RIGHTS FOR BUSINESS, NOT FOR PEOPLE

THE EU'S AGENDA

Friends of the Earth Europe

This image: Large demonstration against the planned free trade agreements TTIP and CETA in Berlin, October 2015
Cover image: Community leader at an oil spill site in Kegbara-dere, Nigeria, where Shell has been operating

"If there ever was a one-sided dispute-resolution mechanism that violates basic principles, this is it.[40]"

Joseph Stiglitz,
Nobel laureate in economics, commenting on ISDS

INTRODUCTION

Transnational corporations enjoy enormous power. Their resources dwarf those of many nation states but their power is not always exercised with care as numerous examples of corporate human rights violations and environmental damage show. Despite these crimes, it has been almost impossible to prosecute transnational corporations internationally, leaving some of the worst offenders unpunished.

On 26 June 2014 the UN Human Rights Council adopted a resolution calling for an intergovernmental working group to establish binding rules for businesses in relation to human rights – a process commonly referred to as the "Treaty". This historic decision means that international human rights law will for the first time apply to the activities of transnational corporations.

The European Commission and EU member states proudly claim to actively promote and defend human rights internally and abroad[1]. But the EU permanent mission in Geneva and member states have tried to frustrate and derail the progress of this working group. Instead the EU wants to rely solely on a set of voluntary principles. This would mean that corporations would not be legally accountable for human rights violations.

Yet there is no hesitation from the EU when it comes to securing privileged treatment for corporations around the globe through investment treaties and trade deals. These often include business-friendly private tribunals (rebranded as investment court system in the context of the EU-US trade talks) that wield the power for corporations to claim financial compensation from governments for any new laws or regulations that reduce corporate profits.

This parallel legal system is exclusively accessible to corporations, or more specifically to foreign investors, and is tilted in their favour. And the problem is about to get a lot worse as negotiations for an EU-US free trade deal (TTIP) and a free trade agreement with Canada (CETA) would significantly expand the corporate tribunals' reach.

This paper outlines how the European Commission and EU member states are aggressively pushing rights for businesses, but refusing to engage in constructive talks at the UN level on establishing rights for people affected by the activities of those companies.

1. EUROPE: CHAMPIONING CORPORATE PRIVILEGES

Investor-state dispute settlement (ISDS) is a provision generally included in bilateral investment agreements (BITs) – agreements between two countries that grant extra protection for investments from foreign companies. EU countries are world leaders in signing bilateral investment treaties, and almost all of these treaties contain ISDS[2]. Between them, the 28 EU member states (who together generate less than a quarter of global economic output) have signed 1,545 BITs, more than half of all BITs worldwide[3].

European companies are also the biggest users of investment arbitration. Nine European countries are among the top 12 states from which ISDS claims originate[4]. Companies from the Global North are responsible for 80% of all ISDS claims[5].

Some European countries have worded their BITs in a particularly investor-friendly way. The Netherlands, for example, which is one of the leading EU countries in terms of signing BITs and the second highest source of claims, gives particularly wide-ranging rights to investors[6]. A recent study found that around three quarters of claims under Dutch BITs are brought by "mailbox companies" that do not have substantial business activities in the Netherlands, but who take advantage of the investor-friendly wording in Dutch BITs to increase the chances of their case[7]. In the Netherlands, giving investors the most expansive privileges possible has become official government policy[8].

European countries have also been behind thinly veiled threats against countries that are taking steps to get out of this lop-sided ISDS system. When South Africa decided to terminate its BITs with some EU countries to reduce the risk of potentially massive liabilities, the then Trade Commissioner Karel de Gucht said the change was "not good for South Africa". Using strong language, he and several EU member state ambassadors expressed their "unhappiness" to South Africa[9].

> "In my view, and in the view of the Netherlands and many other States, I think it is very important to make sure that we use as few as possible limitations [to investor rights], because at the end of the day we want to stimulate investment. We want to stimulate modern types of investment and we don't want to create unnecessary policy spaces and other ways that host States can use to limit and to restrict investors[39]."
>
> Nikos Lavranos, former senior trade policy adviser in the Dutch Ministry of Foreign Affairs

Protests in Brussels against the planned free trade agreement TTIP

WHAT IS ISDS AND WHAT IS THE PROBLEM WITH IT?

Investor-state dispute settlement (ISDS) allows foreign investors to seek financial compensation from host countries in secret, business-friendly tribunals if they deem that their investment potential or profits are affected by changes in the host country's policies or regulations. If a government loses a case, it has to compensate the investor from taxpayers' money with pay outs easily reaching hundreds of millions or even billions of Euro.

