

**STOP THE
TROJAN
TREATY**

THE HIDDEN COST OF EU TRADE DEALS:

**INVESTOR-STATE DISPUTE SETTLEMENT
CASES TAKEN AGAINST EU MEMBER STATES**

4TH DECEMBER, 2014



**Friends of
the Earth
Europe**

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Friends of the Earth Europe is the largest grassroots environmental network in Europe, uniting more than 30 national organisations with thousands of local groups. We are the European arm of Friends of the Earth International which unites 74 national member organisations, some 5,000 local activist groups, and over two million supporters around the world. We campaign on today's most urgent environmental and social issues. We challenge the current model of economic and corporate globalisation, and promote solutions that will help to create environmentally sustainable and socially just societies. We promote environmentally sustainable societies on the local, regional, national and global levels. We seek to increase public participation and democratic decision-making. Greater democracy is both an end in itself and is vital to the protection of the environment and the sound management of natural resources. We work towards environmental, social, economic and political justice and equal access to resources and opportunities on the local, regional, national and international levels.



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Europe**

CONTENTS

EXECUTIVE SUMMARY

INTRODUCTION

METHODOLOGY

KEY FINDINGS

GENERAL TRENDS IN ISDS CLAIMS AGAINST
MEMBER STATES AT THE EU LEVEL

STRIKING FEATURES IN ISDS CLAIMS INITIATED AGAINST EU MEMBER STATES

ENVIRONMENT UNDER ATTACK

GERMANY CASE STUDY: a "settled case"
resulting in lower environmental standards

PRESSURE ON EASTERN EUROPE

CZECH REPUBLIC CASE STUDY: The unbearable
costs of the unpredictable arbitration system

POLAND CASE STUDY: Taxpayers can
only see the bill they have to foot

POLAND CASE STUDY: The high costs of
settlements arising from investor-state disputes

SLOVAK REPUBLIC CASE STUDY: The high price
of affordable health insurance for everybody

ROMANIA CASE STUDY: European Commission tries
in vain to intervene in investment treaty arbitration

CONCLUSION

ANNEX 1 – COMPARATIVE DATA

Investor-state dispute settlement (ISDS) is nothing new, but the recent and ongoing trade negotiations between the EU and US (TTIP) and the EU and Canada (CETA), have given rise to mounting public criticism of the mechanism. Investor-state arbitration provides foreign investors with a privileged mechanism (that domestic investors or other parts of society cannot use). Foreign investors can circumvent domestic court systems and claim financial compensation from host governments in secret business friendly international tribunals, if they deem their investment potentials (including their profits) are affected by the introduction of regulatory and/or policy changes in the host state. These private tribunals are comprised of three for-profit arbitrators who issue their decisions behind closed doors and often have a conflict of interest as they have a commercial interest in keeping the system alive and they often work for the same companies that file cases.

Claims for compensation can – and do – amount to billions of euro. However, ISDS cases themselves, as well as the awards, and other outcome documents for these cases are not fully disclosed to the public even when cases may relate to public interests, such as the environment.

Friends of the Earth Europe compiled available data on ISDS cases taken against EU member states since 1994, and for which documentation is available in the public domain. Considering the enormous lack of transparency around investor-state arbitration, this research exercise can only provide an insight into the overall scale of the phenomenon. However, it highlights the irrefutable attack on recent EU accession countries and the environment, as well as the cost this system has already had on EU taxpayers and European democracy.

KEY FINDINGS

127 known ISDS cases have been brought against 20 EU member states since 1994.

Details of the compensation sought by foreign investors was publicly available for only 62 out of the 127 cases (48%). The compensation sought for in these 62 cases amounts to almost €30 billion¹.

The total amount awarded to foreign investors – inclusive of known interest, arbitration fees, and other expenses and fees, as well as the only known settlement payment made by an EU member state – was publicly available for 14 out of the 127 cases (11%) and amounts to €3.5 billion.²

The largest known amount to be awarded by a tribunal against an EU member state was €553 million³ in the *Ceskoslovenska Obchodni Banka vs. Slovak Republic* case (1997).

76% of known cases (97 out of the 127) were taken against new member states that acceded to the EU between 2004 and 2007.

26 ISDS claims have targeted the Czech Republic (20% of the total), making it the EU member state with the most cases filed against it.

Almost 60% of cases (75 out of the 127) concern environmentally relevant sectors.

The total number of known closed cases for which outcomes are publicly available (63 out of the 127 cases) show full or partial success for investors in 44% (28 out of 63 cases) of cases – with 15 cases in favour of the investors and 13 cases resulting in settlements.

While settlements tend to have a positive connotation, because both parties come to an agreement that puts an end to the dispute, without one ‘winning’ over the other, these can still be very costly to the taxpayer. For instance, the largest known amount to have been paid out by an EU member state relates to a settlement (*Eureko vs Poland*, August 2005). As a result of the settlement agreement reached with Eureko over an insurance enterprise, over €2 billion was paid by Poland.⁴

¹ €29,777,141,904

² €3,502,207,134

³ €553,122,703.29

⁴ €2,201,530,937. This payment was dispersed as an interim dividend through PZU S.A. (a majority state-owned Polish Insurance company) as opposed to directly through the official state budget.

127 CASES AGAINST **20** EU COUNTRIES

1994-2014

€4.7 BILLION

ASKED FROM GERMANY
FOLLOWING DEMOCRATIC
DECISION TO PHASE
OUT NUCLEAR ENERGY

**BIGGEST
SETTLEMENT
PAYOUT**

POLAND TO EUREKO
€2 BILLION

WORST HIT

CZECH REPUBLIC
26 ISDS CLAIMS

BIGGEST AWARD

SLOVAK REPUBLIC
€553 MILLION

MOST CASES

NEW EU STATES
76% OF CASES

THE US-EU TRADE DEAL

IS A TROJAN HORSE



BUSINESSES CAN SUE GOVERNMENTS IN SECRET CORPORATE COURTS IF NEW LAWS
THAT PROTECT PEOPLE OR THE ENVIRONMENT GET IN THE WAY OF THEIR PROFITS

ONE OF THE BIGGEST THREATS IS
INVESTOR-STATE DISPUTE SETTLEMENTS

INTRODUCTION

The ‘Investor-state dispute settlement’ mechanism – (ISDS) has been coming under growing public scrutiny due to its inclusion in the ongoing negotiations of an EU-US trade deal (Transatlantic Trade and Investment Partnership, TTIP) and the recently concluded EU-Canada trade treaty (CETA).⁵ One of the European Commission’s arguments supporting the inclusion of the mechanism in those trade deals is that EU member states have already signed thousands of trade and investment agreements, which include such investor-state dispute arbitration.⁶ Investor-state arbitration has become a consistent feature bilateral investment treaties (BITs), with EU member states being party to some 1,400 BITs including ISDS since the late 1960s.⁷ So the European Commission says it should be part of the agreements now under negotiation.

