Public ownership, benefits and compensation III: the potential risk of legal action under BITs or ECT over compensation for nationalisation of water and energy grid companies

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1. Introduction

Since the Labour party announced plans to bring the water companies and the electricity and gas transmission and distribution companies, and Royal Mail, into public ownership, there have been claims by the CBI, the Social Market Foundation (SMF) and others about:

- The cost of compensation
- the impact this would have on pension funds or employees which own shares in these companies, and
- the risk of claims by foreign owners under international treaties, e.g. Bilateral Investment Treaties (BITs) or the Energy Charter Treaty (ECT).

This paper on potential use of BITs and the ECT to challenge compensation to investors is the third of three reports by PSIRU addressing these issues.

1.1 Context: law and economics of UK nationalisation

In the 2017 and 2019 elections in the UK the Labour Party announced plans to renationalise water, energy, rail and postal companies - the first time that a major political party has done so since the government of Mrs Thatcher privatised large parts of UK utilities. During the election campaign and subsequently these proposals proved to be immensely popular, with a major survey by a (right-wing) think-tank finding huge majorities supporting public ownership of water (83%), energy systems (77%), railways (77%) (Legatum Institute 2017, Labour Party 2019). This has led to a public debate on the advantages of public ownership of companies providing public services, of the desirability of ending PPPs, and of returning outsourced services to inhouse direct provision.

There has been little attempt to challenge the benefits of public ownership. The main issue raised by investors and their advisors in this debate has been the question of how much compensation would be payable to the current private owners, and thus how much the benefits achieved by the policies would cost. This centres on two main options: whether compensation should be based on returning to shareholders the equity they actually have on the books of the companies, or whether it should be based on some formulation of the 'market value' of the company nationalised.

The core questions in this debate concern what is required or permitted under UK law; analysis of the economic arguments for either option; and striking a balance between the public interest and the interest of the private investors. These issues are discussed in detail in a separate paper: "Public ownership, benefits and compensation I: UK and European law, economic issues and balancing public and private interests in compensation for nationalisation of water and energy grid companies" (Hall and Weghmann 2019 OctA), which:

- shows that UK law provides no general right to compensation, or any general formula for it, and so parliament must fix compensation in each case.
- compensation can reflect the need for economic reforms and social justice
- sets out the economic reasons for not basing compensation on any version of market value
- concludes that the book value of equity (or 'net assets') is the upper end of a range that balances public and private interests.

2. Summary

The potential for using BITs or the ECT is, in practice, probably limited to a subset of about 20% of investors. 'Treaty-shopping' by other investors may not be successful.

BITs (or ECT) processes are costly, take years, are uncertain in outcome, and risk undermining political and public perceptions of a company.

The national and public resistance in Germany to the Vattenfall case could be replicated in the UK if such a case was brought against the policy of an elected government.

These factors may deter many of the eligible 20% of investors from bringing cases, so a 'flood of cases' is extremely unlikely. But there may be a few opportunist cases.

Awards need not be generalised to benefit other investors, so the financial implication of even a successful claim would be limited to those who brought the claim. And arbitration awards cannot block or reverse policy.

So the actual impact on the policy, or the total cost of compensation, is likely to be marginal.

3. International treaties and potential relevance for the UK

3.1 Use of international arbitration over compensation

Corporate law firms and others have raised the supplementary issue of the potential relevance of international treaties. They have argued that investors could overturn any parliamentary decision on compensation by bringing arbitration cases under international treaties which provide mechanisms for investor-state dispute settlements (ISDS). These treaties include bilateral investment treaties (BITs) between two countries, multi-lateral investment treaties of which the most relevant is the Energy Charter Treaty (ECT) and free trade agreements (FTAs) covering a particular region or trade between two or more states or groups of states. The ISDS clauses typically enable companies to take claims for compensation against states over expropriation or other actions diminishing expected returns, either to the World Bank's arbitration tribunal (ICSID) or to the International Chamber of Commerce (ICC) or to the United Nations Commission on International Trade Law (UNCITRAL).

These treaties are now being used more frequently by various investors, especially against Spain and Italy under the ECT (TNI 2018), but at the same time there is a growing resistance to this use of the treaties, most notably in Germany: "the legitimacy of the international investment regime is increasingly questioned." (Hoffman 2018).

The potential use of these treaties against a future UK government have become part of the public debate on the nationalisation proposals in the UK. A recent FT report warned that "Labour's nationalisation plans risk 'flood of claims': investors seeking compensation could bring lawsuits under bilateral treaties" , quoting a report by commercial law firm Clifford Chance as expecting companies to use BITs or the ECT to claim compensation. [1] The debate of course is not about actual cases, but about whether the prospective cost of compensation is so high as to demand abandonment of the policy.

However, there are a number of reasons to doubt whether such a flood will materialise or have the desired effect. In a letter to the FT the following day, Professor Peter Muchlinski warned that ISDS was becoming 'increasingly outmoded', that tribunals may not accept relocations just to take advantage of ISDS, and that the threat of using ISDS to block popular re-nationalisations could provoke a national backlash against the firms and strengthen opposition to ISDS mechanisms themselves.[2]

The potential impact can be considered under 6 headings:

- Eligibility to claim
- definitions of compensation in relevant BITs
- Scope for relocation to country with BIT
- Constraints on bringing cases
- Limits to scope of awards
- No impact on policy

3.2 Relevance for UK proposed nationalisations

3.2.1 Eligibility to claim

In both water and energy sectors, about 20% is owned by investors based in countries with current BITs with the UK. (for details, based on comprehensive analysis of owners of the water and energy companies, see annexe 5.1 and tables 4 and 5)

So investors holding 80% by value of each sector, are not currently eligible to use BITs.

In the energy sector, a further 13% is owned by investors from countries which are parties to the Energy Charter Treaty.

The biggest investors in UK water and energy companies from countries with BITs with the UK are the Cheung Kong Infrastructure group (CKI), based in Hong Kong; the YTL group of Malaysia; and state-owned funds from China (CIC and others), Singapore, Abu Dhabi, Kuwait and Qatar. Together they own about 20% of both the water and the energy grid sector. (No Indian investors are included in this table: the report by Clifford Chance (2019) is wrong to state (on p.2) that the UK has a BIT with India, which was in fact terminated by the Indian government in 2017 [3]).

In addition investors from countries in the Energy Charter Treaty (ECT) own about 13% of the energy grid companies, mostly held by investors from Spain (Iberdrola) and Germany (Allianz).

