Dear [trade or foreign minister],

As public sector unions committed to promoting laws and policies that protect workers and the environment and ensuring a financially strong public sector, we write to reiterate our longstanding opposition the investor-state dispute settlement (ISDS) regime and the far-reaching rights for foreign investors enshrined in trade and investment treaties. We specifically wish to share recommendations for our government’s engagement in the ISDS reform process being undertaken in Working Group III of the UN Commission on International Trade Law (UNCITRAL).

UNCITRAL’s Working Group III is comprised of a broad range of countries, many of which have faced costly litigation defending legitimate, non-discriminatory, and legal decisions to protect the public interest from challenge by foreign investors before arbitration panels. Already-strapped public budgets have had to pay billions in taxpayer money to multinational corporations over public interest policies, including toxics bans, land-use rules, regulatory permits, water and timber policies and more. With good reason, ISDS has become exceedingly controversial around the globe.

Although the mandate of the working group is broad and allows for a wide range of possible solutions to the problems of ISDS,[[1]](#footnote-1) the European Union is actively pushing for this working group to conclude with a mandate to negotiate a “multilateral investment court” (MIC).[[2]](#footnote-2) The EU’s proposal would do little to solve the core problems of ISDS and instead would entrench this controversial system.[[3]](#footnote-3) What’s more, a recent decision by the European Court of Justice calls into question whether ISDS and by extension a MIC is even legal under EU law.[[4]](#footnote-4)

As the UN Conference on Trade and Development (UNCTAD) has identified, there are a variety of ways to address the problems caused by existing investment agreements.[[5]](#footnote-5) Given that, as the Organization for Economic Co-operation and Development (OECD) has recently explained, there is no clear evidence that international investment agreements lead to increased foreign direct investment, nor that any such investments that are influenced by the treaties are positive for either party,[[6]](#footnote-6) many states have demonstrated that there are better alternatives for promoting foreign investment.[[7]](#footnote-7)

**We therefore encourage you to reject any recommendation supporting the establishment of a multilateral investment court or other half measures that maintain the fundamental flaws of the ISDS system.**

**Instead, we urge you to use the UNCITRAL Working Group III process to propose and support the following reforms, which would go much further in addressing the injustices of ISDS:**

**Facilitate governments moving away from ISDS and the current investment treaty system**: We urge our government to refrain from signing any new trade and investment pacts that include any form of ISDS and to terminate existing ISDS-enforced treaties. The UNCITRAL process provides a unique opportunity to lay the basis for states to multilaterally agree to the termination of investment treaties and/or withdraw consent to arbitrate.[[8]](#footnote-8) The working group could recommend that governments negotiate an opt-in multilateral instrument, where each state could specify the treaties it seeks to terminate, indicate its intention to waive any notice periods or other conditions for termination by its treaty partners, indicate that it aims to amend underlying treaties to eliminate “survival clauses,” and affirm commitments to provide foreign investors with protections under customary international law. This multilateral approach would lessen the pressure on any one government that is considering terminating its treaties, allowing countries to coordinate and make clear that their treaty termination is directed at the flawed ISDS system, not at foreign investors, and is taken in accordance with international law.

As interim measures, the working group could also recommend multilateral approaches to:

**Withdraw consent to arbitration:** The working group could recommend a multilateral instrument to withdraw consent to ISDS, which would maintain the substantive obligations of their existing treaties, and would allow disputes to be settled only through state-state dispute settlement mechanisms.

**Require exhaustion of domestic remedies**: The working group could recommend that members adopt a legal instrument requiring investors to exhaust domestic remedies before allowing investment arbitration. The ability of investors to challenge a state directly in an ISDS tribunal without resorting to domestic courts first is an anomaly in international law and contrary to international human rights law and customary international law. States and regional economic communities including Argentina, India, Romania, Turkey, the United Arab Emirates, Uruguay, the Southern African Development Community, and the East African Community have required investors to pursue or exhaust local remedies before resorting to ISDS.[[9]](#footnote-9)

**Ban third-party funding in ISDS cases:** The working group could recommend that governments should ban third-party funding. Increasingly, hedge funds have begun investing in ISDS claims, as the potentially high damages have made ISDS a new and highly attractive market for third-party funding (i.e., providing finance for litigation in return for a stake in a legal claim and percentage of the award).[[10]](#footnote-10) This third-party funding gives a small, already privileged class of foreign investors even more resources to launch claims against governments in the unbalanced system where only corporations can be claimants and raises serious concerns, including potential conflicts of interests, about the ability of respondent states to recover costs awarded against unsuccessful and insolvent claimants, and confusion as to the fundamental question of who is the claimant/investor, and whether that investor is – and should be – protected under international investment treaties. [[11]](#footnote-11)

Unfortunately, **the EU’s MIC proposal would only serve to further entrench and institutionalize problematic rights for foreign investo**rs at a time when our government has the opportunity to reclaim our sovereignty and policy space to protect the public interest without concern for extrajudicial attacks from foreign investors.

