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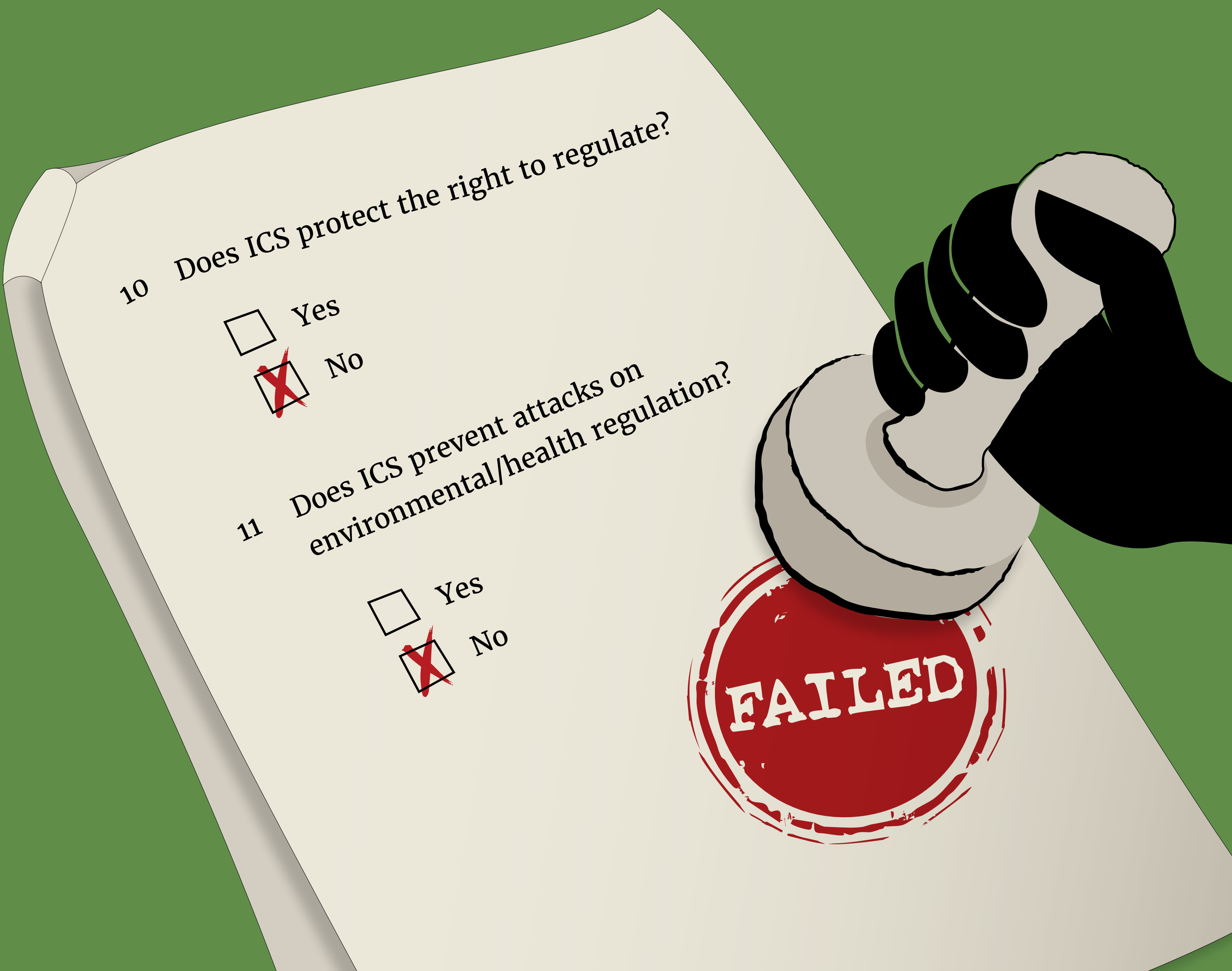
Investment Court System put to the test

New EU proposal will perpetuate investors' attacks on health and environment



Authors: Natacha Cingotti, Pia Eberhardt, Nelly Grotefendt, Cecilia Olivet and Scott Sinclair

Editor: Helen Burley

Design: Karen Paalman

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Executive summary

In autumn 2015, the European trade commissioner, Cecilia Malmström, launched a proposal to give far-reaching rights to foreign investors in all future EU trade agreements. The proposal came in the midst of growing public concern over the inclusion of Investor-State Dispute Settlement (ISDS) mechanism found in EU trade agreements such as the US-EU Transatlantic Trade and Investment Partnership (TTIP) and the EU-Canada Comprehensive Economic and Trade Agreement (CETA). This mechanism, applied in many existing international trade and investment treaties, has seen a surge of controversial cases launched by corporations against states that have taken regulatory action to defend public health, the environment or the public interest.

The Commission promised that its new approach to investment protection – outlined in the Investment Court System (ICS) proposal put forward in the TTIP negotiations - would "protect the governments' right to regulate and ensure that investment disputes will be adjudicated in full accordance with the rule of law." Members of the Commission promised that some of the most egregious cases, which have come to symbolise the injustices and wrongs of ISDS, would no longer be possible under the "reformed" system.

This report puts that promise to the test by examining five of the most controversial ISDS cases from recent years.

These cases include:

- Philip Morris vs Uruguay for the introduction of graphic warnings on cigarette packages and other tobacco control measures in order to promote public health;
- TransCanada vs the US for President Barak Obama's decision to reject the Keystone XL pipeline as part of US' commitment to tackling climate change;
- Lone Pine vs Canada for a precautionary fracking moratorium enacted in Quebec;
- Vattenfall vs Germany for Hamburg city's imposition of environmental standards for water use at a coal-fired power plant;
- Bilcon vs Canada for an environmental impact assessment that prevented the construction of a large quarry and marine terminal in an ecologically sensitive coastal area.

We wanted to test whether these cases would no longer be possible under the Investment Court System (ICS) in order to understand whether it represents a substantial change from the current iniquities of ISDS arbitration. Or whether, as many legal experts and civil society advocates have argued, the European Commission is merely carrying out a rebranding exercise.

Close analysis of each case shows that every one of these controversial disputes could still be launched and likely prosper under ICS. There is nothing in the proposed rules that prevents companies from challenging government decisions to protect health and the environment. And there is nothing to prevent arbitrators from deciding in their favour, ordering states to pay billions in taxpayer compensation for legitimate public policy measures.

In other words, put to the test, the Investment Court System would fail to prevent any of these controversial cases from happening.

In addition, the report finds that:

1. The Commission's use of broad, loosely defined concepts such as "manifest arbitrariness" and "Fair and Equitable Treatment" (or FET) provides the same open door for corporations to sue states in arbitration tribunals as under the current ISDS system.

2. Many of the new limitations and qualifiers in the European Commission's proposal, such as the assertion of a government's right to regulate, are poorly defined and open to interpretation. The burden of proof lies with governments who have to show that the measures they took were *"necessary", "non-discriminatory"* and aimed to achieve *"legitimate"* objectives. The corporations in each of the five cases examined have already argued that the government's regulations were illegitimate, arbitrary, excessive and discriminatory (even though there was no discrimination on nationality grounds) and they could make the same case under ICS.

3. Rather than limit egregious claims, ICS actually creates the potential for more arbitration disputes because, unlike existing treaties, it explicitly introduces the notion of investors' *"legitimate expectations"*. In all five of the cases examined, investors claimed a breach of legitimate expectations. According to the proposal, an investor can only claim *"legitimate expectations"* as the result of *"a specific representation"* from the state – but this limitation is so poorly defined that it could mean any measure, action or even verbal indication by a government official that, according to the investor, had induced it to make or maintain the investment.

4. The right to compensate investors for loss of (future) profit remains, making cases such as TransCanada's exorbitant claim for $15 billion in damages for an unbuilt pipeline more likely. The only exception under ICS that specifically prevents investors from claiming compensation is on matters related to state aid but not on other public policy measures – showing that there was never any real intention to protect other regulatory measures from crippling financial claims.

5. Under the Investment Court System, the interpretation of the expansive rights afforded to corporations and the ill-defined restrictions will still depend on for-profit adjudicators, and not on public, independent judges. They will be paid by the case and the loopholes in the EU's proposed conflict of interest requirements will allow the same pool of corporate arbitrators to continue to sit on arbitration panels. European judges have concluded that the ICS proposals do not meet the minimum standards for judicial office as laid down in the European Magna Carta of Judges and other relevant international texts on the independence of judges.

The fact that each of these controversial cases could still be successfully pursued under the 'reformed' approach suggests that the European Commission has failed to listen to the millions of Europeans who have demanded an end to unjust corporate privileges. Investor-state dispute settlement – whatever it is called – is undemocratic, dangerous, unfair, and one-sided. It is time for the European Commission to end its PR rebranding exercise, and chart a path towards trade justice by getting rid of private arbitration from TTIP, CETA and other EU trade agreements once and for all.

Introduction

The EU and the US are currently negotiating a Transatlantic Trade and Investment Partnership (TTIP) – which is set to become the biggest trade deal in history.[1] One of the most debated aspects of the talks so far has been plans to grant foreign investors special rights to claim financial compensation from host governments, should the latter introduce changes in their regulations that affect the companies' expected profits.

This so-called investor-state dispute settlement system (ISDS) is already in thousands of trade and investment agreements and has been used by companies around the world to challenge public interest regulations from environmental protection to public health measures. For example, Philip Morris is suing Uruguay over the country's anti-smoking legislation, demanding US$25 million in compensation. And pipeline developer TransCanada has just announced it intends to sue the US for US$15 billion following the decision not to build the controversial Keystone XL oil pipeline.

When the European Commission announced its plan to enshrine far-reaching investor rights in TTIP, creating the potential for investor attacks on essential consumer, labour, and environmental protection, there was a major public outcry. The Commission was forced to put the negotiations on that chapter on hold and organise a public consultation. An unprecedented 150,000 people took part, of which 97% clearly rejected the inclusion of the mechanism in any form in TTIP.

"The key question … is not asked in the consultation document: why consider including investor-state arbitration in the TTIP at all?"

Contribution by 120 academics to the Commission consultation about planned ISDS provisions in the TTIP[4]

In September 2015, EU trade commissioner Cecilia Malmström acknowledged that "*ISDS is now the most toxic acronym in Europe.*"[2] Meanwhile, the UN's independent expert on the promotion of a democratic and equitable international order, Alfred de Zayas, told the UN General Assembly that: "*ISDS cannot be reformed. It must be abolished*."[3]

As a result, the European Commission has declared its willingness to reform ISDS.

