Conquering EU courts?

Big business lobbies in secret for new legal privileges in the EU

In the run up to a European Commission proposal to protect cross-border investments in the EU, large banks, law firms and business lobby groups are pushing for vast new legal privileges for corporations. If they get their way, a special EU court exclusively for corporations could make European governments pay huge sums of money as compensation for regulations brought in to protect workers, consumers, and the environment. The significant financial risk of having to pay damages could ultimately put governments off regulating in the public interest. But the corporate take-over of EU law can still be stopped.

Corporate Europe Observatory

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On 6 March 2018 a landmark ruling by the Court of Justice of the EU (CJEU) sent shock waves through the corridors of corporate power. The Achmea judgement[1] saw the court put an end to dozens of bilateral investment treaties (BITs) that EU member states had signed with each other. The CJEU held that the dispute settlement clauses (known as investor-state dispute settlement or ISDS) in these investment treaties were illegal, because they sidelined EU courts. As a result of the ruling, approximately 130 intra-EU BITs are now gradually being terminated.

Intra-EU BITs have enabled foreign investors to bypass European courts when state decisions hamper their investments and instead sue EU member states before tribunals governed by a panel of three private lawyers. For example, under the UK-Romania BIT mining company Gabriel Resources is suing Romania for US$5.7 billion, after Romanian courts found that the firm's proposed toxic gold mine was illegal;[2] under the Netherlands-Croatia BIT a Dutch letterbox company is suing Croatia for US$500 million after national courts ruled that the permits for a contested luxury resort had been obtained illegally.[3] Both projects faced massive opposition over their ecological and social impacts, and local communities challenged them in domestic courts. When the courts found in favour of the community, the investors promptly used the ISDS legal backdoor to claim public money in compensation and undermine the national court rulings. Often the mere threat of an ISDS claim can be enough to halt, weaken or delay public-interest laws, as policy-makers try to avoid expensive legal challenges.

> **There is no other system in the international legal landscape that affords private actors so much power.**
>
> *Academics Alessandra Arcuri, Federica Violi, Kyla Tienhaara, David Schneiderman, Laurens Ankersmit and Harm Schepel, writing about ISDS*[4]

The Achmea bombshell sends shock waves around the arbitral community

Public interest groups were delighted with the CJEU's Achmea ruling. They hailed it as "the beginning of the end" of a regime "that allows multinational corporations to put pressure on public interest decision-making", as environmental law charity ClientEarth put it.[5] Lawyers, however, who make huge profits when companies sue states in private arbitration tribunals, were dismayed by the ruling. An investment arbitration lobbyist called it a "Black Tuesday" verdict.[6] Others spoke of the "Achmea bombshell"[7] and predicted that the judgement would "send shock waves around the arbitral community" – because it had "dealt a real blow" to its business.[8]

This was not surprising. Investment arbitration is big business for corporate lawyers. Elite law firms charge up to US$1,000 per hour, per lawyer, in investment treaty cases, with teams of numerous lawyers usually handling each case. The arbitrators who decide the disputes also line their pockets, earning daily fees of US$3,000 and more. By rendering intra-EU investment treaty arbitrations impossible in the future, the Achmea ruling thus significantly curbed the business of the burgeoning arbitration industry.

> **The Judgment will send shock waves around the arbitral community.**
>
> *Arbitration lawyer at legal chambers 4 New Square, commenting on the CJEU's Achmea ruling* [9]

Big Business fights back

Big business quickly recovered from its Achmea shock, and developed a strategy to try to protect corporate privileges and profits. Their plan: to lobby the European Commission and EU member states to create a new parallel justice system, similar to the old intra-EU BITs, but compatible with EU law. "The Federal Government and the EU must act", wrote Germany's powerful industry lobby group BDI, a mere two weeks after the Achmea ruling, calling for a new "instrument to effectively protect German investments in other European countries".[10] The EU's biggest corporate lobby group, BusinessEurope, urged then European Commission President Jean-Claude Juncker to set up "an alternative mechanism for the settlement of disputes between investors and States within the EU… before intra-EU BITs are terminated."[11]

