# Taxes on trial

## How trade deals threaten tax justice

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**Demands for tax justice have resounded worldwide, with inequality at historic and unsustainable levels and increased attention towards the tax practices of major multinational corporations from Google to Starbucks.**

We believe that governments must be able to change their tax systems to ensure multinationals pay their fair share and to ensure that critical public services are well funded. States must also be able to reconsider and withdraw tax breaks previously granted to multinationals if they no longer fit with national priorities.

But their ability to do so, to change tax laws and pursue progressive tax policies, is limited, thanks to trade and investments agreements. In rapidly developing 'corporate courts', formally known as investor-state dispute settlement system (or ISDS), foreign investors can sue states directly at international tribunals.

This system has become increasingly controversial thanks to negotiations over the proposed Transatlantic Trade and Investment Partnership (TTIP) deal between Europe and the United States. But access to ISDS is already enshrined in thousands of free trade and investment agreements crisscrossing the globe.

Because control over taxes is seen as core to a country's sovereignty, many states have included tax-related 'carve-out' clauses in these trade and investment treaties to limit ability of corporations and other investors to sue over such disputes. But a growing number of investor-state cases *have* in fact challenged government tax decisions – from the withdrawal of previously granted tax breaks to multinationals to the imposition of higher taxes on profits from oil and mining.

Analysis of data and documents on hundreds of ISDS cases filed so far reveals that *foreign investors have already sued at least 24 countries from India to Romania over tax-related disputes* – including several cases where companies have used this system to successfully challenge – and lower – their tax bills.

### How ISDS threatens tax justice

- Under the current system, states can and have been sued for changing tax laws, revoking tax breaks, and increasing corporate, income and other taxes
- A tax 'carve-out' written into a trade or investment treaty doesn't necessarily prevent taxes being challenged – it can just give the lawyers and arbitrators working on these cases more to argue about
- We believe that states must have the ability to reconsider and change previously set and unfair tax 'incentives' granted to corporations, and to be flexible in choosing which industries to subsidise with tax breaks
- The threat of an expensive ISDS case can be as powerful as actually filing one – an unknown number of disputes are resolved before a case is ever formally filed. With states unclear about what might trigger successful claims, the safest course of action is to never threaten a multinational corporation's profits – a dangerous prospect for tax justice and public interest laws
- There is no comparable mechanism for states to hold foreign investors to account for their actions. ISDS is a one-way system, where states are always on the defence. If a multinational behaves badly, a state cannot launch an ISDS claim.

## Taxes on trial in investor state disputes

**Vodafone vs India:** In 2007 Vodafone took over much of India's telecoms business when it acquired a controlling interest in a major Indian mobile phone company. It paid no capital gains tax in India on this $11bn deal because the transaction used a number of offshore companies. After Indian tax officials insisted that Vodafone pay a multi-billion dollar bill, the company launched an ISDS claim.[1] The case is ongoing.

**Perenco vs Ecuador:** In 2008, the Anglo-French oil company Perenco sued Ecuador after the country introduced new taxes on windfall profits in the oil sector.[2] In 2014, an ISDS tribunal found Ecuador in breach of its investment treaty obligations, upholding some but not all of the company's claims. It has not yet ruled on damages.[3] Ecuador has meanwhile filed a $2.5bn counterclaim against Perenco, alleging that the company is responsible for "environmental catastrophe" in the Amazon. This case continues.[4]


Photo: Julien Gomba

*The legacy of oil exploration in the Amazon*

**Micula vs Romania:** In 2005, investors in biscuit, beer and other food and drinks factories in Romania sued the country over the early termination of tax breaks (including exemptions from customs duties and from tax on corporate profits).[5] Romania had ended these "incentives" earlier than it had originally planned, as the European Commission said they had to be eliminated if Romania wanted to join the EU. The case ended in 2013, with a $250m award in favour of the investors.[6] In a new twist, in 2015 the European Commission said paying the ISDS award is in itself a violation of EU state aid rules.[7]


Photo: Júbilo Haku

*Mexico's introduction of a 'soda tax' to tackle obesity drew litigation from US agribusinesses*

