

A WORLD COURT FOR CORPORATIONS

HOW THE EU PLANS TO ENTRENCH
AND INSTITUTIONALIZE INVESTOR-STATE
DISPUTE SETTLEMENT



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INTRODUCTION

The world has reached a dangerous crossroads. In one direction, governments possess and exert the fundamental authority and responsibility to protect their citizens, and cooperate with other governments to ensure that multinational companies do not violate human rights or destroy the environment. In the other direction, states grant corporations yet more rights by entrenching the system that allows them to challenge public interest laws and receive compensation when those laws may threaten a corporation's future profits.

The European Commission proposal for a multilateral mechanism for investor-state dispute settlement (ISDS) – referred to by the Commission as a Multilateral Investment Court – marks the Commission's decision to follow that second path. The proposed global investor court threatens to lock in the highly controversial ISDS system, an undemocratic scheme that undermines national authority and prioritizes corporate profits above all else.

Securing investor rights and remedies is a core principle of the Commission's investment policy,¹ and the proposed investor court is just one in a long line of efforts made by the EU to enshrine and expand the current system of corporate privilege, including the Commission's commitment to include investor rights in future trade agreements² and its attempt to include these provisions in other multilateral efforts, such as the World Trade Organization.³

As companies grow larger and more powerful, it has become increasingly difficult for nations to ensure that these companies comply with human rights and environmental laws. A world court for corporations would be the capstone in the architecture of corporate impunity, preventing governments from addressing their more pressing problems – both domestic and global alike – such as violence, climate change, resource depletion, economic instability, and inequality.

The EU's proposal for a global investor court is a thinly veiled effort to salvage the failing investor-state dispute settlement system by replacing it with a rebranded twin. By ignoring the underlying problems with ISDS as a system, the Commission reveals that it does not view opposition to ISDS as a legitimate concern; the global investor court then becomes merely an attempt to regain political support for investor protections.

The proposed court "would serve to further expand and entrench the controversial ISDS mechanism".

Columbia Center on Sustainable Investment⁴

I



**TODAY'S SYSTEM
OF CORPORATE
PRIVILEGES**

Deregulation, privatization, and the globalization of the world economy have concentrated the power of large transnational corporations.⁵ Today, the biggest companies are wealthier than most countries. Of the 100 largest economic entities in the world, 69 are corporations and 31 are countries.⁶

As the economic scale and global reach of corporations have expanded over the last century, so too have their influence over public policy at every level of government – from the local to the global.⁷ This influence extends far beyond traditional economic matters like taxation and border tariffs and ultimately shapes policy decisions in every area of public affairs, from labor and health standards to consumer and environmental protections to fundamental governance issues, such as public participation, democratic decision-making, and access to justice.

While the growing corporate influence over economics and policymaking has been recognized since at least the 1970s,⁸ recent decades have seen the rise of a new and rapidly expanding body of international laws that expands the political and economic power of transnational corporations to unprecedented levels, while simultaneously reducing corporate accountability for how that power is exercised.

“Modern” trade and investment agreements facilitate unfettered expansion of trade, capital flow and financial speculation across jurisdictions and focus on limiting the regulations that apply to transnational companies. Some of the most powerful corporate tools in these agreements are the investment protection provisions, which expand and strengthen property rights and allow investors to challenge states for perceived violations of their rights to future profits within a binding dispute settlement mechanism.

Under the innocuous guise of “investor rights”, multinational corporations have transformed a system, which was allegedly created to protect foreign investors from mistreatment into a massive, powerful, and still largely hidden body of international rules that companies are using to chill government action, coerce policy outcomes, oppose enforcement of legitimate policy measures, and ultimately sue governments if their demands aren’t satisfied.

In the name of protecting investor rights, governments are being forced to pay foreign corporations when government actions reduce the value of corporate investments – even in cases where the government actions serve vital public interests, such as protecting workers or preventing environmental harm.

Critically, corporations enforce these investor rights through an arbitration system known as investor-state dispute settlement (ISDS). Embodied in thousands of trade and investment treaties, the ISDS system creates a parallel system of justice accessible only to and heavily biased toward large corporations. When a corporation believes its investment in a country has been (or might be) harmed by government action – from denial of an environmental permit to changing labeling laws – it can invoke investor rights to demand the government change course, pressure the government to settle its claims, or bring suit directly before a three-person “arbitral tribunal” comprised of experts in foreign investment law. Many of these arbitrators are corporate attorneys, who typically alternate between serving as panelists and representing corporate clients in other investment cases, which results in an implicit bias towards corporate perspectives.⁹

This systemic imbalance is exacerbated by the limited role of arbitrators to interpret and apply the investor rights embodied in the applicable trade or investment treaty. Thus, their principle consideration is whether a government decision has improperly reduced the value of an investment. Panels have almost no latitude to consider the greater societal value of the decision, assess the issues in the context of international human rights obligations, and take into account the needs and interests of those who might benefit from it – whether they’re workers seeking a healthy workplace or indigenous peoples protecting communal lands from contamination. Likewise, panels have no power to impose liability or punitive measures on investors whose activities cause harm to health or the environment.

When an arbitration panel rules in favor of an investor, the losing government can be forced to pay billions in damages to the corporate plaintiff. And even governments that ultimately prevail must invest years of time and millions of dollars in legal fees to defend the case, while in the meantime, critically needed policy measures may sit in legal limbo and be delayed while the dispute is litigated. As a result, many governments settle cases or give in to industry pressure before a measure is even adopted rather than risk being sued. When these cases are settled, the terms of the settlement are often confidential, and the public therefore has no information about terms of the settlements for which their taxes have been diverted. Even democratically elected representatives are not informed about the terms of the settlement.

