

# THE EU'S DOUBLE AGENDA ON GLOBALISATION:

CORPORATE RIGHTS VS PEOPLE'S RIGHTS



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# INTRODUCTION

The last decades of globalisation have seen corporations expanding across the globe in search for new markets, cheaper labour and lower environmental standards. As economies become more and more intertwined, companies increasingly operate outside their country of origin, often making use of factories and offices in multiple countries in order to assemble a single product.<sup>1</sup>

The main beneficiaries of this development are transnational corporations (TNCs), which have seen their share of profits as a part of global GDP increase by 30% between 1980 and 2013<sup>2</sup> – thereby appropriating over the years an ever-greater share of the wealth produced around the globe. As a result of this process, inequality has risen, large-scale environmental destruction has followed in the wake of the growing trade in commodities such as palm oil or soy, and labour conditions in factories assembling consumer goods and clothes have, in many cases, become shockingly poor. These negative impacts of globalisation are felt particularly hard by people in developing countries.

This expansion of international commerce and the increasing profits reaped from it by corporations have been aided by agreements that facilitate cross-border trade and investment. These agreements enable companies to move their activities to wherever they can maximise their returns, and provide them with extraordinary safeguards if government interventions affect what they consider to be their future profit (see Box B). These agreements also diminish the ability of governments to regulate corporate activities and can therefore hinder their ability to fulfil their human rights obligations to their own citizens.

While trade and investment agreements provide corporations with extraordinary rights that enable them to operate across the globe, companies do not have any binding international obligations regulating their conduct. Communities and workers who are harmed by their operations do not have recourse to an international mechanism through which to hold them accountable. Concurrently, people who resist large-scale projects, such as those carried out by the extractive industry, are increasingly being intimidated, harassed and even killed. In 2017, nearly four human rights and environmental defenders were killed per week, with companies and state security forces often working closely together.<sup>3</sup>

These systematic human rights violations linked to business operations highlight the need for an international grievance mechanism, especially as affected people often cannot rely on their governments to protect their rights. While a number of guidelines and codes of conduct exist, such as the OECD guidelines for multinational companies and the UN Guiding Principles on Business and Human Rights (Box D), these are voluntary and have been rather ineffective in preventing corporate human rights abuses and environmental destruction.<sup>4</sup> Social movements, activists, trade unions and affected people have long been calling for a binding instrument that would make it possible for affected people to hold companies directly responsible for violating human rights.

**The European Union and its Member States are some of the most important actors when it comes to shaping globalisation.<sup>5</sup> This briefing explores the double role the EU plays in this process: spinning a web of treaties that give corporations extraordinary powers while hindering efforts to hold these very same companies accountable. This double agenda is exemplified by the EU's actions in two areas: its reluctance to support binding and enforceable rights for citizens through an UN Treaty on Business and Human Rights (see Box A), while at the same time expanding and entrenching a system of legally binding and enforceable investor rights and privileges that grants corporations extraordinary power over governments and communities (see Box B).**



## BOX A: UN TREATY ON BUSINESS AND HUMAN RIGHTS

In 2013 the Ecuadorian government, together with the government of South Africa, took the initiative in the Human Rights Council of the United Nations (HRC) to propose forming a working group aiming to establish a binding treaty on business and human rights. The aim of this proposal was to finally bring to an end the wide-scale international human rights abuse perpetrated by corporations.

In June 2014 the HRC adopted Resolution 26/9<sup>6</sup>, calling for an intergovernmental working group (IGWG) to establish binding rules for businesses in relation to human rights – a process commonly referred to as the ‘UN Treaty’. This historic decision meant that international human rights law would for the first time apply to the activities of transnational corporations. The ambassador of Ecuador was appointed Chair-Rapporteur, and was charged with leading the process.

The IGWG met in 2015 and 2016 to discuss the scope and nature of the UN Treaty. In October 2017, Ecuador published the ‘Elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights’<sup>7</sup>, which formed the basis for negotiations during the third IGWG session in October 2017. This document outlined the purpose of and the principles underlying the UN Treaty. It elaborated on its scope and obligations, jurisdiction, remedy, international cooperation and mechanisms for promotion, implementation and monitoring.