Table 1. BITs/ECT summary of water and energy grid sectors (direct + via shares in listed companies)

% of sector owned by investors who are based in :	BIT countries	ECT countries
Water	20.4%	n/a
Energy (grids)	19.8%	13.0%

Sources: see annexe 5.1

3.2.2 Definitions of compensation in relevant BITs

Only one of the relevant BITs specify 'market value' as the basis for compensation (Singapore). The China and Hong Kong BITs say simply 'real value'; the Malaysian BIT just says 'value', and specifies that 'the amount of compensation shall be determined by due process of law in the territory of the Contracting Party in which the investment has been expropriated', which in this case is UK law: which does not look promising if the objective is to challenge the evaluations made under UK law. The ECT, however, does specify 'fair market value', as do the new FTAS with Canada and Singapore. But both of those new FTAs also specify that 'valuation criteria may include going concern value, asset value including the declared tax value of tangible property, and other criteria, as appropriate'. (for details and text of definitions, see annexe 5.2 and table 6)

The interpretation of the BITs and ECT, however, is entirely in the hands of the arbitration tribunal, who are not bound to follow any precedent. In practice there is no consistent formula or definition even for assessing what is 'fair value' in each case, and so the scope for arguing over the actual method for calculating compensation is therefore wide. Certainly it can produce very generous results. In the Yukos case against Russia under the ECT, the final tribunal award accepted the

argument that the compensation should include all the potential growth in value between the nationalisation and the tribunal decision, which increased the calculated compensation from $11billion to $33billion; one commentator observed that this: “does not put back the claimant in the situation in which they would have been, but transports them into a more desirable economic situation…” (Cazier-Darmois 2018).

3.2.3 Scope for relocation

Apart from these existing investors, owners of shares in UK water and energy companies could in principle re-arrange their holdings via a BIT country. However, as Muchlinski points out, tribunals may regard such ‘treaty-shopping’ as an abuse, as happened in the case brought by the USA tobacco multinational Philip Morris against the Australian government, using a newly established subsidiary in Hong Kong to take advantage of a Hong Kong-Australia BIT (which also happens to be the only BIT case ever brought by a company based in Hong Kong). The tribunal threw out the case because at the time of the relocation of a holding company to Hong Kong there was clearly “a foreseeable dispute”. [4] Tribunals may take a similar view of similar moves by UK companies, especially since Clifford Chance have publicly recommended such relocations precisely because they foresee a potential dispute with a future UK government : “It would therefore be unsurprising to see some investors who do not have the benefit of an investment treaty moving their investments into entities attracting investment treaty protection and there are already reports that this is being considered.“ (Clifford Chance 2019).

3.2.4 Potential constraints on bringing cases

The prospect of cases under the ECT could also be relevant for the proposed UK nationalisation of the energy companies, but the relevant investors based in countries signatory to the ECT are in Spain (Iberdrola) and Germany (Allianz). Both of these countries, and the UK, are signatories to the Jan 2019 EU agreement not to use the ECT against fellow members of the EU (see below); the applicability of this agreement post-Brexit is uncertain.

Eligible companies may not choose to pursue cases. Claims are not always successful, but are always costly, and would certainly take many years – the Vattenfall case has lasted 7 years so far - and with a growing hostility to the use of ISDS against western countries, discussed below, it may be considered unlikely that eligible investors will launch a ‘flood’ of compensation claims, if a hypothetical future Labour government does offer less compensation than investors want.

As the tables below show, even one case would double the historic total of BIT cases against the UK, and represent a complete innovation in the use of BITs by investors based in Asian countries.

3.2.5 Limited scope of impact of awards

None of the arbitration tribunals have any power to issue rulings overturning policies, they can only award compensation. They cannot enforce their own awards, for that they must rely on national courts, and the EU declaration against the use of intra-EU actions shows, it is possible for governments to discourage courts from doing so.

Clifford Chance are also wrong in suggesting that awards to foreign investors would lead to UK shareholders being given the same level of compensation (“UK and other investors may benefit collaterally by virtue of another investor bringing a successful investment treaty claim. We are doubtful that the UK Government will want to pay higher compensation to foreign investors than to UK pension funds” Clifford Chance 2019 p.2) UK courts and the ECHR have already ruled,

in the Lithgow case concerning the 1977 shipbuilding nationalisation, that the payment of higher compensation to foreign investors did not give UK shareholders any rights to the same level [5]:

> "There is also British legal precedent for compensation at less than fair market value. *Regina v. Lithgow* is a prominent case sanctioning the "less than fair market value" system. In that case, the government acquired the plaintiff's shares when the aircraft and shipbuilding industries were nationalized in **1977.** The plaintiffs claimed that the compensation paid for their shares was grossly inadequate in comparison to their market value. Their claim relied on the fact that British nationals were paid far less compensation than were foreigners who owned shares in the same industry. Nevertheless, the European Court found that a state can distinguish between nationals and non-nationals and that the British nationals were adequately compensated in this case. The British court affirmed this result." (Williams 1993 pp265-266)

3.2.6 Policy continues unaffected

The key issue in this debate, however, is not predicting that hypothetical future, but assessing whether the present threats of such future BIT or ECT claims will affect the policy position of the Labour party. So far, the Labour party has firmly stated that it is not being swayed by such threats. On the contrary, they may even strengthen support for the public ownership policies if current owners announce they will leave the UK to avoid being constrained by its laws. The companies are aware of this risk, according to the FT report: "utilities have held back from restructuring their operations to secure BIT protection because of fears about reputational damage".[6]

3.3 Contesting ISDS: money, trade, sovereignty and democracy

Over the last decade there has been an escalation of conflict over the use of ISDS under BITs, under the ECT, or under FTAs, involving a number of actors with diverse political and economic interests. Any cases brought against a UK government would also face these factors

The dynamics affecting these agreements include not only bi-lateral or multi-lateral deals between states or groups of states, but also national and international pressure from opposing economic interests. One the one hand they are driven by the lobbying by business groups, both through the 'national route' of lobbying states, the 'Brussels route' of direct lobbying of the European Commission, and a combined route of 'capturing' member states' representatives on EU committees. This is opposed by a public resistance to a globalised economy which delivers relatively little benefit to people, which sees trade agreements as undermining democratic controls over environmental and labour standards and the structure of public services (CEO 2019, Greenwood 2017, Dür and Lechner 2014, Dür et al 2019, Rodrik 2018) These developments are summarised in the table below.

