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POLLUTERS' PARADISE

How investor rights in EU trade deals sabotage the fight for energy transition

Avoiding catastrophic climate change is the defining challenge of our time. If we are to have a chance of preventing extremely dangerous levels of global warming, much of the world's fossil fuels – oil, coal and gas – must be left in the ground, unexploited. Societies need to move to an energy system based on renewable sources like sun, wind and water.

This colossal change will require strong action from public authorities. But their ability to introduce the right laws and regulations is severely constrained by a little-known but very powerful legal system. This international investment regime has ensnared many countries in its legal nets in the last decades.

Thousands of trade and investment agreements signed between countries allow multinational companies to sue governments if changes in policy – even in rules to protect the environment or fight climate change – are deemed to reduce their profits. By the end of 2014, there were 608 of these investor lawsuits known to be taking place within international tribunals. The costs of these suits weigh heavily on governments, in the form of hefty legal bills and weakened social and environmental regulations.

A growing number of investor-state lawsuits target government initiatives in the energy sector, ranging from the phase out of nuclear power to moratoria on environmentally-risky shale gas development ('fracking'). As law firms make money each time that an investor sues a state, this encourages more and more corporate lawsuits: for example, over legislation in the renewables sector.

Despite the evident risk to energy transition, even more trade and investment deals are in the pipeline that would empower corporations to challenge strong government action on climate change. Amongst them is the Transatlantic Trade and Investment Partnership (TTIP), currently under negotiation between the EU and the US, and the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, for which ratification could start in 2016.

Yet while big polluters are lobbying heavily for these deals, a growing movement is turning against the corporate power grab. Indeed, there is now more public scrutiny and debate about trade and investment agreements than there has been in years.

Box 1: ENERGY POLICIES UNDER ATTACK IN INVESTOR-STATE DISPUTES

Corporations against environmental restrictions on coal – Vattenfall vs. Germany I: In 2009, Swedish energy multinational Vattenfall sued the German government, seeking €1.4 billion in compensation for environmental restrictions imposed on one of its coal-fired power plants. The case, which was based on the Energy Charter Treaty, a multilateral agreement about investments in the energy sector, was settled after Germany agreed to water down the environmental standards.¹

Corporations against phasing out nuclear energy – Vattenfall vs. Germany II: In 2012, Vattenfall launched a second lawsuit via the Energy Charter Treaty, seeking €4.7 billion for lost profits related to two of its nuclear power plants. The legal action came after Germany decided to phase out nuclear energy, following the Fukushima nuclear disaster. The German government has already spent over €3.2 million to defend the case, and expects a total of €9 million in legal costs.²

Corporations against fracking moratoria – Lone Pine vs. Canada: In 2011, the government of the Canadian province of Quebec responded to concerns over water pollution by implementing a moratorium on the use of hydraulic fracturing ('fracking') for oil and gas exploration. In 2012, the Calgary-based Lone Pine Resources energy company filed an investor-state lawsuit based on the North American Free Trade Agreement (NAFTA), challenging the moratorium. Lone Pine, which filed the case via an incorporation in the US tax haven Delaware, is seeking US\$109.8 million plus interest in damages.³

Corporations against 'buy local' rules – Mesa Power vs. Canada: In 2011, Texas-based energy company Mesa Power filed a NAFTA claim against Canada for a total of CAD\$775 million. The case concerns the Province of Ontario's Green Energy and Green Economy Act. Amongst other objections, Mesa Power is challenging 'buy local' requirements obliging wind and solar firms to source parts of their materials from local suppliers in exchange for access to certain support schemes.⁴ These rules helped to maximise the economic and social benefits of green investments in the region, which initially helped gather broad political support for the Act.

Corporations against research requirements – Mobil Investments and Murphy Oil vs. Canada: In 2007, Mobil Investments (a subsidiary of the world's richest energy company, US oil giant ExxonMobil) and Murphy Oil Corporation sued Canada under NAFTA, challenging a 2004 requirement adopted by the Province of Newfoundland and Labrador that off-shore oil firms must invest a portion of revenues in local research and development. NAFTA (implemented in 1994) included a 'reservation' for such requirements. But the arbitration tribunal ruled against Canada, arguing that the research rules were illegal under NAFTA and that the reservation only protected rules that were in place in 1994. Canada was ordered to pay CAD\$17.3 million plus interest in compensation.⁵

Corporations against oil taxes – Perenco vs. Ecuador: In 2008, Anglo-French company Perenco sued Ecuador based on its bilateral investment treaty with France. The case is one of several concerning the country's tax on windfall profits in the oil sector. While the tribunal has already ruled against Ecuador (the compensation sum is still to be determined), it has also indicated that it holds Perenco liable for breaching Ecuadorian environmental law. Ecuador had claimed that Perenco's oil fields had created an "environmental catastrophe" in the Amazon.⁶

More and more investment disputes are being filed (see Box 2 on page 4), and many of them are initiated by fossil fuel and energy companies. As Lexpert, an online news portal about the business of law, recently noted: "If a single industrial sector might be called the cradle of international ...arbitration, it would be the energy business. Especially oil and gas."⁷ In short, the energy sector is driving the growth in international arbitration.