Ecuador organised four informal consultations between May and July 2018, which focused on the content of the UN Treaty. Based on these consultations, the elements paper from October 2017 and three IGWG sessions (2015, 2016 and 2017), Ecuador published in July 2018 a draft treaty text (the so-called ‘Zero Draft’<sup>8</sup>), which will be negotiated in October 2018 at the fourth IGWG session.

## BOX B: HOW THE ‘CORPORATE RIGHTS’ TREATIES WORK

The enormous privileges and special rights given to foreign investors are established in trade agreements or bilateral treaties that deal only with investment. Taken together they are called International Investment Agreements (IIAs) and usually include two key elements: Rights that are given to foreign investors and a mechanism that allows foreign investors to enforce them. Both elements are highly problematic.

IIAs create an international obligation for a host government to treat a foreign investor in certain ways, by affording a number of rights to the investor. These rights are extremely broad and often go beyond the property rights that national constitutions and legal systems grant. They are also vaguely defined and create a huge amount of uncertainty of what a government is permitted to do under such an IIA. For example, the “fair and equitable treatment” provision has been interpreted in a way that an investor has a right to expect a stable regulatory environment, potentially making any government action that could affect an investor negatively liable for compensation. Similarly, a clause on “indirect expropriation” has been used to stop government action in the public interest.<sup>9</sup> This has hindered governments from fulfilling their human rights obligations towards their citizens.

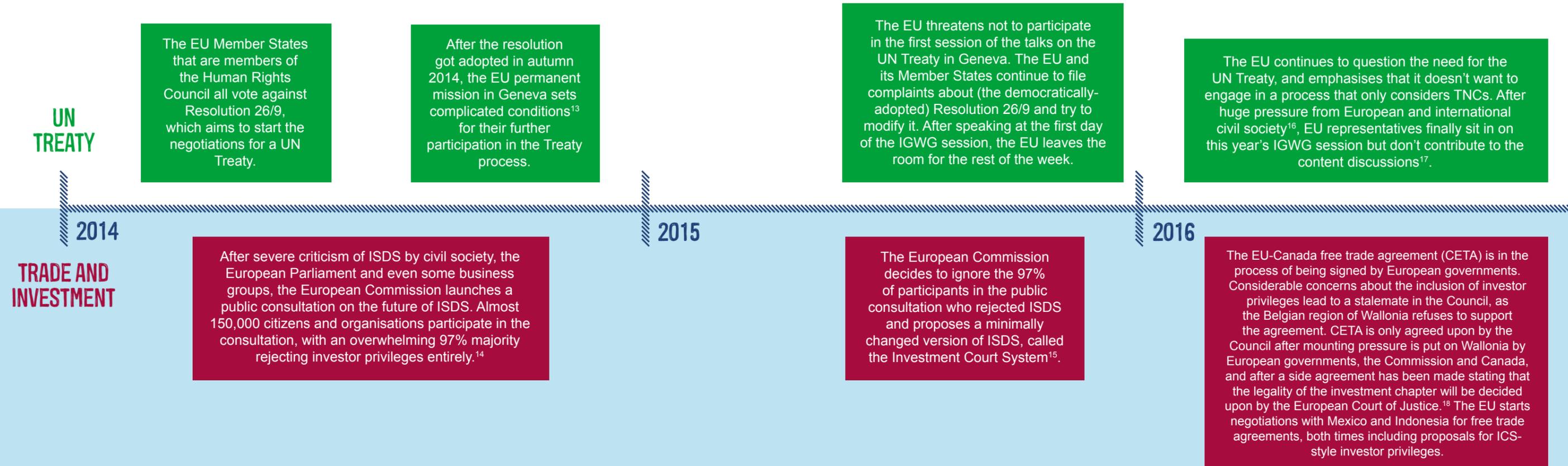
Secondly, most IIAs have a particularly powerful mechanism for enforcement, called investor-state dispute settlement (ISDS). ISDS allows investors to challenge governments directly in an ad-hoc tribunal of three corporate lawyers

without having to go through national courts first. These tribunals can award the investors with enormous amounts of compensation if they deem a government action to be in violation of the IIA. Because only one side can sue, the tribunals have an incentive to provide investor-friendly rulings and their decisions can be enforced almost anywhere in the world, which is why government governments usually pay.

