

**EPSU update on trade developments  
20 October 2017**

**1. New trade package from the European Commission**

On 13 September the European Commission (EC) published a Communication on "A Progressive Trade Policy to Harness Globalisation" outlining a series of initiatives and including a progress report on the EU trade policy strategy "Trade for All"<sup>1</sup>. You can find the documents here <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1715>. In the Annex we include a first ETUC assessment of the package.

Key points in the package for EPSU include:

**Recommendations to open negotiations with Australia and with New Zealand.** For the first time the EC publishes the draft mandates that will be put forward to the Council. This increased transparency is positive, but from the content of draft mandates, there is little sign that the EC is taking a new approach to trade negotiations, as called for e.g. in the recent ETUC resolution.<sup>2</sup>

The Recommendations do not include investment protection provisions following the ruling by the European Court of Justice (CJEU) that the free trade agreement (FTA) with Singapore covers issues that are the shared competence of Member States and the EU and so need ratification also by Member States.<sup>3</sup> The ruling also placed non investment provisions more clearly within the exclusive competence of the Union (including sustainable development and social protection). EPSU asked a question about why there were not more progressive proposals in the Recommendations in a recent civil dialogue<sup>4</sup> meeting. The response was that bringing about change with 27/28 Member States takes time. However there are many negotiations currently taking place<sup>5</sup> and many more are planned, including with Turkey where the EC wants to modernize the Customs Union and enlarge the scope. In [a speech at the Atlantic Council](#) in Washington on 28 October, Vice-President Jyrki Katainen even said that the EC is setting an ambitious aim to open new markets through trade deals every six months. "We are constantly looking for like-minded partners ready to open up but [who] also sign up to advanced rules and standards." At this pace there will be little space to develop a new trade agenda as suggested by the recent 'harnessing globalisation'<sup>6</sup> reflection paper.

**A recommendation to open multilateral negotiations to establish a multilateral court for the settlement of investment disputes (MIC).** The recommendation builds on the public consultation on the EU's current policy on investment dispute resolution earlier this year (see [http://trade.ec.europa.eu/consultations/index.cfm?consul\\_id=233](http://trade.ec.europa.eu/consultations/index.cfm?consul_id=233)). The ETUC note in the [Annex](#) gives a state of play on developments. EPSU recalls the many critiques of the MIC and doubts that it will be an improvement on the existing situation. An interesting FFII blog

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<sup>1</sup> <http://ec.europa.eu/trade/policy/in-focus/new-trade-strategy/>

<sup>2</sup> See

[https://www.etuc.org/sites/www.etuc.org/files/document/files/etuc\\_resolution\\_for\\_an\\_eu\\_progressive\\_trade\\_and\\_investment\\_policy\\_en.pdf](https://www.etuc.org/sites/www.etuc.org/files/document/files/etuc_resolution_for_an_eu_progressive_trade_and_investment_policy_en.pdf)

<sup>3</sup> Please find [here](#) the link to the Opinion.

<sup>4</sup> See <http://trade.ec.europa.eu/civilsoc/meetdetails.cfm?meet=11504>

<sup>5</sup> See overview [http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/#\\_in-place](http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/#_in-place)

<sup>6</sup> See the reflection paper [https://ec.europa.eu/commission/publications/reflection-paper-harnessing-globalisation\\_en](https://ec.europa.eu/commission/publications/reflection-paper-harnessing-globalisation_en) and the ETUC's assessment [here](#).

<http://blog.ffii.org/?p=59009> is critical of the accompanying impact assessment to the EC's request for a mandate to open negotiations on the MIC. In the impact assessment the EC argues that "As the reform being analysed here is the reform of the procedural elements of the dispute settlement system, not a reform of the substantive provisions, no further impacts (e.g. environmental and social impacts) are expected." No attempt is made even to consider whether - as many argue - a MIC would strengthen investment protection vis-à-vis democracy and fundamental rights. As the blog states "In the light of the need to protect fundamental rights, and in the light of the risks of climate change, the EU cannot ignore, legitimise, cause, or perpetuate growing (negative) impacts."

See also critical papers presented at the public forum on 22 September on the MIC and alternatives <https://www.tni.org/en/event/the-eus-multilateral-investment-court-and-its-alternatives>

**The decision by the EC to create an expert group** to provide advice on the EU trade agreements. According to the provisions of the [call for applications](#) when defining the composition of the group, DG Trade shall aim at ensuring, as far as possible, a high level of expertise, as well as a balanced representation of relevant know how and areas of interest, while taking into account the specific tasks of the group, the type of expertise required, as well as the relevance of the applications received.