These excessive investor rights thus perpetuate and exacerbate the power imbalance between the world’s largest businesses and the global public – enabling companies to

avoid accountability for harms they cause while eroding governments' ability to regulate and reduce those harms. As *The Economist* explains:

"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." The Economist¹⁰

The negotiation of agreements granting corporations these special rights has proliferated. There are currently more than 2,600 international investment agreements in force,¹¹ nearly half of which involve EU Member States. Investor rights and dispute resolution mechanisms are also increasingly included in regional trade and investment agreements. For example, since 2009, the EU has included investor rights and dispute resolution in proposed agreements with Singapore, Canada, Vietnam, and the United States. Bilateral trade agreements adopted by EU Member States expand this web of agreements still further. Germany alone has 136 such agreements currently in force or pending entry into force; France has 106.

As the inclusion of excessive investor rights in agreements has increased, so, too, has companies' use of these provisions to file arbitration cases against governments. Until the late 1990s, less than ten known treaty-based ISDS cases were brought each year. This number quadrupled throughout the 2000s and continues to rise, with an average of 60 known cases per year over the past five years.¹² As of July 2017, over 800 known cases had been filed.¹³ However, many cases are conducted in secret, so it is not possible to assess the full extent of these challenges to government decisions.

Although the alleged original intent of ISDS was to protect companies that invested in countries with potentially arbitrary legal systems, today's ISDS cases are no longer filed merely against countries with ostensibly weak governance. From the mid-nineties onwards, most cases have been against governments with "a relatively high level of democratic development and rule of law".¹⁴

“The cost-benefit balance on including provisions such as ISDS looks increasingly questionable, especially when both sides in the deal are advanced economies with low risk of discriminatory treatment of foreign investors and reliable judicial systems.”
OECD¹⁵

The costs of ISDS cases have skyrocketed too.¹⁶ Taxpayer money funds the defense against corporate challenges, which can exceed US \$30 million.¹⁷ The amount at issue is also growing, with investors in 59 cases over a period of just two years claiming at least US\$1 billion, including ten cases with at least US\$15 billion at stake.¹⁸ There are no limitations to arbitration panel awards, which have been as high as US \$50 billion for three related cases.¹⁹ These significant financial liabilities erode the ability of governments to fund important public services such as health care, education, and social programs for the poor.

Further, the system favors investors, who win nearly 60% of the cases that reach the stage of a ruling.²⁰ The system also favors the elites in wealthy countries, which have more resources with which to fight investor challenges,²¹ and wealthy companies, which are able to afford the costs of litigation.

The increasing use and abuse of ISDS has triggered a backlash from concerned citizens, policymakers, and legislators in countries around the world. Until recently considered an inevitable component of any new trade or investment agreement, ISDS is being rejected outright by a small but growing number of countries, and is being seriously reevaluated by many more. As the lack of benefits and exorbitant costs of ISDS have become apparent, countries in Asia, Africa, and South America have cancelled Bilateral Investment Treaties.²²

In Europe, citizen opposition to investor privileges surged when the EU proposed including investment protections and investor state dispute resolution in a planned agreement with the US (the Transatlantic Trade and Investment Partnership, or TTIP). Public opposition continued with the EU’s finalization of an agreement with Canada that included similar provisions (the Comprehensive Economic and Trade Agreement, or CETA). More than 3.5 million people across the EU signed a petition against TTIP and CETA “because they include several critical issues such as investor-state dispute settlement ... that pose a threat to democracy and the rule of law”.²³ To address public opposition to ISDS, the European Commission opened a consultation in 2014. Nearly 150,000 people responded, with 97% of the contributions rejecting ISDS.²⁴



The opposition to excessive investor privileges has developed into a worldwide movement that spans trade unions, small and medium sized enterprises, human rights and consumer groups, farmers, and environmental organizations. Criticism continues to grow and come from a wide spectrum of critics, including UN experts²⁵ and institutions,²⁶ legal scholars and judges,²⁷ economists,²⁸ and governments.²⁹

It is against this backdrop that the European Commission's proposed "solution" to the ISDS problem must be evaluated. Responding to growing opposition to ISDS within and beyond Europe, the Commission, along with the support of a majority of the EU Council, is proposing that governments create a permanent multinational court to hear investment disputes, rather than rely on ad hoc panels assembled for each case.³⁰ By adjusting how arbitrators are selected and paid, and adding a few other procedural tweaks, the Commission hopes to silence the rising opposition to ISDS by permanently locking in a system that is deeply flawed, fundamentally unjust, undemocratic, and ultimately unsustainable.

This lopsided access to justice, which enables private corporations to avoid accountability for harms to countries and communities while forcing governments to pay for the costs of preventing or addressing those harms, must be rejected. Rather than entrenching a system that protects corporate profits at the expense of the broader public interest, we need a system that protects citizen and community rights against harms caused by corporations and their investors and ensures equitable access to justice. The people of Europe – like people everywhere – should demand nothing less.

