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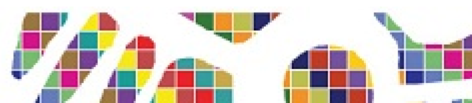

Unmasked

Corporate rights in the renewed Mexico–EU FTA

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Executive Summary

Mexico and the European Union will soon begin the “modernisation” of their 15 year old Free Trade Agreement (MXEU FTA). Although MXEU FTA was the first comprehensive trade deal with a Latin American country, the level of trade liberalization and investment protection in subsequent EU deals has been far higher. The ‘renewed’ FTA with Mexico stands to go much further than its predecessor.

Independent reports have established that the current MXEU FTA has had negative consequences in terms of diversification of foreign trade, greater investments in development and job creation, and human rights protection. Far from addressing these failures, “modernising” this agreement is just a euphemism for the extension and deepening of investors’ protection rights. A key feature of the “modernisation” process is the inclusion of an investment protection chapter and a mechanism for settlement of investor-state disputes.

If pushed through, the “modern” FTA with a full-fledged investment protection chapter will:

1. Allow foreign investors to challenge public interest legislation in Mexico and in Europe

The current EU investment protection proposal -already included in the EU-Vietnam and the EU-Canada deals and being negotiated with the United States- will be rolled into all new EU trade agreements, including the one with Mexico.

Under this proposal companies will maintain the rights to launch multimillion-dollar arbitration lawsuits against the Mexican government over measures designed to protect the people and the environment. Contrary to what the EU claims, the Investment Court System proposed by the European Commission fails to protect the right to regulate. There is nothing in the text of the EU investment model that prevents companies from challenging public interest decisions and arbitrators from deciding in favour of investors, ordering states to pay billions in taxpayer compensation for legitimate public policy measures. The Commission has included ill-defined rights for investors, such as fair and equitable treatment and indirect expropriation. In fact, governments will have to defend public interest measures as “necessary” and in line with “legitimate” objectives in the face of investors’ attacks. The cases will be decided by highly paid lawyers –re-labelled as judges by the EC- who maintain a strong financial incentive to interpret the law in favour of the investor. The salaries are paid by the parties in the dispute at a rate of USD 3000 per day.

2. Locked in privatisation and pro-corporate reforms in the oil and gas sector in Mexico

In December 2013, the Mexican government opened up, after decades, the exploitation of the oil and gas industry to foreign companies. EU energy companies like Shell, BP and Total have a key interest in the Mexican oil market. The strengthening of investment protections under the new EU MX FTA will lock in these reforms. Future Mexican governments will find it hard to reverse these policies without the risk of being sued at international investment tribunals.

The risk of lawsuits by oil companies is real since a significant proportion of the international investment arbitration cases stems from the energy sector, and many involve countries that have undergone energy reforms. Oil and gas companies have initiated 57 known investment disputes, 80% of which were launched in the last 10 years. Countries in the Latin America and Caribbean region are the biggest target.

3. Make it much harder for Mexico and individual European countries to pull out of this agreement

Mexico has bilateral investment treaties (BITs) with 16 out of 28 EU Member States. The majority of these can be terminated at any time or by 2019, giving the Mexican government great discretion to assess whether or not to maintain these agreements. However, if Mexico replaces the current BITs with an investment protection chapter in the EU FTA it would be virtually impossible to withdraw the new rights

granted to foreign investors. The only way would be to put an end to the whole agreement. Furthermore, if an individual member State wanted to consider a revision of the rights granted to Mexican investors, it would have to leave the European Union to roll back commitments.

4. Put Mexico at risk of being the target of a new wave of investment lawsuits by European investors

Mexico, having already faced 23 investment treaty arbitration cases, is the seventh most sued country in the world. As a result of these lawsuits, it has already paid $246 million USD plus interest in "damages" to nine different companies. US investors have initiated most investment arbitration claims so far, but in recent years, several Spanish companies have also led claims against the Mexican government. Telefónica for example is demanding the staggering amount of over USD 1 billion in compensation for Mexico's regulation of the telecommunications sector, a measure that was recommended by the Organisation for Economic Co-operation and Development (OECD) itself.

By signing an investment protection agreement with the European Union, the Mexican government will expose itself to new investment lawsuits by European investors, potentially costing millions from the public budget. Investors from EU member states are the most avid users of the Investment State Dispute Settlement (ISDS) system, having initiated 53% of all known ISDS disputes worldwide. Investors from the Netherlands, the UK and Germany are the most active. Coincidentally, investors from these countries are also the ones that currently invest the most in Mexico. The higher risk of further lawsuits is also enhanced by the fact that, since 2000, flows of EU Foreign direct investment to Mexico have tripled. European investments have been mainly channeled to financial services, tourism and telecommunications. Investments in these sectors are particularly at risk of leading to investment disputes. More than half of lawsuits brought by European companies worldwide have related to services industries, including financial services and telecommunications.

5. Increase the chances that EU governments become the target of lawsuits by Mexican multinationals

Mexican transnational companies are increasingly investing in Europe and in Spain in particular. 2014 marked a record high of Mexican investment in Spain. All of these investments and takeovers would make European countries susceptible to investment arbitration lawsuits by Mexican companies under a new investment protection chapter. While for a long time, Western EU member states had been immune to arbitration lawsuits, in recent years the wealthier EU member states have faced 43 investment treaty cases, 29 of which were against Spain.

6. Allow European companies to continue human rights violations in Mexico with impunity

European companies have a track record of human rights and environmental violations in Mexico with virtually total impunity. The proposed investment chapter developed by the European Union does nothing to address this situation. On the contrary, it will deepen the imbalance between binding rights for corporations and voluntary guidelines when it comes to respect of human right. The EU proposal does not include any obligations for investors, only rights.

This is no surprise. The current Mexico EU FTA includes a Human Rights and Democratic Clause which could have triggered suspensions of the agreement in light of human rights violations. Yet, in the 15 years since this treaty entered into force, the European Union has ignored those violations rendering the clause a merely decorative element.

