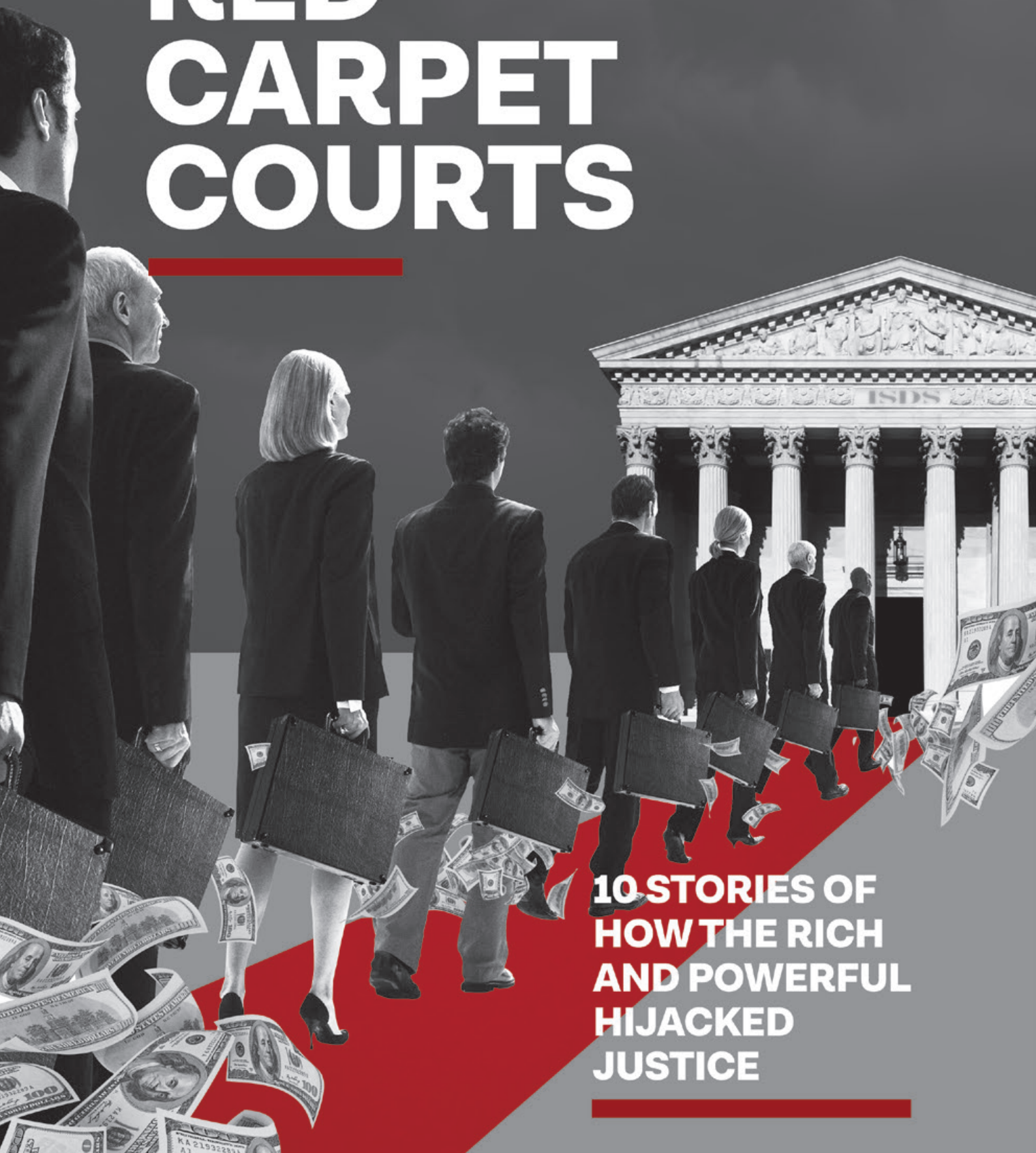
RED CARPET COURTS



10 STORIES OF HOW THE RICH AND POWERFUL HIJACKED JUSTICE

Friends of the Earth Europe
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Corporate Europe Observatory

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1

INTRODUCTION

Imagine an environmentally or socially destructive corporate project – say, a toxic mine, which could poison your local supply of water, or a luxury real estate project, which would displace hundreds of people in its neighbourhood. You and your community oppose the plans, the courts judge in your favour and the project is stopped. Seems like a community victory right? But then, the company behind the project sues your country for interfering with its profits, demanding millions or even billions in compensation, including for future profits. Imagine the lawsuit takes place in a biased pseudo court where rulings have been so devastating for countries that many respond to a case, or even the mere threat of one, by offering vast concessions, such as rolling back their own laws.

Actually, you do not need to imagine all this. It is the reality. Under the ISDS (investor-state dispute settlement) parallel justice system for corporations and the rich, companies can sue countries when they think that government decisions or court rulings – even ones whose explicit aim is to protect people or the environment – affect their profits. These lawsuits bypass domestic courts and take place before an international tribunal of arbitrators: essentially three investment lawyers who decide whether private profits or public interests are more important.

For example, after Colombia's Constitutional Court banned mining activities in a sensitive ecosystem which provides drinking water for millions of Colombians, Canadian mining company Eco Oro sued the country for US$764 million in damages. When Croatian courts cancelled illegal permits issued for a luxury golf resort in the city of Dubrovnik, Croatia was hit with a US$500 million compensation claim. Romania is defending itself from a shocking US$5.7 billion claim by Canadian mining company Gabriel Resources, after the country's courts declared the company's proposed toxic Roşia Montană gold mine illegal.

These are just three out of ten noteworthy but also representative ISDS lawsuits described in more detail in this report, which have been filed, threatened or decided since 2015 (see table 1). Globally, almost 1,000 ISDS cases are known of to date, in which governments have been sued for more than US$623 billion in total. This figure is equivalent to 90 per cent of all Foreign Direct Investment flows to all developing countries in 2018. The total amount of money which states have thus far been ordered or agreed to pay in disclosed ISDS rulings and settlements is US$88 billion – another startlingly large figure, which is equivalent to all Foreign Direct Investment to Australia, Japan and other developed economies outside of Europe and North America in 2018.

Table 1

10 recent ISDS cases that undermined justice and human rights around the world

Case	Year	Origin of investor	Legal base	Outcome	Amount claimed (US$ million)	Amount awarded (US$ million)
Border Timbers and von Pezold vs Zimbabwe	2010	Switzerland, Germany	Zimbabwe-Switzerland and Zimbabwe-Germany bilateral investment treaties (BITs)	In favour of the investor	Not publicly disclosed	65 (196 if there is no land restitution)
Copper Mesa vs Ecuador	2011	Canada	Ecuador-Canada BIT	In favour of the investor	70	24
Gabriel Resources vs Romania	2015	Canada, United Kingdom (UK)	Romania-Canada and Romania-UK BIT	Pending	5700	
Novartis vs Colombia	2016	Switzerland	Colombia-Switzerland BIT	ISDS threat, never filed		
Eco Oro vs Colombia	2016	Canada	Colombia-Canada Free Trade Agreement (FTA)	Pending	764	
Razvoj Golf and Elitech vs Croatia	2017	Netherlands	Croatia-Netherlands BIT	Pending	500	
Kingsgate vs Thailand	2017	Australia	Thailand-Australia FTA	Pending	Not publicly disclosed	
ConocoPhillips and Perenco vs VietNam	2017	UK	Vietnam-UK BIT	Pending	Not publicly disclosed	
Rockhopper vs Italy	2017	UK	Energy Charter Treaty	Pending	Up to 350	
Vermilion vs France	2017	Canada	Energy Charter Treaty	ISDS threat, never filed		

These lawsuits are happening at a critical moment for the ISDS regime. On the one hand, strong public controversy about the 'corporate courts' has kept citizens, politicians and the media engaged, interested and critical on the issue. Also, a number of countries have started to pull out of the regime by terminating ISDS deals. On the other hand, new trade and investment agreements which include ISDS provisions are under negotiation in many parts of the world, and the European Union (EU) is actually planning to scale-up ISDS through a World Court for Corporations (formally known as Multilateral Investment Court). These developments risk further expanding, locking-in and re-legitimising a much-criticised system that has proven extremely dangerous for taxpayers, democracy, social and environmental protection, economic development and climate justice.

Against this background, this report shows that ISDS is again and again used as a corporate weapon against the public interest, and in spite of the ongoing controversy about it, these red carpet courts for corporations continue to thrive and reinforce injustice across the world. This parallel legal system continues to deliver hundreds of millions or even billions of dollars of taxpayers' money to companies and rich individuals. ISDS cases, or just a risk thereof, regularly succeed in intimidating nations into gutting their own laws, thus deeply undermining democracy and citizen engagement around the world. Many cases also show how ISDS directly contradicts and obstructs other legal fields, most notably human rights and environmental law.

The latest EU approach to corporate rights does not do anything to put an end to this or address the many concerns and critiques of the system of EU citizens. In fact, alarmingly, its impact is quite the opposite: under the EU's reformed ISDS (renamed Investment Court System or ICS) and the proposed Multilateral Investment Court, thousands of companies could continue to circumvent domestic courts and sue governments in an exclusive justice system if any national laws or regulations interfere with their ability to make huge profits. The EU's ISDS policy would still pave the way for billions of taxpayers' money being paid to big business and the rich. It could still curtail and undermine policymaking in the public interest, to protect people and the planet. And it could still lead to rulings that directly contradict human rights and environmental law.

As the EU embarks on a crusade to globalise its ISDS approach, this should not just alarm Europeans. From Mexico to Vietnam, from North America to the African, Caribbean and Pacific group of states, citizens and policymakers across the world should realise that the EU has not resolved the deep-seated problems with ISDS, which came under such serious critique in recent years. Instead, the latest investment protection proposals are just as dangerous for taxpayers, policies in the public interest, and democracy as the 'old' ISDS system – and as much a one-way system with only rights and lucrative possibilities, but no obligations for investors. These red carpet courts for corporations should have no space in any international agreement.

Photo credit
Eleanor Goldfield

2

WHEN CORPORATIONS RANSACK COUNTRIES

A PRIMER ON INVESTOR-STATE DISPUTE SETTLEMENT (ISDS)

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

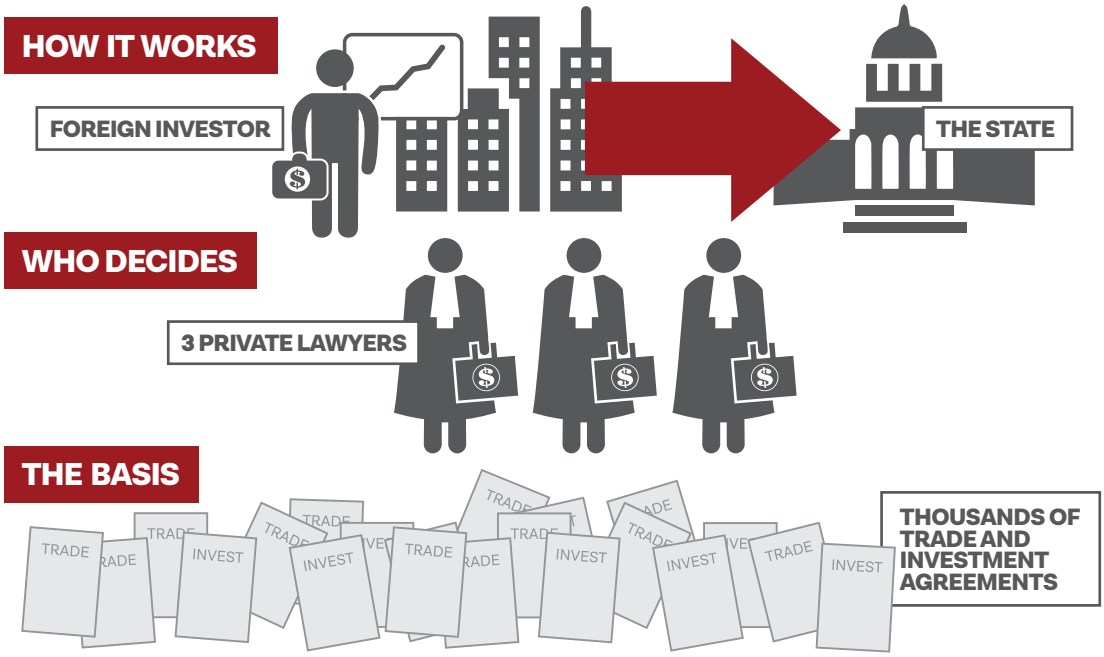
This is how, in autumn 2014, *The Economist* introduced its readers to a once unknown element in international trade and investment agreements. The business magazine referred to ISDS as "a special privilege that many multinationals have abused"[1] and mentioned two infamous examples: Swedish energy giant Vattenfall suing Germany for €6.1 billion[2] in damages because the country phased out nuclear power after the Fukushima disaster; and tobacco company Philip Morris suing Uruguay and Australia over government health warnings on cigarette packs and other measures to reduce smoking.

The legal basis for these investor-state dispute settlements – known under the acronym ISDS – is over 2,650 international trade and investment agreements in force between states worldwide.[4] These agreements give sweeping powers to foreign investors, including the peculiar privilege to directly file lawsuits against states at international arbitration tribunals. Companies can claim compensation for actions by host governments that have allegedly damaged their investment, either directly through expropriation, for example, or indirectly through virtually any kind of regulation. 'Investment' is interpreted so broadly that mere shareholders and rich individuals can sue, and corporations can claim not just for the money invested, but for future anticipated earnings as well.

> **"ISDS has morphed from a rarely used last resort... into a powerful tool that corporations brandish ever more frequently, often against broad public policies that they claim crimp profits.**
>
> **PULITZER PRIZE-WINNING JOURNALIST CHRIS HAMBY**[3]

IMAGE 1

RED CARPET COURTS



ISDS claims are usually decided by a tribunal of three private lawyers – the arbitrators – who are chosen by the litigating investor and the state. Unlike judges, these for-profit private sector arbitrators do not have a flat salary paid for by the state, but are in fact paid per case. At the most frequently used tribunal, the International Center for Settlement of Investment Disputes (ICSID), arbitrators make US$3,000 a day.[5] In a one-sided system where only the investors can bring claims, this clearly creates a strong incentive to side with companies rather than states – because investor-friendly rulings pave the way for more lawsuits and more income in the future.

Weapons of legal destruction

Since the late 1990s, the number of lawsuits taken by investors against states has surged – and so has the amount of money involved (see box 1 on page 9). The last two decades have also seen multibillion dollar claims alleging damage to corporate profits as a result of legislation and government measures in the public interest. Developed and developing countries on every continent have been challenged by companies for trying to introduce regulations to promote: financial stability measures, bans on toxic chemicals, mining restrictions, anti-discrimination policies, environmental protection laws and more. A lawyer who has defended many governments in these lawsuits has hence called investment treaties "weapons of legal destruction".[6]

> **"It's litigation terrorism.**
>
> **NOBEL PRIZE-WINNING ECONOMIST JOSEPH STIGLITZ ON ISDS**[7]

Sometimes, just the threat of an expensive dispute has been enough to freeze or delay government action, with policymakers realising that the cost of public interest regulation is too much for the state to bear. Five years after the foreign investor rights in the North American Free Trade Agreement (NAFTA) came into force, a former Canadian government official told a journalist: "I've seen the letters from the New York and DC law firms coming up to the Canadian government on virtually every new environmental regulation and proposition in the last five years. They involved dry-cleaning chemicals, pharmaceuticals, pesticides, patent law. Virtually all of the new initiatives were targeted and most of them never saw the light of day"[8] (see chapters 3.2 and 3.5 for examples of this 'regulatory chill' effect).

IMAGE 2

THE CHRONOLOGY OF AN INVESTMENT ARBITRATION

PHASE 1

The process starts when a foreign investor sends a notice of arbitration to a state. Unlike in other areas of international law, the claimant does not have to go through local courts first. Both, the investor and the state will be assisted by lawyers (counsel) during the proceedings.

PHASE 2

The investor and the state jointly select the arbitration tribunal. Usually each party picks one arbitrator and both jointly appoint a third to serve as president. The arbitrators are private, for-profit lawyers, not judges, who are paid by the case.

PHASE 3

Proceedings last years and mostly take place behind closed doors, with scant or no information at all released to the public, sometimes not even the fact that a case is happening.

PHASE 4

The arbitrators ultimately determine if the state violated the ECT's investor rights and the size of the remedy. They also allocate the legal costs of the proceedings. Opportunities to challenge the rulings are extremely limited – even if they appear clearly wrong.