In 2019 and 2020 corporations and industry lobby groups held at least a dozen lobby meetings with the responsible European Commission department, DG FISMA (Directorate General for Financial Stability, Financial Services and Capital Markets Union), according to internal documents released via the EU's freedom of information rules.[12] Big business flooded Commission inboxes with letters and position papers. At high-profile events corporate executives repeated the message that there was now not enough business protection in the EU.[13] Big banks (such as Germany's second largest bank, Commerzbank), financial associations (including the European Banking Federation and shareholder lobby Deutsches Aktieninstitut) and other notorious big business lobby groups (such as BusinessEurope and the Association of Large French Companies – AFEP) were particularly active. Arbitration lawyers also joined the lobby battle, sometimes teaming up with chambers of commerce.[14] More recently, lobby consultancies also started knocking on the Commission's door (for example, Brussels-based consultancy FortyEight and BSH Advisors).

Industry cries wolf, Commission responds

The message from big business and their lobbyists was always the same: the termination of the intra-EU BITs "would leave investors without appropriate legal protection" in the EU internal market (as German business lobby groups wrote in a June 2019 letter to the Commission[15]). This was followed up with a threat. "This lack of protection may induce EU companies to invest outside the EU", with the effect of "reduced capital inflows into the EU and tax income" (European Banking Federation position paper from July 2019[16]). It was thus imperative that the Commission urgently create a new legal framework to protect EU corporations. As Deutsches Aktieninstitut and AFEP demanded, rather briskly, in November 2019: "EU companies request that the… European Commission tables a set of legislative initiatives in order to establish a revamped and harmonised EU-wide framework for the protection of intra-EU direct investments in 2020 or 2021 at the latest".[17] Both associations lobby for some of the world's largest corporations: from French multinational Total to German car giant Daimler to banking behemoths like BlackRock and Bank of America.

> **EU companies request that the… European Commission tables a set of legislative initiatives… for the protection of intra-EU direct investments in 2020 or 2021 at the latest.**
>
> *Deutsches Aktieninstitut and the Association of Large French Companies (AFEP)*

The Commission did as big business asked. In 2020 it announced a dedicated policy on intra-EU investments, organised a public consultation and commissioned a consultancy study on the issue. According to the consultation document a policy was needed because "EU investors have repeatedly raised concerns" that "the investment climate has been deteriorating" as a result of the Achmea ruling, which led to a "loss of trust in the effective enforcement of their rights".[18] The evidence provided to show the alleged "investment protection vacuum" (law firm Norton Rose Fulbright[19]), however, seems rather thin (see box on page 6).

> **While the Commission has long ignored workers' requests to create minimum social standards for the EU... complaints about the lack of protection for investors have immediately prompted... a consultation on the issue.**
>
> *Austrian Chamber of Labour*

The contrast between how the Commission treats civil society concerns and those of corporations was once again striking. As the Austrian Chamber of Labour remarked, when critically questioning the Commission's open ear policy for big business: "While the Commission has long ignored workers' requests to create minimum social standards for the EU – such as EU-wide insurance against unemployment – complaints about the lack of protection for investors, on the other hand, have immediately prompted the Commission to run a consultation on the issue."[20]

Corporations want a parallel justice system just for them

The parallel justice system which corporations are lobbying for is based on two pillars:

1. a new system for settling intra-EU investor-state disputes outside EU member states' courts. Here, various options are being proposed, including a new EU investment court that would only be accessible to corporations;
2. substantive rights for EU cross-border investors, that would be equivalent to the broad corporate privileges which the intra-EU BITs had provided – or even more extensive. They should also be consolidated "in one single legal source" (BusinessEurope in a letter to Jean-Claude Juncker, 5 March 2019[21]), for the further convenience of corporations.

The future European Commission initiative (currently planned for autumn 2021) is likely to address both pillars, as well as making proposals to facilitate cross-border investments in a third pillar.