If Mexico and the EU move to modernise their relationship, it should be with the aim to redress the imbalance in favour of transnational corporations observed during 15 years of this free trade agreement instead of expanding investment protection by granting sweeping corporate rights to foreign investors.

Introduction

In 2009, Spanish energy multinational Abengoa sued the Mexican government at a World Bank arbitration tribunal. The reason? Mexican local authorities blocked the operation of a toxic waste disposal in the municipality of Zimapán. This facility would have been installed only 2 kilometres away from a Natural Reserve and less than 500 meters from the *hñañu* indigenous community, putting at risk their fragile ecosystem, including spilling arsenic into the watersheds. The local mayor decided not to grant the license of operation in response to the local opposition united under the movement "*Todos somos Zimapán*" (We are all Zimapán)[1]. Not only was the company able to challenge a government measure intended to protect the environment and local communities, the arbitrators in the case ordered the Mexican government to pay the company 45 million US dollars in compensation for lost profits and 1.7 million US dollars in legal expenses and arbitration tribunal costs[2].

This is not an isolated case. Mexico alone has been the target of at least 23 investment treaty arbitration cases. There are almost 700 investment arbitration lawsuits worldwide which include endless examples of regulatory measures taken by governments in the public interest that have led to investment arbitration lawsuits and millions spent from public coffers[3].

Mexico and the European Union are about to embark on the so-called "modernisation" of their Free Trade Agreement[4] (from now on the MXEU FTA) which entered into force in 2000. At the time, Pascal Lamy, Trade Commissioner for the European Union, proudly called the agreement "the first, the fastest and best"[5]. This treaty was the first comprehensive trade deal that the EU would sign with Latin American countries. However, today, the level of trade liberalization and investment protection of the MXEU FTA has been surpassed by many other treaties.

> "The kinds of trade deals that the European Union and Mexico are negotiating today are very different to what we agreed on all those years ago. They remove many more types of barriers, making them much more effective at opening markets"
>
> EC Trade Commissioner Cecilia Malmström[6]

This "upgrading" is a part of the new strategy recently presented by the European Commission (EC), named "Trade for All"[7]. The idea to launch fresh negotiations was announced with great fanfare[8] before even carrying out an assessment of the impacts of the current MXEU FTA. Numerous independent reports have established that the agreement has had negative consequences in terms of diversification of foreign trade, greater investments in development and job creation, and human rights protection, among others[9].

An important consideration is who is behind the push for this fresh deal. It has been noted that "the main drivers of the modernisation process, at least presently, are not specific problems or interests, but very broad considerations of geopolitics and geo-economics"[10]. A study developed at the request of the European Parliament's Committee on International Trade concludes that it is the EU who has taken the initiative to launch new negotiations[11]. The same study also noted that the business sectors in Mexico, as well as in the EU, do not have a strong interest in the modernization efforts[12]. However, the Mexican government has expressed interest in a trade deal with the European Union that locks in "recent Mexican reforms in telecommunications, finance and energy" sectors[13] and that resembles the Transatlantic Trade and Investment Partnership (TTIP) currently under negotiation by the European Union and the United States.[14]

"The need for and the process of updating the EU-Mexico arrangements are largely unknown to the Mexican business community"

European Parliament study[15]

A key feature in the "modernisation" process is the inclusion of an investment protection chapter as well as a mechanism for settlement of investor-state disputes, which the EC has re branded as Investment Court System (ICS) in all new trade agreements negotiated by the EU.[16]

The EC touts it as a step "towards a more responsible trade and investment policy"[17]. However, "modernising" this free trade agreement is just a euphemism to describe the intention to extend and deepen investors' protection rights and other corporate friendly rules[18]. The new template that the Commission intends to roll out is the one included in the recently signed agreement with Canada - Comprehensive Economic and Trade Agreement (CETA)[19] and the EU-Vietnam FTA[20]. It is also the same proposal under negotiation for the TTIP[21].

If pushed through, the "modern" FTA with a full-fledged investment protection chapter will deepen the imbalance between binding rights for corporations and voluntary guidelines when it comes to respect of human rights. It will also enhance the possibility that companies like Abengoa keep on launching multimillion dollar arbitration lawsuits against the Mexican government (and potentially Mexican companies – ever more present in Europe - suing some European member states) over measures designed to protect the people and the environment.

The coming upgrade should end up with deals that are "comparable to CETA with Canada and TTIP with United States"

Federica Mogherini, EU's foreign policy chief and Vice President of the EU Commission[22]

This briefing presents six key reasons why the inclusion of an investment protection chapter is worrisome and should be resisted.

1. Foreign Investors will be able to challenge public interest legislation in Mexico and in Europe

After intense public pressure[23], in November 2015, the European Commission unveiled a so-called new approach to investment protection – the Investment Court System – to be applied to all future EU agreements in replacement of the controversial Investor-State Dispute Settlement mechanism (ISDS). It was promoted as a solution to the egregious attacks made by investors under the ISDS system[24]. The European Commission claimed that governments' ability to regulate in the public interest is protected[25]. They also claim that the EU investment proposal sets up an independent public court that is substantially different from private arbitration and secures the impartiality of arbitrators, now called judges[26]. The main elements of this ICS proposal have already been included in the EU-Vietnam[27] and the EU-Canada[28] deals and are currently being negotiated with the United States in the context of the TTIP [29].

"When people say that ISDS is dead, it makes me think of a zombie movie because I can see ISDS walking around in these new proposals all over the place"

Professor Gus Van Harten,
Osgoode Hall Law School[30]

However, a close review of the EU investment proposal gives a very different picture. In fact, far from addressing the fundamental flaws of the arbitration system, the Investment Court System is a rebranded version of ISDS. A thinly guised attempt to "*put lipstick on a pig*" as some have described it[31].