HOW COMPANIES HAVE USED ISDS TO DEFEAT PUBLIC INTEREST LAWS

Companies have successfully challenged a wide range of public interest laws before arbitral tribunals, including:

HEALTH

In 1998, after a corporation challenged Canada's ban on methylcyclopentadienyl manganese tricarbonyl (MMT), a toxic gasoline additive, Canada withdrew the ban and paid \$13 million to settle the case.³¹

RACIAL DISCRIMINATION

When companies challenged a South African law aimed at redressing injustices of the apartheid regime, South Africa settled the case in 2009 and agreed to reduce the benefits granted to black investors.³²

MINING

When an environmental assessment concluded that threats to the local community and to endangered species from a mining project could not be mitigated and Canada decided not to permit the project, the mining company challenged the decision and won in 2015.³³

OIL AND GAS

In 2012, Ecuador was ordered to pay \$1.4 billion after terminating an oil production agreement, even though the oil production had caused environmental destruction and resulted in human rights violations over a period of 30 years.³⁴

HAZARDOUS WASTE

When Mexico refused to issue a permit for a waste disposal facility due to water pollution concerns, the waste disposal company challenged the decision and won an award of \$16.79 million in 2000.³⁵

COAL

In 2011, after an energy company challenged Germany's environmental standards protecting a river from the impacts of a coal-fired power plant, Germany lowered the standards.³⁶

ECONOMIC CRISIS

Companies sued Argentina more than 40 times as result of reforms to guarantee the right of access to public services made in response to the economic crisis in 2001; a majority of the completed cases have ruled against Argentina, and by 2014 tribunals had awarded nearly US \$1 billion in compensation to the companies.³⁷

INVESTOR PRIVILEGES HAVE NO PUBLIC BENEFIT AND DO NOT BRING INVESTMENT

The European Commission has asserted that “the basic objective of investment protection remains valid since bias against foreign investors and violations of property rights are still an issue”³⁸ and that Bilateral Investment Treaties (BITs) “have played their part in encouraging and protecting the high volume of EU investment abroad and, reciprocally, the investments held by the rest of the world in the EU”.³⁹ But is there any support for these assertions?

Studies indicate that company decisions to invest abroad are rarely based on the existence of an investment treaty.⁴⁰ Instead, the nature of the investment, access to new markets and natural resources, the expected profits, lower wages or taxes, and the state’s domestic legal system are far more influential.⁴¹ The EU Trade Commissioner confirms that there is no correlation between investment agreements and increased foreign direct investment (FDI).⁴²

Investment protection provisions have very little impact on the cost and coverage of political risk insurance.⁴³

The experience of many countries demonstrates that excessive investor protections do not attract investment. For example, South Africa and Ecuador have concluded that BITs are not decisive in attracting investment; Brazil is the only country in Latin America that has never ratified a BIT that includes ISDS despite receiving the most FDI in the region; and most investments from the US to Europe are made in the Western European Member States, even though none of these countries have an investment treaty with the US.⁴⁴

More importantly, it is now widely acknowledged, that while FDI may contribute to economic and industrial strategies, the benefits are not automatic and if they exist, are not distributed fairly.⁴⁵ 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.”⁴⁶

THE INVESTMENT COURT SYSTEM

As a first attempt to quash the groundswell of resistance to privileges for investors, the Commission proposed an “Investment Court System” in its proposed trade agreements with the US, Canada, and Vietnam. The Investment Court System changes the selection process for judges (assigned randomly from a pre-established list of people) and creates an appellate body, but otherwise is the same as ISDS. The Commission’s proposed Multilateral Investment Court is essentially the multilateral version of the Investment Court System.





A GLOBAL CORPORATE COURT



In the midst of widespread opposition to investor rights and despite previously failed attempts to institutionalize ISDS the EU is attempting to revive efforts to create a multi-lateral investment dispute resolution mechanism. This is an attempt to not only salvage the failing investor-state dispute settlement (ISDS) system, but to strengthen and solidify it. EU discussion papers make it clear that the Commission has ignored and does not view opposition to ISDS as legitimate and that the global investor court is an attempt to regain political support for ISDS. For example, the EU referred to the “perceived” lack of legitimacy of investor-state arbitration and explained that due to the potential impact on public budgets and public policy, it was crucial that justice is “seen to be done” when the EU explains the system and individual cases to legislators and the public.⁴⁷ These statements indicate that the EU is more concerned with changing the perception of ISDS than with actually addressing the problems it causes.

Indeed, as evidenced in its investment policy, the EU wholeheartedly promotes investor protections and investor-state dispute resolution.⁴⁸ In its proposal for a global investor court, the Commission explains that the intent behind the procedural changes is to “rebuild trust in the system and, consequently, improve the recognition and implementation of its decisions”.⁴⁹

The Commission’s ostensible objectives for the proposed procedural changes to ISDS are to improve the legitimacy, transparency, consistency, predictability, and legal correctness of investor-state arbitration. Yet to further “legitimize” this inherently flawed system would only perpetuate inequality and corporate impunity.

THE COMMISSION'S GLOBAL INVESTOR COURT PROPOSAL⁵⁰

The Commission's proposal to establish a global investor court would be a gift to the world's largest corporations. The proposal would modify some procedural aspects of investor-state dispute resolution but would avoid any changes to the excessive investor privileges. The proposal:

- > includes a way to appeal a decision in an investor-state lawsuit.
- > provides full time, secured jobs for judges who would decide disputes, be subject to strict ethics rules and appointed through a more transparent and objective process.
- > proposes that the court be subject to transparency rules and that third parties be allowed to submit interventions to the court if they have a direct and existing interest in the outcome of the dispute.

