

Investment Court System put to the test

New EU proposal will perpetuate investors' attacks on health and environment



Executive summary

In autumn 2015, the European trade commissioner, Cecilia Malmström, launched a proposal to give far-reaching rights to foreign investors in all future EU trade agreements. The proposal came in the midst of growing public concern over the inclusion of Investor-State Dispute Settlement (ISDS) mechanism found in EU trade agreements such as the US-EU Transatlantic Trade and Investment Partnership (TTIP) and the EU-Canada Comprehensive Economic and Trade Agreement (CETA). This mechanism, applied in many existing international trade and investment treaties, has seen a surge of controversial cases launched by corporations against states that have taken regulatory action to defend public health, the environment or the public interest.

The Commission promised that its new approach to investment protection – outlined in the Investment Court System (ICS) proposal put forward in the TTIP negotiations - would “protect the governments’ right to regulate and ensure that investment disputes will be adjudicated in full accordance with the rule of law.” Members of the Commission promised that some of the most egregious cases, which have come to symbolise the injustices and wrongs of ISDS, would no longer be possible under the “reformed” system.

This report puts that promise to the test by examining five of the most controversial ISDS cases from recent years.

These cases include:

- Philip Morris vs Uruguay for the introduction of graphic warnings on cigarette packages and other tobacco control measures in order to promote public health;
- TransCanada vs the US for President Barak Obama's decision to reject the Keystone XL pipeline as part of US' commitment to tackling climate change;
- Lone Pine vs Canada for a precautionary fracking moratorium enacted in Quebec;
- Vattenfall vs Germany for Hamburg city's imposition of environmental standards for water use at a coal-fired power plant;
- Bilcon vs Canada for an environmental impact assessment that prevented the construction of a large quarry and marine terminal in an ecologically sensitive coastal area.

We wanted to test whether these cases would no longer be possible under the Investment Court System (ICS) in order to understand whether it represents a substantial change from the current iniquities of ISDS arbitration. Or whether, as many legal experts and civil society advocates have argued, the European Commission is merely carrying out a rebranding exercise.

Close analysis of each case shows that every one of these controversial disputes could still be launched and likely prosper under ICS. There is nothing in the proposed rules that prevents companies from challenging government decisions to protect health and the environment. And there is nothing to prevent arbitrators from deciding in their favour, ordering states to pay billions in taxpayer compensation for legitimate public policy measures.

In other words, put to the test, the Investment Court System would fail to prevent any of these controversial cases from happening.

In addition, the report finds that:

1. The Commission's use of broad, loosely defined concepts such as "manifest arbitrariness" and "Fair and Equitable Treatment" (or FET) provides the same open door for corporations to sue states in arbitration tribunals as under the current ISDS system.
2. Many of the new limitations and qualifiers in the European Commission's proposal, such as the assertion of a government's right to regulate, are poorly defined and open to interpretation. The burden of proof lies with governments who have to show that the measures they took were "*necessary*", "*non-discriminatory*" and aimed to achieve "*legitimate*" objectives. The corporations in each of the five cases examined have already argued that the government's regulations were illegitimate, arbitrary, excessive and discriminatory (even though there was no discrimination on nationality grounds) and they could make the same case under ICS.
3. Rather than limit egregious claims, ICS actually creates the potential for more arbitration disputes because, unlike existing treaties, it explicitly introduces the notion of investors' "*legitimate expectations*". In all five of the cases examined, investors claimed a breach of

legitimate expectations. According to the proposal, an investor can only claim “*legitimate expectations*” as the result of “*a specific representation*” from the state – but this limitation is so poorly defined that it could mean any measure, action or even verbal indication by a government official that, according to the investor, had induced it to make or maintain the investment.

4. The right to compensate investors for loss of (future) profit remains, making cases such as TransCanada’s exorbitant claim for \$15 billion in damages for an unbuilt pipeline more likely. The only exception under ICS that specifically prevents investors from claiming compensation is on matters related to state aid but not on other public policy measures – showing that there was never any real intention to protect other regulatory measures from crippling financial claims.
5. Under the Investment Court System, the interpretation of the expansive rights afforded to corporations and the ill-defined restrictions will still depend on for-profit adjudicators, and not on public, independent judges. They will be paid by the case and the loopholes in the EU’s proposed conflict of interest requirements will allow the same pool of corporate arbitrators to continue to sit on arbitration panels. European judges have concluded that the ICS proposals do not meet the minimum standards for judicial office as laid down in the European Magna Carta of Judges and other relevant international texts on the independence of judges.

The fact that each of these controversial cases could still be successfully pursued under the ‘reformed’ approach suggests that the European Commission has failed to listen to the millions of Europeans who have demanded an end to unjust corporate privileges. Investor-state dispute settlement – whatever it is called – is undemocratic, dangerous, unfair, and one-sided. It is time for the European Commission to end its PR rebranding exercise, and chart a path towards trade justice by getting rid of private arbitration from TTIP, CETA and other EU trade agreements once and for all.

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