On the one hand, the Commission has failed to protect the right to regulate. There is nothing in the text of the EU investment model that prevents companies from challenging public interest decisions – e.g. for health or environment protection. The Commission has included ill-defined rights for investors, such as fair and equitable treatment and indirect expropriation. Simply stating that governments have the right to regulate in the public interest will not prevent investors from launching lawsuits when they feel their (expected) profits are in danger. In fact, governments will have to defend whether public interest measures are "necessary" and meet "legitimate" objectives in the face of investors' attacks. Moreover, nothing would prevent arbitrators from deciding in favour of investors, ordering states to pay billions in taxpayer compensation for legitimate public policy measures. This creates the risk of regulatory chill — the mere threat of a multi-million dollar international arbitration lawsuit can lead governments to step back from implementing social and environmental protection measures that could affect the interests of foreign investors.

A key way to test the claim on the right to regulate made by the EC, is by analysing whether some of the most controversial arbitration cases in recent years could still be launched under the ICS proposal. A legal study of the cases Philip Morris vs Uruguay; TransCanada vs the US; Lone Pine vs Canada; Vattenfall vs Germany; and Bilcon vs Canada shows they would all have a strong chance of success under ICS, because the new system still grants investors ample and ill-defined rights[32]. Table 1 lists the rights granted to investors under the proposed TTIP agreement, in which the EU has incorporated its proposals for an Investor Court System. This will almost certainly form the basis for the MXEU FTA.

Furthermore, the EU investment proposal includes other dangerous substantive rights for investors such as National Treatment, Most Favoured Nation Treatment, the Umbrella Clause and a provision ensuring the free flow of capital (a de facto ban on capital controls) [33].

TABLE 1

Under ICS, investors maintain ample rights to sue

Investors' right granted under ICS	What the EC claims	How can investors (ab)use these rights?[34]
"Fair and Equitable Treatment" standard *The text in the TTIP proposal which is likely to form the basis for the MXEU FTA:* "A Party breaches the obligation of fair and equitable treatment where a measure or a series of measures constitutes: "denial of justice", "fundamental breach of due process", **"manifest arbitrariness"**, "targeted discrimination" and "harassment, coercion, abuse of power or similar bad faith conduct"[35]	"The standards of protection have been narrowly and clearly defined to prevent abuse."[36] The FET clause, the EC asserts, "is defined through a clear, closed text which defines precisely the content of the standard without leaving unwelcome discretion to arbitrators"[37]	It is problematic that the EC chose to include the most widely used and expansively interpreted investment protection standard[38]. At first sight, one might think that indeed the list developed by the European Commission narrows the scope of this dangerous clause. But, the inclusion of "manifest arbitrariness" as one of the criteria that investors can invoke as a breach of this clause leaves the door wide open for investors to sue and for arbitrators to interpret it to their discretion. When studying what investors have argued in emblematic public interest cases, we found that it is not uncommon for companies to argue that the measures sanctioned by the State were "arbitrary". For example, in the Transcanada's arbitration claim over the US decision to reject the contested Keystone XL oil pipeline, the company claimed the decision was based on "*politically-driven*" and "*arbitrary criteria*"[39]. Tobacco giant Philip Morris called, in the course of the arbitration dispute, Uruguay's anti-smoking measures "*excessive*", "*unreasonable*" and "*arbitrary*" and denied they are related to public health policy[40]. Investors presented similar argumentation in the cases of Lone Pine vs Canada[41] and Vattenfall vs Germany[42]. Arbitration Tribunals have, in some cases, also considered arbitrary the measures taken in the interest of the environment. This was the case of the tribunal's ruling in the Bilcon case vs Canada[43]. So, what constitutes manifest arbitrariness is clearly not well defined and there is plenty of "unwelcome discretion" that arbitrators can exercise.
Investors' "legitimate" expectations *The text in the TTIP proposal which is likely to form the basis for the MXEU FTA:* "When applying the above fair and equitable treatment obligation, a tribunal may take into account whether a Party made a **specific representation** to an investor to induce a covered investment, that created a **legitimate expectation**, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated"[44]**.**	"The 'legitimate expectations' of the investor may be taken into account in the interpretation of the standard. However, this is possible only where clear, specific representations have been made by a Party to the agreement in order to convince the investor to make or maintain the investment and upon which the investor relied, and that were subsequently not respected by that Party. The intention is to make it clear that an investor cannot legitimately expect that the general regulatory and legal regime will not change"[45].	The European Commission has widened the fair and equitable treatment concept by explicitly allowing tribunals to take into account the notion of investors' "legitimate expectations". The only restriction included by the Commission is that investors' legitimate expectation be preceded by "a specific representation" of the state. But this is so vaguely worded that it could mean any measure, action or even verbal indication by a government official that, according to the investor, have induced it to make or maintain the investment. It is very common for investors to claim a breach of their legitimate expectations. And most put forward claims that could be interpreted as "specific representation" from the relevant government authorities to induce the investment. For example, TransCanada in its case against the US, argues that its "*reasonable expectation*" that the US would process its application "*fairly and consistently with past actions*" was "*not met*" and that the government had led it to believe that the pipeline would be approved[46]. Philip Morris, in its case against Uruguay, claimed "*the measures* [taken by Uruguay] *frustrate one of the most fundamental expectations that any investor may have, which is that a host State will comply with its own law and respect private property*"[47]. The company argued that the government "*encouraged*" the company "*to expand its operations…*"[48]. Finally, an arbitration tribunal ruled that Canada frustrated Bilcon's "*legitimate expectations*" as the company had been encouraged by provincial government officials to pursue the quarry project[49].

