would therefore contribute to ending the impunity that TNCs routinely enjoy for human rights violations and to ensuring access to justice for people and communities who are affected by corporate abuse, for example, through repression, the violation of labour rights or environmental destruction.

For civil society, which is backing these and other efforts, the ultimate aim is to prioritise human and labour rights over “investor rights” and cut the unjust privileges which corporations currently enjoy in international law.²³

2- THE PROPOSED MULTILATERAL INVESTOR-STATE DISPUTE SETTLEMENT MECHANISM IS FLAWED AND DANGEROUS

What the European Commission is proposing is a multilateral investor-state dispute settlement mechanism, so ISDS. The “investment court” rhetoric around the proposal could suggest that such a mechanism would deal with grievances from multiple parties related to investment. However, under the Commission’s proposed mechanism, only foreign investors will get special rights to sue and the defendant will always be the state. So, all the proposal does is to multilateralise ISDS.

The flaws of the European Commission proposal

- **One-way system:** Like the existing ISDS system, the proposed multilateral ISDS mechanism appears to be exclusively available to foreign investors. Citizens, communities, trade unions or states would not be able to bring a claim when a company violates environmental, labour, health, safety, or other rules. This one-way character makes the proposed mechanism structurally biased towards investors – because only investor claims can feed the system and the people who benefit from it financially.
- **Same problematic rights for foreign investors:** The European Commission has stated that its proposal will “not affect” the substantive investor standards in existing and future trade and investment treaties, that is, the very same problematic rights which have allowed for billion dollar lawsuits against legitimate and non-discriminatory regulations in the public interest and which can also be found in the EU’s recent agreements and negotiation proposals.²⁴
- **No investor obligations:** As the proposal neither mentions investor obligations nor legal instruments which could establish such obligations, it implies that, like under the existing ISDS system, corporations could not be brought to justice within the proposed institutional structure.
- **No duty to exhaust local remedies:** Nothing in the proposal suggests that investors would first need to exhaust local remedies before they get access to the multilateral dispute settlement mechanism. As with today’s ISDS system they could bypass domestic and European courts, even if they do offer justice and are reasonably available, and directly bring an international claim. So, foreign investors would continue to be exempt from the duty to exhaust local remedies – a key principle of international law to protect sovereignty, democracy and the rule of law. National courts are part of democratic systems and often better equipped to assess domestic law and the circumstances of a case, providing a basis for a fair ruling in subsequent international proceedings.
- **Doubts about independence and fairness of the process:** The establishment of a permanent ISDS mechanism (with publicly appointed full time members, secure tenure, and transparent proceedings) is likely to improve the independence of the current ad-hoc arbitration tribunal system. However it is noteworthy that the dispute settlement mechanisms, that the EU has included in its recent treaties with Canada and Vietnam, are not judicially independent (as arbitrators do not have a fixed salary, but continue to have a financial interest in the

continuance of investor claims), are not free of conflicts of interest (as arbitrators are not banned from on the side lawyering, for example) and are not fair (as affected third parties have no legal standing in the proceedings).²⁵ For these and other reasons the European Association of Judges has questioned the independence of the process.²⁶ So there is reason for suspicion when the European Commission now promises an independent and fair mechanism which cannot be found in these recent treaties. The suggestion made in the proposal, that the multilateral mechanism could rely on existing arbitration institutions and rules (such as ICSID or UNCITRAL, where arbitration lawyers tend to have considerable influence and even sit on some of the government delegations) is also highly problematic as this has the potential to compromise the independence of the process.

- ***Danger of appointment of commercial arbitrators:*** There is nothing in the proposal that guarantees that the proposed dispute settlement mechanism would avoid relying on people from an existing small club of arbitrators. Many of these arbitrators have been subject to widespread conflicts of interest and repeatedly interpreted investment law expansively and in the interest of foreign investors, having arguably taken it far beyond the original meaning intended by the governments who signed the investment treaties.²⁷ That the Commission considers it “desirable” that the members of its proposed dispute settlement mechanism have “previous experience in international investment law” clearly favours the small club of commercial arbitrators who dominate today’s ISDS system.²⁸