In September 2017, the Commission asked EU member states for a mandate to negotiate an international convention to establish such a court in the context of the United Nations Commission of International Trade Law (UNCITRAL), a key hub of today's ISDS regime. In July 2017, the UNCITRAL member states charged one of the body's working groups to consider concerns about and possible reforms of today's ISDS system.⁵¹

The dangers in the EU proposal for a multilateral investment court stem from the problems with ISDS more generally. A global investor court would exacerbate and entrench this undemocratic and harmful system.

"A court would become a device for neoliberal rules of investment protection with even greater authority."
Muthucumaraswamy Sornarajah, Arbitrator and Law Professor,
National University of Singapore⁵²

DANGER #1: **ENTRENCHING THE EXISTING ISDS SYSTEM**

The Commission proposes to delay any multilateral effort at substantive reforms, and suggests that the global investor court should only address procedural issues. By failing to address these expansive substantive rights, the global investor court would entrench excessive corporate privileges developed under ISDS, which are not granted to any other parties. Instead of addressing the fundamental question of whether these powerful corporate rights are necessary, the Commission assumes that they are a foregone conclusion and seeks only to legitimize this system. It has already made clear that it is not going to touch upon the far-reaching "substantive" privileges that investors are being granted in today's trade and investment agreements.

Arbitration panels have interpreted these investor rights broadly, for example by concluding that investors must be guaranteed a stable regulatory framework that does not frustrate the expectations they held at the time they established their investment. For instance, in an oil and gas company challenge to Ecuador's value-added taxes, the arbitration panel found that "there is certainly an obligation not to alter the legal and business environment in which the investment has been made".⁵³ The panel found that the country's change in tax law was incompatible with this requirement and ordered the government to pay the oil company for its losses resulting from the tax.

Companies have even relied on investor rights to escape punishment after they were accused or convicted of crimes, including environmental pollution and corruption. For example, a factory in El Salvador poisoned a village with lead, killing some of its inhabitants, including children. When the government charged the company for violating its environmental laws, the company used its lawyers to threaten the government with an ISDS case, enabling it to avoid a criminal conviction.⁵⁴ The proposed global investor court would enable cases such as these – because the rules on the basis of which they have been filed or threatened would not change.

These broad, substantive rights create a risk of financial liability that leads to a chilling effect on decision-makers.⁵⁵ For example, in 2010, the Inter-American Commission on Human Rights advised the government of Guatemala to suspend operations at Goldcorp, Inc.'s Marlin Mine to prevent imminent human rights violations and grave environmental impacts.⁵⁶ After a brief suspension, the Guatemalan government reopened the mine. Documents obtained through a freedom of information request reveal that the decision to do so was based in part on the government's fear that closure would cause Goldcorp to "activate the World Bank's [investment court] or to invoke the clauses of the free trade agreement to have access to international arbitration and subsequent claim of damages to the state".⁵⁷ Similarly, the government of Indonesia exempted Australia-based Newcrest Mining from a prohibition on open-pit mining in protected forests because it feared that the mining company would otherwise challenge the decision in arbitration.⁵⁸ The mere existence of an international investor court could strengthen the force of this chilling effect.

Through the extreme privileges for foreign investors in today's trade and investment agreements, corporate property rights are elevated over government obligations to protect the public interest and state regulatory authority is severely constrained. The proposed global investor court would be giving force to these very same corporate rights. As one well-known arbitrator and academic observed, "A court would become a device for neoliberal rules of investment protection with even greater authority".⁵⁹ In addition, once the court is established, it would be very difficult to abandon investor-state dispute settlement.



DANGER #2: **REINFORCING CORPORATE PRIVILEGES**

The global investor court would also likely strengthen and reinforce corporate rights, because specialized courts and tribunals tend to interpret the laws they oversee in an expansive manner, becoming “over-enthusiastic about vindicating the purposes for which they were set up”.⁶⁰ Thus, for example, the global investor court decision-makers are likely to accept many cases, rather than determining every now and then that the court has jurisdiction. They are also more likely to rule on the side of protection of corporate property and economic interests over the right of states to regulate and its citizens’ right to self-determination.

In addition, in domestic legal systems, when judges consider whether a public interest law unduly burdens a corporation, they weigh the fact that the public interest law was created by a democratically elected body that seeks to protect the overall wellbeing of the public. Unlike in national courts, judges in the global investor court would not review national government or court decisions with any degree of deference.⁶¹ Instead, these judges would merely be interpreting the investor rights in international investment agreements, without any reference to margin of appreciation for relevant public interest laws, which were enacted democratically. Thus, the decision-makers in the proposed global investor court would be driven by their zeal for articulating and developing investor privileges, and this enthusiasm would not be tempered by respect or deference for the democratic institutions that enacted the laws at issue in the global investor court.

The global investor court is also likely to strengthen corporate privileges by bringing a repetition and consistency to the interpretation of these rights. In deciding more cases influenced by corporate bias, the investor court will be building an increasingly large body of law that supports decisions that favor corporations at the expense of everything else.⁶² As a research paper by the European Parliament’s Directorate General for Internal Policies points out, “Certainty of interpretation is, after all, only a positive thing if the interpretation adopted is a desirable one”.⁶³ By advocating for consistent and predictable interpretations of unbalanced corporate rights, the Commission proposal unabashedly favors the development of a legal regime aimed at strengthening corporate power.