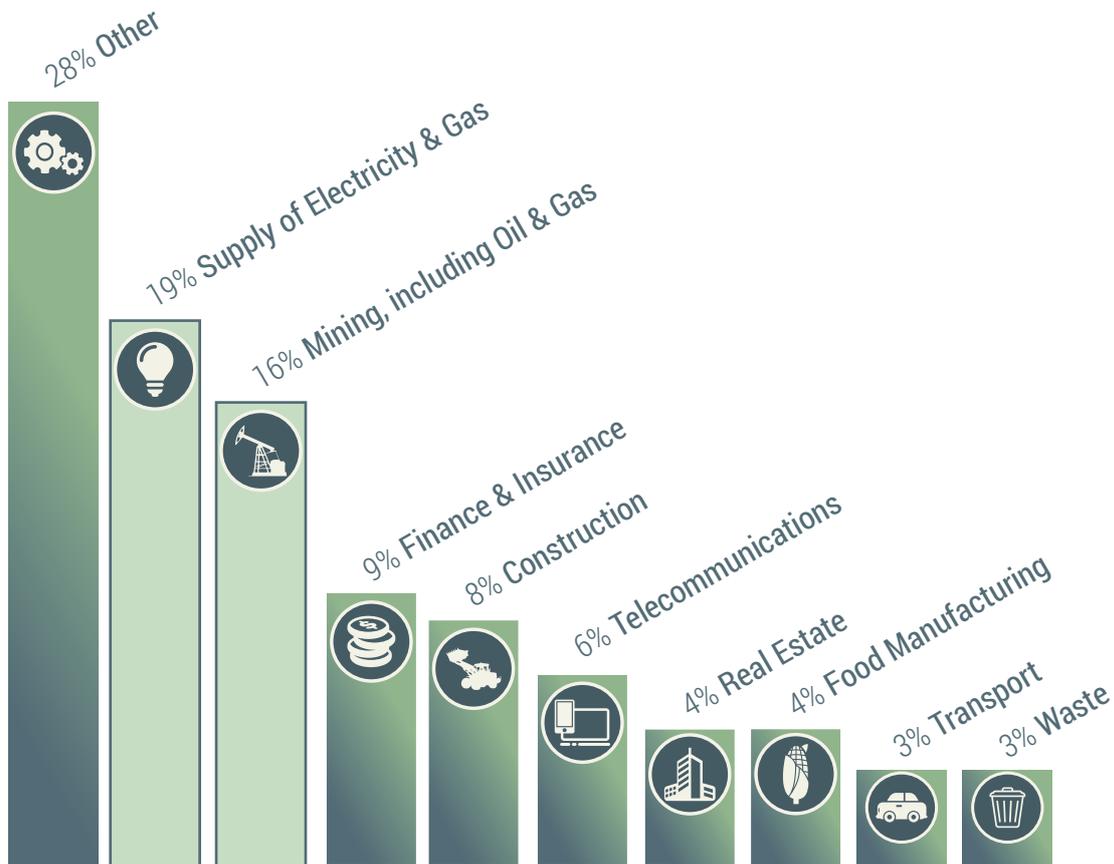
"Energy companies are particularly keen to turn to arbitration."

Tom Sikora, counsel with ExxonMobil⁸

In November 2015, nearly half of all cases pending at the World Bank's International Centre for Settlement of Investment Disputes (ICSID), where most investor-state disputes are tried, related to oil, mining, gas, electric power and other energy.⁹ Challenges relating to the generation and supply of energy have surged in recent years: around 30 per cent of the new cases filed at ICSID in the last two years were energy-related – compared to between 5 and 13 per cent in the previous years.¹⁰ Looking at the full history of all known investor-state lawsuits globally, the Energy Charter Treaty – a multilateral treaty signed after the Cold War to integrate the Soviet and Eastern European energy sectors into Western markets – has become the most frequently invoked legal basis for the corporate claims.¹¹

35 PER CENT OF ALL INVESTOR-STATE CLAIMS RELATE TO OIL, MINING, GAS AND ELECTRICITY

Source: UN Conference on Trade and Development (UNCTAD)¹²



“As the anti-fossil fuel forces gain strength, extractive companies are beginning to fight back using a familiar tool: the investor protection provisions in free trade agreements.”

Naomi Klein, journalist and author¹³

Fossil fuel and energy companies have used these lawsuits to challenge environmental restrictions on coal-fired power plants, government decisions to phase out nuclear energy, and fracking moratoria (see Box 1). Polluters have also used the threat of costly investor lawsuits in attempts to pressure governments to accept controversial energy projects such as the Keystone XL oil pipeline from Alberta, Canada to the US state of Nebraska.¹⁴ Now these same companies are enthused about the prospect of far-reaching rights for foreign investors in upcoming trade agreements, such as the EU-US free trade deal TTIP and the EU-Canada CETA.

Box 2: WHAT YOU NEED TO KNOW ABOUT INVESTOR-STATE DISPUTE SETTLEMENT (ISDS)¹⁵

- › States have signed more than **3,200** international investment treaties.
- › These treaties give **sweeping powers** to foreign investors, including the ability to file lawsuits directly against states in international tribunals in the case of alleged violations of the treaties' provisions. These international lawsuits usually circumvent local courts.
- › Investor-state cases have mushroomed in the last two decades from a total of three known treaty cases in 1997 to a record high of over **50** new claims filed per year in 2012 and 2013.
- › Globally, **608** investor-state disputes were counted at the end of 2014, but due to the opacity of the system the actual figure could be much higher.
- › Cases are usually decided by a tribunal of three private lawyers, the **arbitrators**, who have a financial stake in the system and a number of conflicts of interest.¹⁶
- › Investors have triumphed in **60 per cent** of investor-state cases where there has been an actual decision on the merits of the case, whereas states have won only **40 per cent** of the time.
- › Award figures may reach up to 10 digits. The highest known damages to date, **US\$50 billion**, were ordered against Russia, to the former majority owners of oil and gas company Yukos.
- › To date, the main financial beneficiaries have been large companies and rich individuals, with **64 per cent** of the money from known awards of **over US\$10 million** having gone to companies with over **US\$10 billion** in annual revenue. Another **29 per cent** of these awards have gone to companies with between **US\$1-10 billion** in annual revenue, or to individuals with over **US\$100 million** in net wealth.¹⁷

POLLUTERS LOBBYING FOR CORPORATE RIGHTS

US-based oil and gas multinational Chevron, for example, is lobbying for "a world-class investment chapter" in TTIP. The company has had several meetings behind closed doors with the EU's TTIP negotiators.¹⁸ Chevron focused its entire response to the US government's TTIP consultation on investment protection, in its opinion "one of our most important issues globally".¹⁹ Chevron is currently suing Ecuador to avoid having to pay US\$9.5 billion to clean up oil drilling related contamination in the Amazonian rainforest, as ordered by Ecuadorian courts. The case has been lambasted as an "egregious misuse" of investment arbitration as a way to evade justice.²⁰

"A strong investment protection regime within the TTIP would allow us and other US businesses to better mitigate the risks associated with large-scale, capital-intensive, and long-term projects overseas."