What the European Commission rarely mentions is how often this mechanism has been used against EU member states, and how much this mechanism has cost EU taxpayers. The ongoing negotiations of trade and investment agreements – including the Transatlantic Trade and Investment Partnership, the Transpacific Partnership, and negotiations between the EU and the US respectively with China – are unprecedented in size and scope, and would drastically expand the extent of foreign direct investments covered by investor-state arbitration. Such an expansion would risk seriously undermining governments’ ability to regulate for the protection of people and the environment.

When the state loses an ISDS case or makes a settlement, governments can be forced to foot the bill with public money. In other words, investor-state arbitration effectively allows foreign investors to pass their investment risks on to society – i.e. taxpayers. Even when cases have been discontinued or when the outcome is said to be ‘in favour of the state’, the tribunal can split the costs of the arbitration pro-

⁵ http://europa.eu/rapid/press-release_STATEMENT-14-288_en.htm

⁶ <http://www.foeeurope.org/isds>

⁷ http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf

INFORMATION ABOUT CLAIMS IS OFTEN

NOT PUBLICLY AVAILABLE...



ceedings⁸ between both parties, resulting in the state bearing a cost burden on top of the usually exorbitant legal costs. According to OECD estimates, expenses for a single ISDS case amount to \$8 million on average for legal and arbitration fees alone.⁹

Proponents of the dangerous clause argue that the mechanism is already included in some 3,000 investment treaties worldwide, and that it provides necessary protection for private investors. However, they seldom mention the costs of private arbitration for taxpayers and society. Also they fail to acknowledge that the very reason why European Union member states (mainly Western ones) have not been heavily targeted by ISDS claims is that they have not agreed on trade agreements with other high capital-exporting countries so far – such as the US, Canada, or China, with whom the EU is currently negotiating.¹⁰ In that regard, the parallel negotiations of TTIP, CETA, or the EU-China trade agreements are likely to change the state of play in a significant way.

We consider the reforms proposed by the European Commission as insufficient as they do not take away the fundamental problems with the ISDS system: it is undemocratic, discriminatory, investor biased and unnecessary. We argue that including the harmful clause in the recently concluded EU-Canada agreement and the EU-US trade agreement under negotiations contributes to expanding the scope of private arbitrators' power in an unprecedented way. This jeopardises the ability of national and local authorities to regulate in the public interest in the future and constitutes an unacceptable and unnecessary attack on democracy.

8 The average cost of a basic ICSID arbitration tribunal for each party: \$274,050.62 (€207,960.70) - this figure increases depending on the complexity of the case, number of arbitrators/their rates and the duration of the arbitration. Available at: https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-national.pdf

9 http://www.oecd.org/investment/investment-policy/WP-2012_3.pdf (p 19)

10 The U.S. currently has bilateral investment treaties with 9 EU countries including: Bulgaria, Croatia, Czech Republic, Estonia, Latvia, Lithuania, Poland, Romania and Slovak Republic.

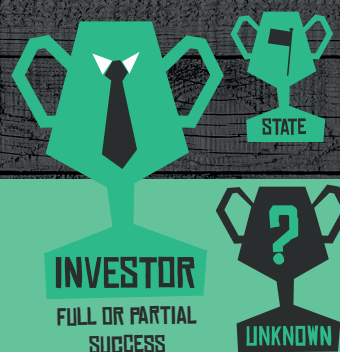
**WHAT DID THE
CASE CONCERN?**



**HOW MUCH
COMPENSATION
WAS SOUGHT?**



WHO WON?



**HOW MUCH WAS
PAID OUT?**



METHODOLOGY

This briefing presents data collated manually on investor-state dispute settlement cases against EU member states since 1994. It uses data available in the public domain. It attempts to provide a comprehensive overview of all known cases for which the relevant documentation is accessible. However, subject to agreement by both parties, some ISDS cases are kept entirely confidential, even in cases where the dispute may be a matter of public interest.¹¹ Due to the limited transparency obligations around arbitration proceedings,¹² the cases gathered here might not encompass all cases of investor-state disputes taken against EU member states. Not all cases are published and even fewer are fully documented. Even when cases are publicly known, many details of the amounts awarded are not fully disclosed.

Where possible, case information was sourced using databases from the International Centre for Settlement for Investment Dispute (ICSID)¹³, the United Nations Commission on International Trade Law (UNCITRAL)¹⁴, or the United Nations Conference on Trade and Development (UNCTAD)¹⁵. Other cases were sourced using arbitration tribunal websites such as; the International Court of Arbitration (ICC)¹⁶, The Stockholm Chamber of Commerce (SCC)¹⁷ and the Permanent Court of Arbitration (PCA)¹⁸. In addition, case award documents were sourced from the Energy Charter Treaty website¹⁹, the Investment Treaty Arbitration website²⁰ with supplementary information gathered and cross-referenced using relevant law firm websites for individual cases. Where information was not accessible through the above-mentioned sources, information was collected from relevant investment arbitration news service reports (such as IA Reporter)²¹ and other relevant journal articles.²²

Note on amounts stated:

- All award amounts stated are comprised of the damage award and, where known, are inclusive of arbitration fees/legal expenses and interest on the damage award.

Note on conversion and exchange rates used:

- All total figure amounts quoted (except for Poland and Slovak Republic) were converted using the European Commission Conversion Tool (06/2014).²³
- Conversions for total figure amounts quoted for the Slovak Republic were completed using the European Commission conversion tool using 06/1997 (year of the case) into US dollars as the euro did not exist then and then from US dollars to euro in 06/2014.²⁴
- Conversions for all total figure amounts quoted for Poland were completed using the European Central Bank conversion rate to the euro.²⁵

Note on Comparative figures used:

For example: the Slovak Republic

Gross average minimum wage²⁶ in the Slovak Republic for one person for one year = €4,224

The total amount paid out by the Slovak Republic in awards = €578,348,827 (2 out of the 13 cases)

Total amount paid out (€578,348,827) divided by the gross average yearly minimum wage = the gross average minimum wage for 136,920 people over a one-year period in the Slovak Republic.