Table 2. Political economy of ISDS cases: actors, actions and conflicts

Actors	Main actions	Key factors
Investors	brought a wave of BIT and ECT cases against European countries, as well as elsewhere opportunistic relocations to countries with relevant BITs	Extra-judicial mechanism for claims Protect returns
Law firms	encouraged BIT/ECT cases to exploit the potential for profitable business	Commercial opportunities for lawsuits Oligopoly of arbitrators
Developing countries	Developing countries have started terminating BITs, including India, South Africa, Indonesia, Ecuador, Bolivia	Democratic/national policy decisions Sovereignty and Calvo principle

		Public service protection
Public campaigns	National actions against use of ISDS including court cases in Germany Successful global campaigns to eliminate or restrict use of ISDS in FTAs, e.g. defeat of TTIP, Global and national campaigns build public support.	Democratic/national policy decisions Environmental/labour regulation Public service protection Sovereignty and Calvo principle
USA and other OECD	USA under the Trump administration has withdrawn from FTAs with ISDS, including NAFTA, TTIP, CPTTP New FTAS have modified or abandoned ISDS clauses.	Nationalism Sovereignty Legacy protection for own investors overseas
European Commission and CJEU	Opposed developing countries initiatives to terminate BITs acted to nullify the use of the ECT e.g. ruling that some ECT awards are illegal state aid organised a remarkable declaration that they regard use of BITs or the ECT by one member state against another as contrary to EU law under the Achmea ruling, and have advised investors and courts that such awards are unenforceable continuing to sign new FTAs, some with ISDS provisions and some without as well as the renegotiation of the ECT, and the restructuring of ISDS through an 'International Court System'.	Continued protection for own investors overseas Commitment to maximising trade EU sovereignty over legal processes Sovereignty and Calvo principle

3.3.1 Historical asymmetry of international law on compensation

Although BIT agreements are formally symmetrical, giving equal rights to investors from each country, they were always Intended for use by western investors against developing countries. (Miles 2014, Wellhausen 2015). This asymmetry can be clearly seen in the table 7 in annexe 5.3.1, which covers cases brought under BITs, the ECT or FTAs. Whereas investors from EU15/USA/Canada have initiated over 600 cases, there have been only 11 cases brought against EU15/USA/Canada brought by investors from other countries - none of which have been successful.

3.3.2 Opposition to use of ISDS in Germany: the Vattenfall case

Public campaigns against ISDS in general and trade agreements in particular have been widespread, but the greatest impact on the politics of these instruments has come from Germany, as a result of two major campaigns.

The first was the huge reaction against the ECT case brought by a Swedish company to demand over €4billion in compensation for the country's decision to phase out nuclear power stations. The second was a constitutional court case against the EU-Canada trade deal CETA (for more detail on this, see annexe). Both of these cases are still continuing at the time of writing (August 2019), but the political effects have already been great.

The largest ECT case anywhere in the world to date is the claim by the Swedish electricity multinational Vattenfall, which owns one of the largest electricity companies in Germany. Vattenfall has twice used the ECT to claim compensation from German public authorities, itself a remarkable fact, since only one other case has ever been brought against Germany under any international investment or trade treaty. The first case brought by Vattenfall was against the city of Hamburg over

its environmental policy restrictions on anew coal-fired plant, which resulted in forcing a policy change to reduce these environmental standards (Jacur 2015).

The much larger claim was for €4.7bn damages against Germany over the decision in 2011 to compel closure of all nuclear plants. The electricity companies with nuclear generators - E.on, RWE and Vattenfall - sued first in the German federal constitutional court (FCC) , but, as discussed in section 2 above, the process under German law is not expected to yield much compensation. So, in parallel to the legal proceedings in the German court, Vattenfall, as the only foreign company able to use international treaties, filed a claim under the ECT for €4.4 billion euros compensation, at ICSID in May 2012.[7] After 7 years, as of August 2019, the case has still not been settled. Extraordinary amounts have been spent on lawyers during this long legal battle. By April 2018 the German Government had spent more than €15 million in legal and administrative costs to defend the case, and Vattenfall has spent €26 million on its lawyers, which it also claims from Germany.[8]

The case has been widely criticised in Germany, and the government has made a strong resistance: in 2018 it submitted to the ICSID tribunal that Vattenfall, a Swedish company, could not use the ECT against Germany because of the CJEU ruling on Achmea (see below), and then it asked for the suspension of all 3 members of the ICSID tribunal: both proposals were rejected by ICSID. [9] [10] The German government also formulated a plan for a new international court system (ICS) to replace ISDS mechanisms, which has been adopted by the EU as a central part of its reform efforts.

Firstly, the ECT is being used to seek far more generous compensation than the process of German justice will deliver. It thus exposes the contradiction between the apparent symmetry of BITs/ECT, and the status of the legal systems in western countries: the German courts are being treated in the same way as western countries have treated the legal systems of south American or Asian countries.

Secondly, the German government and parliament have been extremely firm in resisting the ECT case, made it as difficult as possible for Vattenfall, and effectively increased the stakes to the point where any ECT award would be treated as a clear challenge to the authority of the German courts and parliament. This has undoubtedly influenced the remarkable 2019 declaration by EU states, see below, that the ECT should not be used by investors from EU countries against other EU countries, nor enforced by their courts. It is in effect an assertion by European countries of the Calvo doctrine, that foreign investors are entitled to justice under the national system.

Thirdly, the case has provoked such a strong reaction because it simultaneously attacks the status of the German legal system.

Schill's explanation of the strength of opposition to Vattenfall's case against Germany links it clearly to the impact on democratic decision-making:

> "The entire political and social landscape in Germany has been so deeply influenced by the struggle against nuclear power that Vattenfall II, and with it investor-State arbitration generally, is seen as a challenge to a fundamental social and political settlement and hence to democracy more generally" (Schill 2015)

3.3.3 EU states' declaration against use of BITs etc

The strongest action organised by the EU Commission came in January 2019 when the EU member states (including the UK) all signed a remarkable declaration that tells courts, investors, and tribunals

that intra-EU claims under BITs or the ECT should not be considered and that awards should not be enforced. [11]

Table 3. EU states 2019 declaration against use or enforceability of intra-EU BITs and ECT

"1. Member States 'by the present declaration… inform' tribunals in all pending intra-EU BIT and ECT arbitrations about the legal consequences of Achmea as set out in the Declarations; and undertake, both as defending Member State and the claimant investor's Member State, to inform tribunals of those consequences.
2. Defending Member States will request their national courts and any third country courts to set aside intra-EU BIT and ECT awards or not to enforce them due to a lack of consent to arbitration.
3. Member States "inform the investor community that no new intra-EU investment arbitration proceeding should be initiated".
4. Member States which control organisations which have brought investment arbitration claims against another Member State will withdraw those claims.
5. Member States will terminate all intra-EU BITs by way of a plurilateral treaty or (if more expedient) bilaterally, ideally by 6 December 2019.
6. Settlements/awards in intra-EU BIT and ECT arbitrations which cannot be annulled or set aside and were voluntarily complied with or enforced before Achmea should not be challenged."

This is a remarkable set of statements and actions by states which are party to BITs and the ECT, that they will request their courts not to enforce any awards made post-Achmea, and tell investors not to bring cases, and that these BITs will be terminated within less than a year. One legal commentator described this as 'a comprehensive extermination'. [12]

3.3.4 Erosion of ISDS from FTAs

The ISDS provisions of FTAs, which provide the third main source of potential international investor claims, have come under considerable pressure in recent years from widely supported public campaigns. The proposed EU-USA trade agreement, known as TTIP, was effectively abandoned. Some new FTAs, such as CETA, include ISDS provisions, but others do not, including the USMCA, which replaced NAFTA, and the new EU-Mercosur agreement; others include significant exceptions, such as the TP-CTT for New Zealand, and the EU-Singapore for matters relating to Singapore's water supply.