**US agribusiness vs Mexico:** Mexico was sued by several US agribusiness giants – including Cargill and Archer Daniels Midland – in the early 2000s after it introduced a new tax on the sales of soft drinks containing high-fructose corn syrup.[8] These cases have drawn condemnation from civil society, as campaigners claim Mexico is struggling with public health and obesity crises.[9] The ISDS tribunals ruled in favour of the investors, and Mexico was ordered to pay millions of dollars in damages. The US government also challenged Mexico directly about this tax, with a separate case filed at the World Trade Organisation.[10]

**Tullow Oil vs Uganda:** In 2012 the UK company Tullow Oil sued Uganda over a disputed $400m capital gains tax bill.[11] Ugandan tax authorities had demanded the sum from the company after it sold its stakes in three oil and gas blocks for $2.9bn. Tullow said it had been granted an exemption from these taxes by a government minister. But the Ugandan courts disagreed, saying only parliament can approve such tax measures.[12] In 2015 Tullow withdrew its ISDS case – but only after the state lowered Tullow's tax bill to $250m.[13]

## How trade deals inhibit tax justice

Created half a century ago, the ISDS system was originally designed with simple investor-state disputes in mind. For example: a state physically seizes a company's factory, nationalises it, and the company uses ISDS to secure compensation. But over the last fifteen years multinational corporations and their teams of corporate lawyers have increasingly pushed the boundaries of this system, challenging a wide range of state actions – including environmental and health regulations.[14]

Countries in Africa, Asia, Europe, North America and South America have meanwhile been sued by foreign investors over tax-related disputes, with corporations challenging tax measures from value-added tax (VAT) and corporate income tax to taxes on imports and windfall profits. Canada was sued by a US logging company in a dispute over tax incentives for its operations in Ontario, for example.[15] Ukraine has been sued over plans to increase royalties on gas produced in the country.[16]

Despite the fact that states are on trial in ISDS cases, voters, citizens and ordinary taxpayers have very little access to information about many of these suits. Most hearings are conducted behind closed doors with case documents rarely made public. Analysis of available data and case filings suggest that *at least 24 countries have already been sued by foreign investors in more than 40 separate tax-related suits*.[17] The true figures are likely to be even higher.

Inclusion on our list of tax-related cases does not necessarily imply a judgment in favour of the state's tax measures. States are not always democratic nor do they always act in the public interest. But the threat is clear: a wide range of state tax measures have been challenged by giant companies through the ISDS system. The power this grants corporations to challenge progressive tax policies should concern citizens in every country that has signed up to trade and investment treaties.

Eager to attract foreign investment, many developing countries have offered huge tax breaks to multinational companies. Governments must be able to review and reconsider their tax laws and any tax incentives they may have granted to foreign investors in the past. Tax breaks cost developing countries as much as $138bn a year, and repealing these could release much needed funding for healthcare and other critical public services.[18] In Sierra Leone alone, estimates suggest the country loses as much as $199m in potential revenue a year to tax incentives – more than three times its annual health budget.[19]

But even the *prospect* of an ISDS case can be a powerful deterrent for states considering actions against multinationals. These cases can drag on for years, and are extremely expensive.[20] Even if a state successfully defends itself, it often ends up facing million dollar legal bills regardless.[21] The only safe course of action is to never challenge multinational corporations – a dangerous prospect for the public interest that could thwart necessary, progressive action for tax justice.

Countries that have signed trade and investment treaties "must be very careful in designing and applying tax policies," warned a 2006 report published by the Inter-American Development Bank. It said states should sign up to these treaties but that they "must realise the importance of this issue and the economic hardship that could result from material arbitration rulings against them, where there is finding (sic) that an unfair and inequitable tax treatment...amounts to an indirect expropriation."[22]

"States face real difficulties in determining, in advance, whether they will be the subject of a successful investment claim in relation to their taxation policies, owing to the uncertain state of the law," said Matthew Davie, an arbitration lawyer in New Zealand, in a 2015 article in the Journal of International Dispute Settlement. "Compounding matters further, a series of investment tribunal awards have called into question the effectiveness of taxation carve-out clauses in barring taxation-based investment claims."[23]


Photo: Ross Funnell

## Vodafone vs India

Vodafone is now one of the largest mobile network operators in India, with more than 180 million customers – almost three times the total population of the UK.[24]

The British telecommunications giant – one of the largest in the world – entered India in 2007 through a complex transaction resulting in its indirect purchase of a controlling interest in the Indian phone company Hutchinson Essar Ltd.