Chevron to US negotiators²¹

"Investment access and protection rules must be included in the TTIP, especially Investor-to-State Dispute Settlement (ISDS)."

American Petroleum Institute to EU negotiators²²

In its contribution to the European Commission's consultation on investor rights in TTIP, Chevron has attacked proposals to reform the system so as to preserve countries' right to regulate,²⁴ and has even proposed to expand the corporate privileges granted in TTIP.²³ Several other corporate lobby groups in which big oil and energy play an important role have put forward similar positions, amongst them the International Association of Oil and Gas Producers ("working on behalf of the world's oil & gas exploration and production companies"), the European employers' federation BusinessEurope (providing special services to companies such as Areva, EDF, Enel, ExxonMobil, General Electric, Lukoil, Repsol, Shell, Statoil, and Total), the Transatlantic Business Council (representing over 70 Europe and US-based multinationals including BP, Chevron, ExxonMobil, and Statoil), and the European Roundtable of Industrialists (bringing together 50 bosses of EU-headquartered multinationals such as Shell, Repsol, Eni, Engie, Total, and E.ON).²⁵

MAKING ACTION AGAINST CLIMATE CHANGE ILLEGAL

If big business has its way, it will become close to impossible for governments to take the necessary measures to prevent catastrophic global warming. Such measures would massively bite into the profits of fossil fuel and energy companies, potentially violating the investor privileges in treaties such as the proposed TTIP and CETA, and putting governments on the hook for billions.

Take the existing oil, gas and coal reserves. Climate scientists agree that a large share of these resources needs to stay in the ground if we do not want to wreck the planet. They estimate that if we are to stay below a total global temperature increase of two degrees, humankind can only emit 565 more gigatons of CO₂ into the atmosphere. However the amount of carbon that is already in the reserves of the major oil, gas and coal companies is much higher than that, totalling 2,795 gigatons. This means that the fossil fuel industry has five times as much oil, coal and gas assets in its books as climate scientists think is safe to burn.²⁶ Preventing the exploitation of these assets – for example through hefty taxes, by forcing plants to close down, or by adopting other rules about the extraction, sale or trade of dirty fuels – would profoundly eat into corporate profits. And this in turn would potentially make governments liable for breaching several provisions in trade and investment agreements (see Box 3 on page 6).

“Current trade and investment rules provide legal grounds for foreign corporations to fight virtually any attempt by governments to restrict the exploitation of fossil fuels.”

Naomi Klein, journalist and author²⁷

Or take the example of renewable energy. Getting us off fossil fuels and onto the green energy path will require a range of aggressive steps – from price guarantees to straight subsidies – in order to give green energy a fair shot at competing. But these types of regulatory measures could be penalised, as they violate the standard provisions in international investment treaties (see Box 3). As one of the world's busiest law firms in investor-state lawsuits, K&L Gates, writes: “With respect to ... changes in the renewable energy sector, international investment treaties could be of assistance ... in one of the following two ways. They could be used either as a tool of pressure against further governmental action in the green energy sector, or, alternatively, they could be considered as an exit strategy, which allows an investor to recoup a part or the totality of its loss associated with the frustrated project.”²⁸

LEGAL SHARKS CIRCLING ENERGY TRANSITION

Several international law firms are already alerting multinational corporations to the investment arbitration regime as a potential route to defend their profits in the energy sector. For the lawyers, this is a great opportunity to trawl for business. Due to the explosion in the number of international investment disputes against states over the past two decades, investment arbitration has become a money-making machine in its own right. Legal costs for investor-state disputes average over US\$8 million per suit, and can exceed US\$30 million in some cases. The tabs racked up by elite law firms can be US\$1,000 per hour, per lawyer – with whole teams handling cases. The arbitrators, the lawyers who sit on the tribunals that ultimately decide the cases, also earn handsome fees: at the most frequently used tribunal for investor-state claims, the ICSID, arbitrators earn US\$3,000 per day.²⁹

“Should you let a group of foolish lawyers interfere with saving the planet?”

Nobel Prize-winning economist Joseph Stiglitz³⁰

DISSUADING GOVERNMENTS FROM CLIMATE ACTION

In the context of energy crises and transitions, arbitration lawyers have also encouraged their clients to use the threat of a costly lawsuit as a way to scare governments into submission. Law firm Steptoe & Johnson, for example, praised investment protection “as a highly important tool” for energy producers and their lobby groups “in advocating against legislative changes to renewable energy regulations”.³¹ These changes could be anything, from renewable energy targets to subsidies.

Global law firm Dentons’ ‘practical tip’ for investors affected by energy subsidy cuts reads like this: “In considering whether to bring a claim ... investors should bear in mind that around 30 to 40 per cent of investment disputes typically settle before a final award is issued. Commencing a claim can create leverage to help the investor reach a satisfactory result.”³²

“Chevron argues that the mere existence of ISDS is important as it acts as a deterrent.”

EU Commission official about a meeting with Chevron on ISDS in TTIP, 29 April 2014³³

One can easily imagine how companies, seeing their extractive dreams threatened by democratic opposition or tough anti-pollution regulations, could file, or threaten to file, costly investor lawsuits to dissuade governments from strong action to combat climate change. French multinational Total and US-based oil and gas company Schuepbach, for example, have already challenged the introduction of a ban on fracking in the French courts.³⁴ The inclusion of investor-state dispute settlement in more trade deals such as TTIP would give corporations an extra tool – and in some cases a second chance – to challenge public interest policies.

