ISDS

투자자-국가분쟁해결 제도 개선

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사회

남희섭 | 지식연구소 공방 소장

발제

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목차

□ 사회

- 남희섭 (지식연구소 공방 소장)

□ 발제

- 라일라 휴스 (CIEL 환경건강프로그램 변호사) 3쪽
  Layla Hughes, CIEL(Center for International Environmental Law), Senior Attorney
- 멜린다 루이스 (Public Citizen's Global Trade Watch 국제캠페인 책임자) 10쪽
  Melinsa St. Louis, Public Citizen's Global Trade Watch, Director of International Campaign
- 송기호 (민주사회를 위한 변호사 모임 변호사) 17쪽

□ 토론

- 한선범 (한국진보연대 정책부위원장) 20쪽
- 최승환 (경희대학교 법학전문대학원 교수) 23쪽
- 정　부 (산업통상자원부, 외교부, 법무부) –

발 제 1

라일라 휴스 (CIEL 환경건강프로그램 변호사)

My name is Layla Hughes and I am a senior attorney for the Center for International Environmental Law (CIEL). CIEL is a non profit organization with offices in Washington DC and Geneva. We are dedicated to using the power of law to protect the environment, promote human rights, and ensure a just and sustainable society.

1. Background of ISDS reform

A few years ago, during the EU's negotiation of the trade and investment agreement with the US (know as "TTIP"), a large public opposition to the agreement developed, primarily because the agreement included investor state dispute settlement (ISDS). Millions of EU citizens participated in the European Commission's consultation process to weigh oppose ISDS; they were supported by labor unions, academics, judges and many others. This opposition was one of the main reasons the negotiations on the agreement between the EU and the US have stalled.

As a result of the intense controversy, the EU is concerned with re-establishing perceived legitimacy of ISDS, and therefore proposed the multilateral investment court. It began holding public consultations on its proposal, and it has included provisions that reference the court in its recent trade agreements, such as the ones with Canada, Vietnam, and Singapore

2. EU proposal for the multilateral investment court

The EU's proposal is not significantly different from the current ISDS system. It would differ from traditional ISDS in that it:

- includes an appeals process,
- provides full time, secured jobs for arbitrators who would be subject to a code of conduct and selected by the Parties to the agreement or an independent body from a pre-existing roster,
- proposes that the court be subject to transparency rules and that third parties be allowed to submit amicus briefs to the court, along the lines of the Mauritius Convention

Countries could mutually agree to let cases that would otherwise go to an ad hoc arbitration tribunal created under their existing bilateral investment treaties go

to the multilateral investment court instead

Counties could also decide to include in their future trade and investment agreements an ISDS provision that requires disputes to go to the court. This is what the EU plans to do

CIEL believes that the bias of arbitrators in the current system is a problem, but our fundamental concern is with the substantive standards themselves; the powerful rights given to foreign corporations;

Thus, the main problems with the EU's proposal are:

- The entire focus of EU proposal is to reduced bias of arbitrators by making them judges but there are still big questions about how judges will be selected and what their background will be
- *Regulatory chill*: still no public interest carve-out, allows investors to seek damages over legitimate public interest regulations, dis-incentivizes protective legislation
- *Procedural unfairness*: still no standing for affected third parties, only amicus submissions
- *Rights without obligations*: still no requirement for investors to abide by national/international law or observe human rights obligations in order to access court
- *No respect for domestic courts*: no exhaustion of local remedies requirement, investors can sidestep domestic legal systems

The European Commission has said that it believes that the reason to create a court is to preserve the investment protection system; fixing some of the procedural problems is not a first step to eventually shifting away from ISDS;

CIEL agrees that the MIC will merely institutionalize and entrench excessive investment protection rights, so we don't support the creation of the MIC; we have a **briefing** that provides an overview of the EU's proposal and that identifies what we see as the big risks of this proposal

other CSOs have published other useful summaries about this as well

3. UNCITRAL WG III

The EU needed a place for the negotiation of its proposed court. In 2017, the UN Commission on International Trade Law (UNCITRAL) agreed to task its Working Group III with the job of reviewing ISDS

CIEL and Public Citizen are participating in the UNCITRAL working group III process related to ISDS reform.

So far there have been two meetings; in late 2017 in Vienna and in April this year in NYC. The next WGIII meeting will be in the end of October in Vienna.

The mandate for the working group is broad, and allows for a wide range of possible solutions to the problems of ISDS

However, the European Union's proposal for the investment court is the only developed proposal on the table at this point

The chair of the working group and other states participating in the process have interpreted the mandate narrowly, to focus only on procedural issues, such as cost and duration, the lack of predictability and coherence of decisions, a code of ethics, and third-party funding

In the first meeting of the working group, capital exporting countries dominated the discussion.

There is a split among these countries, between those who do not think any reform is necessary, such as the US and Japan, and those who are supportive of the EU's proposal, such as the EU member states and Canada

In the second meeting of the working group, more countries from the south were engaged. These countries are much more vocal about the fundamental problems with ISDS, and do not keep their statements focused only on procedural issues. However, the countries that are concerned with ISDS have not formed any kind of joint counter proposal to the EU's proposed investment court; it isn't clear what they would like to see from this UNCITRAL process

The next full meeting of the WG will be in October this year; another meeting will take place in February next year; this is the earliest we might see a final report with its recommendations, which would then have to be approved by UNCITRAL next summer – so this is the potential timeline for this working group, although it could go longer

So, the EU's goal is that this final report will provide a mandate to negotiate the investment court, or failing that, a mandate to negotiate an appellate mechanism

The Korea meeting is the only regional meeting of the working group scheduled so far, but there should eventually be regional meetings in Latin America and Africa, too

4. Regional politics of the reform discussion

UNCITRAL has 60 member states representing different global regions. These members have voting rights. Non member states also attend the meetings as observers. They can speak but do not vote.

Normally voting does not take place at UNICTRAL, because it seeks consensus on its decisions. But the controversial nature of these ISDS reform discussions means that a vote on what the final report says is likely, unless the report concludes only with things that all states agree about (which seems very unlikely).

Non state observers also participate in the meetings; there are a handful of CSOs who are accredited observers and many arbitration associations that are also observers

Among the Asia members, the only state that seems to express a clear position thus far is Japan, which is opposed to the EU's proposed court and which generally supports ISDS

The other member states that have engaged in the process and expressed concerns about ISDS but have not taken a clear position about possible solutions yet are:

Australia
India
Indonesia
Pakistan
Philippines
South Korea
Sri Lanka
Thailand

Malaysia is also a member state but until has not participated in the process.

5. CSO proposals

CIEL and some other partners have created a briefing paper that outlines our proposals for reform

Above all, we would like to see a multilateral process to terminate BITs.

For example, states could negotiate a multilateral instrument that specifies the treaties they seek to terminate, indicates their intent not to challenge state parties' effort to terminate, and affirms their commitment to provide aliens treatment required by customary international law. This approach would allow governments to terminate in a coordinated way that reaffirms that termination is not directed against investors but against ISDS.

The Columbia Center for Sustainable Investment has analyzed the legal basis for this approach,

Throughout the world, there is strong global civil society opposition to investment protection and a powerful call for Member States to use the UNCITRAL process to concentrate on the structural problems of the investment treaty regime and to facilitate a discussion on termination or wholesale replacement of existing agreements; This is reflected in our global letter; nearly 400 organizations have signed; open for more signatures

In terms of some of the other possible reforms, civil society organizations take somewhat different positions on them, but we are also focused on making sure

that any outcomes of the UNCITRAL report do not strengthen ISDS, as we believe the investment court would

CIEL believes that fundamentally, any reform needs to be supportive of and complementary to the domestic legal system and to domestic courts

For example, CIEL supports a requirement for investors to exhaust local remedies; IISD put out a great briefing about this last January that I encourage you to take a look at if you haven't already

Other reform ideas that CIEL and some of its partners encourage states to consider are to:

- ensure that states can bring counter-claims against investors,
- deny investors access to ISDS if they have violated domestic or international obligations;
- blocking the use of ISDS to challenge non-discriminatory laws enacted to protect the public interest
- allow third parties, who have been harmed by an investment, to join an ISDS case with full rights as a party to the case

발 제 2

멜린다 루이스
(Public Citizen's Global Trade Watch, 국제캠페인 책임자)

My name is Melinda St. Louis and I am the director of International Campaigns for Public Citizen's Global Trade Watch division. We are a U.S.-based consumer rights organization and are part of a broad coalition of trade unions, environmental organizations, family farm, faith groups and other public interest organizations that have raised concerns about investor-state dispute settlement since the original debate on the North American Free Trade Agreement (NAFTA) between the U.S., Canada and Mexico in the early 1990s.

I've been asked to share some context about the debate around ISDS in the United States.

I'll begin by sharing some of the background of our lessons learned about the dangers of ISDS from the NAFTA context, and how that has shaped broad opposition to ISDS across a political spectrum in the United States. And then I will share the perhaps surprising reality that the current U.S. administration is pushing to largely eliminate ISDS in its renegotiation of the NAFTA, as well as some of the implications for other governments, such as South Korea, that might be considering how to reduce their ISDS liability by exiting from ISDS-enforced pacts.

1. Lessons from ISDS in NAFTA

A. Background

NAFTA was the first free trade agreement to include an investment chapter with ISDS. NAFTA's Chapter 11 gave multinational corporations as the power to sue governments in front of a panel of three corporate lawyers, over any local, state, or national law or policy. These lawyers can order governments to pay the corporations unlimited sums of taxpayer money, including for the loss of their expected future profits.

Under NAFTA's Chapter 11, foreign companies were granted broad rights beyond the rights of citizens or domestic companies. They can claim that laws violate their expansive rights to "fair and equitable treatment" and against "indirect expropriation". Such broad standards have been interpreted by tribunals as providing investors protections far beyond what they would expect under U.S. domestic takings law or the right to due process.

In addition to these extraordinary substantive rights, there are ample procedural concerns that contribute to perceived and real bias in favor of corporations. One day a corporate lawyer can sit on an ISDS tribunal deciding cases and the next day they can attack our laws on behalf of a corporation. And, the lawyers deciding cases also get to decide who pays their large hourly fees. That means even when government's "win" they often have to pay millions in legal costs.

And the fact that only corporations can bring cases creates an incentive for the arbitrators to interpret the standards ever more broadly to benefit corporations in order to ensure more and more "business" in subsequent cases.

For these reasons, civil society organizations raised alarm bells about the inclusion of ISDS in NAFTA and free trade agreements since the beginning. Unfortunately the threats to democracy and to public interest laws are not hypothetical.

B. Record of ISDS under NAFTA

Already more than $392 million has been paid out to corporations in NAFTA ISDS attacks on toxics bans, energy and land use policies, and timber and water safeguards. More than $36 billion is pending in ongoing cases, just under NAFTA.

What has this meant practically for environmental, public health and other public interest protections?

(1) Governments have had to pay corporations for hard-fought environmental and public health protections, (2) some protections have been rolled back in settlements, and (3) the threat of ISDS cases can deter new protections or laws.

For example:

- Ethyl corporation used ISDS to attack Canada's ban of fuel additive MMT – a known neurotoxin banned by several U.S. states. Canada settled the case, paying $13 million to the corporation and reversing the ban.

- SD Myers received $5 million from Canadian taxpayers over Canada's prohibition of toxic material (PCBs), to comply with multilateral environmental treaty on toxic waste trade.
- A NAFTA tribunal ruled against Canada in favor of Bilcon mining corporation, deciding that Newfoundland's environmental impact assessment decision was a violation of the company's NAFTA rights. A dissenting tribunalist called the decision "a remarkable step backwards in environmental protection."
- Natural gas company Lone Pine is currently suing Canada for $250 million over Quebec's time-out on fracking while it conducts an impact assessment. In its filing Lone Pine stated that the Fracking moratorium violated their "valuable right to mine for oil and gas under the St. Lawrence River"
- Toxic waste disposal company Metalclad received $15.6 million from Mexican taxpayers over the municipality's requirement to clean up toxic waste before granting construction permit and its creation of ecological preserve
- And in the U.S. after the historic victory by indigenous and environmental movement in stopping the Keystone XL pipeline under the Obama administration, TransCanada, the corporation behind the pipeline, launched a $15 billion ISDS claim against the United States. TransCanada withdrew the claim only after Trump announced the pipeline would move forward and after the Trump administration agreed to waive its requirement that pipelines must be built with U.S. steel.

C. Growing opposition to ISDS in the United States

The egregious nature of many of these cases has led to increased opposition to ISDS across the globe, and even in the United States.

Progressive organizations and Democrats in the U.S. Congress have been demanding that ISDS should be eliminated from trade agreements for decades. Now ISDS has become widely controversial across the political spectrum. Stark criticism of ISDS has come from voices as disparate as conservative Supreme Court Chief Justice John Roberts to liberal Senators Elizabeth Warren and Bernie Sanders.

Groups in the United States that are publically opposed to ISDS include: the National Conference of State Legislatures (which is majority Republican), the National Association of Attorneys General, the National Association of Counties,

the National League of Cities, libertarian Cato Institute, small business organizations, leading legal and economics professors, unions, environmental groups, consumer organizations and many more.

This broad and diverse opposition to ISDS expansion was one of the main reasons that the Trans-Pacific Partnership (TPP) never received majority support in Congress, despite a full court press by the Obama White House, Chamber of Congress and Republican leadership. Nearly all Democrats in the House of Representatives opposed ISDS in the TPP (despite the fact that the deal was negotiated by a Democratic president), and a sizeable bloc of Republicans opposed as well due to sovereignty concerns – which meant there were never enough votes to pass it, and it languished.

2. Trump Administration's Position on ISDS in NAFTA Renegotiations

It is widely recognized that President Trump's electoral success hinged to a large degree on his angry rhetoric against NAFTA and the TPP, particularly in states that have been hard hit by trade-related job outsourcing. Trump now knows he needs to deliver results to that base of supporters, and thus his administration has been engaged in renegotiating the NAFTA.

Recognizing that ISDS is a political liability, Trump's US Trade Representative Robert Lighthizer has proposed to virtually eliminate ISDS from NAFTA in its renegotiations with Mexico and Canada. USTR Lighthizer has stated in public testimony that he believes that ISDS is an affront to sovereignty and incentivizes job offshoring. And, despite immense backlash from other members of Trump's own administration, the U.S. Chamber of Commerce and the Republican leadership in Congress, USTR LIghthizer's position to remove ISDS has continued to prevail into the end game of the NAFTA renegotiations.

The U.S. government made clear that it intended to opt out of ISDS coverage altogether, and has proposed revising NAFTA's investment chapter so that only direct expropriation of real property is subject to ISDS for countries that choose to be bound by ISDS. Reports are that Canada and Mexico have largely agreed to eliminate the ISDS portion of NAFTA's investment chapter, and that negotiations continue on potential annexes between Canada and Mexico and the United States and Mexico. We understand that the U.S. and Mexico are pushing

to try to conclude a deal in August in order to be able to give notice to Congress to be able to sign a deal with the current Mexican President before the new President of Mexico takes office in December. Canada has been less engaged in the end game negotiations, so we still do not know if a final deal will be reached soon or what the final text will be in the end.

But what is clear is that for many months the official position of the U.S. government has been to not be bound by ISDS and to drastically roll back ISDS coverage, which would likely end the types of ISDS cases against public interest laws like those I noted previously.

This is a remarkable shift in the U.S. government's position on ISDS, given that the United States historically has insisted on including ISDS In its trade agreements, including the KORUS. And this shift is result of many years of mobilization among CSOs and members of Congress from the left and the right, who have made clear that a deal that includes ISDS Is no longer likely to be passed by the U.S. Congress, as we saw when the TPP could not achieve majority support.

3. Implications for KORUS and Other Trade and Investment Treaties

In recent years, many governments, including South Africa, India, Indonesia, and others have begun terminating investment treaties that include ISDS and developing new investment policy frameworks that protect investors while better safeguarding governments' ability to regulate in the public interest. That now even the United States is seeking to remove ISDS in its NAFTA renegotiation indicates that the political tide is turning against ISDS globally. Thus, it has become much more politically feasible for governments to seek to eliminate ISDS from their existing trade and investment agreements.

Furthermore, evidence has shown that there is little to nonexistent upside for governments to include ISDS in their trade and investment agreements. The empirical research shows no correlation between countries having ISDS-enforced pacts and obtaining increased foreign direct investment (FDI). Public Citizen completed new research on investment flows to the five governments that began to terminate bilateral investment treaties with ISDS. The findings provide further evidence to an extremely weak or non-existent relationship between these treaties

and the magnitude of investment inflows. A wide range of factors drives investment flows, and the presence of a BIT is clearly not a determining factor in most cases. Notably, sovereign debt ratings, seen as one driver of FDI inflows, actually improved for four of the five countries after they began terminating BITs.

Given that states have not received tangible benefits from ISDS agreements, while costs have been tangible and substantial, and that the political tide has shifted, governments now have the opportunity to reconsider their trade and investment agreements with ISDS.

The KORUS renegotiations could be such an opportunity. While the closed door nature of the KORUS renegotiations have made it difficult to know for sure what has been considered, we understand that, from the U.S. side, the KORUS renegotiation was undertaken outside the framework of Fast Track Trade Promotion Authority and thus the scope of the renegotiation has not included changes to the rules around ISDS because that would require Congressional approval. However, we do understand that the NAFTA renegotiation is meant to be the new model for U.S. trade agreements, so the KORUS renegotiation certainly provides the opportunity for the Korean government to put forth the demand to remove ISDS from KORUS, just as the USTR is proposing in NAFTA. If the United States wants to be exempted from ISDS in NAFTA, I believe it should be politically feasible for the United States to agree to a joint executive agreement with the Korean government to strip ISDS from KORUS.

To adequately protect policy space for legitimate public interest regulation, we believe the wisest course of action for governments should be to move away from the regime altogether - by not signing new agreements that include ISDS and terminating or renegotiating existing agreements that include ISDS. And the good news is that, given that the global tide is turning against ISDS, it is now politically feasible for governments to do so. Supporting so-called reform measures that address only some of the procedural problems with ISDS such as the EU’s MIC proposal that Layla will discuss is likely to only create more problems down the road.

발 제 3

외자기업 국제중재권(ISDS): 한국의 대안

송기호 (민주사회를 위한 변호사 모임 변호사)

외자기업 국제중재권(ISDS): 한국의 대안

송기호
민변 국제통상위원회 변호사

1. 한국의 피소 상황

가. 한-미 FTA

(A) 엘리엇

최소 7억 7천만 달러 배상 요구. 삼성물산과 제일모직 간 합병을 승인 과정에서 대한민국 정부의 부당한 조치로 주가가 하락으로 손해. 한미 FTA 11.3조(내국민 대우), 11.5조(공정 공평 대우) 위반 주장

(B) 메이슨 캐피털

최소 1억 7,500만 달러 배상요구. 위 엘리엇과 같은 사유. 같은 한미 FTA 11.3조, 11.5조 위반 주장

(C) 서진혜

300만 달러 및 지연 이자 배상 요구. 토지 수용위원회가 재개발 수용 절차에서 부당한 토지 수용 재결. 한미 FTA 11.5조(공정 공평 대우), 11.6조 위반(공정한 시장가격이 아닌 공시지가 기준 보상) 주장

나. 투자 협정

(A) 론스타 펀드

47억 달러 배상을 요구. 한-벨기에 룩셈부르크 투자 보호 협정. 외환은행 대주주 매각 처분 승인 지연과 매각 차익에 대한 과세처분

2.2조(공정 공평대우) 위반, 2.3조(자의적 차별 금지)위반, 3.1조 및 3.2조(최혜국대우) 위반, 5조(수용 보상) 위반, 6조(투자 송금과 회수 자유) 위반

(B) 엔텍합(다야니)

730억원 배상 판정(한국 패소) 한・이란 투자보장협정. 대우일렉트로닉스 주식 인수 계약 해지에 따른 계약금 반환 거부가 부당 공정・공평 대우 원칙 위반
이 패소 사건의 중재인 3인은 Bernard Hanotiau (Belgium) (Chair), Philippe Pinsolle (France) (appointed by the Dayyani family), Gavan Griffith QC (Australia) (appointed by Korea)
187페이지의 판정문에서 중재판정부는 한국정부가 정부기관인 캠코를 통해서 계약 당사자인 대우 채권단의 의사 결정을 간접적으로 통제, 공권력을 남용하여 개입하여 공정 공평대우를 위반했다고 판정

2. 한국의 대안

가. ISDS 폐지

☐ 국가가 법원의 판결없이 조약 위반을 이유로 금전 배상을 외자 기업에게 한다는 것은 사법권 침해

☐ 국재중재의 결함: 판정 결론의 일관성 부족, 종종 모순, 사법의 핵심적 요소인 법적 안정성이 결여

☐ 중재부 구성의 오류: 외자 기업이 중재인 한 명을 정할 수 있는 특권의 부당성

☐ 국가의 정당한 규제권을 제약할 위험 국제 중재에 회부되는 것이 두려워 공익 규제에 소극적이 되는 ‘위축 효과’

☐ 유럽의 투자법원제도(ICS)와 일본 TPP 11의 축소된 ISDS

☐ 수많은 BIT, FTA의 ISDS 폐지 정비

나. 사법 주권 실현

다. 투명성

중재 판정문 공개

라. 론스타 대응

토 론 1

한선범 (한국진보연대 정책부위원장)

토 론 문

한선범
한국진보연대 대변인, 정책부위원장

저는 2006년 한미FTA저지범국민운동본부 출범 이래 언론담당 간사로 일해왔으며, 현재 한국진보연대라는 사회단체에서 대변인 겸 정책부위원장을 맡고 있습니다. 이 토론문에서는 한미FTA 관련 운동을 하면서 느꼈던 그간의 경험들을 바탕으로 말씀을 드려볼까 합니다.

1. 발제문 관련

트럼프 행정부가 NAFTA에서 ISDS를 삭제하려 한다는 사실은 매우 시사적입니다. 미 대선이 있었던 2016년 당시 범국본은 TPP에 반대하는 활동을 하고 있었는데, 여러모로 악전고투하고 있던 상황이었습니다. 그러나 트럼프 미 대통령의 당선 이후 미국이 TPP 협상을 깨면서 상황이 반전되었습니다. “정치적 흐름이 이동했고, 각국 정부들은 ISDS라는 덫에서 빠져나올 기회를 잡게 되었다” 는 멜린다 님의 지적이 트럼프 행정부 등장 이후 벌어지고 있는 상황을 잘 설명하고 있다고 생각됩니다.

국제투자법원을 만들자는 유럽연합의 계획은 발제자 두 분께서 모두 지적하셨듯 ISDS의 폐해로 인해 제기되는 문제들을 봉합하고, 세계 경제위기 이후 무너진 ‘세계화’ 와 ‘자유무역’ 의 질서를 유지하고자 하는 흐름인 것으로 판단되며, 이를 넘어 ISDS 자체를 폐기하는 투쟁을 전개해야 할 과제가 더 중요하게 나선다고 볼 수 있겠습니다.

2. 국내 대응 관련

“정치적 흐름이 이동했고, 각국 정부들은 ISDS라는 덫에서 빠져나올 기회를 잡게 된” 이 상황에서, ISDS를 폐기하기 위한 가장 큰 과제라면 정부 관계자들과 국회의원 대다수에게 뿌리박혀 있는 ‘세계화’ 와 ‘자유무역’, ‘개방’ 에 대한 일종의 맹신을 깨는 것이라는 점을 말씀드리고 싶습니다.
한미FTA 저지 운동을 하면서 부딪혔던 가장 강력한 벽이 바로 이것이었습니다. 4대 선결요건, ISDS, 허가-특허 연계 등 각종 독소조항에 대해 문제제기할 때마다 노무현 정부이건, 이명박 정부이건, 박근혜 정부이건 관계없이 돌아온 답은 “이것이 글로벌 스탠다드” 라는 것 뿐이었습니다.

저는 솔직히 이 정부, 특히 협상 담당자들인 산업통상자원부와 외교부 관계자들이 위에서 언급한 ‘정치적 흐름의 이동’ 을 기회로 인식하고 있을지, 이들이 과연 심정적으로는 ISDS의 폐기를 원하는데 상대가 미국이라서 말을 못하는 것인지에 대해 의문을 갖고 있습니다. 촛불 항쟁이 일어났지만 관료사회는 크게 달라지지 않았으며, 항쟁 이후 들어선 문재인 정부의 첫 통상교섭본부장이 한미FTA 강행을 주도했던 김현종씨라는 점에서 그 우려는 더욱 커집니다. 지난 후속협상에서 ISDS를 논의하기로 했다고

하는데, 우리는 아는 것이 없습니다. 오히려 우리 정부 쪽에서는 별로 원하지 않는데, 미국 쪽이 원해서 ISDS가 폐기되는 씁쓸한 상황이 오지 않을까 하는 생각이 들 정도입니다.

3. 한미FTA 이후의 무역질서는?

약간 논의 주제에서 벗어날 수도 있지만, 이슈를 ISDS로 국한하지 않고 전체로 넓혔을 때, 트럼프 행정부가 ISDS를 폐기하고, 더 나아가 한미FTA를 폐기한다 해서 그 이후에 올 무역질서가 우리에게 더 나을 것인지에 대한 고민도 필요하다고 생각됩니다. 그것은 트럼프 행정부의 무역정책이 속된 말로 “내 껀 내꺼고, 니 꺼도 내꺼” 이기 때문입니다.

트럼프 행정부의 등장 이후 애시당초 최악이었던 한미FTA는 정부가 겨우 홍보할 수준의 호혜성조차 사라지고 말았습니다. 비록 기만에 불과했지만 그나마 얻었다고 홍보하던 분야들인 철강, 자동차 등에서 관세폭탄, 쿼터제한이 떨어지고 있고, FTA 체결 이전에도 0%였던 세탁기에까지 관세폭탄이 떨어졌습니다. 그러나 4대 선결요건, 농업, 금융서비스, 지재권, 허가-특허 연계 등 우리가 내준 분야들에서의 개방 조치들은 계속 유지되고 있습니다.

즉, 한미FTA는 이미 트럼프 행정부 이후 파기된 것이나 마찬가지인 상황이며, 문제는 한미FTA 이후 무역질서가 더 나빠지고 있다는 점입니다. 이러한 상황에 정부와 국회, 학계와 시민사회, 그리고 국제적 운동이 대응해 나갈지에 대해 이 자리에서 고민해봤으면 좋겠습니다.

〈끝〉

토 론 2

최승환 (경희대학교 법학전문대학원 교수)

토 론 문

최승환 (Seung Hwan CHOI)
Professor, Kyung Hee University Law School

1. **총평**: Merinda St. Louis씨는 NAFTA 재협상에서 미국 트럼프 정부가 자유무역협정(FTA)상 투자가-국가간 중재분쟁(ISDS) 조항을 제거하려는 정책결정의 배경 및 논거와 미국내 NGO 단체들의 ISDS 반대운동에 대해 자세하게 소개해 주셨습니다. Layla Hughes씨 또한 국제적으로 확산되고 있는 ISDS 개혁 논의를 다자간투자법원의 설립에 관한 유럽연합(EU)의 제안에 대해 기존 ISDS와의 차이점과 문제점을 소상히 소개해 주셨습니다. Merinda St. Louis씨가 ISDS 제도의 폐지를 주장하는데 비해, Layla Hughes씨는 ISDS 제도의 개혁 및 보완을 주장한다는 점에서 약간의 시각차가 존재하는 것으로 이해하였습니다. 그럼에도 불구하고 저는 두 분 발제자의 주장을 전적으로 공감하고 지지합니다. 특히 북미자유무역협정(NAFTA)의 재협상에 있어 ISDS 규정의 개정에 대한 트럼프 행정부의 적극적인 입장과 ISDS 제도의 개혁에 대한 국제환경법센터(CIEL)의 제언은 '한-미(KOR-US) FTA' 재협상에 나서는 한국정부에게 많은 시사점을 줄 수 있으리라 생각됩니다. 두 분 발제자의 발표를 통해 ISDS 제도의 폐지 또는 개혁을 원하는 주장이 미국 트럼프 정부와 기타 국가들 내에서도 시민단체와 전문가들을 중심으로 활발히 논의되고 있다는 사실을 확인하니, ISDS 제도의 획기적인 혁신을 주장하는 학자의 한사람으로서 대단히 반갑고 연대감을 느끼게 됩니다.

2. **ISDS 규정의 주요 내용**: 토론자로서 저는, ISDS의 제도적 개혁에 대한 제안에 앞서, 먼저 '한-미 FTA'의 이행과 관련해서 특히 논란이 되고 있는 ISDS 규정을 간단히 소개해 드리고자 합니다. '한미 FTA'는 NAFTA와 유사한 투자분쟁해결조항을 두고 있습니다. '한미 FTA'에 의하면, 외국투자가와 해당 당사국은 중재청구를 신청하기 이전에 협의 및 협상을 통한 분쟁해결에 호소하여야 합니다. 특정기간 이내에 합의에 도달하지 못한 경우 당사자는 '국제투자해결본부(ICSID) 협약'상의 중재규칙, 'ICSID 부속편의규칙', '유엔국제상거래법위원회(UNCITRAL) 중재규칙'은 물론 분쟁 당사국이 합의하는 경우에는 기타 중재제도(국제상업회의소(ICC) 등)나 규칙을 포함한 다양한 중재방법에 따라서도 중재청구를 신청할 수 있습니다.

중재청구는 (1) 상대국이 '한-미 FTA' 투자의무나 투자허가, 투자협정을 위반하였으며 (2) 협정위반으로 투자가가 손실이나 손해를 입었다는 점을 토대로 '당사국의 투자가'에 의해 제기될 수 있습니다. 다만 투자가나 투자가와 기업이 청구를

제기하기 전에 현지의 사법 또는 행정 구제책을 완료하도록 요구하지 않습니다. 청구가 ‘한-미 FTA’ 의무 위반(투자협정 위반에 반하여) 주장을 수반하는 경우, 중재재판부(Arbitration Tribunal)는 ‘한-미 FTA’와 ‘국제법의 해당규칙’에 따라 쟁점을 판단합니다. 한미합동위원회가 협정 제22.3.3조 (d)에 의거하여 ‘한-미 FTA’ 조항을 해석할 경우, 해석을 공표하는 결정은 중재판정부에 구속력을 가지므로 중재재판부의 결정이나 판정은 합동위원회의 동 결정에 부합해야 합니다. 국제중재판정은 단심제로서 확정력을 가지게 됩니다. 중재재판부는 금전적 판정만 할 수 있기 때문에 당사국에 분쟁 조치의 철회나 수정을 지시할 수 없습니다. 판정은 금전 손해배상이나 재산의 반환, 또는 양자로 구성될 수 있습니다.

