

UNCTAD Expert Meeting on Taking Stock of IIA Reform

Geneva, 16 March 2016

TUC

Thank you to UNCTAD for the opportunity to speak today.

I am Policy Officer for trade at the TUC, the national trade union centre of the UK, which represents just under 6 million workers. We are affiliated to the International Trade Union confederation which I am pleased is represented at this event through a video statement.

It is welcome that UNCTAD is focusing on the issue of how to **reform International Investment Agreements** (IIAs) as the investor protections contained in the current regime of IIAs are fundamentally unjust and pose serious threats to the rights of workers.

The TUC is mainly concerned with the investor protections provided through Investor-State Dispute Settlement (ISDS) and the European Commission's Investment Court System (ICS) which is contained in the EU-Canada trade agreement and the EU has proposed for TTIP.

Both ISDS and ICS create a special legal system for foreign investors to claim their rights that is not available to domestic investors or any other group such as consumers or workers.

We know from legal analysis that despite making some reforms, the EU's Investment Court System, just like ISDS, provides a far broader scope for investors to sue governments for 'indirect expropriation' or breaches of their rights to 'fair and equitable treatment' than domestic courts would allow.

These courts **bend what is understood as an investor's 'property rights'** so that it can be understood as anything that might threaten future profits such as minimum wage laws or health and safety regulation.

Even if an ICS case is not successful, many governments will calculate that they cannot afford the risk of having to pay large compensation sums to foreign investors and so not implement certain regulations or policies that might invite litigation.

UNCTAD has **flagged up** the ‘regulatory chill’ that special courts for foreign investors can create. The TUC believes such a ‘chill’ is very dangerous as it would mean governments would be less likely to introduce policies that would improve public welfare and workers’ rights.

We know the threat is real as its already happening – New Zealand didn’t introduce plain packaging laws for cigarettes after Australia was sued by Philip Morris via ISDS for its plain packaging laws. Meanwhile, according to UNCTAD’s **review** of ISDS cases in 2015, half were either lost by governments or resulted in regulations being watered down or withdrawn as a result.

Criticism against ISDS and ICS is growing stronger. The European Commission received a record high 150,000 responses in a public consultation on ISDS it ran in 2014 – 97% of respondents, which included those by the TUC and European Trade Union Confederation, rejected ISDS altogether.

The TUC does not believe ICS addresses the concerns raised in this consultation and is calling for ICS, ISDS and all special courts for foreign investors to be scrapped in the EU-Canada agreement, TTIP and all trade agreements.

ICS has also been rejected by the European Judges Association and the German Association of Magistrates.

It is welcome that UNCTAD’s **Action Menu** to reform IIAs picks up on some of these criticisms about ISDS and ICS, and calls for the investment regime to be reformed in order to ensure foreign investors uphold social, labour and environmental rights are respected.

We believe this is very important and are calling for the EU to require foreign investors to demonstrate they are upholding core ILO standards in order to have access to any privileges of trade and investment agreements.

Workers must also be provided with mechanisms that allow labour rights violations to be effectively addressed, with sanctions as a final penalty. Such obligations are necessary for the European Commission’s new **‘ethical’ trade strategy** to carry any weight, particularly when the EU is negotiating investment agreements with countries such as Burma where trade unions face routine brutal repression.

It is also welcome UNCTAD also calls for reforms to IIAs so that the state retains its ability to regulate in the public interest.

It is encouraging that such proposals are being picked up in the model investment agreement adopted by the **Indian government** and being considered by a number of other countries. These include **South Africa**, which has terminated its old Bilateral Investment Treaties that contained ISDS as it had been subject to such damaging litigation via ISDS in the past, with even laws introduced to overcome the legacy of apartheid era racial inequalities being challenged by corporate lawyers.

We know it is possible for countries to negotiate trade and investment without ISDS at all, meanwhile, as we saw with the **Australia-USA Free Trade Agreement** agreed in 2005.

We hope more governments will follow this approach and engage with trade unions, civil society and international agencies such as UNCTAD to design international investment agreements that preserve democracy, workers' rights and justice for all, not just those with the most money.