“It may well be possible to use investment treaty protections as a tool to assist lobbying efforts to prevent wrongful regulatory change.”

Law firm Steptoe & Johnson on “Foreign Investors’ Options to Deal with Regulatory Changes in the Renewable Energy Sector”³⁵

Box 3: A HIT LIST OF MEASURES IN THE ENERGY SECTOR FOR INVESTMENT ARBITRATION LAWYERS

Renewable energy targets: In a briefing about “foreign investors’ options to deal with regulatory changes in the renewable energy sector”, US-based law firm Steptoe & Johnson has explained to producers of dirty energy that they “may well have strong arguments” for making the case that the introduction of binding production targets for renewable energy violated their “legitimate expectations that the proportion of energy from non-renewable sources would not be decreased”. According to Steptoe, green energy targets could result in a breach of the ‘fair and equitable treatment’ standard in investment treaties, potentially paving the way for multibillion-euro compensation awards.³⁶

Subsidy cuts: Dozens of global law firms have alerted their multinational clients to “international investment treaties as a possible shield against government cutbacks in subsidies for the green energy sector”,³⁷ specifically mentioning curtailed incentive schemes in the renewables sector in Spain, the Czech Republic, Italy, Romania, Greece, and Bulgaria (see Box 4).³⁸ The arguments put forward by the lawyers – that the policy changes violate the ‘fair and equitable treatment’ standard and amount to indirect expropriation in that their effect is to deprive the investment of its economic substance – could easily apply to cutbacks in state support for fossil fuels such as coal.

Rejection of dirty energy projects: When indications mounted in 2015 that US President Obama would reject the controversial Canada-US Keystone XL pipeline due to environmental concerns, the arbitration industry started to bang the war drums. “With veto, it’s time for the NAFTA option,” wrote investment lawyer Todd Weiler. He encouraged project developer TransCanada to sue the US for discrimination (because the US had previously approved pipeline projects that were similar to Keystone) and for the violation of NAFTA’s fair and equitable treatment standard (“which includes a prohibition against exercising legitimate regulatory authority for an improper purpose” such as pleasing “the Democratic Party’s most generous campaign donors”). Weiler suggested that TransCanada’s lawyers should quickly “pose awkward discovery questions” and demand documents from the US, as “refusal to fully comply with such demands can be construed as an admission of the facts in the claimant’s case.”³⁹

Fossil fuel taxes: Investment lawyers regularly alert companies to international arbitration as a potential forum to challenge taxes on fossil fuels. As a lawyer of US-based law firm King & Spalding explains: “The economics of an independent power project or of an oil and gas project can be severely impacted if a host State changes the tax regime applicable to the project after an investor has committed its capital.” While some agreements explicitly exclude tax matters from their scope, according to the lawyer, contracts with “specific stabilization commitments” can fill the gap and protect investors from “adverse changes” in tax regimes.⁴⁰ One can easily see how such arguments could be used to squash hefty taxes intended to prevent the exploitation of more fossil fuels.

Exits from dirty energy: When Swedish energy firm Vattenfall sued Germany over its phase out of nuclear power (see Box 1 on page 2), law firm Baker & McKenzie outlined “the possible routes that may be taken in the English courts if the UK government were to take a similar course of action.”⁴¹

Box 4: COMBATING CLIMATE CHANGE THROUGH INVESTMENT ARBITRATION?

Several EU states are currently being sued over rolled-back incentives for renewable energy production which proved too costly in times of economic crises. Spain is the defendant in more than 20 known claims, the Czech Republic in seven, Italy in three and Bulgaria in two. Investment lawyers have referred to these and other cases to point out that investor-state claims could be an effective tool to force states to take the necessary steps to combat climate change.⁴²

Renewable energy cooperatives and environmental organisations have indeed condemned the Spanish and other governments for curbing subsidies to an industry that is seen as a real alternative to dirty energy and the climate crisis. Ordinary citizens who had invested in the sector were also massively affected by the cuts in support schemes. However, the general population has no recourse to investor-state arbitration, while powerful international investors have the resources and legal avenues to sue.

It is also important to note that several of the lawsuits in the renewables sector were launched by speculative funds trying to make windfall profits. Even though they invested when the countries were already in full-blown crisis mode and were busy cutting the support schemes, the funds are now claiming that their expectations of profits were undermined by the change in government policy.⁴³ This speculative use of investment protection is fostered by specialised companies such as European Solar Holdings, which advertises itself as a “vehicle for yield-seeking investors into renewable energy assets in the EU” with the “strongest possible investment protection currently available”.⁴⁴ But state support should go to local and national renewable energy initiatives, and not to international investment funds seeking to ensure big profits and risk-free business protected by investment agreements.

Also, private equity investors and investment fund managers are interested in businesses that yield high returns, and not in ethical investment. It just happened that this business was renewable energy in countries like Spain. Ian Simm, Chief Executive of Impax Asset Management, one of the funds suing Spain, puts it clearly: “We don’t have an ethical mandate per se. ... We’re trying to make money for investors in this area [energy, water, food and waste]. We are often attractive for ethical investors, because what we do fits their objectives, but we also manage funds for investors who would say they are agnostic on ethical investing, at best! They’re attracted by exposure to a high growth area. ... They ought to be able to make good, if not better, returns in the long term from this area than from anything else.”⁴⁵

As a result, other analysts have highlighted the risks that investment arbitration poses to countries’ ability to combat climate change. Gus van Harten, an investment law expert teaching at the Osgoode Hall Law School in Toronto, Canada, has argued that “faced with risks of uncapped financial liability due to ISDS claims, states may be deterred from implementing measures to fulfil their climate change responsibilities”. He has developed an exemption clause intended to protect a future climate agreement from the adverse affects of investor-state dispute settlement.⁴⁶ In October 2015, the European Parliament adopted a resolution including this ‘carve-out’.⁴⁷

“Faced with risks of uncapped financial liability due to ISDS claims, states may be deterred from implementing measures to fulfil their climate change responsibilities.”

