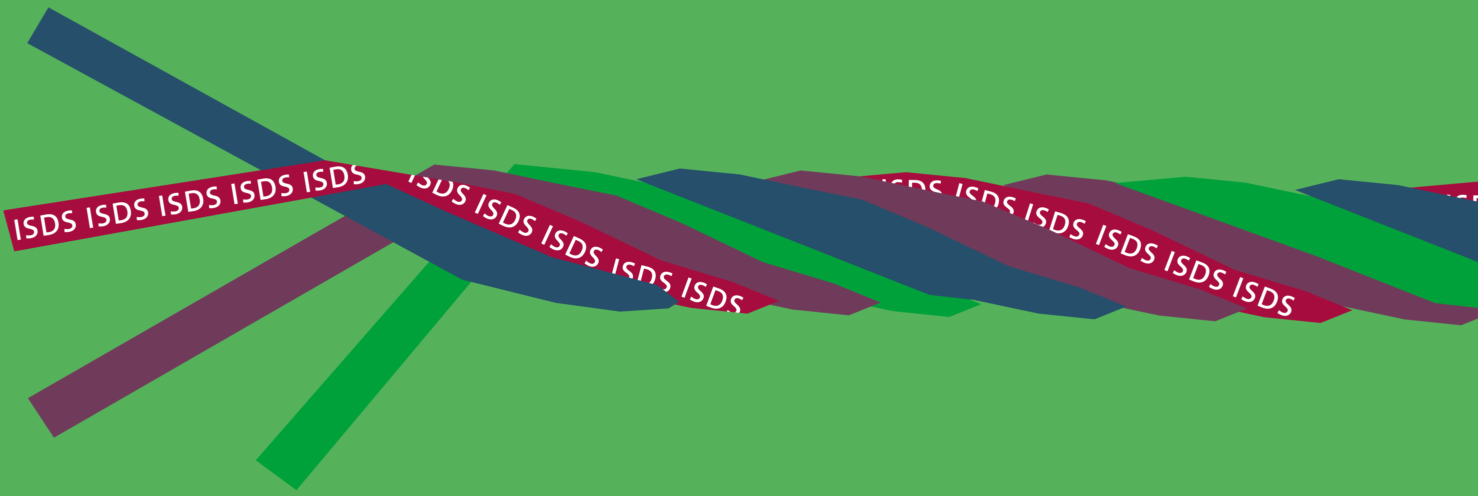

The Multilateral Investment Court Locking in ISDS

Ten reasons why the EU's proposal for a Multilateral Investment Court doesn't fix a fundamentally flawed system

Introduction

In recent years, investment tribunals in which investors can sue states on the basis of trade and investment agreements, have become very controversial. This system, called investor-state dispute settlement (ISDS), bestows three private investment lawyers, called arbitrators, with the power to force states to pay enormous amounts of compensation to foreign investors when they deem that their profits are affected by a law or governmental decision. Studies have shown that these tribunals have been used to attack legitimate public policy and extract compensation from governments for rules that protect people's health and the environment.[1]

The European Commission reacted to the criticism of ISDS by re-branding it as Investment Court System and giving states more influence over the selection of arbitrators as well as enhancing transparency and re-wording some of the controversial VIP rights given to investors. However, overall the Commission's proposal amounted to cosmetic reforms, not touching on the fundamental problems of the system. [2]

In the summer of 2016, the European Commission announced its plans to establish a Multilateral Investment Court. It proposes to establish a court where investors can claim compensation from states, based on existing and future trade and investment treaties. While many of the details have not been agreed or decided yet (and it is still unclear if the idea will find enough support outside the European Union), it is already becoming apparent that the new court would not fundamentally change the ISDS system. To the contrary, the proposal seems aimed at keeping many of the key features (and flaws) intact, effectively locking in ISDS.

We have identified 10 key problems with the new proposal, which reflect how the rights of corporate investors are still privileged over citizens, enhancing their power in relation to sovereign states. There are still no convincing arguments to support any form of ISDS in EU trade agreements – including the misleadingly renamed 'Multilateral Investment Court'.