3.3.5 Developing countries terminate BITs

Countries in the Global South have long resented the use of BITs against them by investors from north America and Europe, and now a number of large economies have started terminating BITs, including India, Brazil, South Africa, and Indonesia.

4. Conclusion

The potential for using BITs or the ECT is, in practice, probably limited to a subset of about 20% of investors. 'Treaty-shopping' by other investors may not be successful.

BITs (or ECT) processes are costly, take years, are uncertain in outcome, and risk undermining political and public perceptions of a company.

The national and public resistance in Germany to the Vattenfall case could be replicated in the UK if such a case was brought against the policy of an elected government.

These factors may deter many of the eligible 20% of investors from bringing cases, so a 'flood of cases' is extremely unlikely. But there may be a few opportunist cases.

Awards need not be generalised to benefit other investors, so the financial implication of even a successful claim would be limited to those who brought the claim. And arbitration awards cannot block or reverse policy.

So the actual impact on the policy, or the total cost of compensation, is likely to be marginal.

5. Annexe

5.1 Eligibility to bring cases under BITs/ECT/FTAs

The tables show the largest owners of all water and energy grid companies which have in total at least 1% of the sector and which are based in countries with current BITs, or signatories to the ECT, or covered by FTAs such as CETA. This includes their direct shares and their shareholdings in the listed companies. There will also be smaller investors who own less than 0.1% of a listed company who may be eligible in addition to those identified in the table below

It is important to note that

- in principle other investors may relocate to countries with BITs, thus increasing the total investments subject to BITs, though there is little concrete evidence of this happening to date.
- such 'treaty tourism' may or may not be accepted by tribunals as creating valid eligibility: as happened in the case brought by the USA tobacco multinational Philip Morris against the Australian government, using a newly established subsidiary in Hong Kong to take advantage of a Hong Kong-Australia BIT (which also happens to be the only BIT case ever brought by a company based in Hong Kong). The tribunal threw out the case because at the time of the relocation of a holding company to Hong Kong there was clearly "a foreseeable dispute". [13] Tribunals may take a similar view of similar moves by UK companies, especially since Clifford Chance have publicly recommended such relocations precisely because they foresee a potential dispute with a future UK government
- actual shareholdings and investors may change between now and the return to public ownership.

The largest holdings in water fall into 3 groups.

Firstly, the Asian investors: the Cheung Kong Infrastructure group (CKI), based in Hong Kong, which owns nearly 7% of the water sector (Northumbrian Water, and part of Southern) – as well as a large proportion of the energy grids, see below; the YTL group of Malaysia, which owns 4.9% of the water sector (Wessex Water); and the state-owned GIC group of Singapore, with 3.4% of the sector, including one-third of Yorkshire Water. All of these – and the investors from China and Abu Dhabi - are based in countries with BITs with the UK, and are eligible to make claims under those BITs (shaded orange). The smaller holding of Kuwait cannot at present use their BIT with the UK as it is not in force, according to UNCTAD.

Secondly, the Canadian and Australian investors. These include Canadian pension funds OMERS and Canada Pension Plan (and the smaller holding from British Colombia's fund): these investors are at present covered by the recently signed free trade agreement between the EU and Canada, CETA, but (a) it has not yet been ratified by all countries (b) countries have to enable dispute resolution mechanisms, and have not done so (c) if Brexit happens, the UK will cease to be covered (though the present government has expressed its intention to negotiate a UK-Canada version of CETA). These are shaded pale as it seems unlikely that CETA can be used in the near future. The Australian investors and funds are not covered by a BIT, nor a FTA like CETA, nor by the ECT – which Australia has signed but not ratified.

Thirdly, the other major investors. These include investors from the UK itself, the USA, Europe, and Switzerland. The ECT is not relevant for water, and in any case EU countries are now committed to not using it against each other (though Brexit may change the status of that agreement).

Table 4. Largest owners of English water companies with BITs, ECT, FTA status

				TOTAL owned by RCV	**Anglian**	**Northumbrian**	**Severn Trent**	**Southern**	**South West**	**Thames**	**United Utilities**	**Wessex**	**Yorkshire**
Owners	Type	Country	BIT	**100.0%**	11.5%	6.2%	**13.0%**	7.3%	**5.1%**	20.4%	**16.4%**	4.6%	9.6%
Cheung Kong Infrastructure	Listed	HK	BIT	**6.9%**		**100.0%**		9.5%					
YTL	PE	MY	BIT	**4.6%**								100.0%	
GIC (Govt of Singapore sovereign wealth fund)	SWF	SG	BIT	**3.2%**									33.6%
Infinity (part of ADIA, Abu Dhabi)	SWF	UE	BIT	**2.0%**						9.9%			
Wren House (subsidiary of Kuwait Investment Authority)	SWF	KW	**1.8%**							8.8%			
CIC Capital [China Investment Corporation]	SWF	CN	BIT	**1.8%**						8.7%			
OMERS/ Borealis	PF	CAN	CETA	**6.5%**						31.8%			
Canada Pension Plan	PF	CAN	CETA	**3.8%**	**32.9%**								
First State Investments	PE	JP	ECT	**3.7%**	**32.3%**								
Deutsche Asset Management Infra investment	PE	DE	ECT	**2.2%**									23.4%
BC IMC (Canadian investment fund)	PF	CAN	CETA	**1.8%**						8.7%			
UBS Asset Management	PE	CH	ECT	**1.6%**				21.9%					
Fiera Infrastructure	PE	CAN	CETA	**1.0%**						5.0%			

The results for energy are similar to those for water. Cheung Kong owns 15% of the whole sector (UK Power Networks, Wales and West, and most of Northern Gas Networks), with other Asian investors from BIT countries (China, Abu Dabhi, Qatar) holding about 4%. The Japanese fund which holds about 3% is covered by the ECT. The EU owners (Iberdrola, Allianz) are technically covered by the ECT, but this is currently under great pressure not be used between EU countries. The Canadian pension funds are covered by CETA, but this awaits ratification by individual countries. Other investors (UK, USA, Australia) have no access to BITs or the ECT or FTAs.