Investors' right granted under ICS	What the EC claims	How can investors (ab)use these rights?[34]
Indirect expropriation *The text in the TTIP proposal which is likely to form the basis for the MXEU FTA:* "Neither Party shall nationalize or expropriate a covered investment either directly, or indirectly through measures having an effect equivalent to nationalisation or expropriation..., except: a) for a public purpose; b) under due process of law; c) in a non-discriminatory manner; and d) against payment of prompt, adequate and effective compensation."[50] *This article has to be interpreted together with Annex 1, point 3:* "For greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it **appears manifestly excessive**, non-discriminatory measures of a Party that are designed and applied to protect **legitimate** policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection and promotion and protection of cultural diversity do not constitute indirect expropriation."[51]	"Detailed language has been agreed upon to clarify what constitutes indirect expropriation, particularly excluding claims against legitimate public policy measures"[52]	The EU proposal contains significant loopholes for investors to continue arguing that measures taken to protect public health, safety or the environment have an effect equivalent to expropriation. The key ambiguities are found in the annex that is meant to clarify further the article on indirect expropriation. Only "legitimate" public policy measures that are not "manifestly excessive" would be out of reach from indirect expropriation demands. But, what is the criterion to determine whether the government measure is legitimate and when it is excessive? Even in cases where the government's measure that led to dispute was undeniably for a public purpose, investors have claimed the policies were illegitimate and excessive. For example, TransCanada argued that the US administration's decision on the pipeline was not for a legitimate public policy objective[53]. Philip Morris International argued that the restrictions imposed did "*not bear any rational relationship to a legitimate governmental policy*" [54]. Lone Pine accused Canada of "*arbitrary*" and "*capricious*" behaviour, questioning the authority's motivation because it had not proved that fracking was harmful[55]. Vattenfall similarly contested the public interest dimension of the regulatory changes on the water permit[56].
Article on the "right to regulate" *The text in the TTIP proposal which is likely to form the basis for the MXEU FTA:* "1. The provisions of this section **shall not affect** the right of the Parties to regulate within their territories through measures **necessary** to achieve **legitimate** policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity. 2. For greater certainty, the provisions of this section shall not be interpreted as a commitment from a Party that it will not change the legal and regulatory framework, including in a manner that may negatively affect the operation of covered investments or the investor's expectations of profits".[57]	It clearly states that the right to regulate for public policies is fully preserved.	The inclusion of an article on the right to regulate is misleading and gives a false sense of security because: 1- The investors might not be able to demand that the government roll back legislation, but nothing in the article prevents them from claiming compensation from the governments. This difference becomes especially evident when comparing it with the second part of the article where the Commission explicitly prohibits investors from demanding compensation when governments reduce or withdraw an EU "subsidy" including "state aid" as defined in the EU law[58]. 2- governments will have to prove that any regulations introduced were "*necessary*" and sought to achieve "*legitimate*" objectives. The definitions of "*necessary*" and "*legitimate*" are open for interpretation[59]. 3- The proposal only states that investment protection "shall not affect" the right to regulate. This is a much less precise formulation and therefore does not constitute an effective safeguard for regulatory flexibility.

The other key claim made by the European Commission (EC) about their current model is that they are setting up an independent public court and securing the impartiality of arbitrators. "The elements proposed for the operation of the Investment Tribunal, are an effective way to insulate judges from any real or perceived risk of bias," the EC claims[60]. However, ICS is not a court since it is based on an arbitration model. Fundamental safeguards to ensure an independent legal system are still missing[61]. Despite re-labelling arbitrators as judges, they will still be highly paid lawyers with an interest in more and longer cases. The parties in the dispute will pay them per case. Therefore, they maintain a strong financial incentive to interpret the law in favour of the investor. The European Association of Judges (EAJ), representing 44 judges associations in Europe, also doubts the Commission's designation of arbitrators as judges: the 'provisions for the election, time of office and remuneration for the judges of the ICS do not meet the minimum standards for judicial office as laid down in the European Magna Carta of Judges or other relevant international texts on the independence of judges.'[62] There are also flaws in the proposed ethics requirements, with no cooling-off period either before or after serving on the roster of arbitrators, no clear definition of conflict of interests, and no explicit ban on being paid for related work while sitting as an arbitrator.

Finally, the ICS proposal retains special treatment for foreign investors. They are the only ones who can initiate lawsuits, and the proposal does not impose any obligations on them, such as compliance with environmental, social, health and safety, or other regulatory standards. In other words, it's a one-way system, like playing football in half of the pitch. One team attacks and the other can only defend itself[63]. Foreign investors would still be allowed to circumvent domestic courts.

2. Privatisation and pro-corporate reforms in the oil and gas sector in Mexico will be locked in

A main concern that arises from including an investment protection chapter in the Mexico-EU Free Trade treaty is that the economic policies of the current Mexican government, that have disproportionately benefited a small number of corporations, will be locked in, and future Mexican governments will find it hard to revert these policies without the risk of being sued at international investment tribunals.

In December 2013, the Mexican government opened up, after decades, the exploitation of the oil and gas industry to foreign companies[64].

> Reforms that would open Mexico's energy industry to foreign investment "would give resource-hungry energy companies access to Mexican oil for the first time in more than seven decades"
>
> CNBC news[65]

In a speech about the modernization of the EU-Mexico relations, EC Commissioner Cecilia Malmström specifically pointed out that the EU has an interest in Mexican "market access in sectors like telecoms and energy".[66] Malmström's words are consistent with the stated interest of Anglo–Dutch multinational oil giant Shell in investing heavily in deepwater oil and gas drilling in Mexico[67].

The Mexican reforms also open up opportunities for other oil companies like British BP and French multinational TOTAL. In fact Bloomberg reported that "Shell, BP and national oil companies like China National Petroleum Corp. already have agreements to collaborate with Mexico's state-owned Petroleos Mexicanos, or Pemex, which may boost their chances for joint ventures" [68].

“Mexico’s vote on rules for the end of its 76-year state-oil monopoly couldn’t come at a better time for global energy companies from Exxon Mobil Corp. to Royal Dutch Shell Plc.”