11 This applies to cases initiated under arbitration rules other than ICSID ie: only 18 out of 85 known UNCITRAL rules cases brought forward under the Permanent Court of Arbitration (PCA) were made public (up until 2012). For more information see: UNCTAD, Transparency: A Sequel, Series on Issues in IIAs II (New York and Geneva, 2012), available at http://unctad.org/en/PublicationsLibrary/unctaddiaa2011d6_en.pdf New UNCITRAL article adopted in 2013 and brought into effect on 1st April 2014 on Rules on Transparency in Treaty-based Investor-State Arbitration available here: <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf>

12 A concern acknowledged by many, including UNCTAD. See for instance: http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf

13 <https://icsid.worldbank.org/ICSID/FrontServlet>

14 <http://www.uncitral.org/>

15 www.unctad.org/ia

16 <http://www.iccwbo.org>

17 <http://www.sccinstitute.com/>

18 http://www.pca-cpa.org/showpage.asp?pag_id=363

19 <http://www.encharter.org/index.php?id=213>

20 <http://www.italaw.com/>

21 <http://www.iareporter.com/>

22 Czech Yearbook of International Law, ICSID review: foreign investment law journal.

23 http://ec.europa.eu/budget/contracts_grants/info_contracts/inforeuro/inforeuro_en.cfm

24 http://ec.europa.eu/budget/contracts_grants/info_contracts/inforeuro/inforeuro_en.cfm

25 http://www.ecb.europa.eu/press/pr/date/1998/html/pr981231_2.en.html

26 Gross average minimum wage differs from the total costs of labour for an employer. Gross average minimum wage excludes taxes/social security contributions, paid days off, public holidays, sick pay and annual leave. The exact amount depends on various factors including if and how many children one has.

1] GENERAL TRENDS IN ISDS CLAIMS AGAINST MEMBER STATES AT THE EU LEVEL

This investigative research has found that:

- EU member states have been respondents in 127 known cases since 1994.
- 20 EU member states have had cases filed against them through the investor-state dispute settlement mechanism to date.
- The (known) amount of damages claimed against EU member states in an individual case ranges from €65,000²⁷ (Czech Republic) to over €10 billion²⁸ (Poland).
- The amount of compensation sought was publicly available for 62 out of the 127 cases (48%) and amounts to almost €30 billion.²⁹
- The total amount awarded to foreign investors from EU member states – inclusive of interest, arbitration fees, other expenses and fees, as well as the only known settlement payment paid out by an EU member state – was publicly available for 14 out of the 127 cases (11%) and amounts to €3.5 billion.³⁰
- The total amount awarded broken down is:
 - ◊ €1,261,767,547 awarded solely in damages to foreign investors as part of an award;
 - ◊ Plus €44,097,915 of known costs paid out by states in arbitration fees, interest and other expenses related to the dispute;³¹
 - ◊ And an additional €2,196,341,672 – paid out by Poland in a settlement agreement with Eureko, August 2005.³²
- 76% of known cases (97 out of the 127) were taken against new member states that acceded to the EU between 2004 and 2007.³³
- 26 cases have been initiated against the Czech Republic – making it the EU member state which has faced the most ISDS cases (20% of the cases).
- Almost 60% of cases (75 out of the 127) concern environmentally relevant sectors.
- The largest known amount to be awarded by a tribunal against an EU member state was €553 million³⁴ in the Ceskoslovenska Obchodni Banka vs. the Slovak Republic case (1997).
- To date, US investors have initiated ten cases against five EU member states (Poland, Romania, the Czech Republic, the Slovak Republic and Estonia)³⁵.
- Of the 127 known cases, 15 were awarded in favour of the investor; 14 cases were found in favour of the state; 13 resulted in settlements; 18 case outcomes remain unknown (or have not been made public); 21 cases have been rejected, dismissed or the proceedings have been discontinued³⁶ and 46 cases remain pending.
- While settlements tend to be interpreted as a positive outcome for the state, they actually can cost taxpayers a lot of money. The largest amount known to have been paid out by an EU member state was as a result of a settlement agreement. After reaching a settlement agreement with Eureko, Poland agreed to pay over €2 billion³⁷ over a dispute about an insurance enterprise, in August 2005. A lack of transparency still surrounds the exact terms of settlement agreements in the context of investor-state disputes, leaving it unclear which trade-offs might have been conceded by states in addition to the amounts known to have been paid.
- There has been a noticeable rise in (the same) investors using the ISDS mechanism on multiple occasions. Seven investors have initiated at least two cases and two investors have initiated at least three. This trend coincides with the rapid increase in the total number of cases being initiated over the past number of years³⁸.

²⁷ €65,614.4 (ECE Projektmanagement v. Czech Republic)

²⁸ €10,265,434,814.5 (Eureko v. Poland)

²⁹ €29,777,141,904

³⁰ €3,502,207,134

³¹ This amount only refers to the fees, interest and other expenses in relation to the dispute, which we know were paid by States in the 14 cases, for which damage awards were publicly available. This does not reflect the full amount States have paid out in legal expenses, arbitration costs etc. for other cases including cases that were rejected, discontinued, settled, dismissed or that are pending.

³² This payment was dispersed as an interim dividend through PZU S.A. (a majority state-owned Polish insurance company) as opposed to directly through the official state budget.

³³ The Czech Republic, Poland, the Slovak Republic, Hungary, Romania, Lithuania, Estonia, Latvia, Slovenia and Cyprus.

³⁴ €553,122,703.29

³⁵ Ameritech vs. Poland (1996), Alex Genin, Eastern Credit Limited, Inc. & A.S. Baltoil vs. Estonia (1999), Ronald Lauder vs. Czech Republic (1999), Noble Ventures vs. Romania (2001), Cargill, Incorporated vs Poland (2004), S&T Oil Equipment & Machinery Ltd. Vs. Romania (2007), Minnotte and Lewis vs. Poland (2010), Mr. Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation vs. Romania (2010), Vincent J. Ryan, Schooner Capital LLC, and Atlantic Investment Partners LLC vs. Poland (2011), EuroGas Inc and Belmont Resources Inc vs. Slovak Republic (2014)

³⁶ Usually, ISDS case outcomes are categorised into the following categories 1) in favour of the Investor, 2) in favour of the state or 3) settled cases. The difficulty with grouping case outcomes into three categories is that it does not reflect the nuanced complexities of dispute awards. Cases that are not found in favour of the investor are not by default in favour of the state. In some cases, the claims are dismissed and both parties are ordered to split the arbitration costs or other legal expenses, but this differs from a claimant bearing the full costs of arbitration or indeed having been ordered to compensate the state which would constitute the outcome being considered in favour of the state.

³⁷ €2,201,530,937. This payment was dispersed as an interim dividend through PZU S.A. (a majority state-owned Polish Insurance company) as opposed to directly through the official state budget.