The severe dangers of the European Commission proposal

- ***Permanent lock-in of ISDS:*** The proposal would create a kind of special court for corporations which would lock governments further into a legal regime where private profits trump the public interest and democracy. Once established, it would take decades to dislodge such a regime.
- ***Undermining real reform:*** More meaningful steps, which governments have taken to minimise the risks of investor attacks – such as the termination of investment treaties or the adoption of model treaties with limited substantive investment protection standards or without access to ISDS – risk being sidelined and delegitimised. The current window of opportunity for regaining policy-space so that governments can address climate change, inequality and other pressing issues of our times risks being closed.
- ***Legitimation of slanted rules:*** The proposed multilateral ISDS mechanism risks re-legitimising a flawed and dangerous regime with some limited procedural fixes. But as long as the far-reaching substantive rights for foreign investors are not significantly limited, they would still be able to attack legitimate public-interest laws, prevent, weaken or postpone regulation and wreak havoc with public budgets.
- ***Even stronger bias towards investors:*** Like other courts, an institutionalised court for foreign investors is likely to tend to increase its power by ruling expansively on its jurisdiction and in favour of the claimants. Some have warned that the investor bias inherent in today’s private arbitration system could even become more intense through an investment court.²⁹
- ***A red herring for ISDS expansion:*** Perhaps the most concerning aspect of the proposed multilateral ISDS mechanism is that it is already being misused to legitimise, and distract from, a massive expansion of today’s foreign investor privileges. In the case of CETA and TTIP, for example, the promise of a future multilateral mechanism is already being used as a key argument to convince EU governments, parliamentarians and the public of the need to include special rights for foreign investors in these treaties. But TTIP alone would newly empower 75,000 companies to file investor-state lawsuits against the US, the EU and its member states – while, today, these companies do not have such direct access to ISDS tribunals.³⁰ Even without TTIP, 81% of US investors operating in the EU would be able to file claims on the basis of CETA, if they structure their investments accordingly.³¹

3- WE NEED MORE RIGHTS FOR PEOPLE AND THE ENVIRONMENT, NOT FOR CORPORATIONS

At a time when all attention should be focused on averting a global climate catastrophe, on tackling social and economic inequality and on empowering the many, there is no space for agreements which would give corporations power to sue governments who pursue such solutions. Instead of increased corporate power over our democracies we need international rules, which

- promote and protect human and labour rights, people's health and the environment in globalisation processes;
- secure policy-space for elected governments so that they can speed up the necessary social-ecological transition of our economies and societies, without facing impossibly costly obligations and liability risks;
- establish the primacy of human rights and environmental law over trade, investment and other fields of international law.

WE THEREFORE CALL ON

- civil society groups to engage in the debate about the proposed multilateral ISDS mechanism and unite in the fight against this new attempt to further lock-in and expand the investment protection regime and to also engage in the process for a binding UN treaty on transnational corporations and other business enterprises with respect to human rights;
- citizens to voice their opinion on the proposed multilateral ISDS mechanism by participating in the Commission's public consultation;
- legislators in the EU to not ratify CETA and other new EU trade deals with far-reaching substantive and procedural privileges for foreign investors under the false claim that these would fix the flaws of the global investment regime; whoever is serious about reforming the investment regime would start with terminating existing treaties or re-negotiating them in a way that they no longer privilege foreign investors;
- the governments of EU member states to not grant a mandate to the Commission to negotiate a convention for a multilateral ISDS mechanism for transnational corporations and on the European Commission to not proceed with this endeavour;
- EU governments to follow the example of countries like South Africa by terminating existing investment treaties and instead improving national laws and legal systems on investment where needed;
- EU governments and the European Commission to promote binding and enforceable public international law to strengthen human rights, environmental and climate protection and the fight against tax fraud and evasion. This includes supporting the creation of a binding UN treaty on transnational corporations and other business enterprises with respect to human rights as a first step to address the grave imbalance between the highly enforceable rights for corporations and the weak international protection of human rights and the environment.