*“This is a dangerous new way
to give transnational corporations their own court, which local companies
and groups can’t access.”*

Maude Barlow, Council of Canadians⁶⁴

DANGER #3:

ACCESS TO JUSTICE FOR CORPORATIONS ONLY

The global investor court proposed by the EU would foster unequal access to justice by creating a permanent venue for corporations to bring their claims against public interest laws, while denying access to justice for those who have been harmed by these same corporations.

Investor-state dispute systems perpetuate inequality by providing a way for corporations to sue governments without providing a corresponding means for governments and people affected by investments to sue corporations. Although the alleged rationale for providing corporations these special rights is that domestic institutions are insufficient to protect foreign investors, this deficiency is all the more true in the reverse. Domestic institutions are often not sufficient to protect the rights of local companies, communities, or others that have been harmed by transnational companies. The imbalanced ISDS system that allows access only in one direction further exacerbates the existing asymmetries of legal systems and access to justice that privileges corporations and leaves few avenues for holding corporations accountable.

The global investor court could also harm public access to justice by reversing judicial decisions from national courts that uphold human rights, such as in *Chevron v. Ecuador*. In this case, an Ecuadorian court ordered Chevron to pay damages for contamination resulting from the company's oil and gas activities. Chevron took its case to an arbitration panel, arguing that the Ecuadorian courts had violated a bilateral investment treaty. The panel agreed, ordering Ecuador to suspend enforcement of its domestic judgment. Ecuador was also required to pay \$112 million in compensation to Chevron.⁶⁵

By failing to allow those harmed by an investment to bring their claims to the proposed court, the Commission proposal precludes the possibility of the court hearing any claims based on corporate obligations, such as those that could be included in future investment agreements, international accords, or which emerge from existing human rights standards applicable to the conduct of business.⁶⁶

Access to justice and equality before the law are fundamental principles of the rule of law.⁶⁷ The United Nations Sustainable Development Goals are a set of globally agreed upon objectives that act as guideposts for national and international action on the world's greatest challenges. Under these goals, states commit to "Promote the rule of law at the national and international levels and ensure equal access to justice for all".⁶⁸ By proposing to create a court that allows only foreign corporations to file claims, the Commission is failing to ensure equal access to justice and supporting the growth of corporate power.

DANGER #4:

INVESTOR RIGHTS WITHOUT INVESTOR OBLIGATIONS

While trade and investment agreements grant strong rights for investors, they impose no meaningful obligations on them. For example, when Ecuador cancelled a contract with a mining company because the company violated domestic law, the mining company challenged this decision. The tribunal found that even when an investment agreement requires compliance with host state laws and the investor has violated those laws, the investor can still sue the state under the investment agreement.⁶⁹ According to the UN Special Rapporteur on the rights of indigenous peoples, these imbalances contribute to “a dangerous accumulation of power among international corporate actors, which impedes states’ abilities to act as an effective regulator and protector of human and indigenous peoples’ rights”.⁷⁰ A global institutional structure to enforce these rights would not only legitimize this dangerous regime, but also protect it from future efforts to regulate transnational corporations and investment flows.⁷¹

Unlike the controversial Multilateral Agreement on Investment (MAI) - which was negotiated, but failed in the OECD in the 1990s - the Commission proposal for a global investor court makes no references to corporate obligations, such as human rights due diligence. Nor does it include any safeguards to deny access to the court for investors who have violated or participated in violations of national or international law. Instead, the proposal reflects an assumption that corporate rights, and the institutions set up to enforce them, are unconnected to corporate responsibilities.

As renowned investment law expert Gus van Harten, Professor at Osgoode Hall Law School, argues: “If a multilateral investment court does not incorporate foreign investor responsibilities, it will exacerbate a fundamental imbalance in ISDS. In such circumstances, it would be better to terminate these special rights for foreign investors in favour of the protections available to all market actors”, such as, for example, through domestic law.⁷²

*The court creates “a parallel and preferential legal system
for foreign investors that undermines domestic legal institutions and courts”.*
*Columbia Center on Sustainable Investment*⁷³

DANGER #5: **UNDERMINING DOMESTIC COURTS AND DEMOCRATIC INSTITUTIONS**

The proposed global investor court has the potential to undermine domestic courts and democratically enacted laws, thereby eroding democracy. A permanent forum for ISDS, the court would hear corporate challenges to judicial decisions and legislative measures, which are normally subject to a country's democratic processes and oversight. One study has calculated that over 80% of ISDS cases challenged judicial decisions or legislative measures.⁷⁴ Final decisions at the global investor court, however, would be unaccountable to any democratic oversight.

The multilateral corporate court would also deprive domestic courts of the opportunity to resolve disputes within the context of national laws. This is "an express disempowerment of the domestic courts".⁷⁵ For example, the proposed global investor court could address EU laws, which are exclusively within the jurisdiction of the European Court of Justice.

The Commission proposal does not include a requirement for the exhaustion of local remedies, which requires individuals to bring their cases to domestic courts before bringing international proceedings against the state. Although required in other areas of international law, such as in the international human rights system, ISDS and its multilateral twin would allow companies to skip this step.⁷⁶ The EU has previously said that the requirement for exhaustion of domestic remedies is unpopular in investment agreements because it "is considered to increase the cost and duration of litigation".⁷⁷ Thus, the Commission prioritizes reducing the cost to corporations of challenging national laws over protecting national democratic institutions. In doing so, the Commission favors corporations over all others, who bear the costs of litigation in domestic courts.