미국인투자가는 자신의 손실에 대하여 직접 제소 또는 투자기업을 소유, 통제하는 미국인투자가가 기업을 대리하여 제소할 수 있습니다. 중재심리 및 제출서류는 모두 일반에게 공개되며, 다만 비밀정보는 관련 절차에 따라 보호됩니다. 중재재판부는 분쟁 당사자와 협의 후 시민단체 등 제3자(*amicus curiae*)의 의견제출을 허용할 수 있습니다. 투자가는 상대국 법원 또는 국제중재절차에 제소할 수 있는 선택권을 가집니다. 다만 미국인투자가는 한국정부를 상대로 한국법원 또는 국제중재절차 제소 중 하나를 선택한 후에는 다른 절차 제소가 불가능합니다. 한국인투자가는 미국정부를 상대로 국제중재절차 개시 후에는 미국법원 제소가 불가능하나, 미국법원 제소 후에는 동 미국 국내법원의 재판 절차를 중지하는 경우, 국제중재절차를 개시할 수 있습니다.

3. **세계화와 지역경제통합의 문제점**: ‘한-미 FTA’는 세계최대시장을 안정적으로 확보하고, 경제사회시스템을 선진화시키고, 생산고용교역 및 외국인 직접투자를 증대시킴으로써 국가경제 발전과 소비자후생 증대에 기여하는 것을 주된 목표로 합니다. 그러나 세계화 및 지역경제통합의 확대는 국제경쟁력을 구비하지 못한 기업을 퇴출시키거나 가혹한 구조조정을 강요함으로써 관련 노동자들의 정리해고와 노동기본권 위반 및 비정규직에 대한 차별적 대우로 인해 지속가능한 발전과 번영을 위해 필수적인 사회통합 (social integration)을 손상함으로써 빈부격차와 사회갈등을 증폭시키고 있습니다. 무역이익은 많은 국가들의 정치체제를 지배해 왔으며, 결과적으로 경제적으로 약자인 국민다수는 경제적으로 강자인 소수의 이익을 위해 희생되고 있는 실정입니다. 세계화 및 지역경제통합이 확대 가속화됨에 따라 비정부간기구 (NGO)를 중심으로 한 반세계화 운동 또한 거세지고 있으며, ISDS 제도에 대한 시민단체들의 반대 운동도 같은 맥락에서 확산되고 있습니다.[1]

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1) 세계화와 신자유주의적 경제통합에 반대하는 시민단체들의 반세계화운동 사례에 대해서는 A. Lang, *World Trade Law after Neoliberalism* (Oxford University Press, 2011), pp. 61-104 참조.

4. 한-미 FTA의 이행실태: 한국의 경우 위생검역(예컨대 미국산 쇠고기 수입확대 문제), 보건 및 의약품(예컨대 약값에 대한 독립적 검토를 위한 입법조치 시행과 허가-특허 연계에 따른 약값 인상문제 문제), 안전(예컨대 수입차 안전기준 특혜 폐지 문제) 및 환경(예컨대 저탄소차 협력금제도 시행문제) 관련 규정의 국내적 이행과 관련되어 국내외적으로 논란이 야기된 사례들은 국민의 생명, 건강, 안전 등을 개선하거나 보장하기 위한 한국의 공공정책 집행이 '한-미 FTA'의 이행과정에서 통상마찰을 야기할 수 있다는 이유로 그 집행이 연기·무산되거나 당초의 정책목표가 완화되고 있는 사례들입니다.[2] 다시 말해 주권국가의 정당한 공공정책의 집행이 '한-미 FTA' 규정에 위반되거나 위반될 수 있다는 이유로 또는 ISDS 대상이 될 수 있다는 이유로 방해받거나 좌절되고 있는 실정입니다. 물론 '한-미 FTA'상의 의무를 위반하지 않는 범위내에서 국가공공정책을 효과적으로 실행할 수 있다면 통상분쟁으로 전화되지 않을 것이나, '한-미 FTA'의 이행을 구실로 미국이 자국산업 및 기업의 이익을 극대화하기 위한 효과적인 압력수단으로 관련 규정을 집요하게 원용할 경우 국가공공정책의 효과적인 집행은 계속해서 도전(challenge)을 받을 것입니다. 실제로 '한-미 FTA'의 이행과 관련해서 검토된 사례들에 있어 한국은 관련 규정상의 정당한 권리를 적극적으로 행사하기 보다는 미국의 통상압력을 고려해서 필요이상으로 위축되어 법리적 판단보다는 정무적 판단을 우선적으로 고려하는 경향을 보이고 있습니다. 독도문제와 북핵문제 등을 포함한 외교현안에 있어 미국의 협조를 받기 위한 정무적 판단을 위해 법리적 검토결과를 무시한다면, '한-미 FTA'는 국민의 건강, 생명, 안전을 보호하기 위한 공공정책을 집행하기 위한 효과적인 수단으로 활용되기 보다는 국제법상 정당한 주권국가의 공공정책 수행을 방해하고 정당한 권리행사를 '위축하게 만드는 효과'(chilling effect)를 초래할 것입니다.

5. ISDS 규정에 대한 '한미 FTA'의 구체적인 개정방안:

첫째, 한국과 미국이 당사국인 국제협정에 부합되는 비차별적 조치에 대해서는 외국투자가가 ISDS 규정을 원용할 수 없게 하고,

둘째, 국제관습법상 확립된 국제인권법의 핵심(건강권, 생명권 등)을 위반한 경우 외국투자가가 ISDS 규정을 원용하지 못하도록 하고,

셋째, 국민건강과 생명 및 안전을 보호하기 위한 비차별적인 공공정책(public policy)의 적법한 수행은 ISDS 절차규칙의 적용대상에서 배제하고,

넷째, ISDS 규정의 적용범위와 관련하여 간접수용의 광범위한 해석은 국가공공정책의 시행을 제한한다는 점에서 ISDS 절차규칙의 적용대상에서

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2) 상기 사례들에 대한 자세한 소개는 최승환, "한-미 자유무역협정(FTA)의 국내적 이행과 관련된 사례와 법적 쟁점", 「국제거래법연구」, 제23집 제1호 (2014. 7), pp. 147-162 참조.

배제하고,

다섯째, 외국투자자에게 국제중재 회부권을 허용함으로써 야기될 수 있는 이른바 사법주권의 침해 문제는 국제관습법상 확립된 '국내적 구제완료'(exhaustion of local remedies)를 국제중재회부의 선결조건으로 부과함으로써 해결하도록 한다.

6. 한-미 FTA 재협상의 기본원칙: 한-미 FTA'를 포함한 지역경제통합협정에서 추구하는 자유무역 및 투자자유화 확대는 경제통합의 목적이 아니라 '수단'에 불과합니다. 경제통합의 주요 목적은 최소한의 인간의 생존여건을 보장하는 '인간의 존엄성'(human dignity)을 증진시키는 것이기 때문입니다. 인간의 존엄성은 모든 법규와 제도를 정당화하는 근본규범이기 때문에 자유무역과 투자자유화 가치에 우선되어야 하며, 인간의 존엄성을 보장하는 경제통합만이 경제적 번영과 사회통합을 조화시킴으로써 경제통합을 성공적으로 지속가능하게 발전시킬 것입니다. 따라서 국민의 생명, 건강, 안전은 경제적 · 상업적 이익을 극대화하기 위해 포기되거나 희생될 수 없습니다. 무역 및 투자 자유화 확대는 국민건강과 생명 및 안전이라고 하는 정당한 목적을 수행하는 수단으로만 기능해야 하며, 국민건강과 생명 및 안전에 관련된 공공정책의 수행은 무역 및 투자 자유화 가치보다 우선적으로 적용되는 상위규범이라는 점이 한-미 FTA 재협상에 임하는 당사국간에 합의되어야 할 것입니다.

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A WORLD COURT FOR CORPORATIONS

HOW THE EU PLANS TO ENTRENCH AND INSTITUTIONALIZE INVESTOR-STATE DISPUTE SETTLEMENT

EN

TABLE OF CONTENTS

Introduction	3
Today’s system of corporate privileges	4
A global corporate court	14
Reactions to the proposal for a global investor court	28
Countering global corporate dominance	34
Useful Resources	38
Endnotes	39

A WORLD COURT FOR CORPORATIONS

HOW THE EU PLANS TO ENTRENCH AND INSTITUTIONALIZE INVESTOR-STATE DISPUTE SETTLEMENT

CIEL

Founded in 1989, the Center for International Environmental Law (CIEL) uses the power of law to protect the environment, promote human rights, and ensure a just and sustainable society. CIEL is dedicated to advocacy in the global public interest through legal counsel, policy research, analysis, education, training, and capacity building.

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S2B

Seattle to Brussels Network is a pan-european network formed in 1999, committed to contribute to a democratically accountable trading system that advances economic justice, social well-being, gender equity and ecological sustainability.

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The Rosa-Luxemburg-Stiftung is an internationally operating, left-wing non-profit organisation providing civic education. It is affiliated with Germany's 'Die Linke' (Left Party). Active since 1990, the foundation has been committed to the analysis of social and political processes and developments worldwide. The Stiftung works in the context of the growing multiple crises facing our current political and economic system. In cooperation with other progressive organisations around the globe, the Stiftung focuses on democratic and social participation, the empowerment of disadvantaged groups, and alternative economic and social development. The Stiftung's international activities aim to provide civic education by means of academic analyses, public programmes, and projects conducted together with partner institutions towards a more just world and a system based on international solidarity.

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INTRODUCTION

The world has reached a dangerous crossroads. In one direction, governments possess and exert the fundamental authority and responsibility to protect their citizens, and cooperate with other governments to ensure that multinational companies do not violate human rights or destroy the environment. In the other direction, states grant corporations yet more rights by entrenching the system that allows them to challenge public interest laws and receive compensation when those laws may threaten a corporation's future profits.

The European Commission proposal for a multilateral mechanism for investor-state dispute settlement (ISDS) – referred to by the Commission as a Multilateral Investment Court – marks the Commission's decision to follow that second path. The proposed global investor court threatens to lock in the highly controversial ISDS system, an undemocratic scheme that undermines national authority and prioritizes corporate profits above all else.

Securing investor rights and remedies is a core principle of the Commission's investment policy,[1] and the proposed investor court is just one in a long line of efforts made by the EU to enshrine and expand the current system of corporate privilege, including the Commission's commitment to include investor rights in future trade agreements[2] and its attempt to include these provisions in other multilateral efforts, such as the World Trade Organization.[3]

As companies grow larger and more powerful, it has become increasingly difficult for nations to ensure that these companies comply with human rights and environmental laws. A world court for corporations would be the capstone in the architecture of corporate impunity, preventing governments from addressing their more pressing problems – both domestic and global alike – such as violence, climate change, resource depletion, economic instability, and inequality.

The EU's proposal for a global investor court is a thinly veiled effort to salvage the failing investor-state dispute settlement system by replacing it with a rebranded twin. By ignoring the underlying problems with ISDS as a system, the Commission reveals that it does not view opposition to ISDS as a legitimate concern; the global investor court then becomes merely an attempt to regain political support for investor protections.

The proposed court "would serve to further expand and entrench the controversial ISDS mechanism".
Columbia Center on Sustainable Investment[4]

I

TODAY'S SYSTEM OF CORPORATE PRIVILEGES

Deregulation, privatization, and the globalization of the world economy have concentrated the power of large transnational corporations.[5] Today, the biggest companies are wealthier than most countries. Of the 100 largest economic entities in the world, 69 are corporations and 31 are countries.[6]

As the economic scale and global reach of corporations have expanded over the last century, so too have their influence over public policy at every level of government – from the local to the global.[7] This influence extends far beyond traditional economic matters like taxation and border tariffs and ultimately shapes policy decisions in every area of public affairs, from labor and health standards to consumer and environmental protections to fundamental governance issues, such as public participation, democratic decision-making, and access to justice.

While the growing corporate influence over economics and policymaking has been recognized since at least the 1970s,[8] recent decades have seen the rise of a new and rapidly expanding body of international laws that expands the political and economic power of transnational corporations to unprecedented levels, while simultaneously reducing corporate accountability for how that power is exercised.

"Modern" trade and investment agreements facilitate unfettered expansion of trade, capital flow and financial speculation across jurisdictions and focus on limiting the regulations that apply to transnational companies. Some of the most powerful corporate tools in these agreements are the investment protection provisions, which expand and strengthen property rights and allow investors to challenge states for perceived violations of their rights to future profits within a binding dispute settlement mechanism.

Under the innocuous guise of "investor rights", multinational corporations have transformed a system, which was allegedly created to protect foreign investors from mistreatment into a massive, powerful, and still largely hidden body of international rules that companies are using to chill government action, coerce policy outcomes, oppose enforcement of legitimate policy measures, and ultimately sue governments if their demands aren't satisfied.

In the name of protecting investor rights, governments are being forced to pay foreign corporations when government actions reduce the value of corporate investments – even in cases where the government actions serve vital public interests, such as protecting workers or preventing environmental harm.

Critically, corporations enforce these investor rights through an arbitration system known as investor-state dispute settlement (ISDS). Embodied in thousands of trade and investment treaties, the ISDS system creates a parallel system of justice accessible only to and heavily biased toward large corporations. When a corporation believes its investment in a country has been (or might be) harmed by government action – from denial of an environmental permit to changing labeling laws – it can invoke investor rights to demand the government change course, pressure the government to settle its claims, or bring suit directly before a three-person "arbitral tribunal" comprised of experts in foreign investment law. Many of these arbitrators are corporate attorneys, who typically alternate between serving as panelists and representing corporate clients in other investment cases, which results in an implicit bias towards corporate perspectives.[9]

This systemic imbalance is exacerbated by the limited role of arbitrators to interpret and apply the investor rights embodied in the applicable trade or investment treaty. Thus, their principle consideration is whether a government decision has improperly reduced the value of an investment. Panels have almost no latitude to consider the greater societal value of the decision, assess the issues in the context of international human rights obligations, and take into account the needs and interests of those who might benefit from it – whether they're workers seeking a healthy workplace or indigenous peoples protecting communal lands from contamination. Likewise, panels have no power to impose liability or punitive measures on investors whose activities cause harm to health or the environment.

When an arbitration panel rules in favor of an investor, the losing government can be forced to pay billions in damages to the corporate plaintiff. And even governments that ultimately prevail must invest years of time and millions of dollars in legal fees to defend the case, while in the meantime, critically needed policy measures may sit in legal limbo and be delayed while the dispute is litigated. As a result, many governments settle cases or give in to industry pressure before a measure is even adopted rather than risk being sued. When these cases are settled, the terms of the settlement are often confidential, and the public therefore has no information about terms of the settlements for which their taxes have been diverted. Even democratically elected representatives are not informed about the terms the of the settlement.

These excessive investor rights thus perpetuate and exacerbate the power imbalance between the world's largest businesses and the global public – enabling companies to

avoid accountability for harms they cause while eroding governments' ability to regulate and reduce those harms. As *The Economist* explains:

> *"If you wanted to convince the public that international trade agreements are a way to let multinational companies get rich at the expense of ordinary people, this is what you would do: give foreign firms a special right to apply to a secretive tribunal of highly paid corporate lawyers for compensation whenever a government passes a law to, say, discourage smoking, protect the environment or prevent a nuclear catastrophe. Yet that is precisely what thousands of trade and investment treaties over the past half century have done, through a process known as 'investor-state dispute settlement', or ISDS." The Economist*[10]

The negotiation of agreements granting corporations these special rights has proliferated. There are currently more than 2,600 international investment agreements in force,[11] nearly half of which involve EU Member States. Investor rights and dispute resolution mechanisms are also increasingly included in regional trade and investment agreements. For example, since 2009, the EU has included investor rights and dispute resolution in proposed agreements with Singapore, Canada, Vietnam, and the United States. Bilateral trade agreements adopted by EU Member States expand this web of agreements still further. Germany alone has 136 such agreements currently in force or pending entry into force; France has 106.

As the inclusion of excessive investor rights in agreements has increased, so, too, has companies' use of these provisions to file arbitration cases against governments. Until the late 1990s, less than ten known treaty-based ISDS cases were brought each year. This number quadrupled throughout the 2000s and continues to rise, with an average of 60 known cases per year over the past five years.[12] As of July 2017, over 800 known cases had been filed.[13] However, many cases are conducted in secret, so it is not possible to assess the full extent of these challenges to government decisions.

Although the alleged original intent of ISDS was to protect companies that invested in countries with potentially arbitrary legal systems, today's ISDS cases are no longer filed merely against countries with ostensibly weak governance. From the mid-nineties onwards, most cases have been against governments with "a relatively high level of democratic development and rule of law".[14]

"The cost-benefit balance on including provisions such as ISDS looks increasingly questionable, especially when both sides in the deal are advanced economies with low risk of discriminatory treatment of foreign investors and reliable judicial systems."
OECD[15]

The costs of ISDS cases have skyrocketed too.[16] Taxpayer money funds the defense against corporate challenges, which can exceed US $30 million.[17] The amount at issue is also growing, with investors in 59 cases over a period of just two years claiming at least US$1 billion, including ten cases with at least US$15 billion at stake.[18] There are no limitations to arbitration panel awards, which have been as high as US $50 billion for three related cases.[19] These significant financial liabilities erode the ability of governments to fund important public services such as health care, education, and social programs for the poor.

Further, the system favors investors, who win nearly 60% of the cases that reach the stage of a ruling.[20] The system also favors the elites in wealthy countries, which have more resources with which to fight investor challenges,[21] and wealthy companies, which are able to afford the costs of litigation.

The increasing use and abuse of ISDS has triggered a backlash from concerned citizens, policymakers, and legislators in countries around the world. Until recently considered an inevitable component of any new trade or investment agreement, ISDS is being rejected outright by a small but growing number of countries, and is being seriously reevaluated by many more. As the lack of benefits and exorbitant costs of ISDS have become apparent, countries in Asia, Africa, and South America have cancelled Bilateral Investment Treaties.[22]

In Europe, citizen opposition to investor privileges surged when the EU proposed including investment protections and investor state dispute resolution in a planned agreement with the US (the Transatlantic Trade and Investment Partnership, or TTIP). Public opposition continued with the EU's finalization of an agreement with Canada that included similar provisions (the Comprehensive Economic and Trade Agreement, or CETA). More than 3.5 million people across the EU signed a petition against TTIP and CETA "because they include several critical issues such as investor-state dispute settlement ... that pose a threat to democracy and the rule of law".[23] To address public opposition to ISDS, the European Commission opened a consultation in 2014. Nearly 150,000 people responded, with 97% of the contributions rejecting ISDS.[24]

The opposition to excessive investor privileges has developed into a worldwide movement that spans trade unions, small and medium sized enterprises, human rights and consumer groups, farmers, and environmental organizations. Criticism continues to grow and come from a wide spectrum of critics, including UN experts[25] and institutions,[26] legal scholars and judges,[27] economists,[28] and governments.[29]

It is against this backdrop that the European Commission's proposed "solution" to the ISDS problem must be evaluated. Responding to growing opposition to ISDS within and beyond Europe, the Commission, along with the support of a majority of the EU Council, is proposing that governments create a permanent multinational court to hear investment disputes, rather than rely on ad hoc panels assembled for each case.[30] By adjusting how arbitrators are selected and paid, and adding a few other procedural tweaks, the Commission hopes to silence the rising opposition to ISDS by permanently locking in a system that is deeply flawed, fundamentally unjust, undemocratic, and ultimately unsustainable.

This lopsided access to justice, which enables private corporations to avoid accountability for harms to countries and communities while forcing governments to pay for the costs of preventing or addressing those harms, must be rejected. Rather than entrenching a system that protects corporate profits at the expense of the broader public interest, we need a system that protects citizen and community rights against harms caused by corporations and their investors and ensures equitable access to justice. The people of Europe – like people everywhere – should demand nothing less.

HOW COMPANIES HAVE USED ISDS TO DEFEAT PUBLIC INTEREST LAWS

Companies have successfully challenged a wide range of public interest laws before arbitral tribunals, including:

HEALTH

In 1998, after a corporation challenged Canada's ban on methylcyclopentadienyl manganese tricarbonyl (MMT), a toxic gasoline additive, Canada withdrew the ban and paid $13 million to settle the case.[31]

RACIAL DISCRIMINATION

When companies challenged a South African law aimed at redressing injustices of the apartheid regime, South Africa settled the case in 2009 and agreed to reduce the benefits granted to black investors.[32]

MINING

When an environmental assessment concluded that threats to the local community and to endangered species from a mining project could not be mitigated and Canada decided not to permit the project, the mining company challenged the decision and won in 2015.[33]

OIL AND GAS

In 2012, Ecuador was ordered to pay $1.4 billion after terminating an oil production agreement, even though the oil production had caused environmental destruction and resulted in human rights violations over a period of 30 years.[34]

HAZARDOUS WASTE

When Mexico refused to issue a permit for a waste disposal facility due to water pollution concerns, the waste disposal company challenged the decision and won an award of $16.79 million in 2000.[35]

COAL

In 2011, after an energy company challenged Germany's environmental standards protecting a river from the impacts of a coal-fired power plant, Germany lowered the standards.[36]

ECONOMIC CRISIS

Companies sued Argentina more than 40 times as result of reforms to guarantee the right of access to public services made in response to the economic crisis in 2001; a majority of the completed cases have ruled against Argentina, and by 2014 tribunals had awarded nearly US $1 billion in compensation to the companies.[37]

INVESTOR PRIVILEGES HAVE NO PUBLIC BENEFIT AND DO NOT BRING INVESTMENT

The European Commission has asserted that "the basic objective of investment protection remains valid since bias against foreign investors and violations of property rights are still an issue"[38] and that Bilateral Investment Treaties (BITs) "have played their part in encouraging and protecting the high volume of EU investment abroad and, reciprocally, the investments held by the rest of the world in the EU".[39] But is there any support for these assertions?

Studies indicate that company decisions to invest abroad are rarely based on the existence of an investment treaty.[40] Instead, the nature of the investment, access to new markets and natural resources, the expected profits, lower wages or taxes, and the state's domestic legal system are far more influential.[41] The EU Trade Commissioner confirms that there is no correlation between investment agreements and increased foreign direct investment (FDI).[42]

Investment protection provisions have very little impact on the cost and coverage of political risk insurance.[43]

The experience of many countries demonstrates that excessive investor protections do not attract investment. For example, South Africa and Ecuador have concluded that BITs are not decisive in attracting investment; Brazil is the only country in Latin America that has never ratified a BIT that includes ISDS despite receiving the most FDI in the region; and most investments from the US to Europe are made in the Western European Member States, even though none of these countries have an investment treaty with the US.[44]

More importantly, it is now widely acknowledged, that while FDI may contribute to economic and industrial strategies, the benefits are not automatic and if they exist, are not distributed fairly.[45] Regulations are needed to avoid the risks that FDI can pose to the environment, local communities, a country's balance of payments, etc. And in general, investment agreements "are not designed to address such issues, as their overriding focus is to protect foreign investment," as an official of the Government of South Africa put it. He explained: "In fact, (international investment agreements) are structured in a manner that primarily imposes legal obligations on governments to provide wide-ranging rights protection to investment by the countries that are party to the treaty. This pro-investor imbalance can constrain the ability of governments to regulate in the public interest."[46]

THE INVESTMENT COURT SYSTEM

As a first attempt to quash the groundswell of resistance to privileges for investors, the Commission proposed an "Investment Court System" in its proposed trade agreements with the US, Canada, and Vietnam. The Investment Court System changes the selection process for judges (assigned randomly from a pre-established list of people) and creates an appellate body, but otherwise is the same as ISDS. The Commission's proposed Multilateral Investment Court is essentially the multilateral version of the Investment Court System.

A GLOBAL CORPORATE COURT

In the midst of widespread opposition to investor rights and despite previously failed attempts to institutionalize ISDS the EU is attempting to revive efforts to create a multilateral investment dispute resolution mechanism. This is an attempt to not only salvage the failing investor-state dispute settlement (ISDS) system, but to strengthen and solidify it. EU discussion papers make it clear that the Commission has ignored and does not view opposition to ISDS as legitimate and that the global investor court is an attempt to regain political support for ISDS. For example, the EU referred to the "perceived" lack of legitimacy of investor-state arbitration and explained that due to the potential impact on public budgets and public policy, it was crucial that justice is "seen to be done" when the EU explains the system and individual cases to legislators and the public.[47] These statements indicate that the EU is more concerned with changing the perception of ISDS than with actually addressing the problems it causes.

Indeed, as evidenced in its investment policy, the EU wholeheartedly promotes investor protections and investor-state dispute resolution.[48] In its proposal for a global investor court, the Commission explains that the intent behind the procedural changes is to "rebuild trust in the system and, consequently, improve the recognition and implementation of its decisions".[49]

The Commission's ostensible objectives for the proposed procedural changes to ISDS are to improve the legitimacy, transparency, consistency, predictability, and legal correctness of investor-state arbitration. Yet to further "legitimize" this inherently flawed system would only perpetuate inequality and corporate impunity.

THE COMMISSION'S GLOBAL INVESTOR COURT PROPOSAL[50]

The Commission's proposal to establish a global investor court would be a gift to the world's largest corporations. The proposal would modify some procedural aspects of investor-state dispute resolution but would avoid any changes to the excessive investor privileges. The proposal:

> includes a way to appeal a decision in an investor-state lawsuit.

> provides full time, secured jobs for judges who would decide disputes, be subject to strict ethics rules and appointed through a more transparent and objective process.

> proposes that the court be subject to transparency rules and that third parties be allowed to submit interventions to the court if they have a direct and existing interest in the outcome of the dispute.

In September 2017, the Commission asked EU member states for a mandate to negotiate an international convention to establish such a court in the context of the United Nations Commission of International Trade Law (UNCITRAL), a key hub of today's ISDS regime. In July 2017, the UNCITRAL member states charged one of the body's working groups to consider concerns about and possible reforms of today's ISDS system.[51]

The dangers in the EU proposal for a multilateral investment court stem from the problems with ISDS more generally. A global investor court would exacerbate and entrench this undemocratic and harmful system.

"A court would become a device for neoliberal rules of investment protection with even greater authority."
Muthucumaraswamy Sornarajah, Arbitrator and Law Professor, National University of Singapore[52]

DANGER #1: ENTRENCHING THE EXISTING ISDS SYSTEM

The Commission proposes to delay any multilateral effort at substantive reforms, and suggests that the global investor court should only address procedural issues. By failing to address these expansive substantive rights, the global investor court would entrench excessive corporate privileges developed under ISDS, which are not granted to any other parties. Instead of addressing the fundamental question of whether these powerful corporate rights are necessary, the Commission assumes that they are a foregone conclusion and seeks only to legitimize this system. It has already made clear that it is not going to touch upon the far-reaching "substantive" privileges that investors are being granted in today's trade and investment agreements.

Arbitration panels have interpreted these investor rights broadly, for example by concluding that investors must be guaranteed a stable regulatory framework that does not frustrate the expectations they held at the time they established their investment. For instance, in an oil and gas company challenge to Ecuador's value-added taxes, the arbitration panel found that "there is certainly an obligation not to alter the legal and business environment in which the investment has been made".[53] The panel found that the country's change in tax law was incompatible with this requirement and ordered the government to pay the oil company for its losses resulting from the tax.

Companies have even relied on investor rights to escape punishment after they were accused or convicted of crimes, including environmental pollution and corruption. For example, a factory in El Salvador poisoned a village with lead, killing some of its inhabitants, including children. When the government charged the company for violating its environmental laws, the company used its lawyers to threaten the government with an ISDS case, enabling it to avoid a criminal conviction.[54] The proposed global investor court would enable cases such as these – because the rules on the basis of which they have been filed or threatened would not change.

These broad, substantive rights create a risk of financial liability that leads to a chilling effect on decision-makers.[55] For example, in 2010, the Inter-American Commission on Human Rights advised the government of Guatemala to suspend operations at Goldcorp, Inc.'s Marlin Mine to prevent imminent human rights violations and grave environmental impacts.[56] After a brief suspension, the Guatemalan government reopened the mine. Documents obtained through a freedom of information request reveal that the decision to do so was based in part on the government's fear that closure would cause Goldcorp to "activate the World Bank's [investment court] or to invoke the clauses of the free trade agreement to have access to international arbitration and subsequent claim of damages to the state".[57] Similarly, the government of Indonesia exempted Australia-based Newcrest Mining from a prohibition on open-pit mining in protected forests because it feared that the mining company would otherwise challenge the decision in arbitration.[58] The mere existence of an international investor court could strengthen the force of this chilling effect.

Through the extreme privileges for foreign investors in today's trade and investment agreements, corporate property rights are elevated over government obligations to protect the public interest and state regulatory authority is severely constrained. The proposed global investor court would be giving force to these very same corporate rights. As one well-known arbitrator and academic observed, "A court would become a device for neoliberal rules of investment protection with even greater authority".[59] In addition, once the court is established, it would be very difficult to abandon investor-state dispute settlement.

DANGER #2:
REINFORCING CORPORATE PRIVILEGES

The global investor court would also likely strengthen and reinforce corporate rights, because specialized courts and tribunals tend to interpret the laws they oversee in an expansive manner, becoming "over-enthusiastic about vindicating the purposes for which they were set up".[60] Thus, for example, the global investor court decision-makers are likely to accept many cases, rather than determining every now and then that the court has jurisdiction. They are also more likely to rule on the side of protection of corporate property and economic interests over the right of states to regulate and its citizens' right to self-determination.

In addition, in domestic legal systems, when judges consider whether a public interest law unduly burdens a corporation, they weigh the fact that the public interest law was created by a democratically elected body that seeks to protect the overall wellbeing of the public. Unlike in national courts, judges in the global investor court would not review national government or court decisions with any degree of deference.[61] Instead, these judges would merely be interpreting the investor rights in international investment agreements, without any reference to margin of appreciation for relevant public interest laws, which were enacted democratically. Thus, the decision-makers in the proposed global investor court would be driven by their zeal for articulating and developing investor privileges, and this enthusiasm would not be tempered by respect or deference for the democratic institutions that enacted the laws at issue in the global investor court.

The global investor court is also likely to strengthen corporate privileges by bringing a repetition and consistency to the interpretation of these rights. In deciding more cases influenced by corporate bias, the investor court will be building an increasingly large body of law that supports decisions that favor corporations at the expense of everything else.[62] As a research paper by the European Parliament's Directorate General for Internal Policies points out, "Certainty of interpretation is, after all, only a positive thing if the interpretation adopted is a desirable one".[63] By advocating for consistent and predictable interpretations of unbalanced corporate rights, the Commission proposal unabashedly favors the development of a legal regime aimed at strengthening corporate power.