Notes

- 1 European Commission, "Press release. EU finalises proposal for investment protection and Court System for TTIP", November 2015, http://europa.eu/rapid/press-release_IP-15-6059_en.htm.
- 2 The Commission's investor rights approach for TTIP, CETA and other trade deals allows foreign investors to claim (and sometimes receive) multi-billion euros from taxpayer money paid in financial compensation for much needed measures to protect public health, the environment and other public interests; it is a powerful weapon for business to fight regulation; it grants special privileges to foreign investors, privileges that no one else in a society has, without any obligations and without any evidence of wider benefits to society; and it risks being incompatible with EU law as it sidelines European courts and is fundamentally discriminatory. See, for example: Corporate Europe Observatory and others, "The Zombie ISDS. Rebranded as ICS, rights of corporations to sue states refuse to die", February 2016, <https://corporateeurope.org/international-trade/2016/02/zombie-isds>; ClientEarth, "Legality of investor-state dispute settlement (ISDS) under EU law", October 2015, <http://documents.clientearth.org/wp-content/uploads/library/2015-10-15-legality-of-isds-under-eu-law-ce-en.pdf>; Gus van Harten, "Key flaws in the European Commission's proposal for foreign investor protection in TTIP", Osgoode Legal Studies Research Paper No. 16/2016, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2692122; "Legal statement of 101 law professors on investment protection and investor-state dispute settlement mechanisms in TTIP and CETA", October 2016, <https://stop-ttip.org/wp-content/uploads/2016/10/13.10.16-Legal-Statement-1.pdf>.
- 3 Corporate Europe Observatory, "TTIP investor rights: the many voices ignored by the Commission", February 2015, <http://corporateeurope.org/international-trade/2015/02/ttip-investor-rights-many-voices-ignored-commission>.
- 4 European Citizens' Initiative Stop TTIP: <https://stop-ttip.org/sign/>
- 5 See article 15 of chapter 8 on trade in services, investment and e-commerce in the EU-Vietnam free trade agreement, http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154210.pdf; and article 8.29 of the EU-Canada Comprehensive Economic and Trade Agreement (CETA), http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.
- 6 See, for example, the Commission's report on a two-day expert meeting in Geneva in December 2016: European Commission, "Summary of discussions on a multilateral investment court", December 2016, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1606>.
- 7 For example: "Non paper. Reforming investment dispute settlement: Considerations on the way towards a multilateral investment dispute settlement mechanism", http://www.vieuws.eu/eutradeinsights/wp-content/uploads/2016/11/Non-paper_Considerations-on-the-way-towards-a-multilateral-investment-di....pdf; "Discussion paper: Establishment of a multilateral investment dispute settlement system", <http://www.politico.eu/wp-content/uploads/2016/12/Joint-paper-2.pdf>.
- 8 European Commission, "European Commission launches public consultation on a multilateral reform of investment dispute resolution", December 2016, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1610>.
- 9 European Commission, "Inception impact assessment", http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_trade_024_court_on_investment_en.pdf.
- 10 The Seattle to Brussels network (S2B) is a network of development, environment, human rights, women and farmers organisations, trade unions, social movements as well as research institutes, which was formed in the aftermath of the World Trade Organisation's (WTO) 1999 Seattle Ministerial to challenge the corporate-driven trade agenda of the European Union and European governments. For more information, see: <http://www.s2bnetwork.org>.
- 11 See: Hamby, Chris: The billion dollar ultimatum, BuzzFeed, August 2016, https://www.buzzfeed.com/chrishamby/the-billion-dollar-ultimatum?utm_term=.ikP9mEKo2#.noApdy8zE.
- 12 See, for example, the Micula case, which Romania lost even though the European Commission intervened in the case, arguing that Romania's actions were in line with EU law: Goyens, Monique, "The Micula case: When ISDS messes with EU law", October 2014, <http://www.beuc.eu/blog/the-micula-case-when-isds-messes-with-eu-law/>. Also see the Bilcon case, which Canada lost because of an environmental impact assessment: Sierra Club, "Corporate rights in trade agreements. Attacking the environment and community values", 2015, https://www.sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/0999_Trade_Bilcon_Factsheet_04_low.pdf. More examples can be found on the ISDS platform website: <http://isds.bilaterals.org/?-key-cases-&lang=en>.
- 13 See: Hamby, Chris: The court that rules the world, BuzzFeed, August 2016, https://www.buzzfeed.com/chrishamby/super-court?utm_term=.kmdGbe2gL#.mbkwkDdAG.
- 14 For an overview, see: UNCTAD, "World Investment Report 2011", chapter III.E, http://unctad.org/en/PublicationsLibrary/wir2011_en.pdf; for more critical analyses, see: Zubizarreta, Juan Hernández/ Ramiro, Pedro, "Against the 'lex mercatoria'. Proposals and alternatives for controlling transnational corporations", 2016, http://omal.info/IMG/pdf/against_lex_mercatoria.pdf; Zubizarreta, Juan Hernández, "The new Global Corporate Law, State of Power Report 2015", 2015 https://www.tni.org/sites/www.tni.org/files/download/01_tni_state-of-power-2015_the_new_global_corporate_law-1.pdf; Carrion, Jesus and others, "Profit Before People and Human Rights. European Transnational Corporations in Latin America and the Caribbean", 2009, <https://www.tni.org/en/report/profit-people-and-human-rights>.
- 15 See the papers referenced in endnote 7.
- 16 "Discussion paper", see endnote 7, p. 3.