PHASE 5

States have to comply with arbitral awards. If they resist, the award can be enforced by actual courts almost anywhere in the world by seizing the state's property elsewhere (for example, by freezing bank accounts or confiscating state aircraft or ships).

BOX 1

Striking figures from the world of ISDS[9]

- Investor-state legal cases have mushroomed in the last two decades, from a total of six known treaty cases in 1995 to a record high of over **70** new claims filed annually since 2015.
- Globally, **942** disputes against **117** countries have been recorded throughout the history of ISDS as of 1 January 2019, but due to the lack of complete and transparent publicly available information the actual figure could be much higher.
- In the 70 per cent of the known cases for which this information is available, investors have sued governments for the total sum of **US$623 billion**. This is equivalent to 90 per cent of all Foreign Direct Investment flows to all developing countries in 2018.[10]
- Investors have triumphed in **61 per cent** of investor-state cases where there has been a decision on the merits of the case, whereas states have 'won' only **39 per cent** of the time (even through states can't ever win through ISDS, only not lose and thus succeed in avoiding having to pay out damages).
- Nearly **a quarter** of ISDS cases end in settlement, most likely involving payments by governments or changes in laws and regulations to appease disgruntled investors, often in partial or total secrecy, meaning citizens don't know where their public money went, or why a policy was changed.
- The total amount of money which states have thus far been ordered or agreed to pay in disclosed ISDS rulings and settlements is **US$88 billion** – a startlingly large figure, which is equivalent to all Foreign Direct Investment to Australia, Japan and other developed economies outside of Europe and North America in 2018.[11]
- Award amounts may reach up to 10 figure sums. The highest known damages awarded to date, **US$50 billion**, were ordered against Russia, to the former majority owners of oil and gas company Yukos.
- The main financial beneficiaries of ISDS have been large corporations and rich individuals: **94.5 per cent** of the known awards went to companies with annual revenue of at least **US$1 billion** or to individuals with over **US$100 million** in net wealth.[12]
- Legal costs for disputes average around **US$4.9 million** for states and **US$6 million** for investors, but can be much higher.[13] For the Yukos claims, total legal costs rose above **US$124 million**[14] and the arbitrators took **US$7.4 million** for themselves.[15] As legal costs are not always awarded to the winning party, states can end up footing the bill even if they don't lose.

Investment arbitration in dire straits: a global storm of opposition

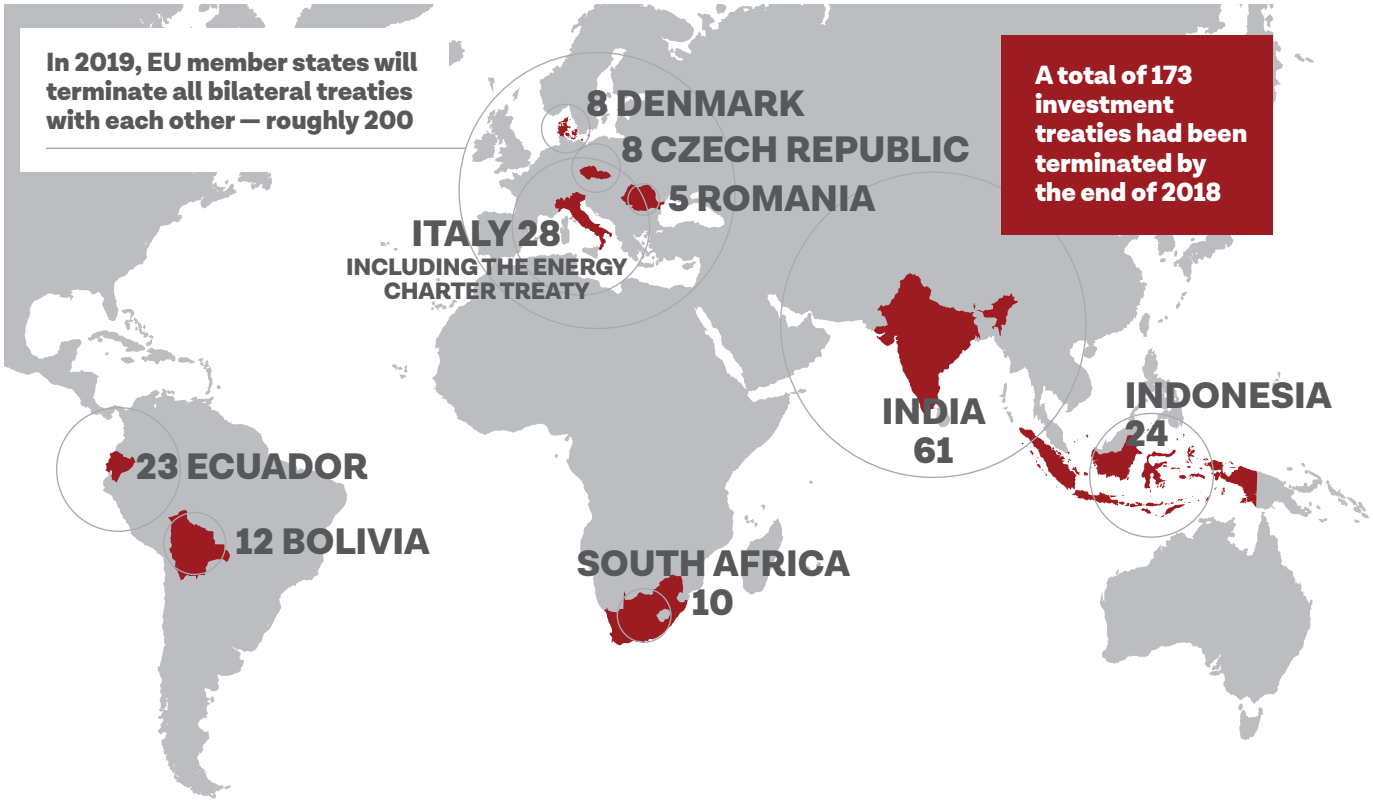
The growing number of corporate lawsuits has raised a global storm of opposition to ISDS, from across the political spectrum. Around the world public interest groups, trade unions, community groups and academics have repeatedly proclaimed opposition to ISDS and urged governments to exit from the regime.[16] Proponents of free markets and trade, such as the right wing US think tank Cato Institute, too, have joined the opponents' camp, arguing that "the ISDS approach of providing... protections only for foreign investors... is akin to saying in a domestic constitution that the only rights we will protect are those of wealthy property owners."[17] Judges have also started to raise similar concerns, stating that "the creation of special courts for certain groups of litigants is the wrong way forward."[18]

Some countries, too, have realised that the promised benefits of investment arbitration have not materialised (see box 2 on page 11) and are trying to escape from the system. South Africa, Indonesia, India and many other countries have terminated some of their bilateral investment treaties (BITs) in recent years.[19] In 2019, EU member states announced that they would terminate all their bilateral treaties with each other – roughly 200 agreements.[20] Italy has also left the Energy Charter Treaty, a large ISDS deal for the energy sector.[21] (see image 3 below)

> **Our perspective on BITs has changed... It seems very much in favour of the investor. Our number one problem is ISDS.**
>
> **ABDULKADIR JAELANI, INDONESIAN MINISTRY OF FOREIGN AFFAIRS[22]**

IMAGE 3

SOME COUNTRIES WHICH HAVE TERMINATED INVESTMENT AGREEMENTS[35]



BOX 2

Busting the myth that investment agreements and ISDS bring investment

ISDS supporters argue that "investors are... more likely to make a cross-border investment... where the host state provides some form of investment protection".[23] They claim that the right to sue states in "neutral" dispute resolution fora outside of domestic courts has a particularly positive effect – because it serves as a "check" to the alleged "arbitrary or unlimited use of government power", increasing "the desirability of a State as a potential inward investment destination".[24]

This may sound plausible to some, but there is one major problem with this argument: there is no clear evidence that investment agreements actually bring investment. While some econometric studies find that they attract some investors, others find no effect at all – or even a negative one. Qualitative research suggests that for the vast majority of investors, investment treaties are not a decisive factor when they go abroad.[25]

Governments have also begun to realise that the promise of foreign direct investment (FDI) has not been fulfilled. After South Africa cancelled some of its investment treaties, an official explained: "South Africa does not receive significant inflows of FDI from many partners with whom we have BITs, and at the same time, continues to receive investment from jurisdictions with which we have no BITs. In short, BITs have not been decisive in attracting investment to South Africa."[26] This has also been the experience elsewhere; Brazil, for example, receives the largest amount of FDI in Latin America[27] – despite never having ratified a treaty allowing for ISDS. In Indonesia, FDI from the Netherlands increased by 19.2 per cent in 2015 – even though the country had terminated its investment treaties with the Netherlands and several other countries the year before.[28]

More importantly it is now widely acknowledged that while FDI may contribute to development, its negative impacts can be substantial, while the benefits of FDI are far from automatic. Regulation is needed to generate positive effects locally, such as decent jobs, generation of tax revenues, or technology transfer – and to avoid the risks that FDI can pose to the environment, local communities etc. Investment agreements are not only agnostic on these crucial development issues, protecting investments irrespective of their nature and impact, but their "pro-investor imbalance can (also) constrain the ability of governments to regulate in the public interest", as an official of the Government of South Africa put it.[29]

ISDS at a crossroads: global expansion and continuing public resistance

Meanwhile, a number of international agreements currently under negotiation or being ratified, threaten to massively expand the ISDS regime, subjecting states to even more liability. These include the African Continental Free Trade Area (AfCFTA, bringing together 44 African economies), the Regional Comprehensive Economic Partnership (RCEP, under negotiation by 16 Asia-Pacific countries), the Comprehensive and Progressive Agreement for a Trans-Pacific Partnership (CPTPP, signed by 11 states from the Pacific, Chile, Mexico, and Canada) and several bilateral deals, including agreements between the EU and China, Canada, Singapore, Indonesia, Vietnam, and Mexico.[30] The EU also plans to scale up – and re-legitimise – ISDS via a permanent global court for investor-state disputes (see chapter 4 for more information).[31]

However, resistance to the red carpet legal treatment of companies continues to build. In a significant moment, aiming to prevent the EU from expanding and locking in ISDS – and to build public pressure for a global system that can punish multinationals for their crimes - more than 200 civil society organisations from across Europe came together in January 2019. Within just two months, over half a million Europeans had supported their call to end corporate impunity.[33] In the run up to the European Parliament elections in spring 2019, hundreds of MEP candidates also pledged to vote against all forms of ISDS and for binding corporate accountability rules. This gives hope to a whole generation of activists. As the UK-based campaign groups put it: "Campaigners all across Europe are gearing up to create an unstoppable momentum for change in our own countries. We're at a tipping point, and if enough of us come together, we could bring ISDS down altogether."[34]

> **Human beings need more rights, corporations do not.**
>
> **FROM THE "RIGHTS FOR PEOPLE, RULES FOR CORPORATIONS" CAMPAIGN[32]**

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Photo credits p7, p12 Friends of the Earth Europe, p10 Occupy London

3

10 RECENT ISDS CASES THAT UNDERMINED JUSTICE

Multi-billion dollar lawsuits bleeding cash-strapped nations, corporations reversing victories achieved by environmental defenders and dazzling financial rewards for investors who perpetrated human rights abuses. Ten investor-state lawsuits which have been filed, threatened or decided since 2015, from all over the globe (in Europe, Africa, Asia and Latin America), demonstrate that ISDS is again and again used as a corporate weapon against the public interest. In spite of the ongoing controversy about them, the red carpet courts for corporations continue to thrive, and to perpetuate injustice across the world.

3.1

SUING TO FORCE THROUGH A TOXIC GOLDMINE

GABRIEL RESOURCES VS ROMANIA

For nearly 20 years residents of Roşia Montană in Romania have fought against a multi-billion dollar gold mining project, which would have destroyed their homes and the surrounding environment. In a remarkable show of people power, they appealed to the Romanian courts, and succeeded in stopping the mine. Now the project's majority owner, Canadian company Gabriel Resources, is suing Romania in an investment arbitration tribunal, seeking US$5.7 billion in compensation for lost profits — nearly three per cent of the size of the entire Romanian economy.

If approved, Roşia Montană would become Europe's largest open-pit gold mine. To extract gold from the rock, tens of thousands of tonnes of cyanide, a highly toxic chemical, would be used and released into the environment every year. Many residents would have to be forcibly evicted from their homes. Three villages and nearly 1,000 houses and churches would be destroyed – many of them national heritage sites. Roşia Montană is also home to unique mining galleries from the ancient Roman Empire. This priceless world treasure, too, would be demolished if the mining project was fully developed. In their place, the mine would leave behind a waste lake the size of 420 football fields.[1]

> **We will not leave our homes and our lands to make room for your cyanide and enrichment.**
>
> **EUGEN DAVID**
> **FARMER FROM ROŞIA MONTANĂ AND PRESIDENT OF COMMUNITY ORGANISATION ALBURNUS MAIOR**[2]

Right from the beginning the proposed mine faced strong community resistance. Throughout the 2000s, local residents and environmental organisations organised protests and gathered signatures against the mine, the use of cyanide, and the potential forced relocations. When they were joined by students, priests, academics, numerous Romanian institutions and citizens at large, "Save Roşia Montană!" became the largest people's movement since Romania's 1989 revolution. For several weeks in 2013 tens of thousands of people took to the streets across the country to oppose the mine and the so called Roşia Montană law, which would have fast-tracked the project, but was rejected because of the massive public pressure. The movement gave hope to a whole generation of Romanians.[3]

Corporate harassment, vigilant courts

And the mining company? It tried to silence the opposition through intimidating phone calls, threats and physical violence. It also put extreme pressure on residents to sell their houses and created an atmosphere of anxiety in the village.[4] According to Eugen David, a farmer from Roşia Montană, the company used "the same tactics as the Securitate", Romania's notorious secret police under the Communist dictatorship: "Intimidation, deceit, family pressure, corruption. Most of all intimidation."[5]

> **The population here would like to stay and I am under the impression that a foreign company is hindering the functioning of local democracy.**
>
> **MARIE-ANNE ISLER BÉGUIN**
> **FORMER MEMBER OF THE EUROPEAN PARLIAMENT (MEP)**[6]

But in spite of all this, the local community didn't back down. They went to court and challenged the procedures and permits of the Romanian authorities. In each case, the courts found that the permits issued to the company had been obtained illegally – noting the lack of compliance with environmental laws or evidence of administrative abuses. So, ultimately, the toxic mine was halted by the Romanian courts. Till this day, the mining company has still not obtained all necessary permits – simply because it failed to comply with domestic and EU law.[7]

Gabriel's true goldmine: ISDS

The project's majority owner is now trying to force through the gold mine via a legal backdoor, which could render the Romanian court rulings meaningless. Since 2015 the Canadian mining company Gabriel Resources has been suing Romania via investor-state dispute settlement (ISDS).[8] It argues that the country breached obligations in its bilateral investment treaties with Canada and the UK – because it 'failed' to grant the required permits. Amongst other things, the company has listed the Romanian government's application to turn Roşia Montană into a UNESCO World Heritage Site and the fact that it sought Parliamentary approval for the mine, as evidence of the unfair treatment which it had to endure.[9]

According to a May 2019 press release, Gabriel Resources is claiming US$5.7 billion in compensation.[10] That figure is equivalent to 2.7 per cent of Romania's gross domestic product (GDP). It is also eight times more than the money the company allegedly spent on developing the mine – on exploration, equipment etc (US$650 million).[11] Forget precious metals: the lawsuit itself could become the company's true goldmine.

> **Gabriel is effectively trying to make Romanians pay for having pushed their legislators to do the right thing.**
>
> **CLAUDIA CIOBANU**
> **ROMANIAN JOURNALIST**[12]

Wall Street money funding corporate lawsuits

Gabriel Resources' claim is financially backed by Wall Street hedge fund Tenor Capital Management. Tenor pays the company's lawyers in exchange for getting a share of the money if it wins.[13] Such funding deals allow companies to draw out legal fights, driving up defence costs for states and increasing the likelihood that governments give in to corporate demands to avoid excessive legal costs and the risk of losing (see box 12 on page 64 for more information on such funding arrangements).[14]

There is reason to fear that Gabriel Resources' multibillion lawsuit might force the Romanian government to let the mine be developed in order to settle the case, for example, by changing laws and issuing new permits. A first warning sign was the government's decision to withdraw its application for Roşia Montană to become a UNESCO World Heritage Site in 2018.[15] Another worrying indicator is a proposed new mining law from early 2019, which would enable new permits.[16] If the mine was not approved, the risk is that Gabriel Resources could still just walk away with a vast amount of public money in compensation.

