

# Multilateral reform of the investment court system

**Submission to European Commission consultation**

**March 2017**



## **Introduction**

The Trades Union Congress (TUC) is the national union centre of the UK. The TUC has 50 affiliated unions, representing almost six million members, who work in a wide variety of sectors and occupations. The TUC welcomes the opportunity to respond to the European Commission's consultation on multilateral reform of the investment court system as we have significant concerns about the proposed system. The TUC objects to the nature of the Commission's online consultation on the proposed multilateral investment system which is biased in favour of the proposal as it provides no opportunity for respondents to reject it.<sup>1</sup> The TUC's online response to the consultation should therefore be considered alongside this submission.

The TUC does not believe the European Commission should proceed with the proposal for a multilateral investment system as is not only unnecessary but would undermine the EU's commitment to promote respect for labour rights and democratic systems of decision making. Rather than develop a multilateral investment court system, the Commission should strengthen provisions in trade agreements to enforce fundamental labour rights and support the development of sound domestic legal systems in partner countries.

## **Unnecessary**

The TUC believes it is important for investors' property rights to be respected. However we do not believe that foreign investors deserve additional rights established in a special body of law to claim compensation when they believe their property rights have been violated, as is proposed in the multilateral investment system. The TUC believes domestic court systems should be used to resolve issues around property rights for both domestic and foreign investors.

If there is no functioning rule of law in certain countries, the domestic system will not be improved by establishing a parallel, democratically unaccountable multilateral court system that only protects foreign investors, such as that proposed by the European Commission.

The TUC believes the EU should work with potential trading partner countries to support the development of well-functioning, independent legal systems as part of its due diligence before undertaking trade negotiations. Indeed the EU has undertaken to support such work by pledging to work towards the realisation of the UN Sustainable Development Goals which include a goal to create Peace, Justice and Strong Institutions (Goal 16).

If foreign investors choose to invest in countries where the rule of law is not yet established, the TUC believes they must bear the risk of this individually through private insurance. Governments should not create parallel court systems to

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<sup>1</sup> <https://ec.europa.eu/eusurvey/runner/multilateralinvestmentcourt#>

protect foreign investors' rights as they come at the cost of undermining labour and social rights and the policy space of governments, as we highlight below.

### **Chilling effect**

The TUC believes that the additional rights given to foreign investors through the proposed multilateral investment system would pose a threat to governments' ability to pass laws that protect workers and public welfare.

The TUC shares the concerns of the ETUC that the proposed multilateral court system does not plan to reform the rules of existing investment protection agreements. As the terms of existing agreements contain broad definitions of what can be interpreted as 'indirect expropriation' and a breach of investors' rights to 'fair and equitable treatment', the multilateral system will still provide scope for foreign investors to challenge legitimate legislation that promotes public welfare. Existing investment protection systems have been used in such a way on numerous occasions in the past with damaging consequences for the countries involved. Bolivia was sued by UK company Rurelac via Investment-State Dispute Settlement (ISDS) for nationalising its energy sector and ordered to pay the company \$31 million in 2014. Slovakia was sued by the Dutch health company Achmea via ISDS when it renationalised its health care system and ordered to pay €1.3 million in 2014. Meanwhile, the Italian diamond company Piero Foresti argued that South Africa's laws to overcome the legacy of racial discrimination left by Apartheid constituted indirect expropriation and sued the government. As a result South Africa had to pay legal fees of over €5 million in 2015. These cases illustrate the serious cost to countries' finances that result from cases brought by foreign investors through special court systems which mean governments have less resources to provide essential public goods such as health, education and infrastructure, or, indeed, support the creation of decent jobs.

Foreign investors' use of ISDS in the past also indicates the dangerous chilling effect that the proposed multilateral court system may have over policy making. For example, New Zealand decided not to introduce plain packaging laws for cigarettes after Philip Morris launched an ISDS case against Australia for introducing similar laws.<sup>2</sup> Indeed, the corporate law firm Cromwell Morris has advised its clients that investor protection in a trade agreement gives foreign investors 'leverage to negotiate with the host government and cause it to change its behaviour more quickly.'<sup>3</sup>

We are concerned that the existence of an additional court system at the multilateral level will add to the pressure ISDS has brought to bear on governments not to pass policies in the public interest that might be challenged by foreign

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<sup>2</sup> <http://www.italaw.com/sites/default/files/archive/costs-and-benefits-of-an-eu-usa-investment-protection-treaty.pdf>

<sup>3</sup> <https://www.crowell.com/NewsEvents/AlertsNewsletters/all/How-Mining-Companies-Can-Mitigate-Risks-and-Protect-their-Investments-Part-I-International-Investment-Agreements>

investors. These could include decisions to introduce additional protections for workers, raise the minimum wage or change the ways public services are run.

## **Unjust**

The TUC does not believe it is just for foreign investors to be given access to a special court system to claim their rights that is not available to any other group, including domestic investors or workers. As discussed above, granting additional rights to foreign investors through the creation of a multilateral investment system risks endangering workers' rights further by creating a means for foreign investors to challenge laws that protect workers.

The TUC believes that rather than pursuing proposals for a multilateral investment system, the Commission should focus its energies on ensuring that workers are able to claim their fundamental rights to organise, collectively bargain and be treated decently.

The TUC welcomes the pledge made by the European Commission's Trade for All strategy to 'prioritise work to implement effectively the core labour standards (abolition of child labour and forced labour, non-discrimination at the workplace, freedom of association and collective bargaining), as well as health and safety at work in the implementation of FTAs and GSP.'<sup>4</sup> This supports the commitment by the EU to work towards the realisation of the Sustainable Development Goals which include a goal on Decent Work (Goal 8).

However, we are concerned that, at present, trade agreements do not contain measures to ensure labour standards are effectively enforced. South Korea committed to respect core ILO standards in the EU-Korea free trade agreement. However, the agreement contained no mechanism for sanctions if labour rights were violated and trade unions were relegated by the agreement to a monitoring role. This meant they have had no power to trigger investigations when labour rights have been abused and while trade unions registered concerns in recent years with the Commission that labour rights, it has been up to the discretion of the Commission whether to take action. The TUC has been concerned by the fact the Commission has to date chosen to take no action to address labour violations in South Korea that have included the imprisonment of union leaders, excessive working hours and union busting.<sup>5</sup>

The ETUC and TUC have raised concerns that the labour chapter in the recently finalised EU-Canada (CETA) agreement adopts the same approach as the EU-Korea agreement.

Given the current inadequacies of labour chapters in trade agreements and the significant incidence of labour rights abuses in many countries the EU has trade agreements with – or is negotiating trade agreements with - it is imperative that

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<sup>4</sup> [http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc\\_153846.pdf](http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf)

<sup>5</sup> <https://www.ituc-csi.org/korean-unions-plan-national>

the European Commission develop more effective means to enforce labour rights. Justice dictates that the European Commission work to ensure that the rights of workers facing discrimination, abuse and exploitation are respected, rather than creating the proposed multilateral investment system which provides another means for already powerful investors to advance their interests and exposes workers to further harm.