Furthermore, the proposed global investor court would not only allow foreign corporations to side-step domestic law, but also receive compensation for financial losses caused by these laws, which might not be available under domestic legal systems. If the proposed investor court ordered governments to pay corporations for profits lost due to compliance with domestic law, it would undermine the domestic system, which has already established both the nature of the laws and the ramifications for when those laws are not followed.⁷⁸ Instead, ISDS creates a parallel system for corporations whereby those domestic laws, and the consequences of disobeying them, is entirely different.

The European Parliament has recommended the Commission ensure that "the jurisdiction of courts of the EU and of the Member States is respected".⁷⁹ Similarly, the European Economic and Social Committee has cautioned that "it is absolutely vital for compliance of ISDS with EU law to be checked".⁸⁰ But the EU's proposal would only undercut EU and national courts.

DANGER #6:

BIASES AND CONFLICTS OF INTERESTS

A small number of arbitrators decide the majority of ISDS cases, many of whom have ties to large corporations and widespread conflicts of interest. With an interest in growing their business and expanding their power, they are pre-disposed to favor corporate profits over the public interest.⁸¹ Several European Commission papers suggest that it wants to keep this tight-knit club at the center of the new global ISDS system.

The Commission asserted that it would be “desirable” that the members of its proposed dispute settlement mechanism have “previous experience in international investment law”.⁸² Thus, the judges on the new global investor court might be the very same small group of people who have repeatedly interpreted investment law expansively, prioritizing the protection of the property and economic interests of transnational corporations over the rights of states to regulate and people’s right to self-determination.⁸³ For example, in a study analyzing how arbitration panels have addressed the question of jurisdiction, i.e., whether the case is properly before them or not, the author found that the panels were likely to allow the case to go forward, even when immediate ownership of the company was in a third state not party to the investment agreement. They were also more likely to allow cases brought by minority shareholders, even when the treaty did not explicitly allow this.⁸⁴

In a related study examining how panels interpreted substantive investor rights, the author also found that arbitrators were likely to interpret these rights broadly, in favor of the investor. For example, when the question of whether a state had violated the standard of fair and equitable treatment, arbitrators overwhelmingly interpreted this term to include novel conceptions of the state’s obligations, such as “unreasonable,” that went beyond the conventional understanding of this concept under international law, such as “willful disregard of due process of law”.⁸⁵

In today’s ISDS system, these expansive, investor-friendly interpretations of the law mean more business for the arbitrators. Because only investors bring ISDS cases, an expansive interpretation of ISDS jurisdiction and substantive investor rights mean that the system pays off for them. This increases the likelihood of future cases – and thereby the profits of the arbitrators, who earn more as more cases are filed. While the judges at the proposed global investor court would not have such a financial incentive to allow cases to go forward (because they would have a fixed salary), they would have a similar incentive to expand their power and the authority of their court. It’s along these lines that Judge Allan Rosas of the European Court of Justice has warned of the “institutionally backed power strategy” that a special court for investors could pursue, risking to accentuate some of the biases in today’s ISDS system.⁸⁶

DANGER #7:

UNDERMINING INTERNATIONAL HUMAN RIGHTS, ENVIRONMENTAL, AND LABOR LAW

The global investor court would make international investment law more powerful while weakening the authority of international human rights, labor, and environmental law by creating an international institution that elevates corporate rights and ignores the international laws that temper those rights. Human rights and labor rights bodies, multilateral environmental agreements, and relevant experts have increasingly recognized that the issues raised in these once disparate fields are integrally related, and that courts and states alike must recognize these linkages in resolving disputes.⁸⁷ Arbitration panels, by contrast, have systematically declined to interpret investment protections in light of international human rights, labor, and environmental law.⁸⁸ Thus, investment protection has developed as a separate strand of international law.⁸⁹ This disconnect contributes to the concentration of corporate power, since enforceable investment laws are viewed in isolation from weaker and unenforceable laws regarding corporate obligations.

Thus, rather than support “legal correctness” (through reviews of legal error by an appellate mechanism), as the Commission claims, the proposed global investor court would institutionalize a legal regime that entirely ignores human rights and environmental laws and contributes to the fragmentation of international law, at the expense of laws that protect the public interest.



DANGER #8:

SABOTAGING ATTEMPTS TO ADDRESS THE REAL PROBLEMS OF ISDS

The Commission's proposed global investor court threatens to impede governments from taking truly meaningful steps to minimize the risks of investor attacks. The creation of the global investor court could de-legitimise effective measures, such as the termination or re-negotiation of investment treaties or the adoption of model treaties with limited substantive investment protection standards or access to ISDS.

With limited time and resources, nations should instead be focused on limiting ISDS and securing the policy space they need to address issues such as climate change and inequality.

Any efforts to increase investment must be rooted in promoting sustainable development and in addressing pressing issues such as climate change. The proposal does nothing to harness investment for these purposes or to safeguard the right to regulate.⁹⁰

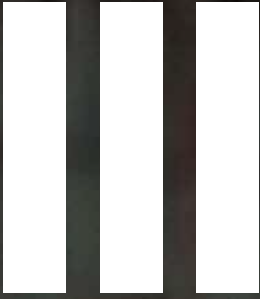


ISDS CASES THAT CHALLENGE PUBLIC INTEREST MEASURES AND WOULD BE POSSIBLE UNDER THE PROPOSED GLOBAL ISDS

As the European Commission proposal would not address substantive rights, which are granted to investors in trade and investment agreements, the global investor court would hear the exact types of cases that led to such strong opposition to ISDS.

