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Tens of Thousands of U.S. Firms Would Obtain New Powers to Launch Investor-State Attacks against European Policies via CETA and TTIP

81 Percent of U.S. Firms in the EU Could Launch ISDS Attacks with CETA Alone; U.S. Corporations Are the Most Aggressive Users of the ISDS Regime

New analysis of data on U.S. corporations with investments in Europe reveal that were the Transatlantic Trade and Investment Partnership (TTIP) to be enacted with investor-state dispute settlement (ISDS) provisions, more than 47,000 U.S.-owned firms would be newly empowered to launch ISDS attacks on European policies and government actions.[1] But because many of the U.S. firms operating in Europe currently also have Canadian subsidiaries, much of this unprecedented increase in European ISDS liability could still occur if only the European Union (EU)-Canada Comprehensive Trade and Economic Agreement (CETA) were enacted with ISDS.

Four out of every five U.S.-owned firms operating in EU member states could gain new rights to attack European Union and EU member state policies using CETA's ISDS mechanism at the stroke of a pen from their parent corporations. Of the 51,495 U.S.-owned subsidiaries currently operating in EU member states, 41,811 are owned by U.S. parent companies that also have subsidiaries in Canada.[2] Any one of these 41,811 firms could be used as the basis for an ISDS case against EU and member state policies under CETA if the U.S. parent company were simply to alter the lines of legal ownership such that its Canadian subsidiary could claim some portion of ownership of its European subsidiary. If CETA were to go into effect with ISDS, such modest changes to corporate ownership documents would allow U.S. firms to bypass domestic courts, challenge EU and member state governments before extrajudicial tribunals and demand compensation for a broad swath of environmental, health, financial and other public interest policies.

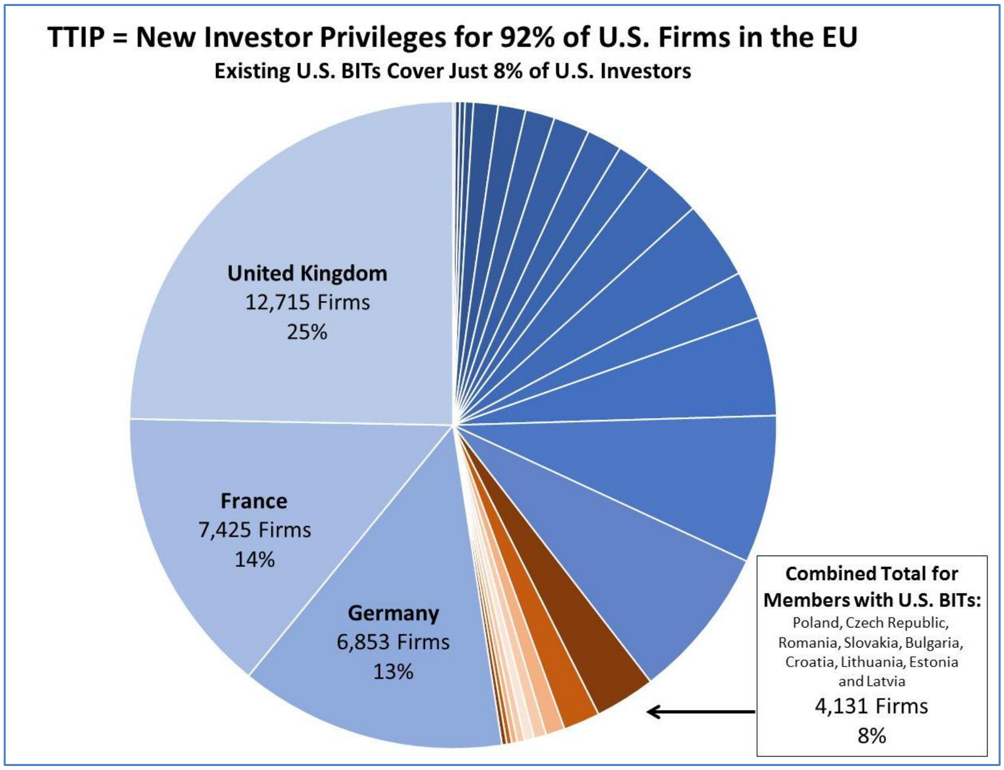
To date, the intense debate on ISDS in Europe has not focused on the reality that CETA would empower backdoor ISDS attacks by U.S. firms in Europe. Exposing European policies to ISDS challenges by U.S. firms via TTIP or CETA is particularly dangerous given the notoriously litigious nature of U.S. companies. U.S. firms have launched far more ISDS cases than firms from any other country in the world – more than twice as many as those launched by firms from the country that is the second-largest source of ISDS claims.[3] Indeed, more than one out of every five ISDS cases in the entire history of the ISDS system has been brought by a U.S. corporation.[4]