ISDS cases are heard by international arbitration panels, made up of three lawyers who specialise in such cases for a fee. It is expensive, with each case costing on average US$8 million. The state's costs are born by taxpayers.

There are many criticisms of the ISDS system:

It's unjust

ISDS empowers foreign investors to claim financial compensation from host states, when democratically agreed regulations affect the value of their investment. It creates a system in which a small, already influential group (foreign investors) increases its power in society at the expense of everyone else.

It's unequal

Only foreign investors can access ISDS to sue governments. This discriminates against national investors and everyone else in society. Governments cannot sue foreign investors through ISDS. It's a one-way street.

It's unbalanced

ISDS does not impose any requirements on foreign investors – they don't have to adhere to national or international social or environmental standards to use ISDS, nor can they be held responsible for infringements of human rights or environmental laws through ISDS.

It's undemocratic

Claims by foreign investors regularly concern environmentally relevant sectors and other public interest legislation. The mere threat of an ISDS case carries the risk of 'regulatory chill' on governments concerned about the potential burden of an investor-friendly ruling on public budgets[10].

It's unfair

Many lawyers act as both arbitrators and counsel, systematically creating conflicts of interests[11]. Furthermore lawyers representing investors in such cases are typically paid by the hour, which creates a financial incentive to initiate cases as well as ruling in favour of investors. In fact the expansion of the ISDS system has largely profited the arbitration lawyers' industry, which in turn has a huge financial interests in its perpetration.[12].

It's unnecessary

Foreign investors can access national courts, just like everyone else in society. There is no justification for creating a parallel legal system that is biased in their favour.

TTIP & OTHER TRADE DEALS: EXPANDING CORPORATE POWER

The EU Commission and EU member states are currently working to massively expand the scope of ISDS through major new trade deals, despite significant public opposition. These include:

- The Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada - negotiations are complete, including an ISDS clause that threatens environmental and health regulations on both sides of the Atlantic[13].
- The Transatlantic Trade and Investment Partnership (TTIP) – this is set to include an investment chapter. The European Commission has proposed an investment court system supposed to address the criticisms of the system, but the reforms keep the flaws of ISDS fully alive[14].
- A comprehensive Investment Agreement is currently being negotiated with China with strong support from corporate lobby groups like BusinessEurope[15].

In a recent public consultation, more than 97% of the respondents objected to the inclusion of ISDS in TTIP. The Commission has ignored public opposition in publishing a proposal for an Investment Court that replicates most of the major flaws that make the current ISDS system untenable[16].

ISDS has also recently been included in other international agreements:

- The recently concluded Trans-Pacific Partnership (TPP) between 12 Pacific countries including the US and Japan contains an ISDS provision, despite signatory countries including Canada, Mexico, Australia and Peru having had bad experiences with ISDS[17].
- Canada recently signed a BIT with China and the US and China are also negotiating an investment agreement.

The inclusion of ISDS in TTIP alone would dramatically expand the reach of private arbitration to 50-60% of inward and outward US FDI flows[18]. The combination of TTIP and other giant treaties in the making (TPP, US-China, EU-China) appear likely to expand the reach of the ISDS system from 15-20% to 80% of investment flows.[19] The enormous scope of the new treaties makes them a huge threat to governments' space for public policies.

SUSTAINABLE DEVELOPMENT IN TTIP – MAKING A MOUNTAIN OUT OF A MOLEHILL

TTIP includes a sustainable development chapter which, according to the European Commission, aims to promote social development and environmental protection. A leaked copy of the Commission's proposal shows that it:

- does not provide adequate protection for an array of environmental policies that TTIP would undermine;
- consists of vaguely-worded, non-binding environmental provisions;
- fails to include any meaningful enforcement mechanism.

An analysis of the proposal concludes that ISDS would trump any environmental provisions arising from the agreement, once again confirming that the Commission puts corporate privileges ahead of any other concerns[20].

CORPORATE SOCIAL RESPONSIBILITY IN THE TRANS PACIFIC PARTNERSHIP

Article 9.16 of the investment chapter of the TPP reaffirms that members of the treaty should encourage their businesses to voluntarily incorporate internationally recognised Corporate Social Responsibility (CSR) standards, guidelines and principles that the members have endorsed. This emphasis on the voluntary nature of CSR stands in stark contrast to the legally enforceable, far reaching rights accorded to investors.