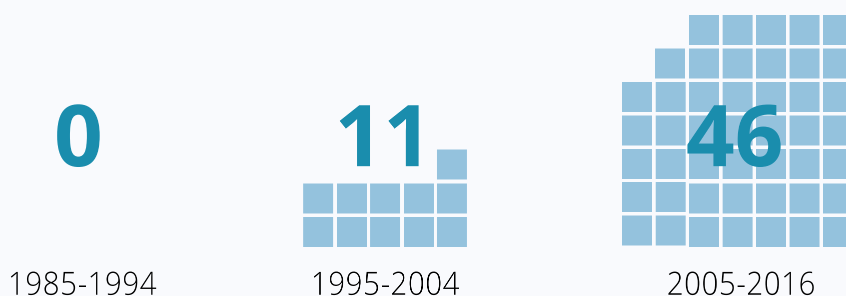
Bloomberg[69]

The strengthening of investment protections under the new EU MX FTA will guarantee that companies will enjoy indefinite years of exploitation, undermining the environment and public interests without interference of national or local governments, unless they want to run the risk of being sued through ISDS. The possibilities of investment protection to act as a shackle for Mexico’s energy reforms have not gone unnoticed. Edgar Uddelohde, a veteran trade professional in Mexico, stated: “For the energy sector the most important part of TPP is the investment chapter” [...] “It protects foreign investment and helps to consolidate the energy reforms of Mexico”[70].

Worse still, as it has been proven, ISDS produces a “chilling effect”[71] on regulatory undertakings, making it practically impossible to scale back the recent neoliberal economic reforms in Mexico, described above[72].

The danger is real considering that a big proportion of the international investment arbitration cases stems from the energy sector, and many involve countries that have undergone energy reforms. According to the latest UN data, there are 57 known investment disputes that directly relate to extraction of crude petroleum and natural gas[73]. Countries in the Latin America and Caribbean region are the biggest target. They have been hit with 46 per cent of all the oil and gas related cases (26 out of 57 known disputes). Also, oil and gas lawsuits are on the rise. The last decade alone (2005-2016) registered 46 disputes, which account for 81 per cent of all the disputes in these two sectors since 1985.

Number of known investment treaty disputes related to extraction of crude petroleum and natural gas



Source: UNCTAD Investment Dispute Settlement Navigator[74]

In part, the EU’s rush to “modernize” the MX EU FTA comes as a response to the conclusion of the Transpacific Partnership Agreement (TPP). This mega deal among 12 countries, which includes Mexico but not the EU, was signed in February 2016 and includes a comprehensive investment protection chapter[75]. With this agreement, the EU aims to guarantee that European corporations have the same unrestricted access, protections and privileges in Mexico as those in TPP countries. Commentators have noted that “The shifting of economic centres of gravity towards the Pacific puts pressure on the EU to adapt to this new scenario.”[76]

“The trade agreement will give protection to impede that future presidents of the country try to revert Mexico´s energy reform”

Ildefonso Guajardo, Minister of Trade of Mexico, in relation to Mexico’s participation in the Transpacific Partnership Agreement[77]

3. It will be much harder for Mexico and individual European countries to pull out of this agreement

Mexico currently has 15 Bilateral Investment Treaties (BITs) with European Member States[78]. The European Commission (EC) claims there are inconsistencies among the level of protection provided to EU investors. Therefore, an investment chapter, they claim, will resolve these "inconsistencies" among the existing BITs[79]. However, what the EC does not mention is that most of those 15 BITs entered into force in the early 2000s and have an initial valid period of 10 years after which they can be terminated unilaterally by the States[80]. An analysis of the termination clauses in all 15 Mexican BITs with EU member States indicates that 7 treaties can be terminated at any time, and other 6 can be terminated by 2019. This gives the Mexican government great discretion to assess, as some other countries like Indonesia, South Africa, Ecuador, Bolivia and Australia have done recently, whether to maintain these agreements in light of a cost-benefit analysis. However, the signing of a new FTA with an investment chapter would automatically replace the current bilateral investment treaties. As a result, the government will find it much more difficult to withdraw support for greater rights to foreign investors. To terminate the protection of foreign investors clauses in a future EU Mexico FTA, the government would have to put an end to the whole agreement, not just the investment chapter.

Reports show that the Mexican government is not overly enthusiastic about the idea of negotiating a new investment agreement with the EU[81].

> "This [investment protection] is a non-issue for Mexico, which feels perfectly comfortable with its BITs with most EU Member States. The EU will have to convince Mexico (and its own Member States) that introducing a new chapter that modifies the BIT approach makes sense"
>
> European Parliament study [82]

The coverage of foreign investors able to sue will be expanded

Mexico has BITs with 16 out of 28 EU Member States. A new investment chapter embedded in the FTA would extend the coverage of rights provided to investors to the other 12 European countries that don't have a BIT with Mexico[84].

TABLE 2

Current Mexico-EU Member States Bilateral Investment Treaties[83]

	Partners	Date of signature	Date of entry into force	Beginning of period when treaty could be terminated unilaterally
Ready to be terminated at any time	Austria	29/06/1998	26/03/2001	2011 (art 30)
	Czech Republic	04/04/2002	13/03/2004	2014 (art 25)
	Denmark	13/04/2000	23/09/2000	2010 (art 23)
	Finland	22/02/1999	30/08/2000	2010 (art 24)
	France	12/11/1998	12/10/2000	2010 (art 13)
	Germany	25/08/1998	23/02/2001	2011 (art 22)
	Sweden	03/10/2000	01/07/2001	2011 (art 21)
Initial 10 year period has passed but it was renewed and now there is a new deadline for expiration and termination	BLEU (Belgium-Luxembourg Economic Union)	27/08/1998	14/03/2003	2023 (art 22)
	Greece	30/11/2000	26/09/2002	2022 (art 21)
	Italy	24/11/1999	05/12/2002	2017 (art 12)
	Netherlands	13/05/1998	01/10/1999	2019 (art 13)
	Portugal	11/11/1999	04/09/2000	2019 (art 21)
The initial 10 year period has not yet passed. Once reached, they can be terminated at any time	Slovakia	26/10/2007	08/04/2009	2019 (art 32)
	Spain	10/10/2006	03/04/2008	2018 (art 23)
	United Kingdom	12/05/2006	25/07/2007	2017 (art 27)

4. Mexico risks being the target of a new wave of investment lawsuits by European investors

The decision to launch the negotiations to "modernize" the MX EU FTA seems to ignore that Mexico has been sued at least 23 times by foreign investors at international arbitration tribunals[85]. In fact, Mexico is one of the most sued countries in the world - 7th place according to UNCTAD 2014 statistics[86]. The majority of these suits have been filed by US investors under NAFTA, but in recent years, several European companies have also filed claims against the Mexican government, in particular Spanish companies using the Spain-Mexico Bilateral Investment Treaty (BIT).