In autumn 2015, it presented a proposal for an "Investment Court System" (ICS), which was promoted as a solution to the egregious attacks made by investors under the ISDS system.[5] ICS was meant to reassure the public that granting rights to investors would not hamper public policy making. The main elements of this ICS proposal have already been included in the EU-Vietnam and the EU-Canada CETA deals.[6]

Parts of the media and several politicians welcomed the proposal as a positive step. Bernd Lange, chairman of the EU Parliament trade committee, said the proposal was "*the only way forward for the EU's trade policy and the last nail in the coffin for ISDS*".[8] The German daily, Frankfurter Allgemeine Zeitung, said that the reforms proved that the administration took people's concerns about investors' rights seriously as they would prevent claims against environmental, health and consumer protection rules. *"Therefore abuse of the investment protection system is in fact impossible,"* the newspaper claimed.[9]

"With the changes we have agreed, we bring CETA fully in line with our new approach on investment protection in trade agreements. In particular, we demonstrate our determination to protect governments' right to regulate, and to ensure that investment disputes will be adjudicated in full accordance with the rule of law."

European Commission Vice-President Franz Timmermans[7]

The Austrian daily, Der Standard, also celebrated the Commission's *"reform proposal"* as a *"success of the critics" as it "could indeed correct many flaws in the existing investment protection system"*.[10]

Civil society was more sceptical, with many groups decrying a twin of the much-loathed 'old' ISDS,[11] a thinly guised attempt to "*put lipstick on a pig*", or describing it as *"essentially a PR exercise to get around the enormous controversy and opposition that has been generated by ISDS"*.[12]

"When people say that ISDS is dead, it makes me think of a zombie movie because I can see ISDS walking around in these new proposals all over the place".

Professor Gus Van Harten, Osgoode Hall Law School[14]

Environmental NGO Transport and Environment, which is on the Commission's advisory group for TTIP, called the proposal *"a mere rebranding exercise of Investor-State Dispute Settlement (ISDS)"* which *"will resolve none of the fundamental concerns about granting special privileges for foreign investors, undermining national laws and bypassing domestic courts."*[13]

EU "Investment Court System" is ISDS under another name

The major flaws[15] in the proposal can be summarised as follows:

- ICS is not a court: it is based on an arbitration model. Fundamental safeguards to ensure an independent legal system are still missing.
- It retains special treatment for foreign investors without any obligations, such as compliance with environmental, social, health and safety, or other regulatory standards.
- Foreign investors would still be allowed to circumvent domestic courts and sue states directly through international tribunals. This discriminates against domestic investors.
- It maintains strong protection for investors, including the right to claim "indirect expropriation" (loss of profits) as a result of new legislation made in the public interest. States will have to defend public interest measures and provide evidence that the effects of their legislation were "not excessive" should investors argue that this is the case.
- It grants no rights to the public or to any victims of investor action. Citizens who suffer damage as a result of the activities of multinational companies (eg polluted water, or health effects) do not have recourse to the international tribunals.
- It fails to protect the right to regulate. The loose wording leaves it up to arbitrators to interpret which government measures are "necessary" to achieve "legitimate" objectives.
- It retains the potential for regulatory chill, because of the potential for investors to claim large sums of public money when new regulations get in the way of their profits.

- Arbitrators are not independent "judges". They do not have a fixed tenure, with a fixed salary. They are paid by the day, with a financial incentive to rule in favour of investors to attract more claims. Arbitrators who current practise privately (representing investors) will be eligible to be appointed as "judges" under the proposal.
- There are also flaws in the proposed ethics requirements, with no cooling-off period either before or after serving on the roster of arbitrators, no clear definition of conflict of interests, and no explicit ban on being paid for related work while sitting as an arbitrator.

Germany's largest association of judges and public prosecutors (with 15,000 members out of a total of 25,000 judges and prosecutors in the country) recently also questioned the EU's rebranding of ISDS as a 'court system': "*Neither the proposed procedure for the appointment of judges of the ICS nor their position meet the international requirements for the independence of courts*". They added: "*Against this background, the ICS appears not as an international court, but rather as a permanent court of arbitration*." [16]

The association has also raised serious concerns about granting exclusive rights to foreign investors and providing them with pseudo-courts, calling on legislators to "*significantly curb recourse to arbitration in the context of the protection of international investors*".[17]

The European Commission claims that the proposals "*are breaking new ground,*" adding: "*With this new system, we protect the governments' right to regulate*".[19]

"The creation of special courts for certain groups of litigants is the wrong way forward."

Deutscher Richterbund, Germany's largest association of judges and public prosecutors[18]

This briefing puts the European Commission's claim that ICS is "a new system that sets down the right to regulate in black and white" to the test.[20]

The briefing compares five previous or ongoing investor-state disputes against the Commission's latest proposal for investment protection in TTIP[21] and future EU treaties. All these investor lawsuits target laws or other measures adopted by countries to protect public health, the environment, local communities or to fight climate change.

The cases examined are: the ongoing Philip Morris lawsuit against Uruguay over the country's anti-smoking legislation; energy giant Vattenfall's first challenge of environmental standards for a coal-fired power plant in Germany (settled after the country agreed to lower the standards); the ongoing claim by Lone Pine against a fracking moratorium in the Canadian province of Quebec; Bilcon's winning case against Canada, over the rejection of a proposed quarry following a negative environmental impact assessment; and the legal action by pipeline developer TransCanada over the rejection of the controversial Keystone XL oil pipeline by the US administration.

Contrary to claims from the European Commission, parts of the media and some members of the European Parliament (MEPs), detailed legal analysis shows that all five cases could still be launched under the EU's proposed "Investment Court System". And they could still result in settlements in favour of the investors (as in the Vattenfall case) or in investor-friendly rulings (as in the Bilcon case).

In fact, far from addressing the fundamental flaws of the arbitration system, the Investment Court System fails the democracy test. This is because the Commission's rebranded version of ISDS contains essentially the same corporate privileges that are at the very heart of these investor attacks against public interest policies. Simply stating that governments have the right to regulate in the public interest will not prevent investors attacking efforts to protect public health, or the environment. As a result, governments will continue to face the threat of spending millions of dollars on costly lawsuits, or billions in damages for regulating in the public interest, and the risk of regulatory chill remains.

> **"This doesn't change anything because the standards on the basis of which judgements are rendered remain the same."**
>
> Nigel Blackaby of law firm Freshfields on the EU proposal[22]

Why would any politician approve of the "Investment Court System" if it risks triggering the exact same attacks on legitimate public policies that these politicians have committed to prevent?

Notes

1 According to European Commission's DG Trade, "The European Union and the United States have the largest bilateral trade relationship and enjoy the most integrated economic relationship in the world". See: European Commission, http://ec.europa.eu/trade/policy/countries-and-regions/countries/united-states/

2 Paul Ames, "ISDS: The most toxic acronym in Europe", Politico, 7 September 2015, http://www.politico.eu/article/isds-the-most-toxic-acronym-in-europe/

3 Alfred-Maurice de Zayas (2016) Statement at the 70th session of the General Assembly, New York, 26 October 2015, http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16745&LangID=E

4 Statement of Concern about Planned Provisions on Investment Protection and Investor-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP), https://www.kent.ac.uk/law/isds_treaty_consultation.html

5 For example, in a public debate on the Investment Court System proposal, Rupert Schlegelmilch from the European Commission argued that investor-state cases such as those filed by Vattenfall or Philip Morris were "based on the unreformed system" and that "what we are doing in the reform is the solution" to these kind of claims. See: TNI, "Does the EU's "Investment Court System" put an end to ISDS?", video, 23 November 2015, https://www.tni.org/en/article/does-the-eus-investment-court-system-put-an-end-to-isds

6 See European Commission announcements on the EU-Vietnam FTA (1st February 2016) http://trade.ec.europa.eu/doclib/press/index.cfm?id=1449 and the EU-Canada CETA (29 February 2016), http://trade.ec.europa.eu/doclib/press/index.cfm?id=1468

7 European Commission, Department of Trade, Press release, "CETA: EU and Canada agree on new approach on investment in trade agreement", 29th February 2016, http://trade.ec.europa.eu/doclib/press/index.cfm?id=1468

8 Victoria Martin de la Torre "S&Ds welcome the new trade dispute resolution mechanism, replacing ISDS" http://www.socialistsanddemocrats.eu/newsroom/sds-welcome-new-trade-dispute-resolution-mechanism-replacing-isds

9 Hendrik Kafsack, "Bessere Schiedsgerichte", 16 September 2015, http://www.faz.net/aktuell/wirtschaft/ttip-und-freihandel/kommentar-ttip-bessere-schiedsgerichte-13806727.html, translation: Pia Eberhardt

10 András Szigetvari, "Investorenschutz: Erfolg für TTIP-Kritiker", Der Standard, 16 September 2015, http://derstandard.at/2000022328908/Investorenschutz-Erfolg-fuer-TTIP-Kritiker, translation: Pia Eberhardt

11 See for instance:
Transatlantic Consumers Dialogue, "Response to the EU Commission's Investor-State Dispute Settlement "reform" proposal", 20 January 2016, http://tacd.org/response-to-the-eu-commissions-investor-state-dispute-settlement-reform-proposal/
Corporate Europe Observatory, "The Zombie ISDS – Rebranded as ICS, rights for corporations to sue states refuse to die", 17 February 2016, http://corporateeurope.org/international-trade/2016/02/zombie-isds
Seattle to Brussels Network, "Courting Foreign Investors",6 October 2015, http://www.s2bnetwork.org/isds-courting-foreign-investors/

12 Global Justice Now, "Commission tries to "put lipstick on a pig" with alternative corporate court system", 16 September 2015, http://disq.us/9i8qc7

13 Transport & Environment, "New' Investment Court System still privileges foreign investors under EU-US trade deal", 16 September 2015, http://www.transportenvironment.org/press/%E2%80%98new%E2%80%99-investment-court-system-still-privileges-foreign-investors-under-eu-us-trade-deal

14 Quoted in: Campact, "Experten-Check: Was der Handelsgericht shof in TTIP wirklich bedeutet", video, 9 December 2015, https://www.youtube.com/watch?v=0x9QZ8ebwf0