Given this data, it is not surprising that across Europe, opposition from government officials, businesses and civil society to inclusion of the controversial ISDS system in TTIP has grown, while it *is* surprising that some seem less concerned about inclusion of ISDS in CETA. Those indicating opposition to ISDS in either or both pacts include European Commission (EC) President Jean-Claude Juncker,[5] the European Parliament's Socialists & Democrats bloc,[6] the French Parliament,[7] the Dutch Parliament,[8] the Austrian Parliament,[9] Germany's Federal Minister for Economic Affairs and Energy Sigmar Gabriel,[10] France's Secretary of State for Foreign Trade Matthias Fekl,[11] associations of small and medium businesses,[12] a vast array of civil society groups,[13] and many of the record-breaking 150,000 individuals who responded to the EC's public consultation on ISDS.[14]

TTIP: Exposing EU Policies and Taxpayers to an Unprecedented Increase in ISDS Liability

More than 19,900 U.S. parent corporations own more than 51,400 subsidiaries in EU member states, any one of which could provide the basis for an investor-state claim if TTIP were to be enacted with ISDS.[15] The resulting new European exposure to investor-state attacks would far exceed the risks posed under any existing European agreements with other countries that include ISDS. That is because the United States is by far the largest source of the EU's inward foreign direct investment (FDI). Indeed, U.S. firms are responsible for more than three times as much investment in the EU as the second-largest FDI source. Two out of every five dollars of FDI in the EU come from U.S. firms.[16] This not only translates into enormous new risks of ISDS exposure under TTIP. It also begs the question of precisely why a U.S.-EU pact would need ISDS and the related investor protections – absent such terms, transatlantic investment flows are already extremely robust.

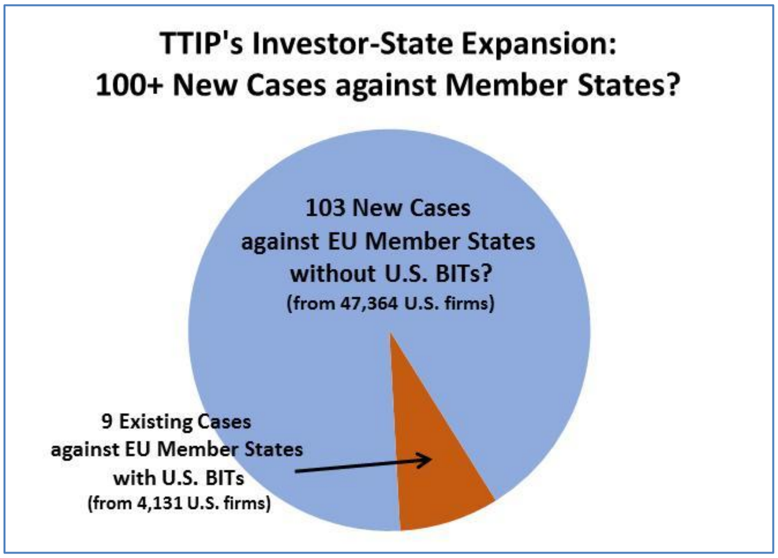
Some EU government officials have attempted to downplay the prospective surge in ISDS liability were TTIP to include ISDS. They point out that nine EU member states already have Bilateral Investment Treaties (BITs) with the United States, and that only nine publicly known investor-state cases have been brought under those BITs.[17] But these nine BITs, between the United States and Eastern European countries that are not major FDI destinations, cover just 8 percent of the U.S.-owned firms operating within the EU.[18] In other words, some EU officials are arguing that because these member states have not faced a wave of ISDS attacks from 8 percent of the U.S. firms operating within the EU, empowering the other 92 percent of the U.S. firms operating within the EU to use ISDS to challenge domestic safeguards should not be cause for concern.