"This is a dangerous new way
to give transnational corporations their own court, which local companies
and groups can't access."
Maude Barlow, Council of Canadians[64]

DANGER #3:
ACCESS TO JUSTICE FOR CORPORATIONS ONLY

The global investor court proposed by the EU would foster unequal access to justice by creating a permanent venue for corporations to bring their claims against public interest laws, while denying access to justice for those who have been harmed by these same corporations.

Investor-state dispute systems perpetuate inequality by providing a way for corporations to sue governments without providing a corresponding means for governments and people affected by investments to sue corporations. Although the alleged rationale for providing corporations these special rights is that domestic institutions are insufficient to protect foreign investors, this deficiency is all the more true in the reverse. Domestic institutions are often not sufficient to protect the rights of local companies, communities, or others that have been harmed by transnational companies. The imbalanced ISDS system that allows access only in one direction further exacerbates the existing asymmetries of legal systems and access to justice that privileges corporations and leaves few avenues for holding corporations accountable.

The global investor court could also harm public access to justice by reversing judicial decisions from national courts that uphold human rights, such as in *Chevron v. Ecuador*. In this case, an Ecuadorian court ordered Chevron to pay damages for contamination resulting from the company's oil and gas activities. Chevron took its case to an arbitration panel, arguing that the Ecuadorian courts had violated a bilateral investment treaty. The panel agreed, ordering Ecuador to suspend enforcement of its domestic judgment. Ecuador was also required to pay $112 million in compensation to Chevron.[65]

By failing to allow those harmed by an investment to bring their claims to the proposed court, the Commission proposal precludes the possibility of the court hearing any claims based on corporate obligations, such as those that could be included in future investment agreements, international accords, or which emerge from existing human rights standards applicable to the conduct of business.[66]

Access to justice and equality before the law are fundamental principles of the rule of law.[67] The United Nations Sustainable Development Goals are a set of globally agreed upon objectives that act as guideposts for national and international action on the world's greatest challenges. Under these goals, states commit to "Promote the rule of law at the national and international levels and ensure equal access to justice for all".[68] By proposing to create a court that allows only foreign corporations to file claims, the Commission is failing to ensure equal access to justice and supporting the growth of corporate power.

DANGER #4:
INVESTOR RIGHTS WITHOUT INVESTOR OBLIGATIONS

While trade and investment agreements grant strong rights for investors, they impose no meaningful obligations on them. For example, when Ecuador cancelled a contract with a mining company because the company violated domestic law, the mining company challenged this decision. The tribunal found that even when an investment agreement requires compliance with host state laws and the investor has violated those laws, the investor can still sue the state under the investment agreement.[69] According to the UN Special Rapporteur on the rights of indigenous peoples, these imbalances contribute to "a dangerous accumulation of power among international corporate actors, which impedes states' abilities to act as an effective regulator and protector of human and indigenous peoples' rights".[70] A global institutional structure to enforce these rights would not only legitimize this dangerous regime, but also protect it from future efforts to regulate transnational corporations and investment flows.[71]

Unlike the controversial Multilateral Agreement on Investment (MAI) - which was negotiated, but failed in the OECD in the 1990s - the Commission proposal for a global investor court makes no references to corporate obligations, such as human rights due diligence. Nor does it include any safeguards to deny access to the court for investors who have violated or participated in violations of national or international law. Instead, the proposal reflects an assumption that corporate rights, and the institutions set up to enforce them, are unconnected to corporate responsibilities.

As renowned investment law expert Gus van Harten, Professor at Osgoode Hall Law School, argues: "If a multilateral investment court does not incorporate foreign investor responsibilities, it will exacerbate a fundamental imbalance in ISDS. In such circumstances, it would be better to terminate these special rights for foreign investors in favour of the protections available to all market actors", such as, for example, through domestic law.[72]

The court creates "a parallel and preferential legal system
for foreign investors that undermines domestic legal institutions and courts".
Columbia Center on Sustainable Investment[73]

DANGER #5:
UNDERMINING DOMESTIC COURTS AND DEMOCRATIC INSTITUTIONS

The proposed global investor court has the potential to undermine domestic courts and democratically enacted laws, thereby eroding democracy. A permanent forum for ISDS, the court would hear corporate challenges to judicial decisions and legislative measures, which are normally subject to a country's democratic processes and oversight. One study has calculated that over 80% of ISDS cases challenged judicial decisions or legislative measures.[74] Final decisions at the global investor court, however, would be unaccountable to any democratic oversight.

The multilateral corporate court would also deprive domestic courts of the opportunity to resolve disputes within the context of national laws. This is "an express disempowerment of the domestic courts".[75] For example, the proposed global investor court could address EU laws, which are exclusively within the jurisdiction of the European Court of Justice.

The Commission proposal does not include a requirement for the exhaustion of local remedies, which requires individuals to bring their cases to domestic courts before bringing international proceedings against the state. Although required in other areas of international law, such as in the international human rights system, ISDS and its multilateral twin would allow companies to skip this step.[76] The EU has previously said that the requirement for exhaustion of domestic remedies is unpopular in investment agreements because it "is considered to increase the cost and duration of litigation".[77] Thus, the Commission prioritizes reducing the cost to corporations of challenging national laws over protecting national democratic institutions. In doing so, the Commission favors corporations over all others, who bear the costs of litigation in domestic courts.

Furthermore, the proposed global investor court would not only allow foreign corporations to side-step domestic law, but also receive compensation for financial losses caused by these laws, which might not be available under domestic legal systems. If the proposed investor court ordered governments to pay corporations for profits lost due to compliance with domestic law, it would undermine the domestic system, which has already established both the nature of the laws and the ramifications for when those laws are not followed.[78] Instead, ISDS creates a parallel system for corporations whereby those domestic laws, and the consequences of disobeying them, is entirely different.

The European Parliament has recommended the Commission ensure that "the jurisdiction of courts of the EU and of the Member States is respected".[79] Similarly, the European Economic and Social Committee has cautioned that "it is absolutely vital for compliance of ISDS with EU law to be checked".[80] But the EU's proposal would only undercut EU and national courts.

DANGER #6:
BIASES AND CONFLICTS OF INTERESTS

A small number of arbitrators decide the majority of ISDS cases, many of whom have ties to large corporations and widespread conflicts of interest. With an interest in growing their business and expanding their power, they are pre-disposed to favor corporate profits over the public interest.[81] Several European Commission papers suggest that it wants to keep this tight-knit club at the center of the new global ISDS system.

The Commission asserted that it would be "desirable" that the members of its proposed dispute settlement mechanism have "previous experience in international investment law".[82] Thus, the judges on the new global investor court might be the very same small group of people who have repeatedly interpreted investment law expansively, prioritizing the protection of the property and economic interests of transnational corporations over the rights of states to regulate and people's right to self-determination.[83] For example, in a study analyzing how arbitration panels have addressed the question of jurisdiction, i.e., whether the case is properly before them or not, the author found that the panels were likely to allow the case to go forward, even when immediate ownership of the company was in a third state not party to the investment agreement. They were also more likely to allow cases brought by minority shareholders, even when the treaty did not explicitly allow this.[84]

In a related study examining how panels interpreted substantive investor rights, the author also found that arbitrators were likely to interpret these rights broadly, in favor of the investor. For example, when the question of whether a state had violated the standard of fair and equitable treatment, arbitrators overwhelmingly interpreted this term to include novel conceptions of the state's obligations, such as "unreasonable," that went beyond the conventional understanding of this concept under international law, such as "willful disregard of due process of law".[85]

In today's ISDS system, these expansive, investor-friendly interpretations of the law mean more business for the arbitrators. Because only investors bring ISDS cases, an expansive interpretation of ISDS jurisdiction and substantive investor rights mean that the system pays off for them. This increases the likelihood of future cases – and thereby the profits of the arbitrators, who earn more as more cases are filed. While the judges at the proposed global investor court would not have such a financial incentive to allow cases to go forward (because they would have a fixed salary), they would have a similar incentive to expand their power and the authority of their court. It's along these lines that Judge Allan Rosas of the European Court of Justice has warned of the "institutionally backed power strategy" that a special court for investors could pursue, risking to accentuate some of the biases in today's ISDS system.[86]

DANGER #7: UNDERMINING INTERNATIONAL HUMAN RIGHTS, ENVIRONMENTAL, AND LABOR LAW

The global investor court would make international investment law more powerful while weakening the authority of international human rights, labor, and environmental law by creating an international institution that elevates corporate rights and ignores the international laws that temper those rights. Human rights and labor rights bodies, multilateral environmental agreements, and relevant experts have increasingly recognized that the issues raised in these once disparate fields are integrally related, and that courts and states alike must recognize these linkages in resolving disputes.[87] Arbitration panels, by contrast, have systematically declined to interpret investment protections in light of international human rights, labor, and environmental law.[88] Thus, investment protection has developed as a separate strand of international law.[89] This disconnect contributes to the concentration of corporate power, since enforceable investment laws are viewed in isolation from weaker and unenforceable laws regarding corporate obligations.

Thus, rather than support "legal correctness" (through reviews of legal error by an appellate mechanism), as the Commission claims, the proposed global investor court would institutionalize a legal regime that entirely ignores human rights and environmental laws and contributes to the fragmentation of international law, at the expense of laws that protect the public interest.

DANGER #8:
SABOTAGING ATTEMPTS TO ADDRESS THE REAL PROBLEMS OF ISDS

The Commission's proposed global investor court threatens to impede governments from taking truly meaningful steps to minimize the risks of investor attacks. The creation of the global investor court could de-legitimise effective measures, such as the termination or re-negotiation of investment treaties or the adoption of model treaties with limited substantive investment protection standards or access to ISDS.

With limited time and resources, nations should instead be focused on limiting ISDS and securing the policy space they need to address issues such as climate change and inequality.

Any efforts to increase investment must be rooted in promoting sustainable development and in addressing pressing issues such as climate change. The proposal does nothing to harness investment for these purposes or to safeguard the right to regulate.[90]

ISDS CASES THAT CHALLENGE PUBLIC INTEREST MEASURES AND WOULD BE POSSIBLE UNDER THE PROPOSED GLOBAL ISDS

As the European Commission proposal would not address substantive rights, which are granted to investors in trade and investment agreements, the global investor court would hear the exact types of cases that led to such strong opposition to ISDS.

There is nothing in the Commission proposal that prevents companies from challenging government decisions to protect health and the environment, nor anything to prevent the court's judges from ordering states to pay billions in taxpayer compensation to corporations for state action on legitimate public policy measures. Each of the following ISDS challenges could also be launched at the proposed investor court:

> Whether a temporary fracking moratorium adopted to provide time for the government to determine a proper regulatory approach for protecting the public from the harmful effect of hazardous and carcinogenic chemicals is arbitrary, capricious, and an expropriation of a mining company's profits.[91]

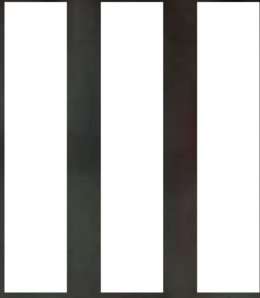
> Whether a government must compensate a company when the government raises the minimum wage.[92]

> Whether the government must compensate a company after denying a mining permit due to environmental impacts.[93]

> Whether a government must compensate an energy company for nearly five billion euros for transitioning away from nuclear energy in response to widespread public opposition.[94]

> Whether a government must pay for the damages awarded in domestic court against an oil company for pollution and environmental damage.[95]

> Whether EU governments must pay damages for measures taken in response to the economic crisis.[96]



REACTIONS TO THE PROPOSAL FOR A GLOBAL INVESTOR COURT

Opposition to the creation of a global investor court has been overwhelming. More than 340,000 EU citizens called on the EU to abandon plans to establish a global corporate court system.[97] These citizens were joined by research institutes, academia, trade unions, governments, and civil society organizations fighting to protect the environment, human rights, women, development, farmers, workers, and consumers.[98]

The consultation conducted by the European Commission presented multiple-choice questions about whether procedural issues were best addressed by the current ISDS system or by the proposed global ISDS mechanism, leaving no opportunity for respondents to indicate that neither option is acceptable. Yet, despite this constrained format, the majority of respondents found a way to express their opposition to investor rights and to the proposed global corporate court. Among the responses to the Commission's proposal, a small minority indicated clear support for the proposed investor's court or supported ISDS generally (16%). Even more took no position on whether a court should be established (20%). Nearly two thirds (64%) of the responses opposed the global investor court altogether or insisted that substantive changes to the investor-state dispute system must be made.[99]

For example, the European Trade Union Confederation (ETUC) responded that "The current MIC proposal does not address [our] central… demand that investor rights should be balanced by an equivalent legal mechanism accessible by trade unions and other stakeholders to enforce the investors obligations".[100] The Trades Union Congress from the UK pointed out that "[T]he proposed Multilateral Investment system would create significant social costs as it stands to undermine domestic legal systems and poses a threat to laws that protect workers and society more broadly".[101]

Academic institutions were opposed to the Commission's proposal. According to the Columbia Center on Sustainable Investment, "The proposal to set up an Investment Court will enhance the worst features of the existing ISDS system".[102] Gus Van Harten, an investment expert at the Osgoode Hall Law School, explained that the proposed court would be "a major expansion of foreign investor protections by institutionalizing them at the multilateral level".[103]

Digital rights activists, environmentalists, consumer organizations, and health groups also opposed this corporate assault on democracy. For example, BEUC, the umbrella association of European consumers organizations observed that "By establishing a [Multilateral Investment Court], the EU and its partners would further institutionalize and justify the need to have a parallel judicial system for foreign investors". [104]

"By bypassing national law you de facto weaken national institutions. And development is a good deal about strengthening your national institutions, including the judiciary."
Guillaume Long, Ambassador, Ecuador Permanent Mission to Geneva[105]

Most EU Member State governments, on the other hand, seem willing to consider the creation of a global investor court. In June 2017, many EU Member States backed the launch of discussions about the court in the United Nations Commission of International Trade Law (UNCITRAL), a key hub of today's regime of corporate rights, where the EU will now pursue its project.[106]

Outside of the EU, the picture is more mixed. In their recent trade deals with the EU, Canada and Vietnam have committed to "pursue with other trading partners the establishment of a multilateral investment tribunal".[107] Canada and the EU have organized joint events to gather support for the corporate court,[108] and other countries, such as South Korea and Argentina have expressed support for the MIC. Many other countries have expressed reservations, including Bolivia, India, Indonesia, Japan, the US,[109] South Africa, and Ecuador.[110] Many countries' positions on the proposed court, however, are in flux.

The business reaction to the global investor court proposal has been mixed, too. On the one hand, corporations and their lawyers are well aware that some changes are required to save the current ISDS system from sinking. The Austrian Federal Economic Chamber (WKÖ), for example, hopes that "a multilateral solution regarding investment dispute resolution… could… lead to wider public acceptance and legitimacy of the system".[111] It is along these lines that some of Europe's most powerful corporate lobby groups have voiced overall support for the investor court proposal. The Federation of German Industries (BDI), for example, "approves of the long-term goal of setting up a multilateral investment court"[112] and the European employers' federation BusinessEurope "welcomes the idea".[113]

On the other hand, the same corporate lobby groups are concerned that the global investor court proposal would curb the power that corporations and their lawyers currently have over the ISDS process. For example, they would prefer to continue choosing the arbitrators who decide ISDS cases without any limitations. Consequently, several business lobby groups have come out strongly against the idea of a closed list of publicly appointed judges who would be assigned to cases on a random basis and banned from working on the side as lawyers in other ISDS cases.[114]

This creates a convenient situation for the European Commission, because the negative reaction from the business sector suggests that the global investor court proposal falls somewhere between investor-friendly demands put forward by industry and public-interest driven positions by civil society groups. This makes it easy for the Commission to sell its proposal as a compromise.

"The political situation is convenient for the EU Commission.
Interest groups from all sides are criticising its reform agenda.
So, the Commission can claim to have responded to the public criticism
and presented a balanced proposal."
Max Bank, Lobbycontrol[115]

Behind the scene, however, ISDS proponents seem well aware that the proposal for a permanent investor court "wouldn't change much" because the far-reaching rights for investors essentially "remain the same," as stated by an investment lawyer who makes money when companies sue states.[116] The European Services Forum, a lobby outfit banding together service players such as Deutsche Bank, IBM, and Vodafone, makes a similar argument, commenting that "the substantive text of investment protection and the conditions to trigger a dispute," as opposed to the details of the dispute settlement process, "will determine if an investor can trust the system".[117] In other words: while big business is not happy that it might lose some control over the ISDS process, it will not lose what really counts: the greater rights that foreign investors are granted in thousands of treaties around the world.

A REAL SOLUTION: A TREATY TO REGULATE CORPORATIONS

Within the Human Rights Council of the United Nations, countries have started to negotiate the content of an international legally binding instrument to regulate transnational corporations and other business enterprises. During these negotiations, the EU has the opportunity to choose the alternate path, reaffirming the obligations of nations to protect their citizens and holding multinational companies accountable for violations of human rights and for harms to the environment. The EU should ensure that the treaty:

- Protects people from corporate abuse no matter where that harm occurs, whether in a country where a corporation is based or where a corporation is operating.
- Holds corporations legally accountable for the harms they cause directly, as well as the harms they cause through their subsidiaries and supply chains.
- Requires corporations to conduct mandatory due diligence to identify and rectify harms before they occur.
- Ensures the supremacy of human rights and environmental law over trade and investment.
- Provides people with access to justice and remedies for violations of their human rights.

COUNTERING GLOBAL CORPORATE DOMINANCE

The European Commission's proposal for a global investor court further widens the gap between rich and poor and is yet another attempt to secure investor rights and remedies, consistent with the EU's efforts to lock in and expand the current system of corporate privileges wherever it can, whether in trade agreements or multilateral institutions.[118]

As demonstrated above, the creation of a new court to hear investor claims would worsen the power imbalance that grants rights, protections, and compensation to corporations at the expense of the public interest. The court would also undermine democratic institutions and lawmaking.

TEN, OF MANY, REASONS TO OPPOSE THE MULTILATERAL INVESTMENT COURT ARE:

1. The citizens of the EU don't want the global investor court.
2. There are no proven benefits of the ISDS system to wider society.
3. Institutionalizing ISDS on a global level will legitimize and entrench a parallel legal system designed to empower transnational corporations.
4. By allowing corporations to bypass domestic legal systems, the court would subsidize the cost of corporate litigation used to protect private property interests while undermining the sovereignty of national courts.
5. The global investor court would allow international businesses to enforce legal rights without requiring them to fulfill their legal obligations, such as complying with domestic and international law.
6. The global investor court would deny access to those harmed by foreign investors.
7. The court would further deter states from regulating in the public interest.
8. The adjudicators would be the same biased arbitrators who have decided past ISDS disputes.
9. The court would substitute the accountable decision-making process of democratic institutions and national courts with an unaccountable one.
10. A global institution for ISDS will exacerbate the elevation of investor's rights over international human rights and environmental laws.

Rather than create a court to legitimize ISDS, countries should reaffirm and reassert their rights and their responsibilities to regulate in the public interest.

To strengthen democracy, address the many global crises we are facing, and be "legitimate and accepted by citizens," as the EU and Canada declare that efforts to address the problems of ISDS should be,[119] the solution must be comprehensive and must be guided by the following principles:

- Eliminate special rights for corporations. Countries can do this by cancelling their BITs, following the example of India,[120] Indonesia, Ecuador, Bolivia, Venezuela, and South Africa.[121] Bolivia, Ecuador, and Venezuela have also renounced the International Centre for Settlement of Investment Disputes Convention.
- Refuse to include ISDS in future trade and investment agreements, including the proposed agreements between the EU and China, Indonesia, Japan, Mexico, Chile, Myanmar, and Vietnam.
- Effectively regulate and hold corporations accountable. States must prioritize their negotiation of the UN treaty to regulate transnational corporations and other business enterprises and ensure that the multilateral reform of disputes arising from investment agreements is addressed in the context of this treaty.
- Focus on strengthening the domestic judiciary and improving access to justice for everyone, including nonresident individuals and small and medium sized companies. For example, South Africa codified investment protection provisions in domestic law.[122]
- Protect and strengthen human rights and the environment. Countries should focus their cooperation on and dedicate their resources to agreements and concrete measures that support and protect human rights, public health, and the environment. States must not allow the threat of costly arbitration awards to limit their ability to enact and enforce laws that protect people and the environment. Any policy addressing investors' rights and obligations must be founded on a commitment to the supremacy of human rights and social and environmental justice.

USEFUL RESOURCES

THE MULTILATERAL INVESTMENT COURT

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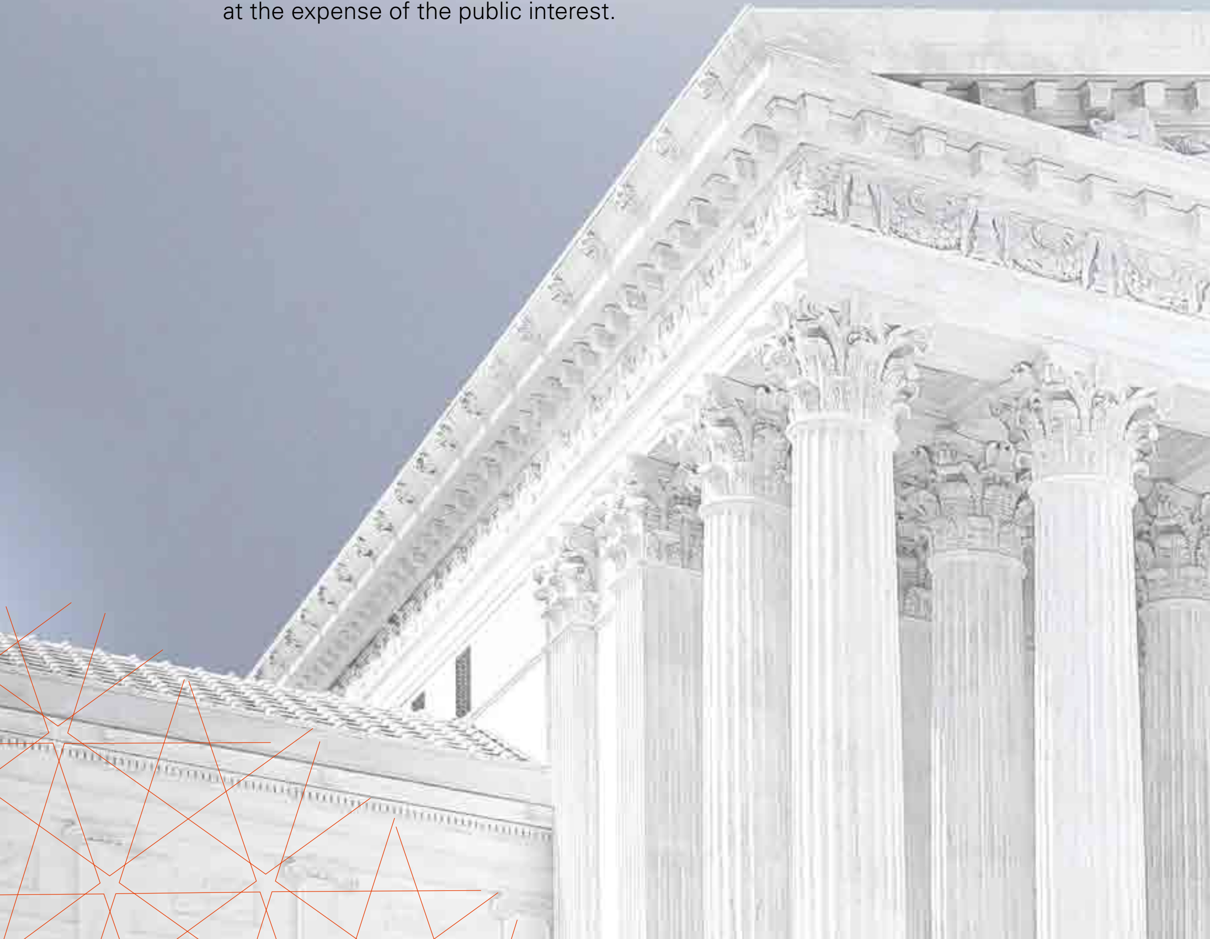
Funded by the **German Federal Ministry for Economic Cooperation and Development**

The European Commission proposal for a global investor court for investor-state dispute settlement (ISDS) – known as the Multilateral Investment Court – threatens to enshrine, expand, and entrench the current system of corporate privilege in future trade deals. A world court for corporations would be the capstone in the architecture of corporate impunity, undermining democratic institutions and lawmaking, and worsening the power imbalance that grants rights, protections, and compensation to corporations at the expense of the public interest.



Selected Resources Related to UNCITRAL's Investment Arbitration Discussions

April 2018

Recommendations for Governments on UNCITRAL Investment Arbitration Discussions

Public Citizen https://www.citizen.org/sites/default/files/public-citizen-analysis-and-recommendations-for-governments-attending-uncitral.pdf

Memo outlining Public Citizen's recommendations for governments engaging in UNCITRAL's Working Group III ISDS discussions. Moving away from ISDS altogether is the wisest course for governments because (1) states have not received tangible benefits from ISDS agreements, while costs have been tangible and substantial, and (2) proposed "reforms" would not protect governments from mounting ISDS liability or eliminate the structural conflicts of interest inherent in the system.

Termination of Bilateral Investment Treaties Has Not Negatively Affected Countries' Foreign Direct Investment Inflows

Public Citizen https://www.citizen.org/sites/default/files/pcgtw_fdi-inflows-from-bit-termination_0.pdf

This report provides an analysis of official government statistics on foreign investment in five countries that have terminated bilateral investment treaties (BITs) – Ecuador, Bolivia, South Africa, Indonesia and India – that reveals that investment flows from former BIT partner countries were more likely to increase rather than decrease after BIT termination.

Investment Court System Put to the Test: New EU proposal Will Perpetuate Investors' Attacks on Health and Environment

Canadian Center for Policy Alternatives (CCPA), Corporate Europe Observatory (CEO), Forum Umwelt & Entwicklung, Friends of the Earth Europe (FoEE), Transnational Institute (TNI) www.foeeurope.org/investment-court-system-put-to-test

This report shows that dangerous attacks against regulations protecting the public interest and the environment would not be prevented by the European Commission's new investment protection proposals for future trade agreements. Five iconic ISDS cases are examined and it is shown that all five could still happen under the Investment Court System - the revamped ISDS adopted by the European Union.

The Multilateral Investment Court Locking in ISDS

Friends of the Earth Europe http://www.foeeurope.org/multilateral-investment-court-locking-ISDS-241117

The European Commission is planning to establish a so-called Multilateral Investment Court (MIC). The court is supposed to replace the controversial investor-state dispute settlement (ISDS) mechanism, but we have identified 10 key problems with the new proposal, in which corporations still enjoy unjustified privileges at the expense of people, the environment and our democracy.

Crucial Ingredients for Meaningful Reform at UNCITRAL: Withdrawal of Consent to Arbitrate and Termination of Existing Treaties

Lise Johnson, Lisa Sachs, Brooke Guven, and Jesse Coleman, Columbia University's Columbia Center on Sustainable Investment (CCSI) ccsi.columbia.edu/2018/04/18/crucial-ingredients-for-meaningful-reform-at-uncitral-withdrawal-of-consent-to-arbitrate-and-termination-of-existing-treaties/

UNCITRAL's Working Group III has been entrusted with a mandate to explore reform of ISDS, including, potentially, through a multilateral instrument capable of reforming existing treaties. However, these discussions are likely to be slow, and outcomes uncertain. In the meantime, governments and their stakeholders remain tied to an outdated system that is widely acknowledged to be ill-suited for modern investment

policy objectives, with increasingly concerning consequences. Two near term options that could accompany longer-term reform are (1) a joint instrument on withdrawal of consent to arbitrate; and/or (2) a joint instrument on termination.

Implications of Achmea: How the Achmea Judgment Impacts Investment Agreements with Non-EU Countries
ClientEarth and Center for International Environmental Law (CIEL) www.documents.clientearth.org/library/download-info/implications-of-achmea-judgment/

The report analyzes how the March 2018 ECJ decision — which found investor-state dispute settlement (ISDS) provisions in bilateral investment agreements between EU countries incompatible with EU law — extends beyond intra-EU trade deals and could apply to any EU agreement with third parties, a finding that could radically reshape the future of investor-state dispute settlement.

Legality of Investor State Dispute Settlement Under EU law
ClientEarth https://www.documents.clientearth.org/library/download-info/legality-of-investor-state-dispute-settlement-under-eu-law/

This study finds that including investor-state dispute settlement (ISDS) mechanisms in EU trade agreements may not be compatible with EU law, including the new 'Investment Court System' proposed by the Commission on September 16 2015.

A World Court for Corporations: How the EU Plans to Entrench and Institutionalize Investor-State Dispute Settlement
CIEL, Seattle to Brussels Network (S2B) www.ciel.org/wp-content/uploads/2017/12/AWorldCourtForCorporations.pdf

An assessment of the EU's proposal for a Multilateral Investment Court, concluding that the court would do nothing to solve the problems with ISDS.

Reply to the European Commission's Public Consultation on a Multilateral Reform of Investment Dispute Resolution
International Institute for Sustainable Development (IISD) http://www.iisd.org/library/reply-european-commission-s-public-consultation-multilateral-reform-investment-dispute

In this commentary, IISD rejects the Commission's ICS proposal as it fails to address most of the flaws that have led to public concern regarding ISDS. IISD further rejects the MIC proposal, which would cement the flawed ISDS regime and, worse, extrapolate it to the multilateral level. Despite the procedural improvements brought by both proposals vis-à-vis traditional ISDS, they fall short of advancing satisfactory alternatives to the unidirectional, exclusionist and unbalanced nature of the existing ISDS regime.

Transatlantic Consumer Dialogue's Response to the European Commission's Investor-State Dispute Settlement "Reform" Proposal
Transatlantic Consumer Dialogue www.tacd.org/wp-content/uploads/2015/02/TACD-resolution-ICS-proposal.pdf

Policy paper by largest consumer organizations on both sides of the Atlantic analyzing the European Commission's ISDS reform proposals, concluding that "simply renaming a system that allows one class of interests – foreign investors – to attack in extrajudicial tribunals consumer protections that apply to domestic and foreign entities alike does not remedy the fundamental structural problems of the EU's proposal or any other ISDS regime."

ISDS Quote Sheet: Selected Statements and Actions Critical of ISDS From Around the World and Across the Political Spectrum
Public Citizen www.citizen.org/sites/default/files/selected_statements_and_actions_against_isds_0.pdf

A list of quotes and actions demonstrating the breadth of opposition to ISDS, including among U.S. state and local government officials and associations; high-level U.S.

judicial, executive and legislative officials; governments around the world, international organizations; business and pro-free trade voices; civil society; and press accounts.