15 Examples include:
Friends of the Earth Europe, " Investment court system, ISDS in disguise: 10 reasons why the EU's proposal doesn't fix a flawed system", 17 February 2016, http://www.foeeurope.org/sites/default/files/eu-us_trade_deal/2016/investment_court_system_isds_in_disguise_10_reasons_why_the_eus_proposal_doesnt_fixed_a_flawed_system_english_version_0.pdf ;
Seattle to Brussels Network, "Courting Foreign Investors",6 October 2015, http://www.s2bnetwork.org/isds-courting-foreign-investors/

16 Deutscher Richterbund, "Stellungnahme zur Errichtung eines Investitionsgerichts für TTIP – Vorschlag der Europäischen Kommission vom 16.09.2015 und 12.11.2015", Nr. 04/16, 4 February 2016, http://www.drb.de/cms/index.php?id=952, unofficial translation: https://www.foeeurope.org/sites/default/files/eu-us_trade_deal/2016/english_version_deutsche_richterbund_opinion_ics_feb2016.pdf

17 Deutscher Richterbund, "Stellungnahme zur Errichtung eines Investitionsgerichts für TTIP – Vorschlag der Europäischen Kommission vom 16.09.2015 und 12.11.2015", Nr. 04/16, 4 February 2016, http://www.drb.de/cms/index.php?id=952, unofficial translation: https://www.foeeurope.org/sites/default/files/eu-us_trade_deal/2016/english_version_deutsche_richterbund_opinion_ics_feb2016.pdf

18 Ibid.

19 First Vice-President of the European Commissions, Frans Timmermans, quoted in Press release "Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations", Brussels, 16 September 2015 http://europa.eu/rapid/press-release_IP-15-5651_en.htm

20 EU Commissioner for Trade, Cecilia Malmström ,Opening Remarks at EP Debate on TTIP, 7 July 2015, http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153598.pdf

21 European Commission, "Transatlantic Trade and Investment Partnership. Trade in services, investment and e-commerce. Chapter II – Investment", 12 November 2015, http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf
All throughout the text, mentions of "the EU proposal" or "the EU proposal on investment in TTIP" refer to the provisions contained in the text, as published by the European Commission on 12 November 2015.

22 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

Could Big Oil sue EU member states over a rejected oil pipeline like Keystone XL? The case of TransCanada vs. the US

What is the case about?

In January 2016, Canadian pipeline developer TransCanada announced it intended to sue the US on the basis of the North American Free Trade Agreement (NAFTA)[1] following President Barak Obama's decision to reject the Keystone XL oil pipeline, linking Canada's tar sand fields to refineries in the US. The project, which, according to critics would have increased carbon emissions, intensifying the pace of global climate change, had faced mounting public opposition. TransCanada is demanding US$15 billion in damages.

Why is the case interesting?

There are three factors that make this case particularly interesting:

1. Money – TransCanada is demanding US$ 15 billion in compensation from the US which is a lot of taxpayer money. It would cover annual community college tuition costs for nearly five million US students.[2] Most of this sum is claimed as compensation for TransCanada's lost future profits that the company would hypothetically have earned. It has actually only spent US$2.4 billion on the project.[3]

2. Climate change – Keystone XL would have encouraged the extraction of some of the planet's dirtiest fuels for decades to come, sending greenhouse gas emissions soaring. Over its projected 50-year lifetime the pipeline would have generated up to 8.4 billion metric tons of carbon dioxide equivalent (CO2e),[4] more than the US's total annual carbon dioxide emissions in 2013.[5] At a time when climate scientists say that most of the world's fossil fuel reserves must be left in the ground if we are to avoid catastrophic climate change, the Keystone rejection put an end to *"a project that was also a weapon aimed directly at the planet's future"*.[6]

"If we're gonna prevent large parts of this Earth from becoming not only inhospitable but uninhabitable in our lifetimes, we're gonna have to keep some fossil fuels in the ground rather than burn them and release more dangerous pollution into the sky."

US President Barak Obama explaining the 'no' to Keystone XL[7]

3. Democracy – by denying the Keystone XL permit, the US government was responding to widespread citizen opposition – from environmentalists, indigenous communities, farmers, and from rangers, who warned that it would threaten their lands and livelihoods as well as wildlife and local species. Their resistance grew into a national movement to oppose Keystone. So, when the Obama administration decided to reject the project, it was responding to public pressure. TransCanada is challenging this decision as "politically motivated", challenging a central pillar of democracy, whereby citizens move their leaders to adopt better policies.

Could TransCanada file a similar case on the basis of the EU's ICS proposal?

The short answer is yes.

TransCanada argues that the US breached NAFTA's **fair and equitable treatment** standard by *"delaying the processing of the application for an extraordinarily long period"* (using "arbitrary and contrived" excuses) and by *"applying new and arbitrary criteria in deciding to deny the application"*.[8]

According to the company, the denial was *"not based on the merits of Keystone's application"*, but *"politically-driven"*:[9] They argue that *"the State Department, itself, concluded on multiple occasions that the pipeline would not raise any significant safety, public health, and environmental concerns that could not be mitigated"*, and that government wanted to appease those with the *"erroneous perception"* that the pipeline was bad for the environment to demonstrate US leadership on climate change.[10]

Does that sound like an argument that Big Oil could get away with under an EU investment treaty which would grant "fair and equitable treatment", including against measures that constitute "manifest arbitrariness" and "fundamental breach of due process… in administrative proceedings" (section 2, article 3.2, EU proposal)? [11]

TransCanada further argues that the US **"unjustifiably discriminated"** against Keystone because it *"has previously approved pipelines from other investors, including from the United States and Mexico, based on factors that, if applied to Keystone's application, would have resulted in approval of the application."*

"TransCanada's claim is not about US soldiers showing up with guns at a pipeline and declaring ownership; it's about a reasonable political choice to protect the planet's climate. In the company's view, however, making a choice they don't like constitutes a theft."

Jim Shultz, The Democracy Center[13]

It also argues that *"the United States had also approved those other applications in a significantly shorter period of time"*.[12]

The EU proposal guarantees *"investors of the other Party… treatment no less favourable than the treatment it accords, in like situations, to its own investors"* (**national treatmen**t, section 1, article 2-3, EU proposal) and to investors of a third party (**most-favoured-nation treatment**, section 1, article 2-4, EU proposal), which would allow the same argument to be made.

According to TransCanada, the US administration's review and rejection of the pipeline was also **"expropriatory"** because *"the State Department delayed its decision for seven years, with full knowledge that TransCanada was continuing to invest billions of dollars in the pipeline"*, which *"substantially deprived"* the company of the value of its would-be investment.[14] This same point could be made under a future EU treaty requiring compensation for *"measures having an effect equivalent to… expropriation"*, including *"for a public purpose"* (section 2, article 5.1, EU proposal).

Annex I of the EU proposal clarifies that *"non-discriminatory measures… designed and applied to protect legitimate policy objectives, such as the protection of public health, safety, environment or public morals… **do not constitute indirect expropriations**"*. Would that render TransCanada's expropriation point meaningless? Not necessarily.

According to the company, the handling of its application was discriminatory (see above). Second, it questions the argument that the US government's decision was driven by a legitimate public policy objective, because it was *"directly contrary to the findings of the Administration's own studies" that "the pipeline would not have a significant impact on climate change"*.[15] What if a tribunal deciding such a claim against an EU member state agreed?

The EU also wants to protect an investor's **"legitimate expectation"**. TransCanada argues that its "reasonable expectation" that the US would process its application *"fairly and consistently with past actions"* was *"not met"*.[16]

The company gives five reasons why it *"had every reason to expect that it's application would be granted... in a reasonable period of time"*. It says it met the same criteria guiding the approval of previous pipelines; the US administration repeatedly concluded that Keystone XL would not have a significant impact on climate change; the relevant executive rules suggest approval unless there are environmental, health and safety concerns; the company worked intensely with the administration to address concerns; and similar pipelines had previously been approved within roughly two years.[17]

"The idea that some trade agreement should force us to overheat the planet's atmosphere is, quite simply, insane."

Bill McKibben, author & environmental activist on TransCanada's NAFTA challenge[18]

Couldn't at least some of these points be considered by an investor to be "specific representations" by a state, which "created a legitimate expectation... upon which the investor relied in deciding to make or maintain" an investment and which the state "subsequently frustrated", as stated in the EU proposal (section 2, article 3.4, EU proposal)?

But what about the EU's proposed **formulation on the right to regulate?** It states that the investor rights *"shall not affect the right of the Parties to regulate within their territories through measures necessary to achieve legitimate public policy objectives"* (section 2, article 2.1, EU proposal).

Wouldn't this prevent an investor lawsuit like Keystone's? Not really. While the US government might have considered the Keystone XL denial necessary to demonstrate leadership on climate change, TransCanada is questioning this necessity, claiming that the decision was *"directly contrary to the findings of the Administration's own studies"* that the pipeline would not have a significant impact on climate change.[19] What if a tribunal deciding a similar claim against an EU member state agreed?

TransCanada is seeking ***"damages** of over US$15 billion from the United States' breach of its NAFTA obligations"*.[20] Claims for the loss of expected future profits would also be possible under the EU proposal. Damage claims could go into billions of dollars.

TransCanada's NAFTA arbitration is happening at the same time as a challenge in a US federal court in Texas over whether the rejection of Keystone XL is constitutional.[21] The EU has said it wants to prevent such **parallel claims** (where an investor challenges the constitutional legality of a decision in the national courts and at the same time seeks compensation in an international investment arbitration (section 2, sub-section 5, article 14, EU proposal). However, experts suggest that the EU's attempt to prevent this might not work in practice.[22] So, a parallel claim could well be possible.

TransCanada's arbitration case can proceed without the company having to go through the domestic courts first. The Commission proposal, similarly, does not require **domestic remedies** to be exhausted first – which is one of the basic rules in international law.

We cannot know how a potential future similar claim against the EU or an EU member state would be decided (the company would only need to win one of its arguments for a tribunal to order compensation from the US). But the investor rights proposed by the European Commission would not prevent such a case from being filed.

"We have a good legal system in this country and those who don't like the U.S. government's decision should go into court."

Sander Levin, Democratic Member of the US House of Representatives [23]

Notes

1 TransCanada Corporation & TransCanada PipeLines Limited, "Notice of Intent to Submit a Claim to Arbitration under Chapter 11 of the North American Free Trade Agreement", 6 January 2016, https://assets.documentcloud.org/documents/2676478/TransCanada-Notice-of-Intent-6-Jan-2016.pdf

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Could Big Tobacco sue EU member states over anti-smoking legislation? The case of Philip Morris vs. Uruguay

What is the case about?