Source: Uniworld, American Firms Directory, 2014

Actually, if the number of ISDS cases is taken as proportional to the number of foreign-owned firms, the ISDS case record under the nine existing U.S.-European BITs suggests that newly exposing the other 19 EU countries to U.S. ISDS claims would invite the launch of more than 100 U.S. ISDS cases against those countries in the early years of TTIP implementation.[19] This figure does not take into account the significant growth of ISDS cases in recent years, which would suggest a higher number of expected ISDS cases under TTIP.

What kinds of EU and member state policies might U.S. firms choose to challenge via ISDS? According to Eurostat, U.S. investments within the EU are mostly concentrated in the financial sector.[20] Indeed, each of the ten largest U.S. financial firms is currently operating in EU member states, meaning that each would be empowered, were TTIP to take effect with ISDS, to challenge European financial regulations before extrajudicial tribunals.[21] Potential targets could range from improvements in ring-fencing policies that protect depositors from risky trading to new restrictions on shadow banking to future regulations to limit tax evasion.



Source: Uniworld, American Firms Directory, 2014

Beyond the financial sector, U.S. firms operating in the EU are largely dedicated to "the manufacture of petroleum, chemical, pharmaceutical, rubber and plastic products" and "the manufacture of food products, beverages and tobacco products," according to Eurostat.[22] These firms would be empowered to challenge improvements or modifications of European chemical safeguards and food safety policies. Both policy regimes already are significantly stricter than the U.S. regulations with which those firms must comply, and both are designed such that new decisions are regularly taken with respect to new chemical substances or categories and new food additives or genetically modified seeds.

Exposing such EU or member state policies, government decisions or other actions to ISDS challenges by U.S. firms is particularly dangerous given the notoriously litigious nature of U.S. companies. U.S. firms have launched far more ISDS cases than firms from any other country in the world – more than twice as many as the cases launched by firms from the country that is the second-largest source of ISDS claims.[23] Indeed, more than one out of every five ISDS cases in the entire history of the ISDS system has been brought by a U.S. corporation.[24] U.S. firms have launched far more ISDS cases than firms from any other country despite having fewer ISDS-enforced BITs at their disposal than firms in more than 40 other countries.[25] For example, U.S. corporations have launched more than three times as many ISDS cases as German firms, even though Germany has enacted more than three times as many BITs as the United States.[26]

<u>CETA: Backdoor for ISDS Attacks from 81 Percent of the U.S. Firms Operating within the EU</u>

Those concerned about an unprecedented increase in ISDS liability from TTIP should be just as concerned with the prospect of CETA taking effect with ISDS included. Even if CETA alone were to take effect with ISDS, 81 percent of the U.S.-owned subsidiaries operating within the EU could still gain ISDS privileges at the stroke of a pen from their U.S. parent companies.

Of the 51,495 U.S.-owned subsidiaries currently operating in EU member states, 41,811 are owned by U.S. parent companies that also have subsidiaries in Canada.[27] Any one of these 41,811 firms could be used as the basis for an ISDS case against EU or member state policies under CETA if the U.S. parent company simply were to alter the lines of legal ownership such that its Canadian subsidiary could claim some portion of ownership of its EU subsidiary. A U.S. parent company could achieve this, for example, by shifting shares in the EU subsidiary to its Canadian subsidiary.