³⁸ http://unctad.org/en/PublicationLibrary/webdiaepcb2014d3_en.pdf (Page 2)

2] STRIKING FEATURES IN ISDS CLAIMS INITIATED AGAINST EU MEMBER STATES

A. 'ENVIRONMENT UNDER ATTACK'

75/127 CASES CONCERN THE ENVIRONMENT

Known disputes of environmentally relevant concern include the following sectors:

OIL

GAS

COAL

NUCLEAR POWER PLANTS

DISTRIBUTION AND
GENERATION OF ENERGY

MINING

FOOD PRODUCTS

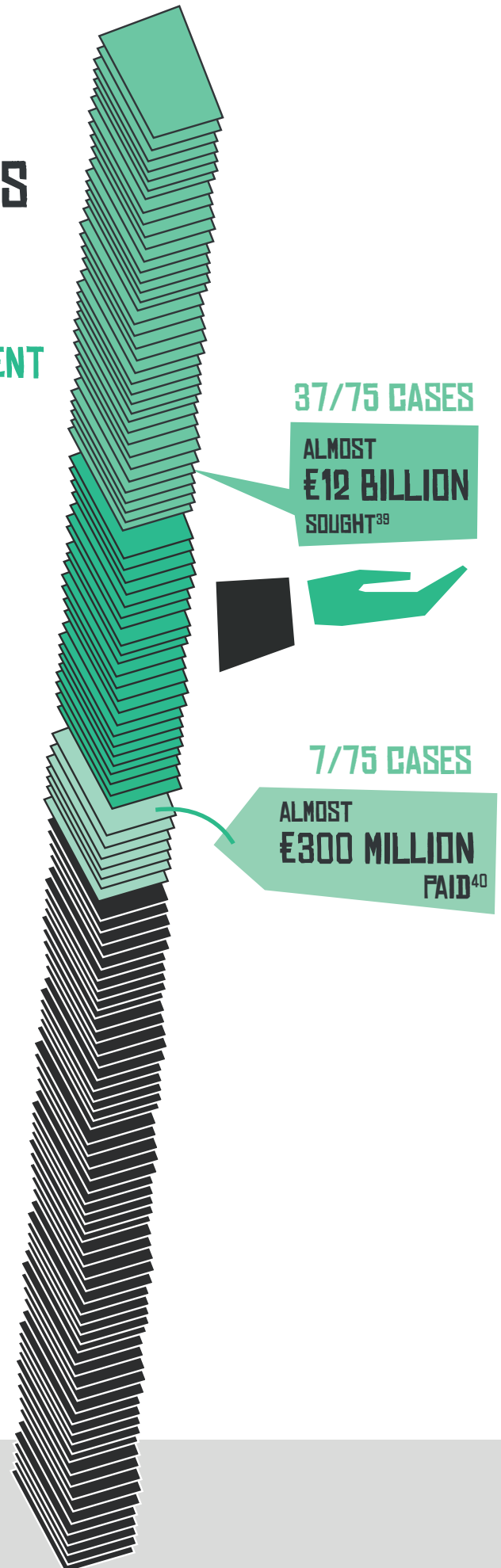
RENEWABLE ENERGY

FORESTRY

AGRICULTURE

CONSTRUCTION

WASTE MANAGEMENT



³⁹ €11,825,468,006

⁴⁰ €275,245,147



GERMANY

CASE STUDY:

A "SETTLED CASE" RESULTING IN LOWER ENVIRONMENTAL STANDARDS

VATTENFALL I VS. GERMANY

COMPANY:

Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG (Sweden).

COUNTRY: Germany

YEAR: 2009

CASE: ICSID case number: ARB/09/6

PROVISION INVOKED FOR FILING THE CASE:

Energy Charter Treaty

CASE DESCRIPTION:

In 2009, Swedish energy company, Vattenfall, initiated an international arbitration case against Germany.⁴¹ The case centered around the construction of a coal-fired power plant on the Elbe river. A provisional contract for the construction of the plant was granted by the City of Hamburg in 2007, which set out a number of environmental limitations in an effort to protect the waters of the Elbe river. Striving to meet the EU's water framework directive, additional environmental restrictions in relation to the treatment of waste waters from the plant were added before the final approval was given in 2008⁴² – which Vattenfall argued would make its project 'unviable'.⁴³ Vattenfall claimed damages of €1.4 billion plus costs and interest under the Energy Charter Treaty. The case was ultimately settled in 2011, with the city of Hamburg agreeing to a modified water permit for the plant. The result was the lowering of environmental standards in comparison to the license permit originally challenged through the dispute.

AMOUNT OF COMPENSATION SOUGHT FOR:

€1.4 billion

FIELD/SECTOR:

Construction of a coal-fired power plant and environmental protection measures

CASE OUTCOME:

A settlement agreement was rendered on March 11, 2011.

CASE STUDY:

WILL GERMANY'S DEMOCRATIC DECISION TO PHASE NUCLEAR ENERGY OUT RESIST THE POWER OF PRIVATE ARBITRATORS?

VATTENFALL II VS. GERMANY

COMPANY:

Vattenfall AB and others

COUNTRY: Germany

YEAR: 2012

CASE: CSID case number: ARB/12/12

PROVISION INVOKED FOR FILING THE CASE:

Energy Charter Treaty

CASE DESCRIPTION:

In 2012, Vattenfall filed a second case following Germany's decision to phase-out nuclear energy.⁴⁴ The decision responded to public concerns raised following the nuclear accident in Fukushima, Japan. Under the Energy Charter Treaty, Vattenfall is claiming compensation of €4.7 billion⁴⁵ over the closure of power plants in Krummel and Brunsbüttel. The case is still pending.⁴⁶

AMOUNT OF COMPENSATION SOUGHT FOR:

€4.7 billion

FIELD/SECTOR:

Phasing-out of nuclear power plants

CASE OUTCOME:

Pending

41 Request for Arbitration document: <http://www.italaw.com/sites/default/files/case-documents/ita0889.pdf>

42 http://www.iisd.org/pdf/2009/background_vattenfall_vs_germany.pdf

43 Award Document: <http://www.italaw.com/sites/default/files/case-documents/ita0890.pdf>

44 <http://www.tni.org/briefing/nuclear-phase-out-put-test>

45 The German minister of Economy stated to a Parliamentary Committee meeting that Vattenfall is demanding €4.7 billion in damages. See here: <https://www.deutschland.de/en/news/vattenfall-sues-germany-over-nuclear-phaseout>

46 <http://www.encharter.org/index.php?id=213&L=0#Vattenfall2>

B. 'PRESSURE ON EASTERN EUROPE'

77 OF THE 127

CASES WERE TAKEN AGAINST:

THE CZECH REPUBLIC

POLAND

HUNGARY

THE SLOVAK REPUBLIC

ROMANIA

**€21⁴⁷ OUT OF
€30⁴⁸ BILLION**

SOUGHT FROM EASTERN
EU ACCESSION COUNTRIES⁴⁹

**€3.5⁵⁰ BILLION
PAID IN 13 OUT OF
THE 14 KNOWN AWARDS⁵¹**

A CLOSE-UP ON:

THE CZECH REPUBLIC

POLAND

THE SLOVAK REPUBLIC

ROMANIA

⁴⁷ €20,955,266,337

⁴⁸ €29,777,141,904

⁴⁹ The Czech Republic, Poland, the Slovak Republic, Hungary, Romania, Lithuania, Estonia, Latvia, Slovenia and Cyprus.