## **2. EC 'non-paper' on the Trade and Sustainable Development (TSD) Chapters of EU trade agreements**

The EC published in July a non [paper](#) to contribute to a debate on reforming current Trade and Sustainable Development (TSD) chapters. The 'non-paper' follows up assurances from the EC that it would seek to improve the enforcement of labour rights in CETA and other agreements (but as mentioned not indicated in the draft mandates for Australia and New Zealand). However the non paper has a very narrow focus and does not properly address the issues of sanctions.

The ETUC trade working group drew up a comprehensive response to the non-paper (see [here](#)) setting out the main demands. The response affirms that while a strong labour chapter is urgent, there are also threats for workers in other parts of trade agreements – such as regulatory cooperation, public services and investment protection – that must also be addressed in order to ensure workers' rights are respected in trade agreements.<sup>7</sup> A number of Canadian unions published a letter recently in the context of NAFTA that makes the same point in an forceful way – see the [attached](#) letter.

For EPSU it is very important to link the reform of the provisions of the TSD Chapters to the scope and breadth of other parts of trade and investment agreements, in order to avoid any negative impacts on decent work and fundamental rights from the trade agreement overall. The European Pillar of Social Rights (EPSR) proposed for adoption on 17 November by all Member States could also provide a framework.

In the last update we mentioned a trade union / civil society 'trade lab' that took place in June. You can now find the summary power point presentations from the four workshops and a summary conclusion of our 10 demands for a progressive trade policy on the website <http://www.tradelab.eu/follow-up/>

EPSU took part on 15 September in an interesting event organised by Belgian trade groups. The event made the link between the MIC, sustainable development chapters and proposed the UN

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<sup>7</sup> See more details in the ETUC progressive trade agenda document [https://www.etuc.org/documents/etuc-submission-non-paper-commission-services-trade-and-sustainable-development-tsd#.Wed8c\\_5IJ9A](https://www.etuc.org/documents/etuc-submission-non-paper-commission-services-trade-and-sustainable-development-tsd#.Wed8c_5IJ9A)

Treaty negotiations as an alternative to the MIC. Since 2014 UN working group has been elaborating “an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.” In October 2017 the UN Human Rights Council will start negotiations on the Treaty. Further information can be found on the website of the [Treaty Alliance](#) that is coordinating lobbying actions in support of the Treaty. Some references to presentations and materials from the event are given below:

- Paper from Pr. Gus Van Harten: *Is It Time to Redesign or Terminate Investor-State Arbitration? A clean break is needed to restore trust, but these stiff tests must be met*, 2017 <https://www.cigionline.org/articles/it-time-redesign-or-terminate-investor-state-arbitration>
- A briefing from the European Parliament on the proposed UN Treaty [http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608636/EPRS\\_BRI\(2017\)608636\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608636/EPRS_BRI(2017)608636_EN.pdf) ;
- ITUC Written Submission to the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/ITUC.doc>
- Ensuring the Primacy of Human Rights in Trade and Investment Policies <http://www.cidse.org/publications/business-and-human-rights/business-and-human-rights-frameworks/ensuring-the-primacy-of-human-rights-in-trade-and-investment-policies.html>
- Ten Key Proposals for the Treaty [https://www.escr-net.org/sites/default/files/attachments/tenkeyproposals\\_final.pdf](https://www.escr-net.org/sites/default/files/attachments/tenkeyproposals_final.pdf)

To note, a technical ILO Seminar and Tripartite Policy Dialogue on Labour Provisions in Trade Arrangements, is planned for 22 and 23 November 2017, Brussels.

### 3. EU Japan (JEFTA)

As reported in the last update, in June EPSU and public services unions from Japan sent an open letter to Cecilia Malstrom and Fumio Kishida (Japanese Foreign Affairs minister) on the EU Japan negotiations (JEFTA). The letter called for transparency and raised concerns that JEFTA will include many of the controversial elements that were in the EU - Canada (CETA) agreement, including investor-state dispute settlement, further liberalisation of public services, and extensive regulatory cooperation. There are fears to that JEFTA will not contain sufficient data privacy safeguards (and pave the way for including sub-standard provisions in TiSA is relaunched). For the letter see: <http://www.epsu.org/article/japanese-and-european-public-service-unions-condemn-secrecy-trade-negotiations>

There has been little public information available recently on developments to finalise JEFTA following the political agreement with Japan in July. It may be that a separate agreement on ISDS/ICS is sought.

### 4. CETA implementation

Provisional application of the agreement started on 21 September, see EC PR [http://europa.eu/rapid/press-release\\_IP-17-3121\\_en.htm](http://europa.eu/rapid/press-release_IP-17-3121_en.htm)

In many countries there are ongoing debates about ratification. If you have information to share you can send it to directly to the S2B network [lucile@S2Bnetwork.org](mailto:lucile@S2Bnetwork.org). EPSU supports ongoing efforts to stope ratification of CETA. As ETUC commented on 21 September, “*The final text of CETA is not fully in line with our expectations...particularly when it comes to public services, investment protection and enforceability of labour rights.*”

A new game for computers and mobile phones on EU trade deals, especially on CETA has been recently been developed by FoEE and CEO. The game is in English, French and Dutch. The German version will be out soon.