There is nothing in the Commission proposal that prevents companies from challenging government decisions to protect health and the environment, nor anything to prevent the court's judges from ordering states to pay billions in taxpayer compensation to corporations for state action on legitimate public policy measures. Each of the following ISDS challenges could also be launched at the proposed investor court:

- Whether a temporary fracking moratorium adopted to provide time for the government to determine a proper regulatory approach for protecting the public from the harmful effect of hazardous and carcinogenic chemicals is arbitrary, capricious, and an expropriation of a mining company's profits.⁹¹
- Whether a government must compensate a company when the government raises the minimum wage.⁹²
- Whether the government must compensate a company after denying a mining permit due to environmental impacts.⁹³
- Whether a government must compensate an energy company for nearly five billion euros for transitioning away from nuclear energy in response to widespread public opposition.⁹⁴
- Whether a government must pay for the damages awarded in domestic court against an oil company for pollution and environmental damage.⁹⁵
- Whether EU governments must pay damages for measures taken in response to the economic crisis.⁹⁶



REACTIONS TO THE PROPOSAL FOR A GLOBAL INVESTOR COURT

Opposition to the creation of a global investor court has been overwhelming. More than 340,000 EU citizens called on the EU to abandon plans to establish a global corporate court system.⁹⁷ These citizens were joined by research institutes, academia, trade unions, governments, and civil society organizations fighting to protect the environment, human rights, women, development, farmers, workers, and consumers.⁹⁸

The consultation conducted by the European Commission presented multiple-choice questions about whether procedural issues were best addressed by the current ISDS system or by the proposed global ISDS mechanism, leaving no opportunity for respondents to indicate that neither option is acceptable. Yet, despite this constrained format, the majority of respondents found a way to express their opposition to investor rights and to the proposed global corporate court. Among the responses to the Commission's proposal, a small minority indicated clear support for the proposed investor's court or supported ISDS generally (16%). Even more took no position on whether a court should be established (20%). Nearly two thirds (64%) of the responses opposed the global investor court altogether or insisted that substantive changes to the investor-state dispute system must be made.⁹⁹

For example, the European Trade Union Confederation (ETUC) responded that "The current MIC proposal does not address [our] central... demand that investor rights should be balanced by an equivalent legal mechanism accessible by trade unions and other stakeholders to enforce the investors obligations".¹⁰⁰ The Trades Union Congress from the UK pointed out that "[T]he proposed Multilateral Investment system would create significant social costs as it stands to undermine domestic legal systems and poses a threat to laws that protect workers and society more broadly".¹⁰¹

Academic institutions were opposed to the Commission's proposal. According to the Columbia Center on Sustainable Investment, "The proposal to set up an Investment Court will enhance the worst features of the existing ISDS system".¹⁰² Gus Van Harten, an investment expert at the Osgoode Hall Law School, explained that the proposed court would be "a major expansion of foreign investor protections by institutionalizing them at the multilateral level".¹⁰³

Digital rights activists, environmentalists, consumer organizations, and health groups also opposed this corporate assault on democracy. For example, BEUC, the umbrella association of European consumers organizations observed that "By establishing a [Multilateral Investment Court], the EU and its partners would further institutionalize and justify the need to have a parallel judicial system for foreign investors".¹⁰⁴

“By bypassing national law you de facto weaken national institutions. And development is a good deal about strengthening your national institutions, including the judiciary.”
*Guillaume Long, Ambassador, Ecuador Permanent Mission to Geneva*¹⁰⁵

Most EU Member State governments, on the other hand, seem willing to consider the creation of a global investor court. In June 2017, many EU Member States backed the launch of discussions about the court in the United Nations Commission of International Trade Law (UNCITRAL), a key hub of today’s regime of corporate rights, where the EU will now pursue its project.¹⁰⁶

Outside of the EU, the picture is more mixed. In their recent trade deals with the EU, Canada and Vietnam have committed to “pursue with other trading partners the establishment of a multilateral investment tribunal”.¹⁰⁷ Canada and the EU have organized joint events to gather support for the corporate court,¹⁰⁸ and other countries, such as South Korea and Argentina have expressed support for the MIC. Many other countries have expressed reservations, including Bolivia, India, Indonesia, Japan, the US,¹⁰⁹ South Africa, and Ecuador.¹¹⁰ Many countries’ positions on the proposed court, however, are in flux.

The business reaction to the global investor court proposal has been mixed, too. On the one hand, corporations and their lawyers are well aware that some changes are required to save the current ISDS system from sinking. The Austrian Federal Economic Chamber (WKÖ), for example, hopes that “a multilateral solution regarding investment dispute resolution... could... lead to wider public acceptance and legitimacy of the system”.¹¹¹ It is along these lines that some of Europe’s most powerful corporate lobby groups have voiced overall support for the investor court proposal. The Federation of German Industries (BDI), for example, “approves of the long-term goal of setting up a multilateral investment court”¹¹² and the European employers’ federation BusinessEurope “welcomes the idea”.¹¹³

On the other hand, the same corporate lobby groups are concerned that the global investor court proposal would curb the power that corporations and their lawyers currently have over the ISDS process. For example, they would prefer to continue choosing the arbitrators who decide ISDS cases without any limitations. Consequently, several business lobby groups have come out strongly against the idea of a closed list of publicly appointed judges who would be assigned to cases on a random basis and banned from working on the side as lawyers in other ISDS cases.¹¹⁴

This creates a convenient situation for the European Commission, because the negative reaction from the business sector suggests that the global investor court proposal falls somewhere between investor-friendly demands put forward by industry and public-interest driven positions by civil society groups. This makes it easy for the Commission to sell its proposal as a compromise.