⁵⁰ €3,501,860,703. This figure includes the settlement payment in the Eureko vs. Poland case, August 2005.

⁵¹ The only case involving a Western European country, and for which the award is known, targeted Spain (in the case Emilio Agustín Maffezini vs Spain)

THE CZECH REPUBLIC

26
CLAIMS
1994-2014

ALMOST
€3
BILLION
SOUGHT⁵²

€460 MILLION
PAID⁵³

DISPUTES RELATING TO:

- FOOD INDUSTRY
- STEEL INDUSTRY
- METAL INDUSTRY
- FISHERIES
- FORESTRY
- TRANSPORT
- PROPERTY DEVELOPMENT
- WASTE MANAGEMENT MEDIA
- BANKING
- ENERGY SECTOR

CASE STUDY: THE UNBEARABLE COSTS OF THE UNPREDICTABLE ARBITRATION SYSTEM

CME VS. CZECH REPUBLIC

COMPANY:

CME

COUNTRY:

Czech Republic

YEAR:

2000

CASE:

UNCITRAL

PROVISION INVOKED FOR FILING THE CASE:

The Netherlands/
Czech Republic BIT

AMOUNT OF COMPENSATION SOUGHT FOR:

\$500 million
(€366,622,671.94)

FIELD/SECTOR:

Media investor

CASE OUTCOME:

Award in favor of the investor:
state was responsible for paying
\$271,165,203 (€198,830,622)
- inclusive of \$1,351,203 in fees.

RONALD LAUDER VS. CZECH REPUBLIC

COMPANY:

Ronald Lauder

COUNTRY:

Czech Republic

YEAR:

1999

CASE:

UNCITRAL

PROVISION INVOKED FOR FILING THE CASE:

United States/Czech Republic BIT

AMOUNT OF COMPENSATION SOUGHT FOR:

Unknown

FIELD/SECTOR:

Broadcasting enterprise

CASE OUTCOME:

The tribunal found that the state breached its obligations early on in their agreement, but concluded this did not constitute a violation of the treaty obligations. The costs were equally split between the parties.

CASE DESCRIPTION:

In the early 1990's Ronald Lauder invested in TV Nova - a private Czech TV broadcaster, through his German company, which was later succeeded by Dutch company Central European Media (CME). Both Lauder and CME sought to initiate arbitration against the Czech Republic to seek damages following the alleged interference of the Czech Media Council into business arrangements, which Lauder claimed contributed to profit losses.⁵⁴ The CME and Lauder cases happened in parallel. Despite dealing with similar facts for both cases, the tribunals delivered two contradictory awards. Lauder's claim was dismissed as not constituting a violation of treaty obligations⁵⁵, while the second case was found in favour of CME who was awarded damages of \$269,814,000 with fees of \$1,351,203 amounting to a total of \$271,165,203 (€198,830,622)⁵⁶.

The Ronald Lauder and CME cases effectively highlight the unpredictability and irregularities of the arbitration system. Despite the lack of consistency in decision making in international arbitration tribunals, the consequences of the awards are irreversible for states being sued and can translate into hundreds of millions of euro in compensation paid out of public budgets.

THE CZECH REPUBLIC HAS ALREADY PAID OUT...

€460.370.618

IN COMPENSATION TO FOREIGN INVESTORS

56.805

CZECH NURSES' SALARIES⁵⁷

⁵² Total amount in compensation sought for € 2,872,236,029 (15 out of the 26 cases taken against the Czech Republic)

⁵³ Total amount of awards paid out € 521,842,092 (3 out of the 26 cases taken against the Czech Republic)

⁵⁴ <http://natialaw.blogspot.be/2011/03/ronald-lauder-vs-czech-republic.html>

⁵⁵ Final Award document: <http://www.italaw.com/sites/default/files/case-documents/ita0451.pdf>

⁵⁶ Final Award document: http://italaw.com/documents/CME-2003-Final_001.pdf

⁵⁷ Annex 1: Comparative data for Czech Republic nurses salaries figures

POLAND



DISPUTES RELATING TO:

- WASTE MANAGEMENT
- STONE MINING
- FUEL RESERVES
- CEMENT
- VEGETABLE OIL PRODUCTION/ PROCESSING
- HEALTH PROCESSING FACILITIES
- INSURANCE
- ISOGLUCOSE PRODUCTION
- SUGAR ENTERPRISE
- MOBILE TELEPHONE COMPANIES

CASE STUDY:

THE HIGH COSTS OF SETTLEMENTS ARISING FROM INVESTOR-STATE DISPUTES: THE LARGEST KNOWN SETTLEMENT PAYMENT IN AN ISDS CASE INITIATED AGAINST AN EU MEMBER STATE

EUREKO B.V. VS. POLAND

COMPANY:

Eureko B.V. (Netherlands)/Achmea B.V

COUNTRY:

Poland

YEAR:

2003

CASE:

UNCITRAL Arbitration Rules

PROVISION INVOKED FOR FILING THE CASE:

The Netherlands - Poland BIT

AMOUNT OF COMPENSATION SOUGHT FOR:

Approx. \$14 billion (UNCTAD)

FIELD/SECTOR:

Insurance enterprise

CASE OUTCOME:

Partial award in favor of the investor - later resulted in a settlement agreement (2005) between the parties⁶⁰ with Eureko known to have received €2,196,341,672.17 (which can be broken down as follows: 33% of PLN 12.75 billion, plus PLN 3.55 billion, plus PLN 1.224 billion)

CASE DESCRIPTION:

The dispute between Eureko and Poland centred on the privatisation of the formerly state-owned insurance company Powszechny Ubezpieczeni S.A (PZU) and resulted in the largest known settlement payment by an EU member state. The Polish Government published an invitation to sell 30% of the shares capital of PZU, and after reviewing the submitted tenders - Eureko and Big Bank Gdanski S.A. (BBD) were selected as the buyers. Eureko planned to increase its share holdings using the initial public offering (IPO) from 30% to 51% - to ensure that the Eureko consortium were the controlling shareholders of PZU. The dispute emerged following Poland's refusal to complete PZU's privatisation - which would have allowed Eureko to obtain this majority stake in the company.