Through its Dutch subsidiary, Vodafone acquired a company registered in the Cayman Islands (a renowned tax haven) which in turn held an indirect interest in Hutchinson Essar Ltd through multiple layers of companies including those registered in Mauritius (another well-known tax haven).[25]

Because this transaction involved the purchase of assets in India, albeit indirectly, Indian tax officials said Vodafone should have to pay capital gains tax in India. Vodafone disagreed, arguing that the deal happened overseas, outside of India's jurisdiction.

The ability of governments to tax the indirect sale of assets in their countries has become an increasingly hot topic as corporate structures have become more complex and multinationals' strategies to minimise their tax bills, including the use of offshore transactions, have become more aggressive.[26]

After the Indian government amended its tax code in 2012 to explicitly require that capital gains taxes be paid on the indirect sales of assets in India, with retrospective effect, it served Vodafone with a multi-billion dollar bill.[27]

Vodafone responded with an ISDS claim, arguing that the state had breached its obligations under a bilateral investment treaty signed between India and the Netherlands in 1995.[28]

Years after the case began, the Indian government is reportedly looking to settle the dispute.[29] But it is also trying to limit its vulnerability to other cases like this in future.

In December 2015 the text for India's new "model" bilateral investment treaty – to be used in negotiations as the basis for any future trade treaties and free trade agreements – was approved, including in it explicit language excluding tax disputes from its scope. It also includes a new clause requiring investors to exhaust local remedies and file claims in local courts before heading to ISDS tribunals.[30]

## Carve-outs haven't stopped the cases

Most ISDS claims so far have been filed against developing countries. But richer states are increasingly being sued too. Last year, Michigan-based company JM Longyear filed a $12m claim against Canada over a dispute about tax breaks for its logging operations in the country. In September the case ended in an undisclosed settlement.[31] Spain has been sued in more than 20 separate cases over a series of policy changes affecting the renewable energy sector, including a tax on power generators' revenues and a reduction in subsidies for these energy producers.[32]

Globally, multinational oil, gas and mining companies are among the biggest users of the ISDS system.[33] Ecuador has been sued multiple times by energy companies over the introduction of new taxes on sales and profits of oil and the withdrawal of VAT tax breaks for foreign oil companies.[34] In an ongoing case, the energy giant ExxonMobil is demanding that Russia reimburse it for $500m in taxes it paid on a high-profile oil and gas project in the Pacific Ocean near Russia's Sakhalin Island, just north of Japan.[35]

In response to growing public concern in Europe about the proposed TTIP deal, proponents of the ISDS system have suggested some reforms. Specific text can be written into treaties like this to protect issues like the environment or services like the National Health Service in the UK.

But these so-called 'carve-outs' are not new, nor do they offer states much protection. Many of the trade and investment treaties already signed include taxation carve-out clauses to limit the ability of investors to file tax-related ISDS cases. The Energy Charter Treaty, for example, is one large and powerful multilateral treaty that has a tax carve-out.[36] The Comprehensive Economic and Trade Agreement (CETA), a controversial new deal negotiated but not yet ratified by the EU and Canada, also has one.

Though some of these carve-out clauses are stronger and clearer than others, they have not prevented lawyers from filing tax-related ISDS cases, and they have not prevented arbitrators from agreeing to consider them. The language in these treaties is often convoluted and sometimes contradictory, with exceptions within exceptions – giving lawyers a lot to argue about but making it difficult for policymakers to know what actions could risk a treaty claim.