The system has been used to successfully attack environmental rules and extract compensation from governments for acting in the public interest:

- The Canadian mining company Copper Mesa sued Ecuador for revoking the concession for a mining project that had encountered fierce local resistance by affected communities. The company hired armed paramilitaries who shot at the local population, but in the ISDS tribunal still awarded the company over US\$ 24 million in compensation. Local residents who counter sued the mining company in a Canadian tribunal for human rights violations were not successful.<sup>10</sup>
- Swedish energy company Vattenfall sued the German government for tightening environmental conditions for a coal power plant by the city of Hamburg. After the ISDS case was filed, the city settled with Vattenfall by agreeing to loosen the environmental rules for the power plant.<sup>11</sup> The European Court of Justice recently determined with this decision Germany has breached European environmental law.<sup>12</sup>

## EU ACTIONS RELATED TO UN TREATY NEGOTIATIONS VS ON TRADE AND INVESTMENT AGREEMENTS:



## BOX C: ENTRENCHING CORPORATE POWER: THE EU'S ISDS REFORMS

Massive criticism of ISDS has put pressure on the EU to act. However, rather than making fundamental changes to the system, the EU has only made some cosmetic procedural changes – which have mainly served to safeguard and expand the system as a whole.

The EU now includes in its free trade agreements a modified version of ISDS, where a list of adjudicators is pre-selected by the states that sign the agreement. These adjudicators receive a fee for being listed and should not work as lawyers in parallel<sup>19</sup>. The new rules also make the process more transparent. This system is called Investment Court System (ICS). However, the far-reaching, substantive VIP rights given to investors have only been changed minimally, and provisions like 'fair and equitable treatment' and 'indirect expropriation' are still included.

The EU now wants to institutionalise ICS further by creating a single arena where investment disputes are heard – the Multilateral Investment Court (MIC). While the exact details of what such a court would look like are still unclear, the EU plans to staff the court with full-time judges and make the proceedings more transparent. The court is intended to take

the place of the ad-hoc tribunals in former and future agreements, provided both partners to the agreement become members of the court.

However, these reforms have no effect on the fundamental problems and injustices of the system, as it still:

- gives investors far-reaching rights: the legal basis for investors to challenge environmental or public health legislation remains the same, and challenges to public interest legislation can therefore continue unabated.
- only allows companies to sue: it remains a one-way street where states, communities or individuals suffering from corporate misconduct are not able to hold corporations accountable.
- puts no obligations on companies: even investors who violate human rights, engage in corruption or pollute the environment can sue governments for compensation.
- undermines domestic courts: investors still do not have to bring their cases before a domestic court, the institution most appropriate for handling such disputes.

## BOX D: UN GUIDING PRINCIPLES (UNGP) ON BUSINESS AND HUMAN RIGHTS

The UNGP were established in 2011 by the UN Human Rights Commission, and were hailed as a way to bridge the governance gap between legislation established at the national level and companies operating at an international level. The European Commission was particularly active on this subject, bringing its own Corporate Social Responsibility policy in line with the UNGP.

The UNGP set out non-binding criteria concerning companies' duties and responsibilities to mitigate the human rights risks related to their business activities. Every country is supposed to develop a National Action Plan (NAP) to implement the UNGP but, since this is voluntary, many states have not developed or implemented their NAP yet<sup>20</sup>.

Most countries that developed a NAP have not taken measures that significantly address the lack of access to justice or corporate impunity for human rights violations. An assessment of the NAPs in the EU, the US and Colombia showed that they don't live up to their potential to articulate an ambitious set of measures to better protect human rights against corporate abuse.<sup>21</sup>

## BOX E: EU INSTITUTIONS

It is important to distinguish between the European institutions. Whereas both the European Commission and the Member States fiercely oppose both the process and the content of the UN Treaty, the European Parliament has stated its support in ten separate resolutions.<sup>22</sup>

The differences are smaller when it comes to investor rights. The Commission, European Parliament and EU Member States all back the trade agreement with Canada that expands VIP rights for investors. However, many political parties and decision makers, especially at the national level, have expressed strong concerns about ISDS.

### UN TREATY

2017

### TRADE AND INVESTMENT

The EU takes part in the IGWG session but as they have only focused on outlining the problems they have with the UN Treaty, the EU is not able to give comments to the elements paper that Ecuador released before the 2017 IGWG session.