Let's look at these issues in a bit more detail to understand what is at stake.

Corporate wish #1: a new EU court to enhance corporate rights and bypass local justice

Big business argues that existing courts are not sufficient to protect cross-border investments in the EU if there is a conflict with a member state. According to the European Banking Federation "a fair judicial proceeding cannot be expected" in member states' courts, which they argue are biased and slow. Moreover, investors allegedly have "no right to go directly before the European Court of Justice".[22] Industry wants corporations to be able to bypass national courts and directly sue member states in an EU-level institution.

> **The investor community should stop lamenting the imminent termination of intra-EU BITs and seize the opportunity to push for the creation of a European investment court.**
>
> *Paschalis Paschalidis, Shearman & Sterling law firm*[23]

This institution could take different forms. While utility companies Enel, EDF and Veolia seem to favour arbitration proceedings similar to those which existed under the intra-EU BITs in their answers to the European Commission consultation,[24] most corporate lobby groups are pushing for a new EU investment court or a specialised chamber for corporate claims in the European Court of Justice. In any case, big business is clear that "no exhaustion of domestic remedies should be imposed as a prior requirement for bringing cases before the specialised tribunal" (AFEP and Deutsches Aktieninstitut).[25] In addition, the new court or tribunal should have the power to award compensation, it should have competence over investor claims against the EU itself, and its rulings should be enforceable across the EU and worldwide.

Third-parties – for example a local community affected by a mining investment – should not have access to the new court or tribunal, according to corporate lobbyists. "The involvement of external stakeholders would in no way help to resolve the dispute impartially", wrote French water multinational Veolia in its contribution to the Commission consultation.[26] Deutsches Aktieninstitut agreed: "Investor-State disputes are bilateral proceedings, not plurilateral proceedings. The proceedings should thus be limited to the two parties – investor and state".[27] Again here corporations are trying to ensure that negatively impacted communities remain excluded from the process, and do not get a hearing, as is the case in current ISDS processes.

> **Following the EU abolishing of all intra-EU BITs, there is an urgent need for an alternative, pan-EU investment court.**
>
> *Financial lobby group Invest Europe*[31]

Industry is aware that its proposed new "fast track investment court", as lobby group WindEurope described it,[28] would massively shift existing legal paradigms. To quote the Luxembourg Chamber of Commerce: "These options… would represent a significant departure from the philosophy of the existing EU judicial system whereby investors have to challenge contested national measures before the courts of a Member State, seeking where necessary, to obtain a reference for a preliminary ruling to the Court of Justice."[29] This 'exhaustion of local remedies' principle – a generally recognised basic rule of international law – aims to safeguard state sovereignty, including the right to make important policy choices about public and private rights, many of which have been developed in EU member states over decades. It also ensures that EU law is applied consistently across the EU. This is why, unlike their corporate colleagues, public interest lawyers have argued that "the national courts of the EU member states should be entrusted to provide justice to cross-border and domestic investors alike". They warn that "side-stepping national courts would be a big step backwards for Europe."[30]

Financial pressure tactics and the power of ISDS threats

Industry is also aware that some of its proposals for a new EU system to settle investor-state disputes would require changes to the EU treaties. Despite this big business argues that "the value at stake is extremely important" (Italian energy company Enel in its response to the Commission consultation[32]). Making clear their reliance on financial pressure tactics to scare governments into submission, corporations argue that only "the risk of judicial proceedings is an incentive for state parties to… engage in dialogue with investors" (German industry lobby groups in a letter to the Commission, June 2019[33]). The European Banking Federation explained the importance of this tactic in a meeting with Commission officials in September 2019, describing how large banks previously used the threat of arbitration under intra-EU BITs "as deterrent to push the counterpart to settle without actually relying on the arbitration proceeding itself".[34]