"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, Lobbycontrol¹¹⁵

Behind the scene, however, ISDS proponents seem well aware that the proposal for a permanent investor court "wouldn't change much" because the far-reaching rights for investors essentially "remain the same," as stated by an investment lawyer who makes money when companies sue states.¹¹⁶ The European Services Forum, a lobby outfit banding together service players such as Deutsche Bank, IBM, and Vodafone, makes a similar argument, commenting that "the substantive text of investment protection and the conditions to trigger a dispute," as opposed to the details of the dispute settlement process, "will determine if an investor can trust the system".¹¹⁷ In other words: while big business is not happy that it might lose some control over the ISDS process, it will not lose what really counts: the greater rights that foreign investors are granted in thousands of treaties around the world.



A REAL SOLUTION: A TREATY TO REGULATE CORPORATIONS

Within the Human Rights Council of the United Nations, countries have started to negotiate the content of an international legally binding instrument to regulate transnational corporations and other business enterprises. During these negotiations, the EU has the opportunity to choose the alternate path, reaffirming the obligations of nations to protect their citizens and holding multinational companies accountable for violations of human rights and for harms to the environment. The EU should ensure that the treaty:

- > Protects people from corporate abuse no matter where that harm occurs, whether in a country where a corporation is based or where a corporation is operating.
- > Holds corporations legally accountable for the harms they cause directly, as well as the harms they cause through their subsidiaries and supply chains.
- > Requires corporations to conduct mandatory due diligence to identify and rectify harms before they occur.
- > Ensures the supremacy of human rights and environmental law over trade and investment.
- > Provides people with access to justice and remedies for violations of their human rights.

IV

**COUNTERING
GLOBAL CORPORATE
DOMINANCE**

The European Commission's proposal for a global investor court further widens the gap between rich and poor and is yet another attempt to secure investor rights and remedies, consistent with the EU's efforts to lock in and expand the current system of corporate privileges wherever it can, whether in trade agreements or multilateral institutions.¹¹⁸

As demonstrated above, the creation of a new court to hear investor claims would worsen the power imbalance that grants rights, protections, and compensation to corporations at the expense of the public interest. The court would also undermine democratic institutions and lawmaking.

**TEN, OF MANY, REASONS TO OPPOSE
THE MULTILATERAL INVESTMENT COURT ARE:**

- 1.** The citizens of the EU don't want the global investor court.
- 2.** There are no proven benefits of the ISDS system to wider society.
- 3.** Institutionalizing ISDS on a global level will legitimize and entrench a parallel legal system designed to empower transnational corporations.
- 4.** By allowing corporations to bypass domestic legal systems, the court would subsidize the cost of corporate litigation used to protect private property interests while undermining the sovereignty of national courts.
- 5.** The global investor court would allow international businesses to enforce legal rights without requiring them to fulfill their legal obligations, such as complying with domestic and international law.
- 6.** The global investor court would deny access to those harmed by foreign investors.
- 7.** The court would further deter states from regulating in the public interest.
- 8.** The adjudicators would be the same biased arbitrators who have decided past ISDS disputes.
- 9.** The court would substitute the accountable decision-making process of democratic institutions and national courts with an unaccountable one.
- 10.** A global institution for ISDS will exacerbate the elevation of investor's rights over international human rights and environmental laws.

Rather than create a court to legitimize ISDS, countries should reaffirm and reassert their rights and their responsibilities to regulate in the public interest.

To strengthen democracy, address the many global crises we are facing, and be “legitimate and accepted by citizens,” as the EU and Canada declare that efforts to address the problems of ISDS should be,¹¹⁹ the solution must be comprehensive and must be guided by the following principles:

- > Eliminate special rights for corporations. Countries can do this by cancelling their BITs, following the example of India,¹²⁰ Indonesia, Ecuador, Bolivia, Venezuela, and South Africa.¹²¹ Bolivia, Ecuador, and Venezuela have also renounced the International Centre for Settlement of Investment Disputes Convention.
- > Refuse to include ISDS in future trade and investment agreements, including the proposed agreements between the EU and China, Indonesia, Japan, Mexico, Chile, Myanmar, and Vietnam.
- > Effectively regulate and hold corporations accountable. States must prioritize their negotiation of the UN treaty to regulate transnational corporations and other business enterprises and ensure that the multilateral reform of disputes arising from investment agreements is addressed in the context of this treaty.
- > Focus on strengthening the domestic judiciary and improving access to justice for everyone, including nonresident individuals and small and medium sized companies. For example, South Africa codified investment protection provisions in domestic law.¹²²
- > Protect and strengthen human rights and the environment. Countries should focus their cooperation on and dedicate their resources to agreements and concrete measures that support and protect human rights, public health, and the environment. States must not allow the threat of costly arbitration awards to limit their ability to enact and enforce laws that protect people and the environment. Any policy addressing investors’ rights and obligations must be founded on a commitment to the supremacy of human rights and social and environmental justice.

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The European Commission proposal for a global investor court for investor-state dispute settlement (ISDS) – known as the Multilateral Investment Court – threatens to enshrine, expand, and entrench the current system of corporate privilege in future trade deals. A world court for corporations would be the capstone in the architecture of corporate impunity, undermining democratic institutions and lawmaking, and worsening the power imbalance that grants rights, protections, and compensation to corporations at the expense of the public interest.