In February 2010, multinational tobacco company Philip Morris International (PMI) launched an investment arbitration lawsuit against Uruguay under the country's bilateral investment treaty (BIT) with Switzerland.[1] PMI claimed that the Uruguayan government's anti-smoking legislation, specifically the ban on selling more than one type of cigarette under a single brand name (single presentation) and the requirement that graphic warnings about the risks of smoking cover at least 80% of the cigarette pack, "*go far beyond any legitimate public health goal*" and deprive PMI's trademark of its commercial value. PMI demanded US$25 million in compensation.[2]

Why is the case interesting?

There are three reasons that make this case particularly interesting:

1. An attack on public health – the lawsuit against Uruguay is a shocking **example of how big business can use investment arbitration to challenge a government's sovereign right to regulate in the interest of public health.** Public health experts agree that tobacco control measures, such as those implemented by Uruguay, have a direct effect in reducing smoking. Uruguay's actions followed the advice issued by the World Health Organisation (WHO) and the guidelines issued under the binding Framework Convention on Tobacco Control (FCTC). The WHO and other public health specialists have praised Uruguay's public health policy and acknowledged that it contributed to a decline in deaths from lung cancer of 15%.[3] The WHO has announced[4] that it will support Uruguay's position in the arbitration proceedings by "*providing evidence of the relationship between large graphic health warnings, bans on misleading branding and the protection of public health*".[5]

2. Dangerous regulatory chill – Uruguay has been at the forefront of the fight against tobacco. It has enacted some of the most advanced anti-smoking legislation worldwide. PMI's decision to sue Uruguay (an insignificant market in the context of PMI's worldwide sales) **is part of a global strategy to warn and scare other countries that dare to contemplate tighter regulation for the tobacco industry.**[6] When governments see the costs involved in these lawsuits, they tend to think twice about regulatory measures. When PMI first threatened to sue Uruguay, the government considered relaxing its new legislation to meet the tobacco company's demands.[7] This lawsuit, together with a similar one against Australia, has already caused other countries including New Zealand to postpone their plans to introduce stricter rules on cigarette packaging.[8]

"The claim is nothing more than the cynical attempt by a wealthy multinational corporation to make an example of a small country with limited resources to defend against a well-funded international legal action, but with a well-deserved reputation as a worldwide leader in tobacco control"

Todd Weiler, investment arbitration lawyer[9]

3. Carve out clauses do not secure the right to regulate – this case is emblematic in showing how governments' attempts to protect public health measures from the scope of investment protection treaties by adding exceptions does not necessarily prevent investors from suing. Article 2(1) of the Uruguay-Switzerland Bilateral Investment Treaty includes restrictive language designed to exclude public health measures from the scope of investor protection. The article states: *"The Contracting Parties recognize each other's right not to allow economic activities for reasons of public security and order, public health or morality, as well as activities which by law are reserved to their own investors".*[10] This did not prevent PMI from suing.

It also shows that investment tribunals are not likely to discard a case due to such exception clauses. During its initial defence, Uruguay argued that the case should be dismissed because the article was "*carving out from the BIT's protection any actions it might need to take for reasons of public health, even if they restrict investors' economic rights*".[11] The tribunal deciding the case dismissed this interpretation, arguing that the restriction only referred to the phase when an investor enters the country, and that it no longer applied after the investment was made.[12]

"While there is language in trade deals that purports to protect governments' right to regulate, many arbitration panels have ignored or narrowly interpreted these provisions, making them practically useless"

Dr. David R. Boyd, professor at Simon Fraser University[13]

Could Philip Morris file a similar case on the basis of the EU proposal?

The short answer is yes.

One of the first hurdles an investor has to clear in an investment dispute is to prove that it has made a valid investment that is protected by the treaty. PMI claims that its "*immovable and movable property, shares and intellectual property rights clearly constitute an 'investment' in the territory of Uruguay*".[14] Both "shares" and "intellectual property rights" are explicitly listed in the EU's **definition of** a protected **"investment"** under its treaties (section 2, Definitions specific to investment protection (x2b) and (x2g), EU proposal).[15] So, it is likely that a tribunal would accept that PMI has made an investment protected under a future EU investment treaty.

Among PMI's key claims is that Uruguay breached the **fair and equitable treatment** standard because its anti-smoking measures were "*excessive*", "*unreasonable*" and "*arbitrary*". According to the tobacco giant, they "*bear no rational relationship to the Government's public health policy*" (because, for example, less shocking images would have been enough to warn people of the health effects of smoking).[16] This line of argument could easily be made on the basis of the EU's current investment protection proposal, which despite evidence that such clauses are repeatedly abused by investors, includes protection to ensure "fair and equitable treatment" (section 2, article 3.1, EU proposal). "*Manifest arbitrariness*" is on the EU's list of criteria for clear breaches of the fair and equitable treatment standard (section 2, article 3.2, c, EU proposal).

"Many of these pictograms are not designed to warn of the actual health effects of smoking; rather they are highly shocking images that are designed specifically to invoke emotions of repulsion and disgust, even horror"

Philip Morris[17]

The EU text also protects an investor's **"legitimate expectations"** (section 2, article 3.4, EU proposal). PMI used this argument in its challenge against Uruguay. The company claims that the single presentation legislation and the 80% health warning requirements have "*failed to maintain a stable and predictable regulatory framework consistent with Philip Morris legitimate expectations*".[18] It also argues that "*the measures* [taken by Uruguay] *frustrate one of the most fundamental expectations that any investor may have, which is that a host State will comply with its own law and respect private property*".[19]

According to the EU text, for an investor to have a legitimate expectation, there must have been "*a specific representation*" by the state, creating that expectation (section 2, article 3.4, EU proposal). The vagueness of the wording could mean any measure, action or even verbal indication by a government official that, according to the investor, induced it to make or maintain the investment.

One of PMI's arguments in the case against Uruguay provides an example of what could be constructed as "*a specific representation*". PMI maintains that Uruguay has actively encouraged the company to continue investing over the past 30 years, and "*encouraged*" the company "*to expand its operations by granting Abal* [its local subsidiary] *a generous package of tax exemptions and credits in furtherance of Abal's plan to make capital investment in the Uruguayan factory to upgrade the machinery*".[20]

According to PMI, Uruguay's tobacco control measures had an effect **"equivalent" to expropriation** of its registered trademarks – because it deprived the company of its intellectual property rights and "*destroy[ed] the goodwill associated with the ... trademarks, thereby depriving them of their commercial value*".[21] The same argument could be made under the EU proposal for "*measures having an effect equivalent to... expropriation*" – including those "*for a public purpose*" (section 2, article 5.1, EU proposal).

In annex I, article 3, the EU proposal states that "*except in rare circumstance... that appear manifestly excessive... non-discriminatory measures... designed and applied to protect legitimate policy objectives, such as the protection of public health...* ***do not constitute indirect expropriations.***" (section 2, Annex 1, EU proposal) Would that mean the end of a claim by PMI? No. Because as in the case against Uruguay, PMI could argue that certain measures were "*excessive*" and "*do not bear any rational relationship to a legitimate governmental policy*".[22]

Ultimately, it would be up to the tribunal to interpret these claims and assess the company's arguments, leaving the door open for the lawsuit to be successful.

The European Commission has claimed that its proposal would preserve governments' **policy space to regulate** on, for example, public health issues. The proposal states that it "*shall not affect the right of the Parties to regulate... through measures necessary to achieve legitimate policy objectives*" (section 2, article 2.1, EU proposal).[23] However, no criteria are specified as to what constitutes a "*necessary measure*" or "*legitimate policy objective*".

This means investors will be able to argue that a government's measures were neither necessary nor legitimate, and it will be up to arbitrators to interpret whether this is the case.

This is exactly what PMI is doing in the case against Uruguay, arguing that its actions where not necessary because "*the same policy objective could have been achieved with a narrower and more appropriately tailored measure*". PMI also claims that "many of these pictograms are not designed to warn of the actual health effects of smoking". [24]

PMI has not only demanded that Uruguay suspends the legislation, but also that it pays **"compensation for loss of revenue and profit"**.[25] The first request would not be possible under the Commission's proposal, as an arbitral tribunal "*may not order the repeal, cessation or modification of the treatment concerned*" (section 2, section 3, article 28.1, EU proposal). However a future tribunal would not be prevented from awarding compensation to investors (including for alleged lost of future profits), as demanded by PMI. Had the Commission intended to fully protect governments from having to pay compensation when they implement "*measures necessary to achieve legitimate policy objectives*" (section

2, article 2.1, EU proposal), it would have explicitly excluded that possibility – as illustrated in the case of another set of measures, namely decisions around subsidies (section 2, article 2.4, EU proposal).

We cannot know how a potential future Philip Morris-like claim against the EU or an EU member state would be decided, but it is pretty clear that the investor rights proposed by the European Commission would not prevent such a case from being filed.

Notes

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Could mining companies challenge EU member states over ‘fracking’ moratoria? The case of Lone Pine vs. Canada

What is the case about?

In September 2013, Canadian oil and gas company Lone Pine Resources initiated an investor-state dispute against the Canadian government under the investment chapter of the North American Free Trade Agreement (NAFTA). The case follows the introduction of a bill (referred to as Bill 18) by the province of Quebec revoking all permits for oil and gas development under the St. Lawrence River and prohibiting further exploration by resource companies. The Bill effectively extended a precautionary moratorium on hydraulic fracturing (‘fracking’), while impact assessments were proceeding.[1] Lone Pine argues that Bill 18 was an “*arbitrary, capricious, and illegal revocation*” of its “*valuable right to mine for oil and gas*” under the River, even though it did not have all the permits needed to drill under the river. Lone Pine is using its US letterbox incorporation[2] in Delaware to demand US$ 109.8 million plus damages and interest[3] - in taxpayers’ money.

Why is the case interesting?