17 Ibid.

18 Ibid., p.5.

19 Ibid., p.6.

20 Ibid.

21 South Africa, Indonesia, India, 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 do India's and Indonesia's new model investment treaties. And in Europe, Italy has withdrawn from the Energy Charter Treaty – a multilateral treaty created after the Cold War to integrate the energy sector of the former Soviet Union into Western markets. For more information, see, for example: UNCTAD, "Taking stock of IIA reform, IIA issue note No.1", March 2016, http://unctad.org/en/PublicationsLibrary/webdiaepcb2016d1_en.pdf; Singh, Kavaljit/ Ilge, Burghard (eds.), "Rethinking bilateral investment treaties. Critical issues and policy choices", March 2016, <http://www.madhyam.org.in/wp-content/uploads/2016/03/Rethinking-BIT-Book-PDF-15-March-2016.pdf>.

22 See: "Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights", <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx>. Additional information can also be found on the websites of the Treaty Alliance (www.treatymovement.com/) and the Dismantle Corporate Power Campaign (www.stopcorporateimpunity.org).

23 See, for example: Bread for the World and others, "UN Treaty on transnational corporations, other business enterprises & human rights: Options for justice", September 2016, https://business-humanrights.org/sites/default/files/documents/UN_Treaty-Legal_Seminar_Report.pdf; United Nations, "Report of the Independent Expert on the promotion of a democratic and equitable international order", August 2015, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/285; and the forthcoming report by Professor Markus Krajewski on the specific question of the hierarchy of rights.

24 See, for example: Transnational Institute and others, "Investment Court System put to the test. New EU proposal will perpetuate investors' attacks on health and environment", April 2016, <https://www.tni.org/en/publication/investment-court-system-put-to-the-test>.

25 See, for example: Gus van Harten, "Key flaws in the European Commission's proposal for foreign investor protection in TTIP", Osgoode Legal Studies Research Paper No. 16/2016, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2692122.

26 See: "Statement from the European Association of Judges on the proposal from the European Commission on a New Investment Court System", November 2015, <http://www.iaj-uim.org/iuw/wp-content/uploads/2015/11/EAJ-report-TIPP-Court-october.pdf>.

27 See: Corporate Europe Observatory and Transnational Institute, "Profiting from Injustice. How law firms, arbitrators and financiers are fuelling an investment arbitration boom", November 2012, <https://corporateeurope.org/international-trade/2012/11/profitting-injustice>; Gus van Harten, "Sovereign choices and sovereign constraints. Judicial Restraint in Investment Treaty Arbitration", 2013, Oxford University Press.

28 "Discussion paper", see endnote 7, p. 5.

29 See: M. Sornarajah, "An International Investment Court: a panacea or purgatory?", Columbia FDI Perspectives No 180, August 2016, <http://ccsi.columbia.edu/files/2013/10/No-180-Sornarajah-FINAL.pdf>; Judge Allan Ross, "The Interaction between EU law and investment law", presentation at the Columbia Law School, 31 October 2016, slide 15

30 Public Citizen, "Tens of Thousands of U.S. Firms Would Obtain New Powers to Launch Investor-State Attacks against European Policies via CETA and TTIP", <https://www.citizen.org/documents/EU-ISDS-liability.pdf> p.1.

31 Ibid.

