

WHAT ARE THE IMPLICATIONS OF AN INVESTOR-STATE DISPUTE SETTLEMENT MECHANISM IN TTIP?

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WHAT IS INVESTOR-STATE DISPUTE SETTLEMENT?

One of the key areas of concern is the proposal to include an investor-state dispute settlement (ISDS) mechanism in the Transatlantic Trade and Investment Partnership (TTIP). Commonly found in bilateral investment treaties, 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 the introduction of regulatory or policy changes in the host state

ISDS cases are heard by international arbitration panels, which are made up of three lawyers who specialise in such cases for a fee. It is an expensive process, costing on average US\$8 million per case, with the costs of the state born by taxpayers.¹

There has been a steep increase in the number of ISDS cases since the early 1990s, with US and EU companies responsible for 75% of existing cases. A growing number of European governments have been sued through the ISDS process, with 127 known cases between 1994 and 2014, costing European governments paid at least €3.5 billion.² Not all cases are made public, so a far greater number of cases may actually exist.

WHAT ARE THE PROBLEMS WITH ISDS?

ISDS is a biased system that privileges the rights of foreign investors over public interests, allowing investors to bypass national legal systems in the countries where they are operating, and putting their interests above legal and policy decisions made at the national level.³ Only foreign investors can instigate legal action through the ISDS mechanism, creating an imbalance in the system and discriminate against domestic investors and citizens.

Arbitrators are not independent, but are 'guns for hire': each arbitrator is paid on a case-by-case basis, and they may also work as legal advisors for the investors when not arbitrating a case.⁴

Once an arbitration panel has made a ruling, there is no right of appeal for the defeated party. Substantial damages can be claimed from states that are judged to have adversely affected an investor's profits, with known awards ranging from a few million to several billion euro.⁵

As a result, there is a high risk that the inclusion of ISDS in TTIP will lead to "regulatory chill" – where states exposed to the risk of being sued under ISDS start to factor their potential liability into policy decisions. This has already led to a delay or weakening of policies designed to protect human safety, human health, or the environment.

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WHY THE COMMISSION'S PROPOSED REFORMS ARE INADEQUATE

As a result of widespread concern over the implications of ISDS in TTIP, the European Commission has proposed addressing the problems caused by conflict of interest for arbitrators, with new rules for appointing arbitrators,⁶ as well as new measures to address the current lack of transparency,⁷ and the practice of companies using “mailboxes” or shell companies to sue states.⁸ However these reforms do not address some of the fundamental problems with ISDS.

ISDS is by its very nature structurally unjust. It is a system set up to respond to commercial interests – and all those involved – the arbitrators, the lawyers and the companies have a vested interest in perpetuating the system and increasing the number of cases.⁹ It only creates rights for investors but no corresponding obligations to address negative impacts of investors' operations. Citizens get no rights to hold investors accountable when their interests are damaged or their rights are violated.

The Commission's attempt to introduce reforms in relation to the Canada-European Union Trade Agreement (CETA) failed to prevent conflicts of interest as a result of arbitrators working as lawyers in ISDS cases; failed to introduce any appeal system; failed to include responsibilities for investors; did not require investors to seek local remedy through the national courts before seeking international arbitration; failed to cap damage payments and failed to affirm the rights of governments to regulate.

These proposals are completely insufficient to address the problems of the ISDS mechanism. The only solution is the complete overhaul of the international investment system. For this reason alone, ISDS should be excluded from the TTIP agreement.

OUR RECOMMENDATIONS:

Friends of the Earth Europe rejects ISDS as a forum to resolve disputes between states and investors and calls for its exclusion from any future trade agreements.

Friends of the Earth Europe recommends to member states, regional and local governments to fully analyse potential liabilities arising from existing investment agreements and start considering terminating investment agreements currently in force.

Friends of the Earth Europe encourages member states as well as regional and local governments to seek to influence the European Commission to remove ISDS from the TTIP negotiations.

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¹ https://www.foeeurope.org/sites/default/files/publications/foee_factsheet_isds_oct13_1.pdf

² http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d4_en.pdf, <https://www.foeeurope.org/how-taxpayers-footing-bill-europes-trade-deals-041214>

³ https://www.foeeurope.org/sites/default/files/publications/foee-isds-myths-140714_0.pdf

⁴ <http://corporateeurope.org/sites/default/files/publications/profitting-from-injustice.pdf>

⁵ http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d4_en.pdf

⁶ https://www.foeeurope.org/sites/default/files/publications/foee-isds-myths-140714_0.pdf

⁷ http://trade.ec.europa.eu/doclib/docs/2013/october/tradoc_151790.pdf

⁸ http://trade.ec.europa.eu/doclib/docs/2013/october/tradoc_151791.pdf

⁹ https://www.foeeurope.org/sites/default/files/publications/foee-isds-myths-140714_0.pdf