Three aspects of this case are interesting:

1. Climate change – in the context of an acute climate crisis, there is increasing consensus on the need to transition away from fossil fuels, including gas. Fracking has also been shown to have severe impacts on the environment, in particular creating the risk of water and air pollution.[4]

2. Investor rights trump public concern over environmental damage – local communities have been at the forefront of the struggle against shale gas exploration and extraction, pushing local and national authorities to ban, stop or regulate this industry to avoid or limit the negative impacts on the surrounding environment and the health of local communities.[6] This is the case in Quebec, where the St Lawrence River’s Utica basin is estimated to contain some 181 trillion cubic feet of natural gas.[7] The introduction of Bill 18 was a response to growing public concern and reflected the authorities’ priorities in taking precautionary action to protect the public. Lone Pine’s legal challenge could make these precautionary steps very expensive in the future – and make other regions think twice before they follow in Quebec’s steps.

> **“Well that’s [fracking] screwing your children and grandchildren. Because if you do that, then there’s no way to avoid the consequences [of] multi-metre sea-level rise. But we can’t do that. And that’s what the science says crystal clear. And yet politicians pretend not to hear it, or not to understand it”**
>
> **Dr James Hansen, top climate scientist asked about the UK policy to pursue fracking, at the Paris COP 21, December 2015[5]**

3. Using the loopholes of the system at the expense of the public interest – the company is using controversial methods to sue Canada. Lone Pine is a Canadian company but can sue its home government at an international arbitration tribunal through its letterbox incorporation in the US state of Delaware. The company has not even tried to seek remedies in national courts, and is claiming damages based on rights held by its joint venture partner, Junex, which holds the permits revoked as a result of Bill 18.

Could Lone Pine file a similar case on the basis of the EU proposal?

The short answer is yes.

Lone Pine argues that Quebec's introduction of Bill 18 is a clear violation of Canada's obligations to "**fair and equitable treatment** under NAFTA. According to Lone Pine, the actions were "*arbitrary, idiosyncratic, unfair and inequitable*".[8] The company also argues it has been denied "*any meaningful opportunity to be heard, any notice that the Act would be passed, or provided any reason or basis*..." The company was told "*the Act was 'a political decision,' and that nothing could be done to prevent it from being passed*".[9] According to the EU proposal (section 2, article 3, EU proposal)[10], a breach of the obligation to "fair and equitable treatment" includes a "*fundamental breach of due process*" and "*manifest arbitrariness*" – exactly what Lone Pine claims happened in Quebec.

Lone Pine also argues that the law passed by the Quebec Parliament suspending Lone Pine's licences had the effect of **expropriation,** violating Canada's NAFTA obligation "*not to expropriate investments of U.S. investors without a public purpose, without due process, and without the payment of compensation*"[11]). The company argues that the Parliament's decision was "*not an act of regulation in the normal course, but an outright destruction of intangible property*"[12] - and that it has not been compensated. The same argument could be made under the EU's proposal which grants investors the right to challenge direct and indirect (or regulatory) expropriation unless there has been "*payment of prompt, adequate and effective compensation*" (section 2, article 1, EU proposal).

> **"Every member of parliament, all the political parties unanimously voted to revoke those licenses, so it was a consensus, a social consensus in Quebec to revoke them. Everybody said: it's a no-brainer [...], this [the river] must be protected"**
>
> **Sylvain Archambault, biologist**[13]

But what about the EU Commission's claim that future measures taken to "*protect **legitimate policy objectives,** such as **the protection of public health, safety, environment***" would be safe from investors' claims? Lone Pine's arguments use loopholes in the Commission's text.

For example, the EU's proposed **annex on expropriation** states that certain measures to protect legitimate policy objectives would not be considered indirect expropriation, except in the "*rare circumstance when the impact of a measure or a series of measures is so severe in light of its purpose that is appears manifestly excessive*" (Annex 1, article 3 of the EU proposal). Doesn't Lone Pine's accusation of "*outright destruction of intangible property*" and "*arbitrary*" and "*capricious*" behaviour by the government fit this "rare circumstance"?

Lone Pine also argues that "*no public purpose has ever been advanced for the expropriation by the Government of Quebec [...] the strategic environmental assessment committee that was struck by the Government of Quebec to evaluate the environmental impacts of shale gas exploration and development [...] had yet to conduct its assessment, and had not yet issued a report*".[14] In other words, the company argues that it was not yet proven that fracking was harmful, so there was no public purpose behind the government's actions.

The Commission's proposal on the **right to regulate** would also not protect fracking moratoria against attacks by investors because the right to regulate is limited to "*measures necessary*" to achieve "*legitimate*" objectives (section 2, article 2, EU proposal). Under the proposal, other oil and gas companies would be able to claim that precautionary moratoriums on emerging technologies or similar measures lack a legitimate public purpose – and that other measures with less harmful effects for the company could be taken. Yet, the right to take regulatory measures in the face of scientific uncertainty is a key pillar of environmental regulation-making in Europe.

Far from adding extra protection, the Commission's proposal could actually pave the way for even more investor claims. The codification of the concept of **legitimate expectations** would mean that in the future, arbitrators would be able to take into account "*whether a Party made a **specific representation** to an investor to induce a covered investment, that created **legitimate expectation**, and **upon which the investor relied in deciding to make or maintain the covered investment***" (Section 2, article 3.4, EU proposal). This is catch-all language, which allows investors ample opportunity to claim that a legitimate expectation has been created and which arbitrators will interpret on a case by case basis. Lone Pine argues that its "***legitimate expectation** of a stable business and legal environment and of **treatment equal to other investors***" included commitments made in face-to-face meetings with officials (e.g. the company's critical comments "***appeared to be well received** [...] and the Enterprise and Junex **were informed at that meeting** that the resources contained in the River Permit **would be accessible to them in the future***".[15]

"Corporations are attempting to achieve by stealth – through secretly negotiated trade agreements – what they could not attain in an open political process"

Joseph Stiglitz, winner of the Nobel Prize for economics[16]

The Canadian government is contesting Lone Pine's claim that it held any rights that can be considered to be investments, and that therefore there was no expropriation affecting the company as a result of Quebec's fracking moratorium. According to Canada, the exploration permit that was revoked was held by Junex (Lone Pine's partner in the joint venture). Lone Pine argues that through its agreement with Junex, it is entitled to exploration rights and that at the time of the moratorium, the company had already spent "*considerable time, resources, and capital to explore for shale gas in the areas [...] and 100% of Junex's interest in the River Permit Area, which had yet to be obtained but was being processed*".[17] So Lone Pine is using a US-based letterbox incorporation to initiate a case in an international trade tribunal and claim Canadian taxpayers' money, while not directly holding the investment rights that were impacted by the regulatory measure in the first place.

The European Commission claims that its investment proposal will prevent letterbox companies such as Lone Pine's Delaware incorporation from benefiting from investment protection. However, it cannot prevent firms from launching arbitration cases against their home government through subsidiaries based in the other party's territory, if they structure their investments accordingly. All they need to be able to show is that they are engaged in "*substantive business operations*". What is more, the EU's definition of a covered investment includes: *"an interest arising from: i) a concession conferred pursuant to domestic law or under a contract, including to search for, cultivate, extract or exploit natural resources, ii) a turnkey, construction, production, or revenue-sharing contract, or iii) other similar contracts"* (Section 1, definitions, EU proposal), similar to what Lone Pine claims is covered by investment protection in the present case through its joint venture with the Canadian firm.

"You have a change in how governments operate. They give a much greater attention to the foreign investors' interests than to the interests of others in the country. In certain cases, the institutional structure changes, so governments will put in a special assessment process for new laws and new regulations to see how this affects foreign investors, US investors in the particular"

Gus Van Harten[18]

Notes

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8 Lone Pine Resources Inc, “Claimant’s memorial”, 10 April 2015, (p. 130; 132; 142), http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/lone-04.pdf

9 Ibid. (p.5)

10 European Commission (2015) “Transatlantic Trade and Investment Partnership. Trade in services, investment and e-commerce. Chapter II – Investment”, 12 November, http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf From now on all mentioning of EU proposal on investment in TTIP refers to this document.

11 Ibid. (p.5)

12 Lone Pine Resources Inc, “Claimant’s memorial”, 10 April 2015, (p.91 and p.126), http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/lone-04.pdf

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Could energy companies sue EU member states over environmental protection standards? The case of Vattenfall vs. Germany

What is the case about?

In 2009, Swedish energy giant Vattenfall initiated an arbitration claim against the German government under the Energy Charter Treaty (ECT), a multilateral treaty signed after the Cold War to integrate the Soviet and Eastern European energy sectors into Western markets.[1] The dispute relates to a water use permit, which the City of Hamburg's ministry for urban development and the environment required for the construction of Vattenfall's coal-fired power plant on the Elbe River. The company claimed that the environmental protection standards required for the water use permit made its investment unviable and demanded €1.4 billion in compensation. The case was settled in 2011, after the City of Hamburg agreed to relax the environmental requirements.[2]

Why is the case interesting?

There are three reasons this case is interesting:

1. Environmental protection – the case illustrates how ISDS can undermine the implementation of environmental laws and hamper an urgently needed transition to sustainable energy. When introducing new permit requirements for water use, the City of Hamburg was directly applying the EU water framework directive, which is designed to improve environmental protection and the health and safety for communities.

2. Special treatment for foreign investors – this case illustrates how foreign investors can use their rights to sue governments outside of established legal systems to deter them from imposing regulations that affect their profits. Vattenfall first turned to the High Administrative Court of Hamburg (Oberverwaltungsgericht) in 2008 because of the "undue delay" in the permit process. Because the company was unhappy with the "extremely severe"[3] restrictions placed on permits, it decided to launch an ISDS claim in the spring of 2009. Several officials have admitted that it was Vattenfall's expensive international arbitration claim which put pressure on the local government and resulted in the case in the High Administrative Court of Hamburg being settled (August 2010) – with the basis of the settlement of the ISDS claim reached in the Spring 2011. This resulted in the lowering of requirements for the water use permit at the expense of the protection of the environment and the surrounding communities.

> **"Vattenfall had no interest in getting compensation, Vattenfall wanted to get rid of the environmental restrictions"**
>
> **Markus Krajewski, professor for public and international law[4]**

3. Conflicts between EU law and investor rights – Ironically the German Government is now being sued by the European Commission for not complying with the requirements of the European Habitats Directive – as a result of the arbitration claim filed by Vattenfall and the settlement. This not only shows the threat that such cases pose to ambitious environmental regulations, but how national and European law to protect the environment can come into conflict with trade and investment agreements which allow investors to kill environmental protection standards.[5]

> **"For environmental policy this is a throwback to the Stone Age"**
>
> **Volker Dumann, Spokesman for the Hamburg Environmental Protection Agency about Vattenfall's claim[6]**

Could Vattenfall file a similar case on the basis of the EU proposal?

