Lawyers Gearing Up To Hit UK With Corporate Sovereignty Claims Totalling Billions Of Dollars Over Brexit

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We're not hearing much about **corporate sovereignty** -- also known as "investment state dispute settlement" (ISDS) -- these days. It's definitely still a problem, especially for smaller countries. But the big fights over the inclusion of corporate sovereignty chapters in the two global trade deals -- the Transatlantic Trade and Investment Partnership (**TTIP**), and the Trans-Pacific Partnership (**TPP**) agreement -- have been put on hold for the moment. That's for the simple reason that both TPP and TTIP are in a kind of limbo following the election of Donald Trump as US President with his **anti-free trade platform**.

TTIP seems completely moribund, whereas TPP -- re-branded as TPP11 to reflect the fact that there are only 11 countries now that the US has pulled out -- is showing the odd twitch of life. A recent article in the Canadian newspaper National Post points out that the departure of the US might even allow **some of the worst bits of TPP to be jettisoned**:

the Americans insisted on longer intellectual property patent terms and stronger copyright regulations than many countries wanted. Canada will now argue for shorter patent terms, in support of its generic drug sector and in an attempt to keep drug costs down.
Canada is also keen to water down the investor-state dispute settlement negotiated by the U.S. in the original deal, and bolster the state's right to regulate in the public interest.

The move by Canada to rein in some of the worst excesses of corporate sovereignty follows the EU's lead in this area. As Techdirt reported, during the TTIP negotiations between the EU and US, the former suggested replacing the old ISDS with a "new" **Investment Court System** (ICS). Although the US was not interested, Canada later **agreed** to this slightly watered-down version for the **CETA**trade deal with the EU.

The ICS still doesn't exist, and is still something of a mystery in terms of how it will work. It was proposed in an attempt to head off massive public **concern** about corporations being able to sue governments -- and thus taxpayers -- for huge sums, completely outside the normal legal system, and subject to few constraints. But even ICS was not enough to stop the Belgian region of Wallonia nearly **de-railing** the CETA deal at the last moment.

Anxious to avoid that happening again, the President of the European Commission, Jean-Claude Juncker, had a rather radical suggestion in his recent State of the Union address. In order to make future trade deals easier to push through the legislative process in the EU, Juncker

proposed **removing investment protection chapters** from them completely, and negotiating a separate deal covering this aspect. An article on Politico.eu explains the thinking behind that move:

Slicing out investment protection will give [Juncker] an immediate legal advantage. Under EU law, a trade deal without investment clauses could be ratified exclusively by the European Parliament and by the member countries as represented at the Council in Brussels. That effectively removes the direct veto powers of the Walloons.

Simon Lester, Trade Policy Analyst at the Cato Institute, thinks the **US should follow suit** -- an idea that someone from the same group **suggested** a few years ago:

The Europeans have faced a greater struggle with investment protection and ISDS than has been the case in the United States, but these provisions have been a problem here as well. If we want to make it easier to get trade negotiations completed and trade agreements passed by Congress, we should consider following the EU's lead.

Although removing corporate sovereignty from trade deals does not solve the larger problem of giving companies special protection, it is a step in the right direction. For example, after concluding trade deals that do not have ISDS chapters, governments may decide to bring them in as quickly as possible in order to enjoy their claimed benefits. When commercial relations work perfectly well without them -- as is already the case for both the US-Australia trade deal, and the one between the EU and South Korea, neither of which include corporate sovereignty -- governments may decide to leave it at that, and forget about further negotiations covering investment.

Unfortunately, none of these recent moves is likely to help the UK, currently struggling with the implications of last year's "Brexit" referendum to leave the EU. Ever-inventive lawyers have realized that an unexpected withdrawal of the country from the EU could represent an excellent opportunity for companies that have invested in the UK to claim that they will suffer as a result, and to use corporate sovereignty clauses to claim compensation potentially amounting to **billions**of dollars. Corporate Europe Observatory has a new post exploring **what could happen here**:

the UK's impending exit from the European Union may bring new investment arbitration opportunities. The country has 92 investment agreements in force, which investors from other countries could use to file ISDS claims against the UK. In conferences and alerts for their multinational clients, some of the top investment arbitration law firms are already assessing the prospect of such Brexit claims. Depending on how the Brexit negotiations turn out, these lawsuits could be about anything from foreign carmakers or financial companies losing free access to the EU market, to the government scrapping subsidies for certain sectors. One lawyer from UK-based law firm Volterra Fietta has even suggested that "there may be a number of investors that would have come to the UK expecting to have a certain low wage group of employees", which might sue for loss of expected profit if they lose access to underpaid, foreign workers.

But the clever lawyers don't stop there. They see opportunities for corporations to use Brexit as a way to sue other EU countries too:

Several law firms have published briefings suggesting that it would be an advantage for corporations if they structured their foreign investment into the remaining EU member states through the UK. This means that if you are a German company, for instance, and have an investment in Romania you could let this investment 'flow' through a subsidiary -- possibly only a mailbox company -- in the UK. You could then sue Romania via its bilateral investment treaty with the UK -- even if no such treaty was in place between Romania and Germany.

This kind of "creativity" is yet another reason why tweaks to corporate sovereignty of the kind contemplated by the EU and Canada are simply not enough: ISDS needs to be dropped completely from all trade deals -- past, present and future.