Gus van Harten, Professor at Osgoode Hall Law School

GROWING PUBLIC OUTCRY

As corporate lawyers and dirty energy producers lick their lips in anticipation of more rights for foreign investors in trade deals such as TTIP and CETA, a growing movement around the world is becoming attuned to the democratic threat represented by these treaties. Indeed, there is now more public scrutiny and debate about trade and investment agreements than there has been in years.

More than 3.2 million people across the EU have 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”.⁴⁸ When the European Commission organised a public consultation on the issue in 2014, the vast majority of the 150,000 contributions protested against the proposed excessive rights for foreign investors in TTIP. It was not only trade unions, consumer and health groups, environmentalists, and digital rights activists that spoke out, but businesses and governments as well.⁴⁹

The US National Conference of State Legislatures, which represents the legislative bodies in all 50 states, has also announced that it “will not support any [trade agreement] that provides for investor-state dispute resolution” because it interferes with their “capacity and responsibility as state legislature to enact and enforce fair, nondiscriminatory rules that protect the public health, safety and welfare, assure worker health and safety, and protect the environment”.⁵⁰

“Why create these rigged, pseudo-courts at all? What’s so wrong with the US judicial system? Nothing, actually.”

Elizabeth Warren, Democratic Senator from the United States⁵¹

Some governments, too, have realised the injustices of investment arbitration and are trying to get rid of the system. South Africa, Indonesia, Bolivia, Ecuador and Venezuela have terminated several bilateral investment treaties. South Africa has developed an investment bill that does away with some of the fundamental and most dangerous clauses in international investment law. India’s new draft model investment treaty does the same.⁵² In Europe, Italy has withdrawn from the Energy Charter Treaty (ECT), notably after having been hit by ECT-based claims in the renewables sector.⁵³

A GLOBAL CORPORATE BILL OF RIGHTS

Still, many of our governments are determined to hand out even more dangerous legal weapons to corporations in the form of new and expanded trade deals. The CETA deal between the EU and Canada, for which ratification could start in 2016, empowers foreign investors to bypass local courts and sue states directly in international tribunals when democratic decisions impact their expected profits.⁵⁴ The Trans-Pacific Partnership (TPP), which was recently concluded by the US and 11 other countries from the Pacific Rim, does the same.⁵⁵ The US government and the European Commission seem determined to enshrine similarly excessive investor rights in the proposed TTIP.

DESPITE THE REFORM TALK, ISDS IS AS ALIVE AND DANGEROUS AS EVER

In the face of fierce opposition to the investor rights provisions in agreements such as CETA and TTIP, the European Commission and some EU member states have come up with a number of proposals for ‘reforming’ the system. But these proposals do not reduce the risk that exclusive corporate rights pose to democracy, public budgets and public policy, including in the energy sector. Here are four reasons why:

1. The EU’s proposals contain the same substantive investor rights that corporations have been referring to when challenging measures to protect the public interest in previous cases. Nothing in the EU’s proposals would stop investors from attacking policies such as fracking moratoria, phase-outs of dirty energy, or measures to rapidly move away from fossil fuels.

Box 5: WHAT DIFFERENCE DO CETA AND TTIP MAKE?

While existing trade and investment treaties already severely limit the policy space that governments have to fight climate change, the inclusion of investor-state dispute settlement (ISDS) in CETA and TTIP would massively expand the investment arbitration system – and multiply liability and financial risks for governments on both sides of the Atlantic.

- › So far, only **9** EU member states, all of them Eastern European, have a bilateral investment treaty with the US;⁵⁶ only **8** have one with Canada.⁵⁷ These treaties cover a mere one percent of US and Canadian investment in the EU. The investor rights included in CETA and TTIP would bring that coverage to 100 per cent.
- › Of the **51,495** US-owned subsidiaries currently operating in the EU, more than **47,000** would be newly empowered to launch ISDS attacks on European policies and government actions.⁵⁸
- › With CETA, **four out of five** US firms operating in the EU – that is a total of **41,811** – could become eligible for an ISDS case against the EU and its members if investments are structured accordingly.⁵⁹
- › EU, US and Canadian companies are already the most frequent users of investment arbitration. They are responsible for launching **over 80 per cent** of all known investor-state disputes globally.⁶⁰
- › A number of mega treaties currently under negotiation (including TTIP) are together estimated to expand ISDS coverage to **over 80 per cent** of the world’s investment flows – from a mere **15-20 per cent** coverage today despite thousands of existing treaties.⁶¹

2. Nothing in CETA or in the EU's TTIP proposal would stop governments from 'voluntarily' repealing measures when a lawsuit has been filed or threatened by a deep-pocketed company. Examples of such 'regulatory chill' include the watering down of environmental restrictions for a coal-fired power plant when Germany settled the first Vattenfall claim (see Box 1 on page 2), as well as New Zealand's announcement that it will delay its 'plain tobacco packaging' legislation until tobacco giant Philip Morris' claim against Australia's anti-smoking rules has been resolved.⁶²

3. The people deciding future CETA and TTIP lawsuits will have strong incentives to interpret the law in favour of the investor, as the arbitrators (re-labelled 'judges' in the Commission's latest proposal for TTIP) are paid per case, usually earning US\$3,000 a day. In a one-sided system in which only investors can sue, this is a strong incentive for pro-investor rulings that pave the way for additional future claims – and more appointments, money and power for the arbitrators.