The claimant contended that Poland backtracked on their earlier commitments and this breach of contract had in turn cost them their opportunity to become majority shareholders. Poland argued that Eureko's claims were predicated on contractual claims under a share purchase agreement making them inadmissible. The tribunal dismissed Poland's plea of inadmissibility⁶¹ concluding that the actions, and inactions, of the Government of Poland were in breach of Poland's obligations under the Netherlands-Poland BIT.

The case was eventually settled and according to a joint press release on the settlement agreement Eureko was paid €2,196,341,672.17 (which can be broken down as follows: 33% of PLN 12.75 billion, plus PLN 3.55 billion, plus PLN 1.224 billion)⁶². In lieu of this payment, the agreement outlined a government-controlled process of decreasing Eureko's shares in PZU by 2011. The deal also stipulated that Eureko was prevented from competing against PZU for a duration of 3 years or from buying shares in PZU during/after the IPO for up to 16 years (unless they fall below 5% at which point they can buy shares but not beyond 5%). Furthermore, Eureko had to waive claims before the arbitration tribunal - effective once the dividends were paid into their account.⁶³

This is a staggering case resulting in a payment of €2 billion, highlighting the huge cost of settlement agreements. When Poland decided to reverse the privatisation of insurance services (in the public interest), ISDS enabled the investor to use special privileges to claim billions in compensation.

This also casts further concern over the other 12 cases that resulted in settlements - the outcomes of which still remain unknown.

⁵⁸ €12,029,847,397

⁵⁹ €2,201,530,937. This figure includes the settlement payment in the Eureko vs. Poland case, August 2005.

⁶⁰ <http://uk.practicallaw.com/6-500-6640?service=arbitration>

⁶¹ Partial Award Document: P. 39&43 http://italaw.com/sites/default/files/case-documents/ita0308_0.pdf

⁶² https://www.achmea.com/SitecollectionDocuments/2009-10-02_1.pdf

⁶³ <http://uk.practicallaw.com/6-500-6640?service=arbitration>

POLAND

CASE STUDY:

TAX PAYERS CAN ONLY SEE THE BILL THEY HAVE TO FOOT

**LES LABORATOIRES SERVIER,
S.A.A. BIOFARMA, S.A.S. ARTS ET
TECHNIQUES DU PROGRES S.A.S
VS. POLAND**

COMPANY:

Les Laboratoires Servier,
S.A.A, Biofarma, S.A.S.
Arts et techniques du
progres S.A.S. (France)

COUNTRY: Poland

YEAR: 2010

CASE: UNCITRAL

PROVISION INVOKED FOR FILING THE CASE:

France-Poland BIT

AMOUNT OF COMPENSATION SOUGHT FOR:

€219,973,603.16

FIELD/SECTOR:

Pharmaceutical Industry

CASE OUTCOME:

In favour of the investor - Poland
obliged to pay €4 million

CASE DESCRIPTION:

In 2010, Servier, the leading French independent pharmaceutical company, initiated an investor-state dispute against Poland. The case was filed under the France-Poland bilateral investment treaty, with claimants seeking \$300 million in compensation.

Poland had enacted a number of legislative and administrative reforms in line with EU regulation of pharmaceuticals under the 1991 Europe Agreement - between Poland and the European communities - following its adoption of the Pharmaceutical Law in 2001, and prior to its accession to the EU in 2004. As a consequence of these reforms, a number of products produced by the claimant were denied approval.⁶⁴ Both parties disagreed over what legal framework was applicable to the harmonisation process. Ultimately, the arbitration tribunal found that Poland had 'not engaged in bad faith behavior in a way that would require damages beyond the Treaty standard, the Tribunal must simply apply the standard of compensation for the divestment of "any" investment under BIT Article 5(2)'.⁶⁵ Poland was obliged to pay damages of €4 million⁶⁶ to the claimants.

POLAND HAS ALREADY PAID OUT...

€2,201,530,937

IN COMPENSATION TO FOREIGN INVESTORS

230.045



⁶⁴ <http://icsidreview.oxfordjournals.org/content/early/2014/06/06/icsidreview.siu009.extract>

⁶⁵ Redacted Final Award document: <http://www.italaw.com/sites/default/files/case-documents/italaw3005.pdf>

⁶⁶ News paper article - Polish Litigation: secret and confidential: <http://www.italaw.com/sites/default/files/case-documents/italaw1270.pdf>

⁶⁷ Annex 1: Comparative data for the Polish nurses salaries figures

SLOVAK REPUBLIC



DISPUTES RELATING TO:

- NATURAL GAS
- STEEL
- TALC MINING
- BANKING SERVICES
- HEALTH INSURANCE
- DEBT INSTRUMENTS
- BANKRUPTCY PROCEEDINGS

CASE STUDY: THE HIGH PRICE OF AFFORDABLE HEALTH INSURANCE FOR EVERYBODY

ACHMEA B.V. VS. SLOVAK REPUBLIC

COMPANY:

Achmea B.V.
(formerly Eureko (Netherlands))

COUNTRY: Slovak Republic

YEAR: 2008

CASE: UNCITRAL

PROVISION INVOKED FOR FILING THE CASE:

Slovak-Netherlands BIT

AMOUNT OF COMPENSATION SOUGHT FOR:

approx. €100 million⁷⁰

FIELD/SECTOR: Insurance enterprise

CASE OUTCOME:

€22.1 million in damages and
€220,772.74 + €2,905,350.94
in costs/expenses (7 Dec 2012)
TOTAL: €25,226,123.68

CASE DESCRIPTION:

In 2008, Achmea (formerly Eureko) initiated an arbitration case against the Slovak Republic under the Slovak-Netherlands BIT claiming they had violated the 1992 agreement on encouragement and reciprocal protection of investments.

Achmea had previously incorporated and funded Union zdravotná poisťovňa (Union Healthcare) in the Slovak Republic. Multiple legislative measures were introduced following a change of government in 2006 which reversed "the 2004 liberalization of the Slovak health insurance market that had prompted Eureko to invest in the Slovak Republic's health insurance sector"⁷¹. The claimants argued that the introduction of these measures destroyed the value of their investment - constituting an unlawful indirect expropriation of their investment in Union Healthcare.