The EU adopts a mandate to update its trade agreement with Chile. It now wants to include investor privileges, which were not included in the original agreement<sup>25</sup>.

At the final discussions of the 2017 IGWG session, the EU forced Ecuador to remove the reference to a 4th IGWG session in 2018 from the notes, thereby putting the whole UN Treaty negotiations in jeopardy<sup>23</sup>. In December 2017, during the negotiations for the bi-annual budget of the Human Rights Council, the EU tried in vain to delete the budget for the 2018 IGWG session<sup>24</sup>.

More than 415,000 European citizens call on the EU not to move ahead with proposals for a Multilateral Investment Court<sup>26</sup>. The Commission ignores these voices, while misrepresenting the results of an official public consultation,<sup>27</sup> and pushes UNCITRAL to start working on the establishment of a Multilateral Investment Court.

2018

During the presentation of the IGWG 2017 report at the Human Rights Council in March 2018, the EU urges members to start informal consultations on the UN Treaty<sup>28</sup>. However, at the beginning of the consultations, the EU asks for a clarification concerning Ecuador's mandate to continue the UN Treaty process. When Ecuador persists with the consultations on the substance of the UN Treaty, the EU refuses to attend the second informal consultation session<sup>29</sup>.

The EU Member States give a mandate to the European Commission to start the process of creating a Multilateral Investment Court, despite the clear rejection of the project by Europe's citizens.<sup>30</sup>

The EU concludes an agreement for a trade deal with Mexico that includes ICS-style investor privileges.<sup>31</sup>

# FIVE WAYS IN WHICH THE EU PROMOTES INVESTMENT RIGHTS WHILE BLOCKING THE UN TREATY

Despite the fact that the EU proudly proclaims to be a leader in promoting human rights, it has systematically tried to obstruct the UN Treaty negotiations since the beginning of the process. While doing so, it has massively expanded corporate rights treaties through its trade and investment policy. In the following section we highlight five contradictions between the EU's investment policy and its approach towards the UN treaty.

1. **Hindering citizens' rights vs extending corporate rights**
2. **Creating a world court for corporations instead of a human rights court for citizens**
3. **Reluctance to allocate budget to the protection of Human Rights vs allocating huge amounts to the promotion of investor right**
4. **Hard rights protecting investors vs voluntary guidelines protecting people**
5. **Citizens depend on national governments for access to justice vs companies have access to international tribunals**

## 1. HINDERING CITIZENS' RIGHTS VS EXTENDING CORPORATE RIGHTS

The EU has systematically undermined not only the process but also the substance of the UN Treaty negotiations. The EU Member States that were members of the UN Human Rights Committee in 2014 all voted against Resolution 26/9, the resolution that initiated the Treaty process<sup>32</sup>.

The argument the EU and its Member States used to vote against a binding treaty was that they wanted to prioritise working on the National Action Plans, which are based on the non-binding UN Guiding Principles (UNGP). They put forward this argument despite the UNGP and NAP's proven ineffectiveness (Box D).

The EU also raised a complaint alleging that Ecuador, the country chairing the process, was excluding certain companies from the scope of a potential treaty. This was despite the fact that the EU does the same thing in most of its new legislation, such as, for instance, in the Non-Financial Reporting Directive adopted in 2014<sup>33</sup> which excludes all small and medium-size companies.

Throughout the following years, the EU continued to obstruct negotiations by filing a number of procedural complaints, and made its participation in the UN Treaty process conditional on resolving these procedural issues.

The EU's approach led to a continuous back-and-forth on the question of whether it would attend the UN Treaty sessions. Neither the Commission nor the Member States have developed a position on content over the past four years, which has made and will continue to make it difficult for them to engage meaningfully in the negotiations.

In contrast to its reluctance to work on establishing an internationally-binding instrument on business and human rights, the EU has invested significant resources in developing and promoting proposals to massively extend and consolidate corporate VIP rights in its trade and investment agreements. Most of the trade agreements the EU is currently negotiating include ISDS provisions. If the EU and its negotiating partners ratify all the agreements that are currently being negotiated or undergoing ratification, this extreme type of investor rights would be enshrined in the EU agreements with Canada, Mexico, Chile, India, Malaysia, Myanmar, Vietnam, the Philippines, Indonesia and Singapore, multiplying the threat of harmful investor lawsuits in the EU and in countries that have many fewer resources with which to defend themselves.