> **Romanians opposed the Roşia Montană mine and our courts declared it illegal. But through a parallel legal system a corporation could now force us to open the mine or pay billions.**
>
> **ROXANA PENCEA BRĂDĂŢAN**
> **MINING WATCH ROMANIA**[17]

Communities demanding that their voices be heard

In November 2018, the Roşia Montană community, together with environmental groups opposing the mine, wrote to the three private lawyers who will decide Gabriel Resources' ISDS case. They explained how the company had violated its obligations under Romanian, EU and international environmental and human rights law, and should therefore not be protected through special rights for foreign investors.[18] As one of the groups' lawyers put it: "Gabriel Resources has never had the right to mine in Roşia Montană. The company should not use investment arbitration to circumvent the legitimate enforcement of domestic law."[19] The arbitrators accepted the letter, but refused to engage with attached testimonies of residents, effectively excluding the affected community from the proceedings.[20]

BOX 3

When ISDS clashes with EU law: the absurd legal saga of the Micula Brothers vs Romania

The Micula case is another eyebrow-raising investor-state lawsuit against Romania. It demonstrates how investment treaties and arbitration can conflict with national and EU law.

In the late 1990s, Ioan and Viorel Micula (wealthy Romanian brothers who also have Swedish citizenship) were granted tax and other incentives for food and drink firms they operated in Romania. In 2005 these incentives were abolished, as part of reforms which were required for Romania to join the EU. The Miculas challenged the decision and sued Romania via its bilateral investment treaty with Sweden in 2006.[21] While the European Commission intervened in the case, confirming that it had required Romania to end the incentives to comply with EU state aid rules, in 2013 an investment tribunal ruled that a state cannot shun liability towards investors by relying on EU law. The arbitrators ordered Romania to pay €178 million in damages to the Micula Brothers.[22]

The Miculas have been trying to enforce the award in different countries ever since, leaving Romania caught in between the instructions and laws of the EU Institutions and wealthy, determined and litigious investors.

The full amount of costs which Romania has paid on the legal saga is unknown. Defending the investment arbitration proceedings alone has already cost Romanian taxpayers €16.7 million.[24]

> **"This case illustrates the risk that a Member State can be successfully sued by a company within ISDS for merely bringing its legislation or policies in line with EU legislation.**
>
> **MONIQUE GOYENS / EUROPEAN CONSUMER ORGANISATION BEUC**[23]

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Photo credits

p13 (foreground left) Laura Muresan, (background) Sebastian Florian
p14 (top) Laura Muresan, (bottom) Kovács László Attila
p15 Cristian Sutu

3.2

HOW BIG PHARMA SABOTAGED THE STRUGGLE FOR AFFORDABLE CANCER TREATMENT

NOVARTIS VS COLOMBIA

In Colombia, the high price of a life-saving blood cancer drug became unsustainable for the public health budget. The government decided, in 2015, to declare Glivec a medicine of public interest and strip pharma giant Novartis of its production monopoly, so that competition with generics would bring down the price of the drug. But Novartis was not ready to give up the goose that lays its golden eggs, and threatened to sue Colombia in an international arbitration tribunal. While the price for Glivec was ultimately reduced, the government no longer dared to touch Novartis' monopoly. The company's scare tactics averted a precedent that could have encouraged other countries to do the same, and reduced Novartis' high profits worldwide.

Glivec (also known as Imatinib) is the drug that converted "a fatal cancer into a manageable condition".[1] Approved in 2001, it was dubbed a "magic bullet"[2] for the treatment of leukemia, a deadly form of blood cancer. In 2015, the World Health Organisation added it to its list of essential medicines,[3] which means these drugs should be available at all times and at a price which individuals and communities can afford.[4]

But the price for Glivec did not allow for that. While the cost of producing the drug is estimated to be US$180 per year,[5] it was sold at the extremely high price of US$19,819 per patient, per year (over 100 times the cost of production) in Colombia in 2014. This is almost twice the average annual income in the country.[6]

> **Patients may have become the "financial victims" of the treatment success, having to pay the high price annually to stay alive.**
>
> **OVER 100 EXPERTS IN CHRONIC MYELOID LEUKEMIA (CML), A TYPE OF BLOOD CANCER, COMMENT ON THE UNJUSTLY HIGH PRICES OF CANCER DRUGS WORLDWIDE**[7]

Public budget bleeds as a result of high drug prices

One key reason for the high price of the medicine was the patent that Swiss pharma giant Novartis obtained in 2012 in Colombia. This meant that they could now quadruple the price of a 400 milligram tablet of the drug to US$43, whereas before, the locally produced generic medicine cost US$10.50.[8]

For Colombia's public health budget, the high-priced drug became unaffordable. It is estimated that between 2008 and 2014, the country spent approximately US$200 million on the medication,[9] bringing Colombia's health system close to bankruptcy.

The Colombian government's battle for affordable cancer treatment for its citizens

This is why, in 2014, a group of Colombian public health organisations requested the Minister of Health to declare Glivec a medicine of public interest and issue a compulsory licence.[10] When a patented medicine becomes subject to a compulsory licence, the government effectively breaks the producer's monopoly and grants other pharmaceutical companies the right to manufacture generic versions of the medicine, causing a drop in the price. Compulsory licences are an important flexibility recognised under the Agreement on Intellectual Property Rights (TRIPS) in the World Trade Organisation (WTO)[11] and many other trade treaties. They have been used in particular by developing countries to increase access to life-saving drugs for diseases such as HIV.

> **Compulsory licensing is a key tool for protecting the financial stability of health systems and ensuring access to medicines and health services for all.**
>
> **132 LAWYERS, ACADEMICS AND OTHER EXPERTS WHO WROTE TO THE PRESIDENT OF COLOMBIA SUPPORTING THE ACTIONS OF THE GOVERNMENT**[12]

The Colombian government decided to pursue this strategy and issue a compulsory licence.[13] In parallel, it also attempted to directly negotiate a price decrease with Novartis, but the company refused outright.[14] It was estimated that opening the Glivec market to generics would have reduced the high prices charged by Novartis by up to 77 per cent, translating into savings of around US$15 million per year for Colombia's public health budget.[15]

Arm-twisting at the highest level

But with global sales of Glivec hitting US$4.7 billion in 2015,[16] Novartis was making record gains from this cancer drug, which accounted for 10 per cent of the company's total revenue.[17] It was thus determined to defend the goose that laid its golden eggs.

On 21 April 2016, Novartis sent a letter to the Colombian government, formally threatening to sue it in an international arbitration tribunal – unless the government reviewed its decisions in relation to Glivec.

Novartis claimed that Colombia had violated its bilateral investment treaty with Switzerland. More specifically, the company argued that the measures taken were unjustified and discriminatory, and that reducing the price of the medicine to the level of generics was equivalent to an indirect expropriation of the Glivec patent.

> **A compulsory licence is tantamount to an expropriation of the patent owner.**
>
> **SWISS GOVERNMENT TO COLOMBIA'S MINISTRY OF HEALTH[18]**

NOVARTIS

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Bogotá, D.C. Abril 21 del 2016

Doctora
Adriana Vargas
Directora de Inversión, Servicios y Propiedad Intelectual
Ministerio de Comercio, Industria y Turismo
E. S. D.

Asunto: Declaratoria de Interés Público para mesilato de imatinib.

Respetada Doctora:

En seguimiento al proceso actualmente adelantado por el Ministerio de Salud y Protección Social con miras a una Declaratoria de Interés Público del medicamento mesilato de imatinib; nos permitimos poner en su conocimiento lo siguiente:

La compañía ha acudido al mecanismo de consultas en virtud del art. 11.1 de la Ley 1198 del 2008, "Por medio de la cual se aprueba el Convenio entre la República de Colombia y la Confederación Suiza sobre la promoción y la protección recíproca de inversiones y su protocolo", de la cual nos permitimos adjuntar copia.

A través de este mecanismo queremos generar una apertura de consultas que involucre a todos los actores del gobierno colombiano relevantes en la materia y de esta manera abrir un diálogo con el fin de llegar a una decisión adecuada que satisfaga las necesidades de todas las partes involucradas.

Agradezco la atención prestada.

Cordialmente,

María Cristina

Novartis also argued that the government had violated the company's "legitimate expectations" of stable patent rules.[19] The arbitration threat was echoed over and over again by powerful actors – including the CEO of Novartis,[20] and the US and the Swiss governments.[21] The US government also threatened to cut US$450 million of funding for the "Paz Colombia" peace process[22] and to block Colombia's efforts to join the OECD club of wealthy countries.[23]

Government fails to break Novartis' monopoly

The pressure worked. Less than a week after Novartis' letter to the Colombian government, on 27 April 2016, the country's Washington-based embassy recommended that the Ministry of Health take all measures necessary to avoid an investor-state lawsuit.[24] And while the Ministry eventually declared that access to Glivec was of public interest,[25] forcing a 44 per cent reduction of the price of the drug,[26] the government dropped its plan to issue a compulsory licence.

> **When a commodity affects the lives or health of individuals, just price should prevail because of the moral implications. Examples include the price of bread during famines...**
>
> **OVER 100 EXPERTS IN CHRONIC MYELOID LEUKEMIA (CML) COMMENT ON THE UNJUSTLY HIGH PRICES OF CANCER DRUGS WORLDWIDE[27]**

Preventing the compulsory licence was what was most important to Novartis. The Colombian market for Glivec is only 1 per cent of Novartis' global sales for the medicine,[28] and thus is too small for a mere price cut to lead to huge losses for the pharma giant. But, in the context of ongoing increased global attention to, and critique of, the high costs of brand name pharmaceuticals for developing countries, the compulsory licence would have set a dangerous and worrying precedent for Novartis. Asked whether it was "true that Novartis is more worried about the signal this would give abroad than the impact in Colombia", the company's President of the Andean Region confirmed this analysis, replying: "Yes, because this is a global company and any country that takes a decision like this... is cause for concern".[29] Pharmaceutical companies like Novartis have systematically used their considerable financial resources to try to avert the use of compulsory licences around the world, according to research on 89 countries published by the World Health Organisation in 2018.[30]

> **A strong... response to the plans of only a few countries to issue compulsory licences for cancer medications is likely to have a chilling effect on others.**
>
> **RESEARCHERS FROM THE UNIVERSITY OF GRONINGEN**[31]

It was a historic step that Colombia declared a patented medicine to be of public interest and succeeded in reducing its price significantly.[32] However, thanks to its investment arbitration threat, Novartis reined in the possibility of a global precedent, and further steps to grant access to affordable medicines across the world.

BOX 4

A booby-trap for access to medicines

Novartis' legal threat to Colombia was not the first time, nor will it be the last time, that a big pharmaceutical company used international investment agreements to attack decisions to alter patent protections of medicines for public health objectives.

In 2013 Canada was hit with a US$483 million investment arbitration claim from US pharmaceutical company Eli Lilly, for invalidating patents for drugs to treat attention-deficit hyperactivity disorder (ADHD) and schizophrenia. Canadian courts had ruled that evidence provided by Eli Lilly did not support the therapeutic uses claimed, and the company's response to the public interest ruling of the courts was to sue the country.[33] In 2017, Ukraine settled a US$800 million case with US company Gilead Sciences, after the government agreed not to break its monopoly, and not to allow the production of a generic equivalent to an hepatitis C drug manufactured by Gilead.[34]

Researchers have warned that these cases mark "the beginning of an ominous and poisonous trend" of big pharma companies "proclaiming their 'legitimate' expectation of monopoly prices... to punish countries that attempt to use lawful flexibilities to assure more affordable access to medicines."[35] According to Professor Brook K. Baker from the Northeastern University School of Law, investment protection agreements are a genuine "booby-trap for access to medicine".[36]

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Photo credits

p20 (foreground) David Mirzoeff, Global Justice Now, (background) Michal Jarmolu/Pixabay
p21 (bottom) Greens/EFA

3.3

BYPASSING COURTS AND LOCAL DEMOCRACY TO BUILD A GATED COMMUNITY FOR THE RICH

RAZVOJ GOLF AND ELITECH VS CROATIA

For the past 13 years, the citizens of Dubrovnik have opposed the construction of a luxury resort on the hill which overlooks their beautiful city. The unpopular project was put on hold by Croatian courts, which found that the required permits had been obtained illegally. But the company behind the project did not give up – subsequently the case has landed both in international arbitration, with the company suing Croatia for US$500 million in compensation, and in national courts, with the criminalisation of civil society.

The city of Dubrovnik was named after the oak trees (called dubrava by the locals) which cover the Srd hill, which is adjacent to the city. In 2010, the local initiative "Srđ je naš" ("Srd is ours") was created, consolidating local activists with national NGOs. Its aim was to protect the beautiful area in the heart of Dubrovnik from the construction of a gigantic gated community and tourist complex, housing two golf courses, two hotels, 240 villas, 408 suites, an amphitheatre, an equestrian club, parks, promenades and a water supply pipeline.[1]

The proposed development would have significantly changed the city. For example, the size of the project was huge, in comparison to the city proper – the area under development would have been 20 times the size of the old town, a UNESCO world heritage site. The project would also have deprived locals and tourists of a pristine site and excellent viewpoint, and would have required huge amounts of water and pesticides to maintain.[2] For locals this was too much for a city that is already heavily impacted by excessive tourism and an overburdened infrastructure.

Not wanted, not legal

The people of Dubrovnik wanted to preserve the beauty of their city and its surroundings, to protect their water supply and the environment, but also to limit the impact of tourism on their livelihoods. Among the local community, the project was also tainted with suspicion of corruption.

> **"The golf case is a textbook example of the worst possible corruption. The law on golf courses was written by the former government for several, already known investors. I tend to believe that the main investor on Srd was one of the investors for whom this whole law was written.**
>
> **ZORISLAV ANTUN PETROVIC, TRANSPARENCY INTERNATIONAL CROATIA**[3]

Backed by NGOs, artists, architects, and other experts, "Srd je naš" used both democratic and legal means to voice their concerns. In a 2013 referendum organised by the campaign, 84 per cent of local residents who voted said they were against the plan.[4] The citizens' initiative also challenged the project in the Croatian courts, which found that the investors' location permits and environmental impact assessments were illegal.[5] This was a powerful example of local resistance and people's empowerment.

> **In Croatia, golf is used as an excuse to go into untouched nature, next to the most beautiful towns and surroundings and build where you cannot build in any other legal way... it's not just about building golf terrains, developing sport or tourism or work opportunities for the locals, but it's rather a large-scale construction scheme of villas and apartments.**
>
> **SRD JE NAŠ ACTIVIST**[6]

This inspiring local struggle, for a respected environment and respectful tourism, led to local victories. But then... the company took to the courts itself. Notably, it did not take its case to the Croatian courts, but to a private, secret international arbitration court, where it is now trying to regain what people's power and domestic courts had refused it: exorbitant profits.

The golf club of ISDS can swing away democracy

The luxury real estate project was backed by the Croatian company Razvoj Golf, which is owned by Aaron Frenkel, an Israeli investor. Through a Netherlands-based letterbox company (Elitech), Razvoj Golf is suing Croatia[7] under the Croatia-Netherlands investment treaty – an agreement which is arguably no longer legally in force (see box 5 on page 28). The investors claim to have spent €130 million on the project, yet they want US$500 million dollars from the Croatian state to compensate them the profits they claim they would have made had the construction gone forward.[8]

Just six weeks after the investors filed this ISDS claim, the Croatian government issued the developers with new permits, identical to the ones which had previously been overturned by the Croatian courts. Though nothing has materially changed regarding the project or the permits, they were re-issued. After another lawsuit by NGOs, a different judge decided that these new permits are now legal. NGOs are currently appealing this decision to the High Administrative Court of Croatia, a second instance court.[9] Thus the investors' multi-million dollar case already seems to be working on the government and persuading them to ignore and overrule citizens' concerns.

> **This is perceived as further humiliation for the citizens of Dubrovnik and as an injustice which we cannot and should not observe silently.**
>
> **ĐURO CAPOR, THE COORDINATOR OF "SRD JE NAŠ"**[10]

But the attack on democracy does not end here. The company behind the project also sued one of the key NGOs which backed "Srd je naš": Zelena akcija or Friends of the Earth Croatia. The investor is demanding, via Croatian courts, €30,000 in compensation from this public interest group for alleged defamation, and even wants to ban the group from publicly speaking about the golf project.[11] It is trying to silence and kill the democratic community voices which helped to bring about an important debate about the proposed golf course project. These legitimate concerns of the people of the city related to livelihood, quality of life, environmental protection, and privatisation of

public space etc. Not only are such concerns not given space nor voice in ISDS cases, but in this instance the company is using its deep pockets to try to censor the community from even speaking out publicly about the controversial project, setting another dangerous precedent of companies using courts to silence citizen opposition.