International law journals are filled with legal debates about when the taxation of foreign investors can count as expropriation or "unfair treatment" under the international ISDS regime. *"In an investment dispute, the very legitimacy of the tax is put into question,"* is how William Park, a Boston university law professor and veteran arbitrator, put it in a 2009 essay.[37] "In times past, investors' primary risk was of open, violent dispossession of their assets. In the modern world, indirect expropriation through regulatory overreach is often the greater threat," suggested Matthew Davie, the arbitration lawyer in New Zealand, in a paper published last year that predicted that the number of tax-related ISDS cases will only rise in future.[38]

"States often want to take the view that tax carve-out clauses protect them whenever a dispute arises in the context of tax. A number of arbitral awards show that is not the case," concluded Timothy Lyons QC, a barrister and arbitrator with 39 Essex Chambers in London, in a July 2015 article published in the Global Arbitration Review. "A tax carve-out clause...may prevent an arbitral tribunal from being turned into a domestic tax appeal tribunal. It will be unlikely to prevent a tribunal from ensuring that investors are protected."[39]

## ISDS and tax havens

In addition to structuring their investments to minimise their tax bills – including through the use of tax havens – multinational companies and their teams of corporate lawyers are increasingly also looking at where to strategically place subsidiaries in order to take advantage of trade and investment treaties that give them access to ISDS.

"Investors can structure investments in such a way as to attract optimal treaty protection – for example, by incorporating an intermediary investment vehicle in a state with a (bilateral investment treaty) in force with the host state," is how the law firm Freshfields Bruckhaus Deringer put it in a briefing on these agreements. "Once a dispute arises investors can use (investment treaties) as leverage in negotiations with the host state."[40]

Investors that set up 'mailbox companies' in the Netherlands to benefit from its favourable tax regime, for example, can also access the vast web of Dutch investment treaties signed with more than 80 other countries.[41] Research published last year revealed how more than 10% of all known investment treaty claims have made use of Dutch agreements – with 75% of these cases "brought on by mailbox companies with no real economic substance in the Netherlands."[42]

At least 20 of the UK's bilateral investment agreements, signed with countries from Belize to Turkmenistan, were expressly extended "by diplomatic notes" to cover investors from Jersey and Guernsey and the Isle of Man, giving companies registered in these tax haven crown dependencies access to ISDS through Britain's treaties. Several of the UK's treaties have also been extended to cover investors from Hong Kong, the Cayman Islands, or the Turks and Caicos.[43]

In one ongoing case, the Canadian mining company Gabriel Resources is using its subsidiary in the tax haven of Jersey to claim protection under a treaty signed between the UK and Romania.[44] The company is suing Romania for halting the controversial Rosia Montana gold mine in Transylvania that has been the subject of mass opposition from local communities fearful of its environmental impact.[45]

Many ISDS cases also involve investments made in developing countries through tax havens. A case brought by the UK company Rurelec against Bolivia, for example, which ended in a multi-million dollar award against the country, centered on investments made by Rurelec in the Bolivian energy sector via intermediaries registered in the British Virgin Islands.[46]


Photo: Andy Hall / Oxfam

*May 2013: IF campaigners outside the Treasury warn the Chancellor that UK tax havens' destructive impact on poor countries is the 'elephant in the room' ahead of the G7 summit meeting*


Photo: Friends of the Earth Europe / Lode Saidane

***February 2015: Protesters say 'no' to TTIP outside the European Parliament in Brussels***

## The threat of TTIP

If passed, TTIP along with the proposed Trans-Pacific Partnership (TPP) deal between the US and countries in the Asia-Pacific region, would dramatically expand the global reach of the ISDS system to cover record levels of global foreign direct investment.[47]

In response to public outcry – and opposition from some EU member states including Germany – the European Commission has unveiled proposals to reform the ISDS system and replace it with an international Investment Court System. But this actually risks further cementing the system, by making it seem more 'legitimate', rather than removing the special facility through which multinationals can challenge laws, regulations, and other state actions taken in the public interest.[48]

And like other treaties that give multinationals access to this system, TTIP says little about investors' responsibilities. There is no comparable system of international justice for states to hold multinational corporations to account for their actions, and while expanding corporate power with sweeping rights and protections, investors' obligations are rarely if ever enshrined in these treaties.

If a state has a dispute with a corporation over its tax bill, it can't launch an ISDS case – this is a one-way system, accessible only to foreign investors (domestic companies can't use it either). And of course if a state takes action against a multinational over a tax dispute, it could soon find itself in the dock facing an expensive ISDS claim.