By signing an investment protection agreement with the European Union, the Mexican government continues to expose itself to corporate abuse and the risk of having to disburse millions from the public budget. Mexico has already paid $246 million USD plus interest in "damages" to nine different companies[87]. This does not include legal or tribunal costs.

TABLE 3

Investment lawsuits against Mexico

Year of initiation	Short case name	Outcome of original proceedings	Home State of investor	How much it paid in damages to investors (in US dollars)
EUROPEAN INVESTORS				
2000	Tecmed v, Mexico	Decided in favour of investor	Spain	5,500,000 plus interest
2004	Gemplus v, Mexico	Decided in favour of investor	France	6,350,000
2009	Abengoa v, Mexico	Decided in favour of investor	Spain	40,300,000 plus interest
2012	Telefonica v. Mexico	Pending	Spain	1,060,000,000
2013	Cemusa v. Mexico	Discontinued	Spain	N/A
INVESTORS FROM OTHER NATIONALITIES				
1997	Azinian v. Mexico	Decided in favour of State	United States	N/A
1997	Metalclad v. Mexico	Decided in favour of investor	United States	15,600,000
1998	Waste Management v. Mexico (I)	Decided in favour of State	United States	N/A
1999	Feldman v. Mexico	Decided in favour of investor	United States	740,000 plus interests
2000	Waste Management v. Mexico (II)	Decided in favour of State	United States	N/A
2001	Adams v. Mexico	Discontinued	United States	N/A
2002	Thunderbird v. Mexico	Decided in favour of State	Canada	N/A
2002	Fireman's Fund v. Mexico	Decided in favour of State	United States	N/A
2002	Frank v. Mexico	Discontinued	United States	N/A
2002	GAMI v. Mexico	Decided in favour of State	United States	N/A
2004	Talsud v. Mexico	Decided in favour of investor	Argentina	9,158,000
2004	ADM v. Mexico	Decided in favour of investor	United States	33,500,000 plus interest
2004	Corn Products v. Mexico	Decided in favour of investor	United States	58,000,000
2005	Bayview v. Mexico	Decided in favour of State	United States	N/A
2005	Cargill v. Mexico	Decided in favour of investor	United States	77,300,000 plus interest
2013	KBR v. Mexico	Decided in favour of State	United States	N/A
2015	Shanara and Marfield v. Mexico	Pending	Panama	N/A
2015	LMC v. Mexico	Pending	Canada	N/A

Source: UNCTAD (http://investmentpolicyhub.unctad.org/ISDS/CountryCases/136?partyRole=2)

BOX 1

European Investors cashing in on Mexico

The Mexican government has already paid 52 million US dollars to European investors as a result of three different lawsuits where the tribunal ruled against the government. French company Gemplus received 6,350,000 US dollars; Spanish companies Abengoa and Tecmed received 40,300,000 US dollars plus interest and 5,500,000 US dollars plus interest respectively.

Abengoa and Cofides (Spain) vs Mexico (Described in the introduction): ICSID tribunal decided in favour of the company as a result of the government's decision to not renew the permits to operate separate landfills of hazardous industrial waste in the municipality of Zimapan in the Mexican state of Hidalgo[88]. The local mayor decided not to grant the license of operation to Abengoa and Cofides in response to the local opposition united under the movement "*Todos somos Zimapán*" (We are all Zimapán).

Tecmed (Spain) vs Mexico: ICSID tribunal rules in favour of the company for the closing down of the Cytrar facility for illegal toxic wastes by the local authorities of Hermosillo, Sonora. Social groups – namely the *Consejo Ciudadano de Protección al Medio Ambiente de Sonora* - convinced the local authorities to close down the facility[89].

Gemplus and Telsud vs Mexico: In a particularly absurd case, an ICSID tribunal ruled in favour of these companies, which operated the National Vehicular Registry (RENAVE), because México decided to cancel the concessions to these companies in 2002 when it was revealed that the director and shareholder of RENAVE, Ricardo Miguel Cavallo (aka "Serpico"), was a former Argentine military leader accused of human rights crimes. Cavallo was indicted by a Spanish court on charges of genocide in 2003.

Mexico is still facing two open investment arbitration cases, one of those by Spanish telecommunication company Telefónica that is demanding the staggering amount of over 1 billion US dollars in compensation[90]. According to Telefónica it lost revenues due to regulatory changes, in particular due to the reduction by Mexico of interconnection tariffs, which is the fee that telephone operators charge one another to connect calls[91]. A 2012 OECD review of the Telecommunication sector in Mexico found that "The lack of telecommunication competition in Mexico has led to inefficient telecommunications markets that impose significant costs on the Mexican economy and burden the welfare of its population". The study estimates the cost to the Mexican economy is 25 billion US dollars each year. It recommended higher regulation of the sector and it supported the measure taken by the government that led to the dispute[92].

Although the number of ISDS cases against Mexico from European companies remains relatively low, compared to those from the United States, there is a high risk of an increase in costly investment lawsuits if Mexico continues to grant investors high level of protection and recourse to ISDS.

EU investors are the main users of the ISDS system. Investors from EU member states have initiated 53% of all known ISDS disputes worldwide. In particular, investors from the Netherlands, the UK and Germany "are the most active in terms of bringing ISDS cases" according to the United Nations[93]. This coincides with the list of European countries investing the most in Mexico: the Netherlands 34%, Spain 32%, Belgium 11%, Great Britain 6.6% and Germany 6.2%[94]. On the other hand, Mexican investors seem to have only used the ISDS system once, in a case against the United States[95]. So, the agreement will not only serve the interest of big business, it will serve primarily the interest of big European business, who are the likely users of the system.