The mobile phone versions are here:

- iPhone and iPad: <http://apple.co/2yfd8qp> Android/Google Play: <http://bit.ly/2hkBdJy>

The computer versions can be downloaded here:

- Mac: [https://corporateeurope.org/sites/default/files/games/dodgydeals/DodgyDeals\\_mac.zip](https://corporateeurope.org/sites/default/files/games/dodgydeals/DodgyDeals_mac.zip)
- Windows: [https://corporateeurope.org/sites/default/files/games/dodgydeals/DodgyDeals\\_win.zip](https://corporateeurope.org/sites/default/files/games/dodgydeals/DodgyDeals_win.zip)

We hope you will enjoy playing this game, and that you can use it in your national campaigns as an outreach tool.

## 5. Trade in Services Agreement (TiSA) – and role of Sustainability Impact Assessments (SiAs)

While TiSA negotiations have come to a halt, a number of activities continue to show the potential dangers of the negotiations. EPSU is working with ArbeitKamer to examine TiSA's Sustainability Impact Assessment (SIA), as an example of how SIAs deal with impacts on services in particular. You can find the final TiSA SiA on the [website](#). Also of interest is what the EC and others do with the results of the SiA. The EC's handbook on SIAs says they are an instrument to inform policy choices.

A workshop event on this is planned for **30 November** (more details to follow). While SiAs seem a technical discussion, the underlying issues about how to measure social / economic benefits and costs of liberalisation are very political.

The TiSA SiA is very sceptical about economic benefits of TiSA. However proponents continue to argue without evidence that regulations are barriers to trade services. The IMF recently rated countries for their barriers to [trade in services](#)— from banking to online consultations with doctors or engineers. The IMF Chart of the Week from [this paper](#) by the IMF, World Trade Organization and World Bank, the IMF gives a global picture of countries' relative openness to trade in services.

Many of the costs of liberalisation are not visible straight away, as illustrated by Public-Private Partnerships (PPPs). These are being promoted as an alternative development model in when in fact they are nothing of the sort, see <http://www.epsu.org/article/epsu-signs-new-campaign-stop-rush-expensive-and-high-risk-public-private-partnerships-ppps>

Although TiSA is stalled, many issues are picked up elsewhere. E-commerce was one of the outstanding chapters to be finalized in the TiSA negotiations. This topic is now in the WTO. In October EPSU joined some 300 organizations from global civil society from more than 150 countries in an open letter to the WTO 11<sup>th</sup> Ministerial meeting (MC11) in Buenos Aires, December 10-13, 2017. See <http://notforsale.mayfirst.org/en/signon/11th-wto-ministerial-letter-global-civil-society-about-agenda-wto>

## 6. EU-Ukraine DCFTA and AA

In the last update we reported on the exchange with Ukrainian health unions on healthcare reforms and relation to the DCFTA / AA (see <http://www.epsu.org/article/report-health-care-reform-seminar-ukraine-1516-may-2017-kyiv>). EPSU members have been campaigning to anchor the development of health and social care systems on public services principles of “universality”, “accessibility”, “affordability”, “continuity”, “user rights”, “transparency and accountability”. In October it was reported that the new reform agreed with the International Monetary Reform (IMF) falls far short of what is needed. Ironically the IMF published in the same days its ‘October Fiscal Inequality Monitor’ that makes the case for more public spending policies for achieving more equitable education and health outcomes. <http://www.imf.org/en/publications/fm/issues/2017/10/05/fiscal-monitor-october-2017>



ANNEX  
MEMO  
20/09/2017

## ETUC Briefing on the Trade Package

The Commission, on Friday 13/9 published a package of new initiatives that add to and complete the existing very intensive trade agenda of the Union:

1. **A proposal for a Regulation establishing a framework to screen foreign direct investment (FDI) coming into the EU**, to ensure protecting the EU's essential interests. This includes:
  - a. a European framework for screening of foreign direct investments by Member States on grounds of security or public order, including transparency obligations, the rule of equal treatment among foreign investment of different origin, and the obligation to ensure adequate redress possibilities with regard to decisions adopted under these review mechanisms.
  - b. A cooperation mechanism between Member States and the Commission. The mechanism can be activated when a specific foreign investment in one or several Member States may affect the security or public order of another.
  - c. European Commission screening on grounds of security or public order for cases in which foreign direct investment in Member States may affect projects or programmes of Union interest. This includes projects and programmes in the areas of research (Horizon 2020), space (Galileo), transport (Trans-European Networks for Transport, TEN-T), energy (TEN-E) and telecommunications.