## ANNEX: List of ISDS tax-related cases*

Note: Inclusion on this list does not imply a judgement in favour of the state's tax measures. This list is unlikely to be comprehensive given the lack of disclosure of detail on many ISDS claims. It illustrates the breadth of tax-related disputes that have already featured in ISDS cases.

| No | Case | Year began | Summary |
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| 1 | Exxon Mobil vs Russia | 2015 | The multinational seeks reimbursement of $500m in taxes it paid related to its Sakhalin-1 oil and gas project |
| 2 | Hanocal vs Korea | 2015 | Former majority shareholder in Hyundai Oilbank, an oil refinery in the city of Seosan, sues over taxes levied on the 2010 sale of its controlling stake in the project |
| 3 | Poltava Gas vs Ukraine | 2015 | Investors sue over state measures including legislation adopted in July 2014 that temporarily raised royalties on gas production |
| 4 | Total vs Uganda | 2015 | French oil company sues via its Dutch subsidiary over a tax dispute related to its sale of oil and gas blocks in the Lake Albert Rift basin |
| 5 | Longyear vs Canada | 2014 | US investors sue over a dispute with the Ontario government about tax incentives for their logging operations |
| 6 | Vodafone vs India | 2014 | British telecoms giant sues, via its Dutch subsidiary, over a multi-billion dollar retrospective capital gains tax bill related to its acquisition of an Indian mobile phone business |
| 7 | Gunes Tekstil vs Uzbekistan | 2013 | Investors sue over alleged seizure of their shopping centres by Uzbek authorities investigating customs, import and taxation offences. (Investors' claims include allegations of human rights abuses) |
| 8 | Federal Elektrik Yatirim vs Uzbekistan | 2013 | Energy investors sue over alleged wrongful prosecution, denial of justice and expropriation by government authorities investigating tax evasion offences |
| 9 | Tullow Oil vs Uganda | 2013 | UK oil giant Tullow Oil sues Uganda in a dispute over a $400m capital gains tax bill |
| 10 | Heritage Oil vs Uganda | 2012 | Canadian oil company sues over capital gains tax dispute with Uganda |
| 11 | Bogdanov vs Moldova | 2012 | Investors in a paint-manufacturing company sue over tax and environmental policy changes, which they say negatively impact their business |
| 12 | Lao Holdngs vs Laos | 2012 | Casino and hotel investors' claims target a range of state actions including an 80% tax on casino revenues. |
| 13 | LSF-KEB vs Korea | 2012 | Investors challenge state actions including imposition of allegedly arbitrary capital gains taxes on the sale of the claimants' stake in Korea Exchange Bank |
| 14 | Orascom vs Algeria | 2012 | Investors accuse government of interference and harassment including tax reassessments |
| 15 | Bidzina Ivanishvili vs Georgia | 2012 | Billionaire and politician Bidzina Ivanishvili, who is a French citizen, says new tax laws were specifically designed to target his investments in commercial banks, resulting in significant losses |
| 16 | Ryan & others vs Poland | 2011 | Investors claims that Poland had acted with bias in improperly levying taxes and sanctions on their company, leading to its bankruptcy |
| 17 | Bozbey vs Turkmenistan | 2010 | Investor's claim includes challenge to the imposition of taxes and fines by Turkmenistan tax authorities, despite allegedly receiving a 21-year tax exemption under a special presidential decree |

