



Challenging Corporate Capture within International Trade and Investment Settlement Mechanisms

Summary

International trade and investment dispute settlement mechanisms, namely the World Trade Organization (WTO) dispute settlement mechanism and the investor-state dispute settlement (ISDS) system established through International Investment Agreements (IIAs), have enormous power in shaping rules and practices of trade and investment, both at the national and international level. They also impact States' ability to legislate and regulate in the public interest. However, the processes by which these mechanisms have been developed, the rules they have created, and decisions made are opaque and often dominated by powerful corporate interests to the detriment of working people, the environment, democratic governance, and human rights.

There is an urgent need to generate awareness on the extent of corporate capture of the international trade and investment rule-setting bodies and the negative impacts it has on human rights. Such awareness is a critical first step in reforming the structure and operation of trade and investment dispute settlement bodies. This project therefore aims to **raise awareness among civil society organizations, the media, and policy makers regarding the extent and impacts of corporate capture of international trade and investment dispute settlement mechanisms**. Ultimately, the project seeks to contribute to the establishment of international trade and investment dispute settlement mechanisms that are transparent, inclusive, equitable, and rights-based.

Background

The WTO dispute settlement mechanism and ISDS are two dominant mechanisms for resolving trade and investment disputes. Whereas the WTO allows member States to bring complaints against another State for alleged trade violations (state to state dispute settlement), the ISDS system grants foreign investors the ability to sue national governments directly in an international forum for breaching the terms of the underlying investment agreement.

Decisions of the WTO dispute settlement mechanism and ISDS tribunals are both binding on the parties and carry weight on subsequent cases, giving these two mechanisms quasi-judicial power to shape international rules on trade and investment. **And yet, these mechanisms operate unconstrained by democratic processes and oversight. In fact, large corporations have had significant influence in both the creation and operation of these mechanisms.**

Traces of corporate influence can be found at the structure of the ISDS system—it grants foreign investors a one-way right to sue the State, bypassing national law and courts, but disallows the host government, domestic investors, or the communities whose human rights or environmental rights are negatively impacted to bring a case against the foreign investor under ISDS. ISDS procedures are also

captured by corporate interest as arbitration tribunals consist of three private attorneys who often rotate between bringing claims on behalf of corporations and serving as panelists adjudicating cases. The proceedings are often non-transparent, as there are no mandatory requirements for the tribunals to publish the decisions.

On the WTO level, powerful corporations and trade associations exert great influence directly over the WTO Secretariat that facilitates the trade dispute settlement process, as well as through a few dominant governments.¹ Corporations are heavily involved in which cases States bring to the WTO as well as the outcome of these cases.

The decisions made by these dispute settlement bodies have significant implications on domestic laws, placing restraint on States' ability to raise social and environmental standards or legislate in the public interest in general. For example, WTO and ISDS tribunals have very rarely ruled in favor of States' right to regulate in the public interest, which is allowed under the general exception clauses embedded in WTO law and most international investment agreements. Professor David R. Boyd at Simon Fraser University noted that ISDS tribunals have "ignored or narrowly interpreted these provisions, making them practically useless."² Public Citizen, a U.S. civil society organization, also found that only one out of 40 States' attempts have been successful in evoking such general exceptions to defend domestic legislation under WTO law.³ This evidence demonstrated the chilling effect the WTO and ISDS has on government action to legislate or enforce existing laws in the public interest, which implicates human rights and environmental concerns.⁴

Recently, new political challenges to global trade and investment regime have emerged and States have started re-thinking alternatives to the existing framework. In response to the growing criticism of the ISDS system, for instance, the European Commission has launched a public consultation for the creation of a Multilateral Investment Court (MIC) as an alternative investor dispute resolution forum, and many are intending to use WTO dispute settlement mechanism as a prototype for the new court. However, the proposed structure for the MIC suggests that it might just be another avenue for corporations to capture democratic governments, serving to further embed and re-legitimize investor to state arbitration. Additionally, the establishment of the MIC would still give primacy to international investment treaties and international contracts over other international and domestic laws that are often directly relevant to the disputes at hand, such as those relating to human rights, labor, and the environment.

¹ *WTO Processes Favor Big Business and Rich Countries*, WHAT'S WRONG WITH THE WTO?, <http://users.speakeasy.net/~peterc/wtow/wto-biz.htm> (last visited June 12, 2017).

² David R. Royd, *Don't Let Trade Deals Hamper Climate Progress*, THESTAR.COM, January 11, 2016 <https://www.thestar.com/opinion/commentary/2016/01/11/dont-let-trade-deals-hamper-climate-progress.html>.

³ Public Citizen, *Only One of 40 Attempts to Use the GATT Article xx/GATS Article XIV "General Exception" Has Ever Succeeded: Replicating the WTO Exception Construct Will Not Provide for an Effective TPP General Exception*, May 2014, <https://www.citizen.org/sites/default/files/general-exception.pdf>.

⁴ For instance, for fear of a WTO challenge, the U.S. government placed a "stay" to indefinitely delay the implementation of a reporting and monitoring initiative that would increase the transparency and sustainability of the shrimp supply chains, which are fraught with forced labor and human trafficking allegations. *Also see* Julia G. Brown, "International Investment Agreements: Regulatory Chill in the Face of Litigious Heat?", June 27, 2013 <http://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=1067&context=uwojls> (last visited August 1, 2017).