> **We are being heavily targeted by the investor, and we are in peril of being shut down. We are afraid that, more and more, this is becoming a modus operandi against environmental defenders.**
>
> **ENES ĆERIMAGIĆ, A LAWYER FOR FRIENDS OF THE EARTH CROATIA**[12]

BOX 5

Suing via treaties which the European Court of Justice ruled illegal

On 6 March 2018, the European Court of Justice, Europe's highest court, ruled that ISDS treaties between EU countries – such as the Croatia-Netherlands agreement used by Razvoj Golf company – were incompatible with EU law, because they sideline and undermine the powers of domestic courts.[13] Following this ruling, EU Member States agreed to terminate their intra-EU Bilateral Investment Treaties (BITs) in 2019.[14]

As a result, since March 2018, several EU Member States have tried to stop ongoing ISDS cases based on the now illegal intra-EU BITs. But so far, ISDS tribunals have rejected these interventions, ruling in favour of pursuing profit-making cases in spite of the significant judgement by the European Court of Justice.[15]

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3.4

DESTRUCTIVE MINING TRUMPS LOCAL HEALTH AND ENVIRONMENT

KINGSGATE VS THAILAND

In the paddy fields of Thailand, a gold mine has been accused by locals of leaking toxic waste, causing serious health problems and ruining crops. The government responded by suspending the mine, and later halting all gold mining in the country while a new mineral law was developed. Yet instead of impacted communities receiving compensation for harm caused, the opposite is happening. Since 2017 the Australian owner of the mine, Kingsgate, has been suing Thailand for millions of dollars in compensation, under a Free Trade Agreement between the two countries.

Chatree was Thailand's first and largest gold mine, and the first major project of the Australian Kingsgate mining company. The mine, which commenced operations in 2001, is situated around 280km north of Bangkok in Phichit, a district that is predominantly agricultural.

The company is in an ongoing dispute with environmentalists and locals, who say they had been negatively impacted by the mine. In 2010 villagers took the company to court for failing to mitigate damages and for obtaining mining permits illegally. The court ruled that the mine had indeed breached environmental protection laws, and ordered the company to submit an Environmental Health Impact Assessment.[1]

Operations were later suspended at the Kingsgate mine in 2015 for several months, amidst ongoing environmental protests and medical tests which found that hundreds of people living near the mine had high levels of toxic substances in their blood. The company itself acknowledged problems with dust, contaminated water, noise, and cyanide management in its own reports, and researchers criticised its "lack of true community consultation".[2]

> **"Locals are deeply concerned, and in some cases fearful, of the mine's environmental and health impacts, whether related to polluted water, dusty air or noise.**
>
> **NATTAVUD PIMPA AND TIMOTHY MOORE, RESEARCHERS WHO INVESTIGATED THE CHATREE MINE**[3]

Developments at the Kingsgate mine in Phichit also occurred after violence had erupted at another controversial mine in the country, the Loei Gold Mine, when over 300 armed, masked men attacked and beat up villagers who were blocking access to the mine.[4] These problems in the gold sector led the military junta which was ruling the country to halt all gold mines nationwide in 2017 "due to their impact on locals and the environment". While human rights groups welcomed the closure,[5] the law used in the process has also been criticised, as it empowers the Prime Minister to issue any order arbitrarily without following legal and other democratic procedures.[6]

The Australian mining company hit back with threats of a multimillion-dollar international arbitration lawsuit. This threat seemed to have paid off: in 2017 the Thai government agreed to lift the suspension on the mine's operation, which in turn led to a steep rise in the company's share price.[7] Yet Kingsgate has not re-opened the mine. Instead it has sought compensation from the government, by filing an Investor State Dispute Settlement (ISDS) case under the Thailand-Australia Free Trade Agreement claiming expropriation, seeking damages of an undisclosed amount.[8] According to rumours in the national media, the ISDS claim could be worth US$900 million, but this has been denied by the government.[9]

Who decides the environmental and human impact of mining?

Gold is currently valued at over US$1,000 an ounce,[10] and yet in spite of the profits which the industry can generate, the gold mining sector does not have a shining history when it comes to human rights and environmental protection. The process used to extract this expensive metal relies on cyanide, a highly toxic chemical, and creates heavy metal by-products. With production and demand rising, easily accessible gold has become scarcer and scarcer, and the waste produced from mining it is increasing.

The health and environmental impacts of the Chatree mine are at the centre of the dispute between the company, government and locals. In 2015 the Central Institute of Forensic Science of Thailand found that 282 villagers living around the mine had excessive heavy metal levels in their blood, which increased the risk of cancer, DNA abnormalities and birth defects.[11] A subsequent independent study by academics in 2018 observed toxic waste leaking from the mine's tailing pond. It also found abnormal electrical resistance, geochemical anomalies and heavy metal contamination levels in surface water, which supports claims by villagers that their rice fields had been polluted.[12]

> **The impacts from the gold mine are real. Many people have already felt the possible health impacts from the gold mine's pollution... Also, many people have engaged in lawsuits against the mine.**
>
> **CHAINARONG SRETTHACHAU, LECTURER, MAHA SARAKHAM UNIVERSITY**[13]

Yet the company has always denied any findings of environmental harm. Kingsgate has produced several glowing Corporate Social Responsibility reports about the Chatree mine,[14] and has used various tactics to dispute the validity of environmental assessments; first it challenged the scientists, then the methodology and then the link between the pollution and the mine.[15]

While different versions of the truth are nothing new, the question of who gets to decide what is a harmful level of exposure to certain chemicals is crucial. In this ISDS case, rather than trusting national research institutes, the precautionary principle or the local community's knowledge, the decision will be made by three investment arbitrators based on narrow investment law in a secret back room process. Neither the details of the claim, nor how much or what type of compensation is being demanded by the company are public at this stage, and yet the arbitrators' decision could impact the entire country through the precedent it sets for regulation in Thailand. There is a big risk that all environmental and human rights concerns will be ignored in the panel's decision, as has happened in many other cases.

Political risk insurance funds ISDS case

Kingsgate mining company and its investors, like most multinational companies, had 'political risk insurance' for its operations, which covered them for financial losses related to war, expropriation and terrorism. Zurich Insurance and others in fact paid out US$58.5 million to Kingsgate for their insurance claim. Some of that money will be used to fund the ISDS arbitration case against Thailand.[16] (see box 12 on page 64 for more information on such third-party funding arrangements).

This ISDS case could turn out to be the real gold mine for the struggling company — in 2018 Kingsgate faced a hostile takeover from Metal Tiger investors, due to poor management[17] and mounting debt.[18] While the ISDS case is ongoing, the company refuses to pay for rehabilitation of the mine that continues to leak toxic tailing into water sources in Phichit.[19]

> **Two big questions still unanswered are: how will the environment be cleaned up, and how will locals who have suffered get help?**
>
> **THANYARAT SINDHORNTHAMMTHAT, LOCAL RESIDENT FROM A VILLAGE IN PHICHIT'S THAP KHLO DISTRICT**[20]

Local people do not have access to insurance, nor to justice in Australian or international courts. They are, however, trying to win some justice through national courts: in 2018 the Thai courts agreed to hear a class action from 6,000 people impacted by the mine, who are demanding around US$15.9 million in compensation.[21]

Extracting profits: how oil, gas and mining companies use ISDS

BOX 6

Companies in the mining, oil and gas industries are the biggest users of investor-state arbitration. They brought 24 per cent of all known investor-state challenges by the end of 2018 (169 cases in total). The number of cases in the extractive sector is also booming in recent years, with 96 new cases launched since 2010.[22]

Many of these investor-state cases target attempts by governments to enact environmental and health protections for their citizens. Strikingly, these cases often reverse achievements resulting from resistance to resource extraction projects by affected communities. A recent study of mining-related ISDS claims against Latin American states found that over two-thirds challenged "hard won measures that Indigenous peoples and other mining-affected communities have fought for to protect their land, water, fragile ecosystems and sacred places from mining and its harmful impacts".[23] ISDS is a further assault on the already weak legal protection of these communities' rights.

> **"Citizens and communities have no comparable legal counterweight at the international level to launch proceedings when mining company activities violate human and environmental rights.**
>
> **MANUEL PEREZ-ROCHA AND JEN MOORE, INSTITUTE FOR POLICY STUDIES**[24]

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p30 (background) Jason Carter, (foreground) Suekanya Theerachartdumrong, Roengrit Kongmuang
p31 (top) Roengrit Kongmuang, (bottom) Francois Molle
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3.5

BLOCKING CLIMATE CHANGE LAWS WITH ISDS THREATS

VERMILION VS FRANCE

When Nicolas Hulot became Minister of the Environment in France in 2017, he gained not only political power but also public support. As a renowned environmentalist, French people believed he could be a much-needed climate champion, who could follow through and deliver on the promise of the Paris Climate Agreement. But this hope was quickly confronted with a huge obstacle: France is a signatory to various investment treaties, and oil and gas companies are prepared to use investor-state dispute settlement (ISDS) to challenge any action on climate change.

It was supposed to be "the" French law on fossil fuels. In the summer of 2017, the French Environment Minister was feeling the heat of the climate crisis and the need for urgent action. He drafted a law to put an end to fossil fuel extraction on all French territory, including those overseas, by 2040 — no more oil or gas was to be extracted from the ground after that year.[1] France was making steps towards transforming the words of the Paris Agreement into a reality.

> **The first draft of the law would have allowed a progressive phase-out of fossil fuel extraction as it banned the renewal of exploitation permits: some oil and gas projects would have ended as soon as 2021, and only a few projects would have still existed by 2030.**
>
> **JULIETTE RENAUD, FRIENDS OF THE EARTH FRANCE**[2]

But Hulot was not the only power-broker to work hard over the summer of 2017. The "Hulot law", as it was later called, went through the benches of the French Council of State — a procedure to ensure that the law is coherent with the French Constitution. However, private law firms who make money when investors sue states under ISDS also closely examined the law, but through a very different lens.

Corporate damages or climate change: the choice politicians have to make

In August 2017, the Council of State received several lobby letters on the Hulot law.[3] One came from a private law firm, Piwnica et Molinié, on behalf of Canadian oil and gas company Vermilion. With 26 fossil fuel extraction sites in France, including many oil projects in the Paris region,[4] Vermilion is the most important fossil fuel producer on French territory, producing almost 75 per cent of national oil. The company and its lawyers threatened to sue France under ISDS if it pushed ahead with the Hulot law.

The letter argued that Hulot's proposed ban on renewing oil exploitation permits violated the Energy Charter Treaty (ECT), an international agreement from the 1990s, which includes far-reaching rights for foreign investors (see box 11 on page 58 for more information). It explicitly says that the Hulot law breaches France's international commitments under the ECT, and refers to six rights in the Treaty, such as "fair and equitable treatment of investors" or the fact that signatories "cannot expropriate investments without respecting certain conditions such as the prompt payment of adequate and effective compensation".[5]

Vermilion's lawyers knew that a billion dollar ISDS threat could not be ignored. As Pulitzer Prize-winning journalist Chris Hamby wrote after an 18-month investigation on the issue: "ISDS is so tilted and unpredictable, and the fines the arbitrators can impose are so catastrophically large, that bowing to a company's demands, however extreme they may be, can look like the prudent choice."[6] And indeed, the French government seems to have reluctantly bowed to Big Oil's demands.

> **Governments will fail to regulate in the public interest in a timely and effective manner because of concerns about ISDS.**
>
> **KYLA TIENHAARA, QUEENS UNIVERSITY CANADA**[7]

The law to restrict fossil fuels ends up facilitating their expansion

After the summer holidays, both a refreshed Hulot, and a transformed Hulot law, returned for discussion. The September 2017 version allowed for the renewal of oil exploitation permits until 2040, meaning that all current exploration and exploitation projects would continue being developed without any constraints for more than 20 years. Under certain conditions, the final version of the law even allowed exploitation permits to be renewed after the 2040 deadline. Thus the new law would in fact now have the opposite effect to its original aim. And worse, once the new law[8] was passed, Hulot signed more fossil fuels permits than his predecessor in the Environment Ministry.[9]

No one will ever know precisely what level of influence the ISDS threat had in emptying the Hulot law of all its ambitious measures — Vermilion was not the only company active on the issue, with a significant amount of big business lobbying aimed at watering down the regulation taking place. Nevertheless, the ambition of France's much-respected Environment Minister was clearly killed by well-resourced corporate interests that used ISDS as one powerful secret weapon against an urgent and popular goal: combat climate change. A year after the September 2017 version of his fossil fuels law, Hulot resigned. In his resignation interview, he stated that corporate lobbies had too much influence on environmental policy-making.[10]

> **ISDS cases risk having a "chilling effect" on implementing the stringent climate regulations required to fulfill a pact to curb global warming.**
>
> **NOBEL PRIZE-WINNING ECONOMIST JOSEPH STIGLITZ**[11]

BOX 7

Regulatory chill: the secret threat that can make governments bow to corporate demands

Due to the high financial risks and legal costs to states of ISDS procedures, letters from investors threatening ISDS cases are very powerful political tools. Corporate lawyers regularly brag about how "threatened claims that never go to arbitration" are used "to get things done quietly".[12]

> **On many occasions, if my office evaluated that we would lose the case, our decision changed the Ministry position.**
>
> **FORMER OFFICIAL IN PERU'S CENTRAL GOVERNMENT OFFICE WHICH DEFENDED ISDS DISPUTES**[13]

ISDS acts as a powerful tool to achieve "regulatory chill": to delay, change or impede new legislation. For instance, faced with an ISDS threat from tobacco giant Philip Morris, Togo dropped its legislative proposal on health and tobacco.[14] While Philip Morris pursued an ISDS case against Uruguay over health-related cigarette adverts, it successfully deterred the adoption of similar tobacco control measures in Costa Rica, Paraguay and New Zealand, among other countries.[15]

> **The mere existence of ISDS is important as it acts as a deterrent.**
>
> **VICE PRESIDENT OF CHEVRON**[16]

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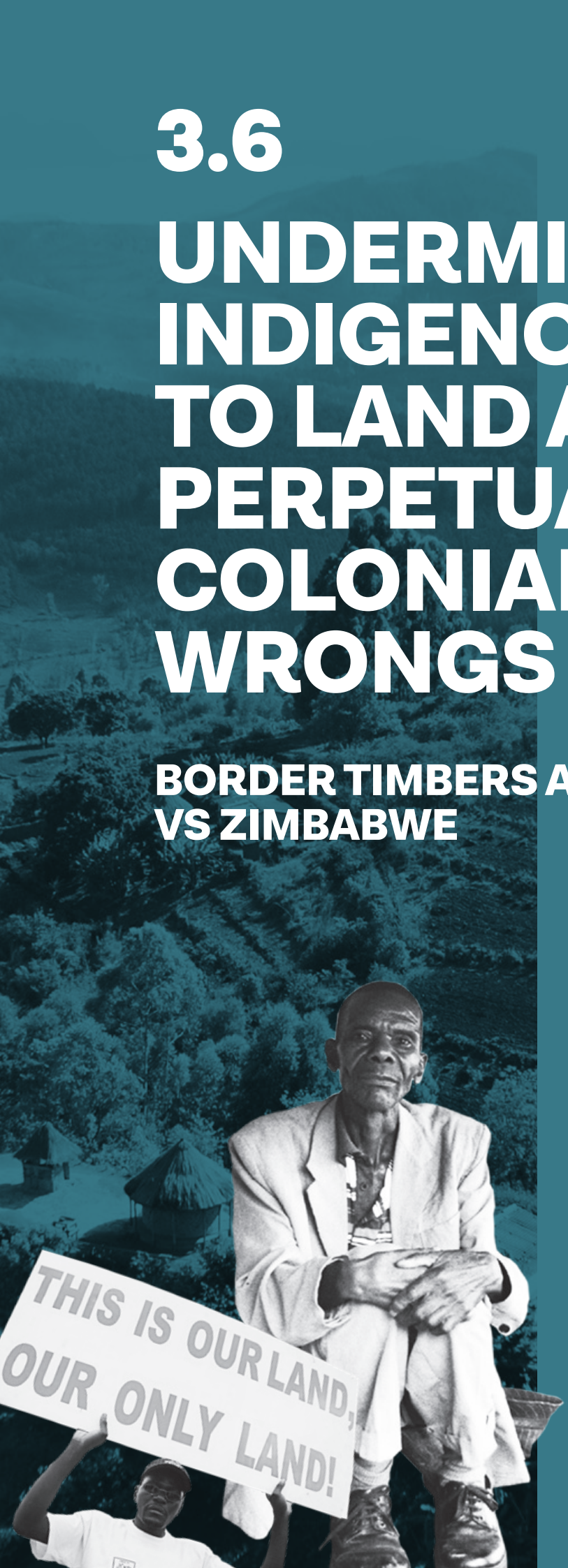
p35 (background) Anita Starzycka, (foreground) 350org
p36 Paris Light Brigade

3.6

UNDERMINING THE INDIGENOUS RIGHT TO LAND AND PERPETUATING COLONIAL WRONGS

BORDER TIMBERS AND VON PEZOLD VS ZIMBABWE



In Zimbabwe's Eastern Highlands, thousands of indigenous families face the imminent risk of forced eviction from their ancestral lands, which they have cultivated for centuries. In blatant disregard of the rights of indigenous people under international law, three investment arbitrators have ordered Zimbabwe to 'restitute' their land to Austrian-Swiss-German investors operating large timber plantations in the area, which had been partly seized during Zimbabwe's land reform programme. The tribunal disdainfully declined to even hear the communities that would be displaced yet again by its judgement.