What the lobbyists are referring to here is the phenomenon of regulatory chill – where the threat of litigation alone can paralyse governments and prevent them from legislating in public interests, due to the financial risks involved. There is evidence showing that public interest regulations on health and environmental protection have been delayed by governments or otherwise adapted to the demands of corporations because of expensive claims or litigation threats. Notable examples include the downscaling of environmental regulations of a coal-fired power plant in Germany, when the country settled a claim by Swedish energy company Vattenfall,[35] and the watering down of a law aiming to end fossil fuel extraction in France following legal threats from oil and gas company Vermilion.[36]

> **Member States would have little interest to listen to the investors' preoccupations without the deterrent effect of an effective enforcement mechanism.**
>
> *Arbitration law firm Linklaters, on the need for a special EU investment court*[38]

As Pulitzer Prize-winning journalist Chris Hamby wrote, after an 18-month investigation on the issue: "Of all the ways in which ISDS is used, the most deeply hidden are the threats, uttered in private meetings or ominous letters, that invoke those courts. The threats are so powerful they often eliminate the need to actually bring a lawsuit. Just the knowledge that it could happen is enough."[37]

It's not hard to imagine how, by empowering investors to directly claim large sums to compensate them for public decision-making, an EU court for corporations could make politicians reluctant to enact much-needed safeguards to protect public health, social well-being, and the environment, if they were opposed by powerful economic actors. At this moment in global history, as the world has a very short amount of time in which to address and avert catastrophic climate change, the risks and dangers for the planet cannot be overestimated.

An EU corporate court: wrong solution for a fictional problem

There are serious rule of law deficits in the EU: media freedom has been declining in nearly all EU countries;[39] corruption scandals persist, including in seemingly corruption-free countries like Denmark, Finland, and Sweden;[40] the erosion of judicial independence and violations of basic rights in countries like Poland and Hungary has been comprehensively documented in recent years.

However, when considering whether it is necessary to create new privileges for corporations, the relevant question is not whether there are general rule of law problems in the EU. The relevant question is rather: is there evidence of *systematic* maltreatment of foreign investors in EU member states, that would justify special protections for them (and not, for example, journalists or human rights defenders)? There is no such evidence.

> **EU law, as progressively developed over decades, provides investors with a high level of protection.**
>
> *European Commission communication on the protection of intra-EU investments, July 2018*[43]

The EU Justice Scoreboard[41] – the key data tool used to monitor the quality of EU justice systems – shows no evidence of systematic abuse of foreign investors in EU member states. In business lobby papers arguing for these privileges, the same small number of examples, mostly from Poland and Hungary, are mentioned again and again. Requests for more evidence are responded to evasively. When, for example, DG FISMA asked for more details about problems Commerzbank had faced with administration in EU member states, the bank responded: "Our statement is based on general observations and cannot be linked to a particular case."[42]

Academic research on the area also shows no systematic evidence that governments around the world treat foreign investors more poorly than domestic investors. Some research even suggests that in fact being a foreign firm can be a political advantage, particularly in countries with weak legal systems.[44] A telling European example can be seen in the tax incentives, subsidies and privileged access to policy-makers granted to German carmakers by the Orbán government in Hungary.

Industry's alarmist claim that the end of intra-EU BITs will "leave investors without appropriate legal protection," as German lobby groups put it,[45] is little but crying wolf. In the EU internal market investors can rely on a long list of rights and protections, including the right to property, non-discrimination, to be heard before an authority and to an effective remedy and a fair trial. The state should not provide protections beyond these basic rights to corporations, argues the Austrian Trade Union Confederation ÖGB in the Commission consultation.[46] The Austrian Chamber of Labour further cautions that: "Any further protection for investors would mean a further shift in the imbalance in Union law in favour of employers in relation to employees".[47]

> **Investors are already comprehensively protected in the EU.**
>
> *Austrian Trade Union Confederation ÖGB*[48]

In any case, if rule of law deficits in the EU are to be addressed, this should surely happen in a way that improves the experience of all citizens, rather than by creating additional legal privileges for a small number of already highly privileged and protected economic actors.

