INTRODUCTION

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

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

We have identified 10 key problems with the new proposals, which reflect how the rights of corporate investors are still privileged over citizens, enhancing the power of foreign investors in relation to sovereign states. There are still no convincing arguments to include any form of ISDS in TTIP – including the misleadingly renamed ‘Investment Court System’.3
Following public opposition to ISDS, the European Commission organised a public consultation, based on the proposal on the EU-Canada trade agreement (CETA). An overwhelming 97% of respondents rejected ISDS. The Commission’s proposal ignores the concerns raised by the public as it retains special rights for investors.

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The new proposal diagnoses the fact that an Investment Court System would drastically expand the rights of investors as it would provide protection for all EU investments in the EU. Currently, just eight per cent of US firms operating in the EU are protected by ISDS, whereas in the EU, the public consultation showed that a majority of respondents want protection for their right to regulate. The proposal would vastly increase the chances of EU governments being sued.

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

The broad definition of investment in the proposal allows foreign investors to claim compensation from the state under a wide range of circumstances. The European Commission claims to have introduced safeguards, with governments only permitted to take “measures necessary” to achieve “legitimate” objectives. However, the mechanism does not provide adequate protection for the public interest without imposing any obligations, such as for environmental, social, health and safety or other standards. Foreign investors would still be allowed to circumvent domestic courts and sue states directly through international tribunals. This still discriminates against domestic investors.

The European Commission claims to have introduced new arbitration terms that aim to protect national governments’ rights to regulate. However, the mechanism does not provide adequate safeguards, with governments only permitted to take “measures necessary” to achieve “legitimate” objectives. This again leaves it up to arbitrators to decide what is allowed and what is not.

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

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

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

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In the context of the UN Human Rights Council discussions on a proposed Treaty on business and human rights, EU member states have voted against this proposal and are boycotting the negotiations. The contents of this document are the sole responsibility of Friends of the Earth Europe and cannot be regarded as reflecting the position of the funder mentioned above. The funder cannot be held responsible for any use which may be made of the information this document contains.