The short answer is yes.

According to Vattenfall, "*the acts and omissions of the Federal State of Hamburg in relation to the authorization process of the Moorburg power plant constitute, separately and in combination*" [7] **a violation of Germany's obligation to provide fair and equitable treatment to investors** under the Energy Charter Treaty.

Vattenfall identified four reasons why Germany breached the fair and equitable treatment standard:

1- It contested the public interest motivation of the regulatory changes, arguing it was a "*politically motivated delay of the administrative procedure for the authorization of the Moorburg power plant by approximately 9 months*".[8] The company has avoided referring to Hamburg's obligations to comply with EU law, instead arguing that the measures were politically motivated, arising from the new government's opposition to the project.[9]

2- The restrictions under the water use permit were "*incompatible with agreements previously reached between Hamburg and the Vattenfall Group*".[10] In 2007 the Hamburg government had issued a preliminary permit as part of the "Moorburg Agreement", which included restrictions on the amount of cooling water that could be taken from the river. In order to fulfil its requirements under EU law, the government tightened the restrictions ahead of a new water use permit being issued in 2008.

3- The fact that the "*severe restrictions under the water use permit were developed* [...] *in only a few days - and three working days before the permits were issued - contrary to all previous statements, and without giving the Vattenfall Group a fair hearing*";

4- That, "*the extension of the monitoring period for the fish stair by one year to two years* [...] *was a politically motivated, unreasonable measure*".[11]

The EU's investment protection proposal would allow the company to make exactly the same arguments as its definition of breaches of fair and equitable treatment includes broad concepts such as "*fundamental breach of due process*" and "*manifest arbitrariness*" (section 2, article 3.2, EU proposal).[12]

In addition, Vattenfall claimed that the "*combined effects of the delay of the administrative procedure and the restrictions imposed on the use of cooling water pursuant to the water use permits amount to an indirect expropriation*" of its investment – as its value and the ability to make profits based on the investment in the future had been severely impacted. Vattenfall claimed that, in order to meet the water use criteria, the power plant "*would have to be shut down for days or weeks during summertime*"[13] and would only be able "*to operate* [...] *with substantially reduced capacity*".[14]

According to Vattenfall, this created "*a very significant reduction of the value of the plant*"[15], leaving it with no other option than to suspend the work of contractors, delay the start of the operation because of the extended monitoring phase[16] and not to be able to replace the ageing Hamburg/Wedel power plant as early as planned. This had the "*combined effects* [...] [to] *destroy the economic value of the plant*."[17]

Under the EU proposal, companies like Vattenfall could easily challenge measures similar to those taken by the Hamburg authorities, which could be described as having "*an* **effect equivalent to [...]**

expropriation" (Section 2, article 3.4 of EU proposal). Under the EU text, governments will have to provide arguments as to why measures to serve public interest policies are not "manifestly excessive" and "protect legitimate public policy objectives", as claimed by the investor (Annex 1.3, EU proposal).

The EU proposal also foresees that investors' "*legitimate expectations*" resulting from "*a specific representation*" will be protected (section 2, article 3.4, EU proposal). Several elements of Vattenfall's claim argue that the company's legitimate expectations were allegedly frustrated. For example, Vattenfall argues that "*at the time of applying for the permits, Vattenfall… had reason to expect that the emission permit would be issued*".[18] Vattenfall also claims that the "*extremely severe*" restrictions with respect to the water use permit "*deviate from… what the Vattenfall Group was entitled to expect*." According to its claim, Vattenfall based its expectations on "*agreements previously reached*" with the administration (eg the Moorburg Agreement), the preliminary start permit, and the "*assurances received from the representatives of the City of Hamburg*".[19] They also point to earlier correspondence with the former mayor indicating that the power plant would be authorised.

While a domestic investor faced with a similar situation would have been left with no other option than to seek remedies through the German courts, Vattenfall used ISDS to initiate an international arbitration claim and challenged the German government on both fronts. The company challenged the delay in the High Administrative Court of Hamburg and then used ISDS, claiming financial compensation for their losses and damages.

"This is a bad day for the climate and the environment"

Manfred Braasch, Friends of the Earth/BUND Hamburg[20]

A company like Vattenfall could take similar action under the Commission's ICS proposal as foreign investors are not required to exhaust local remedies before launching arbitration. It does request that the two tracks are not pursued simultaneously but leaves investors free to pick the route they prefer.

We cannot know how a potential future Vattenfall–like claim against the EU or an EU member state would be decided, but it is clear that the investor rights proposed by the European Commission would not prevent such a case from being filed. The company has clearly found an effective tool to challenge German policy makers as in 2012 it filed another request for arbitration against Germany at the International Centre for the Settlement of Investment Disputes (ICSID), housed at the World Bank in Washington, D.C., following Germany's decision to phase out nuclear energy.[21]

Notes

1 The Energy Charter Treaty, Trade Amendment and Related Documents: http://www.italaw.com/sites/default/files/laws/italaw6101%2839%29.pdf

2 For a comprehensive recap on the case, see: Nathalie Bernasconi, "Background paper on Vattenfall v. Germany arbitration", International Institute for Sustainable Development, http://www.iisd.org/pdf/2009/background_vattenfall_vs_germany.pdf

3 Vattenfall AB, Vattenfall Europe AG and Vattenfall Europe Generation AG & Co. KG, Request for Arbitration, March 30, 2009, Chapter 2 (36.). http://www.italaw.com/sites/default/files/case-documents/ita0889.pdf

4 Das Erste, "Konzerne klagen, wir zahlen: Wie Schiedsgerichte den Rechtsstaat aushebeln," 19 October 2015; version with English and Spanish subtitles available here: https://www.youtube.com/watch?v=YV2NZ9MQh0w

5 European Commission press release, "Environment: Commission refers Germany to Court over coal power plant in Moorburg.", 26 March 2015, http://europa.eu/rapid/press-release_IP-15-4669_en.html

6 Sebastian Knauer, "Vattenfall vs. Deutschland: Machtkampf um Moorburg." Spiegel online, 11 July 2009, http://www.spiegel.de/wirtschaft/vattenfall-vs-deutschland-machtkampf-um-moorburg-a-635520-2.html . Original „Für die Umweltpolitik ist das ein Rückfall in die Steinzeit" (translation by Nelly Grotefendt)

7 Vattenfall AB, Vattenfall Europe AG and Vattenfall Europe Generation AG & Co. KG, Request for Arbitration, March 30, 2009, Chapter 3 (54.). http://www.italaw.com/sites/default/files/case-documents/ita0889.pdf

8 Ibid., Chapter 3 (i)

9 Preuß, Olaf. "Das Paradox von Moorburg." Die Welt, 7 December 2014, p. 5. http://www.welt.de/print/wams/hamburg/article135098349/Das-Paradox-von-Moorburg.html

10 Vattenfall AB, Vattenfall Europe AG and Vattenfall Europe Generation AG & Co. KG, Request for Arbitration, March 30, 2009, Chapter 3 (ii). http://www.italaw.com/sites/default/files/case-documents/ita0889.pdf

11 Ibid., Chapter 3 (i - iv).

12 European Commission, "Transatlantic Trade and Investment Partnership. Trade in services, investment and e-commerce. Chapter II – Investment", 12 November 2015, http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf
All mentions of "the EU proposal" or "the EU proposal on investment in TTIP" refers to this document.

13 Vattenfall AB, Vattenfall Europe AG and Vattenfall Europe Generation AG & Co. KG, Request for Arbitration, 30 March 2009, Chapter 2 (37.). http://www.italaw.com/sites/default/files/case-documents/ita0889.pdf

14 Ibid., Chapter 2 (40.).

15 Ibid., Chapter 2 (43.).

16 Ibid, Chapter 2 (39.).

17 Ibid, Chapter 2 (45.).

18 Ibid, Chapter 2 (16.).

19 Ibid., Chapter 2 (26.).

20 Karin Istel, "Ein schwarzer Tag für die Umwelt": Kohlekraftwerk Moorburg jetzt offiziell in Betrieb genommen –Umweltschützer empört." Elbe Wochenblatt, 3 March 2015, http://www.elbe-wochenblatt.de/neugraben/lokales/ein-schwarzer-tag-fuer-die-umwelt-d34073.html, Original "Das ist ein rabenschwarzer Tag für den Klimaschutz und die Umwelt" (translation by Nelly Grotefendt)

21 Vattenfall AB u.a. v. Federal Republic of Germany, ICSID Case No. ARB/09/6.: https://icsid.worldbank.org/apps/ICSIDWEB/cases/pages/casedetail.aspx?CaseNo=ARB/09/6

Could a mining company sue EU member states over environmental impact assessments? The case of Bilcon v. Canada

What is the case about?

In March 2015, an arbitration tribunal constituted under the North American Free Trade Agreement (NAFTA) ruled that a Canadian environmental review process violated NAFTA's investment protection rules. Bilcon, a US company, wanted to build a large quarry and marine terminal in an ecologically sensitive coastal area in Eastern Canada. It planned to mine and crush basalt and then ship it to the US. In 2007, after extensive studies and public consultation, a government-established environmental assessment panel recommended against the project due to its likely negative environmental impacts. The governments of Nova Scotia and Canada followed the panel's recommendation and denied approval. Bilcon then sued and won its investor–state dispute under NAFTA. The firm is seeking over US$300 million in damages.[1]

Why is the case interesting?

There are three reasons this case is interesting:

1. Environmental protection – this case proves official assurances that investment agreements do not compromise environmental regulation are false. It validates concerns raised by the public and critics of investor–state dispute settlement that foreign investors can use trade and investment treaties to attack environmental regulation, and that they can also win.

2. Dangerous regulatory chill – the Bilcon ruling also undermines the effectiveness of the environmental impact assessment process, which is an essential policy tool for protecting the environment. One member of the three-person NAFTA tribunal deciding the Bilcon case, who was over-ruled on the tribunal, described the majority's ruling as a "significant intrusion into domestic jurisdiction" that "will create a chill on the operation of environmental review panels".[3]

"If you can make US$ 300 million and not have to build the quarry, it'd be stupid to build it. You probably wouldn't make that much money out of it anyway"

Kemp Stanton, fisherman who fought the Bilcon quarry over concerns to peoples livelihoods.[2]

3. Investors privileges at the expense of public interest – the ruling exposes serious problems with the much abused fair and equitable treatment (FET) obligation present in most investment treaties, which gives arbitrators far too much power to decide the legitimacy or illegitimacy of government actions.[4]

Could Bilcon win a similar case on the basis of the EU proposal?

