



## Should the 'right to be forgotten' be reviewed by an international court?

*The questions surrounding the investor-state dispute settlement are not about "corporate profits" or "promoting foreign investment", but about the role of international courts in global governance, writes Simon Lester.*

By Simon Lester

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A few weeks ago, the European Court of Justice (ECJ) issued a decision regarding an individual's right to have negative information about him or her removed from internet search engines, such as Google. Privacy advocates and business groups have debated the merits of the ruling, but there is a larger issue at stake here, related to another prominent policy debate: Investor-state dispute settlement (ISDS). If the Transatlantic Trade and Investment Partnership (TTIP) were currently in force with ISDS, Google could challenge the ECJ ruling before an international tribunal. It is this aspect of ISDS - its international constitutional elements - that should be at the core of the debate.

The actual ISDS debate, unfortunately, is much less substantive. Business groups talk about ISDS as necessary for, and intended to promote, foreign investment. In reality, the evidence on this point is mixed at best. Many studies show no correlation at all between ISDS and investment flows, and investment continues to boom in countries such as Brazil, which has no such treaties in force, and China, which has no treaty with the US or EU.

On the other side, critics obsess about "corporate profits", and claim that lost profits are enough to trigger a complaint. But that is not really how these agreements work. Certainly, if a government action results in lower profits, a company might consider whether an ISDS claim against that action is possible. However, you cannot assert lower profits as the basis of such a claim. The rules are more nuanced than that.

The actual system works like this, as applied to Google's case. The rules in these international investment obligations tend to offer broad and general protections, similar to those seen in domestic constitutional or administrative law. For example, one such rule is that foreign

investments must be provided with treatment that is "fair and equitable." Google could use that rule as follows.

In the ECJ case, the complainant, a Spanish citizen, was upset about a negative article that had appeared in a Spanish newspaper. But the ruling did not force the Spanish newspaper to take down the article. Rather, it compelled Google to remove the article from its search results and set up a general process for removing such items upon request. The local newspaper, which actually published the article, had no obligation to do anything, while Google had to undertake a costly and burdensome effort. Arguably, this approach does not treat Google "fairly" or "equitably".

The outcome of such a claim is unclear, of course, and full legal briefing on this issue would be extensive and complex. But it seems likely that there is at least a credible claim there.

The important point to take from all this is the following. ISDS provides "constitutional" review of government actions, at all levels and for all branches of governments. Lower courts, appeals courts and high courts are all subject to review. Local governments, sub-federal governments, and national governments of all types (even the EU!) are also subject to review.

The question is thus not one of "corporate profits" or "promoting foreign investment". It is about the role of international courts in global governance. Are we comfortable with international tribunals acting as a global high court on matters traditionally within the domestic sphere? That is a big step, one that needs to be acknowledged and debated. To be clear, such a court would not have the same power as national high courts – it could not order governments to take particular actions or enjoin domestic laws. But it could impose liability for monetary damages where government actions violate international obligations. In this way, it could have a significant impact on national laws, regulations and courts.

And if we are going to have a global court, what should the governing structure look like? As it stands now, ISDS courts do not look very credible. Their objectivity has been questioned and they lack legitimacy. If they are going to be used as a high court, more thought should be put into their design. Which individuals should have access to them? What should the substantive obligations be? How should the judges be chosen?

Reasonable people can disagree on the issue of ISDS. But we should at least be asking the right questions.

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