Corporate wish #2: new legal and financial obstacles to public-interest regulation

While ISDS was originally devised to protect businesses from outright property seizures or blatant discrimination, over the years it has developed into a powerful tool which can be used to attack legitimate, non-discriminatory public interest policies. Governments have been sued for tightening environmental regulations, limiting excessive profits during economic crises and policies to prevent discrimination, amongst others. More recently companies have also launched ISDS lawsuits against climate action (for example German coal giants RWE and Uniper suing the Netherlands over its phase-out of coal[49]) and labour rights (for example a Lithuanian businessman suing Denmark over trade union protests against bad working conditions in his company[50]).

That these suits have any prospect of success is the result of the vast privileges provided by investment treaties to investors. The notion of fair and equitable treatment, for example, has been interpreted in a way that de facto requires countries to pay compensation when they change the law.[51] Even more alarmingly, ISDS tribunals use flawed valuation techniques when calculating damages – and regularly award extremely large amounts of compensation for loss of expected future profits. As a result, "investors are being systematically overcompensated", according to Toni Marzal from the University of Glasgow Law School. "They are receiving monetary damages that they would not be entitled to outside of ISDS".[52]

> **Companies are not against measures that protect common interests that matter to society at large, however they cannot be detrimental to businesses' investments.**
>
> *EuroChambres, Association of European Chambers of Commerce*[54]

Given the termination of the intra-EU BITs and the risk to corporate profits involved, industry wants to change EU law so that it continues to allow for similar overcompensations into the future. Provisions such as fair and equitable treatment should be "codified, specified and further developed" in new EU legislation, according to Commerzbank and Deutsches Akieninstitut. The starting point should be the corporate privileges provided for in the EU's recent trade deals with countries like Mexico. But these are not enough – according to the lobby groups the new EU regime should be even more investor friendly: "EU legislation on intra-EU investments should even be more specific/extensive than stipulated under these external agreements as EU cross-border investments and their protection touch the very core of the single market".[53]

The following three examples illustrate how providing the legal protections demanded by corporations would risk driving up costs for public interest regulations in the EU and making it easier for business to secure large amounts of compensation paid out by the public purse:

- The Luxembourg Chamber of Commerce complains that "investors bringing their claim for compensation on the basis of EU law… are… required to show a 'sufficiently serious' breach" of EU law. As a result "compensation for breach of EU law by the Member States is rare". The new, more corporate-friendly EU law should thus follow the rationale of international investment treaties where "any breach of the BIT's investment protection standards which is attributable to the Member State suffices to establish its liability".[55] This would reduce states' policy space to regulate in the public interest, and all but guarantee business' access to public compensation when regulations curb corporate profits.
- According to several corporate lobby groups "compensation should comprise lost income such as benefits that could have been legitimately expected from the regular utilisation of a facility".[56] Under current EU and member state law compensation does not encompass such hypothetical future profits. The financial risk to states of investor-state disputes under the new EU legislation advocated by industry would therefore increase significantly – and with it the risk that states might abstain from bringing in much needed policies to protect people and the planet, out of fear of being sued.
- Lobbyists are also pushing the Commission to specify calculation methods for damages in the upcoming proposal. "It may… be useful to further specify the rights investors enjoy in case of expropriation," writes arbitration lobby group EFILA, "in particular regarding the specific valuation method to be used by courts or tribunals." EFILA (like law firm

Linklaters) suggests 'discounted cash flow' as one option.[57] This methodology can lead to grossly exaggerated compensation payments, as the value of an investment is calculated as equal to a completely speculative future income (rather than the investor's historic costs). In the Tethyan Copper v. Pakistan case, for example, the investor was awarded US$4 billion plus interest as compensation for Pakistan's failure to approve a mine – even though the initial investment was just US$167 million. The tribunal based the compensation on its estimation of the income the investment would have earned over a hypothetical 50-year operating cycle.[58]