4. Neither CETA nor the Commission's TTIP proposal contain meaningful measures to reduce the risks of investor-state disputes for public budgets. Future damages awards could amount to serious raids on public budgets (see Box 2 on page 4). Tribunals could arguably even demand compensation for expected future profits.

Overall, the EU's 'reforms' of the investment arbitration regime do not reduce the risks for public interest legislation, taxpayers and democracy. They are purely an attempt to salvage an increasingly-contested legal regime, concocted to enrich a small elite, by making it more acceptable with reforms around the edges.⁶³

"If the trade rules don't permit all kinds of important measures to deal with climate change – and they don't – then the trade rules obviously have to be rewritten. Because there is no way in the world that we can have a sustainable economy and maintain international trade rules as they are. There's no way at all."

Steven Shrybman, lawyer⁶⁴

HOW TRADE TRUMPS THE PLANET

Extreme investor rights are not the only elements in international trade deals with the potential to sabotage energy transitions. The aggressive protection for patents in the intellectual property sections of these agreements impede the free transfer of green technologies. Public procurement provisions can stand in the way of 'buy local' renewables programmes, which are often needed to convince local politicians to support green energy. Energy chapters like the one foreseen in TTIP can prevent restrictions on oil, coal and gas exports, locking in yet more fossil fuel dependency. And TTIP's proposed regulatory cooperation chapter could give corporations extensive new rights that could kill any prospective energy transition measures at birth – from strict energy efficiency standards to financial rules on dirty energy.⁶⁵

In fact, the green energy programmes needed to lower global emissions have increasingly been challenged under the World Trade Organisation (WTO). The US for example has attacked China's wind subsidy programme as well as India's Solar Mission. India has in turn taken aim at green energy programmes in the US, and China has objected to various renewable energy programmes in the EU. And Japan and the EU have challenged the Green Energy and Green Economy Act in the Canadian province of Ontario, which has also been targeted in an investor-state dispute (see Box 1 on page 2).

"This doesn't change anything because the standards on the basis of which judgements are rendered remain the same."

Nigel Blackaby, lawyer with Freshfields on the EU's proposal for an investment court in TTIP⁶⁶

NO MORE SPECIAL RIGHTS FOR POLLUTERS

It is high time that governments, parliaments, and the public grasp the political and financial risks of the existing trade and investment regime. In a time when all attention should be focused on averting a global climate catastrophe, there is simply no space for agreements that would send emissions soaring and make many solutions to climate change illegal. Existing treaties that allow private companies to sue governments over laws that impinge on their profits – from tough antipollution regulations to the bold steps needed to move to green energy – should be abolished, and plans for supplemental corporate bills of rights in proposed treaties such as TTIP and CETA should be axed.