230 Law and Economics Professors Advocate the Removal of ISDS From U.S. Pacts
Public Citizen www.citizen.org/system/files/case_documents/isds-law-economics-professors-letter-oct-2017_2.pdf

Nobel laureate Joseph Stiglitz, former Labor Secretary Robert Reich, former California Supreme Court Justice Cruz Reynoso, Columbia University professor and UN Senior Adviser Jeffrey Sachs, and prominent New York professor and advocate Zephyr Teachout are among the signers, many of whom supported past pacts with ISDS.

Case Studies: Egregious Investor-State Attacks on Public Interest Policies
Public Citizen www.citizen.org/sites/default/files/egregious-investor-state-attacks-case-studies_4.pdf

Short, accessible summaries of some of the most egregious investor-state cases, organized by the types of public interest policies that have been attacked: health (medicines, tobacco and toxins), environmental (toxic pollution, climate change, mining, energy and public safety), financial stability, essential services, labor rights, and development and industrial policy.

Opinion on the Establishment of an Investment Tribunal in TTIP - the Proposal From the European Commission
DRB www.foeeurope.org/sites/default/files/eu-us_trade_deal/2016/english_version_deutsche_richterbund_opinion_ics_feb2016.pdf

Germany's largest professional organization of judges and public prosecutors, the German Magistrates Association (known by its German acronym, DRB) states in this opinion paper that "the establishment of an ICS [investment court system] is the wrong way to guarantee legal certainty."

Legalization, Diplomacy, and Development: Do Investment Treaties De-politicize Investment Disputes?
Geoffrey Gertz et al.https://www.sciencedirect.com/science/article/pii/S0305750X18300688

First academic article looking at empirical evidence for the claim that investment treaties depoliticise investment disputes. It concludes: (1) Investment treaties have no effect on the likelihood of diplomatic intervention and (2) There is no empirical support that US treaties 'de-politicize' investment disputes.

Societal Benefits and Costs of International Investment Agreements: A Critical Review of Aspects and Available Empirical Evidence
Joachim Pohl, Organisation for Economic Cooperation and Development (OECD) https://www.oecd-ilibrary.org/finance-and-investment/societal-benefits-and-costs-of-international-investment-agreements_e5f85c3d-en

Meta-study on the costs and benefits of IIAs finds no evidence that IIAs increase investment flows or that businesses are aware of IIAs when making an investment decision.

Towards a More Diligent and Sustainable System of Investment Protection
ClientEarth https://www.documents.clientearth.org/library/download-info/towards-a-more-diligent-and-sustainable-system-of-investment-protection/

ClientEarth's response to the Commission's consultation on plans for a multilateral investment court sets out five key recommendations. The multilateral court may replace the controversial investor-state dispute settlement (ISDS) mechanisms that are currently included in EU trade agreements.

Investor-State Dispute Settlement: What Are We Trying to Achieve? Does ISDS Get Us There?
Lise Johnson, Brooke Skartvedt Guven, and Jesse Coleman (CCSI) http://ccsi.columbia.edu/2017/12/11/investor-state-dispute-settlement-what-are-we-trying-to-achieve-does-isds-get-us-there/

In this blog post, the authors analyze whether International Investment Agreements and ISDS are effective at achieving their commonly stated objectives: (1) promote investment flows; (2) depoliticize disputes between investors and states; (3) promote the rule of law; and (4) provide compensation for certain harms to investors.

Costs and Benefits of Investment Treaties: Practical Considerations for States
Lise Johnson, Lisa Sachs, Brooke Guven, and Jesse Coleman (CCSI) http://ccsi.columbia.edu/2018/04/20/costs-and-benefits-of-investment-treaties-practical-considerations-for-states/

This paper analyzes the expected benefits of investment treaties, including: increased inward investment, increased outward investment, and depoliticization of investment disputes. It then considers evidence of the costs of investment treaties, including: litigation, liability, reputational cost, reduced policy space, distorted power dynamics, reduced role for domestic law-making, and uncertainty in the law. The authors set forth practical steps that states can take relating to both existing treaties as well as future treaties with an objective of increasing desired benefits and decreasing unexpected and high costs.

Columbia Center on Sustainable Investment Position Paper in Support of Opinions Expressed in Response to the European Commission's "Public Consultation on a Multilateral Reform of Investment Dispute Resolution"
CCSI ccsi.columbia.edu/files/2017/03/CCSI-EU-Court-public-consultation-submission-15-Mar-17-FINAL.pdf

This Position Paper was submitted to support CCSI's responses to the European Commission's public consultation questionnaire, and addresses the reasons for which CCSI was unable to answer the majority of the substantive, multiple choice questions on the proposed Multilateral Investment Court (MIC) and/or Multilateral Appeal Tribunal (MAT) that were posed in the questionnaire. The questions in the EC's questionnaire were consistently phrased in such a way that respondents had to indicate that either the existing ISDS system or the MIC/MAT best solves the problem in question. In many cases, no feasible response was provided for respondents to indicate that neither ISDS nor the MIC/MAT is sufficient. CCSI outlined concerns about the MIC and MAT that were not captured by the questionnaire.

Inclusion of ISDS Arbitration or an Investment Court in the TTIP: Unresolved Concerns
Brooke Skartvedt Guven (CCSI) http://ccsi.columbia.edu/files/2016/04/160428-TTIP-Stakeholder-Session-The-Investment-Chapter-Unresolved-Concerns-FINAL.pdf

In this transcript from a TTIP Stakeholder Session in April 2016, the speaker discusses the costs and benefits of the current ISDS mechanism and explains why implementing an investment court to replace ad hoc arbitration will not solve all of these problems.

The Settlement of Investment Disputes: A Discussion of Democratic Accountability and the Public Interest
Lise Johnson and Brooke Skartvedt Guven (CCSI) www.iisd.org/itn/2017/03/13/the-settlement-of-investment-disputes-a-discussion-of-democratic-accountability-and-the-public-interest-lise-johnson-and-brooke-skartvedt-guven/

This article looks at the settlement of ISDS claims prior to the issuance of an award, and considers certain threats raised by the settlement of these disputes, including threats to: principles of good governance (including government accountability), the rule of law, transparency, and respect for citizens' rights and interests under domestic law and international human rights law. It suggests proposals for regulation of the settlement of ISDS claims.

The Impact of Investment Treaties on Governance of Private Investment in Infrastructure
Lise Johnson (CCSI) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2411575

This paper discusses the circumstances affecting when an investment treaty will apply to a private investment in infrastructure and also highlights some of the ways that

investment treaties can impact governance of infrastructure development and operation. While focusing on the relationship between investment treaties and investments in infrastructure, this paper is also relevant for the connections between investment treaties and other activities involving investor-state contracts (or quasi-contractual relationships) such as investments in the extractive industries.

Investment Treaties, Investor-State Dispute Settlement and Inequality: How International Rules and Institutions Can Exacerbate Domestic Disparities
Lisa Sachs and Lise Johnson (CCSI) – forthcoming chapter in in José Antonio Ocampo (ed.), INTERNATIONAL RULES AND INEQUALITY: IMPLICATIONS FOR GLOBAL ECONOMIC GOVERNANCE (Columbia University Press, forthcoming 2018. http://ccsi.columbia.edu/files/2017/11/ISDS-and-Intra-national-inequality.pdf

Over roughly the past four decades, government officials from around the world have been erecting a framework composed of thousands of bilateral and multilateral investment treaties with major–but under-appreciated–implications for intra-national inequality. Long imperceptible, the size and power of this framework for economic governance has increasingly become apparent. This paper analyzes the various ways in which international investment treaties impact intranational inequality, with specific concerns surrounding the ways in which they can exacerbate intranational disparities in legal, political and economic terms.

Columbia Center on Sustainable Investment Submission to the UN Special Rapporteur on Extreme Poverty and Human Rights Re: Country Visit to the United States
CCSI http://ccsi.columbia.edu/files/2017/10/CCSI-Input-to-US-visit-Special-Rapporteur-on-Extreme-Poverty-and-Human-Rights-FINAL.pdf

In this submission, CCSI sets forth the ways in which the United States' international investment agreements raise tensions, and can potentially create conflicts with, the United States' human rights obligations, including those that apply extraterritorially, and exacerbate conditions of poverty, extreme poverty, and inequality.

Columbia Center on Sustainable Investment Input to the UN Working Group on Business and Human Rights Regarding Guidance on Human Rights Defenders and the Role of Business
CCSI http://ccsi.columbia.edu/files/2016/05/Input-regarding-guidance-on-human-rights-defenders-and-the-role-of-business-REV.pdf

This input analyzes the possibility that the international investment law regime, comprised of thousands of bilateral and multilateral treaties, may actually exacerbate the potential for repression and criminalization of human rights defenders.

Columbia Center on Sustainable Investment Submission Re: Criminalization and Attacks Against Indigenous Peoples Defending Their Rights: Proposals for Action to Prevent and Protect
CCSI http://ccsi.columbia.edu/files/2016/05/Input-regarding-criminalization-of-human-rights-defenders-16-March-18-FINAL.output.pdf

This submission analyzes the possibility that the international investment law regime, comprised of thousands of bilateral and multilateral treaties, may actually exacerbate the potential for repression and criminalization of indigenous human rights defenders.

International Investment Agreements and the Rights of Indigenous Peoples: Workshop Outcome Document
Jesse Coleman and Kaitlin Cordes (CCSI) http://ccsi.columbia.edu/files/2016/11/Workshop-on-International-Investment-and-the-Rights-of-Indigenous-Peoples-Outcome-Document-November-2016.pdf

On May 12, 2016, the United Nations (UN) Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz, and the Columbia Center on Sustainable Investment hosted a one-day workshop on international investment and the rights of

indigenous peoples. The workshop was part of a series of consultations undertaken to support the Special Rapporteur's second thematic analysis on the impact of international investment agreements on the rights of indigenous peoples. The workshop brought together 53 academics, practitioners, indigenous representatives, and civil society representatives to explore strategies for strengthening the rights and interests of indigenous peoples in the context of international investment. The workshop also built on an earlier report by the Special Rapporteur setting out her concerns regarding the impact of investment and free trade agreements on the human rights of indigenous peoples.

International Investment Agreements: Impacts on Climate Change Policies in India, China, and Beyond

Brooke Skartvedt Guven and Lise Johnson (CCSI) – chapter of *Trade in the Balance: Reconciling Trade and Climate Policy* http://ccsi.columbia.edu/files/2016/12/Trade-in-the-Balance-International-Investment-Agreements-Impacts-on-Climate-Change-Policies-in-India-China-and-Beyond-Nov-2016.pdf

Mitigating and adapting to climate change will require a fundamental reorientation of our global economy as we move away from fossil fuels and transition to a low carbon and climate-resilient world. This paper analyzes the ways in which international investment agreements could potentially play a key role in government efforts to scale up and (re)direct investments to meet climate change mitigation and adaptation needs. As presently drafted and interpreted, however, these IIAs represent a missed opportunity to advance climate change solutions and, worse, may even frustrate them. This paper critically assess the climate-policy consistency of IIAs and how to (re)shape them accordingly.

Columbia Center on Sustainable Investment Submission to the Committee on Economic, Social and Cultural Rights on the Draft General Comment on "State obligations under the ICESCR in the Context of Business Activities" (General Comment No. 24)

CCSI http://ccsi.columbia.edu/files/2017/01/CCSI_Submission-for-DGD-Jan.-2017.pdf

While human rights are critical to ensuring sustainable international investment, CCSI has observed that the human rights framework is often ignored or misunderstood in the context of investment. CCSI's submission supports the role that the General Comment will play an important role in clarifying States' obligations under the ICESCR as they relate to investment regimes and projects. The submission focuses on the draft General Comment's discussion of: (1) host and home states' obligations as they relate to international investment agreements (IIAs), (2) extraterritorial obligations in the context of outward investment, and (3) obligations related to corruption issues.

Investor-State Dispute Settlement, Public Interest and U.S. Domestic Law

Lise Johnson, Lisa Sachs and Jeffrey Sachs (CCSI) http://ccsi.columbia.edu/files/2015/05/Investor-State-Dispute-Settlement-Public-Interest-and-U.S.-Domestic-Law-FINAL-May-19-8.pdf

This policy paper assesses the risks that investor-state dispute settlement poses to the development, enforcement and application of domestic laws. There is no compelling that warrants accepting the risk that ISDS poses to domestic legal systems.

The TPP's Investment Chapter: Entrenching, Rather than Reforming, a Flawed System

Lise Johnson and Lisa E. Sachs (CCSI) ccsi.columbia.edu/files/2015/11/TPP-entrenching-flaws-21-Nov-FINAL.pdf

This paper highlights issues in ISDS and how the TPP, which is labeled by some as a 21st Century Agreement, continues to take a flawed approach to ISDS.

State Control Over Interpretation of Investment Treaties

Lise Johnson and Merim Razbaeva (CCSI) http://ccsi.columbia.edu/files/2014/04/State-Control-over-Interpretation-of-Investment-FINAL-8.13.14.pdf

This note provides an overview of the legal options and practical mechanisms for states to address concerns regarding their existing international investment agreements.

Ripe for Refinement: The State's Role in Interpretation of FET, MFN, and Shareholder Rights
Lise Johnson (CCSI) http://ccsi.columbia.edu/files/2015/05/GEG-WP_101-Ripe-for-Refinement-The-States-Role-in-Interpretation-of-FET-MFN-and-Shareholder-Rights-Lise-Johnson_0.pdf

Many states have taken steps to refine and modernize their investment treaties by, among other steps, clarifying what were often vaguely worded standards, inserting provisions on procedural and jurisdictional questions, and expanding the express ability of states to issue binding interpretations on certain questions. This paper focuses on steps that states can take to address existing treaties and with respect to which they are still exposed to claims, litigation, and potential damages, and to mitigate their exposure.

Columbia Center on Sustainable Investment Submission to ICSID: Illustrative Suggestions for Amendments to the ICSID Arbitration Rules
CCSI http://ccsi.columbia.edu/files/2017/04/ICSID-Rule-Revisions-Comment-31-March-17-FINAL.pdf

In March 2017, CCSI submitted comments to the ICSID Secretariat regarding proposed revisions to ICSID's arbitration rules. CCSI's submission provided illustrative suggestions for amendments regarding the following issues: recognizing and safeguarding of the rights and interests of non-parties; improving transparency of the dispute resolution process; promoting transparency of ownership over investments; preventing actual and apparent conflicts of interest; addressing concerns raised by third-party funding; ensuring legitimacy of settlement agreements; and ensuring legitimacy of the rule revision process itself.

Aligning Swiss Investment Treaties with Sustainable Development: An Assessment of Current Policy Coherence and Options for Future Action
Lise Johnson (CCSI) http://ccsi.columbia.edu/files/2016/08/Aligning-Swiss-IIAs-with-SD-CCSI-June-2016-.pdf

This report provides a framework to help answer questions that states may have about whether and to what extent IIAs can and do support sustainable development, and applies that framework to a review of Swiss IIAs, but the framework is generalizable to analysis of any states' IIAs. The framework identifies five principles that should guide the content and application of IIAs (if and when the treaties are concluded) in order to align them with sustainable development objectives: (1) Maintain legitimate policy space and allow legal and regulatory frameworks to evolve over time to address new challenges and changing circumstances; (2) Do no harm; (3) Advance labor standards, human rights, and environmental protection; (4) Increase cross-border investment flows; and 5. Ensure policy coherence across relevant government policy spheres.

International Investment Agreements, 2015-2016: Review of Trends and New Approaches
Jesse Coleman, Lise Johnson, Lisa Sachs, and Kanika Gupta (CCSI) – in *Yearbook on International Investment Law and Policy*, edited by Lisa Sachs Lise Johnson ccsi.columbia.edu/files/2014/03/YB-2015-16-Chapter-2-Sachs-et-al.pdf

This article provides a review of trends and new approaches in investment treaties concluded in 2015 and 2016.

Investment for Sustainable Development: Views From the Global South
IISD http://www.iisd.org/sites/default/files/uploads/investment-sustainable-development-views-global-south.pdf

At the 9th Annual Forum of Developing Country Investment Negotiators, which took place in Rio de Janeiro, Brazil, in November 2015, negotiators and policy-makers from some 50 developing countries expressed their desire to develop a set of principles on investment from a developing country perspective, building on the United Nations Conference on Trade and Development's (UNCTAD) Investment Policy Framework for Sustainable Development. In response, a preliminary draft of a set of South–South Principles on International Investment for Sustainable Development was developed based on several consultation rounds. In the consultations, countries stressed the importance for developing countries to receive quality investment and acknowledged the

usefulness of a concerted effort to develop international policies to maximize the positive contribution investment can make to achieve the Sustainable Development Goals (SDGs). They identified the some priorities for investment policy-making from a developing country perspective.

State-State Dispute Settlement in Investment Treaties (IISD Best Practices Series)
Nathalie Bernasconi-Osterwalder, IISD http://www.iisd.org/library/best-practices-series-state-state-dispute-settlement-clause-investment-treaties

This paper looks at state–state dispute settlement provisions in international investment agreements. It examines the different mechanisms used to settle investment disputes, including judicial, quasi-judicial and arbitration procedures. It then looks at the different types of claims that can be brought under the typical state–state clause, which include diplomatic protection claims, interpretive claims and declaratory relief requests. The paper also analyzes how treaty and case law deal with the interaction of state–state and investor–state dispute settlement where the treaty provides for both. It concludes with recommendations on how state–state dispute settlement could be used as an alternative to investor-state arbitration, or, if both mechanisms are included, on how to define the relationship between the two and to strengthen the state parties' control over the interpretation of their treaty.

Rethinking Investment-related Dispute Settlement
Nathalie Bernasconi-Osterwalder, IISD www.iisd.org/itn/2015/05/21/rethinking-investment-related-dispute-settlement/

Investor–state dispute settlement (ISDS), a concept much unknown to the broader public and even top policy-makers only a year ago, is making headlines. States and regions have taken and are taking action through their bilateral and regional relations. New approaches to dispute settlement can be seen both in texts of concluded negotiations and in national or regional model treaties on investment. This piece presents several of the proposals for improving the existing regime, in both its procedural and substantive aspects. It also briefly looks at the importance of domestic laws and processes and of state–state dispute settlement—two readily available alternatives to the existing regime. Going beyond the idea of fixing the regime or turning to existing alternatives, this piece takes a step back and brings in new thinking, by starting from a fundamental question: what should investment-related dispute settlement mechanisms at the international level look like if they were to be built anew?

Exhaustion of Local Remedies in International Investment law (IISD Best Practices Series)
Martin Brauch, IISD www.iisd.org/library/iisd-best-practices-series-exhaustion-local-remedies-international-investment-law

The customary international law rule of exhaustion of local remedies (ELR) aims at safeguarding state sovereignty by requiring individuals to seek redress for any harm allegedly caused by a state within its domestic legal system before pursuing international proceedings against that state. In this advisory bulletin, part of IISD's Best Practices Series, we review state-of-the-art options and approaches to the ELR requirement in international investment law.

Investment-related Dispute Settlement: Reflections on a New Beginning
IISD http://www.iisd.org/library/investment-related-dispute-settlement-reflections-new-beginning

If investment-related dispute settlement mechanisms at the international level were to be built anew, what should they look like? That question was the focus of an interactive expert meeting hosted by IISD, on October 17 and 18, 2014, in Montreux, Switzerland. The group's expertise ranged from diplomacy, economics and law, to the fields of investment, human rights and trade. The experts agreed that the status quo of international investment-related dispute settlement was unsatisfactory, and there was much room for reform and new thinking. At the meeting, they explored alternative

models for settling investment disputes at the international level to supplement or replace existing mechanisms.

Investment-related Dispute Settlement: Towards an Inclusive Multilateral Approach
IISD http://www.iisd.org/library/investment-related-dispute-settlement-towards-inclusive-multilateral-approach

Building on the results of the 2014 meeting and recent developments in international practice regarding investment-related dispute settlement, IISD prepared a preliminary draft outline of an Agreement Creating an International Dispute Settlement Agency for Transboundary and Other Investments, which was the main subject of the discussions at the second expert meeting held in Montreux from May 23 to 24, 2016. Experts considered and critiqued elements of the draft outline, suggested alternative approaches and identified additional resources and sources to consider. Participants also discussed institutional and strategic options for further development of an institutional basis for an expanded international regime for the resolution of investment disputes.

Investment-related Dispute Settlement: Lessons From International Accountability Mechanisms
IISD www.iisd.org/library/investment-related-dispute-settlement-lessons-international-accountability-mechanisms

Building on the results of the 2014 meeting and of a second expert meeting held in May 2016, as well as recent developments in international practice regarding investment-related dispute settlement, a third meeting was held in April 2017. Given the extensive expertise of the Washington-based community, the April 2017 expert meeting focused on ways forward on a compliance and dispute settlement mechanism on investment. Drawing lessons from their experience with IAMs, the experts discussed the design of a new international mechanism for resolving investment-related conflicts and ensuring compliance with applicable principles and rules.

The Stakes Are High: A Review of the Financial Costs of Investment Treaty Arbitration
Diana Rosert, IISD http://www.iisd.org/library/stakes-are-high-review-financial-costs-investment-treaty-arbitration

This paper discusses the financial implications of investment treaty arbitrations. It reviews the amounts of compensation claimed by investors from states, and the amounts of compensation awarded when they prevailed on the merits. It also discusses the trend among tribunals to award compound rather than simple interest on the amount of compensation. Next, it looks at three types of arbitration costs in more detail: lawyers' costs, arbitrators' fees and administrative costs.

Assessing the Impacts of Investment Treaties: Overview of the evidence
Jonathan Bonnitcha, IISD https://www.iisd.org/library/assessing-impacts-investment-treaties-overview-evidence

Foreign investors' ability to frame plausible multimillion-dollar claims against a wide range of host government actions — and the fact that these claims are adjudicated through a system of private arbitration — has made investment treaties controversial. With this background in mind, this scoping study seeks to provide an overview and assessment of existing evidence of investment treaties' impacts. The focus is on the costs and benefits of investment treaties from the perspective of developing countries.

Termination of Bilateral Investment Treaties Has Not Negatively Affected Countries' Foreign Direct Investment Inflows

Public Citizen Research Brief | April 2018

Proponents of the controversial investor-state dispute settlement (ISDS) regime convinced governments to sign bilateral investment treaties (BITs) that included ISDS terms with the promise that such investor protections were necessary to encourage inward foreign direct investment (FDI). But the empirical evidence does not support this claim.

This paper provides an analysis of official government statistics on foreign investment in five countries that have terminated BITs[1] – Ecuador, Bolivia, South Africa, Indonesia and India – that reveals that investment flows from former BIT partner countries were more likely to increase rather than decrease after BIT termination. This paper does not explore whether inclusion of ISDS in Free Trade Agreements (FTAs) that combine ISDS-enforced investor protections with preferential market access for goods produced in outsourced facilities leads to increased FDI in lower-wage FTA partners.

Background

Numerous studies have examined whether countries have seen an increase in FDI as a result of signing investment pacts with ISDS provisions. A 2014 analysis by the United Nations Conference on Trade and Development (UNCTAD) covering 146 economies over 27 years found no evidence that BITs foster increased bilateral FDI.[2] A survey of the 200 largest U.S. corporations corroborated these results, finding that leading U.S. firms were relatively unfamiliar with bilateral investment treaties and considered such treaties to be relatively unimportant in their foreign investment decisions.[3] Previous studies found no correlation or only a weak correlation between the presence of BITs and FDI inflows, and one study that did find a correlation was questioned on methodological grounds.[4]

While countries with ISDS-enforced BITs have not seen significant FDI increases, countries without such pacts have not lacked for foreign investment. Brazil, for example, has consistently rebuffed international investment agreements with ISDS provisions,[5] yet remains in the world's top 10 destinations for FDI. Brazil is the leading destination for FDI in Latin America, where most other countries have signed numerous BITs with ISDS terms.[6]

As investor-state challenges against legitimate public interest policymaking have increased at a rapid rate since 2000, some governments have determined that existing BITs with ISDS clauses are not in their national interest and have terminated those treaties. But other countries with similar concerns have not acted because of apprehensions that foreign investors will leave the country or not seek to invest in the country in the first instance if BITs are terminated. Countries began to cancel ISDS-enforced BITs mainly after 2012, so a clear picture of trends over time is just now becoming available.

Summary of Findings

This analysis of official government statistics on foreign investment in five countries terminating BITs – Ecuador, Bolivia, South Africa, Indonesia and India – reveals that investment flows from former BIT-partner countries were more likely to *increase* rather than decrease after termination. In the 32 cases of BIT termination for which official FDI statistics are available, more than half of the time (18) the country experienced *larger investment inflows* from the former BIT-partner country after termination as compared to prior to termination. Specifically, we compare bilateral FDI stock/flows in the five years prior to termination to the five years after termination.[7] In only 14 instances did investment inflows decrease over this time span. We used a five-year time span in order to take into account any changes in FDI flows that could have occurred after official notice but before formal termination. Averaging over several years also controls against findings that reflect year-to-year volatility of FDI flows rather than trends relating to the existence of BITs. Our overall finding is the same whether one calculates averages over a shorter time span such as three years or compares one year before termination to one year after. The overall finding is driven by data from four of the countries – Ecuador, Bolivia, South Africa and Indonesia – which undertook reforms earlier than India, for which trend data are not yet available.

While the findings do not suggest terminating BITs directly boosts investment inflows, they do point to an extremely weak or non-existent relationship between BITs and the magnitude of investment inflows. A wide range of factors drives investment flows, and the presence of a BIT is clearly not a determining factor in most cases. Notably, sovereign debt ratings, seen as one driver of FDI inflows, improved for four of the countries – Ecuador, Bolivia, Indonesia and India – *after* they began terminating BITs.

We found the following trends with respect to the countries included in this analysis:[8]

Ecuador began to terminate BITs in 2008. From 2008 to today, overall FDI stock into Ecuador increased by 38 percent, from $13 billion to $17 billion. After Ecuador terminated its BIT with Uruguay in 2008, FDI from the country increased 420 percent, from an annual average of $6.3 million before termination to $32.6 million after termination.

Bolivia began terminating BITs in 2009, and since then the country's overall FDI stock grew 61 percent, from $7.3 billion to $11.8 billion today. Bolivia terminated its BIT with Spain in July 2012, but FDI inflows from Spain more than doubled, from an annual average of $163 million before termination to an annual average of $457 million after termination.

South Africa decided in 2010 to terminate 20 BITs. FDI stock increased 10 percent since that time, from 1.8 trillion rand to 2.0 trillion rand. After South Africa terminated its BIT with Germany in August 2014, FDI stock from Germany in South Africa increased from an annual average of 93 billion rand before termination to 95 billion rand after termination.

Indonesia gave notice in 2014 that it would terminate its 67 BITs, and its overall FDI stock increased by 5 percent, from $228 billion in 2014 to $240 billion in 2016. Indonesia terminated its BIT with the Netherlands in June 2015, and saw investment inflows from the country increase from an average annual $715 million net outflow before termination to a $1.7 billion net inflow after termination.

India gave notice in early 2016 that it would terminate 58 BITs, and early indications are that the country has continued to experience robust and growing investment inflows. India terminated its BIT with the Netherlands in December 2016. FDI from the Netherlands increased from an annual average of $3.4 billion before termination to $3.8 billion after termination.

Detailed Findings by Country

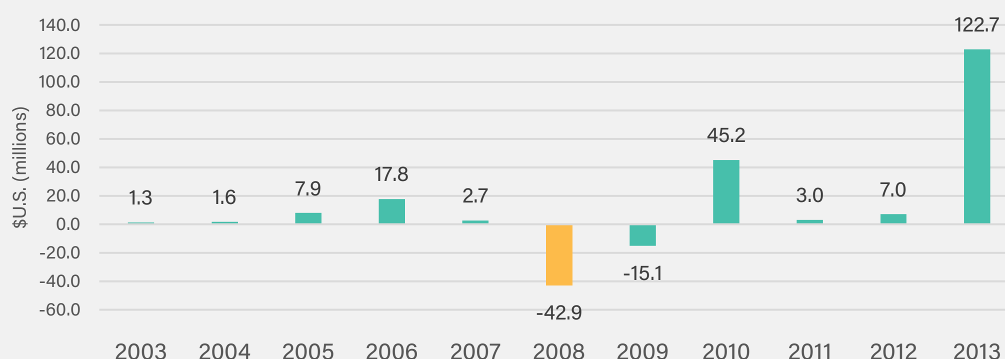
Ecuador

Upon adoption of a new constitution in 2008,[9] Ecuador ended BITs with 10 countries between 2008 and 2010 (Table 1) and in 2009 formally withdrew from the International Centre for Settlement of Investment Disputes (ICSID), one of the main bodies under which ISDS cases are litigated. From 2008 to today, Ecuador's overall FDI stock increased by 38 percent, from $13 billion to $17 billion,[10] and Ecuador's credit ratings improved.[11] FDI increased in two of the four cases of BIT termination for which data are available. For example, after Ecuador terminated a BIT with Uruguay in January 2008, foreign investment from the country increased 420 percent, from an annual average of $6.3 million in the five years prior to termination to $32.6 million in the five years after termination (Figure 1).[12] In mid-2017, Ecuador ended its 16 remaining BITs following the recommendations of a comprehensive audit of Ecuador's investment regime.[13]

Figure 1: Net FDI Flows From Uruguay to Ecuador

Start of Series of Terminations: 2008

BIT Termination: 2008



Source: Central Bank of Ecuador

Note: Net FDI flows in $U.S. million adjusted for inflation (in constant 2017 dollars).

Table 1: Ecuador: Net FDI Flows From Terminated Treaty Partners, Before and After Treaty Termination

Partner	Date of Termination (DD/MM/YYYY)	Average Annual Value in Years Prior ($U.S. Million)	Average Annual Value in Years After ($U.S. Million)	Change in Inflows	Latest Value (2017)
		Where Data Are Available			
Dominican Republic	18/01/2008	0.4	0.2	⇩	1.78
Romania	18/01/2008	0.0	0.4	⇧	0.05
Uruguay	18/01/2008	6.3	32.6	⇧	60.86
Finland	09/12/2010	23.9	-15.1	⇩	-0.89

Data unavailable (date of termination): Cuba (18/01/2008), El Salvador (18/01/2008), Guatemala (18/01/2008), Honduras (18/01/2008), Nicaragua (18/01/2008), Paraguay (18/01/2008), Peru (19/11/2017), Argentina (18/05/2018)

Source: Central Bank of Ecuador and UNCTAD Investment Policy Hub for the list of terminated BITs.
Note: Net FDI flows in $U.S. million adjusted for inflation (in constant 2017 dollars). Average values before and after termination includes as many years of data as are available up to five years. Only two out of the most recent terminations have been reported to UNCTAD.