In addition to this, the EU is currently using another UN forum, the United Nations Commission on International Trade Law (UNCITRAL) to start negotiations on the establishment of a Multilateral Investment Court (MIC). UNCITRAL has historically been dominated by the arbitration industry, and many participants in the discussions – including members of some government delegations – are from law firms and arbitration institutions. In the course of the deliberations, the EU has been one of the most active participants in UNCITRAL.<sup>34</sup>

## 2.

### CREATING A WORLD COURT FOR CORPORATIONS **INSTEAD** OF A HUMAN RIGHTS COURT FOR CITIZENS

For the UN Treaty to be effective, a good implementation and enforcement mechanism is crucial.

There is a need for an institution that affected people can turn to when they don't have access to justice at the national level. Friends of the Earth and others therefore advocate for an international court that guarantees that the obligations defined in the UN Treaty will be implemented. The purpose of this court would be to accept, investigate and judge class actions against companies for violations and abuses committed against communities, citizens and the environment in countries along the supply chain of transnational corporations. The EU and its member states have never expressed any support for such an instrument.

But instead of supporting an international tribunal for victims of corporate abuse, the EU seems intent on creating a world court for corporations, by pushing for the establishment of the MIC. This tribunal would be available exclusively for the purpose of foreign investors suing governments. Other options, like opening such an institution to communities and governments affected by investor misconduct, were never seriously considered by the EU. When the Commission undertook a public consultation on the proposed court it only sought comments on the technical details of its own proposal and subsequently misrepresented the results, incorrectly claiming that there was support for the MIC proposal.<sup>35</sup>

## 3.

### RELUCTANCE TO ALLOCATE BUDGET TO THE PROTECTION OF HUMAN RIGHTS **VS** ALLOCATING HUGE AMOUNTS TO THE PROMOTION OF INVESTOR RIGHTS

Some EU Member States have argued that the task of the UN Treaty intergovernmental working group (IGWG) was completed after the third IGWG session in 2017, and that a fourth session would require a new UN mandate. Fortunately, other countries didn't agree with this reading of the 2014 resolution, and the process has continued past 2017. The EU has however used the argument of a budget deficit at the UN Human Rights Council as an argument to eliminate the budget for the fourth IGWG session in October 2018, claiming that the financial resources for the round were insufficient.<sup>36 37</sup>

At the same time, budget considerations do not seem to be a stumbling block when it comes to investor rights. The European Commission estimated that creating a MIC would cost the EU and the Member States around 5.4 million Euros per year.<sup>38</sup> It has been acknowledged by the Commission that creating such a court could take many years, if not decades. In the meantime, the EU continues to include corporate courts in its ongoing trade negotiations, at an estimated cost of 9 million Euros per year in the medium term.<sup>39</sup> When it comes to safeguarding the ability of companies to sue governments, financial constraints don't appear to be an obstacle for the EU.

## 4.

### HARD RIGHTS PROTECTING INVESTORS **VS** VOLUNTARY GUIDELINES PROTECTING PEOPLE

The only initiatives to address corporate human rights violations that are supported by the EU are voluntary measures. For years, the Commission has continued to refer to the voluntary and ineffective OECD guidelines for multinational companies, or to the even weaker UN Global Compact. Its main CSR priority is now to support the non-binding UN Guiding Principles (see Box D). None of these systems provide victims of corporate abuses with enforceable rights.

Yet, when it comes to shielding the interests of foreign investors, the EU promotes far-reaching and globally enforceable rights in trade and investment agreements. While countries like Brazil have favoured an approach that focuses on the facilitation of dispute prevention,<sup>40</sup> the EU has opted for the exact opposite. Current EU investment treaties contain all the investor rights that have been used by foreign investors in the past to successfully challenge policy in the public interest.