> **'Educational' measures against EU member states are of no value to investors. Investors must have a right to material compensation.**
>
> *Austrian Chamber of Commerce (WKÖ)*[59]

A new investment protection regime designed to satisfy these corporate wishes could dangerously constrain the regulatory space of legislators and administrators across the EU. Currently, EU and member states' law is protective of this regulatory space. If the substantive investor protections and speculative damage calculation methods in international investment law found their way into EU law, however, they would make it much more difficult for member states and the EU to legislate in the public interest. According to environmental law group ClientEarth it could mean that "public compensation must be paid to foreign investors even for incidental economic costs of general non discriminatory laws and regulations that serve a public purpose. This... may deter states from passing laws and regulations."[60]

DG FISMA falls for corporate lobby tactics

DG FISMA (along with the Commission's legal service) has been a long-standing critic of intra-EU BITs, arguing that they led to a fragmentation of the internal market by giving greater rights to some EU companies, but not others. Since at least 2010, the Commission department has pushed for the end of these treaties, attracting the anger of corporate lobby groups and lawyers. In March 2019, while industry was already lobbying for a mechanism to replace the intra-EU BITs, BusinessEurope complained: "We have the impression that our views are met with a certain reluctance from the part of the European Commission services that are dealing with this issue."[61]

Now, however, there are worrying signs that DG FISMA has changed track, and is hell-bent on granting foreign investors new legal privileges and working to create the 'evidence' to justify them. Its 2020 consultation on this issue includes questionable assumptions about the need for more investor rights in the EU – previously DG FISMA had repeatedly underlined the strong protections investors already enjoy and criticised extra rights for foreign investors as discriminatory.[62] The consultation refers to the concerns of "some investors" and "some stakeholders" about an alleged deterioration of the investment climate, without providing any tangible evidence to back up the claim. The manner in which the questions are drafted – in a closed, leading way, with virtually all questions tailored to corporations and their lawyers – suggests that the "outcome of the consultation seems already decided", as the French Veblen Institute for Economic Reforms and Foundation for Nature and Mankind wrote. They argue that the consultation seemed designed to conclude that it was necessary to implement "a system granting private cross-border investors additional tools to sue States wishing to impose necessary and public interest measures".[63]

> **The Commission seems to endorse the claims of business organisations calling for more investors' protection.**
>
> *Clémentine Baldon, law firm Baldon*[64]

When the answers to its consultation questionnaire were not sufficient, DG FISMA followed up with some select corporate contributors to secure further evidence and inputs to support their case. For example, a team at DG FISMA held a conference call with German Commerzbank and sent "some specific follow-up questions on the basis of your response to the public consultation" in October 2020. The bank's lobbyists were thrilled to receive so much attention and responded: "We are very glad to see that our contribution to your public consultation has been examined in such detail."[65]

DG FISMA also organised workshops to further discuss business' demands for more corporate protections in the EU market, bringing together companies like Raiffeisen Bank, industry lobby groups like BusinessEurope, member state representatives and Commission officials. Civil society groups were, not surprisingly, remarkably absent from these workshops.[66]

> **Thank you very much for all your efforts and the good cooperation. It was a real pleasure for me to work with you.**
>
> *Association of German Chambers of Commerce and Industry Lobbyist, in an email to DG FISMA about replacing intra-EU BITs, 10 March 2020*[68]

Ahead of the release of its proposal on intra-EU investment protection, it appears that the Commission might work even more hand-in-glove with corporate lobbyists. In March 2021 BSH Advisors consultancy wrote to DG FISMA officials on behalf of Austrian and German companies, who were eager "to support DG FISMA as much as possible in this important matter". The lobby group suggested that "a well reputed international law firm" could write "a detailed legal opinion" which could outline "various potential policy routes how the level of intra-EU investment protection could be increased". Asked about whether such an opinion "would be deemed useful by your unit" and the proposal to have a phone call to discuss "which routes would be of most interest to you", a DG FISMA official responded with clear interest in the offer: "We are currently waiting for guidance from our hierarchy on the way forward regarding our work... We will reach out to you as soon as we have more clarity and think it would be better to arrange a phone call at that stage. In any case, we... always welcome stakeholder contributions to our work!"[67]

Will the Commission pave the way for a new corporate power grab?