2. THE EU'S CSR AGENDA: A LOT OF WORDS, LITTLE ACTION

The European Commission likes to portray itself as a champion of human rights and declares that promoting and defending these within the EU and abroad is a central tenet of EU policy[21].

Despite on-going discussions on Corporate Social Responsibility (CSR) in the EU for a decade and a half[22], the EU does not have a coherent and robust policy on CSR. This means there are no clear standards for European companies and financiers when they operate outside EU boundaries. The Commission's strategy is, instead, to rely on companies acting on a voluntary basis.

Yet growing numbers of environmental and human rights defenders are being intimidated, arrested, tortured or sometimes killed for protesting against the activities of European companies and their financiers[23]. Without access to justice in their own countries, these people have nowhere to turn.

The only way in which affected communities can pursue justice is to present a case to an OECD National Contact Point in the EU country where the company is based. Or they can make a complaint to one of the multi-stakeholder processes such as the Round table of Sustainable Palm Oil (RSPO). Either route requires resources and rarely leads to a satisfying outcome from the perspective of a victim of human rights violations. None of these procedures are legally binding and none of these bodies can enforce sanctions.

But while the EU overlooks the rights of individuals and communities affected by the activities of European companies, the same companies and foreign investors are being given strong, fully enforceable rights and a parallel legal process where they can present their claims.

> "The financial crisis has demonstrated the difficulty of relying on business to voluntarily self-regulate. In particular, weak and poor States suffer the consequences of an asymmetry in the international system where the business companies rights are backed up by hard laws and strong enforcement mechanisms while their obligations are backed up only by soft laws like voluntary guidelines.[41]"
>
> H. E. Archbishop Silvano M. Tomasi, Permanent Observer of the Holy See to the United Nations

THE 2009 EDINBURGH STUDY ON THE NEED TO GO BEYOND VOLUNTARY MEASURES

Under pressure from civil society groups and the European Parliament, in 2009 the Commission released a study analysing the existing legal framework for European companies operating outside the European Union. The study addressed the role of European companies, their subsidiaries and contractors where violations of human rights and environmental law occurred outside the EU and described the significant obstacles third-country victims encounter in obtaining effective redress both in the host country as well in the European Union. These included time limits, legal costs and evidence requirements[24].

The study warns that because state measures in trade and investment regimes are primarily geared towards liberalising trade and promoting investment, there is a risk of legal and policy incoherence and a need to prevent gaps in human rights and environmental protection[25].

The European Commission did not adopt these recomendations, despite demands to go further from NGOs[26]. Six years after the report came out, the Commission has done nothing to improve access to justice for the victims of abuse by EU-based companies.

The Commission continues to emphasise voluntary, business-driven initiatives to improve corporate behaviour. It has launched guidelines on how to deal with human rights issues in the extractive industries and in IT supply chains. Yet voluntary policies have hardly had any impact on companies' activities in these areas. This single-minded insistence on a voluntary approach was also clear in the EU's Multistakeholder Forum on CSR in February 2015, organised by the European Commission to discuss a possible renewed European strategy on CSR[2].

UN NORMS FOR BUSINESSES

The UN Human Rights Norms for Business were approved in 2003 by the UN Sub-Commission on the Promotion and Protection of Human Rights[28]. They set out basic business obligations regarding human rights. The Norms state that States have the primary responsibilty to promote, protect and secure the fulfillment of human rights recognised in international law, including ensuring that transnational corporations and other business enterprises respect human rights, wherever they operate. While not a formal treaty, they provide a legal framework to address abuses. The text calls on companies to directly implement the Norms, and suggests that breaches can result in compensation for victims. The provisions are all drawn from existing international law and standards.

The Norms were not adopted by the UN Commission on Human Rights in April 2004, who made it clear that the norms did not have legal standing[29].

Formal approval of the Norms has attracted opposition from a number of developed countries who oppose binding obligations for companies. EU members of the UN Commission were: Netherlands, France, Sweden, Austria, Italy, UK, Austria and Ireland. The fiercest opposition has come from the International Chamber of Commerce and the International Organisation of Employers (IOE) which stated that the Norms would divert the attention and resources of national governments away from implementing their existing obligations on human rights. This is unconvincing as businesses, and indeed the European Commission, seem to have plenty of time to negotiate new trade agreements. Being accountable to human rights should not be optional for businesses.