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| 18 | Maersk vs Algeria | 2009 | Danish multinational challenges government's imposition of a tax on windfall profits, allegedly contravening the terms of a oil production sharing contract |
| 19 | MTN vs Yemen | 2009 | Mobile phone giant's claims include complaint over Yemen's alleged refusal to grant it exemptions on profits' tax and customs duties on machinery and equipment transported into the country |
| 20 | Bogdanov vs Moldova | 2009 | Claimants challenge actions of Moldova's customs department, including disputed customs fees related to activity in a "free economic zone" |
| 21 | Perenco vs Ecuador | 2008 | Oil company sues after the state introduced a new tax on windfall oil profits |
| 22 | Burlington Resources vs Ecuador | 2008 | Energy company sues over new taxes on oil revenues, and other state actions |
| 23 | Paushok vs Mongolia | 2007 | Investors challenge new laws including the introduction of a tax on windfall profits from the sale of gold |
| 24 | Mobil vs Venezuela | 2007 | Investor's claim includes allegation that Venezuela damaged its investments by increasing royalty rates and taxes on income from oil projects |
| 25 | Tza Yap Shum vs Peru | 2007 | Shareholders in a Peruvian company engaged in the purchase and export of fish flour to Asian markets sue over the seizure of the company's bank account due to tax debt and other alleged actions by Peru's tax authorities |
| 26 | ConocoPhillips vs Venezuela | 2007 | Investors challenge state measures including increased royalties and income taxes on oil projects |
| 27 | Oostergetel vs Slovakia | 2006 | Investors say the government had previously taken a relaxed approach to the their tax arrears, before changing position and taking actions that led their bankruptcy proceedings |
| 28 | Spyridon vs Romania | 2006 | Investors cite tax liabilities and penalties allegedly imposed on their frozen-food warehousing company, among other state actions triggering their claim |
| 29 | Nations Energy vs Panama | 2006 | Investors claims centre around a dispute with the government over the transfer of fiscal tax credits to third parties |
| 30 | Quiborax vs Bolivia | 2006 | Investors say Bolivia expropriated their property after it rescinded their mining concession citing the company's lack of cooperation with customs officials and alleged tax evasion |
| 31 | Micula vs Romania | 2005 | Investors challenge early termination of Romanian tax incentives, including exemptions from customs duties and payment of corporate profit tax |
| 32 | Cargill vs Mexico | 2005 | US grain giant sues over Mexico's 2002 adoption of a new tax on beverages containing high fructose corn syrup |
| 33 | ADM vs Mexico | 2004 | Agribusiness giant sues over Mexico's 2002 adoption of a new tax on beverages containing high fructose corn syrup |
| 34 | Corn Products vs Mexico | 2004 | Like Cargill and ADM, company sues over Mexico's 2002 adoption of a new tax on beverages containing high fructose corn syrup |
| 35 | EnCana vs Ecuador | 2003 | Canadian company sues over Ecuador's decision not to refund VAT for purchases made by foreign oil companies |
| 36 | Duke Energy vs Peru | 2003 | Energy company claims Peru breached prior agreements when the country's tax authority changed how it interpreted a law regarding companies' restructuring |
| 37 | Occidental vs Ecuador | 2002 | Oil giant claims decision by Ecuadorian tax authority not to refund VAT paid, and its demand that the company repay already reimbursed taxes, is in violation of bilateral treaty with the US |

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| 38 | Tokios Tokeles vs Ukraine | 2002 | Among their claims, the investors' alleged that Ukrainian authorities "conducted numerous and invasive investigations under the guise of enforcing national tax laws" |
| 39 | Enron vs Argentina | 2001 | Investors challenge tax assessments allegedly imposed by Argentinean provinces related to a gas transportation business, as well as alleged refusals by the government to let the company increase tariffs |
| 40 | Feldman vs Mexico | 1999 | Investors sue under NAFTA over Mexico's application of tax laws to the export of tobacco products |
| 41 | Link-Trading vs Moldova | 1999 | Investors sue after the Moldovan government revised duty exemptions connected to a Free Economic Zone. |
| 42 | Goetz vs Burundi | 1995 | Precious metal investors sue after the government allegedly withdraws incentives including tax and customs exemptions |

* Cases included in this table are all those identified in which the claimant's case included a tax-related claim. In some cases, tax-related issues are only part of the dispute.

The data in this table comes from information on cases filed at the World Bank's International Centre for the Settlement of Investment Disputes (ICSID), www.icsid.worldbank.org, from UNCTAD's investor-state database, http://investmentpolicyhub.unctad.org/ISDS, and from news reports and case-specific information including press releases on government, company, and law firm websites.

This table is unlikely to be comprehensive as the amount of information published on ISDS cases varies greatly and the details of investors' claims are not always disclosed.

This table does not include the more than 20 separate cases filed against Spain by investors in the renewable energy sector, over changes to government policy including new taxes on power generators' revenues and a reduction in subsidies for renewable energy producers.

It also does not include the ISDS cases collectively known as the "Yukos dispute," which also involved tax-related allegations.

Inclusion of a case on this list does not entail support for the state's tax or other related actions.

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