Bolivia

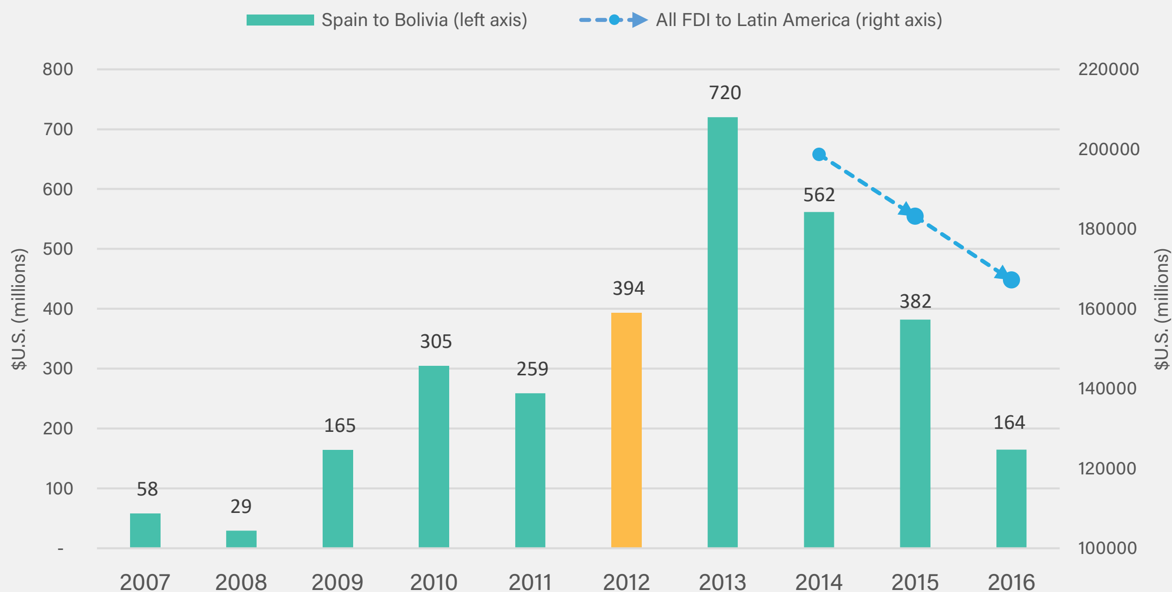
Bolivia was one of the first countries to take steps to terminate investment agreements and withdraw from international arbitration agreements. The country has also experienced a significant growth in FDI over the relevant years. Bolivia began terminating agreements in 2009, and since then the country's overall FDI stock grew 61 percent, from $7.3 billion to $11.8 billion today.[14] Previously, in 2007, Bolivia withdrew from ICSID. FDI stock in Bolivia was unharmed, increasing 14 percent from 2007 to the first BIT terminations in 2009, from which point it continued to grow. Bolivia's credit ratings improved after 2009.[15] FDI flows from six out of 11 partner countries increased after termination (Table 2). Unlike South Africa, Bolivia reports only bilateral inflows, so in most cases where FDI inflows decreased, bilateral stock (or the total accumulation of inflows) is still likely to have increased.[16] Bolivia terminated its BIT with Spain in July 2012, but Spain has remained one of the top three investors in Bolivia ever since, despite a more recent decline in inflows from 2014 to 2016 coinciding with a drop in FDI received by all Latin American countries.[17]

According to the Central Bank of Bolivia, investment from Spain increased from an annual average of $163 million before termination to $457 million after termination (Figure 2).[18]

Figure 2: FDI Flows From Spain to Bolivia

Start of Series of Terminations: 2009

BIT Termination: 2012



Source: Central Bank of Bolivia and U.N. Economic Commission on Latin America and the Caribbean

Note: FDI inflows in $U.S. millions adjusted for inflation (in constant 2017 dollars). The decline in FDI flows from 2014 to 2016 coincided with a decline in FDI to Latin America overall.

Table 2: Bolivia: Inward FDI Flows From Terminated Treaty Partners, Before and After Treaty Termination

Partner	Date of Termination (DD/MM/YYYY)	Average Annual Value in Years Prior ($US million)	Average Annual Value in Years After ($US million)	Change in Inflows	Latest Value (2016)
		Where Data Are Available			
Argentina	13/05/2014	26.3	37	↑	6.2
Austria	01/07/2013	0.2	3	↑	8.2
Luxembourg	10/01/2014	23.7	8	↓	9.6
Belgium	10/01/2014	1.3	1	↓	-
Denmark	13/05/2014	0.2	4	↑	4.1
France	06/05/2013	61.2	204	↑	212.0
Germany	13/05/2013	0.5	9	↑	5.1
Netherlands	01/11/2009	26.8	12	↓	-13.4
Spain	09/07/2012	163.2	457	↑	164.5
Sweden	04/07/2013	221.1	28	↓	-13 .0
United States	10/06/2012	216.5	99	↓	103.4

Source: Central Bank of Bolivia and UNCTAD Investment Policy Hub for the list of terminated BITs
Notes: FDI inflows in $U.S. million adjusted for inflation (in constant 2017 dollars). Average values before and after termination include as many years of data as are available up to five years. Belgium and Luxembourg (as the Belgium-Luxembourg Economic Union) are party to the same BIT.

South Africa

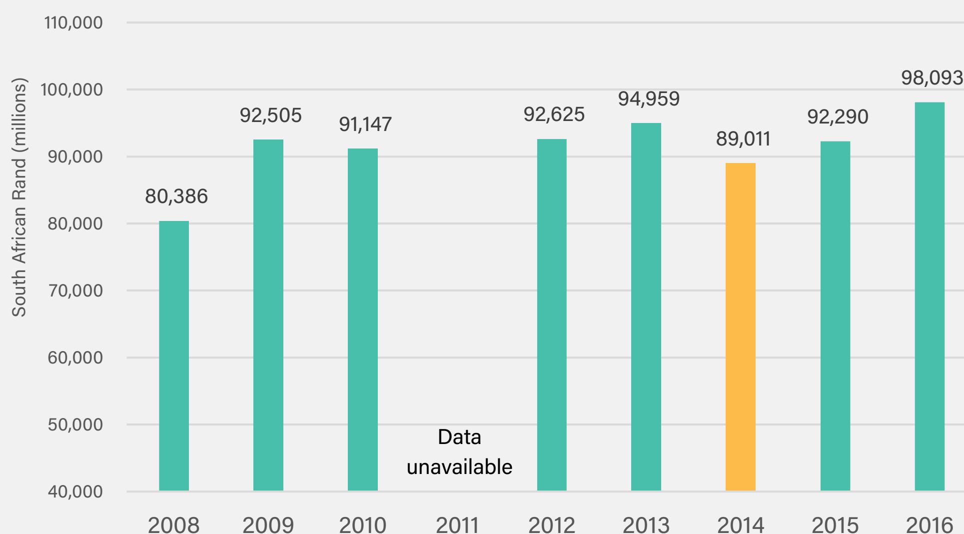
After South Africa conducted a three-year reassessment of its ISDS-enforced investment treaties. Finding no correlation to increased FDI flows but growing liabilities from ISDS challenges, in 2010 it decided to cancel all existing BITs.[19] This included BITs with 20 countries.[20] Total FDI stock remained stable from 2013 when the first terminations went into effect to 2016 at 2 trillion rand, according to the South African Reserve Bank.[21] A fall-off in FDI also did not occur between notice of intent to terminate BITs in 2010 and actual termination. Nine BITs have been terminated thus far (Table 3). FDI stock has measurably increased from five terminated treaty partners, and data are unavailable for one terminated treaty partner, Denmark. South Africa terminated its BIT with one of its biggest investment partners, Germany, in August 2014.

According to data on bilateral FDI stock from the South African Reserve Bank, Germany's FDI stock in South Africa increased from an annual average of 93 billion to 95 billion rand in the years prior to termination compared to the years after termination (Figure 3).[22] There was no drop-off in investment from Germany from the time of South Africa's initial notice in 2010 until 2014 when the BIT was formally terminated; FDI stock from Germany increased from 91 billion to 94 billion rand during this period. The overall trend is even more impressive since it occurred in the context of deteriorating economic conditions, with economic growth rates in South Africa falling from 2.5 percent in 2013 to 0.3 percent in 2016.[23]

Figure 3: FDI Stock From Germany in South Africa

Notice of Intent to Terminate: 2010

BIT Termination: 2014



Source: South African Reserve Bank

Note: FDI inward stock in millions of South African rand adjusted for inflation

Table 3: South Africa: Inward FDI Stock From Terminated Treaty Partners, Before and After Treaty Termination

Partner	Date of Termination (DD/MM/YYYY)	Average Annual Value in Years Prior (Rand in Millions)	Average Annual Value in Years After (Rand in Millions)	Change in Stock	Latest Value (2016)
		Where Data Are Available			
Austria	11/10/2014	7,242	13,261	↑	12,208
Luxembourg	13/03/2013	20,335	56,792	↑	57,432
Belgium	13/03/2013	6,198	8,770	↑	6,797
France	30/08/2014	16,770	16,097	↓	13,775
Germany	30/08/2014	92,809	95,192	↑	98,093
Netherlands	30/04/2014	273,410	543,122	↑	420,581
Spain	22/12/2013	13,505	13,061	↓	12,790
Switzerland	30/08/2014	40,815	23,288	↓	22,413
United Kingdom	30/08/2014	828,798	783,940	↓	757,018

Data unavailable (date of termination): Denmark (30/08/2014)

Source: South African Reserve Bank for FDI values and UNCTAD Investment Policy Hub for the list of terminated BITs
Note: FDI inward stock in millions of South African rand adjusted for inflation (constant 2017 rand). Only FDI stock (not flows) available. Average values before and after termination includes as many years of data as are available up to five years. Values for Denmark are not available. Belgium and Luxembourg (as the Belgium-Luxembourg Economic Union) are party to the same BIT.

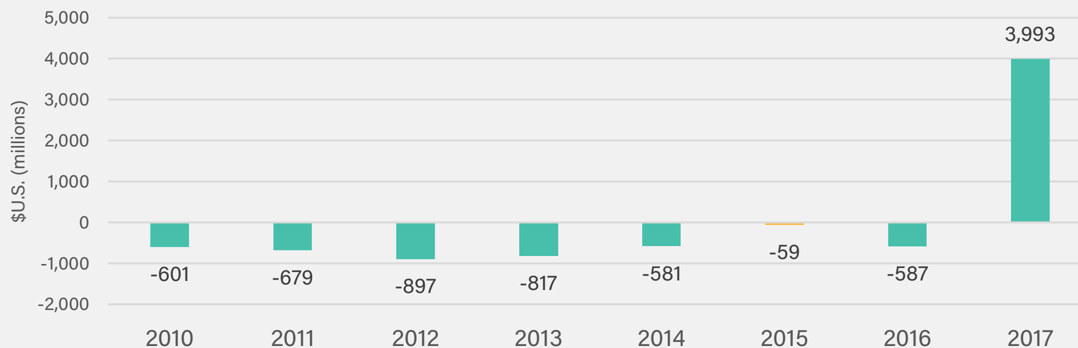
Indonesia

Termination of BITs has not had a detrimental impact on Indonesia's ability to attract foreign investment. In 2014, Indonesia announced plans to terminate all 67 of its bilateral investment treaties.[24] Overall, FDI stock in Indonesia grew from $228 billion in 2014 to $240 billion in 2016.[25] Canceling its BITs also did not negatively affect credit ratings.[26] BITs with 23 countries have been terminated thus far (Table 4). Isolating the subset of terminated BITs for which FDI data are available and investors do not have recourse to ISDS through other agreements,[27] FDI flows increased for four out of the seven partners with cancelled BITs. For instance, Indonesia terminated its BIT with the Netherlands in June 2015. Data from the Central Bank of Indonesia show investment from the Netherlands increased after the BIT was terminated from an average annual $715 million net outflow to a $1.7 billion net inflow after termination (Figure 4).[28]

Figure 4: Net FDI Flows From Netherlands to Indonesia

Notice of Intent to Terminate: 2014

BIT Termination: 2015



Source: Central Bank of Indonesia

Note: FDI inflows in $U.S. millions adjusted for inflation (in constant 2017 dollars).

Table 4: Indonesia: Net FDI Flows From Terminated Treaty Partners, Before and After Treaty Termination

Partner	Date of Termination (DD/MM/YYYY)	Average Annual Value in Years Prior ($US Million)	Average Annual Value in Years After ($US Million)	Change in Inflows	Latest Value (2017)
		Where Data Are Available			
Argentina	19/10/2016	0.1	0.5	↑	0.5
France	28/04/2015	98.4	-79.8	↓	-51.5
India	07/04/2016	12.0	42.2	↑	42.2
Italy	23/06/2015	14.8	11.9	↓	12.9
Netherlands	30/06/2015	-715.2	1,703.3	↑	3993.4
Spain	18/12/2016	1.1	106.1	↑	106.1
Turkey	07/01/2016	15.4	0.4	↓	0.4

Data unavailable or not applicable (date of termination): Belgium (16/06/2002), Bulgaria (25/01/2015), Cambodia (07/01/2016), China (31/03/2015), Egypt (30/11/2014), Germany (01/06/2017), Hungary (12/02/2016), Lao PDR (13/10/2015), Malaysia (20/06/2015), Norway (30/09/2004), Pakistan (02/12/2016), Romania (07/01/2016), Singapore (20/06/2016), Slovakia (28/02/2015), Norway (30/09/2004), Switzerland (08/04/2016), Vietnam (07/01/2016)

Source: Central Bank of Indonesia and UNCTAD Investment Policy Hub for the list of terminated BITs

Note: Net FDI flows in $U.S. million (in constant 2017 dollars). Average values before and after termination include as many years of data as are available up to five years.

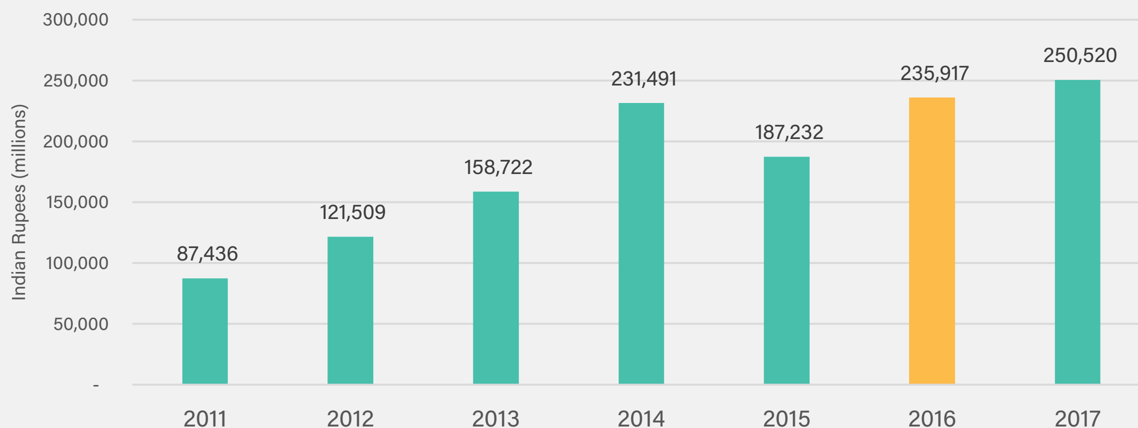
India

India gave diplomatic notice to 58 governments in early 2016 that it would terminate its BITs,[29] yet has not seen a negative impact on investment inflows. After giving notice of termination, overall investment inflows into India increased seven percent, from 304 billion rupees ($44 billion) in 2016 to an estimated 326 billion rupees ($50 billion) in 2017, according to the Indian Ministry of Commerce and Industry.[30] Over the time period from April 2015 to November 2017, Moody's raised India's credit rating.[31] The one terminated BIT for which there are detailed data was with the Netherlands, one of India's top sources of FDI (Table 5). After India terminated its BIT with the Netherlands, in December 2016, foreign investment from the Netherlands increased from roughly 157 billion rupees ($3.4 billion) in the years prior to termination to 250 billion rupees ($3.8 billion) in 2017 (Figure 5).[32]

Figure 5: FDI Flows From Netherlands to India

Notice of Intent to Terminate: 2016

BIT Termination: 2016



Source: Indian Ministry of Commerce and Industry; Note: FDI inflows in millions of Indian rupees adjusted for inflation (in constant 2017 rupees). Data measured according to the Indian fiscal year from April of listed year to March of the following year (e.g. 2015 data spans April 2015 to March 2016). The 2017 figure is an estimate created by doubling the value from the first half of FY 2017 (April 2017 to September 2017).

Table 5: India: Inward FDI Flows From Terminated Treaty Partners, Before and After Treaty Termination

Partner	Date of Termination (DD/MM/YYYY)	Average Annual Value in Years Prior (Rupees in Millions)	Average Annual Value in Years After (Rupees in Millions)	Change in Inflows	Latest Value (2017)
		Where Data Are Available			
Netherlands	01/12/2016	157,278	250,520	↑	250,520

Data unavailable (date of termination): Argentina (30/08/2013), Australia (23/03/2017), Austria (24/03/2017), Bahrain (04/12/2017), China (31/07/2017), Croatia (25/04/2017), Czech Republic (25/04/2017), Denmark (13/05/2017), Egypt (29/03/2016), Germany (03/06/2017), Hungary (29/03/2017), Indonesia (07/04/2016), Italy (23/03/2017), Malaysia (23/03/2017), Oman (22/03/2017), Russian Federation (27/04/2017), Slovakia (28/04/2017), Spain (23/09/2016), Switzerland (06/04/2017), Trinidad and Tobago (06/09/2017), Turkey (17/10/2017)

Source: India Ministry of Commerce and Industry and UNCTAD Investment Policy Hub for the list of terminated BITs. Note: FDI inflows in millions of Indian rupees adjusted for inflation (in constant 2017 rupees). Average values before and after termination include as many years of data as are available up to five years. Data measured according to Indian fiscal year from April to March (e.g., 2015 data spans April 2015 to March 2016). The 2017 figure is estimated by doubling the value from the first half of FY2017 (April 2017 to September 2017).

Endnotes

[1] Brazil is another country that has taken action to modify its investment regime by announcing a new template for its investment agreements in 2013 (Cooperation and Investment Facilitation Agreement), but since it has not terminated agreements in the same manner as the five countries reviewed, it is not included.
[2] "Do Bilateral Investment Treaties Attract FDI Flows to Developing Economies?" in United Nations Conference on Trade and Development, "Trade and Development Report, 2014," United Nations, 2014, at 159. Available at: http://unctad.org/en/PublicationsLibrary/tdr2014_en.pdf.
[3] In this survey of general counsel in the top 200 U.S.-based corporations, the author asked: "How important is the presence or absence of a BIT to your company's typical decision to invest in a foreign country?" Of the 75 respondents, the median response was "2" (not very important) on a one to five scale. The author also asked: "To your knowledge, has your company ever declined to invest (or to consider investing) in a particular foreign project specifically because of the absence of a BIT?" Only four of 75 (5 percent) said their company had declined an investment opportunity for this reason. *See* Jason Webb Yackee, "Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence," *Virginia Journal of International Law*, 51:2, 2011. Available at: http://www.vjil.org/assets/pdfs/vol51/issue2/Yackee.pdf.
[4] A 2005 study claimed to provide the "first rigorous quantitative evidence that a higher number of BITs raises the FDI that flows to a developing country," Eric Neumayer and Laura Spess, "Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?" *World Development*, 3:1, May 1, 2005. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=616242. A later study showed that the findings in that 2005 study were "almost certainly due to misspecification and insufficient attention paid to the endogeneity of BIT participation." It found that the observed correlation between BITs and FDI was largely due to reverse causality (i.e., increases in FDI leading to an increase in the number of BITs) and third factors that caused an increase in both BITs and FDI (e.g., elections), not due to BITs causing an increase in FDI. Emma Aisbett, "Bilateral Investment Treaties and Foreign Direct Investment: Correlation versus Causation," CUDARE Working Paper No. 1032, March 14, 2007, at 34. Available at: http://mpra.ub.uni-muenchen.de/2255/. Another study that found a minimal correlation between BITs and FDI was Mary Hallward-Driemeier, "Do Bilateral Investment Treaties Attract Foreign Investment? Only a Bit…and They Could Bite," World Bank Policy Research Working Paper 3121, Aug. 2003. Available at: http://documents.worldbank.org/curated/en/113541468761706209/pdf/multi0page.pdf. For additional context, *see* Public Citizen, "Myths and Omissions: Unpacking Obama Administration Defenses of Investor-State Corporate Privileges," Public Citizen report, Oct. 2014, at 3-4. Available at: https://www.citizen.org/sites/default/files/isds-and-tafta.pdf.
[5] While Brazil has signed various BITs, none have been ratified or entered into force. United Nations Conference on Trade and Development, "Full List of Bilateral Investment Agreements Concluded: Brazil," UNCTAD Factsheet, June 1, 2013. Available at: http://unctad.org/Sections/dite_pcbb/docs/bits_brazil.pdf.
[6] Brazil has ranked in the top 10 worldwide in FDI inflows between 2010 and 2016. UNCTADStat, "Foreign Direct Investment: Inward and Outward Flows, Annual, 1970-2016," United Nations Conference on Trade and Development, accessed Feb. 2, 2018. Available at: http://unctadstat.unctad.org/TableViewer/tableView.aspx.
[7] If five years have not yet transpired after termination of a specific BIT or five years of pre-termination FDI data are not made available by the relevant government, we average over as many years of annual data as are available up to five years.
[8] Collecting and analyzing bilateral FDI statistics is complicated by the lack of a common framework among countries for reporting FDI statistics. Countries report in local currency or U.S. dollars, using different time periods (fiscal or calendar year), in terms of stocks or flows, and usually with varying delays in reporting. Often only data from sizable investment partners are provided by national authorities. Data remain in the currency in which they were reported. For Indonesia, data from national authorities are reported in U.S. dollars. For Bolivia and Ecuador, raw data from national authorities are reported in U.S. dollars. For South Africa, raw data from national authorities were reported in local currency. India reports values in both local currency and U.S. dollars. All data were adjusted for inflation using GDP deflators from International Monetary Fund "Gross Domestic Product, Deflator," World Economic Outlook, Oct. 2017. Available at: https://www.imf.org/external/pubs/ft/weo/2017/02/weodata/index.aspx.
[9] Ecuador's new constitution prohibited the government from entering into treaties that would give up "sovereign jurisdiction to international arbitration entities." Republic of Ecuador, Constitution of 2008, Title VIII (International

Relations), Chapter 2 (International Treaties and Instruments), Article 422. Available at: http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html.

[10] UNCTADStat, "Foreign Direct Investment: Inward and Outward Flows, Annual, 1970-2016," United Nations Conference on Trade and Development, accessed Jan. 26, 2018. Available at: http://unctadstat.unctad.org/TableViewer/tableView.aspx.

[11] Ecuador's S&P rating improved from CCC- in November 2008 to B+ in August 2014, Moody's improved from Caa1 November 2008 to B3 in December 2014, and Fitch improved from CCC in November 2008 to B in August 2016. Trading Economics, "Ecuador - Credit Rating," no publishing date, accessed Apr. 11, 2018. Available at: https://tradingeconomics.com/ecuador/rating. *See,* for an overview of the three credit rating scales, Fidelity Investments, "Bond Ratings," accessed Jan. 29, 2018. Available at: https://www.fidelity.com/learning-center/investment-products/fixed-income-bonds/bond-ratings. *See*, on the relationship between investment flows and credit ratings, Peilin Cai, Quan Gan and Suk-Joong Kim, "Do Sovereign Credit Ratings Matter for Foreign Direct Investments?," *Social Science Research Network*, Working Paper, July 2017. Available at: https://ssrn.com/abstract=2997573.

[12] Banco Central del Ecuador, "Inversión Extranjera Directa por País de Origen," 2017, accessed April 11, 2018. Available at: http://www.bce.fin.ec/index.php/component/k2/item/298-inversi%C3%B3n-extranjera-directa.

[13] International Institute for Sustainable Development, "Ecuador Denounces Its Remaining 16 BITs and Publishes CAITISA Audit Report," *Investment Treaty News*, June 12, 2017. Available at: www.iisd.org/itn/2017/06/12/ecuador-denounces-its-remaining-16-bits-and-publishes-caitisa-audit-report/.

[14] UNCTADStat, "Foreign Direct Investment: Inward and Outward Flows and Stock, Annual, 1970-2016," U.N. Conference on Trade and Development. Available at: http://unctadstat.unctad.org/. The latest available data is from 2016.

[15] All three ratings agencies upgraded Bolivia after 2009. Moody's rating of Bolivia improved from B2 in September 2009 to B1 in December 2010 to Ba3 in June 2012. Fitch upgraded Bolivia from B- in July 2007 before termination to B in September 2009 to B+ in October 2010 and then to BB- in October 2012. Bolivia's S&P rating improved from B+ in May 2011 to BB- in May 2012 to BB in May 2014. Trading Economics, "Bolivia - Credit Rating," no publish date, accessed Jan. 29, 2018. Available at: https://tradingeconomics.com/bolivia/rating.

[16] Flows, while volatile from year to year, are particularly telling because they represent the total amount of new funds that investors are deciding to bring into the country, without subtracting depreciation of existing capital investments.

[17] U.N. Economic Commission for Latin America and the Caribbean (ECLAC), "Foreign Direct Investment in Latin America and the Caribbean, Table I.4 FDI Inflows by Recipient Country and By Subregion, 2005-2016," Report, Aug. 10, 2017 at 35. Available at: https://repositorio.cepal.org/bitstream/handle/11362/42024/4/S1700815_en.pdf.

[18] Banco Central de Bolivia, "Inversión Extranjera Directa Bruta Recibida por País de Origen," published June 2017, accessed Jan. 26, 2018. Available at: https://www.bcb.gob.bo/webdocs/publicacionesbcb/2017/12/15/Boletin_sector_externo_junio_2017.pdf.

[19] Quoting Xavier Carim, Deputy Director General of the South African Department of Trade and Industry, at the WTO Public Forum in Geneva, Sept. 25, 2012, on the rationale for South Africa's decision: "The spike in international investment arbitrations that followed the financial crisis in 2001 laid bare that bilateral investment agreements can pose profound and serious risks to government policy… Our own experience demonstrated that that there was no clear relationship between signing BITs and seeing increased inflows of FDI… The review identified a range of concerns associated with expansive interpretations on the provisions usually found in BITs: definitions of investment and of investor, national treatment, fair and equitable treatment, most favoured nation clause, expropriation, compensation, transfer of funds etc. The review also identified difficulties with respect to international arbitration... This, in our view, opens the door for narrow commercial interests to subject matters of vital national interest to unpredictable international arbitration outcomes and is a direct challenge to constitutional and democratic policy-making…" Public Citizen, "Selected Statements and Actions Against Investor-State Dispute Settlement (ISDS)," Public Citizen Fact Sheet, March 9, 2018. Available at: https://www.citizen.org/sites/default/files/selected_statements_and_actions_against_isds_0.pdf. *See* also Xavier Carim, "Lessons from South Africa's BITs Review," Columbia FDI Perspectives No. 109, Nov. 25, 2013. Available at: http://ccsi.columbia.edu/files/2013/10/No_109_-_Carim_-_FINAL.pdf.

[20] Investment Policy Hub, "International Investment Agreements Navigator," U.N. Conference on Trade and Development (UNCTAD), undated, accessed Jan. 26, 2018. Available at: http://investmentpolicyhub.unctad.org/. BITs with Zimbabwe (signed in 2009) and Senegal (signed in 1998) apparently went into force at the end of 2010 alongside or shortly after the decision to cancel BITs. They had been signed prior to the decision.

[21] South African Reserve Bank, "Quarterly Bulletin," multiple publishing dates, accessed Jan. 26, 2018. Available at: https://www.resbank.co.za/Publications/QuarterlyBulletins/Pages/Quarterly-Bulletin.aspx. We use figures from the final quarter each year under the headings: "International Economic Relations" – "Foreign Liabilities of South Africa by country" in millions of Rand – "Total Direct Investment".

[22] South African Reserve Bank, "Quarterly Bulletin," multiple publishing dates, accessed Jan. 26, 2018. Available at: https://www.resbank.co.za/Publications/QuarterlyBulletins/Pages/Quarterly-Bulletin.aspx. We use figures from the final quarter each year under the headings: "International Economic Relations" – "Foreign Liabilities of South Africa by country" in millions of Rand – "Total Direct Investment".

[23] Statistics South Africa, "Gross Domestic Product: Third Quarter 2017," published Dec. 5, 2017, accessed Jan. 26, 2018. Available at: http://www.statssa.gov.za/publications/P0441/P04413rdQuarter2017.pdf.

[24] Ben Bland and Shawn Donnan, "Indonesia to Terminate More Than 60 Bilateral Investment Treaties," *Financial Times*, March 26, 2014. Available at: https://www.ft.com/content/3755c1b2-b4e2-11e3-af92-00144feabdc0.

[25] UNCTADStat, "Foreign Direct Investment: Inward and Outward Flows and Stock, Annual, 1970-2016," U.N. Conference on Trade and Development. Available at: http://unctadstat.unctad.org/. The latest available data are from 2016.

[26] Indonesia's Fitch rating improved from BBB- in December 2011 to BBB in December 2017, S&P improved from BB+ in May 2013 to BBB- in May 2017, and Moody's improved from Ba1 in January 2011 to Baa3 in February 2017. Trading Economics, "Indonesia - Credit Rating," no publishing date, accessed Jan. 29, 2018. Available at: https://tradingeconomics.com/indonesia/rating.

[27] The other pacts with ISDS enforcement include the Association of Southeast Asian Nations (ASEAN) Comprehensive Investment Agreement and the ASEAN investment agreement with China. Invest in ASEAN, "ACIA-ASEAN Comprehensive Investment Agreement," accessed April 12, 2018. Available at: http://investasean.asean.org/index.php/page/view/acia-reservation-list. UNCTAD, "ASEAN-China Investment Agreement," Investment Policy Hub, accessed April 12, 2018. Available at: http://investmentpolicyhub.unctad.org/IIA/country/97/treaty/3272. ASEAN has also signed an investment agreement with India, but it has not entered into force. UNCTAD, Investment Policy Hub, "Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the Republic of India." Available at: http://investmentpolicyhub.unctad.org/IIA/country/97/treaty/3503.

[28] Central Bank of Indonesia, "V. 33 Direct Investment Flows in Indonesia by Country of Origin," Indonesian Financial Statistics – External Sector, undated, accessed March 13, 2008. Available at: https://www.bi.go.id/en/statistik/seki/terkini/eksternal/Contents/Default.aspx.