The South-Eastern Chimanimani region of Zimbabwe is a mountainous area where people's livelihoods traditionally depended on planting small fields and raising cattle and goats. But after British colonisation in the 1890s, the most fertile areas were taken by white settlers, forcing the local population to move up into the hills and to less accessible and productive lands further afield. To honour the graves of their ancestors and other sacred sites however, some remained behind, cultivating fields in restricted areas, often in return for a form of slave labour known as 'vhicki', or 'chibharo' for the new land 'owners'.[1]

> **Most of this area was taken away from us by white settlers... Our homes were destroyed, and... we had to live in compounds on our own territory, little more than slaves for the white settlers.**
>
> **CHADWORTH RINGISAI CHIKUKWA, LATE CHIEF OF THE CHIKUKWA PEOPLE**[2]

After Zimbabwe's independence in 1980, many dispossessed families moved back to their traditional homeland. By then, however, their traditional territories were controlled by Border Timbers Limited (BTL), a successor of the British South Africa Company, which led the imperial conquest under a mandate from the British Crown.

In the 2000s, as part of much-needed land reforms in a country where a small group of white farmers owned almost all land, the returnees proposed negotiations for a "Joint Forest Management" system, under which they would have regained access to the land, while BTL would have continued its business and a fair share of income would have gone to the local community. But Heinrich von Pezold, an Austrian-Swiss-German landholder and by then majority-owner of BTL, rejected the plan with a categorical "we will not yield an inch".[3]

While the average size of a farm in Europe is 16 hectares, and 179 hectares in the United States, the Pezold family 'owned' at least 78,000 hectares at the time[4] – about the size of New York City.

Forced evictions, harassment and violence

BTL and von Pezold launched a flurry of court cases, harassments and violence, forcibly evicting numerous families. One particularly brutal eviction took place in January 2013, when BTL security guards burned down over a hundred homes of the Maguta-Gadyadza community and three children died due to exposure to rain and cold. The clan's former headman, Thomas Masengedzero Gadyadza, remembers: "They used blow-torches to set my home on fire... I was not able to save any of my possessions. My wife and I ran to the forest and my two children... ran to the forest from where we watched the burning of our home. There was a lot of noise. We were very frightened."[5]

> **We were dispossessed of our land and territory on racial grounds, and we were treated, and in many ways still are treated, as a sub-human species by the very whites who openly have done their best to destroy our culture, our history, and our ability to gain decent livelihoods from our own land, our own labour and our own natural resources.**
>
> **PHINEAS ZAMANI NGORIMA, REGENT CHIEF OF THE NGORIMA PEOPLE**[6]

Neo-colonial investment arbitration

In 2010, BTL and the von Pezold family sued Zimbabwe under the country's investment treaties with Germany and Switzerland.[7] They challenged government actions during Zimbabwe's post-2000 land reform programme, including the expropriation of some of the investors' property in 2005, the violence that occurred at the time, as well as the government's alleged failure to protect the von Pezolds from settlers on their plantations.[8]

Zimbabwe lost both disputes in 2015. The three arbitrators who decided both cases ordered the country to return the land to the von Pezolds and forcefully remove the settled communities – consistently referred to as "Invaders" in the award. In addition, Zimbabwe was ordered to pay US$65 million plus interest in compensation (or a hefty US$196 million in case there was no restitution).[9] The state challenged both awards (which can be allowed on very narrow legal grounds), but lost again in November 2018.[10] Like in colonial times, the twenty-first century tribunal followed the imperial logic of "whoever owns the land, the natives do not".[11]

As independent researcher Ciaran Cross has observed, the ISDS tribunal, in an approach disturbingly similar to colonial times, "has effectively enjoined both parties (sovereign and corporate) to facilitate the invasion of the indigenous communities' lands – to burn their crops and homes, and remove them by force if necessary – in the name of white European capital, again".[12]

> **BTL is attempting to evict the Chinyai people from land and territory that is ours by historical right, which BTL or their predecessors, the British South Africa Company, obtained fraudulently and violently, without our agreement, without compensation, with violence and illegality.**
>
> **JOHN SITHOLE NGEZIMANA CHINYAI, ELDER OF THE CHINYAI PEOPLE**[13]

As Zimbabwe is obliged to comply with the award, more than 6,000 indigenous families (at least 1,400 of them living in Chimanimani) face the imminent risk of eviction from their ancestral lands and sources of livelihoods as this report goes to press (June 2019).[14] Juliet Chirombo Mavare Mtisi, a member of the Gadyadza clan, describes the fear this creates: "I do not feel safe in my home and in my own fields, and I now fear to remain alone at home, if these BTL security guards can come with guns to arrest me and charge me at their will, even if I am innocent."[15]

Arbitrators find human rights irrelevant

In 2012, four indigenous people living on the land at the heart of the dispute wrote to the tribunal to try to prevent this scenario unfolding. In partnership with the European Center for Constitutional and Human Rights (ECCHR), they wrote that human rights, and in particular the rights of indigenous people under international law, should be considered by the arbitrators. They argued that the tribunal could not legally reach a decision which would violate their internationally recognised rights to traditional land and to being consulted, for example by declaring the company the exclusive owner of the land, or by declaring their presence unlawful. To do so "would be to produce or make inevitable a violation of (our) fundamental human rights under international law", the communities argued.[16]

But the arbitrators denied their petition. Despite acknowledging that the proceedings might impact on the rights of the indigenous people, they asserted that international human rights law had no relevance to the dispute.[17] According to the UN Special Rapporteur on the Rights of Indigenous Peoples, this position "amounts to the subordination of indigenous peoples' rights to investor protections, with no option provided for participation or appeal."[18] Moreover, the von Pezold case is no exception. According to the Special Rapporteur, indigenous peoples' rights and interests were "effectively ignored" by all investor-state tribunals she looked at for a 2016 report on the issue.[19]

> **"International investment agreements... contribute to the subordination of indigenous peoples' rights to investor protections, as those protections become an obstacle to future recognition of indigenous peoples' pre-existing rights.**
>
> **VICTORIA TAULI CORPUZ, UN SPECIAL RAPPORTEUR ON THE RIGHTS OF INDIGENOUS PEOPLES**[20]

BOX 8

Land grabbing through investor-state lawsuits

As pressure on land is growing globally in a world increasingly impacted by climate change, more investor-state lawsuits concerning agricultural investments have been filed in recent years. Since 2004, at least one such claim has been lodged each year, with six cases initiated in 2018 alone.[21]

Many land-related investor-state disputes challenge government actions which respond to community opposition to damaging projects.[22] One example is the US$52 million case by Swedish investor Agro EcoEnergy, which is suing Tanzania for revoking a land title for a sugar plantation. The revocation followed accusations that the company had grabbed the land because it had failed to obtain the free, prior and informed consent of the affected communities living there.[23]

Researchers have warned that such investor-state challenges could undermine human rights based approaches to land governance, and hinder necessary land distribution and restitution. Under investment treaties, compensation orders are based on the current full market price of a piece of land (even though it might have been acquired in colonial times at a price way below the full market price) and frequently include compensation for expected future profits. Such high levels of compensation, which go beyond what is required in national law, can make public interest land reforms and actions to address land grabbing too costly for governments to pursue.[24]

> **“By increasing the cost of land redistribution, restitution or tenure reform, or of public action to address “land grabbing”, investment treaties could enter into tension with progressive land policies.**
>
> **LORENZO COTULA, INTERNATIONAL INSTITUTE FOR ENVIRONMENT AND DEVELOPMENT (IIED)[25]**

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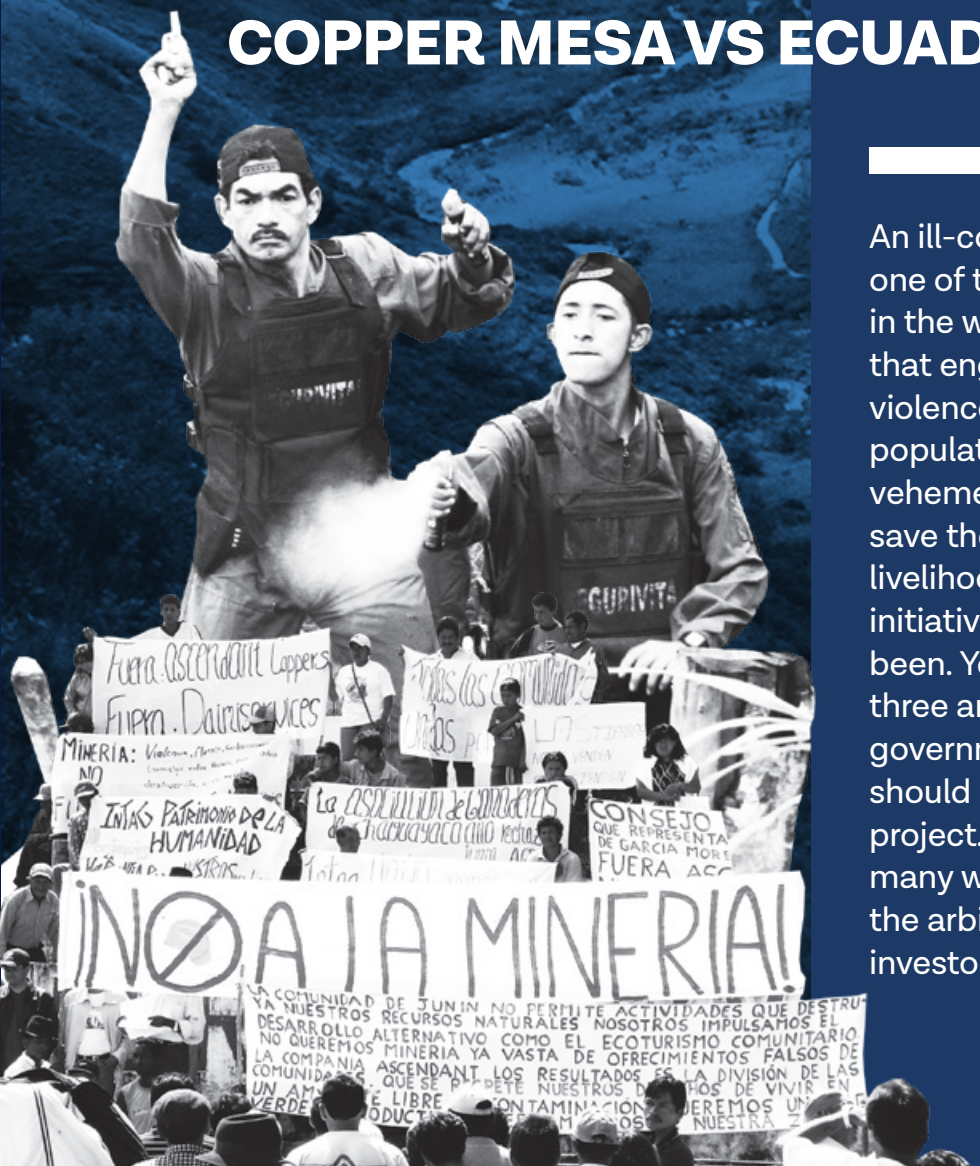
p39 (foreground) Ciaran Cross, (background) CELUCT
p40 (top) Zimbabwe Land, (bottom) David Wright
p41 Time to Climb
p42 Zimbabweland

3.7 WHEN ARBITRATORS REWARD MINING CORPORATIONS' HUMAN RIGHTS ABUSES

COPPER MESA VS ECUADOR



An ill-conceived mining project in one of the most biodiverse areas in the world. A Canadian investor that engaged in intimidation and violence towards the local indigenous population. A local community that vehemently opposed mining to save their forest, water sources and livelihoods. This is the story of a mining initiative that should have never been. Yet, after an investor lawsuit, three arbitrators decided that the government rather than the company should bear the blame for the failed project. In spite of acknowledging the many wrongdoings by the company, the arbitrators compensated the investor with a US$24 million pay off.

Intag, a region in Ecuador that is part of the Andean cloud forest belt, is so biologically diverse (being home to animals including jaguars, spectacled bears and spider monkeys)[1] that it was categorised as one of the 36 recognised biodiversity hotspots around the world.[2] But in this area, deep below the mountains, there are also vast deposits of copper, which is "the third-most-consumed industrial metal in the world".[3]

In 2014, Ascendant Copper (later renamed Copper Mesa — the name we use throughout this case study) acquired concession rights through a dubious tender[4] for an open-pit copper mine in Junín, a town in Intag.[5]

25 years of resistance to mining

The communities of Intag have led, since the mid-1990s, one of the most successful resistance campaigns against mining in Latin America. For them, mining meant the risk of massive deforestation, contamination of rivers and water sources, impact on endangered species and threats to local livelihoods.[6]

When Copper Mesa entered Intag in 2004, they did not even attempt to consult the communities and obtain their consent,[8] a basic legal requirement for mining companies.[9] The people[10] and local authorities[11] of Intag were ready to oppose this new large-scale mining project. It wouldn't be the first time. In 1995, they had already successfully driven away Japanese corporation Bishimetals' copper mining project[12] after various different environmental impact assessments had confirmed that mining in Intag would lead to loss of livelihoods and deterioration of the environment.[13]

> **Mining has left them [communities living near mines in Peru] poorer, more humiliated. This will not happen in Intag.**
>
> **POLIVIO PÉREZ, FARMER LEADER FROM INTAG AFTER VISITING MINES IN PERU[7]**

> **An open pit mine in Intag would destroy what makes the region attractive and deter long term investment... Development should not come at the expense of the fundamentals – clean water, an uncontaminated environment... and respect for the people and their decision.**
>
> **DECOIN, A GRASSROOTS ENVIRONMENTAL ORGANISATION IN INTAG[14]**

Threats and intimidation of local communities

Because Copper Mesa knew that they would not get approval from local communities, they resorted instead to force and intimidation. The company filed lawsuits and criminal complaints against those opposing mining,[15] including a lawsuit for one million dollars against the local community newspaper.[16] Company-hired paramilitaries physically assaulted individuals, including children, and opened fire at community members blocking the way to the company's mineral concessions.[17]

> **A foreign investor ... should not resort to recruiting and using armed men, firing guns and spraying mace at civilians, not as an accidental or isolated incident but as part of premeditated, disguised and well-funded plans to take the law into its own hands. Yet, this is what happened.**
>
> **ARBITRATORS IN THE COPPER MESA VS ECUADOR CASE**[18]

Copper Mesa's mining concession terminated

In 2007, after President Rafael Correa came to power, in spite of his new government's support for mining, the authorities ordered Copper Mesa to suspend its activities due to the company's failure to get the Ministry of Mines' approval for its environmental impact study and to consult with the affected local communities. Under the new mining laws of 2008-2009, those offences became sufficient grounds to terminate a concession, and Copper Mesa's licences were thus cancelled in 2008.[19] The company appealed to the Constitutional Court, but was rejected.

ISDS arbitrators to the rescue

However, the story does not end there. The investment arbitration mechanism in the Canada-Ecuador bilateral investment treaty helped Copper Mesa to avoid financial responsibility for its own failures in this project. In 2011, the company sued Ecuador[20] at an international tribunal for US$70 million (including future expected profits), even though Copper Mesa spent only US$28 million on the project.[21] The company argued that Ecuador expropriated its investment unlawfully, and the changes made in mining laws violated its legitimate expectation to a stable legal environment.