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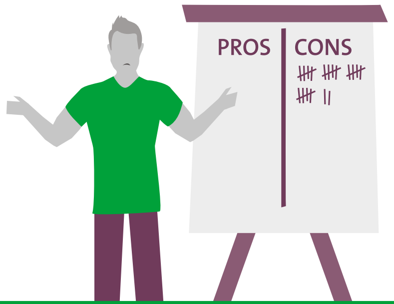
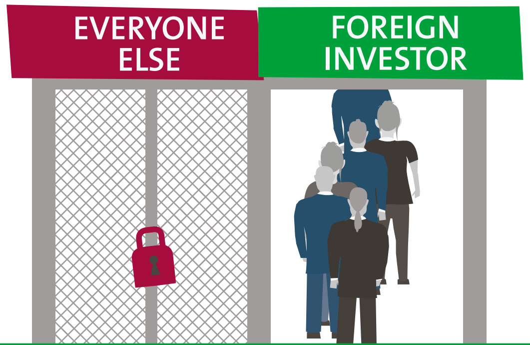


#1 No reason for investor privileges

No convincing reason for ISDS has been brought forward so far. There is no clear empirical evidence that investment agreements lead to increases in foreign direct investment (let alone investment fostering sustainable development), the purported rationale for signing these agreements in the first place.[3] To the contrary, studies have shown that foreign investors are on average treated better than national companies.[4] If investors are particularly concerned about the safety of their investment, they can always acquire a political risk insurance – offered by private and public institutions. Or use domestic courts, just like everyone else.

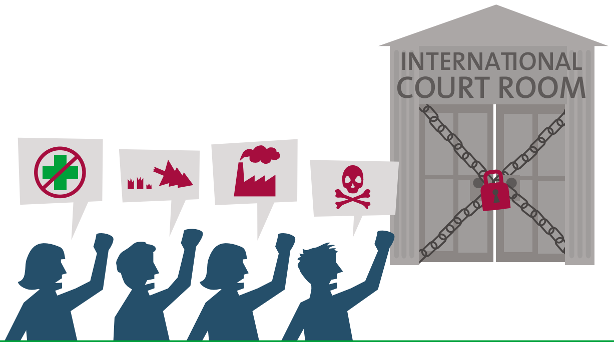
#2 Same problematic VIP rights as before

The Multilateral Investment Court would bring no changes to the extremely far-reaching rights that are afforded to foreign investors in current investment treaties. Investors could keep relying on VIP rights given to them in decades-old investment treaties which have proven to be detrimental to democratic decision making and have been used to attack public interest policies. Any reform that doesn't tackle those VIP rights will not protect us from further investor attacks.



#3 Access only for foreign investors

Only foreign investors would be able to bring claims at the new ISDS court[5], leaving groups affected by investor misconduct out in the cold. This fundamental imbalance provides an already powerful group (foreign investors) with a potent parallel legal system, while local communities who might be affected by investor misconduct (for example mining or oil companies polluting their livelihoods) are locked out. The one-sidedness creates an incentive for investor-friendly ruling, since only their continued claims are going to keep the system running.

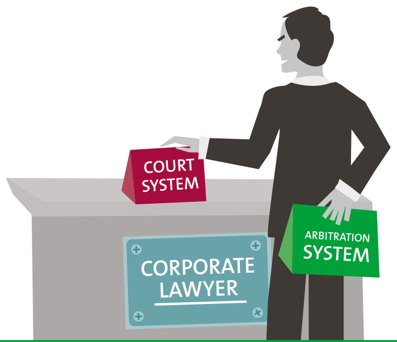


#4 No obligation for investors to respect human rights

Currently, there are hardly any investment treaties with obligations for investors to comply with national laws and respect human rights or refrain from damaging the environment. There are also no restrictions on which investors can access the system, so even investors who have abused their workers or polluted the environment will be able to bring their cases. The new ISDS court proposal is not aiming to change this, thereby perpetuating the deep inequalities produced by economic globalisation.

#5 No respect for domestic courts

It seems unlikely that there will be an obligation on foreign investors to use domestic courts first, if they want to challenge a government action, nor that they would have to show that domestic courts would be unable to handle a particular case. This is contrary to customary international law and international human rights law, which requires the exhaustion of local remedies. In practice this also means that investors can use whichever forum they feel gives them most advantages. This privilege undermines the rule of law and discriminates against domestic investors (and everyone else).

