

## *The Legal Monster that lets Companies Sue Countries*

*Bilateral investment treaties were designed to protect  
European investments abroad. But now they've come back  
to bite Europe*

**Mahnaz Malik**

The news that Germany's nuclear phase-out is being challenged by a Swedish company is not without irony. In doing so, the Swedish energy company Vattenfall is using the very mechanism designed by the German government to protect German investors from the actions of developing countries' governments.

Germany and Pakistan concluded the world's first ever investment treaty in 1959 and renewed their vows on its 50th anniversary in 2009. The blueprint of the German bilateral investment treaty (BIT), which set the template for most European BITs, was cast by the notorious Hermann Abs, chairman of Deutsche Bank in Germany, and Lord Shawcross QC, attorney-general in the U.K. This was in 1957, when the Society to Advance the Protection of Foreign Investments, an organisation of German business people, published a draft instrument entitled International Convention for the Mutual Protection of Private Property Rights in Foreign Countries. The goal of this initiative was to protect European investments abroad against interference by communist and nationalistic governments.

Today, the German investment treaty empire, consisting of over 135 countries, is the largest in the world. In addition to having BITs with countries such as Somalia, Papua New Guinea and Venezuela, Germany also has some 13 BITs with its poorer cousins in the EU, including Greece (signed in 1961, in force since 1963). BITs are typically concluded between a developed and a developing country with the intention that investments from the former will be protected by guarantees of protection and non-discrimination in the latter.

BITs are an anomaly in public international law because they grant private investors the right to bring claims before an international arbitration tribunal. Thus, investors can rely on broad guarantees, such as full protection and security, and fair and equitable treatment before privately hired arbitral tribunals, rather than government appointed judges. These treaty rights are often more favourable to investors than those found in national law.

The concern that foreign investors under U.K.'s BITs may be entitled to higher compensation rights than those available to British shareholders of Northern Rock was put to Lord Davies, the then-government deputy chief whip, at the time of the bank's collapse in 2008. Davies denied that such treaties applied to Britain, while also criticizing the fairness of such arrangements in general. He appeared unpleasantly surprised that treaties created reciprocal rights which foreign investors from the less-developed treaty partner could use against European governments. Davies also found it unbelievable that European standards of governance were somehow wanting under treaties meant to discipline developing country governments.

For years, European and North American governments saw no need for treaties to protect investment flows between developed nations. Thus, the largest flows of foreign investment were unprotected by investment treaties, owing to the mutual confidence developed countries enjoyed in each others' systems of governance and courts.

This dynamic was perhaps accidentally disturbed by the conclusion of Chapter 11 of the North American Free Trade Agreement (NAFTA), which saw the creation of a tripartite investment treaty between Canada, Mexico and the U.S. in 1994. The idea was to provide north American businesses with the investor-state arbitration mechanism to challenge Mexico, the developing country in the party. Although north American investors did sue Mexico under NAFTA Chapter 11, the vast majority of NAFTA claims involve U.S. investors suing the Canadian government and vice versa. Having tasted blood, Canadian investors are likely to demand an investor-state mechanism in the EU-Canada negotiations.

Although at least 81 governments have faced investment treaty arbitration in over 400 claims, western European countries have so far avoided such actions, as there are few investors from the developing world that have the means or occasion to challenge government measures in private arbitration proceedings. European BITs are almost always concluded with lesser-developed countries.

The conclusion of the energy charter treaty to promote and protect investments in the new democracies of eastern Europe and central Asia, like NAFTA, also permits, perhaps inadvertently, western European investors such as the Swedes to bring claims against other European governments such as the German, French and British. The recent claim by Vattenfall warns of another crack in European cohesion as European investors start using investor-state arbitration in treaties governed by public international law, which will prevail over national and European Union law.

Further, the rise of investments from "developing countries" such as China and India into Europe will provide the occasion to use the investor-state mechanism against the U.K. and Germany. European countries may find themselves paying out several million dollars per claim to feed the monster let loose by the late Abs Hermann and Lord Shawcross.

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International Institute for Sustainable Development

Head Office

161 Portage Avenue East, 6th Floor, Winnipeg, Manitoba, Canada R3B 0Y4

Tel: +1 (204) 958-7700 | Fax: +1 (204) 958-7710 | Web site: [www.iisd.org](http://www.iisd.org)

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