NOTES

1. PowerShift/TNI/SOMO, "The German Nuclear Phase-Out Put to the Test in International Investment Arbitration? Background to the new dispute Vattenfall v. Germany (II)", 2013, p. 3, <http://power-shift.de/wordpress/wp-content/uploads/2012/06/TNI-PowerShift-Somo-Paper-Vattenfall-ICSID-case-updated-2013.pdf>
2. IISD, "The State of Play in Vattenfall v. Germany II: Leaving the German public in the dark", 2014, <http://www.iisd.org/sites/default/files/publications/state-of-play-vattenfall-vs-germany-ii-leaving-german-public-dark-en.pdf>
3. Corporate Europe Observatory/Council of Canadians/Transnational Institute, "The right to say no: EU-Canada trade agreement threatens fracking bans", 2013, <http://corporateeurope.org/climate-and-energy/2013/05/right-say-no-eu-canada-trade-agreement-threatens-fracking-bans>; IA Reporter, "In new pleading, Lone Pine questions 'environmental' bona fides of decision to cancel fracking exploration permit, and offers a DCF valuation of its losses", 2015, <http://www.iareporter.com/articles/in-new-pleading-lone-pine-questions-environmental-bona-fides-of-decision-to-cancel-fracking-exploration-permit-and-offers-a-dcf-valuation-of-its-losses/>
4. Canadian Centre for Policy Alternatives, "NAFTA Chapter 11 Investor-State Disputes to January 1, 2015", 2015, p. 11, https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2015/01/NAFTA_Chapter11_Investor_State_Disputes_2015.pdf
5. Council of Canadians, "Exxon Mobil's disastrous NAFTA win against Canada: Resource management and sustainable development take a hit in three different investor-state disputes", 4 June 2012, <http://canadians.org/node/4459>; IA Reporter, "Canada ordered to pay 17+ million to Exxon Mobil & Murphy Oil – and faces a new claim – for imposing R&D requirements on Newfoundland oil project", 2015, <http://www.iareporter.com/articles/canada-ordered-to-pay-17-million-to-exxon-mobil-murphy-oil-and-faces-a-new-claim-for-imposing-rd-requirements-on-newfoundland-oil-project/>
6. Investment Arbitration Reporter, "Tribunal favours Ecuador in environmental counterclaim over Amazonian oilfields", 2015, <http://www.iareporter.com/articles/tribunal-favours-ecuador-in-environmental-counterclaim-over-amazonian-oilfields/>
7. Lexpert, "Energy sector driving major growth in international arbitration", 2014, <http://www.lexpert.ca/magazine/article/energy-sector-driving-major-growth-in-international-arbitration-2626/>
8. Ibid.
9. According to the ICSID website (<https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx>), 213 cases were pending on 2 November 2015. 57 of them related to the oil, gas and mining sector, and 48 related to electric power and other energy.
10. See "ICSID Caseload – Statistics", <https://icsid.worldbank.org/apps/ICSIDWEB/resources/Pages/ICSID-Caseload-Statistics.aspx>
11. UNCTAD, "World Investment Report 2015: Reforming International Investment Governance", 2015, chapter III, p. 114, http://unctad.org/en/publicationchapters/wir2015ch3_en.pdf
12. Ibid., p. 146
13. Naomi Klein, "This Changes Everything: Capitalism vs. the Climate", 2014, p. 358
14. When the Keystone XL pipeline was delayed in 2014, investment lawyers and officials of Keystone developer TransCanada began hinting at a possible NAFTA challenge. See: Elana Schor, "NAFTA's specter may haunt Keystone verdict", Politico, 26 February 2015, <http://www.politico.com/story/2015/02/keystone-pipeline-nafta-115511>
15. UNCTAD, 2015, see endnote 11, chapter III
16. Corporate Europe Observatory/Transnational Institute, "Profiting from injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom", 2012, chapter 4, <http://corporateeurope.org/sites/default/files/publications/profitting-from-injustice.pdf>
17. Gus Van Harten, "Who was awarded compensation in past ISDS awards?", 2015, <https://gusvanharten.wordpress.com/category/costs-to-the-public/>
18. According to information released by the European Commission via the EU's access to documents rules, Chevron met EU negotiators to discuss TTIP at least four times: on 29 April 2014, 1 October 2014, 28 November 2014, and 4 March 2015. Information on file with CEO.
19. "Chevron Corporation: Comments on Proposed Transatlantic Trade and Investment Partnership", 7 May 2013, <http://www.motherjones.com/documents/1237936-ttip-lobbybrief-chevron>
20. Public Citizen, "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?", 2013, <http://citizen.typepad.com/eyesontrade/2013/12/ecuadors-highest-court-vs-a-foreign-tribunal-who-will-have-the-final-say-on-whether-chevron-will-pay.html>
21. Chevron Corporation, 2013, see endnote 19
22. The contribution of the American Petroleum Institute to the European Commission's public consultation on investment protection in TTIP can be accessed via the Commission's website: <http://ec.europa.eu/yourvoice/ipm/forms/dispatch?userstate=DisplayPublishedResults&form=ISDS>
23. For example, Chevron opposed a general exception to achieve public policy objectives in the TTIP investment chapter. The public contributions to the consultation can be accessed via the Commission's website: <http://ec.europa.eu/yourvoice/ipm/forms/dispatch?userstate=DisplayPublishedResults&form=ISDS>
24. For example, Chevron proposed to extend TTIP's investor rights to the so-called pre-establishment phase of an investment. This would limit governments' policy space to regulate the entry of foreign investors and is typically not part of the investment treaties of EU member states. Chevron also proposed a so-called 'umbrella clause' for TTIP, which would bring all obligations a state assumed with regards to an investment under the TTIP 'umbrella' (like a contract with one investor), multiplying the risk of costly lawsuits.
25. The public contributions to the consultation can be accessed via the Commission's website: <http://ec.europa.eu/yourvoice/ipm/forms/dispatch?userstate=DisplayPublishedResults&form=ISDS>
26. Bill McKibben, "Global Warming's Terrifying New Math", Rolling Stone, 19 July 2012, <http://www.rollingstone.com/politics/news/global-warmings-terrifying-new-math-20120719>
27. Naomi Klein, 2014, see endnote 13, p. 359
28. K&L Gates, "International Investment Treaties as a Possible Shield Against Government Cutbacks in Subsidies for the Green Energy Sector", January 2013, <http://www.klgates.com/en-US/international-investment-treaties-as-a-possible-shield-against-government-cutbacks-in-subsidies-for-the-green-energy-sector-01-10-2013/>
29. Corporate Europe Observatory/Transnational Institute, "Profiting from Injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom", 2012, p. 15, <http://corporateeurope.org/sites/default/files/publications/profitting-from-injustice.pdf>
30. Quoted in Naomi Klein, 2014, see endnote 13, p. 72
31. Steptoe & Johnson, "Foreign Investors' Options to Deal with Regulatory Changes in the Renewable Energy Sector", September 2014, <http://www.steptoe.com/publications-9867.html>
32. Dentons, "The Latest Renewables Claim: Abengoa's Subsidiary Launches Investment Treaty Proceedings Against Spain", December 2013, <http://www.dentons.com/en/insights/alerts/2013/december/5/abengoa-subsidiary-launches-investment-treaty-proceedings-against-spain>
33. Steptoe & Johnson, 2014, see endnote 31
34. Emile Picy/Michel Rose, "France Fracking Ban Upheld After Challenge From Energy Giant", Huffington Post, 10 November 2013, http://www.huffingtonpost.com/2013/10/11/france-fracking-ban_n_4083418.html
35. European Commission internal report about a meeting with Chevron on ISDS in TTIP, dated 29 April 2014. Obtained through an access to documents requests via the EU's information disclosure regulation. On file with CEO.