On the basis of these extremely far-reaching rights, investors have been able to challenge governments directly in a dispute settlement system that only they have access to. And if they win, states are under a legal obligation to provide compensation that can be enforced almost anywhere in the world. Creating a powerful way of making states comply with its rulings is also one of the key criteria the EU has set for establishing the Multilateral Investment Court.<sup>41</sup>

## 5.

### CITIZENS DEPEND ON NATIONAL GOVERNMENTS FOR ACCESS TO JUSTICE **VS** COMPANIES HAVE ACCESS TO INTERNATIONAL TRIBUNALS

The EU refers regularly to the fact that if states were only to implement a number of internationally-agreed human rights principles and treaties, then people affected by corporate violations of human rights would have the possibility to gain access to justice at the national level in the jurisdiction where the violation took place. But states are often incapable or unwilling to provide access to justice to their citizens, and in some cases they are even complicit in or actively facilitate human rights violations by corporate actors.<sup>42</sup> Nevertheless, the EU places all its trust in the accessibility and capacity of national legal systems to ensure protection of human rights.

Yet, in the EU's view, these same governments and national courts cannot be trusted when it comes to the treatment of powerful corporations. The EU ensures that they, unlike victims of human rights violations, do not have to go to national courts when they feel unfairly treated. They do not even have to show that a national court would be biased or incapable of handling a particular case. Instead, their VIP rights are protected by international tribunals and can be enforced almost anywhere in the world. And this is the case despite evidence that foreign investors are treated better than domestic investors in general, and especially in the Global South.<sup>43</sup>

# RECOMMENDATIONS: TIME FOR A TURNAROUND

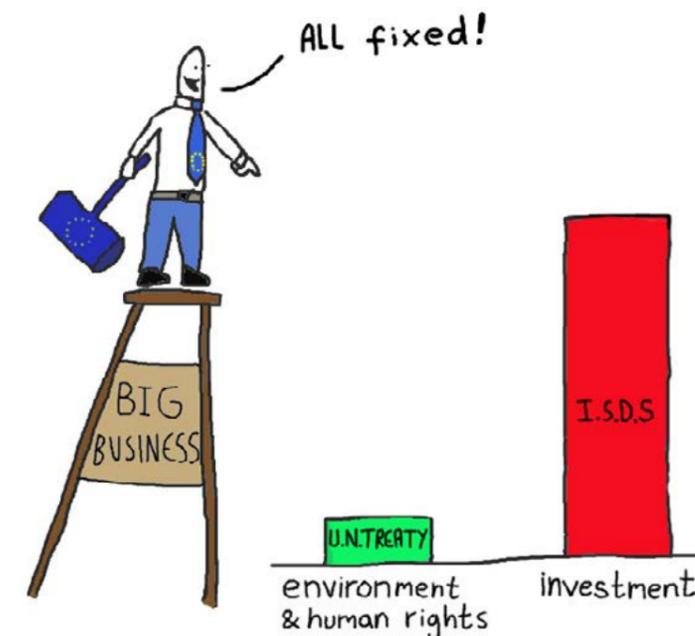
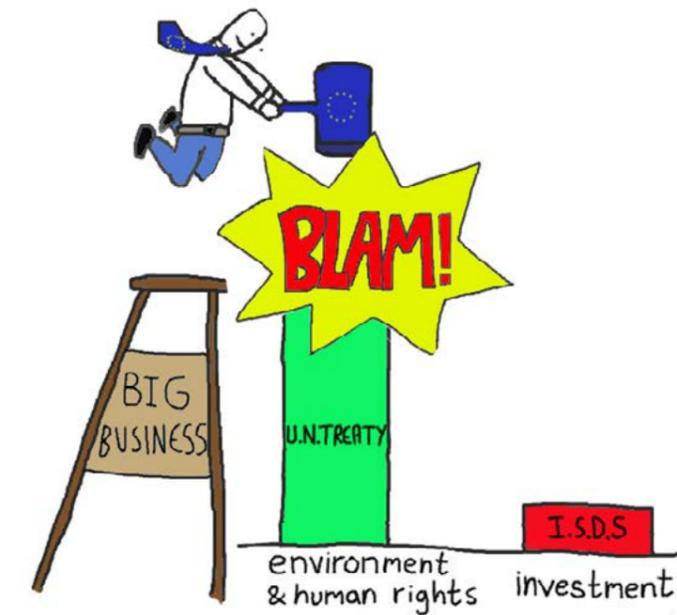
Given the fundamental flaws of the ISDS system and the strong need for the UN Treaty, it is high time for the EU to review its positions on these issues and start addressing and reversing the inequities globalisation is producing. In order to do that, the EU and its Member States should:

- Fully and actively support the negotiation and adaptation of a binding UN Treaty that ensures access to justice for victims of corporate abuses and that ends corporate impunity;
- Work with like-minded partners to create an international court where affected communities can hold investors/companies accountable;
- Refrain from the ratification of new trade and investment agreements that contain investor rights;
- Stop including investor rights into the mandates of new trade agreements, as has already been done with Australia and New Zealand.
- Use the negotiations at UNCITRAL and other international fora to negotiate an international treaty for the termination of investment agreements, instead of pushing for a Multilateral Investment Court. Should a multilateral termination not prove to be feasible, the EU and its Member States should terminate investment agreements unilaterally.

This is not an impossible fantasy. The European Court of Justice has ordered the termination of more than 190 investment agreements between EU Member States, because they have been found to be illegal under European law.<sup>44</sup> Such a mass termination could also be sought with third countries.<sup>45</sup>

France has already introduced legislation that holds companies liable for human rights violations in their supply chains<sup>46</sup>. Such legislation at European level could provide an important basis for a binding UN Treaty.

The legal basis for achieving such a turnaround is there; what is needed now is a reversal of political priorities, by putting human rights and environmental protection ahead of corporate interests and profits.



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# ENDNOTES

1. The numbers illustrate this: international trade grew ninefold between 1980 and 2011 (WTO World Trade Report 2013), while the amount of foreign direct investment has increased almost 15-fold since 1990 (UNCTAD World Investment Report). Available online: [https://www.wto.org/english/res\\_e/booksp\\_e/wtr13-2b\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/wtr13-2b_e.pdf) and [http://unctad.org/Sections/dite\\_dir/docs/WIR2018/WIR18\\_tab03.xlsx](http://unctad.org/Sections/dite_dir/docs/WIR2018/WIR18_tab03.xlsx).
2. Dobbs et al (2015) The new global competition for corporate profits. McKinsey Global Institute. Available online: <https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/the-new-global-competition-for-corporate-profits>.
3. Global Witness (2018) At what cost? Irresponsible business and the murder of land and environmental defenders in 2017. Available online: <https://www.globalwitness.org/en/campaigns/environmental-activists/at-what-cost/>.
4. The UN Guiding Principles are not official UN criteria or guidelines. They have been discussed by UN members, business and non-governmental organizations in what are referred to as multi-stakeholder spaces, but they are not equivalent to the standing UN policy negotiated by states. States are not obliged to incorporate the Guiding Principles into their own national policy. Rather, they are only 'strongly encouraged' to develop, enact and update National Action Plans (NAPs) on business and human rights.
5. The EU is the world's largest internal market, largest trading block and largest recipient and originator of foreign direct investment. See website: European Commission, EU position in World Trade. Last updated 2014. Available online: <http://ec.europa.eu/trade/policy/eu-position-in-world-trade/>. The EU Member States are also partner to almost half of all Bilateral Investment Treaties in the world. See: Titi, C. (2015) International Investment Law and the European Union: Towards a New Generation of International Investment Agreements. European Journal of International Law Vol. 26 no. 3.
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13. These conditions include there being an independent chair; proper consultation of businesses; a wider definition of TNCs; and that the countries supporting the Resolution develop National Action Plans (NAPs).
14. Friends of the Earth Europe (2015) EU-US trade: EU Commission deaf to opposition to investor privileges. Available online: <http://www.foeeurope.org/eu-commission-deaf-opposition-investor-privileges-130115>.
15. *ibid.*
16. Prior to the 2016 negotiation session on the UN treaty, European CSOs gathered over 90,000 signatures from all over Europe demanding that the EU participate in the process in a constructive way (see: Friends of the Earth Europe, Citizens call for rights for people and rules for business. Available online: <http://www.foeeurope.org/rights-for-people-rules-for-business-131016>).
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32. The following EU countries voted against the resolution: Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Macedonia, Montenegro, Romania, United Kingdom (see: Business and Human Rights Resource Centre, UN Human Rights Council sessions. Available online: <https://www.business-humanrights.org/en/binding-treaty/un-human-rights-council-sessions>).
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