The higher risk of further lawsuits is also enhanced by an increase in the flows of EU Foreign direct investment to Mexico. Since 2000, the average yearly investment flow originating in the EU has tripled. European investments have been mainly channelled in the services sector[96], such as financial services, tourism and telecommunications. Three of the five most important banks in Mexico are European (BBVA Bancomer, Santander Serfin and HSBC). Another very visible European investment in Mexico is in the telecoms sector (with Telefónica Movistar) as well as in the beer industry. In 2010, the Dutch brewery Heineken bought one of the two big beer producers in Mexico for 6.5 billion US dollars. Also, in 2013 Belgian InBev purchased another big brewery, Grupo Modelo, for 13 billion US dollars[97]. A further 50 Dutch companies have recently shown interest in investing in Mexico[98]. Incidentally, more than half of lawsuits brought by European companies worldwide have been related to services industries, including financial services and telecommunications[99]. So, investments in these sectors are particularly at risk of leading to investment disputes.

5. EU governments could become the target of lawsuits by Mexican multinationals

The creation of an investment chapter under the Mexico EU FTA increases the risks that European government could also face a flood of new suits. While not on par with the level of European investment in Mexico, Mexican transnational companies are increasingly investing in Europe (see table below), and in particular in Spain[100].

According to a report in Forbes magazine, 2014 marked a record high of Mexican investment in Spain. Quoting analysis from KPMG, Mexican investment in Spain that year amounted to 1,177 million Euros. Mexico became the 5th largest investor in Spain (five years previous it had been the 15th). The report says that in the previous two years 14 acquisitions by private Mexican companies have been done in Spain for nearly 2 billion US dollars[101].

"After two decades in which Spain amassed assets worth €145 billion ($200 billion) in Latin America, last year was the first in which Latin American companies spent more on acquiring their Spanish counterparts than the other way around"

The Economist[102]

Reports indicate how Mexican companies have made a fortune buying European companies, mostly Spanish, since 2012[103].

TABLE 4

Mexican companies penetrate Europe[104]

2012

Kuo buys a subsidiary in Belgium of Swiss Hoerbiger

Villacero buys German steel maker Coutinho & Ferrostaal

Mexichem buys Dutch PVC Wabin

ALFA buys US car maker JL French that operates in Scotland and France

America Movil (of Carlos Slim) invests in Dutch KPN and Telecom Austria

Monex buys the British money exchange company Schneider Foreign Exchange

Grupo Carso (of Carlos Slim) invests in the Spanish football club Real Oviedo

Inmobiliaria Carso (of Carlos Slim) buys branches of the CaixaBank of Spain

2013

Solartec buys Belgian solar panel manufacturer Photovoltec

Graufoz Group buys Spanish maker of panel covers Paneles Paseiro

Metarsa buys German car parts maker ISE Automotive

Inbursa invests in Spanish energy company Gas Natural Fenosa

America Movil invests in Music App company Shazam based in the UK

Cemex buys the Chzec subsidiary of the cement company Holcim

ADO buys the Spanish bus company Avanza

Fibra Uno buys a building portfolio of the Spanish Bank Sabadell

PEMEX takes control of the Spanish shipyard Hijos de J, Berreras

Alfa SAB's **Sigma Alimentos** food unit buys Campofrio, the largest cold meats and processed food company in Spain

Del Valle family buys 6% of Spanish Banco Popular's shares

2014[105]

Extrusiones Metálicas buys aluminium producer Metales Extruidos,

Inmobiliaria Carso becomes major shareholder of building company Grupo FCC;

IAMSA, **Grupo Herradura** and other Mexican entrepreneurs including Carlos Slim buy communications Company Prisa (El Pais),

Financcess México buys IBM Headquarter in Madrid

Alsea buys Food Services Project (Domino's and Burger King operator in Madrid)

Gruma buys Azteca Foods Europe and reaches 11 plants in Europe

Grupo Bimbo buys Sara Lee operations in Europe

Also 6 of the top 10 most "globalized Mexican companies" show a strong presence in several European countries[106].

All of these investments and takeovers would make European countries susceptible to investment arbitration lawsuits by Mexican companies under a new investment protection chapter. These would add to the increasing number of lawsuits against Western EU member states, which until very recently had been immune from lawsuits by investors. There are 43 known cases against Western EU countries[107], 29 of which are against Spain. The other countries that have been sued include: Italy (5), Germany (3), Greece (2), France (1), Austria (1), Belgium (1) and UK (1). Most of these claims (exactly 88%) were filed during the last 5 years (2012-2016)[108].

BOX 2

Most globalized Mexican companies

Company	Sector	European countries in which it operates
Cemex	Cement, ceramics and glass	Germany, Austria, Spain, France, Holland, Hungary, Ireland, Latvia, Norway, Poland, United Kingdom, Czech Republic
Grupo Bimbo	Consumer goods	Spain, Portugal
Mexichem	Chemical and petrochemical	Germany, Austria, Belgium, Bulgaria, Croatia, Denmark, Estonia, Finland, France, Holland, Hungary, Ireland, Italy, Latvia, Lithuania, Norway, Poland, United Kingdom, Czech Republic, Romania, Serbia, Sweden
Alfa	Holding company	Germany, Austria, Slovakia, Spain, Hungary, Poland, Czech Republic
Nemak	Automotive and Parts	Germany, Slovakia, Czech Republic, Poland, Hungary, Austria, Spain
Gruma	Consumer goods	United Kingdom, Holland, Italy

6. European companies human rights violations in Mexico will continue with impunity

European companies have a track record of human rights and environmental violations in Mexico with virtually total impunity (see box below).

The model investment chapter developed by the European Union — already enshrined in CETA and EU-Vietnam FTA — does nothing to address this situation. There is not one single mention of obligations on human rights for investors in the EU proposal. This contrasts to the enhanced rights that it would give to transnational corporations.

