

# The injustice industry and TTIP

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*Le Monde Diplomatique, English Edition, June 2014*

**There is a major legal business in corporate lawsuits against governments, seeking either a change in proposed legislation to suit corporate demands, or compensation. Under TTIP, European governments could face the same claims.**

The Veolia group decided to challenge one of the few concessions won by Egyptian salaried workers in the 2011 “spring” — a rise in the monthly minimum wage from 400 to 700 Egyptian pounds (\$56 to \$99). The French multinational felt this was too much and, in June 2012, filed a claim against the Egyptian government with the International Centre for Settlement of Investment Disputes (ICSID; part of the World Bank group). Veolia claimed Egypt’s new labour legislation contravened undertakings made by the city of Alexandria under their public-private partnership agreement on waste management. The Transatlantic Trade and Investment Partnership (TTIP; or Transatlantic Free Trade Agreement, TAFTA), currently under negotiation, may include provisions allowing companies to sue governments, which is what the US and the employers’ organisations would like. If it does, all signatories could face the same trouble as Egypt.

The investor-state dispute settlement (ISDS) process has already proved profitable for private companies. In 2004 the US group Cargill won \$90.7m in damages from Mexico, over a new tax on a sweetener for soft drinks. In 2010 the Tampa Electric Company won \$25m from Guatemala, over a law capping electricity tariffs. In 2012 Sri Lanka was ordered to pay Deutsche Bank \$60m over the violation of an oil hedging contract ([1](#)).

Veolia’s claim, still in process, relates to an investment treaty between France and Egypt. Worldwide, there are more than 3,000 such treaties, concluded bilaterally or as part of a wider free trade agreement. They protect foreign companies from public decisions (laws, regulations and standards) that could detrimentally affect investments. National regulations and local tribunals no longer have jurisdiction, which is transferred to a supranational court that draws its authority from the state’s abdication of responsibility.

In the name of protecting investment, governments are required to guarantee equal treatment of foreign and domestic companies (making it impossible to favour domestic companies to protect employment); security of investment (public authorities cannot change operating conditions; expropriation without compensation and “indirect expropriation” are banned); and freedom of movement of capital (a company can pull out of a country, taking all its assets with it, but the state cannot ask it to leave).

## Arbitration courts

Cases filed by multinationals are handled by specialised arbitration courts, including ICSID, which hears the most, the UN Commission on International Trade Law, the Permanent Court of Arbitration in The Hague and some chambers of commerce. In most cases, states and enterprises cannot appeal the tribunals’ decisions. (Unlike courts of law, arbitration courts do not have to offer a right of appeal.) Most states have chosen not to write the right of appeal into their treaties. If TTIP does include ISDS provisions, these courts will be very busy. Some 3,300 EU parent companies have more than 24,200 subsidiaries in the US, while 14,400 US parent companies have more than 50,800 subsidiaries in Europe; any of these could bring a claim over policies they believe to undermine their interests.

Private enterprises have been able to sue states for nearly 60 years, but the system has rarely been used until recently. Of the 550 claims since the 1950s, 80% were filed between 2003 and 2012 ([2](#)). Most have been filed by enterprises of the global North — 75% of the cases handled by ICSID came from

the US and EU — and 57% concern countries of the South. Governments that want to break with economic orthodoxy, such as Argentina and Venezuela, are particularly vulnerable.

The measures adopted in Argentina to tackle the crisis of 2001-02, including price controls and restrictions on capital outflow, were denounced in arbitration courts. Presidents Eduardo Duhalde and Néstor Kirchner came to power after riots, but had no revolutionary aims; they were simply trying to deal with the crisis. But the German group Siemens demanded \$200m in compensation when the new government challenged contracts signed by its predecessor (and which Siemens is suspected of having obtained through bribery). Saur, at the time a subsidiary of French group Bouygues, protested against a freeze on water prices, claiming this undermined the value of its investment.