Table 5. **Largest owners of energy grid companies with BITs, ECT, FTA status**

				ET	GD	GD	GD	GD	ED	ED	ED
			Company	SP Trams	Cadent Gas	NGN	SGN	Wales & West	NWEN	UK Power Networks	SPEN
Owners	Country		%of all grids RAV	3.0%	13.6%	3.1%	7.9%	3.1%	2.8%	9.3%	5.7%
Cheung Kong Infrastructure	HK	BIT	**15.1%**			88.4%		100%		100%	
CIC Capital [China Investment Corporation]	CN	BIT	**1.4%**		10.5%						
Abu Dhabi Investment Authority	AE	BIT	**1.3%**				16.7%				
Qatar Investment Authority	QA	BIT	**1.2%**		8.5%						
Iberdrola	ES	ECT	**8.7%**	100%							100%
First State Investments	JP	ECT	**2.8%**						100%		
Allianz Capital Partners	DE	ECT	**1.4%**		10.2%						
OTPP [Ontario Teachers Pension Plan]	CAN	CETA	**2.0%**				25.0%				
OMERS/ Borealis	CAN	CETA	**2.0%**				25.0%				

5.2 BITs/ECT/FTAs definitions of compensation

Table 6. Definitions of 'value of investment' for compensation

Country	BIT/FTA with UK	Definition of value	
China	China BIT 1985 arts 5,7	Such compensation shall amount to the real value of the investment expropriated immediately before the expropriation or impending expropriation became public knowledge.	
Hong Kong	Hong Kong BIT arts 5, 8	Such compensation shall amount to the real value of the investment immediately before the deprivation or before the impending deprivation became public knowledge	
Malaysia BIT	Malaysia BIT arts 4,7	Such compensation shall amount to the value of the investment expropriated immediately before the expropriation or impending expropriation became public knowledge and shall be freely transferable. The legality of any such expropriation and the amount of compensation shall be determined by due process of law in the territory of the Contracting Party in which the investment has been expropriated.	
Singapore A	Singapore BIT 1975 arts 5, 8	Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation or impending expropriation became public knowledge.	
Energy Charter Treaty (ECT)	ECT ; ECT (UNCTAD)	Such compensation shall amount to the fair market value of the Investment expropriated	
Singapore B 2018	EU-Singapore FTA 2018 nyr Arts 2, 3, 7	Compensation shall amount to the fair market value of the covered investment immediately before its expropriation or impending expropriation became public knowledge …. Valuation criteria used to determine fair market value may include going concern value, asset value including the declared tax value of tangible property, and other criteria, as appropriate Art 3 *…(b) claims where a representative submits a claim in the name of a class composed of an undetermined number of unidentified claimants and intends to conduct the proceedings by representing the interests of such claimants and making all decisions relating to the conduct of the claim on their behalf shall not be admissible.* *… Article 2. 3 (National Treatment) shall not apply to any measure relating to: (a) the supply of potable water in Singapore; (b) the ownership, purchase, development, management, maintenance, use, enjoyment, sale or other*	

		disposal of residential property or to any public housing scheme in Singapore.	
Canada	Canada-EU FTA (CETA) 2018 (investment chapter 8) nyr nif	The compensation referred to in paragraph 1 shall amount to the fair market value of the investment at the time immediately before the expropriation or the impending expropriation became known, whichever is earlier. Valuation criteria shall include going concern value, asset value including the declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.	

5.3 Other aspects

5.3.1 Historical asymmetry of international law on compensation

Although these agreements are formally symmetrical, giving equal rights to investors from each country, they were always Intended for use by western investors against developing countries. (Miles 2014, Wellhausen 2015). This asymmetry can be clearly seen in the tables below, which cover cases brought under BITs, the ECT or FTAs. Whereas investors from EU15/USA/Canada have initiated over 600 cases, there have been only 11 cases brought against EU15/USA/Canada brought by investors from other countries - none of which have been successful.

Apart from the two Vattenfall cases discussed below, the UK, France, Germany and Netherlands have faced only 3 cases, two of which were brought by an individual Indian investor, whereas their own companies have initiated a total of 297 cases. Both Italy and Spain have received a number of challenges, mainly under the ECT against renewable energy schemes, but the vast majority of these have been from other EU15 or 'old' OECD countries: if the EU succeeds in ending all intra-EU actions under BITs or the ECT, such cases from other EU15 or 'old' OECD countries will no longer be possible. The figures for Canada and the USA appear balanced, but 27 out of the 28 cases against Canada have come from the USA, and 15 out of 16 cases against the USA have come from Canada, all under NAFTA, which has now been replaced by an agreement with no ISDS. With the exception of some of the recent ECT cases against Spain, hardly any of the challenges to have come from countries outside the EU15.

And none of the handful of cases against an EU15/OECD country have yet been successful. Until Japan joined the flurry of ECT actions on renewable energy with 3 cases against Spain, the only cases ever brought by major Asian countries against an EU15/OECD country consist of two cases from an Indian individual in 2000 and 2006, neither of which even reached a tribunal hearing; the Philip Morris case against Australia which was thrown out for 'treaty shopping' (see below); a Chinese case against Belgium's bank rescues in 2012 and a Slovakian case against Greece's restructuring of bonds in 2013, both of which were rejected, and a discontinued Turkish case against France.

Table 7. International disputes: EU15 and north American countries

Source: UNCTAD https://investmentpolicy.unctad.org/investment-dispute-settlement

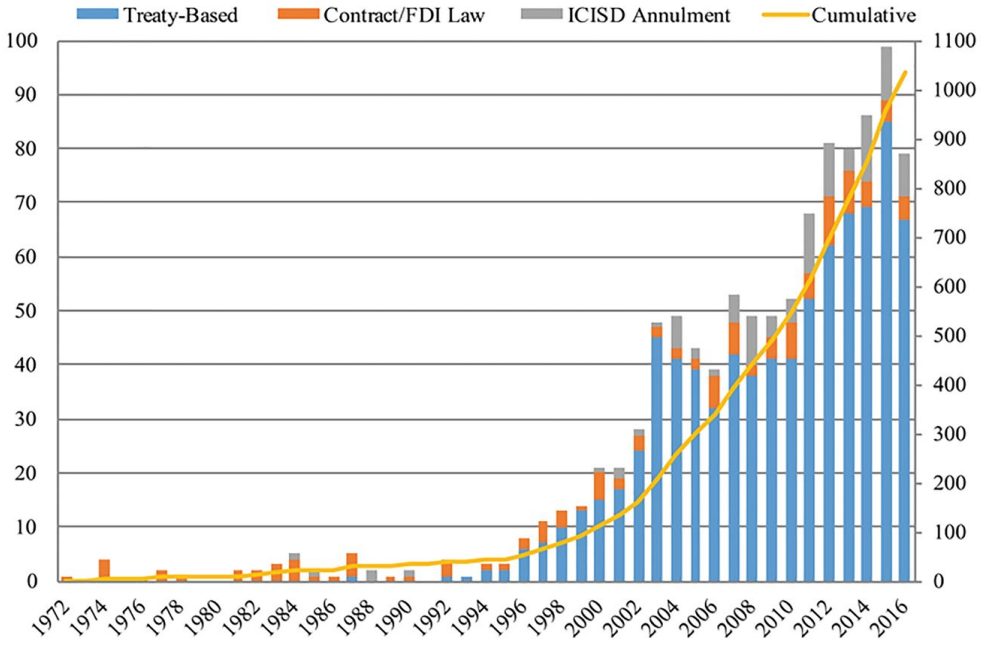
Country	Cases as home state of claimant	Cases as respondent country	Of which:	

			cases brought by EU15/OECD countries	Cases brought by investors in other countries
France	49	1	0	1
Germany	62	3	2	1
UK	78	1	0	1
Netherlands	108	0	0	0
Italy	37	11	11	0
Spain	50	49	42	7
Canada	49	28	27	1
USA	174	16	16	0
TOTAL	607	109	98	11