[29] Amiti Sen, "India's Bilateral Investment Pacts Under Cloud," *The Hindu BusinessLine*, Jan. 15, 2018. Available at: http://www.thehindubusinessline.com/economy/indias-bilateral-investment-pacts-under-cloud/article9625580.ece.

[30] Department of Industrial Policy & Promotion, "FDI Statistics," India Ministry of Commerce and Industry website, multiple publishing dates, accessed Jan. 26, 2018. Available at: http://dipp.nic.in/publications/fdi-statistics. Only top-10 investors are provided on these FDI fact sheets, and Netherlands is the only country whose BIT has been terminated who is also a top-10 investor. Data from April 2015 to March 2016: http://dipp.nic.in/sites/default/files/FDI_FactSheet_JanuaryFebruaryMarch2016.pdf. Data from April 2016 to March 2017: http://dipp.nic.in/sites/default/files/FDI_FactSheet_January_March2017.pdf. Data from April to September 2017 (latest available): http://dipp.nic.in/sites/default/files/FDI_FactSheet_Updated_September2017.pdf. Data from April to September 2017 were doubled to calculate an estimated projection for 2017.

[31] Moody's rating of India improved over this time span, from Baa3 in April 2015 to Baa2 in November 2017. Other rating agency reports were not accessible. Trading Economics, "India - Credit Rating," no publish date, accessed Jan. 29, 2018. Available at: https://tradingeconomics.com/india/rating.

[32] Data on FDI are reported by India in both U.S. dollars and Indian rupees. These were separately adjusted for inflation using GDP deflators for the United States and India, respectively. This accounts for the discrepancy between the dollar value of rupee-denominated FDI using today's exchange rates versus the values provided here.

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Implications of *Achmea*

How the *Achmea* Judgment Impacts Investment Agreements with Non-EU Countries

Key Findings

- In the *Achmea* ruling, the European Court of Justice interpreted investor-state dispute settlement provisions as incompatible with EU law because it sidelines and undermines the powers of domestic courts.
- Although the *Achmea* ruling applies only to bilateral investment agreements between countries that are Member States of the EU, the case's reasoning may also be applied to agreements between the EU or EU Member States and third countries.
- Three key facets of the *Achmea* ruling suggest that investment agreements with third countries will also be incompatible with EU law:
  - Arbitration tribunals through investor-state dispute settlement are not part of the EU judicial system.
  - Such tribunals may resolve disputes that relate to the application or interpretation of EU law.
  - The awards of the tribunal are not subject to review by Member State courts.
- If the *Achmea* ruling is applied to agreements with third countries, there will be major implications — including the inability to enforce tribunals' awards under many existing agreements and to negotiate new agreements that include investment arbitration with the EU or EU Member States.

Introduction

Embodied in thousands of trade and investment treaties, the arbitration system known as investor-state dispute settlement (ISDS) creates a parallel system of justice accessible only to and heavily biased toward large corporations. When a corporation believes its investment in a country has been (or might be) harmed by government action, it can bring a lawsuit directly before a three-person arbitral tribunal, and governments can be forced to pay billions in damages to the corporate plaintiff.

In November 2017, more than 50 governments met as part of a working group of the UN Com-

mission on International Trade Law (UNCITRAL) to discuss reforms to the ISDS system, with another meeting at the end of April 2018 to continue the discussion. Because the European Union is aggressively pushing a proposal to create a multilateral investment court to hear investment disputes, it is important for states to understand the implications of the European Court of Justice's *Achmea* opinion addressing the legality of agreements that include ISDS provisions.

On March 6, 2018, the European Court of Justice (ECJ) handed down its landmark ruling in *Achmea*.[1] The ECJ found an arbitration clause in an international investment agreement between two European Union (EU) Member States incompatible with EU law.

The *Achmea* ruling reveals that the ECJ understands ISDS as sidelining and undermining the powers of the courts of the Member States. In the words of the ECJ, by concluding international agreements with arbitration clauses, Member States

> "*remove from the jurisdiction of their own courts, and hence from the system of judicial remedies which [EU law] requires them to establish in the fields covered by EU law, disputes which may concern the application or interpretation of EU law*"[2]

Removing disputes that may concern EU law from ordinary courts in the EU goes against the EU's constitutional charter, the EU Treaties. Therefore, it is not permitted under EU law.

This ruling is likely to have profound consequences for investment arbitration clauses in current and future investment treaties and chapters concluded by the EU or EU Member States. **Although the case's ruling only applies explicitly to bilateral investment agreements between EU member countries, the implications of the case may well extend much further to investment agreements between the EU[3] or EU Member States and non-EU countries.**

If the reasoning of *Achmea* applies to investment agreements with third countries, the consequences will be vast:

- Cases may be brought before EU (and EU Member State) courts — for instance, by public interest organisations — that question whether investment agreements concluded by Member States with third countries are compatible with EU law.
- Member States will be legally obliged to contest the jurisdiction of any arbitration tribunal established under provisions that do not follow the requirements outlined by *Achmea*.[4]
- If the seat of a tribunal is in a Member State whose national law permits applicants to challenge awards rendered by a tribunal, Member States will be obligated to challenge these awards should they lose the dispute.
- EU courts will no longer be able to enforce international investment awards that were rendered by tribunals whose jurisdiction conflicts with EU law.[5] Decisions made under bilateral investment agreements that were ratified before the Member State joined the EU may still be enforceable by EU courts,[6] although this is far from certain,[7] and such agreements represent only a narrow subset of Member States' bilateral investment agreements.[8]
- The European Commission will no longer have the ability to authorize new bilateral investment agreements that contain investment arbitration between Member States and other countries[9], or negotiate such agreements for the EU.

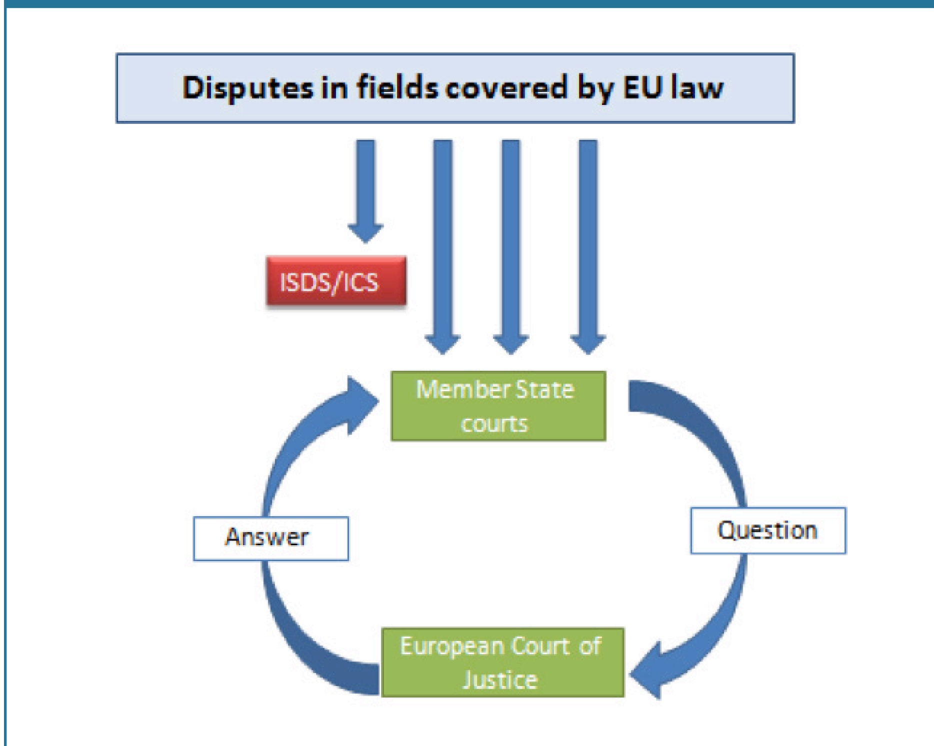
This legal briefing explains the *Achmea* case and examines how the ECJ's reasoning applies to agreements between the EU or EU Member States and non-EU countries.

The *Achmea* judgment explained

In the *Achmea* case, the government of Slovakia went before German courts to challenge an award rendered against it by an investment tribunal under a Dutch–Slovak bilateral investment treaty (BIT). The tribunal had awarded a Dutch investor (*Achmea*) EUR 22.1 million in damages because of the Slovak government's decision to partially reverse an earlier decision to privatize the health insurance market. The Slovak government argued that the arbitration tribunal had no jurisdiction over the dispute and that the dispute should have been resolved before the Slovak courts. The Slovak government thus challenged the investment award before German courts, which subsequently referred the case to the ECJ.

The ECJ found that the arbitration clause in the BIT was contrary to EU law because, essentially, it upset the judicial dialogue between the

FIGURE 1
How ISDS/ICS affects the EU's judicial system under Article 19 TEU and 267 TFEU



courts of the Member States and the ECJ. This judicial dialogue is of fundamental constitutional importance to the EU, and the ECJ refers to it as the "keystone" of the EU's judicial system. Under the EU Treaties, Member States must ensure that their courts are empowered to resolve disputes in fields covered by EU law. Those Member State courts, in turn, may and sometimes must refer to the ECJ for questions of EU law. This dialogue ensures the full and uniform interpretation and application of EU law in all Member States, as well as the judicial protection of the rights of individuals under EU law.[10]

In *Achmea*, the ECJ found that investment arbitration provisions are not compatible with EU law where (1) the investment tribunal is not part of the EU judicial system but (2) may still resolve disputes that are liable to relate to the interpretation or application of EU law, and (3) those decisions are not sufficiently reviewable by a Member State court. Therefore, it is likely that this same reasoning will be applied to investment agreements with non-EU countries as well.

Investment agreements with non-EU countries that are affected by *Achmea*

While it is clear that intra-EU BITs are incompatible with EU law, the reasoning of the *Achema* decision suggests that investment arbitration provisions between the EU or EU Member States and non-EU countries are also impermissible under EU law. The following section assesses investment arbitration provisions with third countries in light of the *Achmea* judgment.

1. Arbitration tribunals established under agreements with third countries are not part of the EU judicial system

In *Achmea*, the ECJ found that the arbitration clause in the BIT violated EU law because investment tribunals established under that clause were not part of the EU's judicial system, and therefore they were not subject to mechanisms under EU law to ensure that the rules of the EU are fully effective.[11] For instance, if a court of a Member State misapplies EU law or interprets it incorrectly, an individual may hold that Member State liable for damages and the European Commission may bring infringement proceedings against it.[12] These safeguards are absent in investment arbitration. Indeed, the ECJ noted that *"it is precisely the exceptional nature of the tribunal's jurisdiction compared with that of the courts of those two [EU] member states that is one of the principal reasons for the existence"* of the arbitration clause in question.[13] Although the Court assessed the arbitration provisions within the Netherlands-Slovak BIT in particular, the same observation is pertinent to all investment arbitration tribunals. Thus, the ECJ's finding on this point would apply to any investment arbitration provisions between EU Member States and third countries.

2. Arbitration tribunals established under agreements with third countries may resolve disputes that could relate to the interpretation or application of EU law

Under *Achmea*, a tribunal that is not part of the EU judicial system will violate the ECJ's exclusive

jurisdiction if it may be called on to resolve a dispute that could relate to the interpretation or application of EU law.[14]

The ECJ thus casts a very wide net: Disputes that are liable to relate to the interpretation or application of EU law must be resolved by courts that are part of the EU judiciary, to the exclusion of any other body. Moreover, the ECJ made clear that this was true even if the question before the tribunal is only whether the BIT has been violated and not specifically focused on the validity of EU law.[15] For the ECJ, the mere fact that the applicable law that tribunal must "*take account of*" could include EU law (as either domestic law or international law) was sufficient to consider that such arbitration clauses violate EU law.[16]

In addition, the ECJ's reasoning suggests that the real issue is not whether an investment tribunal is actually interpreting EU law, but whether the dispute in question falls within a field covered by EU law. Under the EU Treaties, Member States must ensure effective judicial remedies in fields within the EU's judicial system. Therefore, Member States must empower their domestic courts to provide judicial remedies in fields covered by EU law and, consequently, may not remove from their power any disputes in those fields by providing arbitration tribunals jurisdiction over them instead.

To our knowledge, no agreement between an EU Member State and a third country explicitly excludes disputes in fields covered by EU law from the jurisdiction of ISDS tribunals. In fact, almost all investment agreements allow tribunals to resolve disputes that involve EU law somehow.

As an initial matter, most international investment agreements are silent on the question of applicable law.[17] The rules that govern the procedure, either *ad hoc* or administered arbitration, make clear that tribunals have the power to interpret EU law. For instance, when ICSID tribunals hear these cases, ICSID rules require the tribunal to apply the law of the contracting state and international law.[18] Thus, investment agreements that are silent on the applicable law and permit disputes to be resolved by ICSID tribunals are contrary to EU law.

Similarly, investment agreements that are silent on the applicable law and allow disputes to be resolved under the UNCITRAL arbitration rules are also contrary to EU law because the UNCITRAL rules allow the tribunal to apply the law that it determines to be appropriate.[19] This provision does not prevent the tribunal from interpreting or applying EU law in its decisions; therefore, the tribunal could do so in violation of the ECJ's exclusive jurisdiction. The Stockholm Chamber of Commerce Arbitration Rules have a similar provision.[20]

BITs of Member States that do contain applicable law clauses do not fare better. Besides Ireland, which has no BITs, every EU Member State is party to at least one BIT that includes domestic or international law as part of its applicable law and which would therefore likely be found to violate EU law under *Achmea*. At the very least, such tribunals are not prohibited from taking EU law into account. In addition, although not addressed by *Achmea*, many investment agreements include a reference to domestic law in their definition of investment, for purposes of defining the applicability of the agreement. Because these provisions require the arbitration tribunals to apply domestic law to determine whether the investment is covered under the agreement, these provisions also conflict with EU law.

Even if arbitration clauses prohibit tribunals from taking EU law into account, it is questionable whether

BOX 1

Which countries could stand to lose from the Achmea case?

Argentina,[30] China,[31] Columbia,[32] India,[33] Iran,[34] Israel,[35] Kuwait,[36] Lebanon,[37] Mexico,[38] Panama,[39] Russia,[40] South Korea,[41] and Venezuela.[42]

These countries are the home states of investors that have used ISDS in the past (although not always against EU countries) and may therefore seek to invoke ISDS against Member States in the future, based on existing BITs they have with EU Member States. These countries are unlikely to be able to enforce arbitration tribunal decisions in the EU, significantly diminishing the value of investment protection provisions provided under their BITs with EU Member States.

BOX 2

ISDS awards that could be unenforceable as a result of *Achmea*

Ferengi/Wikicommons

Safa v. Greece (2016)[43]

In 2008, the European Commission ordered Greece to recover subsidies granted to the Hellenic Shipyards in order to abide by EU anti-competition rules. Greece expressed concern that ending the subsidies would endanger military shipbuilding essential to national security. In 2010, the EU issued an order allowing Greece to continue the subsidies as long as the shipyard's activities were limited to domestic military operations. In order to comply with the order, Greece announced that the shipyard would end contracts with foreign navies. Safa, a Lebanese investor in the shipyard, brought an ISDS claim under the Lebanon-Greece BIT. The tribunal must now interpret the 2010 EU order and determine whether Greece's decision to end the contracts was necessary to comply with the order.

Flemingo DutyFree v. Poland (2014)[44]

In 2008, the Centre for EU Transport Projects (CEUTP) agreed to co-finance an airport modernization project for the Chopin Airport in Warsaw, Poland. In the course of completing the project, Poland terminated commercial leases with airport vendors in Terminal 1. The Flemingo Group, owner of Polish duty-free operator BH Travel, brought an arbitration claim under the India-Poland BIT. The tribunal considered Poland's claim that the termination was necessary to secure EU funding, thus interpreting the terms of CEUTP's financing contract with Poland. Flemingo was awarded €20 million.

Gazprom v. Lithuania (2012)[45]

The EU's 2009 Third Energy Package rules — intended to encourage competition in energy markets — required Lithuania to separate gas retail operations from gas transmission operations. Once implemented, the new rules would have prevented Lietuvos Dujos, the Lithuanian gas utility partly owned by Russian company Gazprom, from maintaining both its stakes in retail and its stakes in transmission. Gazprom commenced UNCITRAL arbitration, alleging that Lithuania's energy market transformation violated the 1999 Russia-Lithuania BIT. The ISDS tribunal was called to interpret whether Lithuania's actions were necessary to comply with the EU's regulations.

Maffezini v. Spain (1997)[46]

In 1989, Argentinian investor EAMSA partnered with a Spanish public-private entity, SODIGA, to build a chemical production facility in Galicia, Spain. Allegedly on SODIGA's advice, EAMSA began construction of the facility before the environmental impact assessment (EIA) process was complete. The project ultimately failed, and EAMSA filed for arbitration under the Argentina-Spain BIT, claiming that the Spanish government was responsible for the additional costs resulting from the EIA. The tribunal explicitly cited EU law in considering the legality of Spain's actions, revealing another example of a tribunal interpreting EU law in its decisions.

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that alone would render such a provision compliant with EU law. The ECJ has made clear that disputes in fields covered by EU law must be resolved through remedies provided by Member State courts. Removing such disputes from Member State courts by empowering investment tribunals to resolve such disputes violates EU law. Given the breadth of EU law and the fact that investment agreements deal more generally with an issue explicitly addressed by the EU Treaties — the free movement of capital between EU Member States and third countries — it is clear that Member States are required to ensure the exclusive jurisdiction of their judiciary to provide remedies for resolving disputes in those fields.

3. The awards of arbitration tribunals established under agreements with third countries are not subject to full review by Member State courts

Finally, the ECJ in *Achmea* found that the Netherlands-Slovak tribunal violated EU law because the tribunal's award was not subject to full review by a Member State court. The ECJ noted that the investment agreement provided the tribunal with the freedom to choose its seat and, consequently, the applicable law concerning the review of awards. Because the tribunal in question chose Germany as its seat and German law provides for a narrow basis upon which to review an arbitration award, the possibility for EU Member States to ensure compliance with EU law was inadequate.

Although the narrow basis for review may be acceptable in the context of commercial arbitration, the ECJ explained that investment arbitration is fundamentally different because it "*derive[s] from a treaty by which [EU] member states agree to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies which [EU law] requires them to establish in the fields covered by EU law, disputes which may concern the application or interpretation of EU law.*"[21]

One of the hallmarks of investment arbitration is that not only are awards subject to limited or no judicial review,[22] such awards can also be enforced outside the country against which they are rendered. To our knowledge, all BITs between EU Member States and third countries allow for the enforcement of awards outside the EU and, at the very least, limit judicial review of such awards. Consequently, these BITs also breach this requirement set by the ECJ.

Opinion 1/17: Agreements between the EU and third countries

Lastly, *Achmea* provides several pointers regarding the direction of the ECJ's upcoming judgment in *Opinion 1/17 (CETA)* concerning whether the EU's proposed Investment Court System (ICS) in the Canada-EU Comprehensive Economic and Trade Agreement (CETA) is compatible with EU law.[23] This Opinion, expected in early 2019, will have profound consequences for international investment agreements containing some form of ISDS negotiated by the European Union itself, including

Chris Price/Flickr

the proposed multilateral investment court.

In negotiating recent agreements such as the CETA, the Commission has tried to address the legal issues of ISDS,[24] but these efforts are unlikely to be sufficient under *Achmea*. The Commission did not publicly disclose its legal analysis on the compatibility of ISDS mechanisms with the Treaties.[25] Moreover, under CETA, an ICS tribunal may "consider" EU law "as a matter of fact," and in so doing, those tribunals shall follow the prevailing interpretation given to EU law by the courts or authorities of the EU.[26] However, it does not explicitly exclude disputes in fields covered by EU law from the jurisdiction of ICS tribunals. This formulation is unlikely to pass muster under *Achmea* since a tribunal under CETA may still take account of EU law and resolve disputes that may relate to the interpretation or application of EU law.

In addition, the ECJ has already found that an ISDS mechanism in the EU–Singapore free trade agreement (FTA), which is similar to the one in CETA, removed disputes from the jurisdiction of EU member states.[27] These disputes may very well fall within areas covered by EU law and thus are likely to be found incompatible with EU law.

Conclusion: Legal uncertainty and the one-way street of investment arbitration with the EU

Investors from a wide range of countries are likely to be affected by the *Achmea* decision. The reasoning of the *Achmea* decision suggests that investment arbitration provisions between the EU or EU Member States and non-EU countries are also impermissible under EU law. The result is that although investors from the EU may continue to rely fully on the system of investment protection offered under these agreements in non-EU countries, investors from third countries may not benefit from the same level of reciprocity within the EU. Awards won by third country investors could be challenged and unenforceable before EU courts, and Member States may be required to renegotiate or even denounce these investment agreements. At the very least, *Achmea* casts considerable legal uncertainty over such investment agreements, diminishing any potential advantage they bring to foreign investment.

The result of *Achmea* then is that it further exaggerates the already lopsided nature of the current system of ISDS. Investors from EU countries have been the most frequent users of ISDS. The benefits of ISDS to investors from developing economies, for instance, are far less certain and they have used the system less often.[28] Even so, investors from lower middle-income countries have brought investment disputes against EU Member States in the past.[29] The ruling in *Achmea* may take away those few benefits from investors lower middle-income countries and thus make the skewed deal of ISDS entirely one-sided.

Endnotes

1. Case C-284/16, Slovak Republic v. Achmea, EU:C:2018:158 (6 Mar. 2018) [hereinafter *Achmea*].
2. *Id.* para. 55.
3. We note that the question of compatibility of the EU's investment agreements with EU law is currently already before the ECJ. *See* CJEU Opinion 1/17 (CETA).
4. Case C-459/03, Commission of the European Communities v. Ireland, EU:C:2006:345 (30 May 2006), paras. 132-133, 169.
5. Case C-106/77, Amministrazione delle Finanze dello Stato v. Simmenthal, EU:C:1978:49 (9 Mar. 1978), para. 17; Case C-121/85, Conegate Ltd. v. HM Customs & Excise, EU:C:1986:114 (11 Mar. 1986), para. 26.
6. Treaty on the Functioning of the European Union (TFEU), 2010 O.J. (C 83) 47, art. 351. This article nonetheless requires Member States to "take all appropriate steps" to eliminate any incompatibilities between EU law and prior international law commitments.
7. It is unclear whether Article 351 TFEU protects individual investors. *See* Case C-812/79, Attorney General v. Burgoa, EU:C:1980:231 (14 Oct. 1980), para. 10. In addition, the provision requires Member States to "take all appropriate steps" to eliminate incompatibilities, which may include a duty to disavow investment arbitration, and the ECJ could conclude that protection of the autonomy of the EU legal order trumps Article 351 TFEU. *See* Cases C-402/05 P and C-415/05 P, Kadi and Al Barakaat International Foundation v. Council and Commission, EU:C:2008:461 (3 Sept. 2008), para. 304.
8. For example, BITs concluded by France, Germany, the Netherlands, Belgium and Luxembourg, and Italy were concluded after these countries founded the European Economic Community in 1958.
9. Such authorization was previously possible under article 9 of the "grandfathering regulation." Commission Regulation 1219/2012, 2012 O.J. (L 351) 40, pp. 40–46. However, authorisation is not possible if investment agreements "conflict with Union law." *Id.* art. 9(1)(a).
10. *Achmea* para. 36.
11. *Id.* para. 43.
12. CJEU Opinion 1/09, Agreement Creating a Unified Patent Litigation System, EU:C:2011:123 (8 Mar. 2011), para. 82.
13. *Achmea* para. 45.
14. *Id.* para. 39.
15. *Id.* para. 40.
16. *Id.*
17. For example, the BITs of three of the EU's largest Member States – Germany, France, and the United Kingdom – generally have no clauses on the applicable law.
18. ICSID Convention, Regulations and Rules, ICSID/15 (Apr. 2006), art. 42 (1). This provision provides: "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, *the Tribunal shall apply the law of the Contracting State party to the dispute* (including its rules on the conflict of laws) and such rules of international law as may be applicable" (emphasis added).
19. UNCITRAL Arbitration Rules (as revised in 2010), UNICTRAL (Apr. 2011), Art. 35.
20. Arbitration Rules 2017, Arbitration Institute of the Stockholm Chamber of Commerce (1 Jan. 2017), art. 22(1).
21. *Achmea* para. 55.
22. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), *entered into force* 7 June 1959, art. V; ICSID Convention, Regulations and Rules, ICSID/15 (Apr. 2006), art. 53(1).
23. This Opinion was requested by Belgium following the crisis over the signature of CETA in October 2016. For more background, see Laurens Ankersmit, *Belgium Requests an Opinion on Investment Court System in CETA*, 2 Envtl. L. Network Int'l Rev. 54 (2016), https://www.researchgate.net/publication/321703966_Belgium_Requests_an_Opinion_on_Investment_Court_System_in_CETA.
24. CETA Article 8.31 contains several provisions that aim to ensure that investment tribunals under CETA will not interpret EU law. For a detailed assessment of these safeguards, see Laurens Ankersmit, *The Compatibility of Investment Arbitration in EU Trade Agreements with the EU Judicial System*, 13 J. for European Envtl. and Planning L. 46 (2016).
25. *See* Case T-644/16, ClientEarth v. Commission (9 Sept. 2016).
26. Comprehensive Economic and Trade Agreement (CETA), EU-Canada, art. 8.31(2), http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/.
27. CJEU Opinion 2/15, Free Trade Agreement between the European Union and the Republic of Singapore, EU:C:2017:376 (16 May 2017), para. 292.
28. *See, e.g.,* Joachim Pohl, *Societal Benefits and Costs of International Investment Agreements*, OECD Working Papers on International Investment 2018/01 (2018), p. 28, https://www.oecd-ilibrary.org/finance-and-investment/societal-benefits-and-costs-of-international-investment-agreements_e5f85c3d-en (concluding that "the several dozen econometric studies that have tested whether there is a correlation between the existence of international investment agreements and FDI inflows to developing countries show diverse and at time contradicting results"); Lise Johnson, Brooke Skartvedt & Jesse Coleman, *Investor-State Dispute Settlement: What Are We Trying to Achieve? Does ISDS Get us There?*, Columbia Center on Sustainable Investment (11 Dec. 2017), http://ccsi.columbia.edu/2017/12/11/investor-state-dispute-settlement-what-are-we-trying-to-achieve-does-isds-get-us-there/; Lauge N. Skovgaard Poulsen, *The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence*, *in* Yearbook on International Investment Law and Policy 2009/2010, p. 539 (New York: Oxford University Press, 2010).
29. There are at least 15 known investment arbitration disputes brought by investors outside the EU against EU Member States, some of which are classified as lower middle income by the World Bank. Several of these disputes involve EU law questions, directly or indirectly, and involve fields covered by EU law.
30. *See, e.g.,* Bulgaria-Argentina, 21 Sept. 1993, art. 10(4); Hungary-Argentina, 5 Feb. 1993, art. 10(4); Netherlands-Argentina, 20 Oct. 1992, art 10(7); Sweden-Argentina, 22 Nov. 1991, art. 8(4).
31. *See, e.g.,* Cyprus-China, 15 Jan. 2001, art. 9(7); Czech Republic-China, 8 Dec. 2005, art. 9(5); Estonia-China, 2 Sept. 1993, art. 8(7); Latvia-China, 15 Apr. 2004, art. 9(3); Lithuania-China, 8 Nov. 1993, art. 8(6); Malta-China, 22 Feb. 2009, art. 9(5); Slovenia-China, 13 Sept. 1993, art. 8(7); Spain-China, 14 Nov. 2005, art. 9(3).
32. Colombia-Spain, 31 Mar. 2005, art. 10(9).
33. Greece-India, 26 Apr. 2007, art. 10(4); Portugal-India, 28 June 2000, art. 10(4); Romania-Argentina, 29 July 1993, art. 10(4).
34. See, e.g., Croatia-Iran, 17 May 2000, art. 11(3).
35. Israel-Lithuania, 2 Oct. 1994, art. 1(1).
36. See, e.g., Austria-Kuwait, 16 Nov. 1996, art. 9(7); Denmark-Kuwait, 1 June 2001, art.10(6)(e); Poland-Kuwait, 5 Mar. 1990, art. 10(3)(d).
37. See, e.g., Belgium/Luxembourg-Lebanon, 6 Sept. 1999, art. 9(5); Finland-Lebanon, 25 Aug. 1997, art. 9(4); Italy-Lebanon, 7 Nov. 1997, art. 7(3); Slovakia-Lebanon, 20 Feb. 2009, art. 8(4).
38. France-Mexico, 12 Nov. 1998, art. 9(6); Germany-Mexico, 25 Aug. 1998, art. 18.
39. Panama-Spain, 10 Nov. 1997, art. 12(3).
40. Russia-Spain, 26 Oct. 1990, art. 10(3).
41. South Korea-Spain, 17 Jan. 1994, art. 9(3).
42. Venezuela-Spain, 2 Nov. 1995, art. 11(4).
43. ICSID Case No. ARB/16/20 (2016).
44. UNCITRAL (2016).
45. PCA Case No. 2011-16 (2012).
46. ICSID Case No. ARB/97/7 (2000).

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215 Pennsylvania Avenue, SE • Washington, D.C. 20003 • 202/546-4996 • www.citizen.org

FR: Melinda St. Louis, Public Citizen, Global Trade Watch division
DT: April 17, 2018
RE: **Recommendations for Governments on UNCITRAL Investment Arbitration Discussions**

Public Citizen, a leading U.S. civil society organization based in Washington, D.C., U.S.A., has engaged in extensive monitoring and analysis of the international investment agreement (IIA) regime, particularly in the context of U.S. IIAs enforced by investor-state dispute settlement (ISDS). Our key recommendations are:

- Based on Public Citizen's analysis of ISDS awards and jurisprudence that demonstrates the ISDS regime's significant and growing policy and financial liabilities and the body of research showing no correlation between countries having ISDS-enforced pacts and obtaining increased foreign direct investment (FDI),[1] **we urge governments to not sign new ISDS-enforced IIAs and to exit or renegotiate existing agreements that include ISDS**.

- It has become even more politically feasible for governments to eliminate ISDS from their investment policy frameworks. Even the U.S. government, which historically promoted ISDS, is now exiting the regime. In North American Free Trade Agreement (NAFTA) renegotiations, the U.S. is opting out of ISDS coverage altogether, and has proposed revising NAFTA's investment chapter so only direct expropriation of real property is subject to ISDS for countries that choose to be bound to ISDS.