Definitely.

Bilcon successfully argued that the conduct of the Canadian environmental assessment review, along with various provincial and federal government measures, discriminated against the company and violated NAFTA's so called minimum standards of treatment. The EU's proposed foreign investor rights would allow the same investor arguments – and an equally investor-friendly ruling by the arbitrators. The minimum standard of treatment (MST) protections in NAFTA are roughly equivalent to the EU's proposal for *"fair and equitable treatment"* (FET) of foreign investors. The EU proposal states: *"A Party breaches the obligation of fair and equitable treatment…where a measure or a series of measures constitutes a 'fundamental breach of due process' or 'manifest arbitrariness'"* (section 2, article 3, EU proposal).[5]

The Bilcon tribunal ruled that the conduct of the environmental review was *"arbitrary", "grossly unfair"* and a *"manifest failure of natural justice"*.[6] The addition of "manifest" before "arbitrariness" in the EU proposal would be unlikely to make any difference in a tribunal's decision.

The EU proposal also explicitly provides that a tribunal *"may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated"* (section 2, article 3.4, EU proposal). This wording opens the door to future tribunal rulings similar to the Bilcon decision.

"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."

Todd Weiler, Investment lawyer and arbitrator, commenting on the EU's plan for investment in TTIP[7]

In fact, by validating the criterion of an investor's "legitimate expectations" (which is not included in NAFTA), the EU proposal could make it easier for plaintiffs like Bilcon to win their cases. The Bilcon tribunal decided the investor had been encouraged by provincial government officials to pursue the quarry project, and that this was later "arbitrarily" rejected upon the advice of the federal-provincial environmental assessment panel. The tribunal held that this treatment frustrated the investor's "legitimate expectations".

The majority on the tribunal considered the actions of Canada *"as a whole"*, calling it *"unjust"* for provincial economic development officials to encourage the project and then have *"other officials effectively determine that the area was a 'no go' zone for this kind of development"*.[8] This position eviscerates the integrity of any environmental assessment process, which is supposed to be an independent, arms-length review. The dissenting tribunal member described the decision as "a remarkable step backwards" for environmental protection.[9]

The Bilcon tribunal also ruled that the federal and Nova Scotia governments violated NAFTA's national treatment (non-discrimination) rule. The tribunal scrutinised examples of what it considered to be comparable projects involving Canadian investors in quarries or marine terminals that had either not been subject to a full environmental assessment, had been approved with mitigation measures, or approved outright. Two arbitrators were satisfied that Bilcon had been treated less favourably in violation of the national treatment rule. The EU proposal similarly guarantees *"investors of the other Party… treatment no less favourable than the treatment it accords, in like situations, to its own investors"* (**national treatment**, section 1, article 2-3, EU proposal) and to investors of a third party (**most-favoured-nation treatment**, section 1, article 2-4, EU proposal) creating the potential for a similar scenario.

The task of deciding whether proponents of completely unrelated projects were treated better or worse is inherently subjective. The Bilcon ruling demonstrates how ISDS enables private arbitrators to hold elected governments to impossible standards of consistency whereby any difference in treatment can be likened, at the arbitrator's discretion, with nationality-based discrimination. Democratic regulation is paralysed by such a presumption, which the EU proposal does nothing to discourage.[10]

Bilcon did not appeal any decisions related to the project through the Canadian courts, even though it had the right to seek a federal court review of the environmental panel's finding. Similarly nothing in the EU proposal requires an investor to exhaust local remedies. Claimants will still be able to bypass domestic courts in favour of investor–state arbitration.

The tribunal "lacked, with the exception of the dissenting member, even a basic understanding of the legal context within which the decisions it was asked to rule on were made."

Meinhard Doelle, Environmental law professor, Dalhousie University[13]

The NAFTA tribunal, chaired by a German jurist untrained in Canada's legal system, decided the environmental assessment panel had violated Canadian law.[11] The majority of the tribunal felt the consideration of *"community core values"*, which it construed as the primary basis of the environmental assessment panel recommendation against the project, was outside the panel's legal mandate. It also condemned the environmental panel's decision to recommend against the project outright without suggesting changes that might have mitigated its negative impacts and allowed Bilcon to proceed.[12]

Both NAFTA's investment chapter and the EU investor rights proposal give arbitrators the power to usurp the role of the domestic courts. Yet, as the tribunal's dissenting member stressed, even if federal environmental assessment legislation had not been followed to the letter (which was not proved), this should never have been deemed a violation of NAFTA's Minimum Standard of Treatment clause under customary international law. It is the position of all three NAFTA governments that such standards should be interpreted cautiously and only used in cases involving extreme state conduct.[14] The EU proposal would not prevent such a travesty of justice from occurring again.

"By treating this potential violation of Canadian law as itself a violation of [the MST obligation] the majority has in effect introduced the potential for getting damages for what is a breach of Canadian law, where Canadian law does not provide a damages claim for such breach."

Professor Donald McRae, dissenting member of the Bilcon arbitral tribunal[15]

Notes

1 The tribunal's decision on the amount of damages is pending. Bilcon declared in a March 20, 2015 press release it would be seeking "at least US$300 million in damages from Canada." Paul MacLeod. "Bilcon seeks US$300m after win in quarry dispute." Halifax Chronicle-Herald. 20 March 2015, http://thechronicleherald.ca/novascotia/1275735-bilcon-seeks-us300m-after-win-in-quarry-dispute.

2 Quoted in: Das Erste, "Konzerne klagen, wir zahlen: Wie Schiedsgerichte den Rechtsstaat aushebeln," 19 October .2015; version with English and Spanish subtitles available here: https://www.youtube.com/watch?v=YV2NZ9MQh0w

3 Clayton/Bilcon v. Government of Canada. "Dissenting Opinion of Professor Donald McRae." 10 March 2015, http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/clayton-13.pdf.

4 United Nations Conference on Trade and Development (UNCTAD) (2012) "Fair and equitable treatment: a sequel", UNCTAD Series on Issues in International Investment Agreements II, New York and Geneva, 2012 (p30)

5 European Commission, "Transatlantic Trade and Investment Partnership. Trade in services, investment and e-commerce. Chapter II – Investment", 12 November, http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf
All mentions of "the EU proposal" or "the EU proposal on investment in TTIP" refers to this document.

6 "The Tribunal finds that the conduct of the joint review was arbitrary. The JRP effectively created, without legal authority or fair notice to Bilcon, a new standard of assessment rather than fully carrying out the mandate defined by the applicable law." Clayton/Bilcon v. Government of Canada. "Award on Jurisdiction and Liability." 17 March 17 2015, Para. 591.

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

8 Clayton/Bilcon v. Government of Canada. "Award on Jurisdiction and Liability." 17 March 2015, Para. 592.

9 Clayton/Bilcon v. Government of Canada, Dissenting Opinion of Professor Donald McRae. 10 March 2015, http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/clayton-13.pdf.

10 The proposed wording of the national treatment provision TTIP is very similar to that in NAFTA.

11 The tribunal was not qualified to decide whether or not Canadian law had been broken. According to Dalhousie University environmental law professor Meinhard Doelle, the majority's interpretation of Canadian law was almost certainly wrong. Doelle, who has extensive experience with federal assessment panels, observed that the tribunal "lacked, with the exception of the dissenting member, even a basic understanding of the legal context within which the decisions it was asked to rule on were made." Meinhard Doelle. "Clayton Whites Point NAFTA Challenge Troubling" 25 March 2015, https://blogs.dal.ca/melaw/2015/03/25/clayton-whites-point-nafta-challenge-troubling/.

12 As the dissenting member pointed out, "By treating this potential violation of Canadian law as itself a violation of [the MST obligation] the majority has in effect introduced the potential for getting damages for what is a breach of Canadian law, where Canadian law does not provide a damages claim for such breach." Clayton/Bilcon v. Government of Canada, Dissenting Opinion of Professor Donald McRae. 10 March 2015, Para. 43.

13 Meinhard Doelle. "Clayton Whites Point NAFTA Challenge Troubling", 25 March 2015, https://blogs.dal.ca/melaw/2015/03/25/clayton-whites-point-nafta-challenge-troubling/

14 See Permanent Court of Arbitration. Mesa Power Group LLC (USA) v. Government of Canada. "Second Submission of Mexico as a Non-Disputing Party." and "Second Submission of the United States of America as a Non-Disputing Party." 12 June 2015. Available at: http://www.pcacases.com/web/view/51

15 Clayton/Bilcon v. Government of Canada, Dissenting Opinion of Professor Donald McRae. 10 March 2015, Para. 43.

The EU's proposed investor rights don't pass the democracy test

Under the guise of reforming ISDS in trade agreements such as TTIP, the EU-Canada trade agreement (CETA) and the EU-Vietnam Free Trade Agreement (FTA), the European Commission is planning to dramatically expand the reach of this mechanism.[1]

The EU's proposal for investor protection and the Investment Court System fails to protect right to regulate and therefore respect citizens' demand to protect public policies from investors' attacks. It will not prevent companies from challenging regulations or government decisions to protect public health and the environment enacted in the public interest when these interfere with their expected profits. And it will not prevent arbitrators from deciding in investors' favour.

> **"There's so much more money to go after in a developed country. The budgets are so much higher, so for a range of factors, you can expect more claims"**
>
> Gus Van harten[2]

This clearly contradicts the European Commission's assertions that the proposal will preserve governments' space to regulate in the public interest.

Analysis of these five cases shows that excessive rights for investors are preserved and even reinforced.

Our analysis shows five ways in which the Commission's investment proposal allows investors to attack legislation or regulations designed to protect public health and the environment, and as such fails to satisfy the democratic demands made by EU citizens:

1- The "Fair and Equitable Treatment" standard is a "catch all"

The "Fair and Equitable Treatment" investment standard is retained as part of the EU's investment court system proposal. This is the most widely used and expansively interpreted investment protection standard,[3] and a close reading of article 3 in the EU proposal shows that it leaves the door wide open for investors to claim that this standard has been breached should governments take legitimate measures in the public interest.