From the start of discussions on the proposal for a binding treaty in September 2013 the EU has done everything it can to derail the process. After the Resolution had been adopted, the EU tried to delay and obstruct progress[36], seeking to undermine the treaty process.

For example, the EU demanded as a condition for participation that the scope of the proposed Treaty should cover all companies. While this sounds principled, it is not at all in line with what the EU does at home, where it regularly excludes a large part of companies from different new legislation. For instance, legislation on non-financial reporting by companies exempts small and medium size (SME) companies.

Given that the EU is home to a large number of transnational corporations involved in human rights violations around the world, the attitude of the EU and its member states (and also the US) raises concern. If the EU does not sign the Treaty, many corporations would not be covered by this new human rights protection.

The European Commission and member states argue that the proposed binding treaty undermines implementation of the voluntary UN Guiding Principles (UNGP). This argument is also supported by Norway and the business community[37].

UN GUIDING PRINCIPLES (UNGP)

The UNGP were established in 2011 by the UN Human Rights Commission. They were hailed as a way to bridge the governance gap between legislation estblished at the national level and companies operating at an international level. The European Commission was particularly enthusiastic and brought its own CSR policy in line with the UNGPs. The Commission also encouraged member states to develop National Action Plans for the implementation of the UNGPs at national level.

Even though the EU and its member states argue that the UN treaty would endanger the implementation of the UNGPs, only seven out of 28 member states have adopted a National Action Plan (NAP) since 2011[38]. These, and the Commission's own "Staff Working Document on implementing the UNGPs - State of Play" lack ambition and fail to include concrete proposals to address the lack of corporate accountability or the obstacles to accessing justice for the victims of corporate abuse.

EU POSITION ON UN BINDING TREATY ON BUSINESS AND HUMAN RIGHTS

2013

September 2013: the Government of Ecuador deliveres a statement on behalf of 85 member states of the United Nations (UN) at Human Rights Council (UNHRC) asking for a legally binding framework to regulate the activities of transnational corporations and to provide appropriate protection, justice and remedies for the victims of human rights abuses.

EU permanent mission in Geneva gathers members to agree on forming a block to vote against the resultion.[30]

EU permanent mission in Geneva threathens that it will not cooperate if the treaty will be adopted.

2014

Resolution 26/09, adopted on 26th of June 2014[31], calls for the elaboration of a legally binding instrument on TNCs with respect to human rights.

In 2015 and 2016 the open-ended intergovernmental working group (IGWG) will discuss content, scope, nature and form of the treaty.

After the vote, in autumn 2014, EU permanent mission in Geneva sets complicated conditions that needed to be met as a condition to attend IGWG session.[32]

2015

In July 2015 first IGWG session, with invited legal experts who gave their opinion on what such a treaty should look like in terms of scope and content.

March 2015 Resolution of the European Parliament calling on the EU and its member states to engage in the emerging debate on a legally binding international instrument on business and human rights within the UN system.[33]

On the first day of the meeting, the EU representative in Geneva delayed the debate process by putting two new conditions on the table while discussing the work plan.[34] EU representative and member states are silent during the discussions on the Treaty's substance, and leave the room on day two.

Eight out of 28 member states joined the EU delegation on the first day, and only France had one observer throughout the meeting.[35]

CONCLUSION AND RECOMMENDATIONS

The European Commission and its member states have been aggressively working towards establishing the rights for corporations so they can operate outside their borders. With the inclusion of special rights for foreign investors in trade agreements, multinationals have almost unlimited opportunities to defend their interests, regardless of human rights law or the sovereignty of national states to develop environmental and social policies.

Yet the EU is failing to address the lack of access to justice for affected people and those who defend human rights, including in cases involving European companies. While rights for investors are guaranteed and enforceable in law, with special protection through the exclusive ISDS mechanism, citizens and affected communities are only protected by volunatary guidelines and have to depend on non-functioning grievance mechanisms that lack any effective sanctions and enforcement.

To live up to its own commitments on human rights. The European Commission and EU member states should:

- Work constructively towards the adoption of a binding UN Treaty on business and human rights and promote strong, legally binding and enforceable international agreements on human rights and environmental protection that ensure corporate accountability and access to justice for victims;
- Refrain from including investment rights and ISDS mechanisms (or a reformed proposal such as the Investment Court System proposal currently discussed in the context of the EU-US trade talks) in any new trade or investment agreements;
- Remove ISDS from all existing trade and investment agreements.

VOLUNTARY MEASURES FOR PEOPLE

RIGHTS FOR BIG BUSINESS

ENDNOTES

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