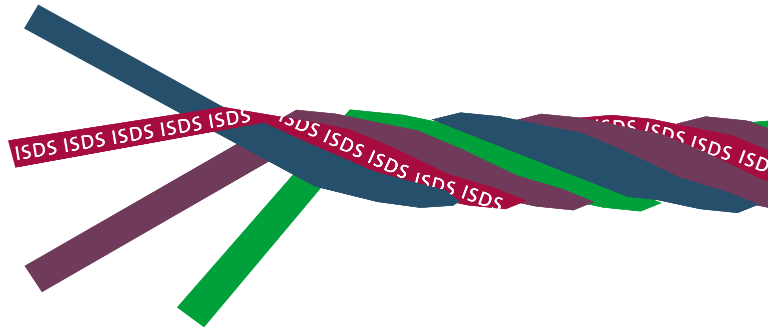


#6 Different name, same arbitrators?

No clear safeguards have been proposed to exclude the small club of arbitrators that is currently ruling on a high number of ISDS cases and was instrumental in driving the expansion of the current system. To the contrary, a desirable qualification of the future judges includes "previous experience in investment law". It is also being considered to dock the new tribunal to one of the existing ISDS institutions where the arbitration industry is holding considerable power. All this indicates a strong continuity with the current system rather than a serious attempt of reform.

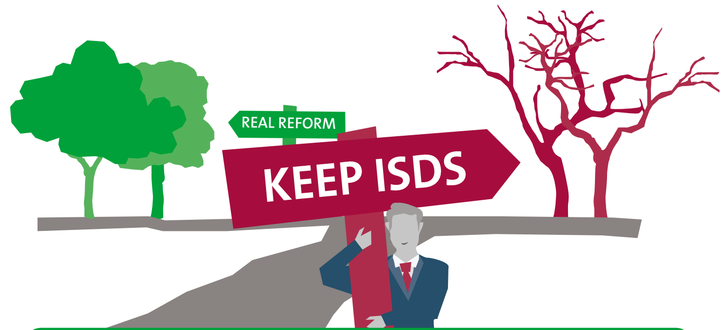
#7 Continued risk of regulatory chill

The use of ISDS as a tool to lobby against legislative changes that would affect a company's profits is already widespread. There are no safeguards foreseen that would prevent the new global corporate court from creating regulatory chill – the use of potential ISDS claims to prevent unwanted legislation from being developed or passed. Unless the investor VIP rights are amended, the dangers of regulatory chill by the Investment Court would continue unchanged.



#8 Locking in ISDS

While promoting the relatively minor changes and improvements that would come from further institutionalising the current ISDS system, the European Union is already using the global corporate court as a justification for a massive expansion of that same system. The EU has proposed to include investor courts in almost all of its ongoing trade and investment negotiations, for example with countries in Asia (Indonesia, Philippines, Myanmar, India, Vietnam, Singapore and China) and Latin America (Mexico, Chile). This expansion would lock-in the ISDS system for decades to come.



#9 Undermining real reform attempts

There are numerous attempts to change and reform the current investment treaty system: Eg South Africa and Ecuador have terminated their Investment Treaties containing ISDS and others have developed new models for investment treaties that include obligations for investors, require them to use domestic courts and look at alternatives to ISDS for settling disputes between investors and host states. The EU's strong push for the global corporate court coupled with the openly hostile reactions to reforms by other countries[6] point towards the intention to further entrench the current biased and unfair system.

#10 A potentially illegal proposal

It is unclear if the new ISDS court would be compatible with the European Treaties. A number of legal experts have pointed out that it challenges the monopoly of the European Court of Justice in interpreting EU law. In a recent ruling the European Court of Justice itself has pointed out that this question remains unresolved.[7] It seems imprudent that the European Commission would push ahead with a project by waiting for the opinion fromof the European Court of Justice regarding the legality of the Investment Court System in the CETA agreementon the matter, which was requested by the Belgium government in September 2017.

In a public consultation on ISDS organised by the European Commission in 2014, 97% of the respondents flatly rejected ISDS.[8] Yet the results were ignored and investment tribunals were included in the free trade agreement with Canada (CETA) as well as other trade deals. A more recent petition that called on the Commission to completely rethink its approach on the global corporate court received more than 340 000 signatures.[9] Instead of reflecting on this opposition and re-considering how international investment rules can help to tackle the most pressing issues of our times such as accelerating climate change and rising inequality, the Commission has shown determination to safeguard much of the existing, deeply flawed system.

What is needed is a turnaround: European government and institutions should start terminating unnecessary and harmful investment agreements and instead support providing effective remedy to local communities when multinational corporations violate human rights and pollute the environment. They should do this by fully backing and constructively participating in the UN open-ended intergovernmental working group to develop a binding treaty on business and human rights.[10]

Endnotes

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