According to internal sources the European Commission will propose new rules on EU cross-border investments in autumn 2021. Discussions between the Commission and EU member state experts, which took place in autumn 2020, suggest that the proposal will be about strengthening substantive investor protections (ie corporate wish #2 above), enforcement rights and remedies (ie corporate wish #1 above), and proposals to facilitate cross-border investments in a third pillar.[69]

A Commission non-paper from September 2020 outlines worrying options for the first two pillars, including a legislative package with corporate-friendly rules derived from international investment law (such as the protection of investors' legitimate expectations) and the creation of a specialised investment court at EU level. "This option", the Commission explains, "would establish an investment court (which could be modelled on the Unified Patent Court – with a central division at 'EU-level' and local divisions, if needed, in Member States) that would deal with individual cases. Investors can bring claims directly and obtain compensation through a binding decision."[70]

The Commission also seems keen on establishing new privileges for business to intervene in policy processes. In a meeting with German Insurance Association GDV on 26 February 2020 DG FISMA officials announced "measures to prevent problems from unexpected regulatory changes, for example by making the national decision making process more transparent and more open for stakeholders' contributions."[71] Its 2020 consultation document also lists "involvement of investors during the preparatory phase of the policy measures" as one of the options "to mitigate the potentially negative impact of Member States' policy changes on investments".[72]

> **Investors should not enjoy any extra rights compared to other actors in the policy process of the European Union and its member states.**
>
> *Federation of German Consumer Organisations (vzbv)*

Public interest organisations have warned against such privileged access for corporate lobbyists, who already dominate many policy processes in the EU. As the Federation of German Consumer Organisations (vzbv) put it: "All stakeholder, be it investors, national businesses and civil society organisations should be informed about projected policy measures. There should be open transparent consultations on those measures addressed to all stakeholders... Investors should not enjoy any extra rights compared to other actors."[73]

The corporate takeover of EU law must be stopped

There are worrying signs that the upcoming European Commission proposal for EU cross-border investments could establish a special big business court, which could force EU governments to pay for regulations that protect workers, consumers, and the environment. Such provisions could ultimately discourage and prevent governments from regulating in the public interest. The corporate lawyers who were so shocked by the end of the intra-EU BITs are now already looking forward to an "all's well that ends well" post-Achmea scenario in which "intra-EU investors will… benefit from the new intra-EU investment protection framework that the EU is in the process of designing," as a lawyer from Austrian law firm Schönherr wrote in February 2021.[74]

The situation is extremely alarming. The introduction of new investment law standards and an EU-wide system of ISDS could have a real chilling effect on public interest regulations. It is likely that corporations would use it frequently and with enthusiasm. Backed up by the power of the EU institutions, it could arguably be even more powerful, and therefore more detrimental to democracy and regulation in the public interest, than the old intra-EU BITs.

But the battle against the new corporate takeover of EU law is not yet lost. There is still time to influence the upcoming European Commission proposal. And while many member states seem to be acquiescing to the Commission's pro-business approach, others seem more reluctant, stressing that existing foreign investor protections and national courts work well in the EU.[75]

The proposal for a new EU justice system for corporations is likely to fuel massive opposition from organised civil society. Trade unions, consumer, health and environmental groups have opposed and defeated ISDS in the past, multiple times over – whether in the context of the Multilateral Agreement on Investment (MAI) in the 1990s, the World Trade Organisation (WTO) at the beginning of the century or through successful mass opposition to ISDS in the transatlantic TTIP trade negotiations a few years ago.