This is no surprise. State and corporate violation of human rights in Mexico have been largely ignored by the European Union. The current Mexico EU FTA includes a Human Rights and Democratic Clause[109], which was a novelty in the agreement. Yet, during the 15 years since the entry into force of this treaty, despite the efforts of civil society[110] to provide this clause with a "positive dimension" that would make it operative, it has been a merely "decorative element"[111]. Yes, the European Parliament has publicly condemned human rights violations on some occasions[112], but there has not been any attempt by the European Union to suspend the implementation of the agreement as was foreseen in Article 58 in case of human rights violations. Civil society organizations have long condemned that "authorities of the European Union have shown themselves to be indifferent in relation to the constant charges of human rights violations, both by the Mexican State as well as by European companies"[113].

> Mexico is "a country where an estimated 98 percent of all crimes remain unsolved, with the great majority of them never properly investigated [...] there is an overall consensus nationally, regionally, and internationally on the severity of the human rights situation in Mexico"
>
> UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein[120]

Since the so-called "war on drugs" was unleashed by former president Calderon in 2006, more than a hundred thousand people have been killed or disappeared[114]. International bodies and organisations such as UN Human Rights Council[115], Inter-American Commission on Human Rights[116], Amnesty International[117], Human Rights Watch[118], and a wide number of other civil society organisations have documented and denounced the "*context of violence and impunity in Mexico*"[119].

But human rights violations in Mexico are also a result of widespread corporate impunity, including European businesses. Transnational corporations operating in Mexico have violated "the right to consultation, free, prior and informed consent and self-determination; to collective ownership; to a healthy environment; autonomy; to freedom of association, generating offal, forced displacement, disruption of the social fabric, pollution and overexploitation of natural resources in Mexico" [121]. Furthermore, "the defenders of human rights, especially at the community level, that seek full respect for human rights against corporate interests are often victims of criminalization, harassment, threats, physical assaults and even murders"[122]. European multinationals have also been accused of violating access to basic public services; the right to food sovereignty and security; labour rights; indigenous rights; environmental rights[123].

"We can conclude that there have been human rights violations by EU multinational companies in Mexico"

Ecorys, consulting firm carrying out the Sustainability impact assessment of EU Mex Trade Agreement for the European Commission[124]

BOX 3

European companies history of human rights violations in Mexico

The Permanent's People Tribunal (PPT) has held 4 different sessions[125] where European companies were accused of breach of human rights and environmental violations in Mexico. Among the European companies accused are giants like BASF, BAYER, NESTLE and SUEZ. The cases highlighted below were part of those presented during the PPT sessions:

Aguas de Barcelona: The Spanish company dedicated to services, distribution and treatment of water is accused of violating the human right to water for over-exploitation of aquifers in the city of Saltillo, causing a deterioration in the quality of water. The company has also been blamed for increasing tariffs beyond the agreement making drinking water inaccessible to most users (92%) that come from the low-income sector[126].

Continental Tire: The German company Continental AG has been accused of violating the labour rights of 1,164 workers at its Mexican subsidiary Euzkadi Rubber Company when in 2001 it closed the company. In addition to the dismissal of all workers, the multinational has allegedly tried to prevent the right to strike, and pressured workers and their families with reprisals like withdrawing basic health services[127].

Holcim Cement Company: The Swiss giant cement company Holcim is charged with health and environmental damages to the community where they operate in Mexico. In particular, they have been accused of polluting the environment with toxic substances that have caused acute intoxication and health damage to the local population, including a high number of children[128].

Union Fenosa (and other European companies): The giant Spanish electricity multinational developed a large wind project in the Isthmus of Tehuantepec in the state of Oaxaca, where it is accused of violating ILO Convention 169, the only international law specifically designed to protect tribal peoples' rights. Local communities charged that the company is pressuring farmers to sign contracts they often don't understand in order to give up their rights to land[129]. Other European companies currently involved in the investment and development of wind energy projects are Acciona Wind Power (Spain)[130] and EDF-Energies Nouvelles (France)[131].

Conclusions and recommendations

The modernization of the MXEU FTA presents us with more questions than answers: who wants this new agreement and why? Whose interest will be represented and who will it benefit?

A preliminary analysis, based on the available information, does not answer all these questions but, at the very least, it shows that the European Union is aiming to expand investment protection by granting sweeping corporate rights to foreign investors in order to lock in neoliberal pro-business reforms in the oil and gas sector in Mexico. As a result, Mexico risks a surge in investment lawsuits by European investors; EU member states might also see themselves in the dock of the accused by Mexican multinationals.

The other element that clearly emerges is that the EU has for the last 15 years ignored not only the human rights violations committed by the Mexican government, but also the accusations of human rights and environmental abuses in Mexico by European companies. The inclusion of an investment protection chapter in this agreement will further widen the imbalance between soft law for the protection of human rights versus hard law in the form of powerful enforcement mechanisms regarding corporate rights. The complete absence of binding obligations for foreign investors in the EU investment proposal will help to perpetuate a history of corporate impunity.

If Mexico and the EU would move to modernise their relationship, it should be based on redressing the imbalance in favour of transnational corporations observed during 15 years of this free trade agreement. This approach could start by:

1. developing an independent assessment of the shortcomings of the Human Rights and Democratic Clause embedded in the current EU-Mexico FTA

2. carrying out, with strong participation of social organisations and affected communities, a systematic study of human rights and environmental violations linked to European investors operating in Mexico

3. adopting enforceable obligations for corporations, for example in the context of the UN efforts to develop a binding treaty on business and human rights.

4. create affordable, effective and expeditious mechanisms to ensure access to justice for victims of human rights violations committed by EU or Mexico companies.

Finally, the Mexican government should assess, as some other countries like Indonesia, South Africa, Australia and Ecuador have done recently, the termination of its current BITs with European countries, taking advantage of the fact that most of them have passed their initial period of validity and may now be terminated unilaterally at any time.

Both parties should respond to the urgent call from civil society and experts worldwide for building an alternative legal framework (to the international investment treaties) that favours the public interest and rejects broad and unchecked rights for foreign investors[132]. If the MXEU investment negotiations are moulded under the same rubric as TTIP and CETA, transnational corporate impunity will continue to flourish.

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