- A growing chorus of government officials from across the political spectrum, small business organizations and businesses, academics, jurists, civil society organizations and trade unions around the world have publicly proclaimed opposition to ISDS and urge governments to exit it.[2]

- Interests seeking to save the ISDS regime have promoted procedural reforms while expanding investors' substantive rights. This approach, seen in the so-called International Court System (ICS) of the Comprehensive Economic and Trade Agreement (CETA) and in the EU's multilateral investment court (MIC) proposal, do not address the fundamental structural problem inherent to ISDS. One already powerful class of interests – multinational investors/corporations – is granted extraordinary commercial rights not available in domestic legal systems and is elevated to equal status with sovereign nations to privately enforce public treaties in extrajudicial venues. The "reform" proposals create new dangers for governments by institutionalizing problematic investor rights.

- **Moving away from ISDS altogether is the wisest course for governments because (1) states have not received tangible benefits from ISDS agreements, while costs have been tangible and substantial, and (2) proposed "reforms" would not protect governments from mounting ISDS liability or eliminate the structural conflicts of interest inherent in the system.**

- To adequately protect policy space for legitimate public interest regulation, IIAs must not grant investors rights beyond compensation for direct expropriation of real property. Terms providing "indirect expropriation" compensation rights and a guaranteed "minimum standard of treatment" (MST) and related "fair and equitable treatment" (FET) rights must be eliminated – as must enforcement mechanisms that empower foreign investors to avoid exhausting local remedies in domestic courts and instead bring claims in extra-judicial international arbitration venues.

Exiting the Unnecessary, Damaging Investor-State Dispute Settlement System

The investor-state dispute settlement system, included in various international investment agreements, fundamentally shifts the balance of power among investors, States and the general public, creating an enforceable global governance regime that formally prioritizes corporate rights and undermines governments' ability to regulate in the public interest.

ISDS gives foreign corporations alone greater procedural and substantive rights than domestic firms or other societal actors by providing only foreign firms access to extrajudicial tribunals and by enabling them to obtain compensation for government policies and actions that apply equally to domestic firms and that would not be deemed to violate domestic property rights protections. The ISDS regime undermines the rule of law by empowering extrajudicial panels of private sector attorneys to contradict domestic court rulings, including those in which countries' highest courts interpret domestic constitutions and laws, in decisions not subject to any substantive appeal.

Not only have governments been ordered to pay billions to corporations and investors for such claims, but ISDS cases have also resulted in the watering down of environmental, health and other public interest policies, and chilled the establishment of new ones: The mere threat of an ISDS case against an existing or proposed policy raises the prospect that a government will need to spend millions in tribunal and legal costs to defend the policy, even if the corporation ultimately does not win the case. Thus, increasingly, investors are employing the filing of ISDS cases as a form of "hard bargaining."

Public Citizen, along with partners around the globe, has documented the mounting costs of the ISDS regime to public interest policymaking, rule of law, democratic governance and development.[3] As the number of ISDS cases being filed annually has grown rapidly, and the policies and government actions being attacked expand, governments have rightly begun to reject further expansion of this controversial system and to exit or renegotiate IIAs that include ISDS.

Various technical reforms to ISDS procedures do not address the fundamental, structural imbalances or conflicts of interest inherent in the ISDS regime. Moving away from ISDS altogether is the wisest course for governments, because (1) states have not received tangible benefits from ISDS agreements while costs have been tangible and substantial, and (2) proposed procedural "reforms" would not be sufficient to protect governments from mounting ISDS liability or to eliminate the inherent conflicts of interest in the system.

States Do Not Receive Tangible Benefits From ISDS Agreements

The purported benefit of ISDS – increased foreign direct investment – remains elusive. Numerous studies have examined whether countries have seen an increase in FDI as a result of being willing to sign pacts with ISDS enforcement. Summarizing the studies' contradictory results, the United Nations Conference on Trade and Development (UNCTAD) concluded, "[T]he current state of the research is unable to fully explain the determinants of FDI, and, in particular, the effects of [IIAs] on FDI."[4] UNCTAD delivered that synopsis alongside its own study finding that "results do not support the hypothesis that [IIAs] foster bilateral FDI."[5] A survey of the 200 largest U.S. corporations corroborated these results, finding that leading U.S. firms were relatively unfamiliar with bilateral investment treaties (BITs) and considered such treaties to be relatively unimportant in their foreign investment decisions.[6] While countries bound by ISDS pacts have not seen significant FDI increases, countries without such pacts have

not lacked for foreign investment. Brazil, for example, has consistently rebuffed IIAs with ISDS provisions,[7] yet remains in the world's top 10 most popular destinations for FDI and the leading destination for FDI in Latin America, where most other countries have signed numerous pacts with ISDS terms.[8]

Governments that have withdrawn from the ISDS system have reduced their liability and protected policy space without experiencing adverse impacts on investment or development. As promised benefits of ISDS have proven illusory while tangible costs to taxpayers and safeguards have grown, an increasing number of governments have begun to reject the investor-state regime. After South Africa conducted a three-year reassessment of its ISDS-enforced investment treaties and found no correlation to increased FDI flows but growing liabilities from ISDS challenges, in 2010 it decided to cancel all existing BITs.[9] In 2014, Indonesia announced plans to terminate all 67 of its bilateral investment treaties.[10] After already terminating 10 BITs,[11] Ecuador conducted an audit of its remaining pacts, which determined they were not in the national interest, and subsequently terminated the rest.[12] India gave notice in early 2016 that it would terminate 58 BITs.[13] Bolivia has terminated 11 BITs thus far.[14] Venezuela, Ecuador and Bolivia have also withdrawn from the World Bank forum where most investor-state cases are tried.[15]

Developing countries that have decided to terminate their IIAs have not faced adverse impacts on FDI inflows. Indeed, even during the period of exiting the system, some countries experienced growth in FDI. For the five countries that have undertaken the bulk of BIT terminations thus far – India, Indonesia, South Africa, Ecuador and Bolivia – in the 32 cases of BIT termination for which official FDI statistics are available, more than half of the time (18) the country experienced *larger investment inflows* from the former BIT-partner country after termination as compared to prior to termination.[16] Total FDI stock in Indonesia grew from $228 billion in 2014 to $240 billion in 2016 after it announced plans to terminate all BITs.[17] FDI flows to Indonesia have increased for four out of the seven partners with cancelled BITs whose investors no longer have recourse to ISDS through any agreement.[18] Indonesia terminated its BIT with the Netherlands in June 2015, and thereafter investment from the Netherlands increased from an average annual $715 million net *outflow* before termination to a $1.7 billion net *inflow* after termination.[19] Similarly for Ecuador, overall FDI stock has increased by 38 percent after it began terminating BITs in 2008.[20] And after Ecuador terminated a BIT with Uruguay in January 2008, FDI from Uruguay increased 420 percent, from an annual average of $6.3 million prior to termination to $32.6 million after termination.[21]

Technical Reforms to IIAs Would Not Protect States From Liability or Rectify the System's Inherent Conflicts of Interest

Purported safeguards and explanatory annexes added to some IIAs in recent years have failed to prevent ISDS tribunals from exercising enormous discretion to impose on governments obligations that they never undertook when signing agreements. The U.S. government's attempt to "include stricter definitions … of what is required for successful claims"[22] in recent pacts has failed to stop tribunals from using increasingly expansive interpretations of foreign investors' rights to side with corporations in ISDS challenges to public interest policies. In the U.S.-Central America Free Trade Agreement (CAFTA), the Parties inserted an annex[23] that attempted to narrow the vague obligation for States to guarantee foreign investors a "minimum standard of treatment," which a litany of tribunals had interpreted as an obligation for the government to not frustrate investors' expectations, for instance by improving environmental or health laws after an investment was established. However, in two of the first investor-state cases brought under CAFTA – *RDC v. Guatemala* and *TECO v. Guatemala* – the tribunals simply ignored the annex's narrower definition of "minimum standard of treatment." They also paid little heed to the submissions of

the governments that negotiated CAFTA, which argued that the "minimum standard of treatment" obligation should be narrowly defined according to State practice.[24] Instead, the *RDC* and *TECO* tribunals both skipped any examination of State practice and relied on an expansive interpretation of that standard, concocted by a previous investor-state tribunal, which included an obligation to honor investors' expectations.[25] Both ISDS tribunals ruled that Guatemala had violated the expanded obligation, and ordered the government to pay millions.[26]

The U.S, government also included a "safeguard" provision in recent pacts to dispense with frivolous investor-state claims. The relevant language in the 2012 U.S. model BIT provides for expedited consideration of arguments from the government that a case should be terminated because the legal claim used by the foreign corporation to attack its policies is not permitted under the treaty's sweeping investor protections.[27] One problem is that tribunalists with financial incentives to continue cases are the ones who decide whether to accept such arguments for termination. Another problem is that many investor-state claims *do* in fact fall within the wide ambit of the investor privileges found in U.S. IIAs. That is because the pacts grant broad rights to investors and give ample discretion to tribunals to interpret those rights as far-reaching restrictions on States' prerogative to regulate in the public interest.

The very structure of the ISDS regime gives rise to conflicts of interest that would not be remediated by enhancement of the weak "conflict of interest" rules for tribunalists. The actual conflict of interest rules that apply under many pacts containing ISDS are notably weak. But there are more fundamental problems. The entire structure of ISDS has created a biased incentive system in which tribunalists, whose incomes rely on being selected to serve on panels, can boost their caseload by using broad interpretations of foreign investors' rights to rule in favor of corporations and against governments. As well, given that tribunalists are paid by the hour in contrast to salaried judges, they can boost their earnings by dragging cases out for years, including those they may ultimately dismiss. ISDS is neither fair nor neutral, not because of a few compromised tribunalists, but due to core design flaws.

Under ISDS rules, only foreign investors can launch cases and also select one of the three tribunalists. (By contrast, in U.S. domestic courts, judges are assigned to a case, not hired by the plaintiff.) Thus, ISDS lawyers that create novel, expansive interpretations of foreign investors' rights while serving as a tribunalist in one case can increase the number of investors interested in launching new cases and enhance the likelihood of their selection by investors for future tribunals. (While governments can also select one of the tribunalists, these individuals do not have the same structural conflict of interest; Interpreting investors' rights narrowly may curry favor with governments, but it would diminish the number of firms interested in launching ISDS claims in the first instance.) This helps explain why a few lawyers are repeatedly picked as ISDS tribunalists; Just 15 lawyers have been involved in 55 percent of all public ISDS cases.[28] The absence of any system of precedent for ISDS rulings, or of governments' rights to appeal the merits of cases, further enables tribunalists to concoct ever more fanciful interpretations of ISDS-enforced agreements and order compensation for breaches of obligations to which signatory governments never agreed.

Transparency rules cannot hold accountable tribunals that remain unrestrained by precedent, States' opinions or substantive appeals. Transparency is a necessary, but not sufficient, condition for reining in investor-state tribunals' ability to fabricate new obligations for States and then rule against public interest policies as violations of the novel obligations. As investor-state documents have become more publicly available, tribunals have not indicated greater hesitance to use overreaching interpretations of investors' rights. Documents were generally made available in the recent *Occidental v. Ecuador* case brought under the U.S.-Ecuador BIT. That includes the publicly-available 2012 award in which the tribunalists concocted a

new obligation for Ecuador to respond proportionally to Occidental's breach of the law, deemed themselves the arbiters of proportionality, and ordered the government to pay $2.3 billion for violating the creative obligation. [29] Ecuador filed for annulment of the award by contesting the tribunal's decision to grant jurisdiction in the first instance. An annulment committee rejected Ecuador's arguments, but, noting a dissenting tribunalist's logic about ordering the country to pay for the full future earnings of an investment only partially held by the claimant, reduced damages to $1.4 billion. Ecuador was ordered to pay $1.4 billion for breaching an obligation to which it never agreed in its BIT to an investor that breached a contract term to which it had agreed, knowing that doing so would forfeit its investment.

Bilateral or Multilateral Reforms That Attempt to Address the Procedural Shortcomings of the System Are Not Sufficient

In response to massive public opposition to ISDS in the European Union, the European Commission has included language in its recent free trade agreement (FTA) negotiations that includes some procedural "reforms" to the ISDS system and renames ISDS as an "Investment Court System," (ICS), as included in the CETA. The European Commission has further received a mandate from its member states to pursue a "multilateral investment court" (MIC) at the global level. On the one hand, the European Commission's ISDS reform proposals demonstrate its recognition that the status quo ISDS is politically untenable. Unfortunately, however, the Commission's proposals fail to address the fundamental concerns about the ISDS regime that have been repeatedly raised by civil society and governments. It is not surprising that the proposal, which promotes some procedural changes on the margins, has been widely rejected by civil society, the European Association of Judges, the German Magistrates Association,, the Transatlantic Consumer Dialogue,, , among many others.

The ICS and MIC proposals would continue to empower foreign corporations and foreign investors alone to obtain extraordinary commercial rights and a system to enforce such rights as against governments. Investors and corporations alone would continue to be empowered to challenge government policies before international tribunals related to many issues of public interest, including environmental and climate policies, control of toxic products and substances, food safety and labelling, regulation of emerging technologies, financial protections for consumers, protecting consumers' privacy rights, affordable access to medicines, the safety of drug and medical devices, affordable quality services, and tobacco regulation. Investors and corporations would have no obligations to host countries or their populations with respect to human rights, the environment or other public interests. Governments would have no rights to access extra-judicial venues to obtain compensation from investors or corporations for wrongdoing. Simply renaming a system that allows one class of interests – foreign investors – to attack public interest policies that apply to domestic and foreign entities alike in international tribunals does not remedy the fundamental structural problems of the EU's proposal or any other ISDS regime. Such public interest policies simply should not be vulnerable to such challenges.

The EU's reform proposals do not address fundamental critiques of substantive rights granted to foreign investors by the current ISDS system. In the CETA "reforms," the definition of investment remains extremely broad, which enables challenges to a wide array of public interest policies and allows firms that have made no real, productive investment to launch a case. The proposals also do not address the concern that the definition of investor allows firms located outside a pact's signatory country to launch cases under the pact.

Furthermore, critics have consistently raised concerns about the vague, broadly-interpreted substantive rights such as "minimum standard of treatment," including the right to "fair and equitable treatment" and a prohibition of "indirect expropriation." These standards have proven dangerously elastic and favorable to foreign investors in a series of ISDS decisions in which governments have been ordered to pay compensation for non-discriminatory public interest policies. The ICS and MIC proposals do not address these concerns. Lawyers that represent investors in ISDS cases have praised the EU's inclusion of language that makes explicit what formerly investors had to convince a tribunal of on a case by case basis: that a tribunal can take into account whether the investor's expectations were frustrated. And the expropriation definition, in combination with the broad definition of investment, would allow for findings of expropriation violations that would not pass muster in many domestic courts. Annex language allows for non-discriminatory public interest policies to constitute expropriation violations in "the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive." This "rare circumstance" language gives the tribunal undue discretion in this area.

The ICS and MIC proposals partially address some of the most egregious aspects of the procedures under which ISDS tribunals have functioned, but do not address fundamental concerns. Partial procedural improvements include an appeals system, a roster of tribunalists that would be randomly assigned to cases instead of appointed by the disputing parties, and prohibiting tribunalists from participating in cases presenting conflicts of interest or serving as counsel in investment disputes. However, these partial improvements do not address the fundamental concerns about formally prioritizing corporate rights over the right of governments to regulate. And, if a more formalized "court" were instituted to enforce such problematic and vague substantive rights for foreign investors, governments' sovereign right to regulate may be further undermined than it is under the current system.[30]

<u>**Eliminating Problematic Substantive Investor Rights and Standards**</u>

The "minimum standard of treatment" (MST) clause and its "fair and equitable treatment" (FET) standard is the most relied upon and successful basis for ISDS claims, especially against legitimate public interest regulation. It would be most prudent to eliminate, rather than attempt to "fix" this clause, in order to fully protect policy space. Of the known U.S. FTA/BIT cases that a government lost, 74 percent were MST/FET violations.[31] As explained in previous sections, treaty negotiators from the United States, European Union, and elsewhere have tried and failed to limit the elasticity of vague MST/FET language and tribunals' ever-expanding interpretations.

For instance, since CAFTA, U.S. trade agreements have included several annexes that were promised to narrow vague MST/FET obligations. By defining these foreign investor rights as derived from Customary International Law that "results from a general and consistent practice of States that they follow from a sense of legal obligation," one annex attempted to constrain the MST and FET obligations to the terms to which the signatory governments agreed and considered themselves bound, such as the provision of due process and police protection.[32] But, as described previously, in both CAFTA cases in which tribunals have ruled on investors' use of such provisions, the tribunals ignored the reformed language and the annexes.

The approach taken by the European Union to "fix" the FET standard in the CETA text explicitly lists new rights for investors, which would formalize the extraordinary rights that past ISDS tribunals have granted to foreign firms. Rather than constrain FET to basic rights such as due process and police protection, the FET language in the CETA investment chapter explicitly lists an array of broader rights that foreign firms could claim as part of FET.[33] For example, the FET definition in the CETA states that a government can be

found to violate FET for "manifest arbitrariness," an open-ended term that ISDS tribunals have interpreted as part of FET to rule against domestic measures taken in the public interest. In *S.D. Myers v. Canada*, an ISDS case brought by a U.S. firm under NAFTA, the tribunal interpreted FET as including a prohibition of "arbitrary" treatment.[34] Using this definition, the tribunal ruled that Canada had violated its FET obligation by banning the export of a hazardous waste called polychlorinated biphenyls (PCB) that is proven to be toxic to humans and the environment.[35] Though the PCB export ban was enacted to comply with Canada's obligations under the Basel Convention, a multilateral environmental treaty,[36] the tribunal ordered the Canadian government to pay millions to the U.S. firm.[37]

The example shows how tribunals had to generate creative interpretations of FET under past ISDS-enforced agreements to claim that FET included such broad obligations as the prohibition of "arbitrary" policies. But under the FET language in the CETA investment chapter, such broad FET obligations would already be spelled out for tribunals. Indeed, veteran ISDS tribunalist Todd Weiler expressed appreciation for the European Commission's new approach: "We used to just have fair and equitable and we had to argue what that meant. And now we have this great list. I just love it when they try to explain things."[38]

Similarly, the CETA investment chapter explicitly allows ISDS tribunals to consider a foreign investor's "legitimate expectation" in deciding whether the government has violated its FET obligations.[39] The obligation to not frustrate investors' expectations has been one of the most expansive interpretations of FET, frequently used to challenge nondiscriminatory domestic policies. For an ISDS tribunal to consider frustrated expectations as a potential FET violation, the European Commission's definition only requires that the foreign firm relied on a "specific representation" from the government, which was later frustrated, in deciding to invest.[40]

The right to compensation for an "indirect expropriation" has proved to be expansive and problematic for States as well. Removing the right for investors to obtain compensation for "indirect expropriation" is the most prudent action for governments. ISDS tribunals have ordered governments to compensate investors for actions that neither result in government control of a property (an expropriation) nor extinguish an investment's value (indirect expropriation), but rather that reduce an investment's value or limit an investor's expected use. This standard has thus allowed compensation for regulatory decisions and policies that would not be subject to claims for compensation in domestic law and thus provide foreign investors with greater rights than domestic investors and persons. UNCTAD lists 51 ISDS awards based on indirect expropriation.[41] Most common are disputes over contractual rights. In general, under domestic law in the United States and elsewhere, contractual rights are only subject to expropriation claims if the government "appropriates" contract rights, not if it simply "frustrates" them.

An example of an egregious indirect expropriation case is *Metalclad v. Mexico*, in which a U.S. waste management firm challenged the denial by the city of Guadalcazar of a construction permit for a toxic waste facility unless the firm cleaned up existing toxic contamination. The Mexican firm from which Metalclad had acquired the facility previously was denied the permit unless and until the same condition was satisfied. The tribunal ruled that denial of the permit constituted an "indirect" expropriation and that the process leading up to the decision violated MST/FET requirements, because the firm was not granted a "clear and predictable" regulatory environment. One factor the tribunal relied on was that Mexican federal officials encouraged the U.S. firm to invest and advised that obtaining the local permit would not be a problem, despite the Mexican operator having been denied the same permissions by the local government. Rather than recognizing what the investor knew – that the local government held the permitting authority

– the tribunal effectively imposed an obligation on Mexico not found in NAFTA to ensure that all officials at all levels provided the same advice to foreign investors.

Moreover, the tribunal defined expropriation in broader terms than expansive U.S. property rights protections: "[E]xpropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State." Under this expansive interpretation of indirect expropriation, whether or not a government action resulted in government control of property short of outright seizure or possession is irrelevant. Also irrelevant is whether a government action extinguished all value of an investment. Instead, the tribunal imposed its assumptions about what an investor's reasonable expectations of gain would be, and then concluded that regulation that interfered with the investor's intended use and thus undermined the expected benefit was an indirect expropriation.

In addition to the MST/FET and indirect appropriation standards, other investment treaty substantive provisions, such as prohibitions on non-discriminatory performance requirements, most-favored nation clauses, and the broad scope of the definition of investment beyond real property, have also exposed States to problematic ISDS claims. Hence, reform efforts that focus on procedural changes to the process of arbitration will not adequately address the concerns about ISDS that have been raised by governments and civil society. Instead, removing ISDS and these damaging substantive standards is the wisest course of action.

ENDNOTES

[1] Public Citizen report, Termination of Bilateral Investment Treaties Has Not Negatively Affected Countries' Foreign Direct Investment Inflows. Available at: www.citizen.org/sites/default/files/pgcw_fdi-inflows-from-bit-termination_finaldraft.pdf

[2] *See* Public Citizen memo, *Selected Statements and Actions Against Investor-State Dispute Settlement (ISDS)*. Available at: https://www.citizen.org/system/files/case_documents/selected_statements_and_actions_against_isds_3.pdf

[3] These conclusions are supported by Public Citizen reports: *Myths and Omissions: Unpacking Obama Administration Defenses of Investor-State Corporate Privileges*, October 2014. Available at: http://www.citizen.org/documents/ISDS-and-TAFTA.pdf and *Case Studies: Investor-State Attacks on the Public Interest.* Available at: http://www.citizen.org/documents/egregious-investor-state-attacks-case-studies.pdf

[4] The report further advised, "Thus developing-country policymakers should not assume that signing up to BITs will boost FDI. Indeed, they should remain cautious about any kind of recommendation to actively pursue BITs." United Nations Conference on Trade and Development, *Trade and Development Report, 2014*, (New York: United Nations, 2014), at 159. Available at: http://unctad.org/en/PublicationsLibrary/tdr2014_en.pdf.

[5] United Nations Conference on Trade and Development, *Trade and Development Report, 2014*, (New York: United Nations, 2014), at 159. Available at: http://unctad.org/en/PublicationsLibrary/tdr2014_en.pdf.

[6] Jason Webb Yackee, "Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence," *Virginia Journal of International Law*, 51:2, 2011. Available at: http://www.vjil.org/assets/pdfs/vol51/issue2/Yackee.pdf.

[7] While Brazil has signed various BITs, none have been ratified or entered into force. United Nations Conference on Trade and Development, "Full list of Bilateral Investment Agreements concluded: Brazil," UNCTAD factsheet, June 1, 2013. Available at: http://unctad.org/Sections/dite_pcbb/docs/bits_brazil.pdf.

[8] Among UN-recognized countries, Brazil has ranked between fourth and eighth in FDI inflows between 2012-2016.United Nations Conference on Trade and Development, "Inward and outward foreign direct investment flows, annual, 1970-2016," UNCTADStat, 2017. Available at: http://unctadstat.unctad.org/TableViewer/tableView.aspx.

[9] Quoting Xavier Carim, Deputy Director General of the South African Department of Trade and Industry, at the WTO Public Forum in Geneva, Sept. 25, 2012, on the rationale for South Africa's decision: "The spike in international investment arbitrations that followed the financial crisis in 2001 laid bare that bilateral investment agreements can pose profound and serious risks to government policy… Our own experience demonstrated that that there was no clear relationship between signing BITs and seeing increased inflows of FDI… The review identified a range of concerns associated with expansive interpretations on the provisions usually found in BITs: definitions of investment and of investor, national treatment, fair and equitable treatment, most favoured

nation clause, expropriation, compensation, transfer of funds etc. The review also identified difficulties with respect to international arbitration... This, in our view, opens the door for narrow commercial interests to subject matters of vital national interest to unpredictable international arbitration outcomes and is a direct challenge to constitutional and democratic policy-making…" Public Citizen, "Selected Statements and Actions Against Investor-State Dispute Settlement (ISDS)," Public Citizen Factsheet, March 9, 2018. Available at: https://www.citizen.org/sites/default/files/selected_statements_and_actions_against_isds_0.pdf. *See* also Xavier Carim, "Lessons from South Africa's BITs Review," Columbia FDI Perspectives No. 109, Nov. 25, 2013. Available at: http://ccsi.columbia.edu/files/2013/10/No_109_-_Carim_-_FINAL.pdf.

[10] Ben Bland and Shawn Donnan, "Indonesia to Terminate More Than 60 Bilateral Investment Treaties," *Financial Times*, March 26, 2014. Available at: https://www.ft.com/content/3755c1b2-b4e2-11e3-af92-00144feabdc0.

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[12] IISD, "Ecuador denounces its remaining 16 BITs and publishes CAITISA audit report" *Investment Treaty News,* June 12, 2017. Available at: https://www.iisd.org/itn/2017/06/12/ecuador-denounces-its-remaining-16-bits-and-publishes-caitisa-audit-report/.

[13] Amiti Sen, "India's Bilateral Investment Pacts Under Cloud," *The Hindu BusinessLine*, Jan. 15, 2018. Available at: http://www.thehindubusinessline.com/economy/indias-bilateral-investment-pacts-under-cloud/article9625580.ece.

[14] Investment Policy Hub, "International Investment Agreements Navigator," U.N. Conference on Trade and Development (UNCTAD), undated, accessed Jan. 26, 2018. Available at: http://investmentpolicyhub.unctad.org/.

[15] Sergey Ripinsky, "Venezuela's Withdrawal From ICSID: What it Does and Does Not Achieve," International Institute for Sustainable Development article, April 13, 2012. Available at: http://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve.

[16] Public Citizen, "Termination of Bilateral Investment Treaties Has Not Negatively Affected Countries' Foreign Direct Investment Inflows," PC Report, April 2018. Available at: *[link forthcoming].*

[17] UNCTADStat, "Foreign Direct Investment: Inward and Outward Flows and Stock, Annual, 1970-2016," U.N. Conference on Trade and Development. Available at: http://unctadstat.unctad.org/. The latest available data is from 2016.

[18] Invest in ASEAN, "ACIA-ASEAN Comprehensive Investment Agreement," accessed April 12, 2018. Available at: http://investasean.asean.org/index.php/page/view/acia-reservation-list. UNCTAD, "ASEAN-China Investment Agreement," Investment Policy Hub, accessed April 12, 2018. Available at: http://investmentpolicyhub.unctad.org/IIA/country/97/treaty/3272. ASEAN has also signed an investment agreement with India, but it has not entered into force. UNCTAD, Investment Policy Hub, "Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the Republic of India." Available at: http://investmentpolicyhub.unctad.org/IIA/country/97/treaty/3503.

[19] Central Bank of Indonesia, "V. 33 Direct Investment Flows in Indonesia by Country of Origin," Indonesian Financial Statistics – External Sector, undated, accessed March 13, 2008. Available at: https://www.bi.go.id/en/statistik/seki/terkini/eksternal/Contents/Default.aspx.

[20] "Foreign Direct Investment: Inward and Outward Flows, Annual, 1970-2016," United Nations Conference on Trade and Development, accessed Jan. 26, 2018. Available at: http://unctadstat.unctad.org/TableViewer/tableView.aspx.

[21] Banco Central del Ecuador, "Inversión Extranjera Directa por País de Origen," 2017, accessed April 11, 2018. Available at: http://www.bce.fin.ec/index.php/component/k2/item/298-inversi%C3%B3n-extranjera-directa.

[22] Office of the U.S. Trade Representative, "The Facts on Investor-State Dispute Settlement: Safeguarding the Public Interest and Protecting Investors," USTR blog post, March 27, 2014. Available at: http://www.ustr.gov/about-us/press-office/blog/2014/March/Facts-Investor-State%20Dispute-Settlement-Safeguarding-Public-Interest-Protecting-Investors.

[23] Dominican Republic – Central America – United States Free Trade Agreement, ch. 10 (Annex 10-B), August 5, 2004, Pub. L. No. 109-53, 119 Stat. 462 (2005), at 10-27.

[24] The U.S. government attempted to make clear the narrowness of the "minimum standard of treatment" standard in its official submission in the RDC case, stating, "These provisions [in the CAFTA annex] demonstrate the CAFTA-DR Parties' express intent to incorporate the minimum standard of treatment required by customary international law as the standard for treatment in CAFTA-DR Article 10.5. Furthermore, they express an intent to guide the interpretation of that Article by the Parties' understanding of customary international law, i.e., the law that develops from the practice and opinio juris of States themselves, rather than by interpretations of similar but differently worded treaty provisions. The burden is on the claimant to establish the existence and applicability of a relevant obligation under customary international law that meets these requirements." *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Submission of the United States of America (January 31, 2012), at para. 3. Available at: http://italaw.com/sites/default/files/case-documents/ita0709_0.pdf.

[25] *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award (June 29, 2012), at para. 219. Available at: http://italaw.com/sites/default/files/case-documents/ita1051.pdf. *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award (December 19, 2013), at para. 455. Available at: http://italaw.com/sites/default/files/case-documents/italaw3035.pdf.

[26] *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award (December 19, 2013), at para. 780. Available at: http://italaw.com/sites/default/files/case-documents/italaw3035.pdf. *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award (June 29, 2012), at para. 219. Available at:

http://italaw.com/sites/default/files/case-documents/ita1051.pdf. For more information, see Lori Wallach and Ben Beachy, "CAFTA Investor-State Ruling: Annex on Minimum Standard of Treatment, Proposed for TPP, Proves Insufficient as Tribunal Ignores Customary International Law Standard, Applies MST Definition from Past NAFTA Award to Rule against Guatemala," PC memo, July 19, 2012. Available at: http://www.citizen.org/documents/RDC-vs-Guatemala-Memo.pdf. And see Lori Wallach and Ben Beachy, "Rebutting Misleading Claims Made by Industry with Respect to RDC v. Guatemala Award: CAFTA Tribunal Rejected CAFTA Parties' and CAFTA Annex 10-B's Definition of CIL Based on State Practice, Imported Past Tribunal's MST Standard," PC memo, November 17, 2012. Available at: http://www.citizen.org/documents/rdc-v-guatemalarebuttal.pdf.

[27] 2012 U.S. Model Bilateral Investment Treaty, U.S. Department of State, 2012, at Article 28. Available at: http://www.state.gov/documents/organization/188371.pdf.

[28] Pia Eberhardt and Cecilia Olivet, "Profiting from Injustice," Transnational Institute and Corporate Europe Observatory report, November 2012, at 38. Available at: http://www.tni.org/sites/www.tni.org/files/download/profitingfrominjustice.pdf.