The ETUC welcomes this proposal that will allow a better understanding of the origins of FDIs in the EU. In the end of the day, the decision whether to accept or not FDIs will stay in the hands of the Member states.

2. **Recommendations to open negotiations for trade agreements with Australia and with New Zealand.** The Recommendations do not include investment protection provisions. This is a policy change, which will entail that the final agreements will only require adoption by Council (by qualified majority) and European Parliament to enter into force. The ETUC is getting in touch both with the Australian Council of Trade Unions (ACTU) and the New Zealand Council of Trade Unions (NZCTU) to find a common approach to the negotiations.

3. **A recommendation to open multilateral negotiations to establish a multilateral court for the settlement of investment disputes (MIC)**, (see state of play of the negotiations below).

4. **The Commission has also decided to publish from now on its recommendations for negotiating directives for trade agreements.** This means that at the same time as they are submitted to the Council for deliberations and transmitted to the European Parliament as they have been in the past; they are now also automatically transmitted to national Parliaments and made available to the general public, thus allowing for a wide and inclusive debate on the planned agreement from the outset. The ETUC welcomes this transparency initiative that will push the Council to publish the negotiating mandates as soon as they are adopted.

5. The Commission has also decided to create an **expert group** to provide advice on the EU trade agreements. The ETUC welcomes this decision and will be part of this group.

### **State of Play on the MIC negotiations**

The Commission has brought the MIC project into the United Nations Commission on International Trade Law (UNCITRAL) based in Vienna. Commission see UNCITRAL as the appropriate UN body to gather support from non-EU countries and to handle the secretariat of the MIC in the future.

UNCITRAL is composed of 60 member states. The member states are structured in a way to ensure that the various geographic regions and the principal economic and legal systems of the world are represented. The 60 member States include 14 African States, 14 Asian States, 8 Eastern European States, 10 Latin American and Caribbean States and 14 Western European and other States. The Commission has an observer status but coordinates the position of the EU member states.

UNCITRAL is discussing the MIC project within a working group on ISDS reform (working group III). The mandate of the working group says that Member States must appoint government officials who can take decisions. This is to avoid that member states appoint professors or lawyers that do not have decision-making power. A next meeting of the working group will take place in the first week of November in Vienna, the following will be in late April in New York. The Working Party reports to the UNCITRAL Commission that meets annually in July. Representative civil society organisation (including Trade unions) can be accredited as observers and sit in the discussions. The MIC, to be “multilateralised” in the UN system, has to be approved eventually by a UN General Assembly Resolution.

The Commission hopes to get support from Canada and Norway (which would influence other EFTA countries). It seems that Australia, New Zealand, Turkey, Thailand have expressed interest. Given that a number of BRIC countries (eg India, Brazil, South Africa) are opposed to the old ISDS system, they might be brought in. On the other hand, at the last meeting of the working group the US and Japan were opposed. The Commission is still negotiating the investment part of the FTA with Japan (which has been given political agreement) so there may be a move there. China and Russia would probably be against at least at this stage.

The Commission published the draft mandate for the Council for opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes on 13/09. The mandate says the following: “The multilateral investment court initiative aims at setting up a framework for the resolution of international investment disputes that is permanent, independent and legitimate; predictable in delivering consistent case-law; allowing for an appeal of decisions; cost effective; transparent and efficient proceedings and allowing for third party interventions (including for example interested environmental or labour organisations). The independence of the Court should be guaranteed through stringent requirements on ethics and impartiality, non-renewable appointments, full time employment of adjudicators and independent mechanisms for appointment.”

“This initiative will only deal with procedural issues. Matters such as the applicable law or standards of interpretation, including ensuring the consistency with other international obligations (for example from International Labour Organisation and UN Conventions) will be addressed in the underlying investment agreements to be applied by the Multilateral Investment Court.”

As said above, the MIC will not deal with substantive provisions, including labour rights. The only space allowed to trade unions would be to make submission to the court (third party intervention), but only when an investor sue a state. Trade unions will not have the possibility to bring investors to the court. Commission gave us an example: if an investor sues a state alleging that the national labour law is inconsistent with the fair and equitable treatment provision of the Bilateral Investment treaty, trade unions could bring legal arguments.

The Commission believe that setting up the MIC could act as a catalyst towards moves for third party rights ie submissions to the court by unions and NGOs. The EU wants the MIC to be flexible on the types of cases it could hear (positive list approach).

The Commission see no link of MIC with the current UN discussion on Business and Human Rights. Note that we were told that the Commission has moved from its negative position on this and is engaging in the discussion. This is being led by the EEAS Human Rights people.

We can expect the EP to take up the MIC issue now that the draft mandate has been published, providing us with the opportunity to try to leverage worker rights into the MIC discussion. The matter will also be taken up by national parliaments and Governments (the mandate needs to be agreed by Council) and affiliates can play a role in influencing them.