5.3.2 Investors and law firms and 3rd party funders

A key driver of conflict over ISDS has been the surge in cases brought under BITs or the ECT in the last decade, as shown in chart below. The law firms are key actors in this, advertising the opportunities for litigation - "Five elite law firms have been involved in nearly half of all known ECT investor lawsuits" - which is further facilitated by third party funders who finance the legal costs in exchange for a share in any award (CEO/TNI 2018).

Chart A. International investment arbitration cases registered by year (1987–2016).



Source: Langford et al 2017

A number of these cases have been based on intra-EU BITs, claiming compensation for policy chages by EU member states.

One such case involved a claim against Poland for cancelling the planned flotation on the stock market of PZU, the Polish health insurance company, which was jointly owned by the Polish

government and a Dutch-owned company, Eureko. Eureko had expected to get another 21% of the company in this flotation, and so claimed, and won, compensation of €1.8 billion under the Netherlands-Poland BIT, which "allowed Eureko to get around a clause in the privatisation deal committing the two sides to adjudicate any disputes in Polish courts." [14] The amount was so great that Poland had to ask to spread out payment to avoid speculation against the Polish currency (Hall 2010). A similar case involved a private company suing Slovakia for changing the regulation of health insurers; again, the company chose to go to arbitration using a BIT between Netherlands and Slovakia. This case, Achmea vs Slovakia, was later in 2018 ruled incompatible with EU law by the CJEU (see below).

There has also been a major surge in cases brought under the ECT: only 19 cases were brought in the first 10 years up to 2008, but 75 investor lawsuits were filed between 2013 and 2017. The cases are now being targeted at western European countries, principally Spain and Italy, with large claims: 16 cases involved claims of over $1billion. Most claims come from companies registered in Europe, though many are 'letter-box' companies registered there for convenience, and a large majority of the cases against Spain, for example, are brought by financial investors. These claims have specifically targeted government policies in support of renewable energy, which has the effect of slowing down such policies by making them too costly.

The concentrated power of a small group of lawyers is intensified by their dominant position both as counsel to parties in the case and also as arbitrators. A group of just 25 lawyers have been appointed as arbitrators in 44 per cent of the ECT cases, and two-thirds of these have also been counsel in other cases. There is in effect an investment arbitration industry consisting of law firms, arbitrators and financiers who have vested interests in perpetuating and expanding the caseload. (Langford et al 2017, CEO/TNI 2018)

5.3.3 EU reaction: not in our back yard

The EU reaction has been complex and tactically wide-ranging. One the one hand it has criticised developing countries for terminating BITs, and it continues to negotiate FTAs some of which include ISDS. It also seeks to create a new more legitimate international system of investor courts, and to renegotiate the ECT itself. On the other hand, it has urged countries to end intra-EU BITs, ruled that tribunal awards under these agreements are illegal state aid, welcomed a CJEU ruling that such BITs were incompatible with EU law, seeks to extend the ruling to cover the ECT, and has organised a declaration by member states that both intra-EU BITs and the ECT should not be used and will not be enforced by their courts. The EU has undoubtedly been influenced by the German backlash in many of these policies.

- **Some awards are illegal state aid**

In Micula v. Romania , a case brought by Romanian investors who had relocated to Sweden to use the Sweden-Romania BIT, the EC prohibited Romania from paying out a US$250-million ISDS award for a breach of an investment treaty by an EU state aid decision, stating that payment of the award itself would violate EU state aid law. This was partly overturned by a CJEU ruling in 2019 that it could not apply to a period before Romania's accession to the EU. The Miculas have also initiated cases in 7 countries, including the UK and the USA, to order payment of the award. [15]

The EU Commission has also ruled that some compensation awards made by tribunals under the ECT, for example against Spain over changes in its policies on renewable energy, cannot be paid because they constitute unfair state aid under EU law.[16]

- **Achmea case: no BITs between member states, no valid ISDS**

In the Achmea case a company used a Netherlands-Slovakia BIT to claim compensation from Slovakia because it reversed the privatisation of health services. The arbitration tribunal awarded compensation to Achmea, but Slovakia referred the judgment to the CJEU, which ruled in March 2018 that the arbitration agreement in article 8 of the BIT has an adverse effect on the autonomy of the EU legal order and so is incompatible with EU law.[17]

Following up on this judgment in July 2018, the European Commission stated that, if investments are affected by member state action, the investor can sue the member state in the national courts which have jurisdiction….. any tribunal constituted under an intra-EU BIT or the ECT (see below) lacks jurisdiction and '. . . national courts are under an obligation to annul any arbitral award rendered . . . and to refuse to enforce it'. [18]

- **BIT tribunals and other courts ignore Achmea and EU declaration**

The Achmea has not deterred tribunals subsequently hearing intra-EU ECT claims. In each of the awards rendered following Achmea, tribunals and national courts have either refused to be briefed on Achmea (Antaris) or dismissed the state's objections in reliance thereon (Antin and Masdar). Since 2018 tribunals have ruled:

- that the CJEU ruling in Achmea does not prevent the use of the multi-lateral ECT by EU countries against each other [19]
- does not even prevent the use of claims under a BIT where the legal framework is ICSID rules rather than German law (as was the case with Achmea) [20]
- does not prevent the use of a Luxembourg-Poland BIT to claim compensation for losses by shareholders as a result of bank nationalisation. Arbitral awards in investment protection dispute remain mainly unchanged. [21]

- EU member states declaration January 2019: no intra-EU use of ISDS under BITs or ECT

The strongest action organised by the EU Commission came in January 2019 when the EU member states (including the UK) all signed a remarkable declaration that tells courts, investors, and tribunals that intra-EU claims under BITs or the ECT should not be considered and that awards should not be enforced. [22]

Table 8. EU states 2019 declaration against use or enforceability of intra-EU BITs and ECT

"1. Member States 'by the present declaration… inform' tribunals in all pending intra-EU BIT and ECT arbitrations about the legal consequences of Achmea as set out in the Declarations; and undertake, both as defending Member State and the claimant investor's Member State, to inform tribunals of those consequences.
2. Defending Member States will request their national courts and any third country courts to set aside intra-EU BIT and ECT awards or not to enforce them due to a lack of consent to arbitration.
3. Member States "inform the investor community that no new intra-EU investment arbitration proceeding should be initiated".