Achmea sought compensation of approximately €100 million for damages incurred. One of the key questions in this case related to the tribunals jurisdiction over the dispute and whether the European Community Treaty supersedes the BIT - rendering the BIT inapplicable. The Slovak Republic objected to "the tribunal's jurisdiction based on the interaction of the BIT with substantive provisions of EU law"⁷². The tribunal ruled that the BIT was not terminated with the Slovak Republic's accession to the EU.

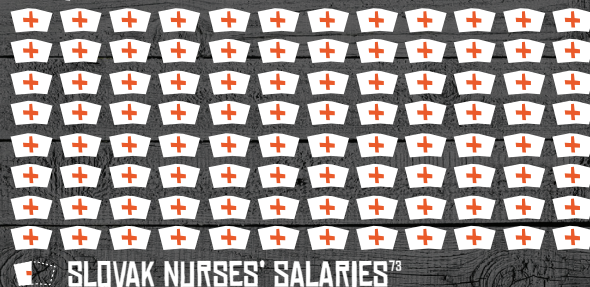
The tribunal ultimately awarded Achmea damages in the amount of €22.1 million, as well as €2,905,350.94 for legal fees and assistance, and a further €220,772.74 to reimburse the costs of the merits stage of the arbitration process.

THE SLOVAK REPUBLIC HAS ALREADY PAID OUT...

€578,348,827

IN COMPENSATION TO FOREIGN INVESTORS

96.391



⁶⁸ €2,614,575,742 (6/13 cases)

⁶⁹ Total amount of awards paid out by the Slovak Republic €578,348,827 (2/13 cases)

⁷⁰ Award Document: pg 40 <http://italaw.com/sites/default/files/case-documents/italaw3206.pdf>

⁷¹ <http://italaw.com/sites/default/files/case-documents/ita0309.pdf>

⁷² Award Document: pg 46 p.147 <http://italaw.com/sites/default/files/case-documents/italaw3206.pdf>

⁷³ Annex 1: Comparative data for the Slovak nurses salaries figures

ROMANIA



DISPUTES RELATING TO:

- OIL REFINING
- AMMONIA PRODUCTION
- AGRICULTURE
- FOOD PRODUCTS/TRADING
- TEXTILES INDUSTRY
- DUTY FREE SERVICES
- STOCK PURCHASE AGREEMENTS
- STEEL PRODUCTION
- REAL ESTATE

CASE STUDY:

EUROPEAN COMMISSION INTERVENES IN INVESTMENT TREATY ARBITRATION...IN VAIN... THE RIGHT TO REGULATE FOR WHOM?

MICULA VS. ROMANIA

COMPANY:

Ioan Micula, Viorel Micula and others (Sweden)

COUNTRY:

Romania

YEAR:

2005

CASE:

ICSID Case No. ARB/05/20

PROVISION INVOKED FOR FILING THE CASE:

Romania-Sweden BIT

AMOUNT OF COMPENSATION SOUGHT FOR:

€450 million

FIELD/SECTOR:

Food products enterprise

CASE OUTCOME:

Award in favour of the investor
\$250 million (€183,311,335)

CASE DESCRIPTION:

The Micula case is one of a growing number of cases which have been filed by foreign investors targeting new member states of the European Union (EU)⁷⁶ following policy and regulatory changes introduced to comply with legal requirements for accession to the EU.

The Micula brothers invested in the North West region of Romania – setting up multiple food processing, milling and manufacturing businesses⁷⁷. In 2005, the claimants initiated a dispute against Romania seeking compensation to the tune of €450 million. The case emerged following a series of decisions taken by Romania, which altered or withdrew a number of investment incentives (ie: exemptions from custom duties and certain taxes) that had previously been offered to the Micula brothers in support of their investment in a disadvantaged region of Romania. Romania argued that the regulatory changes they made were warranted, as they were implemented as part of the lead up to accession to the EU in 2007⁷⁸. In December 2013 the tribunal found Romania in breach of the Sweden-Romania BIT and obliged to pay more than \$250 million (€183,311,335) in damages.

This case has raised a number of concerns:

The Micula vs. Romania case has incited a great deal of interest, particularly in relation to the sovereignty of EU law. The European Commission (EC) intervened and attempted to convince the tribunal that the actions implemented by Romania were taken in an effort to comply with EU law obligations to eliminate state aid (ie: subsidies and incentives)⁷⁹. The Commission argued that if the tribunal ordered Romania to pay compensation it would be considered state aid under a different pretense. The arbitrators were not swayed by the EC's interventions and, in relation to the enforceability of the final award, drew "attention to Romania's obligations under the ICSID Convention to comply with the final ICSID awards."⁸⁰

⁷⁴ €183,311,335 (1 out of 10 cases)

⁷⁵ €1,007,972,137 (7 out of 10 cases)

⁷⁶ Czech Republic, Poland, Slovak Republic, Hungary, Romania, Lithuania, Estonia, Latvia, Slovenia and Cyprus – countries that joined the EU between 2004 and 2007.

⁷⁷ http://www.iareporter.com/articles/20131212_4

⁷⁸ IA Reporter (2009) 'European Commission moves to intervene in another ICSID arbitration, Micula v. Romania – a dispute hinging on withdrawal of investment incentives by Romania.'

Available at: <http://www.iareporter.com/downloads/20100107>

⁷⁹ IA Reporter (2014) 'EC enjoins Romania from paying ICSID award, thus throwing a wrench into enforcement of intra-EU BIT ruling' <http://www.iareporter.com/categories/PDF2014>

⁸⁰ IA Reporter (2014) 'Stay is lifted on \$250 million ICSID award after Romania fails to give assurance that award would be paid in the event of non-annulment' available at:

http://www.iareporter.com/articles/20141002_1

ROMANIA CASE STUDY CONTINUED

Romania has found itself in a conflicting situation, caught between the EU and its commitments to the International Centre for Settlement of Investment Disputes (ICSID) as a member state. The EC issued Romania with a suspension injunction on the 26 of May, 2014 reinforcing their concerns that the award may constitute a form of unlawful state aid⁸¹. In August 2014, an ICSID ad-hoc committee overseeing Romania's case to annul this colossal award presented Romania with the following offer: that they would continue the stay of enforcement of the award for the duration of the pending annulment proceedings, on the condition that Romania agree in writing to pay the full \$250 million (€183,311,335) if the annulment proceedings are unsuccessful – even if this in turn goes against EU law.⁸²

Romania declined, and in September 2014 the tribunal revoked the stay of enforcement. Because of Romania's refusal to commit to the committee's proposal, they could now face a case in US courts where the investors can try to force the state to pay through asset seizure.