Forty claims were filed against Argentina after the 1998-2002 recession. A dozen resulted in victory for the plaintiff, with a total of \$430m in damages awarded. In February 2011 Argentina was still facing 22 claims, 15 linked to the recession (3). It is reported that Egypt was the leading target of claims by multinationals in 2013 (4).

In protest against this system, countries such as Venezuela, Ecuador and Bolivia have annulled their investment treaties. South Africa is thinking of following suit, no doubt worried by its long battle with Italian company Piero Foresti, Laura De Carli and others, over the Black Economic Empowerment Act, which gives blacks preferential access to ownership of mines and land (black South Africans make up 80% of the population but own only 18% of the land, and 45% of them live below the poverty line). Piero Foresti claimed these provisions were contrary to the principle of equal treatment of foreign and domestic companies (5). The case was not taken to its conclusion: in 2010 Pretoria made concessions to the Italian firms.

## Company victories

The company nearly always wins: either the multinational is awarded substantial compensation, or the state is forced to lower its standards or to compromise, to avoid a lawsuit.

In 2009 Swedish public group Vattenfall demanded €1.4bn (\$2bn) in compensation from Germany, claiming that new environmental standards imposed by the city of Hamburg on the coal-fired power station it was building would make the project unprofitable. ICSID decided the claim was admissible and, after a long struggle, a settlement was reached in 2011 and the environmental standards were relaxed. Vattenfall is currently seeking compensation for losses after Germany's decision to phase out nuclear power by 2022. No total amount has been mentioned, but in its annual report for 2012 the group puts the losses at €1.18bn (\$1.7bn).

Multinationals can lose: out of 244 cases up to 2012, 42% were decided in favour of the state, 31% in favour of the investor; 27% reached a settlement (6). In such cases, the investor loses the millions it has committed to the proceedings. But, in the words of a report by the Corporate Europe Observatory (7), the arbitrators of the international arbitration courts and the lawyers “profit from injustice”, regardless of the outcome.

Both parties hire armies of lawyers, who charge anything from \$500 to \$1,000 an hour. The claim is judged by three arbitrators: one is selected by the government accused, one by the plaintiff company, and the chairman is selected by the parties jointly. Arbitrators do not need to be qualified, authorised or appointed by a court of law. They are paid between \$375 and \$700 an hour (sometimes much more), and as cases can take more than 500 hours to resolve, there is no shortage of candidates.

Most arbitrators (96% of them men) come from major European or North American law firms, but law is rarely their only experience. Francisco Orrego Vicuña of Chile, who has judged 30 cases, is one of the 15 arbitrators most in demand. Before moving into commercial law, he held a number of senior government posts during the Pinochet dictatorship. Canadian lawyer and former government minister Marc Lalonde has served on the boards of Citibank Canada and Air France. His fellow Canadian Yves Fortier has been head of the UN Security Council, chairman of law firm Ogilvy Renault, and a member of the boards of Nova Chemicals Corporation, Alcan and Rio Tinto. In an interview, he said: “Sitting on the board of a publicly traded company — and I have served on a number of such boards — has

helped me in my practice as an international arbitrator. It has always provided me with a vista on the business world that I would not have known as a lawyer” (8).

Some 20 law firms, most in the US, supply the majority of lawyers and arbitrators for the ISDS process. It is in their interest to look out for any opportunity to file a claim. During the Libyan civil war, the British law firm Freshfields Bruckhaus Deringer advised its clients to sue the Libyan government, on the grounds that security problems because of instability were having a negative impact on their investments.

Each case brings in over \$8m to the arbitration system. The Philippines, which is fighting a long-haul case against German airport operator Fraport, has paid out a record \$58m in legal costs, equivalent to the salaries of 12,500 schoolteachers (9). States with fewer resources hesitate to spend so much and seek a compromise at all costs, even if it means abandoning their social or environmental goals. The system benefits the richest, and whether the outcome is a judgment or an amicable settlement, it allows case law, and the international legal system, to escape all democratic control.