After such a change in legal papers, the Canadian subsidiaries of the U.S. firms would be considered investors in the EU under the current terms of CETA's investment chapter, enabling them to use ISDS to attack EU policies. In CETA, the definition of an "investor" able to access ISDS is broad. It includes any "enterprise of a Party" (e.g. Canada) "that seeks to make, is making or has made an investment in the territory of the other Party" (e.g. the EU).[28] To qualify as an "enterprise of" Canada, a U.S.-owned firm in Canada would just need to have "substantial business activities in the territory of" Canada.[29] Most existing Canadian subsidiaries of U.S. firms would qualify – unlike "shell" companies, these are firms that are actually doing business in Canada.[30] The CETA investment chapter's definition of "investment" is also broad – owning shares in a firm located in the EU (even a minority share) would qualify as an "investment."[31]

Country	U.S. Firms Granted ISDS under TTIP	U.S. Firms with ISDS Potential under CETA	Share that Could Use CETA
Austria	900	792	88%
Belgium	1,527	1,171	77%
Bulgaria	248	212	85%
Croatia	190	175	92%
Cyprus	119	110	92%
Czech Republic	938	774	83%
Denmark	876	741	85%
Estonia	127	113	89%
Finland	755	659	87%
France	7,425	6,263	84%
Germany	6,853	5,203	76%
Greece	707	657	93%
Hungary	632	542	86%
Ireland	1,233	997	81%
Italy	3,939	3,320	84%
Latvia	122	112	92%
Lithuania	143	125	87%
Luxembourg	214	162	76%
Malta	56	52	93%
Netherlands	2,532	1,931	76%
Poland	1,556	1,345	86%
Portugal	930	820	88%
Romania	491	413	84%
Slovakia	316	279	88%
Slovenia	131	122	93%
Spain	3,801	3,266	86%
Sweden	2,019	1,722	85%
UK	12,715	9,733	77%
EU TOTAL	51,495	41,811	81%

Source: Uniworld, American Firms Directory, 2014

The CETA investment chapter only stipulates one scenario in which the EU or a member state government facing an ISDS challenge from a U.S.-owned firm in Canada could deny the benefits of ISDS to that firm: if the government had active sanctions against the United States (e.g. for human rights or security reasons).[32] Given the low likelihood that the EU will soon impose sanctions on the United States, the EU and its member states are left with little recourse to prevent U.S.-owned firms in Canada from gaining access to ISDS under CETA upon acquiring their parent companies' shares in EU firms.

Such creative reshuffling of corporate structures to access ISDS-enforced pacts is a familiar tactic in ISDS cases. Indeed, it is one that corporate law firms even explicitly recommend to their transnational clients.[33] Whether to allow such "treaty shopping" is a decision left to the three private lawyers who comprise an ISDS tribunal. These lawyers are not bound by precedent or the opinions of the governments that signed the agreements, nor are their decisions subject to any meaningful appeal system. ISDS tribunals have repeatedly allowed foreign firms' treaty-shopping maneuvers.[34]

One of the best known instances of multinational firms moving official ownership of subsidiaries so as to treaty-shop for ISDS attacks is the high-profile *Philip Morris Asia Limited v. The Commonwealth of*

Australia case. The U.S. tobacco giant Philip Morris opted to launch an ISDS case against Australia's landmark plain packaging law for cigarettes under the Australia-Hong Kong BIT. To do so, Philip Morris's Hong Kong subsidiary acquired shares in the company's Australia subsidiary in February 2011. This occurred *after* months of Phillip Morris's Australian subsidiary protesting Australia's announced plans to implement plain packaging.[35] Four months after the legal restructuring, the Hong Kong-based subsidiary notified the Australian government of its forthcoming ISDS claim against the tobacco control law on the basis of its new "investment" in Australia.[36] This occurred 16 months after Philip Morris used subsidiaries in Switzerland with investments in Uruguay to attack similar tobacco control policies in Uruguay under a Switzerland-Uruguay BIT.[37] Meanwhile, Philip Morris identified itself as a U.S. firm when it submitted comments to the U.S. government in favor of including ISDS in the Trans-Pacific Partnership and "any future U.S. Free Trade Agreements."[38]