The arbitrators ultimately sided with the company, and ordered Ecuador to pay US$24 million.[22] An undisclosed third-party funder took a cut of the award.[23] Ecuador also had to pay US$6 million in legal defence and costs of arbitration.

The arbitrators in the case found that Copper Mesa had engaged in "reckless escalation of violence... particularly with the employment of organised armed men in uniform using tear gas canisters and firing weapons at local villagers and officials".[24] However, they blamed the local company officers for such actions, and found that senior management

in Canada were merely negligent.[25] Instead of dismissing the case as a result of this finding, they reduced the compensation by 30%.

Among all the investor-friendly interpretations in favour of Copper Mesa by the tribunal, one exposes the corporate bias of the ISDS system most clearly: the arbitrators' ruling that the Ecuadorian government didn't do enough to help the company deal with protesters. In the arbitrators' upside-down world, apparently the government should have sided with the company against its own citizens during the protest, despite the fact that States are obliged under international law to protect their citizens' human rights. Because it didn't support the company, arbitrators concluded that the government had not provided "full protection and security" to the investor and had not treated it "fair and equitably", thus violating two key provisions in the Canada-Ecuador investment treaty.[26]

> **"[The government] should have attempted something to assist the Claimant in completing its consultations [with the community] and...the Environmental impact assessment... In the Tribunal's view, it could not do nothing.**
>
> **ARBITRATORS IN THE COPPER MESA VS ECUADOR CASE[27]**

The asymmetry of access to justice

While investment arbitrators handed Copper Mesa a hefty reward, Canadian courts dismissed a lawsuit by three Ecuadorian villagers. These villagers sued Copper Mesa's company directors and the Toronto Stock Exchange (TSX) for not having acted to prevent the armed assault perpetrated by Copper Mesa's private security guards (mostly ex-military), against men, women and children from Junín. The lawsuit presented evidence that the company executives and the TSX had been warned about the attack and the potential for further assaults.[28] However, ultimately Copper Mesa's violence went unpunished, exposing once again the asymmetry in access to justice between corporations and affected communities.

Alarmingly, violent attacks on communities defending their local environment have been increasing in recent years. A Guardian headline reporting this development observes that "environmental defenders [are] being killed in record numbers globally"[29], and the newspaper reports that 290 activists were murdered between 2017 and 2018.[30] Resistance to mining, along with oil, is the most dangerous activity for environmental defenders.[31] This case thus illustrates how ISDS may "exacerbate the repression and criminalisation that human rights defenders face".[32] When States are faced with a choice between paying millions to multinational corporations or protecting their citizens' rights, they might think twice about whether to side with their people given the substantial financial risks involved. Arbitrators, meanwhile, are clearly encouraging governments to let mining companies act without any restraints.

BOX 9

The arbitration mafia

Many of the private lawyers who will decide the investor-state disputes in this report — the arbitrators — are part of a small group of commercial lawyers known as the "inner mafia" of investment arbitration.[33] Several of them are known for investor-friendly interpretations of the law, and combine their arbitrator role with other hats — for example acting as academics, sitting on government delegations, or representing the disputing parties in investment claims as counsel, thus opening up a Pandora's Box of conflicts of interest.[34]

For example:

- Swiss lawyer Gabriele Kaufmann-Kohler is considered the world's most powerful investment arbitrator.[35] According to a study of known ISDS awards until 2010, she is also one of the most investor-friendly arbitrators, leaning towards expansive (read: investor-friendly) interpretations of vaguely formulated investment law provisions.[36] She has been on the boards of companies such as Swiss bank UBS, and has repeatedly been accused of conflicts of interest.[37] Kaufmann-Kohler chairs the tribunal which will decide the Elitech/ Razvoj Golf case against Croatia (see chapter 3.3).

- Canadian Yves Fortier is also considered an ISDS "power broker"[38] and is known for his investor-friendly legal interpretations.[39] His professional and personal interest in ISDS was strikingly illustrated by the Yukos arbitrations, where he billed a staggering €1.7 million for his services.[40] He has also sat on company boards, including those of mining giants Alcan Inc. and Rio Tinto.[41] In the Border Timbers and von Pezold cases against Zimbabwe, Fortier acted as tribunal president (see chapter 3.6).

- Simultaneously to sitting as arbitrator, Spanish lawyer Bernardo M. Cremades has also acted as counsel in investment disputes.[42] This "double-hatting" raises numerous conflicts of interest, for example, when Cremades has to decide without prejudice on an issue that also features in another case in which his law firm represents the claimant investor. He is also amongst the world's most influential investment arbitrators[43] – and has been identified as one of the most corporate-friendly ones.[44] He was the investor-appointed arbitrator in Copper Mesa vs Ecuador.

If a doctor is sponsored by Big Pharma, we are likely to question whether the medicine prescribed is the best for our health; if a civil servant gets money from a lobbyist, we might question whether the policies they pursue are in the public interest. In the same vein, if an arbitrator's main source of income and career path depends on corporations suing states, we should surely question the impartiality of their rulings.

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p45 (background) Carlos Zorrilla, (foreground top) Liz Weydt, (foreground bottom) DECOIN
p46 DECOIN
p47 (top) Carlos Zorrilla, (bottom) DECOIN
p48 Liz Weydt

3.8

MAKING PROFITS BUT REFUSING TO PAY TAXES

CONOCOPHILLIPS AND PERENCO VS VIETNAM

Effectively and fairly collecting taxes is essential for all states, and especially for developing countries who wish to sustainably develop. Tax-collection also offers a means to guarantee quality public services for all and to collectively face the challenges of climate change. However, in Vietnam and in other countries, big corporations challenge governments which try to impose taxes on their massive profits. Investor-state dispute settlement (ISDS) is one of their main avenues to try to avoid paying taxes, and to receive millions in compensation instead.

In Vietnam, multinational companies have operated in the oil sector since the 1980s. In 2012, two Vietnamese oil fields were sold by two UK subsidiaries of the US energy giant ConocoPhillips,[1] to a UK company owned by the Anglo-French oil firm Perenco. ConocoPhillips sold the companies for US$1.29 billion, making a profit of US$896 million. But the US$896 million capital gain was never taxed.[2]

> **Major international organisations – including the IMF, OECD, UN and World Bank Group – today called on governments from around the world to strengthen and increase the effectiveness of their tax systems to generate the domestic resources needed to meet the Sustainable Development Goals (SDGs).**
>
> **ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD)**[3]

The government of Vietnam believes that it has the right to tax this previously untaxed gain, as it was generated by exploiting the country's oil resources. The UK-Vietnam tax treaty also grants Vietnam this right.[4] According to the current tax rate in Vietnam, ConocoPhillips would have to pay an estimated US$179 million to the Vietnamese government for its capital gain, money which could fund the government to build 9 hospitals.[5] Vietnam signalled its intention to tax the transaction in 2015 through a single letter to the buyer and seller.

> **Fair taxation will help the Vietnamese government to cover the budget of public services, including gender responsive services such as childcare, in turn creating more chances for women to do paid work and helping to decrease the gender gap.**
>
> **HOANG PHUONG THAO, ACTIONAID VIETNAM COUNTRY DIRECTOR**[6]

Big oil refuses to pay taxes and demands millions instead

Both companies refuse to pay this tax. ConocoPhilips, for instance, argues that the sale was between two UK entities with no taxable presence in Vietnam, so it owes no taxes on the sale to the country.[7] However, strikingly, ConocoPhilips did not pay any taxes on the sale in the UK either, thanks to a loophole in British tax law.[8]

To prevent Vietnam from collecting the capital gains tax, and instead put some extra money into their pockets, ConocoPhilips and Perenco are jointly suing the Vietnamese government via ISDS. The case was filed in 2017 and is based on the UK-Vietnam bilateral investment treaty.

> **The right of the State to tax foreign investors... often faces limitations resulting from the broad and somewhat overstretched interpretations of provisions contained in International Investment Agreements.**
>
> **DANIEL URIBE AND PROFESSOR MANUEL F. MONTES, RESEARCHERS AT THE SOUTH CENTRE**[9]

ISDS could stop developing countries from collecting taxes on capital gains

This case, as well as two others against India (see box 10 on page 54), could act as a negative precedent in Vietnam and other developing countries which are trying to levy taxes to fund poverty reduction, health, education, etc. As journalist George Turner put it when he revealed the oil industry's "pre-emptive legal strike" on Vietnam for Finance Uncovered in 2018: "As more countries claim their resources have been bought and sold by foreigners tax free, this issue is likely to become a new frontier in the anti-tax avoidance campaign. If Vietnam is successful, there could be profound implications for other developing countries, which have often seen Western companies make huge profits on their investments, only to walk away with them tax-free." No wonder, Turner added, that Big Oil wants to stop such a threat "in its tracks".[10]

Both ConocoPhillips and Perenco are frequent ISDS users: ConocoPhillips was awarded more than US$8.3 billion in damages against the government of Venezuela in 2019.[12] Perenco, meanwhile, is suing the Ecuadorian government in an ISDS tribunal – the company is refusing to pay a tax on excess profits resulting from oil exploitation.

No more information is publicly available on their case against Vietnam, due to the secrecy which often surrounds ISDS cases and due to the limited information made available on this case by both Parties. Perenco is still operating oil fields across the country in the meanwhile, generating profits of more than US$32 million in 2017.[13]

> **Developing countries' experience with the outcomes of such cases does not inspire optimism, as it is well known that the panels tend to be more investor friendly and generally support the claims of firms over the rights of governments or even the human rights of their citizens.**
>
> **JAYATI GHOSH, PROFESSOR OF ECONOMICS, JAWAHARLAL NEHRU UNIVERSITY IN NEW DELHI**[11]

BOX 10

How ISDS threatens tax justice

At least 24 countries have faced ISDS cases related to taxation, including Uganda, India, Laos, Algeria, Yemen, Ecuador, Venezuela, Peru, Bolivia, Mexico, and Argentina.[14]

India, for example, has been sued twice for asking companies to pay capital gains tax:

- In 2015, when India tried to impose a US$1.6 billion tax on capital gains of a UK subsidiary of Cairn India, one of the largest oil and gas companies in the country, Cairn sued the country under ISDS, asking the Indian government to instead pay it US$1.3 billion in compensation. The case was filed via the India-UK bilateral investment treaty in 2015 and is still pending.[15]
- When the country tried to impose the same tax on Vodafone, after the British telecoms giant bought one of the largest mobile network operators in India for US$11 billion without paying any taxes, Vodafone sued India via its investment agreement with the Netherlands and later the UK. The issue has gone through various stages, both in the Indian courts and the ISDS system, with India thus far proactively resisting the company's attempt to avoid paying the tax, and a final judgement or resolution of the matter has not yet occurred.[16]

"A wide range of state tax measures have been challenged by giant companies through the ISDS system. The power this grants corporations to challenge progressive tax policies should concern citizens in every country that has signed up to trade and investment treaties.

CLAIRE PROVOST, JOURNALIST[17]

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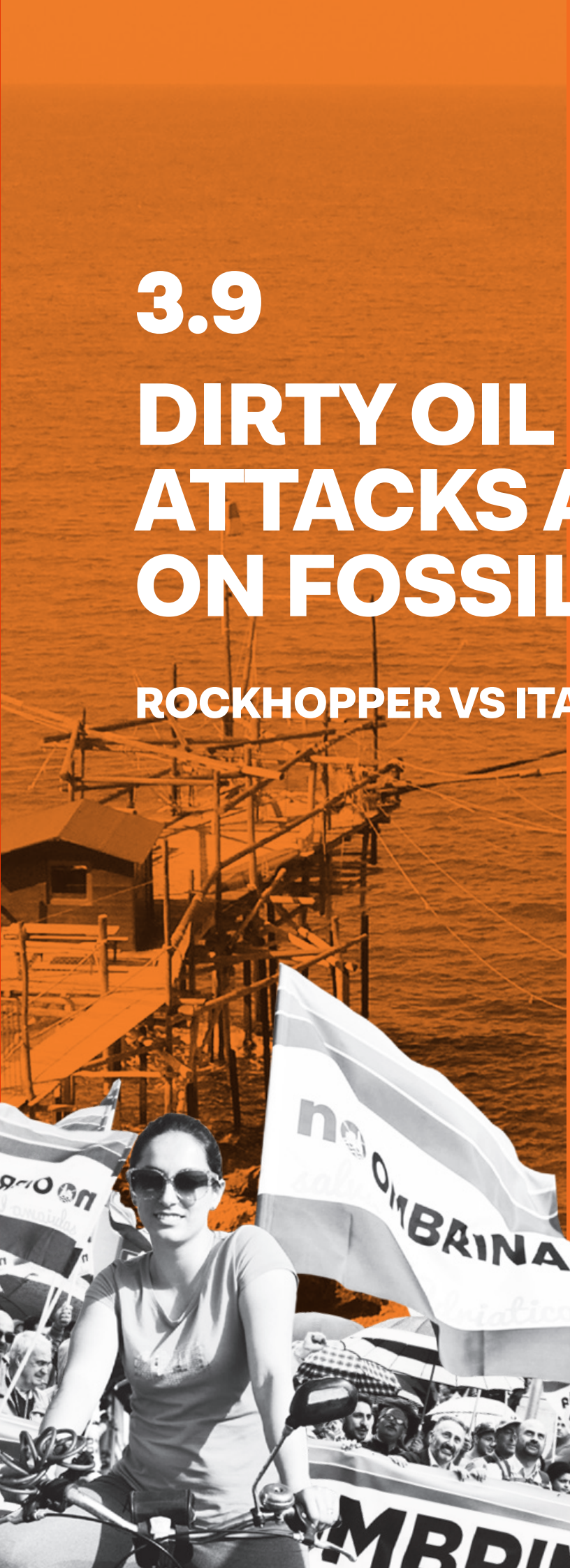
3.9

DIRTY OIL ATTACKS ACTION ON FOSSIL FUELS

ROCKHOPPER VS ITALY



Since 2017 UK-based oil and gas company Rockhopper Exploration has been suing Italy over the state's refusal to grant it a concession for oil drilling in the Adriatic Sea. The refusal came after the Italian Parliament banned all new oil and gas operations near the country's coast, amidst concerns regarding the environment, earthquake risks, local fisheries, and tourism as well as strong opposition from local residents. Rockhopper is claiming up to US$350 million in damages – more than seven times the money which it allegedly spent on exploring the project.

Abruzzo says No to Dirty Oil

Due to its many national parks and nature reserves, the central Italian region of Abruzzo is one of Europe's greenest. Its coastline is dotted with bright beaches and ancient fishing villages leading up to hillside areas rich in vineyards, olive groves and small agricultural communities. For more than a decade the people of Abruzzo have fought to protect their pristine home from dirty oil drilling.

The community learned about the planned Ombrina Mare oil platform in April 2008. Just a few kilometres from shore a test well popped up, followed by an oil leakage a month later.[1] This test well was to pave the way for several wells, subsea pipelines and a 350 metre long floating refinery to desulphurise the low-quality oil. The platform would have spat out tonnes of toxic waste into the water and atmosphere every day.[2]

> **The citizens of Abruzzo spent hundreds of millions of euros on agriculture, fishing and to promote tourism. Those investments cannot be sacrificed for... the extractive industry.**
>
> **CARLO CONSTANTINI, FORMER MEMBER OF THE ABRUZZO REGIONAL COUNCIL**[3]

The threat of an offshore oil rig so close to the coast sparked immediate opposition. The local Catholic Church, several coastal municipalities, the province of Chieti, tourist operators, wine-growers, doctors, fisherfolk, environmental groups and many others opposed the project. Concerns were varied, including those related to disturbance of the fragile eco-system and wildlife (due to the drilling, constant noise pollution, potential oil spills etc), people's health (because of the release of toxic bi-products from oil extraction), earthquake risks, the future of tourism and the project's incompatibility with the local fishing industry.[4]

Under the "No Ombrina" slogan, thousands took to the streets in Abruzzo against the proposed oil rig. In May 2013 40,000 people protested in the city of Pescara. The demonstration was supported by numerous civil society groups, 3 dioceses, staff of 3 national parks, 47 local municipalities and by people across the region. In May 2015 60,000 citizens marched in Lanciano, a town whose population is about half that size. According to Matteo Cernison from the European University Institute "the entire regional society seemed to be mobilised against Ombrina".[5]

> **What are you going to tell your kids, your families? That you made money by bullying a peaceful community? That you don't give a damn about climate change and that while the entire planet is talking about keeping fossil fuels in the ground, you have the gall to come to a foreign country and forcefully drill?**
>
> **MARIA D'ORSOGNA, NO OIL ABRUZZO CAMPAIGN, IN AN OPEN LETTER TO ROCKHOPPER INVESTORS**[6]

The pressure worked. One politician after another, from across the political spectrum, spoke out against Ombrina Mare. In December 2015 the Italian Parliament approved a ban on oil and gas projects within twelve nautical miles of the Italian coast.[7] Ombrina Mare – like other offshore fossil fuel projects – was thus outlawed. In February 2016, the Ministry of Economic Development told Rockhopper that it would not receive the required production concession.