4. Member States which control organisations which have brought investment arbitration claims against another Member State will withdraw those claims.
5. Member States will terminate all intra-EU BITs by way of a plurilateral treaty or (if more expedient) bilaterally, ideally by 6 December 2019.
6. Settlements/awards in intra-EU BIT and ECT arbitrations which cannot be annulled or set aside and were voluntarily complied with or enforced before Achmea should not be challenged."

This is a remarkable set of statements and actions by states which are party to BITs and the ECT, that they will request their courts not to enforce any awards made post-Achmea, and tell investors not to bring cases, and that these BITs will be terminated within less than a year. One legal commentator described this as 'a comprehensive extermination':

> "it would appear that intra-EU investor-state arbitration is finally dead. By the Declarations, the Member States have fallen in line with the EC. The intention is to bring all existing intra-EU investor-state arbitrations to an end by the end of 2019, and prevent any new intra-EU arbitrations. By tackling not only the arbitrations but the treaties themselves, and "informing" tribunals and investors that arbitrations cannot be commenced or continue, Member States intend a comprehensive extermination of intra-EU arbitration."[23]

- **EU aims for global agreement, multilateral court, and revision of ECT**

On March 20, 2018, the Council of the European Union adopted negotiating directives authorizing the European Commission to negotiate a convention establishing a multilateral court for the settlement of investment disputes (MIC).[24] However, these proposals only concern institutional issues, and do not provide for example rights for third parties to be represented, nor protection for democratic decisions, nor create any obligations on investors, leaving them in the privileged position of having only rights – unlike the CFIA proposals of Brazil, see above. (Hoffman 2018)

In June 2019 the EU Commission set out plans to renegotiate the terms of the ECT, including

> "calling for the ECT to incorporate a 'right to regulate' provision, along with revising its existing terms on expropriation, which among other changes would be 'appropriately defined to clarify the nature of indirect expropriation.' …… [and] include provisions on sustainable development, including on climate change and clean energy transition"

The ECT conference itself in December 2018 acknowledged the need to revise the treaty to reflect changes in the energy sector and "updated standards related to investment protection".[25]

5.3.4 The case against CETA: Germany and elsewhere

There have been strong campaigns against free trade agreements all across Europe, including Germany, because of their effects on democratic rights to determine policy and because of the power given to companies through ISDS provisions. The most important focus of campaigns was on the proposed deal with the USA, TTIP, and the proposed EU-Canada free trade agreement, known as CETA.

An intense public debate in Germany included a number of leading lawyers and others arguing that the ISDS provisions in these proposed treaties were incompatible with the German constitution,

would give special rights to Canadian investors, allow secret tribunals to make binding decisions, and create a deterrent effect against social or environmental legislation or regulation. At one stage even Socialist party (SPD) minsters in the coalition government argued at one stage that ISDS was harmful and unnecessary, because foreign investors could use German courts, and the Bundesrat adopted a resolution that neither TTIP nor CETA should include ISDS mechanisms (Bungenberg 2016). In 2016 German citizens submitted a constitutional complaint at the Federal Constitutional Court, with more than 125.000 supporters, the largest civil action in the history of the Federal Republic of Germany, asking for an injunction against Germany's political representatives agreeing to the treaty, because it violates the German constitution and restricts the right of citizens to determine their own political destiny.[26]

In October 2016 the FCC issued a mixed interim judgement. [27] It ruled that the German representatives could agree to CETA in the EU Council - but that it was an agreement covering "mixed" competencies of both the EU and member states, and that any Council decision regarding CETA must only concern those parts of the agreement that undoubtedly fall within the exclusive competence of the European Union, so excluding Chapter 8 on investment and ISDS (and also the chapters on maritime transport, professional qualifications, and trade and labour. It also ruled that member states should be able to veto decisions by CETA committees, so that any conflict with the German constitution could be blocked. Finally, it ruled that CETA Art. 30.7(3)(c) has to be interpreted as to allow Germany to unilaterally terminate the provisional application of CETA, and that Germany should give clear public and international notice of this interpretation of CETA (Baumler 2016). The final ruling of the Federal Constitutional Court is expected in autumn 2019.

EU ratification of CETA has so far carefully respected this judgment. In February 2017, the European Parliament voted for CETA on the basis that it was a mixed agreement, which requires individual ratification by every EU country, including provision for domestic mechanisms for enforcing ISDS. Ratification by the German parliament awaits the final ruling of the Federal Constitutional Court.[28]

A further outcome of the German process was the formulation by the German government in 2015 of a proposal to deal with some aspects of the legal status of the ISDS arbitration tribunals. Instead of ad hoc tribunals and arbitrators, there should be a permanent international investment court, with permanent judges. This was subsequently adopted as EU policy, see below, and the such a system is referenced in both CETA and the EU-Vietnam agreement, even though no such court yet exists (Bungenberg 2016).

CETA has also been the subject of intense campaigns in Belgium, and opposition by the Flanders region of Belgium delayed the Council approval of CETA, and then asked the CJEU to rule on the compatibility of CETA and its ISDS provisions with EU law. In May 2019 the CJEU ruled that CETA is compatible with EU law, because the tribunals/courts would only take account of EU law by accepting CJEU interpretations. Although it concerned only CETA, it implies a similar legitimacy for the other similar FTAs with Singapore and Vietnam, and for the EU-supported UN initiative to create a global investment court. Given the court's ruling in Achmea (see below) that member states may not use BITs against each other, the effect seems to perpetuate an odd asymmetry whereby a Canadian company could sue a government under CETA, but a company in the same situation, based in an EU country, could not do so.[29] The ratification by individual countries may yet prove problematic: by mid-2019 10 member States had ratified CETA or were "reportedly at an advanced stage"; Italy, however, has threatened not to ratify CETA as it considers that the protection afforded for labels of geographical origins is insufficient". Campaigns against CETA continue, with over 555,000 citizens signing an EU-wide petition against ISDS provisions in treaties. [30] The German FCC

reasoning was based on preserving national legal competences, rather than the wider concerns over democratic policy-making, but it means that each member state can control the operation of the ISDS provisions, and it has inserted a right of unilateral termination. Both of these weaken the potential impact of CETA considerably.