36. Steptoe & Johnson, 2014, see endnote 31
37. K&L Gates, 2013, see endnote 28
38. See, for example: *ibid.*; Steptoe & Johnson, 2014, see endnote 31; Jones Day, "International Remedies for Foreign Investors in Europe's Renewable Energy Sector", February 2015, www.jonesday.com/International-Remedies-for-Foreign-Investors-in-Europes-Renewable-Energy-Sector-02-19-2015/; Lalive, "Recent developments in solar energy sector across Europe", February 2015, http://www.lalive.ch/data/publications/Recent_developments_in_solar_energy_sector_across_Europe.pdf
39. Todd Weiler, "With veto, it's time for the NAFTA option", *Global and Mail*, 2 March 2015, <http://www.theglobeandmail.com/globe-debate/time-for-keystones-nafta-option/article23232598/>
40. Thomas Childs, "Challenging a Host State's Tax Measures Through International Arbitration", 2011, <http://www.kslaw.com/library/newsletters/EnergyNewsletter/2011/August/article6.html>
41. Ed Poulton and Richard Davies, "Vattenfall v Germany: the nuclear option and investment arbitration", *Commercial Dispute Resolution*, 10 November 2011
42. See, for example: David W. Rivkin, Sophie J. Lamb and Nicola K. Leslie, "The future of investor-state dispute settlement in the energy sector: engaging with climate change, human rights and the rule of law", *Journal of World Energy Law and Business* 8:2, 2015, pp. 130-153; "How the investment protection regime can contribute to a better environment", Speech by Annette Magnusson, SCC Secretary General, Warsaw, 29 May 2015, <http://isdsblog.com/wp-content/uploads/sites/2/2015/08/Magnusson-Warsaw-29-May-2015.pdf>
43. Corporate Europe Observatory/Transnational Institute, "Profiting from Crisis: How corporations and lawyers are scavenging profits from Europe's crisis countries", chapter 3, 2014, http://corporateeurope.org/sites/default/files/profitting-from-crisis_0.pdf
44. <http://www.europeansolarholdings.com/>
45. Anna Simpson, "Great Investment Opportunities are Being Missed in the Resource Market", *Green Futures*, 26 May 2013, <http://oilprice.com/Energy/Energy-General/Great-Investment-Opportunities-are-Being-Missed-in-the-Resource-Market.html>
46. Gus Van Harten, "An ISDS Carve-out to Support Action on Climate Change", *Osgoode Legal Studies Research Paper No. 38*, 11:8, 2015
47. Council of Canadians, "EU Parliament adopts robust mechanism needed for Paris climate talks", 2015, <http://canadians.org/media/eu-parliament-adopts-robust-mechanism-needed-paris-climate-talks-are-european-national-leaders>
48. European Citizens' Initiative against TTIP and CETA, <https://stop-ttip.org>
49. Corporate Europe Observatory, "TTIP investor rights: the many voices ignored by the Commission", 2015, <http://corporateeurope.org/international-trade/2015/02/ttip-investor-rights-many-voices-ignored-commission>
50. "An open letter from U.S. state legislators to negotiators of the Trans-Pacific Partnership urging the rejection of investor-state dispute settlement", 5 July 2012, <https://www.citizen.org/documents/State-Legislators-Letter-on-Investor-State-and-TPP.pdf>
51. Elizabeth Warren, "The Trans-Pacific Partnership clause everyone should oppose", *The Washington Post*, 25 February 2015, https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html
52. South Africa's law and India's new model treaty both exclude fair and equitable treatment and the most favoured nation principle. Before turning to investor-state arbitration based on India's model treaty, local remedies will have to be exhausted. South Africa's law fully excludes recourse to international arbitration. Moreover, investors' protection has been aligned with the constitution – thus, giving foreign investors no greater rights than others. See Maxim Bönnemann, "Towards Post-Western Investment Law? Alternative Visions in the Making", *Völkerrechtsblog*, 2015, <http://voelkerrechtsblog.com/2015/09/14/towards-post-western-investment-law/>
53. Gaetano Iorio Fiorelli, "Italy withdraws from Energy Charter Treaty", *Global Arbitration Review*, 2015, <http://globalarbitrationnews.com/italy-withdraws-from-energy-charter-treaty-20150507/>
54. Corporate Europe Observatory and others, "Trading away democracy: How CETA's investor protection rules threaten the public good in Canada and the EU", November 2014, <http://corporateeurope.org/international-trade/2014/11/ceta-trading-away-democracy>
55. Public Citizen, "The Trans-Pacific Partnership: Empowering Corporations to Attack Nations", 2015, <https://www.citizen.org/Page.aspx?pid=5411>
56. These EU member states have a bilateral investment treaty with the US: Bulgaria, Croatia, Czech Republic, Estonia, Latvia, Lithuania, Poland, Romania, and the Slovak Republic.
57. These EU member states have a bilateral investment treaty with Canada: Croatia, Czech Republic, Hungary, Latvia, Malta, Poland, Romania, and the Slovak Republic.
58. Public Citizen, "Investor-State Attacks against European Policies via CETA and TTIP", 2014, <https://www.citizen.org/documents/EU-ISDS-liability.pdf>
59. *Ibid.*
60. UNCTAD, "Recent developments in investor-state dispute settlement (ISDS)", April 2014, p. 3, http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf
61. Gus van Harten, "Why arbitrators not judges? Comments on the European Commission's approach to investor-state arbitration in TTIP and CETA", 3 July 2014, p. 28, <http://eu-secretdeals.info/upload/2014/07/Van-Harten-Comments-id2466688.pdf>
62. Tariana Turia, "Government moves forward with plain packaging of tobacco products", 19 February 2013, <http://www.beehive.govt.nz/release/government-moves-forward-plain-packaging-tobacco-products>
63. For a critical analysis of the European Commission's latest reform proposals see: Seattle to Brussels Network, "ISDS: Courting foreign investors. Why the Commission's approach for an 'Investment Court System' still fails to address the key problems of foreign investors' privileges", 2015, <http://www.s2bnetwork.org/isds-courting-foreign-investors/>
64. Quoted in Naomi Klein, 2014, see endnote 13, p. 72
65. Corporate Europe Observatory/AITEC, "TTIP: a box of tricks for corporate climate criminals", 2015, http://corporateeurope.org/sites/default/files/dirtydeals_small.pdf
66. Quoted in Eric Frei, "Schiedsrechtsexperte: TTIP-Gerichtshof würde wenig ändern", *Der Standard*, 2 November 2015, <http://derstandard.at/2000024886097/TTIP-Gerichtshof-wuerde-wenig-aendern>. Translation: Pia Eberhardt.



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PowerShift is a Berlin-based NGO working in the fields of trade and investment policy, raw materials and climate and energy issues. In these areas we struggle for a higher level of social and ecological justice. Our educational and publicity work, research and political activities seek to contribute to a global energy transition and to equitable structures in world trade. We coordinate, inter alia, the German civic alliance TTIPunfairHandelbar and participate in the Seattle to Brussels network of European NGOs.

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