\* \* \*

We would welcome the opportunity to discuss the UNCITRAL deliberations and the above-mentioned alternatives with you in more detail and would be grateful if you were available to meet before the next meeting of the UNCITRAL Working Group III that will take place in Vienna in October 2018.

We thank you for your representation of our nation’s interests at the UNCITRAL Working Group III.

1. For the UNCITRAL working group mandate, see: <http://www.uncitral.org/pdf/english/workinggroups/wg_3/WGIII-34th-session/930_for_the_website.pdf>, para. 6. [↑](#footnote-ref-1)
2. For details about the European Commission’s proposal, see: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608 [↑](#footnote-ref-2)
3. For an analysis of the European Commission’s proposal, see: http://www.ciel.org/wp-content/uploads/2017/12/AWorldCourtForCorporations.pdf [↑](#footnote-ref-3)
4. See, e.g., Nikos Lavranos, noting that “if this MIC is – even potentially- able to interpret and apply EU law, it will not be accepted by the EU’s top court.” Borderlex, “Insight: The end of Intra-EU BITs: What next?” 7 March, 2018, <http://borderlex.eu/comment-end-of-intra-eu-bits-what-next/>. [Maybe we can use a different reference, in govs have a negative perception of Nikos…, like <http://worldtradelaw.typepad.com/ielpblog/2018/03/guest-post-the-cjeu-strikes-again-in-achmea-is-this-the-end-of-investor-state-arbitration-under-intr.html> ] [↑](#footnote-ref-4)
5. For a list of options presented by UNCTAD, see: <http://unctad.org/meetings/en/SessionalDocuments/ciimem4d14_en.pdf>. [↑](#footnote-ref-5)
6. Joachim Pohl, “Societal benefits and costs of International Investment Agreements: A critical review of aspects and available empirical evidence”, OECD Working Papers on International Investment, 2018/01, OECD Publishing, Paris, available at, <http://dx.doi.org/10.1787/e5f85c3d-en>, pp. 14-36, 37-39; Johnson et al., Costs and Benefits of Investment Treaties: Practical considerations for States (CCSI 2018). [↑](#footnote-ref-6)
7. See, e.g., The EU-Indonesia CEPA negotiations, Responding to calls for an investment policy reset: are the EU and Indonesia on the same page?, pp. 20-23, SOMO, 15 February 2018, <https://www.somo.nl/eu-indonesia-cepa-negotiations/>. [↑](#footnote-ref-7)
8. Matthew C. Porterfield, [Aron Broches and the Withdrawal of Unilateral Consent in Investor-State Arbitration](https://www.iisd.org/itn/2014/08/11/aron-broches-and-the-withdrawal-of-unilateral-offers-of-consent-to-investor-state-arbitration/), Investment Treaty News (August 11, 2014) (discussing legal basis for and implications of withdrawals of consent); Rob Howse, [A Short Cut to Pulling out of Investor-State Arbitration under Treaties: Just Say No](http://worldtradelaw.typepad.com/ielpblog/2017/03/a-short-cut-to-pulling-out-of-investor-state-arbitration-under-treatiesjust-say-no.html), International Economic Law and Policy Blog (March 9, 2017). [↑](#footnote-ref-8)
9. Martin Dietrich Brauch, 'IISD Best Practices Series: Exhaustion of Local Remedies in International Investment Law'(IISD, January 2017) available at https://www.iisd.org/library/iisd-best-practices-series-exhaustion-local-remedies-international-investment-law. [↑](#footnote-ref-9)
10. Frank Garcia et al. ‘The Case Against Third-Party Funding in ISDS: Executive Summary’ (Boston University Faculty Papers, April 2018) http://lawdigitalcommons.bc.edu/lsfp/1126/ [↑](#footnote-ref-10)
11. Columbia Center on Sustainable Investment, ‘Illustrative Suggestions for Amendments to the ICSID Arbitration Rules’ (CCSI, March 2017) available at http://ccsi.columbia.edu/files/2017/04/ICSID-Rule-Revisions-Comment-31-March-17-FINAL.pdf [↑](#footnote-ref-11)