Despite experiencing so many defeats, it appears that the ISDS investor super rights are once again coming back with a vengeance. If the corporate lobby campaign succeeds, an EU-wide system of ISDS could give a huge boost to big business' decades old strategy of undermining democracy and favouring huge corporate profits, at substantial cost to the public. But if defeated by an alliance of civil society fighting for a better Europe, it could spell the end of companies using their own parallel justice system to sue governments for having the audacity to legislate in public interest.

Notes

1 Judgment of the Court (Grand Chamber) of 6 March 2018: Slowakische Republik v Achmea BV, Case C-284/16.

2 Corporate Europe Observatory et al. (2019) Suing to Force Through a Toxic Goldmine: Gabriel Resources vs. Romania.

3 Corporate Europe Observatory et al. (2019) Bypassing Courts and Local Democracy to Build a Gated Community for the Rich: Razvoij Golf & Elitech vs. Croatia.

4 Alssandra Arcuri et al. (2020) Expropriating democracy: on the right and legitimacy of not ratifying CETA, *EJIL: Talk! Blog of the European Journal of International Law*, 20 October.

5 ClientEarth (2018) Press release: New ECJ ruling could spell the end of 200 intra-EU investment agreements, 6 March.

6 Nicos Lavranos (2018) Black Tuesday: the end of intra-EU BITs, *Thomson Reuters Practical Law Arbitration Blog*, 7 March.

7 Wolters Kluwer Expert Insights (2020) A post achmea regime investment arbitration eu primacy bits, 27 May.

8 Matthieu Gregoire (2018) Intra-EU BIT Arbitrations Declared Incompatible with EU law, 6 March, p. 8.

9 Ibid.

10 BDI (2018) ECJ Declares Investor Protection within the EU Unlawful, 22 March.

11 BusinessEurope (2019) Letter to Jean-Claude Juncker, 5 March. Released via an access to documents request under the EU's freedom of information law.

12 See the access to documents requests regarding lobby contacts on intra-EU investment protection and facilitation from 19 February and 22 December 2020 on the AskTheEU website.

13 For example at an event organised by French business lobby groups AFEP and MEDEF on 1 October 2019 in Paris: Investissements Directs Etrangers. Quels enjeux pour l'Europe?.

14 See, for example, the position paper of the Luxembourg Chamber of Commerce, which was written by a working group which included many arbitration lawyers.

15 BDI et al. (2019) Letter to Olivier Guersent of DG FISMA on EU investment protection mechanism, 5 June. Released via an access to documents request under the EU's freedom of information law.

16 European Banking Federation (2019) Bilateral Investment Treaties (BITs): Ensuring the Protection of intra-European Investments, 3 July. Released via an access to documents request under the EU's freedom of information law.

17 Deutsches Aktieninstitut and AFEP (2019) EU companies' call for a new intra-EU investment protection framework, November. Released via an access to documents request under the EU's freedom of information law, p. 1.

18 European Commission (2020) Public Consultation document. Intra-EU investment protection and facilitation initiative.

19 Norton Rose Fulbright (2019) Investment protection post-Achmea, May.

20 Original translated by Corporate Europe Observatory: "Die BAK erlaubt sich jedoch den Hinweis, dass die Kommission sich im Hinblick auf konkrete Vorschläge der ArbeitnehmerInnen wie z.B. die Forderung nach der Schaffung neuer sozialer EU-Mindeststandards, beispielsweise in der Arbeitslosenversicherung, bislang nicht veranlasst sah, die Zustimmung/Ablehnung dazu in einer öffentlichen Konsultation abzufragen. Die Äußerungen einiger Interessensträger aus dem Bereich Investitionsschutzrecht hingegen haben augenscheinlich die Kommission dazu veranlasst, deren Anliegen in einer Konsultation abzufragen." Public consultation on an intra-EU investment protection and facilitation initiative. Contribution by the Austrian Chamber of Labour, 14 September 2020, p. 19.

21 BusinessEurope (2019), see endnote 11.

22 European Banking Federation (2019), see endnote 16.

23 Paschalis Paschalidis (2020) The pressing need for a European investment court, *Global Arbitration Review*, 10 February.

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