5.3.5 The erosion of ISDS from FTAs: removing, deferring, and allowing opt-outs

Table 9. Status of new FTA agreements and ISDS mechanisms 2019

Treaty		Status mid-2019	ISDS or MIC mechanism?	Exceptions?
USMCA	USA, Canada, Mexico	Signed. Replaces NAFTA	No	Transitional for Mexico
CETA	EU-Canada	Signed	MIC (but not yet in place)	Subject to each EU country ratifying
CPTPP	Canada-etc	Signed	ISDS	New Zealand can opt-out of ISDS
EU-Mercosur	EU, Mercosur	Signed	No	Subject to each EU country ratifying
EU-Singapore	EU, Singapore	Signed	ISDS	Subject to each EU country ratifying. Also Singapore water supply exempt.
EU-Vietnam	EU, -Vietnam	Signed	MIC	Subject to each EU country ratifying
AfCFTA	African countries	Signed	No	
RCEP	Southeast Asian countries	In negotiation	Reduced scope of ISDS	
TTIP	EU-USA	Abandoned	-	

- **New north American trade agreement USMCA scraps most ISDS**

The United States Mexico Canada Agreement (USMCA), which has replaced NAFTA, has scrapped ISDS between Canada and the USA – while retaining some ISDS between Mexico and the others. The removal of ISDS provisions was strongly supported by USA legislators from both major parties: "in a September 12, 2018 letter, 312 legislators—including Democrats as well as Republicans—from all 50 U.S. states wrote that they "strongly support" U.S. Trade Representative (USTR) Robert Lighthizer's efforts to remove ISDS from NAFTA" [31] It was also strongly supported by long-standing social movement campaigns against ISDS in trade agreements. According to a leading Canadian campaigner:

> "Under the USMCA, ISDS will be eliminated between Canada and the U.S., and scaled back between Mexico and the U.S. This is an incredible achievement. NAFTA's ISDS mechanism, embedded in NAFTA Chapter 11, allowed investors to bypass the domestic courts and sue governments before private international tribunals when public policy choices, laws or regulations allegedly harmed their investments…. The fight against ISDS is far from over. But its phasing out between Canada and the U.S. and its retrenchment between Mexico and the U.S is a remarkable victory for social movements in North America and globally, who have tirelessly campaigned to eliminate this insidious impediment to progressive public policy." (Sinclair 2018)

- **TTIP: dead**

Negotiations on TTIP, the proposed transatlantic FTA between the EU and the USA were effectively abandoned in 2016, though they have not been formally cancelled by either side. The campaigns on both sides of the Atlantic were the key factor in this. It also suits the protectionist rhetoric of President Trump, who strongly opposed and withdrew from TPP on the grounds of protecting USA sovereignty and business interests, but he has not yet denounced TTIP.

- **Transpacific trade agreement includes ISDS, but not signed by USA, exemptions for NZ**

The new *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (CPTPP) – involving most countries except the USA – does include ISDS provisions. But the USA has not signed this agreement. And the scope of ISDS was restricted: "side letters were also signed to exclude compulsory ISDS between New Zealand and five countries: Australia, Brunei Darussalam, Malaysia, Peru and Vietnam".[32] The Australian Labor party agreed to CPTPP but promised that if if it wins the next election it will "seek to remove ISDS provisions from existing free trade agreements and legislate so that a future Australian government cannot sign an agreement with such provisions."[33]

- **New EU-Mercosur trade agreement does not include investment chapter or ISDS**

In June 2019 the EU reached final agreement with Mercosur on a new free trade agreement. However, unlike the FTAs with Canada, Vietnam and Singapore "It does not include investment protection standards or dispute settlement on investment protection" , nor any provisions concerning expropriation. [34]

- **Africa FTA signed but investment and ISDS provisions deferred**

The agreement establishing the African Continental Free Trade Area (AfCFTA) "entered into force on May 30, 2019, with the first phase of the deal taking effect for 24 countries. …. Phase II negotiations on intellectual property rights (IPRs), investment and competition policy are expected to take at least another year." The provisions so far in place do not cover investment, expropriation or compensation [35]

- **RCEP: negotiations continue with reduced role for ISDS**

"After an RCEP negotiation round held in Singapore in late August 2018, most negotiating partners are reported to have agreed to reduce the scope of application of the ISDS clause. A senior official said that ISDS would not be applied on an MFN basis; accordingly, different RCEP members could agree to different dispute settlement regimes." [36]

5.3.6 Developing countries terminate BITs

Countries in the Global South have long resented the use of BITs against them by investors from north America and Europe, and now a number of large economies have started terminating BITs, including India, Brazil, South Africa, and Indonesia.

Table 10. Developing countries reject or terminate BITs

Country	Actions
Brazil	Brazil never signed BITs, and now develops a new model of CFIAs (see below
Ecuador	ended BITs with 10 countries between 2008 and 2010 (Table 1) after new constitution in 2008, and in 2009 formally withdrew from the International Centre for Settlement of Investment Disputes (ICSID). In 2010, Ecuador's Constitutional Court declared the arbitration provisions of six more BITs unconstitutional.
India	India gave notice in 2017 to terminate 58 BITs,
Bolivia	terminated 11 BITs between 2012 and 2014
South Africa	has withdrawn from all its BITs, including 9 BITs with European countries. [37]
Indonesia	announced in 2014 it would terminate all its 67 BITs

Sources: Public Citizen 2018, Martins 2017,

The action by South Africa was prompted partly by a 2008 claim by Italian mining investors for compensation of $268million for South Africa's implementation in the mining sector of black economic empowerment regulations, a key measure to reverse the economic and social injustices of apartheid. [38] The government was not prepared to accept such interference with crucial policies, and so terminated all its BITs. It argues that the South African constitution provides sufficient and equal protection for all investors.

A surge in cases brought by investors against India led directly to the government's decision to terminate existing BITs, although it continues to seek negotiation of new agreements based on a 'model BIT' which still provides for ISDS and covers 'indirect' expropriation, and so is much weaker than the CFIAs promoted by Brazil (see below) [39]

Brazil has never been a party to any BITs but still receives substantial amounts of foreign investment. The National Congress of Brazil has refused to ratify proposed BITs, and also refused to ratify the ICSID convention, because of the risks associated with the traditional ISDS system. Instead, Brazil has developed an alternative model of Cooperation and Facilitation Investment Agreements (CFIAs), and has already signed such agreements with Angola, Chile, Colombia, Malawi, Mexico, Mozambique, and Peru. These CFIAs focus primarily on cooperation and investment facilitation, and include specific social responsibility obligations on investors, based on OECD guidelines, including provisions against corruption and against destruction of the environment. CFIAs.cover only FDI – not financial investments, which may be simply speculative – and are based on the principle of giving foreign investors the same treatment as domestic investors. Compensation for expropriation is covered, but not 'indirect expropriation', which has been used under BITs to challenge democratic

policies on infrastructure or services. There is no provision for ISDS, but each country has to create a national Ombudsman to resolve grievances, and ultimately for state-state conciliation or arbitration. (Martins 2017)

The termination of BITs does not lead to a fall in foreign direct investment. Ecuador, Bolivia, South Africa, Indonesia and India have terminated BITs , and foreign investment has still grown. (Public Citizen 2018)

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