Public money to compensate for hypothetical private profits

Rockhopper had bought the Ombrina Mare license in the midst of mounting rage against the project in the summer of 2014 (via a takeover of Mediterranean Oil & Gas, the previous license holder). So, the company must have been well aware that the project not only lacked several approvals, but also suffered from a lack of public and political support.[8] And yet, Rockhopper announced in March 2017 that it had challenged Italy's refusal to grant the concession in an arbitration tribunal and had "strong prospects of recovering very significant monetary damages... on the basis of lost profits."[9]

According to the company's boss, Rockhopper is not just claiming compensation for the money which it actually spent on exploring Ombrina Mare (US$40-50 million). It also wants an additional US$200-300 million for hypothetical profits the oil field could have made had it not been banned.[10] While many countries' constitutions do not consider anticipated profits to be protected private property, in investor-state disputes companies regularly receive compensation for alleged lost future profits.[11]

> **"We've initiated arbitration proceedings to claim... at least all of the costs spent... which is in the region of 40 to 50 million dollars, but ideally (also) the profits, that we would have made had we been able to develop the field.... The lost profits might easily add up to 200 or 300 million dollars.**
>
> **SAM MOODY, ROCKHOPPER CHIEF EXECUTIVE**[12]

The company's legal costs are fully funded by UK litigation funder Harbour, who will cash in a share of the eventual award (see box 12 on page 64 for more information on such funding arrangements). In the words of Sam Moody, Rockhopper Chief Executive: "That process is costing us nothing."[13] The fact that the claim is backed by a deep pocketed financier however, might well put extra litigious heat on the government to settle the case – and drive up the costs to Italian taxpayers.

Dirty Energy's secret weapon to undermine the energy transition

Rockhopper's lawsuit is based on the Energy Charter Treaty (ECT, see box 11 on page 58), even though Italy had withdrawn from it before the suit was filed. This is possible because of the deeply anti-democratic 'survival', or 'zombie', clause in investment agreements, which allows the corporate privileges to live on even after a country has withdrawn from the agreement. For any investments made before Italy's ECT withdrawal took effect (1 January 2016) it can still be sued for twenty years (until 1 January 2036). So, despite having exited the ECT, Italy could still be subject to many more Rockhopper-style legal attacks.

Indeed after Italy temporarily suspended new oil and gas permits in February 2019, lawyers who make money through investment arbitrations actually advertised Rockhopper's claim as a "benchmark for future cases" by other fossil fuel companies.[14]

> **"Providing fossil fuel corporations with ISDS... is akin to handing your opponent extra weapons and ammunition before stepping onto the battlefield.**
>
> **KYLA TIENHAARA, QUEEN'S UNIVERSITY, CANADA**[15]

Investor-state dispute settlement (ISDS) is thus clearly a powerful tool in the hands of big oil, gas and coal companies to discourage governments from transitioning to clean energy. Climate scientists agree that three quarters of the world's fossil fuels need to stay in the ground if we do not want to destroy the planet.[16] But governments which halt dirty coal pits, gas pipelines or oil rigs in response to these concerns could be held liable for millions, if not billions, in damages – for decades to come.

BOX 11

Meet the world's most dangerous investment agreement: the Energy Charter Treaty (ECT)[17]

The ECT is an international agreement from the mid-1990s, which applies to around 50 countries stretching from Western Europe through Central Asia to Japan. Under the treaty foreign investors can sue governments over measures taken in the energy sector that they consider harmful to their profits.

For example, Swedish energy giant Vattenfall has sued Germany over environmental restrictions on a coal-fired power plant. The company's second claim against Germany – a €6.1 billion challenge to the country's exit from nuclear power – has been going on since 2012 and had, by April 2019, led to over €16.6 million in legal defence costs for German taxpayers.[18] In April 2019, a Swiss company behind the controversial Nord Stream 2 gas pipeline from Russia to Germany threatened to file the first known ECT claim against the EU, which is also a party to the treaty.[19]

Globally, no trade and investment agreement has triggered more investor-state lawsuits than the ECT. In May 2019, a total of 122 corporate claims under the ECT were known of publicly.[20] Given the opacity of the system and the lack of public information, the actual number could potentially be much higher.

Worryingly, in spite of its risk to public budgets and governments' policy space to protect people and the climate, many countries in Africa, the Middle East, Asia and Latin America are in the process of signing up to the ECT with its dangerous investor privileges.

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p55 (background) Maury, (foreground top) Histonium.net, (foreground bottom) Nuovo Senso Civico
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3.10 GOLDEN PROFITS UNDERMINE PEOPLE'S RIGHT TO CLEAN WATER

ECO ORO VS COLOMBIA

In February 2016, after massive local protests, Colombia's Constitutional Court put the final nail in the coffin of a huge gold mining project by Canadian company Eco Oro: the court decided that no extractive activities could take place in the high-mountain ecosystems known as páramos, including the Santurban páramo where Eco Oro had its project. Less than a month later, the company told the government that it would file an investment arbitration lawsuit. Even worse, the US$764 million claim by Eco Oro seems to have triggered a whole string of investor attacks.

"Our gold is our water" and "water before gold"[1] were key slogans of the 40,000 strong demonstration against the mining project in the páramo of Santurban which took place in February 2011 in Bucaramanga, Santander region. It was part of a long struggle by Colombians opposing large-scale gold mining and defending their right to clean drinking water.

> **[Mining in the páramos] is a serious abuse of natural resources, and a refusal of the fundamental right to water.**
>
> **COLOMBIAN SENATOR IVÁN CEPEDA**[2]

Páramos are rare high-altitude wetland ecosystems that serve as vital sources of freshwater. Colombia's páramos provide the country with 70 per cent of its drinking water.[3] The Santurban páramo alone is the source of clean drinking water for two million Colombians. But hidden under these fragile ecosystems lie vast reserves of gold, coal and other minerals, the extraction of which is widely acknowledged as a "major cause of pollution of soil and water" in the country.[4]

Mining companies resist government regulation but people power prevails

Canadian mining company Greystar (later renamed Eco Oro) was one of the first multinationals to acquire exploration rights for gold in Colombia in the mid-1990s. Its Angostura mining project was close to the páramo of Santurban, where exploration and feasibility operations were undertaken for several years.[5] The fragility and ecological importance of the páramos had not yet been officially recognised by the Colombian government.

This changed in 2010, when the first laws to restrict mining in the páramos were enacted. At first, Eco Oro and other companies found ways to get exemptions from the laws, advancing their mines in what had by then become environmental preservation zones.[6] But in 2016, the Constitutional Court struck down all exemptions to the ban on mining in protected areas.[7] At the time, Eco Oro had not received all required permits for its operations, let alone started exploiting the gold. Moreover in 2011 Colombia's Ministry of Environment had even rejected the company's impact assessment.[8]

> **Environmental protection prevails over economic rights acquired by private persons... when it is proven that the activity causes harm, or when there is reason to apply the precautionary principle to avoid harm to non-renewable natural resources or to human health.**
>
> **CONSTITUTIONAL COURT OF COLOMBIA**[9]

The constitutional case was a key victory during a long period of resistance by citizens, NGOs and academics, led by the Committee for the Defense of Water and the Santurbán Páramo, an umbrella organisation of 40 groups, which represents 75,000 people.[10] For the mining industry, it was a major defeat, not least because the court had categorically declared that "public interests supersede private interests", as one gold company later complained.[11]

"Water over profits" rules Colombia's top court, but Eco Oro asks investment lawyers for a second opinion

The industry fought back immediately. Eco Oro sued Colombia via the investor-state dispute settlement (ISDS) mechanism in the Canada-Colombia trade agreement, thereby bypassing Colombian courts. The lawsuit was filed in 2016 at ICSID (International Centre for Settlement of Investment Dispute), the arbitration centre of the World Bank.[12] According to UN data, the company is claiming US$764 million in compensation[13] – more than three times the US$250 million which it allegedly spent to develop the project.[14]

The company argues that the measures taken by the government "destroyed the value of its investments" and frustrated its "legitimate expectations".[15] The reality however is that the Greystar/Eco Oro project was troubled from the beginning. The exploration phase took until 2004, with an impasse in operations from 1999 till 2003. The construction of the mine and its actual exploitation was meant to start in 2008, but it never happened.[16] The mining site was always controversial, and faced increased resistance as the years passed by. In fact, already in 2010, it seemed clear that the government would not grant the environmental license needed to proceed with the exploitation of the mine. Officials from the State Attorney General's Office deemed that "in view of the applicable environmental and mining legislation, this is a nonviable project."[17]

> **"States should not be sanctioned for protecting their water sources, given that they are doing so in accordance with national and international obligations.**
>
> **CARLOS LOZANO ACOSTA, INTERAMERICAN ASSOCIATION FOR ENVIRONMENTAL DEFENSE (AIDA)[18]**

The arbitrators who will decide the case, like in many others, are not interested in hearing those affected by the mining project. In 2019 they rejected a request from the Committee for the Defense of Water and the Santurbán Páramo and allied organisations to provide evidence on how the case could impact on human rights.[19]

The World Bank's conflicts of interest

A World Bank tribunal will decide whether Eco Oro's rights have been violated. But the World Bank's private investment division, the International Finance Corporation (IFC), was a key shareholder in Eco Oro's mine between 2009 and 2015, before it disinvested from the project[20] after civil society investigations proved that it had failed to consider the environmental and social impacts of the mine, a requirement for IFC investments.[21] While financially backing the project, the Bank had claimed that mining in the páramos could "bring substantial benefits and promote sustainable development" in the region.[22]

> **From a judicial perspective, there is a clear conflict of interests. It is difficult to see how in this situation an investment arbitration tribunal can make an objective and independent evaluation of the measures taken by a country to protect the public interest.**
>
> **COLOMBIAN LAWYER MARCO VELÁSQUEZ-RUIZ, SPEAKING ABOUT THE WORLD BANK'S FINANCIAL SUPPORT TO ECO ORO[23]**

As if that wasn't bad enough, Eco Oro's lawsuit is bank-rolled with a US$14 million cash injection from Wall Street private equity firm Tenor Capital. In exchange for a share of the final award, Tenor covers Eco Oro's legal costs. This has not only enabled the company to file the case, but will also provide the financial means to put significant extra litigious pressure on Colombia.[24] (see box 12 on page 64 for more on these kind of funding arrangements).

A flood of cases against Colombia

In 2018, two more Canadian mining companies, Red Eagle Exploration[25] and Galway Gold,[26] filed arbitration cases for similar reasons to Eco Oro. The cases are part of a recent flood of 11 known investor-state lawsuits which have hit Colombia between 2016 and 2018, most of them triggered by recent trade and investment treaties with Canada and the US. Until then, Colombia had not been the subject of investment arbitration attacks, but as we have seen already, one case seems to inspire more, as the word spreads among companies and highly paid investment lawyers about potential rich pickings in impoverished countries which do not have the resources to fight off attacks from multiple well-resourced companies.

BOX 12

How third-party funders make millions by betting on investment disputes

Third-party funding (TPF) of investment lawsuits is a growing and highly contested business. A funder – most frequently an insurance company, investment bank or hedge fund – covers the investor's costs for lawyers and legal proceedings in exchange for a sizeable cut of the profits if the case is won. Typically, a funder will take between 30 to 50 per cent of the final award, or three to four times the amount it invested.[27] These funders mostly invest in cases when the expected outcome is at least US$14 million.[28]

This betting on cases has proven highly lucrative. For example, take Tenor Capital, the funder of Eco Oro and Gabriel Resources' lawsuit against Romania (see chapter 3.1). This Wall Street hedge fund invested US$62.5 million in an investor lawsuit against Venezuela "in return for 70.5% of the 'net'... award after payments to creditors and tax authorities".[29] Tenor hit the jackpot when Venezuela was ordered to pay out US$1.4 billion.

Likewise, in 2017, litigation funder Burford Capital cashed in more than US$100 million when Argentina was ordered to pay US$320 million in a case taken by an airline company. The fund had spent US$12.8 million to pay part of the investors' legal fees, so Burford's gains represent a 736 per cent return on its investment.[30]

This type of speculative funding is likely to inflate the number of investment arbitration lawsuits being taken, as it removes the financial risk for companies of an expensive claim, making it more attractive and viable for businesses to sue.

> **Third party funding gives a small class of investors even more resources to pursue unbalanced claims against constrained states.**
>
> **FRANK J. GARCIA, PROFESSOR & DEAN'S GLOBAL FUND SCHOLAR, BOSTON COLLEGE LAW SCHOOL[31]**

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4

STILL ROLLING OUT THE RED CARPET

THE EU'S ISDS PUSH FOR VIP CORPORATE PRIVILEGES

Despite the many ISDS-related injustices raised by the cases in this report, including in a number of European countries, the European Union (EU) wants to include broad ISDS-style corporate privileges in its trade deals with the rest of the world. It is also pushing for a World Court for Corporations to decide future investor lawsuits against states. The stories presented here, however, should serve as a strong warning of the dangers of such a corporate dream come true – as any of these cases would still be possible under the EU's revised ISDS system.

In stark contrast to public opinion on the issue,[1] the EU is a major champion of ISDS. It has finalised, or is negotiating, several trade and investment deals which include these far-reaching legal privileges for foreign investors (albeit under a new name: Investment Court System or ICS).[2] In the context of ongoing global discussions about reforming ISDS, the EU also launched proposals to establish a new World Court for Corporations, formally known as the Multilateral Investment Court. This global court would rule on investor claims arising under future and existing investment treaties, for countries that acceded to it.[3]

Compared to the current ISDS regime, which we have seen in action in the ten cases in this report, the EU's proposals contain a number of procedural improvements. For example, legal proceedings would be open to the public (rather than secretive as they frequently are today). The arbitrators deciding the lawsuits would be chosen from a pre-determined list agreed upon by the state parties to the investment agreement (and thus no longer hand-picked by the parties to the dispute, reducing some, but not all, concerns about their bias). The proposed Multilateral Investment Court would be staffed by permanent judges with a fixed salary paid for by member countries, compared to the current ad hoc panels of for-profit arbitrators whose earnings increase the more investors sue states – a strong financial incentive to side with the only party that can bring such claims, ie foreign investors.

> **"The Multilateral Investment Court would transform... ISDS from an ad-hoc mechanism to a standing mechanism, risking to create new privileges and 'rights' for foreign investors.**
>
> **INTERNATIONAL TRADE UNION CONFEDERATION**[4]

ISDS attack #1 Lawsuits against decisions that protect the public interest

The EU's revised ICS approach recognises the same wide-ranging 'substantive' rights for investors as in existing treaties, which have been the legal basis for investor attacks against legitimate government decisions to protect the environment, health and other public interests. Therefore, ICS – like the proposed Multilateral Investment Court, which will not change or reduce the 'substantive' investor rights either – is likely to pave the way for more attempts by investors to undermine public interest decisions, like the ones narrated in this report.[5]

> **"This doesn't change anything because the standards on the basis of which judgements are rendered remain the same.**
>
> **NIGEL BLACKABY, ARBITRATION LAWYER WITH FRESHFIELDS LAW FIRM, ON THE EU'S ICS PROPOSAL**[6]

However aside from these procedural improvements, the EU's corporate rights approach does not resolve the deep-seated problems with ISDS. The system remains one-way, with only rights and no obligations for investors. It will continue to allow thousands of companies to circumvent national courts and sue governments via a parallel justice system, if laws and regulations undercut their ability to make money. It would still pave the way for billions of taxpayer's money to be paid to big business. It could still curtail much-needed public interest policymaking to protect people, communities, public health and the planet. And it could still lead to rulings that directly contradict and undermine human rights and environmental law, or effective policies to avert climate chaos.

An analysis of the EU's approach through the lens of five common 'ISDS attack patterns' seen in the cases presented here shows that under the new cover of the ICS and the Multilateral Investment Court, there is still the same old ISDS crusade against citizens and in favour of corporate interests.