Potential profits can be expropriated: The tribunal dismissed other objections made by the respondents, notably whereby Romania claimed that investment incentives should be seen as 'potential entitlements' as opposed to assets which can be expropriated. The tribunal stated;

"investments do include income expectations and such income will of necessity be less if an investor is deprived of incentives."⁸³

EU accession countries have repeatedly been targeted by foreign investors for implementing policy and regulatory changes that coincide with EU standards, and resulting in the EC intervening in multiple cases.⁸⁴

ROMANIA HAS ALREADY PAID OUT...

€183.311.336

IN COMPENSATION TO FOREIGN INVESTORS

38.491



⁸¹ http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38517

⁸² IA Reporter (2014): http://www.iareporter.com/articles/2014002_1

⁸³ IA Reporter (2014) 'Stay is lifted on \$250 million ICSID award after Romania fails to give assurance that award would be paid in the event of non-annulment' available at: http://www.iareporter.com/articles/20141002_1

⁸⁴ E.g. AES vs. Hungary I (2001), AES vs. Hungary II (2007), Electrabel vs. Hungary (2007)

⁸⁵ Annex 1: Comparative data for the Romanian nurses salaries figures

CONCLUSION:

This research – which concentrates on ISDS cases filed against EU member states – only reveals the tip of the private arbitration iceberg. Yet, contrary to the arguments put forward by the European Commission, it clearly shows the unacceptable costs that taxpayers and society bear when foreign investors are being granted privileged treatment.

Perhaps some of the most striking findings to emerge relate to the details about the differences in case outcomes, which clearly show that no matter who ‘wins’ the case, legal and arbitration fees that states have to bear for their defense, costs large amounts of public funds – which cannot be invested for society. Likewise, while settlements are usually presented as a positive step towards resolution, they often mean a heavy financial burden – as shown by the *Eureko vs. Poland* case where Poland paid over 2 billion euro – and force dangerous policy changes for the protection of citizens and the environment.⁸⁶

In March 2014, in response to the growing public concern and criticism of investor-state disputes⁸⁷, the European Commission launched a public consultation on the inclusion of ISDS in the EU-US trade deal (TTIP). The consultation questionnaire was based on the draft investment chapter of the EU-Canada agreement. An extraordinary 149 thousand people replied, of which at least 131 thousand said no to ISDS. In September 2014, despite unprecedented scrutiny and public engagement, the European Commission concluded the EU-Canada trade deal including special privileges for foreign investors. This deal was concluded prior to the release of the final qualitative and quantitative report on the public consultation on ISDS in TTIP, clearly conveying the Commission’s disregard for widespread public disapproval on the mechanism.

Decision makers at national and EU level have repeatedly attempted to dampen the rising concerns that including ISDS in the EU-Canada (CETA) and the EU-US (TTIP) trade deals will dramatically increase the number of lawsuits launched by foreign investors, by referring to the existing investment treaties that EU member states have already signed on to. This fails to acknowledge that the main reason why most European countries have not been sued through ISDS is that they have not consented to investor-state arbitration with other high capital-exporting countries. This will change dramatically if the EU-Canada and the EU-US deals go ahead with investor-state dispute settlement included. This also fails to acknowledge that the nine Eastern European countries that have signed BITs with the US (prior to their accession to the EU) have been targeted through the mechanism.

Including investor-state arbitration in the EU-Canada (CETA) and the EU-US (TTIP) trade deal negotiations expands the scope of private arbitrators’ power to an unprecedented scale. It questions the responsibility of governments locking their ability to regulate for the public interest in the future vis-à-vis their citizens, the very taxpayers who will have to foot the bill for the risks taken by private investors.

**FRIENDS OF THE EARTH
EUROPE BELIEVES
THAT NO TRADE DEAL
INCLUDING ISDS CAN
BE ACCEPTABLE FOR
PEOPLE AND PLANET. WE
CALL ON PARLIAMENTS
TO REJECT THE
RATIFICATION OF THE
EU-CANADA DEAL
AND THE EUROPEAN
COMMISSION TO STOP
THE NEGOTIATIONS OF
THE EU-US TRADE DEAL.**

⁸⁶ “ISDS does not limit the EU’s or a member state’s right to regulate. A country cannot be compelled to repeal a measure: it always has the option of paying compensation instead”; http://trade.ec.europa.eu/doclib/docs/2013/october/tradoc_151791.pdf

⁸⁷ http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179

ANNEX 1:

COMPARATIVE DATA USED IN INFOGRAPHICS/ILLUSTRATIONS

All figures adjusted to purchasing power parity and all currency conversions made using the European Commission Currency Conversion Tool⁸⁸

Czech Republic

- Nurse's Salary (net): \$890 (€675.36) per month (approx. €8,104.32 annually)⁸⁹
- The Czech Republic has already paid out some €460,370,618 in compensation to foreign investors. This equates to:
- The average salary of 56,805 nurses over a one-year period in the Czech Republic, or;

Poland

- Nurses Salary(net): \$ 1,051 (€797.54) per month – approx. €9,570 annually⁹⁰
- Poland has already paid out €2,201,530,937 in compensation to foreign investors, this equates to;
- The average salary for 230,045 nurses over a one year period in Poland or;

Romania

- Nurses Salary (net): \$ 523 (€396.87) per month – approx. €4,762.44 per year.⁹¹
- Romania has already paid out €183,311,336 in compensation to foreign investors, this equates to:
- The average salary of 38,491 nurses' over a one year period in Romania or;

The Slovak Republic

- Nurses Salary (net): \$659 (€ ppp 500) per month – approx. €6,000 annually⁹².
- The Slovak Republic has already paid out €578,348,827 in compensation to foreign investors, this equates to
- The average salary for 96,391 nurses' over a one year period in the Slovak Republic or;

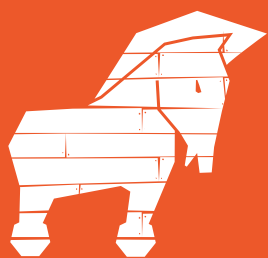
88 Available at: http://ec.europa.eu/budget/contracts_grants/info_contracts/inforeuro/inforeuro_en.cfm (09/2014)

89 <http://www.worldsalaries.org/czechrepublic.shtml>

90 <http://www.worldsalaries.org/poland.shtml>

91 <http://www.worldsalaries.org/romania.shtml>

92 <http://www.worldsalaries.org/slovakia.shtml>



**STOP THE
TROJAN
TREATY**



**Friends of
the Earth
Europe**