Unfortunately, Phillip Morris' legal gymnastics are not an anomaly and ISDS tribunals have allowed such maneuvers. In *Autopista Concesionada de Venezuela CA v. Bolivarian Republic of Venezuela*, a Mexico-based parent firm used its U.S. subsidiary to launch an ISDS case against Venezuela. In the same way, U.S.-based firms could use their Canadian subsidiaries to launch claims against European governments were CETA to take effect with ISDS. The *Autopista* case involved a Mexican parent company – ICA Holding – that owned a subsidiary in the United States and another in Venezuela (the equivalent of U.S. parent companies with subsidiaries in both Canada and the EU).[39] When a dispute arose over a transportation contract between ICA Holding's Venezuelan subsidiary and the Venezuelan government, ICA Holding sought to access a provision in the contract that allowed ISDS claims to be brought against the government under the rules of the International Centre for Settlement of Investment Disputes (ICSID). But since the provision was limited to shareholders from countries that were ICSID members, and since Mexico was not party to ICSID, ICA Holding could not directly launch an ICSID claim against the government. However, U.S. firms could launch such claims, as the United States was an ICSID member.[40] A parallel scenario would be created if CETA (but not TTIP) were to be enacted with ISDS, allowing Canadian but not U.S. firms to challenge EU policies. In the *Autopista* case, the Mexican parent firm transferred 75 percent of its shares in the Venezuelan subsidiary to its U.S. subsidiary[41] more than a year *after* its Venezuelan subsidiary started experiencing the problems prompting the dispute with the Venezuelan government.[42] The Mexican firm then used its U.S. subsidiary to launch an ISDS claim against Venezuela under ICSID rules some months later.[43] In considering this maneuver, the ISDS tribunal dismissed arguments by Venezuela that the investment at issue was ultimately controlled by a Mexican rather than a U.S. firm.[44] The tribunal ruled that the case could proceed,[45] and in a later ruling against Venezuela on the merits, ordered the government to compensate the Mexican firm's subsidiary.[46]

The *Autopista* decision allowing such maneuvers was not an isolated one. In *Aguas del Tunari, S.A. v. Republic of Bolivia*, Bechtel, a U.S. company, owned a controlling share in Aguas del Tunari, a firm in Bolivia, via Bechtel's subsidiary in the Cayman Islands.[47] Less than two weeks *after* a water privatization contract between Aguas del Tunari and the Bolivian government sparked widespread public criticism in November 1999, Bechtel "migrated" its subsidiary from the Cayman Islands to the Netherlands.[48] After public protests intensified, spurring the Bolivian government to terminate Aguas del Tunari's contract,[49] Bechtel used its new Netherlands-based subsidiaries to launch an ISDS case against Bolivia under the Netherlands-Bolivia Bilateral Investment Treaty (BIT). Before this "migration," Bechtel's ISDS options were limited, given that a U.S.-Bolivia BIT had not been implemented and that an ISDS case could not be launched against Bolivia via the Cayman Islands.[50] The Bolivian government argued against this treaty shopping ploy, noting that the Netherlands-Bolivia BIT could not be used for the case given that Bechtel, which was not covered by the treaty, ultimately controlled the shares in Aguas del Tunari – not Bechtel's Netherlands subsidiaries. The tribunal ruled in favor of Bechtel, reasoning that since the Netherlands firms had substantial business activities, they could not be considered shell companies, and thus were empowered to mount an ISDS case against Bolivia on behalf of their shares in Aguas del Tunari – even if the firms were ultimately owned by Bechtel.[51] On this basis, the tribunal majority allowed Bechtel's subsidiaries to continue their case.[52]

Were CETA to take effect with ISDS included, EU member states should expect to see U.S. firms follow the example of Philip Morris, Bechtel, ICA Holding and others. With a simple transfer of shares, thousands of these firms could launch ISDS cases against EU and member state policies.

ENDNOTES

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