One example of a particularly dangerous investment protection standard included in the EU's ICS approach, is the right to "fair and equitable treatment". Amongst other things, it protects investors from "arbitrariness" and "abusive treatment… such as coercion", as well the "legitimate expectation" of an investor.[7] While this may sound innocent, the lawsuits described in this report have been built on these very concepts. For example, in its ISDS threat against Colombia, Novartis argued that the government had violated the company's "legitimate expectations" that patent rules would not change (chapter 3.2). In its suit against Romania, Gabriel Resources describes delays in the permit process for its Roşia Montană gold mine as a "coercive… abuse of power" and the involvement of the Parliament in the process as "arbitrary" (chapter 3.1).[8] In the Copper Mesa case the arbitrators found that Ecuador had violated the fair and equitable treatment standard, because it had not assisted the mining company in its consultations with the local community (chapter 3.7).[9]

Nothing in the ICS system would stop tribunals from ordering compensation to corporations for new laws and regulations in the public interest either. Quite the contrary: while the ICS text on the right to regulate states that countries cannot be ordered to compensate investors for withdrawing subsidies, it does not rule out such orders for regulations "to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity".[10] In other words, the EU, its member states and trading partners will be free to regulate as they wish – but like in the cases portrayed in this report, any new law or regulation could potentially cost them billions in taxpayer money somewhere down the road, as investors continue to have the right to demand compensation.

ISDS attack #2
Legal backdoor assaults on court decisions

Courts have played an important role in the cases described in this report. The luxury golf resort in the city of Dubrovnik in Croatia (chapter 3.3) and the toxic Roşia Montană gold-mine in Romania (chapter 3.1) were both halted after domestic courts found that permits had been granted illegally. In Colombia, several mines were stopped when the Constitutional Court banned extractive activities in the parámos ecosystem (chapter 3.10). All these rulings, which aimed to tackle administrative abuse or to protect the environment, are now being sidelined and potentially undone by ISDS tribunals.

Such legal backdoor attacks on domestic court rulings would still be possible under the EU's ICS approach. It would allow foreign investors to challenge everything and anything that sovereign nations do, including performing the most basic democratic functions of governance: companies could legally question laws passed by Parliaments, actions by governments and court rulings that allegedly harm investments.[11] An ICS tribunal – and the future Multilateral Investment Court – would be able to overrule all EU member state courts, the European Court of Justice and the courts in EU partner countries, if it found that one of these courts' rulings violated the far-reaching substantive investor rights (see ISDS attack #1). But unlike these national courts, ICS tribunals and the Multilateral Investment Court would be accessible only to foreign investors. And their sole purpose would be to protect investments and profit expectations.

> **"The EU's reformist idea concerns predominantly the institutionalisation of the system.**
>
> **IVAYLO DIMITROV, ARBITRATION LAWYER WITH ARNOLD & PORTER KAYE SCHOLER LAW FIRM**[12]

ISDS attack #3
Corporations claiming compensation for loss of imagined future profits

In ISDS challenges, investors often claim damages not just for the money that they allegedly spent on a project, but also for lost future profits: Rockhopper wants up to US$350 million from Italy – more than seven times the money spent on exploring the Ombrina Mare oil field (chapter 3.9); Razvoj Golf and Elitech claim US$500 million from Croatia – nearly four times the money invested in the Dubrovnik luxury golf resort (chapter 3.3); Eco Oro demands US$764 million from Colombia – over three times more than it spent on the Angostura gold project (chapter 3.10); and Gabriel Resources wants a staggering US$5.7 billion from Romania – eight times more than its alleged investments in the Roşia Montană mine, and a figure equivalent to 2.7 per cent of Romania's gross domestic product (chapter 3.1).

Nothing in the EU's recent agreements which include the ICS corporate rights would prevent or even temper such outrageous claims. While the EU-Canada trade deal CETA, for example, states that "monetary damages shall not be greater than the loss suffered by the investor",[13] arbitrators regularly consider expected future profits as part of such a "loss" and thus include this in the calculation of compensation. Clear text explicitly stating, for example, that compensation may not exceed the amount of capital invested by the company involved, is missing in both the EU's recent investment protection agreements as well as its Multilateral Investment Court proposal.

This context puts a "huge price tag" on political decisions, as investment law expert Gus van Harten put it[14] – and makes it potentially very costly for politicians to change course on policy issues or bring in new legislation in response to public demand. In turn such a system also creates a strong risk of regulatory chill, as we have seen in the case of the French law aiming to end dirty

fuels (which was turned into its opposite after Vermilion's ISDS threat, chapter 3.5), Colombia's attempt to break the patent monopoly on a cancer drug to reduce its price in the interest of public health (which was abandoned after an ISDS threat from Novartis, chapter 3.2) and in the case of the Roşia Montană gold-mine in Romania (where the government, after being hit by a multi-billion ISDS claim, now appears to be rolling back on halting the project, chapter 3.1).

The EU even encourages such regulatory chill: its trade deals state that investment tribunals "shall reduce the damages" when there has been "a repeal or modification of the measure" at stake.[15] In other words: if states give in quickly to corporate demands, and roll back attempts to legislate in the public interest, they will be rewarded by the ICS system with less punitive damage awards.

> **The value of third-party funding to actors other than funders and some claimants has not yet been made clear, while the risks are increasingly apparent.**
>
> **BROOKE GUVEN AND LISE JOHNSON, COLUMBIA CENTER ON SUSTAINABLE INVESTMENT**[16]

ISDS attack #4
Rich financiers speculate on injustice by funding ISDS claims

Half of the ISDS cases in this report feature third-party funding. The lawsuits of Kingsgate vs Thailand (chapter 3.4), Copper Mesa vs Ecuador (chapter 3.7), Gabriel Resources vs Romania (chapter 3.1), Rockhopper vs Italy (chapter 3.9) and Eco Oro vs Colombia (chapter 3.10) are all financed by speculative funders, who cover the claimant's legal costs in exchange for a sizeable cut of the payout if the case is won.

Third-party funding has been criticised as an "exploitation mechanism" which "gives a small class of investors even more resources to pursue unbalanced claims against constrained states".[17] While proposals to ban such funding of ISDS claims are gaining traction, the EU's recent agreements with countries like Canada, do not ban it, simply requiring the disclosure of such funding arrangments.[18] The EU's negotiation mandate for the Multilateral Investment Court is also completely silent on the issue.

In other words: the speculation on injustice will continue under the EU's ICS approach, seeing funders with extremely deep pockets fuelling and enabling speculative investor claims and driving up defence costs for states, who have no equivalent funding mechanism. The only difference will be that the public will know a little bit more about the funding arrangements for such claims.

ISDS attack #5
No acknowledgement of affected communities, no place for human rights

One of the most fundamental problems with ISDS is that it is a one-way system that provides only rights to investors, with no balancing obligations. Affected communities cannot use it to sue companies that violate their human rights or cause them financial or other damage, and as we have seen they do not even have the right to be heard in the ISDS system. This grave injustice does not change whatsoever in the EU's proposals.

Several communities affected by the issues which are the subject of the ISDS disputes in this report attempted to be heard in the proceedings – but to no avail. Arbitrators have turned down requests by communities close to the Santurbán mine in Colombia (chapter 3.10) and the Roşia Montană mine in Romania (chapter 3.1) as well as by indigenous peoples living on ancestral land at the heart of two disputes against Zimbabwe (chapter 3.6). These communities documented and offered evidence of human rights violations by the claimant companies, and of how certain tribunal decisions could further violate their rights. But the arbitrators found human rights to be inapplicable and irrelevant to the disputes, and denied the petitioners the right to make their arguments.

The EU proposal for a Multilateral Investment Court mentions the "possibility of submitting third party interventions", a strikingly non-committal clause.[19] The ICS rules in recent EU trade deals, too, allow for "amicus curiae briefs" by "non-governmental persons".[20] But the conditions governing such submissions are extremely restrictive (for example, a brief would have to be sent to the tribunal within 10 days of its establishment – a completely unrealistic deadline), making the procedures seem almost deliberately designed to be impossible for communities to follow. And, as under the existing agreements which enabled the cases in this report, the arbitrators are in any case not obliged to even deal with the arguments sent to them by impacted communities.[21] The EU approach is thus far from anything close to full participation of affected communities in ISDS proceedings, or from holding investors accountable for their human rights abuses – the kind of meaningful ISDS reforms that are required, and have been proposed by numerous academics and UN human rights experts.[22]

> **"The current reform proposals, which are limited in scope and nature, can only offer superficial solutions to symptoms of the fundamental flaws in the ISDS system.**
>
> **AN OPEN LETTER ON ISDS BY INDEPENDENT UN HUMAN RIGHTS EXPERTS**[23]

What is more, there is no mention of human rights anywhere in the EU's investment protection provisions, or in its proposal for a Multilateral Investment Court. Formulations that would make it clear that investor rights must not trump human rights, or that exclude ISDS claims that challenge laws in the public interest are missing, too. Disappointingly, and despite public outcry across Europe, the EU's revised approach to ISDS changes very little when it comes to tackling the negative effects that it can have on human rights.

The ISDS wolf in the ICS sheep's clothing

We cannot know how potential future ICS claims against the EU, its member states or trading partners would be decided – or how a Multilateral Investment Court would rule. But it is nevertheless pretty clear that the investor rights as proposed by the EU would not prevent cases like those presented in this report from being filed in the future. The name change from ISDS to ICS and the Multilateral Investment Court have not led to the much-needed paradigm shift away from VIP legal rights for the rich. Instead the EU's procedural improvements amount to little more than putting a sheep's disguise on the ISDS wolf that still lurks beneath.

> **If domestic courts are good enough for the rest of society, why are they not suitable for corporations?**
>
> **GUY TAYLOR, GLOBAL JUSTICE NOW**[24]

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CONCLUSION: TIME TO END RED CARPET COURTS

The 10 stories in this report describe how the rich and powerful sue countries all over the world using VIP courts. The case studies documented raise serious questions about the legitimacy and fairness of a parallel legal system for corporations. These stories are not isolated or one-off cases. They show that ISDS – and its re-branded EU format – creates significant and systemic public risks, without any corresponding benefits to society. The stories expose the threat that ISDS poses to democracy, public budgets, the integrity of host states' judicial systems and to basic human, social and environmental rights. It is time to end all forms of red carpet courts, and put people's interests ahead of corporations' profits.

ISDS is often seen as an impenetrable, distant international legal system, disconnected from local and national realities. But this report shows that in fact the opposite is true. ISDS profoundly impacts on local and national issues, including undermining basic human and environmental rights, and key principles of democracy.

Ensuring affordable cancer medicines; laws to keep polluting fossil fuels in the ground; preventing environmental destruction in some of the world's most biodiverse regions and in national heritage sites; protecting key sources of drinking water; correcting colonial wrongs by granting people access to their ancestral lands; a fair taxation of corporate profits; and stopping a luxury real estate project that would benefit a few at the expense of many. These are the issues that this report deals with. And these are the type of measures that investment arbitration lawsuits attack regularly.

This report's 10 ISDS stories are a testimony of some of the biggest injustices perpetrated via the ISDS VIP parallel justice system – and show why we must end these corporate courts now.

Injustice 1
Red carpet courts undermine successful community struggles

Local communities have stopped toxic mines in Romania, Thailand, Ecuador and Colombia, as well as a controversial luxury real estate project in Croatia. Communities struggled for access to their ancestral lands in Zimbabwe, and pushed the Italian Parliament to ban drilling for oil near the country's coast. Colombia's attempts to lower the price of a life-saving blood cancer drug, and the proposed French law to end fossil fuel extraction, too, were demanded by public health and climate movements. But ISDS has been used to challenge and undermine these gains by communities and the general public, or to make governments bleed financially for acting in the public interest.

Injustice 2
Red carpet courts overrule national courts and reward investors that have violated the law

In ISDS tribunals, investors have challenged judgements in national courts rendered with a view to safeguard the public interest. The ISDS cases against Romania, Colombia and Croatia described in this report sideline, and potentially override, decisions by domestic courts that aimed to protect communities and the environment.

Furthermore, any foreign investor, regardless of whether its investment and activities contribute to sustainable development and respect national and international laws or not, can use ISDS tribunals against a host State. The cases against Romania, Ecuador, Thailand and Croatia show that in spite of illegal behaviour or violent corporate conduct by investors (including shooting at communities), they were still able to sue governments and demand millions, sometimes billions, in compensation from public budgets. While investors cannot be held to account for their actions under ISDS, they can sue states, even when they have been found to violate a country's laws and have not even fulfilled minimal obligations such as securing the prior and informed consent of the communities living in the area where their investment is taking place.

Injustice 3
Red carpet courts can punch billion dollar holes into public budgets

This report has documented the many astounding claims for damages and compensation made by investors through ISDS, and the often exorbitant amounts awarded by tribunals; a US$ 24 million damages order against Ecuador; a US$65 million award against Zimbabwe (which could climb to US$169 million if the government does not evict indigenous communities from the land claimed by the investors); ongoing cases against Croatia, Italy and Colombia demanding several hundreds of millions of dollars; ISDS claims against Vietnam and Thailand where the amounts claimed are not even public, but which are likely to be financially crippling for these countries' budgets; a shocking US$5 billion ISDS claim against Romania – the equivalent of nearly three per cent of that country's GDP; and oil corporations suing to prevent Vietnam from claiming taxes.

Under ISDS governments can be forced to pay out millions and sometimes billions in taxpayers' money to compensate corporations, including for imaginary future profits. The total amount of money which states have thus far been ordered or agreed to pay in publicly disclosed ISDS rulings and settlements is US$88 billion.

Injustice 4
Red carpet courts can deter government action in the public interest

As we have seen in this report, several cases show the chilling effect that ISDS threats can have on government officials' decisions to advance key public interest legislation, or bring corporate mega projects in line with social and environmental regulations. Facing the threat of multi-million- or even billion dollar lawsuits, France reversed the content of a law that was designed to combat climate change; Colombia weakened a policy on access to medicine for cancer patients; Romania is preparing a new mining law that might make an illegal mine possible again, and has withdrawn an application to designate the area as a protected World Heritage Site; and the Croatian government has re-issued permits that were previously declared illegal by the country's courts. The use of ISDS to stall key legislation in the public interest is one of the biggest hazards of this system.

Injustice 5
Red carpet courts threaten environmental protection and climate justice

In many of the stories documented here, investors have consistently challenged environmental protection measures. An oil and gas company threatened to sue the government of France for attempting to rein in the extraction of dirty fossil fuels – a much needed step to to avert climate chaos. Mining corporations which were ready to release tonnes of cyanide, allow leaks of toxic waste, or contaminate unique forests and sources of fresh drinking water, have sued Romania, Thailand, Ecuador and Colombia after their governments intervened to stop these toxic projects. The Italian ban on oil and gas drilling near the country's coast is also being challenged, and the lawsuit is used as a sword of Damocles to keep the current government from enacting more ambitious action on dirty fossil fuels.

Injustice 6
Red carpet courts undermine human rights

ISDS is not just incompatible with environmental protection and climate justice, it is also a further assault on the already weak legal protection of communities who are seriously affected by investors' projects. In the case against Zimbabwe, the arbitrators have ordered the government to evict thousands of indigenous families from their ancestral land. In Romania, hundreds of villagers might be displaced and have their houses destroyed, to avoid a multi-billion dollar payout. In Ecuador, the community of Junín, which is located in one of the most biodiverse forests in the world, were facing eviction from their land to make space for an open-pit copper mine until the government halted the project.

For these and other reasons, some countries have started to exit ISDS systems, by terminating or not renewing their bilateral investment treaties, or even leaving large investment agreements such as the Energy Charter Treaty (see image 3 on page 10), notably without experiencing any of the often threatened dire consequences for their economy or Foreign Direct Investment (see box 2 page 11). Thus it is clear that despite claims to the contrary from its supporters, ISDS was never about bringing in investment to countries, but more about circumventing democracy and undermining environmental and human rights, to benefit corporations and rich individuals.

Some countries, mostly European, alongside the EU itself, have recently turned to spin and public relations tricks to try to save the red carpet court system. They are trying to rename, re-brand and repackage the ISDS system as the EU's proposed Investment Court System (ICS) and the Multilateral Investment Court. But under these supposedly 'new' ISDS regimes, lawsuits which directly attack government and court decisions to protect the public interest would still be possible, with little consideration for human and environmental rights. And corporations could still claim billions from states for lost future profits.

There is no possibility of a 'better' reformed ISDS, because the entire system has created a structure of impunity, which only benefits rich individuals and corporations. For democracy and justice to thrive, the only solution is for countries to dismantle the red carpet courts. Instead, governments should prioritise the public interest and introduce rules that enable communities and states to hold investors and corporations accountable for their damaging impacts and human rights violations.

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RED CARPET COURTS

10 STORIES OF HOW THE RICH AND POWERFUL HIJACKED JUSTICE

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