For example, investors can argue this standard has been breached if a measure is considered "arbitrary" as in Transcanada's arbitration claim over the US decision to reject the contested Keystone XL oil pipeline. TransCanada claim the decision was based on "*politically-driven*" and "*arbitrary criteria*". Philip Morris called Uruguay's anti-smoking measures "*excessive*", "*unreasonable*" and "*arbitrary*" and denies they are related to public health policy.

Lone Pine argues that Quebec's introduction of a moratorium on fracking was "*arbitrary, idiosyncratic, unfair and inequitable*". Similarly, energy giant Vattenfall has argued that the German government's demand for a new permit for water use to improve environmental protection and the health and safety of communities was a "*politically motivated, unreasonable measure*". Finally, there is the tribunal's ruling in the Bilcon case. The government had rejected plans for a large quarry and marine terminal in an ecologically sensitive coastal area due to the project's negative environmental impact, but the tribunal ruled that the conduct of the environmental review was "arbitrary", "grossly unfair" and a "manifest failure of natural justice".

2- Investors' "legitimate" expectations are now a corporate right

The European Commission has widened the fair and equitable treatment concept by explicitly allowing tribunals to take into account the notion of investors' "legitimate expectations". This gives investors an even more powerful tool to fight tighter rules as investors can argue that their "legitimate expectations" have been undermined (article 3.4, EU proposal) when claiming a breach of the FET clause. This opens Pandora's box of possible claims, which arbitrators will interpret as they see fit. The only restriction is that the state must have made "a specific representation" to the investor.

In the five cases analysed, investors all claim a breach of their legitimate expectations. And most put forward claims that could be interpreted as "specific representation" from the relevant government authorities to induce the investment.

TransCanada argues that its "*reasonable expectation*" that the US would process its application "*fairly and consistently with past actions*" was "*not met*" and that the government had led it to believe that the pipeline would be approved. Philip Morris claimed "*the measures* [taken by Uruguay] *frustrate one of the most fundamental expectations that any investor may have, which is that a host State will comply with its own law and respect private property*". PMI argued that the government "*encouraged*" the company "*to expand its operations*..." Lone Pine complained that Canada violated its "*legitimate expectation of a stable business and legal environment*". Vattenfall claimed that the "*extremely severe*" restrictions for the water use permit "*deviate from... what the Vattenfall Group was entitled to expect*." Finally, Canada was found to have frustrated Bilcon's "*legitimate expectations*" as the company had been encouraged by provincial government officials to pursue the quarry project.

It is therefore not a surprise that investment lawyers who are constantly encouraging investors to sue countries in ISDS tribunals, have praised the fact that the new EU proposal explicitly lists new rights for investors under concepts such as fair and equitable treatment.[4]

3- Failure to limit definition of indirect expropriation

The European Commission has acknowledged that "*indirect expropriation has been a source of concern in certain cases where regulatory measures taken for legitimate purposes have been subject to investor claims for compensation, on the grounds that such measures were equivalent to expropriation because of their significant negative impact on investment*". And yet, the ICS proposal contains significant loopholes for investors to continue arguing that measures taken to protect public health, safety or the environment have an effect equivalent to expropriation (Annex 1, point 3).

First of all, only measures that are applied to protect "*legitimate*" policy objectives will be excluded. Measures that are legitimate but which appear *"manifestly excessive*" could also be considered indirect expropriation. Who will determine whether the measure is legitimate and when it is excessive? Among the cases analysed, investors argue that government measures were not legitimate and were, in some cases, excessive. TransCanada argues that the US administration's decision on the pipeline was not for a legitimate public policy objective. Phillip Morris International argued that the restrictions imposed did "*not bear any rational relationship to a legitimate governmental policy*". Lone Pine accused Canada of "*arbitrary*" and "*capricious*" behaviour, questioning the authority's motivation because it had not proved that fracking was harmful. Vattenfall similarly contested the public interest dimension of the regulatory changes on the water permit. Under the EU proposal, governments will have to defend measures enacted in the public interest and provide evidence that they are not "manifestly excessive" and "protect legitimate public policy objectives" – as claimed by investors. Interpreting these qualifiers is up to for-profit adjudicators.

4 - The article on the "right to regulate" is smoke and mirrors

The inclusion of an article on the right to regulate is misleading and gives a false sense of security because governments will have to prove that any regulations introduced were "*necessary*" and sought to achieve "*legitimate*" objectives. The definitions of "*necessary*" and "*legitimate*" are open for interpretation.[5] In fact, nothing in the Commission's proposal prevents investors from claiming compensation from the governments, even when measures were necessary and legitimate. This creates the risk of regulatory chill. Had the Commission wanted to preserve governments' right to regulate, it would have stated that governments have discretion to determine what is in the public interest and that measures taken in the public interest would not constitute a breach of the investors' rights and nothing in the agreement could be construed as requiring the government to compensate the investor. A high level European Commission representative, speaking at an event in the US, recently admitted: "This is not an exception like the general exception...It is a guiding principle which informs" the tribunal's deliberation. He called this "an important legal distinction".[6]

And indeed, the proposal only states that investment protection "shall not affect" the right to regulate. This is a much less precise formulation and therefore does not constitute an effective safeguard for regulatory flexibility. Investment tribunals may well find that the right to regulate is, technically, never affected by a compensation award, even if it amounts to billions of dollars.

The five cases analysed show how easily investors can argue that the measures taken by the government were not necessary. TransCanada challenged the "*necessity*" of cancelling Keystone XL as a measure against climate change. PMI argues that Uruguay's actions were not "*necessary*" because "*the same policy objective could have been achieved with a narrower and more appropriately tailored measure*", for example, smaller or less shocking health warnings. Lone Pine argues that other measures with less harmful effects for the company were available.

5 - Investors still have right to compensation for loss of (future) profit

Nothing in the Commission's proposal prevents investors from claiming – or receiving – compensation from governments for the loss of expected (future) profits, even when governments can show that the measures taken were necessary and legitimate. In fact, the EU proposal only prevents investors from suing on matters specifically related to state aid, making it clear that action on other matters remains possible. If there was a real intention to protect the right to regulate for the public interest, this could have been done more clearly.

Under ISDS, TransCanada is demanding US$15 billion in damages from the United States. And Philip Morris has asked that Uruguay pay "*compensation for loss of revenue and profi*t". These cases illustrate the potential costs to taxpayers that could result from claims under ICS. Under the current EU proposal, not only could public coffers be depleted, but also the risk for governments to be scared away from regulatory action as a result (regulatory chill) remains.

The provisions, which according to the European Commission, protect the right to regulate, clearly fail to protect public interest measures against claims. No doubt that under the new EU investment proposal enshrined in CETA and the EU-Vietnam FTA and proposed for TTIP, governments who enact ambitious regulations to protect the environment, act on climate change, protect citizens from the dangerous health effects of toxic substances will be on the frontline of corporate claims. The inclusion of arbitration in TTIP (albeit under the name of "investment Court System"), CETA and other free trade agreements will lock member states into the agreement without the option of withdrawing. This is unlike existing bilateral trade agreements where states can withdraw unilaterally. A dissenting government would have to leave the EU to break free from these investment agreements.

Investor-state dispute settlement – under whatever label – is undemocratic, dangerous, unfair, and one-sided. We must not fall into the trap of the European Commission proposal. A path for real reforms starts by getting rid of ISDS once and for all from TTIP as well other EU trade agreements.

Notes

1 For example, in the case of TTIP, while only 8% of US companies operating in the EU are currently covered by ISDS provisions in existing treaties, a TTIP agreement would result in all US firms being covered, creating a likely boom in new claims. For details see Public Citizen, "Tens of Thousands of U.S. Firms Would Obtain New Powers to Launch Investor-State Attacks against European Policies via CETA and TTIP", 2014, (p.1), https://www.citizen.org/documents/EU-ISDS-liability.pdf

2 VPRO International, "Documentary: TTIP: Might is Right (VPRO Backlight)", 19 October 2015, (42'15), https://www.youtube.com/watch?v=j0LOwmwgkdA

3 United Nations Conference on Trade and Development (UNCTAD) "Interpretation of IIAs: What States Can Do", IIA Issues Note, December 2011, p.21, http://www.unctad.org/en/Docs/webdiaeia2011d10_en.pdf, and Gus Van Harten, "Arbitrator Behaviour in Asymmetrical Adjudication (Part Two): An Examination of Hypotheses of Bias in Investment Treaty Arbitration", Osgoode Legal Studies Research Paper No. 31, 2016, http://ssrn.com/abstract=2721920

4 Jonathan Kallmer of law firm Crowell and Moring, for example, stated on the EU's fair and equitable treatment formulation: "I actually think, from the perspective of the greedy, avaricious lawyer, that's a very good obligation to work with". Quoted in: Inside US Trade, "U.S. Investment Protection Advocates Wary Of Possible TTIP Outcome", 24 June 2014

5 It is important to note that the language on the right to regulate in the EU-Vietnam agreement is even weaker than what is included in the proposals in relation to TTIP and CETA: "The Parties reaffirm the right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity" (Chapter II, Article 13 bis.1), with no actual carve-out for such policies, http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154210.pdf

6 Rupert Schlegelmilch (European Commission, DG Trade, Director of the directorate for Services and Investment, Intellectual Property and Public Procurement) speaking at a private luncheon on "Investment Treaty Reform: The European Perspective" on Thursday, April 7th, at 12:00pm at the Cato Institute in Washington, DC.

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Corporate Europe Observatory (CEO) is a research and campaign group working to expose and challenge the privileged access and influence enjoyed by corporations and their lobby groups in EU policy making. CEO works in close alliance with public interest groups and social movements in and outside Europe to develop alternatives to the dominance of corporate power.

www.corporateeurope.org

Friends of the Earth Europe

Friends of the Earth Europe is the largest grassroots environmental network in Europe, uniting more than 30 national organisations with thousands of local groups. We are the European arm of Friends of the Earth International which unites 74 national member organisations, some 5,000 local activist groups, and over two million supporters around the world. We campaign on today's most urgent environmental and social issues.

www.foeeurope.org

German NGO Forum on Environment and Development

The German NGO Forum on Environment & Development was founded on December 12th 1992 after a UN conference on Environment and Development ("Rio"). Its purpose is to coordinate German NGOs in international political processes on sustainable development. The Forum comprises deputies of environmental and developmental organizations and supports organizations from developing countries as well as collaborating with international associations to enable joint activities. It takes part in the subsequent international work on Environment and Development regarding the UN conference in Rio 1992.

www.forumue.de

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