[29] *See* Lori Wallach and Ben Beachy, "*Occidental v. Ecuador* Award Spotlights Perils of Investor-State System: Tribunal Fabricated a Proportionality Test to Further Extend the FET Obligation and Used 'Egregious' Damages Logic to Hit Ecuador with $2.4 Billion Penalty in Largest Ever ICSID Award," PC memo, November 21, 2012. Available at: http://www.citizen.org/documents/oxy-v-ecuador-memo.pdf.

[30] *See* Trans Atlantic Consumer Dialogue, *Response to the European Commission's Investor-State Dispute Settlement "Reform" Proposal,* January 2016. Available at: http://tacd.org/wp-content/uploads/2015/02/TACD-resolution-ICS-proposal.pdf

[31] Lori Wallach, "Fair and Equitable Treatment" and Investors' Reasonable Expectations", PC Memo, September 5, 2012 Available at: https://www.citizen.org/sites/default/files/mst-memo.pdf

[32] Dominican Republic – Central America – United States Free Trade Agreement, ch. 10 (Annex 10-B), August 5, 2004, Pub. L. No. 109-53, 119 Stat. 462 (2005), at 10-27.

[33] European Commission, Consolidated CETA Text, September 26, 2014, at 158. Available at: http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.

[34] *S.D. Myers, Inc. v. Government of Canada*, Second Partial Award, Ad hoc—UNCITRAL Arbitration Rules (2002), at para. 263.

[35] 59 FR 62785, 62877 (Dec. 6, 1994).

[36] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal Adopted by the Conference of the Plenipotentiaries on Mar. 22, 1989

[37] *S.D. Myers, Inc. v. Government of Canada*, Second Partial Award, Ad hoc—UNCITRAL Arbitration Rules (2000), at para. 311. Available at: http://italaw.com/sites/default/files/case-documents/ita0752.pdf.

[38] Todd Weiler, comments at "The Investor-State Dispute Settlement Mechanism: An Examination of Benefits and Costs," CATO Institute, May 20, 2014. Available at: http://www.cato.org/events/investor-state-dispute-settlementmechanism-examination-benefits-costs.

[39] European Commission, Consolidated CETA Text, September 26, 2014, at 158. Available at: http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf. See European Commission, "Public consultation on modalities for investment protection and ISDS in TTIP," March 2014, at 22. Available at: http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.

[40] European Commission, Consolidated CETA Text, September 26, 2014, at 158. Available at: http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf. See European Commission, "Public consultation on modalities for investment protection and ISDS in TTIP," March 2014, at 22. Available at: http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.

[41] UNCTAD. Breaches of IIA provisions alleged and found, Investment Policy Hub. Accessed January 11, 2018. Available at: http://investmentpolicyhub.unctad.org/ISDS/FilterByBreaches.

Reform Options for ISDS

The work of the UNCITRAL Working Group III provides a unique opportunity to tackle the manifold problems of Investor State Dispute Settlement (ISDS). The mandate of the working group is broad, and allows for a wide range of possible solutions.[1]

As the UN Conference on Trade and Development (UNCTAD) has identified, there are a variety of ways to address the problems caused by existing investment agreements.[2] And, as the Organization for Economic Co-operation and Development (OECD) has recently explained, there is no clear evidence that international investment agreements lead to increased FDI nor that any such investments that are influenced by the treaties is positive for either party.[3] In addition, a recent empirical study concludes that there is no evidence for the assertion that ISDS serves to de-politicize disputes.[4] In contrast, many states have demonstrated that there are better alternatives for promoting foreign investment.[5].

The options presented below are intended to support a broad discussion on potential solutions within the Working Group and highlight the diverse ways in which widely-acknowledged problems of ISDS could be addressed.

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[1] For the UNCITRAL working group mandate, see: http://www.uncitral.org/pdf/english/workinggroups/wg_3/WGIII-34th-session/930_for_the_website.pdf, para. 6.
[2] For a list of options presented by UNCTAD, see: http://unctad.org/meetings/en/SessionalDocuments/ciimem4d14_en.pdf.
[3] Joachim Pohl, "Societal benefits and costs of International Investment Agreements: A critical review of aspects and available empirical evidence", OECD Working Papers on International Investment, 2018/01, OECD Publishing, Paris, available at, http://dx.doi.org/10.1787/e5f85c3d-en, pp. 14-36, 37-39; Johnson et al., Costs and Benefits of Investment Treaties: Practical considerations for States (CCSI 2018).
[4] Gertz, Geoffrey, et al. "Legalization, diplomacy, and development: Do investment treaties de-politicize investment disputes?." 107 World Development 239 (2018).
[5] See, e.g., The EU-Indonesia CEPA negotiations, Responding to calls for an investment policy reset: are the EU and Indonesia on the same page?, pp. 20-23, SOMO, 15 February 2018, https://www.somo.nl/eu-indonesia-cepa-negotiations/.

A multilateral approach to terminating existing BITs[6]

The UNCITRAL process provides a unique opportunity to lay the basis for states to agree, multilaterally, to terminate investment treaties and/or withdraw consent to arbitrate.[7] Working Group III could recommend that states negotiate a multilateral instrument that specifies the treaties they seek to terminate, indicates their intent not to challenge state parties' effort to terminate, and affirms their commitment to provide aliens treatment required by customary international law. This approach would allow governments to terminate in a coordinated way that reaffirms that termination is not directed against investors but against ISDS.

Alternatively, the working group could recommend that states negotiate a multilateral instrument to withdraw consent to ISDS, leaving states bound by the obligations under investment agreements but allowing disputes to be settled only through state-state dispute settlement mechanisms or other forms of dispute resolution, such as mediation or the use of an ombudsman.[8]

Explanation:

ISDS reform through the renegotiation of individual investment treaties would involve significant time, effort, and be challenging given the power dynamic and political considerations inherent in treaty negotiations. Instead, countries could terminate multiple treaties at once, lessening the pressure on terminating governments.[9] Obligations of fair and just treatment to foreign investors would remain under customary international law, as well as various human rights treaties and free trade agreements.[10]

Treaty termination is not uncommon or egregious: "denunciations and withdrawals are a regularized component of modern treaty practice."[11] In fact, a growing number of countries have terminated (or threatened to terminate) their BITs in the past decade,

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[6] See Lise Johnson et al., "Addressing the Existing Treaty Challenge: Termination and Withdrawal of Consent," Columbia Center on Sustainable Investment (forthcoming 2018).

[7] Matthew C. Porterfield, "Aron Broches and the Withdrawal of Unilateral Consent in Investor-State Arbitration," Investment Treaty News (11 Aug. 2014), https://www.iisd.org/itn/2014/08/11/aron-broches-and-the-withdrawal-of-unilateral-offers-of-consent-to-investor-state-arbitration/ (discussing legal basis for and implications of withdrawals of consent); Rob Howse, "A Short Cut to Pulling out of Investor-State Arbitration under Treaties: Just Say No," International Economic Law and Policy Blog (9 Mar. 2017), http://worldtradelaw.typepad.com/ielpblog/2017/03/a-short-cut-to-pulling-out-of-investor-state-arbitration-under-treatiesjust-say-no.html.

[8] Some investment treaties, such as the China-Australia Free Trade Agreement (ChAFTA), include a state-to-state 'filtering' provision that requires a period of diplomatic consultation between states before an investor may request arbitration. Free Trade Agreement, China-Australia, 17 June 2015, Art. 9.11,.

[9] This process could also include an agreement to invalidate survival clauses.

[10] For a deeper examination of the investor rights that would survive BIT termination, see Tania Voon et al., "Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights," 29 ICSID Rev. 451 (2014); Clint Peinhardt & Rachel L. Wellhausen, "Withdrawing from Investment Treaties but Protecting Investment" (20 Apr. 2016), http://www.rwellhausen.com/uploads/6/9/0/0/6900193/peinhardt_wellhausen_bitwithdrawal.pdf.

[11] Laurence R. Helfer, "Exiting Treaties," 91 Virginia L. Rev. 1579, 1602-05 (2005).

including India, South Africa, the Philippines, Ecuador, Bolivia, Venezuela, Poland, Romania, and others.[12]

Alternatively, a country could indicate its withdrawal of consent to ISDS in particular, while remaining party to its investment treaties. As with termination, withdrawal of consent to ISDS could be done via a multilateral instrument. Some international law professors have suggested that this approach would be legal under the Vienna Convention on the Law of Treaties.[13]

<u>Example</u>:
India has sent notices to terminate BITs with 58 countries, including 22 EU countries.[14] Indonesia, Bolivia, Venezuela, and South Africa have also announced their intent to terminate investment agreements.[15]

The recent Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS, which imposes changes to over one thousand bilateral tax treaties, provides an example of how a multilateral effort can successfully address problems in existing bilateral agreements.[16]

As a result of the European Court of Justice ruling that BITs between EU member states are illegal under European law, these agreements must now be terminated.[17] The termination may be achieved through an international treaty in which the EU member states agree to immediately terminate all BITs between them without the application of a survival clause.

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[12] Peinhardt & Wellhausen, *supra* note 5, at 4–8; Colin Trehearne, "Will 2018 Mark a Tipping Point for Binding Investor-State Arbitration?," Kluwer Arbitration Blog (31 Oct. 2017), http://arbitrationblog.kluwerarbitration.com/2017/10/31/will-2018-mark-tipping-point-binding-investor-state-arbitration/?print=pdf.
[13] Howse, *supra* note 2, at 2; Johnson, *supra* note 1.
[14] Nicholas Peacock & Nihal Joseph, "Mixed Messages to Investors as India Quietly Terminates Bilateral Investment Treaties with 58 Countries," Herbert Smith Freehills Arbitration Notes (16 Mar. 2017), https://hsfnotes.com/arbitration/2017/03/16/mixed-messages-to-investors-as-india-quietly-terminates-bilateral-investment-treaties-with-58-countries/. Although re-negotiated agreements could still include ISDS, the substantive investment protections would be aligned with customary international law, rather than create additional substantive rights. See Issuing Joint Interpretive Statements for Indian Bilateral Investment Treaties, F. No. 26/07/2013-IC, India Ministry of Finance (8 Feb. 2016), http://indiainbusiness.nic.in/newdesign/upload/Consolidated_Interpretive-Statement.pdf.
[15] Ryan Matthews, Nandakumar Ponniya & Jo Delaney, "Withdrawal from Investment Treaties: An Omen for Waning Investor Protection in AP?," Baker McKenzie (12 May 2017), http://www.bakermckenzie.com/en/insight/publications/2017/05/withdrawal-from-investment-treaties/.
[16] Pascal Saint-Amans, "Ground-breaking Multilateral BEPS Convention Signed at OECD will Close Loopholes in Thousands of Tax Treaties Worldwide," OECD (7 June 2017), http://www.oecd.org/tax/ground-breaking-multilateral-beps-convention-will-close-tax-treaty-loopholes.htm.
[17] *Achmea B.V. v. The Slovak Republic*, Case C-284/16, Judgment of the Court (Grand Chamber) (6 Mar. 2018), http://curia.europa.eu/juris/document/document.jsf?text=&docid=199968&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=445274.

Allow Counterclaims
The UNCITRAL working group could recommend that, to the extent states continue to allow ISDS, counter-claims be permitted as long as there is a factual connection between the originating claim and the counterclaim. Additionally, international human rights and environmental obligations could be considered within the investment dispute resolution panel's jurisdiction for purposes of hearing a counterclaim.[18]

Explanation:
ISDS arbitration panels have historically excluded state-respondent counterclaims against investor-claimants. Although counterclaims are permitted in principle under the ICSID Convention[19] and UNCITRAL Arbitration Rules,[20] states' attempts to assert counterclaims rarely, if ever, succeed. This procedural pattern has led to an asymmetrical system of investment arbitration in which foreign investors are granted rights without accompanying obligations. On the other side of the equation, "a state cannot win; the most it can hope to do is not lose."[21]

Allowing counterclaims in ISDS would have a number of benefits for investors as well as state respondents:

- Efficiency: permitting counterclaims would establish ISDS as a one-stop shop for all claims relating to a particular cluster of events, and would encourage efficient decision-making.[22]
- Consistency: permitting counterclaims would avoid the risk of different fora reaching different conclusions regarding the same legal questions, as well as mitigate the fragmentation of international law.[23]
- Fairness and legitimacy: permitting counterclaims would enhance the perceived legitimacy of the ISDS system by addressing concerns over its current asymmetrical nature.[24]
- Enhanced rule of law: permitting counterclaims would make it far more likely that foreign investors are called to account for their actions.[25]

Adequate public participation, access to information, and access to justice in ISDS disputes are crucial in order to realize the benefits of allowing state counterclaims.[26]

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[18] The viability of this approach, however, would depend on ensuring that experts in human rights and environmental law were appointed to the arbitral tribunals.
[19] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Art. 46, https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20Convention%20English.pdf.
[20] UNCITRAL Arbitration Rules (2010), Arts. 21-23, https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf.
[21] Andrea Bjorkland, "The Role of Counterclaims in Rebalancing Investment Law,"17 Lewis & Clark L. Rev. 461, 464 (2013).
[22] *Id.* at 475.
[23] Kelsey Brooke Farmer, "The Best Defence is a Good Offense: State Counterclaims in Investment Treaty Arbitration" (2016), at 6, http://researcharchive.vuw.ac.nz/handle/10063/5004.
[24] Bjorklund, *supra* note 16, at 475-77.
[25] *Id.*

In discussions during the first meeting, members of Working Group III seemed to agree that investor-state dispute resolution should not reject counterclaims outright. Some indicated that the underlying treaty should determine whether counterclaims are permissible. However, reliance on the underlying investment agreement alone is insufficient to support counterclaims because arbitration tribunals have provided contradictory approaches to this issue, even when the same treaty language is involved.[27]

Example:
The Spain-Argentina BIT allows for dispute resolution upon request of either party.[28] This provision thus allows for counterclaims: the arbitral tribunal in *Urbaser v. Argentina* took jurisdiction over Argentina's human rights-based counterclaim against the Spanish investor.[29] Although ultimately ruling in favor of Urbaser, the judgment created a precedent for host state human rights counterclaims in ICSID arbitration.[30]

The duty to regulate/a public interest carve out
Working Group III could recommend that ISDS be reformed to protect the states' right, and duty, to regulate in the public interest. This can only be achieved by ensuring that investment protections cannot be used as a basis to challenge public interest decisions. The members of Working Group III have discussed a mechanism to enable the early dismissal of frivolous claims.[31] The same mechanism could be used to deny jurisdiction over claims against legitimate, non-discriminatory, and lawful decisions to protect the public interest.[32]

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[26] Otherwise, there is a risk that states could settle ISDS claims by disposing of potential counterclaims on behalf of their constituents, thereby precluding affected citizens from holding foreign investors accountable in other fora for environmental or human rights violations. See Lise Johnson & Brooke Skartvedt Guven, "The Settlement of Investment Disputes: A Discussion of Democratic Accountability and the Public Interest," Int'l Inst. for Sustainable Development (13 Mar. 2017), https://www.iisd.org/itn/2017/03/13/the-settlement-of-investment-disputes-a-discussion-of-democratic-accountability-and-the-public-interest-lise-johnson-and-brooke-skartvedt-guven/.
[27] Farmer, *supra* note 18, at 25.
[28] Agreement Between the Argentine Republic and the Kingdom of Spain on the Reciprocal Promotion and Protection of Investments, 28 Sept. 1992, Art X(3), https://www.investorstatelawguide.com/documents/documents/BIT-0008%20-%20Argentina-Spain%20(1991)%20[english%20translation]%20UNTS.pdf.
[29] *Urbaser S.A. v. Argentine Republic*, ICSID Case No. ARB/07/26, Final Award, 8 Dec. 2016, https://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf.
[30] *Id*; see Edward Guntrip, "Urbaser v. Argentina: The Origins of a Host State Human Rights Counterclaim in ICSID Arbitration?," European Journal of International Law - Talk! (10 Feb. 2017), https://www.ejiltalk.org/urbaser-v-argentina-the-origins-of-a-host-state-human-rights-counterclaim-in-icsid-arbitration/.
[31] United Nations Commission on International Trade Law, Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Fourth Session (19 Dec. 2017), paras. 51-52.
[32] For an explanation by ClientEarth about how this could work, see Towards a More Diligent and Sustainable System of Investment Protection, ClientEarth (15 Mar. 2017), Sec. 4.2, https://www.documents.clientearth.org/wp-content/uploads/2017-03-15-towards-a-more-diligent-and-sustainable-system-of-investment-protection-ce-en.pdf.

Explanation:

Investors have invoked ISDS provisions to challenge domestic public interest measures relating to a broad range of topics, including tobacco packaging laws, environmental health regulations, and affirmative action programs. These actions threaten sovereign states' "right to regulate" by raising the price tag on public interest legislation and pressuring states not to adopt such rules.

For example, when Australia passed plain packaging tobacco laws in 2011, Philip Morris challenged the rule under the ISDS provision of the Australia-Hong Kong BIT. Although the investor's claim was ultimately unsuccessful, the Australian government was embroiled in years of costly arbitration over a measure squarely intended to promote public health. While arbitration was ongoing, New Zealand delayed implementing its own tobacco packaging laws until the Australia claim was settled.[33]

Example:

In response to Australia's experience, the country insisted on including a 'tobacco carve-out' in its next trade agreement, the Trans-Pacific Partnership (TPP). Article 29.5 reads: "A Party may elect to deny the benefits of Section B of Chapter 9 [ISDS] with respect to claims challenging a tobacco control measure of the Party." This provision will protect TPP parties from defending plain packaging laws and other tobacco regulations before ISDS tribunals.[34]

A public interest carve-out could be modeled after the TPP's tobacco carve-out, but broadened to include other forms of public interest legislation.[35]

As another example, the Nigeria-Morocco BIT provides, "For greater certainty, non-discriminatory measures taken by a State Party to comply with its international obligations under other treaties shall not constitute a breach of this Agreement."[36]

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[33] Alexandre Gauthier, "Investor–State Dispute Settlement Mechanisms: What Is Their History and Where Are They Going," Canada Library of Parliament (4 May 2016), at 4, https://lop.parl.ca/Content/LOP/ResearchPublications/2015-115-e.pdf.

[34] Similarly, Professor Gus Van Harten has suggested a 'climate carve-out' provision in BITs that protects domestic climate change regulations from ISDS challenges. Gus Van Harten, "An ISDS Carve-Out to Support Action on Climate Change," Osgoode Legal Studies Research Paper No. 38 (2015), http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1112&context=olsrps.

[35] For example, the provision could provide that *"No claims can be brought in investor-state dispute resolution challenging public interest measures contributing to or aiming at inter alia environmental, social, human rights, or consumer protection."* See ClientEarth, *supra* note 27, Sec. 4.2.

[36] Reciprocal Investment Promotion and Protection Agreement, Morocco-Nigeria, 3 Dec. 2016, Art 23.3, http://investmentpolicyhub.unctad.org/Download/TreatyFile/5409.

Clean hands clause for investors

Working Group III could also recommend that any investor that has violated domestic or international obligations should not be granted access to ISDS.[37]

Explanation:

ISDS panels typically allow investors to bring claims even when they have plainly violated domestic and international law. For example, in 2010, Copper Mesa Mining Corporation brought an ISDS claim against Ecuador for terminating certain mining concessions. Ecuador pointed out, and the tribunal acknowledged, a pattern of unlawful and violent behavior on behalf of the investor: in the tribunal's own words, Copper Mesa "resort[ed] to recruiting and using armed men, firing guns and spraying mace at civilians, not as an accidental or isolated incident but as part of premeditated, disguised and well-funded plans to take the law into its own hands." Despite these findings and despite Ecuador's impressive amount of expert testimony and materials relating to the legal doctrine of unclean hands under international law, the tribunal allowed the claim to proceed and ultimately awarded Copper Mesa $24 million.[38]

A separate and unrelated ISDS panel similarly found that "'unclean hands' does not exist as a general principle of international law which would bar a claim by an investor, such as Claimants in this case."[39]

As a result, investors have unrestricted access to ISDS tribunals regardless of their conduct. This ignores the rationale behind the clean hands doctrine, which has appeared in jurisdictions as diverse as ancient Roman law, modern American law, and the International Court of Justice.[40] There is no reason why investment arbitration should not observe the same equitable doctrine. Any ISDS system should refuse to enforce investor rights if they have not abided by national and international law.[41]

Examples:

India's model BIT provides, "(i) Investors and their investments shall comply with all laws, regulations, administrative guidelines and policies of a Party concerning the establishment, acquisition, management, operation and disposition of investments."[42]

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[37] See ClientEarth, *supra* note 27, Sec. 4.1.

[38] *Copper Mesa Mining Co. v. Republic of Ecuador*, PCA Case No. 2012-2, Final Award (15 Mar. 2016), para 6.99, https://www.italaw.com/sites/default/files/case-documents/italaw7443.pdf.

[39] *Yukos Universal Limited v. Russian Federation*, PCA Case No. AA 227, Final Award (18 July 2014), para. 1363, https://www.italaw.com/sites/default/files/case-documents/italaw3279.pdf.

[40] Stephen M. Schwebel, "Clean Hands, Principle," Oxford Public International Law (Mar. 2013), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e18; T. Leigh Anenson, "Limiting Legal Remedies: An Analysis of Unclean Hands," 99 Kentucky L.J. 63 (2010).

[41] For example the provision could state, "*An investor may not submit a claim if the investment has been made through fraudulent misrepresentation, concealment, corruption, conduct amounting to an abuse of process, fraud, human rights abuses, or not in accordance with the applicable environmental, social, and consumer law, including international law.*" ClientEarth, *supra* note 27, Sec. 4.1. The language is based on based on Articles 8.1 and 8.18 (3) of the Canada-Europe Trade Agreement ("CETA").

[42] Model Text for the Indian Bilateral Investment Treaty, Art. 11, https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf.

As another example, the Morocco-Nigeria Reciprocal Investment Promotion and Protection Agreement provides, "1) Each Contracting Party shall ensure that measures and efforts are undertaken to prevent and combat corruption regarding matters covered by this Agreement in accordance with its laws and regulations. . . 4) A breach of this article by an investor or an investment is deemed to constitute a breach of the domestic law of the Host State Party concerning the establishment and operation of an investment."[43]

Finally, CETA provides, "For greater certainty, an investor may not submit a claim under this Section if the investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process."[44]

These provisions could be expanded to include human rights and environmental obligations.[45]

Exhaustion of local remedies

Working Group III could recommend that investors be required to exhaust local remedies. The ability of investors to challenge a state directly in an ISDS tribunal, without resorting to domestic courts first, is an anomaly in international law and contrary to international human rights law and customary international law.

Additionally, Working Group III could recommend that if a domestic court finds that a law, rule, regulation, or guideline is non-discriminatory, and/or was issued in compliance with ILO conventions, multilateral environmental agreements, sustainable development goals, or other international obligations, that this finding is conclusive and should bar the filing of an ISDS case before any international tribunal.

Explanation:

Under both customary international law and international human rights law, individuals are required to seek redress before domestic courts before bringing international proceedings against the state for wrongful acts.[46] This rule, known as 'exhaustion of local remedies,' is intended to ensure respect for sovereign state authority over matters occurring within the state's jurisdiction. Only after proceeding through the domestic court system may a party bring a claim before an international law tribunal.

Exhaustion of local remedies is nearly ubiquitous in international human rights

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[43] Reciprocal Investment Promotion and Protection Agreement, Morocco-Nigeria, 3 Dec. 2016, Art 14, http://investmentpolicyhub.unctad.org/Download/TreatyFile/5409.

[44] Comprehensive and Economic Trade Agreement (CETA), EU-Canada, Art. 8.18.3, http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/.

[45] More generally, a country could refuse to enter into BITs at all with countries that do not respect international human rights or environmental standards. French President Emmanuel Macron recently adopted this view in response to the United States' withdrawal from the Paris Agreement. See Arthur Neslen, "Macron: EU 'Mad' to do Trade Deal with US after Paris Climate Withdrawal," Climate Home News (22 Mar. 2018), http://www.climatechangenews.com/2018/03/22/macron-eu-mad-trade-deals-us-paris-withdrawal/.

[46] ClientEarth, *supra* note 27, Sec. 2.1.

instruments. The International Covenant on Civil and Political Rights, the European Convention on Human Rights, the American Convention on Human Rights, and the African Charter on Human and Peoples' Rights all contain some form of exhaustion of local remedies requirement.[47] International human rights case law upholds this requirement subject to narrow exceptions.[48]

The failure to require the exhaustion of local remedies in ISDS cases enables investors to side-step domestic courts and remedies, thereby undermining the domestic legal system.[49] The European Court of Justice (ECJ) recently expressed concerns about this aspect of ISDS and determined that ISDS between EU Member States incompatible with EU law, because it removes disputes from domestic legal systems.[50]

Example:
States and regional economic communities including Argentina, India, Romania, Turkey, the United Arab Emirates, Uruguay, the Southern African Development Community, and the East African Community have required investors to pursue or exhaust local remedies before resorting to ISDS.[51]

Third party access
Because the outcome of ISDS can directly affect the livelihood and well-being of local communities,[52] Working Group III could recommend that third parties be allowed to join a case with full rights as a party. This is a common feature of procedural codes around the world and is based on the premise that access to adjudication that directly affects one's vested interests is a fundamental principle of law.

Explanation:
ISDS decisions often have significant impacts on the rights of local communities, businesses, and other actors not directly party to the dispute. In *Ecuador v. Chevron*, for example, an ISDS tribunal ordered the Ecuadorian government to overturn a $9.5 billion judgment against Chevron by the domestic court that would have gone toward environmental remediation and health care costs for communities impacted by the oil conglomerate's decades of pollution.[53] The innumerable individuals affected by Chevron's pollution were stripped of almost $10 billion to which they were legally

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[47] *Id.* at Sec. 2.3.1.
[48] *Id.* at Sec. 2.3.2.
[49] Also this requirement has been dispensed with in ISDS in part because of a concern that domestic courts are not efficient or unbiased, the solution to these problems is to strengthen the domestic judiciary and domestic legislation.
[50] *See Achmea*, *supra* note 12.
[51] Martin Dietrich Brauch, "IISD Best Practices Series: Exhaustion of Local Remedies in International Investment Law," Int'l Inst. for Sustainable Development (Jan. 2017), https://www.iisd.org/library/iisd-best-practices-series-exhaustion-local-remedies-international-investment-law.
[52] See, e.g., Nicolás M. Perrone, "The International Investment Regime and Local Populations: Are the Weakest Voices Unheard?," Transnational Legal Theory 7.3 (2016), at 383-405 (noting that "the notion of investment also serves to occlude other purposes for local resources").
[53] "Ecuador's Highest Court vs. a Foreign Tribunal: Who Will Have the Final Say on Whether Chevron Must Pay a $9.5 Billion Judgment for Amazon Devastation?,", Public Citizen (Dec. 2013), at 1, https://www.citizen.org/sites/default/files/chevron-decision-2013.pdf.

entitled under Ecuadorian law. Nevertheless, those individuals and communities had no representation in the ISDS proceeding that decided their fate.

Very limited third-party participation in ISDS disputes is allowed in the form of *amicus curiae*. However, *amicus curiae* is a shallow and narrow substitute for legal standing. Amici lack substantial procedural and substantive rights in ISDS proceedings. For example, they cannot receive direct compensation for legal injuries, cannot view much or all of the evidentiary record, cannot participate in oral arguments, and cannot participate in settlement negotiations. As one scholar puts it, ISDS panels have "systematically denied *amici* any involvement beyond the submission of briefs."[54]

Third-party intervention is a common feature of domestic procedural codes around the world. For example, in the United States and France, third parties may intervene as a matter of right when their interests directly relate to the subject matter of the litigation.[55] Many other countries including Canada, the United Kingdom, Italy, India, and Brazil, allow intervention at the discretion of the court.[56] The rationale behind third-party intervention in these and other countries is multifold. Intervention increases judicial efficiency[57]; ensures access to justice[58]; improves judicial decision-making[59]; and promotes synchronization among different jurisdictions.[60]

Third party intervention is also a feature of international law. For example, the International Court of Justice allows third parties with "an interest of a legal nature which may be affected by the decision in the case" to intervene at the Court's discretion.[61]In fact, since 1943, the ICJ has declined to exercise its jurisdiction where the legal interests of a third state "would form the very subject-matter of the decision."[62]

Finally, third party intervention is already a feature of some international commercial

[54] Bernali Choudhury, "Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?," 41 Vanderbilt J. of Transnat'l L. 775, 817 (2008).
[55] Federal Rules of Civil Procedure 24(a) (United States); Code of Civil Procedure Title IX (France).
[56] Rules of the Supreme Court of Canada 56–59; Civil Procedure Rules 54.17 (United Kingdom); Code of Civil Procedure 105 (Italy); Supreme Court Rules, Rule 3 of Order XVII (India); Civil Procedure Code 51 *et seq.* (Brazil).
[57] Raising all claims related to a particular set of events before one tribunal avoids duplicative judicial processes and avoid the accompanying waste of judicial resources.
[58] Intervention allows all parties with legal interests in the outcome of a given dispute to access a remedy.
[59] Hearing all sides of a dispute allows the judicial body to have a fuller understanding of the factual and legal issues at play.
[60] Intervention reduces the risk of two separate judicial bodies arriving at different conclusions over the same set of facts and legal questions.
[61] Statute of the International Court of Justice, Art. 62, http://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf.
[62] This is known as the "Monetary Gold principle." See Tobias Theinel, "Third States and the Jurisdiction of the International Court of Justice: The Monetary Gold Principle," 57 German Yearbook of Int'l L. 321 (2014).

arbitration procedural rules.[63] For example, the Netherlands Arbitration Institute Rules allow a third party to request the arbitral tribunal for permission to join the proceedings.[64]

Example:
The United States has the most robust system of third-party intervention, which allows full participation for "*anyone . . . who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.*"[65]

The Netherlands Arbitration Institute Rules provide that "*A third party who has an interest in the outcome of arbitral proceedings to which these Rules apply may request the arbitral tribunal for permission to join the proceedings or to intervene therein.*"[66]

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[63] See Rules of the London Court of International Arbitration (2014), Art. 22.1(viii), http://www.lcia.org/dispute_resolution_services/lcia-arbitration-rules-2014.aspx; UNCITRAL Arbitration Rules, *supra* note 15, Art. 17.5.
[64] Netherlands Arbitration Institute Rules (2015), Art. 41.1, http://www.nai-nl.org/downloads/NAI%20Arbitration%20Rules%20and%20Explanation.pdf.
[65] Federal Rules of Civil Procedure 24(a) (United States).
[66] Netherlands Arbitration Institute Rules, *supra* note 58, Art. 41.1.