Filling the gaps

Civil society across the globe has been demanding a fundamental overhaul of the trade and investment regime. International human rights experts are expressing concern at the current state of play, particularly in regards to the imbalance between investor protections and the rights of citizens. Former UN Special Representative on business and human rights, John Ruggie, writes: “Investor protections have expanded with little regard to states’ duties to protect, skewing the balance between the two. Consequently, host states can find it difficult to strengthen domestic social and environmental standards, including those related to human rights, without fear of foreign investor challenge[.]”⁵ The United Nations Independent Expert on the promotion of a democratic and equitable international order, Alfred de Zayas, has also been calling attention to the harmful human rights effects of both the ISDS system as well as the WTO. In doing so, he particularly pointed to the failure to sufficiently embed human rights principles into their regulatory framework.⁶

The enormity of the ISDS system has received increased public scrutiny, especially as the number of ISDS claims skyrocketed by over 400 percent since the early 1990s with increasingly high amounts of damages, including for loss of future profits, claimed and granted. Since the announcement of the MIC, many groups have shifted their focus and resources on examining issues related to the new court. However, the discussion concerning the ISDS system, including the MIC, focuses largely on the substantive rules and procedures of the investment protection system itself, such as the contours of the fair and equitable treatment principle or the requirement to exhaust local remedies before filing a case under the ISDS.⁷

Little attention has been given to analyzing the broader trade and investment framework by examining the power dynamics and corporate influence that shape its operation. For example, in recent years, few groups have devoted time and resources to understanding the inner workings of the WTO dispute settlement mechanism, a forum that has significant bearing on ISDS tribunals, and how the two systems interact to mutually reinforce each other’s rulings.⁸ As the dominant institution for trade dispute settlement for more than 20 years, rules and decisions of the WTO dispute settlement mechanism help shape and solidify the investment protection system, which explains why the laws and interpretations

⁵ John Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights, Report by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, para. 34, U.N. Doc. A/HRC/8/5 (April 7, 2008).

⁶ Alfred de Zayas, *Report of the Independent Expert on the promotion of a democratic and equitable international order*, U.N. Doc. A/HRC/33/40 (July 7, 2016).

⁷ General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities states: “States Parties should identify any potential conflict between their obligations under the Covenant and trade or investment treaties, and refrain from entering into such treaties where such conflicts are found to exist, as required under the principle of the binding character of treaties.[...]States Parties cannot derogate from the obligations under the Covenant in trade and investment treaties they may conclude. They are encouraged to insert a provision explicitly referring to their human rights obligations in future treaties, and to ensure that mechanisms for the settlement of investor-State disputes take human rights into account in the interpretation of investment treaties or of investment chapters in trade agreements.” June 23, 2017
http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11 (last visited August 1, 2017).

⁸ See, e.g., *Methanex Corporation v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, para. 6.

developed under these two mechanisms closely track each other. In *Methanex Corporation v. United States of America*, for instance, the ISDS Tribunal stated:

“[T]he Tribunal may derive guidance from the way in which a similar phrase in the GATT⁹ has been interpreted in the past. Whilst such interpretations cannot be treated by this Tribunal as binding precedents, the Tribunal may remain open to persuasion based on legal reasoning developed in GATT and WTO jurisprudence, if relevant.”¹⁰

Similarly, little research has been done to understand how and to what extent the WTO dispute settlement mechanism and ISDS are in fact both captured by multinational corporations, whose interests have increasingly become the biggest driver for their decisions. To propel reform and ensure that trade and investment policy serves equitable and sustainable socioeconomic development, it is not enough to change the legal elements of a rule or tweak the procedural requirements of the dispute settlement mechanism, as the whole framework is tainted by oversized corporate control. To ensure that these institutions truly serve the public, the behind-the-scene corporate influence must be systematically investigated, brought out into the open, and ultimately rejected.

Project Description

The target audience groups of this project, which are also the main drivers for trade and investment reforms, are: (1) trade unions and civil society groups focusing on labor, environmental, and human rights issues (collectively “CSOs”); (2) the media; and (3) policy makers at the national level in the EU and the United States as well as international economic institutions including the OECD, UNCTAD, WTO, UNCITRAL.

The project has identified three specific objectives, each targeting an audience group described above.

- Objective 1: Generate awareness among CSOs of the impact of corporate capture, and activate engagement on formulating concrete proposals to reform the trade and investment dispute settlement bodies.
- Objective 2: Increase understanding among policy makers at national and international levels on the extent and human rights impact of corporate capture, and identify champions for further legislative and policy action.
- Objective 3: Increase engagement with the media to generate and promote public discussion on the impacts of corporate capture of the trade and investment dispute settlement mechanisms.

This project will expose the corporate networks and strategies involved in capturing the decision-making processes and operations of the WTO dispute settlement mechanism and the ISDS system to achieve the overarching and specific objectives by engaging in three streams of work: (1) stakeholder consultation; (2) research and analysis, and distribution of information; and (3) advocacy, education, and outreach.

⁹ The GATT is the predecessor of the WTO.

¹⁰ *Methanex Corporation v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, para. 6.

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